AMERICAN INDIAN CULTURE AND RESEARCH JOURNAL 20:4 (1996) 71–90

Claiming Memory in British Columbia: Aboriginal Rights and the State

FAE L. KORSMO

INTRODUCTION

While attending a meeting of a Saami organization in northern Sweden, I introduced myself to an older fellow during a coffee break. "From America?" he asked and paused. "When do you go back?" I replied that I planned to return in a couple of months. He smiled. "You'll go back," he said, "and we will forget you were ever here." This remark from a Saami who was old enough to remember the era of segregation, the political mobilization of northern Europe's indigenous people, the lawsuits, the endless negotiations and promises of the Swedish government, juxtaposed the ephemeral nature of my visit and the extended encounter of a colonial endeavor. Whose memories would become history? Here I would like to explore the significance of memory in the assertion of native claims. I turn to Canada, specifically British Columbia, where claims processes have been underway for a long time.

Proving the existence of aboriginal rights in common law requires a reconstruction of a people's past presented in a way that satisfies Western legal traditions. Evidence must be internally consistent, chronological, and documented. Crucial gaps in time or knowledge must be explained. Observers of the trial and readers of the decisions rendered in *Delgamuukw v. The Queen*[1]

Fae L. Korsmo is an associate professor of political science at the University of Alaska, Fairbanks.

have criticized the process and outcome as expressions of colonialism and ethnocentrism.[2] This essay does not dismiss the criticisms, but analyzes the texts of the decisions issued by the British Columbia Supreme Court and the British Columbia Court of Appeal as representations of the state's concept of itself in opposition to societies claiming to be whole, original, and sovereign.

The European state, while extending its authority to new territories, lost its memory. Colonial officials had no need to justify the intrusions of settlers in terms of who they were or where they came from; they were busy creating facts for future claims. This is an essential feature of colonialism: looking forward to becoming established and creating a mythology binding newcomers to the territory.

The people already living in or near the area have no role in the new myths, except perhaps as enemies or a dying race. They represent a noble yet doomed past that must be prevented from becoming a present-day threat. Insofar as the colonial mythology has put the burden on the indigenous societies to justify their claims in terms of their origins and hardy continuity, the doctrine of aboriginal title is part of colonialism and therefore dooms the indigenous claimants to failure. But there is something else in contemporary aboriginal claims, a reminder to the colonial state of its own homelessness and fragmentation. By demanding a show of coherence and continuity from aboriginal claimants, the state exposes itself to scrutiny. As a result, the claims reveal not only the fissures and discontinuities in the aboriginal society's recollections, but also the differences among government officials, settlers, and others whose accounts are taken as evidence. Allowing these differences to surface as contestable claims is part of the postcolonial experience. Yet, as seen in cases such as *Delgamuukw*, the transition from a myth-making colonial state to a postcolonial cacophony of diverse voices is hardly complete.

The legal doctrine of aboriginal title emerged from the contingencies of encounter in the New World. The explorer's and conquerer's calculation of the native society's relative strength (and other factors such as usefulness and willingness to cooperate) helped to determine whether to leave them alone, establish alliances and joint ventures, or enslave them. The test for proving aboriginal title arose out of these political considerations. Did you resist us? Did you keep your culture intact? Did we recognize your power? Did we keep records of your whereabouts and your

battles with neighboring tribes? In other words, did your forms of resistance resemble ours? Were you sufficiently like us to gain our recognition, yet different enough to be kept separate?

The elements of this test require a high degree of self-consciousness possessed by the indigenous society in order to act and respond to intrusions as a social unit, to reciprocate, in other words, the Europeans' recognition. Needless to say, this delicate balance of sameness and difference would be difficult to demonstrate. Indeed, the more state-like the aboriginal claim, involving elements of separate state-like institutions, the less likely the aboriginal claimants are to convince courts of their claim. The less familiar and more "primitive" the claim, such as nonexclusive hunting and fishing rights, the more likely its success.

The Gitksan and Wet'suwet'en claims considered in *Delgamuukw* involved comprehensive ownership and jurisdiction in addition to aboriginal rights, the latter taking a kind of fall-back position should the claims of ownership and jurisdiction fail.[3] While a few commentators see a necessary linkage between the three, it is more common to distinguish between (1) aboriginal title or aboriginal rights, (2) ownership or proprietary rights, and (3) jurisdiction or legal authority over a territory. Thus, *Delgamuukw* presents a single case from which to examine three levels of group autonomy, ranging from a tolerated yet easily extinguished use of resources to a sovereign ability to make and enforce rules regarding the use of resources. Not surprisingly, the trial judge and the majority of the Court of Appeal focused on the aboriginal rights claim and rejected the ownership and jurisdiction claims. An analysis of their opinions in conjunction with the dissents reveals correspondingly divergent images of the state as a rigid, solid frame versus a fluid, protective layer. The major part of this article will consider the three levels of group autonomy, beginning with sovereignty and jurisdiction. But first, let us turn to a brief background of *Delgamuukw*.

