

Without Treaty, Without Conquest Indigenous Sovereignty in Post-Delgamuukw British Columbia

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In British Columbia right now the year is A.D. 1492. That is the most concise and forward-looking reading of a 1997 appellate decision by Canada's Supreme Court that reverses key findings in the 1991 decision in the First Nations land-claims case *Delgamuukw v. the Queen*. The implications of the decision are so monumental that many in the media, in provincial and national politics, and even on First Nations treaty-negotiating teams have not yet fully comprehended how far-reaching the new legal dispensation is for aboriginal people in the province.¹ For the Gitksan, Wet'suwet'en, Nisga'a, and neighboring peoples, to whom the language of the original case (and of the decision) is most applicable, and to First Nations to whom the language can be more or less readily applied, it represents an inversion of all of the assumptions and certainties of colonialism. In particular, it provides for the elevation of indigenous legal systems, including systems of land tenure and concepts of sovereignty, to the level of constitutional recognition, though it leaves wide latitude for exploring legally what that will mean. Here I begin to explore the implications of the decision for these indigenous legal systems in northwestern British Columbia today, especially considered alongside what the British Columbian government is determined to impose on First Nations: treaties that extinguish title, on the model of the Nisga'a treaty. If First Nations reject that model, then 1997 may come to mark the date when the tide of conquest was turned, when the legal clock was set back to the moment

of European contact, with the relationship to settlers as yet to be determined.

The reason that, among all of the indigenous rights struggles around the globe, it is in British Columbia that aboriginals have found themselves in such a position is what has been called the British Columbia anomaly. British Columbia is a land, for the most part, without treaties. (The few exceptions include some early land transfers on Vancouver Island, the "Douglas treaties," whose legitimacy has been called into question; an area in the northeast of the province that comes under 1898's Treaty 8, which is an extension of an Alberta treaty; and the Nisga'a Treaty of 2000, discussed in greater detail below.) This lack of indisputable cession has been significant in Canadian law because of the Royal Proclamation of 1763, in which King George III declared that title to Indian territory was not to be considered extinguished or transferred merely by conquest or occupation but only through voluntary cession. The Royal Proclamation retains the status of constitutional law in Canada, which, as a Crown dominion, is even today not constitutionally distinct from the United Kingdom. Under this dispensation, British Columbia is the one area of what was called British North America where treaties were utterly neglected as an instrument of colonization. When the colonies of Vancouver Island and British Columbia amalgamated and then in 1871 were confederated into Canada as the province of British Columbia, the Indian title question had not yet been settled. The federal and provincial governments each expected the other to settle the matter, but neither pressed the matter to a resolution. This situation of a legal no-man's-land persists—and even the Treaty 8 lands and the Douglas treaties have now been effectively swept aside in the current province-wide reassessment of the land question.²

Until relatively recently, there was little opportunity for British Columbia First Nations to exploit this gaping hole in the colonizers' paperwork, due to restrictions such as a ban on organizing or fundraising for land claims, repealed only in 1951.³ Nonetheless, political consciousness and various forms of resistance did develop under these restrictions, much of it intertribal and focusing on fishing rights. This activism culminated in the late 1980s with *Delgamuukw v. the Queen*, a legal suit brought against the British Columbian and Canadian governments by the hereditary chiefs of the Gitksan and Wet'suwet'en Nations of the inland northwestern part of the province, whose territories include the Bulkley and upper Skeena River watersheds, an area about the size of West Virginia or Nova Scotia. More than fifty Gitksan and Wet'suwet'en chiefs sued the federal and provincial governments in 1987 for recognition of their absolute ownership and jurisdiction over their separate territories making up the claim, to the exclusion of the Crown's authority. In one sense, then, their suit amounted to a move

for secession from Canada, and the case was covered avidly by the press. The plaintiffs in the case were not bands as defined by the Indian Act or even tribal councils of the type that emerged in the mid- and late twentieth century in response to colonialism (the Gitksan-Wet'suwet'en Tribal Council having been devolved in preparation for the case to a loosely confederated and traditionally governed "Office of the Hereditary Chiefs").⁴ Rather, the suit was brought by the hereditary chiefs themselves, the landholding officers of the traditional political and economic system.⁵

More properly, actually, the plaintiffs were the hereditary names held by those chiefs, since it is in those names that land ownership is vested as the embodiments of offices of chieftainship. These names are in a sense more like titles such as "Prince of Wales" than they are like personal names; they are exclusive and hereditary and automatically confer legally specified rights and privileges, including chiefly names that confer the rights and responsibilities of a chieftainship.⁶ The full title of the Gitksan and Wet'suwet'en case was "DELGAMUUKW, also known as ALBERT TAIT, suing on his own behalf and on behalf of all other members of the HOUSE OF DELGAMUUKW, and others" v. "HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and THE ATTORNEY GENERAL OF CANADA."⁷ During the course of the three-and-a-half-year trial, several of the chiefs party to the suit died—there were three Delgamuukws, for example,⁸ and their heirs succeeded them seamlessly as plaintiffs and as name-holding chiefs.

The arguments in the case stemmed from a type of land-tenure system found among the Gitksan and Wet'suwet'en and also among various other First Nations in Alaska and British Columbia, including, in its strictest application, the Tsimshian and Nisga'a nations of the lower Skeena and Nass Valleys (the Gitksans' linguistic cousins), the Tlingit of Southeast Alaska, the Haida of the Queen Charlotte Islands and Southeast Alaska,⁹ and the Haisla at Kitamaat Village, B.C. Under this system, localized branches of matrilineal corporate descent groups—extended families reckoned through the mother's side—are collective owners of small, well-defined territories, including marine and riparian as well as land rights. Among the Gitksan, Wet'suwet'en, Tsimshian, Tlingit, and Nisga'a, these local groups are called houses; the words in the different languages being used for these extended families are used as well for dwelling houses.¹⁰ Again, a useful point of comparison is European royal and noble houses; both are examples of landed corporate estates. Houses in northwestern British Columbia, however, are said to consist not of individual people but of names.¹¹ The house contains a static stock of hereditary names that are passed on from mother to daughter, from uncle to nephew, from brother to younger brother, and so on, within the house. These name transmissions occur at elaborate political rituals called potlatches or feasts.¹² These feasts are spoken

of as occasions not for giving names to people but for "giving people to names." The most important type of feast is a mortuary feast at which a deceased chief's name is assumed by his or her successor.

