FROM CUSTOMARY LAW TO ORAL TRADITIONS:

Discursive Formation of Plural Legalisms in Northern British Columbia, 1857-1993[1]

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In September 1993, the *Prince George Citizen* ran the byline "Native court ruling seen as precedent." Placed as an item of "local news," the article reported on a recent court case involving a First Nations family of the central British Columbia Interior. "In a precedent setting Aboriginal rights decision," it began, "the BC Court of Appeal ruled this week that the grandparents of a Stellaquo Indian chief who died five years ago legally qualify as his 'dependent parents.' The decision recognizes the cultural background of the Carrier people (also known as Dakelh or Yinka Dene), and the effective adoption of the late Chief Ernest Casimel by his grandparents." Explaining the nature of Aboriginal rights that the courts are bound to recognize, the judges offered, inter alia, the reasoning that "the particular rights must be examined in each case to determine the scope and content of the specific rights in the Aboriginal society."

The casual reader might surmise that, indeed, this legal judgment marks a new era in Aboriginal/non-Aboriginal legal relations and symbolizes twentieth-century advances in cross-cultural relations. This reader might also be startled at the implication that, seemingly for the first time, different but parallel legal orders would be operating across the country. Nothing, however, could be further from the truth: with this legal decision Aboriginal peoples regained rights and powers that they had exercised in the nineteenth century. The BC Court of Appeal had taken its precedent from Canadian case law, particularly from a Quebec Superior Court judgment from 9 July 1867, which it

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perceived to be a "leading case and a most remarkable authority in the field."

A series of questions arise from the decision of the BC Court of Appeal.[2] Here I address two: (1) How was traditional law displaced and, in the process, delegalized in discourse and practice? and (2) What are the implications of this discursive displacement for the contemporary struggle to regain legal pluralism? To answer these questions I take as my starting point the question of colonization, but I do not immediately focus on the impact of colonial rule on the colonized. Rather, I look at the colonizers themselves, in particular at a group of men in New Caledonia who were embroiled in conflict with one another and who emerged as the lawmakers and law enforcers. I am interested in their motives for either upholding or discrediting "Indian law" and in their capacity to do so.

At issue are the implications of personal power struggles for emerging discursive processes and, ultimately, for the discursive formation of "oral tradition" so that, in the twentieth century, it would become hearsay in the eyes of the court. I argue that the concepts of "Indian law," "social custom," and "oral tradition" are drawn upon as political resources. The displacement of a discourse of "Indian law" not only imposes the superiority/inferiority relationship of the colonial frontier, it marks the contest over who is best able to judge and reform those designated as inferior. The examination of personal power struggles between colonial functionaries casts light on why, at some times and places, local officials and the state accommodated, or at least tolerated, traditional laws, while, at other times and places, they rejected them. This examination of interpersonal conflicts also reveals the discursive resources available to the disputants and the interlinking relations of power and privilege in which these discourses are employed.

I draw implicitly upon Michel Foucault's work on the nature of discourse and the discursive construction of the subject. Following Carol Smart, my concern lies with the construction of local knowledge, with "theori[zing] about discourses, relationships, subjects, documents, representations, bodies and so on."[3] The documentation

[2] The implications of this decision are far reaching and may well have diverse and contradictory effects on First Nations' self-determination. I have addressed other of these concerns in an earlier article, "The Supreme Law and the Grand Law: Changing Significance of Customary Law for Aboriginal Women of British Columbia," *BC Studies* 105 & 106 (Spring/Summer 1995): 183-99.

[3] Carol Smart, *Law, Crime, and Sexuality: Essays in Feminism* (London: Sage, 1995), 8.

of political struggles reveals the way in which law, a powerful and privileged discourse, subjugates other discourses and, in the process, subordinates the colonial subject. The discourse of law is significant; as Loo has argued, "the Europeans who inhabited the area that became British Columbia took an active and critical interest in the law, seeing it as central to their identity and securing their future in Britain's far western possession." And further, since "[t]here was nothing natural or automatic about the creation of law and order," it is important to "delineat[e] the conflict and negotiation that accompanied the making of it."[4]

On the frontier the politics of law as an integral part of the colonial project appeared with the establishment of formal colonies and the beginning of urban settlement in the south. Two factors led colonists to envisage a lawless frontier and, hence, to insist on law enforcement: (1) the recurrent movement of Aboriginal traders and prostitutes from the north to the south (to which settlers responded with moral outrage and governments with various political machinations)[5] and (2) the colonists' desire to appropriate natural resources for capitalist investment. Law was seen as a tool for economic development and, as we shall see, settlers turned to it to protect their property from Aboriginal claims and to advance their corporate interests at the expense of Aboriginal economies. Southern settlements, self-defined symbols of Victorian civilization and order, constituted an audience for frontier voices calling for the regulation of frontier depravity on the one hand, and for the repression of Aboriginal resistance to immigrant settlement and resource appropriation on the other.

As the lawless frontier emerged in the colonial consciousness, so did the taken-for-granted superiority of settlement over wilderness, of British justice over lawless custom, of civilized settler over nomadic "savage," of Christianity over animism.[6] Nonetheless colonial conscience was always multifaceted. Contradictions and conflicts emerged from the social relations of the colonists themselves: in their own face-to-face struggles they exposed and condemned each other's alleged violations of the moral politics they espoused. As they came to construct and represent their interests, colonial traders, mis-

[4] Tina Loo, *Making Law, Order and Authority in British Columbia, 1821-1871* (Toronto: University of Toronto Press, 1994), 3, 4.

[5] Robin Fisher, *Contact and Conflict: European Relations in British Columbia, 1774-1890* (Vancouver: UBC Press, 1977), 113.

[6] Fisher, *Contact and Conflict*, 65. John Sebastian Helmcken, *Reminiscences*, vol. 11, *Correspondence*, vol. 1, ADD MSS, 505; BCARS.

sionaries, adventurers, and businessmen variously positioned themselves as moral allies and legal adversaries in shifting relations of power. As they did so, they legitimated their positions by drawing upon selected legal discourses and by placing them in opposition to each other. The discourses available to them comprised traditional Aboriginal accounts and practices, various Christian beliefs and practices, and, of course, the liberal discourses of rationality, uniformity, and anonymous individuality contained within British law.