BRITISH COLUMBIA AND ABORIGINAL PEOPLES

The first recorded encounter between Europeans and the native inhabitants of what is now British Columbia occurred in 1774, when a Spanish navigator met a group of Haida on the coast. Four years later James Cook spent time refitting for his Pacific voyage and trading with the locals at Nootka Sound.[4] The years between this initial contact and the discovery of gold in the Fraser River in

1858 were characterized, according to Robin Fisher, by a fur trade that may have influenced the power relationships among the various aboriginal groups, but did not disrupt their ways of life. In fact, the aboriginal groups often controlled the trading relationships with the Americans and Europeans, rather than the other way around.[5] Not until 1849, three years after the Oregon Boundary Treaty established the southern border of British control in the western part of North America, did Britain establish a colony, the Colony of Vancouver Island, and put the Hudson's Bay Company in control of it.[6]

The gold rush brought hundreds of fortune seekers to British Columbia. In 1858, the British government responded to the influx of gold seekers by taking over the Hudson's Bay Company's jurisdiction and consolidating Vancouver Island with the mainland to establish the Colony of British Columbia. The governor of the new colony, James Douglas, who had also been the Hudson's Bay Company's chief factor on Vancouver Island, favored white settlement over a transient mining population, and settlement soon followed. Douglas, according to Paul Tennant, actually recognized aboriginal title and, during his tenure with the Hudson's Bay Company, treated with native groups on Vancouver Island to purchase lands and establish reserves.[7] He arranged no treaties on Vancouver Island after 1854, however, and on the mainland he arranged none at all. Instead, he granted small reserves and allowed native individuals to homestead (or "pre-empt") land in the same way as white settlers could. Tennant claims that Douglas did not continue treaty-making because he envisioned an assimilated aboriginal population who would maintain neither their collective identity nor their lands.[8]

Douglas's successors continued the assimilationist policy with even greater force. In 1866, the British Columbia legislature forbade aboriginal people from pre-empting land without executive permission.[9] In 1871, British Columbia joined the Confederation of Canada as a province. The federal government reserved for itself exclusive jurisdiction over aboriginal peoples. At the time of British Columbia's acceptance into confederation, the federal government of Canada was busy signing treaties with aboriginal groups west of Ontario (the so-called prairie treaties) and, through the Indian Act, setting up an administration for aboriginal communities.[10] The provincial government of British Columbia resisted federal intrusion and, by and large, maintained that aboriginal title did not exist in the province. In the meantime,

aboriginal groups resisted white settlement and brought their land claims to both capitals, Victoria and Ottawa.

Among those who claimed that miners and settlers were intruding upon their aboriginal lands were Gitksan chiefs. The 1984 claim brought by Gisday Wa and Delgam Uukw, on behalf of their houses and other Gitksan and Wet'suwet'en houses and hereditary chiefs, was a renewal of a one-hundred-year-old effort, although clearcut logging had replaced mining and settlement as the major source of land encroachment. The chiefs brought the claim to court to force the province to recognize title and jurisdiction to territories encompassing about 22,000 square miles on and around the Skeena, Bulkley, and Nechako river systems.[11] The court claim came only after repeated attempts to negotiate failed.

The Gitksan and Wet'suwet'en claim relied on the presentation of evidence that included oral histories, family lineages, songs, and descriptions of the potlatch or feast system of governance. In most Western courts of law, much of this evidence would constitute hearsay, but in the *Delgamuukw* case, it was used (although not entirely accepted, as the next sections will show) to demonstrate the vital and enduring relationship between people and land.

The Gitksan and Wet-suwet-en claimants also tried to demonstrate a continuous presence lasting thousands of years in what is now British Columbia. These two groups, among the thirty or more ethnolinguistic aboriginal groups in the area now covered by the province, had established complex trade relationships along the coast and inland long before their involvement in the Hudson's Bay Company fur trade. Their economy evolved from hunting, trapping, fishing, and gathering, to a mixed economy that incorporated wage labor in the fishing, transportation, and lumber industries. Throughout the many economic changes, the people retained their social structures, including the clans, the houses within clans, crests, songs, and, of course, the feast, also known as the potlatch.[12]

A good deal of the evidence, in other words, consisted of collective memories, both recent and ancient, the pieces of which struck the trial judge, Chief Justice Allan McEachern, as confusing or questionable.[13] Some of the stories were not consistent others. Some were incomplete or without reference to specific dates. Many did not establish specific land uses attaching to specific areas of land. Indeed, the words of the chief justice give the impression he is trying—not always successfully—to establish

definite references in time and space. And this is not a comfortable position. When one is afloat, one is easily deceived. The fluid state has no center.

The following three sections treat the claims to sovereignty and jurisdiction, property, and aboriginal rights.

