EAGLE DOWN IS OUR LAW

Witsuwit'en Law, Feasts, and Land Claims

ANTONIA MILLS

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Eagle Down Is Our Law: Witsuwit'en Law, Feasts, and Land Claims

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Eagle Down Is Our Law

Eagle Down Is Our Law is about the struggle of the Witsuwit'en peoples to establish the meaning of aboriginal rights. With the neighbouring Gitksan, the Witsuwit'en launched a major land claims court case asking for the ownership and jurisdiction of 55,000 square kilometres of land in north-central British Columbia that they claim to have held since before the arrival of the Europeans. In conjunction with that court case, the Gitksan and Witsuwit'en asked a number of expert witnesses, among them Antonia Mills, an anthropologist, to prepare reports on their behalf. Her report, which instructs the judge in the case on the laws, feasts, and institutions of the Witsuwit'en, is presented here. Her testimony is based on two years of participant observation with the Witsuwit'en peoples and on her reading of the anthropological, historic, archaeological, and linguistic data about the Witsuwit'en.

In 1991, the judge who rendered the decision in the court case, known as *Delgamuukw v. the Queen,* dismissed the testimony of Mills and the other anthropologists and ruled that the Witsuwit'en and Gitksan have no aboriginal title.

This book contains the report that Mills rendered to the court. With its publication, the public can judge the quality of the expert opinion report for themselves. The report is introduced by Chief Gisdaywa (Alfred Joseph) of the Witsuwit'en, Chief Mas Gak (Don Ryan) of the Gitksan, anthropologist Michael Kew, and legal scholar Michael Jackson. A prologue by Mills describes the report in the context of the epic three-year court case, and an epilogue, also by Mills, describes what has happened in the provincial appeal and what the Gitksan and Witsuwit'en have done since the decision to further address the issues of aboriginal rights.

Antonia Mills is associate professor in the First Nations Studies program at the University of Northern British Columbia, Prince George.

This book is dedicated to all the trees, salmon, and people in the Witsuwit'en claim area and beyond – past, present, and future.

Foreword

Gisdaywa (Alfred Joseph)

The history, culture, and laws that our chiefs spoke of in the *Delgamuukw* court case have been handed down for thousands of years.

When the elders discuss the laws of the land in the feast house, truth and honesty are what they base our history on. That is why there are different clan members who attend as guests and witness what is taking place in the feast house. They are witnesses to the transactions of those who have the authority on all matters that affect us.

With Gitksan and Witsuwit'en witnesses and expert witnesses, this forum was taken into the immigrants' justice system, where one person addressed as 'my lord, chief justice, etc.' just ignored the chiefs, who reluctantly went before this man, telling him of our history. He did not believe us.

Before contact our people lived a lot longer than they do today. The facts told by Johnny David (Maxlaxlex) and my Aunt Mary George (Tse baysa) say that our people lived for a long time; that they were not a problem for the family. A family member would pick up and move the elder when he or she wanted to move. They were very light and small from old age, yet their brains were very active. They lived at a time when there were no drugs. Their medicine was all natural.

I was born on 27 March 1927, in Tse Kya. I remember the times when I did chores for people who were old and blind. Sometimes, I sat and listened to them telling of their experiences.

I remember those who were 100 years old and older when they died. Naik (Charles Williams Sr.) died in 1936, my paternal grandfather, Gisdaywa (Joseph Nalochs) died in 1944. Kloumkhun (Theresa Grey) died in 1967; Tsebaysa (Rose Brown) died in 1958; Tse G'hot (Mary Ting) died in 1949; S'kum Ye (Margaret Grey) died in 1950.

Cecelia Seymour, Chief Gyologet's wife, died in 1943. Abraham Wilson died in 1940. Old Sam died in 1936 – he was the father of Woos (Matthew Sam), who died in 1977.

These were some of the oldest people that lived in Hagwilget. They talked of the first White people that came into the territory, and they lived off the land before the settlers came. They had feasts for settling their debts and rewards for services. They used the songs, eagle down, rattle, and drum to settle disputes.

When there was a birth in the village, the elders always got together to analyze it. They would all say that this person came back (reincarnation), that he or she would be a chief, a leader. They never went to a record book for information; it was a natural thing for the Witsuwit'en elders to clarify and verify information on various aspects of their culture.

