Mapping Songs, Mapping Histories:
The Negotiation of Cultural Perspectives on Gitxsan Territory

by

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ABSTRACT

Behind political and legal conflicts over aboriginal land and resource rights in British Columbia lies a more fundamental impasse in cultural perspectives. For aboriginal people, a dilemma emerges between the compulsion to communicate their principles and values in terms that non-aboriginal people can understand (at the risk of sacrificing important context), and the compulsion to preserve "absolute meanings" at the risk of sacrificing communication. This thesis explores theoretical approaches to translation as a way of moving beyond this impasse in Crown-Aboriginal relations. It follows the efforts of the Gitxsan First Nation—both in the courts and in practical initiatives—to translate aspects of an aboriginal perspective as evidence of their claim to the land.

This thesis examines three examples of impasse in cultural perspectives, and the Gitxsan's response to that impasse. The first occurs in historic disputes over trapline registration in the 1930s, when different cultural conceptions of "trapline" led to conflict and, in isolated circumstances, to negotiation. The second occurs in the trial of *Delgamuukw* v. *The Queen* (1991), where differences over the nature of aboriginal title and the presentation of aboriginal evidence led to an impasse in communication in the trial, and to a negotiation of meanings in subsequent appeals. In the third example, the Gitxsan explore ways of facilitating cross-cultural communication through the translation of aboriginal evidence into graphic maps. The maps demonstrate a Gitxsan understanding of territory in which cultural rights are inextricably connected to the ecosystems on which they are based.

In each case, differences between Western and Aboriginal concepts remain constant; the potential for conflict or, alternatively, for negotiation builds in correlation with development pressures. Taken together, the examples show how the Gitxsan have adapted their claim of ownership and jurisdiction of their territories to different political environments, using different technologies. By presenting evidence from an aboriginal perspective, the Gitxsan encourage the Crown to begin its own process of translation: to

make room for aboriginal concepts of title, and aboriginal methods of presenting evidence, in order to reach equitable agreements. The Gitxsan's approach has implications not only for their own development plans, but also for those of other First Nations.

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PREFACE

I first began to think about cultural conceptions of territory standing in a clearcut with Ralph Stocker, a Haida friend from Masset. All around us the land had been carved into numbered blocks for incremental logging: Datlamen 12, 1995; Datlamen 13, 1996. Named for the river at its base, Datlamen 12 described an L-shaped block of stumps interwoven with the branches, fallen debris, and sun-scorched vaccinium shrubs of former forest; it fit like a missing puzzle piece around Datlamen 13, a sloping stand of forest framed on one side by the twisting course of a creek. Roads and spurs completed the grid, and flagging tape flashed an indecipherable language of neon yellow at the corners of our vision.

In this landscape of cutblock boundaries coded in the jargon of forest engineers, Ralph told me the story of the place and what it meant to him. That mountain, he said, pointing to a rounded outline in the distance, is Towustaasen. The story of its existence is tied to the story of Tow Hill, which rises above the otherwise flat and windswept landscape of North Beach, some 70 kilometres to the northeast. The story goes something like this: Tow and Towustaasen are brothers, and in the time before they lived side by side. As the years went by, the two brothers grew less and less friendly. Towustaasen accused Tow of eating more than his share of fish, and their argument escalated. Eventually, their differences became so irreconciliable that Tow moved to his current location at the end of North Beach, creating the Juskatla Inlet in his wake. Towustaasen remained at the other end of the inlet and, in their isolation, both brothers enjoyed all the fish they could eat.

This story reveals the implications of different cultural perspectives, and how these perspectives translate physically on the territory. While the road names, property markers, and flagging tape of modern development present one way of reading territory, meanings are also held in the lean of a lone tree on a hilltop, in the face-like features of a rock-formation, in the claw marks left by a bear in the bark of a tree. While one perspective looks for meaning in universal signs (the numbered cutblock boundary and the coloured flagging tape hold the same significance regardless of setting), the other

looks to the particular. In recognizing the connection between landscape and cultural stories, we open our perception to alternate histories. This is the same connection, and the same effect, that the Gitxsan and Wet'suwet'en hoped to achieve in 374 days of testimony in *Delgamuukw* v. *The Queen.*

Two summers later, in 1997, I returned to Haida Gwaii to take part in an inventory and mapping project, the goal being to estimate remaining quantities of large, straight-grained cedar for Haida cultural use. The Haida hoped to prove an aboriginal right to cedar and, from this, to protect remaining quantities of cedar for cultural purposes. To do this, they needed first to establish the rarity of suitable old-growth cedar on the islands, and second to connect a discrete right to harvest cedar with the maintenance of a broader cultural livelihood. My job was to facilitate this broader initiative. What I discovered, however, had nothing to do with how much cedar was remaining, and everything to do with the difficulties of information exchange and ways of organizing information, tensions between ideas of a "past" culturescape and present needs, and different ways of perceiving the same territory.

The experience challenged any romantic ideas I may have had about "life on the territory." Haida carvers did not live in perfect accordance with past ways of life, selecting a cedar after careful spiritual and physical preparation. Instead, many artists purchased suitable logs from the timber companies and had them delivered. Often, the poles and masks they carved were commissioned by distant collectors, or private and public institutions. Neither, however, was this the assimilated culturescape of Pierre Elliott Trudeau's 1969 White Paper. Jars of oolichan grease were regularly pulled from fridges in the homes I visited, the yellow fat spread liberally on bread. *Gaaw* (herring roe on kelp) remained a delicacy for which I was slow to develop a taste, chewing my way hesitantly around crunching, popping herring eggs, sucking moisture back into dried seaweed. The absolutes that had so populated familiar dialogues around the "Indian question" did not appear to exist on Haida Gwaii. Instead, my experiences with the place

and the people constantly reminded me of the complexity of situations, and the role cultural perspectives played in shaping present dialogues and events.

The project I was involved in brought into relief the tensions of translating long-standing knowledge of place to computerized Geographic Information Systems (GIS). As it turned out, the information we sought—the location and density of large, healthy old-growth cedar—proved impossible to locate on either the government's or the timber companies' maps. Existing maps were categorized based on total stand volumes rather than individual species densities, and we soon found that the object of our search was only obtainable by physically walking the territory—counting trees.

I learned that mapping is as much about defining the terms and the parameters of one's search as it is about representing some external "truth." I saw firsthand how easily information could be skewed, and how much the map *was not* the territory. Land that I had walked—slopes dominated by western hemlock; some large cedar framing the ravines and runoff sites; in places, the distinct, disc-like bark of a giant Sitka spruce reflecting the light in silver and grey—became, on the map, "SSWH" (Sitka Spruce-Western Hemlock): no cedar; spruce dominant. The stand had been measured and mapped not for its trees, but for its volume of timber. Sitka Spruce, the largest of the trees, comprised the greatest volume and was thus the "dominant species" in the stand.

If the timber companies maps could be misleading, so, I learned, could our own. We tried shading cedar in different colours, combining different factors, all in an attempt to produce a representation that was meaningful. The bog I had once slogged through, wet and disoriented in my search for Labrador tea, was miraculously transformed into an area of old growth cedar. I remember only stunted trees, their limbs bent and knarled rising out of acidic soil. The potential—indeed the inevitability—of misrepresentation, conditioned entirely by our selection criteria, loomed large.

I looked at the forest cover maps, so familiar to me after many seasons of field work, with new eyes. Obvious now were the inevitable dangers in translating this physical landscape into a legible representation. I will argue that the same applies to "cultural landscapes," in which the translation process is conditioned by the assumptions and selection criteria of the translators. The process of transforming an "illegible" cultural landscape—the symbolic landscape of ancient names, stories, oral histories—into a "legible" terrain of indicators and symbols with intercultural significance can only be a complex and highly subjective one.

In this thesis I ask you to follow me from Haida Gwaii, across Hecate Strait and up the Skeena River to Gitxsan territory, where issues of mapping and representation, knowledge and translation, title and occupancy are the subject of vigorous debate—in the courtroom, at the negotiation table, and on the territories themselves. The amount of "in-house" documentation that has resulted from this work provides a rare opportunity for comment and exploration

INTRODUCTION

NEGOTIATING PERSPECTIVES

Among British Columbia First Nations, the Gitxsan are well known for their political activism. More so than other groups, their name draws associations of confrontation: since the late 1970s, the Gitxsan have erected blockades to protest logging on their territories; their radical claim to the sovereignty of their traditional territories in *Delgamuukw* v. *The Queen* (1991) has also attracted considerable attention. Less well known, but equally imaginative, are Gitxsan attempts to bridge differences in cultural perspectives as a means of expressing their claim. With specific reference to the Gitxsan, this thesis looks to places where impasses have developed in Crown-Aboriginal relations, and explores efforts on both sides to bridge what can now be seen as a cultural gap in communication.

Much of the conflict between First Nations and the Crown centres on different conceptual approaches to the "terms of the debate." Terms which connote a series of associations in one cultural context might mean something very different in another. For example: "sovereignty," "land," "traditional," "Indian," and "chief." Different associations are complicated by the difficulty of communicating between two languages and existing power relations which require one culture to communicate in the language of another. Essential context is often lost in the translation into terms that non-aboriginal audiences can understand. The problem is both linguistic and conceptual: First Nations are faced with the dilemma of trying to communicate with a system *in its own terms* while at the same time preserving their own unique sense of meaning and connotation—the concept in terms of its significance to them.

This fundamental dilemma is informed by theoretical approaches to translation. One side of the dilemma values the preservation of absolute meanings: the translation of aboriginal concepts implies a loss of essential context or, worse, a corruption of principles by adopting the terms of the other. Boldt and Long (1984) adopt this approach in cautioning

against the use of Western terms to express aboriginal concepts. With respect to sovereignty in particular, Mohawk scholar Gerald Alfred warns:

> The use of the term "sovereignty" is itself problematic, as it skews the terms of the debate in favour of a European conception of a proper relationship. In adopting the English language as a means of communication, Aboriginal peoples have been compromised to a certain degree, in that accepting the language means accepting basic premises developed in European thought and reflected in the debate surrounding the issues of sovereignty in general and Aboriginal ... sovereignty in particular. (In Canada 1996, 2.1:111)

Conventional theories of translation support this position that the original is a "pure source," and everything following from that source a derivation. They describe the role of the translator as producing as accurate a rendering of the original as possible. From this perspective, the original is valued above the language or medium of translation.

The other side of the dilemma sees translation not in terms of loss or corruption, but in terms of gain. From this perspective, a translation is an agreement, not a compromise; it is a bridge in understanding that didn't exist before. The work of Walter Benjamin (1968) supports this perspective. For Benjamin, translation is a process of "putting together," a melding of the original and the translated text to create what can best be described as a "third text." From this perspective, translation is a process of negotiation: a "meeting in the middle" between two divergent perspectives. Such a relationship privileges neither the original nor the translation. Instead, both parts change: just as the character of the original inflects the translation, so the language of translation shapes the rendering of the original. Benjamin's reference to Rudolf Pannwitz illustrates this mutual relationship. Pannwitz writes:

> Our translations, even the best ones, proceed from a wrong premise. They want to turn Hindi, Greek, English into German instead of turning German into Hindi, Greek, English. Our translators have a far greater reverence for the usage of their own language than for the spirit of the foreign works.... The basic error of the translator is that he preserves the state in which his own language happens to be instead of allowing his language to be powerfully affected by the foreign tongue. Particularly when translating from a language very remote from his own he must

> go back to the primal elements of language itself and penetrate to the point where work, image, and tone converge. He must expand and deepen his language by means of the foreign language. (Cited in Benjamin, 80-81)

Thus the language of translation must bend to incorporate the language of the original, as much as the other way around. Traces of the original are both inevitable and desired.

The dilemma between the preservation of "absolute meanings" and the negotiation of divergent perspectives is a complex one, and both approaches have their merits. Conventional theories of translation—and of aboriginal rights—tend to presume the positioning of one language, and one culture, above the other. The latter idea of translation as "negotiation," however, works to redress power imbalances through the mutual negotiation of meaning. Understanding translation in this way provides a useful framework for thinking about Crown-Aboriginal relations in Canada. The application of Benjamin's ideas suggests that any "translation" of languages, practices, and paradigms must involve a mutual transformation of Western and aboriginal concepts alike. Both systems must adopt the substance of the other in order to build bridges of comprehension.

Consider, for example, a treaty. Like any agreement, a treaty involves compromise. Parties approaching the table in hopes of upholding absolute positions are likely to view such compromise as a loss; parties looking to build solutions together, however, would find positive elements in the establishment of an agreement. These are not steadfast positions: a real dilemma exists between the need to preserve cultural values and the need to reach across the gap in order to build intercultural solutions.

To date, most of this "reaching across" has been conducted by First Nations. In an effort to communicate their claims across cultural barriers of understanding, First Nations attempted to equate aboriginal concepts with analogous concepts in the Western tradition. For example, the Nuu-Chah-Nulth peoples on the west coast of Vancouver Island employ their aboriginal concept of *ha hoolthe* as an approximation of the Western understanding of sovereignty. Yet, *ha hoolthe* is a unique concept difficult to represent in Western

terms. In its narrowest sense, it connotes "traditional territory"; it is also the "dominion and jurisdiction" that a chief holds over this territory. Still, *ha hoolthe* is more than this: it describes the "centre of power within tribal government," and the "source of energy that people require to determine their independence, integrity and destiny" (Haiyupis 1994, 1). *Ha hoolthe* appears to be about something more than a Western idea of sovereignty. And perhaps, as Boldt and Long might warn, it is something less. Does *ha hoolthe* imply the centralized authority of a single sovereign? Notions of private property? A bridge cannot be constructed from one side only, and the adoption of the other's terms without navigating the "space in between" can have misleading results.

Understanding translation as a process of negotiation implies the participation of both sides in the movement from proposed to accepted meanings, or translations. Present impasses in Crown-Aboriginal communication suggest that the Crown needs to begin participating in the negotiation process, to start building the bridge from its side. Participation is compelled in part by direction from the courts to negotiate meanings at "government to government" tables. Presumably, the Crown is also motivated to move away from present impasses toward the creation of intercultural agreements. The goal of any negotiation, like that of any translation, is an agreement on accepted terms.

This thesis explores the process of translation as a means of moving beyond an impasse in cultural perspectives. Translation is also used to describe a conversion between media, in this case the conversion from songs to maps. Several terms will be used in this thesis as follows. Impasse and negotiation are two tendencies that run throughout the history of Crown-Aboriginal relations. Often, legal and political **conflicts** over land and other issues reflect a fundamental **impasse** in cultural perspectives. An impasse implies more than disagreement; it implies an incommensurable difference in ideas and approaches, an insurmountable "gap" in understanding. And yet, within any impasse lies a desire by both sides to move beyond and across the gap. Such crossings can take the form of conflict or, alternatively, of negotiation.

Conflict implies that both sides maintain their intransigent positions, and existing power relations allow one party's beliefs or practices to resist those of the other. **Negotiation,** however, implies a greater sense of equality among participating parties; it suggests that both parties will be involved in bridging the gap, and that the final meeting place will not be one side or the other, but rather somewhere in the middle. If an impasse is a gap in understanding, then bridging this gap involves the **negotiation of meanings** or **translations** in order to reach an agreement. Reaching an agreement, or "bridging an impasse" is a process of **negotiation (translation)**: it involves moving from conflicting to mutually accepted meanings.

METHOD

This thesis focuses specifically on the Gitxsan: their history, their involvement in the *Delgamuukw* court case, and their present efforts to articulate their rights and plan for the future. I chose to focus on the Gitxsan for a number of reasons. First, the importance of the *Delgamuukw* decision, and the Gitxsan's unique approach to the case, cannot be overstated. Despite the significance of the Supreme Court of Canada's 1997 decision, and the radical departure from the trial decision of 1991, relatively little has been said about the case in terms of its contribution to the negotiation of meaning between Aboriginal and Western perspectives. Second, much of the documentation of Gitxsan land tenure systems, oral histories, and traditional practices has been conducted and compiled by the Gitxsan themselves, creating a rare source of primary information upon which to base my exploration.

The overall structure of the thesis follows a chronological sequence; it also reflects distinctions between developments in practice, and developments in the court. Chapter One examines historic disputes over trapline registration as an early expression of contemporary impasses; it finds in early examples of accommodation the potential for future negotiations. An analysis of a series of court decisions form the core of this thesis. Chapter Two discusses the trial of *Delgamuukw* v. *The Queen* in the British Columbia Supreme Court (1991). In particular, it explores two vignettes from the trial where differences in cultural perspectives lead to an impasse in communication.

Chapter Three explores subsequent developments in the British Columbia Court of Appeal (1993), and the Supreme Court of Canada (1997). Finally, Chapter Four returns to practical initiatives occurring outside the courtroom. Here I move back to the territories themselves, to explore recent efforts among the Gitxsan to translate aboriginal evidence into graphic maps for the purpose of claims and long-term planning.

In exploring these issues, I consider a variety of sources. Chapter One explores the specific issue of trapline registration. It incorporates a broad range of sources, including submissions to the *Royal Commission on Aboriginal Peoples* (1996), relevant case law on traplines, and provincial wildlife policy statements. Chapters Two and Three examine documents from the court proceedings in *Delgamuukw* v. *British Columbia*: the *Reasons for Judgment* of the trial judge, Chief Justice Allan McEachern (1991), of Chief Justice MacFarlane in the British Columbia Court of Appeal (1993), and of Chief Justice Lamer in the Supreme Court of Canada (1997). An analysis of the trial court's Transcript of Proceedings (1987-1991) sheds further light on specific moments in the trial. Finally, my exploration of Gitxsan mapping initiatives in Chapter Four draws from my attendance at a series of Gitxsan mapping workshops, supplemented by personal interviews with Gitxsan mapping staff and affiliated leaders.

In the fourteen months since the Supreme Court of Canada's ruling in *Delgamuukw* v. *British Columbia* (1997), I have immersed myself as much as possible in the issues which emerged from the case, attending conferences and lectures on its implications, and engaging in discussions with those involved in the case—both the "experts" and the plaintiffs—whenever opportunities arose. Some of the ideas for the thesis were hatched over the course of three months working with the Council of the Haida Nation in the summer of 1997. There I was introduced to many of the concepts discussed in this thesis, and the differences in cultural perspectives which frame present impasses.

The thesis took its present form, however, over a series of regular discussions with a friend and historian, Larry MacDonald, and with fellow students in law and history.

Through this process of explication, discussion and feedback, I was involved in my own "negotiation of meanings."

THEMES FOR EXPLORATION

Throughout the thesis, I explore and revisit several key themes:

The core part of the thesis focuses on the negotiation of meanings within a legal setting. Questions which frame my analysis include the ways in which the courts are interpreting section 35(1) of the *Constitution Act*, which calls for the reconciliation of the "prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty" (Supreme Court of Canada 1997, 2). More specifically, I examine how the courts find ways to interpret aboriginal evidence, and how they define aboriginal concepts. As I hope to show, the courts have engaged in these negotiations only with reluctance; judges have repeatedly directed the future resolution of these issues to "government-to-government" negotiations outside the court.

This thesis follows the courts' recommendations, moving outside the courtroom to examples of negotiation in practice. Moving "outside the courts" occurs in two ways. First, through an exploration of the relationship between legal developments in *Delgamuukw* and their implications for Crown-Aboriginal relations. This movement away from the courts reflects another theme in this thesis: the notion that behind particular legal and political conflicts lies a more fundamental impasse in cultural perspectives. While the form and intensity of the conflict might change in different situations, the impasse remains constant. Second, this thesis looks beyond the courts to other settings and other ways of negotiating meanings. It focuses on the Gitxsan in particular. What kinds of practical strategies are the Gitxsan pursuing to communicate their claims? How are they finding ways to reach across the gap in cultural perspectives?