SOVEREIGNTY, JURISDICTION, AND SELF-REGULATION

Unlike other claimants of aboriginal title, the Gitksan and Wet'suwet'en chiefs who filed suit on behalf of their houses and members of their houses also asserted rights of authority over the territory, such as the right to prevent settlement and resource use by outsiders. The chiefs described a complex, multifaceted feast system as evidence of internal governance.[14] But Chief Justice McEachern was not satisfied that the feast was used as a "legislative institution" with regard to the administration and regulation of territory.[15] He found inconsistent practices respecting internal boundaries and remained unconvinced that the Gitksan and Wet'suet'en had a land law system consisting of legislative and enforcement mechanisms.[16] The rules and norms described by the plaintiffs as "law" seemed to McEachern "a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves."[17]

The chief justice suspected the plaintiffs' attorney of trying to manufacture a system of governance out of the "undefined, unspecific forms of government which the chiefs are just beginning to think about."[18] As to the alleged self-governing rights of the Gitksan and Wet'suet'en peoples that would prevail against the province if a conflict arose between aboriginal and provincial law, McEachern pronounced this a "new theory of government."[19]

In sum, the chief justice did not find that either the plaintiffs or their ancestors governed the territory according to their own legal system. In fact, prior to the assertion of British sovereignty in the nineteenth century, the chief justice concluded, the Gitksan and Wet'suet'en people had little need for laws of general application. Individuals may have followed local customs at their convenience, but this could not be called obedience to the law.[20]

The Court of Appeal upheld Chief Justice McEachern's conclusion with regard to jurisdiction. Both McEachern and the Court of Appeal majority (Macfarlane, Taggart, Wallace) interpreted the jurisdiction claim as a broad claim to sovereignty that would, if recognized, establish a third order of government and limit pro-

vincial and federal jurisdiction. The doctrine of tribal sovereignty in the United States, it was emphasized, does not exist in Canada. Instead, Canada was established on the principle of Crown (or parliamentary) sovereignty and, with confederation, a division of powers between the federal and provincial levels.[21]

In Chief Justice McEachern's and the Court of Appeal's assessment, the Gitksan and Wet'suet'en plaintiffs were asking for no less than aboriginal sovereignty: the authority to legislate and execute laws in their territories and to resist the enforcement of provincial law. Dissenting opinions by Court of Appeals judges Lambert and Hutcheon, however, did not consider the plaintiffs' claim to jurisdiction as a claim to sovereignty. Rather, they were seeking recognition of the right to exercise control over their community, land, and institutions, regulating internal relationships in accordance with their own customs and traditions. This right to "self-government" or "self-regulation" rested on flexible customs, traditions, and practices that may appear to contain inconsistencies to outsiders, but certainly the common law provides plenty of inconsistencies as well. In other words, the dissenting judges saw the jurisdiction claim as naturally connected with the aboriginal title claim, stemming from aboriginal customs, traditions, and practices, and giving the native societies the requisite power to continue to develop their culture, society, and economy unhindered by logging, mining, or other ventures by nonaboriginal companies. As such, the right to self-regulation can be seen as an existing right protected by Section 35 of the Constitution Act, 1982.[22]

Aboriginal sovereignty carries with it the notion of absolute authority as well as the executive and legislative functions of the British and Canadian governments. By defining jurisdiction as absolute authority, the courts deny the legality of aboriginal self-government and leave any kind of concurrent powers to be decided through negotiations with the very governments whose standards the aboriginal institutions fail to meet. Aboriginal societies do not resemble the Western state as solidified in a constitutional frame and therefore cannot enjoy any separate authority. Yet there is no room for them within that frame.

Only in the dissent do we see a different kind of state, one that admits of failure and nonawareness, where the common law is "not well or universally understood."[23] Just as a multi-ethnic, dispersed population living across a vast territory requires laws of general application to maintain a social unit, the customs,

traditions, and practices of a small aboriginal society may demand a high degree of flexibility to cope with diminished or threatened resources. If evidence of inconsistencies can be found, then this evidence itself could be taken as an indication of aboriginal law.[24] Rule creation is part of social formation, then; violations of the rules indicate the rules' existence rather than their absence.

But, one may argue, someone in the group must recognize the violations and be able to meet them with sanctions. Following the logic of the dissent, perhaps the violations were needed due to exigencies recognized within the culture, or perhaps a deeper, primary rule prevailed, such as individual autonomy.[25] In any case, the aboriginal conception of rules is not required to fit the state's prevailing definition, for the state itself is transformed and deepened by admitting alternate systems.

