POWER, RESISTANCE AND THE LAW IN A BRITISH COLUMBIA LAND TITLE TRIAL.

by

Tim Solnick

B.A., hons., Oxford University, 1990

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTERS OF ARTS

in

THE FACULTY OF GRADUATE STUDIES

Department of Geography

We accept this thesis as conforming

to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

October 1992

In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

(Signature) _

Department of GEOGRAPHY

The University of British Columbia
Vancouver, Canada

Date 14/10/92

Abstract:

In Canada the law and the law courts have played and continue to play a prominent part in First Nations struggles for self-government and for their land. As such, the role of law demands assessment. Is the legalization of these struggles working to diffuse the efforts of the First Nations? Or do the law and the courts facilitate the process of decolonization in Canada? In this thesis, I investigate these questions with respect to a 1992 British Columbia Supreme Court trial, **Delgamuukw v. Province of British Columbia and the Attorney-General of Canada.** In this case, the Gitksan and Wet'suwet'en First Nations sued the province of British Columbia for ownership and jurisdiction of their territories. Analysing this trial, I suggest first, that the practices and procedures of the legal process reinforced colonialist power relations. The decision to the trial configures strategies of colonization with legal knowledge practices, and re-writes the Gitksan and Wet'suwet'en struggle for their land into legal question formulated on the basis of colonialist discourses. As a site of debate, the court-room encourages the configuration of legal and colonial modes of power because its form and structure promote the exclusion and devalorization of First Nations discourses and knowledges. But, secondly, the specific aspects of the trial indicate that First Nations use of and resistance in the court-room has the potential to enter into and substantively alter the law. Gitksan and Wet'suwet'en people and their lawyers use the court-room, its procedures and the knowledge practices associated with them, such as mapping and writing, to oppose the operations of colonialist strategies. The emergence of a group of lawyers who accept the validity of First Nations knowledge in court, in association with these resistances, suggests the possibility for substantive changes to

the law. Inherent in the struggle of this group of lawyers for control over the means of legal interpretation is the potential for the widespread legitimation of First Nations knowledges and discourses in the legal sphere. In this way, my analysis indicates that during **Delgamuukw** the law and the courts operated in a dual fashion, on the one hand working with colonialist power, but on the other providing space for First Nations resistance to that power; it also underscores the efficacy of that resistance.

CONTENTS:

List of Maps:

List of Figures:

Acknowledgments:

I am grateful to David Ley, Derek Gregory, Gerry Pratt, Michael Jackson, Ellen Pond, Michael Brown, Dave Demerrit, Matt Sparke and Daniel Clayton for their generous editorial assistance and for their invaluable thoughts and suggestions. In addition, discussions with many people in the UBC geography department, especially Bob Galois, Cole Harris, Bruce Willems-Braun, Amanda Ocran, and Alison Blunt have all helped shape my thinking in this thesis. I would also like to thank Tom Shorthouse for bringing my attention to the trial transcripts in the law library, and allowing me access to them. Finally, for their friendship and support I am in debt to many friends in the UBC geography department and outside, in particular Alison Blunt and Ellen Pond again, Jennifer Kwong, and also to my parents, Esme and Harry, my brother Jeremy, and my sisters Jenny, Alison and Gill.

INTRODUCTION

FROM 'SOVEREIGN' SUBJECT TO SITE - ASSESSING THE OPERATION OF LAW IN COLONIALISM AND IN THE PROCESS OF DECOLONIZATION

> *Part of the problem of Eurocanadian-Aboriginal communication and discourse is the question of place: how and therefore where does the discourse happen?*
> (Norbert Ruebsaat)[1]

On the 8th of March, 1991, eight months after the final arguments had been heard, Chief Justice Allan McEachern handed down his decision on the Gitksan and Wet'suwet'en land title trial. These two First Nations had sued the Province of British Columbia for ownership and jurisdiction of their territories, which extend north and south of Smithers ('on the government maps'). The trial was unprecedented for the boldness of the claims and unusual for the fact that First Nations people themselves presented much of the evidence. It was also an extremely long process. When it opened in Smithers on the 11th of May, 1987, preparations for some sort of claim had long been in the making. Members of the two nations had begun inscribing the oral record of territorial boundaries onto maps to present before the Office of Native Claims in Ottawa, in the 1970's;[2]

---

[1] Ruebsaat, Norbert, Speaking with Diane Brown A-Text-In-Progress, *Border/Lines*, Fall, 1989, pp. 18-23.

[2] Neil Sterritt, Gitksan cartographer and Expert witness in the trial, describes being instructed to compile a map by the Gitksan and Wet'suwet'en Hereditary Chiefs in the aftermath of the **Calder** case, (decided upon by the Supreme Court of Canada in 1973), when the federal government initiated a policy to negotiate land claims. Transcripts of the Proceedings At Trial, **Delgamuukw v. Her Majesty the Queen in Right of the Province of British Columbia and the Attorney-General of Canada**, (Between May 11, 1987 and June 30, 1990) [Supreme Court of British Columbia], Smithers and Vancouver, British Columbia: Smithers Registry, volume 112, pp. 7033-7034; **Calder v. Attorney General of British Columbia** (1973), *Supreme Court Reports* [1973], pp. 145-226 [Supreme Court of Canada].

equally, the legal process - taking the commission evidence from elderly plaintiffs and the like - had long been underway. In all, 318 days of evidence and 56 days of closing argument were heard by the time the trial closed at the end of June, 1990. In a judgement that spanned nearly 400 pages including appendices, and arguments that ranged widely from B.C. and Canadian history to the nature of First Nations societies, the Chief Justice systematically dismissed Gitksan and Wet'suwet'en claims to ownership and jurisdiction, their claims to aboriginal rights to use the territory, and their demands for damages for the loss of lands and resources since the establishment of the colony.[3]

The prominent part played by the law and the courts in the current political struggle of First Nations peoples in Canada, as exemplified in this trial, warrants assessment. Is the law operating to diffuse the efforts of First Nations people? Or is it a genuine force for decolonizing their territories and overturning the colonial power relations that continue to define their position in Canada? Certainly, the recent case history in British Columbia presents a confusing moment for any assessment of the relationship between the law, colonialism and the struggle to decolonize. The 1991 Supreme Court of British Columbia decision, in **Delgamuukw**, which is widely regarded as a setback for the First Nations search for a legal solution to regain their land and to re-institute self-government,

---

[3] **Delgamuukw v. Her Majesty the Queen in Right of the Province of British Columbia and the Attorney-General of Canada: "Reasons for Judgement of the Honourable Chief Justice Allan McEachern".** (March 8, 1991), [Supreme Court of British Columbia].

capped a noted thaw in some judicial sympathies towards the First Nations.[4] Accounts which try to deal with this ambivalent history between the law and the First Nations often reproduce a tendency in mainstream legal scholarship to treat the law as an autonomous and closed system, and the source of law as a 'sovereign' centered subject, the judge.[5] In this thesis I attempt a departure from this tendency by approaching judges, law and law-courts, specifically, the judge, the legal sphere and the court room in **Delgamuukw**, as sites where discourse, and practices of power and resistance, are articulated. Doing so I think underscores both how the law has and continues to operate in conjunction with colonialist strategies, and how these strategies are contested through the use of knowledge practices, inscription processes, and procedures that constitute the legal process, thus opening the law to potential changes. In this way it enables a fuller understanding of the role of law in reproducing colonial power relations, and an appreciation of the nature and efficacy of resistance by the First Nations to interrupt and alter that reproduction.

A number of histories can and have been written about the relationship between the First Nations people and the Anglo-American and Canadian law and legal institutions. Paul Tennant's acclaimed book *Aboriginal Peoples and Politics* contains an example of one. In many ways Tennant writes a revisionist history,

[4] Most Canadian precedents favourable to First Nations' demands for self-government have been written within the last thirty years; these include **White and Bob**, the Nisga'a case (**Calder**), **Guerin**, and **Sparrow**. Paul Tennant notes that, by 1989 the courts had at least established that Aboriginal peoples title to their lands preceded the arrival of colonial government, a significant advance on the position that the source of title lay in the law of the colonizers. Tennant, Paul, *Aboriginal People and Politics*, Vancouver, University of British Columbia Press, 1990, pp. 213-226. See **Regina v. White and Bob** (1965), 52 *Dominion Law Reports* (2d) [1965], p. 481 [Supreme Court of Canada]; **Guerin v. Regina** (1984), 6 *Western Weekly Reports* [1984], pp. 481-529 [Supreme Court of Canada]; **Sparrow v. Regina** (1986) 2 *Western Weekly Reports* [1987], pp. 577-609 [British Columbia Court of Appeal].

[5] I use the term 'sovereign' to refer to conceptions of the subject derived from Descartes. The word commonly associated with this subject is 'individual', and it gives the 'impression that human beings are free and self-determining, or that they are constituted by undivided and controlling consciousnesses.' Smith, Paul, *Discerning the Subject*, Minneapolis: University of Minnesota Press, 1988, p. xxxv.

challenging what have been the hegemonic conceptions of B.C. history. In some ways his arguments and others like it are becoming dominant in their own right, particularly amongst the academic and legal supporters of First Nations struggles.

The standard theme of these revisionist accounts is this. Up until the late nineteenth century, the Native American and First Nations self-government and ownership of their territories was recognized in the practices of the early European colonists, and in the treaty making process between these groups. As such, the colonists could only obtain the title to that land with the agreement of recognized representatives from the Native American or First Nations communities that owned them. This principle of consensual extinguishment was enshrined in the Royal Proclamation of 1763 and, supposedly, in the practice of Canadian and American governments.[6] During the late nineteenth century, traced variously to the Governorship of Douglas or Trutch, this approach changed. Motivated firstly by assimilationist and then blatantly racist and white supremacist conceptions, the principle of consensual extinguishment was ignored and then dismissed as not applying to British Columbia.

As the story goes, First Nations people continued to press for the recognition of the principle, and, in the 1960's, lawyers and judges began in Tennant's words, to 'awaken' to the injustices in this situation. In Tennant's version, the 1963 prosecution and acquittal of two members of the Nanaimo Indian Band, Clifford White and David Bob initiated the transition. The two men shot six deer and were promptly arrested for possessing game without a license in contravention of Provincial law, despite the existence of a purchase agreement

---

[6] Darlene Johnston provides a thorough review of the extent to which Canadian governments have deviated from the 'no acquisition' without consent principle in, Johnston, D., *The Taking of Indian Lands in Canada. Consent or Coercion?*, University of Saskatchewan Native Law Centre, 1989.

declaring their right to do so. Tom Berger, then a young lawyer with a new practice took up the case. Berger argued in court that the purchase agreement should be seen as a treaty, and that the Royal Proclamation stood as a guarantee of these treaty rights in British Columbia. In the B.C. Court of Appeal, White and Bob were acquitted by three out of five judges. One of them, Justice Tom Norris accepted Berger's argument that the Proclamation did apply to B.C. and wrote a lengthy decision to endorse that opinion. According to Tennant, Berger's argument and Norris' opinion revived the 'Aboriginal rights' issue, not just in B.C., but in Canada as a whole. As a direct result of the success, the Nisga'a hired Berger to bring a case for a judicial declaration of their unextinguished title to their land. The final decision by the Supreme Court of Canada in that case, declared that the Nisga'a did have title to their land before 1858, a significant advance on previous decisions. On the issue of continuing title, the decision was split, but it produced some of the most important precedent yet, in the form of Justice Hall's conception of Aboriginal Rights as not contingent on Canadian law, but as inherent. Tennant also attributes to it the decision by the federal government to agree to negotiate where title had not been explicitly extinguished. In this version of the story of First Nations people and the law, the spate of favourable legal precedents has continued through **Guerin**, the Meares Island ruling, **Sparrow** until the Chief Justice McEachern handed down what is characterized as a regressive 'throwback' to the nineteenth century, in March 1990.

I have necessarily excluded many of the nuances and details in this caricature but I think these broad brush-strokes are sufficient to provide the sense of these revisionist histories, and also to underline certain lacunae within them. To a considerable degree, for these accounts a history of the relationship between

the First Nations and the law is a history of the Royal Proclamation and precedent relating to First Nations people. Yet by taking this focus these accounts seem on the one hand to bracket change in the law, and on the other, to leave dormant or recessive other stories about First Nations people and the law. The way Tennant attributes the emergence of decisions favourable to the First Nations to an 'awakening judiciary' situates change in the law in the minds of judges, while neglecting to access those minds, theoretically or otherwise. At the same time, some of the precedents described by Tennant indicate other roles for the law. For example, the case of Clifford White and David Bob, to which Tennant and others attribute the subsequent presence of title claims in the courts, involved as Tennant is aware, the criminal prosecution of the two men, ostensibly for maintaining their everyday activities. This case suggests that the law has played a part in suppressing the everyday practices of First Nations people and it therefore implicates the law as a particular mode of colonial power. In this way, by denoting the legislator's writing of laws or the judge's decision which produces precedent as the principal legal acts, accounts like Tennant's leave other aspects of the legal process under-theorized and neglect other relationships between First Nations people and the law.

I think part of the explanation for the gaps in the revisionist accounts arrive because to a considerable extent they accept the conception of the law propagated in the professional ideology of the legal system. Whether you call it legal positivism, or formalism, the professional ideology of the legal system treats the law as an autonomous and closed system, and the source of law as the rational application of rules by a 'sovereign' centered subject, be it legal scholar or judge. It thus situates both the foundation of law and any dynamic to it within the body of the legal system itself. To the extent that the focus on the Proclamation and on

precedent in revisionist accounts of B.C. history also situate the source of law in a 'sovereign' subject, the legislator or judge, and a sovereign act, the decision, these accounts seem resonant with the professional ideology of the legal system. This resonance sounds stronger when we consider the characteristic form and deficiencies evident in many legal analyses that deal with First Nations people. For example, in *Ancestral Lands, Alien Laws*, Brian Slattery explores the approaches contained in the judgements of North American and Commonwealth courts, finds five doctrinal approaches to land title, and assesses the relative merits of these doctrines for First Nations people.[7] The five doctrines, derived from precedent written by judges and the work of legal scholars are divorced from the times and places in which they were written. Historical change is situated in these doctrines and therefore remains an unexplained product of the rational applications of rules by the jurists or scholars who wrote them. Slattery's own efforts to determine the most suitable doctrine reproduce and affirm these notions of the source and dynamic of law. The same tendencies arise in legal analyses of court cases. For example, in an essay on the **Sparrow** decision, a case which arose from the charging of Ronald Sparrow, a Musqueam, for contravening Federal fishing regulations while fishing in the Lower Fraser, Asch and Macklem analyse the logical consistency of the Court of Appeal judgement in the case, and determine that it variously applies two contradictory concepts of rights.[8] Once more, therefore, the focus is on the rational application of rules by a 'sovereign subject', in this case a judge, as the source of the law. By centering their analysis

---

[7] Slattery, Brian, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*, Studies in Aboriginal Rights No. 2, University of Saskatchewan Native Law Centre, 1983. A similar example can be found in Cassidy, Julie: The Significance of the Classification of a Colonial Acquisition: The Conquered/Settled distinction, *Australian Aboriginal Studies*, 1988-89, pp. 2-17.

[8] Asch, M., & Macklem, P. Aboriginal Rights and Canadian sovereignty: an essay on R. v. Sparrow, *Alberta Law Review*, v. xxix, No. 2, 1991, pp. 498-517.

on the logical consistency of the decision, Asch and Macklem abstract from the context of trial, which involves First Nations struggle to maintain their practices, and the deployment of the force of the law to control them. The way both these accounts focus exclusively on, and present reasoned critiques of, judicial precedent leads them to situate change within the legal system and to abstract from the operations of law as a form of power. In this way, they reiterate the explanatory gaps evident in Tennant's work. So, the fact that legal analyses of issues affecting the First Nations reproduce the lacunae in the revisionist account of B.C. history seems to relate, at least in part, to their locating the source and significant acts of the law in the derivation of legal principles by a 'sovereign' or Cartesian subject.

Assessing how the law is operating in relation to the struggle for decolonization therefore requires a reading against the grain of professional legal ideology. Three broad concerns have shaped the particular path I have followed in this undertaking and together they entail a movement from the focus on the application of rules by a 'sovereign' subject, to a focus on a series of sites - judges, legal texts, institutions, and court-rooms - where the law is contested and where practices of knowledge, power and resistance are articulated.

My first concern in this shift has been the need for a more complex notion of the subject than the 'sovereign' subject described above.[9] The Critical Legal Studies movement (CLS), makes a start at providing this more complex subject by shifting from the perspective that judges and lawyers are neutral, centered

[9] If the term subject is confusing it is not surprising. As Paul Smith describes, it is installed in many theoretical debates and made to perform many theoretical tasks. Sometimes it appears synonymous with individual or person. In psychoanalysis it takes on a more specialized meaning as the 'unconsciously structured illusion of plenitude which we call the self.' Other times it is used to refer to the 'subjected *object* of social and historical forces and determinations ..' p. xxvii Nevertheless, in appreciating its meaning, I think it is useful to understand its relationship to the structures of language which in a way its most familiar usage denotes - as in the subject of sentences. Indeed, the most sophisticated notions of the way subjects relate to ideologies describe the subject focus on formulating theories of "the speaking subject". Smith, Paul, *op.cit.*, p. xxxv.

subjects, to reading their decisions in terms of their class, gender or racist interests.[10] In the assessment of one such critic, the 'judicial emperor ... chooses and acts to protect and preserve the propertied interest of vested white and male power.'[11] By taking the significant aspect of judges to be their privileged class, gender or racist interests, the proponents of CLS in effect, suggest that a judge's subjectivity is constituted by these colligated interests. These interests are constructed, at least in part, externally to a judge's mind and in this sense the CLS subject is a decentered subject. Judicial decision making from a CLS perspective can thus be seen to involve a judge speaking from a position that is ideologically constituted. It does not emerge internally from a rational application of rules; it is partly determined by interests in which the judge partakes, but is not the source of.[12]

Post-structuralist academics have developed more sophisticated theories to understand what CLS scholars refer to as 'interests' and the way subjects relate to

---

[7] CLS represents a diverse range of work, united as attempts to expose the political dimensions of the adjudicative and legal process Hutchinson, A. C., Introduction, (Ed.) Allan C. Hutchinson, *Critical Legal Studies*, Totowa, New Jersey: Rowman and Littlefield Publishers, Inc., 1989, pp. 1-11.

[11] *Ibid.*, p. 3.

[12] I don't think either my discussion of choices made from subject positions, or CLS emphasis on a judge's interests necessarily amount to a structuralist position. Hutchinson, whom I quote above, emphasizes judicial choice based on a judge's interests and this suggests the probability not the necessity of a decision. Similarly, when I describe a subject position as constituted by ideologies, I don't want to imply that they determine a judge's decision. Rather I prefer to take up Paul Smith's suggestion that subject positions are constituted by multifarious ideologies, which can be contradictory. In making a decision there is the possibility for agency because of these contradictions. In this way a judge's commitment to the ideology of formalism could lead her to decide against what may be perceived as her class, gender, or racist interests. E.P. Thompson says something similar in a guarded defence of the rule of law, (after cataloguing the terrifying history of class oppression in Hanoverian England, mediated and enforced through the law). He describes how, sometimes, during this period,

> not only were the rulers inhibited by their rules of law against the exercise of direct unmediated force..., but they also believed enough in these rules, and in their accompanying ideological rhetoric, to allow, in certain limited areas, the law itself to be a genuine forum within which certain kinds of class conflict were fought out.

Thompson, E.P. *Whigs and Hunters*, Middlesex, England: Penguin Books, 1985, p. 265.

them. Foucault's notion of a discourse is an example. Discourse refers to a field beyond statements, books, authors, disciplines, which both comes before and continues on after specific utterances.[13] To the extent that it exists beyond the bounds of a subjects' minds or actions but informs their enunciations, it can be seen to have something in common with the notion of ideology that accompanies the class, gender or 'racist' interests, which in CLS schema inform a judge's decisions. In a sense the notion of a discourse is a more elaborate theorization of what constitutes an ideology. It describes a set of statements, which are related in some way, for instance by their object, by their modes of argumentation, by how they thematize or theorize that object. As such they regulate what can and cannot be said about that object. To say I am looking at discourses about others, for example, means that, rather than talking about the other societies I am going to analyse statements about their nature, and look for a unity behind these statements. For example, statements can be located as part of the discourse of 'race', if they refer to others in terms of blood, purity, genes, skin colour. Post-structuralist accounts describe the subject as taking up or articulating a position within signifying practices, (of which sentences, written or spoken are an example), which is constituted by discourses or ideologies. Thus any text is a redistribution of these discourses or ideologies, (amongst also 'formulae, rhythmic models, fragments of social languages.')[14] My analysis of Chief Justice McEachern's judgement in chapter two of the thesis reflects these theories. In that chapter I argue in part that the positions the Chief Justice takes up in the text of the judgement are in keeping with the neutral subject constituted by legal

[13] Discourse can be seen to exist at the level of what Raymond Barthes terms intertext the 'language before and around text', a field of unconscious or automatic quotations, given without quotation marks.' In Barthes Roland, The Theory of The Text, trans. by McLeod, I. in (Ed.) Robert Young, *Untying the Text*, Boston, London: Routledge & Kegan Paul, 1981, pp. 31-37.

[14] *Ibid.*, p. 39.

positivism but also articulate discourses about others such as 'race', and the dichotomies of modern/primitive, civilized/savage. Decentering the 'sovereign' subject of the Chief Justice in this way involves a focus on texts and subject positions as sites where discourses and ideologies are articulated.

The second concern that leads me to make this shift from sovereign subject to sites is a sense that the law has been one of the principle *domains* of power relations between colonialists and colonized peoples.[15] To appreciate how this is so, I think it is useful to elaborate on the other story of the law and First Nations people that is dormant or recessive in Tennant's account. The criminal prosecution of Clifford White and David Bob, and the arrest of Ronald Sparrow are indicative of the particular way in which colonizing power in Canada has strategically criminalized not just First Nations resistance, but what may be regarded as their everyday economic, religious, and governmental practices.[16] The fact that in official statistics, the proportion of First Nations people in the prison population is approximately three times greater than the proportion of the Canadian population that they constitute indicates the pervasiveness of this criminalization, and differentiates First Nations experience before the law from many other groups.[17]

The extent to which the law has penetrated into the lives of First Nations people because of this pervasive criminalization stands in stark contrast to the

---

[15] I use the term domain in Foucault's sense as '... an especially dense transfer point for relations of power...' Foucault, Michel, *The History of Sexuality, volume 1: An Introduction*, New York: Vintage Books, 1980.

[16] Several critical accounts of the law detail the use of this strategy of criminalization. E.P Thompson's erudite exegesis of the brutal use of law in 18th century England to suppress resistance to the introduction of capitalist property relations is an example.

[17] *Basic facts about Corrections Canada*, Correction Service Canada, 1990, p. 25 lists the percentage of male and female prisoners that are 'native' as 10% and 14% respectively. The 1986 Canadian census gives the population of 'Aboriginal Peoples' as 711, 720.

posited role of the law in the liberal nation-state, and relates to the use of the law in the specific interests of the colonialist enterprise. According to Peter Fitzpatrick, a British legal scholar who has worked on the operation of the law in colonial situations in the liberal state, the law unites individuals in a single 'community of mankind'.[18] The principle behind this community is that the actions of individuals can only be legitimately constrained through the 'forms of the rule of law'. Law thus defines the space in which the subject is 'free'. Like other forms of power identified by Michel Foucault it thus constitutes individuals, in this case the 'free-acting' liberal, legal subject. The liberal legal subject has rights to be free from the intervention of law on condition that she/he accept the dictates of disciplinary power and remain within the bounds of 'normal' behaviour.[19] By contrast, in the colonial situation the law unites both colonists and colonized under the same principle but constitutes two entirely different subjects. As free-acting liberal legal subjects, the legitimate constraint of the law makes very little penetration into the lives of the colonists. For the colonized however, the law has historically taken on an 'oppressive specificity' in keeping with the colonialist interests to contain and control the colonized and to regulate social change among them. For these purposes, the law has been used to constitute 'native' society in terms of the colonial discourses, as 'subsistence societies', as 'tribal societies', imposing political structures like the 'Chief and Council', confining these societies to 'traditional lands', restricting movement,

---

[18] See Fitzpatrick, P., Crime as resistance: the colonial situation, *The Howard Journal*, vol 28, No. 4, Nov. 1989, pp. 272-281; and Fitzpatrick, P., The Rise and Rise of Informalism, In R. Matthews (Ed.), *Informal Justice*, Sage, 1988, pp 178-211.

[19] In this respect, according to Fitzpatrick, in the liberal nation states that constitute the home countries, the law operates in conjunction with the pervasive forms of modern micro-power described by Foucault. By various means - disciplinary strategies, in schools, factories, prisons, hospitals, or through discursive strategies of sexuality, modern power is made to operate at the micro-level, to inhere in the gestures and mannerisms of self-surveilling subjects.

forbidding widespread hunting and gathering.[20] It just remained for the criminal law to deal with those who deviated from 'Native' society so defined and confined. Because the law has been used in this way in the Canadian colonial context to control the First Nations, to induce them to assimilate by defining and containing their societies, and criminalizing their everyday practices, it can therefore be seen as one of the principal domains of colonial power relations.

As a principal domain of colonial power relations the law has not just been a mode of power over the colonized but a site of resistance. Because of the criminalizing of their everyday practices, much First Nations resistance has been directed against the law by maintaining those practices. During **Delgamuukw,** Gitksan Hereditary Chief, Gyolugyaat, (also known as Mary McKenzie), spoke of an incident of such resistance that has since been included in the *Adaawk*, the oral history of her house. She described the occasion when a Gitksan Chief Gyetim Galdo'o openly held a feast in Hazelton in defiance of the 1884 ban of feasting, and his arrest.[21] Equally, First Nations people's defiance to the operations of the colonial enterprise - surveying land, settlement and the like - tended to be suppressed by the law: in 1908 three Wet'suwet'en men were convicted for

[20] Imposed during the 1870s, Indian Status and the other provisions of the Indian Act defined and contained First Nations life on the basis of 'race' - purity of blood. Status divided families and weakened communities; in addition the introduction of 'chief and council' to govern bands inhibited tribal strength and unity. Tennant, *op.cit.*, p. 46 The institution of status and reserves were designed with the explicit intent to assimilate First Nations people; they restricted membership in First Nations communities and placed control of it with the state; they rigidly confined the spatial boundaries in which First Nations people could maintain their practices; at various times these assimilationist strategies were bolstered by incentives to persuade First Nations people to join the 'mainstream' - for example, for a long time, a First Nations person could only become enfranchised by relinquishing status.

[21] This sort of resistance is inherent in the sustained defiance of state regulatory laws. The cases of Clifford White, David Bob and Ronald Sparrow are examples of this. Another example is the Washington Payallup peoples attempt to challenge the states 1925 and 1927 declarations reserving the steelhead for sports fishermen and banning Indian net fishing. During the 1950's two Payallup members defied the regulations on net fishing in full public view, and were arrested. In Washington the 1960's marked a high-point of Native American political activity around defiance of fishing regulations. 'Fish-ins' were held, and Indians from across the United States joined to protest assaults against the fishermen.

threatening white settlers who had taken over Moricetown reserve land; when Kispiox Chiefs halted road building in their valley in 1909, the RCMP arrested seven.[22] So the law has been an especially dense transfer point of resistance to colonialism, at which First Nations people have contested the criminalization of their everyday practices and through which much of their defiance to colonial operations has been mediated.

Recent theoretical work suggest that consideration of the law as a domain of power relations requires an analysis of both its social and spatial dimensions - its social relations, institutions and sites. Foucault's focus on sites - schools, hospitals, asylums, factories and prisons - in his exegesis of disciplinary power is suggestive of the latter. Though Foucault specifically directs his attention away from the more blatant manifestations of power such as the law, critiques and applications of his work suggest that his focus on sites of power can be usefully extended to include an analysis of the 'institutional materiality of the state.'[23] For example, Fitzpatrick suggests that because the law was a principal domain of colonial power relations the sites of legal operations became major arenas in which these power relations were worked out, I quote: 'criminality and the courts operated in minutely tentacular ways reaching potentially into all aspects of native society.'[24] In examples from the colonial period in Sri Lanka, Fitzpatrick, describes how court-rooms, as principal sites of resistance were treated as a manipulable means of dispute settlement and made to operate in conformance

---

[22] Don Monet & Skanu'u (Ardythe Wilson), *Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet'suwet'en Sovereignty Case*, Philadelphia, Pa; Gabriola Island, BC: New Society Publishers, 1992.

[23] Driver, F. Power, Space, and the Body: a critical assessment of Foucault's Discipline and Punish, *Environment and Planning D: Society and Space*, 1985, vol. 3, pp. 425-446 Driver criticizes Foucault for his too complete turn from more obvious sites of power in the capitalist state.

[24] Fitzpatrick, *ibid.*, p. 278.

with indigenous expectations and designs. On the other hand, Pierre Bourdieu's work on the law suggests that an analysis of the institutional materiality of the legal sphere should include its sociology. Bourdieu shows that the dynamic for change in the law arises from competition between social factions over the means of legal interpretation. In chapters 3, 4 and 5 of this thesis I apply these considerations. In the first two, I draw upon Bourdieu and Foucault to describe how the social division between legal specialists and lay people, and the differing status of legal specialists is translated into power relations in the court room through the ritualized ordering of space and speech. In the latter chapter, I suggest how First Nations people extend the meaning of court room space beyond the dispute at hand thereby resisting the operations of colonial power, and how their efforts relate to an emerging struggle over modes of legal interpretation between certain legal factions. In this way, by drawing on the work of Foucault, Fitzpatrick and Bourdieu, my treatment of the law as a domain of colonial power relations has tended towards a focus on the social relations and spatialities of the legal sphere.

The third and final consideration that has informed my shift in focus away from the rational decision by a 'sovereign' subject relates to Foucault's equation of 'power/knowledge'. Most of Foucault's analyses have been directed, in some way or other, at the relationship between power and knowledge, but this theme emerges most fully in *Discipline and Punish*. Here Foucault explores the simultaneous emergence and relationship between disciplinary technologies and the human sciences - the objectifying sciences of the individual - which subjugated

human bodies by 'turning them into objects of knowledge.'[25] I have come to this equation and from two directions: The work of Edward Said directed me to its ramifications for understanding the operations of colonial power; Nancy Fraser's analyses of the relation of expertise to social movements and to the state suggested to me its importance for understanding the workings of the legal sphere in late twentieth-century, capitalist societies like Canada.[26] In the case of the former, Said's *Orientalism* demonstrates how colonizing places like Egypt entailed a series of manipulations of knowledge that objectified the Orient for the West thus facilitating and legitimating the colonial enterprise. In keeping with his conclusions, in chapter one I suggest how, Chief Justice McEachern in his judgement articulates realist practices of knowledge - seeing and mapping - with discourses about others to reiterate the colonialist strategies that consigned First Nations lives to reserves. In the case of the latter, Fraser describes the various ways Expert discourses and institutions for producing knowledge - social science discourse produced in universities and 'think tanks'; legal discourses produced in judicial institutions, law schools, journals; and administrative discourses circulated in the social state - re-write the discourses of social and political movements in ways that substantively affect the nature of their struggle. Fraser's suggestion that this re-writing process translates oppositional discourses into forms administrable by the state, in the process re-imposing hegemonic ideological conceptions which undermine political movements, informs the direction of much of the thesis. Indeed, my general hypothesis for the thesis is based largely on

---

[25] Foucault, M., *Discipline and Punish the Birth of the Prison*, New York: Random House, Vintage Books, 1979, p. 28. In Foucault's schema the human sciences constituted a new object of knowledge, the soul or mind of the individual, which could be disciplined or reformed. This development was related to the emergence of localized disciplinary practices in schools, prisons and asylums.

[26] See Said, Edward, *Orientalism*, New York: Vintage Books, 1979; and Fraser Nancy, *Unruly Practices: Power Discourse and Gender in Contemporary Social Theory*, Minneapolis: University of Minnesota Press, 1989.

Fraser's account of the operations of Expert discourses and institutions. The hypothesis is that, in the case of **Delgamuukw**, the reinscription of First Nations discourse and struggles for their land into administrable legal questions, and the ritualized and restrained battle of an adversarial trial re-affirms colonialist ideologies and reinforces colonial power relations. In chapter 2, when I discuss McEachern's articulation of colonialist knowledge practices and discourses it is to suggest how it informs the way he formulates the legal questions into which the Gitksan and Wet'suwet'en struggle for their territories is re-written when it enters the legal sphere. In chapters 3 and 4 I explore this hypothesis at the level of discourse in the court room. Here I suggest that the structure of the court room as site of debate and a mechanism for determining truth supports a constellation of legal and colonial power/knowledge by promoting the exclusion and devaluation of First Nations discourses and knowledges. In this way, focusing on the power/knowledge equation in the relationship between the law and colonialism has led me to consider the practices of knowledge and truth in the judge's text and in the discursive space of the court room.

But Nancy Fraser's work and the Foucauldian equation of power/knowledge are also in part responsible for an underlying formulation of an emancipatory ideal in the thesis. Implicit in much of my discussion of colonial and legal power/knowledge is the sense that their operations cannot be countered by dispelling colonial misrepresentations and revealing the real First Nations societies beneath - the abiding sense in Said's work - but can only be interrupted by the intervention of First Nations voices in the knowledge/truth production process.[27] I derive this sensibility largely from Fraser's formulation for a more

[27] I think a major flaw in Said's thinking in Orientalism is his need to posit a real 'Orient' beneath the veil of the colonial representations. By so doing he restores the realist practices of Western power/knowledge which ground colonial representations, even as he tries to unpack them.

democratic public sphere in the context of the structural inequalities of late twentieth century capitalist societies. In the concluding chapter of the first section, chapter 4, I directly assess the qualities of the courtroom in terms of this formulation.[28] But, the concern for First Nations voices to be heard also underlies my account of the incommensurability between McEachern's description of the territories and that of a Gitksan Hereditary Chief, in chapter 2; and informs my understanding emancipatory potential to be the valorization of First Nations discourses and knowledges in legal discourse in chapter 5. The emphasis on communication implicit in treating the court room as a public sphere is in tension with Foucault's understanding of the politics of truth and discourse in war-like terms as struggle, strategy and counter-strategy.[29] Nevertheless, I think the elements of struggle are evident in Fraser's understanding of the communication process in the public sphere. So, though to the extent that Fraser's formulation draws from Habermas' discussion of the public sphere, a 'communicative ethic' pervades the thesis mixing perhaps uncomfortably with the influences of Foucault I hope this will prove a productive discomfort.

By focusing on the articulations of power and resistance, discourse and knowledge practices at the sites - a judge, legal texts, the legal sphere, the court-room - of one trial, **Delgamuukw**, I have attempted to fill some of the lacunae I find in accounts like Tennant's. In keeping with the other stories of the law and First Nations people, chapters 2,3 and 4 suggest the very specific ways in which the law operates with colonial power in the context of late twentieth century Canada. In chapter 5 I provide some schematics for the black box in which

---

[28] Fraser, Nancy, Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy, *Social Text*, Vol. 5 No. 26, 1990, pp. 56-80.

[29] Foucault, Power/Knowledge, in Power and Strategies, *op.cit.*, pp. 134-145.

Tennant places any dynamism in the law by situating potential transformations to the legal sphere in a legal cohort whose interpretations and emergence is at least in part a response to First Nations demands and resistances. In this way, my movement from 'sovereign' subjects and decisions to sites, discourses and knowledge practices points suggestively to two important conclusions. First, that there is a polyvalency inherent in the law, its social relations, institutions and places: as a domain of power constructed by a colonizing power it operates with colonial power/knowledge, but it also provides a space for potentially transforming resistance. Second, that resistance by the First Nations, (and by extension resistance by other oppositional movements), is effective to the extent that it has a place in establishing the form of the law.

Methodological Notes and Provisos:

The bulk of this thesis is based upon a particular reading of Chief Justice McEachern's judgement and the trial transcripts from **Delgamuukw**, and to a far lesser degree, interviews with legal and academic participants in the trial.[30] What I want to do here is to identify the deficiencies in, and to stress the partiality of this reading process and by extension, my whole project in this thesis.

The obvious difficulty with the transcripts is that I cannot assume that a reading of transcripts recaptures the events and experiences of the trial. I quote Clifford's observations on this matter, partly for their eloquence:

> The trial record - which stenographically preserves, by a precise but not infallible technique, the meaningful, spoken sounds of the trial...[o]mits gestures, hesitations, clothing, tone of voice, laughter, irony ... the sometimes devastating silences.[31]

By this description, the difference between reading the transcripts and attending the trial is much the same as the difference between reading the manuscript for a play, and attending a live performance of it. Though the relationship is inverted - a live performance is an interpretation (a reading and a use) of a manuscript, while trial transcripts document a performance - in the same way that one performance of a play can differ very much from another, and both differ from other readings of the manuscript, reading the transcripts must differ from attending the trial. I cannot gain the authority lent by experience that Clifford

---

[30] I conducted interviews with Professor Farley, a geographer who testified on behalf of the defence, Chief Justice McEachern, and on several occasions, Michael Jackson, of counsel for the plaintiffs. The structure of the interviews was relatively informal, consisting of a series of questions relating to how the trial was conducted, the actions of the respective participants during the trial, and their opinions on some of the issues raised in the process. I have footnoted these interviews where I have relied upon them in the text.

[31] Clifford, J. *The Predicament of Culture*, Cambridge, Massachusetts & London England: Harvard University Press, 1988, p. 290.

claims.[32] Though I have read other accounts of the trial my research began too late for me to witness the trial firsthand.[33] I can only caution the reader that what I say of the trial is not based upon my actual attendance but a specific and personal reading of the trial transcripts.

We know from even the earliest of those writings now labelled post-structuralist that neither my reading of the transcripts and Chief Justice McEachern's judgement, nor Clifford's 'experiencing' of a different trial, should be categorized as passive consumptions; rather they should be seen as productive processes.[34] To do the former is to be in danger of reducing communication to the schema of sender, channel, receiver which relies upon the same 'metaphysics of the classical subject,' which I have critiqued above. I prefer to draw upon two post-structuralist, epistemological concepts, the Text, and the decentered subject described above, to understand the process of reading/consuming. The former envisions an object which is not bound by the covers and spiral binders of the transcripts, but is in part the space of relations between reader, writer and the written. This space is a generative site of meaning. In this sense, meaning is not to be confined to authorial intent behind the statement or work, nor to a single total meaning to be uncovered by critique, (and which varies according to critical doctrine: 'a biographical sense, for psychoanalytical criticism; a project for existential criticism; a sociohistorical sense for Marxist criticism', and so on.)[35]

[32] Though Clifford emphasizes the historically contingent and rhetorical nature of claiming experience - ('I was there') - as a mode of gaining anthropological authority, *ibid.*, pp. 21-54, he doesn't refrain from using that rhetoric himself.

[33] See Monet & Skanu'u *op.cit.*

[34] See particularly. Barthes, *op.cit.*, pp. 31-37. For an attempt to theorize consumption as an active not a passive process which includes but extends beyond reading see Michel de Certeau, *The Practice of Everyday Life*, Berkeley and Los Angeles, California: University of California Press, 1988.

[35] Barthes, *op.cit.*, p. 37.

Rather the text is the site of many meanings, ('polysemic'), which continue to be produced beyond the final utterance of the finished product - the work. These meanings are 'perpetual productions', enunciations, through which the subjects of both the author and reader continue to struggle.

By treating the act of reading as a productive one and by accepting the post-structuralist decentering of the subject I must necessarily accept the specificity of my reading of the judgement and the transcripts. This specificity is a corollary of taking the stance that subject positions are constituted by ideologies or discourses, and that any text is therefore a redistribution of these ideologies and discourses. I can read the text for these discourses, but, by doing so I am producing meanings, which are just as much a product of the subject positions I am able to take up, as they are of the positions of those who made the statements. The point to be made is that my position is a relative one; my reading, one possible reading. One that is likely to differ from Clifford's as he engages with the text of the Mashpee trial, (the notion of text can I think include the performance of the trial itself), and even more likely to differ from any First Nations person who might read the same judgement and transcripts for themselves. My intent here is not to pave the way for an attempt to 'enter into the play of signifiers', enumerating them without hierarchicizing them, in the form of textual analysis that Barthes suggests, but to read at several levels and from particular critical perspectives while acknowledging the partiality of these readings.

In the research for this thesis I have read both judgement and transcripts in a number of ways - in most cases, several ways simultaneously. In some instances approaches only occurred to me after the fact and I had to be content with re-reading what I might have incidentally recorded, *verbatim*, in my notes. These readings can be seen to take place at different levels. Firstly, at the level of

content, I read the transcripts as a fairly direct account of the debates of the trial. I also read for instances which I considered to evidence overt acts of manipulation, silencing - acts of power - and acts of resistance; in other words, I treated them partly as a record of what went on in the court-room. Secondly, at the level of structure, I read the transcripts to attempt to discern characteristic forms of speech of the different participants in the trial. Thirdly, at the intertextual level, I scanned for contrasting discourses about space and others, academia, science and the law that informed statements in McEachern's judgement and the transcripts. Finally, I tried to read the transcripts at the material level of signifiers, to analyse how their form refers to their content the relationship between what they record and the way they record it.

In this reading and the subsequent analysis and writing I have unavoidably reproduced the tendencies, textual strategies, and the rhetorical conventions that characterize the modes of power/knowledge which I critique. For example, though I suggest how realist practices of knowledge - the relationship between seeing and knowing - operate with colonialist strategies, I structure my own argument with the words 'focus', 'perspective', 'looking', 'evidence' and the like. Seeing is thus still the dominant sense in the text of this thesis. Equally, the theory that informs the thesis emerges almost solely from Western philosophical traditions. In this way I reproduce the hegemony of Western power/knowledge in my work. By suggesting that my reading and viewpoint are partial and particular I am trying to offset the hegemony of this regime of truth, and to problematize its claims to universality. I hope thereby to provide space - however modest - for other knowledges and discourses to engage with the partial perspective constructed from my own knowledge and discourse.