These feasts are also democratic in an important sense. Rules of succession are not automatic, as they are, for example, in the British royal family. In Britain, a list can be generated from the rules of succession as to who is in line for the crown. This list cannot be modified and one cannot, theoretically, skip down the list to more appropriate candidates (much as some of Prince Charles's detractors would like to). In northwestern British Columbia houses, however, there is a broad range of people who are in one sense all potentially capable of succeeding to a chieftainship: the members of the house—even (depending on local rules) other relatives, who can be recruited through ceremonial adoption. Although there are strong preferences for a man's name to pass to his younger brother or, if there is none, to his oldest sister's oldest son, and so on, this is not dictated in law. (In fact, chiefs, especially among the Gitksan, are often women.) Rather, through a subtle and elaborate process of consensus building, a chief during his tenure grooms a successor and mobilizes the support of the house's membership, even the support of members of other houses, for the eventual transition after his or her death. This consensus is most fully manifested in a mortuary feast, where a complex exchange of gifts and services validates the succession. The chief's own supporters contribute money and services to the budget of the feast, and that wealth is used to pay guests from other houses for providing services, including witnessing and approving the assumption of the name. If a successor is thought to be unsuitable, key elders in the host house and in other houses can indicate that they will not participate in or attend the feast, and a new successor will have to be chosen. Occasionally, such disagreements are resolved at the feast itself, a kind of political drama that is also part of the democratic process in Northwest Coast feasting.¹³

The potlatch has been described to excess in the anthropological literature. It has been seen, variously, in psychoanalytic,¹⁴ theological,¹⁵ and crude economic¹⁶ terms, among other paradigms. But the most straightforward analyses of this ritual emphasize its role as a political and legal system.¹⁷ It is this understanding that the Gitksan and Wet'suwet'en brought to court in 1987, describing and presenting the laws of the feast hall as a fully operating, coherent, and sovereign system of authority and land tenure that regulates every corner of Gitksan and Wet'suwet'en political, social, and economic life. Over the three and a half years of the trial, testimony was given not only by ethnographers and other scholars but also by the dozens of hereditary chiefs themselves. Among the evidence mobilized were the hereditary names, the oral record of territorial boundaries and place-names, the crests belonging to the houses (including those represented on totem poles),

the elaborate and voluminous oral chronicles and songs that document ownership, and the laws and protocols governing all of these.¹⁸

The trial was conducted during a tense period in aboriginal relations in Canada, and the case became a part of the tension. By the time the court's decision was handed down, on March 8, 1991, relations between First Nations and the dominant society in Canada had become explosive. Flashpoints included dramatic acts of civil disobedience in 1988 by Alberta's Lubicon Cree (against timber and oil extraction) and by Innu in Labrador and Quebec (against NATO flyovers). In 1989 and 1990 at Oka, Quebec, an attempt by Mohawks to protect their lands from a golf course expansion led to a prolonged siege that ended with the Canadian Army invading to arrest the activists. During the Oka siege there were numerous roadblocks by First Nations across Canada to express sympathy and a growing number of roadblocks and other acts of civil disobedience targeting local grievances in British Columbia, especially in the Gitksan and Wet'suwet'en territories.¹⁹

The final decision, in 1991, came as a bombshell and has become notorious in legal and anthropological as well as First Nations circles. The court clearly realized that the Crown's assertion of jurisdiction over Gitksan and Wet'suwet'en territory was legally indefensible; mere occupation by the Crown does not constitute extinguishment of the authority of a preexisting legal system. So Chief Justice Allan McEachern, who was hearing the case, took the only route still open: he denied the very existence of an indigenous legal and political system, even the existence of a civilization there before the arrival of Europeans. He dismissed all of the plaintiffs' actions and found that the Royal Proclamation did not apply to British Columbia and that an absence of treaties did not undermine Canadian sovereignty over the territories. What the plaintiffs called ownership, McEachern wrote, was "nothing more than the right to use the land for aboriginal purposes," and he went so far as to add, "I am quite unable to say that there was much in the way of pre-contact social organization among the Gitksan or Wet'suwet'en."²⁰ "What the Gitksan and Wet'suwet'en witnesses describe as law," he wrote, "is really a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves."²¹ Most notoriously, he cast his argument in blatantly ethnocentric terms:

It would not be accurate to assume that even pre-contact existence in the territory was in the least bit idyllic. The plaintiffs' ancestors had no written language, no horses or wheeled vehicles, slavery and starvation was [*sic*] not uncommon, and there is no doubt, to quote Hobbs [*sic*], that aboriginal life in the territory was, at best, "nasty, brutish, and short."²²

Here McEachern invokes the English political philosopher Thomas Hobbes's famous characterization of human societies without political institutions. That slavery, starvation, and short lifespans were even more characteristic of the British Isles during this same period seems not to have occurred to McEachern, but his entire reasons for judgment are so Orwellian in their obfuscation and so, incidentally, themselves Hobbesian in their unabashed invocation of lawless principles of "might makes right" that the only problem for legal and other scholars evaluating the soundness of the judgment has been where to begin.²³ The Gitksan and Wet'suwet'en began appealing the decision immediately, a years-long process.

The first governmental response to the McEachern decision, in 1993, was to create the British Columbia Treaty Commission (BCTC) and to prepare to set up "tables" for negotiating treaties with all of the First Nations of British Columbia, a decision that temporarily postponed the Gitksan and Wet'suwet'en appeals.²⁴ Clearly, the federal and provincial governments realized that their victory in *Delgamuukw* had been far from inevitable and somewhat likely to be overturned on appeal. They decided that they could more easily afford an expensive treaty process than dozens of successful (or even unsuccessful) lawsuits on the *Delgamuukw* model. The province's ruling New Democratic Party (NDP) invoked the necessity of preserving British Columbia's economy (which is based on the uncompensated extraction of resources from First Nations territories) and thus foreign investment by concluding treaties that would provide "certainty" to "third parties"—the BCTC euphemism for non-First Nations commercial and industrial interests. A few First Nations have moved far ahead at the BCTC tables—most notably the Siammon and the large Nuu-chah-nulth Nation—but only the small Sechelt Salish group near Vancouver has officially advanced, as of this writing, to stage 5 ("Negotiating a Final Treaty"). Even now a large number of First Nations are deciding to stay out of the treaty process.

Even with the BCTC to embody the government's new recognition that aboriginal title at least existed in the past—a great leap beyond what McEachern allowed—interethnic relations in British Columbia continued to be strained. In 1995 and 1996, while I was living in Tsimshian territory working on treaty research, some of this strain gave way at places like Gustafsen Lake, where Shuswap separatists in the southern interior of the province occupied a private non-native ranch on their territory and became the target of an RCMP siege, with, apparently, shots fired on both sides.²⁵ This dispute was settled only after Don Ryan (Maas Gaak), the Gitksan negotiator and one of the political geniuses behind the *Delgamuukw* case, participated in a third-party intervention, invoking principles of nonviolence that had always character-

ized Gitksan roadblocks and other "action on the land."²⁶ Meanwhile, the Nuxalk people of Bella Coola, B.C., were forging alliances with radical environmental groups such as the Rainforest Action Network and using civil disobedience to disrupt logging on their territories. Roadblocks of other kinds appeared throughout 1995 and 1996.

But while some First Nations became more radicalized after the McEachern decision, one important group became more conciliatory: the Nisga'a. The Nisga'a legal and political system is virtually identical to that of the Gitksan,²⁷ and the two groups speak mutually intelligible languages. The Nisga'a had in one form or another been petitioning for a settlement of their land grievances for nearly the entire twentieth century.²⁸ Although their political stance through this period had been usually as uncompromising as the Gitksan's and Wet'suwet'en's—asserting absolute ownership and jurisdiction over their Nass Valley territory, which is near the Alaska border—during the *Delgamuukw* trial Nisga'a rhetoric began more and more to stake out a contrast with Gitksan radicalism. The Nisga'a Tribal Council (NTC) became more and more willing to surrender aboriginal title and to accept authority over a smaller and smaller portion of their claim.