THE BLANKET VERSUS THE BIBLE: SACRED LEGAL ORDERS

Missionaries, the self-appointed conscience of the colonial frontier, could not hope to assert control over their Aboriginal charges through moral suasion alone. Frontier reality conflicted with missionary idealism. Violent reprisals between Aboriginal nations, the introduction of a profitable trade in alcohol, the development of a sex trade with White transients in the north and White settlers in the south, and frontier opportunities for wage labour all contradicted missionary visions of rural utopias of Aboriginal peasants and/or small-scale industrialists.[7] The appeals of European economy and law upset regulatory relations in hierarchical First Nations communities, as individuals, hitherto unimportant in the traditional hierarchy, gained wealth and prominence among the newcomers, and as high-ranking families split internally.[8]

As missionaries confronted violence and social dysfunction in the second half of the nineteenth century, they quickly constructed their own legal discourses with which to label problems and to pronounce solutions. Initially, they sought to impose God's law unilaterally; alcohol-related violence, revenge killings, community raiding, and "women trading" all constituted either "evils," "sins," or "unnatural acts" and were either to be repressed by a male theocracy that dis-

[7] Protestant missionaries on and near the Pacific coast were unable to establish agricultural communities of the converted. Instead, they made efforts to create economic autonomy through the creation of village industries (although it must be noted that only William Duncan at Metlakatla had any success). In the central Interior, the Oblates of Mary Immaculate, a Roman Catholic congregation, constructed autonomous villages with a mixed subsistence/trading/agricultural basis. See Thomas Crosby, *Up and Down the North Pacific Coast* (Toronto: Mission Society of the Methodist Church, 1914); Peter Murray, *The Devil and Mr. Duncan: A History of the Two Metlakatlas* (Victoria: Sono Nis, 1985); David Mulhall, *Will to Power: The Missionary Career of Father Morice* (Vancouver: UBC Press, 1986); John Webster Grant, *Moon of Wintertime: Missionaries and the Indians of Canada in Encounter since 1534* (Toronto: University of Toronto Press, 1984).

[8] Fisher, *Contact and Conflict*, 46-7; Mulhall, *Will to Power*, 79.

pensed punishments and shame or, ideally, to be transcended by religious obedience.[9]

Although God's law was upheld as supreme, the missionaries could not ignore Indian law. Herein lay one of the paradoxes of the missionary project. Native peoples beseeched missionaries to intervene in disputes and misunderstandings within their communities, calling not for adjudication according to White man's law, but for a White man of wisdom to arbitrate according to Indian law.[10] Missionaries such as Anglicans William Duncan and J.J. McCullagh of the Church Missionary Society (CMS), and Fathers Adrien Morice and Nicolas Coccola of the Catholic Oblates of Mary Immaculate, also turned to Indian law because they relied on the patronage of status-bearing individuals whose property rights and social command could not be eradicated without imperiling the very foundations of the mission. This created dilemmas of conscience and forced missionaries into contradictory positions, at times denouncing local customs for their heathen depravity, at other times praising, or at least pragmatically defending, Indian law.[11]

Difficult choices had to be made, and distinctions between undesirable custom and pacifying laws required frequent interpretation and reinterpretation. Compared to British law, Indian law was neither codified nor uniform. Principles of right and wrong were encoded in oral traditions and were subject to considerable variation in their interpretation and application, depending upon such factors as the collective interests of corporate kin groups, principles of revenge, and assumptions about accountability to the kin of an alleged miscreant and/or to bystanders witnessing accidental injuries and death — all of which missionaries found contrary to British impartiality, justice, and fairness. They also objected to what they perceived to be the evil superstitions and bodily harm associated with "medicine men." Moreover, traditional laws were embedded in the protocol and privileges of the potlatch (now known metaphorically as the "law of the blanket" or the "grand law" of the potlatch in some First Nations). Primarily because it was deemed superstitious, pagan, and antithetical to a capitalist ideology of work and wealth accumulation, the potlatch

[9] Murray, *The Devil and Mr. Duncan*, 75-76; Crosby, *Up and Down the North Pacific*, passim; Adrian Morice, *Fifty Years in Western Canada: Being the Abridged Memoires of Rev. A.G. Morice* (Toronto: Ryerson, 1930) 51-54, 116.

[10] William Duncan, Criminal Proceedings, William Duncan Papers, WD2547,C2159, BCARS; Mulhall, *Will to Power*, 104-5.

[11] William Duncan to the Honourable A.C. Elliot, 24 September 1877, GR429 120/77 BCARS; J.W.W. Moeran, *McCullagh of Aiyanish* (London: Marshal Brothers, 1923), 161;

met with abhorrence and was legally banned in 1884 under what became known as the "potlatch law." Although they strove to eradicate totally the ceremonies of the potlatch (prolonged feasting, dancing, religious incantations, and wealth exchanges), missionaries adhered to such of its legal principles as control over hunting territories, chiefly command over commoners, and compensation for accidental wounding or death as well as for wrongdoing.[12]

Political games were played across the northern part of British Columbia as missionaries sought to settle disputes in accordance with Indian law. Roman Catholics and Protestants alike intervened in Aboriginal disputes, at times acting on their own volition, at other times responding to the appeals of disputants who found themselves vulnerable to internal power struggles. Father Morice, the best known Oblate missionary in central British Columbia, was stationed at Fort St. James. From there he sought to exercise theocratic control over far-flung Carrier villages and to restrict the influences of the Hudson's Bay Company and of free traders. Displays of knowledge of Indian law were crucial to Morice's self-esteem and catered to his need to be lauded as a savant of the wilderness.[13] The Oblates had imposed their own theocratic legal order and system of surveillance on their converts and hesitated to engage in British legal processes.[14] Oblate priests were often disillusioned with British law, finding that the secular legal order failed to proscribe what they perceived to be "public faults" and venial sins. Their preferred recourse was to a synthesis of Indian and sacred law.

BRITISH JUSTICE ON THE LAWLESS FRONTIER

Unlike the Roman Catholic missionaries, most of whom came from France or Ireland, the Protestants were willing, if not eager, to embrace the powers of British law. As Thomas Crosby proclaimed of one of his early efforts on the Nass, "I walked up and down in the house,

[12] Mulhall, *Will to Power*, 49, 93; Murray, *The Devil and Mr. Duncan*, 68; William Duncan to the Honourable A.C. Elliot, 24 September 1877, GR429 120/77 BCARS; Morice, *Fifty Years*, 116-18.