PART 1

LAW AND COLONIAL POWER

CHAPTER 2

THE JUDGE'S STORY: WAYS OF KNOWING/WAYS OF OTHERING IN A B.C. SUPREME COURT JUDGEMENT

> *From this elevation - about 5000 feet above the ocean level - I enjoyed an unobstructed view as far as the eye could reach. The hills we had surmounted the day before lay quietly at our feet, seeming mere molehills. On all sides stretched the immense virgin forests, with here and there the sheen of a water-course. And far away in the east loomed the blue tops of the farthest range of the Sierra del Crystal, the goal of my desires. The murmur of the rapids below filled my ears, and, as I strained my eyes towards those distant mountains which I hoped to reach, I began to think how this wilderness would look if only the light of Christian civilization could once be fairly introduced among the black children of Africa. I dreamed of forests giving way to plantations of coffee, cotton, and spices; of peaceful negroes going to their contented daily tasks; of farming and manufactures; of churches and schools.*
>
> (Du Chaillu)[36]

> *What is meant is that natives are not only persons who are from certain places, and belong to those places, but they are also those who are somehow incarcerated, or confined to those places.*
>
> (Arjun Appadurai)[37]

As I have suggested above, the legal system is a site where First Nations people confront colonialism, and are likely to continue to do so.[38] In the following three chapters I will be considering some implications that this location holds for the struggle to decolonize. Here, my focus is on forms of power/knowledge that are imbricated with the legal principles and process, as applied in the judgement to the trial **Delgamuukw v. Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of Canada**. Chief Justice Allan

---

[36] From the Franco-American explorer Du Chaillu's Explorations and Adventures in Equatorial Africa cited in: Mary Louise Pratt, Scratches on the Face of the Country or, What Mr. Barrow Saw in the Land of the Bushmen, *Critical Inquiry*, vol. 12, Autumn 1985, pp. 119-142. Pratt describes it as a relentless travesty of the scientific, informational tradition in travel writing.

[37] Appadurai, Arjun, Putting Hierarchy in its Place, *Cultural Anthropology*, Vol.3, No.1, 1988, pp. 36-49, p. 37.

[38] Not only is the Gitksan and Wet'suwet'en land title trial continuing through the appeal process, but current constitutional discussions about 'native' self-government, identify the courts as the locus where the specifics of self government will be hammered out.

McEachern's **'Reasons for Judgement'** in this trial configure power and knowledge in specific ways by combining realist ways of knowing and colonialist ways of othering. In particular, I discuss how the strategic rendition of the Gitksan and Wet'suwet'en plaintiffs in this document re-enact colonial spatial strategies of dispossession. In this way, it seems evident that the legalization process, which re-writes the Gitksan and Wet'suwet'en political struggle into 'justiciable' questions, has the potential to re-affirm ideologies that have sustained colonial power relations.[39]

The structure of this chapter is as follows. To begin with, I want to highlight aspects of the particular way of knowing contained in the judgement. By contrasting McEachern's description of journeying through the territories with a description by a Gitksan person, recorded in the trial transcripts, the way the surveyor's eye of the Chief Justices erases Gitksan and Wet'suwet'en facts of their presence from the landscape becomes apparent. I then proceed to discuss the modality of power/knowledge that, in the **Reasons for Judgement**, operates with white supremacist discourses in a cycle of self-confirming citation, precluding any possibility of contradiction. McEachern's judgement epitomizes colonial strategies by positing an essential 'Indian' in a state of nature and confining that 'Indian' to his place, a construct of the geographical imagination consisting of villages and cultivated fields.[40] Viewed through McEachern's eyes, the landscape of the

[39] By 'justiciable' I refer to questions that are recognized to be administrable by the law and the courts.

[40] When I refer to Indian or Indians in the text it is in reference to the various constructs in Western mythology and ideology that have been used to stereotype the first inhabitants of North America; in accordance with the traditional gendering of this Indian, I use masculine pronouns. When I am talking about the descendants of these first inhabitants themselves, and where I don't refer to the specific band - as in a Gitksan person - I use the terms First Nation, or First Nations, person. My use of Indian to refer to Western constructs is context specific. Clearly, in other circumstances it takes on other connotations perhaps closer to my use of First Nations. Rather than put contested terms like Indian in scare quotes I leave the capitalization of the first letter to highlight that it is a label and therefore open to contestation. I do the same for labels like Western, European, White, Expert. Without the capitalization these terms become, in effect, reified, thus losing their quality as contested names.

territories confirms this imaginative geography. Finally, I suggest ways in which these discourses and ways of knowing inform certain legal principles and procedure that are applied by McEachern when he decides against the plaintiffs in **Delgamuukw**.

Incommensurable Travel Narratives:

It is well established practice of deconstruction to take official documents and to analyse their rhetorical strategies, linguistic constructs, narrative tropes and ideological content as a literary theorist might a novel.[41] Doing the same for statements by First Nations people is more problematic. In the following section I want to attempt to analyse both an official document and a recorded statement by a First Nations person, in terms of two distinct types of descriptions of places, 'maps' and 'tours'.[42] The former seems to be hegemonic in McEachern's description of the territories, while the latter dominates the description by the First Nations person. The implication is that First Nations experience and ways of knowing are subordinated by the judgement, and that the 'facts' of the case are filtered through one particular, way of knowing. I will begin by looking at journeys described by Chief Justice McEachern in his **Reasons for Judgement**, leaving consideration of the difficulties for First Nations statements until the relevant moment.

---

[41] See for example most CLS deconstruction of legal judgements eg. Frug, G.E. The Ideology of Bureaucracy in American Law, in Hutchinson *op.cit.* Deconstructing maps, another form of official document, is well established in cartography and geography see for example Harley, J.B. Deconstructing the Map, *Cartographica*, vol.26, no.2, Summer 1989, pp. 1-20.

[42] I draw these from de Certeau's elaboration on the studies of how New York residents describe their apartments by C. Linde and W. Labov.

1

The 'long spring evenings' afforded some opportunities for Chief Justice Allan McEachern to visit various areas of the territories, during the six weeks that he took evidence at Smithers in May and June of 1987. June 6th and 7th of the following year, the Judge was provided with a further opportunity to visit the territories. Following a request by counsel for the plaintiffs, he accompanied them, three Chiefs and a forester in a helicopter view of many remote northerly and southerly portions of the territories. On June 8th he motored down the Skeena River, again with counsel.

Judge McEachern's trips in the territory hold a curious status in his reasons for judgement. He mentions them early in his introduction and refers the reader to Schedule 1. In that appendix, he describes his time in the territories in lengthy detail. Yet the significance of this description is not made explicit. Is it just an introduction to provide the reader with a sense of what the territories are 'really' like? Is it part of the evidence?

The early mention of these journeys and the presence of the long description in the Schedules remind me of James Clifford's discussion of ethnographic authority.[43] Clifford describes the frontispiece for Malinowski's *Argonauts of the Western Pacific*, a photograph with the caption "A Ceremonial Act of the Kula". He points out that although all the figures in the photo seem absorbed in the ceremony, on closer inspection, one may be seen looking at the camera. For Clifford the frontispiece asserts presence, that of the scene in the snapshot; it also suggests the presence of the ethnographer. Although I realize the comparison may be unfair to ethnographers, I think McEachern is attempting

---

[43] Clifford, *op.cit.*

something similar. Albeit in a far less elaborate fashion than Malinowski, McEachern is asserting his presence in, and experience of, the territories.

By reading Malinowski's notes, Clifford is able to determine that the ethnographer was greatly concerned to convince his readers that the facts he was putting before them were objectively acquired. Malinowski was writing at a time when ethnographers' statements and observations were by no means accorded a self-evident authority. In fact, he was a key figure in rhetorically establishing the foundation for the authority of ethnographic experience.[44] Chief Justice McEachern also appears to establish his authority to pronounce on the territories by using the rhetoric of experience. But his ability to decide the truth about the territories on the basis of his journeys there is taken as self-evident. It seems to me that in the reasons for judgement in **Delgamuukw**, certainty or truth is self-evident in certain ways of knowing and in certain persons. For now, I want to try to investigate the nature of these ways of knowing by reading more closely into how Chief Justice McEachern describes his experience of the territories, and by considering the significance of what he includes and what he leaves out.

Based on what McEachern writes in Schedule 1 of the transcripts, living in the territories is not a qualification for authoritative knowledge of them. Though the Chief Justice took six weeks of evidence in Smithers, he does not mention whether he lived there during this time. All the everyday journeys that must be made in the course of living in a place - to work, to the grocery-store, home - are evidently insignificant in terms of knowing about that place.[45] What is

---

[44] Clifford is actually tracing both the formation and breakup of ethnographic authority in twentieth-century social anthropology.

[45] I am not trying to generalize here on the sorts of everyday journeys people make, just imagining the sorts McEachern might have made during his stay in Smithers.

emphasized in the schedule are the trips he made through the territories with the express intent to 'explore' the landscape. Accordingly, the sort of knowledge that counts for the Chief Justice is that derived from journeys made with the explicit intent to gather information.

As I mentioned above, I want to analyse the presences and absences in McEachern's descriptions in terms of two forms of place-description, maps and tours; first it is necessary to understand the difference between these two forms and how they figure in narratives and representations of space. Map-type descriptions emphasize the order of places, as in the "living room is next to the kitchen." Tour-type descriptions stress the process of moving between places as in; "if you go up the stairs, and turn right you will come to the bathroom."

In de Certeau's assessment map-type and tour-type descriptions constitute two different symbolic and anthropological languages of space. The former is based around seeing - 'a plane projection totalizing observations' - the latter is founded on going - 'spatializing actions'.[46] These 'two poles of experience' seem to distinguish 'scientific' discourse from "ordinary culture". In the New York study which de Certeau cites, only three per cent of descriptions were of the map type. However, for the 'scientific' discourse of cartography, de Certeau describes a history of the gradual excision of any evidence of the tour - travelling, naming, drafting and so on - from the maps they made possible.[47]

Just as both forms of spatial description used to co-exist on maps, they tend to continue do so in travel narrative, where the tour is punctuated by

---

[46] de Certeau, *op.cit.*, p. 119.

[47] Before their final banishment from the surface of most serious maps, the narrative figures of journeys - 'ships, animals and characters of all kinds' - shared that surface with its opposing spatial language.

mapping, as in "if you turn to the right you'll see", or "if you go straight ahead there is." Action, 'the chain of spatializing operations', here constitutes a condition for what it produces - 'a representation of places' - or what it indicates - a 'local order.' This then is the structure of 'the travel story: stories of journeys and actions are marked out by the "citation" of the places that result from them or authorize them.'[48] It should therefore be possible to analyse travel narrative according to the relative predominance of tour-type or map-type descriptions.

Applied to McEachern's travel narrative I think such an analysis highlights the relative predominance of the latter. First of all, the Chief Justice acknowledges in Schedule 1 that he was 'exposed to countless maps and photographs which describe the topography and important landmarks of the territory.'[49] Indeed, his initial descriptions of the territories describes the order of places as if on the surface of a map. For example:

> Smithers is on the main line of the northern transcontinental C.N.R. Railway and it is also on Highway 16...which traverses generally from Edmonton through the Rocky Mountains by Yellowhead Pass to Prince George and then northwesterly through Burns Lake, Smithers, Hazelton, Terrace and ultimately to the Pacific coast at Prince Rupert.

Or in the judgement itself:

> The territory measures about 275 miles in a north-south direction, centered more or less upon the Hazelton-Smithers area, and it is hour-glass shaped with a "Skeena bulge" in its west-central area.[50]

In addition, the relevant 'facts' he provides about the territories take the form of map-like abstractions - 'Smithers is a town of 7000'; '90% of the residents of the area, including most of the Gitksan and Wet'suwet'en, make their homes [in the

---

[48] de Certeau, *op.cit.*, p. 120.

[49] McEachern, *op.cit.*, p. 305.

[50] McEachern, *op.cit.*, p. 11.

Bulkley and Skeena River corridors.]' This form of description is readily recognizable to, and readable by, anyone who has had any contact with the didactic geography common in schools since the colonial period. At its foundation are techniques for abstracting information like population, land use, the direction and form of transport routes and ways of imaging or graphing that information according to spatial order. The census, the cadastral survey, and cartography represent these techniques at their most rigorous. So, McEachern's understanding of the territories is at the very least informed by maps and related forms of data collection and presentation.

Secondly, the touring element - the getting there - in the Chief Justice's narrative seems quite neglected. In his account, McEachern's evening trips appear presupposed by a definite itinerary, (itself an element of mapping).[51] And he seems to be crossing off the places one by one; 'Kitwancool, Gitwangaak, Kitsegulka, Kispiox, the Hazeltons and Houston....Smithers Landing,....Burns Lake', as he visits them. There is no description of the journeys or the places that he visits, though, reportedly, he visits most of them several times. Nothing specific to any of the trips is recorded. The Chief Justice is merely marking his presence and confirming the presence of the place. These are the 'facts' abstracted from the journeys, in the manner of pushing coloured pins into a map. A down-playing of the actual journeying involved thus seems to characterize McEachern's description of the territories.

The mix of tour and map-type describers in the description of the tours the Chief Justice is guided on is more complex. Here the act of travelling - the spatializing operations - figure prominently in the narrative but in an attenuated

---

[51] de Certeau, *op.cit.*

and map-like form. The helicopter-view is reduced to sweeping moves to either compass-points or around prominent features. For example,

> We swung east along the Kotsine River around the south end of the Driftwood Range and then turned north along the right-of-way of the Dease Lake extension of the B.C. Railway.[52]

Aspects of the landscape described by the Chief Justice seem mainly to be those that would feature on National Topographic Survey (NTS) maps of the area, particularly when he mentions flying over the 'height of land'. Indeed the lack of detail provided about the helicopter journey, to the extent that he barely describes the view, gives the sense that McEachern has written the description *post-facto* using maps. As in the evening journeys, the motive seems less to describe what he has seen than to establish that he has seen so-and-so features prefigured in an itinerary of features. This motive is confirmed by the contents of the last sentence of Schedule 1, which reads; 'I am informed we were able to see about two-thirds of the territory on these three days of travel.'[53] Thus, McEachern's descriptions of the act of travelling itself are subsumed by the concern to be seen to have seen most of the territory, where most of the territory is clearly the spatial order represented on a standard topographic map of the area. Reduced to a device for marking presence, the Chief Justice's journeys are quite literally produced/authorized by a particular spatial order.

Map-type description prioritizes the sense of sight and it is this sense that pervades McEachern's descriptions of the territory. It is clear from the Chief Justice's account that he experiences the territories from a distance cacooned in some form of transport, whether car, boat or helicopter - from which he can survey

---

[52] McEachern, *op.cit.*, p. 305.

[53] McEachern, *op.cit.*, p. 307.

the landscape. Indeed any other mode of travelling strikes him as distasteful for, 'exploration by land in such a country is a long, slow, tedious and often uncomfortable experience.'[54] Seeing from a distance is the only way he can know the territories and this is reflected in his narrative. McEachern talks of his experience and activities on the journeys in terms of sight as in 'the magnificent country we viewed'; or 'we stopped ... to make observations.' 'Landmarks of interest' are spoken of as observed; 'we were able to observe the alleged site of the ancient historical village of Tamlehamid.'[55] Furthermore, McEachern is clearly engaging in a selective surveying process, looking for visible traces of Gitksan and Wet'suwet'en presence in the landscape, 'scratches on the face of the country.'[56] Thus, when he does not find what he is looking for he describes it in terms of sight, as in 'New Kuldo ... is a completely deserted clearing on the west bank of the Skeena, with no visible buildings [my emphasis.]' From the Chief Justice's descriptions, the journeys through the territories thus appear as a trip from one site/sight to another; each site/sight is a locus for a highly selective exercise in observation, less formal than say a cadastral survey, (though, for the Chief Justice, no less authoritative).

To sum up, McEachern's descriptions of his journeys through the territory appear in his judgement as a means to claim the authority of an eye-witness. As such, they indicate that, for McEachern, authoritative knowledge of the territories inheres in the sort of observation-based, intentional information collecting in which he evidently partakes. The map-like terms in which he describes the act of

---

[54] McEachern, *op.cit.*, p. 305.

[55] McEachern, *op.cit.*, p. 306.

[56] Pratt, *op.cit.*, p. 119.

travelling suggest that for the Chief Justice, mapping is the dominant way of knowing space.

2

Having analysed McEachern's way of knowing the territories in terms of mapping and touring, I want to undertake the same procedure for a First Nations person's description. But before I begin, some discussion and provisos are necessary.

First of all, I should admit that I am persuaded to attempt such an analysis by Arnold Krupat's *Ethnocriticism*.[57] The project of ethnocriticism, outlined in this book is concerned with what the author calls 'frontier or border analyses': an analysis of texts that are the products of the interactions - translation, incorporation, appropriation - that occur at the interchange between different languages and cultures. In particular, I am following a rhetorical comparison by Krupat, between the Act in the Georgian legislature that removed the Cherokee from their homeland, and memorials written to Congress by the Cherokee Council to protest this Act.[58]

Though Cherokee rhetorical practices developed in an oral tradition of which Krupat knows/could know little, he regards the Memorials as open to analysis in terms of Western rhetorical tropes. Because the Memorials were written, and because they fall into a readily identifiable category of document - a petition with the explicit intent to persuade Congress to certain actions - Krupat regards them to be hybrid: products of interaction at the border between two

---

[57] Krupat, Arnold, *Ethnocriticism: Ethnography, History, Literature*, Berkeley, Los Angeles, Oxford: University of California Press, 1992.

[58] Ibid., pp. 130-163.

traditions. By his reasoning, therefore, to the extent that they draw upon the Western traditions, the Memorials can be subjected to rhetorical analysis.

The transcripts for **Delgamuukw** record a wide variety of statements by Gitksan and Wet'suwet'en people about their territories, in textual form, and I think these recorded statements can also be regarded as hybrid. They constitute the written product of a very complex frontier interaction between Gitksan and Wet'suwet'en traditions, and the Western legal tradition with all its attendant rootings in particular knowledges and practices. Following Krupat, therefore, I want to analyse one Gitksan Chief's statements on the basis that it is written in the transcripts, in the readily recognizable form of a statement made before a court to demonstrate ownership and use of territory.

Despite Krupat's precedent, so to speak, I do have some serious misgivings about this undertaking. Witnesses in court have considerably less control over the textual outcome of their statements than McEachern holds over his **Reasons for Judgement**, or even than the Cherokee Council held over the Memorials. The possibilities for manipulation or mis-representation are therefore greatly increased. Coupled with an analysis based on a distinction between modes of describing space, which originate under particular historical circumstances, the dangers for misconstrual become even more extreme. I feel it is only acceptable to make such an analysis on the basis that this text is acknowledged to be highly specific, so that any findings cannot be regarded as findings on First Nations ways of knowing space in general. In short I undertake the analysis of the statement as a hybrid product and nothing else.

The territorial description that I want to analyse is given by a Gitksan man, Alfred Mitchell, who holds the chief's name of Txesim.[59] Txesim's testimony diverges strongly from McEachern because, in his narrative the emphasis is mostly on doing and less on seeing. The comparison therefore highlights the particularity of the Chief Justice's way of knowing; it also indicates that Gitksan 'facts' of their presence are unlikely to register on McEachern's visual-oriented mapping of the territories.

Spatial languages of map and tour are combined in Txesim's description, but the latter dominates. He describes a journey to his father-in-law's territory, to 'check the territory' and to trap for beaver. So already, at least in terms of the latter activity, the journey is centered round an action that involves engagement with the country, not the ostensibly, passive procedure of observation. Txesim describes the trapline in map-like terms, as being east of Moricetown, but most of his description focuses on getting to the territory. At the territory he describes, again in map terms, how his father-in-law pointed out the boundary. 'Bec'et K'esdiilih they call that mountain. From that mountain is (sic) goes down the ridge, go north.' But in his description, this seems incidental to, and occurs after the act of beaver trapping. This emphasis on doing is again evident when Txesim mentions a return trip to his father-in-law's territory:

> A few years later he ask me and Allan Naziel, his son, and Roy Naziel, his son, to go check territory. That's what we did. We got two beaver.[60]

So, in describing the territory, Txesim appears less concerned with what he saw than with what he did.

---

[59] Transcripts volume, pp. 52-53.

[60] Transcripts volume 52, p. 3187.

Txesim's descriptions of the journey to the territory also hold a curious mix of map and tour-type describers, but mapping procedures are infused with tour type actions. Spatializing actions are punctuated by the map-like effects, that authorize these actions - 'Going up there -- get on top of the hill, one place a name, G'etsa'lis. ... Go further up right on top there is Decen Ts'o̲l tl'is.' These places seem to structure the journey as if pre-figured in an itinerary: as if the way to the trapline is mapped out according to the order of places the journeyer stops at, on the way. But the mapping element of the itinerary in Txesim's description is imbricated with touring elements. The places are described less as landmarks to see than as places where something is done, sometimes almost ritually, every time the place is passed. According to Txesim's description at Decen Ts'o̲l tl'is '... there is one big dead tree standing there. You pound on it and you hear it echo, go across and back.' Judging by Txesim's comments, the names of the places seem to relate to these actions:

> Mr.Mitchell: Okay. This G'etsa'lis, that's a big flat rock, red rock. You'll see bowls there, two or three bowls sitting there just off this trail here.
> Ms. Mandell: And what do those bowls tell you?
> Mr. Mitchell: Well, that's the landmark. Every time you go by there you pee in there that's why you call it G'etsa'lis.[61]

The name G'etsa'lis appears to relate to the action. Also, he talks about seeing but mainly as a condition for, or authorized by the act of, peeing. In some instances the landmarks he describes relate directly to the necessities of the journey such as:

> From there I went to L̲oteedlus Nii gennaa, their main camp. Pegs in the meadow to tie their horses and stay overnight.[62]

---

[61] Transcripts volume 53, p. 3194.

[62] Transcripts volume 52, p. 3186.

Some landmarks he describes appear to be associated with specific actions made on that journey. 'From there go still on the main trails, Ts'edi sdee. That's little rock with a bird.'[63]

> ... the time we were going up there with my father-in-law, Dick Naziel, he broke the spruce bough, a bunch of spruce bough. And there's another rock, big rock, below that. Put it on that big rock and then sat that bird on there facing where we were going.[64]

In this way, not only does Txesim emphasize travelling in his description, but mapping elements are almost always in terms of actions: actions produce and are inseparable from the spatial ordering, in contradistinction to McEachern's description where travelling is reduced to a function of the spatial order.[65]

The preceding comparison between these two spatial narratives which have emerged from **Delgamuukw** indicates that different descriptions in the trial adopt different spatial languages. Evidently, a particular way of describing and knowing is hegemonic in Chief Justice McEachern's **Reasons for Judgement**, one that prioritizes seeing and systematic observation as a way of determining Gitksan and Wet'suwet'en presence. By contrast, in Txesim's description the marks of presence seem to unfold as the traveller goes through the motions of a journey: it is the actions of travelling that are important. The landmarks that indicate the 'facts' of long presence to Txesim - places where particular actions are usually repeated or that mark an action pertaining to a particular journey - lose

---

[63] Transcripts volume 52, p. 3186.

[64] Transcripts volume 53, p. 3196.

[65] As witnesses and plaintiffs at the trial, Gitksan and Wet'suwet'en people introduced the histories of their houses, their Adaawk and Kungax respectively. The transcript record of these oral histories shows the actions of historic figures producing the space of these actions, (not as content of a spatial container), in a similar manner to Txesim's description in court. I refrain from analysing them in the same manner as I have Txesim's account because it was a specific concern of the Gitksan and Wet'suwet'en plaintiffs, that telling their oral histories in court would lead to them being reproduced without their permission and control.

their meaning in McEachern's sight-oriented schema. Clearly, these 'facts' would not register as presence to McEachern, for whom the acts of travelling are subsumed by the concern to emphasize his presence and to passively observe. The upshot of the evident hegemony of a particular way of knowing in the Chief Justice's description of the territories, is that far from determining First Nations presence, his selective procedure of observation effectively erases that presence. Because of his position as an arbitrator whose recognition or denial of First Nations 'facts', knowledge, and presence has very real and direct consequences, we can begin to see how McEachern's system of surveying, when it erases these 'facts', knowledges and presence, works as a mechanism of colonizing power. In what follows I try to further unpack the relationship between the operations of knowledge and power in the Chief Justice's decision.

Modalities of Power/Knowledge: The invisible I/eye and Colonialist Discursive Strategies of Containment

In the last section I attempted to highlight the particularity of the way the Chief Justice's knows the territories, which is so transparently a way of seeing. I now want to elaborate on that argument by discussing how this way of seeing operates as part of the constellation of power/knowledge articulated by his judgement. Donna Haraway argues that the eyes have been used effectively in the history of science, in the interests of militarism, capitalism, colonialism and male supremacy.[66] I would argue that, in McEachern's judgement, they are used once more to perpetuate the colonial dispossession of land from the Gitksan and Wet'suwet'en people.

---

[66] Ibid., p. 188.

I first want to relate the predominance of the sense of sight in McEachern's spatial narratives with the subject positions he adopts in the text. Similar to nineteenth-century explorer narratives, the position of passive observer that he takes up works as a strategy to naturalize the discourses that inform his observation procedure. Other positions he adopts are suggestively oriented to the interests of capital and belie the supposed neutrality of his position as an observer. Equally, his highly selective procedure for distinguishing First Nations presence draws upon colonialist and white supremacist discourses. I investigate these discourses and suggest how in the judgement these elements operate together in an ineluctable self-fulfilling cycle: McEachern constructs a very restrictive imaginary geography; proves it through citation; and when that imaginary geography is not observed concludes that the territories are empty.

1

Some of the most effective colonialist strategies have been characterized by the combination of techniques of observation/visuality with a discursive disembodiment of the observer. Chief Justice McEachern's **Reasons for Judgement** represents a continuation of that strategy. This strategy 'mythically inscribes all the marked bodies,' while making the 'unmarked category claim the power to see and not to be seen.' For Haraway the unmarked eye signifies the positions of 'man and white.'[67] By being unmarked the ideologies which constitute these positions - Haraway specifies racism, sexism, heterosexism - have and continue to be naturalized in the interests of oppressive power structures like colonialism and patriarchy.

---

[67] Haraway, Donna., *Simians Cyborgs and Women: The Reinvention of Nature*, New York: Routledge, 1991, p. 188.

The Chief Justice's reduction of his journeys to a device to mark presence, and the absence of any reference to interaction with the land, in the his narrative amount, paradoxically, to a self-effacement of his and his party's presence. Even when McEachern is exposed to the land and the country, so to speak, for example when the helicopter is stopped near the peak of Kotsine Mountain in a 'driving rainstorm', the weather is recorded less as a discomfort experienced than as a 'fact' observed.

The way in which this self-effacement, and indeed the whole of the Chief Justice's sight-focused narrative, presents the travellers as 'a kind of collective moving eye which registers ... sights', is strikingly reminiscent of the particular genre of travel writing I showed parodied in the opening quote to this chapter.[68] Mary Louise Pratt's analysis of some of the characteristics of this genre - what she calls explorer-writers - can I think be tellingly applied to McEachern's description.

Firstly, Pratt notes that the information production which constituted the explicit project of these explorer writers was always presented as innocent. In the same way, McEachern clearly regards his observations as neutral - a mere noting of presences and absences. He also describes his journeys as 'a fascinating voyage of exploration and discovery.'[69] The information he provides is thus not produced but discovered. The self-effacement is part of the same process, erasing any possibility that the narrator can be anything but passive receptor. In this way, the Chief Justice is positioned in his narrative as 'a personally innocent conduit of information.'[70]

---

[68] Pratt, *op.cit.*, p. 123. Pratt distinguishes at least two genres of travel writing. The parody is itself taken from the Romantic genre which she contrasts to the 'scientific' into which I have placed McEachern.

[69] McEachern, *op.cit.*, p. 305.

[70] Pratt, *op.cit.*, p. 126.

But, secondly, far from being innocent, in nineteenth-century travel literature this self-effacing presentation through naturalized a series of information orders that were rooted in European discourses and concerns. Two information orders that Pratt distinguishes in writers such as Alexander von Humboldt are remarkably similar to McEachern's. One is the presentation of the landscape as a series of panoramic views, an idiom that played such an important part in European aesthetics in the nineteenth century. The second is the evaluation of landscape in terms of its resources or economic potential. Virtually all the statements in McEachern's descriptions which can be regarded as value judgements refer to these two orders. Uses of superlatives such as magnificent or incredible in Schedule 1 inevitably accompany the world view, and where they do not they describe mountain peaks and ranges, also staples of European aestheticists. Most other adjectives refer to fertility or other attributes associated with resource-wealth. The following example contains both aesthetic and economic valorization:

> We then flew a short distance east along the Babine River which is said to be prime steelhead and salmon territory. ... We then proceeded southeast ... past the magnificent Secugla Mountain and past Kitsequecla Lake until we re-entered the rich Bulkley Valley on the south side of mighty Hudson Bay Mountain.[71]

The textual strategy of self-effacement, which renders McEachern as an invisible eye/I, strives to mask the informational orders that inform his description, rather than acknowledging them as the products/producers of his particular discourse.

The style of explorer-travel writer, and the economic and aesthetic values underlie the subject positions that the Chief Justice assumes in his text. As the disinterested recorder of information, McEachern is most like the subject constituted in the ideology of the legal profession, the proper subject for the state

[71] McEachern, *op.cit.*, p. 306.

functionary as arbiter. The discourse of 'universalism' underlying legal positivism suggests that it is at least partly an ideology of territorial control seeking to incorporate everything under the 'rule of law.'[72] The relationship to the territory that McEachern adopts, underscored by a frequent reference to the area as remote or isolated, indicates that he is not a 'local' state functionary, but one who adjudicates from afar. But the presence of economic value judgements in the text align him with development interests as well. These concerns are more fully expressed in the main body of the judgement where the territories are described in the following terms:

> The territory is a rich agricultural area, (particularly the Bulkley and lower Kispiox River valley), and there are vast forestry resources throughout much of the territory. Equally important are the salmon and other fisheries of the Bulkley, Nass, Skeena and Babine Rivers. Most of the invaluable and irreplaceable Skeena salmon stock pass through the territory by way of the Skeena and Babine Rivers to their destiny in the spawning grounds of Babine Lake.
>
> ... There are, unquestionably immense forestry reserves throughout the territory which are of great economic value.[73]

Though the ideology of economic development evident in this passage does not make explicit in whose interests this development lies, I think that, given the tone and sensibilities of the judgement as a whole, such passages evince a concern for the risk of economic loss to current state and business interests should the territories be removed from the economic systems into which they are currently inserted. The use of the word 'irreplaceable' with reference to the Skeena salmon begins to suggest this concern. But, I think the assimilationist prescriptions McEachern provides most locate his ideology of development with a scenario in

---

[72] Robert Williams traces the roots of what he describes as tendencies to assimilate and appropriate both territory and peoples in the Western legal tradition, to Medieval and Renaissance thought. See Williams, R.A.JR., The Medieval and Renaissance origins of the status of the American Indian in Western Legal Thought, *Southern California Law Review*, Vol.57 Nov. 1983 No.1, pp. 1-99. Whether this genealogy is correct or not, what is clear is that the ideology of the universality of law has, as part of the 'civilizing mission', been a significant legitimating discourse during colonial expansion.

[73] McEachern, *op.cit.*, p. 11-12.

which control of the resources of the territory are wrested from the current economic interests. I quote:

> It must be recognized, however, that most of the reserves in the territory are not economic units and it is not likely that they can be made so without serious disruption to the entire area which would not be in the best interest of anyone, including the Indians. Eventually, the Indians must decide how best they can combine the advantages the reserves afford them with the opportunities they have to share and participate in the larger economy, but it is obvious they must make their way off the reserves.[74]

So the potential for the development that McEachern sees in the territories seems not to be for First Nations people to manage locally, for the Chief Justice a disruptive proposal, but for the enjoyment of a 'larger economy' into which First Nations people can only enter by leaving the reserves.[75] The Chief Justice's strategies and tropes of neutrality therefore belie the subject positions he assumes in the text, which appear to be constituted by ideologies of the state and economic development, in particular development by the current stakes in the regions economy.

But economic and state interests are the subtext of McEachern's descriptions of the territories. The principal question McEachern addresses is the presence of the Gitksan and Wet'suwet'en people on the territories. Their absence or presence is the chief object of observation for the Chief Justice's disembodied eye; the order of information by which this presence or absence is discerned is what is naturalized as discovered, not produced, in McEachern's descriptions of his

---

[74] McEachern, *op.cit.*, p. 300.

[75] Just who this larger economy constitutes was evident in the business pages following the decision, and later, in the appeal trial. The headline of the 'Canada's National Business Newspaper: The Financial Post' read 'Native ruling frees resource projects' indicating the concern of business interests nation-wide. More precisely, 'The Vancouver Sun' identified John Howard, MacMillan Bloedel Ltd's senior vice-president to be in complete agreement with Chief Justice McEachern. Op.cit., Monet and Skanu'u, p. 190. During the appeal to McEachern's decision, a host of business interests intervened in the trial, aligning themselves against the plaintiffs; ALCAN listed among them. So clearly the 'larger economy' refers at least in part to corporate Canada.

journeys. The process of observation is structured by a very specific set of features that describe what Gitksan and Wet'suwet'en presence should look like. According to the descriptions in Schedule 1 peopled villages, maintained buildings and houses evidently equal presence. The Chief Justice applies these criteria, his technique for surveilling/surveying the territory, rigidly at every site/sight. Indeed his narrative reads as a catalogue of such observations:

> On this leg of our voyage of exploration we passed but did not stop at the ancient but now totally deserted village of Gitengas, where there are no buildings standing...[W]e stopped for lunch at a point on the old Telegraph Trail where Chief William Blackwater was born and grew up. There are no residents there now and only a few grave buildings and one small, totally uninhabitable building remains.....
> ... Old Kuldo, also a clearing on the west bank of the Skeena, is now completely deserted with no visible buildings...
> ...[T]he ancient village of Kisegas is a large cleared area with the remains of a number of buildings including an almost fallen-down church...[76]

So intent is McEachern on checking his particular list of criteria for First Nations presence, that he fails to consider that the guides who accompany him, Neil Sterritt, a Gitksan Hereditary Chief, and Alfred Joseph, a Wet'suwet'en Hereditary Chief, themselves constitute such a presence. In keeping with the exemplary practices of nineteenth century explorer/writers, the voices of the people who guide the Chief Justice are completely absent from his narrative. In this way McEachern can only conclude again and again that the 'territory is indeed a vast emptiness.'[77] I have already mentioned how the subject positions assumed by the Chief Justice in the text seem to be constituted by discourses of aesthetics and ideologies of legal positivism and economic development, which shape what he sees and what he describes. In the same way, I think his technique for determining First Nations presence is also informed by particular ideologies and discourses. In what follows, I want to attempt an exegesis of these and

---

[76] McEachern, *op.cit.*, pp. 305-306.

[77] McEachern, *op.cit.*, p. 12.

related discourses about First Nations peoples and to suggest how McEachern's way of seeing operates with these discourses as a mode of power/knowledge.

2

A variety of schemes for othering and classifying inform Chief Justice McEachern's judgement in **Delgamuukw**. These are readily recognizable as concepts and strategies that have informed colonialist and racist practices. I want to unpack the strands of the discourses that underlie these schemes. In particular, I want to emphasize how the most effective of these *othering* discourses constitute a spatialized strategy for territorial acquisition and control, and how in McEachern they are made to operate with legal practices of truth and verification.

Multiple webs of discourses are woven into the economy of difference in McEachern's judgement, some subtly subdued, others blatant and dominant; and power circulates in different ways through these discourses.[78]

The discursive concept of 'race' is submerged in subtle ways in the judgement. When the Chief Justice concludes on the long-time presence of the Gitksan and Wet'suwet'en in the territories, he does so on the basis of ancestry;

> I therefore infer that the ancestors of a reasonable number of the plaintiffs were present in parts of the territory for a long, long time prior to sovereignty.[79]

The assumption here is that identity as a Gitksan or Wet'suwet'en is based on blood or genetics. Elsewhere McEachern admits a suspicion that 'the genetic

---

[78] I use the term economy here to refer to the way the signs of difference in colonial and related narratives - the features associated with civilization and savagery, the west, Third World, 'race', and the like - are ascribed values, circulate and are selectively interchangeable in a similar manner to products, money, and services referred to by the more traditional sense of the word.

[79] McEachern, *op.cit.*, p. 75.

makeup is markedly different now than in 1800.'[80] Admittedly, he is not sure 'if this is important', but there can be no denying that the idea of 'race' forms part of his 'common-sense'. Underlying this race-informed logic is not so much the traditional colonial form of power which ascribes racial attributes and legitimates domination accordingly. Rather, it is replete with the almost equally power-laden implication that, if a change in genetic makeup could be proven, dispossession of the territory would be justified.[81]

Throughout the **Reasons for Judgement** the ostensible characteristics and virtues of Western civilization brought by the settlers to British Columbia are counterposed to the characteristics of a mythical Indian. McEachern, the West,

---

[80] Interview, Chief Justice Allan McEachern, Tuesday 7th July, 1992.

[81] The assumption of race surfaces in the questioning of a witness in the transcripts. It is worth citing this exchange because it indicates not only this assumption but that it is very much an imposed condition of membership, not one that the Gitksan and Wet'suwet'en adhere to themselves. Here Mr. Macaulay, counsel for Canada is questioning Gyolugyat, a Gitksan Hereditary Chief.

Mr. Macaulay: Now, is there a point at which a person is no longer Gitksan in this sense: If a -- somebody who's half Gitksan marries a white, then their children would be a quarter Gitksan? That's how I work it out anyhow.
The Court: Your mathematics is right.
Mr Macaulay:

Q	Yes. Would those children be Gitksan, the ones who were a quarter Gitksan.
A	If -- how did you phrase that? Would you repeat that again, please?
Q	You know quite a few people who are half Gitksan, don't you?
A	What do you mean half Gitksan?
Q	Well, their father is Gitksan and their mother is white, half in that sense, or their mother is Gitksan and their father is white?
A	Well, when a Gitksan male marries a white lady.
Q	Yes?
A	Automatically that lady is – goes on the husband, so she's noted as a Gitksan.
Q	She becomes a Gitksan?
A	Yes.
Q	Is that according to Gitksan law?
A	Well, it –
Q	I'm not talking about the Indian Act now, is that according to Gitksan law? Where a Gitksan marries a white woman --
A	Yes.

Gyolugyat's denial of blood/genetics as a basis for identity as a Gitksan, is a forceful reminder that the use of criteria associated with 'race' to describe or impose group membership is historically specific.

Canada, are positioned in an economy of cultural and racial difference with this Indian, based on an oppositional epistemology: this is the process of othering and it forces subjects into dualisms like self/other, civilized/savage, modern/primitive. So, though McEachern does not explicitly use 'race' as a discourse of othering, he draws upon other, familiar colonialist tropes to define a superior European/Western derived society against the supposedly inferior Indian society that the colonists met when they first arrived in the territories.

This hierarchization is the first of two ways that power circulates through the process of othering in McEachern's judgement. I will expand on it briefly before beginning on the second, and related way, which I refer to as the confinement effect of othering. In McEachern, the hierarchical opposition of Western and Indian society is most blatantly based on the dualism of civilized/savage. What is fast becoming McEachern's most notorious statement is an example of this:

> ... 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, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbs (sic), that aboriginal life in the territory was, at best, "nasty, brutish and short."[82]

Though the Chief Justice is purportedly referring to the indigenous peoples that met the first Europeans to reach the territory, it seems obvious that this statement is more about an idealized European society. The indigenous society is defined purely in terms of the lack of characteristics that we must assume pertain to European society. The tropes that underlie the opposition the Chief Justice sets up between European and pre-contact Indian society are easily identifiable às statements belonging to the Western discourses of cultural and technological

---

[82] McEachern, *op.cit.*, p. 13.

superiority. In McEachern's formulation this superiority includes not just the material technology - wheeled vehicles and so on, but, one must assume, the technologies of food production and distribution, and the techniques and machinery of 'good government.'

The discourse of technological superiority has been intertwined with colonial and neocolonial practices in two related ways. Firstly, because it operates as a species of othering, which finds 'civilization' represented in particular attributes of Western society, and savagery - the lack of civilization - self-evident in the lack of these attributes, the discourse of cultural and technological superiority is a normalizing discourse.[83] By enabling two societies to be distinguished in terms of what is 'good,' 'proper,' 'civilized', 'what ought to be' this discourse targets one as deficient, abnormal, in need of reform, while identifying that reform with the intervention of the other.[84] Through the discourse's normalizing function it has thus been effective in the second way - as a legitimating discourse for intervention in non-European countries during

---

[83] In a provocative discussion of the techniques of nineteenth century colonial power in Egypt, Tim Mitchell demonstrates the representational nature of that power. He describes how order, 'good government', and 'civilization' became self-evident in particularly visual based representations - frameworks - for towns, for government, for schools, for factories, for villages and so on. Mitchell, T., *Colonising Egypt*, Cambridge: Cambridge University Press, 1988. McEachern's apparent concern for the lack of writing in Gitksan and Wet'suwet'en societies could be identified with an understanding of law as a written framework of rules. This understanding seems to inform a distinction between law and custom that McEachern applies to the Gitksan and Wet'suwet'en: 'Warfare between neighbouring or distant tribes was constant, and the people were hardly amenable to obedience to anything but the most rudimentary form of custom.' McEachern, *op.cit.*, p. 73.