In 1996 negotiations between the NTC, Ottawa, and Victoria—negotiations that preceded and remained outside of the BCTC process—resulted in the finalization of an agreement-in-principle that eventually became the basis for the Nisga'a Treaty of 2000. This agreement was to extinguish aboriginal title and settle for 8 percent²⁹ of the Nisga'a claim area to be designated as "Nisga'a Lands," with some fee-simple-like areas (i.e., on the model of private ownership) to replace Indian reserves outside the Nisga'a Lands. In exchange, the Nisga'a would receive a cash settlement and would cease to fall under the Indian Act: they would run their own justice and other systems and have a version of self-government, and they would also pay taxes like other Canadian citizens. Most significantly, the Nisga'a had already abandoned, as a treaty-negotiating position, their system of landholding houses (though they did and do still have houses with chiefs and territories) in favor of a "common bowl" approach by which authority over territories is theoretically pooled in the NTC. There is no mention of houses in the Nisga'a treaty.

I attended a welcoming celebration for the Nisga'a negotiators in February 1996 at the Kitselas Reserve, near Terrace, B.C., where they were received in the midst of their triumphant return to the Nass from a wrap-up negotiating session in Vancouver. There a Nisga'a titleholder spoke before the media's microphones and cameras and reminded listeners that on the Nisga'a's long journey to a treaty they behaved only honorably, "with no roadblocks to be a mark against us." These sentiments were echoed in the mainstream media, such as the *Vancouver Sun*,

which, during the Nisga'a negotiations, regularly ran news reports stirring up settlers' fears of native radicalism and, after the agreement, cast extinguishment of aboriginal title as a benign inevitability within the context of North American history. The implication was to hold up the Nisga'a negotiators as the good natives who surrendered to the loggers and developers, as opposed to the bad natives—the Gitksans, Shuswaps, and others—who would not give an inch.³⁰ But timing is everything. While the i's were being dotted and t's crossed on the Nisga'a agreement on its way to becoming law, as it eventually did in 2000, the assumption underlying the Nisga'a negotiations—that extinguishment, enlarged reserves, and severely delimited self-government were all the government would ever agree to—was exploded once and for all when the *Delgamuukw* appeals process was concluded in Canada's Supreme Court on December 11, 1997.

The federal Supreme Court did not entirely reverse the McEachern ruling or award the case to the plaintiffs—the Gitksan and Wet'suwet'en are in fact still pursuing recognition of title—but it did strike down many of the conclusions in McEachern's reasons for judgment. In particular, it held that the Royal Proclamation of 1763 does indeed apply to British Columbia and that aboriginal title there was never extinguished. This amounts to a finding that what we know as British Columbia has not been ceded to the Crown and is thus not part of Canada—hence the “1492” quality of the decision—though the media and the government have severely downplayed this aspect of the decision. But if so-called British Columbia is not Canada, then what kind of territory is it? What lies “underneath,” to borrow the geological metaphors of the legal jargon, can only be aboriginal title. Although the 1997 decision does not attribute aboriginal title per se to any contemporary group, it provides guidelines for proving aboriginal title that are derived in part from concepts in indigenous legal systems, as envisioned by the plaintiffs in *Delgamuukw*. In particular, these legal tests are: (1) documentation of precontact occupancy (which can include oral histories of the type presented in *Delgamuukw*); (2) continuity of territorial use (of the type documented by ethnographers and other scholars working for the plaintiffs in *Delgamuukw*); and (3) exclusive possession, defined as evidence that First Nations attempted to control use of their territories throughout the postcontact period, according to traditional protocols.³¹ All of these tests, incidentally, were abundantly met in the course of the plaintiffs' evidence in *Delgamuukw*, despite McEachern's widely criticized denials in his reasons for judgment. The Nisga'a, undoubtedly, as a very traditional and inward-looking society that has always outnumbered non-natives in their Nass Valley territories, could meet these tests as well. But instead the Nisga'a in 1997 were in the unusual position of being in the process of surrendering aboriginal title just after it had been recognized by the highest

court. Under the terms of Canadian law, of course, the Nisga'a cannot go back; they are now Canadians only, no longer "Indians." Or are they?

What these developments mean for British Columbia First Nations now can be understood partly through an examination of some of the political and legal repercussions of the Nisga'a treaty, for the assessment of this treaty and of the Nisga'a model of treaty may well be the forum for establishing in law the full implications of *Delgamuukw*. Many First Nations regard the Nisga'a treaty as a negative example, and there was, among First Nations already at the treaty table, immediate resistance to the BCTC's suggestion that the Nisga'a 8 percent land-for-cash formula could be a model for other treaties in the province. The Nisga'a treaty, along with the calamitous Alaska Native Claims Settlement Act of 1971 and the more recent settlement in the Yukon, began to be seen as a lesson in how not to do it rather than as a template. Many First Nations have stayed out of the treaty process, seeing treaties as "certificates of conquest" that take rights rather than grant them. Some, such as the Gitksan, are pursuing their interests both at the treaty table and in court, and the Council of the Haida Nation is reportedly planning to launch a *Delgamuukw*-style suit. Several scholars are advising that signing any treaty is a mistake, especially after *Delgamuukw*. Some were arguing this before *Delgamuukw*, on grounds of international law.³²

There have been direct attacks on the Nisga'a treaty as well. One group of dissident titleholders in the lower Nass Valley has disputed the treaty's legitimacy, questioning its internal democratic support. In the lower Nass, many house territories are excluded from the Nisga'a Lands and are excluded without their chiefs' consent. Meanwhile, among the Gitlaxt'aamiks Nisga'as at New Aiyansh, upriver, where the treaty negotiators (led by Joseph Gosnell, who holds the Gitlaxt'aamiks chiefly name Hleek) are mostly based, key house territories were preserved in the core settlement lands. Kincolith, near the (southern) mouth of the Nass, nearly seceded from the Nisga'a treaty-negotiating umbrella over this and other issues.³³ This was not just a factional squabble but a conflict between indigenous law on the one hand and an attempt to surrender to colonial authority on the other. One Nisga'a wrote to a local newspaper editor,

Our late NTC president James Gosnell's famous quote, "We own Nisga'a lands lock, stock, and barrel; the Nisga'a lands are not for sale because it guarantees our survival," seems to have been incomprehensible to the negotiating officials, because the AIP [agreement-in-principle] in general is the antithesis to the precepts of Ayuukhl Nisga'a [Nisga'a law].³⁴

A Nisga'a hereditary chief, Sim'oogit Keexkw, echoed this sentiment:

Our title to our lands must be maintained by us. Our rights to these lands are embedded in our title. . . . Should we be forced to forego our title then we will have no future. . . . Losing our title and rights to our lands through extinguishment will not bring honour to our collective future.³⁵