[13] Mulhall, *Will to Power*, 94

[14] Roman Catholic missionaries were members of the Oblates of Mary Immaculate, a French order influenced by Jesuit practices. The Durieu system, named for one of its members, offered a strict, patriarchal regime of social control. A "church chief," appointed by the priest and assisted by watchmen, was expected to maintain the social order dictated by the Durieu code. In turn, "commissionaires" reported on the priest, while watchmen reported to the church chief.

giving them the Law as well as the Gospel."[15] In his and other missionaries' eyes, violence, liquor, and the unscrupulous behaviour of European men towards Aboriginal women marked the frontier as a dangerous site lacking order and social decency. For the most part, however, Protestant missionaries were powerless to bring radical changes to the lawless frontier. Their specially appointed First Nations constables had little power within their own villages and none beyond them. The missionaries themselves were not necessarily respected by other frontiersmen, who profited from the potlatch and other aspects of trade that the missionaries abhorred. Several missionaries sought appointments as justices of the peace in the hopes of gaining greater influence.

According to Loo, "English sentiment remained the overriding prerequisite for the colonial magistracy." Justices of the peace were appointed as stipendiary magistrates despite their lack of legal education and credentials. Once appointed, a justice of the peace was empowered to act throughout the colony without the usual requirement of doing so in pairs.[16] As the colonial administration sought to dispense justice with the greatest efficiency, magistrates were given powers of arrest and summary conviction in civil and criminal cases. Such positions were actively sought by colonial administrators and others who desired both the salary and the social prestige they carried. No doubt missionaries seeking such appointments considered both of these factors, but their capacity as magistrates to protect indigenous peoples from frontier depravity and exploitation and to enforce restrictions against the potlatch were probably what was most important to them.

Once appointed, missionaries *cum* magistrates were in a position to adjudicate disputes within the parameters of two legal orders. They pronounced on the meaning and motive of customary law, interpreting intention and consequence and inscribing the same in their bench books, correspondence, and journals.[17] Gathering this body of knowledge elevated them, in their own eyes and in the eyes of fellow frontiersmen, to the status of expert. Other colonials came to rely on their expertise. William Duncan, whose request for a

[15] Thomas Crosby (1914), cited by Daniel Raunet, *Without Surrender, Without Consent: A History of the Nishga Land Claims* (Vancouver: Douglas & McIntyre, 1984), 24.

[16] Loo, *Making Law*, 58, 68.

[17] Unknown Author to Bishop Scholfield, "Notes on Potlatch Views," 3 April 1930, text 277, 87-14, box 2, Anglican Archives, Victoria, BC; William Duncan, Criminal Proceedings 1864-84, WD2547, C2159, BCARS.

commission as a justice of the peace had been granted in 1864, relied on Indian law to regulate fishing at Metlakatla and to settle local disputes.[18] Southern authorities largely ignored Duncan's approach and found no reason to question it until the disputants themselves turned to colonial law. In 1877 one Melum Kausa had pleaded not guilty to trespass on the grounds that, since "white men have now abrogated all Indian laws," he could hunt wherever he pleased. In response Duncan sought the advice of I.W. Powell, the Indian Superintendent of BC, regarding the legitimacy and force of Indian law. Powell, stationed in Victoria, took the position that "this department, so far, has not attempted to interfere with alleged Indian regulations or customs."[19] Duncan, ever swayed in dispute settlement towards the Aboriginal elite, sought to enforce "Indian law in the Skeena River District, which regulated the tribal rights of Indians to certain hunting grounds."[20]

Powell's acceptance of "alleged Indian regulations or customs" was qualified. He was not prepared to acknowledge rights that would "conflict with the laws of the province or dominion,"[21] but this was precisely what soon happened. Duncan's defense of Indian law arose from his personal circumstances as much as from his commitment to Aboriginal efforts to protect their land and resources. He was embroiled in an ecclesiastical dispute with his superiors at the CMS, and he refused the society entry into Metlakatla on the grounds that it had no rights on Aboriginal land. This dispute percipitated a face-to-face confrontation with Bishop Ridley, CMS, who had also been called to the bench. As Duncan sought to defend himself and his followers on the grounds of Aboriginal entitlement and Indian law, so Ridley countercharged that heathen customs had no validity in the face of the superior law of government and God. Other magistrates, while refusing to enter the fray, stopped short of condemning the Indian law held to underlie Duncan's position on Aboriginal entitlement to the lands and buildings of his mission village. Such was the tension, however, that the bench was called upon to judge assault charges laid by Bishop Ridley against followers of William Duncan. Eventually the appointment of colonial officials (such as the Indian superintendent and the fisheries commissioner) as

[18] Raunet, *Without Surrender, Without Consent*, 45.
[19] I.W. Powell, Indian Superintendent, to Reverend R.H. Smith, 19 April 1881, ADD MSS 2644, V.7, BCARS.
[20] William Duncan to the Honourable A.C. Elliot, 24 September 1877, GR 429, 120/77, BCARS.
[21] Ibid.

magistrates precipitated the decline of Indian law and helped to engender the discursive shift from Indian "law" to Indian "custom and tradition."[22] The image of the lawless frontier became firmly fixed, and although at one level the government may have viewed the schism between Duncan and the CMS as a mere tempest in a teapot, it was sufficiently concerned to appoint a former premier and attorney general, A.C. Elliot, as magistrate and Indian agent.