Our people used and managed the natural resources for thousands of years, and the resources remained plentiful. The environment was cared for and kept healthy. It took 100 years of extraction by the Europeans to just about wipe out the resources and environment. This was done without any regard whatsoever for the true owners of the land.

In preparation for the *Delgamuukw* court case, the information gathered had to be written and presented to the Witsuwit'en people in meetings at Tse Kya and Kya Wiget for ratification. Getting together and sharing information was nothing new for the Witsuwit'en and Gitksan – the ancient names of the mountains, lakes, rivers, and creeks and the information needed just started to flow in the language of the land as the elders, with renewed energy, talked to the younger people.

To get into the White man's system, this information had to be put together in a way that they could understand. To do that, people like Tonia Mills worked long and hard with the Witsuwit'en at feasts and meetings; she listened to every Witsuwit'en chief and elder who stood up to speak of the culture and its laws. Tonia Mills spent time with the best advisers of the Witsuwit'en people, some of whom later went on the witness stand for the first time in their lives (including Dzee Madeline Alfred, who lived her life on the territory she loved so dearly, and Txemsem Alfred Mitchell, who grew up on the territory with his grandfather, Alfred Namox).

On behalf of the Witsuwit'en nation, I wish to express our heartfelt appreciation and thanks to Tonia Mills, Richard Daly, Hugh Brody, and the many supporters for the many hours of work they put into our now written history. They are now part of our kungax.

Foreword

Mas Gak (Don Ryan)

Eagle down is sacred among the Gitksan and Witsuwit'en peoples and is a symbol of peace. It is used, for example, to sanctify the beginning of our peacemaking process. In addition, eagle down is used ritually in our system of conflict resolution and mediation. Restitution and compensation are key features in any ceremony in which eagle down is used. A prerequisite in any peacemaking process is the willingness of the parties to make peace and to commit themselves to keep the peace 'until the heart is satisfied.' It's a living process. It's an ideal. The Gitksan and Witsuwit'en have yet to use eagle down in their dealings with the Crown in Canada. The Gitksan and Witsuwit'en have been waiting almost two centuries to make peace with the Crown.

Canada has held the racist view that Aboriginal people are primitive and are incapable of political, legal, historic, or economic thought. This attitude has been institutionalized to the point where Aboriginal rights and title will never include self-government, economic power, or the recognition and respect of our laws and our traditional territories. Canada has put a lot of energy towards making sure Aboriginal people never get involved in the development of the legal principles of Aboriginal rights and title, especially in the courts and in parliament.

The mission of our court case, *Delgamuukw v. the Queen*, is to explode Canada's narrow view of Aboriginal rights and title and to get the Crown to the table to negotiate a treaty.

The Gitksan and Witsuwit'en started the *Delgamuukw* case believing that the court system was just another institution that criminalized and marginalized us for trying to protect our traditional territories. So we set out to challenge the courts to change this situation. One way of doing this was to get the court to hear our voices first as experts.

Our expert witnesses gave their opinions on such things as our history, our form of government, and our legal and economic systems. We searched the world over for non-Gitksan and Witsuwit'en people to reinforce what our people said in court. Antonia Mills was one of several non-Gitksan and Witsuwit'en called to testify on our behalf. In the end, the court did not qualify our experts and went on to challenge some of our non-Gitksan and Witsuwit'en witnesses.

The decisions on our title case from the Supreme Court of British Columbia and the British Columbia Court of Appeal are history. We have seen some change in attitudes and positions from both the courts and the Crown since we started the case. However, the Province of British Columbia still will not honour the decision of the BC Court of Appeal to overturn the lower court's decision on the question of extinguishment of Aboriginal rights and title. The BC Court of Appeal ruled that the Gitksan and Witsuwit'en have unextinguished Aboriginal rights. The province of British Columbia continues to play policy games when it states that the ministries will recognize our Aboriginal activities on the land, and that this may lead to our having legal rights. Such activities include fishing, hunting, trapping, and gathering but not the context of the scope and nature of land use decisions. The province states that these matters will be left to treaty negotiations.