Just as the courts' decisions in *Delgamuukw* have implications for Crown policy and land claims negotiations, the Gitxsan contribution has its own implications for Crown-

Aboriginal relations. How representative are the Gitxsan strategies, both in court and "on the ground?" What are some of the implications of the Gitxsan contribution for other First Nations?

Finally, this thesis provides some historical context for present Gitxsan initiatives. From this perspective, it is possible to see the consistency of the Gitxsan's message, and the ways they have modified their claim to suit different political environments and different opportunities.

CHAPTER ONE

TRAPLINE:
EARLY EXPRESSIONS OF IMPASSE AND NEGOTIATION

Sometime in the early 1980s,[1] in an area just outside of Houston, British Columbia, two trappers met in the process of checking their lines. One of the trappers was a Wet'suwet'en[2] man named Moses David; the other, a white trapper named—somewhat ironically—Baggerman. Both men shared the same surprise in encountering another trapper on what each understood to be his private line. Their meeting brought to the surface discrepancies and misconceptions dating back more than half a century.

The story of this meeting on David's trapline is well known among the Gitxsan and Wet'suwet'en. It goes something like this: some time in the 1930s, Moses David was asked to verbally describe his territory to a BC conservation officer, who then drew this description on a map. When the trapper was asked to verify the information on the map, he indicated that, yes, this was his territory. Yet, as it later became apparent, he was unable to read the map. For whatever reason, the conservation officer's representation of his trapline differed substantially from David's understanding of the same area. In the ensuing years, David continued to use the area he understood as his trapline, unaware that portions of this area were being allocated to non-native trappers who, for the moment, trapped only sporadically. Indeed, it was not until non-native trapping intensified that conflict developed. In the case of David and Baggerman, conflict did not arise until the trappers actually met on the ground.

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[1] The specific details of this meeting and the hearing that ensued burned down with the Wet'suwet'en Treaty Office in 1997. Nevertheless, the story survives as an anecdote—part of an evolving Wet'suwet'en "oral history."

[2] The Wet'suwet'en are a distinct people (First Nation) with territories immediately to the south and east of the Gitxsan. They speak a different language (the Gitxsan are linguistically affiliated with the Tsimshian language group, and the Wet'suwet'en with the Athapaskan language group) which suggests different geographic origins. Nevertheless, strong parallels exist in Gitxsan and Wet'suwet'en social organization, history, and political motivations. In 1978, the two groups established the Gitxsan-Wet'suwet'en Tribal Council to reflect such similarities; this union led the Gitxsan and Wet'suwet'en to enter joint pleadings before the Supreme Court of British Columbia in 1987 (see Chapter Two). At present, the Gitxsan and Wet'suwet'en are preparing their land claims separately.

We can imagine this meeting "on the territory" within the context of many historical moments of "contact and conflict."[3] Both the native trapper, operating within the context of the Wet'suwet'en system of land tenure, and the white trapper, permitted to trap as he was by the BC trapline registry, feel equally confident in legitimacy and source of their claim. In contact, however, comes conflict: whose territory? Whose system prevails? As it happened in this case, the conflict was brought to a hearing under the Wildlife Act, and the Wet'suwet'en trapper lost the case. The official map, drawn by the conservation officer however erroneously, prevailed.

TRAPLINE: CONFLICTING PERSPECTIVES

From a Western perspective, the word "trapline" connotes a "line of traps," a defined area within which to snare furbearers such as beaver, pine marten, mink and otter. As a form of land tenure, a trapline entitles its bearer to specific use rights under the auspices of state management. It exists both as a line on a map, and a physical territory upon which to practice.

I first became aware that the term "trapline" meant something more than this in conversations with members of the Haida Nation in the summer of 1997. "Trapline" seemed to imply a bundle of meanings and associations discoverable only after numerous conversations with Haida hunters and hereditary chiefs. In any case, trapline connoted a much broader range of uses than those accorded by provincial wildlife managers. Elders, for example, speak of trapping "bear, otter and marten, and ... deer from the mountains" (Council of the Haida Nation 1990, 10). Dorothy Bell, a Haida elder, describes her father's "trapping ground" along the Yakoun River: "I remember, summertime he'd be trolling, and then falltime, he'd be up at the Yakoun, all winter trapping. I remember how much fur he used to bring down. Lots of marten, and lots of geese and ducks" (*ibid*). As further exploration revealed, trapping is a term with broad significance for many First Nations; it is often better equated with hunting generally.

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[3] This phrase is borrowed from Fisher (1977).

Beyond their association with a broad range of land uses, traplines have associations with territory itself. Anthropologists and other commentators have pointed to this tendency in the way traplines are interpreted by BC First Nations:

> the trap-line is an area of land with definite natural boundaries ... within which all resources are inherited and distributed for the benefit of the extended family. The trap-line defines family or clan land by the sweep of trapping and hunting activity which is undertaken thereon. It is an economic asset and a social institution. The trap-line expresses a collective culture as a use for the family, clan or tribe altogether, and as such is treated as a family or band "hunting territory." (Rush 1982, 37)

They argue that in the period between 1930 and 1960, the more specific practice of trapping furbearers would have been considered integral to a traditional lifestyle, and therefore inherently connected with territory. This viewpoint has been corroborated by First Nations. In *Delgamuukw* (1991), for example, the Gitxsan and Wet'suwet'en speak of the "interchangeability of the terms 'trap line' and 'hunting territories'" (Gisday Wa and Delgam Uukw 1989, 60). Trapping, they affirm, refers to a range of traditional economic activities fundamentally connected to the underlying system of communally-owned territories: "different kinds of trail systems were used at different times for different purposes. There are winter traplines ... but there are also summer trails to reach, for instance, groundhogs, or berry areas, or high elevation areas that in the winter would be under snow" (Collier, 20 October 1998).

Infused with the richness of an aboriginal understanding, trapline comes to reflect the broader philosophies associated with modern definitions of aboriginal title. In their interpretation of a Crown tenure arrangement, First Nations define principles from their relationship with territory. Like other activities on the land, trapping fits within an ideology of ownership rather than use rights to a single resource. Such ownership implies jurisdiction: a right to manage the resource and to determine the ways in which it is used. From this perspective, trapping stems from and epitomizes a right to the land itself. Hugh Brody arrives at a similar conclusion in his work with the Dene people of northeastern British Columbia. His comments on the present significance of traplines to

aboriginal people reflect the link between traplines and territory: "registered traplines are far more than areas in which an Indian can make money from furs; they are a stake in the land and its future" (1981, 98-99).

Not surprisingly, aboriginal interpretations of traplines differ substantially from definitions within Western legal and bureaucratic traditions. In the courts, trapping has been discussed as one of a range of traditional practices which fall under the spectrum of "aboriginal rights": discrete rights to practice specific activities in specific places, and for specific purposes. Similarly, wildlife regulations and trapline registration policies show a tendency to isolate activities and restrict the expression of rights to categories of exclusive individual use.[4] Such policies contradict the aboriginal significance of trapping—its interrelatedness to other activities and its inherent connection to territory. While First Nations interpret traplines as an assertion of their rights to the land, the Province perceives traplines as an instrument of regulation.

There is clearly an impasse here: an incommensurable difference in perception, in what people believe themselves to be participating. Beyond the particularities of specific disputes, the impasse has its foundations in cultural differences: different perceptions, practices, and beliefs; different property arrangements and governing institutions. An impasse implies not only a gap in understanding, but an awareness of the other side. In this "awareness" lies the potential for both conflict and negotiation.

The following discussion explores both possibilities—conflict and negotiation—as they arise in historic disputes over trapline registration. In such disputes we can locate the seeds of a cultural impasse and the seeds of future negotiation. An early form of Crown land tenure, traplines constitute a historic expression of contemporary disputes between aboriginal and Western conceptions of land title, use and occupancy. These same themes

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[4] Although early trapline regulations incorporated an aboriginal right to hunt (Eklund 1946, 29), contemporary trapline regulations provide for trapping alone as an exclusive activity. Furthermore, while section 42 (3) of the *Wildlife Act* allows traplines to be registered to more than one user as a "tenancy in common," most traplines in BC are registered to individual trapline holders.

emerge in the modern land claims arena: while the form and intensity of land use has changed, the cultural impasse between aboriginal and Western perspectives remains much the same. Subsequent chapters will discuss these themes as they unravel in the recent court case, *Delgamuukw v. The Queen.*

SEEDS OF IMPASSE: TRAPLINE REGISTRATION IN BRITISH COLUMBIA

In northern British Columbia, the early part of the century can be characterized as a time of *de facto* coexistence between white settlers and aboriginal people.[5] Indeed, for most of the century, differences between aboriginal and Western perspectives of land use rarely intersected. Tolerance of difference can be explained in part by a relative absence of development pressures, especially in the northern areas of the province, which allowed the coexistence of multiple uses, and multiple users on the land. As the "Moses David trapline" anecdote illustrates, in many cases white and aboriginal trappers could exercise their practices with little chance of infringement, and little chance of contact in the largely undeveloped northern regions of the province. Not until these different practices and players collided "on the territory," as it were, did the potential for either conflict or negotiation between different perspectives arise.

As white settlement increased, however, the two systems came increasingly into contact. In response to mounting tensions[6] between aboriginal trappers and encroaching white settlers, the provincial government pioneered a system of trapline registration in 1925. Rather than mitigate conflict, however, the system exacerbated the impasse between aboriginal and White perspectives of land use.

The Registration System

Essentially, traplines are a form of Crown land tenure allocating exclusive rights to one or more trappers to trap furbearers in a defined area. For Crown wildlife managers, the

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[5] See Miller's (1989) description of an uneasy coexistence in the years following the decline of the fur trade.

registration of lines constituted a new approach to conservation and competition between trappers. Unlike earlier regulations, which imposed bag limits or closed seasons for certain overexploited species, trapline registration was an experiment in self-management (BC Ministry of Environment 1981, 2).[7] The system introduced principles of private property to wildlife management: managers believed that awarding exclusive rights to a given area would discourage overtrapping as a logical extension of trapper self-interest (Eklund 1946, 30).

Trapline registration was billed as a way to diffuse mounting tensions between aboriginal trappers and encroaching white settlers. For white trappers, the privatization of trapping territories provided a way to exclude aboriginal competition. For aboriginal trappers, however, trapline registration meant the further restriction of off-reserve land use by provincial regulation. Tensions between white and aboriginal trappers are made explicit in the following 1928 geographic description of a trapline registered to a Wet'suwet'en man in Morricetown:

> four miles passing through L.6771; NW11 miles; E 3 miles passing along the N line of L.4245 and 6 to point of comm [sic] .... Not to trap over land upon which any white man resides unless permission is received. (In Rush 1982, 38)

Whereas previous policies had allowed the *de facto* persistence of aboriginal land uses beyond reserve lands, the registration system made it illegal to trap furbearers "except on land registered as a trapline."[8]

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[6] The Royal Commission on Aboriginal Peoples documents specific examples of conflict between White and Aboriginal trappers (Canada 1996, 2.2: 511-515). See also Brody (1981) for a discussion of conflict between Dene and White trappers in northeastern British Columbia.

[7] Examples of earlier regulations include the 1906 amendment to the Game Act, which prohibited beaver hunting for 6 years. Under the trapline system, there are no statutory limits; instead, overtrapping is subject to cancelled registration.

[8] Rush interprets the 1925 trapline legislation to mean that "off reserve trapping by status Indians on unceded Crown land or on private property (though traditional Indian trapping territory) is prohibited subject to provincial regulation" (1982, 38-9).

The imposition of trapline registration in aboriginal territories led to an impasse between aboriginal and state systems of property and resource management. Hugh Brody comments:

> Registered traplines were an attempt to introduce an orderly White presence in the wilderness, and were also held to be the only way of protecting limited wildlife resources from excessive harvesting. They were equally an attempt to bring what were considered the Indians' unusual economic practices into line with ideas of ownership and exclusivity in the interests of rational production for a market economy. (1981, 88)

Provincial traplines conflicted with traditional systems of land tenure in a number of ways. Individual use was one example. Unlike traditional systems, where broad land use rights were generally held by tribal groups and regulated by complex customary arrangements,[9] trapline registration allocated *single* use rights (the trapping of furbearers) to *individual* users. Another example was transfer prohibitions. Trapline regulations prohibited the sale or transfer of trapping privileges from one licensee to another. Such regulations denied the customary hereditary transfer of trapping and hunting privileges within aboriginal systems; they constituted "a significant incursion on the cultural and social importance of the trapline as a signpost of wealth in the Indian community" (Rush 1982, 39).[10]

Yet another example was practices. Trapline entitlements entrenched European values of productivity and efficiency in ways that contradicted aboriginal management practices. Philip Godsell, an official with the Hudson's Bay Company, comments on the productivity of non-native trappers in comparison to their Dene counterparts in 1932:

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[9] The specific nature of aboriginal customary arrangements is beyond the scope of this thesis. Authors who have investigated the subject in detail include Berkes (1986), and Chapeskie (1995). Karl Polanyi also highlights general principles of aboriginal systems in his classic work, *The Great Transformation: The Political and Economic Origins of our Time* (1944). In it, Polanyi characterizes traditional (pre-market) systems by their adherence to principles of reciprocity and redistribution.

[10] In *Re Tompkins and Ardill* (1947), for example, the judge held that a trapper couldn't sell or transfer his trapline to another according to provincial regulations. The ruling reaffirmed that trapping privileges existed only when established by registration.

> The professional trapper does not make an occasional short trapping journey as does the Indian, then forget about his trapline for a while, neither does he "farm" his territory as was done by Indians until just a few years ago. Instead ... [f]rom the first snowfall until the ice breaks up he is tirelessly on the go, and in the course of a single season will accumulate three or four times as much fur as an entire Indian family has been in the habit of taking out of the same territory over a period of years. (In Canada 1996, 2.2:511)

For aboriginal trappers, "[forgetting] about [one's] trapline for awhile" was often a conscious act of management: hunting territories were periodically left to "fallow" to allow furbearer populations to recover (Berkes 1986,151). Such practices were subverted by trapline regulations mandating active and continuous use of registered lines as a condition of entitlement.[11] Indeed, productivity was a central aspect of provincial trapping policy. Regulations went so far as to allow the expropriation of "unused" lines by other (more efficient) trappers (Eklund 1946, 32).

Conflict and Resistance

Native resistance to the trapline system is well documented. The 1996 Royal Commission on Aboriginal Peoples, for example, records submissions from aboriginal people across the country who were reluctant to register their hunting territories as traplines (2.2: 511-515).[12] Trapline registration was especially offensive to treaty nations, who saw the privatization of trapping rights as an abrogation of their treaty rights to hunt, trap, and fish freely throughout Crown lands.[13] Nevertheless, Indian agents

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[11] The British Columbia Ministry of Environment's *Hunting and Trapping Regulations Synopsis* (British Columbia 1998, section 4) entrenches productivity as a requirement for entitlement:

> No person shall continue to hold a registered trapline unless he or she:
> carries on active trapping on his or her registered trapline to the satisfaction of the Regional Manager, or
> obtains permission from the Regional Manager to temporarily discontinue the use of his or her registered trapline for a period not exceeding two years.
> ....
> A person fails to use a trap-line, where within a year that person fails to take from the trapline fur-bearing animals of a value of $200, or 50 pelts, except where it is unreasonable to expect that value of animals or pelts to be harvested from the trapline. (84)

[12] See also Brody (1981).

[13] RCAP cites inter-agency correspondence in the late 1920s referring to treaty rights and provincial trapping regulations as "a source of perennial dispute between the Indians and the Game Wardens, and a

encouraged aboriginal chiefs to register their lines. Even when lines were registered, however, many First Nations continued to trap on the broader landbases of their traditional territories. A 1927 letter to the federal Indian Commissioner from the Indian agent in Atlin, British Columbia (Tlingit territory), highlights the tension between a registered system and the persistence of aboriginal practices:

> In Atlin I have managed to get a few of the Indians to register[,] but I am absolutely certain that despite the fact that they have registered certain sections of their trapping grounds they are not confining their activities to these specified localities but are trapping anywhere and everywhere in localities not registered by white trappers[,] ... and a local game warden can never be the wiser as to their infringements on unregistered territory. (In BC Environmental Assessment Office 1997, 7)

The Indian agent's observations point to the *de facto* coexistence of aboriginal practices and government policy which characterized Crown-Aboriginal relations in the early part of the century. In northern British Columbia at least, wilderness was abundant and development pressures fairly insignificant. "Infringements" by white trappers on aboriginal lines, or by aboriginal trappers on white lines, could conceivably occur unbeknownst to the other trapper, and the game warden could indeed be "never the wiser." In comparison to more intense forms of land use, such as present-day clearcutting, trapping allowed for the coexistence of different practices and different land tenure systems. In the places where differences did intersect—where the white and aboriginal trapper did meet, metaphorically or otherwise—the seeds of future conflicts over territory and tenure were sown. As we shall see in Chapter Three, the potential for cultural impasse would be fully realized half a century later, in the trial of *Delgamuukw v. The Queen.*

SEEDS OF NEGOTIATION: ACCOMMODATIONS AND CHANGES IN TRAPLINE POLICY

While much of the history of Crown-Aboriginal relations can be characterized by conflict, examples where impasse led to negotiation also exist. For First Nations

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source of embarrassment to both [provincial Game and federal Indian Affairs] departments" (1996, 2.2: 510).

especially, attempts to bridge the impasse in cultural perspectives have been an important part of voicing their claims to the land. "Reaching out" has occurred in official and unofficial settings alike. For example, the Gitxsan submitted statements to the McKenna-McBride Commission on Indian Reserves in 1912; and the neighbouring Nisga'a sent land claims delegations to Victoria as early as 1887. Undoubtedly, some "negotiation of meaning" also occurred on the territories, in physical encounters with European settlers. Early efforts to negotiate meanings between disparate practices and principles also exist in the case of traplines. As the following case study reveals, tendencies toward accommodation were inherent in the practice of both government and aboriginal representatives.

Negotiation Begins: The Gitanyow Group Trapline

Like other aboriginal groups, the Gitxsan practiced a system of land tenure which differed substantially from the 1930s system of registered traplines. Two aspects of the trapline system proved especially incongruous. The first concerned the possession of multiple lines. In the context of Gitxsan law, a single hereditary chief might hold and manage more than one territory on behalf of his House group.[14] Registered traplines, however, permitted only one line to be held per person.

The second contradiction concerned the nature of trapline inheritance. Under the provincial system, trapline entitlements passed on to the trapper's male heir. Gitxsan systems, conversely, distributed inheritance matrilineally: a trapper's territory would pass not to his son or daughter, but rather to his sister's children (his niece or nephew). The resulting confusion left a legacy of contested ownership and murky origins with regard to the rightful owners of registered lines, superimposed upon the genealogical record of ancestral entitlements to House territories (Sterritt et al. 1998, 86-89).

Despite these incongruities, most Gitxsan chiefs registered individual traplines to accord as much as possible with the boundaries of their House territories. A group of twelve

[14]The Gitxsan are divided into 39 obvious Houses; their territories, however, are divided into 98 compartments. See Chapter Two, page 24 for further explication of the House system.

Houses in the southern portion of Gitxsan lands pursued a different strategy. The Gitanyow are a tribal group within the Gitxsan nation who have always pursued their land claims independently of centralized Gitxsan tribal organizations. More so than other Gitxsan tribes, the Gitanyow have a history of resistance to Crown policies. Trapline registration was no exception: the Gitanyow refused to register their hunting territories as individual lines, and continued to trap in accordance with customary arrangements both on and off reserve lands (*ibid*, 87).

