

Judging History: Reflections on the Reasons for Judgment in *Delgamuukw v. B.C.*

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So far, most of the running against Chief Justice Allan McEachern's findings in *Delgamuukw v. B.C.* has been made by native people and anthropologists. Both groups have, quite rightly, objected to the denigration of native cultures, to the fact that oral testimony was first admitted then dismissed, and to the assertion that anthropologists were largely unreliable witnesses. Lawyers have also commented on the case in print, and will do so in more detail when the argument is rejoined in the British Columbia Court of Appeal.¹ Without wishing to diminish the force of any of these criticisms, I want to look at the judgment from the point of view of an historian. McEachern's "Reasons for Judgment" is a "book" that also ought to be reviewed as a piece of historical writing in its historiographical context.

It is fitting that the judgment be evaluated as history because McEachern invokes the historical perspective and, at first glance, treats historians and their work with much more respect than anthropology. At the beginning of his "chapter" entitled "An Historical Overview," he notes: "It is not possible to discuss this case except in an historical context."² Later, as he evaluates the various forms of evidence presented to the court, he writes of historians that, "I accept just about everything they put before me . . ."³ By contrast, the evidence presented by Native people and anthropologists is treated with great skepticism. McEachern thought that Gitksan and Wet'suwet'en people who testified had "a romantic view" of the past and, therefore, "much of the plaintiffs' historical evidence is not literally true."⁴ The anthropologists were alleged to have engaged in a "type of study . . .

¹ Hamar Foster, "It Goes Without Saying: Precedent and the Doctrine of Extinguishment by Implication in *Delgamuukw et al v. The Queen*," *The Advocate* 49 (May 1991): 341-57; Leslie Hall Pinder, *The Carriers of No: After the Land Claims Trial* (Lazara Press: Vancouver, 1990).

² *Delgamuukw v. B.C.*, 17.

³ *Ibid.*, 52.

⁴ *Ibid.*, 48-49.

called participant observation” which brought them too close to their subjects (in this case the plaintiffs) and, in McEachern’s view, was “fatal to the credibility and reliability of their conclusions.”⁵ The judge’s rejection of one approach to the past, and apparent acceptance of another, was fundamental to his “Reasons for Judgment” and therefore bears closer scrutiny.

A more careful examination of the evidence provided in the judgment will show that McEachern, in fact, paid very little attention to historians. His rejection of their work is less blatant than his dismissal of anthropology and oral tradition, but it is no less thorough. The reasons for ruling out much of what the native people and anthropologists had to say are up front and clearly stated. Those groups can come to grips with the argument against them and much of the thinking that lies behind it. History and historians are treated more shabbily by not even being given that opportunity. McEachern may appeal to history and uphold the reliability of historians, but he appears to have no understanding of either the historical methodology or the conclusions of historians who have written about Native people in Canada. For this historian, then, both the method of and the reasons for McEachern’s judgment are seriously flawed.

In *Delgamuukw v. B.C.* the naïvety of the conclusions about history follow logically from the means by which they were reached. The judge’s professed reliance on historians arises from his belief that they are “largely collectors of archival, historical documents.”⁶ But if writing history involved ten steps, then the historian has only taken one with the acquisition of the documents. The real work of the historian begins with reading the documents and evaluating them for internal consistency as well as establishing the context in which they were written. Individual documents must be compared to the rest of the written record and, where appropriate, non-written sources. Then the historian develops an interpretation of the past that is logical and consistent with all of the available evidence. The final steps are to write an account of the past in clear, accessible prose, and to point out to the reader, through footnotes and bibliography, the sources that formed the basis for the conclusions.

McEachern, by contrast, adopts a hopelessly outmoded procedure which he describes as a “‘scissors and paste’ format. . . .” No lesser authority than R. G. Collingwood wrote nearly fifty years ago that “scissors and paste history . . . is not really history at all,” and then went on to explain how

⁵ *Ibid.*, 50.

