

Introduction

Five of the papers in this collection deal with the use of the disciplines of anthropology and history in *Delgamuukw v. B.C.*, a case heard in the British Columbia Supreme Court. More commonly known as the McEachern Decision after presiding judge, Chief Justice Allan McEachern of the B.C. Court of Appeal, the outcome was made public on Friday, 8 March 1991, with the release of Mr. Justice McEachern's 394-page *Reasons for Judgment*. No effort is made to analyze the legal decision itself; that work is better left to legal scholars and to the First Nations communities. What follows concentrates instead on the court's use of the materials submitted to it by historians and anthropologists. It comes to the conclusion — let there be no doubt concerning the matter — that those materials were improperly utilized and badly understood.

The *Delgamuukw* case is an important one for several reasons. Brought to court by fifty-one hereditary chiefs of the Gitksan and Wet'suwet'en, representing 6,000 people organized into 133 Houses, this was the longest aboriginal title case in Canadian history: 374 days spent in court and 141 days spent taking evidence out of court. A massive territory, 54,000 square kilometres of crown land along the Skeena River in northern British Columbia, was at stake. The case began in Smithers in May 1987 and concluded in Vancouver in June 1990, with the decision rendered ten months later. The court proceedings, however, represent merely one step in a much longer process. For over 100 years the Province had refused to negotiate land title settlements with First Nations people of British Columbia. In November 1977 the Gitksan-Wet'suwet'en Declaration of ownership and jurisdiction was accepted by the federal government for negotiation. However, the Province of British Columbia failed to act on the Declaration, and the chiefs sought the only available remedy. In October, 1984, fifty-four hereditary chiefs representing seventy-six Houses took the province to court.¹

¹ The Gitksan and Wet'suwet'en Information Packet. Prepared by the Office of The Hereditary Chiefs of the Gitksan and Wet'suwet'en People. Unpaginated. No date or place of publication given.

The chiefs, through their legal counsel, argued that their traditional law remains in effect in their territories unless changed with their consent. Judge McEachern rejected both the claim and the theory underlying the claim, holding that Aboriginal people were never sovereign over these lands; that they held no Aboriginal title to the land, and instead had weaker use rights to the land; that use rights were limited in area; and that extinguishment of these use rights could occur by inference during the colonial period through land ordinances, proclamations or other means.

Delgamuukw is the latest in a long line of legal decisions that deal with self-government and Aboriginal and treaty rights of First Nations in Canada, the United States, and other of the former British colonies. *Delgamuukw* represents a retreat from the findings of courts in all of these jurisdictions. Most notable among the Canadian Supreme Court decisions concerning British Columbia are the 1973 *Calder* case, in which the court split over the issue of whether the Aboriginal title of the Nishga had been extinguished in the colonial period, and the 1990 *Sparrow* case, in which the Aboriginal right to fish was held not to have been clearly and plainly extinguished by legislation.

Delgamuukw is important in that the litigants hoped to gain some measure of control over the natural resources of their region. The Skeena Fisheries Commission, made up of Gitksan and Wet'suwet'en chiefs, the Tsimshian Tribal Council, and the Lake Babine band, was established to manage the Skeena watershed area under their own fisheries management and harvest philosophies. First Nations control over areas important for their forestry products, ceremonial uses, medicinal herbs, and game were linked to success in the suit.

But *Delgamuukw* is notable for reasons other than these quite predictable ones. The full-blown presentation of Gitksan and Wet'suwet'en oral tradition provides one of the richest sources of information about First Nations societies to date. Such a presentation required a concerted effort by the plaintiffs to provide the most thorough and authoritative testimony possible. By doing so, as Dara Culhane points out in this volume, "the Gitksan and Wet'suwet'en approached the court and the proceedings with dignity, sincerity and integrity." Michael Kew (1989:98) noted in a review of *Gisday Wa and Delgam Uukw, The Spirit in the Land*, the opening statement of the hereditary chiefs, that

the case is also unique for the extent and breadth of the evidence from the people themselves. . . . It contains a full record with unsurpassed detail of territory, history, and organization of all the houses (the primary political

units), and it is given in the words and under direction of the people themselves. It is not a construction by outsiders.