In 1924, Indian Commissioner W.E. Ditchburn sought to mitigate conflict in a series of recommendations to the British Columbia Game Board.[15] The Board responded with a new provision allowing the synthesis of neighbouring lines into a single trapping territory. Under this "block system," areas of land could be set aside for communal use. The Gitanyow took advantage of this new provision, and by 1930 had registered most of their ancestral territory as a single "block" trapline. Gitanyow Tribal President Peter Williams described what has become known as the "Kitwancool[16] Group Trapline" in his submission to the Gitxsan Land Claims Advisory Committee on February 1, 1979:

> Kitwancool hold a single registry over their entire territory. This area is registered as the trapping and hunting grounds of the Kitwancool.
> The Kitwancool people decided to form a union to hold their grounds rather than register individually as was done elsewhere. This was done in the 1920s.
> Originally the land was registered under one *simoighet* [chief]—Gwasslam (Walter Douse) but later 2 *simoighets* [chiefs] from each *pdek* [clan] became the governors over the entire *Ansilenisxw* [territory] on behalf of all Kitwancool people....
> The advantage of this is that the history of each house holds good as the basis for authority and rights on the hunting and trapping grounds.
> Each house respects the rights and laws of the other two houses.
> At the time of this registration, some non-Indians were registering in Kitwancool territory. The Kitwancool appealed to the ... game department and the non-Indians withdrew.

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[15] In a 1924 letter to the Chairman and members of the provincial game board, Ditchburn suggested three options for aboriginal traplines: 1) offer a "block system" under which blocks of land would be set aside; 2) register each "individual line"; 3) issue "permits" through Indian agents for each individual line. The game board adopted the first two options. While most aboriginal people chose the second, the Gitanyow pursued the first option (cited in Sterritt et al. 1998, 279).

[16] "Kitwancool" was formerly used to refer to the people now known as the Gitanyow.

> All Kitwancool descendants have the right to use their respective lands, and can do so by consulting with the capital (Kitwancool) first.
> Kitwancool will respect its neighbours if the blanket registered area inadvertently overlapped the neighbours land. (Sterritt et al. 1998, 88; my emphases)

As Williams' submission shows, the resulting registration closely reflects a Gitanyow sense of land ownership, both in the extent of territories represented and the nature of the Gitanyow management authority. Just as chiefs traditionally governed their Houses, so they "governed" the trapline. Under the group trapline, Gitanyow systems of governance and resource management were allowed to remain largely intact. The registration of the Kitwancool Trapline is an example of the Gitanyow's negotiation of aboriginal title within an important tenurial setting at the time.

Implications for Trapline Policy

The "Kitwancool Trapline" was an anomaly in British Columbia at the time, the product of active resistance by the Gitanyow and localized accommodation by government officials. Its creation foreshadows subsequent developments in BC trapline policy. In 1949, the Province permitted the registration of group traplines "predominantly for Native settlements where the inhabitants were not at all willing to confine themselves to specific hunting grounds" (Clancy 1991, 196). The changes marked a significant departure from existing trapping policy. As Clancy comments, "the 'group' provisions ... fit imperfectly with the original logic of trapline registration, which aimed to promote conservation by tying it to individual self-interest" (*ibid,* 197). In accordance with traditional systems, communal lines allowed more than one trapper to access territories traditionally held by family lineage.

The provisions followed from the success of group traplines in other areas, such as Quebec and the Northwest Territories, where aboriginal land tenures were largely intact and resistance to individual traplines was substantial. In any case, such traplines were meant to accommodate traditional land tenure arrangements as much as possible.[17] In

[17] This issue is the subject of significant debate among historians and legal professionals. Two viewpoints exist: those who view territorial boundaries as a product of trapline divisions during the fur trade era, and those who view accommodations within the trapline system as evidence of pre-existing territorial

some cases, group traplines facilitated the persistence not only of aboriginal practices, but also aboriginal management authority. The Quebec Beaver Preserve System, for example, placed aboriginal "headmen" as managers of communal trapping areas. In a 1943 Report, Department of Indian Affairs official Hugh Conn attributed the success of the Quebec beaver preserve system to its conduciveness with aboriginal forms of land tenure:

> The chief reason for their [the Indians'] appreciation is that ... we adhere to Indian manners of procedure and pattern our organization after their sound, well established custom. The plan of organization used on our fur preserves is an adaptation and elaboration of the aboriginal plan of land tenure that from time immemorial has served the Indian population.
>
> Under this system every square mile in the forested portion of Eastern Canada was owned and occupied by tribes, bands [and] finally families of Indians even as we divide into provinces, counties, townships and lots. True there were no fences, surveyed lines, monuments or other artificial land marks separating the various land divisions but they were nevertheless rigidly bounded by such natural landmarks as watersheds, rivers and chains of lakes with their connecting portages. (Hutchins 1987, 33)

CONCLUSION

Early conflicts over trapline registration can be thought of as antecedents to a larger impasse in cultural perspectives. For most of the century, the absence of significant development pressures has allowed for the relative coexistence of aboriginal and Western systems: conceivably, white and aboriginal trappers could walk their lines with little opportunity for contact, and therefore little opportunity for conflict. In the latter part of the century, development pressures have caused conflicts to become more frequent and more intense. The underlying impasse in cultural perspectives, however, has remained

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boundaries. The issue was debated at length in the trial *Delgamuukw*. Chief Justice Allan McEachern adopted the former viewpoint in his conclusion that internal House boundaries were more the product of European influences in the fur trade era than pre-existing social organization:

> While there are many differences between internal boundaries and trapline registrations, there are also so many similarities that I am driven to conclude ... that the source of many internal boundaries was not indefinite, long use prior to European influences, but rather from fur trade use which began after the arrival of European influences on the territory. (Supreme Court of British Columbia 1991, 435)

unchanged. As the trapline example shows, Aboriginal and Western systems and perspectives were no more compatible fifty years ago than they are today; the only thing that has changed is the potential for impasse to express itself. The coexistence of difference, it appears, is no longer possible without conflict and negotiation; development pressures have made "meeting on the territory" more likely. As we shall see in Chapter Two, this impasse in cultural perspectives expresses itself fully in the trial of *Delgamuukw* v. *The Queen* (1991).

In the same way, early examples of accommodation are antecedents to more intense efforts—both by the Crown and aboriginal parties—to negotiate. Without the pressure of court rulings and constitutionally-entrenched aboriginal rights, the accommodation of aboriginal perspectives occurred only in isolated circumstances. As the Gitanyow Group Trapline shows (and subsequent chapters will corroborate) negotiation was successful in places where voices of resistance were loudest, and aboriginal systems most intact. Nevertheless, the negotiation of a space for aboriginal customs within an otherwise incongruous system shows the potential for both sides to bridge cultural differences.

Just as the underlying impasse has remained constant over time, so has the underlying message of the Gitxsan claim remained consistent as a "right to the land itself." Indeed, the registration of the Gitanyow Group Trapline provides a practical antecedent to later expressions of aboriginal title in the courts. From the registration of a group trapline, to their position in court in *Delgamuukw v. The Queen,* to the modern Gitxsan mapping initiative, the Gitxsan have adapted their claim in response to different forums and different times. The historical perspective provided in this Chapter shows how the issue—a claim to the land—creates the impasse: competing claims and conflicting cultural perspectives are interrelated, and express themselves in response to different pressures, and different environments.

CHAPTER TWO

A CULTURAL IMPASSE: *DELGAMUUKW* V. *THE QUEEN*

> *I have said this case is largely about land. The plaintiffs seek a declaration of title or ownership, jurisdiction and other aboriginal rights. The title they seek is not the conventional fee simple well known and understood in our law. While admitting that the underlying, or allodial*[18] *or radical title is in the Crown, the plaintiffs say their aboriginal title is a burden on the title of the Crown which entitles them, at least with respect to unalienated land (and compensation for everyone else), to ownership and possession of, and jurisdiction over, the territory. This is said to arise from continuous and uninterrupted occupation and possession of the territory by the plaintiffs and their ancestors in an organized society. They say this has continued to the present from time immemorial, or for an indefinite, long time prior to their first contact with members of a European or any foreign civilization, and prior to the assertion of Sovereignty by the Crown.*
>
> Chief Justice Allan McEachern, *Reasons for Judgment* (1991, 45)

Chief Justice McEachern's opening comments in *Delgamuukw* v. *The Queen*[19] encapsulate the legal issues which carried this case through subsequent appeals. The plaintiffs' claim to the "ownership and jurisdiction" of their traditional territories implies more a declaration of sovereignty than a plea for land rights within an established system. Not surprisingly, their claim led to a series of legal impasses, originating from the difficulty of discussing issues of sovereignty in the Crown's court. Behind these legal impasses, however, lies a deeper cultural impasse. Divergent perspectives are in constant interplay as the case unfolds: here, the "territory" is the courtroom, and the "meetings" that occur arise between the plaintiffs and the judge, and the expectations they bring to their respective roles. In the trial court, these moments of contact tend to lead to conflict rather than negotiation. Issues of translation arise as the plaintiffs struggle to make concepts from their aboriginal systems understood. How can concepts from an aboriginal

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[18] The *Canadian Law Dictionary* defines an "allodial" title as one which is "owned freely without obligation to one with superior right" (Yogis 1995, 15).

[19] All references to the trial judgment are from the *Reasons for Judgment of the Honourable Chief Justice Allan McEachern*. Number 0843, Smithers Registry, 1991. References are cited in the text as *Reasons*, 1991.

tradition be expressed within a language, and within an institution (the court), where analogous terms may not exist? How can evidence from one system be interpreted within the terms of another, very different, system? As it turns out, *Delgamuukw* is as much about negotiating cultural perspectives as it is "about land."

First, some context for the case. In 1984, 51 Gitxsan and Wet'suwet'en hereditary chiefs filed claim in the British Columbia Supreme Court for the ownership and jurisdiction of some 58,000 square kilometers of their traditional territories in the Skeena, Bulkley and Nechako river valleys of northern British Columbia. The trial was unusual in two ways. First, the nature of the claim: the chiefs outlined their claim not through broad national boundaries, but through their own system of land tenure boundaries and verification procedures. Each chief sought recognition of his ownership and jurisdiction over the particular territories of his "House group." Second, the nature of the evidence: the chiefs sought to prove their claim through the enactment and recounting of their oral history, or *adaawk,* in Court. In both cases, the plaintiffs' strategy shows an adherence to aboriginal perspectives that is unprecedented in aboriginal rights cases.

An explication of some terms is helpful at this point. First, what is a House? In both Gitxsan and Wet'suwet'en societies, territory is held by a Hereditary Chief on behalf of his or her House. The House comprises an extended family affiliated through matrilineal descent. In the past, House members would live together under one roof. Each House bears the name of the chief who founded it; this name is passed onto the chief who represents it, and correspondingly to the territories to which he or she is entitled. Thus the House, rather than the immediate family or the individual, is the landowning and sociopolitical unit in Gitxsan and Wet'suwet'en societies. A number of related Houses comprise a Clan, in which "there is the assumption that all members are related, although the precise nature of that relationship may or may not be known" (Gisday Wa and Delgam Uukw 1989, 24-25).[20]

[20] In Gitxsan society there are 39 Houses (not including the 12 independent Gitanyow Houses) which hold affiliation with four different Clans: *Lax Gibuu* (Wolf), *Lax Skiik* (Eagle), *Giskaast* (Fireweed), and *Lax Ganeda* (Frog). The Wet'suwet'en have 13 Houses and five Clans: the *Gitdumden* (Wolf), the *Gilserhyu*

Second, what is the oral history? Generally, oral history refers to the canon of stories, songs, and images or "crests" which describe the events and experiences of a House group through time. As Stuart Rush, Counsel for the plaintiffs, explains, the oral history is continually evolving. It is like a "growing tree which matures over time with a happening of new events" (Supreme Court of British Columbia 1987-1991, 11:715). The Gitxsan refer to this collection of historical stories and images as their *adaawk*.[21] Beyond the documentation of historic events, the *adaawk* have the explicit function of verifying the ancestral ownership and jurisdiction of House territories. References to the territory are made in place names, migration songs, and House "crests" which depict images from historic events. Verification of these references occurs in public ceremony: the performance of songs and stories and the display of crests on poles or ceremonial regalia reestablish the link between present House members and the ancestors who claimed the land originally. As Counsel for the plaintiffs explain:

> The formal telling of the oral histories in the Feast, together with the display of crests and the performance of songs, witnessed and confirmed by the Chiefs of other Houses, constitutes not only the official history of the House, but also the evidence of its title to its territory and the legitimacy of its authority over it. (In Gisday Wa and Delgam Uukw 1989, 26)

By performing their oral histories in Court, the Gitxsan and Wet'suwet'en chiefs present a modern land claim in the traditional way. The oral histories are meant to reveal the antiquity and sophistication of their cultural systems of land tenure and governance. Furthermore, the *adaawk* constitute the only primary evidence available to a culture whose history is recorded through oral media. The *adaawk* were one of three kinds of oral evidence presented in the trial: the oral histories (*adaawk* and *kungax*) of the Gitxsan and Wet'suwet'en, respectively; the "recollections of aboriginal life" detailed by

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(Frog), the *Laksilyu* (Small Frog Clan), the *Laxsamshu* (Fireweed), and the *Tsayu* (Beaver) (Gisday Wa and Delgam Uukw 1989, 24).

[21] The Wet'suwet'en express their oral histories through their *kungax* (literally, "trail of song").

witnesses; and the "territorial affidavits"[22] of the Gitxsan and Wet'suwet'en hereditary chiefs, which traced the sources of the chiefs' knowledge to deceased ancestors. The trial began May 11, 1987, and went on to become the longest in the history of Crown-Aboriginal litigations. Not surprisingly, the trial contained many moments of conflicting cultural perspectives and failed communication. I have chosen two such "moments"—the performance of a song by Gitxsan elder Mary Johnson, and the production of a map by Chief Justice Allan McEachern—as examples of the different perspectives and expectations that emerged regarding the nature of the claim, and the nature of the evidence in trial.

COURTROOM CONFRONTATIONS

The plaintiffs called upon seven principle witnesses to recite the *adaawk* (or *kungax*) of their House territories, and to offer "recollections of aboriginal life." Mary Johnson was a witness for the Gitxsan. Born in Kispiox in 1909, Mary Johnson was the hereditary chief of the Antgulilbix House in her lifetime. As bearer of the House's name, she was responsible for its territories, and for the transmission of its histories. Johnson performed the Antgulilbix *adaawk* for the Court in April and May, 1987.

In the following excerpt from the trial transcripts, she is in the process of recounting the *adaawk* as evidence of her House group's ancestral claim to its territory. The story she tells details the migration of her ancestors from the ancient village of *T'am Lax amit*[23] to

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[22] Affidavits typically included the chief's name and a statement detailing his or her authority as a representative of a particular House. They listed what the chiefs had learned about their territories, who they had learned it from, and which parts of the territories they had visited in their lifetimes.

[23] Also referred to as Temlaham (Barbeau 1928), and Dimlahamid (Glavin 1990). Known among the Gitxsan as their ancestral homeland, "Dimlahamid" was reputed to have existed near the present-day village of Hazelton. In Gitxsan oral history, the legend of Dimlahamid goes something like this: in the time of *la oo 'y* (thousands and thousands of years ago), the people lived in harmony with the land and with each other. This traditional moral code was disrupted, however, when the people ceased to practice a set of special food rites. A great flood occurred and the inhabitants of Dimlahamid scattered across the land, forming distinct lineage groups as they wandered apart in search of new homelands. Linguists and anthropologists have linked this original diaspora with dialect differences among the Tsimshian language group. (For a more detailed discussion of Dimlahamid and the origins of the Gitxsan territorial claim, see Glavin 1990.)

her present House territory of Antgulilbix. The migration takes place during a time of famine, and Johnson tells how one of her ancestors, a young boy, starves to death on the journey. Later, the boy's sisters succeed in catching a grouse, and at this point they stop to compose a dirge song to lament their brother's death.

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670 MR. GRANT [Counsel for the Plaintiffs]: And in the telling of this *adaawk*, is this the place where you would sing the dirge song?
MRS. JOHNSON: [Yes].
MR. GRANT: My Lord, the interpreter will be able to translate the song. Go ahead and you can sing the song.
THE COURT [Chief Justice Allan McEachern]: *Well, is the wording of the song necessary?*
MR. GRANT: Yes. I believe the wording of the song is necessary, My Lord, it's part of the *adaawk*, it's part of the history. The song itself forms part of the history.

....

671 THE COURT: How long is it?
MR. GRANT: It's not very long, it's very short.
THE COURT: *Could it not be written out and asked if this is the wording?* Really, we are on the verge of getting way off track here, Mr. Grant. Again, I don't want to be skeptical, but to have witnesses singing songs in court is in my respectful view not the proper way to approach this problem.

....

If this has to be done, if you say as counsel this has to be done, I'm going to listen to it. I just say, with respect, I've never heard it happen before, I never thought it necessary, and I don't think it necessary now. But I'll be glad to hear what the witness says if you say that this is what she has to do. It doesn't seem to me she has to sing it.
MR. GRANT: Well, My Lord, with respect, the song is -- is what one may refer to as a death song. *It's a song which itself invokes the history and the depth of the history of what she is telling.* And as counsel, it is—it is my submission that it is necessary for you to appreciate—
THE COURT: *I have a tin ear, Mr. Grant, so it's not going to do any good to sing it to me.*
MR. GRANT: I have a similar problem, My Lord, but maybe after it is sung we may view it at that stage.

....

672 MR. GRANT: You can go ahead and sing the song now.

(WITNESS SINGS SONG)

673 THE COURT: All right now, Mr. Grant, would you explain to me, because this may happen again, why you think it was necessary to sing the song? *This is a*

> *trial, not a performance.*
> MR. GRANT: I agree, My Lord, but I refer you to the ... statement of claim ... which reads ... "that the plaintiffs have owned and exercised jurisdiction over the lands... [and] since time immemorial the plaintiffs and their ancestors have expressed their ownership of the territory through their regalia, their *adaawk*, their *kungax* and their songs." It's specifically pled in the statement of claim that the songs of the people are part of their history and that's part of the way the ownership over the territory has been expressed.
>
> THE COURT: I don't find that a persuasive argument at all, Mr. Grant. It seems to me the fact of *expressing their ownership or their claim to ownership through songs is a fact to be proven in the ordinary way.* It is not necessary, in my view, and in a matter of this kind for that song to have been sung, and I think that I must say now that I—I think I ought not to have been exposed to it. I don't think it should happen again. If it is sought to be—to have that sort of evidence adduced in future, I will expect further and more detailed submissions, because I think I'm being imposed upon and I don't think that should happen in a trial like this. (Supreme Court of British Columbia 1987-1991, 11: 670-74, my emphases)

The dialogue surrounding the performance of the song reveals differences which come to characterize the case. McEachern's discomfort with the performance can be traced to three central questions:

- Why is there a need to sing the song? "This is a trial," he reminds the plaintiffs, "not a performance."
- Why is there a need to interpret the song? "Is the wording necessary?" How, he seems to be asking, are the words of the song relevant to the plaintiffs' claim?
- If the words are so important, why couldn't they be "written out" and verified?

McEachern's questions reveal both his doubts about the song as a credible form of evidence and his expectations about the kinds of evidence that are acceptable. "It seems to me," he concludes after hearing the song, "[that] the fact of expressing their ownership ... through songs is a fact to be proven in the ordinary way" (673). And yet, we can question, what is an "ordinary way" to present a claim? A written title deed? A genealogy? A map? Presumably, McEachern expects a more detailed statement of claim, more specific references to the territory, and a more transparent process of verification. He does not expect to search for significance in the performance of a song.