Increasingly, missionaries found themselves losing their significance as the conscience of the frontier. Lawmakers, who often carried multiple powers as Indian agents, gold commissioners, traders, or other officers, took on the role of mediating southern interests and northern realities. At Fort St. James, Morice acquired the support of Napoleon Fitzstubbs, a justice of the peace with twenty years of police service, who admired the Oblates for their strict "law-and-order" rhetoric and who was willing to allow Morice to settle disputes and to exercise social control as he saw fit, whether through traditional or Oblate means. In further support of Morice, Fitzstubbs also hired the appointed chiefs and watchmen of the Carrier villages as his special constables.[23] Other law enforcers were not so supportive. The intrusion of magistrates and provincial police constables unbeholden to Morice threatened his power in Carrier villages by opening the way for the Carrier to appeal directly to competing legal orders.[24]

Morice's power struggles were exacerbated when he sought to protect the Carrier from colonial law, as, for example, when he sought justice for a lad charged with murder but who, to Morice's mind (and apparently to that of the victim's kin), was guilty of no more than causing accidental death. As was prescribed by Carrier law, the death had been atoned for through compensatory payments, vengeance thereby being avoided.[25] But the local magistrate, the Indian agent, and the police constable stationed at Quesnel (the southern margin of Morice's region) were dissatisfied. Frustrated by Morice's power over the people and by his propensity to take unto himself the law of the land, the three insisted on court proceedings. They dismissed Morice's insistence that the case had been satisfactorily settled in accordance with Carrier law, calling it a defence of Indian custom for no other purpose than to obstruct White justice in order to protect personal power. They interpreted adherence to custom as defiance of

[22] Murray, *The Devil and Mr. Duncan*, 162ff.
[23] Grant, *Moon of Wintertime* 141; Mulhall, *Will to Power*, 88, 89.
[24] Mulhall, *Will to Power*, 121, 171.
[25] Ibid., 127-129.

law. Authority and political security lay in institutionalizing legal processes. No matter how makeshift a temporary court room might be, to the magistrate and constable it signified the supremacy of colonial authority and the advantages of resolving Aboriginal conflicts within the civilizing order of Pax Britannica. Visions of the lawless frontier prompted the antagonists to argue their cases before a southern audience. In this dispute, Morice resorted to the power of the pen to explain "customary law," and his explanation won the youth his freedom and Morice the gratitude of the attorney general.[26]

Faced with local resistance to colonial intervention, Indian agents also upheld Indian law in order to retain their fragile authority. R.E. Loring was the first Indian agent appointed to the Babine Agency at Hazelton, which had been created in an effort to quell settlers' fears of frontier lawlessness and of an Indian uprising. Loring, who under the Indian Act was in a position to exercise legal authority as accuser and judge, was among those who found it useful to appease opponents by settling both territorial disputes and violent altercations according to Aboriginal laws of compensation.[27] In order to do so he forged a strong alliance with Morice, whose missions spread over much of his agency.[28] Unlike Morice, Loring did not speak the Carrier language and did not have a comprehensive grasp of their legal system. He accepted Morice's defence of Indian law, which rested, in part, on raising fears of interracial strife. Should Carrier laws be overlooked, Morice charged, the Carrier would endure miscarriages of justice and violence would erupt. Loring perceived that Morice was in a unique position to prevent an uprising. Thus, whatever his faith in customary law, Loring countered southern accusations that he was ineffective by championing Morice as the person with the solution to the problems of violence and the liquor trade.[29]

As Loring and Morice engaged in verbal skirmishes with the south, settlers to the west raised their own alarms over the lawless frontier. On the Pacific coast and along the Skeena River, years of unrest between First Nations and their resistance to colonial law had led to military intervention. In 1869, the problems between the Nisga'a and

[26] Ibid., 130.

[27] Loring to A.W. Vowell, 11 January 1900, RG 10 C113, vol. 1,586, BCARS.

[28] Mulhall, *Will to Power*, 66, 86, 104-5; Loring to Valleau, 24 July 1900, Loring to Coothe, 21 May 1900, RG10 C113, vol. 1,586, 198, 340, PAC.

[29] Mulhall describes at length the power Morice exerted over Loring, from discouraging him from visiting the eastern portions of their common territory through to assuming his duties. Loring procrastinated in his obligations and remained away from Stuart Lake for two years, all the while defending himself by praising Morice. See Mulhall, *Will to Power*, 86, 88.

the Tsimshian were so severe that Governor Seymour, accompanied by Joseph Trutch (the Commissioner of Lands and Works), and his private secretary, went to the Skeena in an effort to settle the disputes in accordance with Indian law and rituals. This strategy was soon abandoned, however, under the pretext that Aboriginal nations were entitled to the protection and redress of British law — protection that would be fair and rational.[30]

As the years passed, tensions were exacerbated by conflicts with settlers and by the continued intervention of navy gunboats that were brought in to enforce law and order. In the estimation of Israel Wood Powell, the Commissioner for Indian Affairs for British Columbia, the presence of gunboats had enabled the government to keep the Aboriginal population "in order" and was "the Manifestation of Her Majesty's ability to enforce obedience to her laws." Because of the gunboats, he argued, the local government was freed from the "questionable system of gifts and annuities" followed elsewhere in the dominion. Stresses between the First Nations and the provincial government grew throughout the 1880s and were increasingly represented in legal discourses as having to do with "punishing crime," "maintaining peace and order," and "protecting life and property."[31]

On the Skeena, tensions over settler encroachment and appropriation of land reached a crisis in 1888 when Kamalmuk, or Kitwancool Jim as the settlers called him, killed a fellow Gitksan — a sorcerer alleged to have caused several deaths. With the sorcerer's death, according to Kamalmuk's father, "it was all settled." But not in the eyes of the settlers. When Kamalmuk was killed by Special Constable Green, the settlers feared violent reprisals and sought safety in a hastily fortified Hazelton. News that the troubles had been precipitated by allegations of sorcery and rules of revenge prompted calls for British justice. However, troubled Aboriginal leaders persisted in their claims that their law should be upheld not only with respect to matters of violence, but, more particularly, with respect to their lands.[32] In response, Magistrate Fitzstubbs travelled to the upper Skeena villages to inform the chiefs that British law, not Indian law, must prevail.[33]

[30] Barry M. Gough, *Gunboat Frontier: British Maritime Authority and Northwest Coast Indians, 1846-90* (Vancouver: UBC Press, 1984), 197.

[31] Gough, *Gunboat Frontier*, 167, 168.

[32] Report of a Committee of the Honourable Executive Council, 18 October 1888, RG 10, vol. 3,802, file 49,774, PAC; Cecil Clark, *Tales of the British Columbia Provincial Police* (Vancouver: Mitchell, 1971) , 28-33.

[33] *Victoria Colonist*, 16 August 1888.