Another Nisga'a chief, Sim'oogit Niis'yuus, indicated after the treaty his intention to "continue to assert his rights and ownership to a significant tract of land that is entirely outside the boundaries of what would be [i.e., eventually was] transferred to the Nisga'a under the agreement in principle."³⁶ Another Kincolith title-holder wrote:

According to the original treaty [presumably, a covenant with the Creator], these lands were to be ours forever, handed down from generation to generation along with the family "adowaak" (history). The Kincolith history is pushed aside and forgotten. Our first Sim-Aw-Ghits [chiefs] were totally forgotten. They were the first negotiators ever!³⁷

The Kincolith lineage heads Frank Barton and James Robinson brought an injunction against the implementation of the Nisga'a treaty before the British Columbia Supreme Court in 1998 (*Barton, Robinson, et al. v. Nisga'a Tribal Council*), but it was unsuccessful. It must be noted, however, that Barton and Robinson did not sue on behalf of their land-holding houses, and they did not draw on the new findings in the 1997 *Delgamuukw* ruling (the ink on which was still wet). Their arguments dwelt instead on matters such as irregularities in the internal Nisga'a referendum process sponsored by the NTC.³⁸ So the court's finding did not address all possible legal objections, and further suits by antitreaty Nisga'as that use *Delgamuukw* might well achieve different results.

More public and well organized than the internal Nisga'a uprising has been a large political and legal movement against the Nisga'a treaty by the house chiefs of Gitanyow. Gitanyow is the one Gitksan village that was not party to the *Delgamuukw* case. In fact, Gitanyow people only sometimes consider themselves Gitksan, their language is intermediate between the Nisga'a and Gitksan varieties, and they have always been one of the most independent First Nations communities in the Northwest. Their legal argument, which is summarized in an exhaustive scholarly treatment, *Tribal Boundaries in the Nass Watershed*, cowritten by many of the major figures from the *Delgamuukw* plaintiffs' legal and research teams, documents that much of the upper Nass Valley areas signed away to the Crown in the Nisga'a treaty are in fact

Gitanyow territories, more than 80 percent of all Gitanyow territories.³⁹ The book—which is nothing less than a treatise in indigenous instead of Anglo-Canadian jurisprudence—details the gradual expansion of the NTC's representation of its territories, which proceeded apace with the government's growing realization that the Nisga'a would accept a more conciliatory settlement than the Gitanyow or Gitksan ever would. The NDP staked its political future on the Nisga'a agreement⁴⁰ and was content to accept the NTC's claim-boundary around the whole Nass watershed, but this ignores bodies of evidence demonstrating that the Nass is a much more complex occupation area.

The Gitanyow and Kincolith evidence and arguments raise serious legal questions, most centrally: if a treaty extinguishes title, does it matter who signs the treaty? North American history is full of examples in which any signature or "X" is deemed sufficient to divest whole civilizations of their territories, but in the twenty-first century we might expect more nuanced criteria for signatories to treaties, which are after all documents in international law. The BCTC, however, is determined not to involve itself in boundary disputes or internal crises of legitimacy, and demands that territorial "overlaps" be resolved before parties come to the table. The Nisga'a, as the beleaguered NDP's one success story, were granted a *de facto* exemption to this principle.⁴¹

Challenges to the Nisga'a treaty, however, also raise questions more profound than which First Nations group claims which territory—questions that touch on the very legitimacy of treaties and the exact nature of aboriginal title provided for in the 1997 *Delgamuukw* appeal decision. The decision seems to ask courts to examine and be guided by the philosophical bases of different First Nations' "attachment to the land."

How exactly did the Canadian Supreme Court refine the definition of aboriginal title in 1997? Chief Justice Antonio Lamer, writing in the decision, introduced an entirely revised legal interpretation of the concept. Sweeping aside earlier rulings such as the so-called *Van Der Peet* decision (*R. v. Van Der Peet*, 1996), he wrote that land uses under aboriginal title are not restricted to pre-European technologies and activities. He also rejected the Gitksan and Wet'suwet'en position that aboriginal title confers the right to use land in any way whatsoever. Interestingly, he found, more restrictively, that under aboriginal title "the range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title."⁴² This would appear to prohibit, for example, strip-mining a hunting territory or paving over a berrying patch, though not necessarily hunting with automatic rifles or purse seining. On the one hand, this definition presents a danger that some First Nations leaders who might seek the short-term benefits of unsustainable and demonstrably antitraditional practices such as clear-cutting might seek to extinguish aboriginal title for this very reason.

On the other hand, the concept of “the nature of the attachment to the land” opens up as yet legally unexplored vistas of legal enshrinement of philosophical principles of First Nations cultures. Would a First Nation, with recognized aboriginal title, that granted a forest company a license to clear-cut a hillside be violating “the nature of the attachment to the land”? It would according to some chiefs and elders I know. And what are the implications for more profound aspects of the relationship to the land, including the very question of whether land can be alienated?

The research that will guide courts in the post-*Delgamuukw* era will be not only jurisprudential, then, but also ethnographic. I, among many other academic anthropologists working in northwestern British Columbia, have, in my work with the Tsimshian, been documenting institutions, practices, and concepts that constitute the “nature of the attachment to the land.” My work has included documenting genealogies, hereditary names, the ceremonial business of chiefly succession, and the complex management of lineage boundaries. All of this informs the central process of determining who are the personnel—the First Nation members—who constitute the distinct houses that hold aboriginal title. The evidence in *Delgamuukw* brought forth a vast consensus on such legal protocols—the fission and fusion of lineages, the ceremonial adoptions, the alliances between related houses in different territories. As an anthropologist, I have also been particularly concerned with the interrelationships between different institutions within First Nations societies. Traditional politics, kinship, resource use, ceremonialism, religious expression, and other areas of a First Nation’s social life are all part of the same interlocking system and all emerge from the same basic cultural and cosmological principles.

One way to characterize these core principles would be to call it “the nature of an attachment to the land.” In one sense, such an integrated perspective has evolved from the *Musqueam Sparrow* decision of 1990, which legally recognized “the fact that fishing is integral to Musqueam identity and self-preservation” (Reasons for Judgment, *R. v. Sparrow*, 1990). *Delgamuukw* clearly goes much further. Nor is such a cosmological or holistic “cultural” perspective an invention of lawyers or anthropologists, for it is also exactly the kind of thing Gitksan and Wet’suwet’en chiefs were saying on the stand, sometimes through interpreters, in *Delgamuukw*. A perspective that grants an expansive role to the nature of attachment to land in defining the nature of aboriginal title would knit together inseparably the different strands of indigenous life and practice covered in the *Delgamuukw* ruling’s third test of aboriginal title (exclusive possession managed according to traditional protocols). Further, this approach can also address issues covered in the crucial second test, continuity of territorial use.⁴³ This second test is for some groups the most difficult and was in particular grievously

under assault in *Delgamuukw*, with the Crown's lawyers continually probing Gitksan and Wet'suwet'en witnesses on whether they ever ate pizza, where they earned their money, and how much time they actually spent on the land.