[84] The idea of 'normalizing discourses' derives from Michel Foucault, *Discipline and Punish* and the *History of Sexuality op.cit.* For discussions of normalizing discourses in the colonial context see op.cit., Pratt; ibid., Mitchell, especially ch.4, and Homi K. Bhabha, Difference, Discrimination and the Discourse of Colonialism, in (Ed.), Francis Barker et al, *The Politics of Theory: Proceedings of the Essex Conference on the Sociology of Literature, July 1982*, Colchester: University of Essex, 1983.

colonialism, and, (though often less directly), today.[85] The effectiveness of the discourse of cultural and technological superiority lies in the way it euphemistically presents the intervention in terms of the 'civilization'/modernizing/(normalization) it brings.

In McEachern's judgements the normalizing and legitimating dimension of othering is evident but subdued. There is no doubt that the Chief Justice identifies the 'normal attributes' of 'civilized' society with his own European origins, but he does question the extent to which the First Nations have benefitted from exposure to this 'civilization'. Nevertheless, in his version of First Nations history, the suffering they experienced was less to do with colonial intervention than with 'the Indian's lack of cultural preparation for the new regime.'[86] If colonial rule has been at all detrimental to the welfare of the First Nations it is less because of the fact of the rule than because of faulty policies, which could be rectified. And, at the very least, the technology introduced by the colonizers must have ameliorated the suffering:

> access to many European trade goods ... must have made life to some degree more bearable. The acquisition of firearms, for example, made hunting a far less random and hazardous exercise than it had always been.[87]

So, the othering in McEachern's judgement operates at least partly as normalizing discourse by which he can distinguish pre-contact Gitksan and Wet'suwet'en society as inferior and lacking, and it also works partly as legitimating discourse to

---

[85] Michael Adas provides an extensive exegesis of this discourse, detailing its articulation in notions of 'civilizing mission' and more recently in modernization theory. The sensibilities of the discourse are eruditely encapsulated in the title of his book, *Machines as the Measure of Men.* See Adas, M. *Machines as the Measure of Men: Science, Technology and Ideologies of Western Dominance*, Ithaca and London: Cornell University Press, 1989.

[86] McEachern, *op.cit.*, p. 129.

[87] McEachern, *op.cit.*, p. 251.

justify the origins and intentions of the present power of Canadian governments over First Nations peoples.

The second way power and knowledge work through othering in McEachern's judgement, through a confining effect, is, I think, more effective. It operates in different ways throughout the judgement, each freezing Indian society as totally other to Western society yet totally knowable and visible to it.[88] For instance McEachern tries to contain Gitksan and Wet'suwet'en rights in land as communal or collective rights, in opposition to Western individual property rights. The fact that the plaintiffs claimed ownership on the basis of neither collective nor individual rights but based on the Hereditary Chieftainships and Houses into which their society divides, presents a constant concern for the Chief Justice. For, in his reading of precedent, 'Aboriginal interest' in land is known to be and thus frozen as communal:

> The authorities satisfy me that a claim for an aboriginal interest is a communal claim. ... The Crown's "promise" of fair dealing must be classified as a communal or collective promise rather than separate or divided promises to a variety of individuals or sub-groups[89]

It seems that no matter what evidence the plaintiffs could adduce to affirm that their ownership of land is based on kinship groups called Houses (and they adduce plenty), the answer would be the same. The dismissal of anything other than a communal interest, thus, indicates how othering contains Gitksan and Wet'suwet'en society to what is known to be aboriginal, namely the opposite of Europe-derived society.

---

[88] Bhabha, *op.cit.*, p. 199.

[89] McEachern, *op.cit.*, p. 209-210.

Perhaps the most potent configuration of knowledge/power is the othering discourse of spatial confinement, which combines seeing and knowing in the judgement, and which informs McEachern's structured surveillance of the territories. Two elements define the discourse of spatial confinement which circumscribes Gitksan and Wet'suwet'en geographies and to which their possible futures are consigned. The first is an imaginative geography of villages and cultivated fields which defines and confines the space of Indian life. The second is the naturalized and instinctive native who inhabits this imaginative geography and to which the possible actions for Indians are bound as only subsistence practices.

When I talk of a configuration of power/knowledge in which seeing and knowing are intertwined, I am trying to describe a sort of triple movement that occurs in McEachern's judgement and which is very much related to legal notions of truth and verification. It goes as follows. First, the Chief Justice looks to written sources from traders, government personnel, Indian commissioners and so on from the colonial, and just prior to the colonial period; he reads these for the way they interpret the nature of Indian ownership, and as eye-witness accounts of Indian society at the time, thus applying the same assumption between seeing and knowing that apparently informs his own descriptions of the territories, and also assuming the inherent visibility and knowability of Indian society. In the second move, he establishes an imaginative geography of the B.C. Indian and an othered Indian inhabitant on the basis of these interpretations of Indian ownership and Indian society; in the manner of citing legal precedent, he cites the written sources in support of his othering. Third, he deploys this imagined geography and othered Indian in various ways - in for example, his systematic observation of the

territories, which confirms their emptiness, or elsewhere in re-defining the outer limits possible for Gitksan and Wet'suwet'en territorial claims.

We can see the othering process being verified and reinforced by citation in the opposition the Chief Justice sets up between civilized and savage. When the Chief refers to the hardships of pre-contact life in the territories, he is basing it on his reading of the nineteenth century written record. The evidence for his idea that starvation and warring were common is sparse and seems to be wholly based on Indian Agent Loring's observations in the late nineteenth century. McEachern extends these observations to pre-contact aboriginal life in general. I quote:

> His early 1890 Reports on visits to Kuldo detail serious shortages of food, all dried salmon stocks having been exhausted, and the populace living on their cache of potatoes, with violent cases of diarrhoea ... It is difficult to believe their condition would have been any better in a completely aboriginal society, but we shall never know the answer to that question.[90]

But, for the most part, the Chief Justice merely recites the representations of Indians contained in such accounts as true, for example:

> The evidence suggests that the Indians of the territory were, by historical standards, a primitive people without any form of writing, horses, or wheeled wagons. Peter Skene Ogden, the controversial trader-explorer visited Hotset in 1836 and noted their primitive condition in his journal.[91]

In the textual manner eruditely articulated by Edward Said in relation to Orientalist discourse, the observation of war or starvation afflicting Indians moves from the specific incident in one text, to the general warlike or hunger-afflicted nature of Indian life in those that follow. Text builds upon text and in time the knowledge in these texts produces what Michel Foucault terms a discourse. What is knowable about Indians is that they are primitive and savage. Primitiveness

---

[90] McEachern, *op.cit.*, p. 168.

[91] McEachern, *op.cit.*, p. 25.

and savagery become the framework for all statements and observations about First Nations people. If one accepts this framework, First Nations people can, quite literally, only be seen as the primitive and savage Indian. In this way, the body of text, the discourse, the framework can '*create*', in the words of Said, 'not only knowledge but also the very reality they appear to describe.'[92] The Chief Justice's opposition between civilized and savage is thus one articulation in a series that constitute and reinforce potent white supremacist discourses. In this particular case, the discourse positions and contains the First Nations in the white man's past.[93]

This process of knowledge production and othering is, I would suggest, aligned with legal practices of authority, truth and verification. For one, the legal doctrine of precedent encourages and lends authority to the practices involved here. In the establishment of a discourse, expertise and authority accrue to the statements of that discourse with each citation and as the principles of that discourse become associated with academics, institutions and governments.[94] In a sense, precedent represents an explicit institutionalization of this process. In the Anglo-American tradition, the application and development of law has heavily

[92] Said, *op.cit.*, p. 94.

[93] Said says that the Orient is lent its intelligibility by a complex series of manipulations of knowledge, that identified the Orient for the West. The discourse of primitivism represents a different but comparable series of knowledge manipulations that concatenated First Nations of North America with other groups in Africa and the Antipodes as visible to European colonizing powers. In a genealogy of such discourses, Bernard McGrane describes how the othering of these groups shifted from a scale of sacred and profane to the modern/primitive, civilized/savage divide, and finally to culture, which is the most current mark of difference today. The emergence of primitive discourse was based upon a transformations in European understandings of time. McGrane argues that a combination between the biblical time-scale, the work of Newton, Darwin and, in geology, the Uniformitarians, began to align world history on a single linear scale. Only then could Indians and the groups associated with them in 'Europe's collective daydream' be conceived as representatives of a European past. McGrane, Bernard, *Beyond Anthropology Society and Other*, New York: Columbia University Press, 1988. The framework of primitivist discourse did not then emerge solely out of the observations McEachern cites, rather these are just articulations of something much more widespread.

[94] Said, *op.cit.*, p. 94.

weighted towards what has preceded - precedent - namely the past decisions of judges in purportedly similar situations. Precedent is cited and interpreted to authorize decisions made in the present.[95] Not only does McEachern cite the written record as authoritative statements on the past and on Indians, in the manner of precedent, but some of the materials which shape his concept of Indian life carry the weight of legal authorities - in particular, certain important legal decisions during the policies of provincial, federal and imperial colonial governments.

Equally, the sight dominated knowledge practices the Chief Justice engages in resonate with the notions of truth that are institutionalized in legal procedure. The way McEachern uses Ogden's noting of Indian primitiveness, as truth that Indians really were primitive, indicates that he conceives a very direct relationship between representation and reality. Ogden sees primitiveness, therefore there is primitiveness, and no account is made for the constructs and concepts that inform his way of seeing. The assumed correspondence between seeing and knowing is a species of realism that clearly informs McEachern's understanding of his trips to the territories, specifically, his assumption that he can know the territories through his structured observation of them. But routine procedures of the legal sphere are predicated on this realist understanding. The unproblematized importance of the eye-witness is just one example. Indeed, the whole concept of evidence relies on this principle - evidence is of course derived from the Latin *videre*, to see; it is something self-evident or unequivocal to the unmediated eye. The corollary to accepting eye-witness accounts of First Nations society is, so obviously, that their society is completely visible - that it opens itself

[95] Mandel, Michael., The Rule of Law and the Legalisation of Politics in Canada, *The International Journal of the Sociology of Law*, 1985, 13, pp. 273-287, Mandel highlights this aspect of the law as one of the principal ways in which it works to uphold the status quo.

up to the eye of the colonizer. Only such an assumption can lead to McEachern's 'considerable doubt about the antiquity of the House system' on the basis that 'trader Brown does not mention Indian Houses in his records.'[96] This is notwithstanding the Chief Justice's feeling that 'Brown seems to use the terms tribe, band, clan and family interchangeably.' The process of discourse production and authorization that McEachern engages in when he articulates certain white supremacist discourses is thus, at the very least, similar to legal practices of authorization and verification.

McEachern's articulation of the imaginative geography of the Indian largely emerges from notions of property and discussions of reserve policy which he reads in 'official' discourse - the letters and policies of colonial administrators. It is, I think, helpful to elaborate on the conditions in which McEachern draws upon this material. It begins with the consideration of an argument by counsel for the province. They assert that the policy of the provincial government had always been to open the whole province for settlement while reserving for First Nations their village sites, cultivated fields and the hunting grounds that immediately surrounded them. This argument is equivocal because in his capacity as Chief Factor of the Hudson Bay Company, Douglas, later Governor of B.C., signed treaties with First Nations inhabitants on Vancouver Island to obtain land. McEachern finds inference to First Nations ownership of either the whole or part of Vancouver Island in a policy document from the Hudson Bay Company. To resolve confusion, which for the Chief Justice arises 'because of a lack of precision in the language which is of crucial importance in this case,' he draws upon a

---

[96] McEachern, *op.cit.*, p. 75.

definition of ownership made by the Colonial Secretary, Lord Grey, (who is himself citing!).[97] I quote at length:

> What I hold to be the true principle with regard to property in land is that which I find laid down in the following passage from Dr. Arnold...
>
> Men were to subdue the earth: that is, to make it by their labour what it would not have been by itself; and with the labour so bestowed upon it came the right of property in it. Thus every land which is inhabited at all belongs to somebody; that is, there is either some one person or family, or tribe, or nation who have a greater right to it than any one else has; it does not and cannot belong to everybody. But so much does the right of property go along with labour, that civilized nations have never scrupled to take possession of countries inhabited only by tribes of savages - country which have (sic) been hunted over, but never subdued or cultivated. It is true, they have often gone further and settled themselves in countries which were cultivated, and then it becomes a robbery; but when our fathers went to America and took possession of the mere hunting-grounds of the Indians - of lands on which man had hitherto bestowed no labour - they only exercised a right which God has inseparably united with industry and knowledge...[98]

This doubly quoted passage reflects a discourse on property whose most famous articulation came in John Locke's *Two Treatises* during the seventeenth century.[99] Asserting that all references to the need to treaty with First Nations for their land referred to this European concept of what they owned, the Chief Justice writes the following:

> In view of these and other pronouncements from both sides of the world, and in view of the obvious intention of the Crown to encourage the early settlement of the proposed new colony, I conclude that these references must be construed to refer to lands actually possessed by the Indians, (that is their villages and cultivated fields, etc.)[my emphasis][100]

---

[97] McEachern, *op.cit.*, p. 102.

[98] Cited in McEachern, *op.cit.*, pp. 102-103.

[99] In a fascinating historical account of land use in colonial New England, William Cronon discusses the different concepts of property ownership among settlers, both with regards to Native American property rights, and their own. His analysis indicates the eventual supersession of the notion that cultivation equals ownership, specifically private ownership, over the multiplicity that were transposed from England with the earliest settlers. Cronon, William, *Changes in the Land: Indians, Colonists, and the Ecology of New England*, New York: Hill and Wang, 1983.

[100] McEachern, *op.cit.*, p. 109.

With this rather sloppy sleight of pen, (more likely word-processor), the Chief Justice adopts this conception of property as his own, and with it a rigidly circumscribed geography of Indian life. The inevitability of this confinement-effect could not be more adequately described than by the ineluctable tautology that combines definition with prognosis in this statement - it refers to what is actually possessed, hence what is actually possessed equals what it refers to.

Let me elaborate on the very spatial nature of the confinement-effect of othering that is operating here. Now, what is proposed in this conception of property is that unlike enlightened Europeans, the Indian does not possess territory in a self-conscious way. Rather, the Indian is only connected to the land through his way of life. The extent of territory to which any Indian is entitled thus depends upon the nature of that way of life, not on what he might regard as his own. This way of life is of course completely visible and knowable by the European. Appadurai describes how terms like native or indigenous resonate with the sense that people labelled with these terms do not just belong to a place, but are somehow confined by it.[101] This sense saturates the judgement, in which the Gitksan and Wet'suwet'en are confined by the imaginary space that their way of life is known to describe, and pervades much of the material McEachern cites. Explaining the difference between reserve allocations the Chief Justice says:

> There were, of course, many reasons why there could be a different policy on the prairies as compared with British Columbia. The prairie Indians were Nomadic hunters; the British Columbia Indians lived in villages near great rivers and subsisted mainly on the steady supply of salmon which they harvested each year.[my emphasis][102]

---

[101] Appadurai, *op.cit.*, p. 37.

[102] McEachern, *op.cit.*, p. 141.

Here McEachern applies the formulation between way of life and what can be described as possessed by an Indian to the predecessors of the Gitksan and Wet'suwet'en plaintiffs. This process of othering, rooted partly in a particular notion of property, rigidly circumscribes the space of pre-contact Gitksan and Wet'suwet'en life to an imaginative geography, in this case, a variation on villages and cultivated fields - 'villages near great rivers.' McEachern himself expresses the confinement of Gitksan and Wet'suwet'en life that this othering entails, as fact.

> Prior to the arrival of European influences in the territory, aboriginal practices were probably confined reasonably close to village sites where salmon could most easily be obtained, and probably included trapping some animals by snares and deadfall traps and other means. There was no reason for them to travel other than between the villages or far from the great rivers for these or other aboriginal purposes, or to take more animals than were needed for subsistence although it is reasonable to assume they would have travelled as far as was necessary for such purposes.[103]

Pre-contact Gitksan and Wet'suwet'en life is thus subject to a figural, spatial incarceration by what McEachern knows of Indians/what can be known about Indians.

Now, it is already clear the notion of property that informs this imaginative geography also describes an astoundingly racist and derogatory formulation of an othered Indian. He is the Indian who subsists off salmon in the above passages; who travels only for the purposes of subsistence in stark opposition to the 'explorers', traders, Indian Agents, and of course the Chief Justice himself, whose journeys were informational. In contrast to pre-ordered European life, everything this Indian does is naturalized by McEachern; his behaviour is seen as instinctual and passive, in the same way that his way of life and the property he might reasonably be described as owning are understood to be

---

[103] McEachern, *op.cit.*, p. 211.

directly determined by his food source. The most sustained elaboration on this notion of Indian occurs in a systematic rebuttal of each basis for ownership and jurisdiction given by the plaintiffs. Where the plaintiffs say their ancestors 'harvested, managed and conserved the resources within the territory,' McEachern replies:

> While there is no doubt the Indians harvested their subsistence requirements from parts of the territory, it is impossible to conclude from the evidence that these three activities, to the extent that they were practiced, were anything more than common sense subsistence practices..[my emphasis].[104]

Where the plaintiffs say they 'governed themselves according to their laws,' McEachern answers:

> I have no difficulty finding that the Gitksan and Wet'suwet'en people developed tribal customs and practices relating to chiefs, clans and marriage and things like that, but I am not persuaded their ancestors practiced universal or even uniform customs relating to land outside their villages [my emphasis].

Note the passivity in the notion of customs and that these customs developed. Where the plaintiffs argue they 'maintained their institutions and exercised their authority over the Territory through their institutions,' the Chief Justice responds:

> I do not accept the ancestors "on the ground" behaved as they did because of "institutions." Rather I find they more likely acted as they did because of survival instincts which varied from village to village.

So the imaginary landscape of 'villages by great rivers' has an inhabitant who travels for subsistence purposes alone; who only follows customs, and whose behaviour is conditioned by survival instincts, in direct contrast to his exploring, producing, trading, consuming, law-making, planning and scheming European counterpart.

---

[104] McEachern, *op.cit.*, p. 213.

The corollary to this representation of Indian is the complete denial of agency for the peoples othered by it. The style and substance of McEachern's historical narrative that purports to describe both 'the history of the Gitksan and Wet'suwet'en people, and the 'relevant political history' of British Columbia and Canada, is divided by the total absence of agency in the account of the former. The latter account is replete with details of actors - the explorers, traders, Indian Agents, - and their activities - Captain Vancouver exploring the lower reaches of the Columbia river, Chief Factor Douglas for the Hudson's Bay Company signing treaties, Governor Trutch negotiating union with Canada and so on. However, Gitksan and Wet'suwet'en history is described in terms of broad agentless sweeps, as language groups hiving off from one another, practices and customs evolving and the like.[105] In this way, just as the villages are filled with instinctual beings, in **Reasons for Judgement**, Gitksan and Wet'suwet'en people experience history's forces passively; Indians as passive subjects of invisible forces dominate McEachern's sentence structure in this part of the narrative, as in: 'they [the Indians] were largely left in their villages ...';'... they were often thought not to have any need for reserves much larger than their village sites.'; or ' ... the Indians were a greatly weakened people by reason of foreign diseases which took a fearful toll, and by the ravages of alcohol'[106] Even recent Gitksan and

---

[105] See for example, McEachern *op.cit.*, p. 214. This lopsided treatment of history must arise, at least in part, because McEachern finds himself 'unable to accept ... oral histories as reliable bases for detailed history.' McEachern, *op.cit.*, p. 75 The fact that in a judgement filled with statements from the colonial written record, the first citation from a historical First Nations source is cited on page 178 of his judgement, and is, as far as I can tell the only such citation, underscores the imbalance that results. But the division between the McEachern's account of the colonizers and the colonized also reflects a far more wide reaching institutionalized division of labour between those disciplines which traditionally studied Western society, and those assigned to non-Western societies. For the former, historians and sociologists covered both the diachronic processes - of change (and agency) and synchronic processes - of structure. But in the case of many of the latter, disciplines such as anthropology, for a long time only focused on the synchronic. Hence there has been a tendency to only talk about non-Western societies in terms of manners, customs, and structures evolving; this situation has only recently begun to change.

[106] McEachern, *op.cit.*, p. 128-129.

Wet'suwet'en history is naturalized by the Chief Justice in this way, attributed to 'the Indians lack of cultural preparation.' With so total an opposition of narrative styles - the explorers, settlers and colonizers presented as so active, the Indians so supine, it is no surprise that McEachern can conclude that

> The Indians ... became a conquered people, not by force of arms, for that was not necessary, but by an invading culture and a relentless energy with which they would not or could not compete.

It is equally unsurprising that despite examples of First Nations resistance and protest within McEachern's text itself - there are repeated references to Gitksan and Wet'suwet'en claims to the territory from as early as 1890; mention of a 1909 threatened attack on Hazelton suppressed by police; the noting that surveying was prevented at Andimaoul and Kitwancool in 1910 [107] - the Chief Justice feels that 'the Indians did not communicate their dissatisfaction', and that '[u]ntil recently they tended to keep such matters to themselves.'[108] Agency, resistance and protest are not consistent with the Indian as known by McEachern; all examples are either invisible, not seen, or must be the result of external influence. This latter is less the case for McEachern, but the view that claims for title originated from white agitators were common. McEachern himself notes that the missionary Dunce is 'sometimes alleged to be the "inventor' of aboriginal ownership of the province.[109]

Now, the figural incarceration of the Indian inhabitant in an imaginative landscape of 'villages on great rivers' became a literal incarceration through the

---

[107] See for example, McEachern, *op.cit.*, p. 174-5.

[108] McEachern, *op.cit.*, p. 171.

[109] McEachern, *op.cit.*, p. 149.

reserve policy.[110] In the text of the judgement, McEachern's discourse on this landscape appears as a sort of guarded defence of the reserve policy in British Columbia: 'In mountainous areas of British Columbia,' he states,

> where usable land is scarce, and in areas where the Indian diet consisted almost exclusively of salmon taken from the sea or the great rivers, there was less need for large reserves.[111]

Indeed most of McEachern's statements about Indian life are consistent with those made by the men who formulated reserve policy in British Columbia. Nowhere are the white supremacist credentials of this discourse of confinement, and the notion of property upon which it was based, more visibly displayed than with reserve policy. They are clearly evident in Governor Douglas' 1859 proposal to London to:

> permit all persons being at the time British subjects, and all persons who have recorded their intention of becoming British subjects, to hold tracts of unsurveyed Crown land, not being town sites, nor Indian villages...[112]

Since what was self-evident to settlers and colonialist and what could be knowable to them about Indians was that they did not own property, the land that Indians were known to use was to be reserved for them. And since used in settler ideology referred to cultivated, this policy left most of the land vacant for settlement. On the basis of this seamless logic the peoples like the Gitksan and Wet'suwet'en, who were known in this way, could be (legitimately in the eyes of colonial government) dispossessed of their land, confined to reserves, and their elaborate system of ownership erased to accommodate white settlers. Knowledge of the Indian was thus clearly imbricated with power under the reserve policy.

---

[110] I am influenced in this formulation by some unpublished work of Dan Clayton, U.B.C. Geography Department.

[111] McEachern, *op.cit.*, p. 144.

[112] McEachern, *op.cit.*, p. 115.

This same knowledge of the Indian and the space of Indian life is deployed by McEachern to repeat the erasure and dispossession effected by the imposition of reservations. The synthesis of white supremacist discourses from which this village-bound Indian is constructed clearly underlies the Chief Justice's selective observation procedures in the territory. The significance of his dogged cataloguing of empty buildings and uninhabited villages is that, in McEachern's well-trodden formulation, the only way an Indian can own land is to live on it or cultivate it. Ownership or presence can only occur at village sites, which is why he considers it

> highly significant that there is no evidence of village sites in the territory north of Gitengasx or south of Moricetown[113]

Through the process of othering, the Chief Justice confines and contains Gitksan and Wet'suwet'en life, practices and their conceptions of ownership, to a rigidly circumscribed space. When he does not observe them in this space he can thereby conclude that the territory is 'indeed a vast emptiness.' In the same way, he deploys the othered Indian to write a history of the concentration of Gitksan and Wet'suwet'en people in the Bulkley Valley as a history of relinquishing ownership to the territories.[114] McEachern's observations of the territory can only confirm this history. In this way, McEachern's way of seeing is structured by white supremacist discourses; they operate together in a self-fulfilling cycle of observation and citation that informs and enables the Chief Justice's juridical dispossession of Gitksan and Wet'suwet'en land.

To sum up this section, in the first part, I suggested that in his travel narrative, the Chief Justice assumes a self-effaced position in the text that naturalizes/neutralizes his particular procedures of seeing and observing. I

---

[113] McEachern, *op.cit.*, p. 211.

[114] McEachern, *op.cit.*, p. 28.

described how this positioning is characteristic of legal positivism and state ideologies of a neutral arbiter, and how it also belies other positions that he takes up in the text, which are constituted by European aesthetic discourses and certain economic and state interests.

From this section, I think it should be clear that this self-effaced position also distracts from the economy of difference in which McEachern positions himself, Europeans, the West and First Nations. This economy of difference is constituted by discourses of 'race', white supremacist discourses of technological superiority and characterized by a procedure o'f othering. The dominant effect of the othering process is a freezing effect which confines First Nations to the othered positions of communal primitive life and the like, prescribed by McEachern. The spatialized variant of this other, the instinctual, subsisting Indian confined to his villages and cultivated fields is synthesized from white supremacist discourses of property and the nature of Indian life. It is potently deployed in the Chief Justice's **Reasons for Judgement**, along with his narrative of travelling and observing, to erase First Nations presence in and ownership of the territory. The legal process in the judgement is thus imbricated with a particular way of knowing, and with white supremacist discourses. In the final section to this chapter I want to highlight this point by briefly reviewing some further ways in which these processes of seeing and othering inform and determine the legal process and legal principles as they are applied by Chief Justice McEachern.

An Unprincipled Process: Seeing and Othering in McEachern's Legal Procedure

When the political struggle of First Nations for their land enters the legal sphere, it is re-written into what are called 'justiciable' terms. The demands, the sense of injustice, protest and all the various forms of resistance are re-defined as a set of

questions that can be debated in legal argument, and administered according to purportedly neutral legal principles and procedure.

Throughout the preceding section, I have catalogued how McEachern's way of seeing and othering shapes his formulation and resolution of the justiciable questions in this case. How the concept of 'race' shaped his understanding of the longevity and continuity of Gitksan and Wet'suwet'en presence on the territories. How the process of othering precludes him from considering Gitksan and Wet'suwet'en ownership or interests as anything other than communal. And how his framing and resolution of questions of ownership and presence depend on white supremacist notions of property and Indians, which are verified by a procedure of systematized observation. In what follows, I want to emphasize the significance that seeing and othering hold in McEachern's application of legal process by considering three more examples. In this way, I hope to stress that legal principles and procedure can be founded on ways of knowing and conceptions that re-assert colonialist ideologies. The reinscription of First Nations discourses and resistances into justiciable issues can thus work against the struggle to decolonize.

1. Aboriginal rights:

Aboriginal rights were entrenched in section 35 of the 1982 Canadian Constitution. The nature of these rights were to be determined by the courts and this process is continuing. Chief Justice McEachern rules on the nature of these rights. His ruling is taken from a notion of 'aboriginal practices' based on the othered Indian described above. In his words they are 'residential and sustenance gathering rights'[115]

---

[115] McEachern, *op.cit.*, p. 227.

> ... rights arising from ancient occupation or use of land, to hunt, fish, take game animals, wood berries and other foods and materials for sustenance and generally to use the lands in the manner they say their ancestors used them.[116]

In this way, his definition of Aboriginal Rights draws upon the construction of Indian or, as in this case aboriginal which defines and confines pre-contact Indian life to the activity of subsisting in opposition to the interchangeable signs of Western, modern, civilization.

2. The question of cultural continuity.

In the **Reasons for Judgement**, the 'continuity' of Gitksan and Wet'suwet'en culture and society is dismissed by the confinement-effect of the othering inherent in the definition of aboriginal rights and practices. During the trial, both the plaintiffs and the defence adduced evidence and produced legal argument on this question; the former to assert the continuity of aboriginal culture, the latter to deny it: it is one of the justiciable questions into which the struggle for the land is re-written. The Chief Justice formulates the question of cultural continuity in terms of aboriginal practices. In this McEachern follows the defence, deploying othering to in this case freeze Gitksan and Wet'suwet'en life temporally. Defined through othering as a subsistence way of life, McEachern can assert, for example, that despite the prominence of First Nations people in and at least a measure of control over the fur trade, 'trapping for the commercial fur trade was not an aboriginal practice.'[117] The same logic applied to the present period, when 'there is practically no-one trapping and hunting full time', leads the

---

[116] McEachern, *op.cit.*, p. 15.

[117] Op.cit., McEachern, p. viii. The extent to which the First Nations of Western Canada controlled the fur trade continues to be debated. The chief proponent for the scenario of considerable control is Robin Fisher, *Contact and Conflict: Indian relations in British Columbia, 1774-1890*, Vancouver: University of British Columbia Press, 1977. The longstanding preeminence of the Tshimshian trading family, Legaic supports the idea that First Nations did at least exert some control.

Chief Justice to conclude that 'most Gitksan and Wet'suwet'en people do not now live an aboriginal life.'[118] First Nations society is thus divided from Western society in another way: while the latter can be dynamic and changing, the other can only be in stasis, or declining. Othered in this way, Gitksan and Wet'suwet'en societies as distinct, property-owning, self-governing entities can be consigned to the past on the basis that working in manufacturing, commercial fishing and the like are not aboriginal practices.[119]

3. The question of the extent of territory to which the Gitksan and Wet'suwet'en peoples can lay claim:

In formulating this question, Chief Justice McEachern deploys the imaginative geography of Indian life in combination with his mapping way of seeing the territories. Having argued that there is no basis for Gitksan and Wet'suwet'en claims of ownership and jurisdiction over the territory, McEachern finds it necessary to 'delineate the areas within the territory which were subject to aboriginal rights at the date of British Sovereignty ... In case [he was] wrong in the conclusions ...'[120] The area claimed by the Gitksan and Wet'suwet'en is derived largely from descriptions of house territories and the descriptions of boundaries by Hereditary Chiefs. McEachern dismisses the resulting map, at least partly on the basis that it does not look right - on the map - to the sensibilities of his mapping eye: 'the unusual shape of some of the territories leads me to doubt their authenticity.'[121] He replaces it by a procedure reminiscent of the partition

[118] McEachern, *op.cit.*, p. 56.

[119] The best critique I have read of the sort of logic McEachern is using here was actually given in this trial by counsel for the plaintiffs. They critique what they call a frozen concept of aboriginal rights on much the same basis that I do so here. See Gisday Wa and Delgam Uukw, *The Spirit in the Land*, Gabriola, British Columbia: Reflections, 1987 for a reproduction of this critique.

[120] McEachern, *op.cit.*, p. 257.

[121] McEachern, *op.cit.*, p. 262.

of Africa - a supreme expression of imperial confidence. I quote from some of his application of this procedure to Gitksan territory:

> ... a hunter in reasonable country 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 and also on each side of the Skeena south of Gitangasx; on each side of the Kispiox and Babine Rivers within the territory; and on the south or west sides of the Sustat and Bear Rivers.

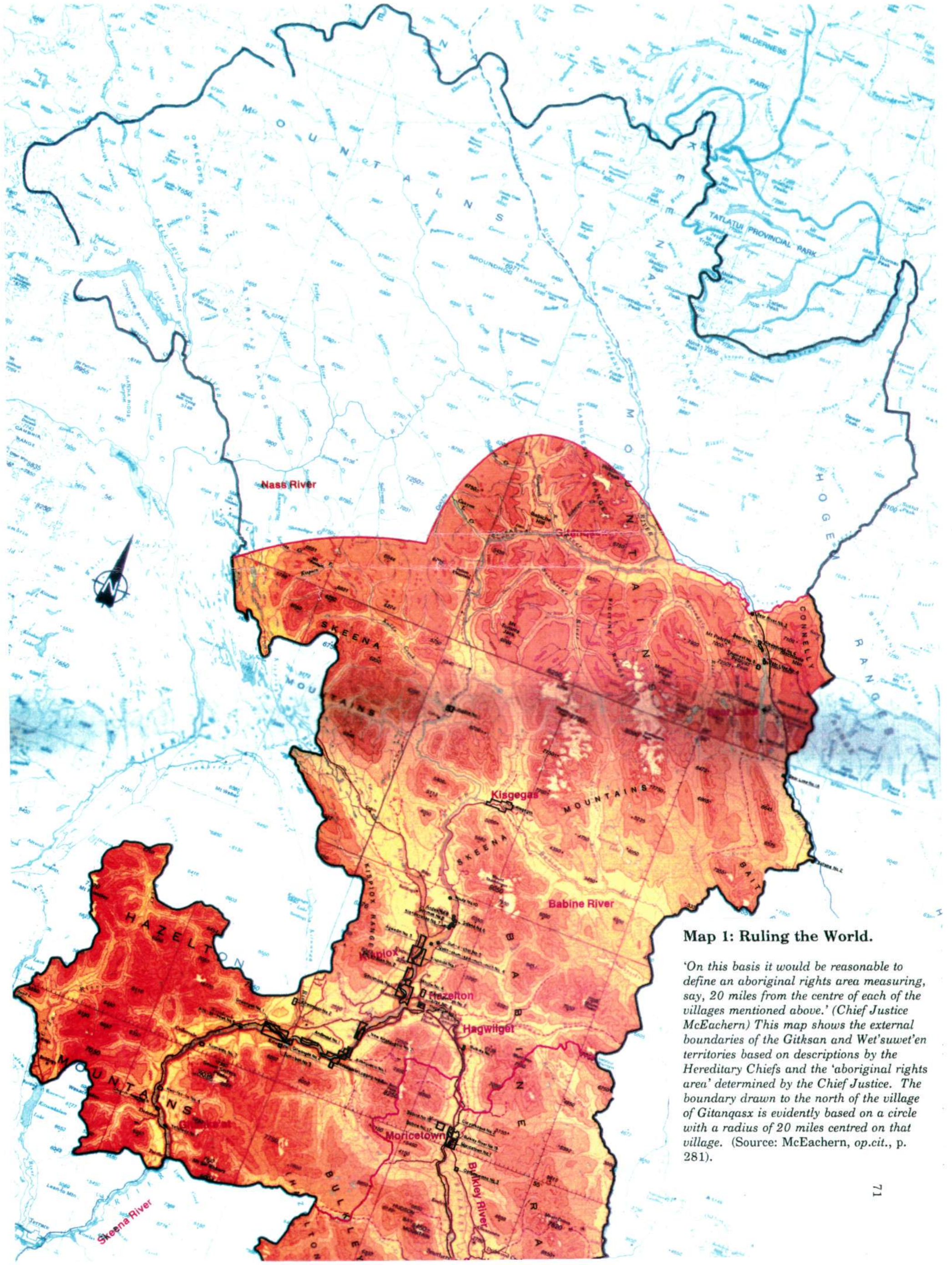
The logic in this process clearly draws upon the 'villages by great rivers' landscape of Indian life, and its subsisting inhabitant. Evident also is the supreme power the map and the eye hold to literally 'rule the world'. From the commanding position, looking down on the territory enframed on the planimetric surface, McEachern can encircle the limit of Indian life in the territory based on arbitrarily estimating the distance a hunter could walk in a day (see maps 1, 2 and 3).[122] Seeing - the mapping way of knowing - and othering thus determine the procedure by which McEachern re-draws the possible extent of 'aboriginal interests.'

Conclusion:

In conclusion, McEachern's particular way of knowing the territories can, I think, be characterized as a sight-based mapping. Certainly the Chief Justice's descriptions of his journeys in the territories are dominated by seeing and mapping describers. For McEachern, this way of knowing and seeing is authoritative. But, I would suggest that other knowledges and

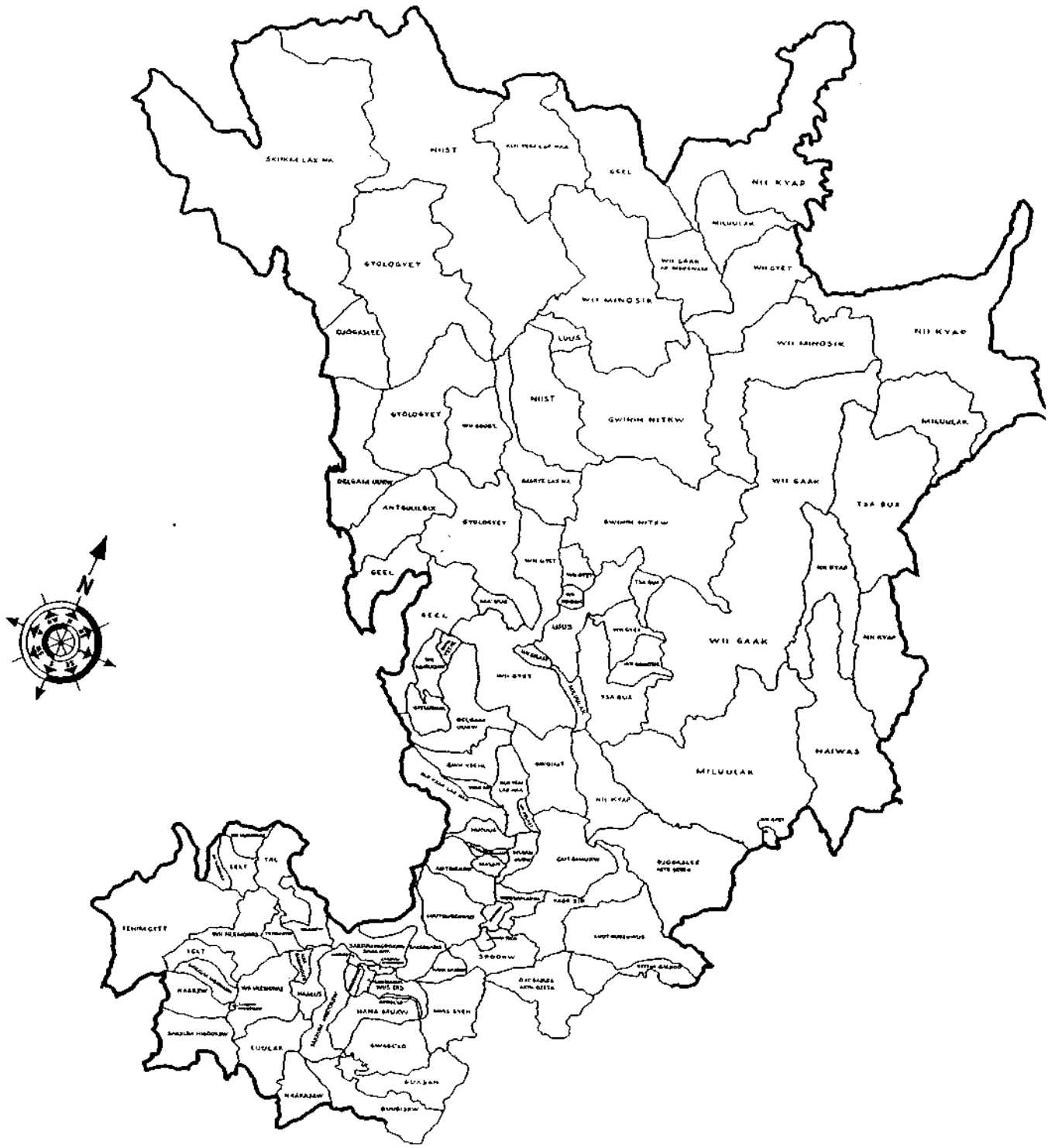
---

[122] Map 1 shows both the boundaries the Chief Justice derives from this process and the boundaries based on descriptions by the Hereditary Chiefs. I have juxtaposed this with the Plaintiffs Maps, Maps 2 & 3, showing the internal boundaries to indicate some of what the Chief Justice erases when he draws lines on the map based on the logic of the confined Indian. The most celebrated example of the supreme power of the map and eye to rule the world, which McEachern's process exemplifies, must surely be the partition of Africa. In the late 19 century the European imperial powers divided that continent amongst themselves arbitrarily separating peoples, countries and resources and arguably paving the way for a century of irredentist and successionist struggles.