For the Gitxsan and Wet'suwet'en, however, this is neither ordinary evidence nor is it an ordinary claim. Rather, the performance of the song is meant to convey the depth of the difference their system presents: like a title deed is to Western concepts of property, the song is to analogous aboriginal concepts. Moreover, it suggests that the plaintiffs have their own expectations of the judge, and of the system he represents. The plaintiffs challenge the judge in two respects: first, they ask him to appreciate the significance of the song from an aboriginal perspective; second, and even more provocatively, they ask him to play a particular role in the drama they perform.

The Cultural Significance of a Song

McEachern's questions betray a preoccupation with the words of the song. Could the song, he asks, not be "written out" and verified, rather than performed (671)? For Mary Johnson, however, the song is more than words put to music. Mr.Grant attempts to explain: "the song *itself invokes* the history and the depth of the history of what she is telling" (671; my emphasis). Grant asks the judge to suspend his orientation toward the specific "facts" in order to interpret the evidence differently. While the words may constitute the empirical "facts" of the Gitxsan histories, he suggests, the act of singing has deeper associations with the territory and the ancestors that are relevant to the claim.

From the plaintiffs' perspective, the song constitutes an aboriginal equivalent of a title deed. It provides a genealogical record of present-day entitlements to land. The stories they tell in the trial are the "evidence" of ancestral occupation, and their performance part of an ongoing process of verification. Ellen Moses, a graduate student who conducted research on Gitxsan songs, describes the situations in which songs were created:

> as the lineage groups wandered towards their present hunting and fishing grounds, significant events occurred. Each event was commemorated by the performance or creation of a song and was represented henceforth in titles, crests, songs and dances associated with the lineage. (1980, 88)

Johnson's story of the grouse is an aspect of the Antgulilbix House identity: represented in song and in House crests, it provides historical context for territorial claims, and its telling and retelling constitute the validation of this claim. Mary Johnson explains:

"today, the young lady that caught the grouse [stands] at the foot of our totem-pole that we restored in 1973, and she is holding the grouse with tears in her eyes" (Supreme Court of British Columbia 1987-1991, 11:673). Her song is the Gitxsan's "best equivalent" to a title deed to land.

Returning to McEachern's perspective, however, if the song were the aboriginal equivalent of a title deed, would the words not have sufficed? Here the performance of the song is significant as an indicator of the degree of difference the plaintiffs mean to convey. In their performance, the plaintiffs appear to remind us that "title" to the land is in itself a Western preoccupation. What the song refers to, they suggest, is something *different* from a Western title deed. Legal practitioners refer to this difference as *sui generis*, which refers to a unique concept that is difficult to explain in the terminology of western property law. For the plaintiffs, the song captures this sense of *sui generis*: it exemplifies a gap in cultural perspectives. An aboriginal relationship with the land, they suggest, can only be fully expressed within an aboriginal context. The performance of the song provides this necessary context.

An exploration of the role of songs in Gitxsan culture provides some clarification. For the plaintiffs, the fact that Mary Johnson knows and can perform her song connects her to an ancient territorial tradition. Her song belongs to a category the Gitxsan call *limx'ooy*—literally "songs from ancient times," the oldest and most sacred in the Gitxsan canon (Moses 1980, 88).[24] The antiquity of songs is shown in part by the dialect in which they are sung. Johnson sings in *simaalgiax,* literally "real language," an ancient dialect reputedly spoken in the Gitxsan ancestral homeland of Temlahem (*ibid,* 89).[25] The song she sings is meant to pull the listener "back in time" to "the ancient past, literally [to] ... the breaths of the ancestors, ... by the very quality of [its] music and the

[24] Moses distinguishes between three types of ancient songs: 1) *limx'ooy*, historical songs or dirges; 2) *xsinaahlxw*, best translated as "songs from the breath of the ancestors"; and 3) *naxnok*, or songs of the supernatural helpers (1980, 88).

[25] Simaalgiax "more closely resembles an archaic version of the Coast dialect than that of the other sub-groups. Many Gitxsan thus refer to simaalgiax as 'the Coast language' and call upon speakers of Coast Tsimshian to translate their ancestral songs for them" (Moses 1980, 89).

emotions [it conveys]" (Gisday Wa and Delgam Uukw 1989, 26). In an interview with Ellen Moses, Mary Johnson described the experience of singing these ancient songs:

> when I sing *xsinaahlxw* or *limx oo 'e*.... [i]t comes from the heart, and while I was singing I picture those that I've seen when I was small, and I remember them. Those that used to sing the song and those that raised the pole, and how they owned always the hunting ground. And it really hurts inside because that's all taken away maybe about two hundred years ago.... So whenever I sang these mourning songs ... it isn't an easy thing for me to do. Deep inside is crying remembering those people.... Grannie ... used to sing them at the totem pole raising, and how precious the hunting and fishing ground is. (*ibid,* 92)

For Johnson, the song has vivid associations with the territory and with the ancestors who peopled it; its performance is a vital aspect of any territorial claim. This is the context the Gitxsan hoped McEachern would appreciate in his interpretaton of Johnson's performance. They ask him to appreciate role of song from an aboriginal perspective.

The Judge's Role in the Drama

The performance of the song also has implications for the role of the judge. As part of the *adaawk*, songs are typically performed within the setting of the Feast. The plaintiffs describe the Feast as:

> a legal forum for the witnessing of the transmission of the Chiefs' names, the public delineation of territorial and fishing sites, and the confirmation of those territories and sites with the names of the hereditary Chiefs. The public recognition of title and authority before an assembly of other Chiefs affirms in the minds of all both the legitimacy of succession to the name and the transmission of property rights. (Gisday Wa and Delgam Uukw 1989, 31)

The performance of the song in court, then, comes with distinct associations for the plaintiffs. In a sense, they transform the Courtroom, and the evidentiary laws and assumptions that accompany it, into the realm of the Feast. Mary Johnson, as chief of Antgulilbix House, seeks verification of her House's *adaawk* in Court, as she would in a Feast. By performing the song, she invites the judge to become a witness to the enactment of the oral history. Like the "Chiefs of other Houses," McEachern is asked to validate the genealogical evidence of ownership.

The Tin Ear Metaphor

McEachern's self-described "tin ear" becomes an appropriate metaphor for the depth of the impasse that emerges. Borrowed from music appreciation, the metaphor suggests that McEachern is incapable of appreciating Johnson's music, and, by implication, that he is incapable of appreciating the connection between the song she sings and the territory she claims. The tin ear metaphor, however, is more complex than it first appears: McEachern qualifies his objection to Johnson's song by referring not to the nature of the song, but rather to a defect of his own—a "tin ear" that inhibits his ability to appreciate fine music.

The metaphor suggests not only personal regret—McEachern frames his words as an apology—but a physical obstacle to understanding. It illustrates the nature of the case more generally: the problem becomes not just a *willingness* to listen, but an *ability* to listen through the barriers of cultural assumptions. In this way, the tin ear shows a conflict that extends beyond legal approaches to evidence to a more fundamental impasse in cultural perspectives. The gap between what the plaintiffs believe themselves to be presenting and what McEachern expects to hear is wide indeed. The gulf only widened in McEachern's judgment.

THE JUDGMENT IN *DELGAMUUKW*: A CULTURAL IMPASSE

The judgment in the trial of *Delgamuukw* affirmed that it is, after all, McEachern's Court. The 1991 judgment was a devastating defeat for the Gitxsan and Wet'suwet'en: Chief Justice McEachern dismissed the entire body of oral evidence, and with it the Gitxsan and Wet'suwet'en's claim to the ownership and jurisdiction of their territories. At the most, McEachern ruled, the plaintiffs had the right "to use any unoccupied or vacant Crown land for subsistence purposes until such time as the land is dedicated to another purpose." In effect, the plaintiffs' rights were no greater than those of any other resident of the territories.[26]

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[26] Although McEachern dismissed the plaintiffs' claim to ownership and jurisdiction, he did find that they had established aboriginal rights for "non-exclusive sustenance purposes" on large portions of the territory. Despite this finding, however, he ruled that any such rights in land were extinguished by colonial enactments passed prior to British Columbia's Confederation in 1871. This finding has been called "blanket extinguishment." Finally, he held that, despite "blanket extinguishment," the Crown had to

McEachern's *Reasons*

McEachern's *Reasons for Judgment* can be discussed in terms of two broad categories: statements on the credibility of oral evidence; and statements on the validity of the claim to ownership and jurisdiction of the territories in question.

The Ruling on the Evidence

> *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.* (*Reasons* 49)

McEachern rejects the entire body of oral evidence presented in the trial (the oral histories themselves, the "recollections of aboriginal life" detailed by witnesses, and the territorial affidavits of hereditary chiefs). His judgment rests on a fundamental distinction between the "admissibility" and the "weight" of the evidence before him. On the one hand, McEachern feels compelled to admit oral evidence "out of necessity," for the plaintiffs cannot prove their case "in any other way" (75). On the other hand, he finds the evidence lacking in sufficient weight to constitute "direct evidence of facts."

With reference to the oral histories in particular, McEachern outlines three principal reasons to justify his decision. First, he concludes, the practice of telling and verifying the *adaawk* is inconsistent: "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, he finds the *adaawk* "seriously lacking in detail about the specific lands to which they are said to relate" (58). And thirdly, the *adaawk* are authenticated through

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honour its unique "trust" relationship (in legal terms, their "fiduciary obligation") with aboriginal peoples. In accordance with this relationship, the Crown had a continuing obligation to permit aboriginal peoples "to use any unoccupied or vacant Crown land for subsistence purposes until such time as the land is dedicated to another purpose" (*Reasons* 254).

Such rights correspond with the rights of non-aboriginal people to vacant Crown lands: they are non-exclusive and subject to general Provincial laws. Moreover, because these rights are not limited to aboriginal peoples (they are not "aboriginal rights"), they are not protected by the Canadian Constitution. As Hamar Foster concludes, a right to use vacant Crown lands "is not an aboriginal right because it is based upon a 'permission' given by the Crown to "Indians and non-Indians alike' to use vacant lands, and because it is not attached to any particular lands. It is therefore not protected [as an aboriginal right] by s.35 of the 1982 constitution" (1991, 351).

reference to secondary sources of dubious quality. They lack a valid external process of verification (beyond the communities to whom the oral histories belonged) (58).[27] At most, he concluded, the oral histories could provide "useful information 'to fill in the gaps' left at the end of a purely scientific investigation" (75). Alone, they are an insufficient source of direct evidence of ownership and jurisdiction of the territories.

McEachern's reaction to Johnson's song, then, was an early sign of his personal discomfort with oral evidence. In this sense, his tin ear symbolizes the impasse in cultural perspectives that characterizes the trial more generally.

The Ruling on the Claim

Having dismissed the oral histories, the recollections of aboriginal life, and the territorial affidavits provided by the plaintiffs, McEachern found little evidence to support a claim to ownership and jurisdiction of the territories. Overall, McEachern argued that the plaintiffs had failed to establish the internal boundaries of their House territories, and, by extension, had failed to establish the external boundaries of Gitxsan and Wet'suwet'en territories. Thus he declared their claim to ownership and jurisdiction of the territories to be completely invalid. The Gitxsan and Wet'suwet'en, McEachern concluded, neither continue to live what he considered to be an "aboriginal life" nor rely in any meaningful way upon the use of the territories.

The Notorious Map 5

Despite his rejection of the claim to ownership and jurisdiction, McEachern found that the plaintiffs were entitled to some lesser aboriginal rights in part of the territories.[28]

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[27] McEachern's conclusions apply to all forms of oral history presented in the trial. He finds the personal testimonies of aboriginal witnesses "insufficiently precise" to demonstrate ancestral land use as proof of present internal boundaries. With regard to the territorial affidavits of the hereditary chiefs, he finds them inadmissable as examples of hearsay.

[28] McEachern's findings stem from a change in the pleadings which occurred partway through the trial. McEachern explains:

> In the early stages of the trial plaintiffs' counsel indicated that this case ... was "all or nothing," that is the claim was for ownership and jurisdiction, and the plaintiffs were not seeking any lesser relief. This position was wisely moderated later in the trial when Mr. Grant

Without any established boundaries, however, the area in which these rights would apply was difficult to determine. McEachern responds by drawing his own map of the territories, based on speculations about aboriginal land use before contact. "Map 5," as McEachern's map is known, has since become the subject of great controversy. McEachern's interpretation here is worth further comment, especially in light of his reaction to Mary Johnson's song earlier in the trial. Following is an abridged account of McEachern's deliberations (adapted from the *Reasons*, 277-79):

"The question," McEachern ponders in preparing the map of Gitxsan and Wet'suwet'en territories, "is where to draw the line." Such an activity, he admits, "seems hardly a judicial function: something more appropriate for the Senate in Rome." Nevertheless, he sets out to offer his interpretation of the evidence he has heard. In drawing the map, he concludes:

> *it will be necessary to be arbitrary. The most helpful evidence is geographical, particularly the great rivers and the location of the villages where the ancestors of the plaintiffs obviously lived and gathered the products they required for subsistence. There is hardly any objective evidence of early aboriginal presence based other than in the villages.*

Working from what he considers to be a lack of objective evidence, McEachern proposes three alternatives for the geographic extent of aboriginal rights on the territory. The third proposal, and the least specific of the three, he finds most reasonable. It acknowledges that the plaintiffs' ancestors "sometimes used lands for aboriginal purposes more distant from the villages and great rivers than one would think at this time," and sets about to determine the furthest extent of this land use. McEachern speculates a twenty mile radius

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made it clear that the plaintiffs were also seeking a declaration of their aboriginal rights. He said that while ownership and jurisdiction were the plaintiffs' primary claims, they wished the Court to grant them whatever other rights they may be entitled to. (*Reasons* 39)

While no formal amendment to the pleadings was made, this informal submission prompted McEachern to find "other" aboriginal rights (short of aboriginal title) on the territories and, ultimately, to produce Map 5. The nature of the pleadings is an issue that becomes increasingly contentious in subsequent appeals. In both the BC Court of Appeal, and the Supreme Court of Canada, the debate centres on two questions: 1) whether aboriginal title can be found if it was not an aspect of the original pleadings; and 2) whether a change in pleadings midstream is fair to the respondents. See note 34.

as the likely distance aboriginal people would have travelled from their village sites.[29] Map 5 illustrates the territorial ramifications of this conclusion:

> *I would fix the north boundary of the lands over which the Gitksan* [previous spelling] *have aboriginal rights by drawing a line across the territory through the centre of the Skeena River where it flows past the village of Gitangasx, the Gitksan's most northerly village.... I must assume some of the villagers at that location would have used some of the lands around their village.... I would therefore add an area north of the river within a radius of 20 miles from the village.... In an attempt to be tidy, I would not include any area east of the Skeena and north of the Sustat Rivers.*
>
> *I would use the agreed boundary between the Gitksan and Wet'suwet'en ... as the southern boundary of the Gitksan aboriginal lands.*

McEachern is cognizant of the fact that his boundary creations are approximate. "Perhaps counsel," he offers, "will prepare a better map, giving effect to what I have endeavoured to describe. If they agree, they could even draw a line across the territory with a ruler. I would not wish to be understood by any of the foregoing to be authenticating the internal or external boundaries in any way."

Despite McEachern's caveats, "Map 5" was the subject of great contention among the plaintiffs (Sterritt, 12 December 1998). Like the dialogue surrounding Johnson's performance in the trial, the map crystallized an impasse in cultural perspectives. From a legal perspective, McEachern bases his conclusions on an absence of "objective evidence of early aboriginal presence ... other than in the villages" (*Reasons* 277). The lines he draws in Map 5, however, reveal preconceptions that run somewhat deeper. The map is

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[29] McEachern complements his speculation by relating his conclusions "as much as possible" to the evidence:

> Mr. James Morrison [a witness for the plaintiffs] ... mentioned that, when he was a boy, the chiefs established a common hunting area at Kisgegas measured by two hours walking distance from the village. On level ground this might be between 8 and 10 miles ....
>
> On the other hand, a hunter in reasonable territory could comfortably walk 20 or 25 miles in a day. In this territory I think 20 miles would be reasonable and I doubt if many Indians would have found it necessary to travel that far from their villages or rivers to obtain what they required for subsistence.
> On this basis it would be reasonable to define an aboriginal rights area measuring, say, 20 miles from the centre of each of the villages mentioned above .... (275)

his own representation of the territory, based on his own speculations, however informed. As a starting point, he assumes an absence of aboriginal occupation, and sets out to determine the furthest extent of aboriginal "presence." Furthermore, in creating the map, McEachern suggests that what was insufficient about the oral evidence—its lack of consistency, its lack of specific references to the territories, and its lack of external processes of verification—can be found alternatively in the graphic map and its connotations of accuracy and objectivity. While the performance of songs in court is "not the proper way to approach [the] problem," the charting of a map presents the claim in "the ordinary way" (Supreme Court of British Columbia 1987-1991, 11: 671,673).

While the Gitxsan and Wet'suwet'en presented a landscape "full" of memories and evidence of occupation, to McEachern it was simply empty. McEachern's recollections of the territory provide further context to this difference in perspectives:

> I visited many parts of the territory which is the principal subject of this case during a 3-day helicopter and highway "view" in June 1988.... I also took many automobile trips into the territory during many of the evenings of the nearly 50 days I sat in Smithers. These explorations were for the purpose of familiarizing myself, as best I could, with this beautiful, vast and almost empty part of the province. (*Reasons* 2-3)

Perhaps it is McEachern's removed perspective—best expressed by his vantage from the window of a helicopter—which causes him to see the land as "vast" and "empty."[30] Clearly, his vantage is different from that of Mary Johnson, who sings from the perspective of experience. Rather than a "vast and empty" space, Mary Johnson describes an occupied landscape with history stretching back to "time immemorial." From Johnson's perspective, territory is saturated with meaning and signs; it provides evidence of established economies, social and political systems. As we shall see in

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[30] McEachern's conclusions have been linked with aspects of colonial thought, in which land was conceived of as "*terra nullius*"—uninhabited and unpossessed—in order to justify imperial claims. The perception of land as *terra nullius* relies on two interrelated assumptions: 1) the land is empty of people, or at least empty of people with any legal rights; and 2) that this land is available for colonization and development. Land becomes a blank slate upon which to write a history of events.

Chapter Four, these "signs of occupation"—both physical signs on the landscape and references in the oral histories—form the material for present mapping efforts.

What emerges in *Delgamuukw* is an impasse in cultural perspectives. Although both the judge and the witness refer to the same area of land, the *territory* they describe—that fusion of physical space with cultural associations, assumptions and institutions—is markedly different.

The Plaintiffs' Perspective

The trial of *Delgamuukw* v. *The Queen*, while unsuccessful for the plaintiffs, would nevertheless prove a significant contribution to the negotiation of meanings in Crown-Aboriginal relations. The case tested an unprecedented approach for First Nations, in terms of both the claim, and the method of presenting the evidence. It introduced new terms and new approaches in forwarding an aboriginal perspective. "Never before," asserted Counsel in their 1987 Opening Statement,

> 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 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 predates the Canadian Constitution by many thousands of years. (In Monet and Skanu'u 1992, 24).

The plaintiffs' choice to represent an aboriginal relationship with the land in its fullness, rather than to define it within the language or the parameters of Western jurisprudence, reflects a "no compromise" approach to negotiation. Perhaps, in conjunction with McEachern's "tin ear," this "absolute position" precluded a negotiation of meanings in the trial. From this perspective the trial was a situation of two parties unwilling or unable to reach across an impasse in cultural perspectives. From the perspective of the plaintiffs, however, "negotiation" was an option that had failed in other settings; the trial was an opportunity to present in full the complexity and the antiquity of their claim to the land.