Chief Justice McEachern's rejection of this testimony and the associated testimony of anthropologists and other academics is therefore a particularly heavy blow to both the First Nations and academic communities. It is most important that such valuable testimony be understood in a light different from that cast by the *Reasons for Judgment*.

In addition, the language employed in the *Reasons for Judgment* to describe Gitksan-Wet'suwet'en people and society and the logic underlying such descriptions shocked and outraged First Nations and academics, a fact noted in the pages of the nation's newspapers. Judge McEachern's reference to the "nasty, brutish and short" lives of Gitksan-Wet'suwet'en people in the nineteenth century and the notion that these people lived without the regular workings of an organized society received wide attention. *The Weekend Sun* reporters Mark Hume and Scott Simpson, for example, write of the fact that "with tears in their eyes, some of them shaking with anger, Indian leaders reacted with shock and dismay to the judgement of Chief Justice Allan McEachern" (9 March 1991). Reporter Ken MacQueen captured the sentiments of many scholars when he wrote that the ruling "has so angered and disgusted many of Canada's leading anthropologists that they are considering legal action" (*Vancouver Sun*, 13 July 1991).

The conduct of the trial and the manner of publication of the *Reasons for Judgment* are also noteworthy. In his chapter, Robin Ridington, a first-hand witness to much of the trial, describes the treatment of the chiefs during the case by a judge who did not understand the value of their contribution to the proceedings. Others, including Bruce Miller in this volume, have commented on the attractive packaging of the decision, the deceptively simple quality of its language, and the fact that it was priced to sell for \$20. Apparently intended for wide distribution, it may provide a misleading account of First Nations history and culture to large numbers of people.

The first piece in this collection is the text of an address given 9 April 1991 at the Museum of Anthropology on the campus of the University of British Columbia. Dora Wilson-Kenni, Yagalahl, of the House of Spookw, served as a member of the Gitksan-Wet'suwet'en litigation team and monitored the trial in Vancouver. She describes the feast system, the importance of the oral testimony, and her strong reaction to the legal process. She comments that "we had to prove that we existed. We had to

prove that we were a people and that we had a language. . . . I'm sitting here. Can't you see me?"

The other contributors to this collection are four anthropologists and one historian. Robin Ridington, Julie Cruikshank, and Bruce Miller are all anthropologists at the University of British Columbia; Dara Culhane is a doctoral candidate in anthropology at Simon Fraser University. Robin Fisher is an historian at Simon Fraser University. Fisher examines the *Reasons for Judgment* in historiographic context and argues that although the Judgment appears to applaud the work of historians, there are serious problems with the judge's "scissors and paste" methodology and consequently with the conclusions reached. Fisher likens Judge McEachern's view of history to views current in the 1930s and notes that Judge McEachern overlooks the important work in understanding the history of British Columbia of the last two decades.

Ridington presents his account of the trial itself as a way to frame the use of anthropological testimony and the testimony of the hereditary chiefs. Cruikshank provides an overview of the approaches to the analysis of oral tradition in order to examine the judge's treatment of the Gitksan-Wet'suwet'en oral histories known as *adaawk* and *kungax*. She comments on his creation of his own brand of scholarship while dismissing the commonly accepted principles of research. Cruikshank calls this an "invention of anthropology." Miller employs Bourdieu's concept of common sense in order to make clear the logical underpinnings of the judge's opinion and the political implications of over-simplification and reliance on the "dominant discourse." Culhane focuses on the court's use of testimony and especially on the performance of Dr. Sheila Robinson, a cultural geographer employed by the Crown to provide anthropological testimony. Culhane points out that the testimony of Robinson, a non-anthropologist with no record of publication or fieldwork in the relevant areas, found favour with the court, while that of Hugh Brody, Richard Daly, and Antonia Mills, all well known and actively publishing in the field, was dismissed.

Important issues, these commentators make clear, are at stake in all of this. Let us now look at what those commentators themselves have to say in order to see, at length and in detail, what those issues are.

REFERENCES

- Kew, Michael. 1989. Review of GISDAY WA and DELGAM UUKW, *The Spirit in the Land: The Opening Statement of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia*, 11 May 1987. *Culture* 9 (2): 98-99.