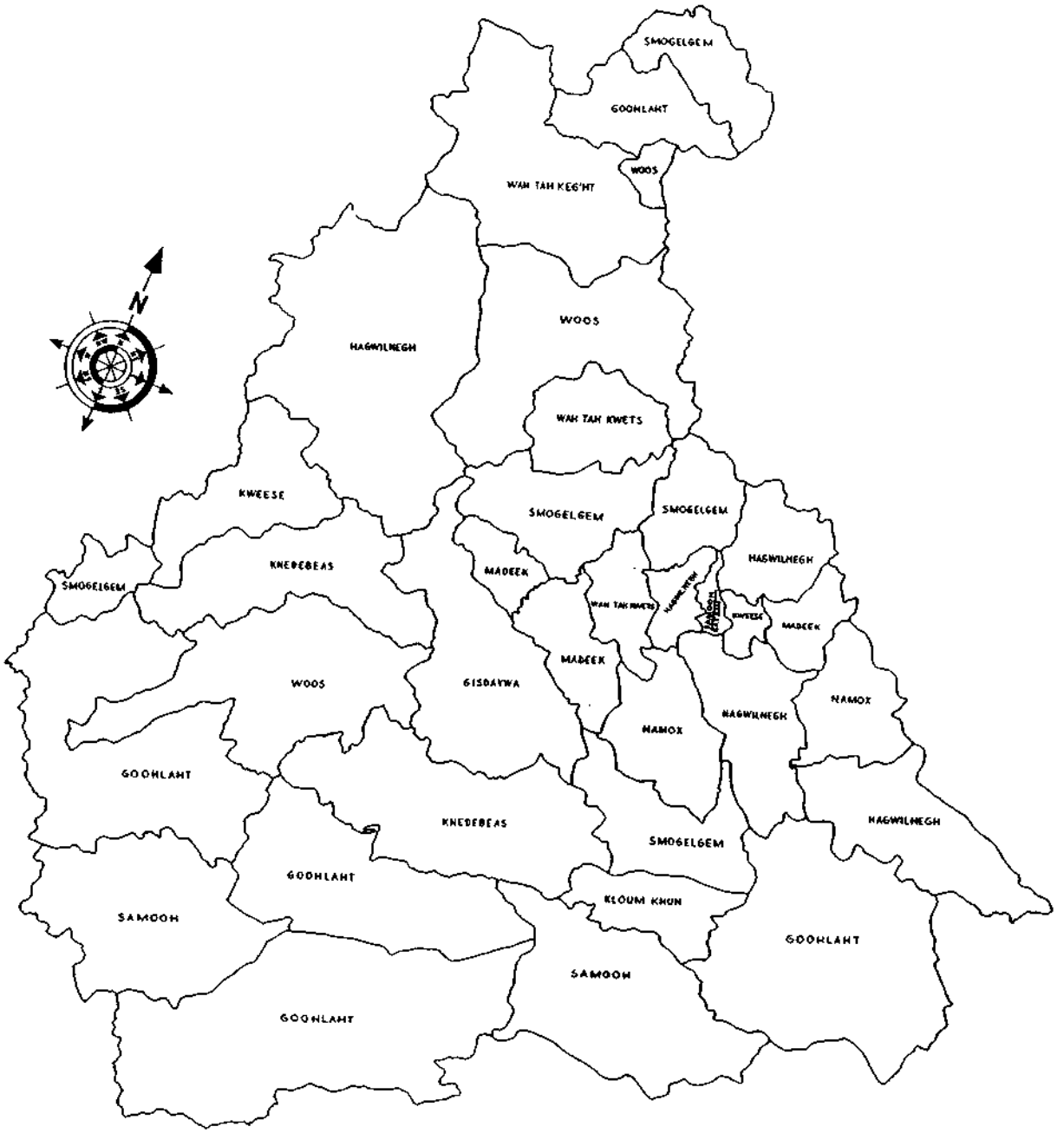


Map 1: Ruling the World.

'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.' (Chief Justice McEachern) This map shows the external boundaries of the Gitksan and Wet'suwet'en territories based on descriptions by the Hereditary Chiefs and the 'aboriginal rights area' determined by the Chief Justice. The boundary drawn to the north of the village of Gitanqasx is evidently based on a circle with a radius of 20 miles centred on that village. (Source: McEachern, *op.cit.*, p. 281).



Map 2: Internal and External Boundaries of the Gitksan Territories. *Maps 2 and 3 show the local territorial intricacies determined from descriptions by Hereditary Chiefs. The Chief Justice's line and circle drawing procedure erases these intricacies. In the* ***Reasons for Judgment*** *these two maps are depicted without the underlay of topographic features that accompanied them during the trial. Presented against a white and empty background they seem 'unreal', as if they don't refer to any place at all* (Source: McEachern, *op.cit.*, p. 8)



Map 3: The Internal and External Boundaries of the Wet'suwet'en Territories. (Source: McEachern, *op.cit.*, p. 9)

ways of knowing are subjugated, as with Txesim's account, when McEachern privileges his own. The emphasis on doing in the record that records Txesim's hybrid description implies that his 'facts' of presence and ownership are quite incommensurable with McEachern's. They are clearly erased in the Chief Justice's visually oriented account. In the words of Donna Haraway, 'vision is always a question of the power to see - and perhaps of the violence implicit in our visualizing practices.'[123] McEachern's power to see is publicly sanctioned - including provision of helicopters - the violence of his visualizing practices, now I hope self-evident.

But, in common with colonial travel narratives, a crucial part of the power of sight in McEachern's narrative is the self-effacement of the seer's position. The particularity of the Chief Justice's visualizing practices is not acknowledged, but denied, masked, hidden. It is this invisible position he assumes that is precisely the one most desired/constituted in legal and state ideologies where the arbitrator must at least appear to be neutral.

What I have tried to convey through much of this chapter is the way in which the power of sight is not neutral but structured by an economy of difference. In McEachern, this latter is based on a dualistic epistemology that counterposes Europe, the West, settlers and the like to an essential Indian. The Chief Justice's othering is founded on white supremacist conceptions of property and discourses of the nature of Indian life. The relentless cycle of citation and observation whereby McEachern deploys his way of seeing and othering appears seamlessly consistent. As such, it is reminiscent of colonialist spatial strategies of dispossession. Based on the written record and statements by colonialists, the Chief Justice constructs

---

[123] Haraway, Donna., *Simians Cyborgs and Women: The Reinvention of Nature*, New York: Routledge, 1991, p. 193.

an Indian in a state of nature, confines that Indian to his place, a rigidly circumscribed space of 'villages by great rivers' and when he does not find this imagineered landscape in the territory, concludes that the land is empty. What I have tried to demonstrate is that the apparent seamless consistency is internal. It has very little to do with what First Nations people themselves did and more importantly, is formulated without recourse to what First Nations people say.

The modalities of power/knowledge described here are clearly imbricated with McEachern's application of legal principles. It is not completely clear to what extent these modalities are inherent in the legal sphere. Certainly notions like evidence and the tradition of precedent are related to the realist ways of knowing and practices of citation that McEachern engages in. In the following two chapters I try to deal with these issues by looking first at power relations in the legal sphere and the court-room, and then applying these to an analysis of the ways in which the court-room as a site of debate perpetuates the subjugation of First Nations knowledge and ways of knowing.

CHAPTER 3

OF LEGAL FACTIONS AND COURT-ROOMS: THE INSTITUTIONAL MATERIALITY OF THE LEGAL SPHERE

> *3. We need to anthropologize the West: show how exotic its constitution of reality has been; emphasize those domains most taken for granted as universal...; make them seem as historically peculiar as possible; show how their claims to truth are linked to social practices and have hence become effective forces in the social world.*
> (Paul Rabinow)[124]

In this chapter I begin to investigate the institutional materiality of the legal sphere and to suggest how power invests its social and spatial relations and its procedures for producing truth. The operations of the legal sphere establish particular power relations, between the legal sphere itself and other sectors of society by monopolizing the means of legal conflict resolution, and within itself, between legal factions who compete for control of the means of legal interpretation. Such an analysis therefore suggests that the dynamic of the legal sphere is situated in the competition between these groups, and also that power circulates through the operations of law. Looking at the spatiality of the legal sphere it is evident both that its characteristic power relations are reiterated at different scales, in its spatial order, its locations, and its architecture, and also that this spatial order reflects colonial spatialities. Furthermore, the power relations that distinguish and define the legal sphere are translated into the discursive space of the court-room through the rigid and ritualized ordering of space and speech. Participation privileges in court-room discourse are thus established externally but practiced spatially to prescribe and contain the roles of non-legal speakers. In this way, it is evident that the legal sphere produces truth through the practised constraint of speech and speakers.

---

[124] Rabinow, Paul, Representations are Social Facts: Modernity and Post-Modernity in Anthropology, in (Ed.) Clifford, James and Marcus, George, E. *Writing Culture: The Poetics and Politics of Ethnography*, Berkeley: University of California Press, 1986, pp. 234-261.

This chapter is divided into three parts. In the first part I draw on Bourdieu's analysis of the 'juridical field' to discuss how the legal system as a social field distinguishes itself from other social fields by adopting a particular attitude to language and to legal matters, thereby privileging only legal specialists with the competency to administer such matters. But Bourdieu also notes that division extends to within the legal sphere, where factions arise according to their roles in the legal process and according to their affiliation with groups outside the legal sphere. Bourdieu suggests that at any one time or place, the particular nature of legal practice depends on the relative power of legal factions. Not only does this analysis indicate that at any one time or place certain members of the legal sphere are privileged as more competent or authoritative than others - in the case of North America, usually judges - but it locates change in the nature of legal practice in the changing relative power of the various legal factions. In the second section of the chapter, I suggest: first that the hierarchical spatial order of the legal sphere that defines its routine operations represent crystallized colonial spatialities, exactly the spatialities the Gitksan and Wet'suwet'en are struggling against in the trial; second that the power relations that distinguish the juridical field are inscribed in the distinct style and architecture of legal institutions, which sets them apart from everyday life as sacred space. In the third section I suggest that the privilege of professional speakers, and the respective authority of the judge and lawyers are translated into the courtroom through the microscale ordering of space, through symbol ritual and the ordering of speech. Positioning, symbol and dress in the court-room constitute the speaking subjects of the court process in accordance with the externally established power relations that define and distinguish the legal sphere. Certain forms of speech are parcelled into specific periods in a strict order and ascribed to these subjects. As part of this process, there is a continuous re-inscription of non-professional speech, in this case,

First Nations speech, into the language of the court. I suggest how this re-inscription is operated as a strategy which maintains the order and authority of speech and speakers, restricting access to forms of speech and conditions of reception according to the predetermined authority of speakers.

The Juridical Field:

Understanding the nature of a trial as a speech situation and the nature of change in the law requires some consideration of the sociology and practices of the 'juridical field'. Bourdieu describes the 'juridical field' as 'an entire social universe ... which is in practice relatively independent of external determinations and pressures.' He suggests that juridical authority is produced and exercised within this social field, and that groups within that field struggle for the power to shape legal interpretation.[125] To analyse the discourse at a trial, it is necessary to recognize that the power relations between speakers are in part determined externally to the specific speech situation that the trial constitutes, and therefore to consider the social production of authority within the juridical field. To interpret or predict change in the legal sphere it is important to relate that change to flux in the relative power of groups within the legal sphere.

There are three points that I want to draw from Bourdieu's analysis of the sociology of the juridical field. Firstly, as a distinct social sphere, the juridical field is characterized by a division of juridical labour. Secondly, there is an uneven distribution of legal 'symbolic capital' among groups or individual members of the legal sphere, according to their passage through the juridical field and their position within the division of juridical labour, and according to the outcome of

---

[125] Bourdieu, Pierre, The Force of Law: Toward a sociology of the Juridical Field, *The Hastings Law Journal*, vol.38, July 1987, pp. 805-853, p.816.

competition between these groups or individuals.[126] The juridical field is therefore hierarchical; change within it the product of struggle. Thirdly, the institution of a 'judicial space' implied by the existence of a juridical field involves the institution of a monopoly. It divides those who are competent to participate in the practices of the field from those who are not.

The juridical field is a complex set of institutions. It consists both of institutions for training and the scholarly production of legal texts - law schools and universities - as well as institutions of practice - private law firms, corporate law firms, courts, and so on. The sociology of the juridical field is correspondingly divided between for example, those who produce scholarly legal texts and those involved in the practical side of law, between members of large firms and sole practitioners, and between those involved in different tasks within the division of labour - eg., teachers, librarians, trial lawyers, judges.

The division of juridical labour is a hierarchical division for several reasons. In the first place, the institutions of the legal system confer different levels of legal symbolic capital on those who pass through them. But this process must be seen in context with the general operation of the juridical field, which, in keeping with Bourdieu's general conception of social fields, is a site of the competition between different groups, some of whom struggle over the 'monopoly of the right to determine the law.'[127] This struggle for control opposes corporate lawyers against lawyers for disadvantaged groups, legal theorists against legal practitioners and so on. It divides the juridical field hierarchically according to the

[126] For Bourdieu, 'symbolic capital' denotes the wealth accumulated by an individual or group in terms of authority, knowledge, prestige, reputation, academic degrees and so on. These forms of symbolic capital can be converted into monetary forms; the exchange value of this capital is constantly being assessed by its possessors, and by those who come into contact with it. Terdiman, R. Translator's introduction, to *ibid.*

[127] *Ibid.*, p. 817.

respective levels of authority and prestige attained by the particular groups at any one time.

Bourdieu attributes the source of change in the law to this contestation within the legal sociological field. In line with much work that is critical of legal formalism, he demonstrates that the application of legal rules is a rhetorical means of gaining authority, whose results are far from predictable, and are indeed, relatively arbitrary. In this way, he argues that the legal dynamic cannot be located in the internal development of its concepts and methods. Rather, Bourdieu situates the dynamic in the variations of the hierarchy in the division of juridical labour, and the struggles which determine them. Struggles within the legal field usually involve contestation between groups with contrary priorities and interpretive schema. These struggles have well defined stakes for example, the control of curricula, the attainment of professorships, or the publication of topics in learned journals. In this way, the outcome of contestation in the legal field affects the nature of legal interpretation and bears on control within the professional body and the form in which that body is reproduced.

The particular configuration of group power in the juridical field is typically crystallized into long-term patterns and this may be seen in the different legal traditions. Thus Bourdieu observes that in the German and French tradition, the law, especially the civil laws, appears to be a real 'law of professors', which gives primacy to legal doctrine over both legal practice and procedure, and the execution of judgements. In contrast, in the Anglo-American tradition, the law is jurisprudential (case law); it relies almost solely on the decisions of courts and on the rule of precedent. Mastery in this system is obtained through practice or through training that aims to reproduce the conditions of professional

practice.[128] It is therefore not surprising that legal rules do not claim to be derived from moral theory or rational science but aim to provide a solution to a law suit, or that judges, who have 'emerged from within the ranks of practitioners' are the significant jurists.[129]

Bourdieu stresses that the relative power of different kinds of legal symbolic capital within the different traditions, depends in part on the position of the juridical field within the broader field of power. This position is linked to the relative weight granted to the 'rule of law' or to government regulation, which prescribes the limits of the power of strictly juridical action. In France, juridical power is limited by State and technocratic power. In the U.S. and Canada, Bourdieu observes, the juridical field is stronger, resulting in the more prominent social role 'attributed to legal recourse within the universe of possible actions,'. Bourdieu sees this social role to be evinced especially in the significance of law in campaigns to right particular wrongs. The juridical field's position of strength in Canada is exemplified, (and was extended), by the 'legalization of politics' involved in the drafting of the Charter of Rights and Freedoms in 1984.[130]

In a similar way, the outcome of the struggle for control over the means of legal interpretation is in part determined by the position occupied in the political

---

[128] Though it is broadly correct to define Canadian jurisprudence as a law of practitioners, the label should not be applied too strictly. In Canada there has been a tendency in recent years to appoint law professors to prominent positions. Three of the present Supreme Court judges were law professors. Equally, their were law professors amongst the practitioners during **Delgamuukw** - Michael Jackson for example. So the division between a law of professors and a law of practitioners becomes somewhat cloudy in Canada.

[129] *Ibid.*, p. 823.

[130] I take the term 'legalisation of politics' from Mandel, *op.cit.* Mandel is thoroughly negative about what he describes as the ascendancy of juridical rule over and at the expense of democratic rule. He sees it as a means by which the late capitalist welfare state, increasingly unable to satisfy the political and economic demands of the population, seeks legitimation in abstract forms; ie which avoid a genuine participatory democracy. As such, Mandel considers that the Charter of Rights and Freedom makes sense partly because of the reliability of the courts in maintaining the status quo.

field by groups or organizations, which can effect the generation of affiliated groups in the juridical field. For example, as the power of dominant groups grows in the social field and the power of the parties and union that represent them in the political field increases, Bourdieu suggests that differentiation and competition within the juridical field tends to increase. Variation within the hierarchy in the division of juridical labour thus depends in part on variations in power relations in the broader social field.

But, juridical power is also conditional upon the monopolization of legal symbolic capital within the juridical field. It involves dividing those competent to take part in the legal 'game' from those, who though they might be in the middle of it, are excluded. Bourdieu traces this exclusion to an utterly different mental space and linguistic stance, established through the attainment of professional competence and the technical mastery of a complex body of knowledge that legal training and practice entails. As a result, non-specialists' sense of fairness and understanding of the facts - their view of the case - is disqualified. The vision of the person who comes under the jurisdiction of the court, such as the client, is thus divided from the professional vision of judicial actors.

Bourdieu sees the division as essential to a power relation which grounds the distinction of the juridical field. The difference in vision - the basis for excluding the non-specialist - results from the establishment of a system of injunctions through the structure of the juridical field and written into its 'fundamental law'. These injunctions are the *principles of division* for the juridical

field.[131] But they are also a 'principle of vision', of a way of seeing: Bourdieu suggests that at the heart of this system of division lies an assumption of a 'special overall attitude', one that is most evident in relation to language.[132] Though legal language constitutes a particular use of ordinary language it draws words and ordinary language away from their usual meanings. This transmutation is linked to the assumption of an attitude, which is basically the incorporated form of a system of principles of vision and division. The fact that legal language uses a word to name something different from what that word would designate in ordinary usage, is because the two uses are connected by radically exclusive linguistic stances.

> The principle of the separation between the two signifiers, which we usually attribute to the effect of context, is nothing other than a duality of mental spaces dependent upon the different social spaces that sustain them. [133]

From Bourdieu's sociology of law, it is apparent: first, that variation in the law is linked to the emergence of and competition between different legal factions; second, that the distinct social space - the juridical field - in which a trial takes place predetermines the respective authorities of participants in that trial. The judge, who has emerged from the ranks of practitioners holds the prestigious rank that permits him to preside over the trial. Lawyers possess differing proportions of legal symbolic capital by virtue of their membership within particular groups in the juridical field, and their standing within it. They are likely to be remunerated

---

[131] Bourdieu's notion of 'principles of division' describes the structured way in which different social groups distinguish between, for example, what they value negatively and what they value positively, and the basis for those valorizations: ie distinguishing between elite and mass, 'pure' and 'vulgar.', 'insiders' and 'outsiders'. Society's rewards are then distributed along the lines of these principles. Terdiman, *ibid.* The legal system distinguishes between client and lawyer, witness and Expert witness. Below, I will be suggesting the ways it regulates speech acts and authority in the court, on this basis.

[132] *Ibid.*, p. 829.

[133] *Ibid.*, p. 829.

accordingly. But, the principles of vision and division which establish the borderline between legal and other actors, which are incorporated into legal language, and which involve training and technical mastery, exclude non-professional participants from the legal game in other than a specified and subordinate role. Before considering this exclusion from participation as an equal in more detail, I want to suggest that the principles of vision and division are incorporated into more than just the language of law. They inhere equally in the physical ordering of juridical space, in the geography of legal institutions, in their design, and in their ritual. In short, I want to suggest that the social source of distinction and division should not be separated from the spatial source.

The Place and Space of the Trial:

In an influential and provocative contribution to the debates concerning the value of informal, local conflict resolution, Christie suggests several ways in which courts are peripheral to the daily lives of non-professional participants in legal disputes.[134] Firstly, courts are situated in the administrative cores of towns, outside the 'territories' of ordinary people. Secondly, within these downtown cores they are often centralized within one or two large buildings of considerable complexity. Hence, Christie suggests that, both in terms of physical situation and architectural design, courts belong to the administrators of law. Thirdly, in the court-room, it is the peripherality of the parties that is striking. The parties are represented, and the representatives and the judge dominate the little activity that occurs in these rooms. Christie's observations therefore point to the

---

[134] Nils, Christie, Conflicts as Property, *The British Journal of Criminology*, vol.17, no.1, Jan 1977, pp. 1-15.

significance of the geographical and spatial organization of the legal sphere. I think that by elaborating on Christie's observations Bourdieu's analysis can be supplemented (and substantively altered.) By looking at the 'spatiality' of the law it seems apparent that the legal social sphere operates in a distinct space, and that the *principles of division* are incorporated into the ordering of that space.

To begin with, it is worth making a point that may seem both obvious and trite, but nonetheless was clearly of significance in the Gitksan and Wet'suwet'en title trial. This point is that the spatial organization of the legal sphere represents a general crystallization of chains of power and an orienting of flows - of capital, and of administration - in keeping with the ordered territory of the nation state. Legal institutions are, as Christie observes, concentrated in administrative centres. They are also ordered in a hierarchical chain of official legal spaces from the local to the provincial to the Federal (and formerly the Imperial centre as well.)[135] The position in the hierarchical chain corresponds to the administrative centre in which the court is located, from the court in the regional centre, to the provincial capital, and then on to Ottawa. As such, it is part of the centralization of power relations within state institutions - pedagogical, judicial, economic and so on - that is associated with modern nation states.

The significance of this spatial order of the courts was never more clear than in a trial like **Delgamuukw**. In the hierarchical order that routine court functioning responds to, Smithers is not an assize town for the Supreme Court. But, at the request of counsel for the plaintiffs, Chief Justice McEachern

---

[135] As an increasing number of legal scholars are stressing, official legal spaces do not constitute the only legal spaces. Indeed, one of the principal arguments of the plaintiffs in **Delgamuukw** is that Gitksan and Wet'suwet'en institutions regulate their own legal space. There are also the distinct legal spaces of corporations, clubs, factories, communities and so on. For an insightful account of the different properties of such legal spaces see De Sousa Santos, B. Law: A Map of Misreading. Toward a Postmodern Conception of Law, *Journal of Law and Society*, vol. 14. No. 3, Autumn 1987, pp. 279-302.

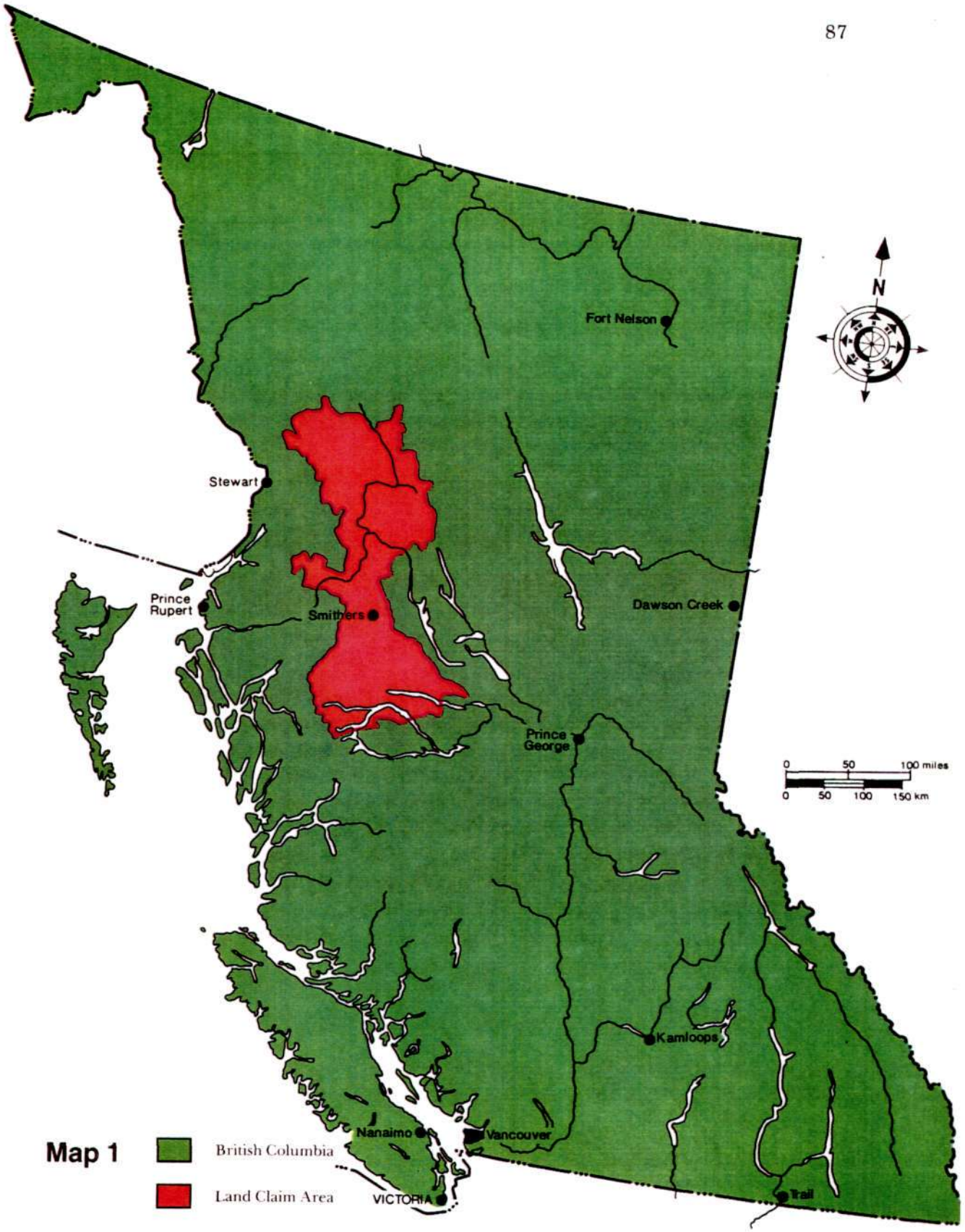
permitted the trial to open there, and the trial began at Smithers, on May 11, 1987. In this location it was relatively local for the Gitksan and Wet'suwet'en plaintiffs, though still removed from the villages and reserves located to the north of that town, where most of the band members live. Nevertheless, it was local enough for the Gitksan and Wet'suwet'en people to provide their support by watching and listening from the spectators' gallery during court sessions. The plaintiffs rented offices across the road from the Smithers court-room and held daily 'debriefing' sessions after each day in court.[136] After the first six weeks, the Chief Justice insisted that the trial be moved to Vancouver, the 'proper' location for a B.C. Supreme Court case. To the plaintiffs, this move 1200 kilometers to the south would effect their ability to make their case, escalating their costs, reducing their morale, removing witnesses from the support of their communities and families, and forcing those testifying, many of them elderly, to spend long periods in a strange and inhospitable environment (see map 4).[137] The Gitksan and Wet'suwet'en protested the move, demonstrating in Vancouver's Robson Square. Their lawyers petitioned Chief Justice McEachern to continue the case in Smithers. But McEachern insisted that the trial should continue in Vancouver.

Removal of the trial to Vancouver resonates with the continuing alignment of resource and administrative flows that orientate Gitksan and Wet'suwet'en territory as a periphery to the lower mainland core. It reinforces the hierarchical ordering of Canadian space, that derives from the colonial period, exactly the ordering that First Nations demands for self government and jurisdiction are resisting. It also indicates that, at least where First Nations people are involved,

---

[136] Interview, Michael Jackson, counsel for the plaintiffs, March 7, 1992.

[137] Don Monet & Skanu'u., *op.cit.*, pp. 50-65 include clippings from the Vancouver Sun, Thursday, July 9, 1987 and the Hazleton Sentinel, Thursday, February 12, 1987, in which these views are expressed.



Map 4: Vancouver in Relation to the Gitksan and Wet'suwet'en Territories (Source: McEachern, *op.cit.*, p. 6).

courts remain irrevocably other, the realm of the administrators of law who historically have been administrators of colonialism.[138] More than anything this is emphasized by Chief Justice McEachern's reasons for rejecting the requests to keep the trial in Smithers. In a memorandum to the plaintiffs' lawyers he wrote: 'I frankly admit that I do not have the endurance to continue a case as difficult as this one for any appreciable time out of Vancouver.' Neither he said, could the court reporters 'be expected to continue such a regime.'[139] In this way, it seems evident that the spatial order of the juridical field responds to colonial spatialities and the desires and intentions of the administrators of law before the demands of the people seeking justice through its procedures.

Architecturally, the courts incorporate both the hierarchical ordering and the separateness of the juridical social space. The movement of the trial 'up' the hierarchy, so to speak, involved a move from the 'old county court-room' at Smithers to Vancouver's Late Modern, glass and concrete, ziggurat-like Law Courts. A celebrated, architectural symbol of Vancouver's credentials as a world-class city, the Law Courts again emphasize that courts are the realm of administrators of law, the judiciary, professional initiates, lawyers, clerks, and that they are peripheral to the experience of other participants in court-actions. Not only are the Vancouver Law Courts an imposing structure, they are raised above the 'everyday' life of the streets.[140] The orderly climb, past waterfalls and landscaped beds of shrubs and bushes, raises one from the public space of the street to the more sacred space of the glass-covered, atrium, which constitutes the

---

[138] See first chapter, and Fitzpatrick, Crime as Resistance *op.cit.*

[139] Monet & Skanu'u, (Vancouver Sun), *op.cit.*, p. 50.

[140] In this respect, the current design is perhaps only moderately monumental by comparison with the planned 50 storey high rise it replaced.

external facade of the building. The move from the atrium to the court-rooms further removes one from the *quotidian*, and into a dimly lit space of deep-pile carpeting and numbered doors. Forbidding to the un-initiated the doors enclose the ritualized space of the court-rooms. Centralized, and symbolizing a particular hierarchy of space, and crystallized power relations, the design and location of the Law Courts thus distinguishes the legal space from other space and in this way encode the *principles of division* that structure the legal system.

Ritualized Space: the Practiced Nature of Division

Now, I want to extend the discussion of 'spatiality' of the legal sphere to include practices in the court-room. More than in legal training or the arrangement and design of legal space, the encounter between professional and non-professional, lawyers, judges and witnesses occurs at trial. It is therefore one of the principal sites where the *principles of division* take effect. I would suggest that division in the court-room does not solely inhere in the attitudes of professionals and non-professionals, and in language as Bourdieu suggests, but is also practised through the ritualized ordering of space and speech in the court-room. Indeed, I think the very encoding process that translates the vernacular into legal argument should be read in terms of practice, as re-inscription and intervention.

1

The first, and most obvious aspect of the practice of division in the court is the translation of the respective symbolic capital of lawyers and judges into the 'legible' forms of symbol and ritual in the court, and the establishment of a symbolic and spatial border between professionals and non-professionals.

Material symbols form one dimension of these processes. A Royal coat-of-arms positioned above the judge's seat in both the Smithers and the Vancouver court-rooms links the judge and court to the source of their authority, state sanction, and to the authority of tradition. During the trial, all legal participants - the judge and the lawyers - are distinguishable by their black robes, and white shirt-front and neckties. The authority of the judge, and membership in the coterie of legal professionals is thus visibly marked.

The physical ordering of court space forms a second dimension to the procedures of division. The court can be seen as a space of both constructed visibility and audibility. The formal ordering of court space controls the widely variable positions of listening, speaking, seeing and being seen. The spatial order is much the same for the Smithers and Vancouver court-rooms. The judge sits separated from and raised above the proceedings which evolve before the bench. Counsel for the plaintiffs and for the defence sit on either side of a table directly in front of the bench from where they orchestrate the adversarial battle that constitutes the trial. When testifying, witnesses sit to one side and speak into a microphone. In the Smithers court-room, witnesses are more visibly offset to one side in a separate dock facing another dock from which they are questioned. A court clerk, spelling interpreter and court stenographer sit between the two docks. In the Vancouver court, witnesses are also offset but less so. They sit at the end of the table occupied by the clerk, spelling interpreter and stenographer. When required for First Nations' witnesses, an interpreter sits beside them (see figures 1 and 2).[141] The elevated position of the judge marks his voice as the voice of

---

[141] Based on drawings by Don Monet, and information in the transcripts of Gyolugyat's testimony.

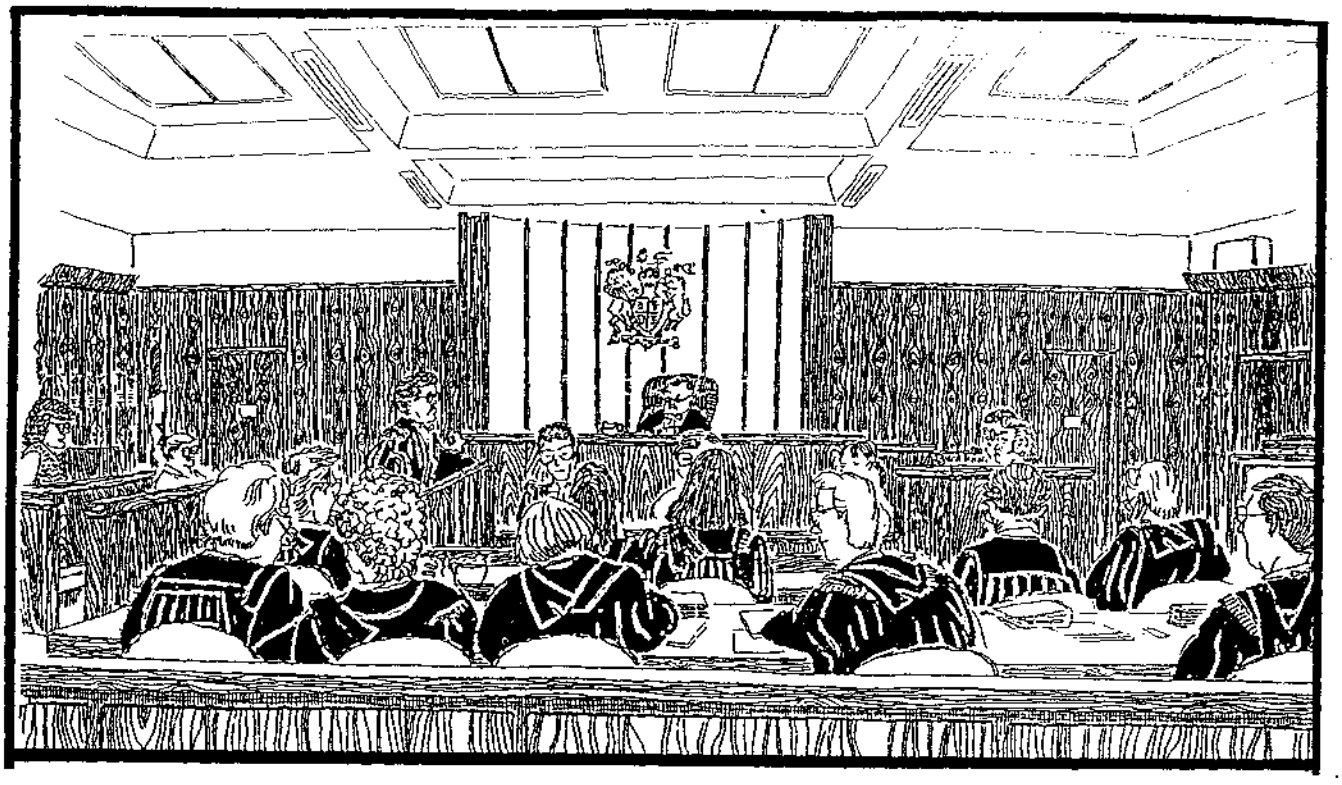


Figure 1: The Smithers Court-room during Delgamuukw (Source: Monet and Skanu'u, *op.cit.*, p. 31. Reprinted by Permission)

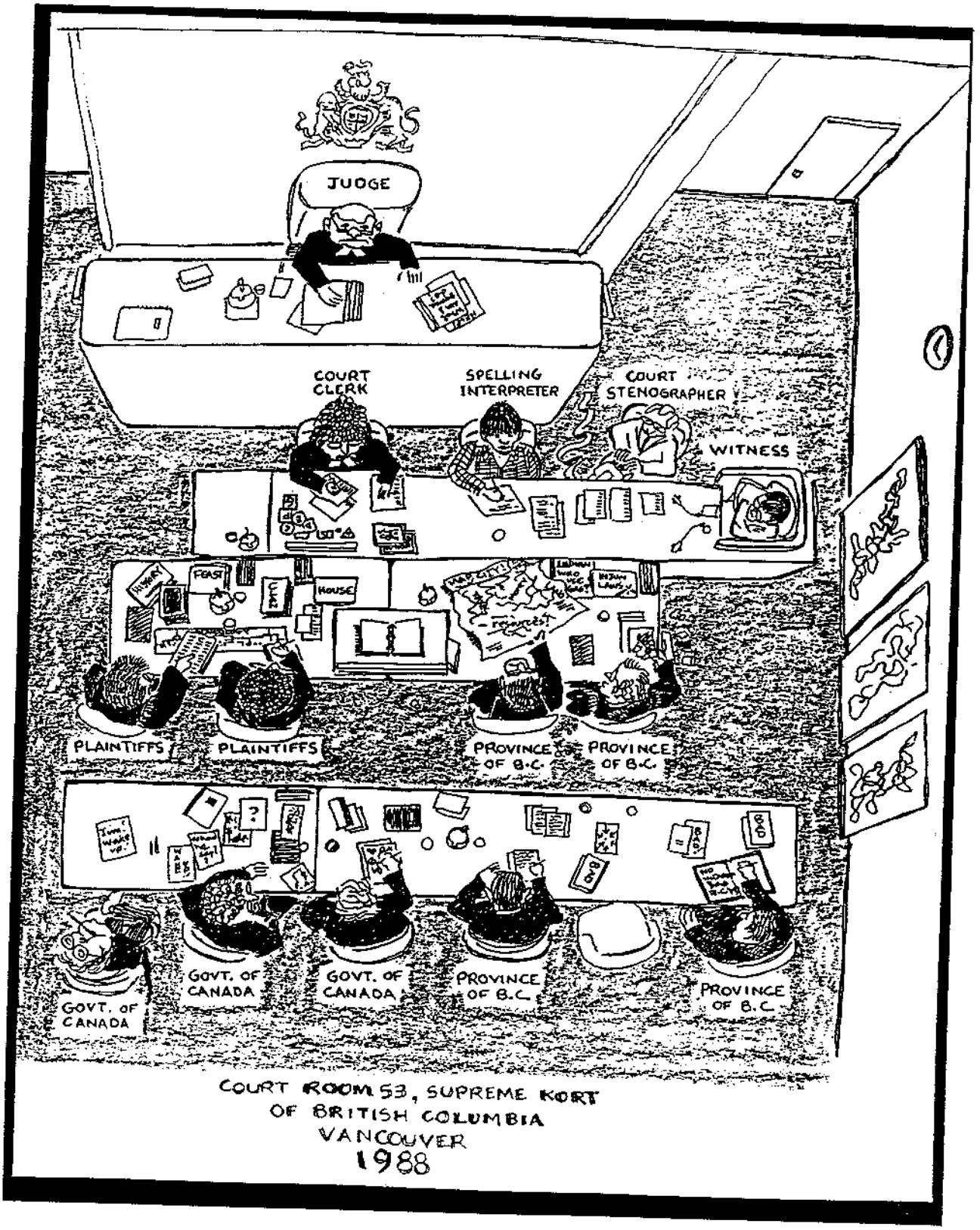


Figure 2: The Vancouver Law Courts Court-room during Delgamuukw (Source Monet and Skanu'u, *op.cit.*, p. 59. Reprinted by Permission)

authority; counsel take a central position in the court that reflects the centrality of their speech to the process; witnesses are positioned to the side; their speech as I will elaborate on below, is an objectified speech. By positioning subjects in a hierarchical arrangement of audibility and visibility, the ordered space of the court-room thus constitutes the respective roles of judge, lawyers, and witnesses, and clerks in the trial proceedings.

The tone and ritualized ordering of speech constitute the third means by which the respective authority of speaking subjects is demarcated in the discursive encounter of the court-room. The daily session in court is opened by the registrar announcing 'Order in Court', then the date and the participants in the trial in progress. The judge is referred to not by name, but either as 'the court' or 'your honour'. As Goodrich puts it,

> It is not a human being, in other words, that sits when the court returns to their seats but rather justice (jus) and law (lex) that take their place at the pinnacle of a strictly ordered hierarchical space, surrounded by a veritable debauch of symbols of majesty and order.[142]

People are called by the court to speak and do not do so out of turn, on pain of the considerable powers of sanction that the court can marshall.

To sum up, the court-room seems to incorporate the principles of division through symbol, ritual, and the ordering of speaking, listening and seeing positions. Symbol and ritual establish the translation of the symbolic capital of the legal sphere into the ordered space of the court-room. They also secure the authority of court-room discourse by connecting it to the authority of the state and to the past. As Bakhtin describes, we confront the authoritative word

---

[142] Goodrich, *op.cit.*, p. 191.

> with its authority already fused to it. The authoritative word is located in a distanced zone, organically connected with a past that is felt to be hierarchically higher.[143]

Symbolism and ritual make the organic connection with the past, linking speech and speakers in the present, to a de-historicized, long-time past, a time immemorial, by couching them in traditions, whose own origins are ill-defined and naturalized. Also, symbols, ritual, and the ordering of the positions of visibility and audibility constitute the roles of participants in the trial. As such they can be seen as *modes of subjectification*, which in effect suspend the 'habitual differences of rank between men (sic), so as to substitute others.'[144]

2

So far, drawing upon Bourdieu, I have suggested how the respective authority of speakers in the court-room is established externally in a distinct legal social space, and in the principles by which the legal agents distinguish themselves from non-legal. I have further discussed how these principles of division are incorporated into the ordering of legal space, and how the ordering effects the translation of legal symbolic capital into the respective roles in the court-room. The second aspect of the practiced nature of division concerns the substantive effects that the pre-establishment of authority and the court's modes of subjectification have on the nature of speech in the trial. It involves a discussion of the *enunciative modalities* - the forms of speech and the character of their

---

[143] Cited in Goodrich, *op.cit.*, p. 192.

[144] Goodrich, *op.cit.*, p. 192, In actuality, the replacing of the 'habitual differences of rank amongst men' in the court-room tends to represent a reinforcement of the habitual differences in that judges and lawyers are disproportionately White, male and wealthy. In fact, the respective subjectification of First Nations speakers and White speakers at the trial resonates in many ways with colonial power relations. I take the term *mode of subjectification* from op.cit., Fraser. I refers to the way discourses constitute and address specific sorts of subjects with certain abilities and capacities. For example legal subjects; objects of investigation as "deviant" or "normal"; self-interested individuals or representatives of groups.

reception - of the court-room, and the division of access to these modalities.[145] Here, I think the substantive effect of the principles of division is apparent in that forms of speech and reception are tied to roles and speaking positions in the court. Division, I suggest, is practiced through the strategic use and constraint of speech acts.