Much has been said about different forms of resistance among minorities and marginalized peoples.[26] But in *Delgamuukw*, it is the state that resists co-optation of its narrative by a minority group that wishes to erode the state's power to define itself. The claim of ownership and jurisdiction bears a disquieting resemblance to the feudal unity of sovereignty and property, a combination often claimed by a colonial state.[27]

PROPERTY, OWNERSHIP, EXCLUSIVITY

The ownership claim of the Gitksan and Wet'suet'en plaintiffs invited the courts to take a stand on aboriginal title. Was it equivalent to a proprietary interest in land, or was it merely a personal right of use that depended for its origins and maintenance on the good will of the sovereign? Chief Justice McEachern accepted the authority of *St. Catherine's Milling & Lumber Co. v. The Queen*,[28] and found that aboriginal rights are nonproprietary rights of occupation for residence and aboriginal use and that they can be extinguished at the pleasure of the sovereign.[29] A proprietary interest, on the other hand, would confer on the owners a right to use the land as they see fit, even though the Crown might hold the underlying or radical title. The Supreme Court of Canada in *Guerin v. The Queen*, found a middle ground between personal usufruct and beneficial ownership as follows:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial

> ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true . . . that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians.[30]

In other words, aboriginal title differs from property rights by the inability to sell or transfer, yet because the Crown has the unique ability to alienate native lands, it takes on a special duty to consider aboriginal interests.[31] In addition, as will be discussed below, aboriginal title confers limited rights based on the historical patterns of use and occupation unique to the aboriginal culture.

The plaintiffs in *Delgamuukw* accordingly went beyond the strictures of aboriginal title and asked for a declaration that their rights of ownership included the right to use, harvest, manage, conserve, and transfer the lands and natural resources within the claimed territory. In response, Chief Justice McEachern differentiated between use (e.g., hunting and fishing) and settlement (permanent or semipermanent dwellings) and between exclusive and enforceable rights of possession and shared or noncontested use rights.[32] For the Gitksan and Wet'suet'en to show proprietary interests, they had to demonstrate exclusive possession and continuous dwelling, both of which would be defended against outsiders. The chief justice found that, apart from the village sites, the plaintiffs or their ancestors did not possess other parts of the claimed territory. Since the British Columbia government included village sites within reserves and those reserves were regulated by statute, the court did not touch on the legal status of village sites. Instead, McEachern and the Court of Appeal focused on the claims for territory lying outside the village dwellings. Did plaintiffs occupy these areas to the exclusion of others? Did they establish and recognize boundaries?

According to McEachern and the Court of Appeal majority, the plaintiffs failed to establish exclusive possession and failed to provide agreement on the boundaries between the territories allegedly belonging to individual houses. There were two major reasons for the failure of the ownership claim. First, contradictory evidence did not persuade the courts of recognized boundaries between house territories. If the houses did not recognize one

another's claims, how then could the state be expected to recognize the sum of their claims? Second, McEachern did not find evidence of *exclusive* use and occupation *prior* to the assertion of British sovereignty. He found that

> at the date of British sovereignty the plaintiffs' ancestors were living in their villages on the great rivers in a form of communal society, occupying or using fishing sites and adjacent lands as their ancestors had done for the purpose of hunting and gathering whatever they required for sustenance. They governed themselves in their villages and immediately surrounding areas to the extent necessary for communal living, but it cannot be said that they owned or governed such vast and almost inaccessible tracts of land in any sense that would be recognized by the law.[33]

To put it another way, wrote McEachern, other groups of people could have settled near the villages, and no Gitksan or Wet'wuet'en law would have challenged their settlement.[34] The occupation was nonexclusive, unenforceable, and unrecognized. It was incidental to the search for food, a product of survival rather than ritual. It could not be called ownership.

Dissenting judges Lambert and Hutcheon disagreed with the stark distinction between the aboriginal rights of use and property or ownership rights. Lambert treated the claim to ownership as encompassing a claim to aboriginal title; Hutcheon drew upon the writings of the first Hudson's Bay Company trader in the area, William Brown, to conclude that the Gitksan and Wet'suwet'en people held possession of lands far from the villages and regarded themselves as owners.[35] In fact, Lambert concluded that the proper test was not the existence of explicit tribal laws against intruders, but rather whether the people regarded themselves as having the right of exclusive use.[36]

Lambert exposes the subjectivity of law regardless of its source. The only difference between the explicit laws sought by McEachern and the subjective version of one's own rights is that the former entails a recognition of another society that may need to see a law of general application and an enforcement mechanism before their members will stay away. The calculation necessary to make such explicit laws (explicit, that is, to the other) could not be expected to occur in the absence of threat. To require such an assertion of exclusivity (in terms understood by contemporary Canadian courts) prior to British sovereignty applies a theory of

the modern state as an instrument of property protection to a nonstate society in precontact days. On the other hand, the subjective test brings up the possibility of an arbitrary and contingent history of state formation and acquisition of territory: We are here because we regard ourselves as having exclusive rights and will act accordingly (e.g., claiming underlying title to aboriginal lands). By treating the plaintiffs and their ancestors as subjects (not of the Crown but as autonomous actors capable of rational decision) equipped with a degree of self-knowledge, one can also see the state as subjectivity, this time inscribed as a highly contingent set of rewards and punishments for individual actions rather than a historical and legal necessity. To see aboriginal rights as equivalent to proprietary interests, the agents of the state are forced to destroy the framework from within.

