

DELGAMUUKW AND THE PEOPLE WITHOUT CULTURE:

Anthropology and the Crown

by

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DELGAMUUKW AND THE PEOPLE WITHOUT CULTURE: Anthropology and the Crown

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ABSTRACT

This thesis examines the response of the British Columbia and Canadian judiciary to Aboriginal efforts to obtain legal recognition of Aboriginal title and rights, and the role played by anthropology and anthropologists in this historical process. Specifically, the thesis provides a detailed case study of the longest and costliest Aboriginal title litigation in Canadian history: the Gitksan and Wet'suwet'en case, also known as *Delgamuukw et al v. R.*. This case is analyzed within the historical and political context of the relationship between Aboriginal and non-Aboriginal peoples in Canada.

Drawing on current theoretical work in the fields of anthropology and law, and cultural critique, the thesis argues that law and legal discourse are embedded in historical and contemporary relations of power and resistance, and shaped by the cultural and political context in which they are practiced. Law is analyzed as a form of socio-cultural reflection, and the courtroom as a site of political struggle. A critical analysis of the use of the theories and data of social science to legitimate various ideologies and strategies in the legal forum provides an original contribution to the theoretical and substantive study of Aboriginal and non-Aboriginal relations in Canadian society, and to theoretical development within the discipline of anthropology.

Anthropologists have served as researchers and as expert witnesses on behalf of both the Crown and Aboriginal litigants. This thesis focuses on theoretical analyses and substantive evidence presented on behalf of the governments of Canada and British Columbia to support the Crown's claims and counter-claims to land title and sovereignty as against Aboriginal peoples. That is to say, this thesis locates itself within the field of anthropological analyses of "western" cultures, rather than the traditional anthropological

focus on the representation of Aboriginal cultures. The methodology adopted is based in a critical hermeneutic, or dialectical, reading of the texts of anthropologists' opinion reports submitted to courts, transcripts of trials, and reasons for judgment.

The thesis argues that an examination of the theory and practice of Canadian law in relation to Aboriginal peoples and Aboriginal land title from a critical anthropological perspective illuminates the inter-relationship between culture, power, history, and law. In conclusion it is argued that anthropologists may make a valuable contribution to disciplinary and public debates on Aboriginal issues by turning our attention to an analysis of Canadian society's relationship to Aboriginal peoples.

**This thesis is dedicated to my mother,
Claire Culhane,
who taught me
which side of the fence to stand on.**

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CHAPTER 1: INTRODUCTION

1.0 SETTING OUT THE ISSUES

It is the law that aboriginal rights exist at the "pleasure of the Crown," and they may be extinguished whenever the intention of the Crown to do so is clear and plain...The plaintiffs' claims for aboriginal rights are accordingly dismissed. (Reasons for Judgment, *Delgamuukw v. R.*, 1991. p.ix)

Thus spoke Chief Justice Allen McEachern of the British Columbia Supreme Court rendering his long awaited judgment in "the Gitksan and Wet'suwet'en case." The case had been four years at trial, beginning in Smithers, British Columbia on May 11, 1987, and concluding in Vancouver on March 8, 1991.

This thesis is an inquiry into the response of the Canadian judiciary to challenges put forward by indigenous peoples for legal recognition of Aboriginal title, the part played by anthropology and anthropologists in this process to date, and what roles anthropologists might play in this forum in the future.

Specifically, it sets out a detailed examination of the longest and costliest land title litigation in Canadian history: "the Gitksan and Wet'suwet'en case," also commonly referred to as "the *Delgamuukw* case," or "*Delgamuukw v. R.*" The trial of Delgamuukw, also known as Ken Muldoe, suing on his own behalf and on behalf of all the members of the House of Delgamuukw, and others v. Her Majesty the Queen in Right of the Province of British Columbia and the Attorney-General of Canada was a conflict over 22,000 square miles of what we now call British Columbia: its land, its resources, and the way of life of its people.

Thirty-five Gitksan and 13 Wet'suwet'en hereditary Chiefs, the "Plaintiffs," brought a petition to the Supreme Court of British Columbia seeking a declaration that,

...from time immemorial they and their ancestors have occupied and possessed approximately 22,000 square miles in north-west British Columbia ("the territory"), and that they or the Indian people they represent are entitled, as against the province of British Columbia, to a legal judgment declaring:

- (a) that they own the territory;
- (b) that they are entitled to govern the territory by Aboriginal laws which are paramount to the laws of British Columbia;
- (c) alternatively, that they have unspecified Aboriginal rights to use the territory;
- (d) damages for the loss of all lands and resources transferred to third parties or for resources removed from the territory since the establishment of the colony; and
- (e) costs (Reasons, 1991:vii).

The main evidence in support of the Gitksan and Wet'suwet'en claim was presented by Chiefs and Elders through telling their two particular kinds of oral history: the Gitksan *adaawk* and the Wet'suwet'en *kungax*. These oral histories document ownership of lands and resources and include sacred reminiscences about ancestors, histories, trails and territories. Their performance includes narratives, songs and dances.

The evidence of the Chiefs and Elders was supported by expert witnesses in the following fields: cartography, palaeobotany, geomorphology, forest ecology, fishery biology, ethnoarchaeology, linguistics, historical geography, anthropology and history. Lay people, also recognized as expert witnesses by the Court, included members of Gitksan and Wet'suwet'en houses who had received training through indigenous forums and/or who had obtained professional and academic credentials in relevant fields.

The Defendants were Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of Canada: "the Crown". The Province of British Columbia claimed a declaration against the plaintiffs--Delgamuukw et al--as follows:

- (1) A declaration that the Plaintiffs have no right, title or interest in and to the Claim Area, and the resources thereon, thereunder or thereover;
- (2) Alternatively, a declaration that the Plaintiff's cause of action, if any in respect of their alleged Aboriginal title, right or interest in and to the Claim Area and the resources thereof, thereunder or thereover is for compensation from Her Majesty the Queen in right of Canada (Reasons, 1991:43).

The Attorney General of Canada was added as a defendant at the request of the Province of British Columbia for reasons explained by Chief Justice McEachern as follows:

What the province is saying is that the plaintiffs cannot succeed against the province in any respect, and that if they had such a claim at the date of Confederation it must, because of the constitutional arrangements between Canada and the province, be pursued as a claim for compensation from Canada (Reasons, 1991:295).

Simply put, the provincial Crown argued that Aboriginal peoples had and have no distinct rights. If they ever had, and if there is compensation owing, it is owed by the federal government. The federal government argues that part of the tab must be paid by the province.

Both the provincial and the federal Crowns' arguments were supported by testimony from expert witnesses in the fields of historical cartography, legal history, history, and anthropology. Most of the Crown's witnesses, however, were professionals and government employees rather than academics or scholars. These included: a physician, several guide outfitters, a retired local politician and self-described pioneer, a popular historian, fisheries officers, and a retired federal Indian Agent. No Gitksan or Wet'suwet'en (or member of any other First Nation) testified on behalf of the Crown.

A total of 318 days of evidence from over 61 witnesses was heard, and legal argument accounted for an additional 56 days in court. Additional evidence was supplied

by affidavit. In total there are 23,503 pages of transcripts, 9,200 exhibits and 82 binders of authorities. In his 400 page Reasons for Judgment, Allen McEachern analyzed the testimony, reviewed relevant points in law, dismissed the Gitksan and Wet'suwet'en claim, and found in favour of the Crown.

Many observers suggest that the \$25 million *Delgamuukw* case was the last of its kind that we will see in Canada (*cf.* Henderson, 1991:9). Indeed, the time, energy, and tremendous human and material resources absorbed by such litigation does not appear to have delivered much in the way of concrete returns to either the Aboriginal peoples or the Crown. Federal and provincial governments, Aboriginal peoples, and what have become known as "third party interests," such as municipal governments, industry and private sector representatives, labour unions, wildlife conservation and sports organizations, appear to have come at least to the strategic decision that more may be gained through negotiations than through litigation.

Others argue that events in the political arena, particularly the development of the British Columbia Treaty Commission whose purpose is to negotiate "modern day treaties" between federal, provincial and Aboriginal governments, have rendered the judgment in *Delgamuukw* redundant. Political Scientist, Paul Tennant, for example, states that,

While the ultimate jurisprudential fate of the ruling remains to be seen, there is already evidence that the course of public policy will scarcely be affected by it (Tennant, 1992(a):73).

The historical and political significance of the judgment will depend as much on the way it is regarded as on what it literally states (*ibid*:74).

Prediction is always a risky business and I will return to this question in the conclusion to the thesis. Whether Tennant's faith in the political negotiation process

proves to be well placed or not, several problems remain to be addressed. First, on the basis of the historical record, Canadian Indian policy has more often than not relied on the law to determine government obligations, and has rarely moved beyond these limits (Macklem 1991; Tyler, 1989). Gitksan leader, Medig'm Gyamk (Neil Sterritt), reflecting on the outcome of the *Delgamuukw* case, wrote as follows:

The day before the judgment came down, provincial land claims policy changed. The Nisga'a got an agreement on March 7, 1991, the day before the *Delgamuukw* judgment, because the Province feared the outcome of our case (Gyamk, 1992:303-304).

And, indeed, Tennant concurs. He says,

There is much irony in this state of affairs concerning the province, for it was the widely-shared *anticipation* that the Chief Justice would produce a different ruling that played some part in leading the province to its new policy (Tennant, 1992(a):73) (emphasis in original).

Second, if Tennant is right and a new day has indeed arrived, then the *Delgamuukw* decision stands as a text representing what has been the ruling interpretation of British Columbia history, and more particularly the nature of Aboriginal and non-Aboriginal peoples and their relationship to each other, for over a century.

By way of introduction, then, suffice it to say that in the arena of Aboriginal/non-Aboriginal relations in British Columbia and Canada, and in the discipline of anthropology, as in so many other places and practices in the contemporary world, we appear to be standing at a cross-roads, or on the edge of a cliff. It seems a good time to reflect on where we have come from and where we might go from here. So it is to Tennant's second point, more than his first, that this thesis is addressed. That is to say, I wish to intervene, by way of writing this thesis, in the academic and public debates about

the meaning of Chief Justice McEachern's judgment in the Gitksan and Wet'suwet'en case.

This is a thesis in cultural critique, and "for cultural analysis and criticism, the contesting of the meaning of things or events is what centrally constitutes politics" (Marcus and Fischer, 1986:153). Political struggles such as that for Aboriginal rights take place on many fronts, the contest over meaning being only one of them: necessary but not sufficient to transform social relations.

"The case is about land," Judge Allen McEachern noted repeatedly in his Reasons for Judgment in *Delgamuukw v. R.* On this point, if on little else, the Chief Justice and I concur. This thesis is about discourse and meaning, not because interpretation is what the struggle is centrally about, but because interpretation is what I have been trained to do. This work, then, is a reflection of the strengths and weaknesses of my skills, and of the constraints and limitations of the subject position from which I write: that of a contemporary critical anthropologist.

This thesis is, unapologetically, a work of "anthropological advocacy" (Paine, 1985; Wright, 1988). Robert Paine makes the point that anthropological advocacy is distinguished by its fundamental concern with justice (Paine, 1985:xiii). The situation I am analyzing is one of conflict, and I support one "side" and not the other because, quite simply, I believe that to be the side of justice. This work differs, however, from traditional anthropology and anthropological advocacy in two important ways. First, I endeavour to take up the challenge that work on "the crisis of anthropology" and the "future of anthropology" often poses in its conclusions: I am studying powerful institutions, individuals, and ideologies in mainstream Canadian society (Clifford, 1988; Dyck and

Waldram, 1993; Fox, 1991; Hymes, 1969; Manganaro, 1990; Marcus and Fisher, 1986; McGrane, 1989; Nader, 1969; Nencel and Pels, 1991; Rabinow and Sullivan, 1987; Rosaldo, 1989; Roseberry, 1989; Ulin, 1991). That is, I am studying "up" and studying "us."

I do not seek to represent marginalized or oppressed peoples or to advocate on behalf of them, although I do take their point of view as valid and their cause as worthy. Second, the goal of this work is not to influence in a short term or immediate way the outcome of a particular process or project. Rather, this thesis is addressed primarily to other anthropologists and intellectuals and I seek, through the telling of this particular story, to contribute to debates and move ahead certain questions of concern. This form of advocacy has more in common with what Peter Harries-Jones has described as the task of anthropologists as advocates in industrialized countries: "to question both the inevitability of events and the certainty of propositions behind them" (Harries-Jones, 1985:233).

Richard Handler has pointed out that,

Recent proposals for 'dialogic' narrative ask anthropologists not merely to include the voices of others in their ethnographic narratives, but explicitly to share 'ethnographic authority' with them. Yet such a strategy may not be well suited for narrations about realities one wants to explore critically. ...In this case to share narrative authority simply traps ethnographic writers in a discourse from which they might need to distance themselves (Handler, 1985:171). (See also Dyck, 1993(b)).

This thesis is, again unapologetically, not a "dialogue with texts" but an "argument with texts." I wish to subvert the authority of the "ethnographic subjects" of this thesis, to assert and earn authority for myself and the argument I put forward, and to persuade the

reader of the validity of my critique. Johannes Fabian proposes that critical projects such as this should be carried out as a polemic. He says,

...polemic is not just a matter of style or taste- bad taste by some canons of academic civility. Polemic belongs to the substance of arguments if and when it expresses intent on the part of the writer to address opponents or opposing views in an antagonistic fashion; it is a way of arguing that does not dress up what really amounts to dismissal of the other as 'respect' for his position; nor does it reject the other view as *dépassé* (Fabian, 1983:152).

This thesis is not, however, intended to be a polemic. Rather, it is intended to be a passionately reasoned, and reasonable, argument.

Marcus and Fischer caution that when anthropologists turn to the study of western cultures they often,

...fail to take account of the existing literature of domestic cultural criticism; ironically, they are careless precisely about that which would be sacred to anthropologists in considering other cultures--indigenous commentaries. For the most part, anthropologists have taken the job of reflecting back upon ourselves much less seriously than that of probing other cultures (1986:111).

Feminist critiques of law¹, critical legal scholarship², and Aboriginal critiques of law and anthropology³ referred to throughout this thesis, constitute just such "indigenous commentaries." I draw on this literature for a critical "insider's" description and analysis of the field of law. At the same time, I analyze this literature as the object of my investigation, as I would do were I investigating the judicial field in a culture other than the dominant western one.

¹ See Butler and Scott, 1992; Cornell, 1992; Currie, 1992; Kline, 1989; Smart, 1989.

² See Coombe, 1989; Delgado, 1988; Derrida, 1992; Gordon, 1984; Hunt and Fitzpatrick, 1987.

³ For critiques by Aboriginal scholars see Deloria, 1969; Doyle-Bedwell, 1993; Henderson, 1985; Monture, 1986; Turpel, 1991(a),(b),(c). For critiques by non-Aboriginal scholars, see Asch and Macklem, 1991; Berger, 1991; Macklem, 1991; 1993; Mandell, 1987; Slattery, 1979; 1983; 1985; 1991; 1992).

Following a framework drawn from recent studies in anthropology and law, the specific case of *Delgamuukw v. R.* is presented "as a point of entry" (Starr and Collier, 1989:14) into the study of ongoing processes through focusing on a "foregrounded moment" (Moore, 1986:321). This moment, and the ongoing processes that constitute its context, can be conceptualized for analytic purposes as consisting in four layers of description and analysis, that I set out in content and in relation to each other.

The historical and political context in which the legal expression of British colonization, Canadian colonialism, and Aboriginal resistance have taken place constitute the horizon, or outer layer, of this study. Within this context, the particular history of British Columbia is presented as a local variant and ethnographic example of the colonial process, thus constituting the next layer of description and context. Third, major court cases and decisions on Aboriginal title are described to provide a more immediate context in which to locate and analyze the *Delgamuukw* case, which serves as the fourth layer of description.

Four questions traverse these layers of description. First, I ask: how have the various "Crowns"--imperial, colonial and domestic--claimed legal title to the lands and resources of British Columbia and the concomitant right to govern the indigenous peoples of this land? My second question is, what is the relationship between the historical and contemporary political and economic context, and the findings of the law in regard to land title in British Columbia? Third, how have anthropological theories about Aboriginal cultures, popular understandings of the relationship between culture and difference, and anthropologists themselves been employed in both challenging and legitimating the Crowns' legal arguments in this context. As the *Delgamuukw* trial occupies most of my

descriptive attention, so too does this question constitute the central theoretical and methodological objectives of this thesis.

In answer to the first question, I begin with an overview of the issues deliberated in Aboriginal title litigation that go to the core of Canada's legal and political legitimacy as a nation state: who owns the land and governs the people, how did they come to do so, and on what basis is such ownership and governance legitimated? Aboriginal peoples and the Crown, when disputing this question, shine light on the beliefs, values and practices each party brings to the claim and to their relationship with each other. At issue in these cases therefore are competing interpretations of human nature, personhood, culture, the past, the present, and the future. Anthropologist Sally Humphreys argues that "...law is part of discourses about good and bad society and a form of socioethnological reflection." "In the legal arena," she continues, "parties compete in attempts to impose models of what society should be on others" (Humphreys, 1985:215).

The courts have demanded that Aboriginal peoples legitimate their assertions of land title, sovereignty and rights, and have established a number of "tests" pertaining to duration of occupancy, resource use, social structure, and world view that Aboriginal litigants have been required to meet.

Anthropologists, performing as translators and advocates, have assisted them in conducting the necessary research and representation these judicial processes have demanded. Corresponding questions are only beginning to be asked, by non-Aboriginal people, about the Crown's title and Canadian sovereignty. Lawyer, Louise Mandell, explains:

The Indian elders in British Columbia question why they must subject their relationship to the land to a non-Indian court's strict scrutiny: why they must explain their use of the land to obtain 'rights' abstractly defined by others. They believe that the Indians have rights to their land because their people go back with the land for thousands of years. What they do not understand is how the Crown acquired its 'rights' to their land (Mandell, 1987:359).

This thesis endeavours to respond to the Elders' query. I ask: what assumptions about human beings and the similarities and differences between them, and what visions of a "good society," have served as the foundation and justification of these Crown claims? In other words, what fundamental assumptions must one accept in order to make sense of the Crown's arguments, and the Courts' decisions?

I will argue that there are two such assumptions. First, that theories and categories of thought are "real" in the sense of being naturally, scientifically, or divinely given. Second, that European peoples and their descendants are fundamentally, incommensurably different from and superior to Aboriginal peoples. I will explain both of these points in more depth.

Anthropologist Lawrence Rosen has said that law is a domain in which culture reveals itself:

...the world of formal courts offers a stage--as intense as ritual, as demonstrative as war--through which a society reveals itself to its own people as much as to the outside world (Rosen, 1989:318).

The first feature of western culture to reveal itself to me from the tomes of legal history and theory I read pertaining to the litigation of Aboriginal title in Canadian courts is the foundational place of abstraction and theoretical assertion in the Crown's arguments. That is to say, the Crowns' claims to title begin with, and repeatedly return to rest, not on facts based on observation and experience, but on theories based on abstraction and

imagination. The first of these being the phantasmic apparition that emerged with the Norman conquest of Britain in the eleventh century of a sovereign "hovering over the land" and thereby holding the "underlying title" to the land. At the same time, the law prides itself on being concerned above all with "brute facts" understood in a positivistic sense.

The centrality of theory to western culture has been most thoroughly discussed in recent years by the French philosopher, Jacques Derrida, who sub-titled his essay on law "The Mystical Foundation of Authority" (Derrida, 1992). The point, of course, is that once we enter into a discourse severed in this way from actually existing people and their experiences, contests concerning validation of knowledge are resolved by the workings of power rather than by reference to "facts on the ground."

In the absence of faith in a universal standard, we are forced to search for other criteria with which to judge alternative accounts, and to acknowledge that, ultimately, these criteria are moral and political ones. Canadian philosopher, Charles Taylor, in his article "Social Theory As Practice," explains,

...it is clear that theories do much more than explain social life; they also define the understandings that underpin different forms of social practice, and they help to orient us in the social world... Naturally, granted what is at stake, human beings will always be tempted to espouse theories that give them a sense of moral orientation, and even more theories which support the practices they find advantageous (Taylor, 1985(b):108).

This observation leads directly to the core of the story told in this thesis. In western culture as a whole, and in Canada in particular, the law imagines itself, and represents itself, as the governing institution where reason, logic and precedent are objectively and impersonally applied to particular situations, and fair and appropriate decisions are reached as a result of a judicious weighing of evidence which itself is

characterized as reliable, empirical "fact." Questions of epistemology--how do we know what we know--are therefore central to the project.

At a very general level we can identify four principal approaches to the question of epistemology and methodology in the present. The first is empiricism and positivism. Mary Hawkesworth, discussing this problem in the context of feminist theory, describes feminist empiricism as follows:

Feminist empiricism accepts the tenets of philosophical realism (which posits the existence of the world independent of the human knower) and empiricist assumptions about the primacy of the senses as the source of all knowledge about the world...From this view the appropriate method for apprehending the truth about the world involves a process of systematic observation in which the subjectivity of the observer is controlled by rigid adherence to neutral procedures designed to produce identical measurements of the real properties of objects (Hawkesworth, 1989:535).

Chief Justice McEachern's ruling in the *Delgamuukw* case was based on a theory of legal positivism. In the area of Canadian law and Aboriginal title, theories of legal positivism dominate the courts' decisions. Lawyers Kellock and Anderson explain as follows:

The positivist theory is based on the premise that the only rights that are legally enforceable are those rights that have been granted by or are recognized by the Government. Based on this theory, if a court is to find that an aboriginal right exists it would have to base this finding on an express or implied recognition of the right by some branch of the Government, whether legislative, executive, or judicial (Kellock and Anderson, 1992:98).

A second theory is what Hawkesworth calls "feminist standpoint epistemologies" which she describes as follows:

Although they repudiate the possibility of an unmediated truth, feminist standpoint epistemologies do not reject the notion of truth altogether. On the contrary, they argue that while certain social positions (the oppressor's) produce ~~distorted~~ ideological views of reality, other social positions (the oppressed's) can pierce ideological obfuscations and attain a correct and comprehensive understanding of the world (Hawkesworth, 1989: 534).

Third, there is postmodernism, the feminist variant of which is described by

Hawkesworth as follows:

...'feminist postmodernism' rejects the very possibility of a truth about reality. Feminist postmodernists use the 'situatedness' of each finite observer in a particular socio-political, historical context to challenge the plausibility of claims that any perspective on the world could escape partiality...they urge instead the development of a commitment to plurality and the play of difference (Hawkesworth, 1989:537).

If we remain within a philosophical framework, postmodernist theory can lead us into a neo-conservative pluralism that has been significantly criticized by representatives of most contemporary social movements (Escobar, 1992). However, as Rabinow and Sullivan point out, there is a fourth alternative:

Pointing up repeated failures to discover any but historically contingent foundations for thought does not in itself have to provoke a crisis of inquiry and understanding (Rabinow and Sullivan, 1987:23-24).

It requires, rather, that we acknowledge,

that all human inquiry is necessarily engaged in understanding the human world from within a specific situation. This situation is always and at once historical, moral and political (ibid:21).

I am not, therefore, seeking to uncover universal laws or universally-generalizable theories about, for example, "WHAT THE LAW IS," as in liberal theory that asserts law represents a consensus of the values of the population (Watson, 1977); or orthodox Marxist theory that asserts that law is merely an instrument that serves the ruling class (Hunt, 1981). I do, however, begin with a materialist premise that "operates as a limiting horizon with which any interpretive formulation must come to grips if it is to avoid mystification" (Rabinow and Sullivan, 1987:16). Stated plainly, the position from which I argue accepts the premise that there is no Archimedean point outside the social from which an "objective" or "value-free" apprehension of an absolute truth can be

apprehended. I argue, therefore, that knowledge is socially constructed (Nancel and Pels, 1992; Rabinow and Sullivan, 1987), and that "truth" represents the result of a process of inter-subjective validation (Ulin, 1984). This having been said, I do not accept that all interpretations are either of equal reliability, credibility or social/cultural desirability. In other words, I argue, with Paul Rabinow, that "Representations are Social Facts" (1986). This leads me to look to the historical record for standards of evaluation in the former case, and to moral, political and ethical postulates for standards of evaluation in the latter case (Taylor, 1985(a)).

In the context of this thesis, which seeks to evaluate evidence in a legal framework, I take guidance from Carlo Ginzburg's observations. He says,

There is an element in positivism that must be unequivocally rejected: the tendency to simplify the relationship between evidence and reality...Instead of dealing with the evidence as an open window, contemporary sceptics regard it as a wall, which by definition precludes any access to reality. This extreme anti-positivistic attitude, which considers all referential assumptions as a theoretical naivete, turns out to be a sort of inverted positivism. Theoretical naivete and theoretical sophistication share a common, rather simplistic assumption: they both take for granted the relationship between evidence and reality...Even if we reject positivism, we must still confront ourselves with notions like 'reality', 'proof', and 'truth'.

The fashionable injunction to study reality as a text should be supplemented by the awareness that no text can be understood without a reference to extratextual realities (Ginzburg, 1991:83-84).

This having been said, I will endeavour to be as honest as I can be about the "historical, moral and political" commitments which shape my inquiry.

The second foundational fiction that is salient in the law on Aboriginal title was that when Europeans arrived in North America they proceeded *as if* the land were uninhabited: *terra nullius*. The justification or legitimation for this assumption was and is

social theory. In describing the defenses of Crown title, I will argue, with Michael Asch and Patrick Macklem, that,

...the assertion of Canadian sovereignty over aboriginal peoples... ultimately rests on unacceptable notions about the inherent superiority of European nations (Asch and Macklem, 1991:510).

Citing the Attorney General of Canada's pleadings in the Gitksan and Wet'suwet'en case, Asch, in another article, says, and I agree, that,

Such a line of argument is, in my view, racist and colonialist in spirit and intent (Asch, 1992:471).

Of course, this position has long been held by Aboriginal observers. James Youngblood Henderson, for example, states that

Canadian law is not impersonal but racially biased; its legitimacy is threatened if not destroyed by its denial of order and freedom to aboriginal people against non-Indians (Henderson, 1985: 186).

Former Chairman of the Nuuchahnulth Tribal Council, George Watts, addressing a gathering of, for the most part, non-Aboriginal academics and lawyers, commented as follows on the judgment in *Delgamuukw*:

Call it whatever you want--ethnocentrism, Eurocentrism, racism--you guys go ahead, go out in the hall and argue about what word you are going to use. We know what it is when we live with it (Watts, 1992:194).

I take his point. However, being one of the "guys" Watts was referring to who is concerned with language, definition and meaning, I will briefly explain my choice of the term "racism" rather than "ethnocentrism" or "Eurocentrism" in this instance. Watts is right that there is considerable debate about these terms, most of which centres around definitions in a rationalist sense. That is, the object is to seek distinctions between the terms and clarify them so that a shared meaning is found when communicating,

professionally, about them. These distinctions are becoming increasingly difficult to pinpoint in the contemporary world where race, culture, class, and gender are so intertwined in relations of inequality, and theories about the same are a part of popular culture. I choose to use the term racism, therefore, not on the basis of a decontextualized definition, but rather because of what the use of this term connotes and evokes (see Tyler, 1986). "Racism" connotes a stronger statement about unequal relations between people than does "ethnocentrism," and infers that the problem is deeper and more complex than attitudes that can change through education. "Racism," sociologist Robert Miles argues, refers to "the *consequences* for the dominated, not to the *intentions* of the dominant" (Miles, 1989:111). Finally, I choose to use the term "racism" in this context because it is the term of choice of those who, like Watts says, "live with it."

To summarize, my goal in relation to the first question--how does the Crown claim title--is to deepen the criticism already begun. That is, I wish to illustrate in detail the degree to which the Crown's arguments and the judge's reasoning are saturated by racism and are logically coherent only if racist assumptions are accepted as valid, and if theory is reified as fact.

The second question: what is the relationship between the historical and contemporary political and economic context, and the findings of the law in regard to land title in British Columbia, is asked and answered by reference to historical research in British Columbia, and to theoretical debates within the fields of anthropology and law, and critical legal studies, about the relationship between law, history and economy.

In answer to the question, I will argue that these relationships are complex and multi-determined, but neither unknowable nor unimportant in understanding the case at

hand. The history of law on Aboriginal title offers a fairly unsophisticated example of the relationship between law, history and economics. While the historical record is complex and interesting, the role law has played at the level of interest to this thesis is a powerful, yet crude, one. Simply put, the questions before the courts have centred on who owns, and/or has rights to exploit and benefit from, land and resources? The relationship between provincial and federal governments, corporate interests, and the courts in British Columbia has been close, and, at times, barely distinguishable.

Regarding the relationship between law and history, the particular story I am telling here evidences Allan Watson's argument that,

...though there is a historical reason for every legal development, yet to a considerable extent law in most places and at most times does not progress in a rational or responsive way and...the divergence between law and the needs or wishes of the people involved and the will of the leaders of the people can be marked (Watson, 1977:8).

Canadian legal scholar, Brian Slattery, in his review of the relationship between law and history in this context concurs as follows:

All national myths involve a certain amount of distortion, but some at least have the virtue of broad historical accuracy, roughly depicting the major forces at work. The myth that underlies much legal thinking about the history of Canada lacks that redeeming feature (Slattery, 1985:114).

And, as to law and economy, I turn to E. P. Thompson who wrote in answer to the question "How autonomous is law in the last instance?" as follows:

Well, for most of the time when I was watching, law was running quite free of economy, doing its errands, defending its property, preparing the way for it, and so on...But...I hesitate to whisper the heresy...on several occasions, while I was actually watching, the lonely hour of the last instance *actually came*. The last instance like an unholy ghost, actually, grabbed hold of law, throttled it, and forced it to change its language and to will into existence forms appropriate to the mode of production, such as enclosure acts and new case-law excluding customary common rights. But was law 'relatively autonomous'? Oh, yes. Sometimes. Relatively. *Of course* (Thompson, 1978:96).

The legal forum has, at the same time, been a site in which First Nations in British Columbia, like other disempowered groups, have waged not entirely unsuccessful resistance. In resisting colonial domination, Aboriginal peoples in Canada by virtue of their minority position and historical experience have available to them three principal arenas in which to struggle: (1) practices of daily life on the land and in the community; (2) political negotiations with governments; and, (3) litigation in the courts. In the British Columbia situation, the factor that has most determined the emphasis on litigation has been the provincial government's refusal, until 1990, to recognize even the possibility of any Aboriginal rights at all and, consequently, to refuse to negotiate with Aboriginal peoples. The province explicitly justified its refusal to negotiate on the grounds that Aboriginal title was not legally recognized in British Columbia, which, as outlined above, rested on the theory of *terra nullius* at the moment of British sovereignty.

As I will explain in more detail in subsequent chapters, the complex legal/political situation of Aboriginal title in British Columbia primarily arises due to the anomaly created by the absence of treaties throughout most of the province (Tennant, 1992(b):106). The legal aspect of this anomaly originates in the settlers and governments in British Columbia having blatantly disregarded British colonial law and official policy which stated that where Britain asserted sovereignty over an occupied territory, the indigenous land owners must be fairly dealt with and a negotiated settlement arrived at with them regarding the Crown's acquisition of land. In B.C., however, such negotiations have not taken place. Instead, imperial and later colonial and then domestic governments have granted legitimacy to settlement that has occurred "as if" the Europeans had encountered *terra nullius*--land unoccupied by human beings -- when they arrived in the nineteenth century. When

Aboriginal people say, as they often do, that they "have to go to court just to prove we exist," they are referring to this "doctrine of discovery" as it is known, and are speaking literally and not metaphorically since, officially, in this area of law, they have yet to be acknowledged as human beings equal to Europeans. Aboriginal legal scholar, Robert A. Williams Jr., argues, based on Foucault, that

In seeking the conquest of the earth, the Western colonizing nations of Europe and derivative settler-colonized states produced by their colonial expansion have been sustained by a central idea: the West's religion, civilization, and knowledge are superior to the religions, civilizations, and knowledge of non-Western peoples...My basic argument...is that law, regarded by the West as its most respected and cherished instrument of civilization, was also the West's most vital and effective instrument of empire during its genocidal conquest and colonization of the non-Western peoples of the New World, the American Indians... Power, in its most brutal mass-mobilized form as will to empire, was of course far more determinate in the establishment of Western hegemony in the New World than were any laws or theoretical formulations on the legal rights and status of American Indians. But the exercise of power as an efficient colonizing force requires effective tools and instruments...law and legal discourse were the perfect instruments of empire...performing legitimating, energizing, and constraining roles in the West's assumption of power (1990(b):8).

As we will see, Williams' thesis is borne out by the Canadian, and particularly the British Columbia, experience. While I am in fundamental agreement with Williams, and owe much of my analysis of the relationship between law, society and culture to Foucault's work as well,⁴ I differ with Williams' analysis on two points. The first is that insufficient attention is paid to possibilities for collective resistance and to the fact that "disempowered groups"--for example, women and Aboriginal peoples--exercise little power to shape the institutions they wage their battles within.⁵ This critique of Foucault's work has been made most thoroughly by feminist scholars (see for example, Diamond and Quinby, 1988; Fraser, 1989; Hartsock, 1990). Aboriginal peoples in Canada have used the law and legal discourse to obtain material and political resources, as a public

⁴ See, in particular, Caputo and Yount, 1993(a); Foucault, 1973; 1979.

⁵ See Worthen, 1991 for a critical review of Williams' work on this point.

education tool, and as a location for contesting--and sometimes winning--symbolic struggles over meaning (Asch, 1989; Macklem, 1991; Sanders, 1992). This process of remaking colonial law and the contradictions therein, has, of course, been the focus of much work within anthropology and law (see for example, Starr and Collier, 1989).

As I attempt to do in this thesis, an examination of how the law and legal professionals have addressed the question of Aboriginal title exposes the very arrogance and hypocrisy Williams describes. Similarly, women have made significant, although necessarily incomplete, gains in areas through struggles in the legal arena around family law and protection from sexual assault.⁶ While being grounded in a Foucauldian analysis insures we do not forget who is setting the parameters of and the terms for the discourse, studying resistance reminds us that what has been constructed can be deconstructed, and reconstructed (Weeks, 1989; Williams, P., 1987).

⁶ There is a huge literature on the complexities and contradictions of disempowered groups using law and the courts as a strategy for social change. Basically the arguments put forward in the debate can be summarized as follows: (1) Those who argue that using the courts and the law as a strategy for social change requires such a "translation" of the cause into a hostile and alien language that any victories won on those terms are necessarily hollow. For a discussion of this debate in the context of feminist issues see Drucilla Cornell's and Iris Young's work as representative of feminist deconstructionist approaches to the problem of law, meaning and political practice (Cornell, 1992; Young, 1991). These are clearly "intellectualist" critiques that it is difficult to imagine being concretely applied, particularly in a lower court context. Dawn Currie (Currie, 1992) argues that postmodernist analyses cannot provide sufficient material grounding for the concrete struggles women are engaged in. See Razack, 1990 for a theoretical discussion; and Razack, 1991 for an account of how these issues were wrestled with in the context of a specific organization, the Women's Legal Education and Action Fund (LEAF). Razack represents a middle position and argues that both concrete gains can be made, and that simultaneously advancing a postmodern critique can highlight the limitations of legal reform and therefore generate debate about the relationship between law and power at a deeper level.

A similar debate can be found in Aboriginal critiques of law as a political strategy. For a review of this debate see Williams, R. 1987. Turpel, 1991(a), argues that concepts like Aboriginal title and its basis in spirituality are untranslatable into the language of law. James Youngblood Henderson (1985), on the other hand, takes the position that recognition and affirmation within the confines of western legal discourse is both possible and desirable. Williams, R. 1987 and Williams P. 1987 argue, like Razack, that marginalized groups have few resources for struggle available and must make the best use possible of all avenues. They argue, at the same time, that this should be done with eyes opened by critical theory and deconstructive critique.

My second argument refers to Williams failure to articulate a critique of the discourse of divine authority and legitimation. The first critique will be brought to bear throughout the following chapter on the history of Crown legal claims and justifications. The second critique will await the final chapters where I discuss the current situation.

For British Columbia First Nations, in particular, their legal strategy has been to try to force British and Canadian courts to obey their own laws (Asch, 1984; Sanders, 1985, 1992; Tennant, 1990). Ironically, the rallying cry for the political mobilization of British Columbia Indians since the mid-nineteenth century has been the demand for "British justice."

Aboriginal resistance can be seen in this instance as the primary motivating force since the story I am telling is about Aboriginal people challenging the law. That is, in legal terms, Aboriginal peoples have been the "plaintiffs" and not the "defendants." June Starr and Jane F. Collier explain as follows:

Legal orders may embody asymmetrical power relations, but power is always an interactional process. Dominant groups enjoy legally protected privileges, but they are also constrained by the law. And subordinated groups that suffer under particular legal systems may find that law offers them, the less powerful, a measure of protection from the powerful, just as it sometimes offers them resources for action (Starr and Collier, 1989:12).

While many theorists and activists--Aboriginal and non-Aboriginal--are sceptical about the use of the law by the disempowered as an instrument for social change, even one of the more pessimistic analysts, Pierre Bourdieu, allows that law's power is limited to the extent that it can maintain the illusion of its neutrality and fairness. Law must succeed in "creating a situation in which no one can refuse or ignore the point of view, the vision, which law imposes" (Bourdieu, 1987:838).

As well as considering litigation as only one among many strategies, the Gitksan and Wet'suwet'en, and others, have been very clear about the limits they place on the scope of the court's legitimacy. Delgamuukw's (Ken Muldoe's) opening statement to the court delivered May 11, 1987 ended as follows:

The purpose of this case, then, is to find a process to place Gitksan and Wet'suwet'en ownership and jurisdiction within the context of Canada. We do not seek a decision as to whether our system might continue or not. It will continue (Gitksan and Wet'suwet'en Hereditary Chiefs, 1992:13).

Assessing the results of the case after the judgment was rendered a Coast Salish Chief, Tom Sampson, said:

It is really not the Gitksan and Wet'suwet'en people that are on trial. It's Canada and it's the colonial system that is on trial...The justice system is really on trial. Justice is supposed to be independent, impartial, and all of those things, but when you look at it, it doesn't look that way (Sampson, 1992:95).

Without diminishing the strength or dignity of Aboriginal resistance, and while it is the situation at the moment, as noted above, that the parties involved in this particular dispute have opted to attempt resolution and reconciliation through negotiation, rather than confrontation and victory or defeat through litigation, it remains that law governs "the court of last resort" where conflicts between Aboriginal and non-Aboriginal peoples over lands and resources may ultimately be arbitrated. The state alone holds a monopoly on the legitimate use of violence, both physical and symbolic. Legal decisions may be enforced by the armed might of the state which only these courts have the power to exercise. Experience shows that the potential use of this option is always lurking behind Aboriginal negotiations with the state.

This relationship to institutionalized power is what most precisely defines the particular character of legal language and texts:

Ordinarily we think of language as describing a fact or a state of affairs...but a special linguistic capacity...which is particularly inherent in the law...makes things true simply by saying them. (The example typically given is itself quasi-judicial: the monarch's power to ennoble commoners simply by dubbing them and proclaiming that they are now titled). This power is of course the attribute of judges and judicial decisions, among others. The texts of the law are thus quintessentially texts which produce their own effects (Bourdieu, 1987:851).

I turn now to the third, and most important question posed for this thesis: how have anthropological theories about Aboriginal cultures, popular understandings of the relationship between culture and difference, and anthropologists themselves been employed in both challenging and legitimizing the Crown's legal arguments in this context?

Anthropology, as a theoretical enterprise, is constituted by the contradiction between sameness and difference, with the concept of "culture" (variously defined historically) serving as the key marker of both (Silverman and Barnett, 1979). Within the political context of colonialism both cultural similarity and cultural difference have been asserted in support of the colonizers' rights to dominate, and in support of the colonizeds' rights to liberation. An emphasis on similarities between peoples has supported Aboriginal claims to equality of treatment and access to benefits within a liberal-democratic state legitimated by an ideology of equality. At the same time, such an emphasis has justified the notion of a single, superior, dominant culture. An emphasis on difference supports Aboriginal claims to self-determination. A response of refusal, however, can also be justified on the basis that there is insufficient common ground to understand or accommodate radical difference. Simply put, both acknowledgement of difference and denial of difference have historically served many disparate, and often opposing, masters. This observation leads logically to the conclusion that the context of power relations in which various discourses on similarity and difference are articulated, in

practice gives meaning to their shapes and consequences. For example, when legal scholar Patrick Macklem set out to examine how these notions have impacted on "how the law has contributed to the current status of First Nations in Canada," he found that issues of cultural difference and similarity form an (inconsistent) "rhetoric of justification." Macklem explains,

Native difference is denied where its acceptance would result in the questioning of basic premises concerning the nature of property, contract, sovereignty or constitutional right. Native difference is acknowledged where its denial would achieve a similar result...Similarity and difference constitute the currency of justification for the invocation and application of traditional categories of legal understanding in the resolution of legal disputes involving native peoples (Macklem, 1991:392).

Chief Justice McEachern's 400 page Reasons for Judgment offers a compendium of European theories about culture and difference, and Native cultures in particular, that begins in the seventeenth century and ends in the present. Throughout the text of the judgment various "theories" about culture and difference that we anthropologists tend to classify temporally according to when they were at their peak in intellectual circles, are drawn on in a non-temporal fashion. For example biological inheritance of character traits, religion, mode of exploitation of land, evolution, learned behaviour, cultural conservatism, absence of ambition, assimilation and acculturation, are relied on quite erratically and inconsistently to explain events and behaviour across time, thus making the document, from an academic point of view, internally contradictory and often incoherent.

For example, McEachern quotes (and misspells)⁷ Hobbes' description of Aboriginal life as "nasty, brutish and short" (Reasons, 1991:13); proclaims that Aboriginal

⁷ It is spelled as "Hobbs" in the Reasons for Judgment, p.13

peoples were driven by biological "survival instincts" rather than "institutions" (ibid:213); draws on Vattel's 1844 theory conflating "natural law" and Social Darwinism (ibid: 79-80); relies on the 1919 precedent from *Re: Southern Rhodesia* that classifies "some tribes...(as)...so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society" (ibid:238); bemoans the fact that the Gitksan and Wet'suwet'en were "culturally unprepared or unable to compete with the relentless energy of pioneers" in the early years of the twentieth century (ibid: 202); then accuses them of "admitting to participation in wage labour" (ibid: 164); laments their current school drop-out rate and concludes that at present they are "truly distinctive people with many unique qualities" (ibid:48). "One cannot...disregard the 'indianness' of these people" the Chief Justice notes, "whose culture seems to pervade everything in which they are involved" (ibid:48).

This brings me to another point of clarification. The word "culture" has been defined historically in a variety of ways, including within the discipline of anthropology, and is currently the subject of much debate (see, for example, Clifford, 1988; Kahn, 1989; Rosaldo, 1989). The use of, and historically variable meanings of, "culture" is one of the subjects of this thesis. I will use the term "culture" to refer to concepts held at a very high, formal level of generalization, such as in the discussion above concerning the "theoretical" focus in western culture. However, I do not consider "cultures," "world views," or "belief systems" to be understandings or assumptions that people carry around in their heads (consciously or not), like a blueprint, and then "apply" in different situations. Rather, I consider "world views," "beliefs systems," and "cultures" as embodied in practices that suppose interpretation and are made manifest in the context of human relations "on the ground," in arenas and forums fused with all the contradictoriness,

contingency, and power struggles that are the stuff of human interaction (Bourdieu, 1977; Coombe, 1991; Gordon, 1988).

I will use the term "ideology" to refer to the expression of specific social interests.

The definition of ideology, in the context of this thesis, is taken from Young, 1980:

Ideology refers to the tacit beliefs through which people represent to themselves (a) themselves as human subjects; (b) other people as subjects; (c) collective social subjects (groups, families, etc.); and (d) social relationships between and among these subjects...Ideological beliefs are represented in such a way that they are felt to be commonsensical, merely mirroring the real conditions of existence (i.e. they describe without distorting) (Young, 1980:133).

Concepts of what constitutes--or ought to constitute--an ideal person or self are inextricably intertwined with questions about culture and epistemology. Marcus and Fischer argue that,

Focusing on the person, the self, and the emotions...is a way of getting to the level at which cultural differences are most deeply rooted: in feelings and in complex indigenous reflections about the nature of persons and social relationships (Marcus and Fischer, 1986:46).

In summary, then, my thesis is that when Crown arguments and Chief Justice McEachern's Reasons for Judgment in the *Delgamuukw* case are examined from this perspective we find that both the judge himself, and the ideology he embodies and practices reflect, represent, advocate and support the atomistic self of European positivism, and the racial supremacy of European colonialism.

Theoretically, my project is informed by current work loosely classified as "critical anthropology," and particularly studies that examine law and legal practices within that rubric. Sally Engle Merry identified this approach in her 1992 review article as an emergent direction in the contemporary anthropology of law, that pays: "increased

attention to power and to the ways law constructs and deconstructs power relations" (Merry, 1992:360).

She continues her description of recent work in this area as follows:

...the concept of culture...[is used]...to describe the ways law maintains power relationships. Instead of looking simply at the role law plays in enforcing rules, it examines how law creates images of social relationships that seem natural and fair because they are endowed with the authority and legitimacy of the law...Work in this vein argues that law maintains power relations by defining categories and systems of meaning (ibid:361-162).

Of course the discourses of law and politics (Aboriginal and otherwise) themselves develop within historical contexts. A feature of the contemporary western world is the emergence of "culture" as both the essential marker of human difference, and as a battleground for struggles over meaning. Cultural critic, Stanley Aronowitz, discusses the central place that "culture" has obtained in contemporary political conflicts as follows:

...what is at stake in cultural politics is the authority of knowledge...Who has the right to determine criteria of validity? Who may speak truth to power? (Aronowitz, 1993:7,9).

Legal anthropologist, Rosemary Coombe, develops this argument in the context of a critique of traditional cultural anthropology. She says that the contemporary world,

...provokes us to reconceive the concept of culture in terms that integrate it into a study of power; it asks us to consider meaning in terms of relations of struggle embodied in everyday practice, and it demands that we view these cultural practices in local contexts, related in specific ways to historical conjunctures in a multinational global economy (Coombe, 1991:189).

The history of Aboriginal claims litigation in Canada provides an illustration of the relationship between culture, meaning, power and context. I will argue that a traditional culturalist thesis, usually associated with Clifford Geertz and work that follows him, and is now increasingly forming the basis of popular and legal thought, and state ideology, does not adequately represent the situation under examination.

First, in terms of its explanatory power vis-a-vis the legal process, my central argument is that when the Crown's legal arguments and strategies, and judges' findings in Aboriginal title litigation, are analyzed in the manner set out above, we do not find a consistent expression of an "autonomous realm of meaning or a unified whole" that we can accurately label "The European world view," as conceptualized in traditional cultural anthropology. Secondly, to identify the central problem as one of cultural difference connotes and evokes a suggestion that the solution lies principally in a change of attitude.

Questions of epistemology have most often been explored within anthropology as an aspect of cultural differences. Through the concept of cultural relativism, and in keeping with anthropology's generally liberal commitments, political arguments about differing epistemologies have been encompassed within the promotion of respect for the different but equal value of all cultures and their particular epistemologies. Given that a tenet of dominant western culture is positivism that regards itself as the single, and therefore superior, route to truth and valid knowledge, the relativist critique launched by anthropology has been implicitly a critique of the west (Marcus and Fischer, 1986:1). My project in this thesis, however, is to make this implicit critique explicit, and further, to make salient the contradiction that arises from asking that a mode of thinking and being that defines itself as singularly valid respect difference, without first having to surrender its claims to superiority (Dews, 1987; Taylor, 1985(a)(b)). Simply put, positivism theoretically forecloses on the possibility of opening up to other modes of being except to dominate them (Taylor, 1985(b):112).

Another focus of my critique therefore refers to the employment of a culturalist analysis by Aboriginal and non-Aboriginal scholars and politicians as the primary basis of

criticism of the relationship between Canadian courts and Aboriginal peoples in general, and in response to *Delgamuukw v. R.* in particular. Very briefly, after the initial anger at the *Delgamuukw* decision was vented, the dominant mode of explanation of "what has gone wrong" in Aboriginal title litigation is that the "world view" and "culture" of judges and the Canadian judicial system is incommensurable with the "Aboriginal world view." A set of oppositions are then called upon to illustrate this lack of fit, the most common being linear versus cyclical notions of time, spiritual versus secular relationships to land, and equality versus hierarchy in social relations.

I, however, share with Moore and others a concern about the adequacy of the anthropological critique of ethnocentrism. She writes:

...the concept of ethnocentrism, while immensely valuable, leaves some very basic issues untouched...the concept of cultural difference has allowed anthropology to use the idea of ethnocentrism--cultural bias--to sidestep any suggestion that other forms of difference might exist which cannot be subsumed under the heading cultural difference (Moore, 1988:194).

How a problem is defined, of course, determines in large measure what solutions are proposed. And, pragmatism rules this process. Explaining the problem of Aboriginal and non-Aboriginal relations as one of cultural difference "works" in a number of ways for the various parties involved in this process. For the judiciary and members of the legal profession, a culturalist explanation can be rendered as a mild challenge when its connotations of innocence and unintentionality are emphasized, thus leaving the fundamental tenet of judicial neutrality relatively unscathed. For anthropologists, such an approach suggests an ongoing role, and ongoing employment, as cultural translators. For the emerging Aboriginal elite, this analysis lends credibility to the development of parallel institutions which they will dominate.

In the context of the realistic political options available to Aboriginal peoples, as minorities within a nation state, this culturalist analysis is pragmatic: it serves to help carve out a space within the existing polity where they may enjoy at least the illusion of greater autonomy, and, perhaps, a larger share in the national wealth. The Canadian public has been willing to listen to arguments for rights and autonomy based on cultural difference, and the increasing public interest in and respect for elements of "Aboriginal culture" contributes positively to both the power and self-image of Aboriginal peoples.

Be that as it may, I will argue that a more critical approach is both intellectually defensible and politically desirable, if not obviously pragmatic in a short term sense. As well as the thin explanatory value discussed above, the problem with conceptualizing the issue as one of two bounded, incommensurable world views, and the resulting solution as the development of mutual respect and enhanced communication, the culturalist view ignores the very significant issue of relationship. Quite simply, cultures are constructed by people in the context of relationships. A conception of the colonized as inferior is fundamental to a colonial "world view" (Fanon, 1963; Gates, 1991; Spivak, 1988). That is to say, if every construction of an 'other' is simultaneously a construction of the 'self,' as the constructionist and relational theory of culture being argued herein would have it, then Chief Justice McEachern's "world view" depends as much on defending the superiority of his race/culture/gender as it does in affirming the inferiority of Aboriginal "world views." The two cannot be seen as separate realms either conceptually or practically. Using McEachern as an illustration, my point is that in order for him to really respect Aboriginal cultures and accept Aboriginal peoples as equals, he would have to accept a critique of ethnocentrism or racism and hence of his own superiority. Therefore, I argue such a critique is a necessary, though not sufficient, pre-condition to mutual respect and equality.

Conversely, Aboriginal people remain relatively powerless within the dominant Canadian society and what images, descriptions, theories are legitimized by the central institutions and public of that society, impact directly on the possibilities open to them.

The theories, practices and interests of anthropologists have figured prominently in British Columbia Aboriginal title litigation processes. Beginning with Dr. Wilson Duff's testimony in *R. v. White and Bob* in 1963, anthropology, in the form of its products, ethnographic texts, has been relied upon and presented as evidence to both support and refute Aboriginal positions.

Anthropologists have analyzed and translated the works of their predecessors, written and presented original texts of their own, testified as expert witnesses on behalf of both the Crown and Aboriginal peoples, and commented on the conduct and outcome of various trials.

Initially, anthropological research was principally concerned with documenting and describing various Native peoples' practices surrounding land occupation and resource use, translating this data into language that lawyers and judges could understand, and defending the reliability of their research methodologies and findings in terms of legal evidentiary criteria.

More recently, following the development by the courts of more demanding legal "tests" for legitimating Aboriginal title and rights, the "world views" and "cultures" of Aboriginal peoples have come increasingly to the forefront of legal battles. Beliefs and practices surrounding spiritual relationships to land, ancestors and cosmos, and the

interrelationships between land, spirituality, social organization, law, and governance have been documented and testified to.

And, as reasons for judgment delivered by various members of the judiciary revealed certain patterns of ethnocentric thinking that limited their ability to accept the co-existence of cultural difference and equality, anthropologists also began to tentatively address this problem in their opinion reports and testimony. The *Delgamuukw* case, more than any other, explicitly challenged the problem of ethnocentrism in relation to judicial bias.

Stuart Rush, one of the lawyers for the Gitksan and Wet'suwet'en, in his opening address to the court, explained the legal team's strategy as follows:

This Court, in hearing the evidence which will be presented in this case, will be faced with a series of legal and intellectual challenges and opportunities of a nature not normally found in matters that come before the bench (*Gisday Wa and Delgamuukw*, 1989:21).

Rush sets out the first challenge to the Court as being to reflect critically on European, or Euro-Canadian, ethnocentrism:

...to understand and overcome the tendency to view aboriginal societies as existing at an earlier stage of evolutionary development...We will be inviting this Court, through its rulings, to reject any legal theory of aboriginal rights which depends upon such evolutionist and supremist assumptions (*ibid*:22).

The second challenge is described by Rush as "the problem of communication between very different cultures." The text continues then to describe the "Gitksan and Wet'suwet'en world-view."

In an article entitled "The Role of Anthropological Evidence in Land Claims Litigation: The Gitksan-Wet'suwet'en Case as an Illustration," written by Rush after the case concluded, he says:

...The anthropologists' role in the trial was to take out of the bulk of undigested evidence the relevant and significant evidence in order to create a picture of a viable, functioning and current society...In short, to show they were native nations. Secondly, the anthropological evidence was intended to translate the evidence of the people to combat the ethnocentrism in the judicial consideration of their society...We knew that the Judge shared the cultural perceptions of the governments and therefore the anthropologists had to break through his vision and to introduce him to the native world view (Rush, 1991: 13-14).

These two foci parallel the description of anthropology's mission that opens Marcus' and Fischer's 1986 book Anthropology as Cultural Critique: An Experimental Moment in the Human Sciences, and reads as follows:

Twentieth-century social and cultural anthropology has promised its still largely Western readership enlightenment on two fronts. The one has been the salvaging of distinct cultural forms of life from a process of apparent global Westernization. With both its romantic appeal and its scientific intentions, anthropology has stood for the refusal to accept this conventional perception of homogenization toward a dominant Western model. The other promise of anthropology, one less fully distinguished and attended to than the first, has been to serve as a form of cultural critique for ourselves. In using portraits of other cultural patterns to reflect self-critically on our own ways, anthropology disrupts common sense and makes us re-examine our taken-for-granted assumptions (Marcus and Fischer, 1986:1).

The bulk of anthropological work that has appeared in court in Aboriginal title litigation has been research situated within the first framework: "the anthropology of the other." This research has been conducted by anthropologists grappling, for the most part, with the problems and questions raised by doing "advocacy anthropology." The primary goal of this work has been to practically effect the outcome of particular processes, such as the legal processes examined here.

In this context, debates have centred on research methodology and the quality of data gathered, and the effectiveness of anthropologists' contributions measured by the weight given their evidence by members of the judiciary, policy-makers and administrators. More recently, questions concerning representation, accountability, and appropriation have increasingly been raised, primarily by Aboriginal peoples. Here, the debates centre on the relationship between non-Aboriginal anthropologists, lawyers and Aboriginal litigants, the cultural legitimacy and political morality of such representations, and the distribution of benefits accruing.

Anthropological attention and commentary has focused primarily on the work of anthropologists who have testified on behalf of Aboriginal litigants. This thesis draws on this body of work, but examines in detail the use of anthropology and the concept of culture by Crown representatives. My focus, in the context of Marcus' and Fischer's formulation, is on the second "less fully distinguished and attended to" promise of anthropology as cultural critique.

The analytic framework within which this thesis seeks to examine the Crown's conduct is what Marcus and Fischer identified as a "strong epistemological critique," that they describe as having the following characteristics:

In all of these efforts, three kinds of critique are important: the critique of ideologies in action, the critique of social-science approaches, and the identification of de facto or explicit critiques "out there" in society, among ethnographic subjects themselves (Marcus and Fischer, 1986:156).

Of course, there is a long tradition in anthropology of utilizing judicial arenas as locations to study "ideologies in action." A consistent objective in the sub-field labelled "the anthropology of law" has been, as Laura Nader described: "the understanding and

analysis of legal systems as they operate in particular cultural and societal contexts" (Nader, 1969:5).

The critique of social sciences approaches, Marcus' and Fischer's second criteria, is addressed in this thesis in two ways. First, the use of positivist social science-- particularly anthropology-- by the Crown and Crown witnesses is described and analyzed within a framework informed by the critique of positivism in general. Second, it is analyzed within the "auto-critique" of positivism and ethnocentrism developed by anthropologists in recent years. The third criteria, "identification of defacto or explicit critiques 'out there'," is met primarily by reference to the work of Aboriginal and non-Aboriginal scholars in the field of legal criticism, and secondarily by reference to the work of other anthropologists who have analyzed judicial processes in general, and the *Delgamuukw* case in particular.

I differ from Marcus and Fischer, however, on the issue of the political possibilities and goals of cultural criticism, and the roles of anthropologists as critics. Marcus and Fischer reflect the frequently criticized lack of attention to power relations by "mainstream, interpretive" anthropologists (see, for example, Keesing, 1987; Vincent, 1990) when they explicitly advocate "tolerant pluralism" (Marcus and Fischer, 1986:128) and explicitly oppose the "advocacy or assertion of values against a particular social reality" (ibid:167). Rather, I would argue, with Robert Ulin, that,

A critical anthropology with practical intent must...go beyond the relativizing of narratives to challenge exploitative and hegemonic social practices and social formations...(Ulin, 1991:81).

Theory and epistemology are, of course, intricately related to methodology, and the methodological approach I take in this thesis is a hermeneutical one, meaning it is

based on a critical deconstructive reading of texts and the reconstruction of an analytic narrative, rather than in participant observation and the writing of ethnography. My reading relies on the hermeneutic method in that it seeks to explicate the structures and meanings inherent in the texts, to clarify what is obscure, and to make explicit what is implicit. At its most basic level,

Hermeneutics shows...that all social science theories must necessarily be interpretive because human actions and cultural products are objectified in the symbols and signs of ordinary language (Ulin, 1984:xv).

Taylor defines interpretation in the sense relevant to hermeneutics as,

...an attempt to make clear, to make sense of an object of study. This object must, therefore, be a text, or a text- analogue, which in some way is confused, incomplete, cloudy, seemingly contradictory--in one way or another unclear (Taylor, 1987:33).

Taylor continues to set out criteria of judgment in hermeneutical studies. The first he describes as follows:

A successful interpretation is one which makes clear the meaning originally present in a confused, fragmentary, cloudy form (ibid:36).

The most common criticism of hermeneutics as it is advanced by its leading proponents such as Gadamer and Ricoeur is described by Ulin as follows:

While self-reflection, effective historicity, and the cultural character of all interactions are indispensable ingredients of the process of totality that defines interpretation, they are not sufficient, at least as articulated in the hermeneutic tradition, to account for the complexity of interactions that are marked by social inequality...The point here is not to reject the hermeneutic project, but to transform its practical intent, the phenomenology of the sociocultural life-world, into one that is critical and emancipatory (Ulin, 1984:127).

In other words, hermeneutic interpretation, in order to be critical, must go beyond mere exposition or commentary and attempt what Carol Gould calls a "double hermeneutic" or "critical reconstruction" (Gould, 1975:xv). She says,

Critical reconstruction is a dialectical method of interpretation...that goes beyond the problem of understanding of the text itself...and does so from the standpoint of an internal understanding of the project that the text embodies and from an external critical standpoint based on knowledge and interests that are independent of the framework of the text (ibid:xxiii).

This is particularly applicable to the subject of this thesis, since, as Terdiman points out:

Unlike literary or philosophical hermeneutics, the practice of interpretation of legal texts is theoretically not an end in itself...but...is one way of appropriating the symbolic power which is potentially contained within the text. Control of the legal text is the prize to be won in interpretive struggles (Terdiman, 1987:809).

The texts that constitute the main subject of this study are the written reports submitted to the court by expert witnesses in anthropology and history hired by both the Gitksan and Wet'suwet'en and the Crown, and the 400-page Reasons for Judgment written by the trial judge, Chief Justice Allen McEachern of the Supreme Court of British Columbia. In addition to these public texts, verbatim transcripts of trial proceedings, particularly the testimony of expert witnesses and their cross examination by lawyers for the Government of Canada, Province of British Columbia, and Gitksan and Wet'suwet'en, were read and analyzed.

An analysis of these texts' rhetorical dimension contributes to a methodological bridge between the first step of understanding the text in its own terms, and the second step of critiquing it from a position based in a differing set of fundamental assumptions. Rhetoric traditionally connotes the deliberately persuasive use of language (see, for example, Paine, 1981). The identification of rhetoric as a key element in textual analysis has been of interest to symbolic and linguistic anthropologists for some time, most often in studies of performance of various kinds like political speech-making, and the formal

recording of oral histories. However, my use of the term follows its use by

Anthropologists George Marcus and Richard Cushman who have argued that:

Rhetorical functions are...an unself-conscious, integral dimension of any kind of written expression, inseparably bonded to the substantive content of the narrative, interpretation, or analysis presented. Just as the logic of argument of a text is abstractable for a certain purpose such as theoretical discussion, so the rhetorical dimension of a text and its arguments, are abstractable for a certain purpose such as a cultural discussion of how a text persuades and effectively communicates its meanings...An awareness of a text's rhetorical dimension by its writer or reader is finally not at all subversive to sophisticated rather than absolutist standards of objective knowledge, but is an integral part of both generating and evaluating claims to objectivity as well as explanations abstractable from their written context (Marcus and Cushman, 1982:54-58).

The historical and political context in which both the legal battle for recognition of Aboriginal title in British Columbia in general, and the *Delgamuukw* case in particular, are located is reconstructed through reference to key sources in law and legal interpretation, history, cultural critique and anthropology. The place of anthropology and anthropologists in these events is examined with reference to literature emerging from the "auto-critique" of the discipline undertaken with some rigor over the past ten years.

In this context, I bring to the reading of these texts two sets of criteria. First, I approach them with the ordinary lay person's common sense regarding facts, evidence and the balance of probabilities. For example, a key point in the provincial government's legal argument is that the Gitksan and Wet'suwet'en, prior to European contact, made little use of the territories surrounding their villages. The Crown specifically argued that they rarely travelled outside of a twenty mile radius of these villages. The Gitksan and Wet'suwet'en argued that they hunted, trapped, gathered and fished throughout their territories, and travelled regularly to visit and trade with neighbours beyond the 20-mile limit alleged by the Crown. Volumes of empirical evidence about the presence of, for example, many species of fur-bearing animals in these territories, their locations in places

further away from the villages than 20 miles, and their role in fulfilling needs for food, clothing, ceremony, shelter and trade, were supplied by the Gitksan and Wet'suwet'en and their expert witnesses. The Crown countered with little empirical evidence and much theory about the behaviour of "primitive peoples." I argue that "common sense" would lead the "ordinary person" to conclude that "on the balance of probabilities" the Plaintiffs have the stronger case.

I will use the term "common sense" throughout this thesis. I use the term to differentiate between specialized, technical or professional knowledge, and lay peoples' assumptions. For example, as I have argued above, one needs only "common sense" to see the weaknesses of some Crown arguments regarding use of resources. That is to say, one need not be an animal biologist to understand the relevant testimony on this subject. Of course, "common sense" in contemporary culture, speaking broadly, also usually incorporates ideas and attitudes about human beings and behaviour based in racism and sexism which I critique. When I use the term "common sense" in this context, I wish to imply that without an underlying assumption of racial/cultural/gender inequality, common sense would suggest the point in question. Referring again to the above example of resource use, I will argue the Crown witness' suggestion that the Gitksan and Wet'suwet'en may or *may not* have utilized the pelts of fur-bearing animals for clothing prior to contact with Europeans defies common sense, *unless* the "common sense" in question includes the assumption that the Gitksan and Wet'suwet'en were "too primitive" to figure out how to make such use of animals. My objective is to, wherever possible, demystify and simplify arguments and processes that I argue are often misrepresented as complex and specialized knowledge, and therefore the exclusive property of, and inaccessible to anyone other than, experts.

The second set of criteria I bring to an evaluation of these texts are those I have learned through academic training regarding research methodology and the specific literatures at issue in this case: British Columbia ethnography, historical and archival research, and ethnographic research. Finally, I bring a theoretical and political perspective that understands the link between culture, context, and power as shaping meaning.

I rely on Vincent's closing remarks to her recently published history of anthropology, entitled Anthropology and Politics: Visions, Traditions, and Trends:

In conclusion, this study presents a case for a new historicism in political anthropology. It should be clear by now that this involves no disengagement from fieldwork and no retreat into reflexivity at the expense of the 'real world'. True historicism, like the dialectic, is immanent critique...An important place exists within political anthropology in the 1990s for a historicist project when it is conceived and conducted as a reflexive affair and when reflection, an act of mind, is set in the field of material production, its cultural mediations and their hegemonic forms. The historicist project is at one and the same time a presentist project given meaning by way of the future...Anthropologists who study politics--whether of the discipline, the academy, or the world 'out there'--have a future (1990:429).

There are obviously innumerable ways in which this story could be told and this thesis written. It is traditional in writing a doctoral dissertation to follow the introductory chapter with a chapter on theory and another on methodology. However, having briefly sketched out above the theoretical and methodological approaches I take, I will depart from this tradition and take my lead from a dissertation written by John Womack entitled "Zapata and the Mexican Revolution," and presented as a model by Albert Hirschman in his article "The Search for Paradigms as a Hindrance to Understanding" (Hirschman, 1987:177-194). Hirschman notes that Womack "abjures any pretence at full understanding right in the preface," where he says that his book (originally his dissertation) 'is not an analysis but a story because the truth...is in the feeling of it...' " He

quotes Womack further as saying "The theoretical analysis....I have tried to weave into the narrative, so that it would issue at the moment right for understanding it."

It is also traditional in a dissertation to have a chapter entitled "Literature Review" in which the author sets out the body of literature into which her or his work fits in terms of being informed by the work of others on related topics and how the thesis will address outstanding questions in the field. As interest in interdisciplinary work has increased throughout the arts, humanities and sciences in recent years, however, the standard "literature review" format has become increasingly hard to adapt. In the case of preparing this thesis, for example, I read widely in a number of areas including anthropology, law, literary criticism, social theory, and history. And, there is now a substantial literature on the *Delgamuukw* case itself written by legal scholars, historians, anthropologists, a journalist, two popular writers, and a cartoonist which I have studied in depth. Rather than writing a separate chapter on literature(s) review(s), I refer to specific literatures and relevant debates within them in footnotes which themselves form a "subterranean commentary on the text," a technique adopted from anthropologist Joan Vincent's recent work cited above.

The remainder of this thesis will be presented in the form of an "analytic narrative," described by Renato Rosaldo as follows:

Perhaps narrative's main strengths are the ways it enables readers to follow events in their unfolding and make synoptic appraisals of sociohistorical subjects (whether of persons, events, or institutions). Such stories can connect their phases in a cumulative unfolding where beginnings anticipate endings and endings render beginnings intelligible. At the same time they can show the concatenation among ideas, institutions, and unique events. Analytical narratives about particular instances can make connections, both temporal and societal, more ramified and densely woven than usual in other analytical modes (Rosaldo, 1980:90).

The central narrative, then, is the story of *Delgamuukw v. R.*, told as an episode in an historical process. Determining a structure of presentation was one of the more difficult tasks involved in producing this document. Since I argue that the key to understanding the *Delgamuukw* decision is found principally in the history of, and internal rationales of, law, I have tried to follow the law. And, since law is both theoretically conservative and traditionalist, and practically relies on precedents which, as historical decisions, draw the past into the present, and legal judgments project this past/present into the future, the route is necessarily circuitous (Fortune, 1993; Postema, 1991). In another way, however, the legal story is frighteningly simple: the law has proceeded by ignoring the presence of Aboriginal peoples, through the theory of *terra nullius*. And, this, I will argue, is the overarching form and consequence of the Chief Justice's reasoning and evaluation of the evidence presented to him. By dismissing the Aboriginal oral traditions as *terra incognita*, and anthropologist witnesses as irrelevant, he created a *tabula rasa* on which he could write his own history and anthropology. In other words, in his Reasons for Judgment, Chief Justice McEachern recreated law's imperialist story: first, he repeatedly described the land as a "vast and empty wilderness" (nature is a passive object); next he silenced the voice and erased the presence of the Aboriginal peoples (also passive objects); then he dismissed the voice of those non-Aboriginal people who sought to validate, represent and translate the Aboriginal point of view (active but troublesome objects). Finally, he took as true the European-derived story (active subjects) of justified colonization supported by social theories about the nature of people and differences between them.

The narrative begins, in Chapter 2, following this introduction, with an historical account of the development in European and then British law of theories of cultural difference and their role as legitimations for imperial conquest and colonization. This

chapter ends with an account of the first significant legal decisions rendered in nineteenth century America, i.e. "the Marshall trilogy."

From the nineteenth century U.S.A., I move, in Chapter 3, to an examination of the colonial and settlement period in British Columbia that encompassed the years 1850 - 1927. It was during this era that law codified and enforced the appropriation of Aboriginal title, and the "founding myth of white British Columbia" -- a local variant of the "metanarrative" of European imperialism--became the dominant ideology amongst non-Aboriginal peoples in the province, and that is reflected most strongly in the Crown's arguments and the Judge's decision in the *Delgamuukw* case (Tennant, 1990).

From 1927 - 1951 organizing for the purposes of advancing land rights activity was ruled illegal under section 141 of the *Indian Act*. Chapter 4, therefore begins with the first of the modern, post-1951 Aboriginal title cases and ends with the *Sparrow* decision that preceded *Delgamuukw*. Three themes are followed through these cases: judges' findings on the existence (or not) of Aboriginal title and the extinguishment (or not) of the same, and the rationales called forth to support these decisions; the development by the courts of increasingly complex and demanding "tests" for Aboriginal litigants to meet in proving their claims; and the role of anthropology and anthropologists in these cases.

Chapter 5 begins with a review of the literature on anthropologists working as expert witnesses, and the questions raised by such involvement. I go on then to summarize the evidence presented by the Gitksan and Wet'suwet'en in three areas: oral tradition, anthropology, and history. I focus here on the Crown's cross examination of witnesses--particularly the challenges to the anthropologists' qualifications--and the

judge's findings regarding the same. This chapter concludes with a discussion of the critiques of the *Delgamuukw* decision written by anthropologists, historians and legal scholars.

Chapter 6 presents a detailed, in depth, examination of the opinion report, testimony and cross examination of the expert witness for the Crown in anthropology, Dr. Sheila Robinson. In this review, a number of issues that are central to the arguments presented in this thesis are salient. Dr. Robinson's testimony, while lacking in professional quality and empirical data, nonetheless supplies the Chief Justice with both theoretical and substantive support for his ideological predisposition.

Chapter 7 summarizes events following the judgment, particularly the decisions of a panel of five Supreme Court judges sitting on the British Columbia Court of Appeal. The appeal decision provides us with some insights into the direction the judiciary appears to be taking following *Delgamuukw* and other cases, and political developments such as the change to a New Democratic Party provincial government in British Columbia. Of most interest from an anthropological point of view is the definition of culture as the newest legal test for Aboriginal title emerging in this forum. This chapter also briefly reviews the status of the British Columbia Treaty Commission which is currently posited as a preferred alternative to the courts as a forum for negotiating a settlement of outstanding Aboriginal title and rights issues.

Chapter 8 concludes the thesis by returning to the four questions outlined above and assessing what the thesis has accomplished in relation to them. Specifically, I focus on what contribution to anthropology and to debates about the role of anthropologists in

Aboriginal/non-Aboriginal relations this thesis may make. Before considering these issues in more depth, however, I will ask and answer, to the best of my ability, the fourth question posed for this thesis: what is the relevance of the relationship between the writer and the text in terms of point of view, access to data, and conditions of research and production.

1.1 LOCATING MY "SELF" IN MY WORK

The relationship between writer and text is an area that has received a considerable amount of attention in the humanities and social sciences in recent years, particularly in anthropology. Whether as a logical extension of the critique of positivism, or in response to challenges surrounding the rights and/or abilities of anthropologists to represent indigenous cultures, or to answer charges of appropriation, it has become expected, even required, that an anthropologist explain her or his relationship to the subjects studied. The issues usually addressed include the anthropologist's race, culture, gender, age, familial relationships, and class background, as well as the political and economic conditions under which research and writing was carried out, and the impact of this on the practice of research and on the final text produced. Drawing on literary criticism, anthropologists have also begun to turn their attention to rhetorical and linguistic techniques, and the politics of reading and writing texts (Clifford and Marcus, 1986; Tyler, 1986).

James Clifford, for example, and others, have argued that when anthropologists, working as we do within a European cultural framework, construct an "other" they are always simultaneously constructing themselves. From this point of view, then, critical reflexivity is a necessary precondition to intellectual honesty (Clifford, 1988).

There are many debates about both the motivation behind, and the utility of, this attention to the anthropological self. Some remain deeply threatened by the fundamental anti-positivism of the emerging convention (Gellner, 1988). Others denigrate it as self-aggrandizement, self-indulgence or narcissism (Friedman, 1987; Sangren, 1988).

For me, for whatever reasons--two of them perhaps being narcissism and self-absorption--I have always quite explicitly and self-consciously pursued intellectual topics that are close to my heart and soul and through which I seek to make sense of my own experience and of the world in which I live. I seek, as Gramsci said intellectuals should, to integrate a "commitment of the heart and of the mind" (Gramsci, 1971).

When all is said and done, a Ph.D. dissertation is an application for recognition by, and membership in, a particular professional club. Dissertations are most often, like this one, the product of a single author produced under definite material conditions, within particular political circumstances, from a specific perspective, and in a certain frame of mind and mood. Like all intellectual work, this thesis is therefore in some sense autobiographical.

There is a vast and rapidly developing literature addressing these issues and I will refer here, by way of introduction, only to fundamental approaches developed by two anthropologists that I have found particularly helpful. The first is Anthony Cohen who makes the following points that I have taken as guidelines. First, he says,

It would not be contentious to suggest that many anthropologists are motivated by a personal problematic as well as by mere intellectual curiosity (Cohen, 1992:223).

Second,

As an anthropologist, I cannot escape myself; nor should I try...I do not regard myself as merely studying my self; but rather, as using my self to study others (ibid:224).

Third,

There is no option for us as social members or as social anthropologists but to proceed from the premise of self. It does not have to be a flabby procedure. Its virtue lies in more than its logical inevitability: it also replicates the process of ordinary interaction, of our lay assumptions that we have understood each other (ibid:237).

The second anthropologist whose work has influenced mine in this area is Judith

Okely. She begins by carefully delineating what she considers as relevant:

...the anthropologist's past is relevant only in so far as it relates to the anthropological enterprise, which includes the choice of area and study, the experience of fieldwork, analysis and writing (Okely, 1992:1).

Further, Okely gives considerable weight to the theoretical implications of interweaving autobiography and intellectual work. She argues that, autobiography dismantles the positivist machine (ibid:3). And, that,

...in an academic context 'the personal is theoretical.' This stands against an entrenched tradition which relegates the personal to the periphery and to the 'merely anecdotal:' pejoratively contrasted in positivist social science with generalizable truth (ibid:9).

The central themes explored in this thesis are Euro-Canadian beliefs about Aboriginal peoples, the nature of justice as dispensed by courts examining questions of Aboriginal title, and the problems associated with wanting to be a responsible, yet critical, anthropologist/intellectual in this day and age, and time and place.

The interrelationships between these themes, the conditions under which research and writing have been carried out, and my autobiography, are significant; and, at least to my mind, inextricable from each other. At the same time, however, I am wary of falling

into two familiar traps. The first is outlined by Judith Grant in her critique of feminist epistemology entitled "I feel therefore I am," in which she argues that the feminist adherence to the principle that "the personal is political" has led to a situation in which individual personal experience is posited as an unmediated "pure" source of knowledge and, more importantly, as unfalsifiable validation and authority (Grant, 1987; see also Aronowitz, 1993:20-62; and West, 1993:21-32).

The second trap I try to avoid is the more familiar, to anthropologists, one pointed out by Clifford, Pratt and Rosaldo and quoted by Okely:

Anthropologists have inserted the 'I' only at key junctures in ethnographic monographs in order, it is argued, to give authority to the text. Otherwise they produced accounts from which the self had been sanitized. To establish authority, it seems, requires only the briefest of appearances. The 'I' is the ego trip...and emerges from writing traditions in western culture (Okely, 1992:5).

I will begin with the basics upon which there appears to be general agreement, i.e.:

...cultural criticism must include an account of the positioning of the critic in relation to that which is critiqued...(Marcus and Fischer, 1986:115).

When the Gitksan and Wet'suwet'en trial opened in Smithers in 1987, I was a graduate student in Anthropology at the University of British Columbia, and was in the process of transforming the undergraduate honours thesis in Sociology and Anthropology that I had written at Simon Fraser University into a book for publication.

This book, entitled An Error In Judgment: the politics of medical care in an Indian/White community, was an account of events that took place over an 18 month period in 1979-80 in Alert Bay, British Columbia. Alert Bay is a small island divided

approximately in half: a white community and an Indian reserve community. I "married into" the Indian community and lived there from 1971 - 1981.