The Gitksan and Witsuwit'en want to get on with the last stop in the domestic court system of this country. Our application for leave to appeal has been granted by the Supreme Court of Canada. I look forward to hearing provincial and federal arguments in the Supreme Court of Canada. I also look forward to the Supreme Court of Canada's decision on our case. I believe the two levels of government will move towards our view of Aboriginal rights and title. The eyes of the world are on Canada.

We also plan to test world institutions on the issue of Aboriginal rights and title. I believe the world states and institutions are not immune to these issues, and they must come to terms with Aboriginal peoples. However, I will have to wait a year or longer, given the recent developments on the political front.

While preparing for the Supreme Court of Canada, we have been attempting to get the Province of British Columbia to the treaty table. On Monday, 13 June 1994, the Gitksan/Witsuwit'en and the Province of British Columbia signed a political accord signifying mutual recognition and respect. The accord also called for the adjournment of our

court case for one year to allow time for the parties to engage in substantive negotiations. The two parties will move immediately to get the federal government to join in this effort. The Gitksan and Witsuwit'en will return to the Supreme Court of Canada for a legal decision should political negotiations fail. On the other hand, we may see the eagle down ceremony.

Eagle down gives us optimism. We have kept the eagle down for thousands of years because it works. Eagle down is our law.

Preface

Michael Kew

This volume makes available to the public one part of the expert anthropological evidence presented in the case of *Delgamuukw v. the Queen*, and it marks another phase in the long struggle of the Witsuwit'en and the Gitksan to be recognized as nations and to regain effective control of their lands. *Eagle Down Is Our Law* is about the continuing system of governance of the Witsuwit'en. Speaking different languages, from entirely unrelated language families, the Witsuwit'en and their Gitksan neighbours share, nevertheless, the same basic structure of social and political organization. They also share the same aspiration to be able to shape their own future in their own land.

The true experts in any cultural system are those experienced and wise leaders who have been taught to know their own laws and values and to understand how they fit together to serve their communities. In this case the true experts are Witsuwit'en chiefs. Although they gave evidence in the trial, these people recognized the need to use outside experts to interpret their culture to an alien culture's courts.

Antonia Mills is one of the anthropologists who served as such an expert and gave evidence in *Delgamuukw*. Having had years of field experience among Athapascan-speaking Beaver (Dunne-za) and having worked on a summer project with the Gitksan people, Mills was amply prepared to work with the Witsuwit'en from the spring of 1985 to the summer of 1988. This book contains the major portion of her work for the Witsuwit'en court case. Her primary method of fieldwork, participant observation, is a cornerstone of ethnographic methodology and is widely recognized as essential to the reliable description of alien cultural traditions. This methodology was demeaned by the trial judge as leading to prejudicial reporting. The full story of Mills's fieldwork experience, including her terms of

agreement with the Witsuwit'en, remains a project for the future and deserves to be told. Although Mills provides few details in this book, she does not obscure her role as an expert and leaves her reader in no doubt of her full support for the Witsuwit'en nation.

After three years of trial, a judgment which dismissed almost entirely the pleas of the Gitksan-Witsuwit'en, and appeal judgments which partly reversed the initial decision, the case will now be argued before the Supreme Court of Canada. A great deal hangs upon its outcome – enough to cause Canadians to ask whether so much should be left up to the courts. In British Columbia, where, for the most part, treaties have not been concluded with First Nations, the common law and the Constitution provide the basis for recognizing distinct Aboriginal societies as nations. The courts and the common law have been the chief means by which BC First Nations have driven senior governments to the treaty negotiation table. The courts have served the First Nations well in the last three decades, and a clear pronouncement from the court in this last appeal could strengthen the position of all First Nations in BC as they begin treaty negotiations.

But will the courts and common law suffice as protectors of First Nations rights? For two hundred years, despite the common law and the courts, First Nations rights have been circumvented and voided by executive order, statutory law, fraud, and outright theft. That the need to rectify this situation is recognized is evident in the willingness of all parties – the two senior governments and the First Nations governments – to enter into treaty negotiations. As these begin, the need for expert cultural interpreters and written accounts of First Nations laws, governments, societies, and philosophies is clear. The general public needs access to up-to-date, reliable, and understandable accounts of First Nations in order to be aware of the advantages, for *all* people, which their continuance promises. Anthropology and other social sciences have an obligation to provide such information, and this book is one step towards that end.