Powell resisted getting involved in the Skeena skirmishes and cautioned Charles Todd, the Indian agent on the lower Skeena, to follow his example. Although he would have preferred to send Powell to the Skeena, the attorney general, Alex Davie, was powerless to insist on this. The provincial government again invoked a gunboat policy to suppress the "Skeena uprising" and to impress the government's legal superiority upon Aboriginal peoples . Eighty officers and men of the Royal Garrison Artillery, along with twelve provincial policemen under their superintendent, Henry. B. Roycraft, were dispatched to the Skeena.[34] The legality of government power was underscored by Roycraft, who called the thirteen chiefs to Hazelton and, as Fitzstubbs had also done, impressed upon them the inevitable power of British law and its capacity for fairness and progress. "I must ask you to remember," he intoned, "that before you came under the British law one tribe was always in danger of being massacred by some other tribes and there was continual warfare between all the tribes: slaves were taken: but now you all live in peace and quietness because of the Queen's care." Indian law was ignored; the elaborate "potlatch system," which provided legal redress from tribal warfare was misunderstood and dismissed.[35] The implication was clear: a frontier subject to Indian law was a "lawless frontier." Anyone who operated within the principles of Indian law, whether to control murder or to protect traditional rights, was deemed an outlaw.

With the cry for British justice to contain violence and with fears of a general Native uprising over land questions, an Indian Agency was established at Hazelton, with Loring as Indian agent. From his arrival, he was embroiled in contestations arising out of the settlers' fears over local law enforcement. Like his contemporaries, Loring did not — perhaps could not — sustain his enthusiasm for Indian law. Rather he tended to apply Indian law only when disputes arose between Aboriginal contestants, and he sought to reconcile disputes between settlers and Aboriginal individuals under English law. He soon deferred, however, to Morice's political needs and superior relations with Aboriginal peoples. A case in point involved Chief Typee, also known as Alex Tyee, of Babine. Typee had been taking goods from a warehouse and storing them for a pending potlatch. Caught

[34] Gough, *Gunboat Frontier*, 207.

[35] A. Davie to Powell, 15 July 1888, Powell to Davie, 16 July 1888, RG 10, vol. 3802, file 49,774, PAC. Carrier, Babine, and Witsuwit'en peoples explain that the origin of the feasting system known generally as the potlatch lay in the need of warring nations to establish a common legal order in order to bring warfare to an end and to ensure the orderly management of land, resources, and people.

by Hudson's Bay Company employee Charles French, who had been sent to Babine in 1892 for this purpose, Typee fled and resisted being arrested by Loring's special constables. Threatened by Loring with the militia and retaliation against his people, and cajoled by Morice's promises of a light sentence, he eventually surrendered. Typee appeared before Loring and received a short sentence.[36]

Typee's conviction and sentence sent a clear, negative message to the Babine and their neighbours. Never very tolerant of thievery, their own laws having clearly prescribed punishments for it, the people did not take lightly the intrusion of police and magistrates. Arrest and incarceration humiliated the chief and his clan,[37] and this humiliation would affect them in all their social relations — most particularly, in their formal relations within the potlatch, the seat of government and law. Time in jail was the lesser of the two punishments endured by the chief, who, according to Charles French and to contemporary Babine accounts of this event, endured shame until he was able to compensate for his wrongdoing by holding a potlatch and distributing compensatory wealth to the appropriate chiefs.[38] Perhaps Loring and Morice recognized the power of traditional law to discourage robbery and, therefore, were comfortable with a light sentence. Harsher punishment could easily have diminished their tenuous influence over the Babine Nation, and even a short sentence appeased their frontier adversaries.

Loring and Morice were allies in their common struggle against the onslaught of frontier society and in their shared determination to retain powers that were being contested by newly arrived functionaries, settlers, and miners. R. Sargent, justice of the peace at Hazelton, Hudson's Bay Company official, and supporter of the local Protestant missionary, was among Loring's arch enemies.[39] Throughout their common tenure at Hazelton, Loring and Sargent were locked in a duel of wills as each contested the other's arrests and convictions. Not only did Sargent dispute the legal authority of Aboriginal con-

[36] According to French, the sentence was six months, but Mulhall, relying on Loring's correspondence, sets it at three months served in Hazelton. See Charles French, *Autobiography of Charles French, 1867-1940*, unpublished manuscript, EC F88A BCARS; Mulhall, *Will to Power*, 90.

[37] Like most of the peoples of the central BC Interior and the Pacific Coast, the Babine Nation is organized into four matrilineal clans, whose chiefs conduct all legal affairs through the potlatch.

[38] I am grateful to Betty Patrick, the late Gordon Joseph, and the late Ted Williams of the Lake Babine Nation for their insights into this particular case.

[39] Mulhall, *Will to Power*, 125; R.E. Loring to A.W. Vowell, 5 January 1900, 11 January 1900, RG10, C113, V1584, 131040, PAC.

stables to arrest White men, he judged White men and Aboriginals differently. Moreover, in his power struggles with Loring, he refused to countenance the conviction and imprisonment of a White man accused of assaulting Aboriginal men.[40]

Indian law was but one site of struggle in the personal battle between Loring and Sargent, but it was an important one. Sargent did not share Loring's enthusiasm for Aboriginal legal practices, not recognizing them as law at all. Nor did he have sympathy for the theocratic law of the Oblates, so admired by Fitzstubbs. Sargent condemned Loring for his efforts to manipulate local "custom" and, like many of the newly established lawmakers, insisted on the necessity of a strict application of British justice to end Aboriginal violence and violations. In consequence, their southern audience was treated to a debate about the nature of Aboriginal social order. While both Loring and Sargent proclaimed the need for law and order, the latter rejected the theocratic powers established by Morice and the accommodations with Aboriginal legal polices upon which Loring and Fitzstubbs relied.

Frustrated by the limits of his summary powers as an Indian agent, Loring eventually petitioned for a commission as a justice of the peace, the office held by Sargent.[41] Both Sargent and Loring attempted to assert their respective superiority by calling for a rough and ready application of British criminal law to "lawless" Natives while alleging incompetence and misconduct on the part of the other.[42] In the process, and in his often contradictory effort to retain peace among his charges while sustaining his influence among his fellow frontiersmen, Loring's references to law came to rest upon colonial law and to reduce Indian law to custom. As he struggled to retain his dignity and the respect of northern frontiersmen and southern functionaries, he spoke less of Indian law and more of the "Queen's law." Recognizing the implications of assertions that Indian law provided legitimacy to claims for Aboriginal land title, Loring came to show less interest in manipulating it in order to retain social harmony.