The 1997 *Delgamuukw* appeal decision has made aboriginal legal principles and protocols—especially including rules governing the use, protection, and alienation of territories—a central type of evidence in the business of evaluating claims to aboriginal title. In light of this, one could legitimately suspect that there is no possibility of extinguishment of title in the indigenous legal systems of the kind described in the *Delgamuukw* evidence. The most concise articulation of this idea was recorded in 1958 by the anthropologist Wilson Duff, who compiled, at the request of Gitanyow (then "Kitwancool") chiefs, a booklet titled "Histories, Territories, and Laws of the Kitwancool."⁴⁴ The monograph was part of a deal to remove and reproduce some Kitwancool totem poles, and the chiefs requested, in return, a publication that would detail the territorial rights that the poles represent and validate. Under the section "Laws and Customs of the Kitwancool," the chiefs state:

One of the strictest laws is that no hunting-ground can ever be cut in half and given to anyone. No one is allowed to make any such hunting-ground smaller or larger, even if they own or have power over it. This also applies to all fishing-grounds and all natural resources in and under the ground. This law is so severe and powerful that no one from another clan or without clan rights can come to hunt, fish, mine, cut timber, or do any other thing on these lands without the consent of the head chief and his council.

These laws go back thousands of years and have been handed down from one generation to another, and they must be held and protected at all costs by the people owning these lands. These laws are the constitutional laws, going back many thousands of years and are in full force to-day and forever.⁴⁵

This understanding is, of course, the basis of the Gitanyow's attempt to defend the more than 80 percent of their territory that the NTC surrendered to the Crown in the Nisga'a treaty. But there is little reason to doubt that, in this as in other particulars, the Gitanyow definition of territorial rights also underlies the Tsimshian, Wet'suwet'en, Gitksan, and Nisga'a legal systems, and quite likely others such as those of the Haida, Tlingit, and Haisla. Certainly the chiefs of all of these nations were, by the time of contact, already embedded in a complex system of mutual diplomatic recognition—disrupted by occasional conflicts

(as in any such system) but always validated and managed by chiefs in the feast hall according to shared respect for the principles of sovereignty. This would imply that even the chiefs who are the holders of aboriginal title are forbidden by indigenous law—law now, since 1997, recognized as a very source of aboriginal title—from alienating it. In fact, as Herb George, the Wet'suwet'en chief Satsan, said after the trial,

What our chiefs don't understand, what they have difficulty with, is that when we compare the case law that is put forward in *Delgamuukw* with our own laws, our chiefs say, "That's really funny. Look at that. They can just change the law anytime they want. Where our laws have remained unchanged for centuries." They can't understand that.⁴⁶

If this is to be taken seriously—and the Supreme Court has said now that this sort of thing must be taken seriously—then not only is British Columbia not part of Canada, but by Canadian law it can never become part of Canada.

Granted, this is only one legal interpretation and the most extreme one at that. But even leaving aside the question of utter inalienability as a legal principle in indigenous law, a fascinating arena has opened up in which indigenous legal concepts are being enshrined in a colonial legal system. *Delgamuukw* provides a window through which all of the institutions, structures, and underlying philosophical principles of an indigenous legal system can be translated into Anglo-Canadian jurisprudence and can be brought into a dialogue with the dominant society's legal categories. Whether First Nations can use this window to convince Canadian courts of something like the sovereignty that the First Nations cultures certainly hold to exist depends in part on how courts will interpret the 1997 decision's definition of aboriginal title.

In a sense, much of the Gitksan and Wet'suwet'en legal principles covered in the *Delgamuukw* evidence are all about continuity and what constitutes it. The 1997 decision vindicates the mechanisms and legal manifestations of these principles of continuity as the kind of data that can be used as evidence for aboriginal title—crests, oral histories, feasts, genealogies—as it was in the *Delgamuukw* evidence. And here is where a closer look at Gitksan and Wet'suwet'en oral histories is in order, since the oral histories are the source of Gitksan and Wet'suwet'en cultural principles of continuity. As Culhane writes:

In the opening address to the court, the Hereditary Chiefs instructed the judge that the *adaawk* and *kungax* should not be taken literally in a simplistic sense. They drew analogies between distinctions made in both Aboriginal and western cultures between experience and hearsay,

opinion and knowledge, lay people and experts. The Gitksan and Wet'suwet'en explained that their oral traditions describe the genealogies of various clans and families, and their relationships with their land and resources. They explain cosmology and spiritual relationships and obligations. They document ownership of lands and resources, transactions, relations with neighbours, and historical events. Adaawk are Gitksan oral histories comprised of a collection of sacred reminiscences about ancestors, histories and territories that document House ownership of land and resources. The Wet'suwet'en kungax is a song, or songs, about trails between territories. The rights to perform particular adaawk and kungax are part of the privileges, like clan crests, that are inherited and stewarded by individuals and House groups when they take ownership and responsibility for the specific territories the oral histories tell about. Learning the content of the narratives, and the specific conventions of oratory and style with which they must be delivered, as well as coming to know how to properly perform the songs and dances that are, like the narratives, essential aspects of adaawk and kungax, takes many years. Chiefs and Elders are, therefore, the custodians of this specialized knowledge. . . . The Statement of Claim filed by the Gitksan and Wet'suwet'en said expressions of ownership come through the adaawk, kungax, songs and ceremonial regalia.⁴⁷

In addition to chartering the complex relationships—which are historical relationships—between the lineages that make up north-western British Columbia societies, oral histories also describe the different ways in which house lineages have maintained themselves and regulated their memberships and defended their territories through the disruptions of history since the Ice Age—through wars, dislocations, disasters both natural and supernatural, and, of course, in the later chapters of the oral histories, European contact. These oral histories—*adaawk* and *kungax*—are also the legal basis for ownership in Gitksan and Wet'suwet'en society. To be able to recite an oral history at a feast, since only matrilineal descendants of the narratives' protagonists can recite them, bespeaks survival through tribulation and the maintenance of hereditary rights.

Oral histories were a focus of the plaintiffs' evidence in *Delgamuukw*, and they were also dwelt on in the final reasons for judgment. McEachern rejected the use of oral history as evidence of prior occupation of or title to the territories on three grounds: "First, I am far from satisfied that there is any consistent practice among the Gitksan and

Wet'suwet'en houses about these matters. . . . Secondly, the *adaawk* are seriously lacking in detail about the specific lands to which they are said to relate." Third, he cited secondary sources about other aboriginal groups that question the validity of oral-historical material.⁴⁸ The conclusions of Susan Marsden's expert-opinion report on oral history were rejected solely on the grounds of her qualifications, which did not include a Ph.D.⁴⁹ Aside from the historical validity—in the Euramerican sense—of the oral histories, their function as a charter for Gitksan and Wet'suwet'en law was explored in the expert-opinion report prepared by the anthropologist Richard Daly, who examined this in the larger context of "attachment to the land." McEachern dismissed nearly everything Daly wrote, on various grounds,⁵⁰ but it is this aspect of the oral traditions—as hereditary prerogatives and deeds to land title—that was most forcefully vindicated in the 1997 appellate ruling, which listed oral traditions among crests, genealogies, and other evidence that could be used to demonstrate a legal basis for aboriginal title.