Eagle Down Is Our Law is an important anthropological document in its own right. First, it helps to fill a gap in the published ethnographic record on Western Carrier language speakers (comprised of the Witsuwit'en of the Bulkley River system and the Naadut'en of Babine Lake). For years the main source of information has been a brief sketch by Diamond Jenness, based on three months research in 1924-5. Mills's study extends that earlier work and brings it up to date.

Second, this book breaks new ground in that it is BC's first pub-

lished ethnographic account commissioned by a First Nation primarily to present evidence supporting a plea for Aboriginal rights. It is an exercise in *applied anthropology* and has been from its inception a fully collaborative effort between the ethnographer and the Witsuwit'en people. Ethnography as a genre of reporting is no stranger to applied anthropology. Many journals of Hudson's Bay Company traders, for example, are replete with ethnographic notes. And ethnography has long been put to use by ethnographers or their masters (i.e., those who employ and pay them). What is new in this present case is that the masters are also the subjects of the study. It should be no surprise that those masters intend to put this study to work in their interest. They have no 'hidden agendas' – their purpose is clear for all to see.

Perhaps it was this openness which led the trial judge to dismiss the testimony of Mills and other anthropologists who gave evidence in *Delgamuukw*. For the same reasons, no doubt, questions will be raised in academic circles – Did Mills get it right? Are her 'facts' correct? Can her account be trusted? The courts will answer such questions – in the manner of courts. But should anthropologists, as experts, merely submit their reports and be content as courts decide which field methods are appropriate, which theoretical models have current relevance, and which expert's analysis provides the better explanation? Of course not. For anthropologists, those questions can only be answered properly within the discipline of anthropology – in the give and take of academic seminars, conference discussions, and journal exchanges. As anthropologists are called upon more frequently to conduct research and to prepare reports for court cases (as well as to produce supporting documents for treaty negotiations), there will be pressures to sidestep the academic seminar, as it were, and to let others call the shots. The author of this book and the Witsuwit'en and Gitksan chiefs are to be commended for the foresight which has led them to bring this study to publication. This achieves, for the story of Witsuwit'en law and government, a shift in venue from the court of law to a wider set of assessors.

Witsuwit'en chief Yaga'lalh, in commenting on the trial judgment in *Delgamuukw*, spoke of it as part of 'a long hard battle.' And, indeed, it is. These two small nations are fighting in the courts for recognition of their rights to their land, they are seeking injunctions to stop invasive trespass, and they are resisting the imposition of unconstitutional regulations upon their resource use. Their struggle needs the wider understanding which this book will help to achieve.

Michael Jackson

Preface

In the early spring of 1987 I sat at my desk in Vancouver charged with the task of writing the opening statement of the legal team representing the Gitksan and Witsuwit'en hereditary chiefs. My desk, and indeed my whole study, was filled with the drafts and summaries of the evidence which was to be presented to the chief justice of British Columbia. The Gitksan-Witsuwit'en case differed, however, from other complex litigation in which expert reports are part of the evidentiary matrix. This was because, embedded in the summaries and drafts of the documents, was an unfolding of the epic history of the Gitksan and Witsuwit'en peoples – a description of their past and present social and economic organization, an account of their cultural values, a statement of their political and legal systems – all of which was underpinned by their distinctive ways of knowing and experiencing themselves and their interrelationship with the life forces within their ancient territories. It was for this reason that the opening statement of counsel starts with this paragraph:

> This court, in hearing the evidence which will be presented in this case, will be faced with a series of legal and intellectual challenges and opportunities of a nature not normally found in matters that come before the bench ... The Gitksan and Wet'suwet'en, in seeking recognition from this court of their rights to ownership and jurisdiction over their territory, are seeking recognition of their societies as equals and contemporaries. The challenge here, both for the court and for us as counsel, is to understand and overcome the tendency to view Aboriginal societies as existing at an earlier stage of evolutionary development. The assumption underlying such a position offers persistent, powerful, and ultimately distorting conclusions as to the real

> nature of Indian society. (Cited in Gisdaywa and Delgam Uuk 1989:21)

The opening statement described the essence of the challenge facing the court as bringing to the judicial process a cross-cultural understanding, which gave equal validity to the Aboriginal world view and did not rely upon eurocentric experience and thinking as the universal reference point. Put another way, the court was being asked to participate in the decolonization of the legal mind as it articulated a principled basis for the adjudication of the constitutional rights of Aboriginal peoples.