Briefly, the story the book told began with the 1979 death, in the local hospital, of an 11 year old Native girl, Renee Smith. She entered the hospital with symptoms commonly associated with appendicitis and died four days later, without a diagnosis, from a ruptured appendix. Dr. Pickup, the resident physician in Alert Bay since 1949, had been in charge of her care. He was an infamous local character, with a reputation as a "drunken old country doctor." Several other "suspicious" deaths, and countless misdiagnoses, had been attributed to Dr. Pickup in recent years. The child's death was "the last straw" and provoked a good deal of anger in the Native community. In writing the book, I documented the efforts of the local Native community to have Dr. Pickup called to account by the B.C. College of Physicians and Surgeons who licensed him, by the provincial government who supported his practice at the hospital through the B.C. Medical Plan and the B.C. Hospitals Act, and the federal government responsible for the bulk of the doctor's income which came in the form of transfer payments on behalf of status Indian patients.

The College of Physicians and Surgeons held an internal review and found that Dr. Pickup had made an "error in judgment" in Renee Smith's case, but was fit to continue practising medicine. Petitions and personal letters submitted by members of the Indian community were deemed "insufficient evidence" to warrant further action by the College. Provincial authorities did agree to hold an inquest into the death, originally not requested by the local Coroner who was one of the doctor's cronies. The 11-day inquest drew national media attention and found Dr. Pickup negligent in Smith's death. Evidence of improper procedure and lax enforcement of normal regulations throughout the hospital's

administration was exposed, and the nation was duly shocked and horrified. However, findings of Coroners' juries are not legally enforceable, and no concrete action on the part of authorities resulted from the inquest.

The provincial government of B.C. held an "in house" inquiry into the administration of the hospital to which Native representatives were invited to make a presentation which was to be restricted to three hours in length. The local band and tribal councils boycotted the provincial inquiry, which ended with a set of recommendations regarding issues such as record-keeping at the hospital.

In 1980 a federal government inquiry into the delivery of medical care to the Kwakwaka'wakw (Northern Vancouver Island) region was then held in response to continued pressure from Native representatives. This inquiry, too, concluded that Dr. Pickup was responsible by negligence for Renee Smith's death and "at least two other deaths," that he was an alcoholic, and that while it was clear that many Native patients had suffered deaths and indignities at his hands, there was insufficient evidence to establish whether or not the label of "racism" fairly characterized the situation, since it was not clear whether or not non-Natives had been treated negligently as well. However, health care in hospitals and the licensing of doctors falls under provincial jurisdiction and the findings of the federally-sponsored inquiry were, like those of the inquest, unenforceable. While the focus of the initial community actions had been on the doctor's well-known fondness for the bottle, and his long time habit of practising medicine while under the influence, the federally-sponsored inquiry had concentrated instead on the disturbing rates of alcoholism and drug abuse among the Indian population, and on the need to revitalize "traditional healing," in order to develop "culturally appropriate" medical care. The inquiry recommended the building and staffing of a band-controlled alcohol and

drug treatment program to be housed in an on-reserve health centre which would employ local people. This centre was built in 1983.

In 1981, I moved to Vancouver with my husband and two children, and my husband and I enrolled in university and began taking courses in, among other subjects, anthropology. I therefore came to the study of anthropology by a somewhat unusual route. I completed a joint honours degree in Anthropology and Sociology, in 1985. In the field of anthropology, I was particularly influenced by the work of Brody, 1975; Dyck, 1985; 1991; Paine, 1977; 1985; and Tanner, 1983. Most of my training was in the school of British social anthropology supplemented primarily by courses in Sociology and Womens Studies. These university courses provided me with contextual, analytic, and comparative frameworks which enhanced the experiential knowledge I had of "Native/White relations," and being a woman, and a political activist.

What interested me were political relations between Native peoples and Canadian society, and especially, relationships between Native and non-Native peoples within the institutional settings that they most often met: schools, hospitals, prisons and political negotiations. While this work contributed to the critical self-reflection I am continuously involved in as a white person living a good part of my life in a Native community, my major analytic interest has always rested in the critique of the "mainstream" or "dominant" culture, rather than in the more traditional cultural anthropological goal of representing the Native "other." The particular story of Alert Bay, Renee Smith, Dr. Pickup and the various government inquiries seemed to me to illustrate many of the themes I was studying and the questions I had been asking of myself and others for many years. Increasingly it became the key story that I thought about these issues with and through. As such, it

became a story I very much wanted to tell, and I took the opportunity of an honours thesis to do so.

The process through which I brought this book from an honours thesis written using pseudonyms to a publication that names places and people took three years from first draft in 1984 to publication in December of 1987. Since this story was, in many ways, as much "mine" as anyone else's, and while I strove to be accurate in my descriptions, and accountable in my representations of events and of the words, thoughts and activities of particular people within the Native community, I did not (and could not) see myself as interpreting or analyzing--representing--"the native point of view" for reasons I will set out below.

I was confident that the descriptive "facts" of the events were true and could be documented and substantiated. The particular interpretation I placed on the events was shared, not by the entire Native community, but by the "faction" to which I belong within that community. What I was saying was true and was common sense at the kitchen tables around which I sat and drank coffee and gossiped. And, it was true and it was common sense to me. That I could tell it in written form and articulate it within a language of academic analysis was the result of privileged education, and served for the other participants as further, external, legitimization of their interpretation of their experiences.

My interpretation and analysis of the non-Native individuals, groups, agencies and institutions, on the other hand, was not one that I shared with them: I didn't sit at their kitchen tables nor they at mine. Nor did I strive to represent their own perceptions of themselves. In fact, it was these very self-perceptions of racial/cultural superiority that were the focus of my critique. I did, however, strive to be fair and factual. My analysis

was broadly representative of a Native critique of colonialism and colonial agents, supported by academic theories and arguments. Stated plainly, it was particular non-Native individuals, groups, beliefs and practices that I saw as "other", and my explicit goal was to describe, demystify, delegitimize, and critically analyze and evaluate them.

After circulating drafts of the manuscript first to Renee Smith's family and then to other people in the community who had been most involved in the events, I met with the Elders Council of the Tribal Council and explained the contents of the book. One of the Chiefs translated my talk into Kwa'kwa'la. They listened attentively. Several shook their heads frequently in disagreement and muttered disapproval. Those most closely related to my husband were silent, but often looked extraordinarily pained. I was putting them in a very difficult position where they would have to weigh many cardinal values and obligations: family loyalty, responsibility for community well-being, and individual conscience. The Elders then met in camera with the Chiefs who relayed their decision to me as follows: "The Old People don't like what you are doing. This is not their way. They think it will bring up old problems and cause trouble and fights again. They would rather you didn't do it. But they said that as long as everything you write down in the book is true and you are not telling any lies then you have a right to say it. They don't want to stop you as long as you are telling the truth." The Chiefs assured the Elders that they had read the manuscript and that it was all, in fact, true and represented how a lot of people thought about what had happened. They thought it was good for there to be a permanent record, even if some people wouldn't like it.

The Tribal Council, including the Elders Council, passed a resolution in support of the book and contributed a written endorsement for the jacket cover. I was truly impressed by the Elders' judiciousness, but the burden of their trust weighed heavily on

me as the publication date drew near. If I had made any errors, no matter how unintentional, I knew I would incur embarrassment and shame that they would bear. I tell this story here for a number of purposes. First, to set out what I know about the value of "truth" and judiciousness among Aboriginal Elders. Second, to set out what I know about the sometimes overwhelming sense of responsibility many anthropologists, lawyers and others feel towards the work they do on behalf of Aboriginal peoples.

When I began attending graduate school in September, 1985, at the University of British Columbia, I was exposed more to the literature and debates of American cultural anthropology. Well schooled, therefore, by the late 1980s, in the ethical debates surrounding reflexivity and anthropological field work, and the problems of representation, appropriation, and commodification, I was committed to being collaborative and accountable. I tried to write in an accessible style and made extensive use of verbatim quotes in an attempt to present a "dialogic text."

Meanwhile, some academic peers and superiors suggested that I was insufficiently "other" to be calling what I was doing "real anthropology," and snidely questioned the difference between my work and "journalism." Others suggested I look at anthropological interpretations of Indian culture and behaviour, particularly "health beliefs." Such second order analyses (for example, Stearns, 1981) however, left me cold and angry since the "truth" of the story I was telling was, to me, opaque. What the Indians really meant, I protested, was what they really said: the doctor was an alcoholic. People were being hurt by him. Everyone knew. The authorities protected him. This wouldn't happen in a wealthy white community. On the one hand, I enjoyed the work of interpretation, analysis and translation, i.e. being the one to tell the story. On the other hand, an uncomfortable feeling lurked around me that *any* attempt to superimpose

interpretation and analysis was in some way a qualification of the experiential truth of the issue (see Rosaldo, 1989).

The book I wrote has been well-received and is frequently used as required reading in undergraduate anthropology and Native Studies courses (Abele, 1989; Mitchell, 1990; O'Neil, 1988). As a result I am often asked to speak to these classes in the Vancouver area. I have come to expect to be asked the following questions by students of anthropology who have read An Error In Judgment:

- (1) Did your book have any effect? Did it do any good?
- (2) What has happened to health care in Alert Bay since 1979? Has having a band-controlled health centre made any difference?
- (3) Do you consider yourself an "insider" or an "outsider" in relation to the Indian community in Alert Bay?

While these are obvious questions, reflecting as they do some of the central questions facing contemporary anthropologists, I do not find them easy to answer.

In responding to the first question, I usually begin by saying that Dr. Pickup retired of his own volition in 1993 at the age of 74 and continues to live in Alert Bay. An extravagant retirement dinner was held for him and was well attended by both Natives and whites. Students are often shocked by this news, and I get the sense that this is not really what they want to hear. I suspect at least some want to hear that this book is an example of what has traditionally been known as "applied anthropology," or "action anthropology," that the meticulous documentation of gross injustice forced the powers that be to mend their ways and institute clearly required reforms. However, the story the book tells is very much about how this did NOT happen. Aboriginal students, by and large, are less naive and most often respond by recounting their own experiences of

events analogous to the ones described in the book. They too ask, however, "what good it does" to write books like this. I can answer only that the impact is less tangible but still, I hope, important: books and the stories they share can urge people to think in new ways about new and old problems. And, I usually add, I hope that the book stands as a "witness": a permanent record of what happened: a documented, accessible validation of a truth that was unjustly denied.

I usually add, too, at this point in the discussion that I think it is important for anthropologists, and others, to be honest about the degree of personal gain involved in writing and publishing. We have a tendency to try to render invisible or unimportant the economic and professional benefits we receive: to conceal the role we play in the commodification of knowledge. We do this by limiting the discussion to our moral and/or political intentions.

The second question, "What has happened to health care in Alert Bay since 1979? Has having a band-controlled health centre made any difference?" is similarly challenging.

The years 1979-1980 were eventful ones in the area of Indian Health Policy. A new Indian Health Policy was adopted by the federal government in 1980 that was based on three principles:

- (1) Recognition of the importance of socio-economic, cultural and spiritual development in attacking the underlying causes of ill health.
- (2) Reaffirmation of the traditional relationship between Indian people and the federal government.
- (3) Maintenance of an active role by the federal government and the encouragement of Indian participation in the Canadian health system (see Culhane Speck, 1989).

This policy was operationalized through the development of a community-based preventive and curative program aimed at alcohol and drug abuse, NAADAP (Native Alcohol and Drug Abuse Program), and the establishment of on-reserve comprehensive health centres and treatment facilities. The recommendations of the federal inquiry were, therefore, merely an implementation of an already in-place policy. Alert Bay itself may or may not have been chosen as the site for the treatment facility and health centre, but one would have been established in the region whether or not the controversy in Alert Bay had ever erupted in the public eye. These centres and what is now known as "the healing (or recovery) movement" have developed in various ways, with mixed results.

A good deal of public education has been undertaken at the community level concerning alcohol and drug abuse, and there is no question that many more community leaders and community members than before, now describe themselves as "clean and sober." There is also little to debate about whether or not such drug-free sobriety contributes positively to the quality of family and community life. There is absolutely no doubt that children are happier and healthier when the adults they depend on behave maturely and responsibly. A new interest has developed in revitalizing traditional healing and alternative medicine, and this has produced not only some effective "cures" but has played an important role in the overall development of pride in identity and heritage.

Critics, however, charge that the health centres remain limited by short term and insufficient funding, ongoing fiscal and program control by the Medical Services Branch, and over involvement of non-Native administrators, therapists, and counsellors inhibits the development of autonomy in this sphere. A considerable amount of dissatisfaction is frequently voiced about the "pan-Indian" cultural practices that have become a part of Indian-controlled health services. Many people in Alert Bay, and elsewhere, argue that,

for example, sweetgrass burning and use of the medicine wheel are "Prairie" cultural practices and not authentically their own. Others complain that these approaches are promoted by "New Age Indians," and are not the stuff of "real" traditional healers.

And, of course, health is "more than the absence of disease," but is also determined by and reflective of social, economic and political conditions. In Alert Bay, at the same time as the health centre and treatment programs have been funded and developed, employment of Natives in the logging industry has all but ceased, participation in commercial fishing has declined, the population of 1960s "Indian baby boomers" have matured, entered the shrinking labour market and started families of their own. Shortage of housing for young families is chronic, and employment hard to find. Over consumption of alcohol and drugs continues to be the main immediate cause of illness, death and family break down on the island. Cocaine, imported, sold and consumed in alarming quantities by local Native people has become a new part of daily life for many.

Finally, in response to question (3), "Do you consider yourself an "insider" or an "outsider" in relation to the Indian community in Alert Bay?" I usually recount an anecdote about an exchange that took place in the context of a heated argument about strategy during the events described in the book. Having been told after many months of intense involvement, and years of active and voluntary "acculturation," that "as a white wife" neither my participation nor my opinions were welcome or appropriate, I had exploded and complained: "I am sick and tired of being treated like a sister one day and a honkie the next!" To which my adversary calmly replied: "But Dara, it's not how we treat you. It's who you are."

Although I focused on the area of power and political relations, rather than on "cultural beliefs and values," in the course of writing the book I emphasized differences between whites and Indians, because that is what the story was about. And, that is what most of my academic training in anthropology had been about. In the book, I discussed some of the problems that arose as a result of my being, ultimately, a "white outsider" and identified them as such.

This is most often where I leave the discussion with students and with colleagues. And, for that matter, until now this is where I have most often left the discussion with all but a few close friends. However, I have become increasingly uncomfortable with this explanation for a number of reasons that I will introduce here and refer back to in the body of the thesis, since these are the issues that I feel are most pertinent to my "personal" relationship to the work at hand.

In An Error In Judgment I also discussed a difference of opinion that emerged regarding the re-definition of the central problem from one of an alcoholic doctor's incompetence, the "captive clientele" situation of his Indian patients, and the complicity of professional and government authorities into a problem of Indian alcoholism, and "cultural differences and misunderstandings" between western bio-medical and traditional Indian approaches to health and healing. On this point, while there were both Indians and Whites on both sides of the argument, the position I took was very definitely a minority one.

Briefly, it was my view--and that of a few others--that "culture" had been introduced into this particular discourse by the federal government and representatives of national and provincial Indian organizations financially supported by the government. It

was, we argued, being used as a foil to deflect the implications of the critique initially waged by the community which was very simple and straightforward: the doctor was a drunk, he should go; Indians should have the power to control the provision of health services in their community--including the power to remove a doctor from practice. By redefining the "health" problem as one of alcoholism among Indians, and the "health services" problem as one of "cross cultural communication," the status quo could remain intact.

It was not that "traditional healing" was not still carried on to varying extents among the Kwakwaka'wakw in 1979-80. It is not that these beliefs and practices are not viable and effective. It is not that the revitalization and reclaiming of culturally-specific approaches to health is not a part of the movement for self-determination. Our point was simply that none of this was mentioned by anyone involved in the struggle to replace Dr. Pickup until the federal government and the National Indian Brotherhood became involved, at which time the history and politics of the local campaign were rewritten and redefined.

The campaign against Dr. Pickup (or as it is now called "for better health") had taken a heavy toll on the Indian community since many people, particularly the Elders (who were then known as "the Old People"), were loyal patients of Dr. Pickup's, and had not approved of the campaign which was led by young people and those affiliated with the band office and band council, and the confrontational tactics that had become common political currency during the 1970s and had rarely been approved of by the whole community. Indians and Whites in 5-mile long Alert Bay had been fishing, logging, and living together, including inter-marrying, for several generations. A public, nationally-televised expose of racial tension in the communities had been difficult for all.

Many local people, therefore, including some--like members of Renee Smith's family--who had been centrally involved in the campaign from the beginning, were glad of a "compromise" position that would put the publicity and internal hostility to rest. And, the health centre did promise jobs and an additional band-run institution to add to the school, band administration, and various economic development projects. Those of us most critical of the "health centre solution" were already employed and, although we didn't know it or plan it at the time, were on our way to embark on professional, middle class tracks, headed out of the reserve community.

Marilyn Strathern has suggested that the difference between ethnographers and their subjects at home and abroad lies as much in the social scientific or anthropological project of analyzing and publishing accounts of everyday life and normally unreflected upon common sense, as in any particular "cultural belief system" (Strathern, 1987:16-37). She argues that "cultural insiders", when they assume the role of professional intellectuals and analysts, distance themselves from their communities of origin. While I think Strathern's analysis is a significant one, and more useful than most found in discussions of "insider" versus "outsider" anthropology⁸, it does not entirely account for the difference

⁸ While working on this manuscript I had combed the literature of "insider anthropology" represented at that time by two books of collected essays: Anthony Jackson's edited volume of papers from an ASA conference in 1985 entitled, Anthropology At Home, published in 1987; and an earlier volume edited by Donald A. Messerschmidt entitled Anthropologists at Home in North America: Methods and Issues in the Study of One's Own Society, published in 1981. I was looking for explanatory, analytic frameworks, and methodological directions for the project An Error in Judgment had become. In particular, I was looking for assistance in coming to terms with this issue that had initially divided the "activists," and that now still seemed very interesting and important only to myself.

In his introductory essay Messerschmidt summarized the key debate as follows: "Ultimately, just as the insider must somehow seek distance to obtain objectivity, so the outsider must seek intimacy in order to understand" (Messerschmidt, 1981:1). While this collection provided some helpful insights, the simplicity of the subjectivity/objectivity framework, and the attention to assisting the disadvantaged did not seem to address the issues I was confronting.

Jackson, introducing his volume in 1985 differentiates the goals of the writers from those who contributed to Messerschmidt's. He says about the American volume:

in interpretations described above. For one thing, neither I nor any of the others who shared my analysis were academically trained at the time. Those participants who were so trained, worked for government and provincial and national organizations, and opposed our position. The division between those (Indian and White) who saw this "solution" as a defeat and as co-optation, and those (Indian and White) who saw it as a victory and as progress, was neither "cultural", nor "professional", but "political".

However, Strathern's formulation may explain in part my continued interest in meanings and definitions of, and the political uses of "culture", and the lack thereof at the community level. For obvious reasons, the fate of the "culture concept" has been of particular interest to anthropologists. I will revisit this debate in the context of current legal and political issues facing Aboriginal peoples and anthropologist in my conclusion. I am seeking at this point, however, only to introduce sufficient background to my interest in, and practical involvement in two issues that constitute central themes in this thesis-- the politics of culture in the context of Aboriginal/non-Aboriginal relations in Canada; and the disjunction between the critical discourse on culture emerging in academia that focuses on the constructed nature of culture and representation, and the political uses of

It has the significant subtitle *Methods and Issues in the Study of One's Own Society*. By 'issues' they seem to refer to matters of social concern--a kind of 'rescue' anthropology. That is not the immediate objective of this volume...The aim is to tackle more general problems of theory and methodology in the discipline of social anthropology itself, not of society (Jackson, 1987:11).

Still, Jackson ends his introduction with a comparison between doing fieldwork abroad and library research at home; the former being "personal" and "experiential" and the later being "more difficult to master" and a "lone struggle". He concludes:

As the papers in this volume show, doing anthropology at home is of benefit when the researcher has prior experience of fieldwork abroad before turning homewards, since this aids the 'distanciation' process that is necessary if we are to see ourselves as other see us (Jackson, 1987:14).

"Objectivity," "distance," "self/other": this material still did not seem to address the process I was involved in or the problem I was wrestling with.

"culture" in social movements like that of Aboriginal peoples that tends to champion essentialist analyses (Williams, 1991). This is an issue of concern among critical intellectuals, particularly those located in academic institutions, across disciplines and social movements.⁹ George Marcus has recently revisited this problem in the context of cultural criticism and anthropology (Marcus, 1992). He distinguishes between "intellectualist counter-discourse" and "empirically derived counter-discourses," writing,

In one sense, counter discourse is the intentional and crafted product of literati who develop techniques of argument in writing to challenge official and dominant informal discourses and given states or conditions of society. I will call this *intellectualist counter-discourse*. The other sense of the term is the empirical probing for counter-discourses and their representation as products of the practical consciousness of the masses out there, so to speak, the subjects of research in multitudes of social situations...I will call these... *empirically derived counter-discourses*. The two kinds of counter-discourses--intellectualist and empirically derived--are of course interrelated, and the best critical works should mesh counter-discourses in both senses (ibid:79).

Marcus goes on to say that possibilities for meshing of the two are rare. His analysis remains locked in the traditional self/other dichotomy of cultural anthropology that presupposes a radical difference between researcher and researched, as I have described above in the context of my previous work. In the project undertaken for this thesis, however, given that the subjects of research, and the audience for whom I am writing, are themselves primarily intellectuals and anthropologists, the self/other dichotomy is not necessarily relevant.

During the years 1988 to 1991, I continued graduate studies in Anthropology at the University of British Columbia and then Simon Fraser University. I also took graduate courses in sociology, intellectual history and feminist theory. I became particularly

⁹ See Escobar, 1992 for a general discussion of anthropologists/intellectuals and social movements; see Butler and Scott, 1992 on how this question is being addressed by feminist scholars, and Epstein, 1987 on the issue within the gay and lesbian movement.

interested in a small sub-field labelled "critical medical anthropology" (Bibeau, 1988). I was fascinated by the critique of western bio-medicine, particularly psychiatry and psychology, as an entry point into a critical analysis of contemporary culture (Kenny, 1986; Gordon, 1988). I began research on a doctoral dissertation on the emergence of child sexual abuse as a public problem in both Aboriginal and non-Aboriginal communities, and particularly on "adult survivors of sexual abuse." This subject, linked as it was with contemporary feminist and family politics, and involving at the same time some of the complexities of racial and gender relations, provided interesting intellectual and personal questions.

These were also the years that the Gitksan and Wet'suwet'en case was being heard in the British Columbia Supreme Court. While I was not directly involved in the trial in any way, I followed developments through media, attended public information sessions, special lectures, support demonstrations, benefit dances and fund-raising performances. I bought raffle tickets, and since Native politics, and politics in general, are a central aspect of my daily and family life, the progress of this court case was the subject of countless informal discussions among friends and relatives.

A few of the lawyers who represented the Gitksan and Wet'suwet'en are people I have known for most of my adult life, and who also know and work with various members of my family since they and we are part of the broadly defined "left community" in Vancouver. In their role as the leading lawyers representing Aboriginal peoples, they have also worked with and for members of the Alert Bay community. However, they are not "friends" in the sense of being people I socialize with regularly. Rather, we share mutual friends, hear about significant events in each other's lives like marriages, divorces, births of children, see each other at particular gatherings, and have occasionally served

together on committees involved in various issues. I knew the chief legal advisor, Michael Jackson, from his work with the Nimpkish Band Council in Alert Bay. Of the three anthropologists who testified on behalf of the Gitksan and Wet'suwet'en, I have met Hugh Brody and Antonia Mills briefly, although I am familiar with their work. The third anthropologist, Richard Daly, is the son of friends of my parents and I have known "of" him, and met him at various times, throughout my life. He is not, however, someone I see regularly on a social basis. In other words, these people are members of what I would describe as the intellectual/political community to which I belong. It is from within this social location that this thesis has been researched and written, and as such the process of producing this work has been significantly different than that I engaged in when writing An Error In Judgment. The research and writing of this thesis has, comparatively speaking, been a very individual and individualistic project.

In 1987, I described my "subject position", as follows:

Most relevant to my understanding of the particular events this book describes, however, was my social location within Alert Bay. The terms "Indian" and "White", in Alert Bay, define categories of people of which a part of the definition includes racial/ethnic origins recognized by society as a whole, while the other part of the definition refers to a given individual's local situation. I am a White woman, married to an Indian man, and we have two children. I lived on the reserve for eight years and have been closely connected to it, through bonds of family and friendship, for a total of fourteen years. I am, therefore, not an Indian, but I am part of the Indian community. I am white, but I am not a part of the White community." (p.15)

Reality is, of course, more complex than the familiar, dualistic culture-categorization scheme represented by my self-introduction in 1987, and by traditional anthropology. In the introduction to An Error In Judgment, I also wrote the following:

As with the observations and interpretations of the specific occurrences recounted here, my perception of meaningful connections is also influenced by both personal and social factors. In 1982, approximately two years after this story came to an end, at the age of 32, I began to attend Simon Fraser University, from

where I graduated in 1985 with an honours degree in Sociology and Anthropology. I am now in my third year of a Ph.D. program at the University of British Columbia. Therefore, the rendition I now offer, and the perspective from which I now view these events, is influenced (or, some would say, distorted) by a distance of time--eight years--between the events and this writing; and by a distance of perception--a university degree in social sciences (Culhane Speck, 1987:19)

In "writing myself in" to my work in 1987, as well as describing my relationship to the Native community and my academic training, I also identified myself by age, gender, ethnicity, and social class as follows:

I was born in 1950, the child of a "mixed" marriage. My mother is a Jewish woman from Montreal, the daughter of Eastern European immigrants. My father is an Irishman from Dublin, the son of Catholic Nationalists. I spent my early childhood in Vancouver, Montreal, and the Republic of Ireland. In 1960, at the age of ten, I returned with my mother to Montreal, where I lived until 1969...While I was growing up, our family's main source of support, and therefore the basis of our material standard of living, was my mother's earnings from secretarial work. I became aware early in life of both the narrow-minded ethnocentrism of my parents' respective families, and of the insidious class snobbery and ethnic chauvinism which is so integral a part of Canadian, and British, society (ibid:15).

And, I noted that my parents were long time political activists, and that both my sister and I followed them in these commitments.

Issues of "identity" and "belonging" have been consciously present to me all my life and therefore also play a role in the choices I have made concerning intellectual work, like this thesis. When people ask me "what" I am (in an ethnic sense or a class sense), I either save time by choosing one of my various incomplete options, or heave a sigh and say I don't have an identity, I have a story. A part of this story, passed on from my parents, is an old paradox: a yearning to belong, and, simultaneously, the often contradictory compulsion to "ruthlessly criticize all that exists."

My "otherness" in terms of my relationship to the Native community, like my "belonging" to Irish and Jewish communities, and my membership in the middle and working classes, has been complex, contested and continually re-negotiated over the course of the last 20 years, in the former case, and over the course of a lifetime in the latter cases. My relationship of "oppositional other" to mainstream culture and to institutions of/and state power, has, on the other hand, been fairly consistent throughout my life and has followed me through whatever other communities I have become attached to. Ultimately, it seems, from a "mid-life" point of view, that is my home.

On March 8, 1991, when the judgment was rendered, I was still a doctoral student in Anthropology, but had transferred back to Simon Fraser University. Like everyone else interested and/or involved in Aboriginal politics, especially in British Columbia, I was shocked by the news of the judgment. I too had anticipated at least a partial victory. The early morning news had announced that the judgment had been released to the lawyers. They were in a "lock up" with the document until noon. One of the lawyers, Leslie Hall Pinder, who is also a well-known novelist, would later write about that morning:

After four years in the courts, Chief Justice Alan McEachern of the Supreme Court of British Columbia had completed his reasons for judgment in the Gitksan-Wet'suwet'en land claims litigation.

At his direction, all the lawyers who had worked on the case were told to meet at the courthouse at 7 a.m., March 8, 1991. We would be sequestered for two hours with the decision and then set free to announce our respective interpretations of the case and its consequences...

There were a great many lawyers at the courthouse at 7 a.m.

First, counsel for the province were called forward. Then those of us on the legal team for the aboriginal people were led by another sheriff through doors, down halls, through doors, corridors, inner places I had never been, the judicial back-alleys of the courthouse--a cavernous, circuitous, confusing route. Into a jury room. At the centre of some place, in the middle of some thing.

It was a large, windowless, dimly lit room. Copies of the judgment had been set out on the oval table. three hundred and ninety-four pages. Each lawyer

took one of the volumes. We had carefully strategized the division of issues between us so that we could cope with the massive text in the short period of time allowed.

But it took less than three minutes for all of us to realize that the case for the Indian people had been decimated (1991:2-3).

In February, 1990, when the Gitksan-Wet'suwet'en case was in its third year before the courts, Vancouver *Sun* columnist Vaughn Palmer observed that, "The thinking in government circles is that the court will probably recognize Aboriginal title...that it still exists today" (Palmer, 1990:B3).

Opinion polls conducted during 1990 and 1991 consistently announced that the majority of people in British Columbia thought the provincial government should reconsider its refusal to discuss land claims with the First Nations and should agree, finally, to negotiate an agreement with them.

During the week preceding the release of the Court's ruling, the Vancouver *Sun* ran a series of articles entitled "Judgment Day" in which spokespeople from government, industry, labour and the general public expressed the view that at least a partial court victory for Aboriginal peoples was anticipated by all concerned. Gitksan and Wet'suwet'en Tribal Council representative, Herb George, told the press that he expected to see "the last little trace of honour in the Crown" reflected in the judgment. "We're not naive," George said, "but we can still dream" (Glavin, 1991:B3).

So thoroughly had I, too, assumed a positive outcome that when I turned on the CBC midday news it was not with bated breath or anxious apprehension, but rather with curiosity to know the details of how far forward the judgment had moved the cause and

what the implications were. I thought I would listen to the news, call a few friends, find out when and where celebratory demonstrations and parties were planned, and then get back to relatively unrelated work.

I could say I was shocked and enraged, but words do not adequately describe what I felt. It is often said that the colonized study the colonizers with more scrutiny and insight than is the reverse. In this case, B.C. Aboriginal people have for a very long time understood the relationship between property and equality in western thinking, particularly as expressed through law. They have also understood, very clearly, the evolutionist assumptions and arguments put forward in court, in official histories, and in popular discourse. When we talk about oral tradition among Aboriginal peoples we usually think of "legends" and "myths." However, a part of the oral tradition of British Columbia Indians is the story of the struggle for recognition of Aboriginal title that has been going on for over 100 years. Most families have several generations of members who have been involved in various ways at various times. Seen in this way, as I saw it, the judgment was and is a grotesque insult.

The outrage everyone I was in touch with felt had to do with many aspects of the judgment. First, Chief Justice McEachern had basically not believed, or accepted as legitimate, the testimony of the Aboriginal Elders regarding both the pre-contact existence of, and the post-contact validity of, Aboriginal title. Although he took pains to say that he was sure they were "all decent and truthful people," his words were interpreted as calling the Elders liars. The denial of what one takes as an opaque truth beyond doubt, which the question of Aboriginal title had long since become to me, is maddening. Second, I too understood the judgment as an insult to myself, my children and many other people I considered "mine." Third, the judgment was an insult to people--the "old people"--who

take "truth" and the telling of it in formal settings very seriously. Fourth, it was an insult to the lawyers and anthropologists and to what they represent, and with whom I feel a sense of community. In other words, the judgment felt to me like an attack on my world.

The banner headline on the front page of March 9th's Vancouver *Sur.* announced: "INDIANS LOSE CASE".

"The government has made fun of us." Gitksan chief, Johnny David (Maxlalex) said (Glavin, 1991:A1).

Gitksan and Wet'suwet'en Tribal Council President Don Ryan (Mas Gak) called for McEachern's removal from the bench, and vowed that "never again will the sacred boxes of our people be opened for the white man to look at" (ibid).

Ernie Crey of the United Native Nations likened the text of the Chief Justice's Reasons for Judgment to a Stephen King horror novel (ibid).

Larry Pootlas of Bella Coola said that when he heard the news he thought he was in South Africa (ibid).

The Shuswap Nation Tribal Council called the judgment "brutal and hostile." "It's a travesty of justice." said Union of B.C. Indians Chiefs spokesman, Saul Terry (ibid).

Ovide Mercredi, Grand Chief of the Assembly of First Nations, described McEachern's decision as "so demeaning it is breath-taking" (ibid).

"The Judgment stands on racism. It defines Indians as no better than the animals in the forest" protested Squamish chief, Joe Mathias. "The corporate board rooms are probably saying 'Thank God we had our brother on the bench,'" he added (ibid).

Indeed, John Howard of Macmillan Bloedel, speaking for B.C.'s forest industry, said he was surprised by the ruling, but pleased. The Chief Justice's assessment that native issues constituted a "social problem that should be dealt with by the legislature," rather than a legal one to be determined by the courts, "has been our view at Macmillan Bloedel for a long time," he commented (Glavin, 1991:B8).

A spokesman for the mining industry expressed relief that the status quo prevailed, and added that he hoped the decision would encourage Aboriginal peoples in the Yukon and Northwest Territories to bring their claims to a final solution (ibid).

Mike Hunter, representing the Fisheries Council of B.C. described the Chief Justice's ruling as "a common sense approach to settling" (ibid). He agreed that the legislature was clearly a better place to deal with Native issues than the courtroom. Industry spokesmen also noted that they feared the court's decision might provoke another wave of Native militancy, which in turn would frighten away potential investors, during the estimated five years it would take for the case to finally be resolved on appeal to the Supreme Court of Canada.

Federal Minister of Indian Affairs, Tom Siddon, stated that the decision gave the federal government an "important insight into the existence and meaning of Aboriginal rights in Canada" (Stills, 1991:B12).

New Democratic Party Member of the Legislative Assembly for northwestern B.C., Jim Fulton, called the decision "a declaration of cultural genocide by the B.C. Supreme Court. It's a legal neutron bomb" (ibid).

Russ Fraser, Attorney-General in the Social Credit provincial government, said he hoped that British Columbians could now "put this whole era behind us" (ibid).

New Democratic Party leader Mike Harcourt admonished all parties to "get out of court" where there must always be "winners and losers," and to come to the negotiating table where there could be "winners and winners" (ibid).

Anglican Bishop Ronald Shepherd, Reverend William Howie of the United Church of Canada, and Roman Catholic Bishop J. Remi DeRoo issued a joint statement calling on their congregations to demonstrate solidarity with Aboriginal peoples (Glavin, 1991:A2).

The Vancouver *Sun* editorial of March 13 concluded that Chief Justice Allan McEachern had produced "a remarkable and crystal clear analysis of the law as he understands it" in the Gitskan and Wet'suwet'en case. It went on to quote the following passage from the Reasons for Judgment:

When plaintiffs bring legal proceedings, as these plaintiffs have, they must understand (as I believe they do), that our Courts are Courts of law which labour 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. Nor can judges impose politically sensitive non- legal solutions on the parties. That is what Legislatures do, and judges should leave such matters to them.

"Hear! Hear!" the editorial cheered, adding that this was an appropriate response to "the likes of Don Ryan."

Pictures of the portly Chief Justice Allen McEachern ran in the daily papers over captions that said "Gut feelings ruled out," and "Emphasis on law and not gut feelings" (Stills, 1991:A12). The judge was described as "a jurist who has never allowed emotional considerations to shake his belief in the rule of law," and who "made it clear from the outset he would decide the case not on personal gut feelings, but according to the law" (ibid). Brief biographical notes included in the stories described the Chief Justice as a 64-year old, non-drinking, non-smoking, Coca-Cola addict and past president of the Canadian Football League. Born and raised on the middle class westside of Vancouver, the Judge and his family were now property-owning, tax-paying residents of Vancouver's elite Shaughnessy neighbourhood (ibid).

The trial and the judgment were being talked about as a major event everywhere I was: at home, at the university, with family or friends. At these various events much discussion was taking place and information and other conversations being reported on. Some people were critical of the lawyers and the way they had conducted the case. Some said they had asked for too much and overwhelmed the judge with mountains of data. Criticisms were made of the anthropology presented, and the anthropologists who had testified on behalf of the Gitksan and Wet'suwet'en: Mills was too ethereal. Daly was too obtuse. Brody was too caustic. They tried too hard to shape the evidence to conform to requirements of legal arguments. They presented too seamless a case.

Indians muttered resentfully about how much money the lawyers and expert witnesses had made. Some asked why the anthropologists had ever been involved in the

first place. Why hadn't the Gitksan and Wet'suwet'en stood by their own Chiefs and Elders and refused the need for "representation and translation" by white anthropologists? Mostly, the people I spoke with were, like me, very angry, and hurt.

The Canadian Council of Churches issued a press release saying "the judgment appears to reflect a colonial view of society towards Aboriginal peoples which is not acceptable" (Glavin, 1991:A1). And the British Columbia Government Employees' Union, the largest labour organization in the province, commented that "In insulting and racist language, native people have been told they have no right to bring their disputes to court...The provincial Crown is relentlessly seeking to grant large companies the unrestrained right to land without concern for Aboriginal interests" (BCGEU, 1991:1).

In an unprecedented move, McEachern's Reasons for Judgment were bound in book form and distributed widely throughout the province. Shock turned to incredulity as the volume circulated among scholars and other people knowledgeable about British Columbia history and Aboriginal issues.

When I read the Reasons for Judgment, I found the text very familiar. The rendition it offered of British Columbia history and the beliefs about Indian racial inferiority and white racial superiority, can be found in many "pioneer accounts" and "memoirs" (see, for example, Halliday, 1935). More, to the point, this way of thinking remains explicitly and unrepentantly predominant in the ideology of rural, white British Columbians. These notions are ones I had become very accustomed to while living in Alert Bay. It was the ideology of the group I had described as the "old colonial elite," of which Dr. Pickup is a representative. I had taken to calling Chief Justice McEachern's Reasons for Judgment, the "Late One Night At The Legion Judgment." And, immersed as I was in the study of

critiques of colonialism and western culture, the text of the Reasons for Judgment, read like a caricature of everything I was studying. Here was Europe's "other" portrayed in a crude and simplistic fashion (see Said, 1978; Spivak, 1988).

The Canadian Anthropology Society, representing 405 scholars, told the press that the judgment "gratuitously dismisses scientific evidence, is laced with ethnocentric bias and is rooted in the colonial belief that white society is inherently superior" (Vancouver *Sun*, 1991:B3).

University of British Columbia Anthropology Professor Robin Ridington added that "if an Anthropology 100 student wrote anything like that in a paper, not only would you write a lot of red ink over it, you would say 'Look, please come in and talk to me. You have real problems'" (ibid).

Commenting on the Chief Justice's dismissal of the validity of Native oral histories, and his uncritical acceptance of the literal truth of the written reports of nineteenth century European fur traders, *Sun* columnist Stephen Hume reminded McEachern that the teachings of Jesus Christ had been communicated and transmitted by means of an oral, and not written, tradition for several centuries. "Eminent persons can be capable of the most loathsome claptrap if it serves their material interests," Hume observed. A debate ensued in the letters to the editor column of the Vancouver *Sun* concerning whether or not it was acceptable practice to publicly criticize judges in such a manner.

A month or so later I attended a meeting of anthropologists at the University of British Columbia to discuss how we, as non-Native anthropologists, could responsibly

respond to the judgment. It was agreed that we would each write an article on a specific aspect of the relationship between anthropology and the case, and these would be compiled in a special edition of the journal B.C. Studies. I chose to write a critique of the opinion report and testimony of the anthropologist who had testified for the Crown, Dr. Sheila Robinson. This topic interested me, and I felt I was well trained and well placed to do this as the focus of my studies and previous work had been on European ideology in relation to Native peoples, and I was interested in the critique of anthropology.

As I became more and more involved in researching the paper I had committed myself to writing on the Crown's anthropology, I became more and more shocked by the poor quality of the work submitted. I read more of the transcripts and more of the legal analyses. Soon, the *Delgamuukw* case became the story I thought with and through about the issues I had been studying and thinking about. And, it seemed to me that the story that I wanted to tell about it was not being addressed by other people working in the field. I wanted to examine the texts of the case as a project in "the anthropology of the west," and I wanted to explore the question of what anthropologists could usefully do in the present. I was interested in focusing not on Aboriginal peoples and their representation, but rather to explore "the honour of the Crown" from a perspective informed by critical anthropology. I decided to change my thesis topic and spent the last half of 1991 and early 1992 in research.

In the Spring of 1992 I accepted a position as Deputy Director of Social and Cultural Research for the Royal Commission on Aboriginal Peoples and moved to Ottawa for two years, bringing my thesis--in boxes--with me, working on it sporadically, and thinking about it constantly. While I am prohibited from writing about the Commission until its final report is issued, obviously the time spent there has had a significant impact on my

thinking about the issues addressed in this thesis. Substantively, it offered me an opportunity to learn a great deal more about the legal dimensions of the relationship between Aboriginal and non-Aboriginal peoples, and about the relationships between the political policy forum and the legal one. The experience of being, for most of my time there, the sole anthropologist working with political scientists, public administrators, and lawyers, for the most part, also caused me to reflect a good deal on the current situation of anthropology and anthropologists in this particular milieu.

I will turn now to the central narrative that constitutes the body of this thesis.

CHAPTER 2: THROUGH THE LOOKING GLASS DARKLY: CROWN TITLE IN HISTORY AND LAW

2.0 IN THE BEGINNING

The narrative begins by locating the Gitksan and Wet'suwet'en case in the historical context of the European colonization of North America, in general, and the British colonization of British Columbia, in particular. My focus is on the initial assertion, and continued claim, made by the British Crown and followed by the Parliament of Canada, to sovereignty and title to the lands and resources of the geographically defined region. The question I pose is: how has the Crown legitimated its position in law and in relation to social and anthropological theories? The answer I find, and set out below, is that Canadian sovereignty and Crown title have consistently been legitimated in law on the basis of the "doctrine of discovery" or the "doctrine of settlement," which, in turn rest on social theories that seek to establish that the indigenous peoples were and are, in various ways, inferior to Europeans. In law, settlement proceeded and was legitimated "as if" the land was uninhabited: *terra nullius*. Therefore, at the most fundamental level, a study of the law in relation in Aboriginal title begins not "on the ground" in concrete, observable fact, but rather "in the air" in abstract, imagined, theory.

Legal scholars have looked to four potential sources upon which Aboriginal title might be recognized in Canadian law. These are: (1) English Common law; (2) British colonial law; (3) constitutional structures and legal precedents that have evolved in the British American colonies to accommodate the existence of both settlers and indigenous groups; (4) the Royal Proclamation of 1763 (Slattery, 1979). Referring to the above list, Kulchyski says:

Together these documents...along with the doctrine of prior occupancy, are the crucial locus for legal arguments respecting the nature and origins of Aboriginal rights. The court cases refer consistently to various combinations of these documents as well as to each other (Kulchyski, 1994:9)

I will outline the bases discussed above in the historical context of their emergence. Slattery identifies four stages in "the evolution of the Crown's right to Aboriginal lands" which I will set out as a framework. These are: first, "that period before the European discovery when the Indian tribes were distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil" (Slattery, 1983:32). The second stage began with European discovery and exploration and was guided in Canada during the period of interest to this thesis by British colonial law. The third stage included the period during which the Crown increased its control by force of arms or treaty. And the final stage is reached when the Aboriginal right is extinguished in favour of the state (Slattery, 1983:31-35).

The question I trace in this context is that which legal scholars have posed to themselves. That is, as Kent McNeil explains:

...not whether the Crown *should* have respected indigenous occupation, but whether it was under a legal obligation to do so (McNeil, 1989:5).

Or, has the law obeyed itself on this question? Chief Justice McEachern notes, repeatedly, as an explanation for the conclusions he reached and expressed in his Reasons for Judgment that "The Court is not free to do whatever it wishes. Judges, like everyone else, must follow the law as they understand it" (Reasons, 1991:2). It is incumbent then, on an anthropological investigation, to begin within the terms of the object of study's own discourse. In the context of this thesis, this is an important question for three reasons. First, Aboriginal critiques of law, and Aboriginal political discourse in British Columbia, particularly, have persistently argued that the central demand is for the

law regarding Aboriginal title to be honoured.¹ Second, if such recognition is, in fact, possible within the law's own terms, then I see that as supportive of my argument that culturalist explanations of Canadian law's failure to respond positively to the Aboriginal challenge are inadequate. That is to say, the question becomes more obviously one of how the law has been variably interpreted and enforced in relation to peoples of different cultures, than whether or not Canadian judges have been able to comprehend unique Aboriginal cultures. Third, the most basic tenet of legal criticism is the question: has the law obeyed itself (Gutiérrez-Jones, 1990)?

There is considerable debate at present within legal and political circles as to whether or not seeking recognition of Aboriginal title within Canadian law is desirable. In the context of this thesis, I present the arguments in favour of the potential for Canadian law recognizing Aboriginal title because of the challenge these arguments present to a traditional, anthropological "culturalist" analysis as a sufficient explanation for the failure of Canadian law to realize this potential, and to reflect the strategic grounds on which Aboriginal peoples have entered into litigation. That is, my argument focuses on *possibilities*. As will become clear, the question of *desirability* of such recognition is dealt with as a separate issue in the conclusion to this thesis.

Legal scholar, Patrick Macklem, in his article entitled "First Nations Self-Government and the Borders of the Canadian Legal Imagination," argues that each framework in law as set out above (i.e. common law, colonial law, treaty rights and interpretation, distribution of legislative authority, constitutional law, and precedent)

¹ See also Asch, M. (1984:42) where he states: "Any difficulty the aboriginal peoples may have had in establishing these aboriginal rights, then, does not stem from any defect in the principles of English law. Rather, the problem lies in the failure to recognize that this legal principle ought to be applied to the aboriginal peoples of Canada."

"contains moments of transformative possibility which, if taken from the margins of legal discourse and placed at the centre of the law governing native people, could assist in the realization of First Nations self-government" (Macklem, 1991:387).

I "translate" Macklem's argument as saying that judges and legislators are social agents who have made **choices** from among a range of possibilities in their interpretations and implementations of law in relation to Aboriginal peoples. That is to say, I would identify what Macklem calls "moments of transformative possibility" as moments when choices were made between one possible interpretation of the law over another, for various reasons. Once the choice is made, by virtue of law's unique capacity to create truth by dictum, the particular selection and construction becomes known as a "legal fact", and on the basis of such facts, all manner of coercion including legitimate armed force may be employed to guarantee compliance.

This illustration raises another issue pertaining to the intellectual and political division of labour in the field of criticism. Macklem is representative of legal scholars attempting to assist in the "realization of self-government through domestic law" (ibid). His language is guarded and at all times reverential towards the law and its possibilities, as is appropriate to the task he has set himself of attempting to encourage members of the judiciary to consider alternative interpretations. I respect his aims, objectives and strategies.

At the same time, use of language in this way, and the careful avoidance of explicitly allocating responsibility to powerful social agents, reinforces the notion that what is going on in this sphere is a process governed by reason and thoughtful debate. It also reinforces the notion, so precious to modern western law itself, that emotion and

rationality are absolutely antithetical, and in this way reinforces the objectivist, and most often masculine, ideology I wish to critique.² This is apparent when we read the works of Aboriginal legal scholars, particularly women, like Patricia Doyle-Bedwell, who writes, in a law journal, about Chief Justice McEachern's decision, as follows:

While reading the case and writing this comment, I constantly had to work through feelings of anger, sadness, abuse, frustration, and hurt. These feelings were not only about the oppression I felt in solidarity with the Gitskan and Wet'suwet'en peoples, but also about the experience of oppression I face as a Mi'kmaq woman. My gender and race are interfaced in such a way that I can never fully separate my experiences of race and gender. I often hurled the case against the wall, unable to continue reading about the invalidation of another First Nations community...I have had to dig deeply into myself to find the strength to continue writing, in a somewhat legal fashion, about McEachern C.J.'s reasons for rejecting the Gitskan claim ... Struggling with the painful feelings when dealing with the Gitskan case must be seen as one of the systemic barriers that I face daily as both a woman and citizen of a First Nation (Doyle-Bedwell, 1993:194). (See also Monture-Okanee, 1992; and Turpel, 1991(a)).

Taking the stand of an anthropologist/cultural critic, seeking more to support and validate the analyses of the disempowered than to influence the powerful, allows me an independence denied Macklem and others working within the legal arena. That is to say, I hope this "outside" subject position allows me to make a contribution to the debate on behalf of critical anthropology, and to illuminate possibilities that are necessarily foreclosed when one is bound by the rules of a particular institutionalized discourse, such as that of the law. At the same time, of course, given the necessary limitations of the institutionalized discourse of anthropological criticism, in taking such a stand I forfeit to a degree the opportunity to have an impact on central institutions, or particular cases: to be

² See for example, Maine, Henry S. (1861) (1970) Ancient Law, Gloucester, Mass.: Peter Smith, at p.15 where he says of non-western and pre-modern legal systems: "Quite enough too remains of these collections, both in the East and in the West, to show that they mingled up religious, civil, and merely moral ordinances, without any regard to differences in their essential character; and this is consistent with all we know of early thought from other sources, the severance of law from morality, and of religion from law, belonging very distinctly to the *later* stages of mental progress [emphasis in the original].

indisputably "of use". However, I believe that it is both the promise and the problem of interdisciplinary work, that many different perspectives may be brought to bear on a given question and that this will be constructively illuminating. Throughout this chapter, I rely on Macklem's legal expertise to mark the historical/legal junctures he calls "moments of potential transformation", and I call "moments of political decision."³

I will endeavour to set out this very complex history in as straightforward a manner as possible and will limit my discussion to the background necessary to contextualize the *Delgamuukw* case. This rather simplistic account is also reflective of my limited expertise. These issues have been the subject of legal debate for hundreds of years. Not being a legal scholar, I do not attempt to cover all the various arguments, possibilities and interpretations of interpretations that are presented in the voluminous legal literature on this subject. Since this is a study in cultural criticism, I am not attempting, as legal scholars are, to develop arguments for use in legal fora: either the academy or the court. I have therefore relied on the works of key scholars who are acknowledged as experts in this field, and who have developed critiques of the law's practice in the field of Aboriginal title and rights ⁴.

I clearly rely on those historians and legal scholars who are attempting to construct interpretations that are sympathetic in various ways to Aboriginal analyses and

³ These will consist in the following: the application of English common law principles, the literal application of British Colonial law, a reading of the Royal Proclamation as recognizing pre-existing Aboriginal title, the choice of precedents, and interpretations of precedents, that acknowledge rather than deny Aboriginal title.

⁴ While a variety of individual authors will be cited when their work is specifically referred to, the key legal scholars in the field who I have relied on are: Russell Barsh, Richard Bartlett, Bruce Clark, James Youngblood Henderson, Michael Jackson, Geoffrey S. Lester, Patrick Macklem, Kent McNeil, Bradford Morse, Douglas Sanders, Brian Slattery, Mary Ellen Turpel.

aspirations. A conscientious reader may therefore wonder what the contrary arguments are. It is not an oversimplification to say that until very recently, the Crown's arguments have relied explicitly on either a legal positivist analysis that argues that if the Sovereign or Crown says it is so then it is so⁵, or the argument that whatever may have transpired historically, contemporary Crown title and jurisdiction is legally valid on the basis of long term use and occupation for three centuries (see for example, Green, 1989; Isaac, 1992). In other words, the Crown has argued that no remedy is necessary. In the concluding chapter to this thesis I will discuss current, emerging proposals for a "third alternative" based on a concept of "made-in-Canada common law." This is, however, a recently developed approach and not one that has been historically important.

And, before proceeding I wish to make one final introductory point by way of a warning to the reader. Writing and reading this story can be torturous since, as Kulchyski points out:

There is no clear, evolutionary logic in the historical development of Aboriginal rights...(in the courts)...In spite of after-the-fact stories that have tried to imply a consistent logic...there was a basic incoherence, an instability and set of contradictions embodied in the original approach...

It is a history of sustained, often vicious struggle, a history of losses and gains, of shifting terrain, of strategic victories and defeats, a history where the losers often win and the winners often lose, where the rules of the game often change before the players can make their next move, where the players change while the logic remains the same, where the moves imply each other just as often as they cancel each other out. It is a complex history whose end has not been

⁵ The theory of legal positivism is based on the premise that the only rights that are legally enforceable are those rights that have been granted by or are recognized by the Government. This is the theoretical basis for the "contingent rights" theory of Aboriginal entitlement, i.e. rights are not inherent or pre-existing but contingent upon state recognition. (See, for a detailed explication, Sanders, 1989).

written and whose beginnings are multiple, fragmentary and undecidable (Kulchyski, 1994:910).⁶

I will begin at the "first stage" identified by Slattery, before the arrival of Europeans, and therefore outside the confines of British or Canadian law. The remainder of this chapter will set out legal developments during the subsequent three stages identified by Slattery. I will trace the various options taken and neglected by the judiciary in relation to the recognition of Aboriginal title throughout history.

2.1 *ABORIGINAL* ABORIGINAL TITLE

When they ask what we feel our basis is in regard to our title, I don't think that there is any question. The title is very clear. The ownership has never changed. It is only the definition in the law in regard to ownership that has changed (Miluulak, (Alice Jeffrey)1992:58).

Before the arrival of Europeans, approximately 500 Aboriginal nations existed in North America. These nations were diverse in terms of modes of living, languages, cosmology, social organization, and relationships to land and resources. While the similarities and differences between these various nations in their relationships to land are interesting subjects of study in themselves, and, may likely offer some practical critiques and solutions to the current global ecological crises facing us all, they are not of interest to this thesis. This is because the particular nature of Aboriginal cultures, understood within their own terms, has not been determinant of legal recognition. Rather, the nature of aboriginal cultures like the nature of aboriginal peoples has at various times and in various ways been the focus of legal attention and inquiry when Aboriginal resistance to colonization has posed a problem for various imperial states who have turned to their

⁶As we will see, Kulchyski's description captures the essential character of the story I am telling. I disagree, however, with his conclusion that the beginnings of this story are "undecidable". I argue they are very clear, and decided.

courts for assistance in reaching resolutions. To be blunt: these cases are about land and resources, and the courts decide who owns them.

Simply put, this thesis takes as given a fundamental truth that,

Regardless of how the inhabitants themselves perceived their connections with the land, in every case a physical and economic relationship necessarily existed. Quite simply, when the English arrived these people were already there, using lands in accordance with their own needs and their own ways of life, as people everywhere do (McNeil, 1989:1-2).

In legal terms this "basis of claim" is referred to as "the doctrine of prior occupancy." While, as we will see, an elaborate and complex architecture has been built by politicians, anthropologists and legal scholars (Aboriginal and non-Aboriginal) around the question of Aboriginal title, for the purposes of this thesis, it is necessary only to take the "doctrine of prior occupancy" as a fact (Rabinow, 1986).

Second, I take as given the point made by Kulchyski, as follows:

Aboriginal peoples, of course, did not go around talking about their rights; mostly, they spoke in a discourse of responsibilities and respect. But that discourse was circulated among themselves. When others came and established--or forced--dominance, it became relevant to speak of rights as a way of negotiating relations (Kulchyski, 1994:7).

In other words, to the extent that I am interested in Aboriginal representations of their relationship to land in the context of this thesis, I understand these representations to be made as strategic discourses within a political context in which Aboriginal peoples must attempt to make themselves understood as credible within the language and framework of non Aboriginal institutions. That is to say, the discussion between Aboriginal and non-Aboriginal peoples about land title and rights is a cross-cultural one in which both parties are engaged in representation and translation. Such communications take place within a context of power relations. As this historical overview will show, shifts in the

context of the communication and the balance of power between the parties determines, more than any other factor, the meaning--as expressed and recognized in practice--of the language developed. To date, the English language, and interpretations defined by categories available in British and Canadian law, have been dominant. In this context, Aboriginal peoples have, until very recently, chosen to represent their rights as being based in prior occupancy and natural law. Again, in this introductory context, "natural law" refers to theories that posit the source of law as resting in one or more deities and/or in nature, as opposed to the source of law resting in a sovereign, a state, or any androcentric construction.

Iroquois philosopher, Oren Lyons, explains as follows:

What are aboriginal rights? They are the law of the Creator. That is why we are here; he put us in this land. He did not put the white people here; he put us here with our families, and by that I mean the bears, the deer, and the other animals ...Each generation must fulfil its responsibility under the law of the Creator. Our forefathers did their part, and now we have to do ours. Aboriginal rights means aboriginal responsibility, and we were put here to fulfil that responsibility (Lyons, 1985:20).

Nisga'a hereditary Chief, James Gosnell, offers the following political articulation of natural law in this context,

It has always been our belief...that when God created this whole world he gave pieces of land to all races of people throughout this world, the Chinese people, the Germans and you name them, including Indians. So at one time our land was this whole continent right from the tip of South America to the North Pole...It has always been our belief that God gave us the land ...and we say that no one can take our title away except He who gave it to us to begin with (Canada, 1983(a):115).

The specific questions that have been before the courts in regard to Aboriginal title have therefore been two:

(1) Did Aboriginal, or "pre-existing" title exist at the time Britain asserted sovereignty?

- and -

(2) If such title existed, has it been extinguished?

Legal answers to these two seemingly simple questions are therefore entangled in layers of assumptions that take us from the concrete to the abstract: into the language of legal "as ifs". The first question, in legal terms, really asks whether or not the Aboriginal population's land tenure system *as understood and interpreted by European courts* qualified to be treated as a legitimate system, according to various social theories that rest, ultimately on questions surrounding the equality of peoples and human nature.

The second question, which arises only if an affirmative answer is given, by a court, to the first, is whether or not the Aboriginal population qualified to be treated as fully human agents whose consent is required for action to be taken on them and/or their property.

From a common sense point of view, the "land claims story" in British Columbia is really very simple and straightforward: Aboriginal people were here, in the geographic territory now called B.C., living on and from the land, organized socially in various ways and practising a range of beliefs in the nature of human beings and their relationship to their physical, social and cosmological environment. Europeans arrived: first a few fur traders and then settlers in ever increasing numbers. In much of Canada the settlers' rulers entered into treaties with the Aboriginal inhabitants that set out respective rights

and responsibilities of the parties.⁷ In British Columbia, however, settlers and their representatives simply assumed ownership and control of the land and attempted to assert political and cultural control over the peoples. They failed to negotiate with the already existing Aboriginal proprietors.

In the face of this, three survival options--or modes of resistance--have been available to Aboriginal peoples in British Columbia: the practice of everyday life; political negotiations with the provincial and federal governments; litigation to seek recognition and confirmation of the legal existence and persistence of Aboriginal title and jurisdiction.

The practice of everyday life has been the strongest, most enduring and ultimately most successful strategy. Aboriginal peoples have simply continued to live on and/or from the land, in kin-based communities, passing knowledge from one generation to the next through a rich oral tradition, and marking the events of their lives in feasts and ceremonials.

Daily life has, of course, been profoundly affected by colonial incursions. Lands and homes have been expropriated, forests clear cut, rivers polluted, fish stocks depleted. Big Houses have been demolished, families broken up, and children incarcerated in residential schools. Feasts and potlatches have been outlawed. Sickness has ravaged bodies, and despair has enveloped souls.

⁷ Legal and political issues and debates surrounding treaties in Canada are not specifically relevant to Aboriginal land title in British Columbia and are not addressed in this thesis in any depth. There is, however, a vast literature on the topic. I refer the reader to the following overviews as entry points into this literature: Bartlett, 1990; Cumming and Mickenberg, 1972; Dickason, 1992; Morris, 1979.

Aboriginal peoples have not, however, been passive victims rendered powerless by this process. They have sought participation in the new economy, education in the new institutions, healing in the new medical facilities, and a place in the new polity. In different ways and at different times the old and the young, men, women and children have welcomed and resisted, modified and adapted to, alterations in gender and generational relations and religious beliefs and practices. Aboriginal peoples have not been resistant to change *per se*. Self-determined social change based in autonomy and dignity has been pursued; coercive cultural transformation based in dependency and subordination, has been refused (See Dyck, 1991).

In the political forum, B.C. First Nations, like other Canadian Aboriginals, have formed local community, regional, provincial and national organizations; lobbied governments at various levels; participated in numerous inquiries, hearings, and Royal Commissions; agitated for civil rights and equality of access to Canadian institutions, and pursued recognition of "special status". Between the political and the legal arena Indians have been treated like the ball in a ping pong game: when the courts have looked favourably on Indian cases, politicians have urged political negotiations; when political negotiations have reached deadlocks, politicians have cried "see you in court."

2.2 THE WHITE MAN'S LAW

...cases must be decided on admissible evidence, according to law. The plaintiffs carry the burden of proving by a balance of probabilities not what they believe, although that is sometimes a relevant consideration, but rather facts which permit the application of the legal principles which they assert. The Court is not free to do whatever it wishes. Judges, like everyone else, must follow the law as they understand it.

What follows, therefore, is my best effort to determine whether the plaintiffs have proven, by a preponderance of admissible evidence, the facts which

they have alleged in their pleadings, and whether such facts establish legal rights which are recognized by the law of this province.

I am sure that the plaintiffs understand that although 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' (Reasons, 1991:2).

The obvious, but unintentional, irony of the Chief Justice's use of his critics' language in this last statement caused discomfort among legal reformers. Hamar Foster, for example, begins his comment on the decision as follows:

There have always been those who maintain that 'white man's law' is incapable of doing justice where Indians are concerned. They have a point. The differences between European and native legal systems, and especially between their respective conceptions of land ownership and stewardship, pose formidable barriers...The question I wish to address...is whether the decision...means that the sceptics were right (Foster, 1992:133).

Brian Slaterry was explicit in his condemnation of this statement. He said:

It is not entirely clear what is meant here by 'the white man's law,' but on any view the expression is misleading and inappropriate. It suggests that the laws of one racial group (people of European descent) occupy a privileged position in Canada and apply to indigenous peoples to their disadvantage and to the exclusion of their own laws. Implying, as it does, a kind of inherent bias in Canadian law, the phraseology must be regretted...It is worth reiterating that Canadian courts are not in any context bound to apply 'the white man's law'. They are bound to apply the (*italics*) law. And that law is the law of all Canadian citizens, of whatever colour, race, or ethnic origin (Slaterry, 1992:120).

Of course, Aboriginal critics have long held the position that there is, in fact, in this country, one law for white people and one law for Indians. James Youngblood Henderson, for example, states that

Canadian law is not impersonal but racially biased; its legitimacy is threatened if not destroyed by its denial of order and freedom to aboriginal people against non-Indians (Henderson, 1985: 186).

I will argue, with the above, and through the material presented in the rest of this chapter, that the Chief Justice's identification of Canadian law as racially-based law is accurate in a literal sense.

2.3 TIME IMMEMORIAL

The Gitksan and Wet'suwet'en begin their story--locate the origins of their title--in unmeasured and undefined, by European terms, "time immemorial" when the Creator placed them on specific territories, usually by transforming a supernatural entity or an animal into a human being.

Chief Justice McEachern rejected the non-specific nature of the Gitksan and Wet'suwet'en interpretation and, referring to the Statute of Westminster passed in 1275 A.D., pinpointed "time immemorial" as the year 1189 A.D. (Reasons, 1991:82).⁸

I am not able to conclude on the evidence that the plaintiffs' ancestors used the territory since 'time immemorial' (the time when the memory of man 'runneth not to the contrary'). 'Time immemorial,' as everyone knows is a legal expression referring to the year 1189 (the beginning of the reign of Richard II), as specified in the Statute of Westminster, 1275. In any event, I think a plea of 'time immemorial' imposes too high a burden upon the plaintiffs (Reasons, 1991:82).⁹

⁸ Bourdieu argues that a central practice of law is to exercise a particular "power of form". He says: "This power inheres in the law's constitutive tendency to *formalize* and to *codify* everything which enters its field of vision (Terdiman, 1987:809) (emphasis in original).

⁹ There are disputes about this date. Laforet comments as follows: "Although McEachern sees this as a fixed date, receding relentlessly into the past, there is an alternative interpretation, i.e. that in 1275 the British defined 86 years as the measure of a very long time" (Laforet, 1994:8). And, Henderson, makes this correction: "...1189 is the date of the accession of Richard I (the 'Lionheart') (Henderson, 1991:14, note 45).

The history of European law, as it is relevant to Aboriginal title in Canada, dates back even further than McEachern's 1275 identification, and, as we shall see, begins as well with a theory of "natural law". Legal historian, James Falkowski, argues that what he calls present-day "Indian law" has evolved from the European Law of Nations that "had its beginnings in the microscopic city-states system of ancient Greece and Italy" (1992:1). During the Roman Empire, the emperor was the single source of authority. After the fall of the Roman Empire, the Catholic Church became the dominant influence in the development of international law (ibid:5).

A common starting point for the history of European/ Aboriginal relations in the Americas is two centuries later in 1492: when Christopher Columbus sailed the ocean blue. In 1497, John Cabot landed on Newfoundland and met the Beothuks. This is the date usually set for the first European contact with Aboriginal people in what is now Canada (Bartlett, 1990:7). On May 3, 1493, Pope Alexander VI, "the most degenerate and corrupt of the Borgia popes" (Falkowski, 1992:3), issued the bull *Inter Caetera*, also known as the *Bull of Donation*, that granted to the rulers of Spain "sovereignty over the land and seas west of a line drawn through the Atlantic Ocean from pole to pole one hundred leagues west of the Azores" (ibid).

The doctrine upon which this bull was based asserted that before the birth of Christ, heathen peoples possessed their own temporal authority based on natural law. However, after the birth of Christ, all the spiritual and temporal authority held by heathen peoples passed to Christ, who became the temporal and spiritual lord over the entire earth. Based on this authority, the pope could extinguish all the rights that non-Christians obtained prior to the division of the world into Christian and heathen.

The ensuing debates between Spanish clergymen, monarchs and noblemen concerning the moral and political legitimacy of conquest and colonialism culminated in the conference at Valladolid fifty-seven years later (Hanke, 1974). An account of this event, and the location of the origins of this discourse in it, has been popularized in Canada by Thomas Berger in several articles and books (Berger, 1981; 1991).

In his most recent publication, A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992, Berger explains:

In 1550 Charles V summoned a junta of the most learned men in Spain--clerics, lawyers and other scholars--to the city of Valladolid...The point on which the king sought advice was: 'How can conquests, discoveries and settlements [in my name] be made to accord with justice and reason?'

...The debate was far-reaching, encompassing the nature of man, the law of nations and the legitimacy of the Conquest (1991:20).

The central protagonists were the Dominican monk, Bartholomew de Las Casas, and the philosopher Juan Gines de Sepulveda. Both agreed that all human beings were of one species. Both agreed that it was the duty of Europeans to convert all the world's peoples to Christianity. They disagreed on method and rationale.

Sepulveda argued, from Aristotle, that some races are inferior to others, and that some men are born to slavery. By this reasoning, the Europeans, a superior race, were justified in subjugating the Indians, an inferior race, who were, naturally, retarded in their development. Sepulveda relied on stories of cannibalism as evidence of this inherent inferiority, even in the face of the obvious technological and political achievements of the Aztecs and Incas.

Las Casas--who Berger calls "the father of human rights in the New World, God's angry man of the sixteenth century" (ibid:23)-- on the other hand, described Indians as people possessing an evolved culture, and social, economic and religious institutions. He argued that they were rational beings, fit to be compared to the Greeks and Romans.

Las Casas' argument was not that Spain should not conquer the Indians of the Americas but rather that its only justification for doing so would be to Christianize them. He was distraught that the cruelty of the conquistadors inhibited this development.

Berger goes on to describe King Charles V, the monarch to whom Las Casas and Sepulveda addressed their arguments, as a man who "genuinely wished to see a humane regime established in his overseas possessions", but who "could not resist the advance by Europe into the New World, and Spain was Europe's spearhead (ibid:27).

The appeal of the Valladolid story, for Berger, is the way it illustrates the antiquity of the terms of the debate regarding human similarity and difference, and what may constitute a justificatory discourse for domination and subordination. Of course, the event's form and plot constitutes an archetypal legal story: a triangle consisting of a good learned person (Las Casas); a bad learned person (Sepulveda); and a benevolent sovereign (or judge) (Charles) pondering a deeply important and complex issue in a quasi-judicial forum.

"Here was the very debate that I heard centuries later in the Mackenzie Valley Pipeline Inquiry." Berger observes (ibid:22). He continues:

How many such commissions have there been since... [Valladolid]... undertaken by the European powers in the New World, and by their successor regimes, all of them, like the first, undertaken with a sense of guilt, a measure of

goodwill, and in the end a conviction that nothing could be done that might impede the proliferation of European settlement throughout the New World (ibid:26)?¹⁰

Indeed, Williams agrees that "Every rationalization for imperialism for the next 500 years would be made by Sepulveda" (Williams, 1990(b):34). While the impact of Spanish colonization in the Americas is important, for the purposes of this thesis my main interest is in British law. The British most adamantly attempted to distinguish themselves from the Spanish by claiming to be guided by the rule of law: the rational and just application of reason, rather than bloodthirsty lust for power and domination. Spanish influence on English thought declined in 1558 when the Protestant Queen Elizabeth 1 ascended the throne (Morris, 1992:56). Thereafter, "the British justified the dispossession of indigenous people by claiming that they were in covenant with God to bring 'true' (as opposed to Spanish) Christianity to heathens" (ibid:57). It is to British law, in particular, that I will now turn.

2.4 RULE BRITANNIA

British law traces its origins to the customs and laws of the common law tradition which emanated from the fifth century A.D. when the Anglo-Saxons invaded England and conquered the indigenous Britons.

Kent McNeil, in Chapter 2 of his book Common Law Aboriginal Title provides a detailed explanation of how land title was argued and proven in English common law courts according to this "ancient constitution." He says:

¹⁰ Historian, Robin Fisher, in a recent article, criticizes Berger for his ahistorical sweep through 500 years of history and for ignoring the three hundred years of the fur trade history during which relations were significantly different. However, if we read Berger as historian of *legal* ideas, and not as a social historian, then his notion that little has changed in 500 years is not incorrect (1992:54).

...in courts of English law, customary law is generally a matter of fact. As such it has to be proved in the first instance by calling witnesses acquainted with the local customs until the particular customs have, by frequent proof in the Courts, become so notorious that the Courts take judicial notice ¹¹ of them (McNeil, 1989:193).¹²

Knafla, a legal historian, describes English common law as signifying

...the existence of a society wedded to a legal system based as much on oral and written customs of the past as on the legislative enactments of a contemporary parliamentary democracy (Knafla, 1986(a):33).

Historically conquest and descent were the only two methods at common law whereby territory could be acquired (McNeil, 1989:36). The Anglo-Saxons went on to absorb the Danes and Gauls, who, in turn, having become Normans, conquered the Anglo-Saxons in 1066. The Norman conquest of 1066 brought a centralized state and church, the arbitrary power of the king, and created a feudal regime sometimes referred to as the "Norman Yoke", against which the English and the Scots waged civil war (Hill, 1958).

Under the Norman-derived legal regime, what has come to be called the "underlying title to all land" was held by the king, or sovereign, who was said to "hover over the land" (ibid: 35). A wide variety of other forms of property--including title in fee simple, usufruct, lease, sharehold, etc.--co-exist with what is called the "radical" title of the Crown (held by the hovering sovereign). The origin of the sovereign's title is to be

¹¹ The term "judicial notice" refers to the process, in common law, of a statement or fact--that is usually "common knowledge" or "folk knowledge"-- being referred to so frequently and repeatedly by a large number of reputable people that the court "takes judicial notice of it", and this act of recognition transforms the utterance into a fact of law.

¹² It is in the context of common law approaches that acceptance of oral history as valid evidence is crucial. If Aboriginal oral histories are ruled invalid, then judicial notice cannot be taken of statements of pre-contact land ownership. In the absence of written records, oral tradition is the sole source of evidence.

found, therefore, in an abstract, conceptual construction, made concrete through the exercise of power as the sovereign simultaneously became the symbolically omnipotent source of law.¹³

Since the Norman invasion, then, and with the later development of parliamentary and constitutional government, the common law came to exist in two senses: as ordinary domestic law and as constitutional law. In the former sense, as domestic common law, it consists in judicial decisions that govern some point of private law in society, such as the right to possess land. In the latter sense, as constitutional common law, it consists in judicial decisions that govern some point of public law, such as the constitution of powers and the vetting of them in federal, provincial, or aboriginal peoples' governments (Clark, 1990; McNeil, 1989). The common law comes into play when a court makes a decision, not by construing and applying statutory law, but rather, in the absence of a statutory law governing the point in question, by identifying a fundamental principle and choosing to recognize that principle as having the legal force to settle the point. In this sense the common law is purely judge-made (Clark, *ibid*:112). Therefore, a consideration of indigenous peoples as equals and the application of English common law principles to them constitutes the first "moment of transformative possibility" or political choice in the legal history of Aboriginal title.

¹³ As we will see, historically, when British settlers, first in the American colonies and later in British Columbia, looked to history and law for moral and political legitimation in their struggles for independence from the British Crown, they constructed a rhetoric recalling a "golden age" of "natural law" that existed prior to the Norman invasion (see Knafla, 1986(a) Herbert, 1954; Parker, 1986 for British Columbia and Canadian examples; and see Parry, J. H., 1979; Williams, 1990, 235-276 for American examples). This local, or common, law has come to be known also by the phrase "the fundamental laws of all Englishmen" which Williams describes as the,

...opinion that the Anglo-Saxons of England lived as free and equal citizens under a form of representative government that was inspired by divine principles of natural law and the common rights of all individuals (Williams, 1990(a):253).

Of course, within the cultural and historical context of the sixteenth and seventeenth centuries this option likely did not come to consciousness among European colonizers. The point, however, is that within the law's decontextualized and objective self description there are no logical grounds for common law property law not to have been applied. It is only culture, or ideology, that can explain why they were not.

2.5 BRITANNIA RULES THE WAVES

When the British became engaged in colonization, common law rules concerning colonial expansion addressed several major questions which necessarily arose whenever British settlers established themselves in another territory: first, what was the source and content of the legal rights of British settlers (Walters, 1993:357). Second, what was the source and content of the legal rights of inhabitants indigenous to the new territory, if any such inhabitants were present? Finally, what were the respective constitutional powers of Crown and Parliament in relation to colonies? (ibid:358).

It is instructive to begin the history of British imperialism in Ireland for a number of reasons. First, Ireland is Britain's oldest overseas colony. Second, the historical process of "racialization" so fundamental to colonial law and culture becomes salient when we look at the Irish story.¹⁴

¹⁴ By "racialization" I mean the ideological process whereby biological or phenotypical characteristics are used to delineate categories of people (Miles, 1989; 75-77, 117-120). That this is an historical and ideological process that forms one of many justificatory discourses of conquest is important both to the central argument of this thesis, and to the situation of Aboriginal peoples in Canada who constitute political and cultural communities and not racial categories (Berger, 1983; Turpel, 1991). The most common example of the historical nature of racialization is given by the variable classification of Jews throughout European history sometimes as a distinct "race" of people, and at other times not.

Canny identifies the years 1565 - 1576 as the period during which English jurists "pondered the Irish problem in secular terms that approached a concept of 'cultural evolution'" (Canny, 1973). They were confronted with two problems: (1) how the Crown could establish legal title to the land; and, (2) how was the indigenous population to be treated?

The first question was easily answered by conquest. The second was more difficult. As Canny explains,

The questions that we must pose are how, at the mid-sixteenth century, the Irish, a people with whom the English had always had some familiarity, came to be regarded as uncivilized, and what justifications were used for indiscriminate slaying and expropriation (ibid:583).

That the Irish were Christian was never doubted by the Normans or their successors, but it was always recognized that Christianity in Gaelic Ireland did not fully conform to Roman liturgical practice, and that many pre-Christian traditions and customs were only slightly veneered by Christianity. On this basis, the Irish could be considered "as if" they were atheists or infidels. Although, unlike "certain savage tribes", the Irish were rarely accused of cannibalism, they were deemed "little better than Cannibals..." (ibid:587). In addition, the English took the Irish practice of transhumance as proof that the Irish were nomads, hence barbarians (ibid:587). In this very early "test" we can see the emergence of differentiating criteria that would continue to serve as rationales for colonialism for many centuries to come: religion, ritual, and relationship to land and property.

The English colonists thus developed a story that said the Irish were at a level of cultural development analogous to the ancient Britons before they were civilized by the Romans. They should therefore be made subservient to the colonizing English so that

through subjection they could come to appreciate civility and thus eventually achieve freedom as the former Britons had done. The first step in this process was to forbid the practice of Gaelic law (ibid:589).

Kent McNeil summarizes the situation described above as follows:

The English were no newcomers to colonial enterprise when the great rush for empire began with the European 'discovery' of America in 1492. Their Anglo-Saxon forebears started to invade the British Isles in the fifth century A.D., eventually spreading over most of what is now England. They absorbed the Danes and Normans who came to conquer them in turn, and went on to subdue Ireland, Wales, and the Isle of Man...The English thus had a long history of colonial experience behind them when the age of discovery began. More important from a legal point of view, their early imperialistic ventures created precedents, which could be used to resolve some of the complex juridical issues that would inevitably be raised by the acquisition of an overseas empire (McNeil, 1989:1).

The relevance of this early history of western imperialism and the legal expression of the same to this thesis is the following. We can see here the antiquity of what continues to be a fundamental contradiction, paradox, or deceit: an abstract philosophical commitment to humanism--defined at the most basic level as the equality of peoples--co-existing with an enduring concrete practice of the production and reproduction of inequality and domination of one people over another. It is within this space between theory and practice that justificatory ideologies are constructed.

Perhaps more importantly, this same space is the site where Aboriginal peoples historically and contemporarily position resistance struggles (see Dyck, 1985; 1991; Gartrell, 1986; Paine, 1977; 1985; Tanner, 1983(a)(b)). And, we see too the enduring materiality of land as the basis of conflict. Law quintessentially embodies this dynamic and its inherently conflictual nature because it is in the legal forum where victories and defeats must be reduced to their crudest level and winners and losers publicly proclaimed

to be such. Hence, in the history of colonial law we can see both the crudeness of the foundational lie, and the ultimately unsophisticated nature of the necessary justification.