[40] Loring to Vowell, 11 January 1990, RG10 C113 V1584, 131040, PAC; Mulhall, *Will to Power*, 152;
[41] Loring to Vowell, 29 October 1899. RG10 C113 V1585, 830 PAC.
[42] Loring to Vowell, 30 December 1899. RG10 C113 V1584, 139 PAC.

THE DECLINE OF INDIAN LAW

Despite increasing acrimony between the various lawmakers and enforcers of the frontier, the rule of Indian law in the north met few obstacles from the south until after 1880, when the question of Aboriginal entitlement began to be taken seriously by the provincial government. While the fracas raised by Duncan and Ridley encouraged governing agents to take action to strengthen the application of the Indian Act and criminal law, colonial authorities to the south were slow to recognize the full implications of Duncan's assertions regarding ancestral rights to territory and resources. Loss of land and resources was resisted by First Nations leaders throughout the north, however, and they consistently identified appropriations of their territories and rights as violations of Indian law.[43]

By 1880 First Nations who upheld ancestral rights were perceived as more than a problem of frontier disorder. They had emerged as a threat to the provincial economy, a threat to be suppressed by the clear, consistent application of a solitary legal system. Arguments for Aboriginal title were based on an interdiscursive process. On the one hand, First Nations defendants of their territories argued that entitlement was based on the fact that their lands were handed to them by the creator and, under "natural law," could not be alienated. On the other hand, they appealed to British law and colonial practice, calling for recognition of the Royal Proclamation of 1763 and of the precedents set by the treaties signed elsewhere in the Dominion as well as those signed by James Douglas, colonial governor of Vancouver Island. At Metlakatla, the Tsimshian invoked the words of Lord Dufferin to legitimate their claims to title and to underscore their appeal for a court ruling to protect it, citing the imperial practice of signing treaties as the only route to preventing colonists from illegally usurping their lands.[44] Aboriginal peoples seemingly understood, in ways their adversaries did not, the implications of legal pluralism upheld by British imperialism and espoused by Powell in 1881. The government, on the other hand, paid scant attention to proclamations of Indian law as the foundation of entitlement, relying exclusively

[43] Fisher, *Contact and Conflict*, 105; British Columbia, Metlakatla Inquiry, 1884, Report of the Commissioners together with the Evidence (Victoria: R. Wolfender, 1885); Report of Commissioners to Northwest Coast Indians, Papers Relating to the Commission Appointed to Enquire into the State and Condition of the Indians of the Northwest Coast of British Columbia, *Sessional Papers*, 5th Parliament, 2nd Session; David Leask to William Seabright Green, 11 December 1886, F.W. Chesson Papers, Glenbow Museum.

[44] Gough, *Gunboat Frontier*, 186.

on its own interpretation of colonial law. Natives who rejected colonial law were deemed by the Royal Commission of Inquiry Into the Northwest Coast Indians (1877) to "hold themselves as above and beyond the existing laws which affect them as Indians."[45]

Despite their condemnation of the potlatch system, missionaries, including those holding magistrate's commissions, upheld claims to ancestral rights and lands. In other words, they spoke out of both sides of their mouths. Clearly, when it came to law, the Anglican J.J. McCullagh wanted it all. Ironically, even while he prosecuted the Nisga'a for potlatching, he defended the traditional potlatch laws that underlay their land claim. At the same time, he denounced Nisga'a family laws — which were both integral to the potlatch and recognized by colonial authority — and lobbied for the unequivocal supremacy of British law. Doctrinal warfare, as much as contestation over legal authority, underlay McCullagh's contradictions, as, for example, when he railed against the Methodist Natives who allegedly held that the government was "an organized system of land robbery" and that civil power "was of the devil and should be resisted." When it came to the land question, however, his inconstancy went unnoticed, and he, like his Methodist counterparts, was condemned by settlers and southerners for instigating Native rebellion.[46] In short, missionaries, in particular those acting as magistrates, were increasingly viewed as pernicious agitators no longer capable of judging or reforming the "inferior." As the government agent in Fort Simpson reported to the attorney general, D. M. Ebert, in 1896: "A great deal of the trouble with the Indians on this coast since I have been here, in fact the most, has been caused by the overzealousness of missionaries who hold commissions of the peace."[47]

The struggle to obtain full control over salmon resources in the interests of coastal commercial fisheries eroded the last vestiges of court application of Indian law. The Nisga'a, the Gitksan, and the Babine (the latter an Indian Affairs administrative unit that encompassed the Witsuwit'en and Ned'u'ten) threatened violent reprisals for loss of control over their resources as a result of established fishing technology being wrested from them by various federal policies and

[45] "Letter to Lieutenant Governor of British Columbia," cited by Raunet *Without Surrender, Without Consent*, 91.

[46] Raunet, *Without Surrender, Without Consent*, 132; Grant, *The Moon of Wintertime*, 141; McCullagh to Powell, 1 February 1896, RGIO, vol. 3,628, 6244-1, BCARS.

[47] Flerin, Government Agent at Fort Simpson, to D.M. Ebert, Attorney General, 7 March 1896, GR429 box 3 file 2, 676/94, BCARS.

practices. Indian superintendents, fishing commissionaires, and members of the government spoke in a single voice: British law was the solitary law of the land. British law granted "privileges" but did not recognize Aboriginal title. Indeed, any move to compensate the Babine, for example, for their "indisputable right to fish for all time," as Chief Atio of Babine Village put it, was deemed a "concession" encumbered by "conditions" determined by the government.[48] Officials retreated to a narrow interpretation of colonial authority and denied any legitimacy to Aboriginal title. Proclamations of Indian law were met with ridicule and contempt; leaders who asserted such rights were treated either as deluded individuals or as dangerous criminals who needed to be subdued by the militia. Their references to natural law and Indian law were rejected as "foolish talk," the consequences of unsavoury White influences.[49]

As the movement to repress the struggle for Aboriginal title gained strength, the discourse of British justice, replete with myths of fair play and impartiality, became entangled with discourses of capitalism. Controlling Native resource use came to be seen as essential to capitalist endeavours and to the general interest of the Dominion.[50] Alliances developed between Indian agents and government officials who had the authority to regulate resources. Such was the case for Loring, who now found himself on the opposite side of issues from Father Coccola, the missionary who succeeded Father Morice. Efforts to subdue the Babines and to have them submit to the Fisheries Act found Hans Helgeson, fishery guardian, commissioned as a justice of the peace. In this capacity he arrested, charged, and convicted Babine men for violating the Fisheries Act and the criminal code. Confrontations

[48] Atio is cited in Department of Fisheries, *Annual Report, 1905*, 207. References to privileges are made in several sources, among them, that of N.W. White, chair of the Mckenna-McBride Commission. *Report of the Royal Commission on Indian Affairs for the Province of British Columbia* (Victoria: Queens Printer, 1916). See also British Columbia, *Papers Connected with the Indian Land Question 1850-1875* (Victoria: Government Printing Office, 1875); *Papers Relating to the Commission Appointed to Enquire into the Condition of the Indians of the North-West Coast* (Victoria: Government Printing Office, 1888).