ABORIGINAL RIGHTS

When Judge Mahoney enumerated the criteria for establishing aboriginal title in the 1979 decision, *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*,[37] he established a certainty that was seized upon by courts faced with considerable uncertainty. The *Baker Lake* criteria have become a standard to uphold or modify. To establish aboriginal title, according to this standard, plaintiffs must prove (1) that they and their ancestors were members of an organized society; (2) that the organized society occupied the specific territory over which plaintiffs assert aboriginal title; (3) that the occupation was to the exclusion of other organized societies; and (4) that the occupation was an established fact at the time Britain asserted sovereignty. Chief Justice McEachern used the *Baker Lake* criteria and added a requirement of his own: that plaintiffs establish indefinite, long use of aboriginal lands, stretching back in time before the possibility of European influence.[38] Justifying this time requirement using precedent such as the 1990 fishing rights case of *R. v. Sparrow*,[39] the majority of the Court of Appeal concluded that the aboriginal practices had to be integral to the unique culture of the original society to establish any kind of aboriginal rights to land, be it title or limited use rights (e.g., nonexclusive hunting and fishing). The time requirement simply reflected the evolutionary nature of culture.[40]

Taking the criteria one by one, the trial judge did find evidence of a rudimentary form of social organization among the ancestors

of the Gitksan and Wet'suwet'en plaintiffs in the precontact period. He also found evidence of occupation and doubted that other organized societies established themselves in the heart of Gitksan or Wet'suwet'en territory on a permanent basis. Finally, some Gitksan and Wet'suwet'en people had been present in their villages and surrounding lands for a long time before British sovereignty.[41]

For previous aboriginal practices to provide the basis of current aboriginal rights, they had to be integral to the distinctive culture of the aboriginal society and not brought about by European influence. Trapping animals for the fur trade, for example, would not establish occupancy; neither would mining under European employ.[42] Hunting over a vast territory prior to the European encounter might establish the basis for continued nonexclusive rights to hunt for sustenance. Subsistence activities of the past, however, set the limits for the continuance of such activities; they do not necessarily provide the basis for commercial activities of the future.

How is a court to know that, at the time of contact, aboriginal societies used specific territories in culturally distinct ways? There are, of course, the statements of the elders and the anthropologists, but Chief Justice McEachern turned instead to the written observations of Europeans, finding that many of the oral histories and much anthropological evidence amounted to bias.[43] By emphasizing the Europeans' interpretation of aboriginal customs, the chief justice acknowledged another, implicit requirement for proof of aboriginal rights: recognition by the colonial state.

Judge Wallace, in a separate, concurring opinion for the B.C. Court of Appeal, also emphasized the necessity of recognition by the European society:

> Prior to the exercise of sovereignty and the introduction of the common law, the issue of aboriginal "rights" did not arise. For the aboriginal peoples to have the right, vis-à-vis European settlers, to engage in those traditional practices and uses of land which were integral to their aboriginal society there must be recognition of such a right by those outside the aboriginal community and some mechanism requiring them to respect such a "right". An enforceable right, as against European settlers, came only with the protection which was extended to aboriginal rights by the adjusted common law.[44]

In other words, if aboriginal practices were not recognized as "rights" by the Europeans and somehow incorporated into common law, they would not survive as aboriginal rights today.

Menno Boldt has pointed out that such limitations put on aboriginal rights make these claims quite senseless as a strategy to enhance the status of native peoples.[45] The purity and distinction required of the aboriginal practice combined with the subjectivity of the European observers put in mind a visit to a museum. The use of such criteria freezes aboriginal rights in time, hearkening back to an origin we can only imagine.[46] Indeed, the trial judge found that the state had extinguished whatever aboriginal rights existed by encouraging settlement of British Columbia. The B.C. Court of Appeal disagreed with extinguishment but limited the unextinguished rights to nonexclusive use for aboriginal purposes.

Lambert's dissent rejected the "frozen title theory," asserting that aboriginal title depends not on time immemorial possession, but on established possession at the time England claimed sovereignty over the territory.[47] Furthermore, Lambert wrote, it is a mistake to draw a sharp distinction between ownership and aboriginal rights; the ownership claim encompasses aboriginal rights. Indeed, that is the idea behind aboriginal title.[48]

Aboriginal rights, then, according to Lambert, arose from past customs and traditions and continued to exist after the colonial state was established. The content of those rights should be determined by the aboriginal society's own description, not that of the European newcomers. The right may include modern means of land use, depending on how aboriginal practices evolved over time, but this is a matter for further litigation rather than negotiation.[49]

To put it another way, the task for the claimants is to connect their origins with the present and rename the contributions of the Euro-Canadians. This is a creative, invigorating enterprise, culminating in elaborate presentations of cultural knowledge before the courts. This can and does occur in Lambert's state, a state that has affirmed its commitment to diversity through the Constitution Act of 1982. The state exists only as it is reflected in the self-assertions of its citizens.

Such do-it-yourself projects meet with skepticism in McEachern's state. Under the guise of historical research, they reconstruct the past according to present aspirations. The claims cannot succeed, but they do make visible the lack of fit between

aboriginal societies' conceptions of themselves and the state's constitutional categories of power.