I spoke of a ritual ordering of court speech above, how people are called to speak by the court and do not do so out of turn. I want to begin here by elaborating on the specific order of proceedings followed by an adversarial court trial. The assignment of the speech within this order to the pre-established roles is evident. The members of counsel for the plaintiffs makes opening statements in which they can present both general and legal argument, counsel for the defendants make a similar statement of defence. Argument is then elaborated upon as witnesses are questioned by counsel during what is called 'Evidence in Direct'. Counsel for the defence can 'Cross-examine' witnesses. Counsel for the plaintiffs undertake the final questioning of a witness in 'Re-direct'. Examination of the witness is frequently interrupted by 'Discussion', 'Submission' and 'Procedure', during which, submissions are made or discussions proceed on matters of argument, legal precedents and procedure. These are decided upon by the judge. Once the plaintiffs have called all their witnesses, defence goes through the same procedure. Legal argument concludes the actual court session and the judge's decision is the final word of the trial (before appeal and the institution of further trials.)

---

[145] I think Foucault's notion of *enunciative modality* encapsulates the concern for voice or speech, and a concern for the site of speech, which I am trying to repeat here. It concerns firstly, what a speaker can and should say, according to the nature of annunciation, be it speech, sermon, lecture, testimony; and secondly, it delimits the context and conditions for annuniciation and the reception of annunciation, for instance theatre, lecture hall, or court-room. Spaces like courtrooms, lecture halls and so on are, designed to emphasize the properties of roles, of the master of ceremonies, the judge, lawyers, witnesses, the warden, the patient and, to facilitate the strategic regulation of the authority and competency of the subjects that occupy these roles.

What is interesting about the speech of the trial is that it seems to take a limited number of forms, each in keeping with an accepted and ritualized order, and each having distinct patterns of reception. The categories in the order of proceeding can therefore themselves be categorized in terms of their nature and the conditions of their reception as differing forms of enunciative modalities. Focusing on just the opening statement, Gyolugyat's testimony, I am refraining from considering all forms of speech at the trial. By neglecting, for the moment, testimony of Expert witnesses and the legal argumentation that constituted the last 54 days in court, there are doubtless forms that I have missed. My purpose here is not to provide an exhaustive account of every form of court speech and its characteristics. Rather it is to emphasize the uneven form of communication that goes on in courts, and to underscore how the establishment of truth and the authority to pronounce the truth resides in the practices and strategies of the court. There are four forms of speech and reception that I want to discuss here; statements before the court, the questioning of and answering by witnesses (into which falls evidence in direct, cross-examination and re-direct), discussion (which includes submissions and procedures), and decisions.

Statements before the court, are typically the preserve of lawyers. The opening statement made by the members of counsel for the plaintiffs, Mr. Rush and Mr. Grant, on the second day of trial, took the form of a long interrupted monologue. It was not by any means an ad hoc statement. Indeed it was read from what was clearly a carefully written and elaborately thought out document. In the opening statement, complex arguments were presented about the nature and history of the Gitksan and Wet'suwet'en societies, and about the history of legal arrangements regarding the exchange of land and resources between Native

peoples and British, American and Canadian governments. It contained extensive citations from historical, academic and legal sources.

To the extent that actual speech acts can be categorized, statements such as this can be characterized in terms of Habermas' limit cases of communicative action as *strategic*, and *conversational*; because in the former, the speaker is trying to influence the judge to take a specific course of action as in 'we will be arguing that this court should not endorse a frozen concept of aboriginal rights.';[146] because in the latter it is argumentation, which is *constative* in the sense that it is representing a state of affairs as true - the nature of Gitksan and Wet'suwet'en society among others - to make that argumentation.[147] In terms of conditions of reception, this form of speech is uninterrupted monologue. It also occurs early on in the order of speech acts before the court. Nevertheless, as argument by counsel, it must be supported by other forms of argumentation, and its claims to truth can be challenged, (indeed have to be), through similar statements by opposing members of counsel.

The rounds of evidence in direct, cross-questioning and re-direct represent one of the chief modes by which argumentation is supported and truth claims challenged in the court-room. It involves questioning by counsel and answering by the witness. In a similar way to statements before the court, the questioner is in the position to organize ideas, evidence and argument. Taking Gyolugyat's

---

[146] Transcripts, volume 2, p. 97.

[147] Habermas, J. *The Theory of Communicative Action* Vol.1, Trans. by Thomas McCarthy, London, Heinemann, 1984. Habermas develops these classifications through an assessment of the work of a number of linguists including Searle and Austin. See pp. 319-328, *On the Classification of Speech Acts*. Habermas is clear that these classifications cannot be used for everyday speech unless there is the successful development of taxonomies for the whole spectrum of illocutionary acts. By using it in the case of court-room speech, I am not trying to suggest that any particular speech act will fit exclusively into the categories that I utilize. I am merely implying that a particular characteristic of court-room speech is that it can be divided into distinct forms according to order and the role of the speaker. I think Habermas' classifications are a useful tool for doing this.

testimony as an example, within the regime of ritually ordered court speech, she could speak only when spoken to. Under questioning from counsel for the plaintiffs, evidence describing the Gitksan system, gradually emerged in the form of counsel's argument, rather than in Gyolugyat's explanations. This is exemplified in the following dialogue, where counsel establishes that Gitksan society is matrilineal. Mr Grant is questioning:

Q	Does your daughter, Fedelia, have any children?
A	Yes. She has two boys and three girls.
Q	Do any -- and what House are the children of your three daughters in?
A	They're in the House of Gyolugyat today.
Q	Does your son, Ben Mckenzie, have any children?
A	Yes, he has.
Q	What are they, boys or girls?
A	Two boys and four girls.
Q	And are they in the House of Gyolugyat?
A	No, they're not.
Q	Which House are they in?
A	They're in Wii Gaax House.
Mr Grant:	That's W-i-i, first word. Second word, G-a-a-x. Why are they in Wii Gaax House and not Gyolugyat.
The Court:	You're talking about the two boys and four girls of Ben Mckenzie's?
Mr Grant:	
Q	Yes. Your son's children?
A	In Gitksan law our children go to the mother's side, not the father, so four of my son's children are in a different House.
Q	And that is also why your daughter's children, of course, are in your House?
A	Yes.
Q	Is this what we would call matrilineal, that is the descent comes from the mother's side?
A	Yes. That's the word, matrilineal.[148]

In Habermasian terms, the lawyer's speech is still *strategic* and *conversational* and can be characterized as argumentation. On the other hand, Gyolugyat's speech is just *conversational* and in a very restricted sense: in the above example it is constrained to acts of either verifying or denying counsel's truth claims and limited *constative* or representational acts, (demonstrated above in the description of

---

[148] Transcripts, volume 2, pp. 175-176.

Gitksan law). As a witness, Gyolugyat has little power as a speaker and little opportunity to organize ideas and argument. Her answers are directed by the questioner to make specific points or contribute to broader arguments, over which the witness has little control. In terms of the conditions of reception, the witness' speech is objectified by the court, made the object of scrutiny; it is not argument, but evidence before the court. To obtain that evidence, the witness can be directed, led, and manipulated as part of the power of questioners to organize argument, ideas and evidence.

To the extent that counsel's speech during questioning is dialogic the conditions of its reception differ from statements. Not only is it subject to refutation during cross-examination by the opposing counsel but both the opposing counsel and the court can intervene during questioning and answering. Most often this is to contest the admissibility of evidence or the adequacy of proof or to introduce points of procedure for discussion.

Interventions can be described as *regulative* speech acts in that they refer to something in a common social world - in this case rules of evidence or procedures for determining proof in the legal social world - in order to establish or contest the legitimacy of a statement or act in court.[149] Interventions are a means, apart from ritual ordering, by which speech in the court is regulated. In the following exchange, it is apparent how intervention is used to constrain the speech of the witness.

A I think I have tried to illustrate what all goes into Adaawk and what it means to the Gitksan people. The Adaawk is the most important. Today, these Adaawks will go because our young people have educated themselves to write these and we have our language, our own alphabets that they can put it down on paper now. So that

[149] My use of the word intervention should not be mistaken with the legal sense of an intervener in court - an external party who intervenes in a case.

these Adaawk's as long as it's on paper, black and white, it will never diminish at all. It will still be there, like it has been before. It goes around like a windmill, it goes around and that's how our Adaawks are. It goes from one generation to another and no one changes it. In the Adaawk, no one changes it. Like the law of the country we live on today, it's called Canada our Province is B.C., laws are made --

The Court: Mrs. McKenzie, we are getting beyond the realm of evidence.
A I am trying to put this --
Mr Grant: I think --
The Court: This is not evidence, Mr. Grant.
Mr Grant: She is trying to -- let her explain what Adaawk is..[150]

In this curtailment of Gyolugyat's speech, it is clear that the principles of division between lawyers and lay-people that structure the rules and language of law, are applied as practised constraint in the court. It is also evident that the speaker must appeal to an externally established authority inhering in her/his role in the proceedings, to intervene in this way. The latter constitutes one of the conditions of its reception. It is presumably also open to discussion as to whether or not the intervention is a correct application of the rules it is appealing to.

Discussion is the preserve of counsel and the court. The witness is excluded from participating both by the ritualized roles of court speech, but also, depending on how versed they are in legal jargon, from a lack of understanding. For, discussion typically takes place in a legal idiom, often with regard to the admissibility or nature of evidence, and usually draws upon both a legal vocabulary, and procedures of assessment that would require participants to have prior training or knowledge.[151]

---

[150] Transcripts, volume 4, p. 236.

[151] Though it is difficult to test, empirical research indicates that the language of statute, precedent, jury instructions and argument on points of law is inaccessible even to those non-lawyers who have obtained several years experience in higher education. For examples of the results of such research see Goodrich, *op.cit.*, p. 203.

Speech in discussion is dialogic. But, the forms of speech acts in discussion differ according to the pre-established roles of lawyers and judge. Both lawyer's and judge's speech can be characterized as *conversational*: both present argument; both are *constative* to the extent that are making truth claims. But, only the lawyers speech acts can be characterized as *strategic* in that they are trying to persuade the judge, who, by virtue of prior gained prerogative, reinforced through the ritualized ordering of court space and speech, is vested with the authority to decide on the matter being discussed, to decide a certain way. In terms of the conditions of reception, the truth claims of any statement made in discussion are thus subject to contestation both by the opposing counsel and the judge, and ultimately a decision on this truth claim by the judge.

Decisions can thus also be characterized, as *regulative* and *conversational* acts in that they make truth claims in the legal social idiom and support these with argument. The long and complex arguments in the decision for **Delgamuukw** took Chief Justice McEachern over eight months to prepare. It represents an extended form of the rulings made on questions of proof and admissibility throughout a trial. The conditions of reception distinguish a judge's ruling or decision from the other speech acts in a trial. Not only is it a monologic speech act, within the bounds of one trial, it is not open to contestation. Its legitimacy is not something to be debated in court, but is established externally through the social authorization of a judge's competency to act on behalf of the collectivity - society.[152] As I have described, this legitimacy is secured both in the legal social field, the broader field of power, and through ritual, symbol and order, in the court-room.

---

[152] Bourdieu, *op.cit.*, p. 838.

Finally, I would suggest that all these enunciative modalities, involve a practice of encoding or re-inscription, which is in itself a speech act. Statements by lawyers, argument based on evidence in direct or cross-questioning, intervention and discussion do not just take place in a different language and with a different attitude, they require a constant translating or abstracting from, for example, the vernacular of the witnesses' answers into questions that can be determined on legal principles. In this way, re-inscription can be seen as one of the dominant procedures in the operation of the court. In one form it is constantly undertaken by counsel as they abstract 'evidence' from the speech of the witness according to the demands of the argument they are making. Re-inscription also constitutes the flip-side of the constraining of witness' speech that intervention involves. When Chief Justice McEachern declares that what the witness is saying is not 'evidence,' he is re-inscribing Gyolugyat's words in a legal idiom. Similarly, the initiation of discussion, whether through intervention or submission is a speech act that transposes the discourse between the witness and lawyer into symbolic expressions that conform to the application of legal principles. It is therefore the act which excludes the witness from participation in discussion as much as the existence of a distinct linguistic attitude. Considering this process of re-inscription, I think it is possible to infer that the various speech acts by lawyers and judges in the court can be attributed with a further characteristic in Habermasian terms, as being *operative* speech acts. In other words, they involve procedures of inferring, identifying, classifying and the like 'that signify the application of generative rules...'[153] As the practices by which lay-person's discourse is encoded in the symbolic expressions of the legal social field, I would suggest that *operative* speech

---

[153] Habermas, *op.cit.*, p. 326.

acts should be seen as another aspect of the practised nature of division in the court.

To sum up this section, the practices by which a court produces truth should I hope be becoming clearer. Part of this system are the means of symbol, ritual and spatial and discursive ordering by which the court translates the legal symbolic capital of members of the legal field, and incorporates the principles of division into the roles and relative authority of speech and speakers. But the court-room is also a site of a particular set of enunciative modalities joined in a ritualized discursive exchange. It is in this exchange that the translation of authority and the constitution of roles has a substantive effect. Within the carefully ordered chain of speech acts that compose a trial, access to the respective enunciative modalities is constrained according to these roles. So for example, lawyers can make *strategic*, *conversational*, and *operative* speech acts - persuading the judge, arguing and representing, encoding in legal terms - while the witness is restricted to limited *conversational* acts - confirming or denying and sometimes representing. And, whereas the lawyers and witnesses speech acts can be contested, only the judge can make speech acts not subject to verification in the court. Furthermore, it is evident that the restriction of speech acts to roles inheres not just in the linking of the ritual ordering of speech to those roles but involves the practices of intervention and re-inscription. These are both performative speech acts; the former can be used by those sanctioned to do so, to constrain speech to that 'proper' to another speaker's role; the latter occurs to a certain extent in all professional speech during a trial and constrains non-legal speakers in another way by abstracting discourse into legal language. In this way, by looking at practices in a trial it is possible to extend Bourdieu's analysis of the juridical field, because it is evident that the principles of division not only

constitute a different attitude or world view but that division is practiced and depends upon the manipulation of power relations in concrete discursive instances.

Conclusion:

I think several important and suggestive conclusions arise from considering the institutional materiality - the sociology and spatiality - of the legal sphere.

Firstly, from Bourdieu's analysis of the sociology of juridical field it is evident that the operations of law are grounded in division. The authority and power of the law relies upon the monopolization of the means of legal interpretation within the juridical field. This monopolization is enacted through the adoption of a special attitude to language and method, and by the installment of a series of principles by which the legal specialists divide themselves from lay persons. Division also inheres in the structure of the legal sphere because of the division of juridical labour, and through other processes of differentiation that relates to the affiliation of members of the legal sphere with groups active in the social and political fields. Bourdieu's situating of the legal dynamic in the competition between the legal factions produced by these processes of division, suggests that interpretation or prediction of change in the law should focus on the emergence of, and variations of power between, these groups.

Secondly, the spatialities - the architecture, spatial order, and locations - of the juridical field are structured on the one hand by the divisions which define and distinguish the juridical field, and on the other by a colonial spatial order. The routine movements and functionings of the legal process operate in accordance with hierarchical spatial ordering that orientates the Gitksan and Wet'suwet'en territories as peripheries to a Lower Mainland core. The scale of architecture reflects this hierarchical spatial ordering. Equally, the design and locations of law

courts distinguish legal space from everyday space thus encoding the *principles of division*, that structure the legal system. Within courtrooms themselves, the ritualized ordering of space and speech, the clothing and the symbols translate the 'symbolic' capital earned by different members of the juridical field into authority in the courtroom. Positioning, clothing and symbol constitute the roles of the court process according to the externally established criteria of membership in the legal social field, and to the authority of the respective participants within that field. Access to speech acts is ascribed according to these roles and regulated through the ritual ordering of speech, and by speech acts - interventions - available to legal specialists. In this way, it is clear that division inheres equally in the spatiality of the legal sphere as well as the sociology, and also that division is practiced.

To conclude, the law can be characterized in Foucault's terminology as a discursive regime. As part of that regime, the court operates upon forms of social constraint which Foucault identifies with discursive regimes. In the manner I have described above, court constraints operate to valorize certain statements and to devalue others; institutionally license some persons as qualified to offer authoritative knowledge claims and concomitantly exclude others; and to provide procedures for the extraction of information from and about persons sometimes through coercive means.[154] Because of this operation of social constraint, in Foucault's terms, as with all discursive regimes, 'power' circulates through the production of legal discourse. In the following chapter I extend this analysis to assess the implications of the court-room as a site of discourse where First Nations issues are debated. It is evident here that the nature of the court as a discursive arena tends to exclude and devalue First Nations discourse.

---

[154] Fraser, Unruly Practices, *op.cit.*, p. 20.

CHAPTER 4

'GOING NATIVE': THE REGULATION OF DISCURSIVE INTERACTION IN DELGAMUUKW

> *[B]ut look a bit more closely at the meaning of the spatial arrangement of the court. The very least that can be said is that this implies an ideology.*
>
> *What is this arrangement? A table, and behind this table, which distances them from the two litigants, the 'third party', that is, the judges. Their position indicates firstly that they are neutral with respect to each litigant, and secondly this implies that their decision ... will be made after an aural investigation of the two parties, on the basis of a certain conception of truth and a certain number of ideas concerning what is just and unjust, and thirdly that they have the authority to enforce their decision.*
>
> (Michel Foucault)[155]

Q:	*It is commonly described in the literature as a problem which can flow from participant observation?*
A:	*Some people consider it a problem and others consider it an advantage.*
Q:	*Yes. What it means is that you become so involved in the culture that you lose your objectivity, that's what's described as "going native?"*
A:	*Objectivity is relative.*
Q:	*Yes, it is isn't it.*
A:	*Yes. For either culture.*

(Trial Transcripts)[156]

In the last two chapters I have been considering what implications **Delgamuukw** holds for the continuing prominence of the legal sphere as a site where First Nations issues are debated. In the first, I suggested how legal principles and procedure can be formulated in terms based on white supremacist discourses, and applied according to particular ways of knowing that erase knowledges evident in the court record of certain First Nations statements. In the second, I extended my analysis from the power/knowledge in Chief Justice McEachern's decision to the power relations in the court; I suggested how the ritual, spatialized ordering of

---

[155] Foucault, Power/Knowledge, *op.cit.*, p. 8.

[156] This excerpt is from the cross-examination of Heather Harris, an adopted member of the Gitksan nation, tendered as an Expert on Gitksan kinship and social structure. I take this particular citation from Don Monet and Skanu'u, *op.cit.*, p. 116 . See volumes 174-178 of the trial transcripts. They do not list the exact reference.

speech in the court-room restrict the possible speech acts of participants in the court process. In this chapter, I attempt to combine these observations in a final assessment of the court-room as a site of discourse by and about First Nations people. I suggest how, though the trial involves multiple discourse publics, including predominantly First Nations ones, these publics are included unequally in the process, due to the nature of the court as a site of discourse.[157] In particular, the inherently mediated structure of the court-room restricts the terms of the debate, and promotes the exclusion and devalorization of First Nations speech.[158] I argue that this constraint operates through discourse, manifest in one form, above, as losing your objectivity, "going native". The implication is that, as a concrete form of the 'public sphere' in late twentieth century capitalist society, the court-room, in its present form, is highly problematic for determining outcomes of the First Nations decolonizing struggle, precisely because it tends to reinforce the more widespread subjugation of their knowledges and discourses.

The structure of this chapter is as follows. The beginning is a return to Nancy Fraser for the purpose of outlining some attributes of an ideal public

[157] I take the term discourse public from Nancy Fraser, Unruly Practices, *op.cit.*, p. 166. It refers to the differentiations in the arena in which matters are debated when they become public. Fraser distinguishes a range of discourse publics along a number of axes,

> by ideology (the readership of the *Nation* versus the readership of *Public Interest*), by stratification principles like gender (the viewers of "Cagney and Lacey" versus the viewers of "Monday Night Football") and class (the readership of the *New York Times* versus that of the *New York Post*), by profession (the membership of the American Economic Association versus that of the American Bar Association), by central mobilizing issue (the nuclear freeze movement versus the "pro-life" movement).

Some publics are large and authoritative. In contrast, others are small, self-enclosed and enclaved. Larger, authoritative publics are often able to lead hegemonic blocs, marshalling different publics to construct the 'common sense' of the day. Smaller, counter hegemonic publics often cannot politicize issues beyond their own boundaries and if they do, the struggle is far more labourious than for larger publics.

[158] By mediated structure I refer to the way the when a struggle is legalized, it becomes transformed into a contest between ostensibly disinterested parties over a particular set of legal questions; questions and disinterested parties thus stand in for or mediate between the original participants in the dispute.

sphere; her work suggests that it should involve the contestation of multiple discourse publics under conditions where the means of interpretation are explicitly thematized. I proceed to discuss how the legal sphere fails to meet the significant part of these criteria, to the disadvantage of First Nations people. First, though in the case of **Delgamuukw** the court-room incorporates multiple discourse publics, I suggest this is a by-product of the embedded nature of the modern legal complex within specialist, scientific institutions. Second, the mediated structure effaces and neutralizes the assumptions of the mediator thus removing her means of interpretation from considered debate. Third, non-legal discourse publics are incorporated into the legal process unequally, and under very specific terms. Drawing on examples from the trial transcripts, I suggest how the mediated structure of the courts demands that First Nations discourse be filtered through particular interpretive frameworks, and how, even filtered in this way, First Nations knowledge and discourse is systematically devalued. Once again, therefore, it is clear that power circulates through the court process authorizing in this case, a single mode of interpretation while excluding and undermining others.

Attributes of an Ideal Public Sphere:

Nancy Fraser's work which deals in various ways with the politics of discourse, provides useful pointers for a normative formulation of a democratic public sphere, one to meet the demands of late capitalist stratified societies.[159] In contrast to what she calls the *'bourgeois masculinist'* conception of a singular public sphere, Fraser's analyses suggest the advantage of arenas which pit multiple contestatory discourse publics against one another, and where the terms and assumptions that

---

[159] This section is based on Fraser's analysis of 'needs' discourse in Unruly Practices, *op.cit.*, and her critique of the Bourgeois public sphere in Rethinking the Public Sphere *op.cit.*

govern the discursive interaction between these discourses are not bracketed but elaborated. I wish to discuss briefly the reasons behind these suggestions.

Fraser advocates multiple and contestatory discourse publics because historically they have proven to be an effective means by which subordinated social groups have fought against their inequality within, and exclusion, from formal arenas of the public sphere. Historical accounts document the numerous ways in which groups accessed public political life, despite their exclusion from the official public sphere. For example, elite bourgeois women in pre-suffrage North America built a 'counter-civil' society of alternative women-only voluntary associations. Working class women participated in male-dominated working class protest. Other women protested on the street and in parades. Thus, in Fraser's assessment, there have always been competing publics and the view that, in this case, women were excluded from the public sphere 'rests on a class - and gender-biased notion of publicity.'[160]

In stratified societies, subordinated social groups - women, workers, peoples of colour, gays and lesbians - have frequently benefitted from forming alternative publics. Such publics have provided sites where members of subordinated groups could discuss their needs, objectives and strategies amongst themselves and away from the supervision of dominant groups. Equally, they have provided venues where subordinated groups could 'invent and circulate counter-discourses,' thus enabling them to 'formulate oppositional interpretations of their identities, interests, and needs.'[161] In this way, alternative publics have functioned as 'spaces of withdrawal and regroupment' on the one hand and as

---

[160] Fraser, Rethinking the Public Sphere, *op.cit.*, p. 61.

[161] Fraser, Rethinking the Public Sphere, *op.cit.*, p. 67.

bases for activity directed against wider publics on the other. Fraser finds an emancipatory potential in the dialectic between these two functions, because it enables groups to partly offset the participatory advantages enjoyed by dominant social groups in stratified societies. This conclusion suggests that to approach democratic political participation discursive arenas should promote the presence and interaction of multiple discourse publics.

A democratic, public arena should also promote the discursive scrutiny of the terms in which issues are discussed, and the means by which they are interpreted or communicated, because oppression and social inequality have historically been supported by restricting debate to the terms and interpretations of hegemonic groups. Fraser's work supports this discursive scrutiny in three ways. First, in her work on discourses of needs or rights, rather than take the interpretation of needs or rights for granted, Fraser highlights that interpretations are politically contested, and scrutinizes the fairness of the interpretation process. Here Fraser's work on needs demonstrates how the means of interpretation reinforce gender inequalities. For example, the explanation loops by which the needs of welfare recipients in the US are interpreted are informed by the notion of male breadwinner, female homemaker. The corollary is that female-heads of households have been treated as deviant and rewarded less. Second, her assessment of the bourgeois public sphere suggests that the assumptions associated with economic, cultural and gender differences of participants in discourse should be explicitly examined. For example, at the level of discursive interaction itself, the assumption that equal participation in the public sphere requires the bracketing of these differences has belied the fact that discursive protocols - style, manners, and accent - have historically functioned to marginalize women and the working class from equal participation in debate. Third, Fraser's account of the

experience of the women's movement indicates that terms which determine the matters for public debate should themselves be a matter for public debate. Based on certain assumptions, those who were able to participate in public discourse have prescribed terms which precluded debate on matters concerning women. For instance, the women's movement fought long and hard to redefine domestic violence as a matter of public debate; it had previously been excluded from widespread discussion by virtue of being labelled a 'private' concern. In this way, Fraser's work suggests that for the democratic participation of multiple discourse publics in a discursive arena the terms, and the assumptions, the processes of interpretation that shape the debate should themselves be admissible for deliberation.

To sum up, Nancy Fraser's work provides some pragmatic suggestions for the forms a public sphere might take to approach a measure of participatory democracy in stratified late twentieth century capitalist societies. Discursive arenas should promote the interaction of multiple discourse publics and encourage the explicit thematization of the terms of debate and the means by which issues are interpreted.

The Court-room as a Discursive Arena:

As a concrete example of debate dealing with issues around decolonization, discursive interaction during **Delgamuukw** diverges from the ideal attributes described above. The trial incorporates multiple discourse publics but their number and nature are limited and the roles they can play restricted. Looking at discourse during the trial it is evident that the nature and structure of the court process - the rigid regulation of speech and the mediated form - dictate the filtering of discourse through particular interpretive lenses. The structure of the

court process promotes discourses which denigrate or exclude alternative modes of interpretation.

1

To begin with, I want to justify an analysis that treats the court-room as a concrete site of the public sphere in late capitalist societies. To do so is certainly not obvious. Indeed, the definition of the bourgeois public sphere as a group of 'private' persons assembled to discuss matters of 'public concern' seems to rule out the possibility of treating courts in this way, precisely because the discussants in the legal sphere are professional. Furthermore, the idea of the bourgeois public sphere was founded upon it being separate from the state apparatus, and though in liberal ideology the role of the courts is often considered to be to protect the 'individual' from incursions by the state, the boundaries between the legal sphere and the state are by no means clear.[162] Nevertheless, notwithstanding these definitional reasons, I think it is both pragmatically and theoretically useful to treat the courts as an arena of the public sphere. First, it is important to acknowledge that in North American societies, the legal sphere is very much a site where 'matters of public concern' are discussed. This tendency at least in Canada is increasing and, as I have mentioned above, is particularly the case for matters that concern First Nations people. Second, in many concrete arenas of debate that are widely regarded as part of the public sphere, the discussants are constituted by a professionalized class of intermediaries who stand in for the 'private persons'. The media is a good example. Third, the boundary between the state and the public sphere is both theoretically difficult to uphold and too exclusive to be useful.

---

[162] The way the state displaces the victim as the injured party in criminal cases, or the way the courts are used by Parliament to determine limits to rights as in the Freedoms and Rights Charter are just two examples of the complex interlinking between the legal sphere and the state.

Fraser highlights this point when she considers the emergence of parliamentary sovereignty. As a locus of public deliberation, sovereign parliaments function as public spheres within the state. Fraser calls them *strong publics* because the deliberation in sovereign parliaments culminates in legally binding decisions.[163] The boundary between state and public sphere drawn by bourgeois conceptions demands a focus on *weak publics*, which are exclusively opinion-forming. As the venue of debate and decision-making on matters of 'public' concern it seems appropriate to consider the courts as a particular manifestation of a strong public.

2

Now, I want to look at the conditions under which multiple discourse publics are incorporated into the court-room-as-strong-public during the **Delgamuukw** trial.

I think it is possible to show that in this trial the court-room became an arena of discursive exchange between multiple discourse publics. The most obvious evidence for this is the explicit labelling or self-identification of certain groups in statements before the court, according to the content of, or the means of, their interpretations. For example, in their opening statement, counsel for the plaintiffs identify Gitksan and Wet'suwet'en speakers as part of a specific *interpretive community*. They do this first by distinguishing their 'world view' from the Western one of judges and lawyers:

> There is a natural tendency, to which lawyers and judges are not exempt, to look at Indian societies using a model of the world that derives from Western concepts. ... The challenge for this court in listening to the Indian evidence is to understand the framework within which it is given and the nature of the world view from which it emanates.[164]

---

[163] Fraser, Rethinking the Public Sphere, *op.cit.*, p. 75.

[164] Transcripts, volume 2, p. 78.

Also, the legal speakers constantly identify a broader legal discourse public from the others present in the court-room or vice versa. For instance, Expert witnesses are often called to contrast their modes of interpretation with legal ones:

> Q Okay. Now, as an anthropologist when you reviewed those transcripts, how did you -- what was the difference between you reviewing those transcripts and myself or his lordship reviewing those transcripts?
>
> A Well, I would be looking for something probably different. I don't know the law at all. So you would be looking at them from that perspective and I would be looking at them from the perspective of what they say about the social life and the social structure and the values of the people and how this has been presented over a period of time and change. And this sort of thing is used a lot in the anthropological reproduction of the past and I am sure these documents will be of interest to scholars in the future.[165]

So at least three discourse publics distinguish themselves or are distinguished here, namely the Gitksan and Wet'suwet'en communities, the community of lawyers and judges, and the various communities of Expert witnesses. If we consider that the last group included besides anthropologists, historians, historical geographers, linguists, a paleobotanist, a geomorphologist, a forest ecologist, and an ethno-archaelogist, I think it is safe to assume that the trial incorporates multiple self-identified discourse publics.

Without going too far, at this stage, I would suggest that at least some of these self-identified discourse publics do correspond with particular interpretive and communicative frameworks. I have described above that at least in the legal sphere, the self-identification (*principles of division* and distinction) do demarcate a specific linguistic and interpretive community. In addition I have suggested that there are differences between a judge's interpretive framework for describing the territories and a Gitksan description recorded in the transcripts. Extrapolating

---

[165] Transcripts, volume 184, p. 11878. Mr. Grant of counsel for the plaintiffs is here questioning Richard Daly tendered as an Expert in anthropology.

from these it doesn't seem too far-fetched to allow that some of the self-identified discourse publics do indeed represent different interpretive communities, which draw upon particular discursive and representational resources.

Nevertheless, it is also evident that, as a discursive arena, the court-room does not, in and of itself, promote the presence of multiple discourse publics. First of all, the range of these publics is clearly limited to that of the plaintiffs, the legal representatives, and those called as Experts. Second, I would suggest that the variety of Expert publics are included less because the legal sphere demands an expansive forum for debate, than as a by-product of the way the justice system increasingly functions and justifies itself by what Foucault calls 'an unceasing reinscription in non-juridical systems.'[166] Indeed, the inclusion of academic discourse publics such as anthropology, history and geography in **Delgamuukw** represents an extension of non-juridical systems into which legal justification is typically reinscripted.[167] As such this inclusion is strongly contested during

---

[166] Foucault is referring here to the way in which, since the eighteenth century, the practice of the power to punish has become bound up with a corpus of knowledge, techniques, and 'scientific' discourses forming what he calls the 'scientifico-legal complex'. Criminal trials thus tend to represent a specific alliance between legal institutions and knowledge and those sciences of the mind or deviancy, criminology, psychology, sociology and so on. Foucault, Discipline and Punish, *op.cit.*, pp. 22-23. Foucault's aim was in fact to write the genealogy of this scientifico-legal complex.

[167] As such, **Delgamuukw** is representative of a series of civil and criminal trials, which also take place within a scientifico-legal complex but whose object is not always/or only, the criminal mind. Classed variously as civil rights disputes, 'cultural conflict', and increasingly, 'land claims', these trials configure the scientifico-legal complex in different ways and constitute different objects for that complex. By introducing sociologists, social-psychologists and anthropologists in the court-room, these trials enact a significant shift in the scientifico-juridico alliance. See Rosen, Lawrence, The Anthropologist as Expert Witness, *American Anthropologist*, 79, 1977, pp. 555-578. Rosen reviews some of the many different cases in which this has occurred, in an article providing guidelines for anthropologists as expert witnesses. One of the earliest and most notable was 1954 **Brown v. Board of Education** decision, the landmark civil rights decision that desegregated American schools. There, the NAACP relied extensively on social scientists to establish that there was no difference between the intellectual capacity of African Americans and those of European ethnicities. Others include the use of anthropologists in determining the impact of forcing Amish children to attend school past grade eight on the Amish community: 1972, **Wisconsin v. Yoder**; and a host of tribal status and land claims cases.

trial. For example, counsel for Canada, Ms. Koenigsberg disputes the admissibility of anthropological analysis saying:

> ... And we have it not only in Mr. Daly's conclusions on ... [his] interviews, but we have it by his telling us what witnesses meant when they gave evidence in this court-room. And it is exactly couched in those terms, I believe Alfred Joseph meant this when he said da-da, da-da, in this court-room. It simply highlights the difficulty of the translation of the discipline of anthropology, which has its own merit and its own place into expert evidence to be considered to determine legal issues in this court-room.[168]

That the court-room in **Delgamuukw** is an arena for multiple discourse publics thus relies to a considerable extent on expanding the traditional category of Expert, and this is clearly under sufferance that the opinion of these Experts can be shown to be relevant to legal issues.

It is also clear that the well-established structure of deliberation in the court-room as a mediated adversarial dispute, incorporates multiple discourse publics unequally and under rigidly controlled conditions. Discourse in the court-room is mediated at several different levels. First of all, the legalization of a dispute involves a removal from the immediate struggle and interested parties. Once legalized, the dispute is to be decided upon the basis of rationalized debate between disinterested parties. So it is mediated in the sense that these disinterested parties stand in as intermediaries between the disputants themselves. The dispute between disinterested parties is then itself mediated by a third disinterested party, the judge, who assumes the position of neutrality in the spatial arrangement of the court-room, 'behind the table.' Finally, Expert witnesses are called to mediate (though only to the extent that they can offer opinion) on questions which require specialized knowledge or skills. This mediated structure dictates the terms under which discourse publics are incorporated into

---

[168] Transcripts, volume 184, p. 11819.

the court-room. I have described above how access to certain speech acts is constrained according to the speaking roles of lay-witness, Expert witness, lawyer or judge. It follows that discourse publics are incorporated unequally into the deliberation process according to which one of these roles their representatives are ascribed.

In summation, during the **Delgamuukw** trial the court-room included multiple discourse publics but this seems to be by virtue of extending the range of specialist publics that can be included in the category Expert. As such, the court prescribes a very specific and limited role for these publics. Under such conditions it seems impossible or at least very difficult for the presence of multiple discourse publics to offset the participatory privileges enjoyed by members of the legal sphere.

3

Now I would like to suggest how the mediated structure restricts the questions that can be discussed in the court-room. My intention is to highlight: first, how the legalization of a dispute limits it to what is deemed to be justiciable - any question that approaches these limits as they are formulated by the mediator/judge can be excluded precisely for not being justiciable; and second, how, by taking up the position of neutrality, the assumptions and interpretive framework of the mediator are also excluded from debate.

The mediation of disputes to the legal sphere restricts the likely set of questions to be deliberated according to the current limits on what is or is not justiciable - ie. what can properly be defined as a legal question. The way the mediation of disputes to the legal sphere limits what can be discussed becomes particularly obvious and ironic during the recent legalization of the decolonizing

struggles. **Delgamuukw** epitomizes this irony because the chief legal argument upon which the Gitksan and Wet'suwet'en claims to ownership and jurisdiction of their territory rests depends on the past recognition of their title to the land by the colonialists who promoted its settlement by white people.[169] In the court-room, the Gitksan and Wet'suwet'en struggle to regain their land is limited by the main justiciable issue - whether or not the principle of consensual extinguishment of First Nations title enshrined in the Royal Proclamation of 1763 applied to British Columbia. Without this precedent for recognizing title, the injustice in dispossessing the First Nations of their land, on the basis of racist and white supremacist assumptions, and arguably genocidal intentions could not easily be made a justiciable issue. The question of title in effect defines the current limits for viable legal argument in favour of the First Nations struggle for their land in B.C.

Yet, what can and cannot be defined as a legal question changes historically and is a matter of political struggle. This is true of the limits to legal debate of the struggle of First Nations for their land. Until the 1963 **White and Bob** case when Justice Norris accepted Tom Berger's argument that title remained un-extinguished in B.C., the only viable legal question had been effectively limited to the size of reserves. The McKenna-McBride Commission represents the most blatant example of this limiting in B.C. In September of 1912, B.C. Premier Richard McBride signed an agreement with J.A.J. McKenna, recently appointed Special Commissioner of Indian Affairs, which laid out a procedure to provide 'a final adjustment of all matters relating to Indian Affairs in

[169] There were two variations of this argument in **Delgamuukw**. Counsel for the defence took the position that First Nation title has at one time been recognized in the Royal Proclamation of 1763, but that this did not apply to British Columbia. Counsel for the plaintiffs argued that recognition to title inhered in the common law as evidenced by the practices and treating making of the early colonists, and later the Canadian and American Governments.

the Province.' This agreement only dealt with the "reserve question" (ie. reserve size) and, as a result, First Nations bands like the Nisga'a, who had long been demanding recognition for title, protested fiercely.[170] Subsequently, to prevent the continued attempts to press for title by the First Nations in B.C. the question of aboriginal title was effectively excluded from consideration as a legal issue by the 1927 federal ban on all land claims related activity by First Nations. This part of the Indian Act was not rescinded until 1951. So, the limits to legal argument relating to the First Nations territorial struggle have changed historically, and are clearly contested.

The notion that there are limits to what can and cannot be prosecuted as a legal question denies the contested nature of these limits and enables boundaries of the legal to be drawn according to the sensibilities of the judge. This is not to say that a case could not be brought which defies these limits. Indeed, by asking for ownership and jurisdiction the plaintiffs in **Delgamuukw** are very close if not beyond those limits. It is just that to do so is to risk dismissal precisely for exceeding the bounds of the legal, and this is in effect what Chief Justice McEachern does to this part of the plaintiffs' claim. I quote:

> I fully understand the plaintiffs' wishful belief that their distinctive history entitles them to demand some form of constitutional independence from British Columbia. But neither this nor any Court has the jurisdiction to undo the establishment of the Colony, Confederation, or the constitutional arrangements which are now in place. Separate sovereignty or legislative authority, as a matter of law, is beyond the authority of any court to award.[171]

The concept of a definitively legal or justiciable issue thus promotes the possibility for de-legalizing issues arbitrarily, while tending to remove the issue of limits to what is legal from the list of what is at stake during deliberation in the court.

---

[170] Tennant, *op.cit.*, p. 88.

[171] McEachern, *op.cit.*, p. 225.

The sensibilities, interests, and assumptions of the judge are also precluded from debate because of the mediated structure of the court as a discursive arena. The positioning of the judge as neutral arbiter presiding over the adversarial contest that constitutes the trial obviously assumes that the judge's notions and understandings are not an issue in the deliberation of a trial. The interpretive frameworks that inform judges, interests relating to their socioeconomic position and status are all bracketed when they become the mediator in a trial. Yet I have suggested that a judge's sensibilities determine the limits of what is legal; I have also suggested how, in the case of **Delgamuukw**, the assumptions and interpretive frameworks of Chief Justice McEachern condition the way he sees evidence and affect his decision. The position of neutral arbiter effectively naturalizes these frameworks and assumptions. This does not mean that the effect of, say, racist assumptions on the judge's decisions cannot be raised in the court. Counsel for the plaintiffs introduce this matter with respect to judgements of the Court of Appeal in the **Calder** case in which the Nishga'a were labelled as 'a very primitive people'.[172] But the matter is raised only indirectly. By virtue of a supposed neutrality, the assumptions and interpretive schemas of the judge who presides over a trial are not one of the issues at stake in the court's deliberation.

To sum up, contrary to Fraser's concept of an ideal public sphere the court-room does not encourage the explicit thematization of the terms of debate and the means by which issues are interpreted. The conditions governing the mediated structure of the court tend to exclude both the contested issue of what should constitute a justiciable question, and the judge's modes of interpretation from direct deliberation.

---

[172] Gisday Wa and Delgam Uukw, *op.cit.*, p. 21.

4

Now I want to discuss the interaction between the multiple discourse publics during **Delgamuukw**. The analytical benefits brought by treating the court-room in terms of Fraser's ideal public sphere are I think evident here. Applying Fraser's model to the court-room modifies Habermas' faith that the legal system presents 'enduring possibilities of hypothetically examining ... the rightness of actions and norms'.[173] By focusing on the interaction of discourse publics, Fraser's model highlights two features of the legal process in the court-room. First, that it necessarily involves the 'world disclosing' aspects of language as well as the 'action coordinating ones'. The discursive interaction in the court-room during **Delgamuukw** is characterized by a translating and filtering through particular interpretive frameworks - the violence of a 'world view' in one language disclosed through the words of another. Second, power circulates through the process of legal deliberation - discursive interaction during the trial is also characterized by the systematic devalorization of any interpretations (including Expert ones) that draw upon First Nations statements about their society and their territory.[174] Together these indicate how difficult it is for First Nations people to speak in their own voice in the court-room even when those voices speak in a language the court-room recognizes. The upshot is that the mediated structure of the court-room promotes the subjugation or devalorization of First Nations knowledge and discourse.