[49] Loring to Vowell, 30 August 1906; Williams to Venning, 30 August 1906; Brodeur to Venning, 31 August 1906; Memorandum, "The Removal of Barricades Placed by Indians in the Babine River, A Tributary of the Skeena, n.d.; H. Helgeson, Fishery Overseer to J.T. Williams, Inspector of Fisheries, 21 October 1906; Venning to J.T. Williams, 8 July 1907. Not everyone was equally dismissive of Aboriginal rights and law. Indian Superintendent Vowell averred that the "tribal law" in question was "more or less within the domain of prescriptive rights." Memorandum, Babine Fishing Rights, 30 August 1906, RG23, vol. 164, file 583, part 1, PAC.

[50] A. Noble to Department of Marine and Fisheries, 23 October 1905, RG23 vol. 164, file 583, part 1, PAC. L.P. Brodeur, Minister Marine and Fisheries, to Fraser River Canners Association, 30 October 1905, RG23, vol. 164, file 583, part 1, BCARS. Gough, *Gunboat Frontier*, 168.

between the Babine and fisheries guardians transformed the former's image from that of a law-abiding to a law-defying people. "The Indians have defied the law and Government," wrote Edward H. Hicks Beach, Stipendiary Magistrate, "and the Government will have to send a sufficient force of men to enforce the law and punish the Indians or let the natives have their way ... we are likely to have serious trouble." To Helgeson "those Indians [we]re now outlaws." And for John Williams, Inspector of Fisheries, who was informed by Helgeson of the situation at Babine Lake (and who had likely never met any Babine), Babine men were a "bombastic, troublesome and lazy lot."[51]

THE EMERGENCE OF ORAL TRADITION

As political power shifted so did legal discourse. With power vested more and more in the south, local functionaries had less to say about Native/White relations and less to say about traditional law. With the passing of Native commissions sent in 1891, 1913, and again in 1923 to investigate discontent over the assignment of reserves, little more was heard about Indian law. The last nail in its coffin was hammered by the 1927 revisions of the Indian Act, which outlawed all avenues to the legal redress of Aboriginal title and strengthened the anti-potlatch law of 1884. Assertions by missionaries and magistrates of the validity or pragmatic utility of Indian law no longer had political force.

The disappearance of Indian law from courts and public discourse was not associated with a lack of scholarly or even popular interest in Aboriginal society. Rather, collectors and ethnologists appeared on the scene and a new discourse materialized — one more anthropological than legal. The shift was to a scholarly scrutiny of oral tradition — categorized variously as "legends," "myths," "texts," "folk tales," "stories," and "tales" — and to a popular fascination with what were held to be primitive or exotic customs.

Franz Boas, eminent ethnologist, is exemplary in this regard. Arriving in 1886 at the height of the protests against the potlatch law and in the midst of struggles for land rights, he made no mention of the Aboriginal legal order embedded in potlatching. He responded to the criminalization of the potlatch by defending the institution

[51] Hicks Beach to John T. Williams, Inspector of Fisheries, undated, Helgeson to Williams, August 1906 Lake Babine Band Treaty Resource Centre; J.T. Williams, Fisheries Inspector, to R.M. Venning, Assistant Commissioner of Fisheries, 23 July 1907, RG23 vol. 164, file 583, part 1, PAC.

on economic grounds, not as the quintessential expression of a legal system.[52] Noting that other collectors of artefacts had neglected to obtain explanations of their cultural significance, Boas gathered stories and tales along with related paraphernalia and, in the process, remarked on the "weird," "strange," and "wild" behaviour and appearance of potlatch participants.[53] Boas systematically collected and retold Tsimshian mythology primarily so as to explicate images of harmonious social order at the expense of understanding social disruption. In doing so he contributed to a functionalist discourse that ignored magistrates' and missionaries' conceptions of "customary law" and its relations to the social forces of frontier colonialism. Ironically, in the long term Boas hardened notions of oral tradition as exotic narrative and laid foundations for its later reification and reinvention by neotraditionalists and professional observers who likewise treated cultural performances and exotic tales as inflexible over time.[54] The Boasian treatment of mythology and oral tradition was replicated throughout the Pacific Northwest. In 1922 Diamond Jenness visited the Bulkley Carrier and noted the passing (so he presumed) of their customs and oral traditions. He described the potlatch system in detail — still vibrant despite prohibition — yet failed to recognize in it a legal system. In the Bulkley Carrier he saw only a traditional social order vainly confronting Western civilization. In this manner legal codes embedded in legends and historic narratives, and signified in potlatch presentations and graveyard celebrations, eluded ethnographers and became fixed in anthropological narration as various forms of funerary customs and oral traditions. And so (to pass swiftly through the next four decades) what had formerly been understood as Indian law was reduced to myths collected by anthropologists bent on salvaging cultural survivals and capturing dying memories of ancestral tales.[55] And there it remained, for all but the Aboriginal peoples themselves, until a new era of land claims emerged.

When Indian law again appeared before the bench it had been radically transformed in legal discourse into oral tradition; its veracity was doubted and its legal powers were dismissed. First the Nisga'a

[52] Douglas Cole and Ira Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990), 130-31.

[53] Ronald P. Rohner, *The Ethnography of Franz Boas, Letters and Diaries of Franz Boas Written on the Northwest Coast from 1886 to 1931* (Chicago: University of Chicago Press 1969), 33-34, 39.

[54] Franz Boas, *Tsimshian Mythology* (Washington, DC: US Government Printing Office, 1916).