⁶ *Ibid.*, 52.

that approach to the past began to be superseded in the seventeenth century.⁷ McEachern does seem to have some reservations about scissors and paste, as he allows that "it is not usually good practice," but he goes ahead and follows it nonetheless.⁸

Actually the McEachern methodology would be better described as xerox, scissors, and paste. For the first step in this procedure is to pull the documents out of their original context by use of the xerox machine. Thus, for example, a letter from Governor James Douglas to the British Colonial Secretary on Indian land policy is isolated from his numerous letters on other issues of the day. It is as if Douglas did his thinking in watertight compartments rather than as a busy governor dealing with a dozen overlapping questions at the same time. Individual documents are then cut to pieces so that excerpts can be quoted. The historical sections of the judgment consist of long successions of quotations from original sources strung together with commentary by the judge. The trouble with scissors and paste is that scissors cut things out of context and, once removed from their setting, all the bits of the document are of equal weight. After the individual pieces have been trimmed to a suitable shape, with the application of paste, the past can be stuck back together according to a new, and more acceptable, pattern.

Worse still, by failing to refer the reader to the original source of the document, McEachern makes it very difficult to follow his cutting and pasting. There are several instances where documents are quoted without any citation at all.⁹ When a reference is provided, the citations are not to archival collections, but are either to the compilations of documents brought together for this case or to previous cases where they were used. These citations obscure the historical reasoning behind the judgment. For, unless one has access to the exhibits placed before the court, or is very familiar with the documentary record, checking the accuracy of the quotations and the extent to which lack of context distorts their meaning will be a complicated task. Because one cannot easily check McEachern's footnotes, the validity of his interpretation of history remains, at very least, an open question.

Not all of these shortcomings are unique to the McEachern judgment. Though this may be a particularly brazen example, other judgments are based on similar techniques. Combing the documents for suitable quotes,

⁷ R. G. Collingwood, *The Idea of History* (London: Oxford University Press, 1961), 257-60. This book was first published in 1946.

⁸ *Delgamuukw v. B.C.*, 99.

⁹ See, for example, *Delgamuukw v. B.C.*, 110, 120-23, 158, and 181-82.

pulling them out of context, and then citing them to court exhibits or other judgments is common practice in legal circles. It is almost as if an historical document does not acquire legitimacy until it has been introduced in court. Thus the various enactments of the colonial legislature of British Columbia that are alleged by the province to have extinguished aboriginal title prior to 1871 are sometimes called "the Calder XIII" in legal circles because they are referred to in the *Calder* case.¹⁰ This shorthand form of citation is undoubtedly more convenient than referring to a series of Acts, but having the legal system recreate the past in its own image is not good history. The drawbacks of this approach will be explained in any primer on the historical method.¹¹

Also anachronistic is Chief Justice McEachern's belief that the documents are self-explanatory. He praises historians for providing "much useful information with minimal editorial comment." Their marvellous collections," he adds, "largely spoke for themselves." If one accepts this premise, then it is logical "to allow the participants — those who were actually on the scene dealing with these problems — to be judged by their own words. . . ."¹² This notion is, at best, very innocent. For the meaning of documents is not self-evident: it can only be understood in context. A document cannot be properly evaluated until we know who wrote it, for whom it was written, and, most importantly, why it was written.¹³ As McEachern inadvertently shows, it is not possible for judges, any more than historians, simply to allow figures from the past to speak for themselves. By giving, as he does, an individual like Joseph Trutch the benefit of every doubt, the chief justice makes a very real judgment about the past. Again, these points are elementary to the process of writing history.

Less obvious, perhaps, are the consequences of McEachern's complete faith in the documentary record as the primary, if not the only, reliable source of insight into the past. He hearkens back to the old view that history, based on the study of written sources, is the appropriate discipline for understanding European cultures, whereas anthropology, based on the use of oral and material sources, is the discipline devoted to indigenous peoples. One of the many problems with this dichotomy is that exclusive reliance on written documents to interpret history confirms the hegemony

¹⁰ Foster, 345ff.