2.6 BRITANNIA WAVES THE RULES

The "not-Christian enough to qualify" exception developed to cope with the Irish situation became codified in law in *Calvin's Case* in 1608, when Chief Justice Coke articulated what has become known as the "infidel rule" (Walters, 1993:360). Coke's reasons were set out as follows:

And upon this ground there is diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, seeing that he hath *vitoe et necis potestatem*, he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain. But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidels are abrogated, for that they be not only against Christianity, but against the law of God and of nature.¹⁵

The seventeenth century marks both the beginning of British settlement in the Americas and the elaboration and consolidation of secular colonial theories. Canadian philosopher James Tully writes,

Consequently, the initial conditions for theorizing and reflecting on property rights in America are of a (European) people who arrive on a continent of roughly five hundred established Aboriginal nations and systems of property and who do not wish to become citizens of the existing Aboriginal nations, but wish to establish their own nations and systems of property in accordance with their European institutions and traditions...

One of the leading problems of political theory from Hugo Grotius and Thomas Hobbes to Adam Smith and Immanuel Kant was to justify the establishment of European systems of property in North America in the face of the presence of 'Indian Nations'. Almost all the classic theorists advanced a solution

¹⁵*Calvin's Case* (1608) 7 Co Rep 1a, 2 State Tr 559, Moore KB 790, Jenk 306, 77 ER 377, at 398.

to this problem of justifying what was seen as one of the most important and pivotal events of modern history (Tully, 1993(b):3-4).

Tully's first point bears emphasis as it is rarely included as one of the potential options, or choices, historically available to the law and settler populations, and its omission underscores the central place of ideologies of racial and "evolutionary" supremacy in the colonial process. That is: Europeans did not arrive to lands without law. Again, to answer the question why the option of behaving as guests and attempting to live by Aboriginal laws does not appear to have been taken up in the long term, we have to look more to European and Euro-Canadian history and culture than to Aboriginal beliefs and practices.¹⁶ The challenge as I see it at this stage, is to continually try to remember that it is choices and decisions, not determinations, we are exploring.

A memorandum of the Privy Council of Great Britain in 1722--from an anonymous case--is generally referred to in order to conveniently summarize imperial constitutional law in skeletal form (Walters, 1993:359). The Privy Council stated:

If there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go they carry their laws with them, and therefore such new country is to be governed by the law of England. This rule can be labelled the "settlement," "occupation" or "discovery" rule.¹⁷

The 1722 Memorandum also articulated a "conquest" rule.

Where the King of England conquers a country...he may impose upon the conquered people what laws he pleases. But until such laws are given by such conquering prince, the laws and customs of the conquered country shall hold place (ibid).

¹⁶ As we will see later, contemporary fur trade historians and legal scholars are increasingly emphasizing the fact that during the approximately 300 years of the fur trade, Europeans were most often "on the ground" (literally) subject to Aboriginal law and/or to a regime best described as one of "legal pluralism" where both French, British and Aboriginal law co-existed (Fisher, 1977, 1992; Foster, 1981, 1992(b); McLaren et al, 1992).

¹⁷ Privy Council Memorandum of 9th August, 1722, 2 P. Wms. 75,

Thus the key features of the conquest rule were, first, the continuity of existing local law and, second, the special constitutional powers of the Crown (not present in the case of settlements) to rule by prerogative, unconstrained by principles of English constitutional law.

To summarize, the method of acquisition, settlement or conquest/cession, determined two matters: first, the law that should apply at the moment of acquisition of territory, and second, the power of the various branches of British government with respect to the colony.

Of course, as Walters goes on to point out, given the fact that Britain never had, and never would, colonize an uninhabited land, the doctrines of "settlement", or "occupation", or "discovery" provided for in the 1722 memorandum were never really, literally applied (Walters, 1993: 360). Rather, inhabited nations were deemed, by law, to be uninhabited if the people were not Christian, not agricultural, not commercial, not fully evolved, not white, in the way. The literal application of British colonial law to Aboriginal peoples "as if" all peoples were equal, therefore represents another moment of transformative possibility/political choice.

As we will see, "on the ground" the questions posed by the 1722 Memorandum were answered eclectically over the ensuing centuries. Legal scholars (see for example, McHugh, 1987; McNeil, 1989; Sanders, 1992; Walters, 1993; Williams, 1990(b)); historians (see for example Andrews, 1973; Canny, 1973); and anthropologists (see for example, Cohn, 1989; Starr and Collier, 1989; Vincent, 1989, 1990) agree that attempts to generalize British colonial legal practice are doomed to failure.

Canny points out that,

Even Common Law, often loudly proclaimed as the palladium of English liberties overseas, was transferred to the colonies...in piecemeal and selective fashion. Different rules, different interpretations, were applied in different colonies, and then still further modified by local precedent as well as by local legislation... These characteristics set English colonizing activities...apart from the activities of most other European groups (Canny, 1973:577).

In the *Delgamuukw* case, however, Chief Justice McEachern upheld the theory of *terra nullius* in its simplest form:

I think it unnecessary to continue this debate. In my view, it is part of the law of nations, which has become part of the common law, that discovery and occupation of the lands of this continent by European nations, or occupation and settlement, gave rise to a right of sovereignty...

In my judgment, the foregoing propositions are absolute. The real question is, whether, within that constitutional framework, the plaintiffs have any aboriginal interests which the law recognizes as a burden upon the title of the Crown (Reasons, 1991:82).

In Canada, France had preceded England in settlement, and had entered into numerous treaties with the Mi'kmaq's, the Maliseets, Montagnais-Naskapi, Huron and Abenaki to secure these Aboriginal peoples as allies against both the Iroquois and the English (Dickason, 1992:103). Throughout the seventeenth century numerous agreements were entered into between and among Aboriginal peoples and the French and English. Many of these treaties were verbal agreements, solemnized through assembly and gift exchange, symbolized by, for example, wampum belts, and renewed regularly in similar fashion. The key element of the early Indian-European treaty-making process, Dickason argues, was that it conformed to Aboriginal practices more than European models.

Current legal debates revolve around issues of interpretation of treaties with Aboriginal peoples arguing that the treaties constituted "peace and friendship"

agreements, and the Crown arguing that they were land cessions. The issue of verification and validity of oral tradition plays an important part in these legal disputes as well.

By the Treaty of Utrecht of 1713, France ceded control over the Maritime regions, while retaining Cape Breton Island, Ile St. Jean and miscellaneous islands in the Gulf of St. Lawrence (Dickason, 1992:117). In 1759 the British captured Quebec after seven years of war, and the subsequent Peace of Paris signed in 1760 temporarily sorted out disputes between France, England and Spain (Slattery, 1985:119). France ceded all its remaining territories in Canada and its territories east of the Mississippi River. Spain ceded Florida to Britain, but retained its territories west of the Mississippi captured from France in 1759. Two issues are important to note here as both will continue to be central themes in Aboriginal/non-Aboriginal debates over the centuries: conflict and negotiations between European powers, and later between federal and provincial governments, over lands and resources that have excluded Aboriginal participation and ignored Aboriginal interest; and Aboriginal conviction that these agreements are not binding on them.

Slattery quotes Chippewa leader, Minivavana as having told an English trader:

Englishman, although you have conquered the French, you have not yet conquered us. We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. they are our inheritance; and we will part with them to none (Slattery, 1985:119).¹⁸

¹⁸ Slattery is quoting: Alexander Henry *Travels and Adventures in Canada and the Indian Territories between the Years 1760 and 1776* (1809), quoted in Dorothy V. Jones *License for Empire: Colonialism by Treaty in Early America* (Chicago: University of Chicago Press, 1982). The statement was made at the post of Michilimackinac in the fall of 1761, after Quebec and Montreal had been taken by English forces (Slattery, 1985:ftnt 25:385).

2.7 THE INDIAN MAGNA CARTA

The prevailing conditions in the early 1760s, and therefore the historical context in which the Royal Proclamation of 1763 was issued, were complex (Slattery, 1985; Walters, 1993; Williams, 1990(b)). The British were faced with a number of problems. First, their relationship with Indian nations who had been allies of the French was precarious. Second, during the war there had been active competition for Indian allies and British army commanders in the field had been generous in their purchases of furs and exchanges of ammunition with the Indians (Williams, 1990(b): 275). After the war, London cut back these funds considerably and field commanders found themselves unable to honour commitments they had previously made (ibid). Third, settlers and fur traders were making incursions on Native lands and resources independently, causing hostility and opposition among the Natives and impeding the development of Crown monopoly (Slattery, 1985; Williams, 1990(b)). Fourth, Britain's hegemony in North America was still threatened by the Russians from the north, and the Spanish from the southwest. The Royal Proclamation of 1763 addressed all these issues. What have become known as its "Indian provisions" are of most interest to the present discussion and these are set out in the following preamble:

*And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, and with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.*¹⁹

¹⁹ There have been a number of published versions of the Royal Proclamation of 1763, and wording varies. The quotation cited here is taken from Reasons, 1991:313

As we will see, interpretations of the historical, legal and political implications of the Royal Proclamation of 1763 have occupied a central place in Aboriginal title and rights discourse and litigation over the past two centuries.²⁰ The ins and outs of all these issues continue

²⁰ First, the fundamental legal debate surrounds whether the proclamation asserts ultimate British sovereignty over Aboriginal lands and peoples, and/or whether it recognizes Aboriginal sovereignty. An overriding legal question that has been the subject of several court cases is whether or not the Royal Proclamation should be interpreted as having **recognized** pre-existing Aboriginal rights (the "inherent rights" approach); or whether the Royal Proclamation **created** these rights (the "delegated rights" approach).

Second, there is little debate that it grants the king sole right to negotiate the surrender of lands with Aboriginal peoples. Legal debates on this point have focused on whether under the terms of British colonial law the king was acting lawfully in an "inhabited territory." Another issue that has been the subject of moral and political argument is whether or not it is just for a monarch or representative of a foreign government to assert power by the simple assertion of sovereignty.

Third, the Royal Proclamation prohibited colonial governments or individual British subjects from appropriating unceded Indian lands, and from settling on or purchasing lands directly from Indians. This exercise of sovereignty, as we will see, has been contested by settlers and colonial governments, particularly in the United States, as an unwarranted limitation on individual rights and the development of private capital.

Fourth, the proclamation identifies Indians as "Nations or Tribes". The intended meaning of this language has also been hotly contested, with some arguing that the British Crown thereby recognized the sovereignty of Indian Nations, and opponents arguing that the words were used rhetorically and without the assumption of equality between nations. This debate is of particular interest to this thesis both theoretically and substantively. In Canada, Indians and advocates have argued strongly in court for the former interpretation, while the Crown has argued that interpreted within the context of its time, the writers of the Proclamation clearly intended the latter meaning. Robert Williams, Jr. argues that the Royal Proclamation was first and foremost an opportunistic expression. He says:

These two goals--facilitating the profitable Indian trade and protecting Indian lands to prevent costly hostilities--were viewed as complementary halves of a self-serving colonial policy put forward by mercantilist interests and their advocates in the British Ministry at Whitehall in the 1760s (1990(b):237).

Contemporary Canadian Indian legal scholars, however, view the Royal Proclamation as the first written constitutional document for British North America...[that]...recognized the existence of Indians' territorial rights, and established legal procedures for the surrender of these rights (Chartier, 1985:26).

Fifth, the Royal Proclamation guarantees Indians the protection of the Crown and this would later come to be expressed as a "fiduciary duty." Debates involve whether or not these duties and obligations should be interpreted as resulting from a negotiated agreement between equal parties, or as governing a relation of dependency analogous to the parent/child relationship.

Sixth, it acknowledges Indians as having some form of interest in their lands and resources. Whether, legally, this is an independent proprietary and commercial interest or some form of "lesser title" that constitutes a "burden on the Crown" is a subject of ongoing controversy (Slattery,

to interest historians and anthropologists. As Andrews explains, from an historical perspective,

The English, in fact, were eclectic in their choice of aims and methods; at one time or another they tried almost everything...Late-comers to the New World, they had an abundance of precedents from which to choose. No other colonial empire employed so wide a range of legal devices in establishing settlements, or allowed so many diverse forms of social, religious, and economic organization. Many factors contributed to this diversity: the habit of eclectic borrowing already noticed; differences in time, place, and circumstance; differences in personality and purpose; and the absence of sustained interest and continuous effective control by the central government (Andrews, 1973:2-3).

Even the most optimistic analysts, however, acknowledge that the Royal Proclamation differentiated Indian title from non-Indian title in three significant ways: (i) Indian title is collectively or communally held, not individually held; (ii) Indian title can be exclusively transferred to the Crown; and, (iii) its definition is tied to pre-existing use practices, and not simply to possession.

Since the issuing of the Royal Proclamation preceded European contact with west coast Aboriginal peoples by 11 years, the specific eclecticism that arose in British Columbia was, as we will see, for the Crown to question whether the Royal Proclamation of 1763 is relevant to British Columbia given that the Pacific coast was unknown to the British King at the time. Chief Justice McEachern ruled on these grounds that the Proclamation did not apply to British Columbia: what the sovereign could not see, did not exist.

1985:120).

Seventh, the Royal Proclamation requires that such land rights can only be surrendered at a public assembly at which the Indians give consent to surrender. This issue comes up particularly in treaty litigation where Aboriginal claimants may argue that whatever negotiations and agreements are claimed by the Crown to have been reached with their ancestors, there was insufficient knowledge and/or participation.

An interpretation of the Royal Proclamation of 1763 that favours Aboriginal interests represents another moment of transformative potential/political choice, discussed above.

To summarize, I have set out above four of the five potential bases for recognition of Aboriginal title in Canadian law: (i) recognition of Aboriginal title in Aboriginal terms; (ii) application of English Common Law rules for acquiring territory; (iii) application of British Colonial Law rules for acquiring territory; (iv) the Royal Proclamation of 1763. Chief Justice McEachern dismissed all of these potential bases for the reasons cited above.

Before moving on to the fifth potential source, cases that form the key precedents referred to by Canadian judges most frequently in relation to Aboriginal title and rights litigation, it is necessary to take another detour via seventeenth century England to contextualize the emergence of the political theory that underlies much current legal thought on property. Since these cases span a period of one hundred and eighty years I will present them each in their historical context. The first of these cases, heard by Chief Justice Marshall of the United States Supreme Court, codified seventeenth century British social theory, particularly that of John Locke, into law.

2.8 ENOUGH AND AS GOOD

Englishman John Locke is usually identified as the most significant political theorist of this era (Tully, 1993(b)). Locke, himself involved in the management and exploitation of the British colonies on the eastern seaboard of America, gathered together arguments circulating during the early seventeenth century and set them out in theories that would serve many of the later legal and political justifications of European property in

America up to and including Chief Justice McEachern's ruling in *Delgamuukw v. R.* in 1991. Given the importance of Locke's theoretical assumptions to both anthropological theory and contemporary Crown arguments in Aboriginal title litigation, I will return to them at various points in the narrative. At this point, I will set out in skeletal form only the points, identified by Tully as "the most enduring conventions of European theoretical reflection on property for the following centuries" (Tully, 1993(b):5).

"In the beginning all the world was America," Locke wrote. By this he meant that Aboriginal peoples lived in a pre-political state of nature representative of the first stage in universal evolutionary development. Important characteristics of this early developmental phase included a hunting and gathering economy and no established systems of property or government. Europe, correspondingly represented the most advanced stage of evolutionary development evidenced by a legally codified system of property and government, agriculture, markets and commerce (Locke, 1970).

Locke went on to theorize that Aboriginal peoples therefore had property rights only "in the products of their labour: the fruit they gather, the deer they catch and the corn they pick" (ibid:6). In this they are governed by the dictates of a "natural law" that says each individual may appropriate what nature offers up without consultation with (or consent from) others "as long as there is enough and as good left in common for others" (ibid:6). Locke reasoned from these premises that Europeans who would increase the productivity of the land through agriculture were justified in appropriating Aboriginal lands without consent. Since this process was governed by the "natural law" of history and evolutionary development, should the Aboriginal peoples inhibit European settlement, they would be in violation of natural law and could justifiably be eliminated.

Locke characterized Aboriginal law and government as ad hoc, led by war-chiefs, and arbitrary. At the same time, he stressed the absence of crime and property disputes based on limited desires and material possessions. They have "fixed desires for property, and thus produce for the sake of subsistence rather than for surplus" he wrote. Tully concludes that if Locke had recognized Aboriginal forms of property as equal, "settlement in America would have been illegitimate by his own criteria of enough and as good, and consent would have been required" (Tully, 1993(b):10). This, again, is central to the argument I am putting forward in this thesis: if the appropriation of Aboriginal land without consent is contrary to European, or Euro-Canadian, laws and "cultural values," then cross-cultural misunderstanding appears problematic as an explanation of the central problem.

Chief Justice McEachern quoted the Swiss writer, Vattel, who in 1844 published a pseudo-scientific treatise that articulated Locke's theories on labour and agriculture with Darwinian evolutionism, and provided a justification for imperialism that was cloaked in scientific inevitability. Vattel wrote:

The earth, as we have already observed, belongs to mankind in general, and was designed to furnish them with subsistence. If each nation had from the beginning resolved to appropriate to itself a vast country, that the people might live only by hunting, fishing and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants. We do not, therefore, deviate from the views of nature, in confining the Indians within narrower limits...(Reasons, 1991:80).

Locke's theories were influential in post-Revolutionary America and it is to that place and time that we turn now, to examine the processes and events that codified Locke's theories into law. In 1776 the American colonies declared independence from Britain. In the ensuing years three distinguishable factions emerged to dispute issues of land rights and lawful methods of acquisition of Indian lands (Williams, 1990(b):260 -

310). Litigation during this period, particularly three cases that have come to be known as the "Marshall trilogy" would have a profound effect on later Aboriginal title litigation in Canadian courts.

A faction of the American population that had remained pro-British continued after Independence to argue for a literal interpretation of the Royal Proclamation of 1763, and asserted that the British Crown alone retained the prerogative to negotiate with and acquire land cessions from Indians.

Legislators and political leaders of Virginia and the other landed colonies argued that they held controlling rights to Indian lands on the basis of their Crown charters, and having "inherited" the sovereign prerogatives previously held by the British Crown and set out in the Royal Proclamation of 1763.

And finally, a large group of frontier speculators claimed that under natural law and natural right, the Indians themselves, as sovereign princes of the soil they occupied, could sell land to whomever they wished. Williams describes what he calls the speculators "anti-positivist discourse" as follows:

...Americans exercised their natural-law rights as free men when they purchased, without a government intermediary, lands held by the Indians. Concomitantly, the Indians, as free, unconquered nations...exercised their natural rights by freely alienating that which they occupied and held as their own under natural law to whomever they pleased. The Indians' willingness to enter the colonists' land market was proof positive of their rational capacity to act in their own best interests...

Suddenly, even the most hardened land-market capitalist assumed the mantle of zealous advocate of the Indians' natural-law right to engage in unregulated real-estate transactions. Neither the King nor the landed colonies "owned" the lands on the frontier, argued these speculators. The Indian tribes occupied these lands as free and sovereign peoples. By natural law, the Indians could therefore sell their rights to the land to whomever they pleased, the

Proclamation of 1763 and the landed colonies' charter claims notwithstanding (ibid: 272).

The question of lands Indians may not want to sell or cede to anyone was not addressed in any of the above positions.

This was the context in which three decisive legal judgements were rendered by Chief Justice Marshall of the United States Supreme Court that continue to be referred to and drawn on as precedent in both Canadian and American Aboriginal title litigation (Dole-Bedwell, 1993; Macklem, 1991; Slattery, 1979; Williams, 1990(b)).

The first case, *Fletcher v. Peck*²¹, heard in 1810, concerned the validity of a Georgia statute that revoked a prior statutory land grant made to the New England Mississippi Land Company. The Company then divided and resold the land to individuals, including the Plaintiff, Robert Fletcher. Chief Justice Marshall ruled, on the basis of the Royal Proclamation of 1763, that the sale was illegal because the lands in question had never been surrendered by the Indians to either the British Crown, the government of the United States of America, or the state of Georgia. Marshall held that "Indian title" was a title of occupancy only (not fee simple) and could only legitimately be extinguished by a European-derived sovereign. Another U.S. Supreme Court judge, Justice Johnson, dissented from Marshall's decision arguing that Indians "retained absolute proprietorship of their soil" which could be extinguished only by conquest or purchase (Macklem, 1991:398).

²¹*Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) at 146

The second case in the Marshall trilogy, *Johnson v. McIntosh*²², was heard in 1823. The appellant, Johnson, claimed that he had inherited title to a tract of land from his father who had purchased it from the Piankeshaw and Illinois Indians. The federal government, who had sold the land to McIntosh, argued that they had acquired the land from the same Indians at a later date, i.e. after Johnson's father claimed to have purchased it. Marshall found in favour of the federal government on the basis that they alone had the exclusive right to acquire Indian title. He relied on the doctrine of discovery, or settlement, and the theory of *terra nullius* to defend his position, arguing that Crown title was grounded in the voyages of discovery made by the Cabots in late 15th century (Macklem, 1991:398-403).

Marshall argued, as Chief Justice McEachern would 170 years later, that his ruling was based in law, and not necessarily in justice. He wrote that his decision was determined by,

History, and the decisions made and enforced by those Europeans who invaded America respecting Indian land rights... (Macklem, 1991:400)

This second case in the trilogy, *Johnson v. McIntosh*, is the decision most frequently selected as a precedent for application by Canadian judges, including Chief Justice McEachern who cited Marshall's finding that English title was established by the "heroic efforts" of the Cabots (Reasons, 1991:20).

The third and final case, *Worcester v. Georgia*²³, was decided in 1832. The State of Georgia had attempted to enact statutes that sought to assume jurisdiction over the

²² *Johnson v. McIntosh* 21 U.S. (8 Wheat) 543 (1823) at 573

²³ *Johnson v. McIntosh* 21 U.S. (8 Wheat) 543 (1823) at 573

Cherokee Nation by annexing its territory, annulling its constitution and laws, and requiring whites to obtain state permission before entering Cherokee territory. A white missionary, Samuel Worcester, was arrested for refusing to comply with this statute and challenged the state's jurisdiction. These same lands, and jurisdictional arrangements, had been the subject of a treaty between the federal government and the Cherokee.

Chief Justice Marshall reversed his earlier position and ruled that the doctrine of discovery was relevant only between European nations, and yields only "an exclusive right to acquire title" as set out in the Royal Proclamation of 1763 (Macklem, 1991:403). Macklem identifies this decision as another moment of transformative possibility, explaining as follows:

Discovery, properly understood, vests only the exclusive right to acquire title from native people as against other potential nations. This holding is critical to the development of a set of principles governing the common law of aboriginal title that would facilitate the realization of self-government, for it challenges the assumption that the Crown holds underlying title to native land, and instead suggests that Crown regulation or extinguishment of the native proprietary interest at common law cannot occur absent native consent (Macklem, 1991:405).

This decision of Chief Justice Marshall in *Worcester v. Georgia* has not been chosen as a precedent by Canadian judges.

I will leave the eastern United States now and return to British Columbia to review contemporaneous developments in Aboriginal relations with the Crown closer to home.

CHAPTER 3: BRITISH LAW FOLLOWS ITS SUBJECTS

3.0 THE COLONIAL PERIOD IN BRITISH COLUMBIA

Throughout the first half of the nineteenth century, the Hudson's Bay Company was continuing to expand across what was to become the province of British Columbia, building forts and engaging in trade with Aboriginal peoples. Historian, Robin Fisher, comments that,

It was argued, in the context of litigation on the land question in the 20th century, that the establishment of forts by the Hudson's Bay Company constituted a conquest of the area that became British Columbia. In reality, the Indians accepted the existence of trading posts out of self-interest rather than fear, and therefore they can hardly be described as a conquered people during the fur-trading period (Fisher, 1977:40).

During the early years of the century, British colonial policy was strongly influenced by humanitarian sentiment in Britain that conceptualized the mission of Britain to be to "take the evils of slavery, ignorance and paganism at source, to extend to the simpler people the benefits of steam, free trade and revealed religion, and to establish not a world empire in the Napoleonic sense but a moral empire of loftier interest (Morris, 1973:39 quoted in Asch, 1984:62,). This is known in legal terminology as the "trusteeship theory of colonialism", and in anthropological literature as colonization through "tutelage" (Dyck, 1991; Paine, 1977).

The establishment of the Colony of Vancouver Island, granted to the Hudson's Bay Company by Royal Charter on January 13, 1849, marks the beginning of the settlement period in British Columbia, although significant numbers of settlers did not begin to arrive before the 1860s (ibid). However, the political, economic, cultural and legal implications of the transition from the fur trade to settlement are significant since they involved a marked difference in the value--broadly defined--of land to non-

Aboriginals, and created the positions of Governor, members of provincial assembly and justices of the peace. The difference between fur traders and settlers is described by Fisher as follows:

The settler came to re-create an alien civilization on the frontier, while the fur traders had to operate largely within the context of the indigenous culture...(ibid:60)...That is, generally traders reacted to what they saw, while settlers tended to react to what they expected to see (ibid:74).

The legal practice of settlement was expressed in a rapid proliferation of laws regrading ownership of land, access to resources, and political relations between indigenous peoples and settlers, and within and between settler populations. This later half of the nineteenth century is a particularly important era in the context of this thesis, since, as we will see, it is during this period of time, and in this context, that we can trace the major influences on Chief Justice McEachern's thinking, particularly the emergence of the "founding myth of white British Columbia" (Tennant, 1992(a)). In Britain, racial attitudes were hardening and moving away from the previous humanitarian approach. Armed rebellions like the Indian mutiny, wars in South Africa, Maori-European wars, and rebellion in the West Indies were fuelling the "wild savage" image, always the other side of the same coin on which the "noble savage" is stamped. Darwin had published Origin of the Species in 1859 and "the notion of British superiority and aboriginal inferiority was being solidified from a generally held hypothesis into an empirically proven doctrine by the work of scientists and pseudo-scientists (Fisher, 1977:88). The theories of Locke and Vattel were increasingly drawn upon and popularized as scientific and moral justifications for colonization. Fundamental to this ideology is the notion of an absolute and unbridgeable difference between races. "The British colonist established a line of cleavage based on race and could not permit any crossing of that barrier by admitting that the Indian was in any way comparable to western man" (ibid:93).

In practice, these theories produced much enduring ambivalence, and, more to the point, constructed the "Catch 22's" that became the foundation of British Columbia political culture and legal argument in relation to Aboriginal title and peoples. Aboriginal people who appeared to succeed in assimilating were regarded with fear, animosity and contempt since they challenged the received view of difference and inevitable decline. That is to say, they ceased to be "different enough", or "appropriately different". Aboriginal people who refused or "failed" to assimilate were regarded with fear, animosity and contempt because they were different and backward.

The first Governor of the new colony of Vancouver Island was a lawyer, Richard Blanchard, who proved unequal to the task at hand and in 1851, James Douglas, Chief Factor of the Hudson's Bay Company Fort Victoria, assumed the additional position of governor. Douglas was the son of a Scots trader and a "free coloured woman" of British Guiana, and his wife, similarly, was the child of a Hudson's Bay factor and a Cree woman (Tennant, 1990:17). Fisher describes Douglas' attitudes as "a mixture in which the knowledge of the fur trader was accompanied by the paternalistic concerns of the nineteenth-century humanitarian (Fisher, 1977:68)." In this way, Douglas embodied and personified the transitional historical period he governed.

Most importantly, for my purposes here, however, are the fourteen agreements made between Douglas and various Aboriginal nations on Vancouver Island between 1850 and 1854, known as the "Douglas Treaties" (Fisher, 1977; Madill, 1981; Tennant, 1990). While scholars concur that these agreements should be interpreted as treaties that clearly recognized some form of Aboriginal interest in the land and that required explicit cession and/or extinguishment, there is a debate among scholars in this area about what the scope of the Aboriginal title Douglas recognized was. Fisher, for example,

argues that the treaties were based on current British opinion about the nature of Aboriginal land tenure and took little account of Indian realities (Fisher, 1977; 1992; see also Duff, 1965). He concludes that Douglas was authorized only to confirm a right of occupancy to lands under cultivation, village sites and fenced fields. Indians would have hunting and gathering rights over other lands as long as these were "waste" and not allocated to settlers. Paul Tennant, on the other hand, argues that

The most important fact about the Douglas treaties is that they stand as unequivocal recognition of aboriginal title. It was with this initial acknowledgement that the British established their rule in British Columbia (Tennant, 1990:20).

It has been argued--and here we encounter the beginning of another dominant theme in Aboriginal/state relations--that one reason for Douglas having ceased to address the question of Indian title was that as the costs of administering the colony increased, neither the Hudson's Bay Company nor London allocated a proportional increase of funds to accomplish the task (Fisher, 1977:150). And, another long standing, and still important, debate began during these years about whether the provision of any funds for Indian issues was the responsibility of the local or imperial government (*ibid*).

The colonial office in London, and the legislative assembly in Victoria were both concerned not only, or even principally, with Indian matters. Rather, they were consumed with planning a very culturally-specific and homogenous colony. An early instruction to the governor of the colony was to insure the transfer of "a cross section of British society to the colony", and a process whereby "a just proportion of labour and capital" would be achieved, and "paupers, squatters and land speculators" would be prevented from settling. (*ibid*:60). Their ambition to create a civilized "whiteman's province" would be expressed in immigration and settlement policies, state ideology, popular sentiment and

sporadic outbursts of hostility and violence towards Asians as well as Aboriginal peoples throughout the province's history.¹

Fisher notes an important distinction, however, between the vision put forward by Douglas and the missionaries and that held by the majority of settlers and legislators. He says:

There was a vast difference between the changes introduced by the settlers and those that the missionaries planned for the Indians. The Indians were largely irrelevant to the settlers' concerns, and in any case it was thought that they were shortly destined for extinction. So, as far as many of the settlers were concerned, the Indians had no future. To the missionaries, however, the Indians very definitely had a future, although it was seen in terms of them ceasing to be Indians and closely imitating the whites. (Fisher, 1977:143).

While Douglas initially respected Aboriginal law to the extent that he regularly ordered Europeans to pay compensation to the families of victims injured by them, Fisher notes that his practices also revealed that "the two races did not stand equal before the law...when an Indian wounded a European the statute book declared it to be an offence punishable by death" (ibid:65). During the course of the 1850s, Douglas increasingly invoked British law to settle both European-Native disputes and intra-Native disputes. In 1855 he wrote optimistically that he thought the Indians were beginning to have a clearer idea of the nature of British law which was "the first step in the progress of civilization" (ibid:65).

The legal history of British Columbia is a relatively new field of academic interest (see Foster, 1992(b); Knafla, 1986(b); McLaren et al, 1992). According to legal historian,

¹ The literature on race relations in British Columbia has grown substantially in recent years, due mostly to work being done by social historians, and some anthropologists and political scientists. An entry into this literature can be obtained through the following: Adachi, 1976; Li, 1988; Roy, 1989; Ward, 1978).

Knafla, the members of the newly established colonial judiciary of the late nineteenth century all "assumed that the law in force was that of England" (Knafla, 1986(a):42), and furthermore were men who revered the "ancient constitution" and English common law (ibid). Douglas appointed his brother-in-law, David Cameron, a linen-draper from the West Indies, as Supreme court Justice in 1853 and Chief Justice in 1856 (ibid:42).

The Gold Rush of 1857-58 brought the Pacific northwest to the forefront of Britain's interests in North America (ibid:43). The summer of 1858 began with the arrival of 400 miners in Victoria, and by September there were thousands (Fisher, 1977:95). With the influx of miners and increasing numbers of settlers, Douglas gave up his former practice of "legal pluralism" and insisted that Indians and whites alike seek redress through representatives of British law rather than through traditional modes or individual retaliation.

In 1858, the British established direct rule on the mainland, creating British Columbia. Douglas resigned as Chief Factor of the Hudson's Bay Company and retained the position of Governor only.

In 1861, the House of Assembly passed a petition, sent to the Duke of Newcastle, seeking funds to extinguish Aboriginal title in which they stated their belief that "the extinction of Aboriginal title is obligatory on the Imperial Government," (Public Archives, Ottawa, C.O. 305/17, pp. 133-34, cited in Madill, 1981:17). The requested funds never arrived. Instead, the Duke of Newcastle wrote back acknowledging,

...the great importance of purchasing without loss of time the native title to the soil of Vancouver Island...but the acquisition of the title is a purely Colonial Interest and the Legislature must not entertain any expectation that the British Taxpayer will be burthened to supply the funds or British Credit pledged for the purpose (Newcastle to Douglas, 19 October 1861, Papers, p.214).

This correspondence has become important in litigation because if it can be shown that the British Crown, and/or Canadian parliament recognized Aboriginal title in British Columbia, then the story developed by the province of British Columbia in support of non-recognition is significantly challenged.

A smallpox epidemic that began 1862 is estimated to have wiped out 70 - 90% of the Aboriginal population of B.C. over the next 50 years (Duff, 1965). This rapid decline in population, and the decimation and demoralization that accompanied it served to reinforce the increasingly popular theories of the inevitable demise of the Aboriginal peoples. This helped rationalize the taking of lands and the repression of cultures considered doomed to extinction anyway.

As was the pattern in British Columbia, the Gitksan and Wet'suwet'en continued to fish, hunt, gather, and trade with each other, with other Aboriginal groups, and now, with non-Aboriginals. In fact, they furnished the Hudson's Bay Company staff with most of their requirements (Ray, 1987:83). Into their pre-existing life ways and institutions they incorporated wage labour in guiding, packing, canoeing, mining and later on in the century, employment in fish canneries.

The economic interests of the non-Indians were limited to the extraction and transportation of resources, particularly furs and gold. At this time, there were less than 100 non-Aboriginal residents in the area and the "whites depended on Indian participation for the success of most economic activity" (Galois, 1989:21).

Native resistance took on a number of forms during this first period. Individual confrontations decreased and nativist and syncretist religious movements began. When,

in 1864, legislative assemblies replaced direct rule, Douglas retired as governor and was replaced by Frederick Seymour in British Columbia and Arthur Kennedy on Vancouver Island. Neither Seymour nor Kennedy were actively concerned with Indian land rights and they left the responsibility for policy-making in this area to their newly-appointed Chief Commissioner of Lands, Joseph Trutch. Trutch "personified settler interests and attitudes, considering Indians 'as bestial rather than human,' 'uncivilized savages,' 'ugly and lazy,' 'lawless and violent'" (Tennant, 1990:39).

Trutch's position was that Indians had not evolved to the stage where they could conceptualize concepts of property. Furthermore, following Locke, he reasoned that hunting, fishing and gathering did not involve the application of human labour to the transformation or cultivation of the land and therefore the Indians were not using the land efficiently. He argued that:

The Indians have really no right to the lands they claim, nor are they of any actual value to them (Trutch to Acting Colonial Secretary, 28 August 1867, Papers, p. 42).

Trutch disposed of the Douglas Treaties by declaring them friendship pacts, and the monies they received as payments required to keep the peace. He proceeded to reduce the reserves Douglas had laid out by inventing a rule that a maximum of ten acres should be allotted to each adult male, and then reduced the allocations accordingly. Trutch also passed an ordinance that prohibited Indians from pre-empting land without the written permission of the Governor.² Vancouver Island and the mainland were united into

² As part of his commitment to assimilation, Douglas had specifically allowed, and encouraged, Indians to pre-empt land on the same basis as settlers, i.e. by cultivating it and building on it. His vision was that Indians would move off the reserves after having been cared for, civilized and Christianized, and become citizens of the colony. Trutch's curtailing of this option by requiring written permission succeeded in discouraging the practice. By 1875, Fisher says, there was only a single case of an Indian pre-empting land under this condition (Fisher, 1977:165).

one colony, British Columbia, in 1866. By this time the Aboriginal population had been reduced to approximately 40,000 people.

The questions about Douglas and, particularly, "the Douglas treaties," that have become legally important can be summarized as follows.

First, were these agreements treaties or merely private purchases made by the Hudson's Bay Company? Second, did Douglas recognize Aboriginal title in a proprietary sense, or merely use and occupation? Third, did Douglas recognize an Aboriginal interest in all lands, or only those "under cultivation, village sites or fenced fields?" Fourth, did Douglas take a consistent stand throughout his period as governor, or did he change his mind, or did the instructions he received from London change over time?

Chief Justice McEachern addressed this question at some length in his Reasons for Judgment, devoting 30 pages to the chapter entitled "The Relevant Political History of British Columbia in the Pre-Colonial Period" (Reasons, 1991:99-130). Regarding the Douglas Treaties, he said:

With respect, I think too much has been made of these treaties as there is no clear understanding of what was involved, and the reasons which motivated the parties to act as they did. The Hudson's Bay Company apparently decided to acquire aboriginal interests in land in which it was interested, and obtained such land for a few blankets. It is not clear whether they acquired lands including village sites, or cultivated fields or surrounding hunting grounds. It did not include the whole territory. The Colony made a few additional acquisitions under obvious pressure from settlers who were concerned not just about an uncertain title, but also about their safety...

... This is all so uncertain and equivocal that I am unable to attach any legal consequences to these treaties...I am more impressed by the unequivocal fact that the Crown, while recognizing aboriginal possession of village sites, was both setting aside reserves and marketing the unoccupied balance of the colony (ibid).

It was after 1870 that the Gold Rush brought large numbers of whites, including surveyors, miners, merchants, missionaries and government administrators to the Gitksan and Wet'suwet'en territory. A permanent white settlement was established at Hazelton but whites remained a numerical minority, who continued to buy large quantities of dried salmon and other foodstuffs from the local Indians (Ray, 1987:83).

Chief Justice McEachern summarized colonial policy as follows:

By to-day's morality...[it]...will be regarded by many as an attempt to destroy Indian culture and identity. By the standard of the day, compared with the rest of the world, it was probably enlightened. I need not pronounce on that question.

He does, however, go on for two more pages at the end of his chapter on the colonial period pronouncing on other matters, and even assigning anthropologists a task.

Chief Justice McEachern says:

For reasons which can only be answered by anthropology, if at all, the Indians of the colony, while accepting many of the advantages of European civilization, did not prosper proportionately with the white community as expected...

No one can speak with much certainty or confidence about what really went wrong in the relations between the Indians and the colonists...In my view the Indians' lack of cultural preparation for the new regime was indeed the probable cause of the debilitating dependence from which few Indians in North America have yet escaped.

It would be overly simplistic, and probably inaccurate, to say that the white settlers were either too kind or too cruel, and that the Indians should either have been given more support, and the dependence increased, or no support at all so that a dependence would not have arisen. So long as Indians had access to white communities there was bound to be a mixing of incompatible cultures.

Being of a culture where everyone looked after himself or perished, the Indians knew how to survive (in most years). But they were not as industrious in the new economic climate as was thought to be necessary by the newcomers in the Colony. In addition, the Indians were a greatly weakened people by reasons of foreign diseases which took a fearful toll, and by the ravages of alcohol. They became a conquered people, not by force of arms, for that was not necessary, but by an invading culture and a relentless energy with which they would not, or could not compete.

Many have said with some truth, but not much understanding, that the Indians did not do as much for themselves as they might have done. For their part, the Indians probably did not understand what was happening to them. This mutual solitude of misunderstanding became, and remains, a dreadful problem for them and for everyone.

What seems clear, however, is that the source of the Indian difficulty was not the loss of land for aboriginal purposes.

...

Preoccupied with the business of getting a new colony started, and of scratching out a hard life in a hard land, the new white settlers, and particularly their leaders, did not pay sufficient attention to the real and potential sociological, cultural and economic difficulties the Indians were experiencing. They became a problem seen through European eyes to be dealt with bureaucratically--an Ordinance here, a dollar there, and tragedy almost everywhere. I suspect the white community understood what was happening to the Indians but did not have the resources, or the knowledge, to respond appropriately.

Even to-day, it is difficult to say what should have been done short of abandoning the settlement of the colony. There is an obvious down-side to every possible alternative. Even a division of the colony between settlers and Indians was not possible for there was no part of the colony where Indians did not have a presence...As in so many other parts of the world, the seeds of the present difficulties were sown, not intentionally I am sure, but by mixing two cultures, and by indifference, during the colonial period (ibid:128-129).

3.1: A NATION IS BORN

Canadian Confederation under the *British North America Act* (now the *Constitution Act*) took place in 1867. No Aboriginal peoples were party to the negotiations or agreements that led up to the passing of this Act. Its terms regarding the distribution of legislative authority and responsibility towards Aboriginal peoples are well known. Consistent with the theory articulated in the Royal Proclamation of 1763, the Crown's underlying title and sovereignty were confirmed. Section 91(24) confers on Parliament jurisdiction over "Indians and Lands reserved for Indians." Provincial governments have jurisdiction over education, health, social services, wildlife and game, but may not pass legislation specifically addressed to Indians. Macklem summarizes this further twist on the play of

theories of cultural/racial difference and similarity and their reflection in Canadian law as follows:

Federal jurisdiction is derived from s. 91(24) of the Constitution Act, 1867, which has been read to permit Parliament to single out native people and treat them differently than nonnative people. Parliament is also entitled to treat native people the same as nonnative people under laws passed pursuant to other heads of federal power...[e.g. the Fisheries Act (ed)]...Provincial legislatures are not entitled to treat native people differently than nonnative people, but can pass laws regulating native forms of life so long as such laws are of general application and do not touch on matters which are inherently Indian (Macklem, 1991:423).

In the final analysis, Macklem points out, all this meant that,

Parliament and provincial legislatures pass laws regulating the life and culture of native people without native consent (ibid:419).

Following a complaint about the treatment of British Columbia Indians by the colonial government, registered with the Aborigines Protection Society in London by a Victoria attorney, Sebright Green, on June 24, 1869 Trutch, was asked by the Colonial office to reply. Trutch wrote a lengthy letter in which he denied that title or interest had ever been recognized, and claimed that Douglas made agreements with various families in order to secure peaceful relations. Thus began the key ongoing debate about the legal significance of the colonial period. Future jurists and historians would tend to fall into either the "Douglas" camp or the "Trutch" camp. Those in the former would argue that Douglas had recognized Aboriginal title or interest that he intended to extinguish through treaties. Those in the later would disagree and say that Trutch was right and that Douglas had never recognized Aboriginal title or interest, and that the so-called "treaties" were meant only to temporarily appease the Indians.

British Columbia did not join Confederation until 1871. Negotiations between London, Ottawa and Victoria began two years earlier in 1869. Both London and Ottawa expressed concerns about the fact that British Columbia did not appear to have a process

in place for legally extinguishing Aboriginal title and releasing land for settlement, and queried the absence of treaties. The British Columbia delegation, represented by Trutch as chief negotiator, spent June and July of 1870 in Ottawa negotiating the terms of union which were passed by Order-in-Council in July 1870. Clause 13 of the Terms of

Reference refers to Indians:

The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.

To carry out such a policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the local government to the dominion government in trust for the use and benefit of the Indians on application of the dominion government; and in case of disagreement between the governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.

These negotiations surrounding Indian policy in the Terms of Union of 1871 is of considerable legal and political significance since arguments have been made by historians that Trutch actively allowed a mistaken impression to remain with federal officials that the Indian policy in British Columbia, like that in the rest of the country, had dealt with Indian title before opening land for settlement, and that reserve lands were being allocated on the basis of the national, 80 acres per family, standard. If it can be shown that Trutch did, in fact, deceive federal officials then it supports the Aboriginal argument that the federal government has consistently recognized their interest whereas the provincial government has not. More to the point, such a finding of fraudulent action would cast doubt on *all* land title throughout the province, and generally cast a shadow on British Columbia settler history and self-image.

In effect, the Terms of Union gave the province direct title to public lands.

Confident that the "Indian title question" was resolved, the province now lumped Indians together with non-white immigrants as ineligible for even the most basic political rights, like the vote. Meanwhile, in the rest of Canada this era witnessed the signing of major treaties with Indians west of Ontario.

Chief Justice McEachern had this to say on the controversy:

In their argument plaintiff's counsel make serious allegations against many Colonial officials including Trutch, Robson, Crease and Governor Musgrave. They allege Trutch 'purposely lied' (in the discussions on Confederation) and that he participated in a scheme of misinformation which led to the 'impoverishment of the people'. Counsel allege a 'perversion of history'...Historians have not generally treated Trutch as unkindly as plaintiff's counsel...(Reasons, 1991:132).

He then quotes from Margaret Ormsby's 1958 book, British Columbia: A History, and Robert Cail's 1974 volume, Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913, in support of his statement, and selects the following sentence from the later to foreshadow his final word on the matter:³

The evidence does not prove that Trutch himself was not convinced that the Indian policy of the province was anything but in the best interests of both the Indians and the white settlers, but it does suggest that he was not anxious to have the details of that policy known to the dominion authorities (Cail, 1974:191, quoted in Reasons, 1991:132).

³ But see Fisher, 1992, where comments as follows: With so little understanding of the historical methodology, it is not surprising that the chief justice is also unable to discriminate between good and bad history. The views of particular historians are brought to bear on his judgment without regard for their competence on the subject at hand. The counsel for the plaintiffs were apparently very critical of Joseph Trutch, who was a major figure in the making of Indian land policy in British Columbia. As Chief commissioner of Lands and Works between 1864 and 1871, Trutch entrenched the non-recognition of aboriginal title and drastically reduced the size of existing reserves. Yet McEachern observes that some historians have not 'treated Trutch as unkindly as plaintiff's counsel'. In support of this claim he cites Margaret Ormsby, who in British Columbia: A History does not say a word about Trutch's Indian policy, and Robert Cail, whose two chapters on Indian land policy rely entirely on published sources. Other historians, who have looked more carefully at the record of Trutch's dealings with Indian land, have concluded that, in the 1860s, he made many of the decisions that have led to to-day's impasse on native land claims (1977:47-48).

Chief Justice McEachern:

Even though Trutch clearly set out his understanding of the Indian policy of the colony in his 1870 memorandum, the evidence about the character of Trutch is equivocal and, there being no need to do so, I think it best not to enter into that controversy. Such matters are best left to historians... (ibid:132).

In the paragraph following this dismissal of the debate, however, the Chief Justice goes on to note that during Trutch's regime there was,

...a measure not of assimilation, but rather of conformity on the part of many Indians with the growing white population...Even in the territory the Indians were understandably taking whatever advantage they could of the white economy, particularly by utilizing its market for their furs and by working for wages. It is impossible to say if they were better or worse off as a result of these changes (ibid:133).

By 1871, then, we see that a theory of Aboriginal title in British Columbia legitimated by Lockean political theory and nineteenth century evolutionism has been formalized and articulated with the locally-particular historical vision of the "founding myth of White British Columbia", and has become consolidated as the basis of provincial government policy. It remained yet to be codified into law and become "the truth".

In 1872 a large demonstration of Coast Salish people protesting the seizure of their lands took place outside the New Westminster Land Registry office (Tennant, 1990: 53), heralding a new phase in Native resistance. Throughout this period various groups sent petitions and delegations to state their grievances to government. Five issues preoccupied them: (i) recognition of Aboriginal title, (ii) insufficient land allocations; (iii) arbitrary allocation of reserves; (iv) encroachment by whites; (v) lack of support for developing agriculture and animal husbandry. The MacDonald government, in 1873, officially requested the province of B.C. to adopt the 80-acre standard for allocation of reserve lands. B.C. agreed to 20 acres and never honoured the agreement (Tennant, 1990:46). Douglas, from retirement, wrote to Superintendent of Indian Affairs, Powell to

protest Trutch's actions and stated that his intention and practice had been to allocate whatever lands the Indians themselves identified as being required (Douglas to Powell, 14 October, 1874, Papers p. 53).

In 1874 the B.C. legislature passed the *B.C. Land Act* aimed at consolidating previous laws affecting Crown lands. In an extraordinary move in 1875, the Dominion Deputy Minister of Justice recommended that the law be disallowed, in part because it did not take into account Aboriginal title, and prevented Indians from pre-empting land without written permission from the government. The federal Deputy Minister cited the Royal Proclamation of 1763 in support of his position, arguing that British Columbia by being the only province not to follow British policy in this regard, jeopardized the "honour of the Crown." The Deputy Minister noted that while Indians did not hold "freehold title in the soil," but instead had a "usufruct right of occupation or possession of the same for their own use" (Province of British Columbia, Papers of the Legislative Assembly, 37th, Victoria 1873-74, pp. 1027-28, quoted in Madill, 1981:34). The Act was disallowed.

It was by reading newspaper reports of this federal/provincial dispute about their lands that British Columbia Indians became aware for the first time of the Royal Proclamation of 1763, and seized upon it as a recognition and guarantee of their rights. As this fact became known among British Columbia Indians, they began to discuss the possibility of taking their case directly to London.

British Columbia Aboriginal people, then and now, interpreted the Royal Proclamation's words to mean what they said, i.e. that the King recognized Indian nations and land rights and pledged to protect the same (Sanders, 1986, Tennant, 1990). However, by the time British Columbia had joined Confederation in 1871 "the doctrine of

legal positivism, which held that the sovereign was the sole source of rights, had become dominant within British jurisprudence, as it remains so to-day" (Tennant, 1990:213). That is to say, what Aboriginal people didn't comprehend was that later sovereigns and representatives of sovereigns could and would interpret this proclamation in various ways, including that neither Aboriginal peoples nor their lands existed "in the eyes of the Sovereign" in 1763. The Indians appear to have believed that the sovereign was a person, the king. They appear to have failed to understand the magic land ownership possessed by the concept of the omnipotent hovering sovereign.

Following the federal governments disallowal of the B.C. Lands Act, the federal and provincial governments agreed to constitute a joint federal-provincial reserve commission to examine the land question. In order to assist, the provincial legislature moved to have the Papers Connected with the Indian Land Question, 1850-1875 published. Trutch, however, managed to withhold the collected papers from the assembly, and, more importantly, from the commission (Fisher, 1977:187, Tennant, 1990:47). The withholding of this publication from public, particularly Aboriginal, access would play an important part in future relations between Aboriginal peoples and the British Columbia provincial government, in particular. The papers contain the correspondence between the colonial office and, first Douglas and then Trutch. That is, this constitutes the official documentary record of the critical period in British Columbia history when the Crown acquired title.⁴

⁴ A reading of these papers leaves little doubt about a few key legal points. For one thing, the Crown is initially clearly cognizant of, and anxious to settle, Aboriginal interests in land. For another, the Crown clearly wants this accomplished in as "legal" and "humanitarian" a way as possible, reflecting the principles of British colonial law and policy. On the other hand, the Crown does not wish to pay the costs, nor do they want any problems to arise that might impede settlement. The balance between humanitarian concern and economic efficiency shifts repeatedly throughout, but by the end of the twenty-five year period covered by the paper, settlement--and settlers'--interests are clearly at the forefront. Correspondence from first colonial and then provincial officials follows

Three Commissioners were appointed to the Indian Reserve Commission: two former Hudson's Bay Company men, Anderson and Mckinlay for the federal government and provincial government respectively, and Gilbert Sproat as a third. They agreed at the outset to set aside the fixed acreage formula and be guided by the specific uses and needs of particular Native nations. The application of this formula resulted in very small amounts of land being set aside for reserves on the basis that in many parts of the province, the Indians were primarily dependent on fish and sea resources. Land not being actively "used" by Indians was excluded from their allotments. Land held by real estate speculators for the purpose of profit, however, was not.

In 1878 pressure from the provincial government, and disagreement between the federal and provincial governments about who would pay the costs of the commission led to it being reduced to a one-man commission with Sproat in the position of Commissioner. By 1880 public opinion among settlers in B.C. was turning against the commission and a petition was taken up and sent to the federal and provincial governments protesting the establishment of reserves near their lands "on the improvement of which we have expended upwards of a decade of our most vigorous manhood" (Fisher, 1977:195). In that same year Trutch's brother-in-law, James O'Reilly, replaced Sproat as commissioner and was instructed to take into account the interests and claims of white settlers as well as those of Indians. O'Reilly reduced the reserves previously laid out by Sproat (Fisher, 1977:198, Tennant 1990:50).

a similar pattern, and conclusion, and the shift in attitude and position from Douglas to Trutch is clearly represented.

Paul Tennant summarizes the results of the Commission's work as follows:

Ultimately, then, despite the formal federal power over Indians and lands reserved for Indians, and thanks, again to Trutch, the province retained control over the number, location, and acreage of Indian reserves...The dominion government did use its authority to assume control over the Indians themselves and to do so entered into a partnership with the Christian churches (Tennant, 1990:51).

Chief Justice McEachern's assessment of this Indian Reserve Commission was based on O'Reilly's notes, which he called "fascinating reading." He says:

The Indians claimed either huge reserves and payment for all lands outside their reserves, or just the former, and declined to participate in the process if they did not receive a favourable response. Mr. O'Reilly repeatedly urged the Indians to tell him what they required in the way of land, forestry resources and fishing stations, but often to no avail. As is so often the case...the two cultures do not always communicate well with each other (Reasons, 1991:167).

The similarities between McEachern's contemporary views and those of Joseph Trutch are most thoroughly addressed in a critique of the judgment written by anthropologist Robin Ridington in which Ridington sets out a series of quotes from the writings of Joseph Trutch between 1864 - 1880, and argues that,

The quotes from Trutch show that he used language that is virtually identical to that used by Mr. Justice McEachern...The language is the same because both writers served the needs of a colonial regime...The views of Trutch may be understood, if not excused, by the context of nineteenth century British imperialism. Trutch did not have the benefit of an anthropological perspective. McEachern had no such excuse (Ridington, 1992:218).⁵

The Indian Act had been passed in 1876, and in 1884 clauses were added banning potlatching. This increased resentment on the part of First Nations towards the

⁵ There seems a certain irony in the fact that we criticize McEachern for not changing enough to be able to see how little the Aboriginal peoples have changed. The irony dissolves, however, when we remember that, in western thinking, "aboriginal" is a time-bound category and cannot escape its place in history, whereas "non-Aboriginal" is defined as being not only free to change, progress and "evolve", but required to do so (see Fabian, 1983).

governments. The Indian Act also delegitimated traditional chiefs and systems of law. In 1884 a Gitksan Chief of Gitwangak complained to the Provincial Government of British Columbia that miners were moving into his territory without consent. He said:

From time immemorial the limits of the district in which our hunting grounds are have been well defined. This district extends from a rocky point called "Andemane", some two and a half or three miles above our village on the Skeena River to a creek called "She-quin-khaat", which empties into the Skeena about two miles below Lorne Creek. We claim the ground on both sides of the river, as well as the river within these limits, and as all our hunting, fruit gathering and fishing operations are carried on in this district, we can truly say we are occupying it (Gisday Wa and Delgam Uukw, 1989:11).

This action is what witness for the Crown in *Delgamuukw*, David Ricardo Williams, would describe in his report as "the first definite hint by natives that they possessed proprietary rights" (Williams, D. 1987:2).

In 1885 three Coast Tsimshian chiefs, accompanied by missionary William Duncan, became the first of many delegations to travel to Ottawa "to tell them our troubles about our land". (Tennant, 1990:55). Among their principle demands was that a public inquiry be held into the land question.

Provincial Premier Smithe agreed to a meeting between federal, provincial and Nisga'a and Tsimshian leaders. He insisted, however, that missionaries not be allowed to attend. Smithe dismissed the Indian claims, telling them "When the whites first came among you, you were little better than the wild beasts of the field." He continued:

The land all belongs to the Queen...A reserve is given to each tribe, and they are not required to pay for it. It is the Queen's land just the same, but the Queen gives it to her Indian children because they do not know so well how to make their own living the same as a white man, and special indulgence is extended to them, and special care shown. Thus, instead of being treated as a white man, the Indian is treated better. But is the hope of everybody that in a little while the Indians will be so far advanced as to be the same as a white man in

every respect. Do you understand what I say (Province of British Columbia, Session Papers, 1887:264; quoted in Tennant, 1990:58)?

Nisga'a Chief Charles Barton replied: "I understand. As I said before, we have come for nothing but to see about the land which we know is ours" (ibid:257).

The federal and provincial governments did, however, agree to a public inquiry that began in the winter months of 1887. Nisga'a Chief, David Mackay, addressed the hearings eloquently. He said:

...what we don't like about the Government is their saying this: "We will give you this much land". How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land--our own land. These chiefs do not talk foolishly, they know the land is their own; our forefathers for generations and generations past had their land here all around us; chiefs have had their own hunting grounds, their salmon streams, and places where they got their berries; it has always been so. It is not only during the last four or five years that we have seen the land; we have always seen and owned it; it is not new thing, it has been ours for generations. If we had only seen it for twenty years and claimed it as our own, it would have been foolish, but it has been ours for thousands of years. If any strange person came here and saw the land for twenty years and claimed it, he would be foolish. We have always got our living from the land; we are not like white people who live in towns and have their stores and other business, getting their living in that way, but we have always depended on the land for our food and clothes; we get our salmon, berries, and furs from the land [cited in Berger, 1981:58].

In 1888 the first significant legal case involving issues of Aboriginal title and the effect of the Royal Proclamation of 1763 in Canada was heard in Ontario.. In *St. Catherine's Milling and Lumber Co. v. R.*⁶ the issue in dispute was the legality of a logging permit issued by the federal government to St. Catherine's Milling and Lumber Co. The federal government claimed title to the land by virtue of a treaty with the Ojibwa and by virtue of section 91(24) of the *Constitution Act* 1867. Ontario, on the other side, argued

⁶ *St. Catherine's Milling and Lumber Co. v. R.* (1885) 10 or 196 (Ont.Ch.); (1886) 13 OAR 148 (ont.CA0); (1887) 13 SCR 577 (SCC); (1888) 14 AC 46 (PC).

that all lands that belonged to the province at the time of Confederation still belonged to them based on s. 109 of the *Constitution Act 1867*. The Ojibwa were neither consulted nor involved in the case.

Lord Watson ruled in favour of the province, saying that the federal government had the right to enter into treaties and extinguish Aboriginal title. However, he said, once the Natives are divested of proprietary interest, title to the land remains with the provincial Crown.

Watson's ruling on the Royal Proclamation further evidenced the ascendancy to dominance of legal positivism in British and Canadian jurisprudence: he ruled that Aboriginal title had no pre-existence, but was created by the British Crown through its recognition in the Royal Proclamation. Aboriginal title, as a creation of the British Crown, could remain in effect only "at the pleasure of the Crown" and could be eliminated by any contrary action by the Crown, however implicit. While positivism in social theory rules out evidence and knowledge from any source other than "brute facts" apprehended by the five senses recognized in western culture, legal positivism sidesteps the requirement that brute facts must exist independently out there and must come to human consciousness by way of the senses. Legal positivism expresses the unique ability of law to simply create rather than find facts. As we will see, the St. Catherines Milling decision, and the reasoning supporting it, is repeated by Chief Justice McEachern.

A census was taken in British Columbia in 1880 that listed Aboriginal peoples as a majority of the total population of 49,459. The census of 1891 counted 98,173 persons in the provincial population, of which one third were Indians. Paul Tennant says that,

...by the late 1880s there was unanimity among provincial politicians concerning the Indian question. Regardless of their faction or federal party loyalties, they believed the white myth that Indians had been primitive peoples without land ownership, and they accepted the white doctrine that extension of British sovereignty had transformed an empty land into unencumbered crown land. In the provincial view, the surviving Indians were mere remnants of an irrelevant past with neither the right nor the means to influence their own unhappy future (Tennant, 1990:52).

In summary, during the 1870s and 1880s a sudden and large influx of miners poured into British Columbia; a colonial administration was established and an array of laws governing lands, resources and policing were enacted; intensive white settlement began; missionaries arrived; smallpox decreased the Aboriginal population substantially; Aboriginal peoples took employment in the new industries and continued working on their lands; a wide range of resistance activities aimed at maintaining control over lands and resources were initiated at local, provincial, national and international levels.

3.2 OUTLAWING CULTURE

This period of time also constitutes the historical context of the origin of two additional arguments put forward by the Province of B.C. in the *Delgamuukw* case: implicit extinguishment and abandonment. The implicit extinguishment argument alleges that the Aboriginal people complied without important or serious resistance to colonial rule and therefore it is reasonable to assume that they were consenting to assimilation, both legally and culturally. Therefore, the argument goes, when federal and provincial laws were enacted and Indians obeyed them, they were effecting legal extinguishment of title. The "abandonment" argument alleges that, being anxious to assimilate and participate in the new economy, Indians voluntarily abandoned their territories and outlying villages, along with fishing, hunting, gathering and trapping, and became wage labourers, settled into villages that the government then "gave" them as reserves.

The Gitksan and Wet'suwet'en argued that they never consented to extinguishment and complied, sometimes, with various laws either because they agreed with them in spirit, or because they were forced by arms and numbers to accommodate the settlers and governments. As to abandonment, again, they argued that they have not abandoned hunting and trapping and fishing territories but continue to use them for purposes other than permanently residing on them. Another line of argument says that to the extent that people have ceased earning their living from the land, it has not been by their choice but rather by the force of necessity. Given the importance of this issue, both the Gitksan and Wet'suwet'en and the Crown called expert witnesses on settlement history, particularly on the relationship between Indians and law, government, and economic participation. Dr. Robert Galois, an historical geographer, testified for the Gitksan and Wet'suwet'en on this subject, and David Ricardo Williams, a popular historian, was called by the Crown to counter Galois' testimony.

Williams, for the Crown, argued that during what he called "the era of permanent penetration",

...the native people accepted governance by the white community, as evidenced by frequent participation by natives in economic and law enforcement activities in the claims area (Williams, D. 1987:1).

He notes further that the Indians were generally considered good workers and that they engaged in very little vandalism. "Therefore," Williams argues, "one can only conclude that the work could not have been accomplished except with the co-operation of the Indians" (ibid:7).

Galois, for the Gitksan and Wet'sutwet'en, noted that while new opportunities and sources of wealth in some ways enhanced and elaborated pre-existing practices, they

also produced adjustments in the internal division of labour and changes in the "seasonal round" of activities. And, with Europeans came, as always, disease and Christianity. Significant population decline brought about by diseases led to changes in settlement patterns, and some elements of Christian practices and beliefs modified the feasting system (Galois, 1987:22).

Ideological hegemony notwithstanding, when, in 1898, Beaver Indians assembled at Fort St. John demanding a treaty before they would allow gold seekers into their territory, the federal government complied and once the provincial government was assured that they would not be financially responsible for treaty annuities, they did not oppose the process. At the time there were few white settlers in the region. Treaty 8, signed in 1899 and covering a corner of northeastern British Columbia, acknowledged the pre-existence of Aboriginal title and the applicability of the terms of the Royal Proclamation of 1763 to British Columbia, including the requirement that consent must be obtained before extinguishment of title can be legally valid. As we will see, this event has similarly not been recognized as a precedent by succeeding British Columbia jurists.

The 1890s were also the years of the Klondike Gold Rush and the building of the Dominion telegraph line over Gitksan territory. The early years of this century saw increasing agricultural settlement and the beginnings of serious land speculation in anticipation of railroad construction.

The 1890s also witnessed the organizational consolidation of a province-wide protest movement among Aboriginal peoples, led by the Nisga'a who established their own newspaper and used it as a vehicle for organizing and educating Indians all over the province. This period also evidenced the beginning of an important theme in British

Columbia Aboriginal history. Some nations, like, for example, the Nisga'a, began early on in their contact with Europeans to successfully articulate their pre-existing economic and political structures with those of the Europeans. Under the tutelage of Anglican missionaries, and often being of mixed blood resulting from carefully arranged marriages during the fur trade period, many members of this elite have, since the late nineteenth century, been literate, educated, and fair-skinned. For example, Native participation in the commercial fishing and logging industries has formed the basis of what could be described as a dynastic network of wealthy families, particularly on the coast, who have succeeded very well for generations, by anyone's standards. The usual "barriers to assimilation" have been minimal, in other words. According to European, and anthropological, theories the expected outcome would be the rapid assimilation of these families into Canadian society. In British Columbia, however, these families have formed the backbone of the resistance movement and the movement for recognition of Aboriginal title. Money earned has been churned back into communities and nativistic movements through continued potlatching, despite legal prohibition, and has funded the development of political organizations, the employment of lawyers, the sending of delegations to Ottawa and London.

The Boer War that ended in 1905 ushered in an era of large scale expropriation of Gitksan and Wet'sutwet'en territory to provide veterans with "unoccupied farmlands" (Brody, 1987). Crown witness, Williams, described a number of incidents in this period where "Indians took up arms against whites pre-empting land," but concluded that these episodes do "not seem to have been provoked by aboriginal claims" (Williams, D. 1987:48).

In 1906 the Coast and Interior Salish peoples sent a delegation of chiefs to London where they were told that their grievances could only be dealt with by the Canadian federal government. In 1907, the Nisga'a Land Committee was organized within the framework of Aboriginal social structure: the sixteen members represented each of the four clans in the four villages. Wealthy and worldly wise aristocrats and fishermen, photographs of the Nisga'a Land Committee taken during this era show sixteen solemn men, well-dressed in tailored three-piece suits, watch chains and polished leather shoes.

The following year, 1908, a delegation of Gitksan chiefs travelled to Ottawa to present a petition protesting the wrongful expropriation of their territory. The summer of 1909 saw a gathering of Interior Nations and the formation of an organization named the Interior Tribes of British Columbia, that then amalgamated with the North Coast and Nisga'a to form the Indian Rights Association. Tennant describes official responses to these developments as follows:

As there had been in 1887, there was still in 1909 and later a belief among provincial politicians that Indians were getting their political ideas from Whites, especially from missionaries (Tennant, 1990:86).

However, Tennant argues, given the deeply antagonistic rivalry between missionary groups,

...had the missionaries been in charge, it is highly unlikely that the north coast Protestant and the south coast Catholic Indians would have combined forces as they did so firmly from 1909 to 1927 (ibid:87).

As we will see, the belief that "white agitators" are the cause of Aboriginal discontent remains prominent in British Columbia.

In 1910 a delegation of chiefs met with Prime Minister Wilfred Laurier during his tour of British Columbia and articulated their case. Laurier assured them he would look

into it and, if he found the facts warranted it, would not hesitate to forward their petition to the Judicial Committee of the Privy Council for adjudication. From 1910 to 1927, British Columbia Indians believed that their case was in the process of coming before the Privy Council in London.

Since 1763 the Judicial Committee of the Privy Council had recognized the "pre-existence" of aboriginal rights and their continuity unless explicitly extinguished according to the letter of British Colonial law throughout the empire. As Sanders points out:

The idea that there could be imperial intervention in indigenous policy in Canada was no Indian invention. The Royal Proclamation of 1763 represented imperial recognition of Indian political and territorial rights against local 'frauds and abuses' (Sanders, 1992:295).

In the first decade of this century, land speculation and settlement in various parts of British Columbia was proceeding at an accelerated rate. Meanwhile, the Indian Reserve Commission continued its work, now headed by A. W. Vowell. However, in 1911, the Province of British Columbia announced a new policy that terminated the "granting" of any further Indian reserves. The federal government responded that no further alienation of Crown lands to non-Indians in B.C. could occur until the outstanding issues between the federal and provincial governments had been dealt with. These issues were the extinguishment of Aboriginal title, and the application of the federal 80 acres per family land allocation standard. An impasse had been reached and the governments' response was to set up A Royal Commission on Indian Affairs in British Columbia, known as the McKenna-McBride Commission. Through a process of negotiation between the two levels of government, the terms of reference for the commission excluded the question of legal title their mandate was simply to adjust the size of reserve land. However, knowing that Aboriginal title was the single issue the Indians wanted to discuss, official documents preceding and following the McKenna-

McBride Agreement state unequivocally that the land title question would be dealt with separately, and most likely by a court. Some Aboriginal nations boycotted the hearings because of the exclusion of land title from the terms of reference, while others participated.

It was at this time that a new actor entered the play: a lawyer advocate, Arthur O'Meara. O'Meara served as sole legal advisor to the Indian Rights Association and formed the Society of Friends of the Indians of B.C. to raise money and sponsor public talks. O'Meara was detested by government officials.

I return now to evidence presented to Chief Justice McEachern describing this time period.

Expert witness for the Gitksan and Wet'suwet'en, historian Arthur Ray, concluded his expert opinion report on economic history in 1915. His assessment was that the Gitksan, Wet'suwet'en and Babine traditions were not incompatible with "progress" or "development", but they practised persistent resistance to external domination of their economy. He says:

They were largely successful in these efforts until the early years of this century when the federal and provincial governments passed conservation legislation which curtailed their economic flexibility and weakened their subsistence base. The economic activities of the Gitksan, Wet'suwet'en and Babine in the Upper Skeena River area had not created the problems that this legislation was intended to resolve. Rather, the laws were needed to protect resource-based industries, particularly the salmon canning industry that had been developed by Euro-Canadians outside of the region. However, the Gitksan, Wet'suwet'en and Babine, similar to other native groups had to pay the price (Ray, 1987:93-94).

The period from 1914 - 1921 witnessed the consolidation of white settlement and increased mining and agriculture, and the continuation of the pattern of local confrontation

and provincial and national political activity. While local level protest continued in the form of confrontation, petitions and meetings concerning land and resource use, the Gitksan also participated in provincial organizing efforts, including making a presentation to the McKenna-McBride hearings.

The McKenna-McBride Commission completed its work in 1916. The schedule of reserves which was the product of its efforts were given to a further body, the Ditchburn-Clark commission, who cut off and further "amended" the reserves set aside by McKenna-McBride without aboriginal consent. Orders-in-Council conveyed these reserves from the Province to the Federal Government. When the Royal Commission completed its work, Indian reserve land had been reduced by 47,058 acres valued at \$1,522,704.00 and new reserves totally 87,292 acres valued at \$444,853.00 had been added (Tennant, 1990:105-107). Many Aboriginal nations refused to accept the findings of the Royal Commission and turned their attention, as the Commissioners had advised them to do, to preparing their case for the Judicial Committee of the Privy Council in London.

O'Meara and the Nisga'a Land Committee prepared a lengthy petition that included a declaration of traditional Nisga'a ownership, reiterated the terms and conditions set out in the Royal Proclamation and explained that these terms had not yet been met (ibid).

There was, as ever, a hitch. Technically speaking, the Judicial Committee of the Privy Council could normally act only on a Canadian matter on appeal from a Canadian court decision. As long as neither Indians nor a government had initiated a court action and been allowed to appeal the decision, the Canadian officials could legitimately refrain from forwarding the Indian petitions to London.

In 1914 the federal cabinet passed an order-in-council stipulating that the federal government would refer the claim of the B.C. Indians to the Exchequer Court of Canada "with the right of appeal to the Privy Council" providing three conditions were accepted by the Indians: (1) if the court found in favour the Aboriginal title, the Indians would surrender this title completely in return for the same sorts of treaty benefits negotiated elsewhere in Canada, and would accept the recommendations of the McKenna-McBride Royal Commission; (2) any obligations of the province would be fulfilled by its granting the land for the reserves; (3) the province would take part in the court case represented by legal counsel of its own choosing, while the Indians would be represented by counsel nominated and paid by the Dominion government (i.e. NOT O'Meara). The Allied Tribes of B.C. rejected all three conditions, and continued their lobbying efforts, stressing their preference for negotiations with governments rather than litigation (Tennant, 1990).

Meanwhile, in another corner of the British Empire, a court case that would have ramifications for both the Allied Tribes petition in 1927 and the *Delgamuukw* decision in 1991, was being heard in 1919 in Southern Rhodesia. Adjudicated by Lord Sumner, the key finding was that there are some tribes "so low in the scale of social organization that their usages and conceptions could not be continued under the British regime."⁷ On the other hand, the judgment in *re: Southern Rhodesia* continues, there were indigenous peoples whose legal conceptions, although differently developed are hardly less precise than our own, and these systems of land title could continue. Sumner thus endorsed pre-existence of Aboriginal title and continuity after the assertion of British sovereignty, but added an important caveat: for title to continue the traditional system had to be based on individual rather than tribal ownership.

⁷ *In Re Southern Rhodesia* (1919) A.C. 211

Perhaps buoyed by this decision, Duncan Campbell Scott, now Superintendent of Indian Affairs, ordered the recommendations of the McKenna McBride Commission to be implemented without Aboriginal consent. However, In 1921 Lord Sumner's decision in *Re: Southern Rhodesia* was criticized and rejected by Viscount Haldane's ruling in another Nigerian case before the Judicial Committee of the Privy Council, *Amodu Tijani v. Southern Nigeria*⁸ where the *In Re Southern Rhodesia* judgment was rejected by Viscount Haldane, who argued that indigenous land tenure systems should not be judged by British standards but rather recognized on their own terms.⁹

Chief Justice McEachern noted that,

If it were necessary to find the Gitksan and Wet'suwet'en, as aboriginal peoples rather than villagers had institutions and governed themselves, then I doubt if this requirement has been satisfied...I think...there is much wisdom in the dictum of the Privy Council in *Re Southern Rhodesia* (Reasons, 1991:226).

This decision brought Lord Coke's seventeenth century decision in *Calvin's Case* into the nineteenth century, and Chief Justice McEachern insured its persistence by bringing Lord Sumner's decision into the late twentieth century.

⁸ *Amodu Tijani v. Southern Nigeria* [1921] 2 A.C. 399(P.C.) at 403

⁹ The text of Haldane's ruling read as follows: In interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely...The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community...The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or the circumstances (ibid)

The Allied Tribes of British Columbia recognized the Haldane decision as favourable to their cause and sent a formal petition to the Canadian Parliament in 1925 asking that a special committee be struck to initiate this process. A Special Joint Committee of the Senate and House of Commons was appointed in 1926 to enquire into the Petition of the Allied Tribes. Although invited, the provincial government of British Columbia declined to participate or to send observers. The fourteen member committee included four Senators from British Columbia, H. H. Stevens, Conservative MP for Vancouver Centre; Minister of Indian Affairs Charles Stewart; and future prime minister R. B. Bennett. The majority-Liberal committee began hearings in March 1927 (Tennant, 1990:106-108).

The question of documentation proved prickly. O'Meara presented quotations from instructions sent by the Colonial office to Douglas that evidenced the recognition of Aboriginal title in B.C.. The Chairman of the Committee intervened saying that O'Meara could not quote from documents not in evidence. Paull interrupted and explained that Duncan Campbell Scott had refused to give him access to the Papers Connected with the Indian Land Question, in which could be found all the evidence referred to. Stevens had, with him in the room that day the book, but refused to allow it to be entered into evidence because it was his private property and he feared losing it. Scott said the Department of Indian Affairs had only one copy and also would not risk entering it into evidence. Finally, O'Meara was allowed to read from it into the record (ibid).

The Committee rejected all the claims of the Allied Tribes, and set out six reasoned arguments in support of their position. First, without commenting on pre-existing title, they argued that the assertion of British sovereignty was itself evidence that no prior title had been acknowledged or could continue. Second, the Committee claimed

that the Hudson's Bay Company had achieved the "conquest" of B.C.. Third, they pointed out that all Indians were not in agreement with the claim since all did not belong to the Allied Tribes organization. They also referred to a presentation by two traditional Chiefs from the interior who, not being English speakers or knowledgeable in the language of legal disputes had not mentioned the words "aboriginal title" in their presentation. Fourth, the committee declared that the aboriginal title claim was only fifteen years old, since that was when it was first articulated as a legal claim. The committee ignored, therefore, the ample documentation of resistance through civil disobedience, violence and non-violent confrontation, petitioning, letter-writing and appearing before various committees of inquiry. Fifth, they found that Indians had implicitly consented to the denial of aboriginal title by their acceptance of government reserve policies, which the committee said "they accepted for years without demur." Sixth, the committee blamed "mischievous white agitators". Finally, they chastised the Indians for rejecting the findings of the Indian Rights Commission and the McKenna-McBride Commission and continuing to "take up the time of the government and Parliament with irrelevant issues" (ibid:109-113).

Looking back from a position post-dating the *Delgamuukw* decision, perhaps the bitterest irony of the 1927 Committee decision is their reasoning that because the Indians had not presented proof of the antiquity of their title through their own oral tradition, this proved that the claim was of recent invention and unduly influenced by whites. The Committee said:

Tradition forms so large a part of Indian mentality that if in pre-Confederation days, the Indians considered they had an aboriginal title to the lands of the Province, there would have been tribal records of such being transmitted from father to son, either by word of mouth or in some other customary way. But nothing of the kind was shown to exist (Canada (1927):viii, quoted in Tennant, 1990:110).

The Committee did not recommend that the claim be forwarded to the Judicial Committee of the Privy Council. Instead they made two recommendations. First, that an annual allotment of \$100,000. should be made to British Columbia Indians in lieu of treaty payments. Second, they recommended an amendment to the *Indian Act* that would state:

Any person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which, the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months.

This became Section 141 of the *Indian Act*, following Section 140 that outlawed potlatching. The official explanation, and the one accepted by both federal and provincial governments, was that this clause was necessary to protect impressionable Indians from exploitation by white lawyers. However, the language of the Act does not specify that it is applicable to non-Indians only, and, in effect the amendment made it impossible for any organization to exist if pursuing the land claim was one of its objectives.

Among British Columbia Indians the amendment is remembered much more bitterly, and mention is often made of it in discussions of Indian political history. In Indian memories section 141 is usually linked with the potlatch prohibition, and the combination of the two produces the still common belief, which presumably existed from 1927 until 1951 as well, that any gathering of Indians or any discussion of land claims was illegal without the permission of a missionary, Indian agent, or police official. Until this section was amended in 1951, no such public, legal activity did take place.

Chief Justice McEachern summarized this period in his Reasons for Judgment as follows:

It seems to me that there has always been much uncertainty about the true nature of "Indian title" in the province. Even some Indians have not always been completely consistent because there are references in the historical record to suggestions that enlarged reserves were their primary concern. In this respect, of course, the speakers, whoever they may have been, did not speak for anyone but themselves. I think it is fair to conclude that the basic position of most Indians, at least since about 1880, was that the various Indian tribes or peoples owned all or most of the province.