Dr. Tonia Mills was one of the three anthropologists retained by the Gitksan and Witsuwit'en chiefs to help describe to the court the nature and shape of their societies and their institutional framework through which their rights of ownership and jurisdiction were exercised. Unlike many other Aboriginal rights cases (particularly those in the United States), the 'expert' evidence of anthropologists was not conceived as the primary proof of the claim; rather it was conceived to provide an explanatory text to the statements and descriptions of Aboriginal peoples themselves given in their own voices and in their own languages. The role of the anthropological expert in the Gitksan-Witsuwit'en case was therefore to write a report and to give evidence which described Gitksan and Witsuwit'en society from the perspective of the Aboriginal peoples themselves and to do so within a framework which would enable the court to understand and respect that perspective. The appropriateness, and indeed necessity, for such a role has now been reinforced by the statement of the Supreme Court of Canada in the *Sparrow* case, where the court stated, 'It is ... crucial to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake' ([1990] 1 SCR 1075 at 1112).

In order to fulfil this mandate, Dr. Mills lived among the Witsuwit'en for some three years and, in the scientific tradition of participant observation, put herself into a situation where she could describe the Aboriginal perspective within a cross-cultural conception of anthropology. Her abilities to do so were enhanced by the fact that, parallelling her work for the case, she was also engaged in research on the belief and experience of reincarnation among Aboriginal peoples, including the Witsuwit'en. Her demonstrated ability to understand, respect, and integrate that experience within her work was the measure by which many Witsuwit'en were able to trust and confide in

her, imparting to her knowledge which has been withheld from other anthropologists whose objectives have been directed towards meeting the 'academic perspective' of a distant university rather than the 'Aboriginal perspective' of the Aboriginal peoples themselves.

The difference is fundamental. The academic perspective starts with the assumption that you have already graduated from a place of learning, usually with high honours, and are trained to observe and document what you are about to see and hear. You begin your task already an expert with the analytic and conceptual tools of your profession. The Aboriginal perspective sees you as a person who is at the very beginning of your understanding. You are as but a child who, like a child, must be shown the ways and instructed by those who have knowledge based upon the accumulated teachings of many generations. As you demonstrate the ability to understand and respect you are entrusted with yet more knowledge. Layer by layer you become a person of knowledge and power. Dr. Mills became sufficiently knowledgeable that the Witsuwit'en people were prepared to allow her to present a report and to testify about those matters about which she had learned so as to complement the evidence of the Witsuwit'en people. Together that evidence was designed to explain to the chief justice of British Columbia what it was to be Witsuwit'en and why the Witsuwit'en and the Gitksan sought from a Canadian court recognition of their rights to be accorded the respect of an ancient and contemporary society and to be acknowledged as founding nations of Canada.

To the immense disappointment of the Gitksan and Witsuwit'en peoples, Chief Justice McEachern was not able to accord that recognition, respect, and acknowledgment. As Dr. Mills explains in her prologue, her evidence, like that of the other anthropologists called by the Gitksan and Witsuwit'en, was given little weight by the trial judge. Similarly, much of the evidence of the people themselves was described and analyzed through an ethnocentric perspective. The opportunity for a defining vision and expression of a decolonized legal mind was not embraced. Because of this, the judgment of Chief Justice McEachern, despite its length, tells us little about the Gitksan and Witsuwit'en in terms of how they see themselves. It contains nothing at all regarding the description and analysis of Dr. Mills. Because it is my judgment and, more important, it is the judgment of the Witsuwit'en people themselves, that Dr. Mills's report says something significant about the nature of Witsuwit'en society, and its laws

and institutions, it is important that UBC Press is publishing this report.

Dr. Mills's preface does an admirable job of situating her report in its appropriate and legal context. If you spend enough time around lawyers and in the courts you run the terrible risk of actually sounding like a lawyer! Fortunately for Dr. Mills, during her fieldwork with the Witsuwit'en, she impressed those whom she met with her gently inquiring mind and her sensitivity and eagerness to listen and learn, qualities which all of us who are lawyers – or judges – ignore at our peril.