The oral histories are complex and do many things. I do not attempt here to cover their nuances or their cultural or indigenous legal significance. But I do wish to address one aspect of their use as a legal and social charter in First Nations societies, an aspect that relates to some of the other expert-opinion conclusions the court rejected in 1991. In particular, McEachern emphasized a 1979 study showing that only 32 percent of Gitksans in one sample attended feasts,⁵¹ and he found that the Gitksan genealogies compiled by the plaintiffs' expert, the anthropologist Heather Harris, could not "establish House membership as an active force in the lives of the persons listed."⁵² These arguments of McEachern's, misguided though they were, get right to a key question: to what extent does membership in a traditional tribal grouping of whatever sort, according to some rules of descent (matrilineality in the case of the Gitksan and Wet'suwet'en), automatically confer an identity or type of community involvement that ought to be associated with rights in the land? Throughout North America, this question has plagued the position of aboriginal people in court.⁵³

An example of how oral histories, as a component of indigenous legal systems, can address this question comes from an *adawx*⁵⁴ belonging to the Tsimshian community in which I work, Kitsumkalum, where some houses possess detailed traditions of shared ancestry with Nisga'a, Gitksan, and other houses. One such group, the Gitxon⁵⁵ subgroup of the Eagle clan, details how a woman of the Gitxon group, through a series of kidnappings and natural disasters, finds herself stranded in a remote foreign country (Haida Gwaii, the Queen Charlotte Islands) and bears sons who grow up having never seen their homeland. Their teasing at the hands of local children, to the effect that they have "no uncles" and thus no landed identity or sense of history, inspires a dra-

matic escape to their home territory, where they are embraced as long lost relatives and reintegrated into the landedness and cohesion of the local society.⁵⁶ It is part of a larger epic sequence of *adawx* describing the spread of the Gitxon Eagle-clan people throughout the Northwest. Contrary to McEachern's baffling reference to a Gitksan and Wet'suwet'en belief that "the lands their grandparents used have been used by their ancestors from the beginning of time,"⁵⁷ people in northwestern British Columbia believe no such thing. What Gitksan and Wet'suwet'en law does assert is that oral histories record and validate how a house membership's remote matrilineal ancestors first arrived in their territory and validated and maintained their presence and ownership there by propitiating and forming alliances with their new neighbors and with spiritual entities resident in the land.⁵⁸

Whether or not the Gitxon story and others like it are literally true in every particular is one question, one with which McEachern was rather shortsightedly preoccupied. More to the point, research by Marsden and others, including archaeologists, linguists, and geologists, which grew out of the *Delgamuukw* research effort, is gradually showing that the basic outlines of migration histories as detailed in the oral histories are largely correct⁵⁹ (a view also held by the earliest anthropologists such as Franz Boas for the Tsimshian, John Swanton for the Tlingit and Haida, and Marius Barbeau for the Gitksan). This is why as early as the late nineteenth and early twentieth centuries there was corroboration of the migration history from Gitxon-group elders and tradition keepers among the Nisga'a, Tsimshian, Haida, and Haisla. For the purposes of implementing a recognition of aboriginal title, the Gitxon story is also significant because it serves as a textual illustration of basic principles in Tsimshian, Gitksan, Haida, and Nisga'a (among others) law governing the rights that flow from membership in a corporate descent group, a house. The narrative informs listeners that inherited privileges, including the rights to territory, are inextinguishable and are automatically associated with matrilineal descent, howsoever a house's membership might be dispersed as a result of warfare, natural disasters, or, there is no reason to doubt, colonial diaspora and assimilation. Like the kidnapped woman, one can always go back. In addition, some oral histories outline the ceremonial and genealogical mechanisms by which a house whose members have died out can be reactivated by importing members of a related house in another village or another nation, putting names on them, and "standing them up," at a feast, as the restored house citizenry holding authority over the territory.⁶⁰

If, after 1997, courts must recognize lineage-owned oral histories as manifestations of indigenous legal systems that prove aboriginal title and govern an attachment to the land, then what may well emerge in the legal exploration of aboriginal title in northwestern

British Columbia is recognition of the inextinguishability of aboriginal title and criteria for the inextinguishability of individuals' and communities' claims to aboriginal group membership. These areas— inextinguishability of title, spiritually appropriate land stewardship, inextinguishability of group membership, recognition of indigenous mechanisms for group membership—are only a few of the aspects of the British Columbia First Nations land struggle in which the 1997 decision might lead to new and unprecedented findings and recognitions of rights.

It should also be mentioned that many of my discussions here are not applicable equally to all First Nations. The 1997 decision responded to arguments made in the specific context of the Gitksan and Wet'suwet'en. But there are profound differences in indigenous law and culture within British Columbia. For example, the Wakashan- and Salish-speaking peoples of the central British Columbia coast (Heiltsuk, Kwakwaka'wakw, Nuuchahnulth, Nuxalk) have systems of descent— rules for who belongs to which landholding crest group—that are radically different from what is found among the Tsimshian, Haida, Gitksan, Nisga'a, and Wet'suwet'en farther north. In some of these central coast societies, group membership must be ceremonially activated, with no understanding that someone of a certain pedigree automatically has a specific set of rights. If these nations use *Delgamuukw* to assert their aboriginal title as the Gitksan and Wet'suwet'en have been doing, then the results could be very different. To take another example, oral histories among First Nations of the southern and eastern interior of the province have cultural roles very different from those on the coast, where narratives are lineage-owned migration histories that operate as land deeds. There are deep differences even within the "Carrier" group of Athapaskans, of which the Wet'suwet'en Nation is one (very "Northwest Coast"-like) subgroup. How *Delgamuukw* will apply to them has yet to be explored in any detail.

As of this writing, some First Nations in British Columbia are pursuing their agendas at treaty tables, some in courtrooms, and some in both arenas. First Nations taking any of these approaches can only be strengthened by what the 1997 *Delgamuukw* decision has to say—and it is important to emphasize that not every First Nation at a treaty table is willing to accept extinguishment of aboriginal title. No one else will have to do what the Nisga'a have done, still less what has been done in the rest of Canada and the rest of North America. On the other hand, it is no time for complacency. It is unlikely that the Supreme Court of Canada will reconsider the basis of the *Delgamuukw* decision and "close the window" on aboriginal title, as it were, but there may never be a time as ripe as right now for First Nations in British Columbia to bring the full weight of their living, breathing indigenous legal systems to the attention of the dominant society, and to demand that the

Crown recognize the application of indigenous law. Anything can happen. The year in British Columbia right now is 1492, and the next five hundred years may be very different from the last five hundred.