[55] For example, Diamond Jenness, "Myths of the Carrier Indians of British Columbia" *Journal of American Folklore* 47 (1933): 4; Viola Garfield, *Tsimshian Clan and Society* (Seattle: University of Washington Publications in Anthropology 7, 1939); Boas, *Tsimshian Mythology*.

(*Calder v. Regina* 1969) and then the Gitksan and Witsuwit'en (*Delgamuukw v. Regina* 1987) brought "oral tradition" to the court as evidence. In hearing testimony in *Delgamuukw*, Chief Justice McEachern went to great lengths to determine its validity, allowing it to proceed, although, as he said, within the letter of the law it was hearsay. McEachern treated oral tradition in the discourse of the plaintiffs with ill-concealed contempt. Its manner of presentation he deemed "fatal to the credibility and reliability" of its truth and of the witnesses themselves. In contrast, written texts were perceived to be true historical texts, regardless of the capacity of colonial observers to comprehend the Aboriginal social/legal order. McEachern rejected the potlatch as a judicial body on the grounds that it was not so described by a Hudson's Bay Company trader in the 1820s (although few Witsuwit'en or Babine readers would miss the descriptions of legal protocol to which they still adhere today).

McEachern found sufficient anomalies and gaps in witnesses' testimonies to disqualify "oral tradition" as a true and binding legal code. In a strange twist of logic, which assumed that truth can be separated from culture, the chief justice averred that, prior to colonization, Gitksan and Witsuwit'en ancestors "were hardly amenable to obedience to anything but the most rudimentary form of custom." Further, "what the Gitksan and Wet'suwet'en witnesses describe as law is really a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves."[56] Thus in a colonial discourse reminiscent of the frontier magistrates, McEachern fashioned a narrative imbued with explicit and implicit assumptions of the superiority of colonial and constitutional laws — assumptions that would sustain the superordination of judicial authority while distancing alternative discourses and subordinating them to positivist truth.[57]

The continuity of discourse that delegalized Indian law and reduced it to oral tradition, social custom, and moral obligation is revealed in

[56] *Delgamuukw v. Regina*, 13, 219, 214.

[57] McEachern is not alone in his understanding that custom fails to constitute law and that oral tradition fails to meet tests of evidence established within common law. McNeil, arguing for the recognition of land rights inherent in customary law and the capacity of British law to protect those rights, acknowledges the difficulties facing any group making such a claim. He suggests that "in courts of English law, customary law is generally a matter of fact. As such 'it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the Courts, become so notorious that the Courts take judicial notice of them.'" The difficulty, of course, lies in presenting the frequent proofs in accordance with rules of evidence, and the problems of proving relevant customs may be insurmountable. Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon, 1989), 193.

two cases that sought recognition of Carrier family law and that were brought to the BC Supreme Court. Both cases, *Michell v. Dennis and Dennis* (1984) and *Casimel and Casimel v. ICBC* (1989), sought recognition of Carrier adoptions and, with that recognition, compensation under provincial statutes. In their reading of case law, first Justice Hutchinson and then Justice Wong found that the moral obligations and social responsibilities inherent in these customary, binding family relations were not legal obligations. But, as I pointed out at the beginning of this article, in 1993 the BC Court of Appeal dismissed their delegalization of customary adoption, and it did so by drawing on case law, not on a broader interpretation of parallel legal orders. Thus did customary law return to the bench, presumably to be administered once more within the frame of a discourse of plural legalisms.

What are some possible ramifications of the reassertion of Indian law into the Canadian legal order as rights to be determined by the court itself? As I have argued elsewhere, Indian law constitutes "materials of identity," that is, a symbolic order that speaks to the past in the interest of the present. Taking customary laws to court implicates the plaintiffs in internal battles among Aboriginal peoples over the exercise of traditional authority.[58] What lies before us is a significant moment in which material relations have altered, creating new openings for a neotraditionalist counter-legal discourse. What neotraditionalism demands, without qualification, is recognition of an Aboriginal legal order as perceived by and conceived in the discourse of the plaintiffs and their legal counsels who address the court. While the Supreme Court struggled to retain its authority and to distance and subordinate the alternative discourse of the plaintiffs, so the plaintiffs sought to establish their own versions of authority and truth. Even as the Supreme Court strained to exclude challenges to legal language, the plaintiffs endeavoured to predetermine the conditions and contents of the reception of customary law. If, indeed, the dominant legal order, through its courts, establishes what prevails as a right in any Aboriginal society, then the plaintiffs and their legal counsels are in a position to exclude the possibility of alternative meanings and other discourses that might arise within their communities.

[58] Jo-Anne Fiske and Claudine Herlihy, "Courting Customs: Taking Customary Law to the BC Supreme Court," *International Journal of Race and Ethnicity* 1 (1994): 49-65.

Do we now see a lawmaking class emerging within Aboriginal nations? Will the end result be a reified "truth discourse" devoid of the flexibility and process inherent to the legal order from which it emerged? Such is the suggestion made by Yagalahl (Dora Wilson) in her response to McEachern's reasons for judgement: "Our laws were set in place thousands of years ago, and they cannot be changed."[59] Stated otherwise, a contemporary discursive formation of "potlatch law," "the law of the blanket," or "grand potlatch law" may in time establish a new truth discourse. Significantly, however, it is the courts, not the feast and potlatch halls, that are emerging as the site of this discursive formation; the dominant legal order has appropriated the meaning and motive of traditional law.

While it is true that the essentially British legal practices upon which the courts formerly relied can no longer be used to constrain the application of customary internal regulations, the court's basic processes of verification remain unaltered. No longer is it merely a question of the law of the bench over the law of the blanket, but a question of internal hierarchy: who in the First Nation will be empowered to verify traditional rights? Will the careful avoidance of coding traditional law be undermined as the dominant courts unilaterally assume the right to do the opposite? And what has the closing of the nineteenth century to tell us about the waning of this one? Perhaps that the discursive formation of legal codes may best be understood not as truth but as social practice. As a new class of lawmakers emerges, what is construed as law is likely to reflect conflict and institutional change within the shifting formations of Aboriginal nations.

[59] Dora Wilson, "It Will Always Be the Truth," in *Aboriginal Title in British Columbia: Delgamuukw v. the Queen,* Frank Cassidy ed. (Lantzville, BC: Oolichan, 1992), 200.