It is not difficult to summarize the position of the province...Since Confederation, the position of the province has been consistent, even unyielding, on the question of 'Indian title'...

In my view there is no profit in seeking to assign blame from such a great distance. It is timely and appropriate that these questions should now finally be resolved. This judgment is the necessary first step in that process.

...I do not consider myself bound by historical statements made either by Indians or Crown officials about questions of law. I am not persuaded any of them spoke with a complete understanding of either the law or the facts, and the law today is much different from what it was just a few years ago...Also, Indians and officials could honestly have been wrong, or even wrong-headed in some of the statements they made while still having an honest belief in what they said...My responsibility is to apply the present law to the facts as I understand them (Reasons, 1991:182-183).

From this point, the Chief Justice spends another two pages rationalizing the small size of reserves in B.C. on the basis of a fishing economy. He then goes on to discuss, as he will periodically throughout the judgment, his assessment of what the "Indian problem" *really* is (see Dyck, 1991). The Chief Justice says:

Without intending any offence, I have driven through some of the reserves which demonstrate disadvantages, and I have witnessed first-hand how some of them live. It is interesting to note that housing on reserves seems to be much better where there is (or was) a payroll such as from the sawmill at Kitwangak (Reasons, 1991:184).¹⁰

¹⁰ Noel Dyck has labelled the Chief Justice's methodology as "drive-by ethnography" (personal communication).

He then continues a discussion of high school drop-out rates and drug and alcohol abuse, and concludes his summary of the "relevant political history of the province from 1871 to the present" with a quotation from himself in reply to a former DIAND official called by the Crown as an expert witness. The excerpt reads as follows:

McIntyre: ...in my opinion I would say that the biggest--that the biggest problem facing these people today is one of lack of economic opportunity, and I think if they had a -- if they had an improved economic circumstance that many of their -- of their social problems might be lessened.

Court: I have heard in this evidence--in this case evidence about employment, which I gather would be included within your category of economic opportunity. I have heard about education, housing, alcohol and drugs, health, gambling. I dare say there are others. Could you rate them as degrees of seriousness, or is that a reasonable request to make.

McIntyre: ...I observe what appears to be considerable improvement of that. For instance, I see a number of good quality homes that have sprung up. I see--I see community halls and recreation facilities that have come into existence, I am aware that band councils are apparently taking on greater responsibility (Reasons, 1991:185).

Finally, the Chief Justice summed up the 1927 banning of political organizing by saying,

I do not consider it necessary to mention anything else which occurred between 1927 and the commencement of this action in 1984...(ibid:182)

3.3 SURVIVAL

British Columbia Indians continued to potlatch clandestinely, and to organize politically in various ways in an attempt to better their lot, achieve the right to vote, and survive such travesties of the 1930s and 1940s as the advent of residential schools (Brody, 1981; Haig-Brown, 1988; LaViolette, 1976; Tennant, 1990).

In 1947 British Columbia Indians were allowed to vote in provincial elections, and in 1949 Nisga'a Hereditary Chief Frank Calder was elected as Canadian Commonwealth Federation Member of the Legislative Assembly for Atlin, becoming the first Indian elected to any post-Confederation Canadian legislature.

In 1949 the Judicial Committee of the Privy Council was replaced by the Supreme Court of Canada as Canada's highest court of appeal. Although Canadian judges were still free to use decisions of the Judicial committee as precedents, they didn't.

"Conventional wisdom among judges, lawyers, academics and government officials held that aboriginal rights were both insignificant and irrelevant (Tennant, 1990:218)." Since Indians had apparently, publicly, complied with the banning of land claims activity set out in 1927, it was assumed by the powers that be that they too had forgotten about it. In a positivistic world, what a man cannot see, does not exist.

The Indian Act amendments in 1951 dropped from the books both Sections 140 and 141. Potlatches were held, in public, in numerous villages beginning in 1953. And, by 1959 Coastal and Interior Indian organizations were meeting to discuss ways and means of petitioning the Crowns to revive the issue of unresolved Aboriginal title in British Columbia.

Tennant marks the 1959 Native Brotherhood of British Columbia (NBBC) Convention as the first significant occasion since the 1927 banning of political legal activity on the land question where B.C. Aboriginal peoples had the opportunity to gather and openly discuss pursuing such actions once again. He argues that the leaders who organized this convention had two goals in mind: a short term objective focused on consolidating the NBBC as a provincial organization to represent all status Indians in B.C.

to a parliamentary committee; and a long term objective of pursuing the legal recognition of Aboriginal title (ibid:129).

CHAPTER 4: JUSTICE ON TRIAL

4.0 TWO RIFLE SHOTS

In British Columbia the first of the modern, post-1927, Aboriginal rights cases was "initiated by a number of rifle shots on Vancouver Island" (Tennant, 1990:218).

The case of *R. v. White and Bob*¹ involved two members of the Nanaimo Band of central Vancouver Island in British Columbia, who were arrested in the summer of 1963 following a hunt on the south slope of Mount Benson, a few miles inland from Nanaimo. Clifford White and David Bob were charged and found guilty under the *Game Act of British Columbia* (R.S.B.C. 1960) for being "in possession of deer during the closed season" (Berger, 1981:49). Each was fined \$100.00 (or 40 days in jail in default).

The case attracted the attention of Thomas Berger, then head of the British Columbia New Democratic Party and a practising lawyer in Vancouver. White and Bob argued that their right to hunt and fish for food on unoccupied Crown lands was guaranteed to them under the terms of a treaty signed between Saanich Chief, Whut-Say-Mullett and Governor James Douglas, also Chief Factor of the Hudson's Bay Company, in Fort Victoria on February 7, 1852.² Berger argued that this treaty was protected by the *Indian Act* which, as federal legislation, was paramount over provincial legislation such as the *Game Act*. The Province of B.C. argued that the document in question did not constitute a treaty as between the Crown and an Aboriginal nation but rather was a

¹ *R. v. White and Bob* (50 Dominion Law Reports (2d) [1965], 620.

² *The treaty at issue in the White and Bob case was one of the 14 "Douglas Treaties."*

commercial conveyance between a group who were not a state and had no international personality, and the Hudson's Bay Company, a private enterprise.

British Columbia provincial governments and their lawyers for the first time had to develop legal arguments to defend their historical denial of Aboriginal title. They began with the tried and true assumption of pre-contact primitiveness, and adopted the St. Catherine's Milling precedent to the effect that Aboriginal title could only exist if created by a sovereign's act. They proved to be quite creative in developing new arguments. They claimed that the Royal Proclamation, contrived retrospectively--i.e. understood within the context of its time--did not refer to British Columbia since European contact had followed the issuing of the Proclamation. They pointed to the present tense of the phrase "the Indians with whom we are connected" as evidence that the writers of the proclamation sought to exclude any Aboriginal groups with whom they were not yet connected. The present tense is the common grammar of statutes. Proclamations and constitutions are considered, legally, to "speak until they are repealed." This argument has been described by historians and legal scholars as "implausible," "indefensible" and "ridiculous." Chief Justice McEachern, however, found it convincing.

The next legal line of attack developed by the Province was that if there had, in fact, been some form of Aboriginal title, it was extinguished implicitly by the colonial legislature. An argument that B.C. shares with other jurisdictions is that whatever may have taken place in the past, Indians are now assimilated since they are no longer "racially pure," and their culture--measured by language, religion, clothing, food, weapons, mode of earning a living, housing and means of transportation--has become indistinguishable from non-Aboriginal culture. This is referred to in law as the "frozen rights" theory, since Aboriginal cultures are "frozen" at the moment of "discovery" and any

developments since that moment are principally the result of European influence (see Fabian, 1983).

Berger was successful in obtaining a new trial for White and Bob and went on to win a decision by the County Court of Nanaimo, which was then upheld by the B.C. Court of Appeal and the Supreme Court of Canada that the document was in fact a treaty and that White and Bob indeed had the right to hunt and fish for food on unoccupied Crown land (Berger, 1981:53). Mr. Justice Tom Norris of the B.C. Court of Appeal further ruled that the treaty was, like other treaties signed between the Crown and Canadian Aboriginal peoples, consistent with the direction of the Royal Proclamation of 1763. He wrote: "the aboriginal rights as to hunting and fishing affirmed by the Proclamation of 1763 and recognized by the Treaty...still exist." The legal significance of this decision was that "For the first time a judge, and a well-respected British Columbia judge of conservative leanings at that, had presented a comprehensive opinion endorsing both the pre-existence and the continuing existence of aboriginal rights in British Columbia" (Tennant, 1990:219).

As we have seen, anthropologists arrived on the stage led by Wilson Duff in the White and Bob case. Initially, anthropological research was principally concerned with documenting and describing various Aboriginal peoples' practices surrounding land and resource ownership and use, translating this data into language that lawyers and judges could understand, and considering whether or not these concepts of "Aboriginal title" are commensurable with concepts of property recognized by Canadian law. For example, during the *R. v. White and Bob* trial Wilson Duff responded to Berger's question concerning the meaning of the term "tribal territories" in the context of the Nanaimo (Saalequun) as follows:

Berger: When you say tribal territories, can you tell us what you mean by that? What use would the Indians have made of their tribal territories?

Duff: This could be a very complicated statement. Your Honour, because they used different kinds of territories in--with different intensity. They would use the rivers, of course, for fish with great intensity, and the beaches with great intensity, and the mountains and forest with somewhat less intensity, yet they would go at least that far back, not only to hunt the land mammal, deer, and also other land mammals, but to get bark and roots for basketry and matting and such things. These territories would be definitely used by them and would be recognized by other tribes as belonging to them (Berger, 1981:52-53).

1969 was also a political turning point for Aboriginal peoples in Canada (Weaver, 1981). The new liberal government published their now infamous White Paper Policy on Indian Affairs that stated:

...aboriginal claims to land...are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to Indians as members of the Canadian community (Canada, 1969:1).

And Prime Minister Trudeau, speaking in Vancouver on August 8, 1969, had said in reply to a question about recognition of Aboriginal title and rights:

Our answer is no. We can't recognize aboriginal rights because no society can be built on historical 'might have beens' (Tennant, 1990:172).

In 1969, the three B.C. provincial Indian organizations met in Kamloops, B.C. Debates ensued surrounding the appropriate response to the White Paper Policy and which legal and political strategies offered most promise of success. Unanimity, as ever, was found in the fundamental premise that Aboriginal title had existed and still did. In a later "All Bands Assembly" in Vancouver in 1970, as had been the case at Kamloops, the general impression of those in attendance was that non-Indian experts would prepare a historical-legal argument, and this would be presented to a parliamentary committee (ibid:227). So began the contemporary period of B.C. Aboriginal politics in which debates concerning the relative merits and effectiveness of civil disobedience, political negotiation

and litigation were ongoing. The preferred tactic, as evidenced by the resolutions of provincial and national conferences was always political negotiation. The strength of their legal position, and the refusal of successive British Columbia provincial governments until 1990, to recognize the legal existence of Aboriginal peoples in the province, has led British Columbia Indians into the courts primarily as a means to achieve a strong enough bargaining position to "bring the government to the table." In this objective, they have, finally in 1993, succeeded. However, it has taken over twenty years and millions of dollars to achieve this. And, being involved in litigation has usurped the energies of a generation and taken an unmeasurable toll in local and human resources. More to the point, while Aboriginal peoples have become increasingly involved as active players in and directors of litigation, legal requirements have, in turn, shaped Aboriginal political representation, and, to varying extents, have played a role of questionable value in movements for cultural revitalization and persistence. The next chapter provides an overview of the most significant Aboriginal title cases fought in Canadian courts since the *White and Bob* case.

4.1 CALDER

Within the 30 year period 1963-1993 a number of important cases have been litigated in Canada concerning Aboriginal rights of various kinds. The questions that have been before the courts in British Columbia where the question of Aboriginal title has dominated the legal agenda are worth summarizing again:

- (1) Did British Columbia Indians have title to their lands before the assertion of British sovereignty in the territory sometime in the mid-19th century?
- and -
- (2) If they did have such title, does it continue to-day or has it been extinguished (Tennant 1990:212)?

This chapter briefly examines five court cases--*Calder*, *Baker Lake*, *Guerin*, *Bear Island* and *Sparrow*--that have set the questions and accumulated the jurisprudence that followed the Gitksan and Wet'suwet'en into court in 1987. I will trace the evolution of three themes through these court cases that are important to this thesis in providing a context for understanding both the strategies and outcomes of *Delgamuukw*. First, the different answers that have been given by the courts to the two central questions set out above constitute precedents, trends and directions that were available to Chief Justice McEachern in his decision-making and that shaped the legal arguments developed by both Crown and Aboriginal litigants. Second, and directly related to the first theme, is the courts' development of increasingly complex "tests" that Aboriginal litigants must meet to establish their cases. The requirements set out in these tests have been particularly important for anthropologists and others who have been engaged in research for use in litigation, since these tests have determined the research questions addressed. And, the third theme, that arises from the second, is the growing importance of the role of Aboriginal elders and experts as witnesses, and the involvement of anthropologists and other professionals as expert witnesses.

Cases in British Columbia have focused on Aboriginal title. What is now called "the Calder case" went to trial in 1969³. The Nisga'a Tribal Council represented by Chief Frank Calder, asked the court for a declaration that:

- (1) the Nisga'a held title to their territory prior to the assertion of British sovereignty;
- (2) that this title had never been lawfully extinguished; and,
- (3) that this title is a legal right.

³ *Calder et al v. A.G.B.C. (1969)*, 8 *Dominion Law Reports (3d)*, 59-83, [S.C.B.C.].

The *Calder* case was four days at trial. Five chiefs: Calder, Gosnell, McKay, Nyce and Robinson; one provincial archivist, Willard Ireland; and one anthropologist, Wilson Duff, testified (Kulchyski 1994:87-98). In support of their claim that their Aboriginal title had never been ceded, sold, surrendered or lost in war, the Nisga'a relied upon written archival evidence of having begun petitioning the Queen and Colonial officials for recognition of their title since first contact in the eighteenth century.

Both the chiefs and the expert witnesses focussed on demonstrating extensive Nisga'a use and occupation of the Nass Valley (Berger, 1981). Wilson Duff presented the Nisga'a system of property ownership as different from but analogous to English common law ownership as illustrated by the following excerpt from court transcripts:

The court: I want to discuss with you the short descriptive concept of your modern ownership of land in British Columbia, and I am going to suggest to you three characteristics (1) specific delineation of the land, we understand is the lot.

Duff: Yes.

Court: Specifically delineated down to the lot, and the concept of the survey; (2) exclusive possession against the whole world, including your own family. Your own family, you know that, you want to keep them off or kick them off and one can do so; (3) to keep the fruits of the barter or to leave it or to have your heirs inherit it, which is the concept of wills. Now, those three characteristics...are you with me?

...

Duff: Delineation but not by modern surveying methods.

Court: Of course, I understand, yes.

Duff: Exclusive ownership resting not in an individual.

Court: Possession or occupancy. not ownership?

Duff: Oh, I see. Possession or occupancy resting in a specific group rather than an individual. The right of alienation, which in practice would leave the land within the same tribe. It was limited (ibid-97).

The Supreme Court of British Columbia responded with the following decision. The court ruled that (1) the Nisga'a were too primitive in the nineteenth century to have held concepts of property that could be considered on an evolutionary developmental par with British law; (2) if any form of Aboriginal title had existed it had been "implicitly" extinguished by provincial land legislation prior to Confederation; and (3) the Nisga'a therefore had no legal rights.

The Supreme Court of Canada, however, found differently when the case was appealed to them in 1973.⁴ Of the seven members of the panel, one dismissed the case on a technicality and did not comment on the issues at trial. The remaining six found unanimously that the Aboriginal title existed prior to European arrival, and that it was based in long term prior occupancy. The *Calder* decision therefore marks a significant departure from the positivist theory of Aboriginal rights which gave legal standing only to rights recognized by a sovereign. The Appeal judges split three/three on the question of whether this title had been extinguished or not, debating as to whether extinguishment could be implicit by virtue of ignoring Aboriginal title, or had to be explicit by the sovereign expressing his "clear and plain intention" to extinguish Aboriginal title.

The Supreme court appeal panel judges relied extensively on both the written record and the testimony of the expert witnesses, reserving their highest praise for the contribution of Wilson Duff, anthropologist. Justice Hall, who wrote the most favourable judgment, was impressed by Duff's testimony presented within an evolutionary framework that:

...the Nishga's in fact are and were from time immemorial a distinctive cultural entity and concepts of ownership indigenous to their culture and capable

⁴ *Calder et al v. A.G.B.C. (1973)*, 34 *Dominion Law Reports (3d)* [1973], 145-226

of articulation under the common law having, in the words of Dr. Duff, 'developed their cultures to higher peaks in many respects than in any other part of the continent north of Mexico.'⁵

Lawyer for the Nisga'a, Thomas Berger, wrote confidently in a 1981 anthology in honour of Wilson Duff that the *Calder* case had:

...demonstrated the relevance of anthropological and historical knowledge to the proving of native land claims. It is now not at all unusual for anthropologists to give evidence in native rights cases. Anthropological evidence, "once studied and understood" gave rise in Canada to a new and further recognition of aboriginal rights...Anthropological evidence will be important, now and in the future, in establishing the full extent such claims (Berger, 1981:64).

The Supreme Court ruling in the *Calder* case was considered a victory by B.C. Indians and their supporters. Six supreme court judges agreed that Aboriginal title in fact existed, and three allowed that it may continue to exist. Furthermore, Prime Minister Trudeau, who had previously described Aboriginal rights as "historical might have beens," now allowed that they "may have more rights than we thought." The Liberals instituted the Comprehensive Claims policy and invited Aboriginal nations to claim land traditionally used and occupied by their ancestors and still used by themselves, i.e. to establish evidence within the terms of the Supreme Court of Canada's criteria in *Calder*. This generated significant research opportunities and political activity.

In 1972, the New Democratic Party (NDP) replaced the Social Credit Party as the provincial government in British Columbia. British Columbia Indians had been hopeful that such a change in government would mean that the NDP would honour the implicit promise made through their years in opposition when they had vehemently criticized the Social Credit Party's refusal to acknowledge or negotiate Aboriginal title. Frank Calder

⁵ *Calder v. Attorney-General of B.C.* (1973) 34 D.L.R. (3d) [1973] 175.

was appointed to the NDP Cabinet, but as a Minister without Portfolio and found his position lacking in influence or prestige and ultimately demeaning. The NDP did not, during their brief period in power, change the century-old position on Aboriginal title in British Columbia.

4.2 BAKER LAKE

When Calder went to court the trial took four days. No explicit "legal test" existed at the time, and judges "saw aboriginal title as a factual matter arising from actual historic occupation of ancestral lands" (Henderson, 1991:9-10). Such a test requires minimal evidentiary support, is relatively uncomplicated and accessible to common sense reasoning and understanding. Justice Mahoney's 1980 decision in *The Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* and his articulation of a precise legal test for Aboriginal plaintiffs to meet, set the terms of research questions in the land claims area for a decade to come (see Elias, 1993).

The Plaintiffs in this case were the Hamlet of Baker Lake, the Baker Lake Hunters and Trappers Association, the Inuit Tapirisat of Canada, and individual Inuit living, hunting and fishing in the Baker Lake area. The Defendants were the Attorney General of Canada and the Minister of Indian Affairs and Northern Development in Right of Her Majesty the Queen, and a consortium of mining companies.⁶ The plaintiffs asked the court for an order restraining the government from issuing land use permits, prospecting permits, granting mining leases and recording mining claims which would allow mining activities in the Baker Lake area, and an order restraining the defendant mining

⁶ *Hamlet of Baker Lake et al v. Minister of Indian Affairs and Northern Development et al* [1980] 5 WWR 193, 50 CCC (2d) 377 (FCTD)

companies from carrying on such activities there. They also asked for a declaration that the lands comprising the Baker Lake area are subject to the Aboriginal right and title of the Inuit residing in or near that area to hunt and fish thereon.

The government defendants in their initial pleadings admitted that the Plaintiffs and their predecessors had occupied and used the Baker Lake area since time immemorial. They withdrew this admission during the trial. The mining companies denied the existence of aboriginal title either pre or post contact. Both government and mining companies argued that if an aboriginal title ever existed it was entirely extinguished either by the Royal Charter of 1670 granting Rupert's Land to Canada, or by subsequent legislation.

Mahoney found the evidence of the Inuit elders and that of Superintendent Dent of the R.C.M.P. "complementary" (Reasons, Mahoney, 1980:202). The principal point he took from this evidence was that prior to moving into settlements in the early 1950s the Inuit were "nomads" for whom,

The exigencies of survival dictated a society composed of small, scattered groups. The band itself had no political hierarchy; that existed only at the camp level. Major decisions all involved the hunt, conducted at the camp level, and were made by the oldest hunters. Neither individuals, camps nor bands claimed or recognized exclusive rights over a particular territory ... There is no evidence or reason to infer that the Inuit's nomadic ways, relationship to the land and social and political order changed from prehistoric (circa 1610) times until their settlement (circa 1950) (ibid).

He concluded that,

I have no doubt as to the sincerity of all the Inuit witnesses when they testified to their feelings about the land... Their attachment to the land and life on it is genuine and deep (ibid).

Again, expert witnesses were called. Dr. Elmer Harp Jr., Professor Emeritus of Archaeology at Dartmouth College, Hanover, New Hampshire, and Dr. J. V. Wright, head of the Scientific Division of the Archaeological Survey of Canada, particularly impressed Justice Mahoney with their detailed and recognizably "scientific" evidence, and with the fact that they agreed with each other on fundamental issues (ibid:208).

Wildlife biologists, ethologists and other experts on animal behaviour were called to the stand by both parties. Those called by the Plaintiffs supported the Inuit hunters' claims that the caribou herds were declining and being driven away by mining activities. Those called by the government and mining companies, claiming to base their knowledge on scientific surveys reaching far beyond the immediate area of Baker Lake, claimed the causes of the herds' decline were multiple. Mahoney ruled that "on the balance of probabilities...activities associated with mining exploration are not a significant factor in the population decline" (ibid:210).

Justice Mahoney was less impressed with Dr. Milton Freeman who he described as "a social anthropologist, which is to say that he is neither an archaeologist nor a linguist; he studies the social behaviour of people in the context of their society or culture" (ibid:211). Mahoney dismissed Freeman's evidence on the technical point that Rule 482 of the Rules of Evidence require that an expert witness' testimony in chief be laid out in his or her affidavit in order for the opposing lawyers to have adequate opportunity to review the expert opinion report and prepare for cross examination (ibid:212). On the stand, Dr. Freeman elaborated on the nature of "band level societies," a term he had not used in his affidavit. The crown and the mining companies objected to his testimony following his statement that the small hunting units described by local non-Inuit observers are,

units of a much larger coherent organized society and very much interacting, interdependent, mutually dependent on interaction with other units within the society...this all constitutes a very coherent society which anthropologists have no problem in identifying...(ibid:212)

Mahoney ruled that "this was not what was promised" in the affidavit which said Dr. Freeman would discuss the relationship between the Inuit and their environment. Dr. Freeman was engaging in "persuasive arguments," the judge said. He concluded:

Those encampments of two or three families were the units described by the Inuit witnesses, encountered by Inspector Dent in the mid-1950s, by Norton in 1762, and discovered to have existed in the Thule period (ibid:213).

Mahoney was similarly not persuaded by Dr. Peter Usher's evidence. Usher holds a Ph.D. in Geography. { Quoting the Shorter Oxford Dictionary definition of geography as the "science that describes the earth's surface, its form and physical features, its natural and political divisions, its climates, productions etc.," Mahoney concluded that Dr. Usher's evidence didn't constitute his field of expertise, geography. } Mahoney wrote:

Dr. Usher's evidence had more the ring of a convinced advocate than a dispassionate professional. There was a lot of prognosis...Neither his formal training as a geographer nor his experience in and with the Arctic and Inuit qualify him to form opinions on political, sociological, behavioural, psychological and nutritional matters admissible as expert evidence in a court of law (ibid:214).

In summary, Mahoney, like judges before and after him, appears to prefer to rely on his own common sense interpretation of Native testimony, given "factual" confirmation by "ordinary white people," and/or clearly recognized "scientists." They appear to distrust the evidence presented by even well educated and well respected--by the criteria of western scholarship--scholars of "softer sciences" like anthropology or social geography. This is, of course, a political choice and not simply an intellectual preference or a learned reflection on epistemology.

On the legal source of Inuit Aboriginal title, Justice Mahoney set out the following four point test which he said the plaintiffs must prove to establish an aboriginal title cognizable at common law:

- (1) That they and their ancestors were members of an organized society.
- (2) That the organized society occupied the specific territory over which they assert the aboriginal title.
- (3) That the occupation was to the exclusion of other organized societies.
- (4) That the occupation was an established fact at the time sovereignty was asserted by England (ibid:220).

We can see in the "Baker Lake test" the recognition, and construction, of complexity around the Aboriginal title issue.

The Baker Lake plaintiffs passed the test, but only just. Mahoney wrote:

The fact is that the aboriginal Inuit had an organized society. It was not a society with very elaborate institutions but it was a society organized to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do: hunt and fish and survive. The aboriginal right asserted here encompasses only the right to hunt and fish as their ancestors did (ibid:219).

Here the legacy of evolutionary anthropology, and the sedimentation of evolution in public, intellectual, and political culture is evident. Unlike the Nisga'a, who as Hall had commented based on Duff, had "developed their cultures to higher peaks," the Inuit were less developed.

On the question of extinguishment, Mahoney ruled that neither the Royal Charter of the Hudson's Bay Company, nor admission of Rupert's Land into Canadian confederation had extinguished the common law aboriginal title the Inuit held. Neither, he found had legislation subsequent to 1870 had the effect of extinguishment. His

conclusion, in summary, was that the plaintiffs are entitled to a declaration that they have an aboriginal right and title to hunt and fish on the lands in question. Mahoney argued that the aboriginal right could not have been proprietary because then it would have been extinguished. ✓

4.3 GUERIN

The next significant court case in the 1970s was launched in British Columbia. In 1950 federal officials of the Department of Indian Affairs had arranged for the Musqueam Band, whose reserve forms a small enclave located in the most elite neighbourhood of southwest Vancouver, to lease a portion of land to the Shaughnessy Golf and Country Club. In 1970, then Chief Delbert Guerin, learned that DIAND officials had lied about the true value of the land and advised the band to enter into a lease on terms significantly favourable to the Golf and Country Club. The Musqueam Band sued the federal government for breach of trust and the federal court awarded the band \$10 million in damages. The Federal Court of Appeal overturned this decision. The Musqueam again appealed to the Supreme Court of Canada, who found that, indeed, the Crown and its agents have a fiduciary obligation to act in the best interest of Indians and that this had not been done in the case before them. However, it is to the portion of their decision that bears directly on the issue of Aboriginal title that I will now turn.

In his majority judgment, Chief Justice Dickson ruled that:

...Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.⁷

⁷ *Guerin v. R.* (1984) 2 S.C.R. 335, 13 D.L.R. (4th) 321

Dickson's ruling in *Guerin* repeats the fundamental points that the Crown holds underlying title, that Aboriginal title is not proprietary, and that it can be surrendered only to the Crown. The significance of Dickson's ruling is that Aboriginal rights can apply to off reserve lands, and that the fiduciary duty is itself legally rooted in Aboriginal title, and not, as was argued, in the discretionary benevolence of the Crown or the Department of Indian Affairs. Madame Justice Bertha Wilson, in her judgment entered confirmed in law the requirement of Native consent to disposition of their lands. She wrote:

...the bands do not have the fee in the lands; their interest is a limited one. But it is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title, unless, of course, the Indians agree (ibid).

Macklem identifies Wilson's insistence on consent as another "moment of transformational possibility" (Macklem, 1991:413). That is to say, a precedent was created here by Wilson which could be adopted by judges when ascertaining whether or not particular Aboriginal peoples have consented to extinguishment of title. As we will see, Chief Justice McEachern did not avail himself of the potentialities of this moment.

Meanwhile, on the political front in the 1980s Aboriginal energies were consumed by participation in two processes: the comprehensive claims policy, and the repatriation of the Canadian constitution. Aboriginal groups across the country complained about the slow movement of claims through the federal Office of Native Claims. The federal government's policy allowed them to only negotiate one claim at a time in each province or territory. In British Columbia the entire process was stalled because of the provincial government's continued refusal to participate. As a result the Nisga'a claim which had been filed first lay dormant, and all other groups knew that theirs would not even be considered until after the Nisga'a. Throughout the 1980s, various B.C. Aboriginal nations

mounted campaigns of civil disobedience halting industry and transportation across their lands, and applying to the courts for injunctions to halt development until their claims were heard and adjudicated.

The second arena for political struggles during the 1980s was that of the Constitution. As part of the process of repatriation, Aboriginal peoples sought to have recognition of inherent title and rights entrenched and given constitutional protection. Some British Columbia Indians, fearing that repatriation would jeopardize their relationship with the Imperial Crown that they considered still to be active, mounted an international campaign to stall repatriation of the Constitution until Aboriginal issues were dealt with. Negotiations took place during a series of five First Ministers' Conferences held in 1983 - 1987, ending with the non-resolution of the Meech Lake Accord. For the purposes of this thesis, all that requires clarification is the most basic issue surrounding the relationship between the Constitution and legal strategies. Section 35(1) of the *Constitution Act* 1982 states that:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

This clause has been described as an "empty box" which litigation and further negotiations must fill. In other words, it was left to the courts to answer questions about what rights are already "existing," are these rights inherent or delegated, what is the content of these rights.⁸ As we will see, these questions continue to preoccupy the courts, to which we will now return.

⁸ For a thorough discussion of the origins of the Constitutional debates see Asch, 1984; see Sanders, 1983 for a cogent analysis of legal issues; see Hawkes, 1989 for a discussion of the negotiation process; see Shwartz, 1986 for a critical approach to the Aboriginal case.

4.4 BEAR ISLAND

In the case of *The Attorney-General for the Province of Ontario (The Plaintiffs) vs. the Bear Island Foundation and Gary Potts, William Twain and Maurice McKenzie Jr. on behalf of themselves and on behalf of all other members of the Teme-agama Anishnabay, and the Temagami Band of Indians* (the Defendants),⁹ the Crown claimed unencumbered title to 4000 square miles of land in Northern Ontario. The Defendants argued that Crown title was burdened by Aboriginal title recognized by the Royal Proclamation of 1763, and by unfulfilled obligations under the Robinson-Huron Treaty of 1860. The Bear Island trial remains the longest recorded civil hearing in Ontario history, lasting for 120 days of hearings (see Bray and Thompson, 1990; Clark, 1990).

For my purposes here, I will review only the findings of Justice Steele on the expert evidence in history and anthropology, and most particularly on the character of the witnesses, and his further elaboration of the legal test for Aboriginal title.

Regarding expert witnesses, Steele said:

In summary, I believe that a small, dedicated and well meaning group of white people, in order to meet the aspirations of the current Indian defendants has pieced together a history from written documents, archaeology and analogy to other bands, and then added to that history a study of physical features and other times, together with limited pieces of oral tradition.

...This leads me to doubt the credibility of the oral evidence introduced and affects the weight to be given to the evidence of non-Indian witnesses (Steele, Reasons, 1985:20).

⁹ *A.G. Ontario v. Bear Island Foundation* (1984), 49 O.R. (2d) 353, 15 D.L.R. (4th) 321 (Ont. H.C.)

A.G. Ontario v. Bear Island Foundation [1989] 68 O.R. (2d) 394, 38 D.L.R. (4th) 117 (Ont. C.A.)

A.G. Ontario v. Bear Island Foundation (1991), 83 D.L.R. (4th) 381

Justice Steele's findings on history rested on his conclusion that since neither the French nor the English considered Indians as equal to Europeans, the Royal Proclamation of 1763, interpreted within its historical context, could not reasonably be seen to recognize Aboriginal title. He wrote:

To conclude, in 1763, George III, with the advice of his United Kingdom Ministers, did not grant ownership of vast tracts of land to Indian bands subject to a limited right of repossession by repurchase, surrender or conquest when a war had just been fought to acquire those lands. At that time, Europeans did not consider Indians to be equal to themselves and it is inconceivable that the king would have made such vast grants to undefined bands, thus restricting his European subjects from occupying these lands in the future except at great expense (bid).

Ironically, Justice Steele's analysis accords with that of the radical American Indian scholar, Robert Williams, Jr. who says of the proclamation,

Its discourse was one of interest and expediency as articulated by armchair empire builders in the Old World, who viewed the honoring of promises made to savages in the New World as the cheapest, most "expedient" means of containing both frontier defense costs and inland expansion by British American colonists (Williams, 1990(b):217).

Steele also found that the evidence presented did not, to his satisfaction, prove that the Teme-agame Anishnabay were, in fact, members of an organized society in 1763 (Steele, Reasons, 1985:21).

The Bear Island case provides an opportunity to reflect on how the Canadian courts began to approach history in the context of Aboriginal rights litigation during the 1970s and 1980s. This will provide some insights into the legal tradition in which Chief Justice McEachern heard the *Delgamuukw* case. In 1973 when the decision in *Calder* was arrived at, Justice Hall relied extensively on Wilson Duff's interpretations of Nisga'a oral tradition and wrote in regard to colonial documents that they,

...must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and

culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman specie (Hall, Reasons, 1973:145).

In 1977, in the case of *Kruger and Manuel v. The Queen*¹⁰, then Chief Justice Dickson argued that traditional legal approaches may not be adequate to the task at hand since "claims to aboriginal title are woven with history, legend, politics and moral obligations" (Dickson, Reasons, 1977:377). In the *Simon v. R.*¹¹ case in 1985, the Supreme Court again found that the past and present should be separated when they overruled Justice Paterson's 1929 decision in *R. v. Syliboy*. In that case, Paterson had found that a particular agreement between the Crown and the MicMac in 1752 was not a treaty representing the "unconstrained Act of independent powers," but rather an agreement between a civilized power and savages. The 1985 Supreme Court of Canada decision read in part:

It should be noted that the language used by Patterson J...reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law, and, indeed, is inconsistent with a growing sensitivity to native rights in Canada (Dickson, Reasons, 1985:400).

Legal scholar, Joel Fortune, summarized significance of the decisions in *Kruger* and *Simon* as follows:

The combined effect of these two decisions is the legal recognition of the potentially determinative effect of particular histories upon issues that involve aboriginal rights. Notably absent from these references to history, however, is any sustained discussion of how knowledge of the past is to be arrived at and how it is to be applied (Fortune, 1993:86).

¹⁰ *Kruger and Manuel v. The Queen* [1977] 4 WWR 300, [1978] 1 SCR 104, 75 DLR (3d) 434, 14 NR 495, 34 CCC (2d) 377

¹¹ *Simon v. R.* (1985), 24 D.L.R. (4th) 390

In the same year, 1985, in the Supreme Court of Ontario, Steele handed down his decision in the Bear Island case that resembled Patterson's 1929 ruling in both theory and substance. While the Supreme Court of Canada in 1991 rejected Steele's finding that "the defendants failed to prove that their ancestors were an organized band level society in 1763," they simultaneously ruled that they were unable to find any "palpable and overriding error" in Steele's findings of facts, although they did not necessarily agree "with all the legal findings based on those facts (Dickson, Reasons, 1991:381).

Fortune asks the obvious question:

How is it possible to distinguish Steele J.'s 'correct' determination of the facts from his 'incorrect' finding that the Teme-agama Anishnabay did not constitute an organized society in 1763? (Fortune, 1993:87)

Fortune answers his own question by concluding that the Bear Island decision is an illustration of "the judicial reluctance to acknowledge openly that a legal outcome may rest on a question of historical interpretation (ibid:88)."

The Bear Island judgment refashioned the Baker Lake test into a more complex 3-part test adding requirements for proof of the nature of aboriginal rights enjoyed prior to the relevant date, as well as a system of land-holding and a system of social rules and customs. And, that this continuity of exclusive occupation be evident to the date of commencement of the court action (Henderson, 1991:11-12). In Bear Island the claimants had to show exclusive occupation until the time they started their claims action. This set a precedent, as Elias points out, whereby the claimant groups had to show that they have excluded not only other groups of Indians, but well-armed non-Indian explorers, miners, traders, settlers, and police as well (Elias, 1993). Elias concludes that if the tests are elaborated much further, it won't be possible to meet them. He says,

The tests set out by Mr. Justice Steele in *Bear Island Foundation*, for example, may have crossed the line of social science comprehension. It is difficult to imagine what resources are available that could be used to reconstruct aboriginal practices at the time of the Royal Proclamation of 1763, and then to show that those practices were unique to the Temagami people, especially at the level of definition and detail demanded by the court (*ibid*:265).

The evidentiary requirements therefore expanded exponentially, and with them the role and importance of anthropology and anthropologists. The "land use and occupancy" studies that were previously required to establish long term, prior occupancy, now required more supplementation by research into cosmology, language, spirituality, governance, law, family life, and world views. The increase in volume and complexity of evidence was generated by the court's responses to these cases, and the political context shaping both.

4.5 SPARROW

The next, and final, case of importance that preceded *Delgamuukw v. R.*, was *R. v. Sparrow*,¹² began in 1984, the same year that the Gitksan and Wet'suwet'en filed their statement of claim. On May 25, 1984, Reginald Sparrow, member of the Musqueam band, was charged with fishing salmon using a drift net that was longer than permitted by the Department of Fisheries issued permit for Indian food fishing. Sparrow defended himself by saying he was practising an "existing Aboriginal right" under Section 35(1) of the Constitution Act 1982. Sparrow was found guilty in provincial court in B.C.. The British Columbia Court of Appeal agreed that Sparrow's aboriginal right to fish had not been extinguished prior to 1982, but that the mesh size regulations of the Department of Fisheries were applicable. Therefore, they found that food fishing was an aboriginal right, limited by conservation measures adopted by the Department of Fisheries.

¹² *R. v. Sparrow* (1990), 70 D.L.R. (4th) 385

At issue on appeal before the Supreme Court of Canada in the case was whether the Musqueam Nation could assert an aboriginal right to fish that would override federal regulations requiring a fishing permit and restricting the method of fishing to the use of a drift net with a maximum length of 25 fathoms. The Musqueam asserted that their right to fish was an "existing aboriginal right... recognized and affirmed by s. 35(1) of the Constitution Act, and therefore paramount over federal law." To be regulated in the exercise of their right by Department of Fisheries and Oceans regulations was inappropriate and unconstitutional.

The Supreme Court of Canada agreed and in its decision of May 31, 1990 found as follows on the key points. First, Aboriginal rights that exist at common law are recognized and affirmed by s. 35(1) and, as a result, laws that interfere with the exercise of such rights must conform to constitutional standards of justification. This interpretation, recognition and affirmation of existing aboriginal rights went further in specifically allowing that the practice of such rights should be reasonably seen as necessarily evolving over time, writing that "a modernized form of such a practice would be no less an aboriginal right" (Dickson and LaForest, Reasons, 1990:417).

In general, Dickson C.J. and LaForest J. called for "a generous, liberal and purposive interpretation of s. 35(1)" (ibid:427). Any Aboriginal rights extinguished before 1982 could not be revived by s.35(1), however, the Sparrow decision insisted that the Crown must show clear, plain and explicit intent to extinguish Aboriginal title and that laws of general application applied to Indians should not be construed as having effected "implicit extinguishment." Where a resource, like fish, is scarce, Aboriginal rights should take precedence over commercial and sports interests and be limited only by the requirements of conservation of the resource. The Court affirmed the findings in *Geurin*

in relation to the Crown's fiduciary obligations and noted that the relationship between Aboriginal peoples and the Crown was "trust-like" rather than "adversarial." Further, adequate consultation with Aboriginal peoples was clearly a pre-condition against which the constitutionality of laws that infringe on aboriginal rights could be ascertained. They wrote:

...the aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries (ibid:420).

On the source of the Aboriginal right, the Supreme Court in *Sparrow*, were satisfied that the Musqueam had met all the tests set out in *Bear Island*. They found that,

It is clear that the Musqueam have a history as an organized society going back long before the coming of the whitemen...and that the taking of salmon from the Fraser River was an integral part of their life and has continued to be so to this day (ibid:398).

At the same time, they noted that,

...a practice which had not been integral to the organized society and which became prevalent as a result of European influences would not qualify for protection (ibid).

The *Sparrow* court, however, while not explicitly adding to the test, implicitly gave it a very contemporary interpretation by requiring that an aboriginal right be "integral to the distinctive culture" of the people involved:

The nature and content of an aboriginal right is determined by asking what the organized aboriginal society regarded as "an integral part of their distinctive culture."...To be so regarded those practices must have been integral to the distinctive culture of the above society from which they are said to have arisen (ibid:401).

...

In the Court's view, the reason for concluding that the Musqueam Nation enjoys a right to fish lies not in the presence of state action conferring such a right, but instead arises from the fact that fishing is integral to Musqueam self-identity and self-preservation (ibid:401).

The content of aboriginal rights thus is to be determined not by reference to whether executive or legislative action conferred such a right on the people in question, but rather by reference to that which is essential to or inherent in the unique relations that native people have with nature, each other, and other communities (ibid:402).

The Court acknowledged their reliance on expert evidence, particularly the testimony of Dr. Wayne Suttles:

The evidence which established that the Musqueam lived on the north shore of the Fraser River as an organized society long before European settlement of surrounding area. Evidence also disclosed that the taking of salmon was an integral part of their lives, being an important source of food and central to the system of ceremony and beliefs of the Salish people, of which the Musqueam were one of several tribes (ibid:402).

The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected with their cultural and physical survival (ibid:402)

[It is worth noting the careful omission of a traditional "commercial" use.]

On the central question of history and justice, the Sparrow decision, despite clearly being the centrepiece of the liberal Dickson court's directions followed throughout the 1980s, remained adamant on the fundamental point:

It is worth recalling that while British policy toward the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereign and legislative power, and indeed the underlying title, to such lands vested in the Crown (ibid).

In summary, the Sparrow decision interpreted s.35(1) to constitutionalize the protection previously accorded to native peoples under the common law of aboriginal title; interpreted "existing aboriginal rights" not as residue of freedom left over after state regulation but regulation of common law; subjects legislative initiative which regulate or

extinguish common law rights to constitutional scrutiny; and calls for liberal and purposive interpretation of s.31(1).

At the same time, the Sparrow judgment maintains a relationship of legal dependence between native peoples and the Canadian state since underpinning their interpretation is the proposition that native people are in a hierarchical relationship with the Crown, albeit tempered by the attachment of a fiduciary obligation, and upholds the underlying assumption of sovereign authority over aboriginal peoples. The Sparrow case was being heard simultaneously with the Delgamuukw case and the Supreme Court of Canada's decision was rendered one year before that of Chief Justice McEachern's lower court decision.

By the time the Gitksan and Wet'suwet'en initiated *Delgamuukw v. R.* in 1987, the federal comprehensive claims policy had almost ground to a halt strangling in red tape, the provincial government of British Columbia still refused to recognize the existence of First Nations or join in any negotiations with the federal government, the Constitution talks appeared at a standstill regarding the inclusion of clauses on native rights. At the same time, several significant victories had been won by Aboriginal peoples in court, and the Supreme Court of Canada headed by Chief Justice Brian Dickson had shown itself to be sympathetic to aboriginal claims. Legal scholar, Douglas Sanders, writes that between 1983 and 1987, decisions of the Supreme Court of Canada had established the following:

- (1) a favourable interpretation rule for treaties, statutes, the Constitution, and whether a document is a treaty;
- (2) a legally enforceable fiduciary obligation on the part of the Crown in the management of Indian assets;
- (3) a rule that aboriginal or treaty rights can only be extinguished by governmental actions that are clear and plain; patterns of regulation that

go as far as making the rights unusable do not constitute an extinguishment;

- (4) unextinguished rights are protected by section 35 of the constitutional amendments of 1982, and regulations or restrictions on those rights, whether enacted before or after 1982, are only valid if they meet certain court created tests; and;
- (5) a general principle that the courts must ensure that the honour of the Crown is upheld in its dealings with Indians (Sanders, 1992:279).

There are two points that are important to bear in mind regarding the context in which the Gitksan and Wet'suwet'en chose to go to court. The first is, as Medig'm Gyamk (Neil Sterrit) explains, the deadlock created by the British Columbia provincial government's refusal to recognize or negotiate with Aboriginal peoples:

You have to go back to the mid-70s and the early 80s to understand why we did what we did. Because the provincial government refused to negotiate, and they said it, at least once a year, if not more often. The federal government has a claims policy that they brought into place after the Calder case, and that claims policy was hollow. It was empty. It meant nothing. Still, the Gitksan and Wet'suwet'en entered into one of their phases of trying to resolve the land question in the mid-70s, and in 1977 qualified for federal funding to prepare negotiations.

Beginning in 1977, a tremendous amount of work was done, work that built on what was done before and took it even further. A base was built to prepare for negotiations.

When the Constitutional process came along, in 1981 and 1982, the Gitksan and Wet'suwet'en asked themselves and talked to the elders and wondered: 'Can we create the political will on the part of the politicians in British Columbia and in the federal government to negotiate?'...We have been consistent. You could see it based on the things that the elders were saying to the McKenna-McBride Commission between 1912 and 1913 and the points they were making when Indian reserves were being set up in the 1890s. We read and knew what they were saying, and there were elders in the 1970s and 1980s who were repeating those same comments and questions. They all wanted to resolve 'the land question'. They wanted recognition of who and what they were, and they wanted to have some dignity in their own land.

The constitutional process provided an opportunity. So we entered that process. It didn't take long, however, to find out we were wasting our time in the constitutional process. It was clear nothing was likely to happen, because there was no political will or understanding at the time for anything substantial to happen.

The negotiation process wasn't available to us--it just wasn't working (Gyamk 1992:303).

The second condition was that, as we have seen, each major court case over the past two decades had changed the "tests" required to establish Aboriginal title in law. The courts consistently upped the ante in terms of evidentiary requirements. Since the tests were developed post hoc by judges, Aboriginal litigants and their lawyers entering a case could only estimate what might be set out as required during the course of the trial (Henderson, 1991:11-12).

Gitksan chief, Satsan (Herb George), following the release of the judgment, expressed the following account of the Gitksan and Wet'suwet'en's strategy:

So we choose instead to challenge the whole bloody game, to say that this game is wrong, to say we don't agree with your referee and your umpire. This is a fixed game. We want to see a change. We want to see a radical change. That's the way we approach this game.

The people who referee and umpire the game don't agree. And they don't agree because it's their right not to agree. They have established that amongst themselves. They set out the rules. We try to meet the rules, and they can just disagree with us, which they have done. They set out a test. 'You must be an organized society,' they say. So we look at what is an organized society in your terms. We find that out, and we say, 'Yes, we meet all of those different criteria as a society. So let's take them on, let's challenge them. We did...If you meet the test and you beat the test, then they change the test, because that's their right, their prerogative. It's their game. We understand the game we're in. Make no mistake about that (Satsan, 1992:55).

CHAPTER 5: THE TRIAL

Law, is, of course, only one domain in which a culture may reveal itself. But like politics, marriage, and exchange, it is an arena in which people must act, and in doing so they must draw on their assumptions, connections, and beliefs to make their acts effective and comprehensible (Rosen, 1989:318).

5.0 INTRODUCTION

Courts have long served as ideal locations for writers of social drama, satire and farce. The *Delgamuukw* trial could well be seen as living theatre at its best. Social actors representing all the key categories of players in British Columbia history and contemporary life were there. The Aboriginal peoples, the Crown lawyers, and the Judge played out the initial and ongoing colonial contradictions and disputes that have shaped life in the Canadian west for two centuries: who owns the land? The plaintiff's lawyers, well known for their work in labour, womens, prisoner and human rights movements, represented the voice of people Frank Cassidy and Paul Tennant call "the new British Columbians" who do not identify with the old settlers' founding myths (Cassidy, 1992(a); Tennant, 1990; 1992). The anthropologists and historians called as expert witnesses by the Crown were conservative and parochial. Those called by the Gitksan and Wet'suwet'en were liberal and cosmopolitan. For four years they faced each other and argued about who they were, where they came from and where they belonged, and where and how their children would live. While they battled primarily over the past, the real struggle was about who would determine the future.

This chapter provides a review of the key evidence presented by the Plaintiffs in the *Delgamuukw* case. It is divided into three sections: (1) oral tradition; (2) anthropology; (3) history. Each of these sections is further set out in four areas of discussion: (a) evidence presented to the court; (b) trial discussions; (c) findings and rulings; (d) critique.

5.1 ORAL TRADITION

Never before has a Canadian court been given the opportunity to hear Indian witnesses describe within their own structure the history and nature of their societies. The evidence will show that the Gitksan and Wet'suwet'en are and have always been properly counted amongst the civilized nations of the world; that their ownership of their territory and their authority over it has always existed; and that they have shaped a distinctive form of confederation between House and Clans. The challenge for this court is to hear this evidence, in all its complexity, in all its elaboration, as the articulation of a way of looking at the world which pre-dates the Canadian Constitution by many thousands of years (Gitksan and Wet'suwet'en Hereditary Chiefs, Opening statement, quoted in Monet and Wilson, 1992:24).

Eighteen chiefs testified in person at the trial, beginning with Gyolugyet (Mary McKenzie) in Smithers on May 13, 1987. An additional ten Gitksan and Wet'suwet'en, who were not chiefs, testified, and a further thirty-eight witnesses tendered and were cross-examined on territorial affidavits. Thirty of these were chiefs. While the topics covered by the evidence were wide and varied, the most unique aspect of the evidence was its presentation in the form of Gitksan *adaawk* and Wet'suwet'en *kungax*.

Adaawk are Gitksan oral histories comprised of a collection of sacred reminiscences about ancestors, histories and territories that document House ownership of land and resources. The Wet'suwet'en *kungax* is a song or songs about trails between territories. Their performance at feasts publicly validates these claims.

The Statement of Claim filed by the Gitksan and Wet'suwet'en says expressions of ownership come through the *adaawk*, *kungax*, songs and ceremonial regalia; confirmation of ownership comes through totem poles erected to give those expressions a material base; assertion of ownership is made through specific claims.

In presenting this evidence the Gitksan and Wet'suwet'en asked the Court, first to hear and understand it in "its own terms," within the context of the Gitksan and Wet'suwet'en "world view":

The challenge for this Court, in listening to the Indian evidence, is to understand the framework within which it is given and the nature of the world-view from which it emanates (Gisday Wa and Delgam Uukw, 1987:23).

A world view, it was argued, is defined by anthropologists as being composed of two inter-related parts: a notion of how the world is structured and how its parts form a cohesive whole; and, a set of rules which set the structure in motion and control and direct it (ibid:22).

The fundamental features of the Gitksan and Wet'suwet'en world view and the central differences, or oppositions, between it and "the Western world view" were identified in the opening statement as follows:

- (1) The Western world view sees the essential and primary interactions as being those between human beings. The Gitksan and Wet'suwet'en, on the other hand, understand human beings and animals to be "part of an interacting continuum which includes animals and spirits."
- (2) Time, in the Gitksan and Wet'suwet'en world view is cyclical and past events "directly effect the present and the future," whereas in the Western world view time is linear and causality is direct, i.e. "an event has the ability to cause or produce another event." Westerners believe in accidents and coincidences. Gitksan and Wet'suwet'en do not.

- (3) The Western world view makes fundamental distinctions between sacred and secular, spiritual and material, natural and supernatural. Whereas, "the integration of what to us are discrete and separate parts of life, infuses the Gitksan and Wet'suwet'en thinking and major institutions."

The Gitksan and Wet'suwet'en offered the court, in some instances--notably the Gitksan *adaawk* of Medeek and the Wet'suwet'en *kungax* of the House of Goohlaht--archaeological and geological evidence that supported events and places noted in the oral histories in order to link these with conventional scientific proof. They also drew analogies between distinctions made in both Aboriginal and Western cultures between experience and hearsay, opinion and knowledge, lay people and experts (ibid: 38- 40). They stated, however, that

For the Court...to deny the reality of Gitksan and Wet'suwet'en history except where it can be corroborated by expert evidence in the Western scientific tradition is to disregard the distinctive Gitksan and Wet'suwet'en system of validating historical facts (ibid:40).

And this, they made clear, they would consider as tantamount to denying the fundamental equality of peoples.

The first legal evidentiary obstacle encountered was what is known as the "Hearsay Rule" regarding evidence and how it would be applied to the admissibility and significance of the *adaawk* and *kungax*. Oral histories constitute hearsay, within a strict legal interpretation, since they purport to rely on the words and experiences of people who are deceased and not available for cross-examination. The scope of the claim and the centrality placed on this testimony troubled the judge:

The matter is made even more difficult by Mr. Jackson's further submission that the plaintiffs also seek to establish, in addition to history, the culture and

social organization of these two peoples by the declarations of deceased persons. Mr. Jackson agreed with me that the problem is not just the proof of an oral history but rather the proof of an oral history, tradition, laws, culture and social organization of these two peoples.¹

The second contradiction, pointed out by Joel Fortune, is that for an oral tradition to exist in the present, it must, obviously, be part of the experiences of a living person. Therefore it is questionable whether the hearsay rule should apply at all (Fortune, 1993:98). In this context, the truthfulness of the stories handed down is not the issue. The question is simply whether that tradition continues to exist, and the story functions only as evidence that a tradition is being followed. From this premise only testimony of peers is required to attest to the character and credibility of witnesses (ibid:99).

McEachern noted that he was satisfied that the *adaawk* and *kungax* had gone through a "sifting process" through their having been told and retold and witnessed repeatedly, and that lent them an "enhanced trustworthiness" in his eyes. But, he added, "historical facts sought to be adduced must be truly historical and not anecdotal" (Delgamuukw, 1987, oral history:698).

In the end, McEachern admitted most of the evidence and testimony to be weighed at the end of the trial. McEachern warned that "hearsay evidence may be disregarded "if it is contradicted, or if its value as evidence is destroyed or lessened either internally or by other admissible evidence, or by common sense" (ibid:692). He

¹ Delgamuukw v. R. (1987), 40 D.L.R. (4th) (hereinafter referred to as Delgamuukw, 1987, oral history).

The Chief Justice's concerns here related to the "test" established in the Baker Lake case that demands claimants prove they were members of an "organized society" at the time of contact (see page 214). The first contradiction is, of course, that a "society" is, by definition, organized. That is to say, what would an "unorganized society" be?

expressed his willingness, however, as the judge of first instance in a case of such importance, to 'lean towards admissibility' and to 'harken to the evidence' (ibid:697). This ruling, early in the trial, gave cause for optimism.

McEachern appeared particularly concerned about maintaining a clear distinction between "historical facts" and "beliefs." Throughout the testimony, the Chief Justice appeared to become increasingly impatient with having to listen to the oral histories, and took exception, particularly, to witnesses singing in court. "This is a trial," he proclaimed at one point, "not a performance." (Monet and Wilson, 1992: 42).

The opening address had noted that the *adaawk* and *kungax* should not be taken literally in a simplistic sense (Gisday Wa and Delgamuukw, 1987:38-42). And, anthropologists and ethnohistorians called as expert witnesses attempted to elaborate on the various methods they use to analyze oral histories.

There are two principal approaches to the ethnohistorical approaches to the study of oral history. One is the more familiar historical method of verifying when and where specific events took place by examining a variety of sources and comparing accounts of particular events. This involves cross-referencing information from oral histories with historical, archeological and biophysical data on technology, resource and land use, and social organization to assess the degree to which "real events" or "literal truth" is reflected in the oral accounts.

An analysis of oral history also involves the even more complex task of interpreting the many layers of meaning revealed by oral tradition when it is understood within the cultural context of its performance (Cruikshank, 1992:27). Such an analysis of

oral tradition requires the interpreter to describe and explain the different historical and local contexts in which oral tradition is transmitted, including the political dynamics involved in various forums, the reputation of the speaker, the knowledge base of the listeners, and the use of various rhetorical strategies. Anthropologist, Julie Cruikshank, describes oral tradition as "a prism which becomes richer as we improve our ability to view it from a variety of angles" (Cruikshank, 1992:35) "Oral tradition differs from western science and history," Cruikshank continues, "but both are organized systems of knowledge that take many years to learn, and both are perpetually open and incomplete" (ibid).

Such an analysis was done in great detail in the *Delgamuukw* case and was presented to the court by Richard Daly, anthropologist for the Gitksan and Wet'suwet'en, whose evidence was rejected in total.

Chief Justice McEachern concluded:

I am not able to accept adaawk, kungax and oral traditions as reliable bases for detailed history (Reasons, 1991:75).

Of course, the rejection of oral history serves an important rhetorical/ideological purpose in rendering non-literate cultures "people without history" and thus making of their histories blank pages, *tabula rasa*, upon which Europeans can write their own versions. Furthermore, in denying absolutely the validity of oral tradition, Europeans can simultaneously affirm the absolute validity of written history.

Richard Daly, for example, pointed out in his opinion report that "oral history is not the same as the individual reminiscences of an elder," and that oral tradition should be treated,

as a whole, a corpus of linked and overlapping records of events that have been reiterated down through the generations. Individual tellings of one Chief's history must be compared with one another, and then with the accounts of the same or related events from the viewpoint of other Chiefs. When this is done carefully the oral tradition can be treated as a valid historical source. (Daly, 1987:60-61).

During his testimony, Daly went into more significant detail on the methodology he employed to analyze the oral tradition. And, the judges attention was repeatedly drawn to the particularities and richness of Gitksan and Wet'sutwet'en oral traditions and the attention paid to them by scholars.

Cross examination of the chiefs testimony proceeded according to adversarial custom. The lawyers for the province and the federal government challenged the accuracy of the testimony, and the credibility of the witnesses. For example, Geoff Plant, lawyer for the province of British Columbia questioned an elderly woman about the number of residents in her home village.

Plant: Do you know how many members there are on the band list?

Gwaans: No.

Plant: Do you know how many people live on the Reserve?

Gwaans: No.

Plant: Do you have an approximate idea of how many people live on the Reserve?

Gwaans: No.

Plant: Is it in the order of hundreds of thousands, tens of thousands of people (quoted in Monet and Wilson, 1992:45)?

And, questions that have come to be known as relevant to the "pizza syndrome" were raised by the same lawyer.² For example:

Plant: Is there electric lights on the Reserve?

Gwaans: Are you going to pay the bill?

Plant: Do you pay the bill, Mrs. Ryan?

Gwaans: Yes, I did....

Plant: So far as you know, do the members of the Band who live on the Reserve, do some of them own automobiles and trucks?

Gwaans: Well, I seen some cars there, but I didn't ask.

Plant: You have seen some cars on the reserve?

Gwaans: Well, they will call me nosey if I ask them, the people there.

Plant: You have seen people who live on the reserve drive cars?

Gwaans: Oh yes.

Plant: And there is a school on the reserve?

Gwaans: Yes.

Plant: Is there a church on the Reserve?

Gwaans: Yes, two churches, Salvation Army and United Church.

Plant: Which church do you go to?

Gwaans: Salvation Army (ibid:46).

The cross-examination process was a very difficult and unfamiliar one for the Elders who are accustomed to being treated respectfully and with deference. Certainly, it

² The term "pizza syndrome" was coined by Barbara Williamson in the Project North B.C. Newsletter (Fall 1989). It refers to the cross examination themes used by Crown counsel in Aboriginal rights cases where they question Aboriginal witnesses about their involvement in wage labour, use of "western technology," and consumption of "white food" like Kentucky Fried Chicken, Pizza and MacDonald's burgers. The implication, in their minds, is that this is evidence of assimilation.

is not accepted practice to confront and challenge an elder. One of the interpreters wrote about her experiences as an observer and participant in the trial, with both humour and anger:

One of our witnesses had a lot of fun with one of the lawyers. She is an elderly person. She is in her eighties. She had been to the hunting area, berry-picking area, you name it, on the territories most of her life. So in her evidence, she was talking about times when they went out berry-picking. The lawyer was trying to confuse her by using the place names that she had given and describing the territory. Here he was questioning, questioning, and what he was doing--and didn't realize--was he was going up and down, up and down, this mountain that she was describing. Finally she got annoyed, and that's the beauty of being able to speak your own language, she says to the interpreter, 'What's the matter with this lawyer? Is he crazy? We've been up and down that hill a lot of times now.' So sometimes it was funny.

Sometimes it was very emotional. The spirits of our grandfathers and our grandmothers were on our shoulders, and we were there speaking on their behalf because they are the ones that taught us that this is our land. There were a lot of times where I just felt like screaming: 'Hey, you're wrong. How dare you say this? How dare you do this? How dare you be disrespectful to my elder sitting in that witness stand? How dare you speak to her that way? How dare you speak to him that way (Yagalahi, 1992:203).

In the final analysis, Chief Justice McEachern gave no weight to the oral tradition testimony except, minimally, where it could be supported by data from research conducted within the paradigm of western science. As with most fundamental issues, references to the judge's evaluation of oral tradition are scattered throughout the Reasons for Judgment, and I have reconstructed them in order of their relevance to specific questions and not necessarily in the order in which they appear in the Reasons for Judgment.

It is important, first, to understand what the Judge believed he was seeking, in a specifically legal sense, in the oral tradition evidence. This is explained most succinctly in the Reasons for Judgment at page 53:

In a nutshell, they sought first to establish both the present social organization of the Gitksan and Wet'suwet'en; secondly, that it exists today in the same or nearly the same form as at the time of contact; thirdly, that at that time, and since, the plaintiffs have used and occupied all of these separate and remote territories for aboriginal purposes; and fourthly, because of the way the plaintiffs have framed their case, they undertook also to prove the boundaries of these 133 separate territories and the distinct use made of them by the plaintiffs and their ancestors (1991).

Perhaps Allen McEachern's most revealing reflection is his first, found at page 17, where he laments that with regard to those histories that "unfortunately, exist only in the memory of the plaintiffs,"

...I must leave it to the social scientists who are just beginning their journeys of discovery into the vast and largely uncharted **terra incognita** of the unwritten histories. I wish I could know what they will discover (ibid:17).

Like the "vast and empty" *terra nullius* "discovered" centuries ago, the voice of the people only recently acknowledged at law to exist at all awaits European discovery, analysis and exploitation.

Beginning on pages 46 and 47 of the Reasons for Judgment the Chief Justice explains that,

At an early stage of the trial I expressed the hope that I could make a convenient but simplistic distinction between what European-based culture would call mythology and "real" matters...I have concluded that it would be overly simplistic to attempt such a distinction, and I must accordingly reject mythology as a valid distinction between what is and what is not part of an *adaawk* or *kungax* (ibid:46-47).

While acknowledging that the "objective validity" of oral traditions varies from culture to culture, and that Dr. Philip Drucker "believes oral histories on the north coast are usually correct," he quotes at length from Dr. Bruce Trigger's (whose work has focused on Huron and other eastern Aboriginal peoples) essay "Time and Traditions, Essays in Archaeological Interpretation," and selects the following passage for emphasis:

...oral traditions may supply valuable information about the not too distant past. Used uncritically, however, they can be a source of much confusion and misunderstanding in prehistoric studies (ibid:47-48).

At page 58 he cites Dr. Arthur Ray and Dr. Charles Bishop on problems of verification in "memory ethnography," in which they generalize that such work can only provide relatively accurate information to a depth of one hundred years.

McEachern concludes that oral tradition may "well provide useful information 'to fill in the gaps' left at the end of a purely scientific investigation (ibid:48). Chief Justice McEachern takes pains to repeat the reasoning behind his ruling on admissibility and his caution at the outset that the oral tradition was "subject to objection and weight (ibid:46)" which would adduced at the end of the trial. At page 58, he details his reasons for rejecting *adaawk* and *kungax* as direct evidence of facts "except in a few cases where they could constitute confirmatory proof of early presence in the territory." "My reasons," the Chief Justice writes, "are principally threefold:"

First, I am far from satisfied that there is any consistent practice among the Gitksan and Wet'suwet'en Houses about these matters. The early witnesses suggested that the *adaawk* are well formulated and the contents constantly sifted and verified. I am not persuaded that this is so.

...

Secondly, the *adaawk* are seriously lacking in detail about the specific lands to which they are said to relate (ibid:278).

His third reason was that the attempt by the plaintiffs to authenticate their *adaawk* by reference to work on oral tradition among others peoples failed because this information did not "relate to the territory but they demonstrate the weakness of this kind of evidence" (ibid).

Finally, he notes, and attaches an appendix provided by the province of B.C. as supporting evidence, that references to the historical period are found in the *adaawk* and *kungax* which, in his opinion, renders them unauthentic in their representation of pre-contact Aboriginal life. Specifically, the Chief Justice notes one mention of moose (who, a provincial wildlife biologist estimated entered the territory in historical times); a reference to a chief Legaic who the Chief Justice assumes must be the same Legaic as the person who appears in historical records; one reference to guns and gun powder; and a reference to the Hudson's Bay Company (*ibid*).

Judge McEachern claimed that,

Much evidence must be discarded or discounted not because the witnesses are not decent, truthful persons but because their evidence fails to meet certain standards prescribed by law (*ibid*:49).

The judge used two principle criteria to determine weight. First, he tried to distinguish between what "a deceased elder said he or his elders did, and what they believed," and allowed only the former to stand as evidence. Second, he accepted the plaintiff's culturally specific definition and identification of the distinction between folklore ("antimahlaswx" in Gitksan), and laws or traditions, allowing only the latter to stand as evidence (*ibid*:55).

Chief Justice McEachern also relied on precedents set in cases where the issue of oral tradition testimony had been dealt with. First, he took from *Kruger v. R.* the direction that evaluation should be based on "facts pertinent to that Band and to that land, and not on any global basis" (*ibid*: 54).³

³ This direction, as we will see, was not taken in regard to the Crown's expert witness' evidence.

Second, McEachern referred to another of Dickson's rulings in the case of *R. v. Simon*⁴ where he found that to demand written support where oral tradition was the only source of evidence available would be to "impose an impossible burden of proof (ibid: 407-408).

Having established, to his satisfaction, an intellectual basis for rejecting oral tradition as valid evidence, the Chief Justice offers specific examples to support his conclusions, as follows:

Indian culture pervades the evidence at this trial for nearly every word of testimony, given by expert and lay witnesses, has both a factual and a cultural perspective (ibid:49).

...

When I come to consider events long past, I am driven to conclude, on all the evidence, that much of the plaintiffs' historical evidence is not literally true...I must assess the totality of the evidence in accordance with legal, not cultural principles.

I am satisfied that the lay witnesses honestly believed everything they said was true and accurate. It was obvious to me, however, that very often they were recounting matters of faith which have become fact to them. If I do not accept their evidence it will seldom be because I think they are untruthful, but rather because I have a different view of what is fact and what is belief (ibid:50).

In summary, Chief Justice McEachern rejected evidence based on Gitksan and Wet'suwet'en oral tradition in the first place because he found it to be not literally true "on its own terms," but that it could be granted validity when evidence adduced from studies done within the epistemological framework of western science were offered in support. Secondly, he found this testimony lacked credibility when assessed by legal criteria for reliable evidence. In this context he found that the *adaawk* and *kungax* as presented revealed inconsistent practices, and were lacking in detail in relation to specific lands as

⁴ *R. v. Simon* (1985) 24 D.L.R. (4 th) 390 (S.C.C.)

required by English common law. The judge supported his conclusions by reference to expert opinion in the form of work by anthropologists and historians setting out methodological cautions in the analysis of oral history.

A number of critiques have been written about the Chief Justice's dismissal of oral tradition. For the most part criticism has been directed to the judge's failure to appreciate the world view of Gitksan and Wet'sutwet'en peoples and their particular conceptions of history. Dr. Julie Cruikshank summarizes these arguments in the following statement:

...the court's decision to present and evaluate oral tradition as positivistic, literal evidence for 'history' is both ethnocentric and reductionist, undermining the complex nature of such testimony because it fails to address it on its own terms (Cruikshank, 1992:29).

Legal critics have pointed out the "Catch 22" nature of this ruling as follows:

The trial judge's rejection of oral histories effectively made the Gitksan and Wet'suwet'en peoples without history before the first European records in the 1820s. The Gitksan and Wet'suwet'en oral histories are unusual in that there are great numbers of them, and they are very detailed. They have been accepted as reliable and used by anthropologists and archaeologists. If these oral histories are entitled, as the trial judge found, to little or no weight, it is doubtful if **any** aboriginal people in Canada could rely on their oral history to establish the existence and character of their pre-contact societies.

When this result is combined with the trial judge's invention of a new test for the existence of aboriginal rights--that they be exercised for a "long, long time" **prior** to the assertion of British sovereignty--the judgment effectively makes the proof of aboriginal rights impossible (Plaintiffs' Appeal Factum, 1991:1).

More paradoxical, of course, is the fact that the Chief Justice, of necessity, made a number of pronouncements on the nature of Aboriginal life prior to the arrival of Europeans for which the only source was oral histories. The logical conclusion appears to be that the judge did not, in fact, reject oral histories. Rather, he **theoretically rejected it, and then, in practice**, selectively chose from them those descriptions he wished to

lend the status of fact and rejected those he did not. My interest, in this thesis, however, is what the judge's evaluation of oral tradition says about the judge and his epistemology.

The judge could not understand the *adaawk* and *kungax* as subject to different but equal rules of validation without first acknowledging the equality, and hence denying the superiority, of his own epistemology, and by extension of himself and "his people." His failure to do so, and the concomitant impossibility of separating a critique of ethnocentrism from an appreciation of other cultures in this context is apparent.

This can be seen in McEachern's use of "subjectivity," "culture" and "emotion" as interchangeable terms--and as implicitly synonymous with irrationality--throughout the judgment. For example, the Judge wrote:

I have heard much a this trial about beliefs, feelings and justice. I must say again, as I endeavoured to say during the trial, that Courts of law are frequently unable to respond to these subjective considerations (ibid:2).

And:

One cannot ignore the "indianness" of these people whose culture pervades everything they do. For example, they have an unwritten history which they believe is literally true both in its origins and in its details. I believe the plaintiffs have a romantic view of their history which leads them to believe their remote ancestors were always in specific parts of the territory, in perfect harmony with natural forces, actually doing what the plaintiffs remember their immediate ancestors were doing in the early years of this century... They believe their special relationship with land has always been enlightened. And they believe Indian social organization in the territory has always been more or less as it is now (ibid:48).

Anthropologist Renato Rosaldo in his 1989 book, Culture and Truth, describes the popularity of this new meaning of "culture" and its implications. He writes:

In the nations under discussion, full citizenship and cultural visibility appear to be inversely related. When one increases, the other decreases. Full citizens lack culture, and those most culturally endowed lack full citizenship. In Mexico, Indians have culture and "ladinos"...do not. In the Philippines, 'cultural minorities' have culture, and lowlanders do not. Ladinos and lowlanders, on the other hand, are full citizens of the nation-state. They work for wages, pay taxes, and sell their

wares in the local market. People in metropolitan centers classify them as civilized, in contrast with Indians and cultural minorities who are cultural, not "rational"... Those people who have culture also occupy subordinate positions within the nation-state... the people with culture have been confined to marginal lands... In the Philippine case, the "people with culture" occupy both ends of the social hierarchy. Roughly speaking, Negrito hunter-gatherer groups are on the bottom and lowlanders are on top. The difference between the two ends of the spectrum is that the Negritos are precultural and the lowlanders are postcultural... In this pseudoevolutionary ladder, people begin without culture and grow increasingly cultured until they reach that point where they become postcultural and therefore transparent to "us" (ibid:198-199).

The judge's use of "culture," like that described above by Rosaldo, simply replaces the word "race" with the word "culture" but retains the same meaning as in presumably archaic racialism. Kahn argues, by way of quoting from a variety of contemporary definitions of both terms, that at a formal level "race" and "culture" are hard to distinguish from each other (Kahn, 1989). A similar point is made by Giroux (1993) in his discussion of the "nouveau racism." This objection to liberal discourse is increasingly being voiced by those "marginalized others" who are categorized as "having culture" (see, for example, Ferguson, Gever, Minh-ha and West, 1990). This is the critique that informs the argument I am putting forward in this thesis, and that will become more salient when we come to analyze the current, post-*Delgamuukw*, legal field in which the "Sparrow test" for Aboriginal rights has become dominant.⁵ Since, I argue, it is practice in context, and not a singular fixed definition, that gives words their relevant meanings, it is appropriate when

⁵ The reader will recall that the Sparrow test stated follows: "The nature and content of an aboriginal right is determined by asking what the organized aboriginal society regarded as an integral part of their distinctive culture... To be so regarded those practices must have been integral to the distinctive culture of the above society from which they are said to have arisen.

In the Court's view, the reason for concluding that the Musqueam Nation enjoys a right to fish lies not in the presence of state action conferring such a right, but instead arises from the fact that fishing is integral to Musqueam self-identity and self-preservation.

The content of aboriginal rights thus is to be determined not by reference to whether executive or legislative action conferred such a right on the people in question, but rather by reference to that which is essential to or inherent in the unique relations that native people have with nature, each other, and other communities."

examining the law to look to meanings that dominate conservative discourses on "culture." Meaning, like theory, travels (Said, 1983:212). When Aboriginal peoples look to their "culture" as definitive of their identity, the meaning is not necessarily the same as when the Supreme Court of Canada looks to "Aboriginal culture" to define property rights.

Returning to Chief Justice McEachern's decision, Cruikshank argues that,

...no matter how thoughtfully oral tradition is performed, an appreciation of its messages anticipates--and requires--a receptive audience (Cruikshank, 1992:38).

In this instance, the Gitksan and Wet'suwet'en took the enormous risk of publicly enacting narratives that have been performed only within a community where their meaning would have been 'self-evident' to observers and participants. The pain and the rage expressed by the Gitksan and Wet'suwet'en leadership and their supporters in response to the judgment was triggered in part by their understanding of what the judge's statements about their oral traditions say about them. In the context of the judge's ideology, recognition of emotion and/or intuition as a valid source of knowledge categorizes a person, or group, and their epistemology, as less credible and less competent than people who relegate "subjectivism" to the margins of knowledge. These criteria provide means of assessing rationality which then serves as a principle for categorizing individuals and groups and determining the degree to which they are fully human agents, which in turn renders members of different categories of persons as variously capable of governing themselves (Ulin, 1984).⁶ In the case of "undeveloped agents" like indigenous peoples, or "developing agents" like children, or "incompletely

⁶ See Ulin, 1984 for a thorough discussion of the "rationality debates" that have preoccupied British social anthropology, but that have been peripheral to American cultural anthropology. And see Gordon, 1988 for an argument in support of the thesis that "rationality is what cultural values hide behind" in the western world.

developed agents" like women, or "insufficiently developed agents" like the mad, or "inappropriately developed agents" like the rebellious, their subordination to governance, tutelage, control, hospitalization, or incarceration is legitimated by their categorization as relatively irrational, and therefore not fully human, agents. A key element in this ideological judgment of rationality is the relationship, within western discourse, between reason and rationality and their posited opposition to emotion, which, as we have seen, McEachern equates with "culture" (Abu-Lughod and Lutz, 1990; Lutz, 1988). Catherine Lutz argues that,

As both an analytic and an everyday concept in the West, emotion, like the female, has typically been viewed as something natural rather than cultural, irrational rather than rational, chaotic rather than ordered, subjective rather than universal, physical rather than mental or intellectual, unintended and uncontrollable, and hence often dangerous. This network of associations sets emotion in disadvantaged contrast to more valued personal processes, particularly to cognition or rational thought, and the female in deficient relation to her male other...a 'rhetoric of control and management' of emotion is also a narrative about the double-sided nature--both weak and dangerous--of dominated groups (Lutz, 1988:62-63).

While Lutz' topic is the symbolic relationship between gender and emotion in western culture, the "female other" she describes represents a characterization of a subordinate "other" in European thought. This "slot" is occupied most often by women, people of colour, the poor, and a variety of minority scapegoats.

Chief Justice McEachern's judgment of the validity of oral tradition reflects his judgment of the people whose tradition it is, not the application of abstract epistemological principles, or reason, or legitimate processes for validating knowledge.

If ethnocentrism or racism explains Chief Justice McEachern's failure to accept the evidence of the oral histories, then we would expect that his appreciation of

academics might be grounded in the accepted norms of his own society. I turn now to the issue of anthropology as evidence in *Delgamuukw v. R.*

5.2 ANTHROPOLOGISTS AND ANGELS

The foundation for the admissibility of expert evidence in cases which raise factual issues about human behaviour, as relied upon by the Gitksan and Wet'suwet'en, was set out by the Supreme Court of Canada in *Lavallee*:

In some circumstances the average person may not have sufficient knowledge of or experience with human behaviour to draw an appropriate inference from the facts before him or her...The need for expert evidence in these areas can, however, be obfuscated by the belief that judges and juries are thoroughly knowledgeable about 'human nature' and that no more is neededExpert testimony is admissible to assist the fact-finder in drawing inferences in areas where the expert has relevant knowledge or experience beyond that of the lay person⁷

In the *Delgamuukw* case, lawyers for the Gitksan and Wet'suwet'en argued that the Court had to try to understand "across both a profound cultural divide, and from a distance of 200 years and more" (*Delgamuukw*, 1991(b):Appendix E:4). The expert knowledge referred to here consists in the unique understandings of life and cosmos embedded in different cultures.

The Crown, on the other hand, relied on an article entitled "The Expert in Court," written by Anthony Kenny and published in a 1983 edition of the Law Quarterly Review. Kenny set out four criteria for determining whether a discipline is sufficiently "scientific" in its methodology to justify the admission of expert opinion evidence in Court. Since Kenny's article, as quoted by the Crown in court, sets out the key questions that are the

⁷ *Lavallee v. The Queen* (1990) 55 C.C.C.(3d) 97, at pp. 111 and 125 (Supreme Court of Canada).

subject of debate about the role of social sciences in the legal forum, and that are reflected in Chief Justice McEachern's conclusions about the evidence in *Delgamuukw v.*

R., I will quote it at length. Kenny says:

First, the discipline must be consistent. That is to say, different experts must not regularly give conflicting answers to questions which are central to their discipline. That is not to say that there may not be differences of opinion between experts...