But the story does not end here. Hardly passive in their defeat, the Gitxsan and Wet'suwet'en took momentum from the trial to begin preparation for an appeal. It appears they also saw some problems in their approach to the trial: they entered the Court of Appeal two years later with altered pleadings.

LOOKING BACK: THE SITUATION IN 1991

In 318 days of evidence documenting the complexity and endurance of Gitxsan and Wet'suwet'en cultural systems, McEachern seemed to see only inferiority in the differences presented. His judgment has been widely criticized as racist and legally unsound.[31] For many observers, his greatest failure was his inability to appreciate the plaintiffs' evidence *on its own terms*. But is it possible to set aside one's own cultural framework in order to appreciate a claim from its own cultural context? Is it appropriate for a judge to do so? The Supreme Court of Canada would shed light on these questions in the years to come.

We can now see in *Delgamuukw* an impasse between a judge who couldn't "hear" and a group of plaintiffs who refused to "speak" his language. This conflict lies deeper than legal strategies and terminology; it is better described as a cultural impasse of deep preconceptions. It is the same impasse that arose between David and Baggerman on the traplines. Bridging such impasses, however, is essential in working towards just settlements. How can this be done? Both the Supreme Court of Canada and the Gitxsan themselves would soon show the way.

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[31] See, for example, Culhane (1988); Foster (1991); Asch (1992); Fisher (1992); Sanders (1992); and Tennant (1992).

CHAPTER THREE

THE COURTS BEGIN TO BRIDGE THE IMPASSE

The landscape of Crown-Aboriginal relations has changed significantly since the BC Supreme Court ruling in 1991. Both the British Columbia Court of Appeal ruling in *Delgamuukw* (1993) and the subsequent decision in the Supreme Court of Canada (1997)[32] offer approaches towards bridging the gap in communication that developed in the 1991 trial.

AN UNDERESTIMATED DEVELOPMENT: THE COURT OF APPEAL RULING IN *DELGAMUUKW*

Legal analysts tend to overlook the Court of Appeal ruling in *Delgamuukw*, focussing instead on the groundbreaking theoretical developments of the Supreme Court of Canada ruling four years later. The Court of Appeal ruling, however, made an important contribution to the practical negotiation of meaning. The following provides a summary of the developments in the Court of Appeal.[33]

In the British Columbia Court of Appeal, the Gitxsan and Wet'suwet'en altered their original claim in two ways. First, they amalgamated the individual claims of each House into two broad communal claims advanced on behalf of each nation. Second, they changed the wording of their pleadings from "ownership and jurisdiction" to what better approximates "aboriginal title" and "self-regulation" over the land in question. If a right to the ownership of the territories could not be found, the appellants argued, the Court should find alternatively a proprietary interest in the lands.[34] The appellants disputed

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[32] The ruling in the Court of Appeal for British Columbia and in the Supreme Court of Canada will be referenced as follows: (BCCA 1993) and (SCC 1997), respectively. Cases are cited by paragraph, rather than page number.

[33] For a detailed discussion of the Court of Appeal's contribution to aboriginal title law, and its implications for the BC Treaty Process, see Foster (1996, 533-37).

[34] The Supreme Court of Canada would later use this change in the pleadings as part of their rationale for a retrial. "The collective claims," they argued, "were simply not an issue at trial, and to frame the case on

almost every aspect of the trial judge's findings. Essentially, they argued that by dismissing the oral histories, McEachern dismissed evidence that was highly relevant to the nature, geographic extent, and antiquity of their systems of land ownership, self-government, and trade. Had McEachern given proper weight to the evidence, they argued, the outcome of the case would have been very different.

Appeal Court Justice Macfarlane was hesitant to interfere with the trial judge's findings. He acknowledged the sizable effort McEachern made in assigning credibility to the mass of evidence before him, and concluded that any intervention with respect to the weight of the evidence would be "inappropriate" without a reassessment of the entire body of evidence (BCCA 1993, 124). Macfarlane's comments reflect the general hesitancy of appellate courts to alter a trial judge's interpretation of evidence (and especially assessments of credibility) unless some "palpable and overriding error" can be shown in the trial judge's assessment.[35] Macfarlane dismissed the appeal, but altered the trial judge's orders in two important ways: first, he found that nineteenth century colonial legislation did *not*, as McEachern ruled, extinguish all aboriginal rights.[36] Secondly, based on this finding, he held that the plaintiffs had existing rights on portions of their traditional territories.

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appeal in a different manner would retroactively deny the respondents the opportunity to know the appellants' case." Furthermore, "the appellants sought a declaration of "aboriginal title" but attempted, in essence, to prove that they had complete control over the territory. It follows that what the appellants sought by way of declaration and what they set out to prove by way of the evidence were two different matters. A new trial should be ordered" (SCC 1997, 5).

[35] Wallace J.A. explains such principles in concurring with Macfarlane's judgment: "An appellate court should find error on the part of the trial judge with respect to those aspects of the finding of facts which involve questions of credibilty or weight to be given the evidence of a witness only if it is established that the trial judge made some 'palpable and overriding error' which affected his assessment of the material facts" (BCCA 1993, 503). Although they registered concern with some aspects of the judgment, neither Wallace nor Macfarlane saw in McEachern's reasoning any error of this magnitude.

[36] The significance of this finding should not be overlooked. Macfarlane not only acknowledges the persistence of Gitxsan and Wet'suwet'en aboriginal rights on their territories, he also fortifies the BC Treaty Process, which operates under the premise that aboriginal rights continue to exist until they are surrendered or ratified in treaty. As Hamar Foster comments, "the importance of [the Court of Appeal] decision, and especially what it had to say about extinguishment, went unappreciated by many vocal critics of the treaty process" (1998, 229).

Unlike McEachern, Macfarlane was not convinced that early legislation showed the Crown's "clear and plain intention" to negate an aboriginal interest in land. Furthermore, he saw little reason why aboriginal rights to hunt and fish on occupied territories could not coexist with settlement. By removing the blanket of extinguishment, Macfarlane breathes life into McEachern's Map 5, which mapped boundaries within which "non-exclusive aboriginal rights" could persist in Gitxsan and Wet'suwet'en territories. Whereas McEachern found only a Crown obligation to permit the persistence of aboriginal land use, Macfarlane found constitutionally-sanctioned rights, "other than a right of ownership or a property right," in the territories outlined in Map 5 (*ibid*, 293).[37] Such rights might include hunting, fishing, and trapping; gathering berries and other plants for food; and using natural materials for shelter, medicinal, spiritual and ceremonial purposes. To acknowledge such rights is to acknowledge the potential for infringement by competing activities such as logging, mining and settlement. In order to find out if rights are being infringed, Macfarlane suggests, one needs to spell out the nature and scope of those rights, and the specific sites to which they refer.

As a whole, Macfarlane compels negotiation. It is important to note here, however, that, like courts before him, Macfarlane felt no compulsion to define the terms of the debate. In his mind, attempts by the courts to define aboriginal rights as proprietary or non-proprietary are futile: the aboriginal interest in land is unique or *sui generis*; it receives adequate Constitutional protection without additional definition. "To stretch and strain property law concepts in an attempt to find a place for these unusual concepts," he notes, "is, in my opinion, an unproductive task" (166). Macfarlane focuses not so much on a theoretical negotiation of *meanings* as on a practical negotiation of *interests*. "The Indian interest," he feels, can "coexist to a large extent" with other interests in land. He recommends consultation and reconciliation as the process through which to define and

[37] Here Macfarlane expresses regret with regard to the nature of the pleadings in trial. Because the plaintiffs framed their claim within the "all or nothing" terms of ownership and jurisdiction, he explains, when the claim to ownership failed, nothing remained but the plaintiffs' alternative claim to "whatever other aboriginal rights could be made out on the territory" (266). McEachern interpreted these remaining aboriginal rights as falling within the approximate area delineated on Map 5.

balance aboriginal interests with the competing interests of non-aboriginal Canadians (284).

The Provincial Government Responds

Macfarlane's judgment forced some important changes in provincial policy. By establishing the existence of unextinguished aboriginal rights, he established a new requirement for consultation. Aboriginal rights, he said, "can never be determined in a vacuum."[38] Instead, consultation is necessary in order to define the rights "in light of surrounding circumstances," and to consider "whether they are in conflict or can co-exist with other activities: for instance, mining ... parkland ... or railway rights of way, or timber licenses as in cases yet to be heard" (289).

On January 25, 1995, the BC Ministry of Aboriginal Affairs released its *Crown Land Activities and Aboriginal Rights Policy Framework.* The policy framework was issued in direct response to the Court of Appeal ruling in *Delgamuukw*; it also responded to the clarification of aboriginal rights set out in *R.* v. *Sparrow* (1990). Essentially, the framework comprised four principles for consultation regarding development activities on areas subject to unextinguished aboriginal rights:

1) **Establish the Right.** Recognized rights include hunting, fishing, and trapping, gathering berries and other plants for food, and using natural materials for shelter, medicinal, spiritual and ceremonial purposes. In areas where development is proposed, the Crown must establish whether any aboriginal rights exist through "extensive consultation with the aboriginal peoples affected."
2) **Determine Whether Activities on Crown Lands Would Infringe the Right.** Infringement is defined as any action which "imposes [un]due hardship, ... denies the holder of the right their preferred means of exercising that right, or ... limits the aboriginal right unreasonably."
3) **Resolve Matters of Conflicting Interest by Negotiation.** If the proposed Crown action and the aboriginal right cannot co-exist, negotiation and, if necessary, dispute resolution mechanisms should be employed.
4) **Attempt to Justify the Infringement if it Cannot be Avoided.** Based on principles established in *R.* v. *Sparrow,* the Crown may justify infringements

[38] Here Macfarlane cites the Ontario Court of Appeal in *R.* v. *Taylor* (1981, 232).

> when they can prove a "compelling and substantial objective" for the proposed activities. Such objectives include, for example, conservation of natural resources, and public safety. (Ministry of Aboriginal Affairs 1995)

The Imbalance Remains

Despite mandated consultation with First Nations on all development activities, the referral process has engendered remarkably little change on the ground. In 1996, for example, the Gitxsan received some 150 referrals from Crown agencies requesting consultation on development activities within Gitxsan territories. The Gitxsan responded to 90 of these referrals, citing site-specific information detailing the nature of infringement caused by logging activities within their territories. In each case, however, logging activities were carried out without significant changes to reflect Gitxsan concerns (Overstall, 21 June 1997). Macfarlane's suggestion that interests be negotiated "in context" still remains subject to established power relations on the ground. In light of continued "business as usual" approaches to consultation, the Gitxsan have developed their own response to the Court of Appeal ruling. These initiatives are the subject of Chapter Four.

The Crown policy framework offers a reasonable strategy for consultation; it would likely work well if the parties could negotiate freely. However, a power imbalance persists. Despite movements toward a practical negotiation of interests, provincial policies neither recognize aboriginal title nor attach credibility to oral histories as a means of proving this title. A legal impasse persists between an aboriginal conception of territory as a proprietary interest in the land itself and a Crown policy framework which recognizes only rights to specific land uses. Furthermore, the terms of the debate remain undefined.[39] The failure of the Gitxsan referrals suggests that without clarification of the *nature* of the aboriginal interest, competing interests will retain the upper hand in practice, and policies of inclusion and negotiation will remain vague supplications of the Crown's fiduciary obligation to aboriginal peoples.

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[39] Justice Lambert's dissent in the Court of Appeal goes some distance in moving toward a definition of terms; his argument is later echoed in the Supreme Court of Canada's ruling.

On June 13, 1994, the Province and the hereditary leaders of both nations agreed to adjourn legal proceedings for one year to reattempt negotiation.[40] In 1996, however, the negotiations broke down, and the Gitxsan and Wet'suwet'en moved their appeal to the Supreme Court of Canada. The Supreme Court heard the case in June 1997.

REDRESSING THE BALANCE: *DELGAMUUKW* IN THE SUPREME COURT OF CANADA

On December 11, 1997, the Supreme Court of Canada handed down its decision in *Delgamuukw v. British Columbia*. The decision was a breathtaking victory for the Gitxsan and Wet'suwet'en plaintiffs, and for First Nations across the province: it overturned the trial judge's dismissal of oral history, and by extension, placed into significant doubt the trial judge's conclusions on the evidence. Herb George, Speaker for the Wet'suwet'en, commented, "we are no longer an invisible people" (*The Globe and Mail,* 12 December 1997, A1). For all appearances, the decision was radical and unprecedented: some critics went so far as to label Lamer's judgment as "invented law." It is important to note, however, that Lamer relied upon well established precedents and longstanding arguments in the history of the Indian Land Question in British Columbia: the Supreme Court's decision in *Delgamuukw* was not so much new as it was delayed by historical circumstance.[41]

The Supreme Court of Canada ruled on two of the main sticking points in the trial: it upheld the use of oral history as a means of proving aboriginal title, and it redefined the

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[40] In addition, both parties agreed to approach the BC Treaty Commission to begin negotiation of a settlement (BC Ministry of Aboriginal Affairs, 13 June 1994).

[41] *Delgamuukw* is certainly not the first attempt to resolve what has been known as the "Indian Land Question" in British Columbia. As Foster notes,

> it is surely important to remember ... that before the First World War, the territories in the *Delgamuukw* decision were very nearly the subject of an Aboriginal title lawsuit not unlike *Delgamuukw* itself; that this was due to pressure exerted by Aboriginal people upon the government of Canada; that the lawyer retained by Ottawa advised that Aboriginal title was a form of ownership that existed, unextinguished, in British Columbia: that Laurier's government was prepared to act on that advice, and that the unwillingness of subsequent governments to go to court deferred a judicial resolution of the issue until today. (1998, 229)

nature of aboriginal title for the purposes of subsequent litigation and negotiation. It ordered a new trial based on new principles.

The Use of Oral History as Evidence

Aboriginal title, the Supreme Court of Canada held, can be proven not just through direct evidence of use and occupation of land, but also through culturally-situated evidence such as laws, place names and oral histories (Louise Mandell, Presentation 15 October 1998). While the Court of Appeal hesitated to interfere with McEachern's assessment, the Supreme Court engaged in a close reevaluation of McEachern's treatment of the oral evidence in trial. McEachern, remember, found the oral evidence lacking in sufficient weight to stand as independent evidence of historic use and occupancy. While he admits the oral histories "out of necessity," he renders them impotent as "direct evidence of facts" (*Reasons* 1991, 57).

Chief Justice Lamer offers a starting point for interpreting the oral histories differently. A fair interpretation, he posits, assumes that "common law rules of evidence should be adapted to take into account the *sui generis* nature of aboriginal rights" (SCC 1997, 3).[42] Lamer then applies this principle to McEachern's judgment:

> In my opinion, the trial judge expected too much of the oral history of the appellants.... He expected that evidence to provide definitive and precise evidence of pre-contact aboriginal activities in the territory in question.... [T]his will be almost an impossible burden to meet. Rather, if oral history cannot conclusively establish pre-sovereignty ... occupation of land, it may still be relevant to demonstrate that current occupation has its origins prior to sovereignty. This is exactly what the appellants sought to do. (*ibid,* 101*)*

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[42] Lamer draws this principle from his earlier decision in *R.* v. *Van der Peet* (1996), at paragraph 68:

> In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of the aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case (Cited in SCC 1997, 80).

Not only did the trial judge "[expect] too much" of the oral history, he also allowed a more general discomfort with oral evidence to flavour his judgment of the evidence at hand. Aspects of the oral histories which framed McEachern's critique—a lack of geographic specificity, "literal truth," and objective verification—are, as Lamer notes, "features, to a greater or lesser extent, of all oral histories, not just the *adaawk* and kungax" (*ibid,* 98). As Lamer points out, McEachern's discomfort with the oral evidence casts dangerous implications for the use of oral history in subsequent aboriginal rights cases:

> The implication of the trial judge's reasoning is that oral histories should never be given any independent weight and are only useful as confirmatory evidence in aboriginal rights litigation. I fear that if this reasoning were followed, the oral histories of aboriginal peoples would be consistently and systematically devalued by the Canadian legal system.... (*ibid,* 98)

Furthermore, biases against oral evidence prevent an engaged "hearing" of the evidence at hand. McEachern's reaction to Johnson's song (Chapter Two) is evidence of this tendency in the trial. Indeed, as Lamer recognizes, the Gitxsan *adaawk* and the Wet'suwet'en *kungax* are "oral histories of a special kind" (*ibid*, 93). The Gitxsan distinguish between the *adaawk,* the "official or sacred litany of the history, law, customs, and traditional territory of a House," and the *antimahlaswx*, a collection of the House's stories and folklore (*Reasons* 1991, 45). Unlike other stories, the *adaawk* are explicitly geographic in orientation. They detail place names and specific sites where events occurred in aboriginal history. Furthermore, they have a distinct relationship to traditional systems of land tenure: stories and songs were told and retold as evidence of internal land allocations long before they were enacted for external land claims processes. As such, the *adaawk* provide evidence of the historic use and occupation of the territory; they are well suited for the forwarding of aboriginal title claims.

Aboriginal Title Defined and Affirmed

I would like to propose that the significance of the Supreme Court decision lies in two developments: first, the recognition that contemporary impasses require a negotiation of meaning; and second, the action undertaken by the Court begins this process of

negotiation. These "beginnings" of negotiation arise in the Court's definition of aboriginal title. The Supreme Court said that aboriginal title in Canada is:

> **Exclusive:** It encompasses "the exclusive use and occupation of the land."
> **Inalienable:** It "cannot be transferred, sold or surrendered to anyone other than the Crown."
> **Pre-existing:** It is in place before the assertion of British sovereignty.
> **Communal:** It is shared by members of an Aboriginal group. (SCC 1997, Summary, 6-7)

This definition makes a significant contribution toward bridging the gap between Crown and Aboriginal perspectives. Here, the Supreme Court departs from previous judgments in three ways: first, the act of defining aboriginal title is in itself unprecedented; second, the content of the definition surpasses previous judgments in its inclusion of aboriginal perspectives; third, the method of defining aboriginal title provides an exemplary foundation for future negotiations.

A Definitive Statement

The action by the Court to provide a definition is significant in itself. "Although cases involving aboriginal title have come before this Court and Privy Council before," Chief Justice Lamer comments, "there has never been a definitive statement from either court on the *content* of aboriginal title" (*ibid,* 116). In cases where title was discussed, it was described vaguely as "an interest in land" (*Guerin* v. *R.* 1984, 382) which was something "more than the right to enjoyment and occupancy" at common law (*Canadian Pacific Ltd.* v. *Paul* 1988, 688).[43] As much as aboriginal title differed from fee simple, it was *sui generis*, a unique concept arising in and of itself, which could not be defined.

Two streams of thought have been used to justify this lack of definition. Early cases said that aboriginal title was irrelevant: the Court in *St. Catherine's Milling*, for example, felt it was not "necessary to express any opinion on the point" (1888, 55). More recent cases

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[43] Based on a survey of "the Court's analysis of Indian title up to this point," the Court in *Canadian Pacific Ltd.* v. *Paul* (1988) comes to "the inescapable conclusion ... that the Indian interest in land is truly *sui generis.* It is more than the right to enjoyment and occupancy although, as Dickson J. pointed out in *Guerin*, it is difficult to describe what more in traditional property terminology[sic]" (658).

have deferred to government-to-government negotiation as a more appropriate setting for interpretation. For example, Lambert J.A. concluded his dissent in *Delgamuukw* v. *The Queen* (BCCA 1993) with an appeal for negotiation:

> in the end, the legal rights of the Indian people will have to be accommodated within our total society by political compromises and accommodations based in the first instance on negotiation and agreement and ultimately in accordance with the sovereign will of the community as a whole. (1097)

Furthermore, the Courts have been hesitant to apply principles from the common law to interpretations of aboriginal rights.[44] The Nigerian Court in *Amodu Tijani*, a Commonwealth case with relevance to Canadian aboriginal law, is frequently cited on this point. The Court warns: "there is a tendency, operating at times unconsciously, to render [aboriginal] 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" (1921, 404). The Supreme Court agrees, suggesting that to interpret aboriginal rights within the exclusive framework of the common law is to deny aboriginal systems their difference, and to perpetuate patterns of assimilation.