The notion of aboriginal rights implies a truth of origins, if only we could discover it and translate it into modern terms. That the common law incorporates such a term indicates how we grasp at the sanctity of beginnings and cannot help but envy societies that have not lost their memories. If anything, the myth of the state relies on timelessness, a rational solution to tribalism, a structure always available to be discovered or carried to new lands.[50]

MABO AND NATIVE CLAIMS: A NEW MODEL FOR CANADA?

In *Mabo v. Queensland*,[51] the High Court of Australia overturned years of precedent that justifed the extinguishment of aboriginal rights and in this decision affirmed the aboriginal title of the Meriam people to the lands of the Murray Islands. The majority opinion in *Mabo* resembles Lambert's dissent; indeed Lambert cited *Mabo* as an important authority. *Mabo* raised aboriginal title to the status of property rights, a right against the state, unless the state (Queensland), in a valid exercise of legislative or executive power, revealing clear and plain intention to do so, extinguished the title (and such extinguishment would bear the obligation to compensate). A year after the high court's decision in the *Mabo* case, Australia enacted a law for the recognition, protection, and extinguishment of native title.[52] Does this represent the beginnings of an inclusive state or simply another crack in the structure—like common law—that allows aboriginal groups to gain a hearing but not to find a place? And if they do find a place, what happens to competing claims, not the least those claims disputed among different aboriginal groups? Does the inclusive state simply become the captive of different groups at any given moment?

Questions like these have come to the fore for federal and British Columbia officials in the negotiations leading to the Nisga'a Agreement-in-Principle of February 1996. The Nisga'a land claim, like that of the Gitksan and Wet'suwet'en chiefs, goes back about a hundred years. The *Calder* decision of 1973 acknowledged the existence of aboriginal title, but the details were to be hammered out by negotiations.[53] The resulting agreement includes not only Nisga'a ownership of 1,930 square kilometers of land in the lower Nass Valley and former reserve lands, but also self-government, a separate Nisga'a court, and a percentage of the salmon harvest.[54]

The agreement represents the first comprehensive land claims settlement in British Columbia, possibly a model for other claims processes in the province. Not surprisingly, opposition political parties and resource-based interest groups such as the nonaboriginal commercial fishery, are challenging the settlement.[55]

CONCLUSION

As more aboriginal claims are negotiated, it is helpful to compare the state's and the native claimants' positions along the separate dimensions suggested by Tzvetan Todorov.[56] First, there is a value judgment: Is the other party good or bad, inferior or superior? Second, what kind of relationship is established: distance, submission, or identification? Third, what must be known of each other? There is a range of knowledge, from absolute ignorance to as much knowledge as an outsider could have of the other party.

The native claims seem to seek distance, as emphasized in the Gitksan and Wet'suwet'en claims of ownership and jurisdiction, the ability to expel outsiders and maintain internal control. To achieve that distance, however, one must present a great deal of knowledge about one's own legal and social systems in terms that are as familiar as possible to the courts. Presumably once formal recognition of a separate, parallel system has taken place and mechanisms for compensation and future negotiations incorporate the recognition of equal parties, then little need will exist for extensive knowledge of the other party's history.

Recognition of the desired distance, however, cannot follow a history of countless interactions with the Europeans and colonial institutions. Chief Justice McEachern did not see enough evidence of resistance, nor did he see familiar aboriginal executive and legislative institutions he could identify as legitimate. Without physical barriers, aboriginal societies from the origin to the present have to strain to separate their histories from the observers, the traders, the police, the settlers. It is impossible to provide the requisite familiarity with native institutions and demonstrate the requisite distance in the same claim. Indeed, the more aboriginal groups pursue their claims, the more terminology and conceptual categories they must adopt from dominant institutions, thus presenting their uniqueness in familiar terms.

Least troublesome for the state is the acknowledgment of nonexclusive aboriginal rights to take food for sustenance, an

activity not only deemed primitive but also quite easy to regulate and subordinate to other resource use, reducible as it is to units, times, and places. This is the kind of knowledge the fish and game management agencies can incorporate into their plans.

But if we were to abandon the structural model of the state and accept the dissenting voices in *Delgamuukw*, would we have anything but the elevation of subjectivity to icons? Right now the state offers the forum to present one's stories and reserves the right to accept or reject, in total or in part, to call them hoaxes or wounds in need of balm. If the state becomes transformed in this process to the fluid protective layer some would like to see, there has to be identification rather than distance. Whether one calls it co-management, co-optation, or integration, leadership circles in native and nonnative societies overlap and lead to even more vehement cries for distance and secrecy, more virulent claims of superiority.

Furthermore, we see quests for what appear to be the other's defining characteristics. "Indigenous knowledge," "indigenous ways of knowing" appeal to members of the postcolonial state who have forgotten how to communicate with the physical-spiritual world. Using the proceeds from subsurface resources to build schools appeals to indigenous leaders who have been isolated from the most important human-to-human communications regarding resource distribution.[57] Distance is fast disappearing as an option, as is absolute ignorance of the other.