Second, the discipline must be methodical. That is to say, there will be agreement about the appropriate procedures for gathering information within the discipline. A procedure carried out by one expert to reach a particular conclusion is one which must be capable of duplication by any other expert...

Thirdly, the discipline must be cumulative. That is to say, though any expert may be able to repeat the results of others, he does not have to: he can build upon foundations that others have built. The findings of one generation of workers in the discipline are not called in question by the workers of the next (that is not to say that they may not be placed in an altered context, or accounted for by a higher level system of explanation; this quite frequently happens). But research, once done, does not need doing again; if you have to repeat someone else's experiments, or re-sample this population, on the very same issue as him, that shows you there was something wrong with his experiment, or something faulty in his sampling.

Finally, the discipline must be predictive, and therefore falsifiable. It need not necessarily predict the future (palaeontology does not) but it must predict the not yet known from the already known (as the doctor's diagnosis of the nature of a terminal illness predicts what will be found at the post mortem, and is falsified if it proves otherwise (Kenny, 1983:113).

This, of course, is a political statement about what valid knowledge is, and represents the Eurocentric positivism that has long been the focus of anthropological criticism, and is now the subject of so much contemporary critique.

Indeed, the emergence of the tradition of expert witnesses to the court in British law dates back to the 16th century when juries of presumably "objective" arbiters whose qualifications were that they knew nothing of the case or the parties involved, replaced assemblies of neighbours and colleagues in the development of juries. Rosen describes the historical relationship between positivism and expert witnesses as follows:

In the 12th to 14th centuries, juries consisted of groups of neighbours who were already acquainted with the facts of a case or regarded as easily capable of discovering them. In a sense, jurors in this period were as much witnesses as judges of the facts...It was only in the 16th century, as the jury was transformed from a panel of co-residents or colleagues to a group of uninformed arbiters who, instead of bringing their own knowledge of the facts to bear on a case, waited for evidence to be presented to them in court, that experts were brought in by the contending parties to give testimony (Rosen, 1977:556).

And, it is this fundamental debate about truth, knowledge, validation and legitimacy that still constitutes a central focus for discussions about the role of anthropologists as expert witnesses in, primarily, Aboriginal title and rights cases (Bea's, 1985; Bourgeois, 1986; Clifford, 1988(b); Culhane, 1992; Dyck and Waldram, 1993; Feldman, 1980; Kousser, 1984; LaRusic, 1985; Maddock, 1989; Pryce, 1993; Ray, 1991; Rosen, 1977; Sansom, 1985; Steward, 1968; Wright, 1988).

Anthropologists first began to work in the capacity of expert witnesses in significant numbers in the United States when the Indian Claims Commission was established in 1946. The key statute in the Commission's terms of reference that immediately involved anthropologists stated that "only a tribe, band, or identifiable group"⁸ was permitted to file claims. A number of very well known anthropologists, including Julian Steward and Alfred Kroeber, worked for and testified on behalf of both government and Indian claimants, respectively (Sutton, 1985:3-15).

From this starting point, almost half a century ago, certain enduring problems have confronted anthropologists who have become involved in these proceedings. These issues have been: (i) the reputation and expertise of witnesses for Aboriginal litigants versus that of witnesses for governments; (ii) scholarly independence and "objectivity"

⁸ United States of America, Indian Claims Commission Act, 60 *Stat.* 1049 (1946), section 2.

versus interested advocacy and "subjectivity," (iii) differences between the practices of an adversarial legal forum and a collegial academic forum; and, (iv) the impact on anthropology of putting its literature before the courts. While the questions have persisted, the debates about them have been shaped by changes in the political and cultural environment and concomitantly in anthropology.

The reputation of anthropological witnesses was the subject of a debate between Dr. Robert Manners and Dr. Nancy Oestreich Lurie that raged in the pages of Ethnohistory in 1956. Responding to a paper entitled "Historiography, Ethnohistory and Applied Anthropology" that Lurie presented to a meeting of the American Ethnological Society in 1954, Manners wrote that Lurie was "palpably conscious of holding a position on the side of the angels" when she suggested that "reputable anthropologists" would not work "against Indians" and "for the government of the United States." He continued by noting that several renowned anthropologists such as "Swinton, Willey, Steward, E. Voegelin and W. W. Hill--to mention only some--had seen fit to accept employment with the Justice Department 'against' the Indians."

The specific passage in Lurie's paper that had provoked this response from Manners read as follows:

The attorneys for the Justice Department working with their ethnologists, are obliged to defend the government against the Indians' claims or at least check that no more will be claimed than can be reasonably expected.

It may be noted in this connection that more ethnologists of recognized standing have been willing to testify for the Indians' attorneys than for the Justice Department. Apart from a few notable exceptions, the Justice Department has been obliged to hire ethnologists and historical researchers unfamiliar with the tribes in question and for the limited purposes of claims litigation. It is fair to say that a great many of these people are certainly less experienced as a group than the ethnologists employed by the Indians' attorneys and may be without any particular scholarly interest in the work they are doing (Lurie, 1956:258).

Lurie protested that perhaps because "both Indians and angels are supposed to come equipped with feathers," Dr. Manners was somewhat confused. She "was on the side of...proper scientific method and the welfare of anthropology," Lurie argued. "I was not decrying that people would testify for the government, but that the discipline of anthropology was threatened by careless qualification of 'experts' in the public mind or at least the legal section thereof" (ibid: 260).⁹ And, she continued, her position reflected neither "goo-goo humanitarianism nor slanted liberalism." "There have been isolated instances of dissatisfaction in working with the government on the grounds of past experience which was scientifically distasteful" she added (ibid:261).

Lurie acknowledged that anthropologists faced problems of intellectual integrity in working for Indians in these cases as well. First, there were often problems with Aboriginal litigants making extravagant claims based on a "legal theory of bargaining where you ask for a big amount and haggle it down to about what you considered fair in the first place" (ibid: 270). Second, among anthropologists who wished to maintain and/or establish long term research relationships with Indian groups there was concern that testifying for the government, or declining requests to testify for Indians, could jeopardize future research opportunities:

The fact remains that no one knows how cases will be decided, and fear has been expressed by witnesses for both sides that the Indians, as interested parties to the claims, may vent their displeasure in given decisions by withholding data from any ethnographers who may go among them in the future (ibid:271).

She also agreed with Manners that the central problem for any anthropologist testifying as an expert witness in any case is the fact that "what succeeds under testing

⁹ See also Wright, 1988:385 for a discussion on the role of anthropologists as "watchdogs" of their discipline in this context.

by trial is not necessarily what is thoroughly and objectively tested in an academic sense" (ibid:272).

Julian Steward is perhaps the best known of American anthropologists to testify on behalf of the government at Indian Claims Commission hearings. His comments on his testimony in the Northern Paiute case are informative both for the debate on the role of anthropologists as expert witnesses and, even more specifically for the prominence that Steward's theories would achieve in supporting the Crown's argument and the judge's decision in *Delgamuukw v. R.*.

In a 1955 article in Ethnohistory, Steward wrote that:

An important difference between witnesses concerning the nature of acculturation can be illustrated by the Northern Paiute case. Omer C. Stewart, witness for the Plaintiffs, assumed that territorial "bands" and "chiefs" mentioned by recent informants and by certain early observers were aboriginal features which continued to exist long after White occupation of the area. I, representing the Government, interpreted the same evidence as indicating that after horses were acquired predatory groups developed and lasted only during a brief phase of acculturation, when the native economy was changed by the presence of livestock and other foods that could be acquired through raiding. These bands had limited cohesion and transient membership, and they operated under "chiefs" whose function was to lead these forays. None of these functions had an aboriginal basis. The Northern Pauite case also illustrated the hopeless inadequacy of using "nation," "tribe," "band" and "chief" to convey any precise meaning (Steward, 1955:298).

Steward soon became pessimistic about the possibilities for anthropologists as expert witnesses. His primary objection, set out in a 1968 article was to the adversarial practices of the legal system in general, and to cross examination in particular (Steward, 1968). He was joined in this complaint by Alfred Kroeber who, after watching the attorneys for the Indian plaintiffs in *The Indians of California v. United States* (13 Ind. Cl. Comm. 369[1964] cross examine the opposing anthropologist, Dr. Ralph Beals,

threatened to resign as the Indians' chief expert witness unless the judge ordered all the attorneys to modify their aggressive tactics (Beals, 1985:136).

Beals himself wrote of the event as follows:

The detail I have given about the hearing-room experiences illumines an important point. I have noted my own increasing commitment to the government position as the questioning proceeded. At least some of the anthropologists working for the Indians experienced some alienation and more sympathy for the government position. In other words, drawn into an adversary proceeding, all of us in one way or another were influenced in our emotional and to some extent intellectual commitments (ibid:151).

Beals concluded that the courts reflect the culture and ideology of the wider society and that this, ultimately, is the greatest problem that confronts anthropologists as expert witnesses and as public educators. He says:

The situation of the expert witness is not helped by the widespread misconceptions of the nature of science and scientified inquiry. The nineteenth-century quest for the Laws of Nature made so deep an impression on the general public that people are not yet ready to accept the problematical nature of knowledge not only in the world in general but in the world of science in particular (ibid:152).

Lawrence Rosen makes the point that "Whatever their impact on developing judicial concepts and doctrine, and whatever the merits of alternative modes of presenting their data to a legal proceeding, it is clear that participation in legal cases has had a reciprocal effect on anthropological thinking" (Rosen, 1977:567). As an example, he cites Stewards' reflection on how his participation in legal proceedings led him to further refine his distinctions between different kinds of bands, i.e. patrilineal hunting bands, composite hunting bands, predatory bands, etc. (Steward, 1955:295 quoted in Rosen, 1977:568). As we will see when we come to examine the Crown's case in Delgamuukw, Stewards's theoretical legacy, itself developed within the context of meeting the requirements of legal argument, continues to hold a great deal of validity, and hence power, in this forum.

While the interpretive, qualitative nature of fieldwork and participant observation has been acknowledged to be problematic in the legal context from the outset, the debates that began in the 1950s and 1960s focused on defending anthropology's claim to the status of a scientific discipline, and encouraging the courts to respect the niceties of scholarly debate and the prestige of specific scholars in their search for truth and justice. Steward, Lurie, Kroeber, Beals and others argued forcefully for the scientificity of their theoretical and methodological procedures and their research findings. All were eagerly in search of universal laws of human and historical development. All were committed to a model based in natural science. All advocated pluralism and liberal cultural relativism as a basis for development of a just and humane process for the inevitable assimilation of Native peoples. In other words, the debate was not about fundamental epistemology nor about social transformation, but rather about differing evaluations of what criteria should satisfy the demands of an agreed upon epistemological foundation. And, suggestions that the courts, or claims and inquiry processes, might be inherently biased against the Indian case were backgrounded. As Dyck and Waldrum have argued,

Historically, anthropological expressions of this cultural relativism may have been more likely to produce generalized critiques of ethnocentrism than to expose existing colonial power relations (Dyck and Waldrum, 1993:16).

Reviewing the literature on the use of anthropology in Aboriginal claims cases in courts in the United States, Canada and Australia, over the period 1950 - 1993, it appears that little progress has been made in reaching mutually acceptable resolutions to any of the problems outlined above. The issue of governments relying on poorly qualified marginal scholars rather than well respected academics as expert witnesses continues to be an issue as we will see when we come to examine the Crown witnesses put forward in the *Delgamuukw* case (Culhane, 1992; Pryce, 1993; Ray, 1991, 1992). (See also Clifford, 1988(a); Feldman, 1980; Richardson, 1975).

The conflict between notions of scholarly independence and "objectivity" versus interested advocacy and "subjectivity" continue to occupy an important place in anthropological debates (Dyck, 1993; Elias, 1993; Feldman, 1980; LaRusic, 1985; Maddock, 1989; Paine, 1985; Rosen, 1977). And, as this thesis evidences, continue to be seen as polar opposites by judges. Dyck and Waldram, for example, argue in 1993 that

To identify an anthropologist as an advocate within a courtroom or before a public inquiry may be to label him or her as 'biased' and thus to strip that person of whatever 'expert' knowledge or capacities she or he might otherwise be able to bring to bear in support of aboriginal peoples. This conflict between the immediate demands of being asked to 'act like an expert' and the longer term gains to be achieved by anthropologists through acknowledging and revealing the interested nature of all knowledge clearly warrants further discussion within the discipline (Dyck and Waldram, 1993:22).

Problems concerning the differences between the practices of an adversarial legal forum and a collegial academic forum also continue unchanged. Expert witnesses are still subjected to aggressive cross examination where their credentials, and characters, are challenged. They are still asked to give conclusive "yes" or "no" answers to questions that are the subject of ongoing debate.

The impact on anthropology of putting its literature before the courts has received less critical attention, but there are notable exceptions. Maddock, for example, discussing the contradictions facing anthropologists who testify as expert witnesses on behalf of Aboriginal peoples in Australia argues that

...anthropologists are ambiguously placed. On the one hand, as expert witnesses, they express opinions in the claim book and witness box on questions of ritual, social organization, land use, and the like. On the other hand, they have preceded all this with the lawyerlike activity of interpreting statutory provisions in order to further the interests or give effect to the wishes of those who are, in fact, their Aboriginal clients. How could it be disputed that such a dual role endangers intellectual integrity (Maddock, 1989:166)?

Maddock also cautions that unless this problem is recognized and explicitly addressed,

...anthropologists will smuggle into their accounts a legal view that, intended to express a traditional reality, has been shaped in its original formulation and its subsequent development by the exigencies of legal policy and reasoning (ibid:173).

Perhaps because the pattern identified by Lurie of academically-based and/or well qualified anthropologists most often testifying on behalf of Aboriginal peoples has, for the most part, repeated itself in Canada, most discussion has been around the work of anthropologists who have testified for Aboriginal groups, and the extent to which they shape their reports to fit legal arguments.

Dyck makes a more general point about the situation in Canada. He says:

It has, of course, been flattering for anthropologists to be heard as expert witnesses in court cases and public inquiries, but we need to be mindful of the manner in which liberal-democratic institutions create both the demand for such expertise and the controls that govern it (Dyck, 1993:199).

Anthropologists working in this field have responded in various ways to these dilemmas. Over the years a number of proposals have been put forward. Lurie, referring to a discussion at the 1954 meetings of the American Ethnology society reported that

...[it was]...suggested that through the medium of tribal councils and Indian rights organizations the positions of the ethnologist in claims cases should be made clear; that he is impartial by definition no matter who employs him, and that the decisions will rest on legal interpretations and conclusions over which the ethnologist has no control (Lurie, 1956:263).

Lawrence Rosen summarized the situation twenty-two years later in 1977. Rosen discussed the following proposals: (i) court-appointed experts in addition to or instead of experts hired by contending parties; (ii) appointment of a board of experts rather than reliance on single scholars; (iii) development by professional associations of standards

and qualifications for expert witnesses; (iv) devolving appointment of expert witnesses in particular cases to professional associations; (v) pre-trial conferences between experts in the absence of judges and juries where issues could be debated and papers prepared explaining theoretical and methodological differences; (vi) development of appropriate approaches to questioning of expert witnesses that are not, as in normal cross-examination, aimed at discrediting the character or expertise of the witness (Rosen, 1977). While quasi-judicial forums such as public inquiries have adopted a wide range of procedures, the courts have not taken up any of these suggestions.

Some anthropologists have, like Steward, abandoned the legal forum in disgust or decided that anthropology is not suited to that domain (Dyck and Waldram, 1993:12). Others, like Clifford, have placed themselves above the common fray and written eloquently and somewhat esoterically about such conflicts (Clifford, 1988(b)). Many, either sincerely subscribing to the legitimacy and promised neutrality of the courts (see for example, Salisbury, 1976), or pragmatically accepting the limitations and challenges of this forum as given have continued to try to develop research methodologies that will both satisfy legal requirements and respectfully represent Aboriginal peoples.

Peter Douglas Elias offers an extraordinarily meticulous and rigorous set of research proposals that directly address each of the demands set out in the legal tests developed through *Calder*, *Baker Lake* and *Bear Island*, before Canadian Aboriginal litigants (Elias, 1993). Elias emphasizes in each of his proposals that the resulting "data may be readily returned to the source, that is, the hands and mouths of the individual [Aboriginal] respondents...[and that the same data can be]...fully accessible to common sense" and "virtually no explanation or interpretation is required for their understanding" (ibid:235). I interpret this latter reference to be directed towards providing judges, and

lawyers, with evidence that does not require them to step outside of their own paradigms or "world views."

Elias makes two further points that bear directly on this discussion. First, despite the vast literature on Canadian native law issues, and the astounding volume of social science research that has been put before the courts during the past thirty years,

...little of this literature...does more than mention the role of social sciences as a source of information in court decision-making processes. Legal scholars have made virtually no attempt to show how social science data have been or might be integrated into an overall legal strategy for addressing these questions (ibid:236-237).¹⁰

Second, he notes that,

The questions involved in land claims work, however, are largely questions of law rather than science, and cultural experts must be as aware as possible of the legal culture shaping the field (ibid: 266).

Several points emerge from this review that are ever present but infrequently explicitly stated or analyzed, and which I want to foreground. First, while Aboriginal peoples, anthropologists, and the world at large have changed in various ways since the establishment of the Indian Claims Commission in the U.S. in 1946, neither the law, nor legal strategies have responded positively or in a complementary fashion to these changes. That is to say, the law seeks to reproduce itself, not to find justice; and lawyers are charged with winning their cases, not finding the truth. In the particular case of the relationship between anthropology and law, it is the law that has dominated and to which anthropologists and Aboriginal peoples have attempted, repeatedly, to respond.

¹⁰ This "one-way" relationship between anthropologists and lawyers is noted as an ongoing problem throughout the field of applied legal anthropology in both Canada and the United States. See Starr and Collier, 1989; and Vincent, 1990.

It is interesting too, to note the "antiquity" of the theoretical and substantive arguments which have also persisted. The governments have argued that at the time of European contact, Aboriginal peoples were insufficiently evolved to be classified, in terms of European social theory--specifically, various versions of evolutionism--to be considered land owning peoples. Aboriginal peoples argued, initially, that in terms of European theories they were sufficiently evolved. In recent years, they have argued that their relationship to land is valid in its own terms: different from but equal to European categories.

Kwakiutl, Bill Wilson:

So what we say is we have title and that is why we are talking to you about aboriginal rights, but we are not talking English Common Law definitions, international law definitions that have been interpreted and reinterpreted and sometimes extinguished by conquest and ceding treaties and other agreements like that. We are talking about the feeling that is inside all of us as metis, Indian and Inuit people that this country belongs to us...

My whole point [is] that we must stop viewing [aboriginal rights] from the point of view of the dominant society if we are ever going to understand what the Indian people, the Inuit people and the Metis want. The question, then, is whether there is a means of understanding this concept from the Native point of view (Wilson, 1983(a):423).

This language is, of course, familiar to anthropologists. The notion that culture(s) is(are) plural, and that each should be understood within the context of its own history and conceptual scheme formed the basis of Franz Boas' redescription of anthropology at the turn of this century. It is this paradigm that has, until very recently, dominated American cultural anthropology. And, it is this paradigm that has increasingly shaped the presentation of Aboriginal title and Aboriginal rights litigation in Canadian courts and defined the role of anthropologists working in support of Aboriginal peoples in legal, political and public forums. The Gitksan and Wet'suwet'en law suit, perhaps more than any other, was argued within this framework.

The second argument the governments make is that since contact Aboriginal peoples have become sufficiently assimilated, or acculturated, as to render them essentially indistinct from other Americans/Australians/Canadians. Aboriginal litigants argue that while they have changed, they remain culturally distinct peoples.

The Crown (in Canada and Australia), or the Government of the United States, consistently demand that the evidence presented by expert witnesses for Aboriginal litigants, particularly historians and anthropologists, be weighed and measured by the kinds of criteria set out above by Kenny. These same expert witnesses, while often conducting "quantitative" and "scientific" research, just as consistently argue that oral histories and qualitative research methodologies like participant observation produce knowledge that is valid and, in this case, crucial.

With these questions in mind, I turn now to the legal issues facing the court in *Delgamuukw v. R.* The arguments put forward by the Gitksan and Wet'suwet'en in answer to these questions are set out below, to provide a context for examining the opinion reports and testimony of the anthropologists called as expert witnesses for the Plaintiffs.

The Court was faced with the following questions, with which the reader is likely painfully familiar by now:

- (1) What is the source of Aboriginal rights or how do Aboriginal rights arise?

The Gitksan and Wet'suwet'en argued that their rights arise from long time prior ownership, as required by law, and by virtue of a spiritual covenant with the Creator. As required by law, and in the context of definitions drawn from European social theory, the Gitksan and Wet'suwet'en argued that they lived in organized societies, with laws and institutions of their own

that regulated social, economic and political life. Anthropologists supported this claim as described below.

- (2) What is the scope of Aboriginal rights? Particularly, do they include aboriginal self-government, and commercial hunting and fishing rights? The Aboriginal plaintiffs argued that their pre-existing inherent right to self-government flows from their Aboriginal title, and that the division between "commercial" and "non-commercial" is a construct of European theory and not applicable in the case before the courts. Substantively, they argued that they had always traded their resources with neighbours and Europeans were no different. Anthropologists and historians supported this claim through reference to pre-contact trade, the relationship between wage labour and elaborated feasting, and descriptions of indigenous conflict resolution processes. Anthropologists also described different theoretical approaches to understanding processes of social and cultural change.
- (3) How can such rights be extinguished and have they been in this case? The Plaintiffs argued that extinguishment of their title could only be effected with their consent and that such an agreement had never been reached. Anthropologists addressed this issue through theoretical discussions about the necessary conditions for informed consent to be legitimately obtained, and substantive descriptions of the historical context in which colonial law and administration became dominant in Gitksan and Wet'suwet'en territory.

- (4) What is the nature of Indian title in relation to the Canadian system of property law? The Plaintiffs at first argued that they wanted a declaration stating that they held paramount title and then, during the course of the trial, agreed that the underlying title lay with the Crown as set out in the Royal Proclamation of 1763. This was explained as a gesture of compromise. As to the relative status of Aboriginal title and title in fee simple, the Plaintiffs argued that their relationship to land was different than that of Europeans and Euro-Canadians but culturally appropriate to them and equal to Canadian property law. Anthropological evidence, while indirectly important to this point, did not directly address it. It was argued very much within a legal framework. However, anthropologists attempted to discuss different cultural concepts and values relating to property.
- (5) Can any fiduciary obligation can be imposed on the Crown in this case? This, again, was principally a legal question.

In order of appearance, the first expert witness to testify was Neil Sterritt, hereditary chief and cartographer. He testified on the subject of internal and external territorial boundaries. Next, Rolf Mathewes, Palaeobotanist, testified that his research supported the story told in the Seeley Lake *adaawk* about a massive landslide that occurred around 3,380 years ago. Alan Gottesfeld, geomorphologist followed Mathewes, and he, too, rendered his support for the *adaawk* based on results of research conducted in accordance with the "scientific methodology" required by his discipline. Sybille Haeussler, Forest Ecologist, took the stand on November 10, 1988, and described unique features of the three different ecoregions that converge in Gitksan and Wet'suwet'en

territory. Haeussler was followed by Sylvia Albright, Ethnoarchaeologist. Judge McEachern asked her to provide a definition of her area of expertise before she began. Albright replied as follows: "Ethnoarchaeology is the ethnographic observations on cultural behaviour of the aboriginal group of people living in a specific area with archaeological evidence from the same area, of understanding the past occupation of that same area" (Monet and Wilson, 1992:114). Albright gave evidence that archaeological data established continuous occupation in the territory for at least 5000 years. Heather Harris, a non-Native woman who had married in to a Gitksan family and been adopted into a House and clan, and who also held a bachelors degree in anthropology, testified about the genealogies she had collected that described the matrilineal kinship system that forms the basis of Gitksan and Wet'suwet'en social structure. The lawyer for Canada, Marvyn Koenigsberg, suggested to Harris under cross-examination that she may have "gone native" (ibid). Dr. James Kari, Linguist explained the Tsimshianic roots of the Gitksan language that shows their historical relationships with the coastal peoples, and the Athabaskan roots of the Wet'suwet'en which shows them to be distinct peoples historically associated with northern and eastern peoples. Both languages currently show considerable borrowings from each other.

The first "professional anthropologist" to testify was Dr. Richard Daly who took the stand for three weeks in February and March, 1989. Daly's 700-page report, entitled "Anthropological Opinion on The Nature of the Gitksan and Wet'suwet'en Economy" was based on his doctoral dissertation at the University of Toronto supervised by Dr. Richard Lee. Its eight chapters divided it into the following topics: theory and methodology in anthropology; kinship economy; ownership and management in a kinship economy; the natural environment, nutrition and production strategies; the seasonal round of economic activities; storage, the accumulation of values, and social hierarchy; the question of trade;

the feast: paradigm for social interaction and the circulation of values. Daly's curriculum vitae showed that he had received his Masters degree in Anthropology from Manchester University in 1975, and since that time had been employed in various professional positions while preparing his doctoral dissertation for which he did fieldwork in the claims area for approximately two years in 1986 and 1987.

Daly's opinion report was written from a perspective influenced by the theories of the French anthropologist, Maurice Godelier, well known for his work on non-western, non-capitalist economies. Daly's methodology included extensive archival research as well as interviewing of elders and participant observation, set out as in his report as follows:

My approach has been, first, to study ethnographic publications concerning the Gitksan and Wet'suwet'en in order to refresh my understanding of the contours of the cultures and economies which were the subject of this report and which I had gained some understanding of during the years when I worked at the Royal Ontario Museum...I then began to gather information based upon the peoples' own explanations of their economic life. I gradually learned the social context which gave broader meaning to this information. This developed as my experience of the Gitksan and Wet'suwet'en communities increased. At this stage I turned again to the documented source materials and ethnographies and assessed these against the knowledge I possessed at that point in the research (Daly, 1988:19).

Daly listed the following specific sources for his opinion report:

- (1) the transcripts of witness' statements and commissioned evidence of witnesses in the trial;
- (2) formal interview data he collected during his research in the form of written fieldnotes that had been submitted to the court;
- (3) knowledge he obtained through informal discussions, not recorded in writing;
- (4) ethnographic monographs, including the Barbeau-Beynon papers, oral histories and fieldnotes collected by John Cove, Father Morice, Diamond Jenness, Franz Boas, Wilson Duff, John Adams, and Marjorie Halprin;
- (5) articles and books on general history and economic history.

Daly addressed the problematic relationship between participant observation methodology and objectivity in his opinion report setting out the following question and answer:

How does the participant observer anthropologist strive for objectivity in his or her work, especially when the road to data collection leads through the day-to-day lives of people the anthropologist knows and cares about?

The anthropologists seldom, if ever, achieves his or her goal of fully identifying with the community studied. The reality is that the researcher's partisanship to his or her own culture and education is a barrier to identity with, and acceptance by the people studied. The cultural differences, and differences due both to history and the realities of power relations between the culture of the anthropologist and the culture of the subject impede the interaction. If an anthropologist did achieve this level of identification, he or she would be rendered incapable of continuing to be an anthropologist; namely, of translating one culture into the terms of another...

Anthropologists seek to determine the truth through their work, seeking validation or invalidation of propositions by cross-referencing data and seeking to place the phenomena studied in as fully rounded a context as possible (ibid: 26-28).

And, he quoted the code of ethics of the American Anthropological Association, as further clarification of his role and work.

Crown lawyers challenged Daly's qualification as an expert witness on the grounds of Section 11 of the Evidence Act that says an expert should disclose the facts upon which his opinion is based. They argued that Daly's failure to turn over notes relevant to two years of participant observation was a breach of this requirement. Further, they charged that his report was "opinion thinly disguised as argument," that he had interwoven oral histories with other information, "the foundation of which is highly questionable," that his report duplicated evidence already given by other witnesses, and that since his participant observation had been conducted after the commencement of the trial and could not be replicated, it should not be admissible (Transcripts, Vol. 184:11822).

Chief Justice McEachern ruled that Daly qualified as an expert witness and that he would hear his evidence, subject to qualification as to weight. In other words, he would hear him for himself and decide on the reliability of the evidence when he rendered the judgment.

Dr. Antonia Mills followed Daly in March 1989. Mills graduated with a doctorate in cultural anthropology from Harvard University in 1969. Since that time she has lived, worked and taught at a number of universities in Canada and the United States, and has conducted participant observation and archival research among the Dunneza-Cree (Beaver) Indians and the Wet'suwet'en, primarily. Her 216 page opinion report, entitled "The Feasts, Institutions and Laws of the Wet'suwet'en," focused on Wet'sutwet'en culture history, and emphasized religion and cosmology. Mills' particular research interest for the past several years had been reincarnation beliefs and practices among the Wet'suwet'en. She described her task in her introduction as offering an ethnographic description of,

...a culture as dynamic as the rushing waters of the Bulkley Canyon, which owes as much to headwaters Athapaskan origins as to its downriver and coastal prerogative oriented neighbours. The nature of the Wet'suwet'en feast; the genesis of the Wet'suwet'en system of clans, houses, crests, titles; the functioning of these institutions, and the laws which regulate their relationship to their land and to the creatures and plants that live on it are described in the following chapters (Mills, 1989:9).

Crown lawyers argued against her qualification on the grounds that her training and work emphasized psychology, symbolism and religion and was therefore "not of interest to this case" (Transcripts, Vol. 196:12860). Like Daly, she had conducted participant observation following commencement of the court action. Like Daly, she was charged with being an advocate who lacked objectivity, and who duplicated the evidence of the lay witnesses. McEachern, again, allowed her testimony.

Crown lawyers focused their cross-examination of Mills on the question of warfare. In her case, they took umbrage at a statement she made in her 20-year old Ph.D. thesis on the nature of warfare in western society. MacKenzie asked Mills as follows:

MacKenzie: On page 60, you set out your description of western society. I'm not going to read it out, but I just ask you to read over the first couple of paragraphs down to the line "Normal men have killed perhaps 100,000,000 of their fellow normal men in the last 50 years" Was that your view in 1969?

Mills: Yes.

MacKenzie: And is that your view to-day?

Mills: I think I probably am a bit more sophisticated than that, but people certainly continue to kill their normal men. It's not as if I'm saying that other people don't do it as well. It's not as if I'm claiming that the Wet'suwet'en didn't kill one another (Transcripts, Vol. 196:12869).

At one point in her cross-examination, Chief Justice McEachern intervened in the Crown's cross-examination of Mills, the Plaintiff's only female anthropologist, on the subject of her alleged romantic biases:

Court: Are you surprised to find so many like Ogden writing that the masses came out of their huts naked? Had their level of civilization not progressed beyond that at or just after the time of contact (Transcripts, Vol. 201:13319)?

Mills replied that the Wet'suwet'en normally wore clothes.

Court: I've heard...I have an impression that I am hearing perhaps the best side of these people, which is understandable, but you haven't said anything about wars...Would you call them war-like?...the people generally (Transcripts, Vol. 201:13320)?

Mills answered that she found it difficult to respond to a question that required her to make sweeping generalizations that characterized an entire people as either "war-like" or not. The Chief Justice continued:

Court: There is a suggestion of slaves. Did the Wet'suwet'en take slaves? (ibid)

Mills explained at length the similarities and differences between "slaves" and hostages taken in war.

Court: There is even a suggestion in one of the pieces about cannibalism. Was that a feature of the Wet'suwet'en in any way?

Mills: No
(Transcripts, Vol. 201:13321).

The Chief Justice suspected Mills of presenting a romantic picture of the Wet'suwet'en. Romanticism is a criticism often made of the discipline, and there is an extensive scholarly literature on romanticism in anthropology (see, for example, Stocking, 1987). However, suggestions that aboriginal peoples were war-like, naked, slave-owning cannibals at the time of European colonization are not part of a learned debate on romanticism. These are empirically unfounded, archaic images that arise from obsolete beliefs and bear no relation whatsoever to historical fact.

Arthur Ray¹¹ followed Antonia Mills, and he, in turn, was followed by Fishery Biologist, Mike Morrell. On day 210 of the trial, anthropologist and film-maker, Hugh Brody, took the stand.

Brody's 213 page opinion report was entitled "The Nature of Cultural Continuity Among the Gitksan and Wet'sutwet'en of Northwest British Columbia," and was based on participant observation, interviews and archival research that included perusing the Barbeau-Beynon archives, Indian agents' letters and reports, MacKenna-McBride documents, trapline registration, and territorial disputes recorded by whites. The purpose of his report, as set out on page 1 was to "...to bring some part of another people's world view into ours." Brody, however, identified the "heart" of his endeavour as being "to

¹¹ I will discuss Dr. Ray's evidence in a subsequent section.

recognize and then break free from Euro-Canadian ethnocentricity" (ibid:7). And, one of the first steps in that process, Brody advised, was to recognize that European intellectual thought, as expressed through language, was abstract and conceptualizing. "Hunting peoples," he wrote, "dislike generic categorizing language and prefer specific and concrete vocalization...hunting and gathering societies might be said to believe above all in facts" (ibid:5)).

Brody went on to summarize the history of research into Aboriginal title and rights over the past twenty years, noting the trend away from assimilation studies popular in the 1960s, through the land use and occupancy studies of the 1970s, and into the ownership and jurisdiction studies of the 1980's. He wrote:

The assumption that rights of ownership are established on criteria of land use or occupation now appears naive. (We do not apply these criteria to our own rights. We do not draw boundaries around our territories by using and occupying them (ibid:6)).

He then went on to review anthropological theory and to show how, until very recently, anthropology ignored "how people regard themselves."

It was not, however, what Brody had to say about the Gitksan and the Wet'suwet'en that Chief Justice McEachern and the Crown's lawyers objected to most strongly, but rather what he had to say about European and Euro-Canadian ethnocentricity. The Crown selected four passages from Brody's opinion report as evidence that "his report has nothing to contribute to the issues before this court" (Transcripts, Vol. 210:14217).

The first Crown objection was based on the following statement on page 2:

...our society has occupied the lands of other societies, and is committed to a particular kind of historical process. This means that settlers and governments have tended to see native peoples through unclear or distorting lenses.

Chief Justice McEachern objected strongly to this statement. He said:

I have expressed the view for some time that courts of law are troubled on a daily basis with this question of feelings. Feelings are what make people function the way they do in many cases, but it's not something that laws and judges can manage very well. And if somebody wants to tell me what somebody else's feelings are, I have to discount it very substantially, because firstly he may have misconstrued the feelings, and secondly, the feelings may not be rationally founded (Transcripts, Vol. 211:14254).

...

Jackson¹²: My Lord, perhaps I might be permitted, in response to Mr. Goldie's point in reading that particular part which you just read and the whole relevance of how native society is perceived (ibid:14255).

Court: Does it matter...in any real sense, does it matter?

Jackson: Well, My Lord, my point was to deal with these issues, and the relevance of a social scientific analysis to the appropriate legal conclusions, which of course are for Your Lordship to decide...

Court: Let's assume for the purpose of this argument...they are going to...they are going to be found to have the rights that are claimed in the Statement of Claim. Does it matter if, from the time of contact, circa 1800 A.D., that they have been treated badly or they have been treated well? Does it make any difference?

Jackson: I think the way Your Lordship has framed it, no. It does not. But is our submission that in coming to that kind of conclusion as a matter of law that they have rights, there are a number of matters which have been pleaded in Defence and there are a number of matters pleaded in the Statement of Claim upon which Your Lordship should hear evidence regarding the establishment of reserves. It is our submission that understanding the cultural context in which that took place will enable Your Lordship to make a conclusion, a legal conclusion.

Court: The fact is that a reserve was established, or an area was logged, or a mine was found and exploited or something of that kind. Those are facts that may go to all sorts of issues relevant to this case, but if--does it make any difference if settlers and governments have had an attitude or have viewed things in a particular way? The more I hear of this case, the more it comes back to the old question, 'what are the facts?' As the detective used to say, 'what are the facts, ma'am?

¹² Lawyer for the Gitksan and Wet'suwet'en, Michael Jackson.

Jackson:...just the facts...

Court: Yes. 'Just the facts, ma'am.' I know that its late in the day to try and boil things down. I know its late in the day to change the rules, and I don't want to change the rules upon which we have been functioning, but that sort of a passage, "This means that settlers and governments have tended to see native peoples through unclear or distorting lenses..." seems to me to be of highly questionable relevance. You might just as well say what happened indicated that Indians have tended to see governments through unclear or distorted lenses and that probably the answer would...what is...what difference does it make? Of course...do they have rights and what are they? ...not how the people view each other..

Jackson: My Lord...

Court: As I said a moment ago, they may view each other from completely irrational bases. They probably do. Most people do view each other from an irrational basis. Again, what difference does it make?

Jackson: I think it does make a difference, My Lord, in terms of understanding events which have taken place which are relied upon by my friends as evidence of loss or acquiescence in the loss of rights. And I will...

Court: I have grave misgivings about the conspiratorial theory of history, but that's perhaps a cultural impediment that I am going to have to try and avoid as we proceed. Go ahead, please, Mr. Jackson....(ibid:14256-14258).

Next, the Crown objected to the statement on page 49 of Brody's report, that

Gitksan and Wet'suwet'en reserve lands amount of some 45 square miles. According to white interpretations of events, the villages that make up most of the 45 square miles represent the conclusion of a historical process.

Mr. Goldie, lawyer for the Province of British Columbia, objected strongly to this passage.

Goldie: My Lord...I check my assumptions at the door, and I don't think it's appropriate for a witness to talk about "we." If he is talking about some other culture, let him talk about it...but I leave my assumptions at the door, and I don't want to deal with cross examination on the basis that I am depending on some particular point of view that is ascribed to me or to my client for that matter (Transcripts, Vol. 212:15381).

It would be a very interesting and perhaps educational process if Mr. Brody told us about ourselves and held up a mirror to us, but what has that got to do with this litigation?

Chief Justice McEachern agreed with the Crown.

Court: "According to white interpretations..." What white interpretations? All white interpretations? It doesn't say some. I don't know if it means some, but...isn't that just so wide and sweeping and so extensive that it's not keeping to deal with it? That's what every white person thinks, and then again we still have the problem. If he does, so what? We are still talking about rights that arose at the time of contact, as I read the authorities. I mean, I just have difficulty with the nature of this evidence. It seems to me it's way beyond what any court has ever been asked to look at before. I suppose there have been things as broad as that...isn't this...hasn't this perhaps gone over the line?

I must say I find that statement to be terribly, terribly exaggerated, and when you get into that area, you know that you are having a terrible time coming to grips with anything that's going to be useful. I mean, I think if the witness wants to say that's his view, I suppose that's all right. He doesn't say that. He says this is what everybody thinks. I don't think that is even close to being right. And if...well, maybe that's his view. Maybe he thinks every white person thinks that.

Brody: There is...and I said I am dealing at a high level of generality here self-evidently...there is a core to the intellectual assumptions that are made within our intellectual heritage, and these assumptions say a lot about what is expected to happen to tribal and aboriginal peoples.

Court: Well, I can understand the approach, Mr. Jackson, when we are talking about the culture of the Indian people, and one has to be generous, which is not really the word I am looking for, but quite relaxed about the extent to which evidence can go, because it's a very ill-defined kind of a study. But when you are talking hard facts, such as the McKenna McBride, you have got terms of reference, you have got a transcript, you know it was said, then it seems to me that there isn't much that can be said about that. It speaks for itself...Truly, there must be limits, and I am just having trouble finding what they are here. I have a terrible feeling that I am way beyond them, and you are asking me to go way beyond them...It's like when you are in a contest or a game and they suddenly say we are not going to play it according to the rules. I just have the sense that I am asked to listen to material that is not something that a judge should be hearing (ibid: 15383-15389).

Brody's well known, in anthropological circles, interpretations of "frontier culture" incurred the wrath of the Crown and the judge as well, and the following statement from page 69 of his report was singled out as reason to disqualify him as an expert witness:

The encounter between native culture and frontier whites may be said to constitute a meeting of culture and anti-culture. Whites who are roaming, often alone, far from their own land, encounter those who are absolutely at home. The whites have thus in a way shed society. The native people they deal with are absolutely at home...

Finally, Crown lawyers pointed out the following statement, claiming it revealed Brody's inappropriate biases most strongly:

Newcomers, sure of their superior knowledge, understanding and rights, do as they think fit, encourage others to do likewise and call upon the forces of Canadian law and order if too directly thwarted and opposed (ibid:71).

The government of Canada summed up its objections to Brody's qualifications as an expert witness as follows:

Koenisgberg: It is my submission what Mr. Brody is doing is describing attitudes of white people... how they feel about what's going on, and how to a certain extent the Indians feel from his point of view in response. And it is my submission that inquiry is irrelevant to the issues in this lawsuit. The issues that are being put forward by the plaintiffs for Your Lordship to decide is did the government, the white government impose jurisdiction? Questions like were reserves created and what were they, how the whites felt and how the Indians felt is beyond the purview of this inquiry. It's an interesting question. I am sure it is one which has probably concerned many a graduate thesis. But to determine--to go into detail about what was happening is in my submission irrelevant. It is, of course, in my submission, also in the nature of argument and speculative in the extreme...If this kind of evidence is allowed its tantamount to allowing experts to act as counsel and it's as if all the 45 or 50 witnesses that Your Lordship has heard for over a year, that Your Lordship cannot evaluate and interpret that evidence, but that you require the assistance of an expert to do so (Transcripts, Vol. 211:14253).

Chief Justice McEachern posed the following question to Crown counsel regarding Brody's admissibility:

Court: Well, let me pose this scenario...That an expert in the sense of a person highly trained and experienced in the discipline who has strongly held and widely publicized views on the question, is nevertheless called as an expert witness and he's qualified in the sense that he is shown that he has all the experience-related requirements of an expert. Can the court say...I won't hear this witness because he has a well known and admitted point of view? Is that not a matter that goes to weight (Transcripts, Vol. 210:14217)?

Mr. Goldie for the province of B.C. responded, and summed up his objections as follows:

Goldie: Normally speaking, the experts everyday are called who are--who are known as the proponents of a point of view. That is to say, they favour a particular theory but this is not a case of favouring a particular scientific theory.

Court: He favours a party.

Goldie: His is favouring a party. That's the thrust of my submission, My Lord, and if he favours the party that takes him out of the category of the expert who says, well, I believe in the such and such theory of relativity.

Court. Yes.

Goldie: And I will stand up and be counted on that point, but there is no such suggestion of that here.

Court: And then proceeds to try and persuade the court that his theory is right.

Goldie: That's correct...That's correct...but his theory...

Court: What's the point of this?

Goldie: His theory has got nothing to do with the particular parties to the case. There is no theory being advanced here in my submission...My principle objection is that he says his report is an overview...The word overview means that he cherry-picks from the evidence of others...I don't mind his saying that every other anthropologist except himself is wrong and he's right...That's his privilege...

Court: You can't get ready for a case like this without being closely associated with the people and of being associated with them, but the question is does it go beyond that when he says, as he said before, he likes Indians and he has an--or aboriginals--and he has a favourable disposition towards them. Does that disqualify him?

...In a perfect world I would hope that parties would confine their expert testimony to persons whose objectivity is not open to question. That may not always be possible. And, indeed, it might be a dangerous test to apply, because the person who hides his biases is no more credible than the person who makes it known. The former may be more dangerous than the latter (ibid: 14217-14223).

McEachern therefore allowed Brody to be qualified, subject to weight, of which he apparently gave none.

The Crown's and the Chief Justice's response to Brody's arguments are indicative of the fundamental challenge to the court's self-image and legitimacy, characterized by the term "judicial neutrality," that a critique of ethnocentrism and epistemology poses.

This is a challenge not only to a system of justice but also to a system of knowledge and an embodied way of being.

The criteria apparently being employed by the Judge to evaluate the validity of the evidence presented by the Gitskan and Wet'suwet'en witnesses and the anthropologists who testified on their behalf are familiar to anthropologists and philosophers, and other western intellectuals. They are the criteria of positivist social theory, that have, as well, become "common sense." Charles Taylor suggests that a close relationship between personal identity and positivist, or naturalist, social theory is integral to a modernist identity and its desires for control through objectification, epitomized in the position of judge. Taylor writes:

...behind and supporting the impetus to naturalism...viz. the understandable prestige of the natural science model, stands an attachment to a certain picture of the agent. This picture is deeply attractive to moderns...It shows us as capable of achieving a kind of disengagement from our world by objectifying it (Taylor, 1985(a):3).

Taylor goes on to discuss the importance of the "disengaged atomistic self" to contemporary identity and to what he calls the "self-definition from which people orient themselves to the world" (ibid:107). Given that the law's most fundamental self-image and claim to public legitimation rests on the assumption of a firm boundary between reason and emotion, thought and feeling, the judge's own investment in such an image of himself is understandably significant. The most pernicious feature of this belief system is that it refuses such a description of itself and masquerades rather as objective fact and universal law, comparable to the laws of nature. Plainly stated, McEachern's refusal to consider the significance of perception and emotion, is indicative of the significance of perception and emotion.

There is another layer to the discourse on gender, emotion, culture and rationality that is helpful in understanding the law's, and Chief Justice McEachern's, responses to the challenges put forward by Aboriginal litigants and anthropologists. Seidler describes the relationship between concepts of rationality and hegemonic masculine identity as follows:

In Western Europe since the period of the Enlightenment in the 17th century, men have assumed a strong connection between their rationality and their sense of masculine identity. They have learned to appropriate rationality as if it were an exclusively male quality denied to "others": women and colonized people in particular...Since 'rationality' is identified with knowledge, it is similarly denied to these same "others." Emotions and feelings are likewise denied as genuine sources of knowledge within the culture. Rather, they are associated predominantly with weakness and femininity, and so as antithetical to the 'strengths' with which boys learn their sense of masculine identity.

Men could only assert their humanity by mastery over the physical world, and by learning to dominate their passions and desires. It is this inherited notion of self-control as dominance that has been so closely identified with modern forms of masculinity (Seidler, 1987: 94).¹³

The refusal by the court to hear or take account of a critique of ethnocentrism, was, I would argue, an important determining factor in the judge's final decision. Without a consideration of this critique as a necessary pre-condition to approaching Aboriginal "world views," all the testimony was seen and heard through such "distorting lenses," and the judge's interpretation governed by such "irrational feelings," that the outcome could not have been different from what it was, no matter what quality (or lack thereof) of

¹³ Connell (1987) and others have pointed out, the association of these characteristics with "men" should be more accurately conceptualized in a symbolic rather than an essentialist fashion (1987:53). First of all, there are clear differences between the degree to which different groups of men, and in some cases individual men, hold these beliefs, and, more to the point, to the degree to which different men have the power to put them into practice. This is discussed in the context of debates about "hegemonic" versus "non-hegemonic masculinity." Connell suggests that the terms "masculine" and "feminine" be replaced by the terms "symbolic masculine" and "symbolic feminine" to account for this gap between generalizing theory and lived experience. However, the Judge clearly expresses a point of view that can be characterized as representing a rigid form of hegemonic hyper-masculine ideology.

evidence was presented. Of course, to entertain notions of racism, like sexism, implies a fundamental challenge to "judicial neutrality," and its pre-condition: positivism and objectivism in human relationships within aggregates of disengaged self(s). To challenge the epistemological foundations of western law, and the judge's own identity, is moving beyond an appeal to compassion and equal rights.

As evidenced by the statements in his Reasons for Judgment, Chief Justice McEachern, in the final analysis, gave no weight to anthropological evidence (or at least to the anthropological evidence presented by the Plaintiffs).

Addressing the professional anthropologists, he said:

I must briefly discuss the evidence of Drs. Daly and Mills and Mr. Brody because of the importance attached to it by the plaintiffs. These anthropologists studied the Gitksan and Wet'suwet'en people intensively. Drs. Daly and Mills actually lived with the Gitksan and Wet'suwet'en for 2 and 3 years respectively after the commencement of this action...This evidence was seriously attacked on various grounds, particularly that they were too closely associated with the plaintiffs after the commencement of litigation...and that they did not conduct their investigations in accordance with accepted scientific practice (Reasons, 1991:50).

Dr. Daly, Judge McEachern said, was "more an advocate than a witness," and Dr. Mills "also showed she was very much on the side of the plaintiffs" (ibid:50-51). The Chief Justice did not mention Hugh Brody by name again, nor did he make any specific comments on Brody's evidence.

McEachern went on to quote the following passage from the Statement of Ethics of the American Anthropological Association in support of his dismissal of Daly's work:

Section 1. Relations with those studied: In research, an anthropologist's paramount responsibility is to those he studies. When there is a conflict of interest, these individuals must come first. The anthropologist must do everything within his power to protect their physical, social and psychological welfare and to honour their dignity and privacy.

Several more critiques of Daly are specifically made by the Chief Justice. First, that,

...he seems to be describing a society I do not recognize from the evidence of the lay witnesses. In fact, I felt constrained to comment during his evidence that one would think the motor vehicle had not been invented. Many of his propositions are based on facts not proven in evidence (ibid:51).

Second,

...he placed far more weight on continuing aboriginal activities than I would from the evidence although he recognized the substantial participation of the Indians in the cash economy (ibid).

Third, the Chief Justice was not convinced that,

...substantial portions of House members' income from small enterprises and wage labour is devoted to the proper conduct of House affairs (ibid:51).

"With respect," the Chief Justice argued, "I think this confuses the practice of chiefs making substantial contributions to feasts in which they are particularly interested with the day to day life of these people" (ibid).

Fourth, Daly's statement that "Houses own the rights to the labour of their sons and daughters, and of their daughters' offspring," was, according to McEachern, "not proven at trial and I have no reason to believe it is true" (ibid).

Fifth, McEachern claimed to find "Dr. Daly's report exceedingly difficult to understand. It is highly theoretical and, I think, detached from what happens, 'on the ground'." The Judge goes on to quote the following passage from Daly's report that he did not understand:

The world view of those living close to nature in a non-centralized, kinship society, reflect the basic reciprocal principle which governs day-to-day social relations in the society itself. On one hand, nature's life force is seen to nurture

the people; on the other, nature exacts its price from the people, its life force feeding in turn, upon the people and their society, consuming them, causing death so as to nurture rebirth. The House group's proprietary representative, its leader or chief, exercises a reciprocal stewardship vis-a-vis the land, and at the same time, a proprietary right toward this land vis-a-vis the claims of other groups or nations. On one hand, the land is dealt with as a property object between two potentially competitive groups. As such it is subject to ownership. On the other hand, the land is non-property when it is viewed in terms of the people's relationship to the life force in the natural world (ibid:51).

Sixth, and, in McEachern's words, "most significantly,"

Dr. Daly lived with these people for 2 years, while this litigation was under way making observations on their activities, listening and, I think, accepting everything they said, without keeping any notes.

Seventh, the Chief Justice considered the fact that the Tribal council had not shown Dr. Daly a 1979 survey that found "32% of the sample attended no feasts, and only 29.6% and 8.7% engaged in hunting and trapping respectively." The Chief Justice put great store in this survey, despite criticisms made of the methodology employed, and mentioned it several times. The survey had been conducted by a consultant hired by the Tribal Council and did not survey a representative sample of the community. The questions were also poorly designed.

He concluded:

For these reasons, I place little reliance on Dr. Daly's report or evidence. This is unfortunate because he is clearly a well qualified, highly intelligent anthropologist. It is always unfortunate when experts become too close to their clients, especially during litigation (ibid).

Regarding Dr. Mills, chief Justice McEachern found that as well as being "very much on the side of the plaintiffs," she had changed her opinion in her final report from that contained in her draft of June 1986 where,

...she attributed all Wet'suwet'en social organization, including the kungax, to borrowings from the Gitksan or other coastal Indians. This is a startling

departure from a large body of professional opinion on the part of a witness closely associated with the beneficiaries of her new opinion (ibid:51).

Finally, the Chief Justice concluded,

Again, however, apart from urging almost total acceptance of all Gitksan and Wet'suwet'en cultural values, the anthropologists add little to the important questions that must be decided in this case. This is because, as already mentioned, I am able to make the required important findings about the history of these people, sufficient for this case, without this evidence (ibid).

Of the other expert witnesses and their testimony, the Chief Justice gave mixed appraisals. He found that.

...the archaeological evidence establishes early human habitation at some of these sites, but not necessarily occupation by Gitksan or Wet'suwet'en ancestors of the plaintiffs (ibid:61).

Regarding the *adaawk* of the Seeley Lake Medeck in which a massive landslide is recorded along with the presence of a supernatural grizzly bear and which the plaintiffs sought to bring both oral tradition and scientific evidence forward in support of, McEachern concludes that he is satisfied the landslide took place but he neither rejects nor relies on this evidence to support Gitksan presence in the area at the time (ibid:66). While he commented that he "had a favourable impression of the competence and industry of Ms. Harris," he did not find the genealogies she collected could "establish House membership as an active force in the lives of the persons listed" (ibid:68). The Chief Justice was less complimentary towards Susan Marsden, another "married in" and adopted woman who testified about evidence provided by the *adaawk* and *kungax* as to origins and migrations:

I am unable to accept Ms. Marsden's theory. I have no doubt it is put forward honestly and in good faith, but her qualifications are not adequate for such a study (Marsden holds a B.A. in Anthropology..ed), it has not been published or subjected to academic or other learned scrutiny, she is an interested party, and she has ignored some verified facts and other learned opinions...(ibid:68).

The judge was impressed by the linguists, Drs. Rigsby and Kari, of whom he wrote:

By a mysterious process only properly understood by very learned persons, it is possible to make estimates of when the speakers of a particular dialect 'separated' from speakers of other dialects...The evidence of these language specialists supports Gitksan and Wet'suwet'en identity as distinct peoples for a long, long time (ibid:73).

In critiques of the judgment written by anthropologists three themes have been predominant: (1) that the judge negatively evaluated, and insulted, Gitksan and Wet'suwet'en culture; (2) that his judgment was based on his own unexamined ethnocentric biases; and (3) that he rejected the evidence of well respected anthropologists, and dismissed the value and credibility of anthropology as an intellectual discipline.

Anthropologist Robin Ridington wrote that he "experienced a deep sense of shame at the judge's failure to understand the teachings that the chiefs and elders had so generously given him...I was ashamed and sad at the judge's failure to understand" (Ridington, 1992:207). He then goes on to charge McEachern with holding a "systemic and unacknowledged ethnocentric bias [which] is fatal to the credibility and reliability of his conclusions" (ibid). "McEachern revealed a world view and an ideology appropriate to a culture of colonial expansion and domination," Ridington concludes. Ridington's article ends with a listing of the ethnocentric assumptions underlying the *Delgamuukw* decision. These are: (1) evolutionism; (2) primitivism; (3) written histories are superior in reliability and accuracy to oral; (4) agricultural and industrial land use is superior to hunting and gathering; (5) primitive aboriginals are inferior to civilized Europeans; (6) colonizers have been motivated by good intentions; (7) inevitable assimilation. Finally, in describing the

similarities between Chief Justice McEachern's thinking and that of Joseph Trutch,

Ridington chastises the judge for failing to progress and change:

The views Trutch expressed may be understood, if not excused, by the context of nineteenth century British imperialism. Trutch did not have the benefit of an anthropological perspective. McEachern had no such excuse. He rejected both aboriginal and anthropological evidence in favour of an ideological mind-set virtually unchanged from the time of Trutch (ibid:218).

Ridington concludes that "Allan McEachern is not an unintelligent man. He is merely the prisoner of his own culture's colonial ideology" (ibid:219).

Julie Cruikshank wrote a critique of the judgment focussing on the judge's rejection of oral tradition as evidence, referred to earlier. Cruikshank also criticized the judge for rejecting the anthropological evidence and argued that McEachern invented his own anthropology, which she describes as follows:

Its *foundation*, rooted in nineteenth century positivism, is a simplistic progressive evolutionary model with his own society occupying the apex and hunting societies occupying a 'much lower, even primitive order' (McEachern 1991:31). Its *object* is his searching inquiry about the nature of society (which provides little cause for optimism, based as it is in speculations about the nature of 'primitive society'). Its *evidence* comes from his comparison of written archival documents with the oral traditions presented by Gitksan and Wet'suwet'en hereditary chiefs (Cruikshank, 1992:26, emphasis in original).

Cruikshank's article closes with the following appraisal:

His conclusions, though are not conclusions. They are positions that anthropology has shown to be ethnocentric and self-serving. The judge's anthropology reflects a primitive understanding of the concept of culture which he claims to comprehend. The judge's anthropology does, indeed, "speak for itself," but it does not speak for anthropology (ibid:41).

Bruce Miller's critique, drawing on the work of Pierre Bourdieu, began as follows:

The Delgamuukw decision rendered by Judge McEachern has as distinctive attributes (1) the employment of simple language, or "plain language" and (2) an appeal to common sense (Miller, 1992:55).

Miller objects to these attributes on the basis that they "create an environment which appeals to pre-existing notions of racially linked social and cultural characteristics," and that they support "the proposition that the testimony of anthropologists and historians can be supplanted by the common sense of a layperson" (ibid).

Miller goes on to demonstrate how McEachern used simplistic anti-intellectualist notions to legitimate his own version of history and historiography, as well as anthropology and anthropological methodology, with the result that

Those people most suited by personal experience or professional training to comment on the nature of native society, the Natives themselves and anthropologists working in the region, are thus left with no voice at all (ibid:60).

Thus, Miller concludes:

The thesis here is that this treatment is not politically neutral. Despite the judge's contention that the process of anthropology is inherently political, it is rather this efforts to construct his own history and anthropology that are imperfect, inconsistent with professional practice in those disciplines, and supportive of a conservative construction of the issues before the court. I argue that this judgment is part of what Bourdieu calls the "dominant discourse" which, relying on the 'common sense' of the layman, is by definition ethnocentric, over-simplified, and logically flawed (ibid:65).

While I agree with Miller that if expert witnesses are to be employed in litigation their qualifications and testimony should be evaluated by the terms of their disciplines and not by legal opportunism, Miller's critique is an example of how intellectualist discourse can mute and mystify critique. The point I wish to argue is that McEachern's Reasons for Judgment defy the common sense understanding of the layman as much as the analysis of professionals.

Michael Asch reiterates many of the points made by other anthropologist/critics, particularly those made by Ridington. He compares the way McEachern employed

concepts of "culture," "ethnocentrism," "cultural relativism," and "cultural change" with the way these same concepts are treated by the contemporary discipline of anthropology. Asch's analysis is based on a review of five introductory-level university textbooks in Anthropology.

On the concept of culture, Asch argues that anthropology asserts that culture is learned behaviour whereas McEachern asserts "the premise that human behavioral patterns are based on instinct."

Whereas anthropologists have consistently rejected ethnocentrism, defined as,

...the belief that one's own patterns of behaviour are always natural, good, beautiful or important and that strangers, to the extent that they live differently, live by savage, inhuman, disgusting or irrational standards...

McEachern makes clear that the assessment of the quality of life among the Gitksan and Wet'suwet'en at the time of first contact with Europeans will be based on resolving whether they possessed the characteristics: presence of written language, horses, and wheeled vehicles; absence of slavery, starvation, and war...[this]...assumes that the values and technology of western culture such as wheeled vehicles and written language naturally represent qualities universally desired by humankind.

On the issue of Aboriginal acculturation, so fundamental to the Chief Justice's evaluation, Asch argues that,

Recent research by a number of anthropologists, mainly Canadian, has shown clearly that the premises of acculturation theory, and in particular the assumptions upon which they are based, are poorly confirmed by fact (ibid:234).

Like the other anthropologists cited above, Asch takes exception to McEachern's rejection of anthropological evidence and particularly to the judge having cited the code of ethics of the American Anthropological Association in rejecting Richard Daly's work. Asch writes,

As I interpret the judgment on this point, it is implied that the evidence of cultural anthropologists must always be suspect because of an inherent conflict between the requirements of 'telling the truth' demanded by the judicial system and an overriding requirement to use whatever means necessary (including perhaps lying) in order to protect the interests of the peoples with whom an anthropologist has worked as demanded by their code of ethics.

Asch goes on to describe the circumstances under which the American

Anthropological Association developed the specific clause referred to by McEachern:

In my recollection, the context for its acceptance had much to do with the Vietnam war and the revelation that some 'anthropologists,' through so-called 'research' projects, may in fact have been living in local Vietnamese communities for the purpose of providing information about suspected anti-government locals to American and South Vietnamese espionage personnel. In short, it was feared that they were using the term 'anthropological research' as a cover for their spy operations. At the same time, other anthropologists were working in situations where governments demanded that they spy on local citizens...In short, the Code of Ethics was not intended and cannot be appropriately interpreted to mean that, where for example the rule of law exists, anthropologists are required to avoid telling the truth as they have come to know it (ibid:237).

Asch's commentary extends beyond a condemnation of the judge's rejection of the Native evidence and an anthropological critique of the misuse of anthropology, to a consideration of its relevance to the law and the credibility of the judgment within that context, i.e. on its own terms. On this point Asch concludes:

...on such crucial points, there exist serious concerns that the judgment's findings of fact are accurate; or factually relevant to the determination of the legal issue; or that the interpretation of fact is adequately comprehensive or based on current knowledge (ibid:238).

More to the point, Asch argues,

It would be one thing to conclude that this judgment is a rogue decision based on an idiosyncratic approach; one not likely to be repeated in future trials. But the *Delgamuukw* judgment is not a rogue decision. It does not stand outside of Canadian legal precedent and tradition. Rather, this judgment, notwithstanding the existence of enlightened remarks from senior members of the judiciary...is in fact consonant with, if not fostered by, that tradition (ibid:238).

Writing in the same special issue of B.C. Studies devoted to the *Delgamuukw* case, I wrote a critique focussing on the judge's dismissal of the anthropologists who testified on behalf of the Gitksan and Wet'suwet'en. My central argument was that the Crown's anthropologist and her opinion report and testimony, were, by professional and lay standards, inferior to those of the Gitksan and Wet'suwet'ens' witnesses, and yet were granted more credibility by the judge.

The Crown's anthropologist was also critically appraised by another anthropologist, Paula Pryce. Pryce examined Dr. Robinson's performance in another Aboriginal rights case before the courts: *Cecil Reid et al v. Regina and the Minister of Fisheries and Oceans*. In this case, as in *Delgamuukw*, Dr. Robinson testified for the Crown and against the Heiltsuk Band who employed Dr. Wayne Suttles, a well-known Anthropologist. As in *Delgamuukw*, the judge found in favour of the Crown and, by implication, was more impressed by Robinson than by Suttles. Pryce's analysis of the central problem in these proceedings was that

As demonstrated in the recent judgment of former Supreme Court of B.C. Chief Justice Allan McEachern...Canadian legal institutions are fundamentally Eurocentric, allowing for little difference in cultural worldviews (Pryce, 1993:110).

Pryce surmises that the key difference between Suttles and Robinson was that,

Suttles and Robinson have two very different approaches to the scholarship they present in the Heiltsuk case. Their basic points of departure differ, one being academic and the other legalistic. Legalistic scholarship in the style of Sheila Robinson appears to be based in the adversarial procedures of Western law...In contrast to Robinson's legalistic scholarship, academic scholarship comes to its conclusions as a result of the research process (ibid:111).

Pryce concludes that

In this case and in others, the Crown Counsel...takes an active part in...cultural imperialism. By hiring legalistic scholars like Sheila Robinson rather

than academic ones, the state channels its arguments specifically to refute the claims of the plaintiffs. If we can judge by the Crown's success in the Heiltsuk and Gitksan-Wet'suwet'en cases, scholarship of this kind has become an effective tool in upholding the status quo (ibid).

Again, while I agree with Pryce, I want also to point out, as I will in the next chapter, that the central problem is that the Crown's evidence makes no sense and can only be understood as credible and coherent if the fundamentally racist premises are given credibility.

These conclusions raise two important questions. First, have the Canadian courts, by a combination of the development of increasingly complex tests for establishing Aboriginal title and a corresponding refusal to critically reflect on its own procedures and epistemological premises, created a situation in which the burden of proof is impossible for any Aboriginal group to meet, regardless of the quality or quantity of data mustered? The second question, are the Crown's positions as argued in *Delgamuukw* supportable by any reputable contemporary research, will be addressed by an analysis of the case presented by the Crown in *Delgamuukw v. R.* .

5.3 WHAT IS HISTORY?

Two years after his 1987 ruling on the admissibility of oral tradition evidence, Chief Justice McEachern made a second ruling on how to respond to historical documents recognized as such within the academic study of history.¹⁴ McEachern divided this material into two categories: (1) documents written by contemporaries; and, (2) historians' opinions (see Fortune, 1993).

¹⁴ *Delgamuukw v. B.C.* (1989) 38 B.C.L.R. (2d) 165 (documents), herein referred to as (Delgamuukw, 1989, documents).

Documents written by contemporaries are called in law--as a term of art--"ancient documents" which according to common law rules are admissible if they are "more than thirty years old, produced from proper custody and otherwise free from suspicion" (Delgamuukw, 1989, documents:ftnt 55:169). McEachern ruled that "ancient documents admitted into evidence are, subject to weight, prima facie proof of the truth of the facts stated in them." (ibid:171) The records of early explorers, fur traders, and colonial officials, that had been housed in archives were classified as "ancient documents." McEachern allowed, however, that such documents may contain mixtures of "fact and hearsay," and he set out the following criteria by which hearsay evidence could be disregarded:

...if it is contradicted, or if its value as evidence is destroyed or lessened either internally or by other admissible evidence, or by common sense (ibid:note 55 at 172)

On the question of the role of interpretation of historical documents, the Plaintiffs argued that each document should be accompanied by an historian to interpret and legitimate it. The Defendants argued that all documents should be admitted and then weighed. "In both instances, the question was reduced to whether the documents should be admitted," Joel Fortune observes, "not how the court should proceed to give them meaning" (1993:103).

Regarding the second issue of the interpretations and opinions of historians, McEachern ruled that they may express their opinions 'based upon inferences from the documents about the recorded facts of history' (Delgamuukw, 1989:documents:175). They would not be permitted, however, to "construe a written document...or generalize upon the broad sweep of history which is so often subject to learned disagreement and revision" (ibid:175-176). As he had done in regard to the distinction between history and

mythology in oral histories, the Chief Justice here assumed that fact and opinion could be clearly differentiated within historical documents.

A third evidentiary ruling was made on the admissibility of "treatises" defined as written materials including published books and articles, and unpublished theses, essays and studies (Fortune, 1993:105).¹⁵

The Crown argued that "only totally unbiased, non-controversial, generally accepted works that have endured and survived expert public review such as standard texts, qualify as learned treatises." (Delgamuukw, 1989, treatises). McEachern concluded that such an orthodox approach was not practical in this case and decided to admit all this material subject to weight and to objections by counsel that particular items may be untrustworthy because of "disabling bias or a demonstrated lack of competence or for other reasons" (ibid: 187-88). Fortune points out that in this ruling, strictly speaking, the Chief Justice abandoned "even the pretence of shaping a legal-historical investigation with the tried and true rules of law (1993:105)." Instead, he set out his own test as follows:

I believe the opinions of the expert witnesses must be assessed and weighed in the light of other learning, for there is no other reliable way to do it except perhaps demeanour and internal consistency which are inadequate tests for expert evidence in exotic disciplines (Delgamuukw, 1989, treatises-188).

More importantly, the judge assumed that he could and would make the final determination of what was fact and what was not:

Impermissible opinions and the conclusions they [historians] wish me to reach in connection with the subject matters of their opinions will undoubtedly be

¹⁵ *Delgamuukw v. B.C.* (1989) 38 B.C.L.R. (2d) 176, herein referred to as (Delgamuukw, treatises, 1989).

interwoven with permissible opinion, and it will be my responsibility to disregard the former while profiting from the latter (ibid:175-176).

This approach is, of course, in keeping with law's formalist self image of independence and omnipotence described by Bourdieu as "a site where universal reason actualizes itself, owing nothing to the social conditions under which it is manifested" (Bourdieu, 1987:820).

Moving now from theory to practice, and from rulings made early in the trial proceedings to Chief Justice McEachern's final judgment, we will see that, again, neither scholarly methodology nor ordinary common sense appears to have dominated the manner in which the evidence was evaluated. Rather, as he wrote his own anthropology, so too did the judge write his own history.

The first academic historian to testify was fur trade expert, Dr. Arthur Ray, from the University of British Columbia. Ray began his report with a description of the task he was asked by the Plaintiffs to perform:

...to examine the economic history of the Middle Skeena River-Lake Babine region in order to (a) search for evidence of the native exercise of title in the area; and (b) to examine the way the Gitksan, Wet'suwet'en and Babine responded to economic developments following European contact (Ray, 1987:1).

Ray also attached certain conditions to his participation in the court case:

I agreed to do the research with the understanding that I would be free to make my own conclusions from the materials I examined. We also decided that it would be best to have me work independently of other researchers who were helping them so that my interpretations could stand alone. Accordingly, I did not read any of the other reports before submitting my final opinion and appearing on the witness stand, nor did I attend the trial before that time (Ray, 1990:15).

Ray's testimony covered the period just before Brown's arrival in 1822 and the ensuing century. The sources Ray examined for this study were Hudson's Bay records,

ethnographies, interviews with contemporary key informants. His report was divided into two time periods: (1) The Transitional Years, 1830 - 1860; and (2) Competition and Economic Diversity, 1860 - 1915. The details of his research and report have subsequently been published (Ray, 1990, 1991).

After setting out background information on descriptions of villages, locations of fishing sites, indigenous social structure, and the development and westward expansion of the fur trade and the Hudson's Bay Company, Ray describes what trader William Brown, the author of the first written descriptions of Gitksan and Wet'suwet'en life ways, found when he arrived in 1822 to establish Fort Kilmaurs on Babine Lake¹⁶:

Brown discovered that the regional economy was a delicately balanced system in which villages were linked together by kinship ties, trade, gambling and potlatching activities. However, it was a system that was easily upset by internal disputes and wider conflicts on the peripheries (Ray, 1987:46).

Brown described the people as living in four major villages between which were scattered territories of the constituent Houses. Brown recorded that "access to Babine and Wet'suwet'en house territories was tightly controlled by 42 'nobles' and 'men of property' (Ray, 1991:303 quoting Brown, Fort Babine [Kilmaurs] District Report, 1822-23, B. 11/e/1).

The immediate problem this presented to Brown was that "lineage heads gave only a few of their fellow kinsmen the right to hunt and trap" and most of their produce was "tithed" to the Chiefs. It was only the Chiefs who the Company could deal with. These elders "generally had well-established trading connections already" and were

¹⁶ Ray notes that the North West Company had operated Fort St. James on nearby Stuart Lake from 1806 - 1822 and their traders had obtained "second-hand information about the Babine, Gitksan and Wet'sutwet'en. Subsequently, William Brown discovered that some of this intelligence was not accurate (Ray, 1991:302).

interested in trading with the Hudson's Bay Company only if it was to their advantage (Ray, 1991:304). Ray wrote:

In their efforts to secure more fur from the upper Skeena watershed, HBC men had to confront two additional obstacles: first, the well-developed internal pattern of exchange within and between local villages; and second, the external trade network that extended to the coastal Tsimshian (ibid:304).

Brown had difficulty competing with these coastal Aboriginal traders who could, simply put, offer better prices and better trade goods than the Hudson's Bay Company could. A similar problem arose regarding Brown's dependence on Indians for transportation. Ray says:

Even at rates the HBC considered to be unreasonable, it was difficult to persuade Indians to transport goods at the times the company wanted. The Indians were said to be willing to do the work only when it suited them because they had a variety of alternative work that was easier and more lucrative (Ray, 1987: 76).

Chief Justice McEachern commented on this issue as follows:

Throughout his Journals Brown frequently recognized that he was having great difficulty competing with the traders from the coast, and that beaver returns were never what he hoped they would be. He had great difficulty getting the Indians in his area to be as industrious in their trapping as he wished they would be (Reasons, 1991:26).

Brown resorted to acting as middleman between the Athabascans and the Gitksan and Wet'sutwet'en, importing the moose hides they so highly valued from Company trading posts east of the Rockies and trading these for furs. Ray quotes an excerpt from Brown's journals to illustrate this:

I made then [1823] what I considered very handsome presents consisting of cloth blankets, shirts, etc.. But the following day they brought back the whole and informed me that it was not to receive such articles as these that they had given me their furs. One of them, Snuggletrun [the second highest ranked Hot-set leader] from whom I had received about twenty skins I had given two yds Red Strouds, one flanal shirt, one awl, one firesteel, one gun flint, two needles, two hanks thread, two yards gartering, ten ball, one half point powder, one point shot and one sixth point tobacco, requested I take back the whole and give him a

dressed skin in the place (Ray, 1991:308 quoting Brown, Fort Babine [Kilmaurs] District Report, 1822-23, PAMHBC B.11/e/2, footnote 13).

One important point to remember about Arthur Ray's testimony is that in analyzing the records of William Brown, Ray too introduced new historical research that had been inaccessible until the late 1960s (Ray, 1991:310), and had subsequently been ignored by previous researchers working in the area. As we will see, Brown's journals challenge many assumptions held by historians and anthropologists about the pre-contact nature of Gitksan and Wet'suwet'en society. Ray noted that in the course of his research he

...discovered that all the important ethnographic studies of the region, such as those of A. G. Morice, Diamond Jenness, Irving Goldman and Julian Steward had not used this material because it was unavailable to them. More recent writers, most notably Vernon Kobrinski and Charles Bishop, draw heavily on these earlier published ethnographies, but ignored the critical Brown material (Ray, 1990:15).¹⁷

The legal significance of Ray's report and testimony is that it supported the claim that the Gitksan and Wet'sutwet'en "did occupy the territory in dispute at the time of initial European contact" (ibid:1991:309). Further, it provided documentary evidence that "they did manage and conserve the resources of their vast territory through a house (lineage) territory system (ibid), before the local commencement of the European fur trade that focused on beaver. "Of considerable importance to the Wet'suwet'en," Ray notes,

Brown outlined a feasting and house territory system that was very similar to the one the hereditary Chiefs described in their opening statement 170 years later (Ray, 1990:16).

Ray also argued that the population--estimated to be in excess of 9000--would have required supplementary meat, clothing materials and ceremonial exchange times for subsistence and trade. As we will see in the counter-arguments put forward by the

¹⁷ Ray is here referring to the following works of these authors: Bishop, (1979); Goldman, (1963); Jenness, (1943); Kobrinski, (1977); Morice, (1970); Steward, (1961).

Province of British Columbia, the role of resources other than fish will take on a good deal of importance.

The legal questions to which all this testimony was addressed were those pertaining to the nature of pre-contact Aboriginal social life: particularly economic and governmental practices. First, did they live in an organized society at the time Britain asserted sovereignty? Second, how did European contact change them? I add a third question, on what premises do the questions and their answers rest?

Arthur Ray's opinion report on economic history ends in 1915 and he concludes that the Gitksan, Wet'suwet'en and Babine traditions were not incompatible with "progress" or "development," but they practised persistent resistance to external domination of their economy. He says:

They were largely successful in these efforts until the early years of this century when the federal and provincial governments passed conservation legislation which curtailed their economic flexibility and weakened their subsistence base. The economic activities of the Gitksan, Wet'suwet'en and Babine in the Upper Skeena River area had not created the problems that this legislation was intended to resolve. Rather, the laws were needed to protect resource-based industries, particularly the salmon canning industry that had been developed by Euro-Canadians outside of the region. However, the Gitksan, Wet'suwet'en and Babine, similar to other native groups had to pay the price (Ray, 1987:93-94).

Arthur Ray has written about his experiences as an expert witness in the

Delgamuukw case:

The expert witnesses, who often are academics, find themselves in the unusual circumstances of having to do ethnohistory in an adversarial environment where their personal credibility and that of their report are sharply challenged (Ray, 1990:13).

The province's case relied heavily on attempting to establish that, contrary to Brown's records and Ray's interpretations, "the Gitksan and Wet'suwet'en had already

changed in major ways by the early 19th century because of European expansion" (Ray, 1990:16).

In addition, both federal and provincial Crown counsels focused on pre-contact intra-Indian violence. In order to do so Crown counsel focused on "creating the image of the savage in defence of the Crown" as Ray entitled the article he wrote about his experience as an expert witness in the *Delgamuukw* case. Ray says:

It was apparent to me that the Counsels for the Crown had two major objectives in mind when they pursued this line of questioning. They hoped to raise doubts about the reliability of Brown as an observer and they tried to suggest that the area was in a state of turmoil at the time of first contact. I think this line of inquiry also reflected an underlying and disturbing attitude of Crown Counsel toward Native people--that they were revengeful and violence prone before the "civilizing" influences of European missionaries and government officials modified their behaviour (Ray, 1990:19).

Counsel for the government of Canada, James Macaulay, concentrated on "confronting" Dr. Ray with anecdotes drawn from the reports of early traders and explorers of confrontations, real and imagined. The essence of the federal cross-examination of Arthur Ray is illustrated by the following exchange:

Macaulay: I put it to you, Dr. Ray, that's really the point of the cross-examination, or one of the points any how, that is a very fragile system and it was interrupted by such things as a single killing...Do you agree that the reciprocal killing system had that effect?

Ray: My point would be that societies generally value peace, that's both within groups and between groups; that their systems for sustaining peace break down from time to time are easy enough to prove. And if you wanted to use the European example, just remember the period we're talking about is close to the Napoleonic Wars, right?

Macaulay: Yes.

Ray: A lot more people got killed in those. And would you not say that those European societies valued peace as well?

Macaulay: I'm not saying European societies valued peace, Dr. Ray--

Ray: Well, would you say that the European societies had equally fragile systems? No human society has been able to sustain peace both in itself and between itself...

...

Macaulay: Isn't that the source of the violence...that the endemic violence was based on a fair degree of truculence...that there was a certain excitability and ferocity that led to the whole village...

...