Lamer is cognizant that the *sui generis* nature of aboriginal title "precludes the application of traditional real property rules" (SCC 1997, 130) in interpreting its content. A history of frustrated negotiation efforts, however, prompted the Supreme Court to offer some clarification of terms. As he explains, the key to the Supreme Court approach lies in the fusion of common law and aboriginal perspectives.

A "Genuine Property Right"

The content of the definition also departs from previous interpretations. Unlike early judgments (most notably *St. Catherines Milling and Lumber Co.* v. *The Queen,* 1888), which limited aboriginal title to a "personal" interest in land, a "licence to use"[45]

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[44] See, for example *R.* v. *Sparrow* (1990, 1112).

[45] In an attempt to distinguish aboriginal title from "normal" proprietary interests, such as fee simple, the Privy Council in *St. Catherine's Milling* described aboriginal title as a "personal and usufructory" (rather than a proprietary) interest in land (1888, 54). Subsequent cases, including *Guerin* v. *R.* (1984) and

subservient to other proprietary interests, the Supreme Court in *Delgamuukw* emphasizes a right to the land itself—to the "exclusive use and occupation of the land held pursuant to that title" (SCC 1997, 117). As Slattery comments, the decision means First Nations have a right to "full-blooded title. It has some differences from ordinary title but nevertheless its something that we have to take seriously. This is a genuine property right in every sense of the word" (*The Globe and Mail,* 12 December 1997, A1). Aboriginal title is *sui generis* (and therefore distinct from fee simple ownership) not as an ephemeral and lesser interest in land, but as a historically and culturally unique concept: historical circumstances make it inalienable to anyone except the Crown; cultural distinctions demand that it be understood with reference to both common law and aboriginal perspectives.

The Negotiation of Meanings

For the purposes of this thesis, the *method* the Court adopts in interpreting aboriginal title is most relevant. The Court engages in the process of negotiating meanings by acknowledging a conflict in contemporary interpretations of land ownership, both in terms of ideological differences about property and methodological differences in the documentation of evidence. In the case of aboriginal title, the Court perceived a conflict between the plaintiffs' view of title as an inalienable property right and the Crown's view of title as a "bundle" of discrete rights (i.e., to hunt and fish) without broader significance. Both views, the Court concludes, are incorrect.

To bridge this gap, the Court suggests, requires an understanding of both aboriginal and Western perspectives. Chief Justice Lamer concludes: "the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land" (147); a "true reconciliation" between these divergent perspectives "will, equally, place weight on each" (148). This sense that aboriginal title lies "somewhere in between" the positions of the Crown and the plaintiffs points to its quality as a *sui generis*

Canadian Pacific Ltd. v. *Paul* (1988) have been more hesitant to define aboriginal title as either proprietary or non-proprietary. In *Canadian Pacific Ltd.* v. *Paul* especially, the court suggests that if aboriginal title is not proprietary, it is something very close to proprietary.

concept.[46] While previous courts have used *sui generis* to describe a difference from the common law, and to remove the burden of further definition, the Supreme Court interprets *sui generis* as an umbrella concept that reflects the fusion of aboriginal and common law perspectives. Aboriginal title is *sui generis* in that it requires that meanings be negotiated by aboriginal people and the Crown.

The Supreme Court identifies a number of ways in which aboriginal title is *sui generis*. Two aspects in particular exemplify the method of the Supreme Court's approach: the preexistence of aboriginal title before British sovereignty; and the ways in which it differs from traditional Western property concepts. In both cases, the Court reaches back to principles in the common law to inform and complement the aboriginal perspective.[47]

- ***The Preexistence of Aboriginal Title***

Aboriginal title, the Supreme Court concludes, takes its source from an occupation of the land prior to the assertion of British sovereignty in 1846.[48] Basing present title on the fact of physical occupation derives from the common law principle that "occupation is proof of possession in law." In the common law tradition, however, this principle applies in situations where sovereignty has been asserted. Aboriginal title, however, exists prior to British sovereignty. "What this suggests," the Supreme Court concludes, "is a second source for aboriginal title." Aboriginal title also originates in "pre-existing systems of

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[46] It is important to recall here that *sui generis* is not unique to *Delgamuukw*; rather, it is a legal phrase that has been used in the history of aboriginal rights litigation to describe concepts or terms that are unique to aboriginal systems, and therefore difficult to explain in Western legal terms.

[47] This method is also employed by Michael Asch in his exploration of conceptual differences between Dene and European notions of wildlife, and how these differences affect aboriginal interests in land claims agreements (1989).

[48] This date is a rough estimate of the time British sovereignty was asserted "in the territory" (i.e., in northern British Columbia). McEachern explains in his *Reasons*, "Great Britain asserted sovereignty in the territory not earlier than 1803, and not later than either the Oregon Boundary Treaty, 1846, or the actual establishment of the Crown Colony of British Columbia in 1858" (1991, viii-ix). The Oregon Boundary Treaty of 1846 was the date chosen.

aboriginal law" (114).[49] As the source of aboriginal title, "prior occupation" has foundations in both British and Aboriginal traditions.

Proving prior occupation as a test of aboriginal title also requires the reconciliation of divergent perspectives. Here again, the common law provides illumination, but only in conjunction with an aboriginal perspective. At common law, proving physical occupation is relatively straightforward: "physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of defined tracts of land hunting, fishing, or otherwise exploiting its resources" (77).[50]

However, proving occupation in the *pre-sovereignty* period, more or less than 150 years ago, is somewhat more challenging. While the Supreme Court allows aboriginal groups to cite present occupation of lands as proof of their ancestral claims, they must demonstrate some continuity between present and prior occupation. Proving this continuity is where the aboriginal perspective must enter. In many cases, the Supreme Court acknowledges, discontinuities in occupation were the result of colonial appropriations. Taking this into account, aboriginal groups need not demonstrate an "unbroken chain" of occupation, but rather a "substantial connection between the people and the land" (73). Presumably, this connection can be demonstrated through the use of oral history and other aspects of the aboriginal perspective as evidence.

- ***Differences between Aboriginal and Western Property Concepts***

The nature of an aboriginal relationship with land is difficult to explain in Western legal terminology. By all sources, land appears to be of central significance to aboriginal cultures. There are aspects of this relationship which suggest a concern for future as well as present generations. Furthermore, the Court acknowledges that "the relationship ...

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[49] "Aboriginal laws" of property would include, for example, traditional systems of land tenure and resource allocation, rules of trespass and customs for granting access to territorial acquisitions. For a detailed survey of Wet'suwet'en traditional laws, see Antonia Mills (1995).

[50] The Supreme Court bases its discussion here on the work of Kent McNeil (1989).

has an important non-economic component" (66). And yet how to define this interest in land—beyond vague references to its inherent value—within the terms of Western property concepts? Lamer turns for illumination to the relatively obscure concept of "equitable waste" at common law. The doctrine of equitable waste holds that "persons who hold a life estate in real property cannot commit 'wanton or extravagant acts of destruction' or 'ruin the property'" (66) in a way that would limit the enjoyment of subsequent bearers of the estate.[51]

For Lamer, both the aboriginal relationship with territory and the feudal notion of responsibility for the estate imply a sense of intergenerational equity. Both are driven by the understanding that properties can have intrinsic value beyond their economic relevance. Lamer uses his findings to impose an inherent limit on aboriginal title lands: "lands so held cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands" (7). For example, he explains, it would be inappropriate to strip mine land established as a hunting ground, or to pave land with ceremonial or cultural significance.

Finally, the notion of aboriginal title as a "communal interest in land" has associations with feudal property arrangements.[52] Once again, the court reaches back to examples from the common law to inform otherwise intangible concepts in the aboriginal tradition.

CONCLUSION

The Supreme Court of Canada in *Delgamuukw* provides both definition and movement towards the negotiation of meaning between Aboriginal and Western perspectives of territory. Not only does the Court acknowledge the need to bridge concepts, it also takes significant steps toward building such bridges. In affirming aboriginal title, the Supreme

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[51] Lamer turns for reference to Burn's *Cheshire and Burn's Modern Law of Real Property* (1988, 264) and Megarry and Wade's *The Law of Real Property* (1975, 105).

[52] Common property theorists have explored this connection in depth. See, for example, Berkes' *Common Property Resources: Ecology and Community-Based Sustainable Development* (1989), and *Cultural*

Court made further negotiation necessary. Furthermore, in admitting oral evidence, the Court indicated the direction such negotiations would take. In these ways, the Supreme Court made strides toward redressing the power imbalance that persisted through the Court of Appeal.

The Supreme Court decision also contributed to the *practice* of negotiation. The decision supported the general consultation framework recommended by the Court of Appeal, under which the infringement of aboriginal title is permissable if it can be justified. Indeed, the Supreme Court strengthened this formula: Crown referrals to First Nations regarding development activities on their territories must be "deeper than mere consultation" (SCC 1997, 168). At the same time, the recognition of aboriginal title as an economic interest in land means that "fair compensation" must be paid for infringement (169).

It is too soon to assess the full practical implications of the Supreme Court decision. To date, there have been no substantial revisions to the Crown consultation policy set in motion by the Court of Appeal. This is suggestive of some of the limitations of the Supreme Court's decision. As an institution of the Crown, the court never once considers the validity of the Crown's claim to sovereignty vis-a-vis the aboriginal claim. If aboriginal title comes with inherent constraints, how and to what extent is the Crown title constrained? If it is unreasonable for an aboriginal group to pave a burial site, is it any less reasonable for the Crown to do so even with consultation? What constitutes a "justifiable infringement" of aboriginal title? *Delgamuukw* says that infringements of aboriginal title by federal and provincial governments can be justified by any number of "compelling and substantial" legislative objectives, including resource development, settlement, and conservation of natural resources.[53] While the Supreme Court reinforces

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Survival Quarterly's 1996 Special Edition, "Voices from the Commons: Evolving Relations of Property and Management."

[53] Lamer draws from preceding judgments in *R.* v. *Sparrow* (1990), and *R.* v. *Gladstone* (1996) to arrive at a range of legislative objectives which can justifiably infringe aboriginal title. These include "the development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, and the building

the need for consultation to avoid infringement, and compensation to redress it, it offers little in the way of binding constraints on Crown activities. Crown allocations of resources must "reflect the prior interest of the holders of aboriginal title in the land." This might entail, Lamer speculates,

> that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of aboriginal title lands, that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced. (167)

Again, Lamer defers further assessment of competing interests to negotiation outside the courtroom. "These difficult economic considerations," he concludes, "obviously cannot be solved here" (88). It remains to be seen how the Court's efforts to equalize power relations between the Crown and the aboriginal plaintiffs will take effect at the negotiation table. Likely, the resolution of "these difficult economic considerations" will mean future litigation as well as future negotiation.

From a legal perspective, the Supreme Court's ruling that meanings must be negotiated does not solve the problem of interpreting the significance of oral history. Presumably, future judges and negotiators will face the same difficulties as McEachern: how to translate oral histories—their territorial references and genealogies—into some agreed upon meaning between cultures; how to establish culturally appropriate criteria for the quality and credibility of oral evidence.

Practical developments on Gitxsan territory provide some early answers. Outside the arena of the Courts, the Gitxsan have been pioneering their own strategies to better communicate their claims. In response to the Court of Appeal ruling, and in particular its demands for site-specific information as proof of existing aboriginal rights, the Gitxsan

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of infrastructure and the settlement of foreign populations to support those aims," as "compelling and substantial" legislative objectives (SCC 1997, 165).

are inventorying and mapping cultural and ecological information on their territories. This practical initiative is the subject of Chapter Four.

CHAPTER FOUR

MAPPING ORAL HISTORY ON GITXSAN TERRITORY

The story now returns to practice in the field where it began, with a dispute over traplines (Chapter One). In response to developments in *Delgamuukw,* the Gitxsan are experimenting with ways to use oral histories to give a cross-cultural understanding of aboriginal title. They are performing what may in the courts have seemed an impossible task: the translation of songs and stories into graphic maps. The mapping initiative exemplifies a practical negotiation of meaning. Moving from the impasse that developed in the trial, the Gitxsan are finding ways to convert apparently intangible aspects of the oral histories into "terms of negotiation"—terms that are more accessible to outside audiences, and indeed to new generations of Gitxsans (Sterritt, 1 December 1998).

HISTORICAL FOUNDATIONS: "WE'VE BEEN MAPPING FOR A VERY LONG TIME."

Mapping weaves throughout the Gitxsan history in direct conjunction with their claims to the land. As Ken Brealey argues, "'Mapping' cultures only become 'map-making' cultures for the same reasons that anyone makes maps at all: to satisfy certain needs, to serve certain interests, and to perform certain tasks" (1997, 17). For the Gitxsan, the "interests" and the "tasks" may have changed, but the motivations remain the same. Whether in statements to Royal Commissions and federal officials in the early years of dispossession, or in subsequent years of litigation and negotiation, the Gitxsan have adapted the same claim of "ownership and jurisdiction" of their traditional territories to suit different political environments. Mapping becomes a powerful form of communication and, for a culture which has always mapped its relationship with the land in some sense of the word, the shift to "paper maps," and later to the dynamic medium of computer imagery, only exemplifies its adaptability.

Since contact, aboriginal societies have searched for ways to devise intercultural forms of communication through which to express their claims. Maps were one such means of communication; they provided a visual medium to articulate boundaries, depict important

geographic features, and locate sacred sites. Some early examples of graphic maps survive within the context of communication and directional assistance to explorers and settlers,[54] and, more politically, within the context of early land claims.[55] True to their long history of resistance and the assertion of their territorial rights, the Gitxsan were among these early mapmakers.

The "Samuel Douse map" is a case in point. Samuel Douse (Biiyoosxw) was a chief of the Gitanyow, the same Gitxsan tribal group that established a Group Trapline in the late 1920s, and perhaps the most independent and militant of the Gitxsan tribes. Like the Gitxsan mappers today, Douse sought a means of communicating his claim across barriers of cultural understanding. In 1910, Douse approached Indian agent John McDougall with a statement of claim: the first recorded map of Gitanyow territory from an aboriginal perspective. While this original map doesn't appear to have survived, Douse produced a similar map for the 1915 hearings of the McKenna-McBride Royal Commission. Another Douse map survives in the form of a photograph taken by the Tlingit ethnographer, Louis Shotridge.[56]

Shotridge traveled through the Skeena region in 1918, collecting artifacts and documenting "disappearing societies" for the University of Pennsylvania. In his published account of his travels, he describes an encounter with Gitanyow leaders:

> Some of the older men talked over this land question to me and on one occasion one of the leaders showed me a map, cleverly drawn with pen and black ink on a sheet of wrapping paper, indicating a tract of land which the chief claimed had been theirs from time immemorial. He stated that his ancestors had fought hard to retain this possession, and that every member of the group is taught at childhood

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[54] See Fossett (1996) for a discussion of early Inuit cartographies.

[55] The Nisga'a were likely the first producers of graphic maps. Within the Nisga'a cartographic record, Jacob Russ's 1906 *Sketch Map of New Aiyansh* survives as one of the earliest maps of the Nisga'a claim.

[56] Sterritt et al. note: "Although this map has not been located, it is likely similar to the 1910 Samuel Douse map and is probably the map that Shotridge photographed in 1918 and/or the map that Ditchburn used to draft the 1920 DIA blueprint labelled 'Kitwancool.' All the Gitanyow maps that have been located have the same information" (1998, 277).

> to hold on to it. I could not obtain the drawing which I thought would offer a good sample of an Indian idea of map making but I photographed it. This is the first group of Indians I have ever met in the Northwest who foresaw the value of land and who are making efforts to provide some kind of a foothold on behalf of the generation to come.[57] (Shotridge 1919, 140; cited in Dean 1998, 207)

Shotridge's photograph is still on file in the University of Pennsylvania archives. It shows the external boundary of the Gitanyow territory, together with major rivers, tributaries, and village sites labeled with their Indian names. The map was obviously highly valued as a powerful representation of the Gitanyow claim. Shotridge leaves, to his disappointment, with only a photograph. A similar situation arose in the 1915 McKenna-McBride hearings, when Gitanyow chief Albert Williams showed a reluctance to surrender one of Douse's maps: "The reason I am going to give [the map] to you—I am not going to let anyone have this, but the reason I am going to give it to you is because we ... want the whole country within that black line" (Cited in Sterritt et al. 1998, 64).

The Douse map is part of a long history of Gitxsan resistance to the loss of their lands effected by the reserve system and encroaching settlement. Maps became a way of communicating to officials, commissions, and encroaching settlers the nature and the substance of their claim. Then, as they are now, maps were used to assert ownership and jurisdiction of the land. The Douse map emerges as a political artifact: by charting its movement through history—how it is alluded to, photographed, and presented in various official settings—we see the "officialness" of the map valued then as it is now. Like the Douse map, modern Gitxsan maps attempt a common language to facilitate cross-cultural communication. While the mappers' tools have changed dramatically, the message remains the same.

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[57] In asserting that this was the "first group of Indians...in the Northwest who foresaw the value of land," Shotridge neglects the neighbouring Nisga'a, who began to formally protest the loss of their lands in the early 1880s.

MODERN MAPPING ON GITXSAN TERRITORIES: THE STRATEGIC WATERSHED ASSESSMENT TEAM

In 1994, the Gitxsan created the Strategic Watershed Assessment Team (SWAT), an organization dedicated to the inventory and mapping of cultural and ecological information on Gitxsan territories. In the four years since its inception, SWAT has produced a series of sophisticated maps for several "pilot" House territories. Unlike the static, two-dimensional products of conventional cartography, these maps are dynamic and multi-dimensional—the products of modern computerized information systems. Each map comprises layers of biophysical, cultural, and political information, which is colour-coded according to the factors selected. For example, shades of purple might depict the density of a particular tree species in one layer, while shades of blue might depict the frequency of culturally modified trees in another. The maps serve two broad purposes: first, to document a continuity of aboriginal use and occupation as the source of aboriginal title, and the basis for external land claims; and second, to provide a framework for long-term planning and development among the Gitxsan themselves. In addition, they offer a template for the future use of oral history as evidence of an aboriginal perspective.

The mapping project took initiation and direction from developments in *Delgamuukw*. Impetus for the project came largely from the Court of Appeal ruling, which recognized the existence of aboriginal rights, and suggested that the proof of such rights lay in the documentation of site-specific information. Mapping seemed a logical way to present connections between specific sites, and evidence of aboriginal occupation. If the Court of Appeal provided the motivation,[58] the trial record in *Delgamuukw* provided the raw material (some 23,500 pages of transcript evidence) for the mappers to work with. Indeed, more than raw evidence, the case provided a series of "foundation maps" upon

[58] Practical motivation for the mapping initiative also came from the 1994 *Memorandum of Understanding* between the Province and the Gitxsan and Wet'suwet'en hereditary chiefs. The agreement postponed court proceedings for one year as part of a renewed commitment to negotiate a settlement outside of Court. Negotiations broke down in 1996, however, and the parties resumed their preparations for the appeal to the Supreme Court of Canada.

which to layer additional information. Neil Sterritt recalls, "the *territories* were the key [to the trial case], and the maps were the key to the territories. Maps were always present as a picture to explain what people were saying; they were always there" (1 December 1998). Maps were used in the trial to link oral evidence with the physical territories. They detailed Gitxsan external and internal boundaries, linked place names with their associated ownership, and sketched a distribution of resources relevant to a traditional economy (Overstall, 13 November 1998).