N O T E S

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- 1 For a first exploration of the issue, see James A. McDonald, Janice Tollefsen, and Barbara Milmine, eds., *We're All Here to Stay: Forum on the Implications of the Delgamuukw Decision for Northern British Columbia* (Prince George, B.C.: J. McDonald).
- 2 See Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849–1989* (Vancouver: University of British Columbia Press, 1990); also Tennant, "Aboriginal Rights and the Canadian Legal System: The West Coast Anomaly," in *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West*, ed. John McLaren, Hamar Foster, and Chet Orloff (Regina, Sask.: Canadian Plains Research Center, University of Regina, 1992), 106–46; Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*,

- 2d ed. (Vancouver: University of British Columbia Press, 1992).
- 3 Tennant, *Aboriginal Peoples and Politics*, 111–13.
- 4 James A. McDonald and Jennifer Joseph, "Key Events in the Gitksan Encounter with the Colonial World," in *Potlatch at Gitsegukla: William Beynon's 1945 Field Notebooks*, ed. Margaret Anderson and Marjorie Halpin (Vancouver: University of British Columbia Press), 212.
- 5 An Alaskan precursor to the *Delgamuukw* case was *Tee-Hit-Ton Indians v. United States* (1955), in which the Tlingit lawyer and activist William L. Paul argued that aboriginal title to Paul's Teeyhittaan clan's territory had not been extinguished. The United States won, the decision being that the grievance did not constitute a "taking" under the Fifth Amendment. See Stephen Haycox, "Tee-Hit-Ton and Alaska Native Rights," in McLaren, Foster, and Orloff, eds., *Law for the Elephant, Law for the Beaver*, 127–46.
- 6 See Heather Ann Harris, "Only Their Skins Change: Gitksan Social Structure, Kinship, and Genealogy" (master's thesis, University of Alberta, 1994); Antonia Mills, *Eagle Down Is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: University of British Columbia Press, 1994), 112–34; Christopher F. Roth, "'The Names Spread in All Directions': Hereditary Titles in Tsimshian Social and Political Life," *B.C. Studies* 130 (2001): 69–92.
- 7 Don Monet and Skanu'u (Ardythe Wilson), *Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet'suwet'en Sovereignty Case* (Philadelphia: New Society Publishers,

- 1992), 19. The even fuller title lists all of the chiefs and their houses.
- 8 See Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. the Queen: Proceedings of a Conference Held September 10 and 11, 1991* (Lantzville, B.C.: Oolichan Books, 1992), 3.
 - 9 For an exhaustive survey of Tlingit and Kaigani Haida land tenure, see Walter R. Goldschmidt and Theodore H. Haas, *Haa Aani, Our Land: Tlingit and Haida Land Rights and Use* (Seattle: University of Washington Press, 1998).
 - 10 For the concept of house, see Viola E. Garfield, "Tsimshian Clan and Society," *University of Washington Publications in Anthropology* 7, no. 3 (1939): 167–340; Claude Lévi-Strauss, *The Way of the Masks*, trans. Sylvia Modelski (Seattle: University of Washington Press, 1982), 174; Harris, "Only Their Skins Change," 66–78.
 - 11 See Margaret Seguin, "Lest There Be No Salmon: Symbols in Traditional Tsimshian Potlatch," in *The Tsimshian: Images of the Past, Views for the Present*, ed. Margaret Seguin (Vancouver: University of British Columbia Press, 1984), 111–12; Seguin, "Understanding Tsimshian 'Potlatch,'" in *Native Peoples: The Canadian Experience*, ed. R. Bruce Morrison and C. Roderick Wilson (Toronto: McClelland and Stewart, 1986), 483.
 - 12 Stephen A. McNeary, "Where Fire Came Down: Social and Economic Life of the Niska" (Ph.D. diss., Bryn Mawr College, 1976), 178–89; Harris, "Only Their Skins Change," 22–24; Mills, *Eagle Down Is Our Law*; Gisday Wa and Delgam Uukw, *The Spirit in the Land: The Opening Statement of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia, 1987–1990* (Gabriola, B.C.: Reflections, 1992), 26–28.
 - 13 See Mills, *Eagle Down Is Our Law*, 136–37; Dara Culhane, *The Pleasure of the Crown: Anthropology, Law, and First Nations* (Vancouver: Talonbooks, 1998), 120; Roth, "The Social Life of Names: Personhood and Exchange among the Tsimshian" (Ph.D. diss., University of Chicago, 2000). Culhane provides the best summary of the *Delgamuukw* case.
 - 14 See Ruth Benedict, *Patterns of Culture* (Boston: Houghton Mifflin, 1934); Alan Dundes, "Heads or Tails: A Psychoanalytic Study of the Potlatch," *Journal of Psychological Anthropology* 2 (1979): 395–424.
 - 15 See Irving Goldman, *The Mouth of Heaven: An Introduction to Kwakiutl Religious Thought* (Huntington, N.Y.: Robert E. Krieger Publishing, 1981); and Stanley Walens, *Feasting with Cannibals: An Essay on Kwakiutl Cosmology* (Princeton, N.J.: Princeton University Press, 1981).
 - 16 See Wayne Suttles, "Affinal Ties, Subsistence, and Prestige among the Coast Salish," *American Anthropologist* 62 (1960): 296–305; and John W. Adams, *The Gitksan Potlatch: Population Flux, Resource Ownership, and Reciprocity* (Toronto: Holt, Rinehart, and Winston of Canada, 1973).
 - 17 See Marcel Mauss, *The Gift: Forms and Functions of Exchange in Archaic Societies*, trans. W. D. Halls (New York: W. W. Norton, 1967); Marius Barbeau, *The Downfall of Temlaham* (Toronto: Macmillan, 1928); Homer G. Barnett, "The Nature of the Potlatch," *American Anthropologist* 40 (1938): 349–58; Mills, *Eagle Down Is Our Law*; William Beynon, *Potlatch at Gitsegukla: William Beynon's 1945 Field Notebooks*, ed. Margaret Anderson and Marjorie Halpin (Vancouver: University of British Columbia Press, 2000); and Roth, "The Social Life of Names."