If the state does cloak the masks of diverse subjects, the inquiry into origins becomes less a search for truth than yet another means to resist contemporary assimilative pressures. Claims processes encourage the dusting off of traditions and institutions, but do not guarantee them a viable future. Like the provisions of the Australian Native Title Act of 1993, claims processes require a certain amount of identification and sharing of knowledge between parties and try to avoid built-in assumptions of inferiority or superiority. They rarely settle anything once and for all.

Whose memories become history? In British Columbia, aboriginal groups urge the rethinking of centuries. They have only partly succeeded. Compared to the comprehensive settlements with the aboriginal peoples in Canada's North,[58] the British Columbia groups, with the exception of the Nisga'a, have not attained the three levels of autonomy claimed in *Delgamuukw*. Greater degrees of contact and resource exploitation will complicate the achievement of distance.

NOTES

1. The trial decision was reached in 1991 by Chief Justice Allan McEachern of the Supreme Court of British Columbia. See 79 D.L.R. (4th) 185 [1991] 3 W.W.R. 97, 25 A.C.W.S. (3d) 1012. The published version available to the author is found in *Smithers Registry*, no. 0843 (B.C.S.C), 1–394. The appeal was heard by the British Columbia Court of Appeal, 104 D.L.R. (4th) 470 [1993]. Throughout the rest of the article, the two *Delgamuukw* decisions will be cited, with page numbers, as *Smithers* (the trial decision by Chief Justice McEachern) and 104 D.L.R. (4th) 470 (the appeals decision).The Canadian Supreme Court is scheduled to review the case in June 1997.

2. For critical discussions of the trial decision by anthropologists, see Michael Asch, "Errors in *Delgamuukw*: An Anthropological Perspective," in *Aboriginal Title in British Columbia*, ed. Frank Cassidy (Montreal: Oolichan Books and The Institute for Research on Public Policy, 1992), 221–43; Michael Asch and Catherine Bell, "Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*," *Queens Law Journal* 19:2 (1994): 503–50; and Robin Ridington, "Fieldwork in Courtroom 53: A Witness to *Delgamuukw*," in *Aboriginal Title in British Columbia*, 206–20.

3. The plaintiffs' counsel first indicated that they were seeking no less than recognition of aboriginal ownership and jurisdiction, but later during the trial altered the claim to include aboriginal rights. *Smithers*, 1991, part 6, section 1, 39.

4. Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2d ed. (Vancouver: UBC Press, 1992), 1–2.

5. Ibid., chs. 1–2.

6. Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849–1989* (Vancouver: UBC Press, 1990), 17.

7. Ibid., ch. 2.

8. Ibid., 26–37. Hamar Foster suggests that resistance to treaty-making may have come from the aboriginal groups themselves. He also points out that although formal treaty-making ceased, informal land purchases continued into the 1860s. See Foster, "Letting Go the Bone: The Idea of Indian Title in British Colombia, 1849–1927," in *Essays in the History of Canadian Law*, vo. 6, ed. Hamar Foster and John McLaren (Toronto: University of Toronto Press, 1995), 43–46.

9. Foster, "Letting Go the Bone," 54.

10. Only one of these treaties, Treaty No. 8, was applied to British Columbia, and only to the northern interior groups of Beaver, Slave, and Sekani Indians. See Tennant, *Aboriginal Peoples*, 65–67, and Dennis F.K. Madill, "British Columbia Indian Treaties in Historical Perspective" (Unpublished monograph, Department of Indian and Northern Affairs, Research Branch, Corporate Policy, Ottawa, 1981), 43–63.

11. Gisday Wa and Delgam Uukw, *The Spirit in the Land: Statements of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia, 1987–1990* (Gabriola, BC: Reflections, 1992), 1–2.