---

[173] From Thomas McCarthy, translator's introduction to Habermas, Theory of Communicative Action vol one, *op.cit.*, p. xi.

[174] I take the terms 'world disclosing' and 'action coordinating' from Stephen White. White, Stephen, K. *Political Theory and Postmodernism*, Cambridge: Cambridge University Press, 1991. In this book, White is trying to forge a theoretical pathway through the 'postmodern problematic', he identifies as the polarization of theorists around these two characteristics of language - Habermas and his followers on the side of 'action coordinating' and the post-structuralists on the side of 'world disclosing'. White considers that both aspects are important and should be kept in tension. I think Fraser's work does just that.

Both Fraser and Counsel for the Plaintiffs provide reasons why it should be important for First Nations people to be able to speak in their own voices. Fraser argues that self-expression is required if identities, interpretive frameworks and the like are to be made explicit, as demanded by her conditions for an ideal discursive arena. For Fraser, participation in a discursive arena must

> [mean] being able to speak "in one's own voice," thereby simultaneously constructing and expressing one's cultural identity through idiom and style.[175]

Counsel for the plaintiffs also regard it as important for the Gitksan and Wet'suwet'en to be able to express themselves in their own terms. In the opening statement they stress that:

> Never before has a Canadian court been given the opportunity to hear Indian witnesses describe *within their own structure* the history and the nature of their societies.[176]

In Counsel for the plaintiffs' reasoning, it is vital for historical events in B.C. to be explained in 'terms of the authentic Indian voice, and the Indian understanding of these events within their cultural framework,' to appreciate that the Gitksan and Wet'suwet'en have continued to remain distinct while adapting to changes brought by settler society.[177] In a sense what they are saying is that to assess the rightness of actions - in this case the dispossession of First Nations land in B.C. -

---

[175] Fraser, Rethinking the public sphere, *op.cit.*, p. 69 Fraser provides other important reasons as well. Based on feminist research which shows how women's voices are less often heard and more likely to be ignored in debate or discussion with men, Fraser describes how deliberation can serve as a mask for domination - groups are included into a generalized 'we' without their express agreement, or heard to say 'yes' when in fact they have said 'no.' To avoid such uses of deliberation it is vital for subordinate groups to be able express themselves in their own voices.

[176] Delgam Uukw, Gisday Wa, *op.cit.*, p. 36.

[177] Delgam Uukw, Gisday Wa, *op.cit.*, p. 51.

the court must hear the Gitksan and Wet'suwet'en side of the story.[178] So there are important theoretical and practical reasons why First Nations people should be able to speak in their own voices during **Delgamuukw**.

Now, I think it is possible to argue that there is both a strong and a weak sense to 'speaking in one's own voice.' The strong sense is definitely demanded by Fraser's theoretical consideration: for the speaker to be able to find voice in her own idiom and style rules out translation or interpretation. The weak sense would allow for a speaker's words to be interpreted in a different style and idiom, though only by an interpreter with a thorough understanding of the idiom and style from which it was interpreted; and I will argue below that, for the purposes of the trial, counsel for the plaintiffs accept the weak sense. In what follows, I want to describe both the complexity of 'speaking in one's own voice' during **Delgamuukw**, particularly because of the diversity of styles in which the Gitksan and Wet'suwet'en speak, and the corresponding range of discourse publics they represent; and, how during **Delgamuukw**, First Nations discourses are either subjugated or devalued in the court, regardless of whether we use the strong or the weak sense of speaking in your own voice.

First I want to suggest the mediated structure of the court-room renders it almost impossible for Gitksan and Wet'suwet'en witnesses to speak in their own voice in the strong sense. During **Delgamuukw**, the conditions of discursive interaction in the court-room result in a constant reinscription of First Nations discourse. I have described above how the speech of witnesses is limited to certain speech acts and is constantly rewritten into the arguments of lawyers, in much the

---

[178] Counsel for the plaintiffs try to enable this 'authentic Indian voice' to be heard by drawing an analogy between the Western scientific tradition and the 'distinctive Gitksan and Wet'suwet'en system of validating historical facts,' thereby extending the category Expert to Gitksan and Wet'suwet'en hereditary chiefs.

same way that citations are used in academic texts. Looking at the trial record of First Nations testimony it is clear that legal debate is a representational as well as a deliberative process: it is apparent that this rewriting usually involves a filtering or translating process. In what follows, I detail how certain First Nations speakers cannot speak in their own voice because, on the one hand, the idiom and style of their speech are transformed through representational frameworks which are themselves effaced, and on the other hand, because the power of the court operates to erase modes of expression which do not accord with these representational frameworks.

The speech of First Nations witnesses is refracted through three dominant representational lenses. The first of these involves a naming or classifying process which forces the aspects of Gitksan life into specific categories. So for example the Gitksan *Adaawk* is categorized in terms of history, story or legend. During her testimony, Gyolugyat resisted its categorization in terms of the middle category by counsel for the defence, saying '[i]t's not a story, it's just how people travelled is the *Adaawk*.' In his reasons for judgement, Chief Justice McEachern marked his sense that at least some of the *Adaawk* was 'not strictly true' by calling it legend or mythology.[179] The second representational tendency involves a distancing from the experiences of the witness, and the objectification of these experiences. We see this process throughout Gyolugyat's testimony as her experiences become evidence for the nature of Gitksan institutions such as the Feast, or the structure and systems of Gitksan society. This distancing from experience is evident during Txesim's testimony when the spatial arrangement of places he journeyed to is abstracted from his experiences of journeying with the aid of a map.

---

[179] For example, McEachern, *op.cit.*, p. 57.

Ms. Mandell:

Q	And you identified -- I'm sorry you identified for us three places along the trail on Friday, and I was wondering whether you could assist us in -- in locating those places. the first was a place which I'll have to describe for you with the English. It's a place where you described where if a log was knocked, there would be an echo at that spot.
A	Okay. Just before it -- a log would echo, there's one spot that's called G'etsa'lis. It's right in this logged area.
Q	Okay. And you're pointing to the area where there's a shield?
A	Yeah, it says logged out.
...	...
Q	Okay. And then you mentioned as well a place where there was a bird that you turned around. Where is that place located?
A	From here about couple hours walk be right at that area. We call it Tse'edi sdee ..
Q	Okay, my Lord, the witness is pointing to ... -- a place virtually at the boundary along the dotted line?
A	Real close to this line

We can see in this citation the mix of tour-type and map-type describers, but, in the context of the legal questioning it is evident how the emphasis on touring - the experience and actions of the journey - which I identified in Txesim's description above, is transposed into an emphasis on mapping - the location and order of places. In Ms. Mandell's map-based questions, Txesim's journeys come to be authorized by the spatial order - the citation of places - they produce, and his actions become the content of that order:

Ms. Mandell:

Q	Yes. As the red line intercepts with the green line. You mentioned when you were there that you took the bird and placed it on a spruce bough; is that correct?[180]

The re-inscription of Txesim's descriptions of the territories into legal argument thus involves its filtering through the spatial language of mapping. The third representational tendency of the filtering process is the presentation of Gitksan and Wet'suwet'en society in visual forms. Diagrammatic genealogies and tables

---

[180] Transcripts, volume 53, p. 3194.

showing the seatings at Gitksan Feasts are used throughout Gyolugyat's testimony to help explain Gitksan society to the court. For example:

Mr Grant:

Q	You recall meeting with my articling student and discussing the seating with her and showing and/or having her diagram out the seating of your table?
A	Yes.
Q	Now, I wish to show you a document and ask if you have seen that before. This is the second document under tab 3. It's entitled "The Modern seating." Have you seen a copy of that document before now?
A	Yes. I believe I have.
Q	Now, the centre square, can you explain what that represents and what the names on both sides represent?[181]

So legal argument by counsel and the court during **Delgamuukw** involves a reinscription and filtering process, which operates through these three related, representational axes - classification, distancing from experience, and visual representation. Re-written in this way, the idiom and style of First Nations witnesses is translated into ones that are apparently more acceptable to and readable by the court.

In the court-room, these representational frameworks are effaced: the representations of Gitksan society become more than representations - one way of seeing - and come to mean the reality of the society. For instance, the representations which objectify Gitksan society in visual ways - diagrams, tables and the like - seem to replace/or stand in for the 'reality' of Gitksan life as experienced and explained by Gyolugyat. For example, these tables are used to describe the seating arrangements at feasts, but in the process, there seems to be elision between representation and what they purport to represent, and the diagrams become the thing to explain, not the seating arrangement itself:

---

[181] Transcripts, volume 3, p. 201-2.

Mr Grant: Okay. What I would like you to do is to explain this diagram to the court. Now the court has a copy of it in front, and if you want to refer to parts of it you can -- or in front of him.

I think it is telling, therefore that after a short period during which the diagrams are explained, the Chief Justice seeks to dispense with the explanation and just have Gyolugyat confirm or deny the accuracy of the representations:

The Court: ... a table such as we have here, of the seating, it seems to me, could be put to the witness and she could be asked is this the way you sit at the Feast? Seems to be all she has to do is to say yes or no and if (sic) can be left for cross-examination ...

In this formulation, the elision between reality and representation is fairly complete. In keeping with realist ways of knowing, Gitksan and Wet'suwet'en societies are completely visible and therefore knowable; everything that can be known about them can therefore be visually represented: the diagram can, if accurate, stand exactly for 'the way you sit at the Feast.' By treating representations as reality in this way, the nature of the legal process as a representational process is itself elided, in keeping with the assumption of its neutrality.

Modes of expression that do not fit with these effaced representational schema are very audible in the court-room, and quickly excluded or assimilated. In the following example where Gyolugyat's description of an aspect of the Gitksan Feast is reinscripted through an intervention by the Chief Justice, the audibility of alternative modes of expression is clear, as is the violence entailed by their assimilation.

Mr Grant: .... how would you explain what a Nax Nok is?
A I believe your Lordship is stating this, as a Gitksan law we start our procedures with a Nax Nok. Nax Nok is used in starting in a Feast House. When there is a death of a Chief, raising of a totem pole, a head stone, and then the Feast is put on, and the first thing that appears in the Feast House is for the Chief to act out their Nax Nok, which is a living thing to us, and you may call it a spiritual thing that gives the strength of what the proceedings of a Feast

would be. I will -- we will start heavy Feasting by acting out the Nax Nok.

The Court: It's a ritual?

A It's the power.

The Court: Is it a ritual?

A Well, in a way, yes, the way it was and the way it is today.

This exchange between Gyolugyat and Chief Justice McEachern I think indicates quite bluntly the erasure of the meanings of one discourse public - a Gitksan one - as the discourse of one of its members is forced into categories acceptable to the court. In this way it is clear that the court-room can permit some expressive modes but not others. The power of intervention operates to suppress the idioms and style of certain First Nations speech, thus it is extremely difficult for certain Gitksan and Wet'suwet'en people to, in the strong sense, speak in their own voices in the court-room.

Now I want to describe in **Delgamuukw**, the extent to which the mediated structure of the court-room as a discursive arena promotes the devalorization of First Nations people's discourse, when they speak in their own voice even in the weak sense.

First I want to complicate matters by suggesting that in the court-room, First Nations people identify with a variety of discourse publics and adopt many idioms and styles, some of which correspond to those I described above as legible and acceptable to the court. Several First Nations persons are listed among the Expert witnesses and are identified with, or at least communicate in, the idiom of specialist academic discourse publics. Heather Harris, tendered as an expert on Gitksan kinship, is an adopted member of the Gitksan Nation. She compiled many of the genealogies I mentioned above, which visually represent Gitksan and Wet'suwet'en society for the court. Neil Sterritt and Marvin George, both Gitksan, are qualified as cartographers for the court. They undertook the massive

task of translating the Hereditary Chief's descriptions of the territory into map-like descriptions in a similar manner to Ms. Mandell's reinscription of Txesim's account, above. Indeed, during his testimony, Neil Sterritt distinguishes himself from many of the hereditary chiefs by virtue of his fluency in the language of topographic maps, because he can describe the territories in terms of features on a map:

> A I have seen some individuals who could do a map very accurately in terms of the features of a given area. I have not seen that widespread amongst the people, but I have also seen that the same people who could do a very accurate drawing of a territory with creeks and so on, quite an accurate drawing, could not necessarily read the topographic map or take that information to a topographic map, although some of them could read a topographic map, but generally the most of them could not read a map, no. Some did try to draw and to bring that forward, but generally what you're saying I couldn't agree with.
>
> Q But the concept of depicting on a piece of paper physical features on the ground was not unknown?
>
> A Yes. Because some individuals could do it, but certainly the concept of a territory within the mind of the chief, because they had their mental maps of their territories, and -- and knew the territories, but to take and put that onto a map, some of them could do that, but it wasn't widespread.
>
> Q Well --
>
> A Not to my knowledge.[182]

So, different First Nations people can communicate using different interpretive and representational frameworks and some of them use this ability to translate certain First Nations discourse into a form understandable by the court. To the extent that different people amongst the Gitksan and Wet'suwet'en have command of these different discursive and representational resources, I think it is possible to suggest that there are a variety of First Nations discourse publics evident in **Delgamuukw**.

---

[182] Transcripts, volume 138, pp. 8656-7, Neil Sterritt is here being questioned by Mr. Goldie, counsel for the province.

The discourse publics engaged in translating between different idioms are hybrid to the sense that they operate at the border between different cultures and incorporate elements of both. Evidently some of the discourse publics First Nations people identify with overlap with specialist or academic publics like anthropology or cartography. In **Delgamuukw**, the anthropological discourse of some of the anthropologists who are not members of First Nations incorporate elements of First Nations speech. For example, the anthropologist Richard Daly, tendered by the plaintiffs, applies an increasingly familiar methodology which maintains the importance of using First Nations oral history along with written or other sources to reconstruct the past.[183] Also what the Gitksan and Wet'suwet'en say about their society and their use of territory informs Daly's analysis. So the hybridity works both ways: certain First Nations people who count themselves among academic or specialist publics utilize the discursive and representational resources of these publics, while the discourse of these publics draws upon certain First Nations speech and knowledge.

I think it is feasible to suggest that the people whose speech is translated or interpreted by the specialist First Nations discourse publics can be described as speaking in their own voice in a weak sense. To the extent that Heather Harris's genealogies and Neil Sterritt's maps represent the speech of the Hereditary Chiefs in a different idiom, the Hereditary Chiefs speak through these representations. I think a less strong case can be made for Daly's histories and his study of the Gitksan and Wet'suwet'en societies, because he is not merely translating or interpreting oral history or First Nations statements, but analysing and assessing

---

[183] For other examples of this sort of work see Julie Cruikshank; for example Cruikshank, Julie, *Life Lived like a Story: Life Stories of Three Yukon Native Elders*, Lincoln: University of Nebraska Press, 1990. Oral history is more and more seen as necessary to get at the history of any oppressed groups, women, people of colour and so on.

their accuracy with respect to other sources and the like. Nevertheless, for the purposes of assessing the possibilities for First Nations self-expression in the court-room, I think it is worth treating Daly's work - because it incorporates Gitksan and Wet'suwet'en knowledge - as an extreme case of First Nations people speaking in their own voice in the weak sense.

If we look at the treatment of these hybrid discourses - discourses in an idiom and style legible to the court and including statements by a witness who the court accepts as 'obviously qualified in anthropology' - during **Delgamuukw**, we see that they are usually devalued, or to use the Chief Justice's terms, not given much 'weight.'[184] Taking the case of the mapping process, during cross-examination of Neil Sterritt's testimony, it becomes apparent first that the compilation of maps has had to comply with the legal criteria of 'hearsay'. In this case, to avoid characterization as hearsay the Hereditary Chiefs had to demonstrate that their knowledge of the territories derived solely from deceased persons (the reputation exception to hearsay). Counsel for the defence then sought to undermine the legitimacy of the maps by on the one hand attempting to show that some of the sources for the information must be living:

Mr. Goldie:

Q	Now, Mr. Sterritt, would you not agree with me that if Mr. Blackwater had placed -- had put down on a piece of paper the source of the information that he relied upon with respect to the territories in May, 1988, that he would have used the names of a good many people, most of whom were then living?
A	I don't know?
Q	Well, he would have used your name, wouldn't he?
A	I don't think so?[185]

---

[184] Transcripts, volume 184, p. 11819.

[185] Transcripts, volume 138, p. 8671.

and on the other suggesting that the maps were compiled in a politically charged context:

Mr. Goldie:

Q Let me put it this way. That the period that we are speaking of, May, 1983, to May, 1988, was within a period in which there was an expectation within the Gitksan community of substantial compensation from either the settlement of land claims through negotiation with the federal government or through the litigation with the provincial government.[186]

The intimation is that Gitksan and Wet'suwet'en knowledge should not be valued highly in the court-room because it can be characterized as both hearsay and political. In the same vein, Chief Justice McEachern devalued the plaintiffs' maps saying that though they were 'extremely well done', they were 'largely argumentative', portraying 'a political or legal decision.'[187]

Richard Daly's testimony was also negatively appraised for its connections with First Nations knowledge and discourse in the context of the litigation. His testimony is characterized by attempts to question the impartiality of his evidence. In the following excerpt, counsel for the defence implies that Daly has lost his objectivity by attempting to identify his sympathies for the plaintiffs:

Q Okay. You did attend the trial at Smithers from time to time?

A Yes, yes.

Q And you did participate with the people who also were attending the trial and some of the demonstrations that took place, specifically to attempt to persuade the Chief Justice to stay in Smithers for the rest of the Trial?

A Yes. I was wondering if that would come up. I was even handed a drum but I didn't beat it. But it was part of the participant observation.[188]

---

[186] Transcripts, volume 138, p. 8672.

[187] Interview, McEachern, July 7th, 1992.

[188] Transcripts, volume 190, p. 12404.

But, the most effective of counsel for the defence's strategies to devalue Daly's evidence was to highlight's his reliance on interviews taken with Gitksan and Wet'suwet'en people, after the start of the trial. Mr. Willms relates a lack of science to the participant observation in Daly's work, in the following excerpt:

> Now if it's done ahead of time so that it relates back to a period prior to the commencement of litigation, then it's got some natural science to it.[189]

McEachern ultimately made this his most significant reason for ignoring Daly's evidence saying:

> Most significantly, Dr. Daly lived with these people for 2 years, while this litigation was under way making observations on their activities, listening, and I think accepting everything they said ... [190]

Any connection with First Nations discourse or knowledge of their history, territory or the nature of their society, made since litigation commenced, thus seems sufficient to devalue even qualified Expert testimony in **Delgamuukw**. So, even extreme cases for First Nations people speaking in their own voices in the weak sense are undermined during the trial.

If we consider the way in which these hybrid discourses are undermined it is evident that the power to devalorized statements circulates through discourses associated with the mediated structure of the court-room. The nature of the legal process as a struggle between disinterested mediators, decided by a third disinterested mediator promotes discourses about the sort of statements that should be excluded from consideration in the court-room: namely statements that are not disinterested. These discourses in a sense *regulate* the purportedly neutral space of the court-room. Above we saw these regulating discourses deployed

---

[189] Transcripts, volume 184, p. 12806-7.

[190] McEachern, *op.cit.*, p. 51.

strategically to label and devalue the maps and Dr. Daly's evidence as 'political' or as argument - in other words beyond the bounds that define the disinterested, mediated discursive space of the court-room. Expert testimony is certainly very vulnerable to these discourses because there is an inherent tension in the position of an Expert witness in the court-room. On the one hand the witness is called to argue a position by one side in an adversarial struggle, yet on the other hand the mediated structure of the court-room demands their evidence be 'objective, ... impartial and ... reasonable.'[191]

But regulating discourses are used to exclude or undermine other forms of testimony as well. Chief Justice McEachern deploys such discourses to dismiss First Nations statements that make demands for justice which fall beyond the limits of justiciable questions as they are currently defined. I quote:

> I have heard much at this trial about beliefs, feelings, and justice. I must again say, as I endeavoured to say during the trial, that Courts of law are frequently unable to respond to these subjective considerations. When plaintiffs bring legal proceedings, as these plaintiffs have, they must understand (as I believe they do), that our Courts are Courts of law which labour under disciplines which do not always permit judges to do what they might subjectively think (or feel) might be the right or just thing to do in a particular case. Nor can judges impose politically sensitive non-legal solutions on the parties. That is what Legislatures do, and judges should leave such matters to them.[192]

In addition to the regulating discourses derived from the notion that statements in the court should be disinterested, there are those that originate with the particular prejudices of the legal system about, and conceptions of, truth. The discourse of hearsay is a formalized institutionalization of the realist way of knowing: the corollary to disregarding observations which were heard to be made is to treat direct observation un-problematically as truth. We see the reputation exception to

---

[191] McEachern, *op.cit.*, interview.

[192] McEachern., *op.cit.*, p. 2.

hearsay used above, first as a condition for accepting Gitksan and Wet'suwet'en knowledge of the boundaries and ownership of territories, and then later to devalue it. Less formalized discourses based on conceptions of truth hegemonic in the legal sphere are also applied in the devalorization of certain testimony. We see an example in the Chief Justice's assessment of historians:

> Lastly, I wish to mention the historians. Generally speaking, I accept just about everything they put before me because they were largely collectors of archival, historical documents. In most cases they provided much useful information with minimal editorial comment. Their marvellous collections largely spoke for themselves.[193]

Here we see the assumption that meaning is self-evident in written text combining with realist ways of knowing to valorize the written over the oral record, and correspondingly, historians over anthropologists. So, it is evident in **Delgamuukw**, that the discourses which are deployed to devalue even those First Nations voices which are translated into an idiom and style recognizable by and legible to the court derive their power from and are promoted by the mediated structure of the court-room, and the hegemonic conceptions of truth upon which the legal process is currently based.

Now, I think it should be clear that the possibility to devalorize First Nations discourse and knowledges in this way reflects a more widespread subjugation of these discourses and knowledges. Obviously, if what counsel for the plaintiffs call the distinct Gitksan and Wet'suwet'en 'system for verifying facts' was recognized or institutionalized in Canadian society, then statements about Gitksan and Wet'suwet'en history, society or ownership of territory by a Hereditary Chief could not be dismissed as political or subjective. In the court-room they would in all probability have the status of Expert statements and could

---

[193] McEachern., *op.cit.*, p. 52.

theoretically only be contradicted by a specialist in the same field - another Hereditary Chief. But, the history of colonial power/knowledge has been precisely to deny any status to First Nations institutions of knowledge and truth, while promulgating a set of knowledges about the Indian totally independent from what First Nations people knew or stated: in the same way that Edward Said describes British knowledge of the Middle East, what the colonialists know of the Indian is the Indian, and no Indian is capable of challenging that.[194] Because the mediated structure of the court-room promotes the reinscription or devalorization of what First Nations people say in their own voices, in the strong or the weak sense, it reiterates the exclusion of their knowledges and discourses enacted by the colonialists. Contrary to the ideal behind Fraser's prescriptions for a public sphere, therefore, the court-room does not counteract the inequalities in late twentieth century stratified societies. In terms of such an ideal discursive arena the court-room can thus be seen as a problematic site for the deliberation of issues affecting the First Nations, precisely because in its present form it tends to reinforce the more widespread subjugation of First Nations knowledges and discourses.

Conclusion:

In the last chapter I have attempted to suggest why the court-room is not an ideal site for deliberating issues of consequence to First Nations people. As a major site of debate in Canadian society, the court-room lacks the attributes Fraser identifies

---

[194] Said, *op.cit.*, ch. 2, The scope of Orientalism. I described in the second chapter how these knowledges defined and confined the life of the Indian thus enabling the dispossession of First Nations land.

as necessary for democratic participation in the context of widespread social inequalities.

First, though in **Delgamuukw**, the court-room incorporates multiple discourse publics, this seems to depend on extending the category of Expert, which limits the nature of publics that could feasibly be included and incorporates them into the debate under unequal terms. The presence of multiple discourse publics is thus unlikely to have the emancipatory effect Fraser hopes for because the possibility for these publics to counteract the participatory privileges enjoyed by members of the legal profession is sorely limited.

Second, the mediated structure of the court-room prevents the terms of debate, the assumptions of the mediator, and the representational and interpretive frameworks involved in the legal process from being explicitly thematized. The notion of the justiciable issue associated with the legalization of a struggle masks the fact that what is justiciable has changed historically and is contested and contestable. The idea that the legal process and the mediator who presides over it are neutral denies the inherent interpretative and representational nature of the former, while naturalizing the assumptions and interpretive schema of the latter. In this way, matters which have played an important part in the oppression of groups - definitions of what is justiciable, racist assumptions and the like - are excluded from the list of what is at stake in a court-room deliberation.

Thirdly, the mediated structure of the court-room tends either to exclude First Nations voices from the deliberation process, or devalorized those voices. The continual reinscription entailed by legal argument filters what First Nations witnesses say through particular representational frameworks. Because these frameworks are effaced, modes of expression which diverge from their associated

idioms and style are very audible in the court-room and quickly reinscribed. It is thus almost impossible for certain First Nations speakers to speak in the strong sense in their own voices, because their idioms and style differ from those acceptable to and legible by the court. But even the most extreme cases of the weak sense for First Nations people speaking in their own voice are devalued in **Delgamuukw** via discourses promoted by the court's mediated structure and hegemonic conceptions of truth. In this way it is clear that the nature of the court as a discursive arena in this case reinforces the more widespread subjugation of First Nations discourses and knowledges.

In conclusion, I think my movement, in the last three chapters, from McEachern's judgement to the structure of the court-room as a discursive arena and to an analysis of discourse during the trial, indicates how the nature of the legal process can bolster the constellations of power/knowledge evident in the Chief Justice's **Reasons for Judgement**. Because the assumptions of the mediator are precluded from explicit deliberation and the subjugated position of First Nations discourses and knowledge reinforced, the possibility for Judge McEachern to draw upon white supremacist discourses with no recourse to what First Nations people do or say is encouraged. In the following chapter, I shift the analysis of the Gitksan and Wet'suwet'en struggle in the court-room and look at the trial less as an arena of debate and more in terms of First Nations resistance. I think this shift provides for a very different assessment of the court-room because it indicates how effective that resistance is: First Nations use of the court-room seems to be transforming the legal sphere and holds the possibility for changing the court-room as a discursive arena.

PART 2

THE LAW AND DECOLONIZING RESISTANCE

CHAPTER 5

MAPPING, WRITING AND RESISTANCE DURING DELGAMUUKW:

> *Mr Macaulay: There is another matter that will come up when my friends, at last it is produced, that's his atlas of maps. The maps we received today. This comes as no surprise because we have seen this kind of map before. The place names, the names of creeks and rivers of hills and all the other features, are none of the them (sic) geographic names, they are the Gitksan names.*
>
> (Trial Transcripts)[195]

> *The very exercise of colonial power provoked counter-powers which were extensively and effectively organized. These powers, in turn, drew on vital traditions pre-dating colonization. Although for the colonists these counter-powers were aberrant, insignificant or non-existent, it was the same counter-powers that entered constitutively into colonial power providing the prime impetus for what humanity, fairness and universality the law had in that situation. It was the barbarians who provided these elements of civilization which the colonists claimed as their own essence and prerogative.*
>
> (Peter Fitzpatrick)[196]

In the last three chapters, I focused on the legal sphere and the court-room as an arena of discourse; I outlined various ways in which the power circulating through spatial order, speech acts and discourse were deployed during **Delgamuukw**, to restrict, contain and devalue First Nations speech and knowledge. Now I want to take a slightly different tack by considering the actions during the trial in terms of resistance. Read in this way, the mapping of the territories, the continuous spelling of Gitksan and Wet'suwet'en names and words, certain speech acts, and protests at the court can be identified as a series of resistances both to colonial power/knowledge and the operation of the court-room within that constellation of

---

[195] Transcripts, volume 4, p. 279.

[196] Fitzpatrick, The Rise and Rise of Informalism, *op.cit.*, p. 187-88.

power/knowledge. By highlighting counsel for the plaintiffs complicity in these acts, and by juxtaposing them to the ways in which counsel for the plaintiffs defy their position as mediators for clients and adopt different means of interpretation that do not devalue First Nations discourses and knowledges, I tentatively link resistance to potential transformations in the law. It appears that though the court-room during **Delgamuukw** reinforces the subjugated position of Gitksan and Wet'suwet'en speech and interpretations it also evinces the conditions for their acceptance and valorization. But these conditions arise at least in part, from resistance; Fitzpatrick's assessment appears confirmed: any fairness and universality is not inherent to the law, but effected only through the struggle of suppressed groups.

I am dividing this chapter into four parts. To begin with, I want briefly to plot a framework for discussing resistance. Drawing on de Certeau and Nancy Fraser, I consider how resistance can be identified not just in direct challenges to hegemonic meanings or interpretations, but also in the subtle subversion and manipulation of power structures. In the second part I suggest that Gitksan and Wet'suwet'en inscriptions - writing, spelling and maps - constitute such acts of resistance because they resist the erasures enacted by the operation of colonial and legal power/knowledge and begin to deconstruct colonial, spatial narratives. In the third part, I focus on resistance in and around the court-room discussing how at different scales, First Nations people seem to politicize the space of the court-room, underlining the geographical hierarchies into which the court is inscribed and making speech acts which defy the ritualized and constrained order in court. I highlight the role of counsel for the plaintiffs in these resistances. In the final section, I attempt to outline the characteristics of an oppositional legal discourse

public and to associate the First Nations resistances with the formulation of these characteristics.

Recognizing Resistance:

De Certeau differentiates between two forms of practices - the *strategy* and the *tactic*. I think when read next to Nancy Fraser's account of the formulation of oppositional needs discourse, and the resistance to the institutionalized means for interpreting and administering needs, this differentiation provides a useful framework for identifying resistance. In such a framework, both the systematic deployment of interpretations and discourses in opposition to hegemonic interpretations and also the ways in which the 'weak' use, manipulate, subvert, and divert hegemonic discourses and power structures can be identified as resistance.

Strategies can be distinguished from tactics in terms of the space in which they operate and the types of operations that those spaces make available. The strategy is the practice of a subject - be it person, group, institution, nation-state or the like - who has gained/won/demarcated a place of its own from which to act, 'a base from which relations with an *exteriority* composed of targets or threats .... can be managed.'[197] In the sense that it affords a measure of protection from the variability of circumstance, the delimiting of a 'proper' place represents a *'triumph of place over time'*. It also enables a set of actions. It allows one to exploit or realize acquired advantages and to plan for future expansions, to survey the terrain, to constitute objects for analysis or management, and to identify targets for attack. A certain power - the power to provide oneself with one's own place - is thus the precondition and a determining factor for the practice and the nature of

[197] de Certeau, *op.cit.*, p. 36.

strategies. By contrast, a tactic is an intentional action conditioned by the 'absence of a proper locus.'[198]

> The space of the tactic is the space of the other. Thus it must play on and with a terrain imposed on it and organized by the law of a foreign power. It does not have the means to *keep to itself*, at a distance, in a position of withdrawal, foresight, and self-collection: it is a maneuver "within the enemy's field of vision," ... and within enemy territory.

In these circumstances, the set of actions available differ from strategies. There is no possibility for formulating general strategy, viewing the opposition as a whole within a 'visible and objectifiable space.' The subject has no base from which to fortify its position and plan raids, nor a place where it can store its winnings. The tactic is opportunistic and temporizing, relying on the clever use of time. It must take advantage of the 'cracks that particular conjunctions open in the surveillance of the proprietary powers.' It makes use of the languages, structures, and terrain, imposed and controlled by these powers, but it does so in unexpected ways subverting them from their intended purpose, manipulating and tricking them and in this way sketching out 'the guileful ruses of *different* interests and desires.'[199] In de Certeau's words, 'strategies are able to produce, tabulate, and impose ... spaces, [and] when operations take place, whereas tactics can only use, manipulate and divert these spaces.'[200]

De Certeau's war-style metaphor resonates with Nancy Fraser's accounts of opposition to hegemonic needs interpretation and modes of administering needs. On the one hand, Fraser's description of the politicization of needs by subordinated groups can be likened to the strategy. In capitalist societies, needs discourse has

---

[198] de Certeau, *op.cit.*, p. 37.

[199] de Certeau, *op.cit.*, p. 34.

[200] de Certeau, *op.cit.*, p. 30.

typically been contained and determined by constructions of what is 'political,' 'economic,' or 'domestic.' So, for example, when violence in the home was defined as a domestic concern, it was depoliticized, kept from widespread debate and maintained as a solely private matter; as such providing shelters for the victims of domestic violence was precluded from the formulation of needs that should be met by the state. Members of subordinated groups often internalize hegemonic needs interpretations, but in Fraser's account needs interpretations can under certain circumstances become politicized via oppositional discourses. Politicization requires the formation of an oppositional discourse public, which represents the attainment of a particular stage in the resistance of subordinated groups, a stage associated with the 'self-constitution of new collective agents or social movements.'[201] I think this stage parallels the attainment of a place of one's own, in this case constituted by the publications, flyers, protests and meeting places of oppositional social movements. From this place groups can strategize: survey the opposition, plan ahead and formulate discourses and interpretations that, as in the case of terms like 'wife battering', 'marital rape', 'sexism', developed by various women's groups, contest the hegemonic interpretation and bring needs out from the containing constructs of 'domestic' and 'economic.' So, though in de Certeau's description, strategies appear very much as the preserve of the 'strong,' Fraser's account suggests that subordinated groups are able to reach a stage when they can mark out a place from which they too can deploy strategy.

On the other hand, Fraser describes several forms of resistance to hegemonic interpretations of and modes for administering needs which resemble tactics. These typically involve the use, manipulation and diversion of hegemonic operations and language rather than a direct challenge to them. For example, the

[201] Fraser, Unruly Practices, *op.cit.*, p. 171.

historical record shows that women acting on their own have displaced and modified agencies' interpretations of their needs. For instance, during the Progressive era in the U.S., women beaten by their husbands involved case workers in their situation by filing complaints alleging child abuse by their husbands. In this way, they informally widened the jurisdiction of the state, securing intervention in a situation not recognized to be within the jurisdiction of any agency by invoking an interpreted need that was seen as legitimate; by citing the state's definition of an official need while at the same time displacing it they thus brought the state's definition of needs closer to their own interpretations. Fraser also describes how informally organized groups use state provisions in ways unintended by administrators thus subverting the imposition of particular forms of association. In this case, Afro-American welfare recipients altered the meaning and use of the benefits - prepared meals, food stamps, cash transportation, clothing, child care and the like - by exchanging them across 'kin networks' that included several families. In this way, Fraser argues, they circumvented the 'nuclear-familiarizing procedures of welfare administration.'[202] In both these examples, resistance takes place, as de Certeau puts it, 'behind enemy lines', they represent practices of the moment, the making and seizing of opportunities provided by lacunae within the languages and structures of the dominant. In this way, de Certeau and Fraser's work enable us to identify the use and manipulation

---

[202] Fraser, Unruly Practices, *op.cit.*, p. 179.

of imposed spaces and operations by subordinated groups as tactics of resistance.[203]

To sum up, tested against Fraser's accounts of resistance, de Certeau's definition of strategies and tactics seems to provide a suggestive framework for identifying and analyzing resistance. My interest here is not to catalogue practices in the court-room in terms of strategy and tactic just that, in terms of resistance in the court-room, this framework directs analysis to the use and manipulation of court-room space and discourse as well as to direct and formal oppositions to colonial and legal power/knowledge.

Registering Difference through Mapping and Writing:

In this section, I want to suggest that the use of maps and other practices associated with inscription - writing, spelling and the like - during **Delgamuukw**, constitutes resistance to colonial and legal power/knowledge. The operations of language and inscription, of naming, writing and mapping have been essential to the colonial process. Many places had to, in effect, be produced through language - named, written and mapped before they could be colonized. The use of maps and

[203] Fraser's assessment of the contest to politicize and depoliticize needs in North America leads her to look more optimistically on tactics rather than strategies. In the case of the politicization of domestic violence she finds that ultimately as the need came to be identified and administered by state institutions it was once more depoliticized. In the early stages of the struggle, when shelters were opened and run by women who had themselves been battered, women who entered these shelters came to reject interpretations that inculpated themselves and defended the batterer and began to identify with other women and to adopt new self-descriptions with new models for their own agency. However, the funding of shelters by local government - something regarded as a significant victory from a feminist perspective - brought with it procedures for regulation and requirements for professionalization. A professional staff of social workers replaced those who had themselves experienced battery producing a divide between professional and client. In keeping with the training of social workers, the explanations and interpretations of battering began to be framed by a 'quasi-psychiatric' perspective. As a consequence the activities of such shelters has become less politicizing and more individualizing. In this way, the language of therapy has replaced that of consciousness-raising, the neutral tropes of 'spouse abuse' supplanted talk of 'male violence against women'.

the spelling of Gitksan and Wet'suwet'en words, in court, begins to undo this procedure, by bringing different languages and spatialities into circulation; it resists the erasure of First Nations knowledges and discourses that has characterized colonialism and which court-room procedures have a proclivity to reinforce; and it initiates a process of deconstruction. The realist assumptions that support colonial spatial narratives begin to lose their coherence when counterpoised to maps depicting First Nations knowledge and bearing First Nations names. In these circumstances, the inevitability of these colonial spatial narratives becomes questionable, promoting possibilities for other spatialities.

1

I want to begin with the observation that the continual spelling of Gitksan and Wet'suwet'en words, and the display and discussion of maps portraying features and territories labelled in the Gitksan and Wet'suwet'en tongues were both prominent aspects of **Delgamuukw**. In the case of the former, interpreters were provided to assist in the spelling of words and the 'problem' Gitksan and Wet'suwet'en words presented to the court occupied a good part of the early discussions during the trial, evidenced in the following statement by the Chief Justice:

> The Court: What I am troubled by, I would estimate we have taken close to a third, if not half of the day, struggling with the spelling of these names. Is it not possible to have a glossary, a roster, some more convenient way than the way we have done it ... [204]

Numerous glossaries were provided but the trial was still characterized by the frequent spelling of Gitksan and Wet'suwet'en words. In the case of mapping, the court was presented with a book of maps representing the territories of the

---

[204] Transcripts, volume 4, p. 278.

Gitksan and Wet'suwet'en houses, hunting grounds, berry picking areas, fishing sites and the like, all demarcated with Gitksan and Wet'suwet'en names (see for example map 5). These maps, and particularly those of the territories were introduced during the testimonies of many Gitksan and Wet'suwet'en witnesses. They were also the principal focus during testimony by the two Gitksan cartographers, Neil Sterritt and Marvin George.

Spelling and mapping - in the sense of representing space on a planimetric surface - are related as operations of inscription. I have described above how the making of the maps involved transcribing the oral record of the Hereditary Chiefs. Spelling - ascribing visual signifiers which can be written to the significant sounds of a language - is an essential stage when transcribing languages with an oral tradition. Furthermore, the demarcation by Gitksan and Wet'suwet'en names, of the territories, hunting grounds, fishing sites and berry picking areas on the surface of a map clearly requires the transcription of the Gitksan and Wet'suwet'en languages. The discourses of accuracy that pervade mapping (and also court reporting) encourage standardized, not phonetic spellings of these names. Accordingly, mapping and a concern for accurate spelling are closely associated during the trial. We see this association reflected in the transcripts of Neil Sterritt's testimony, for example:

Mr. Grant:

Q	Just ask you to go upstream, follow the upstream designation of the Skeena River. Do you see any other names that you are -- that you can identify as describing -- or apparently describing a feature on the map?
A	Yes, the next creek up from Alma Creek has printing M-u-s-k-h-a-b-l-e space C-r.
Q	Is there -- how does that sound to you?
A	Well, that would -- if I pronounced it exactly the way it's spelled, would be Muskakhable or something like that. But that creek, there is also a bracket behind it with another handwriting, "Has gravel in it".
Q	Is that gravel?
A	G-r-a-v-e-l.

The Gitksan and Wet'suwet'en have complex legal systems which delineate, among other things, the foundation, perpetuation and regulation of territorial ownership in their socio-political systems, in which people hold membership in Houses, groups of Houses (Wilnat'ahl and Clans, the land-holding unit per se is the House or Housegroup. The fishing sites shown here are part of the territorial holdings of these Gitksan and Wet'suwet'en Houses.

A Housegroup's fishing sites are often located on rivers and lakes within the large tracts of land which constitute their most extensive territorial holdings. However, their sites can also be found, quite frequently, along a stretch of river in the vicinity of their village, or in canyon areas nearby, where there are fish and sites in sufficient numbers to provided for several Housegroups. In such cases, the territory adjacent to that stretch of river, which otherwise would have extended to the river, stops short of the river bank to allow for the fishing stations, smokehouses and, in more recent times, the gardens of a number or all of the Houses in the village. Along this stretch of river each House may own one or more sites, often adjacent to each other and to those of related Houses, either Houses of the same Wilnat'ahl, or Houses linked to them by long-standing marriage ties. In this way the sites of a House and its closest relatives will often form a cluster, and new sites, should they be needed, for themselves, or their relatives, are most likely to be created within this general area.

Among the Gitksan and Wet'suwet'en all fishing sites are named, sometimes after the creek or river on which they are located, sometimes after the character of the site itself, and sometimes after the nature of the House's activities on the site. The names are passed unchanged from generation to generation and, in a number of instances, they describe physical characteristics of the river, which have been modified over the years, but are still remembered in their original form. It is the responsibility of the Chief of the House to ensure the perpetuation of the name of the site, and in the case of a new site, it is he who must come to know its character and name it accordingly. The memory of the name of a fishing site, and any history related to the site, is perpetuated by the Chiefs over the years and constitutes a formal and legal validation of the House's ownership of that site.