Ray: ...And my only point was I do not subscribe to the bloodthirsty savagery of Native people, nor the noble savage. I don't subscribe to either. I see Native people as people. They have the same problems that other peoples have around the world and in different points in time. That is the main point of my report. Nothing more; nothing less. (quoted in Monet and Wilson,

Finally, late on the second day of cross examination Chief Justice McEachern intervened:

Maybe I can ask you this, Dr. Ray: Mr. Macaulay has been suggesting a tendency toward violence and you have been resisting that and you are saying that wasn't the state of things, or at least it wasn't the normal diet for the period you are talking about. Yet, there seems to be some pretty strong suggestions that there was warfare on the Skeena, and I take it you are saying that was at some later time? (quoted in Ray, 1990:24)

Ray writes in response:

I replied by saying that I thought the portrayal of Indian society as being a violence-prone one was an ethnocentric point of view. I noted that I did discuss violence in my opinion, but I also made it clear that feasting provided one way of dealing with the problem. Murders did not always lead to revenge killings by the offended relatives. Concerning the frequency of conflicts, I reminded the court that during the cross-examination I had noted that the level of tension increased after Brown's time because of the rise of the Legaic Chiefs on the coast, the growing use of alcohol in the fur trade, and the growing number of white settlers and colonial officials who were trespassing on Indian land in the late 19th century. With this exchange the cross-examination on this topic ended (Ray, 1990:25).

Chief Justice McEachern's "findings of fact," and interpretations of "white, written history" were as disappointing and alarming as his rulings on "Indian, oral history." Regarding Arthur Ray, the judge acknowledged that he "has excellent qualifications in his special area of expertise" and that he, McEachern has "no hesitation accepting the information contained in" Brown's records (Reasons, 1991:73). He goes on to quote the

following passage from Ray's opinion report as "the strongest statement supporting the plaintiffs' basic position which is to be found in any of the independent evidence adduced at trial" (ibid):

When Europeans first reached the middle and upper Skeena River area in the 1820s they discovered that the local natives were settled in a number of relatively large villages. The people subsisted largely off their fisheries which, with about two months of work per year, allowed them to meet most of their food needs. Summer villages were located beside their fisheries. Large game and fur bearers were hunted on surrounding, and sometimes, on more distant lands. Hunting territories were held by 'nobles' on behalf of the lineages they represented and these native leaders closely regulated the hunting of valued species. The various villages were linked into a regional exchange network. Indigenous commodities and European trade goods circulated within and between villages by feasting, trading and gambling activities (Ray, 1987: 55, quoted in Reasons, 1991:73)

Even in his summary that follows this direct quotation we can see the distance between what was said/written and what was heard/read. McEachern notes:

It is worth noting that Dr. Ray believes the natives were located in villages...

[a significant point in the Crown's argument was that they lived in villages that are now reserves and made little use of surrounding land that is now either Crown land or in the hands of forest companies in the form of timber leases or held in fee simple by individuals]...

that they lived off the land, principally the fishery...

[another Crown argument that fish is the only resource they many have any claim to]...

and hunted in the surrounding lands which were partly controlled by nobles or chiefs...

[Brown said "tightly controlled" by "nobles and men of property," Ray said "held" by nobles...and "closely regulated"]

or on some more distant unidentified lands

[these lands were identified by Aboriginal witnesses and anthropologist].

The Chief Justice continues:

The foregoing must be considered in the context of the larger picture which emerged from the evidence. First, it would be incorrect to assume that the social organization which existed was a stable one. Warfare between neighbouring or

distant tribes was constant, and the people were hardly amenable to obedience to anything but the most rudimentary form of custom. Brown held them in no high esteem, partly because of their addiction to gambling, and Ogden, about whom there are different views...described them most unkindly. I conclude from the foregoing, however, that there was indeed a rudimentary form of social organization...(ibid:73-74).

He goes on then to emphasize that "game was never really plentiful in the territory and fishing was the mainstay of the economy;" that Brown noted that "the chief's control of territories was not exclusive" and was sometimes limited to beaver, and finally that he was presented with too much evidence to be able to do more than "extract from it an impression of what was going on."

In the following paragraph the Chief Justice sums up this impression as resting on assumptions that anything that may have happened prior to 1700 was irrelevant, and that the arrival of European fur traders caused major destabilization, increased warfare "if it had not always been present," and that, quoting from Wilson Duff, "the entire coast became...glutted with trade goods." This leads the judge to make the following critical legal finding in which we see the transformation of "impression" into "fact:"

In fact, active trade was underway at the coast and spreading inland for at least 30 years before trader Brown arrived at Babine Lake, probably converting a Gitksan and Wet'suwet'en aboriginal life into something quite different from what it had been...

I find the weight of evidence supports the view that the fur trade materially changed aboriginal life before or around the time trader Brown was making his records at Fort Kilmauers. That does not prevent me from accepting Dr. Ray's opinion that Indian social organization did not all arise by reason of the fur trade. I think the evidence supports that by 1822 the Indians of the Babine Lake region had a structure of nobles or chiefs, commoners, kinship arrangements of some kind and priority relating to the trapping of beaver in the vicinity of the villages (Reasons, 1991:43).

Dr. Ray's evidence, as well as that of the archaeologists Drs. Ames and MacDonald, the linguists Drs. Rigsby and Kari, Ms Heather Harris' genealogical evidence

and Browns's records, were cited in support of the judge's conclusion that "the ancestors of a reasonable number of the plaintiffs were present in parts of the territory for a long, long time prior to sovereignty" (ibid:75).

The judge wrote the following comments on historical evidence:

Lastly, I wish to mention the historians. Generally speaking, I accept just about everything they put before me because they were largely collectors of archival, historical documents. In most cases they provided much useful information with minimal editorial comment. Their marvellous collections largely spoke for themselves. Each side was able to point out omissions in the collections advanced on behalf of others but nothing turns on that. I do not accept that part of the evidence of Mr. Williams which suggests legal consequences from Gitksan or Wet'suwet'en compliance with Canadian law.¹⁸

¹⁸ Here McEachern is referring to the province's argument that the Gitksan and Wet'suwet'en "by accepting and using reserves, and by conforming generally with the law of the province, have given up their aboriginal rights. Alternatively, it was argued that throughout this entire history Canada has, on behalf of the Indians, bound them by constitutional arrangements and agreements with the province" (Reasons, 1991:293). Simply put, the province's main argument was that while Indians had not formally *de jure* consented to surrender their lands, they had informally *de facto* done so by conforming with provincial laws. In particular, they had so consented to accepting the reserves as the only lands they may have "aboriginal rights" of any sort to, and had surrendered any claim to any other lands. This is one of the many "catch 22s" in Crown reasoning based in evolutionary theory. If the Indians had taken up arms this would be held as evidence of their savagery (or "truculence") and concomitant absence of rights to lands and resources. Not rebelling with arms is seen as evidence of voluntary compliance, hence assimilation and concomitant absence of rights to lands and resources. The alternative argument waged by the province was that if there was any responsibility owed to the Indians it was owed by the federal government. McEachern dismissed this argument and ruled as follows:

With respect...the consideration of reserves, at best, was village sites, not user rights to lands beyond the villages. Further, the agreement between the province and the federal authority to adjust reserves in this century was clearly recognized by the parties themselves as an agreement only about reserves, and the Commissioners [McKenna and McBride(ed)], who represented both levels of government, made representations to the Indians of the territory that their rights additional to reserves, if any, were not the subject of their proceedings. In fact, it was expressly stated those questions would be resolved in Court where we now are. The honour of the Crown precludes me from giving effect to this defence. In my judgment, the plaintiffs have not directly or indirectly released their causes of action.

Similarly,[in response to Williams evidence (ed)] I do not find, as a matter of law, that the acceptance of British Columbia law, or conformity with it, precludes them from advancing their claims for aboriginal interests. In my view, the Indians claims have not been discharged by any conduct on their part (Reasons, 1991:293).

Robin Fisher points out that McEachern appears at first glance to respect historians and their craft, when he says that he "accepts just about everything they put before me..." However, Fisher argues that "a more careful examination of the evidence provided in the judgment will show that McEachern, in fact, paid very little attention to historians" (Fisher, 1992:44). This is evidenced by his later description of historians as "largely collectors of documents," and his dismissal of their interpretations. In other words, McEachern appreciated the "facts" written in documents which he heard speaking for themselves directly to him, and the historians for bringing these written voices to his visual attention. He appears to have found debate among historians "interesting" but not particularly relevant.

A number of critiques of Chief Justice McEachern's use of history have been written since the publication of the Reasons for Judgment in *Delgamuukw v. R.*. Anthropologists Julie Cruikshank and Andrea Laforet, and legal scholar Joel Fortune discussed the judgment in the context of current academic debates on the nature of historical understanding. Fortune begins with a review and assessment of the role played by history in land claims litigation in general, and in key recent Supreme Court of Canada decisions in particular.

Fortune puts his central question succinctly as follows:

In the context of history, philosophy and epistemology this illustrates a fundamental problem: how can past events or past cultures be retrieved from the intangible and presented to-day (Fortune, 1993:91)?

Both Aboriginal litigants and the Crown use history to support their positions. Native litigants argue that originating wrongs, supposedly relegated to the past, continue into the present and give a sense of temporal depth to their grievances. Seeing the

history of Aboriginal/non-Aboriginal relations in this way also provides support for an argument of having resisted domination and assimilation and having persisted in exercising rights embedded in a distinct culture for "a long, long time." In these ways, the past and the present are linked. However, past and present are distinguished in Native arguments when contemporary adaptation and cultural viability are highlighted.

On the Crown's side, the past and the present are separated when arguments are advanced to legitimate the claim that "we can only be just in our time," and, particularly, when a radical break between pre and post contact, Aboriginal and non-Aboriginal cultures and practices, is important. The past and the present are not radically separated when the past serves the purposes of the present, as in the use of precedents.

Fortune goes on to outline three theoretical positions in contemporary historiography: positivism, interpretivism, postmodernism. Ginzburg describes the first in the context of history as legal evidence as follows:

In a positivist perspective, the evidence is analyzed only in order to ascertain if, and when, it implies a distortion, either intentional or unintentional. The historian is thus confronted with various possibilities: a document can be a fake; a document can be authentic, but unreliable, in so far as the information it provides can be either lies or mistakes; or a document can be authentic and reliable. In the first two cases the evidence is dismissed; in the latter, it is accepted, but only as evidence of something *else* (Ginzburg, 1991:83).

Fortune turns to E. H. Carr's What Is History?¹⁹ as typical of the interpretivist school and quotes the following as representing the "essence" of Carr's argument:

What is the criterion which distinguishes the facts of history from other facts about the past?

¹⁹ It was Carr's work that the Plaintiff's relied heavily on in their submission regarding the admissibility of oral tradition.

...The facts speak only when the historian calls on them: it is he who decides to which facts to give the floor, and in what order or context. It is the use to which certain facts are put that makes them historical (Carr, 1964:10, quoted in Fortune, 1993:99).²⁰

This position comes closest to being analogous with the argument put forward by the Gitksan and Wet'suwet'en: i.e. that both oral and written histories are subject to established criteria, standards, and processes for validation.

Literary critic and historian, Hayden White, as might be expected, is called upon as an example of "recent literary theory that questions the notion that ancient documents, as 'texts' have any independent meaning at all" (Fortune, 1993:102). White writes:

The text-context relationship, once an unexamined presupposition of historical investigation, has become a problem, not in the sense of being simply difficult to establish by the once vaunted 'rules of evidence', but rather in the sense of becoming 'undecidable,' elusive uncreditable--in the same way as the so-called rules of evidence (White, 1987:186, quoted in Fortune, 1991:102).

While White's position and that of Carr are philosophically and epistemologically comparable in that both deny the possibility of "objective history" in a positivist sense, they differ on the question of whether reasonable criteria for proof can be established, and particularly in their significance in practice.

Fortune notes in regard to postmodernist theories that "for some historians, this proposition implies an especially pernicious relativism: the simultaneous interpretation of text and context appears to denude the past of any objective content" (1993:102). This criticism assumes that without "objective" content, defined presumably in positivist terms, there is no truth. We are left, still with dualistic opposition. That White's analysis is particularly difficult to translate into any concrete strategy in the courtroom has been the

²⁰ Fortune also draws on R. G. Collingwood's The Idea of History, and L. F. S. Upton, 1991.

subject of considerable debate among adherents of the critical legal studies movement.²¹

However, that says as much about law, evidence and the courtroom as it does about postmodern social theory. I would argue, rather, with Ginzburg who says:

There is an element in positivism that must be unequivocally rejected: the tendency to simplify the relationship between evidence and reality...But the sceptical approach that has become so pervasive in the social sciences goes much beyond the just rejection of these premises by falling into what I would call the opposite trap. Instead of dealing with the evidence as an open window, contemporary sceptics regard it as a wall, which by definition precludes any access to reality. This extreme anti-positivistic attitude, turns out to be a sort of inverted positivism. Theoretical naivete and theoretical sophistication share a common, rather simplistic assumption: they both take for granted the relationship between evidence and reality (Ginzburg, 1991:83).

Andrea Laforet, in her article entitled "The Gitksan - Wet'suwet'en Case," argued that the judgment was "about what constitutes legitimate history." Laforet begins as follows:

In the document, Reasons for Judgment (McEachern 1991), there are two principal ideas of the past which emerge in opposition to each other, the paradigm represented by the Gitksan adaakw, and the paradigm represented by the interpretation of the past offered by Justice McEachern in providing the reasons for his decision.

Running through the judgment is the assumption that one of these paradigms of the past, i.e. the Gitksan, is, as an oral tradition, subject to profound cultural bias, and that the other, the argument made by Justice McEachern, is based on documentary evidence free from cultural distortion (1993:1).

Laforet argues that oral histories and written histories are different but equal as to value, and from a scholarly position are subject to comparable criterion of evaluation and judgment of merit. Laforet adopts four criteria developed by Anthropologist Arjun Appandurai which he claims cluster around four principal elements that are universally applied to evaluate historical validity. These are authority, continuity, depth, and interdependence. Laforet then evaluates both the

²¹ See, for example, Cornell, (1992); Delgado, (1988); Gordon, (1984).

adaawk and *kungax*, and what she calls "McEachern's history" according to Appandurai's four criteria and shows that while radically different, both can be seen to formally fulfil these requirements in culturally-specific ways.

Cruikshank, like Laforet, focuses principally on Chief Justice McEachern's evaluation of oral tradition but discusses as well the point that,

written records do not 'speak for themselves' and...like oral testimonies...must be understood within the context in which they were and are produced. Both oral traditions and written accounts are deeply embedded in social process (Cruikshank, 1992:39).

Fortune concludes his analysis as follows:

In the end, the dominant culture asserted its historical vision over that of the Gitskan and Wet'suwet'en (1993:116).

Laforet, concludes her article with this comparison:

Imagine the situation of the inhabitants of Earth, visited and then taken over by space voyagers from Alpha Centauri, and required to defend their ownership of the planet entirely with reference, not to written documents, but to chants. The governments of the several countries of Europe would be left with whatever lands could be defended through citation of medieval song liturgy. Farfetched? Certainly, but no more farfetched than what has actually happened to the Gitskan and Wet'suwet'en (1993:31).

Cruikshank, however, concludes that

The lessons to be drawn from comparing oral with written accounts are not about the cultural relativity of texts, but about power and domination (1992:39).

In relation to the argument presented in this thesis, I am endeavouring to support the critiques launched by my colleagues above, but to argue further that the judge's ideology and "simplistic positivism" necessarily precludes the possibility of his being able to "understand and respect the meaning of history as represented by the Gitskan and Wet'suwet'en." That is to say, the supremacy of his own view is a fundamental tenet of

his theory and ideology, and authentic respect for others is logically not possible. The relationship is dialectical, interdependent and inseparable, and the difference is antagonistic, not complementary.

A traditional culturalist analysis is also challenged by the critiques written by historians who have addressed their criticisms to substantive issues, such as errors in "fact," and theoretical questions regarding McEachern's historical methodology used in constructing his version of history, and his denigration of the skills and talents of professional historians.

Arthur Ray, as well as being critical of the Crown's approach to his cross examination, has reflected on the trial process and outcomes. He notes that the adversarial courtroom is an inappropriate forum in which to hold scholarly debates, and that lawyers are rarely familiar with historical methodology. They "take extreme positions" and "champion points of view" as a strategy, Ray argues. In this particular trial Ray charged that the Crown by using documents written fifty or sixty years later than the time period being discussed "attempted to interpret history backwards."

Robin Fisher has written the strongest critique of the Chief Justice's use of history in the *Delgamuukw* case (Fisher, 1992:44). Fisher accuses McEachern of having "failed to listen to the custodians of the past in his own culture." He says:

McEachern may appeal to history and uphold the reliability of historians, but he appears to have no understanding of either the historical methodology or the conclusions of historians who have written about Native people in Canada. For this historian, then, both the method of and the reasons for McEachern's judgment are seriously flawed (ibid).

Fisher attributes many of McEachern's historical errors to what he describes, paraphrasing Collingwood, as his "xerox, scissors, and paste" methodology. "In *Delgamuukw v. BC* the naivety of the conclusions about history follow logically from the means by which they were reached," Fisher argues. He describes this methodology as follows:

For the first step in this procedure is to pull the documents out of their original context by use of the xerox machine. Thus, for example, a letter from Governor James Douglas to the British Colonial Secretary on Indian land policy is isolated from his numerous letters on other issues of the day. It is as if Douglas did his thinking in watertight compartments rather than as a busy governor dealing with a dozen overlapping questions at the same time. Individual documents are then cut to pieces so that excerpts can be quoted. The historical sections of the judgment consist of long successions of quotations from original sources strung together with commentary by the judge. The trouble with scissors and paste is that scissors cut things out of context and, once removed from their setting, all the bits of the document are of equal weight. After the individual pieces have been trimmed to a suitable shape, with the application of paste, the past can be stuck back together according to a new, and more acceptable, pattern (ibid:46).

Finally, Fisher argues, McEachern's methodology can be reduced to arbitrariness:

But for McEachern, the best historians are not those who have done adequate research or drawn the most logical conclusions, but simply those who appear to support his views...Having selected historians with compatible opinions, McEachern then goes on to use their work in slippery ways (ibid:48).

Fisher further argues that rather than being an anomaly, McEachern in fact represents common practice in terms of the use of history in the courtroom and particularly by judges. He says:

Not all of these shortcomings are unique to the McEachern judgment...there is also a developing tradition in this province of lawyers and judges presuming to be historians, whether in or out of the courtroom. Having made judgments about legal issues that have a historical dimension, they presumably feel that they are thereby qualified to write history.

What these judges and lawyers are often doing is shaping the past to serve the needs of the present, which is not quite the same thing as writing history...We can safely assume that none of these legal professionals, let alone the bar associations, would let an historian walk in off the street and take over one of their cases just for a change of pace...Once in a position to judge the law, evidently one may also judge history (ibid:54).

Arthur Ray concluded rather sadly that

...after 374 days of trial covering all aspects of Gitksan - Wet'suwet'en history in depth, Justice McEachern still held the same Eurocentric view of Native people that has been an unfortunate judicial and political tradition in British Columbia since the colonial era (Ray, 1990:26).

The more important issue is, however, that this is THE LAW we are talking about, one of the most powerful institutions in Canadian society. The notion that we are governed by reason, logic and the objective evaluation of fact is what legitimizes the state and the courts sole control over armed force and "the means of destruction." This is the real problem pointed to by all the various critiques of the judgment written by intellectuals. Regarding history, Fortune notes:

The reason why the courts should critically examine the assumptions that underlie an unproblematic conception of historical knowledge is that these assumptions, as we have seen, inform the law. If the assumptions, when they are challenged, cannot be justified, neither can the law (1993:115).

Fortune's statement accords with that made by Asch regarding the Chief Justice's dismissal of ethnographic scholarship. Asch wrote:

Given the importance of the findings of fact to the judgment's decision about Gitksan and Wet'suwet'en aboriginal rights, it is fair to enquire as to the approach used for their determination. If this approach is appropriate, it is probable that the findings of fact made in the judgment represent a reasonable foundation upon which to base a finding in law. If, however, the approach for determining the facts is not appropriate, this raises serious concerns about the judgment's findings in law (1992(b) :222).

Historian, Donald Bourgeois, has this to say after reviewing the role of historians as expert witnesses in Aboriginal litigation in Canada:

The purpose of litigation is to settle a dispute with finality. Whether or not the decision is historically 'correct' is, from one perspective--that of the court--irrelevant. The main issues are whether or not a decision was arrived at with a sufficient degree of certainty that the finds of fact and/or law were correct and whether the procedure used to arrive at those decisions was fair.

Determining the truth of what happened is incidental to the courts role in society which is to secure peaceful settlement of economic, social, and political conflicts between two or more litigants(1986:196).

Bourgeois' analysis is supported by the province of British Columbia's response to the Gitksan and Wet'suwet'en's critique of McEachern's historical findings set out in their appeal factum. The Province of British Columbia, wearing a social democratic Crown, argued that:

The Chief Justice's approach to opinion evidence on matters of the broad sweep of history points out the difference between how historians approach history and how courts approach history.

...The reason why courts have had no difficulty taking judicial notice of the facts of history is that historical fact is not a matter of opinion when dealt with by the courts. The doctrine of judicial notice is firmly grounded in the court's recognition of its general ability to deal with matters of history without the assistance of experts. Historians revise history...The Chief Justice's ruling is consistent with the doctrine of judicial notice, consistent with recent pronouncements of the Supreme Court of Canada and is based firmly on the difference between the way historians approach history and judges approach history (Province of British Columbia, Defendant's Appeal Factum,III-12-14).

In other words, judges do not study or interpret history, they are empowered to create it, under conditions of their own choosing.

CHAPTER 6: AND HERE'S TO YOU DR. ROBINSON

6.0 JUDGING EXPERTISE

Since the Gitksan and Wet'suwet'en were the Plaintiffs in the case, it was their evidence that was presented first. The Crown, as Defendants, followed with their own battery of documents and witnesses in an attempt to refute and rebut the evidence that had already been put before the judge. As we will see in this chapter, the witness for the Crown whose evidence related most closely to the topics covered by the Plaintiff's witnesses, in both theoretical and substantive content, was the witness who was qualified as an expert in anthropology. This witness' evidence was crucial since it supported the key points in the Crown's case. The reader will recall that the expert witnesses for the Gitksan and Wet'suwet'en were ultimately dismissed because they appeared to the judge to be advocates who "favoured a party" and hence he did not consider them to be "experts;" and because their research was, according to the judge, not carried out according to acceptable scientific methodological standards. Chief Justice McEachern's reasons for rejecting the testimony of some other expert witnesses, for example Susan Marsden, were that she was not properly qualified in her field, and had not submitted her research to scholarly scrutiny. While McEachern praised Dr. Ray, he rejected much of his evidence and accepted, instead, the evidence to the Crown's witness on the same issues. We should expect that the Chief Justice would weigh all the expert witnesses' testimony by the same standards and criteria. This, as we will see, was not the case.

6.1 HER MAJESTY'S LOYAL ANTHROPOLOGIST

Her Majesty the Queen In Right Of The Province Of British Columbia And The Attorney General of Canada, and, specifically, the prestigious Vancouver law firm of

Russell DuMoulin who represented Her In Right Of Them, proffered anthropological evidence in the Delgamuukw case in the form of a 29-page opinion report entitled "Protohistoric Developments in Gitksan and Wet'suwet'en Territories," prepared under their direction by Sheila Patricia Robinson, Ph.D., a cultural geographer by training, who was accepted by the Court as an expert witness in anthropology.

Since receiving her Ph.D. from the University of London in 1983, Robinson has been sporadically employed as a researcher and consultant by Parks Canada, primarily in Alberta, and has co-authored two published, scholarly papers (Sumpter, Ian et al(1984); Suttles et al (1987)). She was commissioned by the federal government's Office of Native Claims to review the Kwakiutl Comprehensive Land Claim submission in 1984. Robinson has held no academic positions. Since testifying on behalf of the Crown in *Delgamuukw v. R.*, Robinson has appeared as an expert witness in anthropology in a number of other land claims cases, including:

- (1) *Reid et al v. R.*: a case involving the Heiltsuk Band of Waglisla [Bella Bella] (Robinson, 1990; see also Pryce, 1993);
- (2) *R. v. Jim*: a case involving the Wet'suwet'en (Robinson, 1991).
- (3) She also supplied an affidavit in *Sparrow v. R.* on behalf of the Pacific Fishermen's Defence Alliance, an organization formed specifically to oppose Native fishing rights (Robinson, 1987(b)).

A review of the curriculum vitae of the plaintiffs' anthropologists shows a history of professional appointments by academic, public and private institutions, as well as a consistent pattern of employment by First Nations and aboriginal organizations to do work in support of land rights.

A parallel review of the Crown's anthropologist's career history shows a paucity of professional appointments, and a consistent pattern of employment by the state to do work in opposition to land rights.

It is interesting in this regard to note Robinson's apparent change in political sentiments during the period between 1983, when she completed her doctoral dissertation, and 1987 when she began work as an anthropologist for the Crown. In her Ph.D. thesis she argued that aboriginal peoples on the Northwest coast were cultivating tobacco prior to the commencement of the fur trade. Robinson noted that:

Implications of the relative neglect of prehistoric Indian agricultural practices go beyond correcting the record for academic purposes. Studies such as this one have direct relevance to modern political issues concerning aboriginal land claims. **It has often been convenient for professionals other than scholars to 'forget' that Indians were farming in many parts of the Pacific Northwest region prehistorically and in the early historic period, or that they had well-developed systems of territorial property ownership.** There is not room here to explore the unsatisfactory way most native people were treated after the mid-19th century with regards to their territorial claims: it is just mentioned in passing that when the lands the Indians had previously occupied and exploited were expropriated and then allotted to them after they had been 'adjusted' by government representatives to 'appropriately-sized' holdings for their future use, it was usually assumed that the Indians had no need for extensive acreage because they had not traditionally engaged in agricultural pursuits. **This was especially the case on the coast of B.C. where territorial allocations (made without the Indians' formal agreement to allow any alienation of their lands)** were, on the average, smaller than those recommended by the Dominion Government of Canada (Robinson, 1983:405)(emphasis added).

The province of British Columbia's legal argument rests principally on establishing that indigenous peoples did **NOT** have well developed systems of territorial property ownership prior to the "historic" period (i.e. European arrival); and **DID** consent, implicitly and/or explicitly, to the alienation of their lands.

Robinson's thesis, in all her work as an expert witness, is that prior to contact, or "proto-contact," with Europeans the practice of property ownership and resource management among aboriginal peoples was simple and bore little if any resemblance to European concepts of property. She goes on to argue that Aboriginal life was dramatically and irreversibly affected by the commencement of trade with Europeans during the eighteenth and nineteenth centuries to the point where these peoples ceased to live "truly aboriginal" lives. Since first contact, Aboriginal peoples have been assimilating into Canadian society. In short, on behalf of the Crown, Robinson argues from an evolutionary theoretical position wherein social change is driven by simplistic economic and technological determinism. She relies very heavily on the work of Julian Steward in this area.

Robinson's opinion report began with a description of Gitksan and Wet'suwet'en socio-political organization and their system of land tenure before contact with European things. She goes on to argue that the introduction of these commodities dramatically changed aboriginal culture and society even before actual contact with a European person took place in the form of the arrival of Hudson's Bay traders in the 1800s.

Chief Justice McEachern mentions Robinson only once in his Reasons for Judgment in reference to a particularly contentious point in her argument regarding the dating of the commencement of the protohistoric period her report discusses:

There is some conflict in the evidence about the start of this period. Dr. Robinson believes that it was as early as 100 years before actual contact, mainly because of trade goods filtering into the territory both from the east and the south as well as from known and unknown Russian (and possibly other) Asiatic travellers or traders who may have visited our coast.

Other witnesses put the start of the proto-historic period later than Dr. Robinson, possibly about the time of the start of the sea otter trade in the last few years of the 18th century or early 19th century (Reasons, 1991:24-25).

However, the Crown's legal and political position is refracted throughout Robinson's account of Gitskan and Wet'suwet'en history and is reflected on a number of levels, both factual and ideological, in McEachern's decision.

This is particularly alarming, when, as we will see, the narrative presented by Robinson is examined in detail and it becomes clear that her opinion report failed to meet basic and generally accepted standards of scholarship: the logic of her argument was fundamentally faulty; factual evidence presented to support key points in her thesis was weak and/or selected and weighed not according to scholarly criteria but to meet the requirements of the Crown's legal arguments; she neglected to review current literature on the topic she wrote about; and she failed, under cross-examination, to adequately defend her work.

Robinson promised her employers that her theoretical model was: "innovative, credible, and in keeping with recent ethnohistoric, cultural-ecological and cultural-evolutionary research" (Robinson to Russell DuMoulin, Exhibit 1191 - 16). I began, therefore, by reviewing the theoretical literature in the three sub-disciplines in which Robinson claimed expertise: ethnohistory (Krech, 1991; Williams, 1988); cultural ecology (Orlove, 1980); and evolutionary theory (Durham, 1990). Here I found that, in keeping with theoretical trends in anthropology as a whole, scholars working in these subfields are grappling with the rejection of "grand theory" emerging in the social sciences as a whole and are directing their attention to questioning positivism and objectivism, including the value-free neutrality of both researchers and research methods that this tradition is rooted in (Durham, 1990; Krech, 1991; Orlove, 1980; Williams, 1988).

In each of these fields there has been a critical re-thinking of the ethnocentric biases inherent in traditional evolutionary paradigms that posit universal laws of social and cultural development, particularly those that seek to classify all human societies on a hierarchal continuum of stages of progress. Previous studies conducted within a comparative framework where findings based on the history of one group are assumed to be appropriate to another are being challenged as a result, particularly, of new data generated by increasingly rich ethnographic and ethnohistorical studies of specific groups. The applicability of abstract explanatory models must increasingly be proven and not assumed. It is worth noting that research by anthropologists that has described the ongoing validity of hunting cultures and ways of life in Northern Canada has been instrumental in challenging these models (Asch, 1991). (And see also Asch, 1977; Feit, 1982; Tanner, 1979; cited in Asch, 1991). Many of these researchers have also been involved in conducting research for litigation and in testifying as expert witnesses.

Questions of causality remain contentious but unicausal theories that argue that "the economy" or "the religion" is "the cause" of social change have been generally replaced by multi-causal, dynamic models that aim for a more wholistic conceptualization of the relationship between culture and society, between the macro-level of analysis and the micro-level, and between emic and etic accounts. Current approaches also take consciousness, particularly the "native's point of view," seriously--though not uncritically--in studies of social change.

So armed, I returned to Robinson's report only to find that the current literature on cultural ecology and cultural evolution is not reflected either implicitly in her arguments or explicitly in her bibliography. Undaunted, I trudged off to the library to review the research on European-Native relations during the fur trade of the eighteenth and nineteenth

centuries (Bishop, 1984; 1987; Fisher, 1977). Returning once again to Robinson's treatise, I found that this body of literature was similarly absent from her opinion report. What is most surprising in this area is that while Robinson does rely on the previous work of a few leading scholars, she fails to take into account their current work that is based on subsequent research, much of which consists of revisions--in light of new findings--to their former hypotheses about the impact of the maritime and land-based fur trade on indigenous economies and land tenure systems (see, for example, Bishop, 1987).

Robinson's central thesis--that the introduction of European-manufactured commodities into already existing aboriginal trade relations had the effect of significantly transforming Gitksan and Wet'suwet'en culture in a relatively short period of time--flies in the face of both the substantive and the theoretical literature on this question (Bishop, 1987; Feit, 1982; Ray, 1991).

As I moved back and forth between these bodies of academic literature and Robinson's opinion report I found myself increasingly reminded of one of the issues being debated in the auto-critique that the discipline of anthropology has been engaged in in recent years. I began to fear that I was falling into the anthropological/ intellectual trap of trying to bludgeon chaotic data into an overly systematic analysis that superimposed an abstract model of order and coherence where none existed "on the ground" (Rosaldo, 1989).

Many anthropologists are asking questions about the relationship between formal belief systems, or world-views, or, in this case, anthropological theory itself, and what actually existing individual people really say and do in the course of everyday life. While the ideas and explanations expressed during informal communication tend to reflect core

assumptions of a particular culture, such arguments and opinions are often found to be internally contradictory and inconsistent when they are analyzed from the point of view of a theoretical model, or formal system of logic. Informal discourse is acknowledged to be influenced by the immediate context in which it takes place, by the relationships between the parties involved, and by the goals of individual actors. Such interaction does not necessarily, or often, follow the rules of logical argument or scholarly debate. It is "allowed" to be fused with emotion, and therefore is seen as somewhat outside the social space that demands objectivity. It is thus seen as a form of thinking and behaviour most appropriately displayed, if at all, in the private sphere, and most often associated with lesser valued categories of people.

"Ordinary people" in the course of everyday life are excused from critically reflecting upon their "common sense understandings," and even on their more explicitly stated philosophies of life. However, western society is a highly stratified and specialized one in which academics and members of the judiciary, in light of their privileged access to education and training, are specifically charged with the task and responsibility of following an established set of rules and processes when they are performing as professionals in formal settings. This includes professional intellectuals. This is, after all, what, at least ideally, differentiates them from common folk and legitimizes their claim to teach, adjudicate and govern.

I decided then to read the eight volumes of transcripts of Robinson's testimony and cross-examination in *Delgamuukw v. R.*. I thought that perhaps this would provide clarification of some of the seeming inconsistencies and contradictions in her report when she testified orally. Such was not the case. In response to simple and concrete questions requiring "yes" or "no" answers, or statements of facts, a reading of the

transcripts revealed that Robinson's habit was to respond to straightforward questions with long, rambling responses liberally sprinkled with scientific and technological jargon.

What all this has to do with the question at hand is this: when, assuming that my goal was to conduct a scholarly critique of the work of another scholar, I turned from academic literature to Robinson's opinion report and testimony I found that Robinson invokes theory inconsistently and sporadically to fill in gaps created by her dismissal of available empirical evidence, and as a rhetorical device to help render her narrative, and the Crown's argument, convincing.¹

This conflation of theory and empirical data begins in her initial proposal to Russell DuMoulin where Robinson sets out her understanding of the task they had assigned her as being:

...to develop theories showing that significant changes occurred in Gitksan and Wet'suwet'en socioeconomies during the late prehistoric and early historic eras and that these were the result of both indirect and direct European influence (Robinson to Russell DuMoulin, Exhibit 1191-1).

Peter Grant, lawyer for the Gitksan and Wet'suwet'en, pursued the question of Robinson's use of the term "theory" in the above paragraph:

Grant: That was your theory, was it not?

Robinson: In the narrowest sense...

Grant: I understand that. I am not suggesting that that's all you -- I understand that you went on to explicate it. I just want to try to crystallize the theory to start with, okay? What do you mean by theory there, or theories? What do you mean when you use the term theories as a social -- as a cultural geographer?

¹ Robinson's "performance" is typical of what is identified as appropriate, and normal, courtroom ritual. See Gutierrez-Jones, 1990; O'Barr, 1982:1-13;83-91; White, 1985; 1990).

Robinson: Theories are explanations or attempts at explanation that try to account for or resolve into a logical framework facts relating to a central issue or problem.

Grant: I would be correct to say that theories are not facts, you would agree with that?

Robinson: Yes.

Grant: And what you do when you have a theory is you test it?

Robinson: Sometimes (Transcripts, vol. 288:21668) .

Robinson went on to explain that her method of "testing theories" was to "line up" the work of various authors who worked within her chosen theoretical framework and locate points of agreement between the various authors. Grant pursued her on this methodological point as well:

Grant: But for good scholarship, do you know-- do you not agree that whether the ethnographic or early historic record supports your proposition, your theories, or opposes your theories, good scholarship requires that you deal with them and that you explain them if they don't support your propositions...

Robinson: I think in an ideal world that might happen (Transcripts, Vol. 288:21686).

I concluded that I should approach Robinson's work from the point of view of the judicial, and not the academic, context in which it was produced. When Sheila Robinson took the stand and swore on the Bible to tell the whole truth and nothing but the truth she claimed her place in a legal and historical process that is as old as what we now call the "Province of British Columbia" itself.

As a witness for the Crown opposing a petition by aboriginal peoples for recognition of their ownership of their ancestral lands and their inherent right to govern themselves, Robinson committed herself to support an argument that the Province has

been making since British subjects arrived on the shores of present-day British Columbia.

Chief Justice McEachern explained the provincial position as follows:

The province takes the position that the new British colonies of Vancouver Island and British Columbia, established in 1846 and 1858 respectively, and amalgamated into the merged Colony of British Columbia in 1866, are classified not as conquered or ceded rather as settled colonies because British subjects settled here partly under the sponsorship of the Hudson's Bay Company. From that beginning, it was argued, British law followed its subjects, and no one can claim any lands or interests in lands except through the Crown. Then, the argument goes, the only title or rights which can exist are those granted or recognized by the Crown (Reasons, 1991:6).

The legal argument put forward by the Province of British Columbia, briefly reiterated, was as follows:

- (1) No system of property ownership or government existed among the Aboriginal people prior to European contact that could be recognized by British or Canadian law.
- (2) Even if they did, such systems were extinguished either by the assertion of British sovereignty (i.e. the doctrine of discovery, or settlement), or
- (3) No such systems continue to-day either at law or "on the ground" because Aboriginal people have become assimilated into Canadian society and do not now possess a distinct culture.

This legal argument supports and is supported by an historical narrative. The B.C. story, is, of course, a local variant of the metanarrative of colonialism and imperialism.

Paul Tennant explains as follows:

Every self-respecting people has its own founding myths; British Columbia whites, were, and are, no exception. The traditional White views were fully formed by the 1880s and remained little changed until the 1950s. These views belittled the worth and the claims of Indians while legitimizing the land ownership and political jurisdiction of the colonial authorities and their successors...only occasionally, and especially during the last quarter century, when the provincial government has had to defend its views in court, were attempts made to construct coherent legal or philosophic arguments in support...The province's arguments in

the Delgamuukw case provide the most comprehensive example of such an attempt (Tennant, 1990:7).

In order to support and legitimize this argument lawyers for the Crown turn to anthropology. They are particularly attracted to those branches of anthropology that give credence to theories of universal laws of social and cultural evolution and that posit that all societies follow Western Europe, over time, on the climb up the developmental ladder from hunting and gathering to modern industrial capitalism. Cultural ecology and evolutionism, ironically the work of American Marxist anthropologists, and those wishing to take a materialist--not necessarily Marxist--approach in support of Aboriginal peoples during the Cold War era of the 1950s and 1960s, have been the Crown's theories of choice.

Second, if any such Aboriginal title did exist, so the Crown's argument goes, it was extinguished in the nineteenth century when Europeans arrived in British Columbia. Paul Tennant, summarizes this argument as follows:

Put another way, the argument asserted that the ordinary operation of a British colonial government had the effect of wiping out the legitimacy of any pre-existing aboriginal arrangements. The argument thus not only took for granted that extinguishment of title could be implicit; it also assumed that extinguishment would be automatic....Ignoring Indian title was thus to be seen as extinguishing it (Tennant, 1990:217).

Here the Crown looks to those anthropological theories that argue that contact between aboriginal peoples and colonizers inevitably results in the absorption of aboriginal peoples into Canadian society through assimilation and acculturation. Evolutionism therefore serves a number of purposes in the Crown's case against aboriginal peoples. It supports the argument that aboriginal peoples were lower down on the evolutionary/ developmental ladder when Europeans arrived and this justifies the appropriation of their land by "superior" races. Then, evolutionism goes on to support the

argument that aboriginal peoples have, since colonization, changed--or evolved--into something "not truly aboriginal." Finally, and perhaps most importantly, evolutionism in both its archaic and its more contemporary forms, says that this process is either natural and/or inevitable and/or "progressive," and therefore in the best interests of Aboriginal peoples.

Countless re-readings of Robinson's opinion report had done little to dispel the confusion I had experienced when I first encountered the document. I decided therefore to consider Robinson's opinion report and testimony as a discrete text in and of itself, to be interpreted and analyzed much as an anthropologist would translate a story told by a member of one culture to an audience of another culture.

The first step, then is to "get inside" the story and to try to understand its meaning on its own terms. This hermeneutic approach involves a close reading of a given text or texts, in this case: Robinson's opinion report and the transcripts of the testimony she gave in court based on this opinion report. I wanted, in other words, to reconstruct Robinson's story about the Gitksan and Wet'suwet'en and to comment on it as I went along: to tell a story about the story someone else told.

The questions guiding my analysis during this "first hermeneutic step" were the following: within the terms of her own text, does Sheila Robinson accomplish the tasks she sets herself? Is the account internally coherent? Are her arguments logically developed? Does she present adequate empirical evidence to support her propositions? In short, does her account make sense, why and/or why not?

A second set of questions involved the relationship between Robinson's report and testimony and Chief Justice McEachern's decision. In this case, I wanted to trace the "empirical facts" Robinson presented in support of arguments that were chosen to support findings in the Reasons for Judgment. For example, in the case of Crown's argument about whether or not the Gitksan and Wet'suwet'en had any "reason to travel" far beyond their village sites, I looked at Robinson's evidence and that of Dr. Arthur Ray who was called by the Plaintiffs to testify on the same subject as Sheila Robinson.

Robinson's report is an historical narrative that begins with a description of Gitksan and Wet'suwet'en society covering, by the author's own admission, an unspecified period of time prior to the arrival of European things, circa--according to Robinson--the mid-seventeenth century. The time period covered by the report ends with the arrival of Hudson's Bay trader, William Brown, in 1822. What is being told then is a story about an estimated 9,000-10,000 people and how they lived in northwestern British Columbia from the mid-seventeenth to the mid-nineteenth century. Robinson's testimony constitutes an elaboration of her report, and the cross-examination, an interrogation of the same report.

One final warning to the reader: a hazard of the hermeneutic method is that if one is successful in translating the point of view of an "other" which point of view is not internally coherent, and is based in circular logic, the effect can be quite dizzying. In this case, where we are trying to critically unravel a mixture of fact, fiction, ideology and unreflected upon common sense from within our own culture, and from within an adversarial judicial forum where strategic and tactical arguments of the moment take precedence over serious reflection and debate, acute seasickness can ensue. I have endeavoured to provide rest stops on terra firma along the way to ease the journey. If the

text feels repetitive and relentless and crazy-making at times, well, unfortunately, it is. The challenge, as ever, is to "stay sane in insane places."

I will begin by briefly recreating a thumbnail sketch of the subject matter to reorient the reader. According to all available accounts, at the time in question the Gitksan and Wet'suwet'en were hunters-fishers-gatherers: all their material needs were met by harvesting the resources of their lands. Their principle means of subsistence was salmon fishing. They were matrilineal people: organized into clans and Houses led by chiefs. They traded their surpluses with various of their neighbours. Between 1774 - 1822 European traders were making contacts with Aboriginal peoples in British Columbia, first on the coast and then moving inland. During this time, the Gitksan and Wet'suwet'en had no direct contact with Europeans, but received some European goods in trade from their coastal and eastern neighbours. In 1822, Hudson's Bay trader William Brown established a fort in Gitksan and Wet'suwet'en territory and kept written records of his dealings with them.

6.2 THE JOB BEGINS

Russell and DuMoulin wishes to retain you as a consultant to assist us in the conduct of litigation relating to certain Indian land claims. We wish to retain your services for four months. We may extend this agreement from time to time thereafter. Your fee would be \$250.00 per day...While we have not yet determined the nature of the assignments you will carry out, we confirm that your assistance will be in areas related to your professional and academic experience. We anticipate this will include, for example, research and evaluation of the anthropological aspects of Indian land claims (letter: G. Plant of Russell DuMoulin to Sheila Robinson, February 19, 1986, Exhibit 1191-9).

During the fifteen months that elapsed between the date of this initial contract and the submission of Sheila Robinson's final opinion report, entitled "Protohistoric Developments in Gitksan and Wet'suwet'en Territories," on May 12, 1987, Robinson

corresponded regularly with Russell DuMoulin on the topic of her report and submitted at least two preliminary drafts for their examination.

In December, 1986, Robinson assured her employers that the theoretical model she had developed was "innovative, credible, and in keeping with recent ethnohistoric, cultural-ecological and cultural-evolutionary research" (Exhibit 1191-15).

As late as May 4, 1987, Plant wrote to Robinson saying,

I enclose the draft of your report...You will see that I have made a considerable number of revisions and deletions...What I would like you to do is to provide me with a final draft in a form which you are completely happy with (i.e. you would have no reservations about delivering it to a publisher) (Exhibit 1191-17).

Robinson's report, consisting of an introduction and five sections, covers 29 pages; and an additional 67 pages of supporting notes and references are appended to the main body of the report. My re/de/construction begins with the introduction in which Robinson sets out her central argument, her theoretical premises, and her methodological principles and procedures. Following this I will look at each section and summarize its central arguments and supporting evidence.

Since Robinson's narrative is principally a story about change initiated by the arrival of European commodities during a specific period of time, in order to understand how, why and what change took place we have to know, first of all, what was going on before the things showed up. Robinson describes this time period as "pre-historic," "pristine," "traditional" and when a "truly aboriginal way of life" existed.

"Pristine" is defined in the dictionary as follows: "1. belonging to the earliest period or state. 2 a: uncorrupted by civilization b: free from soil or decay: being fresh and clean." Anthropologists have long since jettisoned the term "pristine" as an appropriate description of pre-contact aboriginal societies and now consider it to be reflective of the worst form of romanticism practiced by the discipline in its earliest days.

The "other" in European thought symbolically represents the antithesis of what is civilized, but in a contradictory way.² The "savage" is ignoble, violent and dangerous, all that is not rational and civilized: "warlike." At the same time the "savage" is noble, passive and innocent, all that is not cunning and corrupted: "pristine."

Robinson's use of the term "pristine" as synonymous with "truly aboriginal," is consistent with the judge's comment in his Reasons for Judgment where he says:

It is common when one thinks of Indian land claims, to think of Indians living off the land in pristine wilderness...Similarly, it would not be accurate to assume that even pre-contact existence in the territory was in the least bit idyllic. (Reasons, 1991:13).

² There is a huge and rapidly growing literature on European concepts of the "other." This literature has emerged primarily from anthropology, literary criticism, feminist studies, and history. Literary critics have examined the way non-European peoples have been represented in literature written during colonial times. Edward Said's 1975 book Orientalism is a classic of this school in literary criticism, as is his most recent publication, Culture and Imperialism. Todorov, a literary historian, argues in his The Conquest of America, that the "discovery" of America was instrumental in creating "the Native other" as central to modern European identity. For anthropologists, of course this has always been a question of central concern. For a recent, and particularly interesting review of this topic see Trouillot, 1991 who argues that anthropologists have been complicit in a long history of the west's construction of a "savage slot" in the "trilogy order-utopia-savagery." Trouillot is impatient with anthropologists still seeking "the savage in the text" and suggests rather that "the time is ripe for substantive propositions that aim explicitly at the destruction of the savage slot (ibid:40)." An emerging "classic" that links the construction of woman as "other" with that of "Native as other" is Trinh Minh Ha's Native, Woman, Other. Berkhofer's White Man's Indian: Images of the American Indian from Columbus to the Present, is an entry to American history from this perspective. Daniel Francis has recently taken a similar approach to Canadian history in The Imaginary Indian.

Robinson raises the question of romanticism in the introduction to her report, as follows:

More to the point, reconstructions of traditional native socioeconomies which fail to account for indirect European influence deny the dynamic dimensions of ongoing cultural adaptations and resign their subjects to an untenable--however romantic--"snapshot" stasis. In this context, Gitksan and Wet'suwet'en claims about "traditionally" having owned and managed certain territories are questionable (Robinson, 1987(a):2).

Robinson defines romanticism as the failure to take account of the impact of European things, thus leaving the notion of an unchanging "pristine" pre-contact existence not only in tact but standing as the "objective" opposite to arguments in support of cultural continuity after contact which Robinson has now labelled "untenable" and "romantic."

The footnote to paragraph 3 is important as well and is worth recounting in full. It reads:

I am generally suspicious of writers who tend towards a static or structural treatment of any society. The ideal models may outline rules of behaviour, but do not adequately account for ongoing adjustments--in population distribution and density, in resource distribution, in alliance formations, and so on. As poorly understood as are the processes of change occurring in the protohistoric and early historic eras, the fact that changes were occurring is irrefutable. Gitksan and Wet'suwet'en societies were never static (ibid:5).

Under cross examination Dr. Robinson was able to name only one text that fit the description she set out of "static or structural treatments," and that study referred not to the Gitksan and Wet'suwet'en but to another Northwest Coast group, and, furthermore, has since been substantially revised by the authors themselves, based on later research.³ She could not name any sources that described the Gitksan and Wet'suwet'en this way, nor could she identify any sources that denied the undeniable: i.e. that changes occurred in Gitksan and Wet'suwet'en society and culture during the 18th and 19th centuries.

³ Under cross-examination Robinson explained that she was referring here to Rosman and Rubel (1971) (Transcripts, Vol. 293:22157).

The final sentence of paragraph 3 gives away the central point of the exercise: "In this context, Gitksan and Wet'suwet'en claims about 'traditionally' having owned and managed certain territories are questionable" (ibid:2). This is, of course, a very specific reference to the particular case at hand and therefore to the evidence of the Plaintiffs and the anthropologists who testified on their behalf.

In a rhetorical sense paragraph 3 and its footnote serve a number of purposes. They allude to two popular stereotypes of anthropology as idealistic and romantic and/or abstract and intellectual, and to the oft-repeated charge that anthropological work "freezes" natives in unchanging pre-contact idealized states and denies the obvious: "that changes were occurring is irrefutable."

Paragraph three and footnote three also serve to characterize Dr. Robinson, in contrast to the "straw anthropologists" she has been setting up, as a reasonable, scholarly woman who deals in objective facts, rather than romantic ideals. Dr. Robinson testified that she was not referring to the opinion reports submitted by the plaintiff's anthropologists when she made the statements in paragraph 3 and footnote 3. It seems fair to conclude, therefore, that the value of this paragraph is primarily rhetorical, its main effect being to surreptitiously discredit scholars who oppose Robinson's point of view by creating an image of them consistent with a particular political viewpoint. These paragraphs therefore establish a common habitus (Bourdieu, 1977) between Dr. Robinson and Chief Justice McEachern: we are people of like mind; we are educated; we are objective; we are intelligent; we are on the same side. For example, McEachern repeatedly suggests in the Reasons for Judgment that both the Gitksan and Wet'suwet'en elders and the anthropologists were presenting a "romantic" and "static" picture that did not conform to activities "on the ground."

The historical description of non-literate indigenous cultures as they were before written descriptions of them were recorded by Europeans is principally the subject matter of ethnohistory. Ethnohistorians strive to reconstruct a holistic picture of specific aboriginal cultures by methodically combining data from a number of sources, primarily: oral tradition, archeology, linguistics, field work and historical documents (Krech, 1991; Ray, 1991(a); Williams, 1988).

Since these are the only possible data sources available for such reconstruction, the discipline of ethnohistory is largely defined by this methodology. In other words, ethnohistorical studies are based on interpretation and the discipline has treated interpretivist methodology very seriously.

The subject matter of Robinson's opinion report therefore falls principally within the rubric of ethnohistory. However, she dismisses the data base, and by inference the methodology, of the discipline in which the Court qualified her as an expert witness.

Robinson:

It is important to emphasize the limitations inherent in any theory of aboriginal land use which attempts to reconstruct a 'reality' that existed long before any relevant written records were kept and long before the memory of living man. ...Such evidence as exists, which varies in its reliability may support more than one theory of pre-contact land and resource use (ibid:1).

Robinson "has not conducted fieldwork among the Gitksan or Carrier," or anywhere else for that matter. To be fair, it is not likely that it would have been possible for her to do so since they, like many indigenous peoples, assert the right to grant or deny access to their communities to researchers. It is doubtful whether they would have

allowed a researcher employed by the Crown to conduct studies within their communities in preparation for, or during the course of, litigation.

McEachern made it clear that he also rejected fieldwork as a valid methodology when he dismissed the research done by the experienced anthropologists who testified on behalf of the Gitksan and Wet'suwet'en, and who did do fieldwork. What, in McEachern's eyes discredited these anthropologists and their findings was that, he said, "they did not conduct their investigations in accordance with accepted scientific practices" (Reasons, 1991:50). This was evidenced, McEachern surmised, by the fact that they appeared by their support of land rights to have become "too close to their subjects." That is to say, they did not present themselves as value-free, objective researchers. Of course, in so doing, they also failed to present themselves as value free human beings.

Robinson rejects oral tradition out of hand as unreliable and the judge, as we have seen, was apparently also persuaded by this argument. Robinson's treatment of archaeological evidence as a whole is also highly selective. In her initial proposal to Russell DuMoulin Robinson suggested that "archeological reports could be quite worthwhile," and she referred to archeologists MacDonald, Allaire and Coupland as "usually forming sound opinions" (Exhibit 1191-2). However, by the time of the trial she had changed her mind about this (Transcripts, vol. 289:21727 - 21730).

The Crown's case is based on the argument that ranking emerged in response to the European fur trade, and that the hunting territories were also only sporadically and incidentally used prior to their "commercial" exploitation for the fur trade. Coupland says: "Archeological evidence reflects the emergence of ranked society" circa 2500-1500 B.P.

(Coupland, 1986:18). And, he argues that there is ample evidence of land mammal hunting having been carried on in the area at that time.

Robinson dismissed Gary Coupland's work, which did not support her argument. There is general agreement in the literature that Coupland's findings are valid (Ives, 1987). Where debate does arise is on the subject of whether the indigenous people living in the area at that time were the ancestors of the present inhabitants. That is to say, debate centres on the question of migrations. And, this is the point that McEachern seizes upon:

There is no doubt, in my view, that there has been human habitation at locations on the lower and middle Skeena River extending at least from Prince Rupert harbour in the west to Hagwilget canyon, and at Moricetown, for at least 3000 years or more. This has been established in the findings and conclusions of several reputable archaeologists...The difficulty from the plaintiff's point of view, is that none of this evidence, except the Seeley Lake event which I shall describe in a moment, relates distinctively to the plaintiffs. Any aboriginal people could have created these remains (Reasons, 1991: 59).

Robinson does not deal extensively with linguistic evidence. The Chief Justice, too, apparently found linguistics baffling but impressive. Robinson declared that the historical record vis-a-vis the Gitksan and Wet'suwet'en was "virtually mute." Hence, she did not conduct any archival research in connection with her report. Robinson claimed the first written records kept by a European observer, Hudson's Bay trader, William Brown, who arrived in 1822, and relied upon by Arthur Ray, were irrelevant to her study because, she said, Brown was describing social organization that had radically changed as a result of the introduction of European commodities into indigenous trade relations during the protohistoric period that had preceded Brown's arrival.

In other words the only reliable information, according to Robinson would have to come from the written records of people who didn't write, or written records by Europeans

who by their very presence--or, in this case, by the presence of commodities manufactured by them--would have so changed aboriginal culture as to render it not "really aboriginal" anyway; or from a 300-year old person.

Yet, in her doctoral dissertation, Robinson criticized two other scholars for using a similar approach:

...coming to grips with what is and what is not contained in the ethnographic and early historic records is a necessary precondition for further general theoretical investigations. There are already too many statements in Northwest Coast cultural historical research to this effect: When the documents are silent, I have chosen to rely on inference or speculation to provide an analysis that is systematic rather than piecemeal... [Taking these liberties] is, I believe, scientifically justifiable in that it provides hypotheses that can be tested by future documentary and/or field research (Robinson, 1983:408-409).

Since oral tradition, historical records, archeology, linguistics and field work are the **only** possible sources of historical information about non-literate societies, Robinson therefore denied the validity of both the data base and the methodology of the discipline in which the Court accepted her as an expert witness.

There is thus, at the core of her argument, a logical fallacy that makes reading her work feel like riding on a spinning top. Because it is here that she makes it clear that she is conducting an interpretive study defined by positivist ideology. In other words, if we accept the premises of positivism then the only "facts" that are true are those whose ontological status is identical to the facts of natural science, i.e. whose existence stands outside of inter-subjective validation processes in an absolutist fashion. Arguments such as the Crown's, Robinson's and McEachern's, Philosopher Peter Dews says, are "in pursuit of a truth whose conditions of possibility have been ruled out on a *priori* grounds" (Dews, 1987:xvi).

The status of absolute truth is granted theoretically/ ideologically by Robinson and McEachern to historical documents written by white men. In practice, though, in this particular case, the validity of such a white man's written documents, i.e. trader Brown's journals, is invalidated by speculations about what happened prior to his arrival. Therefore, Robinson and McEachern conclude that there are no facts worthy of the name that can be told by anyone. The *tabula rasa* has been created in the image of the law's theory of *terra nullius*. This leaves Robinson free to pursue theoretical speculation based in out-moded social science, while the Chief Justice is released to pursue his own speculations guided by common sense and unfettered by social theory, but legitimated by a rhetoric of social science all the same.

Dews describes these ideological gymnastics where the real and the imagined become fused and then arbitrarily distinguished from each other by power as a feature of contemporary western culture. The grounds of certainty that western culture has clung to since the Enlightenment--the promise that the application of reason to objective facts will bring justice--crumbles beneath our feet and our skies fall around us. We are left radically threatened and those whose interests have been well-served by absolutism become even more vehemently and viciously defensive (ibid: 15-19).

Robinson writes in her introduction as follows:

It is important to emphasize the limitations inherent in any theory of aboriginal land use which attempts to reconstruct a 'reality' that existed long before any relevant written records were kept and long before the memory of living man....Such evidence as exists, which varies in its reliability may support more than one theory of pre-contact land and resource use (1987(a):1).

Robinson explains these methodological propositions by advancing her conclusion:

None of our contemporary knowledge is untainted by European influence which was manifested long before relevant written records were kept (ibid:2).

Robinson dismissed all ethnohistorical data sources as invalid on an *a priori* basis; and then, having established a *tabula rasa*, paradoxically proceeded to selectively pick and choose evidence from these same sources to reconstruct her own version of Gitksan and Wet'suwet'en history. When challenged on her methodology under cross examination, Robinson acknowledged the illogical and contradictory nature of what she was doing as follows when she referred to the Section of her report that described pre-contact Gitksan and Wet'suwet'en society:

...this Section IV that these paragraphs are embedded in is referring to traditional, so in that sense I would be looking at or considering prehistoric to the extent that that can't be done (Transcripts, Vol. 293:22192).

6.3 DOING WHAT CAN'T BE DONE

The introduction to Section IV of Robinson's opinion report is entitled "Gitksan Territorial Ownership: Traditional," and reads as follows:

Section IV provides some context for arguments presented in Sections II and III by theorizing about the dynamics of territorial acquisitions and control in traditional Gitksan societies prior to the protohistoric period. Emphasis is placed on the fact that traditional Gitksan societies were never stable and that rights to certain territories probably changed hands frequently. A scenario where the most highly valued territories were those close to the relatively stable village bases in prehistoric times is developed to contrast with the description of protohistoric and early historic patterns of Gitksan land holdings presented in Section V (1987(a):17).

Robinson's definition of theory, as explicated under cross examination was as follows:

Robinson: Theories are explanations or attempts at explanation that try to account for or resolve into a logical framework facts relating to a central issue or problem (Transcripts, Vol. 292:21668).

Robinson agreed that theories were not facts. Grant questioned her again, in reference to her use of the word "theorizing" in this introductory paragraph to Section IV.

Grant: It's your speculation?

Robinson: I use the word theorize...you use the word speculate. I think we are probably discussing the same thing (ibid:22163).

This confusion between theory, conjecture and speculation and the way Robinson uses these terms interchangeably is important rhetorically to reinforce the notion that there is no certainty here and all anthropological interpretations are equally valid.

We can now move on to a detailed look at Robinson's reconstruction of traditional Gitksan territorial ownership. The Province's central argument, that requires anthropological support, is that there was no land tenure system that resembles the one being described by the Plaintiffs and which finds support in archeological, linguistic, oral tradition and historical data, particularly that described in Brown; and that the hunting territories and access routes were used only incidentally, sporadically and arbitrarily by anyone who wished to wander about.

Section IV covers six pages and encompasses 12 paragraphs. What appears at first as an impressive 10 pages of supporting notes is revealed upon closer examination as repetitions of eight sources, summarized as follows: Adams, 1969; Boas, 1916; Davidson, 1955; Duff, 1959; Garfield, 1951; Inglis and MacDonald, 1979; Jenness, 1943; Tobey, 1981. All of these sources rely, to some extent on oral tradition. Of these eight, only Adams deals specifically with the Gitksan. Adams conducted fieldwork among the Gitksan during the mid to late 1960s.

Like so many other aspects of Robinson's contribution, her dismissal of oral tradition and ethnography stands as yet another oxymoron when it becomes clear that 47 of the 82 sources Robinson lists in the bibliography to her report base their work substantially on oral history and/or field work. In other words, having rejected oral tradition on theoretical and methodological grounds, she then relies on oral tradition selectively to support her argument.

Furthermore, since Brown's journals did not become available until the 1960s, the ethnographic sources that she does, ironically, rely on to reconstruct **her** description of pre-contact aboriginal society were similarly not informed by Brown's observations.

The purpose of this section of Robinson's report is to establish four points: (a) to provide a baseline description of Gitksan and Wet'suwet'en society from which to measure the changes that, she argues, took place during the protohistoric period; (b) to show that this society was unstable; (c) to show that territorial rights changed hands frequently; (d) to show that the most highly valued territories were those close to the relatively stable village bases, i.e. not the surrounding hunting territories.

Robinson's narrative begins with the following paragraph (#25):

Oral traditions describe groups of **settlers** wandering about until they **discovered unoccupied lands**. According to the narratives, the **pioneers** established villages and **laid claim** to **fishing sites, hunting territories**, and other **resource-producing areas by using** them. The **act of discovery**, often reinforced by **supernatural occurrences**, constituted the **basis of claim** in many **myths**. However, **repeated use** seems to have maintained **rights to resources** (1987(a):9)(emphases added).

The rhetorical dimension of this paragraph, "speaks for itself," and I will not belabour the reader with a detailed analysis of the obvious parallel being attempted here

between the European story and that of the original ancestors of the Gitksan and Wet'suwet'en. This, of course, is a common theme in arguments against the legitimacy of Aboriginal claims: in this version of the narrative the ancestors of the Aboriginal peoples were simply the first ones to arrive on the continent and they laid claim to the land in the universal way of migrants everywhere always. The Europeans, then, simply did the same thing when they came a few thousand years later.

Under cross-examination Peter Grant asked Robinson to delineate the time depth referred to in her cavalier sweep through history: Perhaps 100 years? Perhaps 10,000 years?

Grant: You have no sense of the time depth of which is being discussed there?

Robinson: No, I don't.

Peter Grant asked Robinson about facts about the Gitksan and Wet'suwet'en to support her claims:

Grant: I would ask you if you can give one example of where the Gitksan have acquired territory by seizure of unclaimed land?

Robinson: No, I cannot.

Grant: Can you give one example of where the Gitksan have acquired land by discovery?

Robinson: No, I cannot.

Grant: Can you give one example of where the Gitksan have acquired land by occupying and using unclaimed territory?

Robinson: I've read examples of these, but I don't know if they apply to the Gitksan in the historical or the modern.

Grant: Can you give me one example of where the Gitksan acquired land by gift?

Robinson: Not specifically, no.

Grant: Can you give me one example of a migrant in the Gitksan case coming from a neighbouring village who brought claims to neighbouring territories with them. Do you know of one example among the Gitksan?

Robinson: Off hand, specifically, no. I wouldn't be surprised if I could find one...

Grant: Can you give one example among the Gitksan of persons who brought their land with them when they moved from one territory to another?

Robinson: No, I cannot (Transcripts, Vol. 292:22191-22195).

In the introduction to her opinion report, Robinson describes her methodology as follows:

This report is based on a review and interpretation of existing information, largely contained in secondary sources, both published and unpublished, concerning the Gitksan and Carrier, as well as other northwest coast and interior native groups. I have not carried out fieldwork among the Gitksan or Carrier. Nor have I conducted archival research in connection with this report although I am familiar with many of the archival sources. My general understanding of the consequences of European influence is shaped by the research I carried out for my doctoral dissertation. In connection with this study of Indian agriculture on the northern Northwest Coast, which will be referred to here as "(Robinson 1983)," I investigated ethnographic and early historic records pertaining to the Tlingit, Haida, Coast Tsimshian and neighbouring native populations. Tracing the connection between European fur traders and the adoption of agricultural practices by some coastal native groups required that I develop an understanding of changes in regional economies stemming from direct and indirect contact with Europeans, which is applicable to a study of the Gitksan and Wet'suwet'en. Although my analysis in the present report borrows from the work of others, the conclusions are my own (1987(a):3).

The comparative method is a venerable one in anthropology and ethnohistory and lies at the heart of anthropology's essentially humanitarian ethos. It is in coming to terms with the tension between similarities and differences in the human condition that we can come to both respect difference and honour our common humanity. Methodologically, this tension operates like a "checks and balances" system: careful attention to detailed descriptions and analyses of particular cases respects the integrity of specific peoples and is a necessary condition for theoretical generalization. Theoretical generalization can

then point to commonalities and suggest trends and possibilities that may allow different groups of people to learn from the experiences of others and to enrich their particular visions of human potentialities. Anthropologists then strive to maintain a constant movement between the particular and the general. Robinson explains this as follows:

Ethnological and ethnographic analogies allow many of the lacunae to be glossed over. This is generally- accepted practice as scholars can then move beyond the level of anecdotal description to address broader issues germane to their fields of inquiry. In addition, researchers usually possess a sufficient degree of familiarity with pertinent records to eliminate more glaring distortions (Robinson proposal to Russell DuMoulin, Exhibit 1191-2).

True enough. However, what this statement "glosses over," and what is similarly "glossed over" in Robinson's practice of the comparative method is the necessary precondition of addressing all the relevant data available to reconstruct a particular case and then systematically determining which "lacunae" can legitimately be "glossed over" and which cannot. In other words, the comparative method is not a *carte blanche* for ungrounded speculation. Robinson goes on in the same paragraph to conclude:

However, that we deal in possibilities and probabilities more often than in fact is an important point to raise (ibid:4).

Again, this statement misrepresents what most anthropologists ("we") do, and asserts that the only "facts" which are valid are positivistic ones. The rhetorical value, is, of course, obvious: there are no facts here. There is no truth except the one that power tells.

At an ever so slightly more subtle level, the ancestors of the Aboriginal peoples appear to have, conveniently, laid claim only to those areas that the province of B.C. has, since 1871, been prepared to allot them, and under the conditions and by the same criteria (use and occupancy) as the same provincial government has been prepared to allow, sometimes.

This, of course, lays the groundwork for claiming that Native people "abandoned" their lands by "ceasing to use" them, and thus rendered "abandoned lands" available for a new wave of "pioneers" to "discover," etc. etc.. Such a conceptualization also serves the rhetorical function of reaffirming the notion that nothing of any importance happened in northwestern British Columbia until Europeans arrived during the last century, and further supports the idea that anthropological research is nothing more than "anything goes" speculation. This is achieved by collapsing thousands of years of aboriginal history into one vaguely-worded paragraph (see Fabian, 1983).

The next paragraph, #26, states:

Where conflict over resources was minimal, boundaries were **probably** vague and faded away from the village cores. **I envision** a patchwork configuration where controlled resource-producing areas away from village bases were linked up by a system of trails (1987(a):11) (emphasis added).

This, too, is based on comparative speculation:

Grant: And here you are speculating, are you not?

Robinson: Yes. And my speculation is based on a very extensive reading of cultural ethnography as a source of comparative examples and from comparative examples from the northern northwest coast region and adjacent interior region, among other sources (Transcripts, Vol. 292:22175).

Robinson describes Gitksan and Wet'suwet'en society as a "segmentary" one that lacked "mechanisms to create and sustain centralized political and economic authority." She admits that this is based on theoretical generalizations about the nature of "segmentary societies" and not on data about the Gitksan and Wet'suwet'en.

Similarly, Robinson goes on to outline her "envisioned patchwork configuration" joined by a "network of access routes being freely used by all village members" (a point

which will become important to her later argument about the extent of, and reasons for, warfare during the protohistoric period), and where boundaries were "hazy."

Robinson describes a number of processes to substantiate her contention that "territorial rights changed hands frequently," drawn either from material on other northwest coast groups or from Adams' modern study of the Gitksan potlatch (Adams, 1969).

Robinson herself makes the following statement in her Ph.D. dissertation which, carried out under scholarly direction, in its caution against speculative comparison, does reflect current research in the field. After quoting and criticizing two other scholars for relying on "inference or speculation to provide an analysis that is systematic rather than piecemeal," Robinson argues, in her dissertation, that

Piecemeal reconstruction of particular developments is perhaps a tedious route to scholarly enlightenment, but eventually leads to more easily substantiated and probably more appropriate hypotheses. And it is in keeping with the works of scholars who stress that the analysis of cultural processes is not always amenable to rigid theoretical treatment because historical records may yield unanticipated yet illuminating data (Robinson, 1983:409).

Since 1983 when Robinson completed her dissertation, ethnohistorians, for the most part, have, indeed, been engaged in work that focusses on the particularities of local variation rather than the construction of theoretical generalizations (see Krech, 1991).

As well as presenting herself as an ethnohistorian, Robinson also claimed cultural ecology as an area in which she had expertise. She defined cultural ecology as follows: "the study of people and relationships and their environments" (Transcripts, Vol.8:21652).

When Robinson was asked to substantiate her claim that her model was "innovative, credible, and in keeping with recent ethnohistoric, cultural-ecological and

cultural-evolutionary research" (Exhibit 1191-15), she referred to the recent work--not cited in the bibliography of her report--of scholars like Colin Yerbury, Shepherd Krech, Toby Morantz, Arthur Ray and Charles Bishop, each of whom stress the importance of such a local focus. She referred, in particular, to a 1986 volume of the journal Anthropologica, edited by Dr. Edward S. Rogers of the Royal Ontario Museum, which begins:

By the late 1950s or early 1960s, I assumed that the issue of land tenure among Subarctic Algonquians had been resolved once and for all and that "hunting territories" came into existence after the arrival of Europeans. This assumption was challenged by investigators such as Toby Morantz and Harvey Feit, who began to undermine my conviction. The reevaluation of my thinking was further hastened when I listened to papers presented in an all-day session organized by Toby Morantz and Jose Mailhot for the Canadian Ethnology Society meetings at the University of Toronto, May 9-12, 1986. Scholars who spoke in this session convinced me that after several decades of my previous viewpoint, it was time to reexamine the complex topic of Subarctic Algonquian land tenure and resource use. In spite of the extensive literature on the land occupied by the original inhabitants of North America, we still know very little about Indian relationships to land and its resources, especially in the Subarctic. Fortunately there are scholars who continue to labor very hard at understanding the wisdom of Indian elders and the remarks of traders and other Europeans preserved (Rogers, 1986:1).

In the epilogue to this volume Rogers summarizes recommendations for future research. Most importantly, he urges that scholars develop more precise descriptions of local areas, take greater account of regional variation and exercise more caution in asserting comparative generalizations. He lists the following factors to be taken into account in future studies: climatic changes, game cycles, spatial distribution of resources, production of trade items, resource productivity, size of fish, demographic patterns, technology, sociopolitical organization, influence of religious beliefs and behaviour patterns, role of traders, role of missionaries, role of government and perhaps anthropologists (ibid: 207-210). Peter Grant asked Sheila Robinson whether she agreed with Rogers' recommendations.

Grant: You would agree that these are factors that should be considered in the type of an -- in analyzing the pre-contact society, climatic changes? ...Do you agree that in a study of the Gitksan or the Wet'suwet'en the climatic changes should be taken into account?

Robinson: Oh, I would think so.

Grant: Game cycles should be taken into account?

Robinson: Yes.

Grant: Spatial distribution of resources should be taken into account?

Robinson: Yes.

Grant: Production of trade items should be taken into account?

Robinson: Well, I think your question initially was dealing with the pre-historic. I think in this section I don't know if they are talking only about pre-historic, but I would say yes.

Grant: Resource productivity should be taken into account?

Robinson: To the extent that it can be.

Grant: And the...size of fish?

....

Robinson: I would say that fish, characteristics of fish perhaps rather than just size might be important for this area.

Grant: For the Gitksan and Wet'suwet'en area?

Robinson: Yes.

Grant: Good. I agree. So characteristics of fish should be taken into account for Gitksan and Wet'suwet'en?

Robinson: Perhaps.

Grant: And...cultural considerations?

....

Robinson: To the extent that they can be.

Grant: The technology...the technology of the Gitksan and Wet'suwet'en should be taken into account?

Robinson: Yes. And what they acquired from traders, yes.

....

Grant: And sociopolitical organization should be taken into account?

Robinson: Yes.

Grant: And the influence of spiritual beliefs and behaviour patterns --

Robinson: Yes.

Grant: Now, in your research and preparation of your report you did not take into account climate, did you?

Robinson: Not specifically.

Grant: Game cycles?

Robinson: Not specifically.

Grant: Spatial distribution of resources?

Robinson: Yes, to some extent.

Grant: Did you refer to that -- describe that in your report?

Robinson: I don't know. I'm sure you've had a more thorough review of the paragraphs in recent days than I have. But, yes, it has got a spatial component to it in its description of the changes in hunting territories and so on.

Grant: But I am talking about spatial distribution of resources, that would be game and where they are located?

Robinson: Did I take it into account? Yes, to some extent.

Grant: But you have indicated before you weren't sure where these resources were located within the Gitksan and Wet'suwet'en territory?

Robinson: I'm not sure what level of detail you were asking for, then or now.

Grant: And did you deal with the production of trade items?

Robinson: Yes, to some extent.

Grant: And to the extent it is reflected in your report?

Robinson: Yes. Not necessarily.

Grant: Well, we have nothing --

Robinson: Not necessarily expressed in the report directly all the consideration I made of the exchange of trade items.

Grant: Well, what sources did you rely on for your analysis of the spatial distribution of resources? If you want you can look at the bibliography of your report.

Robinson: Oh, can I?

Grant: Yes.

Robinson: Well, that's great. Perhaps we can go and list all the writers again who have dealt with spatial distribution in the territories.

Grant: No, no, no.

Robinson: No, no, no. Please don't shake your head at me.

Grant: I want to ask you this, what sources did you deal with respect to spatial distribution of resources among the Gitksan and Wet'suwet'en?

Robinson: Kobrinsky and Bishop, among others.

Grant: Okay. Thank you. Which sources did you rely on in your consideration of production of trade items with respect to the Gitksan and Wet'suwet'en?

Robinson: Any of those sources which are referred to in chapter three of my dissertation which pertain to trade and the discussions of production and exchange, the circulation of wealth and so on. And also to those scholars that I have listed several times now who are included in the bibliography. I can either go alphabetical if you go through the footnote list again, or I can recite them probably from memory going from north to south.

....

Grant: You may have misheard me again.

Robinson: No, I didn't mishear you.

Grant: I asked what sources did you rely on in support of your analysis of the production of trade items among the Gitksan and Wet'suwet'en?

Robinson: Well, I relied on more than those sources that pertain directly to the Gitksan and Wet'suwet'en.

Grant: I understand that.

Robinson: Well, I'm glad.

Grant: I want to know specifically which ones relate to the Gitksan and Wet'suwet'en?

....

Robinson: Specific information on the Gitksan and Wet'suwet'en...is expressed in the Brown reports...

Grant: But the Brown reports that I have been discussing with you...are not cited in the report?

Robinson: No, they are not cited in the report (Transcripts, Vol. 293:22165-22171).

6.4 NO REASON TO TRAVEL

The Crown's case requires that the judge accept a description of pre-contact Gitksan and Wet'suwet'en society as one in which people rarely travelled more than one day's walk, an estimated 20 miles, beyond their villages, to hunt or gather. Therefore they sought to establish that there were few necessary or desired resources in these territories and that, as a consequence, there were no "real" rules about access to or exploitation of these lands.

Robinson summarizes this argument in the concluding paragraphs of the introduction to her report:

Speaking generally, one may expect that some form of organized control would have been exercised over access to the fisheries and other resources which were **necessary for survival** and over the local trails and bridges which facilitated prehistoric trade networks (1987(a):16) (emphasis added).

A number of points are being made here that are fundamental to the argument. There is "some form of organized control" (read: NOT ownership) "exercised over access (read: NOT ownership) "to the fisheries (read: NOT game) and other resources" (read: NOT property) "which were necessary for survival" (read: meet the basic survival needs of the organism) "and over the local trails and bridges which facilitated prehistoric trade networks."

Robinson continues:

But prior to the intensification of pressure on interior fur resources sparked by European demands for furs there would appear to have been no need for a sophisticated and elaborate body of rules governing access to resources or for extensive and defined areas of land for their exploitation. **In the absence of**

- **competition over scarce resources, there is no reason for the rules to exist** (1987(a):17) (emphasis added).

Therefore, the Crown's case requires that, first, prior to the commencement of the fur trade in the 1780's, the supply of game and other resources within Gitksan and Wet'suwet'en territory was not scarce in relation to the demand for it by the estimated 7-10,000 aboriginal people living there at that time.

This argument has both a theoretical and an empirical aspect. Empirically, the questions to be asked are the following: (1) what game were in the territory and how were they obtained and used; (2) to ascertain whether or not these resources were sufficiently scarce to warrant conservation people to resources ratios may be calculated and the social organization examined to determine the degree to which structurally-generated competition was present and adding to pressure on the resource supply.

Robinson says the Hudson's Bay records are "virtually mute" on the subject at hand. The judge accepts these records as "a rich source of historical information," and he had, he said, "no hesitation accepting the information contained in them" (Reasons, 1991: 201). These records, as testified to by Arthur Ray, are replete with references to both the presence of resources in the territories and their use and importance to the Aboriginal peoples of the region.

Harmon, who preceded Brown by 12 years, recorded that the Gitksan and Wet'suwet'en captured caribou, beaver, bear, lynx, martins, marmots, fishers, foxes, minks, swans, and hares with a variety of implements (Harmon, 1903). Brown confirmed the importance of hunting in the territories for clothing, trade goods and ceremonial uses.