12. This summary of the evidence is taken from Gisday Wa and Delgam Uukw, *The Spirit in the Land*, 25–46.

13. *Smithers*, 56–59.
14. Gisday Wa and Degam Uukw, *The Spirit in the Land*, 30–35.
15. *Smithers*, 215.
16. Ibid.
17. Ibid., 219.
18. Ibid., 218.
19. Ibid., 219.
20. Ibid., 221.
21. The question of whether aboriginal societies possess inherent powers of self-governance can be answered at several levels: the self-conception of the group, the constitutional arrangements of the state, and the international legal norms of self-determination and human rights. In U.S. constitutional jurisprudence, the doctrine of tribal sovereignty arose as a means to limit the jurisdiction of state governments over Indian tribes and to justify the inclusion of tribes under the umbrella of the federal government. Eroded during eras of assimilation and termination, the doctrine of tribal sovereignty was renewed in the 1970s. Generally, tribes have the powers to determine their membership criteria, regulate tribal property, tax, maintain law and order, manage hunting and fishing, and regulate health and safety. Although comprehensive claims agreements in Canada, such as the Nisga'a agreement mentioned below, do include some similar powers for Canadian aboriginal groups, the process of recognizing such powers seems to have emerged only in the last two decades, and on a case-by-case basis as a result of negotiations. As a constitutional entrenchment of aboriginal rights, the Canadian Charter of Rights and Freedoms includes a section (35) on aboriginal rights (see below, note 22). Some Canadian legal scholars conclude that the aboriginal rights mentioned in section 35 include an inherent right of self-government. For background on tribal powers and U.S. policy, see David H. Getches et al., *Cases and Materials on Federal Indian Law*, 3d ed. (St. Paul, MN: West Publishing Co., 1993), passim; Charles F. Wilkinson, *American Indians, Time and the Law* (New Haven, CT: Yale University Press, 1987). For Canadian sources on self-government, see John Borrows, "Constitutional Law from a First Nation Perspective," *University of British Columbia Law Review* 28:1 (1994): 1–47; and Bob Freedman, "The Space for Aboriginal Self-Government in British Columbia," *University of British Columbia Law Review* 28:1 (1994): 49–90.
22. 104 D.L.R. (4th) 470 at 762. Section 35(1) of the Constitution Act of 1982 reads, "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."
23. 104 D.L.R. (4th) 470 at 719.
24. 104 D.L.R. (4th) 470 at 718.
25. The idea of primary and secondary rules comes from H.L.A. Hart, *The Concept of Law* (New York: Oxford University Press, 1961), 92–114.
26. Sally Engle Merry, "Resistance and the Cultural Power of Law," *Law and Society Review* 29:1 (1995): 11–26.
27. Russel Lawrence Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980),

chs. 1–3; Gordon I. Bennett, "Aboriginal Title in the Common Law: A Stony Path through Feudal Doctrine," *Buffalo Law Review* 27 (1978): 617–35.

28. 14 App. Cas. 46 [1888].
29. *Smithers*, 194.
30. 13 D.L.R. (4th) 321 [1984] at 339.
31. Whether this amounts to a fiduciary obligation has been the topic of debate. See Michael J. Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law," *UBC Law Review* 27:1 (1993): 19–49.
32. *Smithers*, 222.
33. Ibid.
34. Ibid.
35. 104 D.L.R. (4th) 470 at 758–60.
36. 104 D.L.R. (4th) 470 at 710–12.
37. 107 D.L.R. (3d) 513 at 542.
38. *Smithers*, 98, 212.
39. 1 S.C.R. 1075.
40. *Delgamuukw*, 104 D.L.R. (4th) 470 at 492 and 515.
41. *Smithers*, 227.
42. *Delgamuukw*, 104 D.L.R. (4th) 470 at 494 and 514.
43. *Smithers*, 50–52.
44. 104 D.L.R. (4th) 470 at 570.
45. Menno Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993), 29–30.
46. Brian Slattery, "Understanding Aboriginal Rights," *Canadian Bar Review* 66 (1987): 727–83.
47. 104 D.L.R. (4th) 470 at 628.
48. 104 D.L.R. (4th) 470 at 703–11.
49. 104 D.L.R. (4th) 470 at 644–57 and 741.
50. The philosophical origins of liberalism center around the social contract, a decision entered into by rational human beings to establish a government. The notion of social contract is ahistorical, and the modern democratic state, founded on the ideology of liberalism, is also seen in modern contract theory as an arrangement existing independently of particular historical circumstances. The timelessness of the state can be used as a justification for boilerplate applications of state action in varied circumstances, but it also seems virtually empty of content and therefore wide open to definition. For a survey of liberal theory, see Ian Shapiro, *The Evolution of Rights in Liberal Theory* (Cambridge, England: Cambridge University Press, 1986).
51. 107 A.L.R. 1 [1992].
52. "Native Title Act 1993," no. 110, *Commonwealth Statutes Annotations* (31 December 1993), 2121.
53. *Calder v. the Attorney-General of British Columbia (B.C.)*, [1973] S.C.R. 313.
54. "Nisga'a Treaty Negotiations: Agreement-in-Principle," issued jointly by the Government of Canada, the Province of British Columbia, and the Nisga'a Tribal Council, 15 February 1996.

55. Mark Hume, "Angry Fishers Denounce Deal," *The Vancouver Sun*, 16 February 1996; Stewart Bell and Justine Hunter, "Nisga'a Deal Initialled into History," *The Vancouver Sun*, 16 February 1996.

56. Tzvetan Todorov, *The Conquest of America*, trans. Richard Howard (New York: HarperCollins, 1984), 185.

57. Todorov observes in his study of the encounter between Europeans and Native Americans that the latter favored communication with the world, the former favored exchanges between men. *The Conquest of America*, 252.

58. For brief overviews of the northern claims negotiations, see Peter Jull, *Constitution-Making in Northern Territories* (Northern Territory, Australia: Central Land Council, 1996), 14–18, and Letha J. MacLachlan, "Comprehensive Aboriginal Claims in the N.W.T.," *Information North* 18:1 (March 1992): 1–7.