The Chief is also responsible for the management of all the fishing sites of the House. Each year he must ensure the just allocation of sites and their harvest to the members of his House and their relatives while, at the same time, keeping in mind their future needs and those of the generations to come. He is also responsible for ensuring that the members of his House do not harvest the rivers and lakes to the detriment of the fish species. To this end he draws on the complex system of fishing technology, habitat enhancement and conservation techniques which the Gitksan and Wet'suwet'en have developed over the centuries.

In the last century non-Indians and their governmental agencies have tried to claim the right to restrict access to fishing sites and their harvest and to determine fishing technology and methods of conservation. The Gitksan and Wet'suwet'en have resisted these attempts from the beginning and continue to do so, vigorously asserting their long-standing ownership of their fishing sites, as well as that of their other territorial holdings.

Gwin'oop fishing site on the Skeena River near Kispiox Village, July 1986

Cleaning fish at the fishing site, Antkili's Fish Camp, July 1986

Gitwangax Chiefs confront federal government fisheries officers, Antkili's Fish Camp, July 1986

GITKSAN AND WET'SUWET'EN JURISDICTION

Fishing sites, an san honhl (Gitksan) łok'k'et (Wet'suwet'en)

MAP SYMBOLS

salmon sites

Anyam-Mehuleł ● - fishing site
- fishing site name
- name of the House that owns the site (if more than one name shown — more than one House claims ownership)
- name not yet recorded

Wiłg'aax ● - fishing location probably containing multiple sites

trout or lake sites

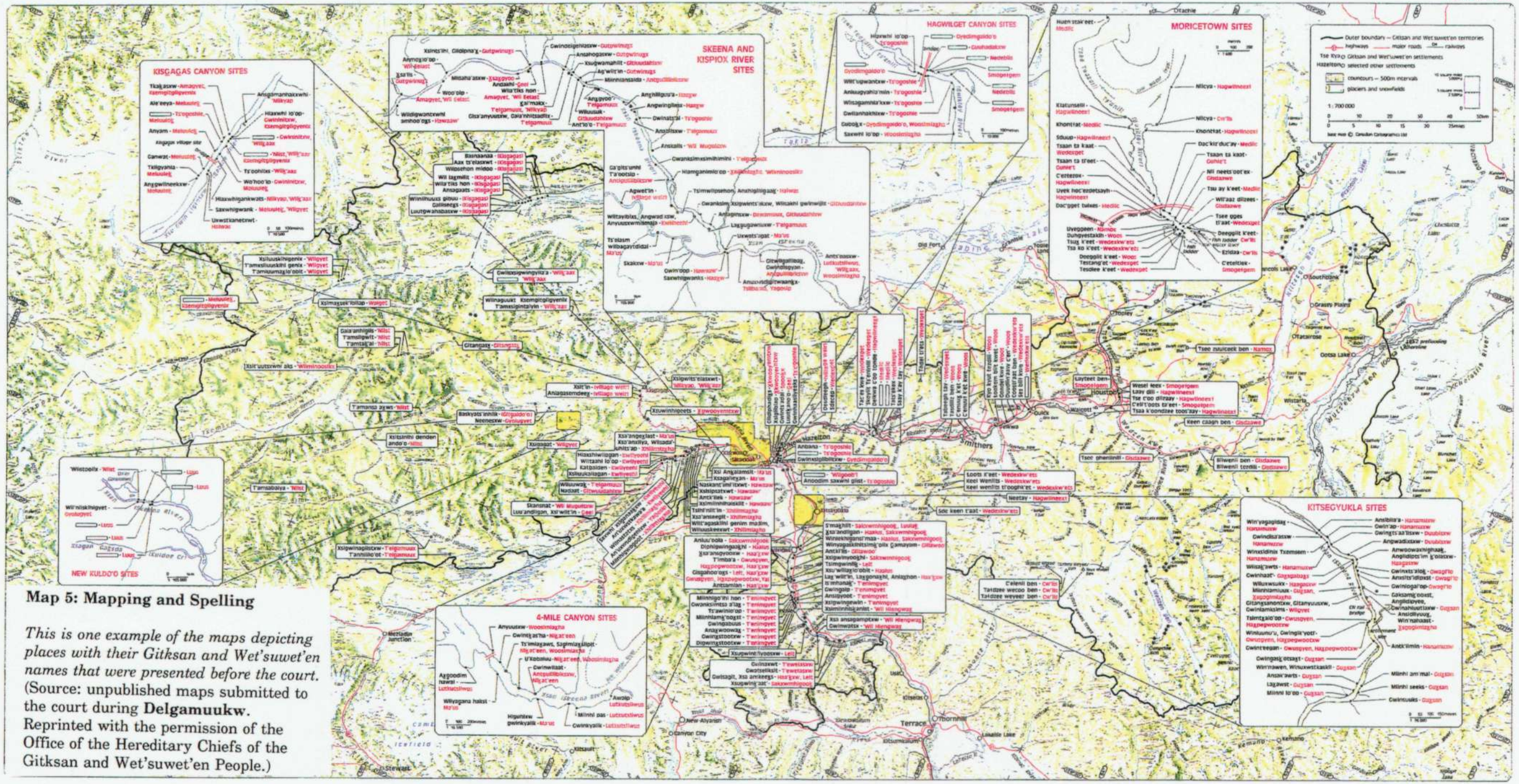
T'amsabaiya-Nilst ▲ - fishing site
- fishing site name
- name of the House that owns the site

▲ - fishing location probably containing multiple sites

note: not all northern Gitksan trout fishing sites are shown on the map

● - cache pits or other archaeological evidence of nearby fishing activity

Source: This map represents the work of many Chiefs, elders and researchers who together documented the names, locations and ownership of the fishing sites. Several other people were also instrumental in compiling the research and arranging it in its present form.



Map 5: Mapping and Spelling

This is one example of the maps depicting places with their Gitksan and Wet'suwet'en names that were presented before the court. (Source: unpublished maps submitted to the court during **Delgamuukw**. Reprinted with the permission of the Office of the Hereditary Chiefs of the Gitksan and Wet'suwet'en People.)

Q Yes.
A And that creek has been identified to me by hereditary Chief James Morrison as Maxhla Saa Giiblax. That's M-a-x-h-l-a space S-a-a space G-i-i-b-l-a-x. And Giiblax is fine gravel, G-i-i-b-l-a-x.[205]

So, the trial process during **Delgamuukw** is characterized by a systematic inscription of Gitksan and Wet'suwet'en oral-centered culture, their languages, histories, and territorial record, through the operations of mapping and spelling.[206]

2

Once we appreciate that the legal process is very much a literate process, indeed, that power in the legal sphere circulates through writing, I think it is plausible to suggest that the operations which inscribe Gitksan and Wet'suwet'en language and history - spelling and mapping - at least in part constitute tactics of resistance for oral-centered cultures in a place of their other: the writing fixated court-room.

The relationship between the transcripts as a recording and representational medium, and the trial it records highlights the particularly literate or written form that power takes in the court-room and in the legal system. In the first place, the recording process diminishes the power speakers in the court-room hold over their speech. As part of the record of a court's

---

[205] Transcripts, volume 129, p. 7940.

[206] My use of the term 'oral-centered', arises from a need to resist an absolute distinction between oral and written cultures. Euro-American cultures, cultures we might be tempted to call literate, do not lack an oral tradition - myths, story-telling, opinion, urban-legends, oral-history. Similarly the Gitksan and Wet'suwet'en peoples and presumably many others who would be called oral cultures do utilize writing. Though the use of writing might be recent amongst some of these cultures it is a dangerous presumption to regard writing as somehow not First Nations, as an impurity in their culture. Such understandings rely upon homogeneous and frozen notions of culture which allow one group of people, those with power, to change and 'progress' while consigning others to stasis; thus they have had much to do with colonial power. Writing by First Nations people does not imply 'Westernization'. Indeed based on this trial I argue that it is used it specific ways especially to resist Euro-American colonialism. Perhaps we should describe this process as the First Nationalization of writing.

proceedings, (which includes the judge's rulings) the statements recorded in the transcripts can be re-introduced into the court-room and used in ways unforeseen by the speaker. For instance, in the following example, part of the trial record is used in an attempt to silence an Expert witness, on the basis of a statement he had made at an earlier point in the trial process.

Mr Goldie: My lord, I am going to object to this witness giving any evidence which relates to the history crests or traditions of his house and I do that because he disclaimed any knowledge or insufficient knowledge, to answer questions about this on his examination for discovery ...

....

Mr Rush: Perhaps I can save my friend some time, I don't intend to ask him about the history. I intend to ask him whether or not that is the crest of Mediig'm Gyamk ... This witness happens to hold the name of Mediig'm Gyamk and I think it's quite relevant whether or not the holder of the name can identify the crest which attaches to the name.

Mr Goldie: That may be so, ... but Mr. Sterritt on his examination for discovery in February 26th, 1987 question 974 I put this question to him.

Q Now, Mr. Sterritt, what is the history of the house of Gitludahl that you said existed in December, 1983?

A I referred to a history of Gitludahl and I don't know it.

Q You don't know it?

A No.

In my view with great respect ... unless the crest is not part of the history, and of course, if it isn't, I have misunderstood a good deal of the evidence in this case, then I don't think, with great respect, there ought to be any questions put to him, even on the question of recognition, because that must be hearsay.[207]

Transcripts of a day's proceedings are provided to lawyers by the end of that day. Almost immediately they become part of an arsenal to be used strategically by them as in the above case. Past statements recorded in the transcripts can thus be used to silence witnesses or catch them contradicting themselves. They can also be re-introduced to help a witness clarify a point, which supports or

---

[207] Transcripts, volume 112, p. 699-7002.

contradicts the relevant legal arguments. In this way, writing, in the form of the transcripts is a mechanism of power in the court.

In the second place, control over this mechanism of power is a defining feature of the differential power relationships in the court-room. This is highlighted by the fact that access to the transcripts is regulated in the same manner as access to speech: for the time that a witness is on the stand they cannot review what they have said in the transcripts.[208] Control over the transcripts is a position of power in the court-room and it distinguishes those with relatively more power - lawyers and judges, from those with less - disputants, witnesses.

Writing thus overlays, circulates through and provides a medium for many of the power relations in the court-room and the legal system itself. This relationship between power and writing seems to be characteristic of the legal system and many other institutions - the Church, literature, education - for whom the

> permanence of inscription ... is a weapon against time, oblivion and the trickery of speech, which is so easily taken back, altered, denied.[209]

The very idea of law in the Western tradition refers to something that is written which commands obedience because of social or other sanctions; constitutions, the rule of precedent, and court decisions epitomize the relationship between power and writing because they are exemplars of this idea of texts as 'moral objects', which subject us, and demand that we observe and respect them.[210]

---

[208] Interview, Professor Farley, July 1st, 1992.

[209] Barthes, *op.cit.*, p. 32.

[210] Barthes, *op.cit.*, p. 32.

Furthermore, what is written - precedent, speech recorded in transcripts and the like - constitute the substance from which legal arguments are fashioned both by the lawyers and by judges when they write their decisions. What cannot be written quite simply cannot be included in nor shape law; it cannot benefit from the power to command obedience that legal texts hold. In this way, it seems clear that the law is a very literate form of power.

In an arena where power circulates through writing, many of the practices of oral-centered culture are literally out of place - 'in the place of the other.' The following example in which Gitksan Hereditary Chief Antigulilbix (also known as Mary Johnson) sings a song as part of the *Adaawk* highlights the precarious position that certain modes of oral expression hold in the court-room.

The Court:	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.
.....	.....
A	Well, if the court wants me to sing it, I'll sing it.
The Court:	No, I don't Mrs. Johnson, but apparently counsel does. And I think I'm in a position where if counsel say this has to be done, then I have to listen to it. ...
Mr. Grant:	You can go ahead and sing the song now.
	(WITNESS SINGS SONG)
Mr. Grant:	
Q	Can you tell us what the words of the song mean in English?
A	They sang about the grouse flying, flying, how the grouse flies, those are the first word. And another word says "I will -- I will ask for you tell him to give it to me." That means the first singer grabs the tail end of the grouse. And another word says, "I will make noise underneath your wings." That means when you hear the drum, when the grouse word says of how -- how the grouse gave himself up to die for them to help them save their lives. So that's the end of the song. And today, the -- the young lady that caught the grouse stood at the foot of our totem-pole that we restore in 1973, and she is holding the grouse with tears in her eyes.
.....	.....
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]t'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 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.[211]

It is evident here how, during **Delgamuukw**, specific modes of oral expression were not only diminished through the translating and recording process, but even the legitimacy of their enunciation in court was strongly opposed. So, certain types of performative expression that First Nations people use to recount their history cannot be recorded in the transcripts, and for the Chief Justice, at least, do not belong in the court-room.[212]

In this respect, the acts of spelling and mapping appear, at least in part, as a very practical tactic for getting things said and recorded in the context of an arena that is hostile to certain modes of oral expression that First Nations people rely upon. Firstly, as I have suggested above, the transcribing process assists the presentation of Gitksan and Wet'suwet'en knowledges in a form legible to and acceptable before the court. The use of mapping was particularly effective in this sense because it could be characterized as an Expert discourse. Through maps and First Nations cartographers like Neil Sterritt, Gitksan and Wet'suwet'en people

---

[211] Transcripts, volume 11, pp. 671-674.

[212] By contrast, where English is concerned the degree to which the transcripts record performative forms of expression is sometimes quite remarkable. In short, the signifiers of punctuation spaces, commas, colons and so on - permit a very detailed rendering of speech that includes pauses, hesitations and gestures. The court reporting system represents a highly developed use of these signifiers. Not only does this allow pauses to be recorded - with two dashes - but gestural elaborations signifying irony or qualification are registered as well, as in the inverted commas that modify the word scientific in the following statement:

> Some assistance will be provided to this court in the form of archaeological and geological evidence which relates significant events and places referred to in the ada'ox and the kungax to conventional 'scientific' proof. (Transcripts, volume 2, p. 88)

At least where English is concerned, therefore the trial record is likely to include certain meaningful gestures, hesitations and irony.

could at least speak in their own voices, even if in the weak sense. Secondly, as operations associated with inscription, mapping and spelling enable these knowledges to be recorded, written, and therefore to become the substance of legal arguments. Thirdly, in legibly presenting Gitksan and Wet'suwet'en knowledges to the court, spelling and mapping also registered the difference of these discourses and knowledges. They permitted First Nations words, and names - of territories, houses and institutions - to be inscribed, to become part of the court record and themselves to enter into legal argument. In this way, the continual spelling of Gitksan and Wet'suwet'en words and the display and discussion of maps depicting features named in these languages are used to bring subjugated knowledges and discourses into play in the legal process, while registering their difference.

To sum up, I think spelling and mapping during **Delgamuukw** constitute tactics of resistance to the extent that they use operations of inscription to defy the tendency for the court-room as an arena of discourse, to erase oral modes of expression, and knowledge preserved in oral forms.

3

Now, I want to suggest that registering difference through mapping and spelling resists certain operations of colonial power/knowledge. In many cases, colonialism has required a linguistic as well as a physical colonization of space: territory had to be brought into existence, differentiated and given meaning through naming in the language of colonists before they could possess it. In most cases this process has erased other spatialities while naturalizing those of the colonists. Maps depicting features with their First Nations names re-open the possibilities for other spatialities and undermine the naturalization process.

Paul Carter's erudite and innovative 'spatial history' of the colonizing of Australia, **The Road to Botany Bay**, underscores how the development of the colony required a linguistic colonization.[213] In this, Carter seeks to dispense with generic, colonialist history that tends to mythologize a spontaneous and theatrical settlement, and to demonstrate 'the dialectical nature of foundation, the sense in which the new country was a rhetorical construction, a product of language ... '[214] For my purposes, the significant conclusion of this wide ranging project is that possession and colonization of Australia was contingent on the landscape being made intelligible to Europeans, through naming. Explorers were sent out to locate objects of 'cultural significance' to colonialists; they had to differentiate the land as mounts, hills, and rivers, before they could write about them; but more to the point, their mission was to classify the landscape in ways that spoke to the needs and desires of the colonizers demarcating fields of promise - areas which could be habitable or had commercial potential and the like. In Carter's words therefore,

> [p]ossession of the country depended on demonstrating the efficacy of the English language there. It depended, to some extent, on civilizing the landscape, bringing it into orderly being. More fundamentally still, the landscape had to be taught to speak.[215]

The Road to Botany Bay is a detailed exegesis of how this task was accomplished through the practices of naming, which enclosed the landscape in a net of associations that conveyed useful facts, enabling the actions of colonialism by creating a framework for them. Carter's spatial history of Australian colonialism thus conveys the extent to which the colonial possession of a country was contingent on its linguistic appropriation.

---

[213] Carter, Paul, *The Road to Botany Bay*: Explorations of Landscape and History, New York: Alfred A. Knopf, 1988.

[214] *Ibid.*, p. 36.

[215] *Ibid.*, p. 58.

Moving on from Carter's account, I think it is important to underscore the obvious ways in which successful colonization of a country fixes and authorizes the space of action produced through these practices of naming. Linguistic appropriation by travellers and explorers neutralizes the otherness of the country. But, combined with physical possession, the framework of names invented (the founding of places) by these travellers is transformed by the colonizers into a 'place of their own.' The organizing of space on the basis of the framework, and the deployment of the framework to organize discourse, spatial narratives - maps, accounts of history, (Carter would say linear, theatrical accounts which exclude the creation of the space of action - the theatre - through naming), and so on - reifies and naturalizes it. In this way, settlement patterns, maps and histories that accompany and linger on after the successful establishment of a colony fix and confirm the network of names - the place in which spatialities of colonies and ultimately nation-states have been enacted - as the only framework, determining and constraining all future spatialities.

The linguistic appropriation of territory associated with colonialism and its subsequent reification and naturalization had two related consequences for those people who preceded the colonizers and remained after their arrival. Firstly, it erased the names and meanings that differentiated the country for these prior and continuing inhabitants and which enframed their actions. The names with which the Aborigines in Australia or the First Nations in Canada 'inhabited the landscape could have no epistemological place: they were not typical, obeyed no known rules, conveyed no useful facts,' for the colonizers.[216] Hence, except on occasion when the 'indigenous' names bore some significance for the Europeans they were effaced by the practice of naming. Even when included, they were

[216] *Ibid.*, p. 61.

inscribed into European spatialities - referring more to the incidents of an explorer's journey, say, than to a different realm of action. Secondly, and as a corollary to this erasure, transforming the founding acts of naming into the place of the colonialists othered the first peoples in their own countries. The processes of naturalization that fixed and confirmed the framework of names marked a motion towards rendering the language of these peoples ineffectual, inoperative in their own land. As colonialism progressed, more and more of the activities that the colonized engaged in, including resisting or challenging colonialism, required the language of the colonists, thus further reifying the spatialities of the colony. In this respect, as Carter incisively notes, teaching the first peoples English, whatever its motive, characterized 'language as an instrument of physical colonization,' because 'to place [them] in possession of English was simply to possess [them], to help them forget [they] were ever at home.'[217] So, in the constellation of colonial power/knowledge, just as naming enabled colonization, through these processes of erasure and othering it functioned also as a strategy of dispossession.

To appreciate how colonialist power/knowledge works through naming and language in this way is, I think, to understand how the circulation of First Nations names in the court-room via mapping and spelling constitute acts of resistance.

Firstly, the continual spelling of Gitksan and Wet'suwet'en words and names, and the display and use of maps using these words and names, resists the effacement of First Nations spatiality enacted by colonial power/knowledge. As operations of inscription they bring Gitksan and Wet'suwet'en spatialities to presence before the court in an arena, which in the case of the oral record of these

---

[217] *Ibid.*, p. 64.

spatialities undeniably reinforces the process of erasure. This point is underscored if we consider that many of the important features named and listed on the Gitksan and Wet'suwet'en maps and in their statements about their territories to mark out boundaries and the like, are 'un-named on government maps' - in other words, Gitksan and Wet'suwet'en spatiality could not be effectively apprehended by the English language.[218] Mapping and spelling using Gitksan and Wet'suwet'en names thus takes advantage of the court's inscription procedures and valorization of Expert discourses like cartography to circulate spatialities that have been subjugated by the colonial process.

Secondly, spelling Gitksan and Wet'suwet'en words and mapping their subjugated spatialities resists the othering enacted by colonial power/knowledge. By bringing First Nations spatialities to presence before the court these operations at least symbolically re-center the territories around a Gitksan and Wet'suwet'en realm of action, thus marginalizing or othering the British Columbian and Canadian hierarchical, spatial organization. This is particularly evident in the intentional alignment of the maps on an East-West axis (see map 6). Most significantly, they re-establish the efficacy of the Gitksan and Wet'suwet'en languages for describing their territories and for discussing and enabling action concerning those territories. So, the resistance these practices of spelling and mapping offer to colonial othering processes is not just symbolic but, in a very tangible sense resists the ways language and naming operate as strategies of dispossession.

---

[218] See for example the territorial affidavits listed in Schedule 5 of Chief Justice McEachern's Reasons for Judgement.

RANGE AND DISTRIBUTION OF

Beaver, ts'imilix (Gitksan) tsaa (Wet'suwet'en)

Castor canadensis

MAP SYMBOLS

common to abundant

present, mostly low density

Source: Haller David F., History and zoogeography of some selected mammals in northern British Columbia, Smithers, January 1987

OVERVIEW

The fossil history of beavers in North America extends back to the early Oligocene, over 25 million years ago. Up to about 10 000 years ago, the present beaver coexisted with *Castoroides*, the giant beaver. Fossils of the two have been found together in the Yukon, Alaska and at several locations in the continental United States. There are apparently no fossil records for British Columbia, but the present species has been found in study area archaeological sites from strata dated 1400 – 2400 years BP.

The North American beaver is presently distributed in suitable habitats throughout the continent except in the Florida peninsula, the southwestern desert, and the arctic tundra

ECOLOGY

Ideal beaver habitat contains adequate forage for construction of a food cache, herbaceous vegetation for summer feeding, and a pool of water of sufficient depth and size to contain the food cache and provide escape from predators. Beavers prefer slow moving, narrow streams, and lakes with dammable outlets, but will occupy a variety of other habitats. Bank burrow colonies are common on streams that are too large to dam, but which support good food resources along their shores.

The feeding habits of beaver vary considerably over their total range but the preferred food in most areas is deciduous trees and shrubs, particularly poplar and willow. Beavers do not use their food plants in a *sustained-yield manner. Rather, they tend to over-exploit some resources* and waste others by inundation, so that the carrying capacity of a local habitat, and eventually the population itself, will often be reduced.

Beaver colonies consist of family groups, usually one pair of adults and one or two litters. Territorial behavior appears to set the upper limit on colony density, but a variety of external factors including disease, predation, and natural events that change water levels can all affect local numbers. Overall, the animals are adaptable, mobile, and prolific, and are able to withstand considerable exploitation as long as their food supply remains intact. Further, their dam building and channelling activities create aquatic and riparian habitats used by many other species.

RECORDS

As the primary object of most early explorations in the north, the beaver was apparently widely distributed. MacKenzie was impressed with the amount of beaver sign along the Blackwater River in 1793, and some Indians encountered by Simon Fraser near the mouth of the Stuart River in 1806 were reportedly wearing beaver robes. Black's expedition into the upper Finlay and Stikine River Drainages in 1824 encountered beavers or sign over most of the area covered, and numbers were killed for food. There are scattered records of beaver occurrence throughout the study area in the late 19th and early decades of the 20th century, but there is evidence for dwindling numbers in many areas during that period. In response, the provincial government maintained a closed season for beaver throughout most of the province between 1906 and the early 1920's.

SUMMARY

The beaver, the national emblem of Canada, was the first natural resource to be exploited by the Europeans, and it played a leading role in their exploration and settlement of the country. The available evidence suggests that the distribution of beavers at European contact was essentially the same as that today, in suitable habitats throughout the map area. Because dispersing animals may sometimes take up temporary residence in marginal habitats, often at high elevation, the extent of low density occurrence is probably greater than that depicted on the map, especially in the north. The SE Alaska distribution could not be mapped with the information available.

Beavers are well adapted to the cold northern environment, laying in a store of food for use in winter and generally spending most of that season relatively protected from both enemies and weather by layers of ice and snow. Therefore, they might have survived in at least minimal numbers during harsh periods and in areas where more exposed species could not.

Map 6: Re-aligning the Territories.

I use this map to demonstrate the intentional alignment of the territories on an East West axis by Gitksan and Wet'suwet'en cartographers. (Source: unpublished maps submitted to the court during **Delgamuukw**. Reprinted by permission of the Office of The Hereditary Chiefs of the Gitksan and Wet'suwet'en People.)

Thirdly, these operations begin to break down the processes whereby the Canadian spatial framework established through colonization is reified and naturalized. The undermining of these processes seems to be the source of Mr Macaulay's indignation when he protests that the place names in the Gitksan and Wet'suwet'en maps are not 'the geographic names.'[219] Clearly, the naturalization of one particular spatial schema inherent in the sense that the names that structure it are the geographic names becomes much harder to sustain when spatial discourse organized on a different framework is brought into play. Certainly the circulation of such discourse begins to deconstruct some of the most effective naturalizing strategies, the 'government maps' which disguise a particular social structure and spatiality 'beneath an abstract, instrumental space' and a rhetoric of accurate mimesis: the naming of features 'un-named on government maps', for example, undermines the realist pretensions - that these maps simply portray what is out there - which sustain these strategies.[220] In this way, the use of mapping and spelling by the plaintiffs in **Delgamuukw** resist the processes whereby the framework of names - the place of colonial and national spatialities - is fixed and confirmed as the only possible framework.

I think, therefore, that the spelling out loud of First Nations words and the display of maps depicting features named in First Nations languages can be described as transgressive acts. By re-establishing the efficacy of these languages to discuss and act upon the territories, by therefore enabling subjugated spatialities to be circulated, and finally, by undermining the naturalization of one single framework, these operations create the potential for alternative frameworks and spatialities to be constructed. In these ways writing, a mode of legal power,

---

[219] Transcripts, volume 4, p. 279.

[220] Harley, Deconstructing the Map, *op.cit.*, p. 5.

and mapping, a practice which, I suggested above, the Chief Justice configures with colonial and legal power/knowledge, are used during **Delgamuukw** to resist the operations of colonial power.

To sum up this section, I have tried to suggest that spelling and mapping by the plaintiffs during **Delgamuukw** is an example of how the constellation of colonial and legal power/knowledge is resisted. As operations which are associated with and enable inscription they represent pragmatic tactics to get Gitksan and Wet'suwet'en knowledges spoken and recorded in an arena which places great emphasis on writing. By registering First Nations words and places these tactics resist a fundamental colonial strategy - the taking possession of a landscape through language. In this way the court-room - in many ways the place of the other for oral-centered cultures like the Gitksan and Wet'suwet'en - is used to oppose colonial strategies which have erased, othered and dispossessed First Nations.

Transgressing the Boundaries of Court-room Space and Speech:

Now I want to describe resistances during **Delgamuukw**, which were less systematic than the use of mapping and spelling, but which manipulate the nature of the court-room as a discursive arena and subvert the principles and practices of division in the legal sphere. In different ways the actions of Gitksan and Wet'suwet'en people and also their counsel politicize court-room space and speech or introduce un-authorized forms of expression into it. In so doing they not only make the meaning of court-room space more fluid (even if just momentarily), but they transgress the founding principles of the legal sphere that divides it from the rest of society as a distinct social field.

1

Firstly, I want to recap the principles and means by which the legal sphere distinguishes itself from other social fields.

Juridical power involves the monopolization of legal symbolic capital within the juridical field - the division of those competent to partake in the legal 'game' from those who though they might be right in the middle of it, are not. This division is enacted on the one hand through the adoption of a particular linguistic and mental stance only attainable by training and the mastery of an extensive body of knowledge, and on the other, through the establishment of a system of injunctions. As a result, non-specialists' sense of fairness and understanding of the facts - their view of the case - tends to be disqualified when their disputes are legalized, and the act of engaging in the dispute is given over to lawyers. The person who comes under the jurisdiction of the court, the client say, is thus divided from the professional, judicial actors in terms of attitude and language and a series of principles which ground this division.

I have described above how, on three scales, the spatial order of court-rooms on the one hand reflects the centralization of state power and on the other reiterates these *principles of division* that define the legal sphere. In terms of what I shall call here the macro scale the scale of nations and provinces, I argued that court-rooms are organized according to a spatial hierarchy of administrative and resource flows which continues to orient Gitksan and Wet'suwet'en territory as peripheries to a Lower-Mainland core and ultimately, to Ottawa. At the meso-scale - the level of cities and buildings - I argued that the principles of this spatial hierarchy are present in the situating of court-rooms in city centres and in the way architectural form reflects position in the hierarchy - small county court-room in Smithers, monumental and temple like structure in Vancouver. Furthermore, I

suggested that the architecture of court-rooms resonates with the principles by which the legal field is divided from other social fields because it sets off the place of legal practices as sacred spaces, raised and removed from the everyday. Finally, at the micro scale - the scale of power relations between bodies I suggested that these *principles of division* are practiced through the ritualized ordering of space and speech in the court-room itself. The subjects of the court process, judges, lawyers and witnesses, are constituted through positioning in a hierarchical arrangement of constructed visibility and audibility. Division, I concluded, is practiced through the ritualized and strategic use and constraint of speech, which regulate the respective speech acts available to these subjects. The spatiality of the court-rooms is not innocent therefore, but inscribes a particular order and translates legal capital into power and division in the court-room.

Nevertheless, in its structure and posture the legal process presents an ideology of neutrality, which benefits from the seeming naturalness of the legal spatial order. The ideology of neutrality pervades the very form of the trial - an arbitrator presiding over an oral contest between two parties. The crystallized flows of power into which such purportedly neutral contests are inserted, and the circulation of power that sustain these contests are naturalized, in the same way (indeed as part of the same process and moment) that the structure of places which sustain colonialist spatialities become fixed and confirmed as the place of colonies and ultimately the nation-state, Canada. When these practices become places, become routine, organize the bulk of action and discourse in their respective fields, they become <u>the</u> spatial order; at this point, nothing could seem more natural than for a trial like **Delgamuukw** to move in accordance with this order from Smithers to Vancouver, or equally, for the speech and understandings of the First Nations plaintiffs to be curtailed, excluded or devalorized in accordance

with the *principles of division* which structures the juridical process. The posture of legal neutrality is in this way bolstered by the fixity of the spatial order and the routiness of the practices into which it is written and which sustain its procedures.

So, to sum up, the legal sphere is structured by a distinction between legal actors and lay people based on attitude and language. The institutionalized spatial order of the legal process - of court-rooms and practices - not only manifests broader national and provincial alignments of power, but translates the *principles of division* into practice. But an ideology of neutrality and a spatial fixity belie the imbrication of power with the operations of the juridical field.

2

In the context of this account of the naturalized processes and practices that characterize the workings of the legal sphere, certain actions during **Delgamuukw**, both by First Nations people and their counsel appear to transgress the boundaries which delineate the legal as an apolitical space, and threaten to break down the defining division between legal specialist and non-specialist.

The requests and protests which accompanied the removal of the trial to Vancouver from Smithers are, I think, an example of such acts of resistance. Both counsel for the plaintiffs and First Nations groups took part in the attempts to keep the trial at least relatively local to the territories. The lawyers made formal pleas to Chief Justice McEachern, while First Nations groups protested both in Vancouver's Robson Square and outside the court-room in Smithers.

Requests and in particular the protests outside the court-room clearly politicize the macro-scale organization of legal space. In a sense they represent an

attempt to make the legal process respond to Gitksan and Wet'suwet'en spatialities. In this respect the opening of the trial in Smithers based on an earlier request represented a partial success for counsel for the plaintiffs and the Gitksan and Wet'suwet'en people, because Smithers was not a regular assize town for the Supreme Court.[221] The efforts to make the courts responsive to the geographies of First Nations people alters the meaning normally ascribed to the spatial organization of the courts - neutral, or maybe functional - by underscoring that this organization is interwoven with a particular spatial order, one that sustains the marginality of Gitksan and Wet'suwet'en territories to the spatialities of British Columbia or Canada. So, to the extent that it politicizes the routine functionings of the legal process, the protests outside the court-room in Smithers and the pleas by the plaintiffs' lawyers I think can be said to constitute acts of resistance.

Other instances during **Delgamuukw** show First Nations people, with the help of their counsel, making speech acts that defy the ritualized and strategic ordering of speech in the court-room. The singing of the song from the *Adaawk* of Antigulilbix's House, which I cited earlier is one such instance. Here, despite strong protests from the court, counsel for the plaintiffs enable a form of expression, which cannot be recorded in the transcripts, and which is repudiated by the Chief Justice, as performance, to be expressed in the court-room. Another example shows Mr. Grant for the plaintiffs enabling Gyolugyat to make a speech act that contravenes the rigid restriction of speech according to role in the legal process:

> Mr. Grant: I'd like to move into the last main area of your evidence, Mrs. McKenzie. I'd like you as Gyolugyet to explain to the court why

---

[221] McEachern, *op.cit.*, interview.

	you authorized this court action and what you are seeking out of this court case?
....	....
The Court:	Well, I'm reluctant, Mr. Grant, to stop you, but there have to be some limits to the leeway extended to a witness, and it doesn't seem to me to be of any particular importance, from a legal point of view, as to why she authorized the commencement of the action. There's a legal question that may arise in that regard, and if there was evidence that bore on that question I would say yes, but I don't see what it would be. As to what she's claiming or hopes to get out of the lawsuit, that's a subjective matter that I can't deal with. ...
....	....
Mr. Grant:	... Now, in asking this witness, the first witness that you have heard these questions, I can assure you it is not our -- counsel's intent to ask this question of all 54 plaintiffs ... But we -- it is my submission that it would be of assistance to you with respect to ... [the] ... prayer of relief to hear from this chief or from one or a few chiefs in a representative way what they see as the outcome of the future with respect to their territory. ...
The Court:	Well, I'm not legally persuaded, Mr. Grant, ... but in view of your assurances and no counsel having yet objected at least, I'll allow you to ask that question of this witness.
Q	Mrs. McKenzie, could you tell the court what you see -- as what you would like as Gyolugyet to see happen in the future with respect to you territory?
A	I'd like to see that -- that the laws of the Gitksan be recognized and that the territories will still be authorized by the chiefs.
Mr Grant:	What do you mean the territories will be authorized by the chief? Can you explain that?
The Court:	You mean managed by the chiefs?
The Witness:	Managed by the chiefs; that whatever resources that are found on the territories, they have to accept the power of the head chiefs and to go to the owners of these territories first before anything happens on these territories. Like what I'll say, mining is done on the -- some of these territories or coal is or even oil. I'd like to see that the head chiefs that own these territories would be involved in whatever it is. They have to be notified first and be in with the discussions of how these things will work because if these things work there has to be roads going into the territory. Now, I'd like to see that we as Gitksan, Gitksan chiefs, be involved and for them to notify us of these things before starting anything up on the resources of our territory.

Returning to Habermas' classification, here, Mr. Grant's efforts allow the witness, Gyolugyat to overstep the typical constraint of a witness' speech to limited *communicative* and *constative* acts - responding to questions and representational acts respectively - and to convey opinion, ideas, and desires in the court. The final example I want to give is the opening statement made by Gyolugyat and Gisday

Wa. The speaking of this statement breaks with the ritualized ordering of speech and speaking roles because it involves a lay-person speaking a part in the proceeding of an adversarial trial that would normally be reserved for a lawyer. As such, counsel for the plaintiffs had to obtain special permission from the Chief Justice for this action, which was reluctantly given.[222] In giving an opening statement, therefore, Delgam Uukw (also known as Mr. Muldoe) and Gisday Wa (also known as Mr. Joseph) were able to make speech acts that, in the discursive arena of the court-room, are typically restricted to specialist speakers, as is evident in the following excerpt:

Mr. Muldoe:	If the Canadian legal system has not recognized our ownership and jurisdiction but at the same time not extinguished it, what has been done with it? Judges and legislators have taken the reality of aboriginal title as we know it and tried to wrap it in something called aboriginal rights. An aboriginal rights package can be put on the shelf to be forgotten or to be endlessly debated at Constitutional Conferences. We are not interested in asserting aboriginal rights. We are here to discuss territory and authority. When this case ends and the package has been unwrapped, it will have to be our ownership and our jurisdiction under our law that is on the table.
Mr. Joseph:	Our histories show that whenever new people came to this land, they had to follow its laws if they wished to stay. The Chiefs who were already here had the responsibility to teach the law to the newcomers. They then waited to see if the land was respected. If it was not, the newcomers had to pay compensation and leave. The Gitksan and Wet'suwet'en have waited and observed the Europeans for a hundred years. The Chiefs have suggested that the newcomers may want to stay on their farms and in their towns and villages, but beyond the farm fences the land belongs to the Chiefs. Once this has been recognized, the court can get on with its main task, which is to establish a process for the Chiefs' and the newcomers' interests to be settled.
Mr. Muldoe:	The purpose of this case then, is to find a process to place Gitksan and Wet'suwet'en ownership and jurisdiction within the context of Canada. We do not seek a decision as to whether or not our system might continue or not. It will continue. I will explain to my people in my town what I have just said.[223]

---

[222] Interview, Michael Jackson, counsel for the plaintiffs, July 17th.

[223] Transcripts, volume 2, p. 67.

Again in sharp contrast to the usually limited *conversational* and *constative* speech acts available to a non-specialists in the court-room, Delgam Uukw and Gisday Wa here make a *strategic* and *constative* speech act - representing a particular situation as true with a view to persuading the court to take a certain action; 'to place Gitksan and Wet'suwet'en ownership in the context of Canada.' In this way, counsel for the plaintiffs use their juridical, cultural capital to enable First Nations speakers to defy the ritualized ascription of speaking roles in the court-room.

Like the protests around the removal of the trial these speech acts by First Nations people alter the meaning of court-room space. With these statements, First Nations people expand the official and accepted function of the court-room using it against the grain to air their opinions, arguments, grievances and hopes amongst a wider public.

Moreover, the defiance of the rigid regulation of speech acts in the court-room also goes against the *principles of division* that structure and offset the juridical field. Firstly, because, in the most obvious sense the fact that lay-persons assumed speaking positions typically reserved only for specialists contravenes the principle that a trial should be a mediated contest between qualified lawyers. Secondly because in these instances, First Nations people made argument, elaborated upon their own sense of injustice, and their understanding of the facts, they resisted the division between the legal and the lay attitude that legalization of a dispute typically entails. Finally, the fact that in these instances counsel for the plaintiffs enabled their First Nations clients to make argument before the court suggests that the usual relationship between client and legal professional, which is defined by the latter's adoption of a particular attitude based on training and the like, was being undermined because counsel identified with, or at least respected the relevancy of, the plaintiffs' understanding of the case. In this way, I

think, the occasions during **Delgamuukw** when counsel for the plaintiffs use their cultural capital as lawyers to permit their clients to speak out of turn or beyond their ascribed position represent resistances to the mediated structure and nature of legal disputes and the *principles of division* that sustain them.[224]

Summing up, the actions by counsel for the plaintiffs, and the Gitksan and Wet'suwet'en people, which I describe here, though sporadic throughout the trial, do I think resist the operations of legal power/knowledge in significant ways. The protests and requests by the Gitksan and Wet'suwet'en people and counsel for the plaintiffs, against the removal of the trial to Vancouver, politicized the routine functions of the court-room and tried to make the legal process responsive to First Nations geographies. The speech acts by Gitksan and Wet'suwet'en people, which, with the efforts of the lawyers defied the ritualized and prescribed order of speech extended the official meanings of court-room space by using it to circulate First Nations opinions and sense of injustice. These acts both by First Nations peoples and their lawyers also break down the distinction between specialist and non-specialist in the legal process. In this way, even if momentarily, these acts subvert the intended functioning of legal process shaping its functions to alternative intentions, while undermining the *principles of division* which structure these functions.

---

[224] There is at least one far more striking example of such resistance, also from British Columbian/First Nations 'case history', which occurred in the **Western Forest Products Ltd. v. Richardson and Others.** Charged with obstructing logging, the Haida refused representation and presented their entire defence themselves. As part of their case, members of the Haida nation recounted their history and explained their society without recourse to Expert witnesses. In deciding that case, Justice McKay stated that although 'political' evidence of this sort would not normally be permitted in a court of law, he had allowed the Haida to be heard because no other arena was available to them. Nevertheless, in deciding against the Haida he deployed the same regulating discourses that Chief Justice McEachern resorted to saying, that 'while people sometimes think that judges have the power to do what they want, they must in fact act according to law.' Cited in op.cit., Goodrich, p. 183. Another interesting commentary on that case can be found in Ruebsaat, Norbert, Speaking with Diane Brown a text-in-progress, *op.cit.*

Identifying an Oppositional Legal Discourse Public:

In the final section of this chapter I want to carry through the implications that I think are incipient in the enactment of the resistances I have described above and particularly in counsel for the plaintiffs' participation in these acts, namely that there is a group within the juridical social field who do not devalue First Nations discourses and knowledges. Many of the actions and statements by counsel for the plaintiffs during **Delgamuukw** permit its members to be, at least tentatively, identified as part of an oppositional legal discourse public, because they do not merely differ in opinion to counsel for the defence and Chief Justice McEachern, but assume a different approach to the legal process and hold alternative modes of interpretation. Juxtaposed to the resistances described above and considering the extent to which these interpretations respond not just to First Nations legal needs, but to their explicit demands as clients, I think it is fair to conclude not only that the legal sphere currently holds the conditions for reversing the subjugated position of First Nations knowledges, but also that these conditions are at least partly produced by First Nations resistance.

I think counsel for the plaintiffs can be distinguished from McEachern and counsel for the defence as an oppositional legal discourse public, partly for the discourses they drew upon to formulate their arguments and legal principles and more strongly for the alternative modes of interpretation which they adopt.