Robinson admitted, under cross-examination, that her knowledge of the ecology of this area was limited. She could not answer questions about where various game were located or what their habits were. When confronted with evidence about their use she equivocated in the extreme, preferring to adopt an argumentative approach to the questioning more suited to Crown counsel than to an expert witness.

Robinson: ...We have to think in terms of the used resources rather than what's out there in terms of the natural environment. So the environment as it is used is different than the environment as it exists.

Grant: Well, the coastal Tsimshian use the sea-based resources, the interior Gitksan use the riverine resources, at least as far as the fish is concerned, right?

Robinson: Yes.

Grant: You don't know what they wore, the interior Gitksan and Wet'suwet'en. You have already told us that?

Robinson: For which time period, sir?

Grant: Pre-contact?

Robinson: No. I don't think anyone knows what they wore pre-contact.

Grant: But we can assume that they wore something in the winter months?

Robinson: Yes, I think so.

Grant: And we can assume that it wasn't from fish?

Robinson: Not necessarily. I have seen reference to the use of fish skin.

....

Grant: This is Harmon. You remember Harmon? You referred to him earlier, Dr. Robinson?

Robinson: Yes.

....

Grant: Where he refers to "The Native of New Caledonia, we denominate Carriers" You see that?

Robinson: Yes, I do.

Grant: Okay. Now, turn the page over. And then he gets into a description of them:...

Their clothing consists of a covering made of the skins of the beaver, badger, muskrat, cat or hare. The last they cut into strips, about one inch broad, and then weave or lace them together, until they become of a sufficient size to cover their bodies, and to reach their knees. This garment they put over their shoulders and tie about their waistes. Instead of the above named skins, when they can obtain them from us, they greatly prefer, and make use of blankets, capots, or Canadian coats, cloth or moose and red deer skin. They seldom use either leggins or shoes, in the summer.

Now, that description by Harmon is of the eastern Carrier. You would agree that that is some indication of what the aboriginal people of the interior, the north central interior of B.C. was wearing by a contemporary historical account?

Robinson: Well, in the historic period for the Carrier or the eastern Carrier....And I am gratified to see the reference of using the skin of fish for clothing is mentioned at the bottom of that paragraph.

Grant: Yes. Well I knew you would find that.

Robinson: Well, good.

Grant: And I am going to read that.

....

Grant: Well, let's read what is there since you pointed it out.

The women, however, in addition to the robe of beaver or dressed moose skins, wear an apron, twelve or eighteen inches broad, which reaches nearly down to their knees. These aprons are made of a piece of deer skin, or of salmon skins, sewed together. Of the skin of this fish, they sometimes make leggins, shoes, bags, etc. but they are not durable; and therefore they prefer deer skins and cloth, which are more pliable and soft. The roughness of salmon skins, renders them particularly unpleasant for aprons.

You have to -- in any of the analysis of Gitksan and Wet'suwet'en pre-contact you have to take into account that there was some resources that they relied on for clothing?

Robinson: Locally. Some resources that they relied on for clothing, yes, I would think so.

Grant: Yes. And you are not suggesting that you assumed that they wore fish skins in the winter months in the central interior of B.C.?

Robinson: I don't know. Harmon has given us a comment about the use of fish skins as part of the clothing. But there is no reference here to what seasons of year they wore the fish skins and whether or not they comprised of part or all of their clothing.

Grant: Well, he says what they were used for?

Robinson: Yes. They also wore Canadian coats, blankets, capots and so on.

Grant: Yes, after contact that's what he says?

Robinson: Yes. And this is pretty early after contact, too.

Grant: This is 1811. Yes, 1812.

Robinson: Yes.

Grant: But would it not be fair to assume that the Gitksan and Wet'suwet'en would rely upon furs from within their area for clothing pre-contact?

Robinson: I imagine that they relied on them to some extent. We have here a description of the use of other species of animals for clothing or fish.

.... Grant: (referring Robinson to paragraph 28, of her opinion report and supporting footnote on page 68 of part 2) You state, and this is your statement:

In my opinion, outlying borders were 'probably hazy' because there was little need to define them precisely....

And I think we've already established that this is conjectural on your part:

My reasoning is that it is only when there is pressure on a certain resource, when competition draws attention to a certain resource, then there is need to define it specifically.

Grant: Accepting that reasoning, you must analyze all potential sources of pressure on the resource to come to a conclusion; do you not agree?

Robinson: Not necessarily. And I do not believe there is information about all possible pressures coming to bear on resources.

Grant: You would -- to come to a conclusion about pressure on a certain resource, it would be relevant to determine the utilization of that resource for clothing needs, would it not?

Robinson: Not necessarily.

Grant: Would it not be relevant to determine the population pressure on that resource if the resource was utilized for clothing needs, that is the demography?

Robinson: Not necessarily.

Grant: Would it not be necessary to determine the utilization of that resource for feasting purposes?

Robinson: Not necessarily.

Grant: Would it not be relevant to determine the necessity or the utilization of that resource for trade purposes?

Robinson: Not necessarily.

Grant: You say not necessarily?

Robinson: Yes.

Grant: So ? --

Robinson: You're talking about resources generically, and I wouldn't say that any of those criteria you've just put to me are applicable for all situations. I'm not quite sure what situation you're referring to, Mr. Grant.

Grant: Well, what situation are you referring to in your footnote; do you know?

Robinson: I'm not sure what you're referring to, sir.

Grant: I'm referring to the second sentence in...footnote 28a: "My reasoning...My reasoning" being Sheila Robinson's reasoning?

Robinson: Yes.

Grant: Is this only when there is pressure on a certain resource when competition draws attention to a certain resource, then there is a need to define it specifically?

Robinson: Yes.

Grant: What resource are you talking about?

Robinson: I'm talking about a general principal as is expressed with regards to cultural ecological theory, and I did draw attention earlier to a reference, Robert Netting, and his very basic book called "Cultural Ecology," and you'll find there's reference to these general principles there. Your list of questions that had to do with specific characteristics or attributes associated with each resource, each or any resource, I said not necessarily, because I didn't think they were applicable criteria.

Grant: You applied this reasoning in this statement to the Gitksan and the Wet'suwet'en?

Robinson: Yes, I have.

Grant: In fact, in this footnote you're dealing with the Gitksan.... There is no evidentiary basis for the utilization of this approach and its applicability to the Gitksan, is there; the approach starting "My reasoning is?"

Robinson: Well, that may be your opinion, it's not mine.

Grant: Is there an evidenciary basis for applicability to the Gitksan?

Robinson: Yes. I think the basic premise in anthropology is that comparative examples are of extreme use, are of usefulness in identifying situations from one area to another. Anthropology is imperative.

Grant: When there's not sufficient data about the specific society you're studying?

Robinson: When there is some specific data it's also useful to use comparative approaches, because it tends to lessen the entrapment one can fall into by treating any society in isolation or as a unique example. These general principles and cultural ecology have brought application.

Grant: Are you finished?

Robinson: For the time being, yes.

Grant: Thank you. Maybe I'll ask you a question.

Robinson: Oh, good.

Grant: You're stating that with respect to that sentence that it is irrelevant whether the Gitksan rely on any specific resource for clothing, feasting, trade goods, its irrelevant to determine whether or not there is pressure on that specific resource?

Robinson: I think you're putting words in my mouth. These are not quite the questions you asked me earlier in --you're summarizing them in a slightly different manner. It's difficult for me to put the kind of words you're putting to me now against the list of questions you've just asked me. You were asking me whether or not these factors are necessary or necessarily taken into consideration in looking at pressure on any resource, or that's how I understood those questions to be.

Grant: Well, let me rephrase them. In determining whether or not there is pressure on a certain resource among the Gitksan, it would be relevant to determine whether the Gitksan would utilize that specific resource for clothing, would it not?

Robinson: Only if it was the kind of resource that was ever used with clothing.

Grant: Yes or no?

Robinson: If it was ochre it wouldn't be.

Grant: Maybe. Of course, I'm talking about a resource used for clothing?

Robinson: To the extent that that could be determined, yes, it would be relevant.

Grant: To the extent that it can be determined if the Gitksan used a specific resource for feasting, it would be relevant to determine that so to determine the pressure on that resource?

Robinson: To the extent that that could be known, yes.

Grant: Yes, you agree. And similarly, with respect to the utilization of a specific resource with respect to trade or exchange, as you've phrased it, it would be relevant to determine the pressure on that resource by the Gitksan?

Robinson: To the extent that that could be known, yes (Transcripts, Vol. 293:22151-22205).

Finally, Grant shows Robinson a map on which the location of various game species and other resources like berry patches have been marked out. The map shows these resources as being distributed throughout the territory and not simply surrounding the village sites or within 20 miles or one day's walk from these same villages.

Grant: And mountain goat you've referred to as one of the trade goods. And in this case we see that there are mountain goat both inside and outside the black outlined area. But if the Gitksan and the Wet'suwet'en were involved in using or trading mountain goat furs or mountain goat skins then they would require access to these territories?

Robinson: Not necessarily. And I might say that knowing some things about the environment is only one of the several factors that have to be taken into consideration. Without knowing about the density, the distribution of those animals that are being exploited, without knowing what their recovery rate is after exploitation or during exploitation, and without having some idea of the demands on those natural resources by the local population, the natural distribution makes little sense by itself. It doesn't tell me anything.

Grant: It does tell you something, doesn't it?

Robinson: It tells me that the animals were present or not present.

Grant: It tells you that if the Gitksan required those animals for their own use or for trade they would have to have access to places where those animals were located?

Robinson: Yes, they would.

Grant: Thank you, doctor (ibid:22205-22213).

It is tempting to simply dismiss Robinson's behaviour as obnoxious. However, that would ignore the important rhetorical impact of her courtroom style. When we excerpt extracts like the above from the transcripts, and edit out repetitions and tangential comments in order to follow specific points through the discussion, it becomes very clear that Robinson engages in argument for the sake of argument and often makes no sense at all.⁴ However, from the point of view of judges, lawyers and lay people listening to days and days of testimony, some of it highly technical in nature, the details and logic of argument easily become lost. What Robinson does succeed in then is in reinforcing notions that the subject matter being dealt with is of a highly technical and complex nature that only well-educated specialists can possibly comprehend. In fact, what is being discussed is very simple: were there animals in the specific geographical locale in question, i.e. the hunting territories shown on maps; and did the people who lived on that specific piece of land during a specific time, the late eighteenth and early nineteenth centuries, use these resources? The answers, according to the **facts**, are also simple: yes, yes and yes.

Robinson, however, persists in her argument and advances theoretical propositions in place of facts. In support of her contention that,

...prior to the intensification of pressure on interior fur resources sparked by European demands for furs there would appear to have been no need for a sophisticated and elaborate body of rules governing access to resources or for extensive and defined areas of land for their exploitation.

⁴ Sociolinguist William Labov, in his studies of middle class speech patterns and styles like verbosity, and overuse of modifying and qualifying words classifies speakers like Robinson as typical: "he succeeds in letting us know that he is educated, but in the end we do not know what he is trying to say, and neither does he" (Labov, 1969:200).

She says,

...from my own reading and cultural ecology, I would say that a general rule of thumb that many anthropologists or cultural geographers go by is that people seldom assert exclusive or limiting control over any kind of specific or general resource unless there is a need to do so (ibid:21644).

So the resources were there and the people used them. The next question relevant to the Crown's case is, did they compete for them?

Robinson's depiction of pre-contact Gitksan and Wet'suwet'en society also included a description of the social and political structure with a particular emphasis on economy, trade and land tenure. In this regard she wished to show that there was nothing we would recognize as a system of property ownership, that these societies were "never stable," and that "rights changed hands frequently." In order to achieve this, she described a situation of fairly intense internal competition:

House rank was not fixed through time, and chiefs of the same side competed to recruit members and to amass wealth for potlatching. **Wealth was derived in part from resources taken from house-controlled territories.** Households within a side did not have equal access to 'shared' resources: higher-ranking chiefs were evidently able to lay claim to the more productive areas (1987(a): 20)(emphasis added).

Arthur Ray argued that:

...before contact, the Gitksan and Wet'suwet'en already were highly dependent on their salmon fisheries. They located their semi-permanent villages beside the most reliable fishing sites and tapped the adjacent countryside for a variety of other resources. Local population pressure would have made it necessary for them to conserve these other resources, particularly game. The house-territory system was well-suited for that purpose (Ray, 1991(a):311-312).

And, based on his research in the Hudson's Bay archives, Ray argued further that.

What is abundantly clear from Brown is that you have a fully-articulated feasting system with house territories, family heads. In other words, the system--the very system that the ethnographers...begin to describe with Morice some 60 years later is a system that essentially Brown has just given us the bone outline for in 1820...(ibid).

In 1822 Brown said that access to Babine and Wet'suwet'en house territories was tightly controlled by 42 "nobles" and 17 "men of property" (ibid:303). Chief Justice McEachern, after describing Brown as "our best historian," and historical documents as "speaking for themselves" and requiring no interpretation, analyzes Brown's references to "men of property" as an equivocal statement regarding the existence of a land tenure system. The acquisition and production of goods for trade among the Gitksan and Wet'suwet'en and between them and their neighbours is another source of demand, or pressure, on the resources in the hunting territories.

In her first draft report to her employers, Robinson said as follows:

In late pre-historic times Gitksan and Wet'suwet'en people were already involved in extensive aboriginal exchange networks, were already increasingly being influenced by coastal dwellers with whom they exchanged locally-produced and exotic commodities, were already developing ways to more effectively exploit local resources to satisfy subsistence and exchange related needs, and so on (Exhibit 1191-22).

Grant questioned her on the absence of this opinion from her final report.

Grant: And that was your opinion at that time based on your sources?

Robinson: Yes.

Grant: And that's your opinion to-day? You didn't change your opinion?

Robinson: No, I didn't.

Grant: But you did not include that opinion in your report, did you?

Robinson: Oh, gee, I would think that I had, but it would perhaps...

Grant: I would ask you to take a chance over the evening to look at that.

Robinson: Because I certainly think that it's stated in my

report that coast interior trade or exchange did not spring up as a result of the European induced fur trade, but that there was an extension of, an expansion of and intensification of that contact.

Grant: Okay...I know you make reference to coastal interior trade...before contact in the pre-historic time...But here you're saying more than that...

Robinson: I may have expanded it there, but I don't think that the idea was left out of the report.

Grant: You can look at the report, and if I stand to be corrected, I will ask you first thing in the morning.

Robinson: I may have changed phrasing. I don't think the content was ignored.

Grant: I couldn't track this, doctor. I couldn't track this into your report, and you may direct me to where I should have looked to track it (Transcripts, Vol. 289:21798).

The Hudson's Bay records and the oral histories, as well as ethnographic, archeological and linguistic evidence all document extensive trade in the region as a whole in both primary and manufactured goods. Harmon and Brown describe well-organized and managed trade in furs, dressed skins, leather, fish, fish oil, blankets, shell beads, berry cakes, nets and dogs (Transcripts, Vol. 203:13478).

Nonetheless, the Judge concluded that:

There would undoubtedly be some bartering but that would be in sustenance products likewise obtained by aboriginal practices (Reasons, 1991: 392).

Finally, Robinson concludes:

In my research I have discovered no conclusive evidence that suggests that, prior to the advent of European influence in the claims area, the Gitksan and Wet'suwet'en lineages and families identified ownership rights to large and precisely defined tracts of hunting territories.

And the judge concurs.

6.5 MOUNTAINS AND THINGS

Robinson's opinion report is principally about social change, and the baseline-- "prehistoric" Gitksan and Wet'suwet'en society--from which change is being measured was outlined in the previous chapter. Remembering that we are now back inside Robinson's argument, we have to accept, for the sake of argument, her description of pre-contact aboriginal society in order for the remainder of her narrative to make sense. We must assume, therefore, that people were living in villages, subsisting principally on fish, and wandering about once in a while on the territories, "envisioned" by Robinson as a "patchwork configuration" with "hazy boundaries," doing the odd bit of hunting and gathering. These territories were unowned as were the access routes between them. Use rights, where specified, fluctuated considerably. Society was organized into clans and houses in which rank was flexible and changed frequently and there was no centralized political leadership. Feasting occurred but was not integral to the political, economic or social system. Trade with neighbours also took place but was limited to accidental surpluses in subsistence goods, i.e., production specifically for trade did not take place.

The Crown's argument is that when European commodities were introduced by the fur trade, which commenced with Captain Cook in 1774, desire for and competition over these things stimulated northwest coast societies to trap hitherto unexploited, or under-exploited fur-bearing species on territories outside of their villages and at a distance from the main subsistence source of salmon in the rivers.

Generally speaking, fur trade scholars agree that once trade in European commodities begins, a given indigenous society has entered what is called the "protohistoric" period of their history. The first question to be asked regarding the specific history of any particular group, then, is when did this period begin for them. Two primary

sources are consulted on this question: archeological data concerning when the first items of European manufacture have been unearthed in a given area, and historical documents in the form of records and observations kept by European traders. Oral tradition is also mined for references to the arrival of these new things and how they were regarded and used by the indigenous people concerned. As we will see, the dating of the commencement of the protohistoric period is problematic for Robinson in a number of ways.

Paragraph 1 of the introduction to Sheila Robinson's opinion report duly sets out the author's central task:

This report investigates the argument that indirect contact with Europeans during the protohistoric and early historic periods provoked significant changes in patterns of Gitksan and Wet'suwet'en land use (1987(a):1)

Paragraph 2 defines these terms more precisely:

By "protohistoric," I mean the time prior to European presence in the area claimed by the Plaintiffs but when European influence was felt through native intermediaries. Roughly speaking, the protohistoric period spans the mid-seventeenth century to the early nineteenth century. "Historic" refers to times when Europeans were present--even if intermittently. "Prehistoric" applies to all time prior to the protohistoric era (*ibid*).

This periodization scheme (pre-historic, proto-historic, historic) is important to the Crown's and Robinson's argument for a number of theoretical, methodological and empirical reasons.

First of all, however, I want to step outside of this framework for a moment to point out the ideological, or rhetorical, value of these categories. Conceptualizing history in these terms centralizes the activities and presence of European commodities, and then persons, as the dominant, definitive, active agent in Gitksan and Wet'suwet'en history.

This is, of course, a logical framework for an analysis whose purpose is to establish the determinacy of European activity. This periodization scheme therefore serves the ideological purpose of defining the relevant categories of the discussion in Euro-centric terms, superimposes this categorization on the Gitksan and Wet'suwet'en, and infers that this was a crucial and transforming turning point in their history, rather than a significant period in a continuous historical process. It stresses externally-determined change rather than internally-governed continuity.

Most fundamentally, however, it is a **model**, an abstract construct developed by academics to facilitate comparison and theoretical speculation. A classification scheme like this is not a fact. We can imagine a huge number of other categories and an even greater variety of events that might fill these same categories. For example, in the West, a common time classification is "pre" and "post" World War II. The whole world was NOT involved in this conflict and for those who were not, such a classification would be meaningless. Within the west, while pre- and post-War may be widely recognized as a relevant categorization on a highly general level, it may not be the most relevant classification scheme for everyone. 1945 may be remembered as the year the war ended and by others as the year a child was born, a village was relocated, a parent died. The point is, classification schemes are variable and culturally constructed.

Stepping back into Robinson's framework, the first question to be asked is a theoretical one: why is it important to her narrative to categorize history in this way? Robinson elaborates on this point in Paragraph 3 of her introduction that begins as follows:

Recognition that protohistoric European-influenced developments took place and were significant has one very important implication. It casts suspicion

on any portrayal of a "pristine" or truly aboriginal way of life based on contemporary knowledge.

And, a more precise answer is offered by the Chief Justice:

The difference between the pre-historic, proto- and historic periods is relevant to the question of determining what are aboriginal as opposed to non-aboriginal practices. I shall discuss this later (Reasons, 1991:25).

The beginning of the protohistoric period therefore signals the end of Aboriginality. According to this version of evolutionary theory, once aboriginal people came into contact with European things, they were, whether they knew it or wanted it or not, launched on an irreversible climb up the evolutionary ladder which would take them, rung by rung, through assimilation and acculturation to their inevitable end in the mainstream of Canadian society. The only other option would be to not climb on the ladder, and be left behind to die; or to fall off the ladder on the way up, and be left behind to die.

One may be Aboriginal in as much as one is not civilized. One may be civilized in as much as one is not Aboriginal. More importantly, Aboriginality is a thing of the past that has no place in the contemporary world. I shall discuss this later.

Pushing the date of the beginning of the proto-historic period back as far as possible is important to the Crown's and Robinson's argument for a number of reasons. Firstly, her/their central thesis is "that protohistoric European-influenced developments took place and were significant" in changing Gitksan and Wet'suwet'en economic practices and land tenure systems. Therefore, the longer this period can be portrayed as having lasted, the more credible is the notion that significant social and cultural change took place before Brown arrived.

The problem for Robinson lies in establishing the date at which the protohistoric period **began**. A long protohistoric period is important as a justification for her methodological decision to ignore archival records in her research. In the supporting footnote Robinson says:

Vitus Bering's voyage to northwestern Alaska from Siberia was in 1641. There is no doubt that trade in European commodities from Siberia into North America began some time earlier. The protohistoric period perhaps extends back as early as the mid-sixteenth century, when Russians first began to settle into the Kamchatkan peninsula (ibid:30).

Bering's voyage took place in 1741. Robinson claimed under cross-examination that "1641" represented a typographical error.

6.6 VISIONS AND SUPERCHIEFS

Sheila Robinson's statement that trade in European commodities began some time earlier was questioned under cross examination. Peter Grant asked Robinson what factual evidence she relied on to support her statement that "there is no doubt that trade in European commodities...began sometime earlier." Grant confronted her with the fact that upon reviewing the sources listed in her bibliography in support of this statement he was unable to find any references to European-manufactured metals having been found in the territory prior to 1780.

Grant: What I suggest to you, with all due respect, Dr. Robinson, is there isn't a scintilla of evidence, other than what Father Morice speculated, that there was European trade goods moving into the Git'ksan or Wet'suwet'en area before 1786...(yet) here you say there is no doubt...

Robinson: I have no doubt at all that there wasn't a considerable amount of proto-historic influence coming from Asiatic sources or Northern Russian sources in the proto-historic period, as I have defined it mid-17th century onward.

Grant: Into the Git'ksan and Wet'suwet'en area, doctor?

Robinson: I have absolutely no reason to think that they were isolated from what are otherwise described in several places as broad trade patterns, broad developments occurring.

....

Grant: Well, doctor, look, you have explained what you meant by there is no conclusive evidence...'More likely than not', I think you said. But here you say there is no doubt. That's pretty conclusive...isn't it?

Robinson: Yes, and I'll stand by that. I will say that there is no doubt. **We may not have material items representing that in that claims area yet. I would say that further archeological research will no doubt turn them up** (emphasis added).

Grant: And that is speculative?

Robinson: Yes, it is, but it's based on my opinion (Transcript, Vol. 291:21865-21867).

Undaunted, Robinson stretched the point even further when the Judge intervened and asked for more details about early foreign influences.

Court: What Euro-Canadian influences would extend back four centuries?

Robinson: Coming from the east coast of North America and also up through the Mississippi drainage there is some--there's some thought that indirect European influence was having its effect on Indian groups quite removed from the direct sources of contact. Some of those influences included diseases spreading through, and perhaps extracting considerable tolls on some populations before there was ever any real historic record of it. There seems to be--and even such--such things as the introduction of horses from Spanish sources, for instance, seems to have had tremendous effect on the settlement patterns and economic behaviour and social relations of Indian groups through the plains and prairies, for instance. So something as minor as the horse coming in caused tremendous dislocations through the prairies.

Court: That would go back to the 16th century?

Robinson: Yes. So the post-contact period or protohistoric period has been traced to the first arrival of Europeans in the New World. Some scholars take it back that far. From the north northwest American direction and the Siberian connections some people are saying that if we lift the notion that only Europeans can affect North American cultures then we are dealing with an Asiatic influence; Chinese, Japanese and so on. That seems to have stimulated trade and trade economies. That's much more conjectural as you push it back into the past, but there are certainly scholars who agree that indirect influences were important.

Court: Thank you (ibid).

This horse assumed an important role in the Chief Justice's Reasons for Judgment--as it galloped across North America--dropping announcements heralding the imminent arrival of European civilization as it went. The judge's repeated references to the important role of the horse as a marker of the evolutionary development of Aboriginal peoples provide an example of Robinson's rhetorical, rather than factual, influence on the judge's final decision⁵. However, for now it is Robinson's speculations that we are concerned with. Robinson's somewhat bizarre rhetorical excesses in attempting to stretch the protohistoric period back to the arrival of the horse on the Prairies, and thus suggesting, given the context in which the statements are being made, that this is somehow relevant to the Git'ksan and Wet'suwet'en, foreshadows a problem that recurs over and over again in her opinion report: the misuse of comparative data from other regions and other peoples' histories to make speculative assertions about the Git'ksan and Wet'suwet'en.

This collapsing of "pre-historical" time out of time is ideologically parallel to the unsystematic mixing of data about a wide variety of aboriginal peoples, and is similarly reflected in McEachern's Reasons for Judgment when he conflates Hobbes' unfounded 17th century speculations about Man (sic) in a state of nature, the arrival of the horse on the Prairies during the 18th century, and Ogden's and Brown's 19th century descriptions of the Gitksan and Wet'suwet'en (Fabian, 1983).

⁵ Similarly, it would not be accurate to assume that even pre-contact existence in the territory was in the least bit idyllic. The plaintiffs' ancestors had no written language, no horses or wheeled vehicles, slavery and starvation was not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbes, that aboriginal life in the territory was, at best, "nasty, brutish and short" (Reasons, 1991:6)

And, on this key point as on others, Robinson eventually vacillated:

Grant: ...when are you referring to as "prior to the advent of European influence?"

Robinson: Well, we've discussed this, and I think we're going to leave it as the mid-eighteenth century and Chirikov's arrival on to the northern coast (Transcripts, Vol. 291:21966).

If we take 1750 as the mid-18th century then Robinson's protohistoric period has now been reduced from 400 to 72 years.

According to evidence subsequently accepted by the judge, the protohistoric period for the Gitksan and Wet'suwet'en began in 1778 and ended in 1822, therefore encompassing a mere 44 years (Reasons, 1991:24). Nonetheless, Robinson argued that the land tenure system, and clan and House-based social structure recorded by William Brown emerged and became consolidated during this short period of time. And, the judge concurred:

In fact, active trade was underway at the coast and spreading inland for at least 30 years before trader Brown arrived at Babine Lake, probably converting a Gitksan and Wet'suwet'en aboriginal life into something quite different from what it had been (Reasons, 1991:75).

No serious scholar, and no Gitksan or Wet'suwet'en witness, denied that changes took place in Gitksan and Wet'suwet'en society during the fur-trade period, or during any other period of history, for that matter. The Plaintiffs' testimonies, and that of their expert witnesses, attested to the fact that the fur trade did put additional pressure on land-based resources, did exacerbate competition within Gitksan and Wet'suwet'en society and between them and their neighbours, did introduce smallpox and other diseases that reached epidemic proportions and took a heavy toll on the population, and did bring the aboriginal peoples into a new relationship with a foreign power. Change is never denied,

but change is empirically described, not theoretically assumed. Total transformation is denied, on the basis of the best available evidence.

Robinson relies on "visions" as well when it comes to dealing with the evidence cited by most of her sources concerning the impact of smallpox epidemics on population distribution and land use during the protohistoric period. Robinson argues that smallpox took its toll before the fur trade began .

Robinson: I also feel that there may be earlier epidemics that we simply don't have historic documentation for.

Grant: What makes you believe there are earlier epidemics...Do you have any information or is this just speculative?

Robinson: Well, it's certainly not speculative.

Grant: What's the source for that statement?

Robinson: I think we were describing this on Saturday, and I was hoping that you people had done enough homework to realize that I was right with Catherine McClellan being one person who referred to the protohistoric contact between the Old World and the New World from Eurasian sources.

Grant: Well, I'm asking you what sources do you rely on to say that there was disease before 1774 on the Northwest coast? Who says that?

Robinson: I'm saying its likely.

Grant: You say it's likely?

Robinson: Yes

Grant: And that's your speculation?

Robinson: Yes (Transcripts, Vol. 292:21940).

The debate that is taking place here about which had more impact on indigenous societies, the arrival of commodities or the arrival of diseases, is an interesting one. If the Crown wants to show that change took place, it would seem not to matter what the cause

of the change was. However, the moral and ideological differences between believing that the savage lust for European things prompted change, or believing that the aboriginal peoples were innocent victims of diseases brought by the Europeans, are obvious and speak to one of western cultures' solutions to the problem of social and personal responsibility (see Foucault, 1975; Tesh, 1981).

If native people changed because they wanted things then they are somehow responsible and guilty at the same time. They are responsible because they displayed rational choice behaviour in pursuing material goods; but they are thus guilty of losing their "pristine" Aboriginality and no longer being attractive to us. They were compensated, in that they did receive the things they wanted; and why should they get our things if they don't want to become like us? There is something fundamentally unfair feeling about that to most westerners. Its parallel to the way many people feel about welfare recipients getting something for nothing and not suffering sufficiently (Gordon, 1988).

Wealth and its pursuit are extraordinarily contradictory and confusing questions for westerners (see Simmel, 1978). Not having it shows you to be an undeserving failure, but possibly of a kindly disposition. Having it shows you to be deserving success, but possibly of an unkindly disposition. It is western capitalist culture's most viciously enforced imperative, while it is Judeo-Christianity's greatest sin: "the root of all evil."

On the other hand, if Aboriginal peoples changed because many of their numbers were eliminated by disease, they were not responsible. According to western biomedicine, the body is a passive victim randomly attacked by germs that do not discriminate on the basis of race, gender or social class. Bearers of germs are held

responsible, usually, for contagion. It would not be as morally acceptable to say "we nearly wiped you out with smallpox, so tough luck," as it is to say "you went for the goodies, so tough luck" (see Lock and Gordon, 1988).

There is still another point to be settled regarding time and that pertains to the fur trade period itself. The fur trade is usually divided into two periods: the maritime fur trade and the land-based fur trade. The maritime period spanned, approximately 1774-1805. During these years the target species was the sea otter. This was followed by the land-based fur trade during which a wider variety of fur-bearing land mammals were trapped and their pelts traded (Fisher, 1977).

This is important because, sticking to trying to ascertain what is happening "on the ground," the time, prior to Brown's arrival, during which the Gitksan and Wet'suwet'en could have been undergoing significant change shrinks again to about 20 years, if we consider that it was not until the land-based fur trade began that significantly more intensive trapping on the hunting territories took place. That is, if there was little pressure on the interior resources until the land-based fur trade began in the 1800s, it seems even more unlikely that an "elaborate system of rules" would have emerged between 1800 and 1822.

More to the point, the legal question being investigated is what kind of social organization existed among the aboriginal people at the time of the assertion of British sovereignty which the judge places at between 1803 and 1806, the time when the land-based fur trade was just beginning.

6.7 THE MAGIC OF COMMODITY FETISHISM

The next question is, what happened--on the ground--in northern British Columbia during these thirty odd years? The Crown's argument is that the land tenure system and social and political structures being claimed by the Gitksan and Wet'suwet'en as having been in place before contact with Europeans or their things **really** arose as a direct response to the European fur trade. They argued that the desire on the part of the aboriginal people to have furs to trade with native intermediaries for European-manufactured things drove them to use their hitherto under-exploited hunting territories to trap these animals and to exert ownership over them.

Again, there is a theoretical and an empirical aspect to this argument. Empirically, it requires evidence of the actual trading that took place: who gave what to whom in exchange for what, when and where? Evidence of change is necessary as well. So evidence for the Crown should show that in the course of 20 -40 years a system of property ownership and resource management, based in Houses ranked in a hierarchal manner and articulated with other Houses and clans throughout the region, emerged, stimulated by the desire for European things.

A second line of argument employed was that as a result of becoming more involved with the Coast Tsimshian people because of the European fur trade, the "inferior" Gitksan copied their social organization and land tenure system. Empirically, the Crown has to show it happened. Theoretically, they have to provide a plausible explanation for why these things could not have happened without the stimulation of European commodities. The remainder of Robinson's report is devoted to telling this story.

Robinson's account of the protohistoric period begins with Captain Cook's arrival in 1774 which commences the maritime fur trade. In paragraph 3 of her introduction Robinson locates her analysis within the discipline. She says,

Most modern scholars engaged in North American ethnohistoric research agree that indigenous populations were profoundly affected by indirect contact with Europeans before they experienced direct contact with them. Although the nature, timing, intensity and repercussions of protohistoric European influence varied considerably from region to region, research indicates that no native groups in what is now known as British Columbia were isolated from stimulus stemming from the European presence in the New World (1987(a):3).

This paragraph offers us an early example of a "say everything and nothing" formulation that will appear repeatedly throughout the report. The introductory sentence presents us with a very definitive statement: "indigenous populations were **profoundly affected**...(emphasis added)." The second sentence tells us that this "profound affect" "varied considerably," in all its important features, from region to region. This is an important qualification to the universal, strong statement in the first sentence. By the final sentence, the "profound affect" has been reduced to an even vaguer "stimulus."

A possible explanation for Robinson's inconsistency and equivocation on this question is that the theoretical argument and methodological procedures she is advancing, in fact, fly in the face of what "most modern scholars engaged in North American ethnohistoric research agree" on (see for example, Adams, 1987; Bishop, 1986; Rogers, 1985).

As she herself notes in her Ph.D. dissertation, written in 1983, the question of the impact of the fur trade on indigenous societies is far from settled among anthropologists and ethnohistorians. Chapter VII of her doctoral dissertation, entitled "Assessing the

Impact of Early Contact With Europeans on Northern Northwest Coast Indian

Socioeconomies," and encompassing 77 pages, begins with the following paragraph:

How scholars have viewed the impact of early contact with representatives of Western civilization on North-west Coast Indian cultures has varied considerably (1983:350).

Their interpretations of the cultural contact situations during the maritime fur trade period fall into three distinct categories. The first claim that contact with the earliest explorers and fur traders provoked essentially no changes in the traditional social and economic organizations of the Northwest Coast Indians (the minimal cultural change hypotheses); the second argue that this early period of intercultural inter-native socioeconomic organizations (the negative impact hypotheses); while the third identifies a series of progressive developments in the early historic period which triggered the efflorescence of Northwest Coast cultural organization to levels which were unattainable before the Europeans arrived (the positive impact hypotheses) (ibid:423).

Robinson's categorizations here are simplistic and exaggerated. She posits the debate as being between an exaggerated "no change" thesis and an equally exaggerated "devastating changes" option. No one, and particularly not the authors she mentions as belonging to the "minimal cultural change" category, like Joan Wike (1951) and Robin Fisher (1977), argue that the fur trade brought "essentially no changes in the traditional social and economic organization." What they do argue is that while **change** took place, transformation did not.

Robinson's penchant for presenting herself as the sole voice of reason appears to be at work here when we find that the third alternative presented--and the only one that appears "reasonable" and "not extreme"--is the one she chooses.

While Robinson is most critical of the "minimal cultural change hypotheses," she concludes that,

Given the variations in Indian-European interactions during the early historic period, it may be profitable to break the records down to a point where

separate communities' involvements with the foreigners and their native trading partners can be examined more closely (ibid:425).

She notes in this regard that:

If theoretical emphases are shifted away from tracing developments in structural processes towards understanding the nature of particular historical developments which can be documented, we will achieve a clearer understanding of early post-contact adaptations (ibid:408).

What most modern scholars are trying to do is to understand the dynamic and uneven nature of social change. More to the point, what most modern scholars are trying to do is to **document** what actually took place in particular areas, among particular people, at particular points in time. In an effort to meet this goal, researchers have focussed on assembling and analyzing data on what goods were traded where and by whom (Wike, 1951).

While there remains a good deal of debate about the impact of the fur trade, most scholars do agree, based, for the most part, on analyses of written records kept by European traders, that the goods demanded by the aboriginal people were clearly "luxury" items as opposed to essentials. Joan Wike, who analyzed the logs kept by trading ships' captains, says that during the initial stages of the maritime fur-trade iron, copper, guns, and ammunition were traded. By the end of the period the demand was for rum, molasses, pilot biscuits, and luxury items (Wike, 1951).

The Aboriginal peoples Europeans encountered on the Northwest coast were shrewd and experienced traders who exerted a good deal of control over the exchanges and transactions by employing strategies such as withholding furs to drive up prices, placing "advance orders" for future trade goods and refusing to trade unless they were satisfied (Fisher, 1977; Ray 1991(a)). They have concluded therefore that the Aboriginal

interest in trade was for the purposes of elaborating their ceremonial system as opposed to improving the sufficiency of their subsistence exploitation for which indigenous technology continued to be used well after guns and ammunition were acquired and used for warfare and social control (Fisher, 1977).

Two sections of Robinson's report appear to deal primarily with the first half, or maritime phase, of the fur trade. I will begin with Section 11: Protohistoric Developments in Gitksan and Carrier land use. The introductory paragraph to this section reads as follows:

Gitksan and Wet'suwet'en claims of traditional ownership and occupation of certain territories can be challenged on the basis that they do not account for developments which occurred during the protohistoric period. These changes include adjustments in boundaries between the Gitksan and Wet'suwet'en and their neighbours as well as more precise delineation of boundaries within and at the margins of Gitksan and Wet'suwet'en territories. Both processes of territorial demarcation are linked to and were stimulated by indirect contact with Europeans through the eighteenth and early nineteenth centuries (1987(a):21) (emphasis added).

The section consists of ten paragraphs with fully 27 pages of supporting notes, the majority of which, as in the previous section, are not based in data concerning the Gitksan and Wet'suwet'en. The principal source relied upon for the Gitksan in particular is John Adams' unpublished doctoral dissertation. Adams did participant observation research among the Gitksan during the 1960s and both his theoretical stance, his research findings, and his political attitudes conformed to the Crown's position and Robinson's 1987 report.

Adams' central thesis was as follows:

The traplines as we know them today were drawn up to regulate the fur trade which is post-contact and was not a means of subsistence: the pelts were brought home, but the meat was cached or discarded. How much the territories may have changed since the coming of the Whites is unknown (Adams 1969:14).

Chief Justice McEachern intervened in Robinson's cross examination to note that, in his opinion, this statement was directly related to another statement of Adams' that he found interesting:

It is the potential value of the claims against the Government which creates the interest in traplines now, which in turn provides the stimulus necessary for the Gitksan to maintain those parts of their aboriginal social organization which regulated use of land. (Transcripts, Vol. 294:22285).

That the Judge maintained this point of view himself is evidenced by the following comment in the Reasons for Judgment where McEachern both ignores all the historical evidence based on archival documents that was presented relating to Gitksan and Wet'suwet'en representations to bodies like the McKenna-McBride Commission, and gives the courts credit for preserving aboriginal culture. He says:

I wish to say, however, that I shall leave this case with the settled conviction that, in the long run, the greatest value of this case, apart from being the first stage in the] settlement of legal rights, may well be the enhancement of interest in Gitksan and Wet'suwet'en languages, traditions and cultures. This is because the evidence satisfies me this case has been a 'Battle of Britain' for these people and it has inspired them to renew (an accurate word, in my view) what was a declining interest in their aboriginal heritage. The interest and activity generated by this law suit assures the survival of these peoples as distinct societies. This may at one time have been doubtful but I now believe it is a certainty (1991:36-37).

Adams' research was done without reference to the crucial Brown documents and under the assumption that the first written records pertaining to the area began in 1867, 45 years after Brown. Furthermore, Adams is referring here to the trapline registration that took place during the 1920s, approximately 100 years after the period Robinson is dealing with and for which she supplies Adams as a reference.

Adams, however, appears to share Robinson's methodological approach to the validity of Native statements. He says:

The actual rate of change seems quite rapid, though Gitksan informants often deny that there are any changes at all. They assert that 'things have always been just as they are now for thousands and thousands of years' (Adams 1969:2).

By 1987, however, Adams, like most northwest coast scholars, was in the process of rethinking some of his earlier assumptions. He asks, in the introduction to the Arctic Anthropology edition that also contained the article by Bishop cited in the last section,

What could possibly account for Northwest Coast stratification **prior** to the coming of Europeans? Unfortunately, political ideology has played a major role in this matter for at least 50 years (Adams, 1987:69).

Since this section is concerned primarily with the issue of property boundaries, the central story being told goes as follows: When the coastal peoples began trading sea otter pelts for European goods, mostly non-essentials, from 1778 onwards, they brought these goods along with them on their regular trading excursions to their Gitksan neighbours. The Gitksan then traded these goods with their Wet'suwet'en neighbours, as they had been doing for centuries.

Robinson argues that the Gitksan and Wet'suwet'en trapping of fur-bearing species in their hunting territories changed qualitatively and quantitatively during these years: qualitatively because they were now trapping to produce a surplus for trade which they had not done before and because these goods were, ultimately, destined to articulate with a capitalist commodity market; quantitatively because they now required more furs than previously when they had been trapping for subsistence, ceremony and trade within the indigenous market. This, according to Robinson, "probably resulted in the imposition of more precise boundaries around resource-producing areas with the establishment of some exclusionary rules governing rights to their use" (1987(a):8).

At this stage in the story there are two important points to be made: one, during the first twenty or so years the fur trade was a maritime-based trade; and, secondly, the things entering the indigenous system through trade between the coastal and interior peoples were luxury items. Remembering that Robinson's opinion report was based primarily on her doctoral dissertation on coastal history, here the differences between the experiences of the Gitksan and Wet'suwet'en and those of the coast were even sharper, and even more obvious, than during the pre-contact period. Problems with Robinson's haphazard use of the comparative method and her equally imprecise attention to locating events in time leads to even greater confusion in this section where time and place are all important.

The ships landed first at the coast, and not at Hazelton. The furs being sought--sea otter pelts--were not located within Gitksan and Wet'suwet'en territory. The European commodities being offered to the Gitksan and Wet'suwet'en by their coastal neighbours were non-essentials. The land-based fur trade, which involved the Gitksan and Wet'suwet'en more directly did not begin in earnest until very close to the time that Trader Brown arrived.

Boundaries between village groups' territorial holdings were also delineated during this period. Robinson explains,

Extension of territorial holdings in northerly and southerly directions along previously established trade routes characterized the Kitwankul's and other Gitksan village groups' aggressive expansionists tendencies during the protohistoric period, when they sought to gain more control over lands and trade routes at the expense of their neighbours (Robinson, 1987(a):7).

In the next paragraph she says "many protohistoric developments in Gitksan-Wet'suwet'en societies are **associated with** the introduction of European commodities" (ibid:6). And then,

Competition for European goods fostered an increase in economically motivated warfare: wars waged over strategic land and trade routes resulted in many shifts in population distribution and territorial holdings (ibid).

As we have seen, Brown describes the Babine chiefs as "men of property" and outlines a social organization and land tenure system very similar to that described by the contemporary lay witnesses.

The other major source Robinson relies upon in this section is George MacDonald. MacDonald argues, on the basis of data he acknowledges as conjectural, that competition over European trade goods, particularly metals, stimulated increased warfare over control of trade routes (MacDonald, 1984). In particular, MacDonald's rendition of the "Epic Of Nekt: A Warrior's Saga," appears to capture the imagination, particularly, of the judge. Leaving aside for the moment questions about why this account would have such a strong appeal to the Euro-Canadian male imagination, it is interesting to note that what is accepted as valid in the oral history is the notion that wars were engaged in. What is rejected, however, is the aboriginal peoples' **explanation** of what the wars were about. Robinson quotes MacDonald as saying that, in the indigenous accounts, "Motives are stated in terms of revenge rather than economics" (i.e. motivation based on issues not determined by European influence). He concludes, however, that while the wars were fought over "important oolachen fishing grounds," he **believes** "it was the pursuit of metals and improved weapons, rather than control of the oolachen trade, that prompted this aggression." (MacDonald, 1984:73, quoted in Robinson, 1987(a):34).

Even MacDonald, however, acknowledges that the objects of battle were transportation routes and that "territories were sacrosanct" (ibid).

This is a good example of one of many cases where while in theory oral tradition is rejected, in practice it is selectively relied upon. For example, both Robinson and McEachern repeatedly emphasize conflict and inter-group warfare after the arrival of European things but prior to the arrival of Europeans, and rely on the accounts of battles found in the oral histories. However, even in this regard, the selection of evidence appears to follow "theoretical," or, more accurately, ideological, guidelines rather than scholarly ones.

Section V, entitled "Gitksan Territorial Ownership: Protohistoric/Early Historic" consists of four paragraphs and speaks to the issue of internal boundaries during the land-based fur trade phase of the protohistoric period. This appears to follow chronologically after section II which discusses the emergence of internal boundaries during the maritime phase. Here Robinson argues that potlatching increased substantially during this period as a result of competition between Chiefs, and that land holdings changed hands through potlatching.

She goes on to lay the groundwork for arguments that will emerge later saying that once fur-bearing species were depleted in a given territory the territory was simply abandoned and therefore could be "discovered," "claimed by migrants," etc. etc.. Of course, given that the argument begins by saying that the land had no value to the aboriginal people before the fur trade, it proceeds logically that there was no value remaining after the fur trade purposes were served. Robinson writes:

The protohistoric and early historic shift in economic emphases towards the production of furs for exchange probably also resulted in some resource-producing areas being abandoned. In other words, new gaps emerged in the village 'patchworks'. These new gaps were probably closer to villages than the prime peripheral hunting territories. Although several of the examples cited consider European diseases a major factor contributing to the abandonment of certain territories, it can also be suggested that some territories were simply abandoned if they had few fine fur-bearers to begin with, or as their fur stocks were depleted. I envision what can be described as a centrifugal shift in territorial holdings throughout the protohistoric and historic periods, with mid-range territories being increasingly abandoned in favour of outlying ones (1987(a):20).

Section III of Robinson's report is entitled "The Expansion of Coast-Interior Trade."

Here Robinson begins by saying that she is really just expanding on the points made in the previous section but emphasizing how "New European wealth stimulated northern coastal societies and economies to the point where a **different kind of social and economic organization began to emerge**" (emphasis added).

According to Robinson's narrative, the coastal peoples became aggressive middlemen and traders and three superchiefs arose, among them a Coast Tsimshian named Legaik. Her argument is that in having to defend themselves against Legaik's aggression, the Gitksan and Wet'suwet'en consolidated their external boundaries which had been "hazy" up to this point.

Twenty paragraphs long, this section is devoted primarily to a retelling of a story about the rise of Legaik's dynasty. The Legaiks' story takes up 13 paragraphs, the better part of seven pages, and is based almost entirely on an unpublished undergraduate honours thesis done at the University of British Columbia in 1978.

Grant: If you look at paragraph 16 to 21...this is your synopsis of Michael Robinson's study of Legaik, isn't it?

....

Robinson: Oh, it goes up to 22, I believe....

Grant: I'm sorry, yes, I see that. But that's your synopsis of Michael Robinson...You in part quote him and you in part summarize what he said?

Robinson: Yes.

Grant: And really that's all that is?

Robinson: I believe so.

Grant: Yes. It's not any further research on your part other than Robinson's own discussion on Legaik?

Robinson: No (Transcripts, Vol. 292:21940).

The major point Robinson seems to be making with this section is that the Gitksan and Wet'suwet'en did not firmly delineate their external boundaries until forced to by Legaik's aggression. Secondly, this brings them into subordinate trading relations with the coastal peoples and allows the diffusion story more credibility.

Another theme in Robinson's argument is that the Gitksan and Wet'suwet'en land tenure system and social structure was "borrowed" by them from the Coast Tshimsian people during this period. She ends this section with a re-assertion of her central theoretical argument:

Changes in external Gitksan boundaries reflect changes in economic relations among resource-controlling groups, in either case (ibid:7).

We have here a statement of the first premise of her theory, i.e. that the things were the motivating force for all these changes. She goes on to add a second assumption to the foundation upon which she is trying to build this argument:

It was less a matter of what goods they acquired than who furnished them and how they were used. There was considerably more status to be gained through relations with the 'superior' coast people than through exchange with 'inferior' Athabascans (ibid:16).

The evidence, again, challenges this notion. First of all, there is ample evidence that what goods were received was very important, and that the moose and deer hides

supplied by the eastern Athabascans were a highly prized trade item. Grant confronted Robinson with Brown's explanation of Gitksan trading practices with their coastal neighbours, the interior Athabascans and with the Hudson's Bay Company (Transcripts, Vol. 293:22157-58).

Grant: Well, let's look at page 11 (of Brown's report) then: It does not appear to me that we are able to cope with these people by making derouines into the country they are in the habit of visiting unless we sell our property so cheap as to prove prejudicial to the trade of Western Caledonia, and even then we will not be able to secure one half of the trade, for we do not meet on an equal footing as they receive goods at a low rate from the vessels which frequent the coast. Now, would you agree with me that that's consistent with logic, that the trade--the goods that Brown had to get would have been over land, that is coming into New Caledonia right?

Robinson: It's consistent with a Eurocentric logic...

Grant: I'll rephrase my question so you understand it. Brown got his trade goods...over land, right?

Robinson: Yes.

Grant: And the vessels got their trade by sea?

Robinson: Yes.

Grant: It was cheaper to get the trade goods up by sea at that time than over land?

Robinson: Was it? I don't know that.

Grant: You don't know that, okay. Assume that it was cheaper to get them by sea, or let's not even assume that, let's just say that what Brown says here is true, they received goods at a low rate from the vessels which frequented the coast. And Brown is saying: "We will not be able to meet on an equal footing." For whatever reason, Brown says they could not compete giving the goods to the Indians at the same rates as the vessels.

Willms⁶: Well, My Lord, I object. It's equal footing not equal rate that Brown says, and then he goes on to describe how they apparently are able to get rid of some old, not very good stuff, which appear to be great in the eyes of the people picking them up, but he doesn't say equal rate, he talks about footing.

⁶ R. Willms, lawyer for the Province of British Columbia.

The Crown counsel's intervention exposes the ideological underpinnings of the argument as here he characterizes Indians as simple and easily impressed by anything European. Given that by his own admission the trade goods being offered were "old, not very good stuff," without this underlying assumption it would not make much sense to argue that the arrival of these things caused so much social reorganization or encouraged assimilation of coastal traits and later European ones.

There are repeated references to the importance of deer and moose hides traded with the east. Ray argues that by the time Brown arrived in 1922, the trade was one where the scarcer furs were traded for moose and deer hides, and the plentiful fish for European things. Under cross examination, Robinson admitted that the sentence in her report that read: "There was considerably more status to be gained through relations with the 'superior' coast people than through exchange with 'inferior' Athabascans" (Robinson, 1987(a):16) was "speculative" (Transcripts, Vol. 292:22126-27) and based on Kobrinsky, Steward and Goldman, who did not have access to Brown's journals. Ultimately she relied, she said, "on a considerable understanding of cultural ecological theory which suggests that, in all likelihood, that's what occurred" (ibid).

An aspect of this theoretical approach is that "simple" societies always assimilate the characteristics of "complex" societies when they come into contact. In other words, this is an example of evolutionary theory. Just as the Wet'suwet'en "naturally" copied the Gitksan, and the Gitksan "naturally" modeled themselves on the Coast Tshimsian, so "naturally" the Indians emulated the whites when contact took place.

The judge appears to find this argument convincing:

...it is common for adjacent aboriginal people to "adopt" customs and practices from each other. That different people would have so many similar institutions and practices almost demonstrates the borrowing theory. Most of the experts believe the Wet'suwet'en adopted much of the culture of the Gitksan, but culture, like their languages, may well have travelled in both directions (Reasons, 1991:32).

Here McEachern makes two interesting points. First he accepts the "borrowing" or unidirectional theory of complex cultures diffusing traits to simpler cultures and then allows that, among Aboriginals, there can be mutual exchange. As we will see, he does not conceptualize the possibility, in the case of Indian/European contact, living "adjacent" to each other, of either language or culture travelling "in both directions."

All of which is to say that human groups live in relationships with each other, and these relationships define and redefine the meaning of the categories. Aboriginal/European relations do not consist in two wholly autonomous, internally homogeneous categories of people meeting, exchanging discrete items of "culture" and then returning to their isolated, independent units with bits of the other tacked on like a piece of jewellery on a lapel. Rather, these relations consist in an ongoing, constantly negotiated, mutually defining dynamic. Ideally, the will to control is superseded by the will to understand and human life is mutually enhanced. In reality, however, the will to power dominates colonial relations and human life has been impoverished. Diffusion in this context is oppression.

The alternative to evolutionism and diffusionism as grand theory is grounded theory and history. If we jettison evolution and diffusionism as a unilinear universal law of social development then we free ourselves to look at all of humanity's various and sundry experiments in living, and to study and evaluate change without the narrow vision that evolutionism imposes on the practical and aesthetic imagination.

Section VI, the final section, "Protohistoric Changes in Wet'suwet'en Social and Economic Organization, after Kobrinsky" is simply a five and a half page regurgitation of a ten page paper written by Vernon Kobrinsky in 1977.

The second paragraph of this section reads as follows:

Kobrinsky's viewpoint is important for two reasons. First, his assertion that significant socioeconomic changes occurred during the protohistoric period supports claims that European influence was a major factor in disrupting 'traditional' native lifestyles before direct contact between Indians and Europeans occurred. Second, much of the ethnographic evidence he assembles related to changes in styles of resource control. Specifically, Kobrinsky asserts that precise delineation of territorial boundaries relating to the allocation of rights to fine-fur species was a by-product of the fur trade (Robinson, 1987(a):24).

Kobrinsky outlines a conjectural three-stage history of social development for the northwestern Carrier, in which changes from composite band to sept, then from sept to phratry-clan social organization are seen as direct responses to changing economic conditions (ibid).

In her draft proposal to Russell DuMoulin, Robinson promised that in her report,

Particular attention will also be paid to theories which regard relatively minor external stimulæ as catalysts or 'triggering' factors which can provoke significant internal adjustments in socioeconomic configurations.

She found this in Kobrinsky's article.

She continued, in her proposal:

This will not be a comprehensive overview but will legitimize the positions taken by Kobrinsky and MacDonald in the terms of theoretical traditions in the social sciences.

Grant questioned her about this:

Grant: You saw your role here as legitimizing Kobrinsky and MacDonald, not determining whether or not they could stand up under careful scrutiny of those in support and in opposition to them; isn't that right?

Robinson: Well, no.

Grant: Then why did you use the word legitimize in your proposal?

Robinson: It's one of my favourite words. But in the context of this paragraph, and in the way that cultural ecologists often do their work, is that they do use comparative examples from all over the world that investigate similar kinds of relationships or aspects of relationships between people and their environments, and what I intended to do there, not realizing that when I submitted this report in May that that would be the end of it, but what I would have liked to have done, and what I intended to do there, is put this in the context of some general ecological theories, which showed that this is not an unusual situation, that this kind of scenario occurs all over the world and it's consistent with models in ecological anthropology and cultural geography which show -- explain how these relationships work. So basically what I was going to do there, rather than, as I say, not a comprehensive overview but say let's pull together perhaps a set of cultural ecological works that put this in the context and explain that this is not an unusual way of looking at the world.

Grant: I do not want to look, and I will not refer to those views that oppose or challenge Kobrinsky and MacDonald on this point; I will look and find those that support them, that was what you set out as your approach and that's what you mean by legitimize, you would buttress their theory?

Robinson: Oh, yes. And I don't see that that's objectionable at all (Transcripts, Vol. 289:21747-21751).

Despite the fact that clear lines of demarcation between the pre-historical, proto-historical and historical periods are crucial to her thesis, and to McEachern's Reasons for Judgment, many of Robinson's paragraphs begin with phrases such as "during the late pre-historic or early proto-historic," or "during the protohistoric or the historic" periods. And, she is equally imprecise about whether the key events she selects for emphasis mark the points in a processual continuum or whether the key events mark radical change.

For example, she says, referring to the early proto-historic:

Competition for European goods **fostered an increase in economically motivated warfare**: wars waged over strategic land and trade routes resulted in many shifts in population distribution and territorial holdings.

Competition for European goods also stimulated more peaceful territorial adjustments: **a general expansion and sharpening of territorial boundaries and**

an exercising of more rigorous control over resource use can be linked to the intensified intertribal exchange (1987(a):6) (emphasis added).

And, then, again, 4 pages later,

The early historic period is marked by an increase in economically-motivated conflict, expressed in outbreaks of warfare and increasingly competitive potlatching (ibid)(emphasis added).

An explanation for this equivocation may be found by tracing these key points through the process of construction that Robinson's opinion report went through. In her doctoral dissertation, Robinson was firm about the need to avoid both ungrounded theoretical speculation about the nature of aboriginal societies, and simplistic uncausal theories of social change. In the preliminary draft of her report submitted to Russell DuMoulin, Robinson initially said:

...process of cultural change are so poorly understood and difficult to demonstrate that theories which are based on the assumptions that relatively minor external stimuli can 'trigger' profound changes in patterns in socioeconomic behaviour are often dismissed as un-demonstrable speculation...

Grant explored this question of causal theory in relation to the above paragraph under cross-examination.

Grant: That's a fair statement of the state of the art in the field?

Robinson: Yes, and I would say that cultural ecologists and that's people that deal with cultural geography, cultural anthropology and archeology who share a common interest in the relationship between people and land and changes in those relationships, do indeed recognize that sometimes profound socioeconomic changes are triggered by relatively small or what appear to be small factors. And that often direct cause is obscured by the subsequent consequences. And this is something that I think is generally recognized as a theoretical orientation in other scholarly fields.

Grant: But there is some legitimacy to the criticism within the field that relatively minor external stimuli can trigger profound changes and patterns of socioeconomic behaviour, there is some legitimacy to the concern that this is often undemonstrable speculation?

Robinson: Not within the field, I would say that criticism is levelled at it. I think the criticism comes more from people that are outside the fields of

anthropology and cultural geography who don't know where the theories of explanation are derived or from where they are derived. recognized (Vol. 289:11456)

Robinson's preliminary proposal to Russell DuMoulin continued:

With the scenario related to socioeconomic developments I outlined above, it can be suggested that European influence stimulated Gitksan-Wet'suwet'en cultural changes along prevailing emphases and directions...

What it implies is that cultural changes which have already begun may be stimulated further in the same direction by additional input from outside sources and/or feedback from inside sources. Once the wheels are in motion, the trajectory is hard to change. 'Causes' of significant socioeconomic adjustments may be seen, in this case, as a set of accumulating circumstances which were gradually leading toward a reorganization of Gitksan-Wet'suwet'en cultural-environmental relations.

The notion of 'causality' raises a complex set of philosophical issues which need not be addressed here. What, however, should be stated is it is not necessary to suggest that European influence of the sort I described caused major shifts in Gitksan-Wet'suwet'en social and economic behaviour...

European-derived stimuli may have 'merely' added to pressure already being placed on their cultural systems. It may, in fact, be appropriate to regard European influence in this light rather than to see it as a 'prime mover' or initiating catalyst...

Her next draft promised:

Particular attention will also be paid to theories that regard relatively minor external stimulæ as catalysts or 'triggering' factors which can provoke significant adjustments...

Robinson's final report, while employing vague and inconclusive wording is emphatic on the question of European commodities being the "prime-mover" or "triggering" factor causing change. Her report begins:

This report investigates the argument that indirect contact with Europeans...provoked significant changes in patterns of ...land use.

...proto-historic European-influenced developments took place and were significant...

...processes of territorial demarcation are linked to and were stimulated by indirect contact with Europeans...

...protohistoric developments...are associated with the introduction of European commodities...

Competition for European goods fostered an increase in economically-motivated warfare...

Competition for European goods also stimulated more peaceful territorial adjustments.

...more rigorous control over resource use can be linked to...

...changes in external Gitksan boundaries reflect changes in economic relations...

New European wealth stimulated northern coastal societies and economies to the point where a different kind of social and economic organization began to emerge.

The presence of European traders is linked to the emergence of several chiefdoms on the northern Northwest Coast.

The protohistoric and early historic shift in economic emphases towards the production of furs for exchange probably also resulted in some resource-producing areas being abandoned...

Kobrin'sky's viewpoint...supports claims that European influence was a major factor in disrupting 'traditional' native lifestyles...

Kobrin'sky outlines a conjectural three-stage history of social development...seen as a direct response to changing economic conditions.

And, finally, under cross examination, Robinson moves quite definitely from her initial position, reflecting the state of the art in the field:

assumptions that relatively minor external stimuli can 'trigger' profound changes in patterns in socioeconomic behaviour are often dismissed as un-demonstrable speculation...

to the following which is more supportive of the Crown's case:

Grant: Even if you accept the proposition that in 1705 some metal comes inland through the Gitksan area, are you saying that that would lead to the change to a territorially-based society from a nonterritorially-based society?

Robinson: Yes. I think that the influx of European wealth was a major triggering factor (Transcripts, Vol. 289:11478).

If theories are, as Robinson explicitly defined them, "an explanation or attempts at explanation that try to account for or resolve into a logical framework facts relating to a central issue or problem," then Robinson's theoretical model is devoid of empirical content.

And the judge, who bases his decisions on facts and not beliefs, concludes:

The Indians in those early times would have searched for food and other products in the vicinity of their villages. There was no need for them to go very far for such purposes, and I know of no reason to suppose they did (Reasons. 1991:370, 453).

The "facts" or, rather, the "best evidence," showed that during the pre-historic period the territories were owned by "men of property" who controlled the hunting and trapping for food, clothing, feasting, and trade that was carried out on these lands. The best evidence also showed that there were many reasons to compete for these resources which were periodically, relatively scarce. The best evidence showed that there was extensive trade throughout the region during this time as well. In other words, the facts showed that, on the ground, there were many reasons to travel beyond the villages, and many reasons for rules to exist concerning property and resource exploitation.

Robinson set out to prove two key points in her opinion report and in her testimony. First, that the Gitksan and Wet'suwet'en lineages and families did not identify ownership rights to large and precisely defined tracts of hunting territories prior to the advent of European influence. Second, that European influence, in the form of commodities traded for with coastal Aboriginal peoples, caused the Gitksan and Wet'suwet'en lineages and families to identify ownership rights to large and precisely defined tracts of hunting territories after European influence. These two points relate to

events that took place during two distinct periods of time: the "pre-historical" and the "proto-historical."

While Robinson's report and testimony were internally contradictory in many ways, she is particularly equivocal on two key points: timing and causation. The two questions, of timing and of causation, are, of course, closely linked as the arrival of European commodities, on the ground, marks both the end of the pre-historic period during which aboriginal practices were carried out, and the beginning of the proto-historic during which the commodities caused these practices to change into something no longer "truly aboriginal."

Robinson's thesis on social change during the protohistoric period is also simple. The purpose of these sections of Robinson's report was to establish that internal and external boundaries and a desire to own and control transportation routes emerged in greatly strengthened form during this period. In order for this to "work" we must accept first of all that this was a "hazy" and ill-defined system before European things appeared among the trade wares of Tsimshian traders between 1788 and 1822; AND that the desire for these things was sufficiently strong among the people to generate far-reaching social change.

The theory says that because they were new things and different things, and, implicitly because Indians were rather simple and easily impressed; and particularly because they were things produced in a European commodity market, the desire for them was strong enough to generate the desire and need for private property.

The judge, however, concluded that:

In fact, active trade was underway at the coast and spreading inland for at least 30 years before trader Brown arrived at Babine Lake, probably converting a Gitksan and Wet'suwet'en aboriginal life into something quite different from what it had been... I find the weight of evidence supports the view that the fur trade materially changed aboriginal life before or around the time trader Brown was making his records at Fort Kilmauers (Reasons, 1991:75).

That is to say, if the events and the social changes outlined are not clearly distinguishable in terms of pre-historic and proto-historic, then how can we determine with any precision "what are aboriginal practices and what are non-aboriginal practices?" If the arrival of European commodities was not a definitive and transforming moment in aboriginal history, then what really happened? What real value do things have? These are the points that seem most difficult for Sheila Robinson, scholar, to defend; but imperative for Sheila Robinson, Crown witness, to assert.

In her doctoral dissertation, in which she argued that aboriginal peoples on the Northwest coast were cultivating tobacco prior to the commencement of the fur trade, Robinson noted that:

Implications of the relative neglect of prehistoric Indian agricultural practices go beyond correcting the record for academic purposes. Studies such as this one have direct relevance to modern political issues concerning aboriginal land claims. It has often been convenient for professionals other than scholars to 'forget' that Indians were farming in many parts of the Pacific Northwest region prehistorically and in the early historic period, or that they had well-developed systems of territorial property ownership. There is not room here to explore the unsatisfactory way most native people were treated after the mid-19th century with regards to their territorial claims: it is just mentioned in passing that when the lands the Indians had previously occupied and exploited were expropriated and then allotted to them after they had been 'adjusted' by government representatives to 'appropriately-sized' holdings for their future use, it was usually assumed that the Indians had no need for extensive acreage because they had not traditionally engaged in agricultural pursuits. This was especially the case on the coast of B.C., where territorial allocations (made without the Indians' formal agreement to allow any alienation of their lands) were, on the average, smaller than those recommended by the Dominion Government of Canada (Robinson, 1983:483)

Of course, without clearly delineated historical periods, and without European commodities as the causal factor in "dramatic shifts in land tenure systems," what does the Crown have to argue?

Sally Humphreys, in her article "Law as Discourse," cited in the introduction to this thesis, describes law as a "moral discourse" and as a "form of socioethnological reflection" (Humphreys, 1985:215). Because as we will see, the key differentiating criteria that is emerging in law to distinguish between Aboriginal and non-Aboriginal "culture" is participation in a commercial market place, it is worth pausing for a moment to look at the Crown's argument and Justice McEachern's findings from the point of view of what kind of society and description of human nature and human behaviour is being put forward as both an explanation of the past and a prescription for the future. That is to say, what are the characteristics of the ideal person who constitutes the norm the law is defending here?

The Crown's and Robinson's theoretical assumptions that they offer in support of their historical reconstruction were summed up in the following paragraph set out in Robinson's introduction:

Speaking generally, one may expect that some form of organized control would have been exercised over access to the fisheries and other resources which were necessary for survival and over the local trails and bridges which facilitated prehistoric trade networks. But prior to the intensification of pressure on interior fur resources sparked by European demands for furs there would appear to have been no need for a sophisticated and elaborate body of rules governing access to resources or for extensive and defined areas of land for their exploitation. In the absence of competition over scarce resources, there is no reason for the rules to exist.

So the provincial case requires: (1) no need--but under cross examination it is clear that these resources are used for food, clothing, shelter, ceremony, etc. So we

have need. (2) No scarcity but according to Ray game was never plentiful. (3) No competition: but in her effort to establish in another part of the report that aboriginal society was never stable Robinson details intense competition.

So we have scarcity and we have need and we have, it would seem, a good deal of competition in which wealth derived from the land was the currency. So why was this not enough to stimulate property delineation?

None of the conditions necessary for her argument are met with facts. This leads to the Crown counsel focussing on the issue of defining the economy as a separate sphere and as defining as "economic" only that which is mediated through the market which is a euphemism, again, on the ground, for saying only after Europeans arrived. The point was most clearly made in the following exchange between Hugh Brody and Province of British Columbia lawyer, William Goldie. Goldie had been trying to make Brody agree to his statement that the Gitksan and Wet'suwet'en had "no reason to travel" more than twenty miles away from their villages for economic reasons. Brody had been resisting.

Goldie: ...Let us restate the assumptions that I am asking you to make. One, the primary food source is at the door-step of the home in Hagwilet. You accept that? The second assumption is that the territory in which the hunting is carried out is 90 miles away from that home. Number 3, that subsistence is not an economic activity in the question I am about to ask you. Number 4, that extended time is a period in the winter time of up to 7 months. You understand these assumptions?

Brody: Yes.

Goldie: Now, on those assumptions I suggest to you that the only logical reason for somebody being away from his home 90 miles for an extended period in the winter time would be to carry on an economic activity other than subsistence?

Brody: Well, your assumptions logically compel the conclusion, because you have defined economic activity to exclude subsistence in your assumptions.

Goldie: Yes.

Brody: So, it follows logically, not as a matter of any empirical interest, but as a matter of logic that they are out there pursuing an economic activity.

Goldie: Yes (Transcripts, Vol. 214:15494).

The facts establish that there were many reasons to want the resources one had to travel to get to. The theory asserts that none of those reasons were sufficiently "economic." The Judge concludes that the facts show that "there was no reason to travel." It is in this aspect of the reasoning that we see John Locke's theories emerge most clearly.

6.8 I OWN, THEREFORE I AM

What has really been concluded here? Assuming that (despite facts presented to the contrary) the animals located in the outlying areas were not needed for subsistence, assuming that they were desired for feasting, exchanging, ceremony, prestige, sociality, joy; why would a poet, a shaman, a carver, an artist, a mother, a father, a sister, a brother, a lover, a friend travel 90 miles, in the harsh Canadian winter? Why, first of all, would it "not be reasonable to assume that anyone would travel 90 miles" to secure them? It does not make sense unless we accept the notion of the person, and of human nature, at the root here.

While the study of varying cultural beliefs about human nature has long been a concern of anthropologists, in recent years, as stated in the introduction to this thesis there has been a renewed emphasis on investigating theories of the self, personhood and human agency as "a way of getting to the level at which culture is most deeply rooted," and as a means of countering "the subtly ethnocentric assumptions about human agency embedded in the frameworks with which anthropologists have represented their subjects" (Marcus and Fisher, 1986:45-46).

Within the contemporary western world, political debates and struggles have come increasingly to focus on questions of human nature: of what it means, or ought to mean, to be human, in which "the self" has become salient as a site of political struggle and conflict. "A fateful struggle for power is now taking place around the modern self" (Levin, 1987:1).

Different concepts of the "ideal self" increasingly arise in discussions about Aboriginal/non-Aboriginal peoples and cultures. Researchers like psychiatrist Cisco Lassiter argue that

The world of the modern European self is located in a Euclidean-Newtonian space, homogeneous, uniform, and continuous: a space without sacred places, where all places are essentially interchangeable, and where geometry forgets the spiritual meaning of the earth, the land, and the human need for home (Lassiter quoted in Levin, 1987:10).

I argue that the Crown's case, and the judge's findings reflect this particular view of the self, personhood and human agency that rests principally on a conception of human nature as inherently individualistic, aggressive, acquisitive and competitive in which rationality is measured according to the degree to which the ideal "economic man" strives for and achieves individual ownership of private property. The self embedded in the Crown's legal argument, Robinson's anthropology, and the Chief Justice's ruling is the self of European political economy, including both liberal democratic and orthodox Marxist theory. This is the self of the "free alienated labourer" who can be moved about by the demands of capital.

The identity and well-being of the aboriginal self, on the other hand, "depends on earth, ground, and place for an essential relationship to departed ancestors, cultural traditions, the world of the dead, gods, and time itself...this self cannot survive without

access to the traditional sacred places, orientation by tribal landmarks, rootedness in the earth and in kinship relations" (Lassiter, 1987:11).

I draw here on literature critiquing the image of "economic man." If we are "primitive" "animals with rationality and culture added on," then Social Darwinism and evolutionism tells us that the degree to which rationality and culture have been added on to our basic animalistic nature is minimal and here we have the "nasty, brutish and short" image. And, it follows, the "needs" of primitives are even more strictly limited to the survival of the organism and this supports an evolutionary theory of psychological development that asserts that when people are engaged in a daily struggle for material survival they do not have the leisure time necessary to develop abstract thought or aesthetic appreciation. I am not arguing that increased leisure time and freedom from material want do not contribute to the development of arts and literature etc.: we don't have to turn to "primitives" for an answer to this question, ask any contemporary single working mother how important the debates on postmodern aesthetics in contemporary architecture are to her. However, the notion of material needs and scarcity must always be seen in a relative sense, i.e. these needs, like others, are historical and can only be fixed universally at a very very basic level. This thesis also assumes, implicitly, a thesis of evolutionary psychology that alleges that the capacity for abstract thought and the development of an aesthetic sense is not possible in conditions of material deprivation.

Going back to Robinson's statement now, and focussing on the second sentence, I read this sentence to say that the conditions described in the preceding sentence were insufficient to generate property ownership rules, or even, for that matter, very strict rules governing use, even of the means of basic subsistence. This argument also then rests on two more assumptions built on the basis of the theory of human nature and needs set

out in my analysis of the first sentence: (1) that the only motivation for people to develop the kind of intense relationship of identity with land and resources that we understand as "ownership of property" is the "need" to secure the means of subsistence (defined as material needs of the organism), as individuals AGAINST other individuals. This is the core concept of "possessive individualism," characterized by the slogan "I own therefore I am" (MacPherson, 1962).⁷

The particular extrapolation of this fundamental tenet most influential in colonial thought is found in theories of Social Darwinism and in this melange of Social Darwinism, crude evolutionism, and economic determinism, individuals, cultures and societies proceed through stages of development from infancy/primitiveness/simplicity to maturity/civilization/ complexity, and are ranked accordingly in relation to each other. This ideology characterizes "primitive" humans as beings driven by base survival instincts; while the best of their "civilized" counterparts are motivated by the narrowly construed "rationality" of individual economic accumulation and self-aggrandizement.

While these theories can be traced through several centuries of European thought, they remain prevalent to-day. This conception of human nature has never been without opponents and critics in the west. Anthropologist, Deborah Gordon, argues that in the context of the current resurgence of neo-conservatism in the western world these theories are regaining increasing prevalence in contemporary culture where, she says, only two possible explanations for all of human behaviour are currently granted legitimacy:

⁷ Richard Handler identifies Lockean political theory and Macpherson's critique as being central to contemporary culture's conceptualization of individualism, authenticity and culture as commodity (1985; 1986; 1991). For a classic critique of "economism" see Dumont, 1977; and see also Dreyfus and Dreyfus, 1979; Klammer, 1987. For a critique of economism in Marxist anthropology, particularly the work of Godelier, from the perspective of critical anthropology see Ulin, 1984.

"adherents to contemporary neo-conservative ideology can recognize nothing but either bargaining gambits--the approved behaviour of the 'successful'--or madness--the discredited behaviour of the 'failures' " (Gordon, 1988:54).

The relationship of these arguments and assumptions to the development of property can be illustrated by setting out the following "just so" story: if we begin with the assumption that there is a hierarchy of needs with the needs of the biological organism as primary, and these needs can be listed as discrete items and can be conceptualized as the needs of isolated or isolable individuals, AND that "primitives" are consumed by the hardships of satisfying these needs to the exclusion of the development of abstract conceptions of property then, and only then, does the Crown's and Robinson's argument make sense.

To summarize: my thesis is that the Crown's argument, in this and other land claims cases, is based on a particular theory of human nature: that of western naturalism (Gordon, 1988; Taylor, 1985(a)(b)), the economic man of possessive individualism (Macpherson, 1962, Handler, 1985), and *homo faber* of Marxist theory (Ulin, 1984). These theories of human nature posit the universal and ahistorical existence of a self that is an autonomous, atomistic, organism whose needs are hierarchically ordered with predominance given to satisfying the needs of the organism: food and reproduction (naturalism). The degree to which rationality and culture are added on this organism is measured by the degree to which s/he manifests narrowly-defined economic rationalism.

This constitutes the Catch 22 of the test for Aboriginality discussed previously: given that lesser rationality is synonymous with being Aboriginal, then demonstrations of economic rationality constitute proof of assimilation and negate the right to make

Aboriginal claims. On the other hand, demonstrations of cultural persistence, demanded by the courts, are demonstrations of irrationality and hence negate the right to have claims heard seriously.

In the case of the anthropologists, it set up a situation wherein the possibility of arriving at a scholarly position in support of an Aboriginal claim was denied on a priori grounds. Catch 22 again. My critique draws on three bodies of literature: the communitarian philosophers, critical feminist theory and the anthropological critique.

Communitarian philosophers differ among themselves according to whether they are presenting a metaphysical argument and positing a transcendental human nature or, like Marx, defining human nature as "historical" and as "the sum of social relations." They agree on theorizing the self as intrinsically social and humans as "beings in relation." For example, Charles Taylor argues that,

As organisms we are separable from society--though it may be hard in fact to survive as a lone being; but as humans this separation is unthinkable. On our own, as Aristotle says, we would be either beasts or Gods (Taylor, 1985(a):8).

Communitarian critics of rights-based liberalism, like Michael Sandel, say

...we cannot conceive ourselves as independent in this way, as bearers of selves wholly detached from our aims and attachments. They say that certain of our roles are partly constitutive of the persons we are as citizens of a country, or members of a movement, or partisans of a cause. But if we are partly defined by the communities we inhabit, then we must also be implicated in the purposes and ends characteristic of those communities. As Alastair MacIntyre writes: 'What is good for me has to be the good for one who inhabits these roles.' Open-ended though it be, the story of my life is always embedded in the story of those communities from which I derive my identity--whether family or city, tribe or nation, party or cause. On the communitarian view, these stories make a moral difference, not only a psychological one. They situate us in the world, and give our lives their moral particularity (Sandel, 1984:5-6).

In recent years the most intense critique of the dominant individualistic theory of the self has been waged by feminist scholars who argue that the vision of the atomistic,

... 'unencumbered self' criticized by communitarians, is a male one, since the degree of separateness and independence it postulates among individuals has never been the case for women...the dynamics of gender constitution in western societies result more often than not in autonomous, unencumbered male selves and relational, situated and encumbered female selves...it is clear that the feminist and communitarian critiques of the unencumbered self converge. (Benhabib and Cornell, 1989: 12)

They differ with the communitarians, however, on the question of the way in which women, by virtue of their subordination within the family, or their embeddedness within kinship relations, and the denial of sexual autonomy to women, has excluded them from the description of the "western" autonomous self. Western feminists have been critically supported in this critique by non-western scholars--feminists and others--who have pointed out that the individualistic model is in fact "western." Western feminists and non-western scholars have, in turn, been critically joined by neo-Marxists or humanist Marxists--feminists and non-feminist, western and non-western, who have pointed out that the "male," "western" thesis is, in fact a "male," "western," "bourgeois" thesis. Within the western tradition therefore, there has been a consistent critique of what has been the dominant thesis (or the thesis of the dominant).