- 18 The transcripts of the trial, which taken as a whole constitute one of the richest and fullest records available of any First Nations legal and social system, are available, among other places, at the Office of the Hereditary Chiefs of the Gitksan in Hazelton, B.C., and at the University of British Columbia's Law Library.
- 19 McDonald and Joseph, "Key Events," 212–13.
- 20 Monet and Wilson, *Colonialism on Trial*, 191.
- 21 *Ibid.*, 189.
- 22 *Ibid.*, 187–88; also Culhane, *The Pleasure of the Crown*, 236.
- 23 See the articles in the special issue of *B.C. Studies* 95 (1992); also in Cassidy, *Aboriginal Title in British Columbia*.
- 24 See Culhane, *The Pleasure of the Crown*, 336; McDonald and Joseph, "Key Events," 213–14.
- 25 See, e.g., Robin Ajello, "Echoes of Oka," *Maclean's*, September 4, 1995, 16; Terry Glavin, "How the Circus Came to Gustafsen Lake," *Georgia Straight*, September 22–29, 1995, 16, 19; Janice G. A. E. Switlo, ed., *Gustafsen Lake under Siege: Exposing the Truth about the Gustafsen Lake Stand-Off* (Peachland, B.C.: TIAC Communications, 1997).
- 26 This aspect of the Gustafsen Lake events was first revealed in Antonia C. Mills, "Confrontations: Blockades at Gustafsen Lake and Gitksan Territory," paper presented at the 95th annual meeting of the American Anthropological Association, San Francisco, November 1996.
- 27 See McNeary, "Where Fire Came Down."
- 28 See Daniel Raunet, *Without Surrender, Without Consent: A History of the Nisga'a Land Claims*, rev. ed. (Vancouver: Douglas and McIntyre, 1996).
- 29 Keep in mind that the minuscule Nisga'a settlement area under the terms of the treaty "represents 20 per cent of the lands to which the Nisga'a can prove Aboriginal title on the basis of available evidence, not less than 10 per cent as claimed"; see Neil J. Sterritt et al., *Tribal Boundaries in the Nass Watershed* (Vancouver: University of British Columbia Press, 1998). But the government is content to portray it as 8 percent for purposes of securing similarly meager settlements with other First Nations.
- 30 See, e.g., Stephen Hume, "\$175 Million for Nisga'a Is a Peanuts Settlement for Our Sins," *Vancouver Sun*, January 31, 1996, A9; Ronald A. Irwin, "On the Road to Justice for All," *Prince Rupert (B.C.) Daily News*, March 8, 1996. These views are even echoed occasionally by apologists for extinguishment policy within academia; see Hamar Foster, "Honouring the Queen's Flag: A Legal and Historical Perspective on the Nisga'a Treaty," *B.C. Studies* 120 (1998–1999): 11–35; also John Lutz, "Precedents Indicate Everyone Got a Good Deal," *Vancouver Sun*, March 1, 1996, A19.
- 31 See McNeil, "The Post-Delgamuukw Nature and Content of Aboriginal Title" (unpublished paper, copy in author's possession, 2000).
- 32 See Foster J. K. Griezic, "The Nisga'a Agreement: A Great Deal or a Great Steal?" *Globe and Mail* (Toronto), March 5, 1996, A19; Taiaiake Alfred, "Deconstructing the British Columbia Treaty Process" (Delgamuukw working paper, 2000).
- 33 See John E. Stevens, "People of Kincolith Have Spoken" (letter

- to the editor), *Prince Rupert (B.C.) Daily News*, May 25, 1997, 7.
- 34 Darryl Watts, "Treaty Betrays Nisga'a" (letter to the editor), *Terrace (B.C.) Standard*, June 18, 1997, A5.
- 35 Herbert Morven, "Nisga'a Want to Enter the Mainstream, Be a Part of the Future" (letter to the editor), *Terrace (B.C.) Times*, February 7, 1996, A7. See also Ray Guno, "Nisga'a Deal a Modern 'Thirty Pieces of Silver'" (letter to the editor), *Terrace (B.C.) Standard*, June 18, 1997, A5.
- 36 Vaughn Palmer, "Nisga'a Chieftain Tacks on a P.S. to That 'Full and Final Settlement,'" *Vancouver (B.C.) Weekend Sun*, March 9, 1996, A18.
37. Samuel H. Lincoln Jr., "Treaty AIP Unfair to Kincolith," *Prince Rupert (B.C.) Daily News*, March 6, 1996. It should also be mentioned at this juncture that the lower Nass, like the upper Nass, is a complex occupation area that has seen shifts in aboriginal land use since contact. Tsimshian chiefs have always been owners in the lower Nass as well, and there are solid Tsimshian claims to the territory on which Kincolith itself—a postcontact mission town—sits. This also has not been properly addressed by the NTC or by the government's negotiators.
- 38 See James Robinson, "Treaty Controversy Continues," *Prince Rupert (B.C.) This Week*, June 29, 1997, 7.
- 39 Sterritt et al., *Tribal Boundaries*; also Neil Sterritt, "The Nisga'a Treaty: Competing Claims Ignored!" *B.C. Studies* 120 (1998–1999): 73–97.
- 40 In May 2001, the NDP lost its parliamentary majority in Victoria. British Columbia's new premier, Gordon Campbell of the right-wing Liberal party, campaigned hard with an anti-native platform that included a call for a referendum to abrogate the Nisga'a treaty and scrap the treaty process. The future of the land claims process is in doubt as this goes to press.
- 41 See Doug Donaldson, "First-Come, First-Serve Policy Disrupts Native Negotiating Table," *Vancouver Sun*, March 15, 1996, A23.
- 42 See McNeil, "The Post-Delgamuukw Nature and Content of Aboriginal Title," 13.
- 43 The first test, precontact occupancy, does not require legal demonstration in contemporary practice.
- 44 Wilson Duff, ed., "Histories, Territories, and Laws of the Kitwanoocool," *Anthropology in British Columbia Memoir no. 4* (Victoria: Royal British Columbia Museum, 1959).
- 45 *Ibid.*, 36.
- 46 Herb George, "The Fire within Us," in Cassidy, *Aboriginal Title in British Columbia*, 55.
- 47 Culhane, *The Pleasure of the Crown*, 120; see also Gisday Wa and Delgam Uukw, *The Spirit in the Land*.
- 48 See Culhane, *The Pleasure of the Crown*, 257–58; also Julie Cruikshank, "Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition as Evidence in *Delgamuukw v. B.C.*," *B.C. Studies* 95 (1992): 25–42.
- 49 See Culhane, *The Pleasure of the Crown*, 259.
- 50 *Ibid.*, 122–23, 257–59, 275–79.
- 51 *Ibid.*, 276.
- 52 *Ibid.*, 259.
- 53 See James Clifford, "Identity in Mashpee," in *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art* (Cambridge: Harvard University Press, 1988), 277–346.

- 54 *Adawx* is the Tsimshian cognate of Gitksan *adaawk* or *adaawak*.
- 55 The Nisga'a spelling is *Gitxhoon*. There are no members of the Gitxon/Gitxhoon group among Gitksan or Wet'suwet'en houses.
- 56 For the full versions, see John Morvin, "The Origin of the Githrawn Group at Gitsemralem," 1953, Beynon manuscripts, Columbia University, no. L.86, reprinted in George F. MacDonald and John J. Cove, eds., *Tsimshian Narratives 2: Trade and Warfare*, Canadian Museum of Civilization, Mercury Series, Directorate Paper no. 3 (Ottawa: Directorate, Canadian Museum of Civilization, 1987), 1–4; also Marius Barbeau, *Tsimshian Myths Illustrated*, Anthropological Series no. 51, National Museum of Canada Bulletin no. 174 (Ottawa: Dept. of Northern Affairs and National Resources, 1961), 3–17.
- 57 See Culhane, *The Pleasure of the Crown*, 261.
- 58 See, e.g., Gisday Wa and Delgam Uukw, *The Spirit in the Land*, 25–26. All sovereign states, incidentally, through their written or oral histories, do the same thing or something analogous, and we do not dispute the United Kingdom's legitimacy as an independent state simply because we doubt Geoffrey of Monmouth's assertion that King Arthur was a direct descendant of Aeneas of the Trojan War.
- 59 See Culhane, *The Pleasure of the Crown*, 121; Susan Marsden, *Defending the Mouth of the Skeena: Perspectives on Tsimshian Tlingit Relations* (Prince Rupert, B.C.: Tin Ear Press, 2000), 46–51.
- 60 See Roth, "The Social Life of Names," 60–64.