

CORRESPONDENCE

Re "Cultural Contrast: The British Columbia Court's Evaluation of the Gitskan-Wet'sewet'en and Their Own Sense of Self and Self-Worth as Revealed in Cases of Reported Reincarnation," by Antonia Mills, WINTER 1994-95

DEAR EDITOR

In her article on reincarnation evidence at the Delgamuukw trial, Antonia Mills quotes Chief Justice McEachern as saying "I have been brutal." She goes on: "He exemplifies this by declaring that the Royal Proclamation of 1763 . . . does not apply to British Columbia and . . . that Aboriginal title . . . has been unilaterally extinguished by the Crown."

What the Chief Justice actually said was this:

The parties adduced such enormous quantities of evidence, introduced such a huge number of documents, and made so many complex arguments that I have sufficient information to fuel a Royal Commission . . .

As I am not a Royal Commission, and as I have no staff to assist me, it will not be possible to mention all of the evidence which took so long to adduce, or to analyze all of the exhibits and experts' reports which were admitted into evidence, or to describe and respond to all the arguments of counsel. In these circumstances I must . . . summarize. In this respect I have been brutal. I am deeply conscious that the process of summarizing such a vast body of material requires me to omit much of what counsel and the parties may think is important.

As with most things in life, context is all.

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HAMAR FOSTER
Professor of Law

REPLY

DEAR EDITOR:

Thank you for providing me with the opportunity to reply to Hamar Foster's letter to the Editor regarding the appropriateness of quoting an excerpt of Chief Justice McEachern's Judgment to read "I have been brutal." Professor Foster is correct that the full sentence reads, as shown in his letter, "In this respect I have been brutal."

Before I even had the opportunity to obtain and read Chief Justice McEachern's Reasons for Judgment, I received a copy of the News Release from the Gitksan and Witsuwit'en Office of Hereditary Chiefs, dated March 8, 1991, the day after the decision, which says "Even at the introduction of the document, this judge says ' . . . I have been brutal.' (pg. 3). Indeed this is an understatement. The volume of evidence that this judge rejects in respect to the continued ownership and jurisdiction of the Gitksan and Wet'suwet'en territories, the details of cultural organization, of the language, of their whole cultures, is amazing. . . . After three years of hearing testimony, the judge even rejects the idea that the Gitksan and Wet'suwet'en cultures were and are complex and sophisticated (pg. 237) instead asserting that thousands of years of social development happened since European contact."

In the perception of the Gitksan and Wet'suwet'en, the decision was brutal. As Professor Foster notes, I said the Judge exemplified this [being brutal] "by declaring the Royal Proclamation of 1763 . . . does not apply to British Columbia and . . . that Aboriginal title . . . has been unilaterally extinguished by the Crown." These are statements I stand behind. Indeed the Provincial Court of Appeal overturned in 1993 the ruling that the Royal Proclamation does not apply to British Columbia and the Treaty Negotiations underway at present in British Columbia are testimony to the recognition that negotiated settlements of aboriginal rights must be made.

Many parties have felt concern or compassion for the criticism that the Delgamuukw decision occasioned towards its author. One author hoped that the Judge's miss-spelling of Hobbes, in his now famous/infamous statement that aboriginal life in the territory was "nasty, brutish and short" (Judgment, p. 13) would not occasion any more quotes with "[sic]" placed after Hobbs. Is there a connection between McEachern's sad choice of the quote from Hobbes re "nasty, brutish and short" and his choice of words, "In this respect, I have been brutal?" The Delgamuukw case required listening to evidence that was presented from a non-Western perspective. Can a Western system of jurispru-

dence be expected to encompass other vantage points? These are major problems that our modern and post-modern world will answer. Compassion is due both the Judges who must make those decisions and the Native peoples who must negotiate or litigate their cases.

In the end the Judgment's use of the word brutish and brutal will be lost under the weight of the continued negotiations. I find that already some graduate students describe the Delgamuukw case in terms of the decision of the Provincial Court of Appeal, as the Calder case is described on the basis of the decision at the Federal Court of Appeal. This is entirely appropriate.

I quite agree with Professor Foster that "As with most things in life, context is all." The context of great importance to British Columbia at the present time is how Aboriginal Rights will become defined through the process of negotiating the many outstanding land claims into treaties. We have before us the opportunity to see such rights defined by the very highest principles of justice. My concern with seeing that the Gitksan and Wet'suwet'en points of view be heard, compassionately, was used as reason to disregard the evidence I put forth to document that the Wet'suwet'en have a long and proud history in their territory (see *Eagle Down Is Our Law: Witsuwit'en Feasts, Law and Land Claims* 1994 for that evidence and my commentary on the initial decision). I regret that testimony given in support of land claims cannot always be judged dispassionately. I truly believe that the best decisions will be made by those who have compassion for all the life forms, the Native and non-Native, the fish and the fowl and the animal. Several Native graduate students I have had the honour of having in a class at UNBC this past year contrasted the Native and non-Native points of view in terms of goals. In their depiction the Native point of view represents the long term concern with sustainability of the environment while the Western/Canadian point of view is concerned with the short term economic extraction of resources to be converted into short term wealth. These perceptions remind us of the great importance of taking a long term, global view of what a sustainable future looks like. Surely there do not need to be more Chechnias to demonstrate that listening to and learning from all points of view offers the most viable future for us all.

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