Firstly, in their opening statement, counsel for the plaintiffs drew upon a culturally relativistic notion of law in contrast to McEachern's notion which was, I suggested above, founded on white supremacist discourses. McEachern holds First Nations institutions up to Western forms and finds 'no obedience to anything but

the most rudimentary forms of custom.'[225] By contrast, Mr. Rush states in the opening statement:

> In the course of this trial, you will hear repeated references by Gitksan and Wet'suwet'en witnesses to their law. Yet, you will not hear evidence locating the power to legislate in any Gitksan legislature. You will not hear of any Wet'suwet'en Supreme Court House, inhabited by a specialized judiciary, charged with interpreting and applying the law. Nor will you see any Wet'suwet'en policemen or Wet'suwet'en bailiffs, who make their living enforcing Gitksan and Wet'suwet'en law. What the court will hear about are the principles in rules which entrench fundamental Gitksan and Wet'suwet'en values, establish a basis for social order, and provide for the peaceful resolution of conflict.[226]

So counsel for the plaintiffs arguments are informed by very different discourses at least to the Chief Justice's.

Secondly, and in a similar vein, counsel for the plaintiffs' formulation of legal principles are not founded upon white supremacist strategies. For example, I described above how both McEachern's formulation of the principle of 'aboriginal rights', freezes these rights according to racist understandings of First Nations practices. By contrast, counsel for the plaintiffs formulate a principle of aboriginal rights not on the basis of the content of what First Nations were doing at the time of contact but on the fact and function of such practices; in this schema, if First Nations can be said to have governed themselves by their own laws in a particular fashion then they have a right to do so now with no restrictions on the form the government and laws should take. In this formulation, First Nations societies are thus not contained as the other to European societies and thereby consigned to the past but can be dynamic, develop, and still remain as First Nations societies.

Thirdly, counsel for the plaintiffs challenge accepted modes of interpreting texts by insisting that documents should be read contextually. Contrary to Chief

---

[225] McEachern, *op.cit.*, p. 73.

[226] Transcripts, volume 1, p. 85.

Justice McEachern who seems to place considerable emphasis on the literal meaning of each word to interpret the Royal Proclamation of 1763, they insist that it must be placed within the context of a long line of treaties and agreements between Native Americans, First Nations and British and North American governments.[227] Counsel's attitude to reading treaties is more of a departure; they argue that where possible, treaties should be interpreted with regard to the Native American or First Nations understandings of those treaties. This concern is reflected in the way they read the treaties, because they try to consider what Native Americans or First Nations thought they were getting and their reasonings for signing, by looking at the record of the treaty making process itself - the speeches made and so on - and also the historical conditions affecting the tribes or bands in question.[228] In this way, counsel for the plaintiffs move away from the literal readings of treaties which are frequently used to highlight how little Native Americans or First Nations were remunerated for their lands, and to stress therefore both their purported naivety and the expediency of the treaty making

---

[227] In the case of McEachern's reading, I am thinking here of the emphasis he placed on the words at the 'will and pleasure of the sovereign' in the Royal Proclamation. He reads these to refer to the principles whereby Aboriginal title to land could only be extinguished consensually, suggesting that these principles were expedient and could be abandoned at a convenient time. See McEachern, *op.cit.*, p. ix. By some accounts, even his interpretations of these words are faulty because, in the text of the Royal Proclamation they could also refer to the limiting of the bounds of colonial settlement - ie. that these limitations remain 'at the pleasure of the Crown'. I quote from the Appellants' Factum in **Delgamuukw**, section 906:

> In the overall context of the Proclamation's provisions these words were not intended nor should they be read as limiting the nature of the Indian interest to a non-proprietary one dependent upon the goodwill of the sovereign. Rather, they are a reference to the fact that the boundary line (the so-called Proclamation line) between the English settlements was not seen as a permanent one.

The argument that the Royal Proclamation should be read contextually is elaborated in Gisday Wa and Delgam Uukw, *op.cit.*, pp. 71-89.

[228] For example, counsel for the plaintiffs draw upon a detailed documentary record of the conduct of the negotiations with the Six Nations of the Iroquois Confederacy during the Covenant Chain Treaty Councils of the 18th century. Appellants' Factum, *ibid.*, sections 876-878. While, in the more recent treaty history in Canada, they take into account circumstances such as a smallpox epidemic and a diminishing food supply to understand the Cree Nation's desire to enter into a treaty with Canada: Appellants Factum, *ibid.*, p. 264.

process on the part of the Europeans; interpretations which are again reflected in McEachern's **Reasons for Judgement.**[229] In this way, in contrast to the un-problematized process that McEachern engages in for reading both legal and historical documents, for counsel for the plaintiffs meaning is not self-evident in texts.

Fourthly, and most significantly, the actions and statements of counsel for the plaintiffs indicate that they do not devalue First Nations discourses and knowledges and indeed struggle to validate them and to promote the inclusion of First Nations people speaking in their own voices in both strong and weak senses in the trial process. Counsel for the plaintiffs' willingness to include subjugated discourses and knowledges like the Gitksan *Adaawk* and the Wet'suwet'en *Kungax,* their reliance in different ways upon evidence from these oral forms of knowledge, (including that contained in the maps and in anthropological testimony), and their promotion of First Nations modes of expression, as in the singing of the song, certainly marks a departure from practice in most cases involving First Nations people, and represents the strongest evidence for their valorization of these discourses and knowledges. Sustained argument for accepting the truth in First Nations oral history was given in the opening statement and is very revealing in itself, and worth quoting at length:

> The test of the experts' truth in the Western scientific tradition has two facets: on the one hand there is expertise by virtue of special training and discipline, while on the other hand, there is discovery and truth by virtue of testing hypotheses under controlled conditions. In the Gitksan and Wet'suwet'en system of knowledge, there are properly qualified specialists: Hereditary chiefs and elders, and they have responsibility for facts that are more than individual opinions. Also, a chief has undergone specialized training and study, thanks to which he or she can be trusted to ensure that facts are stated and ordered in the proper manner. Finally, this stating and ordering amounts over long periods of time, often reaching far beyond the lifetime of any single chief, to a test of truth. By surviving in the Feast system, facts acquire a higher status, and come to constitute a part of accepted

---

[229] McEachern, *op.cit.*, p. 99-130.

> knowledge -- much as scientifically verified facts assume the status of knowledge in the Western tradition.
>
> The difficulty we in the Western tradition have is in seeing the nature of facts in another, different kind of cultural arrangement. If one culture refuses to recognize another's facts in the other culture's terms, then the very possibility of dialogue between the two is drastically undermined. The challenge for this court in understanding the nature of Gitksan and Wet'suwet'en history as real, is part of the Court's task in treating Gitksan and Wet'suwet'en society as equals.[230]

In many ways, this statement constitutes the most revolutionary departure from the norms of legal truth because it dispenses with mimetic criteria - the correspondence between representation and reality - and recognizes the extent to which truth is the product of social rules, practices and institutions.[231] In this way, counsel for the plaintiffs clearly opposed the exclusion and devaluing of First Nations discourses which McEachern and counsel for the defence enacted by deploying regulating discourses, (epitomized in labelling these discourses as 'subjective', 'political' or hearsay).

These four elements of the plaintiffs case in **Delgamuukw** suggest the outlines of an oppositional legal discourse public. Counsel for the plaintiffs thus constitute at least part of a group that is struggling to gain some measure of control over the means of legal interpretation. Should they do so, it seems possible that they could reverse the subjugation of First Nations discourses and knowledges in the legal sphere.

Nevertheless, the development of the characteristics of this legal discourse public which valorize First Nations discourses and knowledges should not be separated from First Nations resistance. The continuing store set by counsel for the plaintiffs to make courts able to accept First Nations oral history and the like

---

[230] Transcripts, volume 2, p. 93.

[231] It is important to acknowledge that this departure is not always consistent. For example, a good part of the plaintiff's case depends upon establishing the truth of their version of history, including that which reads documents contextually.

arises in part from Gitksan and Wet'suwet'en demands and actions. It was the members of these nations who insisted that their case should be based upon their oral histories, the *Adaawk* and *Kungax*, and it was they who undertook to transcribe these knowledges in the form of maps and the like, which are legible to the court.[232] In this way, the conditions which suggest the possibility for reversing the subjugation of First Nations knowledges and discourses in the court are at least partly attributable to the ways in which the Gitksan and Wet'suwet'en people use the legal process and court-room.

To sum up, actions and statements by counsel for the plaintiffs distinguish them as members of an oppositional legal discourse public, which, contrary to the Chief Justice and counsel for the defence valorizes and validates First Nations discourses and knowledges. That they do, and that the potential for legitimizing these discourses and knowledges inheres in their struggle for control over the means of legal interpretation, has been partly contingent on First Nations use of the court-room to resist colonial and legal power/knowledge.

Conclusion:

I think in terms of de Certeau's categories of practice - strategy and tactic - many of the actions and statements during **Delgamuukw** make sense beyond the immediate goals and debates of the adversarial contest at hand. In the context of the particular position First Nations people occupy as colonized subjects, always having to operate in de Certeau's words, in 'the place of the other' actions like the mapping of the territories, the continual spelling of Gitksan and Wet'suwet'en words, the protests against the removal of the trial to Vancouver, and the efforts

[232] Interview, Michael Jackson, 5th September, 1992. Counsel for the plaintiffs are continuing to press for the acceptance of oral testimony in the Appeal process even though the case in Appeal does not strictly require it.

to introduce First Nations understandings into the court appear as acts of resistance. Mapping and spelling resist the processes of erasure and othering enacted by colonial power/knowledge and reinforced in the court-room by the legal sphere's founding reliance on the written; in effect, they mark the use of the court's inscription process and emphasis on the written to circulate subjugated discourses and knowledges. The protests against the removal of the trial politicize the routine operations of the court, in particular those which respond to spatialities inherited from colonialism. Equally, the efforts to include Gitksan and Wet'suwet'en senses of injustice and hopes into the court-room extend official meanings of the court space by using it to circulate non-legal arguments and interpretations. As such, they also resist the fundamental *principles of division* which structure the juridical field. In these ways the space of the court-room, a place constructed with the colonial framework and responsive to colonialist spatialities and discourses, is made to respond to different intentions and desires than merely the resolution of disputes through a mediated adversarial process.

It is difficult to determine the effectiveness of these resistances though I think it is arguable that they do have a significant effect on the legal sphere. Some of the actions seem to promise quite radical transformation of the legal sphere, particularly those by counsel for the plaintiffs which undermine the division between lay and lawyer, but often these are the most sporadic and least sustained and thus seem least likely to make a lasting impact. The systematic inscription and circulation of First Nations discourses through maps, the telling of the *Adaawk*, and spelling seems to present a serious challenge to colonialist strategies, but it is difficult to gauge its impact by looking at the legal sphere alone. Nevertheless, in the context of the emergence of an oppositional legal discourse public which valorizes First Nations knowledges and discourses, and

considering the extent to which Gitksan and Wet'suwet'en action has contributed to this valorization, it does not seem too far fetched to conclude that at least in part, First Nations resistance has the potential to alter the legal sphere and reverse the subjugation of First Nations discourses and knowledges within it.

CHAPTER 6
CONCLUSION:

As a focus on **Delgamuukw,** a singular, sustained encounter between First Nations people and the legal sphere, I like to think this thesis is like a snapshot, or better still, a timed exposure of a night-time cityscape. Not because such a photograph is an accurate recording of the experience of a city by night. Indeed such an exercise obtains a rather emaciated record; all the sounds and smells of the scene are erased while the time period with all its motions and changes is frozen into one instant; even the visual range is limited to what can show up with limited light, or what is not obscured by other brighter images. Furthermore everything in the image depends on the positioning of the camera; anything stationary or moving outside its field of vision is excluded. A timed exposure, like other photographs, is thus very much a production. As such camera positioning, film and the lights of the cityscape interact to produce a sense of the movements, direction and speed in the city. In a similar manner reading the relicts of a trial - its decision and transcripts - for this thesis, I brought a particular perspective informed by Western theoretical concepts with their specific emphases and limited, receptive capacities.[233] Allowing for the limitations of this medium, and for my particular positioning of the theoretical camera, in the manner of the timed exposure of the cityscape I have tried to produce some sense of the colonial and post-colonial movements and directions of **Delgamuukw**, as an after image of the trial in my thesis.

---

[233] My use of a visual metaphor is no accident here; Western modes of objectification are most often founded on visualizing practices and this is reflected by the structuring vocabulary and the focus on structures in my thesis.

If my efforts have been at all successful, what this after-image suggests are three movements and directions simultaneously present in **Delgamuukw**. First there is a colonialist moment - a series of ways in which the practices of the legal sphere combined with colonialist strategies. Second, an anti-colonialist moment - a catalogue of instances in which First Nations people and their legal representatives resisted this combination, or turned the procedures of the court-room against colonialist operations. Third, a post-colonialist moment - relating to First Nations use of the court-room, the emergence of a legal faction whose struggle over the means of legal interpretation has the potential to overturn certain colonialist operations of the legal sphere.

I have suggested that the colonialist moment is evident in the decision to the trial and in the specific operations of the discursive arena of the court.

The articulation of realist knowledge practices and white supremacist discourses in Chief Justice McEachern's **Reasons for Judgement** indicates how the rational decision making procedures so esteemed by the legal profession can be a prejudiced process. The legalization of the Gitksan and Wet'suwet'en struggle re-writes that struggle into a series of questions that are 'justiciable' - ie that can be administered by the judicial process. What I have tried to highlight is that though McEachern's procedure for answering these questions might be perfectly rational it erases First Nations' knowledges, while his formulations of the case's 'justiciable questions' reiterate colonialist constructions of the Indian as other. The Chief Justice's determination of the extent of Gitksan and Wet'suwet'en presence on the territories, and his related dismissal of their ownership is the best example. His way of knowing the territories is dominated by visualizing techniques akin to mapping and surveying which, when he describes the territories produce an account that is radically incommensurable with the facts of Gitksan and

Wet'suwet'en presence, as recorded in certain First Nations descriptions. The authority of the Chief Justice's way of knowing benefits from the self-effaced position that he assumes in his text, in keeping with the well-established rhetorical strategies that characterize Western scientific discourses as well as nineteenth century genres of travel narratives. By so doing McEachern naturalizes the particularity of his visualizing practices. But, if I am correct, these practices are far from neutral; rather, they are structured by a systematic othering founded upon white supremacist conceptions of property and discourses of the nature of Indian life. As such, McEachern's rational process for determining the extent of Gitksan and Wet'suwet'en presence on the territories configures colonialist and legal modes of power/knowledge. In chapter 2 I described this configuration in terms of three movements in McEachern's judgement. First, the Chief Justice reads the writings of the colonial and just prior to the colonial period, accounts written by traders, government personnel, and Indian commissioners, for their understanding of the nature of Indian ownership and for eye-witness accounts of Indian society at the time. He thus assumes the same direct relationship between seeing and knowing that informs his own visualizing practices, and correspondingly, the inherent visibility and knowability of First Nations societies. In the second move, he constructs an imaginative geography for the life of the B.C. Indian based on these accounts. By drawing on colonialist writings in this way, McEachern is articulating a white supremacist - specifically pro-settler - discourse that determines what can be said or known of Indians. The imaginary landscape of B.C. Indian life that he constructs is therefore rigidly confined to 'villages by great rivers,' and inhabited by an othered Indian. This Indian travels only for subsistence purposes, follows customs, behaves according to his survival instincts, and has no concept of ownership, in direct opposition to his exploring, producing, trading, consuming, law-making, planning, scheming and

owning European counterpart. In the manner of citing legal precedent, the Chief Justice supports his othering with quotes from the colonial written record. Third, he deploys the imagined geography of B.C. Indian life in combination with his systematic observations of the area claimed to determine from the abandoned villages he sees that the territories are a vast emptiness. With the relentless and seamless logic of this cycle of citation and observation, and his determination that the territories hold no evidence of First Nations presence, McEachern can thus dismiss Gitksan Wet'suwet'en claims to the territory, precisely because, in the white supremacist discourses he adopts, Indians can only own the land upon which they live or cultivate. The rational truth-determining process applied by the Chief Justice thus erases Gitksan and Wet'suwet'en 'facts' of their presence and ownership, while formulating the question of their ownership of the territories in terms of a white supremacist conception.

During **Delgamuukw** the nature of the court-room as a discursive arena, encouraged the particular constellation of colonialist and legal power/knowledge that I outlined in McEachern's judgement. In chapter 4 I described the structure and form of the adversarial process as mediated. Theoretically, when a struggle is legalized it is transformed from a dispute between 'interested' parties to a rational debate of 'justiciable' questions by 'disinterested' parties. 'Justiciable' questions, and 'disinterested' lawyers presided over by a 'disinterested' mediator, the judge, thus stand in or mediate for the 'interested' parties. In a number of ways, the mediated form of the legal process tends to bolster colonialist operations. In the first place, the re-writing of the struggle into legal terms restricts what can be discussed according to the present limits of what is justiciable. In the case of **Delgamuukw**, (and all land title cases in B.C.), this limit was prescribed to whether or not B.C. First Nations people had or have legally recognizable title to

their land. Because the law and the court-room are very much the preserve and place of the people who colonized Canada, First Nations struggle to regain their land in the court-room is thus ironically restricted to the past recognition of their ownership by colonists, (whether it be in the common law or in the Royal Proclamation). This is, in effect, another way in which, when in court, First Nations people are in 'the place of the other.' Furthermore, the notion of a definitively justiciable question on the one hand distracts from the fact that what is justiciable has changed historically and been contested - for a long time, First Nations struggle for their land was officially recognized only to refer to reserve size - and on the other enables the boundaries of what is justiciable to be drawn according to the sensibilities of the judge. Attempts to introduce questions that approach the limits of justiciable as dictated by the colonial past risk being dismissed precisely for being beyond the bounds of the legal. In this way, as a rationalized debate over justiciable questions, the legal process contains the level at which First Nations anti-colonialist struggles can enter the legal sphere according to the specificities of a colonial past. Second, the position of the judge in the (spatial) structure of the court process naturalizes her/his interpretative framework and sensibilities. In keeping with the self-effaced position the Chief Justice takes up in his description of the territories, the positioning of the judge as arbiter, behind the table before which the two parties of lawyers present their cases presents the assumption that she/he is neutral. The sensibilities which lead the judge to draw the bounds of the legal at a particular point, and the means by which she/he formulates and determines the justiciable questions of the case are precluded from formal consideration in a trial. By insisting that the position of the judge is a neutral one, the mediated structure of the court-room opens the possibility for a judge to draw on white supremacist discourses in the manner I suggest McEachern does unchallenged. In this way, and in answer to the

hypothesis that structures this thesis, the legalization of the Gitksan and Wet'suwet'en struggle for their land into the mediated discursive battle in the court-room promoted the rewriting of that struggle into a series of justiciable questions, constrained according to the specificities of the colonial past and formulated and determined on the basis of white supremacist discourses.

Assuming that the participation by First Nations people in decision-making process over issues that effect them is one means by which the operations of colonial power/knowledge could begin to be undermined, **Delgamuukw**, suggests that the legal process fails to provide such a means. This much is evident in my comparison of the discursive arena of the court-room to Nancy Fraser's outline for a public sphere that could best counter the participatory inequalities arising from the structural inequalities in late twentieth century societies. First, by restricting the terms of debate - what should or should not be justiciable - and the mediator's assumptions, from explicit thematization in the court-room, the legal process reiterates the tendencies of the bourgeois public sphere to restrict certain issues from public deliberation, while bracketing the status and identities of the participants; tendencies, Fraser shows to have supported patriarchal and racist interests. Second, Fraser suggests that to offset the participatory privileges enjoyed by certain groups a discursive arena should encourage the interaction of multiple discourse publics, in which groups can formulate arguments and strategy away from general scrutiny. But the legal sphere typically restricts the non-legal participants to those that can meet the criteria of witness or Expert witness, while the ritualized ordering of space and speech in the court-room rigidly ascribes speaking roles and access to certain speech acts, according to membership of and status in the juridical field, and to the acceptable non-legal roles. The potential for multiple discourse publics to offset the participatory privileges held by members of

the legal profession is thus largely negated. Third, Fraser suggests that assuming interpretive schema and identities should be made explicit in an ideal discursive arena, participation of a discourse public in a debate requires being able to speak in your own voice. However, during the trial, legal argument entailed the continual filtering of First Nations speech through particular representational frameworks. Because in the court-room these frameworks are naturalized, certain idioms and styles of speech that do not fit with these frameworks are very audible. The court record holds instances where such idioms and styles expressed by First Nations persons were quickly excluded or assimilated. If being able to express oneself in one's own idiom and style is speaking in one's own voice in a strong sense, this possibility was unavailable to certain First Nations people. But even the weakest case for First Nations people speaking in their own voice - namely anthropological testimony that drew upon Gitksan and Wet'suwet'en discourses and knowledges, and translated them into a form legible to the court - showed these discourses and knowledges to be devalued. In short because First Nations oral history and knowledge of their society could not claim the status of being Expert, anything based on them could be labelled in the terms of the discourses that regulate the 'neutral' space of the court-room as 'political' or 'subjective', thus diminishing their value in an arena which permits only 'disinterested' and 'objective' statements. In this way **Delgamuukw** indicates how the mediated structure of the court-room reinforces the more widespread subjugation of First Nations discourses and knowledges in Canada. It thus appears to be problematic that the court-room is such a significant site where decisions are made on issues affecting First Nations people, precisely because the structure of the court-room as a discursive arena promotes a repetition of the denial of any status to First Nations discourses and knowledges, that characterizes both the Chief Justice's decision and the history of colonialist power/knowledge.

The anti-colonialist moment in **Delgamuukw** is evinced in the way the Gitksan and Wet'suwet'en people and their lawyers used inscription procedures and court space to counter the strategies of colonialist and legal power/knowledge in ways that extended beyond the immediate concern of the trial. We see such resistances firstly, in the continual spelling of Gitksan and Wet'suwet'en words and in the introduction and display of maps depicting features named in the languages of these two First Nations. In a place where oral-centered cultures are very much the other, the operations of spelling and mapping take advantage of court transcribing procedures and the realist knowledge practices so valued by the law to circulate their subjugated knowledges - their oral histories and records of their territories - and also to make the Gitksan and Wet'suwet'en languages effective for discussing the territories and for enabling action relating to them. Circulating these discourses and making First Nations languages effective is important for their case because it allows Gitksan and Wet'suwet'en spatialities to be presented in legal argument. But, they also represent a more widespread resistance to the colonial strategies which linguistically appropriate territory into colonialist spatialities and continually reproduce it as the place of the colonists. By making Gitksan and Wet'suwet'en languages effective the spelling and mapping during **Delgamuukw** resisted the characteristic colonial process in which, by rendering their languages inoperative, the colonized are made other in their own land. Displaying maps depicting features with their First Nations names resisted the processes which fix the place of colonial spatialities as the only possible place by disseminating spatialities that inhabit a different place, so to speak. In a similar manner, the Gitksan and Wet'suwet'en and their counsel's protests against the removal of the trial to Vancouver attempted to make the legal space responsive to Gitksan and Wet'suwet'en geographies. In this way they politicized the court space thereby undermining the way the routine operations of the court

reinforces colonial spatialities. We see the use of court-room space to challenge legal and colonial power/knowledge secondly, in instances where counsel for the plaintiffs use their juridical capital to enable First Nations people to make speech acts that resist the prescribed speaking roles in court. These occasions show efforts by counsel for the plaintiffs to include Gitksan and Wet'suwet'en peoples' sense of injustice over their colonization and their hopes for a post-colonial future to the territories. In this way they extend the official meanings of court space by using it to circulate non-legal arguments and interpretations, specifically ones which highlight the oppressive nature of the colonialist enterprise in Canada. Through procedures of inscription, protest and by resisting the defining juridical division between legal specialist and lay-person, during **Delgamuukw**, the court-room was thus made to respond to anti-colonialist intentions and desires beyond the resolution of the justiciable questions at hand before the court

Finally, I think the post-colonialist moment is intimated in various actions of counsel for the plaintiffs, which are at least in part connected to Gitksan and Wet'suwet'en use of the court-room. Perhaps the most radical of these is the way the plaintiffs' lawyers break down the *principles of division* which divide legal specialist from lay-person. By recognizing the relevance and significance of First Nations senses of injustice and desires, counsel for the plaintiffs effectively undermined the founding distinction of the juridical field - namely the specialness of the legal attitude towards disputes. The instances during the trial, when their efforts enabled Gitksan and Wet'suwet'en people to participate on more equal terms, and to speak in their own voices in a strong sense, in effect marked the times when the discursive arena of the court-room came closest to resembling Fraser's ideal democratic public sphere. In a sense, these fleeting moments held the equation for a radical transformation of the court into a more egalitarian and

inclusive, and therefore potentially post-colonial public sphere. Less radical but more likely to alter the legal sphere in post-colonial ways are the actions by counsel which demarcate them as an oppositional legal faction that recognizes the legitimacy of First Nations knowledges and discourse. Counsel for the plaintiffs willingness to incorporate the Gitksan and Wet'suwet'en oral histories into the legal process and to formulate legal argument on their basis indicates an emerging valorization of First Nations knowledges and discourses among certain members of the legal profession. Following Bourdieu's assertion that changes in the legal sphere derive from the competition between opposing legal factions to monopolize the means of legal interpretation, I would suggest that, inherent in the struggle of these members of the legal profession for control over the means of legal interpretation, is the potential, however slim, for the validation of First Nations knowledges and discourses in the legal sphere. Considering that, in **Delgamuukw**, the presence of oral histories and the like relates to direct demands made to their lawyers by the Gitksan and Wet'suwet'en people, I think it is possible to link the potentially post-colonial moment when First Nations knowledges and discourse will constitute legitimate evidence in the legal process to First Nations use of and resistance in the courts.

Clearly the conclusion that **Delgamuukw** holds certain anti-colonialist and post-colonialist moments as well as a colonialist one merits some modification to my earlier statement: notwithstanding my sense that the legal sphere is a problematic site for the deliberation and decisions on issues affecting First Nations people, bringing such issues to court remains a valid political strategy because resistance in the court-room and its potential effects extend beyond just winning the dispute before the court.

Directions:

Now, I think the limitations of this thesis in the face of the complexity of the trial and the vast body of information produced during its proceedings are such that my findings can only be suggestive. As such, I hope that they at least suggest the value in, to return to my photographic metaphor, shifting the camera position and applying similar sensibilities to related problems. In this respect, during the course of my work, I have become aware of a number of research foci that would compliment, support, refute or modify my findings here.

One, that given time, I would particularly liked to have undertaken here is a further investigation of the realist ways of knowing that I have mentioned constantly throughout the thesis. The formulation of the legal question of First Nations title by counsel for the defence, and by McEachern, and testimony on this matter by one geographer, is especially suggestive here. In this formulation the matter hinges on whether or not, at the time of the Royal Proclamation, 1763, British Columbia was known by the colonial authorities. Professor Farley, of the UBC geography department was commissioned by counsel for the defence to show that according to maps of the period, this was not the case. Already then we see the trademark of realist knowledge practices in the association between seeing and knowing inherent in the sense that representation in a visual way equates with knowledge. During Farley's testimony, the full extent of this association is clear because the issue comes to hinge not just on whether the area was mapped - there were maps at the time showing the coastline of B.C. - but whether or not it was accurately mapped. Knowing thus becomes equated with accurate visual representation.

A second object for further research is an empirical examination of the oppositional legal discourse publics and the sociology of the legal sphere more

generally. Only such a study could confirm the emergence of such a faction in relation to First Nations issues.[234] It could also detect the relative power of, and no doubt evident divisions within, such a faction, which could modify my optimistic conclusions for its potential to transform the mode of legal interpretation. Equally, determining to what extent such groups are involved with other oppositional movements such as feminism or organized labour might indicate that the legal sphere is in some sense primed for potential changes introduced by First Nations resistance.

Third, this thesis focuses very much on struggles and dynamics internal to the legal sphere, but much work remains to be done on the interrelationship between the legal and other spheres. The important questions relating to why First Nations issues are so prominent in the legal sphere - has the path to legalizing their struggle been a contested one? and so on - requires some consideration of the relationship between such institutions as the Department of Indian Affairs (DIA), which seemed to contain First Nations discourses for so long, and the law. Furthermore, much theoretical work posits that the legalization of an issue functions to contain and depoliticize that issue. Since **Delgamuukw**, the issue of land title has if anything, been more politicized, thus warranting further

---

[234] There is considerable other evidence to suggest this is so. If we read between the lines of Tennant's account, I think it is possible to discern, accompanying early successes such as **White and Bob**, some signs of the emergence of a block of lawyers in support of the First Nations struggle to decolonize. Tennant describes the young lawyer Tom Berger taking up the case. In a footnote he adds how Berger came to be involved in the case through his contacts with Maisie Hurley, the white publisher of the *Native Voice*, and her husband, another lawyer Tom Hurley, who apparently had defended many First Nations in the B.C. courts. Presumably there were more lawyers who had represented First Nations people than Berger and Hurley. Since Berger and Hurley, that group has grown in relative strength and numbers - not only have other firms such as Mandel and Pinder gained a reputation for representing First Nations, but a group of supportive academic lawyers, have since emerged, such as Doug Sanders at U.B.C. and Brian Slaterry and Darlene Johnston in Saskatchewan. This legal group has gained the trappings of institutionalization - Native Law Centres in Saskatchewan and at U.B.C.; and an ideology (or possibly several ideologies) that include(s) Tennant's reading of the history of the Royal Proclamation and also, Justice Hall's principle of inherent rights.

investigation of the relationship between the law, and broader discourse publics within academia, the media, and the state.

Fourth, the operation of the legal sphere both to reinforce colonial power/knowledge and to provide a space for resistance to that power/knowledge suggests the validity for a concerted focus on such ambivalent operations in other domains and sites of power relations. In the *History of Sexuality*, Foucault described the *polyvalency* of discourse: ie that discourses deployed in the interests of regulation and control can also provide a basis to resist or alter that regulation.[235] I think the conclusions of this thesis suggest that the same might be the case for sites of power like court-rooms, and also the practices associated or valorized in such sites - during **Delgamuukw**, writing and mapping. Other colonial examples of the possible *polyvalency* of sites that deserve further investigation are museums, particularly anthropology museums. Like court-rooms they have been configured in the interests of colonial power/knowledge to objectify the colonized, to propagate myths of their extinction and the like. But in recent years, First Nations groups, and other 'indigenous' peoples have asserted control over the objects in these museums, and used museum space as bases for organizing, for disseminating anti-colonialist messages and the like. So research on the *polyvalency* of sites of power seems a valid avenue for the continuing investigations of the operations of power and resistance.

Fifth and finally, a more thorough understanding of the role of the legal sphere in colonizing and decolonizing requires the future assessment of the progression of what I describe as potential transformations in the treatment of

---

[235] Foucault, History of Sexuality, volume 1 *op.cit.* I have in mind here Foucault's account of how the fashioning of the construct homosexuality in the interests of regulating a 'normalized' sexuality also provided the basis upon which gay people could organize and challenge that normalized sexuality.

First Nations discourses and knowledges. My assessment that First Nations resistance has the potential to enter into and change the means of legal interpretation and arguably the law is predicted by the work of Bourdieu, Fitzpatrick, and Fraser. However, in this respect, their predictions are a little more bleak. Bourdieu suggests that what he calls avant-garde lawyers, by adapting the legal process to the demands of oppositional groups in minor ways, ultimately reproduce the power and form of the juridical field. Similarly, Fitzpatrick admits that though in colonial settings resistance has altered law,

> the transformation of law through counter power operated back .. on counter power. It was now accorded some legal recognition, as regulated trade unions, and thereby partly assimilated and neutralized within colonial power.[236]

Perhaps most bleak is Fraser's description of the way the early shelters for abused women were, with recognition by the state, transformed from places which united women in the struggle against violence, to ones which interpreted the problem in therapeutic terms and normalized the women as individual victims. These are all salient premonitions for the way First Nations knowledges and discourse might be received by the legal sphere. If future work finds that the *Adaawk* and *Kungax* have in effect been normalized, say as exceptions to Expert testimony, then their potential to transform the court-room into a more democratic discursive arena will have been forestalled. In such a case, other First Nations which perhaps have less precise territorial distinctions than are present in the oral record of the Gitksan and Wet'suwet'en might find there discourses excluded, notwithstanding the validity of the Gitksan and Wet'suwet'en forms. If this is the case, then, in the interests of creating a more egalitarian public sphere it would perhaps be valid to look to the more radical possibilities inherent in the occasions when counsel for the plaintiffs broke down the legal *principles of division* and devise strategies to

---

[236] Fitzpatrick, Informal Justice, *op.cit.*, p. 188.

further that break down. Whatever the findings it is research in this area could clearly modify the tone of my conclusions.

Though my conclusions would do well from the support of further research I think two sensibilities from this perhaps blurry image of colonial and postcolonial movements and directions remain important. The first is the sense that the role of the legal sphere in colonization and decolonizing should not be too hastily pre-judged. To conclude that the law is a neutral decision-making process to which First Nations people can turn should other avenues be closed - as is the sense gained from the role given to the law during the 1992 Constitutional Accord in relation to self-government - would be to deny the very manifest ways in which legal practices and procedures were configured with colonial power/knowledge in **Delgamuukw**. However, to decide on the basis of this same trial decide that First Nations people should not take their claims to court is to preclude a potentially important and viable means of decolonizing. So, by accepting the *polyvalency* of the court-room one must forgo the possibility of a straightforward assessment of the relationship between law, colonialism and the struggle to decolonize. Second, is the sense that First Nations resistance and by extension, the resistance of other oppositional movements is effective. The evident potential, for First Nations resistance to alter the form of the law, even in a case with so unfavourable a result, is a suggestive theoretical and political finding. In some ways, making the effectivity of resistance visible in this way is reminiscent of how Marx's labour theory of value demonstrates to workers that they are the source of both capitalists' wealth, and the workers' own wages. Appreciating that the source of moderation in the law is partly attributable to the resistance of oppositional groups represents a powerful shift from locating its root in an enlightened, humane, paternalistic sovereign, or benign state; this appreciation

thus undermines a conception which masks the validity of resistance and allows dominant groups to claim enlightened change as their prerogative, and is at the same time a motivating understanding in the face of the frequent sense that resistance is ineffectual.

Bibliography:

Adas, M. *Machines as the Measure of Men: Science, Technology and Ideologies of Western Dominance*, Ithaca and London: Cornell University Press, 1989.

Appadurai, Arjun, Putting Hierarchy in its Place, *Cultural Anthropology*, Vol.3, No.1, 1988, pp. 36-49.

Asch, M., & Macklem, P. Aboriginal Rights and Canadian sovereignty: an essay on R. v. Sparrow, *Alberta Law Review*, v. xxix, No. 2, 1991, pp. 498-517.

Barthes Roland, The Theory of The Text, trans. by McLeod, I. in (Ed.) Robert Young, *Untying the Text*, Boston, London: Routledge & Kegan Paul, 1981, pp. 31-37.

Basic facts about Corrections Canada, Correction Service Canada, 1990.

Bhabha, Homi, K., Difference, Discrimination and the Discourse of Colonialism, in (Ed.), Fransis Barker et al, *The Politics of Theory: Proceedings of the Essex Conference on the Sociology of Literature, July 1982*, Colchester: University of Essex, 1983.

Bourdieu, Pierre, The Force of Law: Toward a sociology of the Juridical Field, *The Hastings Law Journal*, vol.38, July 1987, pp. 805-853.

Carter, Paul, *The Road to Botany Bay*: Explorations of Landscape and History, New York: Alfred A. Knopf, 1988.

Cassidy, Julie: The Significance of the Classification of a Colonial Acquisition: The Conquered/Settled distinction, *Australian Aboriginal Studies*, 1988-89, pp. 2-17.

Certeau, Michel de, *The Practice of Everyday Life*, Berkeley and Los Angeles, California: University of California Press, 1988.

Christie, Nils, Conflicts as Property, *The British Journal of Criminology*, vol.17, no.1, Jan 1977, pp. 1-15.

Clifford, James, *The Predicament of Culture*, Cambridge, Massachusetts: Harvard University Press, 1988

Cronon, William, *Changes in the Land: Indians, Colonists, and the Ecology of New England*, New York: Hill and Wang, 1983.

Driver, F. Power, Space, and the Body: a critical assessment of Foucault's Discipline and Punish, *Environment and Planning D: Society and Space*, 1985, vol. 3, pp. 425-446.

Fitzpatrick, P., Crime as resistance: the colonial situation, *The Howard Journal*, vol 28, No. 4, Nov. 1989, pp. 272-281.

Fitzpatrick, P., The Rise and Rise of Informalism, In R. Matthews (Ed.), *Informal Justice*, Sage, 1988, pp. 178-211.

Foucault, M., *Discipline and Punish the Birth of the Prison*, New York: Random House, Vintage Books, 1979.

Foucault, M., *The History of Sexuality, volume 1: An Introduction*, New York: Vintage Books, 1980.

Fraser Nancy, *Unruly Practices: Power Discourse and Gender in Contemporary Social Theory*, Minneapolis: University of Minnesota Press, 1989.

Fraser, Nancy, Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy, *Social Text*, Vol. 5 No. 26, 1990, pp. 56-80.

Gisday Wa and Delgam Uukw, *The Spirit in the Land*, Gabriola, British Columbia: Reflections, 1987.

Habermas, J. *The Theory of Communicative Action* Vol.1, Trans. by Thomas McCarthy, London, Heinemann, 1984.

Haraway, Donna., *Simians Cyborgs and Women: The Reinvention of Nature*, New York: Routledge, 1991.

Harley, J.B. Deconstructing the Map, *Cartographica*, vol.26, no.2, Summer 1989, pp. 1-20.

Hutchinson, Allan. C., (Ed.) *Critical Legal Studies*, Totowa, New Jersey: Rowman and Littlefield Publishers, Inc., 1989.

Johnston, D., *The Taking of Indian Lands in Canada. Consent or Coercion?*, University of Saskatchewan Native Law Centre, 1989.

Krupat, Arnold, *Ethnocriticism: Ethnography, History, Literature*, Berkeley, Los Angeles, Oxford: University of California Press, 1992.

Mandel, Michael, The Rule of Law and the Legalisation of Politics in Canada, *The International Journal of the Sociology of Law*, 1985, pp.273-287.

McGrane, Bernard, *Beyond Anthropology Society and Other*, New York: Columbia University Press, 1988.

Mitchell, T., *Colonising Egypt*, Cambridge: Cambridge University Press, 1988.

Monet, Don & Skanu'u (Ardythe Wilson), *Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet'suwet'en Sovereignty Case*, Philadelphia, Pa; Gabriola Island, BC: New Society Publishers, 1992.

Pratt, Mary Louise, Scratches on the Face of the Country or, What Mr. Barrow Saw in the Land of the Bushmen, *Critical Inquiry*, vol. 12, Autumn 1985, pp. 119-142.

Rabinow, Paul, Representations are Social Facts: Modernity and Post-Modernity in Anthropology, in (Ed.) Clifford, James and Marcus, George, E. *Writing Culture:*

The Poetics and Politics of Ethnography, Berkeley: University of California Press, 1986, pp. 234-261.

Rosen, Lawrence, The Anthropologist as Expert Witness, *American Anthropologist*, 79, 1977, pp. 555-578.

Ruebsaat, Norbert, Speaking with Diane Brown A-Text-In-Progress, *Border/Lines*, Fall, 1989, pp. 18-23.

Said, Edward, *Orientalism*, New York: Vintage Books, 1979.

Santos de Sousa, B. Law: A Map of Misreading. Toward a Postmodern Conception of Law, *Journal of Law and Society*, vol. 14. No. 3, Autumn 1987, pp. 279-302.

Slattery, Brian, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*, Studies in Aboriginal Rights No. 2, University of Saskatchewan Native Law Centre, 1983.

Smith, Paul, *Discerning the Subject*, Minneapolis: University of Minnesota Press, 1988.

Tennant, Paul, *Aboriginal People and Politics*, Vancouver: University of British Columbia Press, 1990.

Thompson, E.P. *Whigs and Hunters*, Middlesex, England: Penguin Books, 1985.

White, Stephen, K. *Political Theory and Postmodernism*, Cambridge: Cambridge University Press, 1991.

Williams, R.A.JR., The Medieval and Renaissance origins of the status of the American Indian in Western Legal Thought, *Southern California Law Review*, Vol.57 Nov. 1983 No.1, pp. 1-99.

Court Cases:

Calder v. Attorney General of British Columbia (1973), *Supreme Court Reports* [1973], pp. 145-226 [Supreme Court of Canada].

Delgamuukw v. Her Majesty the Queen in Right of the Province of British Columbia and the Attorney-General of Canada: "Reasons for Judgement of the Honourable Chief Justice Allan McEachern". (March 8, 1991), [Supreme Court of British Columbia].

Guerin v. Regina (1984), 6 *Western Weekly Reports* [1984], pp. 481-529 [Supreme Court of Canada].

Regina v. White and Bob (1965), 52 *Dominion Law Reports* (2d) [1965], p. 481 [Supreme Court of Canada].

Sparrow v. Regina (1986) 2 *Western Weekly Reports* [1987], pp. 577-609 [British Columbia Court of Appeal].

Unpublished Material:

Transcripts of the Proceedings At Trial, **Delgamuukw v. Her Majesty the Queen in Right of the Province of British Columbia and the Attorney-General of Canada**, (Between May 11, 1987 and June 30, 1990) [Supreme Court of British Columbia], Smithers and Vancouver, British Columbia: Smithers Registry.

Appellants Factum, **Delgamuukw v. Her Majesty the Queen in Right of the Province of British Columbia and the Attorney-General of Canada**, [British Columbia Court of Appeal].