This has led to a number of conclusions, most importantly: what has been represented in the dominant thesis as universal "human nature" and "natural law" is in fact a minority and interested thesis. I argue that each of these perspectives is different in significant ways, i.e. there is not an identity between feminist, non-western, and communitarian critiques. The significant difference is that these perspectives allow for an opening up to each other and to a different future, whereas the dominant thesis debars its holders "from formulating such a transformation theoretically" (Dews, 1987: 215).

To conclude: there are very important and fundamental differences between these various critiques. Their similarity, or common ground, rests in their rejection of the self of western economic man and their assertions of a fundamentally relational self, although what constitutes the relations fundamental to their various notions of the self differ: for communitarian philosophers it is the ontological being in relation as opposed to atomism; for feminists, too, being in relation is fundamental but sexual autonomy (including reproductive rights) is defined as a necessary pre-condition or corrective to achieving this; for aboriginal peoples, the relationship to land and kin is defined as fundamental to the relational self.

The common ground shared by these critics is both oppositional and emancipatory. The emancipatory potential of these theoretical propositions is described by Dews as "allowing us to theoretically formulate a transformation of existing society into one based on difference without domination and affinity without identity (ibid: 303).

In other words, all of the above schools of thought argue that human beings are social beings. We do not feed ourselves, we feed each other. We do not clothe ourselves, we clothe each other. We do not shelter ourselves, we shelter each other. We do not reproduce ourselves, we reproduce each other. We do not love ourselves, we love each other. We do not make war on ourselves, we make war on each other.

In light of the above discussion, the implications of item 28 of the Chief Justice's Reasons for Judgment--that asserts the rule of the omnipotent, disengaged, autonomous self in the person of the sovereign, or the Crown, or the judge--are rendered more ominous.

IT IS THE LAW THAT ABORIGINAL RIGHTS EXIST AT THE PLEASURE OF THE CROWN, AND THEY MAY BE EXTINGUISHED WHENEVER THE INTENTION OF THE CROWN TO DO SO IS CLEAR AND PLAIN.

CHAPTER 7: AFTER THE JUDGMENT

7.0 TESTING, TESTING...1, 2, 3, 4, 5!

Allen McEachern upped the ante once again and added yet another requirement to the "test" developed since *Calder* by the *Bear Island* and *Baker Lake* decisions, insisting that the protection of common law could only be applicable to defined "aboriginal practices." Legal scholars Kellock and Burton explain:

McEachern, C.J. added a fifth requirement to the list in *Baker Lake*: that protection afforded aboriginal rights be extended only to 'aboriginal practices' [that have been] carried on within an aboriginal society in a specific territory for an indefinite or long, long time (Kellock and Burton, 1992: 109).

A brief summary of the Chief Justice's findings will be helpful at this time to provide an introduction to the British Columbia Court of Appeal's responses to the arguments and counter arguments made by the Gitksan and Wet'suwet'en and the Crown following the *Delgamuukw* decision.

In answer to the first question on the source of Aboriginal rights, or how do Aboriginal rights arise in law, the Chief Justice said that they arise "by occupation and use of the specific lands for aboriginal purposes by a communal people in an organized society for an indefinite, or long, long time prior to British sovereignty." Following the four part test set out by Justice Mahoney in *Baker Lake*, Allen McEachern found as follows:

(i) Were their ancestor members of an organized society at the time of contact?

I am quite unable to say that there was much in the way of pre-contact social organization among the Gitksan or Wet'suwet'en simply because there is so little reliable evidence....I accept the opinion of Professor Ray that there was minimal social organization (1991: 227).

(ii) Did they occupy a specific territory?

...there is evidence of Indians living in villages at important locations in the territory. I infer they would have used surrounding lands, and other lands further

away as may have been required. This is sufficient to satisfy this part of the test for the areas actually used (ibid:227)

(iii) Did they exclude other organized societies?

While I have the view that the Gitksan and Wet'suwet'en were unable to keep invaders or traders out of their territory, there is no reason to believe that other organized societies established themselves in the heartland of the territory along the great rivers on any permanent basis, and I think this requirement is satisfied for areas actually used (ibid:228).

(iv) Was occupation established at the time British sovereignty was asserted?

For the purposes of this test, I find some Gitksan and Wet'suwet'en had been present in their villages and occupied surrounding areas for aboriginal purposes for an uncertain, long time before British sovereignty.

And, he found that

...some of the ancestors of some of the plaintiffs have used some of the territory in an aboriginal setting for a long, long time (ibid:211).

So Aboriginal people did have rights, but what were they?

...[these]...aboriginal practices were probably confined reasonably close to village sites where salmon could most easily be obtained... There was no reason for them to travel other than between the villages or far from the great rivers for these or other aboriginal purposes...

I find that the aboriginal practices of the plaintiffs ancestors were, first residence, and secondly subsistence--the gathering of the products of the lands and waters of the territory for that purpose and also for ceremonial purposes.

In my view, commercial trapping was not an aboriginal practice prior to contact with European influences and it did not become an aboriginal practice after that time even if lands habitually used for aboriginal purposes were also used for commercial trapping after contact.

I do not accept that the ancestors 'on the ground' behaved as they did because of 'institutions.' Rather I find they more likely acted as they did because of survival instincts which varied from village to village (ibid:213).

Another possible source of Aboriginal rights could be the Royal Proclamation of 1763, but Chief Justice McEachern found that it did not apply to British Columbia.

Legal critics have argued that the Chief Justice's findings in law are as archaic and, in some cases, as questionable in terms of fact and reasoning as his findings on oral tradition, anthropology and history (Burns, 1992; Burton and Kellock, 1992; Doyle-Bedwell, 1993; Fortune, 1993; Foster, 1992; Macklem, 1993; Sanders, 1992; Slattery, 1992; Walters, 1993). First, the chief justice ruled out the possibility of Aboriginal title or rights being considered "ownership" of land because what he called the "relevant judicial authorities" (i.e. decisions in *St. Catherine's Milling, Calder, Baker Lake, and Guerin*), state that the aboriginal right in traditional lands is not proprietary, but is a right of use and occupancy alone, existing at the "pleasure of the Crown" and constituting a mere burden upon the Crown's title. Hamar Foster concludes on this point that, "Chief Justice McEachern's conclusion that Indian title is non-proprietary finds no real support in the authorities and is wrong in law" (Foster, 1992(a):11). And, Foster continues, relying on the *St. Catherine's Milling* case "is a little like describing Austria-Hungary as a major world power: it may have mattered a great deal once, but its importance is now more historical than actual" (ibid:11-12).

Second, the Chief Justice ruled that Aboriginal government and customary law "gave way" to colonial law upon the establishment of the British colony. In other words, Chief Justice McEachern found **both** that underlying title was vested in the British Crown since the sixteenth century by virtue of the doctrine of discovery, based on the theory of *terra nullius*, **and** that the Gitksan and Wet'suwet'en lived in an organized society at the time Britain asserted sovereignty around 1805. He wrote:

The Aboriginal system...gave way to a new colonial form of government which the law recognizes to the exclusion of all other systems...After that, aboriginal customs, to the extent they could be described as laws before the creation of the colony, became customs which depended upon the willingness of the native community to live and abide by them, but they ceased to have any force, as laws, within the colony (Reasons: 1991:453).

This, of course, goes to a finding that Aboriginal peoples have assimilated into Canadian society and have no laws or institutions of government or resource management that are distinctly "aboriginal" and that continue into the present.

However, British colonial law has no provision for indigenous legal systems simply "giving way." Either people are there living in an organized society with recognizable forms of government in which case their laws continue until expressly extinguished by the conquering sovereign, or they are not there or not living in an organized society in which case the sovereign's laws apply at the moment of discovery (Walters, 1993:410).

When lawyers protested that the Chief Justice was upholding the doctrine of discovery and simultaneously applying the doctrine of conquest and that this could not be the case because the Aboriginal peoples in British Columbia were never conquered, the judge replied: "With respect, that is not a relevant consideration at this late date if it ever was" (Reasons, 1991:454).

Third, the Chief Justice ruled that the aboriginal right of use and occupancy established with respect to the village sites alone had itself been extinguished by colonial and imperial legislation. This ruling on extinguishment is really the key finding of the judgment since it renders the judge's findings on the nature, scope and source of Aboriginal title and rights legally irrelevant.

It was on the question of extinguishment that the Chief Justice's ruling elicited the most criticism from the legal community as a whole. The legal test for extinguishment had been developing since *Calder* and was affirmed by *Sparrow* as follows:

The test for extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

Furthermore, the Supreme Court of Canada had leaned towards suggesting that the "honour of the Crown" would be well served by reasonable attempts to obtain aboriginal consent to extinguishment as well. (see Wilson in Guerin decision, p.).

Chief Justice McEachern, however, interpreted this to mean as follows:

It is significant, in my judgment, that the Court made this pronouncement regarding the test for extinguishment in the context of a discussion of Calder, which was concerned with the colonial period, and also that the Court did not include express statutory languages as a part of its test. I therefore conclude that express statutory language is not a requirement for extinguishment.

...intention in this context must relate not to a specific, isolated intention on the part of the historical actors, but rather to the consequences they intended. In other words, the question is not did the Crown through its officers specifically intend to extinguish aboriginal rights apart from their general intention, but rather did they plainly and clearly demonstrate an intention to create a legal regime from which it is necessary to infer that aboriginal interests were in fact extinguished (Reasons, 1991:239).

Specifically, he wrote:

The underlying purpose of exploration, discovery and occupation of the new world, and of sovereignty, was the spread of European civilization through settlement. For that reason, the law never recognized that the settlement of new lands depended upon the consent of the Indians...

It would not be accurate to assume the colonial officials, or their masters in London, chose wilfully to ignore aboriginal interests. As the evidence shows, their intention was to allot generous reserves, and to satisfy the requirements of the Indians in that way, and to allow Indians to use vacant Crown land (ibid).

In other words, Aboriginal rights were extinguished by implication and by the consequences, intended or otherwise, of "history." And thus are the events of history transformed, post hoc, into facts of law.

Foster points out the inherently contradictory logic of the judge's reasoning by explaining that if the judge is right that the colonial period (1850-1871) is the "legally critical period" during which extinguishment took place, the Gitksan and Wet'suwet'en territories were "in reality, virtually unaffected by settlement at that time" (Foster, 1992(a):13).

6.1 THE CROWN CHANGES HEADS

Of course, as had been expected, Chief Justice McEachern's decision was appealed by the Gitksan and Wet'suwet'en, and the appeal was responded to by the provincial and federal governments.

With the exception of the years 1974-1976, British Columbia had been governed since the 1950s by the right-wing Social Credit party which had, until 1990, staunchly opposed any recognition of, or negotiations with, Aboriginal peoples on the land question. It was a Social Credit "provincial crown" that had argued the *Delgamuukw* case. However, six months before the judgment was rendered, in November 1991, the New Democratic Party (NDP) had been voted into office on a platform that promised recognition of Aboriginal title and commencement of negotiations on land rights. It was therefore an NDP government that was forced to make a decision about what to do when the Gitksan and Wet'suwet'en appealed Judge McEachern's ruling to the B.C. Court of Appeal.

The NDP and the Gitksan and Wet'suwet'en Hereditary Chiefs agreed to request that the Court decide some questions now and leave the remaining ones for the Supreme Court of Canada to decide if, by the time the case came before them the parties had been

unable reach negotiated agreements. The new government put forward the following position in its appeal factum:

- (1) The trial judge (McEachern) erred in making a finding of "blanket extinguishment" on the basis of colonial instruments enacted prior to 1871.
- (2) The plaintiffs (Gitksan and Wet'suwet'en) do not have a right to ownership of, or a proprietary interest in, the lands and resources which they claim.
- (3) The plaintiffs do not have the right of self-government or jurisdiction as claimed...But it is understood that aboriginal peoples who lived in an organized society governed themselves by their own system of laws and customs. Certain rights or freedoms to self-government may continue to exist, but are subject to the laws of Canada and of the Province.
- (4) The province does not generally disagree with the factual findings of the trial judge on the question of ownership and jurisdiction.
- (5) The province supports the findings of the trial judge with respect to the effect to be given to the expert evidence...It does not take the position the trial judge ignored or improperly rejected evidence. It supports the trial judge's conclusions as to the value of oral histories.
- (6) The trial judge was correct to characterize the plaintiff's aboriginal rights as *sui generis*. But the precise location, scope, content, and consequences of the plaintiffs' aboriginal rights is a matter for negotiation, and further judicial consideration. (Reasons:1993, *Delgamuukw*, Appeal:15)

The panel of five appeal court judges--Justices Macfarlane, Taggart, Wallace, Hutcheon and Lambert-- found unanimously that:

- (1) There was no blanket extinguishment of aboriginal title as a result of Britain's colonization of what is now British Columbia.
- (2) The introduction of a land settlement scheme by the colonial government prior to 1871 did not show a "clear and plain intention to extinguish" and therefore aboriginal rights were not extinguished.
- (3) After 1871 aboriginal rights could not be extinguished by the provincial government.
- (4) There was no evidence that the federal Crown extinguished aboriginal rights between 1871 and 1982.

- (5) After 1982, not even the federal government has the power to extinguish aboriginal rights because of their entrenchment in Section 35 of the Constitution.

In other words, the Court of Appeal found in favour of the (new) Crown's (new) position. In doing so they strategically "cleaned up" the worst of McEachern's judgment, in a legal sense, and brought it up to date and in line with recent Supreme Court of Canada directions, and federal government perspectives. At the same time, of course, this course of action rendered unnecessary any explicit critique of the Chief Justice's ruling which would have been an embarrassment to the judiciary as a whole, the B.C. judiciary in particular, and would have challenged one of the most important social and political roles of the law, which is to legitimate the exercise of power by showing it to be guided by the objective, neutral application of reason and to be free of racial bias.¹

The Appeal Court Judges disagreed on the definition of Aboriginal rights. Mr. Justice Macfarlane, supported by Taggart, Wallace and Hutcheon, relying on the "new test" enunciated in *Sparrow*, identified two questions to be decided in determining whether a particular practice should be protected as an aboriginal right:

- (1) Was the practice integral to the distinctive culture of the aboriginal society in which some of the ancestors of the present plaintiffs were members?
- (2) Was the practice existing as an aboriginal right at the date when sovereignty was asserted and was it unextinguished in 1982? (Reasons: *Delgamuukw* Appeal:18).

In other words, the critical defining difference between Aboriginal and non-Aboriginal "practices" and therefore "peoples" remains, in law, and appropriately for the times, "culture" defined in a contemporary manner. That is, the legal definition of

¹ The Canadian judiciary has been under particular fire recently on the issue of judicial bias in the form of racism in law enforcement and criminal proceedings. (See for example, Hamilton and Sinclair, 1991; Canada, 1989; Turpel, 1991(b), (c); Kaiser, 1990).

aboriginality is linked to practices which can be shown to have been carried out prior to European contact, and which were, then and now, "integral to the distinctive culture" of the individual Aboriginal nation bring a claim.

Macfarlane's definition of aboriginal rights is a seminal one and, as we will see, he applies this definition to all the judgments that follow. There are four aspects to Macfarlane's definition:

- (1) The focus of the question is what lands the people occupied and how these lands were used. The inquiry becomes showing the customs and practices of the people in using particular pieces of land.
- (2) That use and occupation is bound up with history. The question becomes how did the ancestors use the land. A time-bound "traditional" element is central. Aboriginality, the Aboriginal "other" remains firmly rooted in the past (see Fabian, 1983).
- (3) Occupation is defined as use to the exclusion of others. This means that native societies have to have actively excluded others from their territory and maintained exclusive possession of the same territory.²
- (4) The use of the land must be integral to the culture--it must be distinctively "Indian."

But what happens if an Aboriginal society develops traditions and customs as a result of European influences and they continue for a long, long time before the assertion of sovereignty? This issue of time and the continuation of "Aboriginality" into the present and future divided the appeal panel.

Macfarlane and Wallace took an historical approach. They tried to look to the past, find something they could identify as "traditional," or "distinctively Indian" and "integral to the culture." Lambert, on the other hand, viewed aboriginal title, and the rights

² The reader will recall that Elias (1993) pointed out earlier that this test is interpreted to include non-Aboriginal people as well.

flowing from it, to be contemporaneous, allowing a blossoming in the present and into the future of the rights.

On the question of the legal effect of European influences, Lambert represented a minority position when he accused the other members of the panel of supporting a "frozen rights" thesis. Lambert wrote:

Once it is recognized that aboriginal societies were societies capable of change, the notion that there is an 'aboriginal' use which can be discovered only on the basis of evidence of long-time use must be rejected (Reasons, *Delgamuukw*, Appeal:172).

Of course, in practice the debate over "European influences" is really a debate about whether or not Aboriginal people can use their resources to compete in the capitalist market-place. Again, Lambert takes an independent stand arguing that

The purpose of s.35 when it was prepared in 1982, cannot have been to protect the rights of Indians to live as they lived in 1778...Its purpose must have been to secure to Indian people, without any further erosion, a modern unfolding of the rights...(ibid:189).

Lambert chastises McEachern for finding that "commercial trapping is not an aboriginal practice." He says:

In my opinion, to classify the aboriginal custom, tradition or practice as a custom of commercial trapping is to adopt the settlers' point of view of the classification of aboriginal title rather than the aboriginals' point of view...If the Indians used land in 1820 in accordance with their aboriginal title but the use was a new one in 1820, then the important point is that at that time, namely 1820, the aboriginal right represented by the aboriginal title was taking on an 1820 contemporary form (ibid).

Lambert relies extensively on the *Mabo* decision for support for his stand and quotes generously from it³. This decision, handed down by the Supreme Court of Australia in 1992, dispensed with the theory of *terra nullius* as a foundation for Australian

³ *Mabo v. The State of Queensland* (1992), 107 A.L.R. 1 (H.C.A.) 1t 35-36

law regarding Aboriginal peoples. The *Mabo* decision therefore stands as the first and can be adopted as a precedent by any former British colony (Stephenson and Ratnapala, 1993). For example, Lambert looks to Mr. Justice Brennan's ruling in *Mabo* to support his stand on cultural change:

...Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed...

Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people (Brennan in *Mabo*, at pp.35-36, quoted by Lambert, Reasons: *Delgamuukw* Appeal, at p. 144-145).

On the question of jurisdiction or an inherent right to self-government, again, the Appeal court was divided. Macfarlane, for the majority, rejected this aspect of the claim, saying:

Rights of self-government encompassing a power to make general laws governing the land and resources in the territory, and the people in that territory, can only be described as legislative powers...the jurisdiction of the plaintiffs would diminish the provincial and federal share of the total distribution of legislative power in Canada (ibid:34).

In support of this position, they offered four points:

- (1) that "on the date that the legislative power of the Sovereign was imposed...any vestige of aboriginal law-making competence was superseded."
- (2) if this is wrong (in law) then "a continuing aboriginal legislative power is inconsistent with the division of powers found in the *Constitution Act 1867*..."
- (3) "the plaintiffs failed to establish the necessary ownership needed to support such a jurisdiction..."
- (4) "the establishment of some form of Indian self-government...is ripe for negotiation and reconciliation" (ibid:43-44).

Lambert, again, disagreed. In his minority finding he argued, based on the "doctrine of continuity" provided for under British colonial law, that Aboriginal rights survived both the assertion of sovereignty and the division of legislative powers. He says,

...the existence of a body of Gitksan and Wet'suwet'en customary law would be expected to render much of the newly introduced English Law inapplicable to the Gitksan and Wet'suwet'en peoples...(ibid:233)

Justice Hutcheon also took an independent position on this question, placing himself between the majority and Lambert. He transformed "self-government" into a more limited concept of "self-regulation" by removing any concept of law making by institutions. This minimal range of jurisdiction, he then argued, could be granted:

The appellants have a right of self-regulation exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity (ibid:268).

The specific application of the scope of government, or management, powers was also addressed by the Appeal Court panel. Even Justice Lambert advocates a "central governing authority" whose chief goal would be conservation and who would be required to "follow full procedures for consultation with all those interests affected by its decision" (ibid:133).

Finally, the Appeal Court panel dealt with the logical conclusion of their findings: if Aboriginal rights have not been extinguished, then what is the status of titles in fee simple that have been granted by the province for the past 123 years? They declined to give a definitive answer but made a range of suggestions about the situation in which Aboriginal title and Crown and/or fee simple title could co-exist. Justice Macfarlane, for example, concluded:

Uncultivated, unfenced, vacant land held in fee simple does not necessarily preclude the exercise of hunting rights...On the other hand the building of a school on land usually occupied for aboriginal purposes will impair or suspend a right of occupation...

In essence, this is little different from Chief Justice McEachern's suggestion that land could be returned to aboriginal use after it had been clear cut:

As Aboriginal rights were capable of modernization, so should the obligations and benefits of this duty be flexible to meet changing conditions. Land that is conveyed away, but later returned to the Crown, becomes again usable by Indians. Crown lands that are leased or licensed, such as for clearcut logging to use an extreme example, become usable again after logging operations are completed or abandoned (Reasons, 1991:248).

In the majority the Appeal Court found in favour of the provincial government on appeal. In summary, the judges found that the Gitksan and Wet'suwet'en had Aboriginal rights that were not proprietary but otherwise remain undefined, and that these rights have not been extinguished because the Crown has failed to demonstrate a "clear and plain intention" to do so. That is, they found that extinguishment had to be explicit, and not implicit:

...In the end, the aboriginal interest is a right of use and occupation of a special nature--best described as *sui generis*. To stretch and strain property law concepts in an attempt to find a place for these unusual concepts which have arisen in a special context, is in my opinion, an unproductive task.

Whatever protection is required to sustain the *sui generis* interest of the descendants of the aboriginal peoples is now afforded by the Constitution, and in my view we should struggle no more to find a place in English property law for that interest (ibid:130-131).

As previously discussed, the *sui generis* theory of aboriginal rights, in terms of aboriginal interests is a double-edged sword. On the one hand, it recognizes the "cultural distinctiveness" of Aboriginal title and does not try to force it to conform to European categories of definition. On the other hand, as long as the courts, and/or popular culture,

are dominated by a theory of racial or cultural supremacy then saying Aboriginal rights are different in theory can be expected to result in these rights being considered "lesser" ones in practice. And, this theory ends the embarrassing discussion about whether or not the law has obeyed itself in relation to Aboriginal peoples.

The New Democratic Party government, as set out above, supported the dismissal of oral tradition and anthropological evidence by Chief Justice McEachern. While the B.C. Court of Appeal's panel of five judges were divided on many of the issues before them, they all supported the Chief Justice's findings on this issue. Justice Lambert mentioned that more weight should have been given to the oral histories and the testimony of the chiefs and elders. However, the judges were unanimous in their findings that the volume of evidence was such that they could not reasonably be expected to review it, and they were satisfied that no "palpable and overriding error in fact" was evident in McEachern's assessment of, or application to law of, the expert evidence. They said even if they were to review all the evidence and the transcripts,

The Court of Appeal could not be exposed to all the nuances in the evidence or be in as good a position as the trial judge to weigh the credibility (Reasons, *Delgamuukw*, Appeal:34).

During the course of the *Delgamuukw* trial several other Aboriginal rights cases were winding their way through the lower courts in British Columbia. *Delgamuukw* addressed issues fundamental to all of them, particularly the existence (or not) of aboriginal rights protected by the Constitution, what the nature of these rights are, and whether or not they have been extinguished. Since these issues were fundamental to all the cases, an agreement was reached between the Crown and the various Aboriginal litigants to send all the cases to appeal at the same time. These additional cases were:

R. v. Alphonse, R. v. Dick, R. v. Van Der Peet, R. v. Gladstone, R. v. N.T.C.

Smokehouse, R. v. Lewis, and R. v. Nikal. The Court's findings in these cases are applications of the findings of the Appeal court on *Delgamuukw* and hence define the key questions remaining for the Supreme Court of Canada, or alternative negotiations, to resolve. These cases are set out in Appendix 1 where I briefly outline the stories that gave rise to the cases, the questions facing the Appeal court when they came to address them, and the Appeal court rulings. Of particular interest to this thesis is that the debate among the judges offers an insight into the emerging debate about the nature of Aboriginal rights now recognized. We can see in the reasoning applied by the judges the most recent "definition of culture" and difference employed by the courts in Canada to justify current decisions.

In summary, should agreement not be reached through negotiations now underway with both provincial and federal governments, the central question that remains for the Supreme Court of Canada to resolve if the Gitksan and Wet'suwet'en appeal is heard in 1996 is what is the nature and scope of whatever Aboriginal rights continue to exist. To summarize, the "test" as it now stands was originally articulated in the *Sparrow* judgment of 1990, and subsequently upheld by the B.C. Court of Appeal panel. To repeat, this test is:

The nature and content of an aboriginal right is determined by asking what the organized aboriginal society regarded as an integral part of their distinctive culture...To be so regarded those practices must have been integral to the distinctive culture of the above society from which they are said to have arisen. A modernized form of such a practice would be no less an aboriginal right...A practice which had not been integral to the organized society and its distinctive culture, but which became prevalent as a result of European influences would not qualify for protection as an aboriginal right.

In other words, the legal challenge to Aboriginal peoples has now become one of proving that (a) they engaged in some practice or other (e.g. fishing); and (b) that the practice (e.g. fishing) was and is integral to that which makes their culture distinctive. The definition of culture remains central to defining legally meaningful difference.

Michael Asch and Patrick Macklem outline a strategy in response to this new test that would argue for Canadian courts to adopt an inherent theory of Aboriginal rights that includes sovereignty:

According to an inherent rights approach, First Nations sovereignty is a term used to describe the totality of powers and responsibilities necessary or integral to the maintenance and reproduction of aboriginal identity and social organization. Under an inherent rights theory, First Nations sovereignty and aboriginal forms of government, as the means by which aboriginal identity and social organization are reproduced, pre-existed the settlement of Canada and continue to exist notwithstanding the interposition of the Canadian state (Asch and Macklem, 1991:503).

In other words, the court's interpretation of what is integral to a distinctive culture should include everything necessary to reproduce "aboriginal identity and social organization." Macklem, in his most recent work, argues that while the idea of the Supreme Court of Canada defining and codifying in law a definition of what is integral to distinctive Aboriginal cultures may appear at first a rather frightening proposition, the outcome could be positive if more Aboriginal people themselves become involved in the legal profession particularly as litigators of Aboriginal rights cases, and as educators of the judiciary in cultural sensitivity.

On the issue of the need to critique the underlying ethnocentricity of the law, Asch and Macklem urge that the courts should acknowledge that the assumptions of *terra nullius*,

...ultimately rest on unacceptable notions about the inherent superiority of Europeans nations... We believe it abhorrent that Canada was constituted in part by reliance on a belief in inequality of peoples and that such a belief continues to inform political and legal practice in 1991 (ibid:510).

They suggest that the theory be officially and publicly dispensed with.

However, it is not to the courts that either Aboriginal peoples in B.C. or the Crown are currently looking for resolution of the title and rights issue. Rather, it is on the B.C. Treaty Commission that attention is focused. Just as the *Calder* decision encouraged the Federal Government to negotiate with the Nisga'a, the *Sparrow*, *Delgamuukw* and B.C. Court of Appeal decisions have all recommended and encouraged that the issues be resolved through political negotiations. Although not often stated in these terms, the courts, bound as they are by their colonial inheritance and archaic powers of truth creation, have been shown unwilling to, or incapable of, resolving the issues.

On June 28, 1991, about three months after the *Delgamuukw* decision was released, the B.C. Claims Task Force, which had been made up of representatives of federal, provincial and aboriginal governments, as well as "third party" labour and business interests, published their report which contained 19 recommendations for developing a process for negotiations amongst the parties. The Task Force itself was prompted by the anticipated positive results of the *Delgamuukw* decision.

7.2 POLITICAL NEGOTIATIONS

The Task Force report called for casting aside the historically troubled relationship between Aboriginal and non-Aboriginal peoples, rooted in the imperial inheritance, and for developing a new "made-in-BC" solution. This new relationship would be realized through

the negotiation of "modern day treaties," and would be based on "recognition and respect for First Nations as self-determining and distinct nations with their own spiritual values, histories, languages, territories, political institutions and ways of life (Province of British Columbia, 1991:16).

In September 1992 representatives of the federal and provincial governments, and the First Nations' Summit, signed an agreement creating the B.C. Treaty Commission which would serve as a watchdog over, and facilitator of, the six stage process of treaty making. On June 21, 1993, the federal and provincial governments finalized a *Memorandum of Understanding between Canada and British Columbia respecting the sharing of pre-treaty costs, settlement costs, implementation costs and the costs of self-government*. Simply put, Canada has agreed to provide the cash, and B.C. the land.

The Treaty process, as of this writing, remains a fact on paper only although all the parties are engaged in complex negotiations regarding interim measures and costs. For the purposes of this thesis it is important only to note, in conclusion, the following.

Aboriginal peoples and rights in British Columbia existed in the past and continue to exist in the present. It has taken the courts over 100 years to arrive at this fundamental recognition. The rights remain undefined except to the extent that they appear to include practices that constitute "an integral part of a distinct aboriginal culture," and to exclude proprietary and commercial interest. The British Columbia Treaty Commission must ultimately be bound by and limited by legal decisions since the law remains, the "court of last resort" in settling differences that cannot be reconciled through the negotiation process.

At the national level, following the Oka crisis in the summer of 1990, the federal government convened the Royal Commission on Aboriginal Peoples, mandated to make proposals for the development of a new relationship between Aboriginal and non-Aboriginal Canadians. The same themes that dominate the public representation of the B.C. Treaty Commission dominate the Royal Commission. The most fundamental of these themes is that the past should be put behind us with as little recrimination as possible. Historic injustices should be remedied and we should all move on to building a stronger, more prosperous B.C. and Canada. Thinly veiled threats addressed to "extremist elements" on both sides suggest that as long as the future of Canada's and British Columbia's resources are the subject of conflict, the necessary investors will not be attracted to our province, and our already high rate of unemployment will escalate.

Of course, both levels of government, and Aboriginal leaders, were set back when the Constitutional referendum failed to entrench the inherent right in the Constitution in the Fall of 1992. This left Aboriginal leaders in a situation where legal decisions and an increasingly conservative Supreme Court of Canada appeared to be moving away from the "liberal and purposive" interpretation of Aboriginal rights advocated by former Chief Justice Dickson, and legal protection of the right to self government through political negotiations had failed, and where their own representivity was held up for public questioning.

In its first public release the Royal Commission on Aboriginal Peoples took a position in support of an inherent right to self-government. This model is often referred to as a "made-in-Canada" solution. In its second publication, *Partners in Confederation*, the Commission outlined a proposal for implementing self-government without constitutional protection based on the notion that Canadian common law, beginning with the fur trade,

as always been pluralist in practice, if not in theory or statute. This would allow legal recognition of the inherent right to self-government common law protection at the local level, governing areas "integral to their distinct cultures," which, in modern form, include health, education, social services. In legal terms, these areas would be under the jurisdiction and laws of First Nations as, this theory argues, they always have been and as they were recognized during the early contact period. In areas that are not "core," i.e. that are not "integral to their distinct cultures," like commercial resource exploitation, a situation of legal pluralism would prevail with a federal, overarching power--not necessarily a court--mandated to conserve and protect the resource, having final say in conflicts. At the level of capital offence, property law, international relations, armed force, the Supreme Court of Canada would remain the highest court.

In this proposal, as in the B.C. Treaty process, the question of ultimate legal title is "set aside" as unresolvable. The reasoning behind this is that the "two world views" (Aboriginal and European) are incommensurable, particularly where property is concerned. The contrast is most often talked about as being between "spirituality" and "materialism." Another line of argument is that neither "side" will ever compromise their particular perspective: Aboriginal peoples will never say that they do not, in some sense, remain the sole owners of the lands and resources of this country; "settlers" will never say that their claim to property is illegal and the foundations of their nation's history immoral. Hence, it is best to just acknowledge that enduring difference and move on.

Therefore a new national "founding myth" is in the making, and a legal justification is being constructed as a skeleton to hold it together. It goes like this: Aboriginal people lived in organized societies and in a close spiritual relationship with the land. Fur traders arrived and the Aboriginal people shared their resources with them in exchange for

various goods. The relationship at this time was relatively co-operative and economically interdependent. In the area of practices that we now categorizes as "legal" or "medical", pragmatism and pluralism reigned in day-to-day life. Therefore Canadian history REALLY starts with a relationship of mutual recognition and respect. With settlement came competition over lands and resources and an unfortunate period of "culture clash" during which well intentioned but ill-informed non-Aboriginal people and governments engaged in the making and executing of some "bad policy," like the residential school system and relocation policies.

These best forgotten centuries ended around 1970. Since that time we have been embarked on a new road that has been bumpy but is clearly headed in an opposite direction from the old road. The Oka Crisis helped us all to realize that there were still many lessons to be learned. The defeat of the Charlottetown accord helped us realize that the crisis in political legitimacy is deep and multi-cultural. It is time we return to the beginning of our relationship and start all over again. Whereas the "old" national myth "skipped over" both pre-contact Aboriginal societies and the fur trade, the "new" national myth prefers to give short shrift to the early settlement and pre-World War II era.

CHAPTER 8: CONCLUSION

Given the nature of the project pursued in this thesis, this conclusion is very much a conclusion to the thesis, and not to the story told herein. The Gitksan and Wet'suwet'en response to Chief Justice McEachern's findings was most succinctly put by Yagalahl (Dora Wilson) when she said:

It is our land, and regardless of how many decisions come down, we will always say that because it is the truth. It will always be the truth (Yagalahl, 1992:205).

Aboriginal Member of Parliament for the Western Arctic, Ethel Blondin, expressed the strategic pragmatism that reflects the very real position of Aboriginal peoples as minorities in the Canadian nation state:

As an aboriginal person I can't afford to be pessimistic...You have to leave the doors open...all of them (Blondin, 1992: 253- 254).

This feeling was echoed by many, including Gyamk, who said:

At the bleakest of times, at the saddest of times, there's always a sense of humour and a sense of optimism...Ultimately, we must be optimistic (Gyamk, 1992:303).

In other words, the courts were not granted the symbolic legitimacy to give or take away that which they do not own: lands, resources, and peoples' identities.

Legal scholar Douglas Sanders evaluated the results of litigation in the Aboriginal title and rights area as only one among many strategies employed within a long term context. He wrote:

How did the strategy of litigation fit with other strategies to bring about change? No one could suggest that the Gitksan and Wet'suwet'en put all their eggs in one basket. They used every strategy available--roadblocks, fish-ins, marshmallow fights, participation in the First Ministers' conferences, a play (that toured the province, the country, and the world), a film, links to academics ...buttons, shirts, posters, T-shirts...Is such litigation a bad strategy? Only if the litigation is seen in isolation from other actions and strategies. We need to get

over our idolatry of the courts and judges. They are not the only game in town. (Sanders, 1992:283).

Sanders also argues that,

...the claims cannot be taken literally. Were the Nisga'a going to get title to the Nass River valley? Were the Gitksan and Wet'suwet'en going to get title to their territory and jurisdiction? No one expected such a literal win... (the cases) ...were attempts to get the courts to kick governments. (ibid:281).

Be that as it may, this thesis has taken the claims, and responses to them, literally, in order to understand the reasoning and cultural premises underlying the arguments and decisions, and to challenge their legitimacy, morality and inevitability. Stepping outside the limits of pragmatism and political strategies, I have sought to make salient the meaning, in a broad sense, of these events.

In the introduction I posed four questions for this thesis. I will return to these questions now. First I asked "how have the various 'Crowns'--imperial, colonial and domestic--claimed legal title to the lands and resources of British Columbia and the concomitant right to govern the indigenous peoples of this land?" I hope I have answered this thoroughly. The central point of my analysis has been that the cultural, or ideological, basis for Crown claims has been racism. I think critics would be hard pressed to argue this point. Some might say that it is unfair to judge history by present day values, but I would respond that this is not what I have done. Rather, I would argue that it is the law which by its conservative and tradition-bound nature cannot, or will not, make the necessary break with its past.

Philosopher, Gerald Postema, questions the inherent conservatism of law's reliance on history in general, and precedent in particular. He argues that,

Law is essentially historical, not just in the sense that the life histories of legal systems can be chronicled, but more importantly in the sense that it is characteristic of law to anchor justification to the past. Time is the soil of the lawyer's thinking (Postema: 1991:1156-1157).¹

And, he goes on to ask "Why should it be? Why treat this past as normative?

Why think the past has legitimating power? (ibid)"

Criticizing the liberal interpretive approach in the field of legal scholarship as set out by Ronald Dworkin in Law's Empire, Postema identifies the central problem in Dworkin's analysis as being that he asks us to,

...presuppose that those who engage in the practice *have been acting with integrity*. That is, we must assume that the practice as it presents itself historically is consistent with its underlying principles, that participants have been behaving in a way that is consistent with its underlying commitments, and that the only question is what these commitments are (ibid: 1179) (emphasis in original).

The history of Canada in regard to Aboriginal peoples has been to champion the fundamental equality of peoples and the supremacy of law guided by reason and fact in theory, while denying this equality in practice. This has been accomplished by exercising law in an arbitrary, unreasonable manner, "as if" Aboriginal people first did not exist, and then "as if"--when Aboriginal people did not give consent to surrender their lands--they did. And, always "as if" Aboriginal peoples are not equal human beings.

¹ A similar point is made by Torres and Milun in their review of the Mashpee Indian claims case in Maine, U.S.A.. They point out that, ironically, the law, in its use of precedent, displays the kind of cyclical approach to history claimed by Aboriginal peoples and usually characterized as opposite, and even antithetical, to the "linear" historical sense attributed to western European cultures:

Law, by drawing constantly on precedent to develop itself, strives to collapse linear temporal sequence by bringing the past forward and, by creating a new precedent, drawing the future into itself (Torres and Milun, 1990:625).

The trouble with Dworkin's legal interpretivism, like the trouble with Geertz' interpretive anthropology, is that it,

...obscures the possibility of...'critical history,' which involves simultaneously an interpretation and an indictment of current and perhaps long-standing behaviour of members of a community, indictment made in terms of the commitments and ideals of that community. This view treats 'mistakes' not merely as theoretical anomalies, but as behaviour for which participants at the time, and those who inherit the practice are accountable (ibid:1179).

Such a critical history, Postema concludes, is necessary to challenge national hypocrisy. Postema's critique is particularly cogent in the context of Canadian Aboriginal title litigation. If we refer back to the most fundamental historical/legal concept that underlies Crown title, we find that it too was based not on "historical fact," but on the arbitrary power of the sovereign to declare the territory *terra nullius* and assume sovereignty. As we have seen, this founding fantasy was upheld even by what is considered the most "progressive" ruling in Canadian legal history, the *Sparrow* case, where Dickson, C. J. and LaForest, J. wrote:

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.

As a concluding response to this question, I would argue that the current approach of politically "setting aside" the question of title and fundamental premises, while legally allowing the same to continue to form the basis of the "law of the land" and to govern the "court of last resort," while perhaps politically expedient and pragmatic in the short term, remains morally repugnant. Such ghosts, when not confronted directly, have a tendency to haunt nations and peoples.

Michael Ignatieff, in his recent book about the "new nationalisms," describes the problems of truth and history as manifested in "the former Yugoslavia." Paraphrasing Vaclav Havel, Ignatieff writes:

...nations cannot hope to hold together if they do not come to some common--and *truthful*--version of their past...It is always said that aggression begins in denial and that violence originates in guilt (Ignatieff, 1993:24) (emphasis added).

The truth can be denied, ignored or camouflaged under the cover of "cultural misunderstanding," but basic issues in a relationship remain. What really prevents the necessary legal and political reform on this issue is not unreasonable demands on the part of Aboriginal peoples, but rather the failure of the Canadian courts and legislatures to take an honest, courageous stand on history and truth. As Chief Tom Sampson pointed out in his response to the judgment cited in the introduction, it was not the Gitksan and Wet'suwet'en who were on trial as much as Canadian law. From that perspective, the *Delgamuukw* decision stands as a travesty.

From the perspective taken in this thesis of analyzing this historical process with the goal of understanding what it may reveal about the dominant culture, we have seen how--historically-- particular definitions and uses of "culture" have played a central role in legitimating Crown title. Given the assumption that in defining Aboriginality in this context, courts and judges have simultaneously defined the core of European and Canadian "culture," we have seen how this core has now come to be defined as resting in individual property ownership and participation in a commercial, market economy. In other words, what constitutes the important difference between Aboriginal and non-Aboriginal peoples, according to current jurisprudence, is money and property. We can see here the entrenchment of the ideal person or self modeled on "rational economic

man," and the manifestation of neo-conservative ideology. The ideal self encoded in the courts' current definitions of "distinct Aboriginal cultures" remains,

...the image of the modern self, capable of nearly absolute freedom from social determinacy, able to disengage in order to reach a higher level of truth, and in order to control nature and all that is symbolically associated with nature, is a western ideal of what it means to be human. To be disengaged means to be free to be one's own unique author; this attitude epitomizes the modern western identity particularly in North America (Gordon, 1988:40).

The second question posed for this thesis was "what is the relationship between the historical and contemporary political and economic context, and the findings of the law in regard to land title in British Columbia?" As I argued in the body of the thesis, this relationship while not necessarily determinant, in the case at hand has been a relatively close one. Clearly, the courts, as represented by judges and their decisions, are not monolithic and the recent rulings of the B.C. Court of Appeal confirm again a range of opinions among leading jurists. At the same time, the economy of British Columbia, dependent as it still is on primary resource extraction, continues to decline as Canada and British Columbia become increasingly enmeshed in a rapidly restructuring global economy. Aboriginal peoples, regardless of domestic developments, must eventually find a place in this economy and some control over lands and resources perhaps offers the most security and certainty. It certainly offers the *only* possible basis on which kin-based communities can survive, and in which some degree of cultural continuity can be expected to prevail. In the context of the increasing dominance of international capital and the declining economic control exercised by governments of nation states, it is interesting to recall the debates that gave rise to the cases that constituted the "Marshall trilogy" in nineteenth century America. A persistent theme in the struggle over land has been the competing interests of Crown(s), state(s), and private capital(s). Then as now, capital is relatively race (or culture) blind, and the role of resource companies in British Columbia land rights struggles has been a significant one. Since 1990, and immediately

preceding the province of British Columbia's historical policy change from complete non-recognition to qualified recognition of Aboriginal rights of some sort, major corporations have shown an interest in promoting reconciliation between Aboriginal peoples and governments, and in engaging in negotiations with Aboriginal groups directly. Leading Canadian banks now all have departments and personnel devoted exclusively to Aboriginal business, as do most major corporate law firms. These developments suggest the possibility that the nexus of the relationship between Aboriginal and non-Aboriginal peoples may well be shifting from the political to the corporate arena. The implications of such developments for the future have received little attention from anthropologists, but considerable attention from business and government. Aboriginal peoples and their advocates have, of necessity, been encompassed by responding to agendas set by government and courts and these agendas, as we have seen, have dealt overwhelmingly with competing interpretations of the past, which remain to be resolved. This situation has insidiously reinforced the kind of legalistic conservatism described by Postema where justification must always lie in the past, whether in Lockean political theory or in real and imagined pre-contact Aboriginal Gardens of Eden. Such an entrenched mode of thinking tends to deflect from recognition of the unique circumstances of the present and the possibilities of a future yet to be constructed.

It might behoove us to refocus our attention somewhat from the past to the future, and from particularism to comparativism. Becoming pseudo-independent, local enclaves in the "New World Order" may provide a short-term base for a new Aboriginal elite, but international examples of the fate of local peoples dependent, materially and spiritually, upon land for survival should alert us to some potential problems.

This brings me to the third and most central question posed: how have anthropological theories about Aboriginal cultures, popular understandings of the relationship between culture and difference, and anthropologists themselves been employed in both challenging and legitimating the Crown's legal arguments in this context? This thesis has traced the involvement of anthropology and anthropologists in this process to date, particularly in British Columbia. On behalf of Aboriginal peoples, anthropologists have argued for tolerance and respect for differences. Canadian anthropologists--particularly those working in the North--by documenting the ongoing viability of hunting, fishing and gathering economies have both supported Aboriginal struggles and challenged anthropological theoretical orthodoxy in areas like assimilation/acculturation theory, and economic and technological determinism. In other words, the record of anthropological advocacy in Canada is one in which the discipline can take some pride (see Dyck and Waldram, 1993).

Anthropologists, at the same time, have been subjected to legitimate and illegitimate challenges by both the courts and by Aboriginal peoples. The courts, to date, have for the most part concluded that anthropological evidence is not by and large reliable, and anthropologists are suspect in their loyalties. However, these conclusions have been arrived at by jurists working within their own terms, and, as I have argued in this thesis, these terms have not always been reasonable or credible, much less desirable. Stated plainly, it may be to our credit as a discipline that, under these conditions, we have not succeeded in gaining the overwhelming endorsement of the judiciary.

Presumably, anthropologists should have a lot to offer now that the question before the courts has become one of defining Aboriginal cultural distinctiveness, and the

underlying assumptions of colonial law and ideology. And, I will argue that we do have a significant contribution to make. There are however, some important factors to take into account in the current situation.

In the course of the last twenty years, an increasingly well-educated and politically astute--in terms of relationships with government--elite has emerged among Aboriginal peoples. A particularly powerful faction of this elite are "the Native lawyers" who, having appropriated "the master's tools" are engaged in various attempts to "dismantle the master's house." This group is particularly vocal and vociferous in their criticism of non-Aboriginal advocates, particularly anthropologists and lawyers.

The position emerging within Aboriginal circles can be categorized as "cultural nationalism" and is represented by Mary Ellen Turpel, a leading Aboriginal legal scholar.² Turpel argues that cultural differences should be understood as incommensurable differences. She says:

When we think of cultural differences between Aboriginal peoples and the Canadian state and its legal system, we must think of these as problems of conceptual reference for which there is no common grounding or authoritative foothold (Turpel, 1991(a):45).

Turpel goes on to criticize the legal strategy employed in the Gitksan and Wet'suwet'en case as follows:

I would seriously question whether differences can be or should be put before the court as evidence of the court's lack of authority, culturally...

² For a contemporary anthropologically based critique of cultural nationalism see Handler, 1984; 1985; 1991. The subject of the relationship between anthropologists, emerging Aboriginal elites, and cultural nationalism has received considerable attention in recent years particularly in the Pacific. See Friedman, 1992; Hanson, 1989; Kessing, 1991; Linnekin, 1991. These issues are also dealt with in a wide variety of social and cultural contexts in a recent collection of essays entitled The Politics of Culture, see Williams, 1991.

Nevertheless, some lawyers see this as a viable strategy. "The first task in advancing cases involving Aboriginal rights through Canadian courts is to make the different world views of the Indian Nations visible" Mandell writes. I would query how, by whom, and to what end? Once again, cultural differences are not such that they can be managed within the dominant legal conceptual framework. There are huge epistemological problems that would make this technique appear even more hegemonic in that to try to understand in that context is to deny even more fully the implications of cultural difference (ibid: 50) (See also, Monture, 1986).

After articulating a scathing critique of anthropology in general, Turpel goes on to quote favourably from Ruth Benedict's thesis in Patterns of Culture that different cultures,

...are oriented as wholes in different directions. They are travelling along different roads in pursuit of different ends, and these ends and these means in one society cannot be judged in terms of those of another society because essentially they are incommensurable (ibid:56).

This kind of essentialist analysis of "culture" as naturally or metaphysically or genetically given has for a long time been rejected by anthropologists in favour either of "learned behaviour" models or, more recently, by a focus on the "constructed" nature of culture. Turpel's position is that "For a judge, a situation of cultural difference should be and must be a situation of not knowing" (ibid:62). She makes it clear that she extends this analysis to non-Aboriginal people as a whole. Of course, Turpel and others are engaged in lobbying, in particular, for an "alternative" or "parallel" Aboriginal justice system. The strategy adopted promotes both the reification and codification of theories of cultural differences, and models of "traditional culture" into law, and the neglect of a more comprehensive critique of law and the legal system. This position is most clearly articulated by another influential Aboriginal legal scholar, Patricia Monture who writes:

A doctrinal framework which holds these two valid theoretical perspectives, the First Nations view and the established Canadian view, on Aboriginal Rights must be constructed. This new legal doctrine which will enhance the validity of both perspectives, is essential to establishing fair, just, and peaceable relations in this country. Both of the equally valid legal traditions of this country must be willing to participate to each others' mutual satisfaction and agreement (Monture, 1990:191).

For conscientious anthropologists who have survived a decade or more of wrenching self-criticism and the deconstruction of Eurocentric analytic categories, particularly those that posited culture as integrated, bounded, and homogenous, and as constituting an autonomous realm of meaning, the adoption by many Aboriginal peoples of what some might call "the worst of anthropology," like the culture and personality school represented by Benedict, is perplexing at best. For those of us who do not support the position that the "established Canadian view" is valid and deserving of respect, we find ourselves in an odd position.

These developments present many anthropologists with serious problems. Not only does it tend to promote and legitimate often idiosyncratic constructions of historical and anthropological "facts" that our training makes it hard for us to validate, but anthropology for the most part has argued strongly against essentialist analyses of culture as these have historically been linked with racism and have been the foundation of ideologies of colonialism and imperialism. The popular essentialism of identity politics locates "ethnographic authority" exclusively in the experience, feelings or blood stream of Aboriginal peoples. Such a stance forecloses debate before it begins, and most certainly delegitimizes traditional anthropologists and anthropological knowledge based on the interpretation, translation and representation of Aboriginal cultures.

On the other hand, Scott reminds us that "the first responsibility of an anthropological criticism...(is)...the interrogation of the space of its own theoretical procedures" (Scott, 1992:376). He continues:

I can readily agree that in yesterday's ethnographies there was an unproblematized representation of culture as integrated, static and the rest. And yet I think that this recognizably 'anti-essentialist' characterization of 'culture' as mobile, as unbounded, as hybrid, and so on, is itself open to question: for *whom* is 'culture' unbounded--the anthropologist or the native? What I am trying to

suggest is that the 'boundedness' or otherwise of what is called 'culture' is something that gets established in kinds of authoritative discourse, of which western 'theory' is itself one, and the native's discourse another. Obviously neither 'boundedness' nor its absence is *given* in the world: neither in the world of the anthropologist nor in that of the native. To say *a priori* that 'cultures' are not 'bounded' therefore is misleading since local discourses do, in fact, establish authoritative traditions, discrete temporal and spatial parameters in which it is made singularly clear to cultural subjects and their others what is (and who are) to belong within these parameters, and what (and who), not (ibid:376).

The question of whether or not essentialism is "legitimate" when employed by marginalized peoples and groups as a political strategy is the subject of a lot of debate within and without anthropology at the moment. It would appear that contemporary liberal democracies like Canada can accommodate this discourse through the adoption of liberal multiculturalism. The more difficult questions are, I believe, can social relations be effectively or radically transformed when informed by such an ideological position. It is this question that is increasingly being asked among "rank and file" participants in contemporary social movements, where the essentialist paradigm shows signs of exhaustion, even while it becomes increasingly entrenched as a professional ideology. And, if not, then what are the implications for the non-elite majority of Aboriginal peoples, and what kind of future does this suggest for everyone? Cornel West, commenting on grass roots movements among African Americans and their relationship to the black middle class political leadership, describes an emerging interest in "beginning not with the problems of black people but with the flaws of American society," and a turning away from "racial reasoning" toward the development of "moral reasoning." Similar trends can be seen within the Aboriginal movement in Canada at the community level. This involves not a rejection of commitment to distinct cultural survival, but a rejection of dualistic analyses trapped in the past and an opening up to new configurations and relations projected into the future. I would argue that anthropology, given its historical scepticism regarding "essentialist" theories of various sorts, and its comparative orientation, has

much to offer to this debate. A more difficult problem may be making links with a clearly identified audience or constituency, other than ourselves, interested in engaging in these debates, which are notably absent in the relatively elite circles, Aboriginal and non-Aboriginal, that anthropologists are most accustomed to working in.

This brings me, finally, to the fourth and final question posed at the outset about the relationship between writer and text, or anthropologist and subject. As described in the introduction, this thesis has in some way also served as a vehicle for me to try to find a place to stand as a "critical anthropologist." I seek an answer to the question posed by Annemiek Richters:

To whom do critical thinkers link their criticisms in a society where the acceptance of this hegemony of void is seen as progress, wisdom, and the rightful recognition of the sovereignty of the individual, in a society so hegemonic in its subtle but effective concealment of real powers and interests that not even a latent resistance seems possible? In this situation we need critical intellectuals who have Gramsci's 'pessimistic intellect and optimistic will,' Foucault's 'pessimistic hyper-activism,' and Habermas's 'hope without hope' to fight the *peists*³ of capitalistic culture and to keep believing in the social relevance of their critical activities (Richters, 1988:443).

I have attempted to accomplish this in a number of ways in this thesis. First, I have tried to fulfil the role of "witness" and "recorder," by meticulously documenting what I consider to be a case of gross injustice. I believe there is always good work to be done by anthropologists in describing "reality" thickly and thoroughly. Second, I have tried to serve as what Gramsci called 'an organic intellectual of ourselves,' which includes an obligation to critically monitor the public use of the products of our own labour and discipline. This I attempted to do in my criticism of the Crown's use of anthropology and anthropologists, Chief Justice McEachern's Reasons for Judgment, and by compiling a

³ "Peists" are monsters of Celtic mythology who assume a variety of shapes and forms.

critical review of colleagues' responses to these events. Third, I have tried to address the dilemma described by Bauman who suggests that,

To remain eligible for the bonuses, contemporary intellectuals must stick unswervingly to the Weberian injunction of keeping the poetry of values away from the prose of bureaucratically useful expertise (Bauman, 1992:17).

For anthropologists this dilemma manifests itself both when we seek legitimacy within institutions like courts and government policy-making fields, and increasingly, among Aboriginal elites. As an alternative, Bauman suggests, critical intellectuals should take advantage of the autonomy that is our "most precious and cherished consolation for the eviction from the house of power" (ibid: 18) and focus on building critical community. There is a need, in other words, to pay attention to locating and participating in building an audience for critical analyses. In the contemporary world, that in itself is a considerable challenge.

Such critiques may not serve "useful" purposes in the traditional sense of "applied" or "advocacy" anthropology, in that they are not likely to be readily adopted by ethnographic subjects and put to use in policy or legal forums, or even necessarily in arenas for public education. However, as Bauman argues,

The world needs self-criticism as a condition of survival and decency. But it does not make the life of criticism easy (ibid: 186).

For me, for now, this is where I stand.

APPENDIX 1

The following summarizes the seven cases heard by the B.C. Court of Appeal in 1993 and referred to in Chapter 7.

R. v. Alphonse

On April 3, 1985, William Alphonse, a Shuswap member of the Williams Lake Band, living on the Sugar Cane Reserve, shot and killed a deer on his traditional hunting grounds, during closed season and without a permit. The lands are currently held in fee simple—privately owned—by the Onward Cattle Co. Ltd. The lands were originally sold by the Crown to a private individual in 1890 or 1896. Alphonse was charged under the *Wildlife Act of BC*, with one count of hunting out of season and another of having dead wildlife in his possession.

Alphonse's defense was that he was exercising an unextinguished aboriginal right to hunt on traditional territories protected under section 35(1) of the *Constitution Act 1982*. At his first trial in the Provincial Court of B.C. Alphonse was acquitted of both charges. The Crown appealed this decision and the Appeal Court found Alphonse guilty of the first offence under the *Wildlife Act* (hunting out of season), but dismissed the appeal on the second charge of being in possession of dead wildlife.

Appeal Court Judge MacFarlane, writing for the majority, found on appeal that Mr. Alphonse was exercising an unextinguished aboriginal right, and that the <<Wildlife Act>> is of no force or effect with respect to aboriginal persons. Justice Lambert, writing his own reasons agreed. He wrote:

It is therefore my opinion that when Mr. Alphonse shot the antlerless male mule deer on 3 April, 1985...he carried out the act which lay at the core of his Indianness, namely the act of killing the deer and keeping its carcass (Reasons: Alphonse:52).

R. v. Dick

The next case, *R. v. Dick*, also concerned the application of the provincial *Wildlife Act*. In this case, however, the animal in question was an elk, which is under special protection for conservation purposes. The regulations that have developed governing the hunting of elk on Vancouver Island have been a point of contention between provincial game managers and Aboriginal peoples for some time. Vancouver Island is divided into a number of wildlife management areas. Each year a limited number of elk hunting permits are allocated to each area specifying the number, age and sex of animals that can be killed that year. Anyone wishing to obtain one of these permits must enter a lottery which is open to all permanent residents of the province. No special provisions were made for Indian access for food or ceremonial hunting purposes. A number of elk hunting licenses, were, however, officially set aside for commercial hunting guides who could distribute them to non-resident, trophy-hunting clients

Ralph Dick was found in possession of a dead elk, shot by his son, and charged. He argued in defence that first, he was exercising an aboriginal right protected by section 35(1). The province argued that the primary purpose of the *Wildlife Act* was conservation and that the Sparrow decision had given priority to conservation over Indian rights. The trial judge, in finding in favour of Dick, wrote as follows:

...the people of Gold River are cognizant of and accept the need for conservation and propagation of the elk herds in their area. They take no issue with the concept of limited entry hunting permits providing their right to hunt for food is recognized and given effect to within that concept. These people are quite prepared to co-operate with the officers of the government in reasonable conservation measures. But they question

rather cynically how it can be that within the concept of limited entry hunting a specific number of permits to hunt elk is allocated to professional guides for trophy hunting while their right to hunt these animals for food is denied (ibid:63).

Appeal Court Judge Macfarlane, representing the majority, found that "Mr. Dick was exercising an aboriginal right when he was found in possession of dead elk" (Reasons, Dick, Appeal:69). And, while holding, as he did in the Alphonse case, that the *Wildlife Act* is not necessarily, in a legal sense, inconsistent with s.35(1), in this case the allocation of permits to guides and trophy hunters could not continue unless Indian food hunting rights were given first priority. This decision was based on Sparrow.

Justice Lambert took a stronger, minority position, arguing that "s.34(2) of the *Wildlife Act* did not apply to Mr. Dick at all (just as s.27(1) did not apply to Mr. Alphonse)" (ibid:74).

R. v. Van Der Peet

The third case, *R. v. Van Der Peet*, dealt with a different question than the Alphonse and Dick cases: whether the aboriginal right to fish extends to commercial fishing. Dorothy Van Der Peet, a member of the Sto:lo nation, sold fish caught under an Indian Food Fish license which prohibits selling, bartering or offering to sell or barter any fish caught under its authority. The Crown called Dr. Gordon Stryd as an expert witness in anthropology, and the Sto:lo called Dr. Richard Daly. Stryd argued that bartering and trading fish had been an "occasional, incidental and opportunistic" occurrence prior to contact and was not central to Sto:lo life the way fishing for food and ceremony was. Daly argued that the Sto:lo had produced, preserved and traded surplus fish prior to contact, and had sold large amounts of fish, for cash, to the British between 1820 and

1846 when British sovereignty was established. Therefore, the selling of fish was part of the aboriginal right protected under section 35(1). This was a case where a practice had become "traditional", "unique" and "integral to the distinct culture" after contact and for a long, long time before the assertion of sovereignty.

The Provincial Court judge, Scarlett, agreed with Stryd and found Van der Peet guilty. He said,

Clearly, the Sto:lo fish for food and ceremonial purposes. Evidence presented did not establish a regularized market system in the exchange of fish. Such fish as were exchanged through individual trade, gift, or barter were fish surplus from time to time. Natives did not fish to supply a market, there being no regularized trading system, nor were they able to preserve and store fish for extended periods of time. A market as such for salmon was not present but created by European traders, primarily the Hudson's Bay Company. At Fort Langley the Sto:lo were able to catch and deliver fresh salmon to the traders where it was salted and exported. This use was clearly different in nature and quantity from aboriginal activity (emphasis in the original).

Appeal court judge, Selbie, disagreed and found Van der Peet not guilty. He said:

In my view, the evidence in this case, oral, historical and opinion, looked at in the light of the principles of interpreting aboriginal rights referred to earlier, is more consistent with the aboriginal right to fish including the right to sell, barter or exchange than otherwise and must be found so. We are, after all, basically considering the existence in antiquity of an aboriginal's right to dispose of his fish other than by eating it himself or using it for ceremonial purposes--the words 'sell', 'barter', 'exchange', 'share,' are but variations on the theme of 'disposing'. It defies common sense to think that if the aboriginal did not want the fish for himself there would be some stricture against him disposing of it by some other means to his advantage. We are speaking of an aboriginal 'right' existing in antiquity which should not be restrictively interpreted by to-days standards. I am satisfied that when the first Indian caught the first salmon he had the 'right' to do anything he wanted with it--eat it, trade it for deer meat, throw it back or keep it against a hungrier time. As time went on and for an infinite variety of reasons that 'right' to catch the fish and do anything he wanted with it became hedged in by rules arising from religion, custom, necessity and social change. One such restriction requiring an adjustment to his rights was the need dictated by custom or religion to share the first catch--to do otherwise would court punishment by his god and by his people. One of the social changes that occurred was the coming of the white-man, a circumstance, as any other, to which he must adjust. With the white-man came new customs, new ways and new incentives to colour and change his old life, including his trading and bartering ways. The old customs, rightly or wrongly, for good or bad, changed and he must needs change with them--and he did. A

money economy eventually developed and he adjusted to that also--he traded his fish for money. This was a long way from his ancient sharing, bartering and trading practices but it was the logical progression of such. It has been held that the aboriginal right to hunt is not frozen in time so that only the bow and arrow can be used in exercising it...The Indian right to trade his fish is not frozen in time to doing so only by the medium of the potlatch and the like....(ibid:91).

On Appeal, however, Justices Macfarlane and Taggart found that the first trial judge was right. Applying the Sparrow test, they said that

Fishing was a integral part of the distinctive culture of the aborigines. Fish had a religious significance. Fish were revered. They were used for food, but played a significant role in ceremonial and social ways...But that is not to say the purpose of fishing was to engage in commerce. In our opinion, trade with the British was not of the same nature and quality as the aboriginal traditions disclosed by the evidence...As a practical consequence the aborigines probably began to adjust to those changes. Undoubtedly they began to sell fish on a commercial scale. But that practice, which had not been integral to the organized society and its distinctive culture, and which was induced and driven by European influences ought not, in my opinion, to qualify for protection and priority as an aboriginal right...the question of what is an aboriginal right deserving protection is not determined necessarily by reference to the activities in which aboriginal persons were engaged in 1846. The test is whether such activities or practices were integral to the distinctive culture of the aborigines... (ibid:92).

Macfarlane and Taggart concluded that their decision should not be interpreted to mean that "persons of aboriginal ancestry are precluded from taking part, with other Canadians, in the commercial fishery. But they must be subject to the same rules as other Canadians who seek a livelihood from that resources" (ibid).

Justice Wallace agreed, but his ruling stressed his opinion that to consider the aboriginal right to fish as being a commercial one would have the effect of "enlarging the scope of 'existing aboriginal rights' recognized by common law at the time of sovereignty" (ibid:105). He said:

If s.35 had, as its purpose, the recasting of the nature and scope of aboriginal rights to reflect the aboriginal community's objective of satisfying its economic needs, one result would be the creation of an aboriginal priority in the

commercial fishery along the coasts and rivers of British Columbia. The effect of this priority would be that other interest groups wishing to participate in the fish harvest for any purpose--be it food, sports or commercial--could do so only after the aboriginal commercial catch (as determined by their economic needs) was satisfied...The consequence would be to give Constitutional protection to aboriginal rights of a scope and nature which reflects objectives rather than traditional aboriginal practices integral to the culture and traditional way of life of the native community (ibid:105-106).

Justice Lambert, writing on his own, concluded that "Mrs. Van der Peet was exercising an aboriginal right when she sold ten salmon to Mrs. Lugsdin for \$50.00" (ibid:134). Lambert argued that when the Sto:lo began selling fish to the first Europeans who arrived in the early nineteenth century "all they were doing was exploiting a new opportunity. The new opportunity did not give rise to a new custom or practice. It represented only a response to a new circumstance in the carrying out of the existing practice" (ibid:134).

Lambert defended his reasoning by claiming that he was applying a "social perspective" to the definition of aboriginal rights. "I think the 'social' perspective is the correct one, because rights are not defined in terms of the purpose for which they are to be exercised, but in the way the rights may be employed in a social context (ibid: 134). He continued:

The fact that non-aboriginal people now engage in or formerly engaged in the same practices as aboriginal people does not indicate that the practice was not or is not an aboriginal practice. No doubt the Hudson's Bay traders who arrived at the Fort Langley post in the early 19th century had fished for salmon in their boyhood in the Tay or the Dee. A practice, tradition or custom may be integral to the distinctive culture of an aboriginal people even if a similar custom is integral to the distinctive culture of many other peoples as well (ibid:136).

Justice Hutcheon also agreed with Mr. Justice Selbie's decision that the aboriginal right to sell fish includes the right to sell, trade or barter. He based his decision on the

fact that the evidence showed that Sto:Lo had been engaged in the "commercial exchange of fish" for at least 26 years when, in 1846, British sovereignty was declared.

He rejected Chief Justice McEachern's extension of the "test" to include that aboriginal rights must have been in effect for a "long, long time" prior to British sovereignty. And, he rejected the Crown argument that "aboriginal rights must describe pre-contact life."

R. v. Gladstone and Gladstone

R. v. Gladstone and Gladstone, the fourth case heard by the *Delgamukw* Appeal panel, arose from a "sting" operation wherein Department of Fisheries' officers attempted to set up two members of the Hieltsuk nation. The story was reported in court by the Crown as follows:

Donald and William Gladstone are members of the Heiltsuk Indian Band of Bella Coola. They arranged to ship to Vancouver approximately 4200 pounds of herring spawn on kelp. The fisheries officers were alerted by an informant and they kept under surveillance the transportation of the crates from the freight carrier in Vancouver to a warehouse in Richmond...Later that day, William Gladstone arrived with a U-haul truck to pick up the crates. He drove into Vancouver and parked in a lot at Seymour and Nelson Streets. William and Donald Gladstone then drove in a Javelin automobile to the premises of Seaborn Enterprises Limited, a retail fish store at 1310 West 73d Avenue in Vancouver. They had with them one white container of herring spawn which they took into the store. William Gladstone spoke to Mr. Katsu Hirose, the owner, and asked, according to Hirose, if he was 'interested in herring on kelp' to which he replied he 'never touched herring on kelp from native Indians'. They left and returned to the parking lot where they were arrested. Subsequently, the herring spawn on kelp was sold by the fisheries officials for \$143,944.00

This case involved complicated charges and defences under the Criminal Code having to do with entrapment, search warrants, and evidence, interesting in their own right but not directly relevant to this thesis. I will review only the aboriginal rights aspects of this case. At the first trial, the judge acknowledged that the Heiltsuk had harvested

herring spawn on kelp for hundreds of years. Alexander Mackenzie's 1793 journal recorded his having traded with them for this foodstuff. Therefore, Judge Lemiski found, the right to trade and barter herring roe was an aboriginal right that the *Fisheries Act* regulations interfered with. However, he concluded that this interference was valid in this case because the Gladstones had attempted "to sell a relatively large quantity of spawn in a surreptitious manner to a foreign buyer in a location far removed from the Heiltsuk Band's region" (Reasons, Galdstone, Appeal:158).

The B.C. Court of Appeal judge, Anderson, agreed with the trial judge, although he found the *Fisheries Act* regulations did not, in general, interfere with the Aboriginal right to fish. He was adamant, however, that selling 4200 lbs of herring roe for several hundred thousand dollars was "inconsistent with a `traditional aboriginal right'".

It is interesting to note that in this case, which was identical, legally, to the Van der Peet case, in that the strict question before the Appeal court was whether or not the aboriginal right to fish included commercial rights, the "moral" difference between Dorothy Van der Peet selling her white neighbour Mrs. Lindsgren ten salmon for \$5.00 each; and the Gladstone brothers selling their 4800 lbs of herring roe to a Japanese fish buyer for thousands, captured the interest of the judges.

Justices Macfarlane, Taggart and Wallace agreed that "the activity in question could not be viewed as an integral part of the distinctive culture of the Heiltsuk people...the activity is different in nature and quality than the aboriginal right...(168). They continued:

The case is not one that turns on quantity, although both judges took account of the quantity involved. There was evidence of considerable quantities

being transported to other Indians in aboriginal times. But the quality and character of the activity in aboriginal times was quite different from that disclosed by the evidence in this case. The aboriginal activity was rooted in a culture which gave significance to sharing a resource, to which one nation had ready access, while other Indian peoples did not.

... The appellants were not exercising an aboriginal right when they attempted to sell herring spawn on kelp to a Japanese fish product buyer in Vancouver (ibid:169).

Again, Mr. Justice Lambert took his own position. He argued:

...that the aboriginal rights of the Heiltsuk people to harvest herring spawn and to trade their herring spawn extensively and in considerable quantities have been established...For those reasons I have concluded that the Heiltsuk people have existing aboriginal rights to harvest herring spawn deposited on kelp, hemlock branches, and similar substrates, at their traditional locations, not only for their own consumption, but also for the purposes of trade in quantities measured in tons, subject only to the need for conservation of the resource; and that they have an aboriginal right to trade in herring spawn in quantities measured in tons (ibid:180).

Lambert continued to point out that he rejected the trial and appeal court judges' reasoning and found it to be an example of the "discredited frozen rights theory...and reflect a concept of aboriginal rights which fails to reflect any aboriginal perspective and which adopts too narrow a level of generality" (ibid:81).

R. v. NTC Smokehouse Ltd.

In *R. v. NTC Smokehouse Ltd.* the issues pertained to the exercise of the aboriginal right to fish when articulated with an aboriginally-owned corporate venture. NTC Smokehouse Ltd., a fish processing plant jointly owned by the Sheshaht and Opetchesaht Indian Bands, and operating under a business license granted by those bands, purchased 119,000 pounds of fish not lawfully caught under the authority of a commercial fishing license but rather under an Indian Fish License issued under the authority of a band by law. NTC Smokehouse then sold 105,000 pounds of this fish.

The legal issues were:

- (1) Do the sections of the *Fisheries Act* [4(5) and 27(5)] under which NTC Smokehouse Ltd. was charged constitute an infringement of Aboriginal rights protected by the constitution?
- (2) Does the aboriginal right to fish include the right to sell?
- (3) Does the band by-law withstand scrutiny?

The NTC Smokehouse Ltd. argued, re: question one, that they were not accountable for how the fish was caught. Their lawyers claimed that once fish is caught, it becomes the private property of the person who caught it. This person's civil rights regarding the disposition of private property are a matter of provincial jurisdiction and therefore regulations of the federal *Fisheries Act* are not applicable.

Regarding question 2, they argued that the aboriginal right to fish does include a proprietary and commercial interest and that fishing in their territories was properly regulated by their own band by-law. Further, the band by-law applies to all traditional hunting, fishing and gathering areas on and off reserve.

In presenting their appeal facts the Crown and the Aboriginal parties submitted an agreed upon statement of facts indicating that, since the Sparrow decision and the new position adopted by the Province of British Columbia in the *Delgamuukw* appeal, these facts were not at issue before the Courts anymore. This statement of facts would serve as a model for future cases and represents a consolidation of agreement on issues formerly the subject of dispute. As we will see, the statement also attests to the validity of anthropological and historical evidence in the determination of these facts, and anthropologists and historians as expert witnesses. Since it represents a significant

turning point in the emergence of Aboriginal title and rights in Canadian law, I reprint it here in its entirety.

STATEMENT OF FACTS

1. The Sheshaht Indians have lived on the land adjacent to the Somass River, near Port Alberni, as an organized society since long before the coming of European settlers.
2. The taking of salmon from the Somass River was part of the Sheshaht culture and remains so to this day.
3. For the Sheshaht, the salmon fishery has always constituted a part of their distinctive culture. Salmon was consumed for subsistence. Salmon was consumed on ceremonial and social occasions. Salmon was also an article of trade which was used by the Sheshaht for livelihood purposes. Richard Inglis, curator of the Provincial Museum and renowned authority with respect to trade relations of West Coast People stated:

'The Somass River Fishery was and still is an integral part of the Sheshaht economy...The Fishery was to be used not only as a food supply but also as a means to earn a livelihood.

4. Commissioner Patrick O'Reilly was appointed Indian Reserve Commissioner for the Province of British Columbia and in that capacity he allotted Reserves including Sheshaht Reserve #1 TSAH AH EH. The letter of appointment and instructions to Commissioner O'Reilly from the Department of Indian Affairs dated August 9, 1890 stated that:

'You should in making allotments of lands for Reserves make no attempt to cause any violent or sudden change in the habits of the Indian Band for which you may be setting apart the Reserve land; or to divert the Indians from any legitimate pursuits or occupations which they may be profitably following or engaged in; you should on the contrary encourage them in any branch of industry in which you find them so engaged.'¹

6. The first non-Indian to make contact with the Sheshaht People was Charles Barclay in 1787. He traded metal with the Sheshaht for fresh salmon.
7. The Sheshaht traded fresh fish to the first European traders. That fish was shipped to the Hudson's Bay Company in Victoria and was transshipped to the Sandwich Islands or the Hawaiian area. When asked about the Sheshaht trading, bartering, or selling salmon from the Somass River, Richard Inglis gave *viva voce* evidence as follows:

¹ N.B. No. 5 not in original.

'Salmon was sold to the first fur traders that came into the region. It was sold to early settlers, to early store owners. It was sold to traders starting at least in the 1840s, probably through many of the decades of the 1800s to the independent traders coming on the coast and then taking the salmon to Fort Victoria and then transshipped to Hawaii. Salmon was sold to the canneries and formed a major - a major part of the wage-earning ability of the Native People. Throughout this period salmon has always been traded, or has always been exchanged between Native groups and given out at ceremonies and served at feasts to visiting groups, and also provided to members of the community who have moved away. That is family, friends. The salmon has been traded with those people as well, and provided as a family obligation.

8. The Somass River fishery took increased focus after contact with Europeans as a food resource and as a means to obtain a livelihood. The Somass River fishery is the one traditional economic pursuit that the Sheshaht have continued from precontact times to the present.
9. Patricia Berenger, anthropologist, gave expert evidence that the Sheshaht traditionally relied on Somass River salmon for winter food requirements, feasts and ceremonies. She also noted:

'Cured salmon and sea foods were also used for purposes of trade and barter, to enable the chiefs to secure valuable relations of exchange with neighbouring tribes'

10. Patricia Berenger described how the Sheshaht utilization of the Somass salmon fishery was essentially unchanged from the traditional pattern until the time when the Sheshaht sold fresh and cured fish to the isolated white settlers at Alberni. She noted that in the latter instance the Sheshaht spent the money they earned on commercial trade items and some staple food goods.

In answer to the first question raised in *R. v. NTC Smokehouse*, Justices Wallace, Macfarlane and Taggart found in the negative, arguing that the *Fisheries Act* regulation of the catch was necessary and that food fishing and commercial fishing must be separated otherwise the resource will be depleted.

In answer to question 2, what makes aboriginal rights, aboriginal, the majority ruling adopted the *Sparrow* test. In answer to question 3, the Appeal court judges found,

unanimously, that the Somass River was not included within the boundaries of the reserves and therefore was outside the jurisdiction of the band by-law.

Justice Lambert, while agreeing with the majority, took pains to point out that this case involved a corporate entity and not an individual. His interpretation of the prohibition on selling fish under the Indian Food Fish licenses was that it was intended to curb an unregulated black market participated in by individuals. He concluded that there is no reliable "objective" evidence to prove a link between prohibition of the sale of Indian food fish and depletion of the resource. Although, he agreed that the correlation has been made so many times that it deserves "judicial notice". However, if there is not in fact a "real" link, as opposed to an "assumed" link, then this prohibition penalizes processors, packagers, and consumers. Lambert suggests that a solution may lie in a constitutional severing of individuals and corporations.²

The sixth case addressed involved three members of the Lewis family of Squamish, Allan Frances, Allan Jacob, and Jacob Kenneth, who were charged with fishing on the Cheakamus River, without a permit, out of season, using a net longer than allowed by regulation. Once again, the crown and the Aboriginal litigants submitted an agreed upon statement of facts similar to that in *R v. NTC Smokehouse Ltd.* The Lewis' argued that their fishing was legal under the terms of the Squamish Indian Band By-Law. The case was settled on a question of technicality. The Appeal Court judges found that in this case the boundaries of the reserve extended to the middle of the river and therefore the two fishers who were standing on the reserve side of that middle line were fishing

² For a full and detailed discussion of Justice Lambert's findings and reasoning on the issue of the proprietary and commercial interest inherent in aboriginal title, see pages 251 - 254 of his findings on *NTC Smokehouse*.

legally, while the one standing on the other side was not. Lambert concurred with the majority in this finding, but stressed

I repeat, this appeal does not relate to the origin, nature or scope of the aboriginal title of the Squamish people to their ancestral land, to the Squamish River, or to the fishery or the fish in the Squamish River. Nor does it relate to the aboriginal fishing rights of the Squamish people (Reasons, Lewis, Appeal:290).

R. v. Nikal

The seventh and final case involved a Gitksan, Jerry Benjamin Nikal, who was charged with fishing without a license and pleaded in defence that he was fishing with a license issued under Gitksan and Wet'suwet'en By-law. Again, arguments were developed about whether the boundary of the reserve extended into the river or not. However, the central issue in this case was whether or not the requirement that Indians obtain a DFO food fishing license AT ALL was an infringement on their aboriginal right to fish as protected under the Constitution. On this important question of the socpe of Aboriginal jurisdiction, the judges found as follows: Macfarlane, Hutcheon and Taggart argued that it was not. Wallace said it could be, but on the facts of this particular case it was not. Lambert said it was an infringement as it stood now but that it should be replaced by a negotiated agreement that would achieve conservation purposes.

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