Although mapping was well underway in 1997, the decision in the Supreme Court of Canada provided validation and reinforcement. The Supreme Court's recognition of aboriginal title, and its upholding of oral history as a valid means of proving this title, leant support to a project which premises its work on the assumption of aboriginal title, and the use of oral history. Mapping continues in preparation for future negotiation or, perhaps more likely, a retrial.

From Songs to Maps: An Unlikely Leap?

Chapter Two documented an impasse between two perspectives, represented in two seemingly contradictory media: Mary Johnson's song and Allan McEachern's Map 5. Certainly, maps and songs conjure disparate connotations in terms of purpose and form. For McEachern especially, Mary Johnson's song, together with the broader oral history from which it originates, connotes mythological references and an absence of "literal truth," a lack of specific detail, and dubious processes of verification (*Reasons* 1991, 181; SCC 1997, 97). A map, on the other hand, would seem to satisfy better the requirements McEachern seeks. Maps, in popular understanding, tend to connote objective, accurate representations of reality. Official maps (such as topographical maps, forest cover maps, highway maps) are typically highly detailed and systematically verified. From McEachern's perspective, maps and songs are different things altogether. As a means of expressing a claim to territory, songs are clearly inferior.

And yet, as Lamer reminds us, the oral evidence presented in trial is a very "special kind of oral history" (SCC 93). The *adaawk* are specifically intended—both in the setting of

the feast and in the courtroom—for the purpose of territorial claims. The plaintiffs associate songs, like maps, with travel, and with territorial claims. Indeed, for the Wet'suwet'en, oral history is denoted by the word *kungax*, or "trail of song." The songs express "the spirit trail of a Chief's name" and, as the enactment of personal crests, they validate the succession to a Chief's name and its association with a particular territory:

> As the Wet'suwet'en follow the trails to their territories, so they seek to capture the songs that go with their titles to their territories. The songs link the land, the animals, the spirit world, and the people. The power of the hereditary names and crests is continually renewed for the Wet'suwet'en by the highly personal and individual experience of being captured by song. (Gisday Wa and Delgam Uukw 1989, 30)

A closer look at the *adaawk*, removed from the connotations of oral histories more generally, suggests that the gulf between oral history and modern maps may not be so great after all. Both the *adaawk* and Western maps share similarities in purpose: they describe a culture's relationship with territory. Both provide information about place names, the location of historic events, political boundaries, and land tenure allocations. Both attach this information to specific geographic features.

An example from the trial illuminates these connections. During her testimony, Mary Johnson is asked to identify the boundaries of her territory. She responds by identifying physical features on the land—the mountain *Andamhl*, "where the moon shines on," and the creeks *Xsu Wil Gall Bax* and *Xsan Max Hlo 'o*—as territorial boundaries. As her testimony reveals, each of these places act as "spatial anchors"[59] for stories: a clearing on the mountain of *Andamhl* is the home of *Gyadim Lax Tsinaast*, the "mean man" who lives in the hills. Johnson describes how the mean man comes down from the hills to attend a feast; he is so ugly that the villagers throw a blanket over his head, and make a mask of him (Supreme Court of British Columbia 1987-1991, 13:850; cited in *Reasons* 367).

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[59] The concept of place names as "spatial anchors" to stories is borrowed from Cameron (1997).

From McEachern's perspective, such references are nebulous at best: a lack of geographic specificity, combined with an interspersion of supernatural references, weakens the Gitxsan geography in relation to its European counterpart. Contradictions between the Gitxsan map of the territory and the stories that accompany it bolster his conclusion that "Johnson knew very little about her boundaries" (*Reasons* 1991, 373).[60] A conventional cartographer might echo McEachern's exasperation: what is the point of this? Why are you telling me a story about an ugly man when I asked you to identify a boundary on a map? For Mary Johnson, the story defines the territory: "where this mean man lives ... that's where *Xsan Max Hlo 'o* [the creek] runs down, that's our boundary" (*ibid,* 367). Place names are associated with characters—ancestral and supernatural—contained within the stories and songs of a House group. Like the land to which they refer, these stories are considered the property of a House group.

The story of the mean man has deeper significance still. While a Western viewer might conceive of a boundary as a line on a map that denotes ownership of a place "out there," for Mary Johnson, the boundary appears to have little meaning without reference to the stories that are its source. Like the song in Chapter Two, the act of telling the story is significant: it reflects the protocol of the Feast, in which ancestral ownership is verified through the recital of oral history. Johnson talks about the "mean man" in the same way as she would in a Gitxsan feast hall. In doing so, she asks the judge to respect the functional similarities between the Aboriginal feast and the Western court, and therefore, the validity of her story as "court-quality" evidence.

As Johnson's story shows, naming and describing territorial features are as much about *claiming* land as they are about familiarizing oneself with the landscape. Parallels with

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[60] The southern portion of the Antgulilbix territory for which Johnson testified was among the least defined of the Gitxsan House territories. No Territorial Affidavit was produced to accompany the claim; instead, the plaintiffs relied upon the evidence of surrounding territories produced during the trial. McEachern concludes that the boundaries of Antgulilbix are inadmissible, making all neighbouring claims equally unreliable. The "gap is created in the Claim Area [belies] the Plaintiff's claim to ownership and jurisdiction of the entire Claim Area" (*Reasons* 373).

mapping are not incidental. The language of the surveyor, it appears, applies just as well to the migration stories of the Gitxsan ancestors:

> For the Gitksan [previous spelling] ... the process of claiming territory is described as "walking the land" or "surveying" it and includes naming mountains, rivers, lakes, and other areas. These names are highly descriptive and reflect a detailed knowledge of the landscape. Once the land was surveyed, the house hosted a feast and announced its claim to the territory and its names. The guests of the host, the chiefs of the other houses, acknowledged the claim to the territory, thereby validating the house's ownership of the territory and completing the process of establishing land tenure. (Sterritt et al. 1998, 12)

Indeed, some commentators are thinking about oral histories as maps in their own right. Hugh Brody wrote in *Maps and Dreams*, "Oh yes ... Indians made maps. You would not take any notice of them. You might say such maps are crazy. But maybe the Indians would say that is what [our] maps are, the same thing. Different maps—from different people—different ways" (1981, 45). For Ken Brealey, a geographer from the University of British Columbia, the difference between oral histories and Western maps lies not so much in their *function*, but in their *form*. While European representations of territory might be described as "graphic," Aboriginal representations might be called "graphemic." As such, they "are not committed to a two-dimensional sheet, but transmitted from generation to generation orally (as in the stories and songs), and physically (as in the dances, ceremonies, and migrations)" (Brealey 1997, 15). Thus stories, songs, place names and poles codify geographic features, boundaries and expressions of ownership just as maps do for Euro-Canadians.

Similar motivations, then, describe the recitation of an oral history and the production of a map. Both present a picture of territory; both associate that depiction with human institutions such as land ownership. These connections suggest that the conversion of oral histories to maps may not, indeed, be so great a leap.

The Gitxsan Method: Whose Culture Frames the Question?

> *The territory is a vast emptiness.*
> Chief Justice Allan McEachern, *Reasons for Judgment* (1991)

> *You could drop us anywhere in our territories and ... within a day we would find evidence of our being there .... You just have to know how to look .... We know how to see the evidence of our people's use of the land, and it's everywhere, it's thick.*
>
> Russell Collier, Land and Resources Officer, Gitxsan Treaty Office (October 20, 1998)

The Gitxsan mappers regularly share their techniques in regional, national, and international presentations and workshops. They entitle their presentation: "Whose Culture Frames the Question?" In any mapping exercise, underlying cultural assumptions dictate the nature of the information represented. In this way "the same piece of territory, depending on what question you ask, exhibits different properties, different capabilities." When we map our territories, Collier explains, "we start by assuming first that there are a variety of needs that we have to account for, in addition to the rights of the plants and animals to exist in and of themselves" (20 October 1998). These assumptions drive the Gitxsan approach as mapmakers, and shape what they see on the territories. While Collier sees a territory "thick" with the signs of his ancestors, McEachern would surely find only thin evidence in an area unoccupied and, from his perspective, unused.

In a practical sense, mapping began with the selection of a pilot area in which to focus efforts. The territories of the Eagle Clan (Lax'skiik) are located in the southern portion of the Gitxsan claim; they overlap roughly with one of the five major watersheds in the Gitxsan territorial matrix. For the mappers, this fusion of political and ecological boundaries provided an ideal interface for land use planning.

Mapping begins with the representation of existing information: the topographical and forest cover databases compiled by the Province; and the oral evidence recorded in *Delgamuukw*. "Mappable information" from the oral histories includes trails, specific sites of traditional use and, as Collier explains, the "names of things." For example,

> the name of a rock, as a marker for which way to go. Or the name of a hillside where some significant event, such as a trade negotiation, or a peace settlement, or a battle happened. Or the name of a ridgeline that you follow to get to a certain

> area, or the name of a stream ... they're geographical places, they're place names which we use to identify significant parts of the territories. (20 October 1998)

The mappers reinforce information from the oral histories through ongoing consultation with Gitxsan elders, and field surveys to verify traditional use sites. SWAT also conducts plant and wildlife inventories to supplement provincial databases.

In the end, the Gitxsan maps present a composite image of the Gitxsan perspective—the same perspective presented in *Delgamuukw*, and in prior attempts to negotiate land claims. This perspective is at once ecological and cultural; its different facets emerge in the map layers themselves. On top of the physical information for the territories—the government topographical maps, for example—lies detailed information about habitat and species composition, and on top of this a web of cultural associations—trail networks and campsites, sacred sites and place names. Although the layers can be separated to exist independently, the Gitxsan would argue that the cultural *is* ecological: cultural information does not so much rest *on top* of physical information as it reflects and interpenetrates the layers beneath it. For example, documentation of wildlife sign represented in one map layer correlates with historic hunting trails in another; a place name such as *Andapmatx* (Kologet Mountain) describes a mountain as much as it does the ecological and culture associations with the place. It means, literally, "where to hunt mountain goats" (Sterritt et al. 1998, 301).

As we discussed above, maps and oral histories share similarities in their geographic orientation, making the process of translation not so difficult to comprehend. Though illustrative, however, a map can never reproduce an oral narrative in its fullness. Certainly, it can chart an ancestral migration, locate the site of historic event, record the place names that link past to present, people to territory, but can it record the sadness of a dirge song? the spiritual potency of a *naxnox* performance?

As Collier explains, the maps are not meant to capture the fullness but rather the fundamental elements of the oral histories. They are a blend of traditional and modern

media. Principles of aboriginal systems are preserved in maps which are at once *ecological* and *cultural* in their orientation.

Translating Traditional Principles: An "Eco-Cultural" Orientation

When SWAT was established in 1994, legal definitions of aboriginal rights were still limited to specific practices on specific sites, rather than to comprehensive rights on broader landbases. Rights were also limited temporally, in that they were defined by practices as they existed before the assertion of British sovereignty.

This "pre-*Delgamuukw*" conception of aboriginal rights has flavoured mapping initiatives in other areas. The "map biography" technique, for example, has been used in areas across Canada to document aboriginal land use.[61] Essentially, the technique involves asking hunters, trappers, fishermen and berry pickers from different territories to individually map the land they had used in their lifetimes. Each hunter marks the gathering locations and campsites for each species hunted, then connects the sites to form a circular representation of the territory used. Individual maps are then overlapped to show the geographic extent of historic land use by the entire group. In the late 1970s, map biographies provided a very positive contribution to aboriginal land issues: they documented elders' knowledge of territory, and reinforced anthropologists' hypotheses that territories were used communally. However, the method reflects certain assumptions about aboriginal rights as specific uses tied to specific sites. Furthermore, as "biographies," the maps tend to look backwards to land use in individual lifetimes, rather than forwards to future uses and long-term planning.

As a reflection of their approach in *Delgamuukw,* the Gitxsan chose to map their lands differently. Rather than mapping site-specific information alone, for example the specific locations where species were hunted, the Gitxsan chose to map the habitat on which those

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[61] The "map biography" technique was first developed by Milton Freeman (1976) in conjunction with Inuit hunters. The method received popular attention through Hugh Brody's classic work, *Maps and Dreams* (1982). Since then, map biographies have become "virtually the sole method used in Canada for documenting official claims to ancestral lands because of the ease and straightforwardness of documentation, the visual effectiveness of the composite map, and the aura of scientific objectivity derived from the survey methodology" (Fox 1998, 1).

species depend. Furthermore, they wanted their maps to show more than past use; they needed to provide a basis for future planning. For the Gitxsan, mapping land meant mapping from an "ecological perspective." It meant thinking about the entire landbase, rather than specific land uses; and thinking about long-term time frames, rather than solely short-term objectives.

Mapping Habitat

> *The province [says] that the right to hunt, fish, gather for social, ceremonial and sustenance purposes is site-specific, and while that right may exist, the right to the habitat may not exist.... [For us], if there's no habitat for these plants and animals to live in, then it's an empty right.* (Collier, 20 October 1998)

The Gitxsan approach is based on a simple formula which recognizes that the exercise of aboriginal rights is dependent upon a healthy and functioning environment. Thus, *habitat* is required to support the *animal and plant species* which in turn support the exercise of *cultural* rights. More simply, cultures depend upon ecosystems.

The pilot project on Eagle Clan (Lax'skiik) territories supports this fundamental formula. In consultation with Lax'skiik elders, SWAT representatives identified eight plant and animal groups on which to focus mapping efforts. These included bald eagle, cedar, edible berries, salmon, grizzly bears, pine marten, mountain goat, and moose. Species were selected based on their cultural relevance to the Lax'skiik people, but also on their ecological significance as "indicator species"—keys to the health of the system as a whole.[62] Collier explains:

> we chose resources with a broad range of habitat requirements. Some of them, such as bald eagles, were important symbolically to the Eagle Clan. [They also] have very highly defined [ecological] ranges—the fish they feed on, their nesting sites in the cottonwood floodplains. So they range from ... [species with very

[62] The determination of ecological significance involved a review of biological literature to determine the key habitat features that these species required. For example, pine marten thrive in areas with dense canopy cover and high quantities of dead woody debris on the forest floor. In this way, cultural significance overlapped ecological significance. The species selected became, in ecological jargon, "indicator species": by protecting their habitat, the habitat of species with similar requirements is protected as well.

> specific habitat requirements, and specific cultural uses] to some very broad-ranging large mammals such as grizzlies and moose .... In order for our own cultural needs to be met, we needed a broad range of values to be inventoried and mapped. (20 October 1998)

While the Gitxsan initiative is unique in its approach, it is not immune to the effects of existing Crown policy. Selection was also influenced by legal factors, in that species had to accord with aboriginal rights policy at the time.[63]

Mapping habitat becomes another way of expressing a Gitxsan claim to territory (aboriginal title). In Chapter One, this same strategy emerged with traplines. From an aboriginal perspective, traplines meant territory: a right to own and manage the land, rather than a right to a single land use. Here, Gitxsan strategies reflect the same belief that the use of the territories shouldn't be restricted to particular *practices*; rather, it should reflect a more fundamental right to use and manage lands as they see fit.

Mapping La oo'y

> *We're trying... to add an element of la oo'y to our planning. We want very much to get out of the 60-80 year rotation, or even shorter, that dominates current land use planning, and get into something that more nearly resembles how the ecosystem naturally works.* (Collier, 20 October 1998)

A second aspect of "mapping ecologically" involves thinking about the land in long rather than short-term time frames. In their maps, the Gitxsan hope to convey a sense of *la oo'y*. Best translated as "time depth," *la oo'y* is "a very special term; it's used to describe our sense of House identity, our oral histories, [our] relationships to each other and to the land through time" (Collier, *ibid*). In court, the Gitxsan used the concept of *la oo'y* to emphasize the historical continuity of their claim. Mary Johnson's song was particularly exemplary: a *limx'ooy* or ancient dirge song, it referred to the passage of information over "thousands and thousands of years." For the mappers, "[adding] an element of *la oo'y* to [their] planning" means thinking in long time frames about past and

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[63] Recognized rights under the *Crown Land Activities and Aboriginal Rights Policy Framework* (1995) include rights "to hunt, fish, and trap, gather berries and other plants for food, and use natural materials for shelter, medicinal, spiritual, and ceremonial purposes" (BC Ministry of Aboriginal Affairs).

future alike.[64] Maps reflect a broader SWAT mandate, in which present planning efforts draw from established practices, principles, and knowledge bases in order to make decisions about the future. And yet how is it possible to incorporate this sense of "time depth" into something as static and visual as a conventional map? Here is where the process of translation begins.

In translating aboriginal concepts such as *la oo 'y*, the Gitxsan turn to a very modern set of tools. Computer software such as Geographic Information Systems (GIS) provide some temporal flexibility, allowing the mappers "to move different kinds of solutions forwards and backwards in time" (Collier, *ibid*). GIS compiles layers of information to form very detailed representations of a particular space. For example, a particular area might be mapped for its topographical contours, its habitat composition (the distribution of forests, swamps, lakes etc.), its road networks, and its aboriginal heritage sites. However detailed, such an extensive database remains a snapshot in time. At this point, the Gitxsan introduce software such as Predictive Ecosystem Mapping (PEM). PEM is an interpretive device which uses existing sources of information to make generalizations about the future. Like a hairdresser uses computer imagery to predict how a particular cut will grow in over time, predictive software uses the land's existing features to speculate the effects of a particular development activity.

While computer software acts as a *tool* of translation, the mappers are also helped by the nature of the information they map. Gitxsan place names, for example, carry with them associations of the past, which encapsulates this sense of *la oo 'y*. "Encoded into descriptions of places," the mappers explain, "is the experience of being there." The Gitxsan language is itself conducive to mapping:

> our language is more visual, more pictorial than English is. English is highly abstract in some ways, while our language is well-suited for describing geographical things. It's oriented that way. In fact it's very difficult to talk about

[64] Chief Justice Lamer arrives at a similar conclusion from the evidence in *Delgamuukw*: "the relationship of an aboriginal community with its land ... applies not only to the past, but to the future as well" (SCC 1997, 126).

> land without talking about your relationship to it, simply for that reason. When we talk about things or actions or places in English, it's a lot more like painting a picture with words. It's a combination of visual cues, or other sensory cues. How tired you get before you reach a certain spot, those kinds of things.
>
> There's a place called "forehead touches the ground"... where the cliff that you're climbing is so steep that your forehead is actually almost touching the rock wall there. But those kinds of names and descriptions of them mean a lot to people who speak the language, and it says something about what you expect to find there, and how the experience of the place is organized. And that's another aspect of *la oo 'y* again.... When you're talking about a geographic location in our language, you're also talking about your experience of it, and that's what I meant about your relationship to the land. (Collier, *ibid*)

Mapping ecologically, then, is as much about documenting human experience as it is about species composition and habitat. This fusion of cultural and ecological considerations characterizes a Gitxsan geography, whether it is expressed in oral histories or modern maps. By translating traditional principles like *la oo 'y*, and combining these principles with site-specific information from field surveys, interviews, and the oral histories themselves, SWAT produces some of the most sophisticated ecosystem maps in the province. The maps provide a foundation not only for territorial claims, but also for long-term planning.

Claims and Referrals

The maps are used for both external and internal purposes. Externally, they become negotiating instruments for use in future treaty negotiations or aboriginal rights litigation. In the interim, the maps have become an important resource for ongoing consultations with Crown agencies regarding development activities on Gitxsan territories.[65] Maps show how and where Gitxsan rights will be infringed by development activities such as logging, mining, and mineral extraction. Here the links between habitat and aboriginal rights are especially important.

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[65] As I discussed in Chapter Three, consultation with First Nations about development activities (such as logging, mining, and mineral extraction) on their territories is mandated by the *Crown Lands Activities and Aboriginal Rights Policy Framework* (BC Ministry of Aboriginal Affairs 1995).

Typically, the Gitxsan will respond to development referrals by listing the specific and cumulative effects of a proposed activity on the habitat of culturally significant species. In addition, they will provide recommendations for alternative courses of action. For example, in an area where a proposed clearcut would have detrimental effects on moose winter range, the Gitxsan propose "logging in no more than 1/3 of winter range every 25 years" (Lax'skiik Chiefs, Letter to Rod Meredith, 10 May 1996). In more sensitive habitat such as moose calving areas, the Gitxsan propose selection logging as an alternative to clearcutting. In both cases, recommendations are designed to "allow provincially authorized logging and the exercise of Lax'skiik aboriginal rights to coexist in the same area without unlawful infringement" (*ibid*).

Long-Term Planning and Community Empowerment

Within the Gitxsan Nation, the maps are an important resource for long term planning and development. Typically, SWAT development plans scale the intensity of use in correlation with cultural and ecological sensitivities: some areas are recommended for complete protection; others for "traditional use," such as berry picking, fishing, or selective cedar harvesting; others for more intensive uses such as small-scale logging operations. Development plans show the same sensitivity to ecological and cultural needs which, throughout this thesis, has characterized the Gitxsan relationship with the land:

> when we start thinking about forestry, it's not just ... how many trees are there that are marketable, it's also: "my family also needs x quantity of fish for the wintertime, and that means that we have to be careful with this spawning stream. My family also needs y quantity of moose, for example, and that means that there has to be sufficient moose in the area to maintain themselves and have something left over for ourselves and the other predators. (Collier, *ibid*)

In effect, the mappers begin with the assumption of ownership and jurisdiction; they focus their energies on planning their role as long-term stewards of the land. This ecological orientation applies not only to the planning, but also to the claim itself: in future negotiations, the Gitxsan hope to receive compensation in the form of moneys for habitat restoration (Collier and Vegh, Presentation, 11 June 1998).

The Gitxsan maps have also played an important role in revitalizing stories within Gitxsan communities:

> when we look at the significant features of the territory maps, they're drawn from the oral histories that describe that territory. So like the poles are—the feast poles, totem poles ... the maps become a mnemonic aid for helping keep a story that is told in the feast halls, keeping the story going. It's another artifact you can use to stimulate the memory, so it's a way of retaining our collective remembrance of those stories. (Collier, *ibid*)

As the earlier chapters have shown, the Gitxsan have long adapted their claim of ownership and jurisdiction to different political environments through different avenues. In Chapter One, it was the creation of a group trapline within an otherwise incongruous system of trapline registration. In Chapter Two, it was the forwarding of a land claim, the terms and the approach of which reshaped the landscape of aboriginal rights in Canada. Here, the Gitxsan continue in that tradition. The maps give graphic expression to aboriginal perspectives. In ways more tangible than previous initiatives, they rechart a cultural landscape.

MAPPING AND *DELGAMUUKW*: LINKS AND IMPLICATIONS

The Gitxsan SWAT initiative provides an excellent example of the practical negotiation of meaning. In effect, the project picks up where the Courts left off: from the Court of Appeal's suggestion that site-specific information will be necessary to prove the existence of aboriginal rights, and from the Supreme Court of Canada's suggestion that the resolution of land claims issues will require a negotiation of meaning between cultures. Efforts to translate the oral evidence into graphic maps go a long way towards bridging the gap that developed in the trial. Through their efforts, the mappers translate abstract legal principles (for example, Lamer's suggestion that oral histories be interpreted "in light of the evidentiary difficulties inherent in adjudicating aboriginal claims" (SCC 1997, 105)) into practice.

Perhaps most significantly, the maps give tangible form to some of the fuzzy aspects of the Court's definition of aboriginal title. How, for example, does an aboriginal

relationship with territory differ from Western property concepts? As we discussed in Chapter Three, aboriginal title is *sui generis* in that it:

- is a form of ownership held communally;
- originates in prior occupation of the land; and
- is limited by cultural restrictions on the types of uses to which the land can be put.

These aspects of aboriginal title correspond with the political, cultural, and ecological map layers. First, a "political" layer outlines the territorial boundaries of the House group; it corresponds with the nature of aboriginal title as a form of collective ownership. Second, the "cultural" layer documents traditional use sites and place names as a means of documenting continuity in occupancy and possession. Third, an "ecological" layer documents species composition and habitat features. All these aspects correlate with the Supreme Court's recognition that a responsibility to the land, to future generations, and other species constitutes a key feature of aboriginal title.

This latter aspect proved especially difficult to interpret in the courts. To aid him in his conclusion that aboriginal title lands "cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands" (SCC 1997, 7), Chief Justice Lamer reaches back to obscure principles in the common law tradition.[66] The Gitxsan capture this "ecological aspect" of aboriginal title more intuitively, by mapping habitat as the basis for aboriginal rights.

The negotiation of these meanings that the Gitxsan engage in, however, brings with it certain constraints. As the Supreme Court ruled, the establishment of land claims based on the evidence of oral history implies certain limitations: the land cannot be used in ways that conflict with aboriginal tradition. Aboriginal peoples must surrender their title if they choose to use the land in ways which desecrate or ignore aboriginal heritage, or which limit the use and enjoyment of future generations. In a similar way, the maps bring the oral history to bear on Gitxsan plans for the future. Mapping the oral histories

[66] See Chapter Three, page 53 for Lamer's reference to the doctrine of equitable waste at common law.

means incorporating traditional principles—a sense of responsibility to the land, and a sense of long-term thinking—into development activities on Gitxsan lands.

The Gitxsan maps exemplify the idea of translation as a process of "putting together." They unite two seemingly incongruous technologies: the aboriginal technology of mapping through oral histories, and the modern technology of computerized mapping. Just as the dynamic images of the SWAT maps move away from the frozen representations of time in conventional maps, so the maps reflect an understanding of culture as a continually evolving set of practices and principles, rather than as a frozen artifact of history. This understanding of culture differs significantly from McEachern's understanding of aboriginal tradition as a historic actuality, and arguably from the Supreme Court of Canada's interpretation of tradition as a constraint on future development. For the Gitxsan, it appears, tradition is a pathway from past to future: while change and movement are inevitable, the past can never be forgotten. From this perspective, technology does not so much corrupt an authenticity as it facilitates its modern expression.

CONCLUSIONS

IMPLICATIONS OF NEGOTIATION

IMPLICATIONS OF THE JUDGMENTS IN *DELGAMUUKW* V. *BRITISH COLUMBIA*

Looking back on the series of judgments in *Delgamuukw,* we can trace an evolution in the negotiation of meaning, from the impasse that occurred in the trial court to the Supreme Court of Canada's engagement in the negotiation process. Beyond the principles they propose for interpreting aboriginal concepts, the Supreme Court paves the way for the practical negotiation of meaning. The Supreme Court of Canada has positioned itself as a respected arbiter, but at the same time has made it clear that the courts are not the place to resolve such issues. Rather, they should be used as a last resort when negotiations fail. In this way, the Supreme Court encourages negotiation. Chief Justice Lamer concludes:

> Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve ... the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. Let us face it, we are all here to stay. (SCC 1997,186)

By spelling out for both sides the type of information they will consider, and the ways they will interpret such information, the courts create parameters for practical negotiations. If the courts agree to consider oral history as evidence of aboriginal title, it becomes apparent that the Crown must also consider oral histories in negotiations outside of Court. In this way, they go some distance toward redressing the power imbalance between the parties.

Should a retrial occur, it will be within a different arena than McEachern's court. Future judges will have to apply new principles: first, they will have to recognize the existence of aboriginal title, its nature and implications for future development. Second, in considering oral evidence, judges will have to set aside standard evidentiary rules to take into account the unique nature and context of an aboriginal perspective.

The evidence to be considered will likely be different as well. As Chapter Four shows, the "evidence" has become more accessible: maps will play a major role in preparations for a retrial. Here the Gitxsan have moved considerably from their approach in trial to begin bridging the impasse in cultural perspectives. In developing the potential for negotiation, they reduce the inevitability of a return to the courts. Short of complete resolution outside the courts, interim settlement may narrow the range of issues to consider in a retrial. In any case, future Gitxsan strategies in the wake of *Delgamuukw* will be interesting to watch.

Implications for Practice

A central theme in this thesis has been the relationship between legal developments in the courts and their implications in practice.

From a legal perspective, the Supreme Court ruling is remarkable: it provides a working definition of aboriginal title, and principles for interpreting oral histories. In relation to the themes developed in this thesis, the courts traced the origins of the legal impasses in the case to a more fundamental cultural impasse between the plaintiffs and the Crown, and between the plaintiffs and the trial judge. The Court saw in this impasse the potential to bridge the gap; the negotiation of meaning they engage in begins to bridge cultural perspectives.

From a practical perspective, however, the Court of Appeal ruling was most significant. As we discussed in Chapter Three, the Court of Appeal ruling set the wheels in motion for the practical negotiation of meaning. Requirements for site-specific information as proof of aboriginal rights led to the establishment of the Gitxsan mapping initiative. The Province's response to the 1993 ruling has opened up doors for other groups as well: funding opportunities arising from new aboriginal rights policies have allowed First Nations around the province to map historic information and articulate their boundaries in preparation for treaty, litigation, and planning with *Delgamuukw* specifications in mind.

Practical implications of the Supreme Court of Canada's decision have yet to be felt on the ground. To date, the provincial *Crown Land Activities and Aboriginal Rights Policy Framework* (1995) has incorporated no changes to reflect the content of the 1997 decision. Aboriginal title, it appears, remains a theory which the courts have recognized, but which remains to be proven or accepted in practice. Despite the Supreme Court's ruling that consultation must be "deeper than mere consultation," experience in practice suggests little has changed. The Gitxsan have responded to well over 400 referrals for development activities on their lands. In only two cases have any changes been made to proposed development plans on Gitxsan lands; in both cases, changes were made on the recommendations of outside experts rather than through consultation with Gitxsan representatives. Futhermore, these changes addressed concerns unrelated to aboriginal interests (Collier, Telephone Interview, 16 March 1999). The Province, it appears, expects a retrial.

IMPLICATIONS OF THE GITXSAN CONTRIBUTION

It is important to remember at this point that the implications of the Supreme Court ruling are also the implications of the Gitxsan approach. Both the Supreme Court and the Gitxsan mappers accept the possibility and emphasize the importance of negotiating cultural perspectives.

Constraints of the Evidence: Have They Limited Themselves?

The process of translation necessarily involves compromise, and efforts to negotiate "intercultural" terms come with certain constraints. For the Crown, the constraints are relatively obvious: the Courts clearly state that status quo development of First Nations' territories will no longer be tolerated. For lands in which aboriginal title can be established, First Nations will have the authority to determine how their lands will be used, and any infringements by the Crown will have to be justified, at least in theory. In ways that are less obvious, the Gitxsan are also constrained by the Supreme Court's interpretation of aboriginal title. In presenting their claim, Gitxsan and Wet'suwet'en hereditary chiefs described their relationship with the land as one that incorporated a sense of responsibility to "the spirit in the land and all living things" (Gisday Wa and

Delgam Uuwk 1989, 7). The Supreme Court interprets this by limiting aboriginal title to uses which reflect, rather than detract from, that relationship. In this way, the Gitxsan are bound by their own traditions: evidence used to prove their claim has implications for the kinds of development activities the Gitxsan may consider in the long-term.

For the Gitxsan, these limitations are as much a part of their claim as they are a part of their long-term planning. As shown in Chapter Four, the Gitxsan appear to be mapping their future with cultural and ecological concerns in mind. Other aboriginal groups, however, may find these limitations more constraining. Certainly, the Gitxsan have made an important contribution to Crown-Aboriginal relations: their efforts have led to the recognition and intercultural negotiation of aboriginal title, and the recognition of oral history as a valid source of evidence. On a practical note, their efforts have seen the entrenchment of provincial consultation requirements which before did not exist. How much, however, does the Gitxsan contribution "raise the bar" for other First Nations in the presentation of their claims? Will other groups be required to provide the same depth and quantity of information to prove aboriginal title to their traditional territories? Does the Gitxsan negotiation of aboriginal title set unreasonable limits for others?

Proving Aboriginal Title: Have the Gitxsan Raised the Bar?

The Supreme Court of Canada's recognition of oral histories as a credible form of evidence nevertheless implies certain evidentiary standards. Here we return to same issues McEachern struggled with: information from oral histories may be admissible, but it must still be court-worthy. The Gitxsan began to rigorously document their oral histories and the knowledge of surviving elders in the early 1970s. Efforts intensified in preparation for *Delgamuukw,* and, as a result, the Gitxsan ethnographic record is among the most comprehensive in the province. Not all First Nations, however, will have access to the same breadth and quality of information. In many cases, elders have taken their knowledge with them to their graves. Furthermore, colonial land appropriations and subsequent Crown policies under the Indian Act were more effective in some places than others. In places where European settlement was heaviest, the capacity to prove the continuous occupation of traditional territories was hindered by the same land

appropriations First Nations protest in their claims. How much will other First Nations be bound by the Gitxsan contribution? Will they need to perform ancestral songs in court? To translate their oral histories into sophisticated maps?

The British Columbia Court of Appeal ruling in *Delgamuukw*, and the resulting Crown policy framework, set standards for detailed, site-specific evidence as proof of aboriginal title. But the case did not end in the BC Court of Appeal. The Supreme Court of Canada recognized that for many First Nations (even for the Gitxsan), providing "definitive and precise evidence of pre-contact aboriginal activities" may prove an "impossible burden to meet" (SCC 1997, 101). By reducing the expectations for oral history, the Supreme Court suggests that subsequent courts will have to take the effects of colonial policies and the absence of surviving elders into account. In cases where aboriginal title cannot be proven, the Court outlines a spectrum of lesser rights which may still apply to aboriginal territories.

Finally, even if the quantity and calibre of information required to prove aboriginal title proves an impossible task for other groups, the Gitxsan nevertheless make an important contribution in proving it can be done. By showing that such information existed for one First Nation in one area of the province, the Gitxsan imply that such information exists—or at least existed—in other areas as well.

Negotiating Aboriginal Title: Unwelcome Constraints?

A second aspect of the Gitxsan contribution is their negotiation of aboriginal title in the courts. While the recognition of unextinguished aboriginal title provides uncontested benefits to First Nations, the way in which this title is defined contains inherent limitations for future development. Not all First Nations will have the same ties to traditional principles, and the same ideas for future development as the Gitxsan.[67]

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[67] The Nisga'a, for example, agreed in their 1998 treaty to develop their lands in accordance with provincial resource extraction quotas for the next nine years, after which they will create their own development plans (Canada et al. 1998, 5:17). The Nisga'a Treaty raises the question of how much negotiated settlements will differ from court settlements. How will different strategies—litigation or negotiation—shape the kind of title that is recognized? Will the Nisga'a lands be "aboriginal title" lands in the same way as the Gitxsan

The Courts foresaw the need to bypass the constraining aspects of aboriginal title. For the Crown, they allowed infringements to be justified by reasons of the broader public good, provided fair compensation was awarded. First Nations also have avenues to avoid limitations: should they want to develop the land in ways incongruous with their tradition, they must surrender their aboriginal title to the Crown. Given the high levels of poverty and unemployment that most First Nations experience, aboriginal title might be a luxury they cannot afford. Given the level of information required to prove aboriginal title, and the inherent constraints that such title implies, some aboriginal groups may choose to pursue status quo tenures such as tree farm licenses, where eligibility and potential uses are subject to the same rules as non-aboriginal tenure holders. In other words, for some First Nations, articulating their traditions and negotiating meanings across cultures may in the end prove too constraining.

THE GITXSAN HISTORY: NEGOTIATING IMPASSE

This thesis has shown that the Gitxsan have a history of reaching across cultural boundaries, either through strategies of confrontation or strategies of negotiation. Development pressures have increased dramatically since the Gitanyow registered their Group Trapline in the 1920s, increasing the potential for conflict, and the need for negotiation. As pressures have changed, the Gitxsan have modified their strategy accordingly. While the trapline anecdote in Chapter One demonstrated an absence of communication in practice (the trappers weren't aware of their competing claims until they met on the territory), modern mapping efforts show significant developments in the translation of an aboriginal perspective.

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lands would be if they are recognized by the courts? Will they be subject to similar limitations on development?

There is evidence to suggest that the recognition of aboriginal title in the courts may prove more powerful than agreements reached through treaty negotiations. In the case of the Nisga'a Treaty, provincial and federal laws will continue to apply on the majority of Nisga'a lands, except in certain defined circumstances where Nisga'a laws will be paramount. The Gitxsan case suggests that aboriginal title might be proven in the absence of treaties. As Foster notes, aboriginal title lands, like Indian reserves, are subject to federal jurisdiction alone; it is likely that the province would have no jurisdiction in court settlements of aboriginal title (1998, 226). Until the Crown is willing to consider the full implications of aboriginal title, the courts may indeed prove the best arbiters of the Gitxsan claim.

In the years since contact, the Gitxsan have modified the expression of their land claim to suit different political environments, and to respond to different opportunities: the SWAT mapping is a modern expression of the same claim Samuel Douse made in 1910, the same claim the Kitwancool trapline demonstrated in 1920s, and the same claim brought before the BC Supreme Court in 1987: a right "to the land itself."

CONCLUSIONS ON NEGOTIATION

This thesis has looked to negotiation as an important strategy in bridging the cultural impasse between Crown and aboriginal perspectives. Questions remain, however, as to the effectiveness of negotiation given the history of the Crown's relationship with aboriginal peoples, and the persistence of inadequate consultation processes on the ground. How compelling are the Supreme Court's recommendations, and the efforts of the Gitxsan themselves, in urging the resolution of aboriginal land claims? Echoing previous courts in aboriginal rights cases, Lamer concludes his judgment by urging that aboriginal claims be settled through government-to-government negotiation, rather than litigation. The Crown, he writes, "is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith" (1997, 186).

As Lamer's statement suggests, the Crown has not always conducted itself in "good faith" in its negotiations with aboriginal people. The recent case in *Gitanyow* v. *The Queen* (March 23, 1999) focuses on this point. The Gitanyow sought a declaration in which the Crown's obligation to negotiate in good faith is a legal duty.[68] The judgment held that the Crown has a duty to negotiate with First Nations in good faith because of its fiduciary obligation to aboriginal people. This obligation, however, does not extend to the legal duty to achieve a treaty. Moreover, the decision held that the courts have the "important task of ensuring that the Crown does not fail in its fiduciary obligation to aboriginal peoples" (*ibid*, 18). It remains to be seen whether the decisions of the courts, and the actions of the participants, will be sufficient to allow negotiations to be conducted

[68] A second part of their declaration held that the Crown is in breach of this duty to negotiate in good faith because of its negotiations with the neighbouring Nisga'a, whose claim overlaps the Gitanyow's.

with fairness and equity. As the *Gitanyow* case shows and subsequent litigation will likely confirm, *Delgamuukw* raises more questions than answers.

Proceedings with respect to the second declaration have been adjourned pending the outcome of the first declaration.

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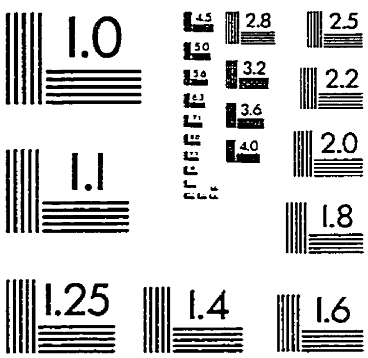

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