¹¹ See, for example, Norman F. Cantor and Richard I. Schneider, *How to Study History* (New York: Thomas Y. Crowell, 1967), 44-45.

¹² *Delgamuukw v. B.C.*, 52 and 99.

¹³ Cantor and Schneider, 47-48; Robert Jones Shafer, *A Guide to the Historical Method* (Homewood, Illinois: The Dorsey Press, 1974), 141-61.

of the colonizers. And that is part of the reason why historians have concluded that they must move beyond their traditional reliance on written words if they are ever to understand the indigenous past.

Ethnohistory is the technique that is now used to write native history. Recognizing that no single source provides the key to unlock the past, ethnohistorians use oral tradition, ethnography, and archaeology as well as the written record.¹⁴ Even the earliest documents were written by Europeans who observed Native cultures that were changing, often very rapidly. Therefore oral tradition and archaeology are particularly important for understanding Native cultures prior to the arrival of Europeans in North America. All of these sources must be critically evaluated, for each one has its own particular power as well as its deficiencies. And all of these sources must be used in conjunction: each one used to verify the others. Bruce Trigger is one of the leading exponents of ethnohistory in Canada, and he is selectively quoted by McEachern on the limitations of oral history.¹⁵ The judge does not, however, quote Trigger, or any other historian, on the limitations of the written record.¹⁶ The point that he misses is that each one of these sources has its drawbacks, which is why they all have to be mined for all that they are worth. Since he places so little credence on oral tradition, ethnography, and archaeology — the evidence that could be used to reconstruct pre-contact Gitksan and Wet'suwet'en life — it is hardly surprising that he should have found that those people did not have cultures that were viable and long-standing enough to establish an Aboriginal title to their territory.

With so little understanding of the historical methodology, it is not surprising that the chief justice is also unable to discriminate between good and bad history. The views of particular historians are brought to bear on his judgment without regard for their competence on the subject at hand. The counsel for the plaintiffs were apparently very critical of Joseph Trutch, who was a major figure in the making of Indian land policy in British Columbia. As Chief Commissioner of Lands and Works

¹⁴ On the nature of ethnohistory, see Bruce G. Trigger, *The Children of Aataentsic: A History of the Huron People to 1660* (Montreal and London: McGill Queen's University Press, 1976), I, 11-21; James Axtel, "Ethnohistory: An Historian's Viewpoint," *Ethnohistory* 26 (Winter 1979): 1-13.

¹⁵ *Delgamuukw v. B.C.*, 47-48. In this case McEachern does provide a citation, but alas the page number is incorrect and less than half of the following quote actually comes from the source cited, which is Bruce Trigger, *Time and Traditions: Essays in Archaeological Interpretation* (Edinburgh: Edinburgh University Press, 1978), 127-28.

¹⁶ Bruce G. Trigger, *Natives and Newcomers: Canada's 'Heroic Age' Reconsidered* (Kingston and Montreal: McGill-Queen's University Press, 1985), 168.

between 1864 and 1871, Trutch entrenched the non-recognition of aboriginal title and drastically reduced the size of existing reserves. Yet McEachern observes that some historians have not "treated Trutch as unkindly as plaintiff's counsel."¹⁷ In support of this claim he cites Margaret Ormsby, who in *British Columbia: A History* does not say a word about Trutch's Indian policy, and Robert Cail, whose two chapters on Indian land policy rely entirely on published sources.¹⁸ Other historians, who have looked more carefully at the record of Trutch's dealings with Indian land, have concluded that, in the 1860s, he made many of the decisions that have led to today's impasse on native land claims.¹⁹ But for McEachern, the best historians are not those who have done adequate research or drawn the most logical conclusions, but simply those who appear to support his views.

Having selected historians with compatible opinions, McEachern then goes on to use their work in slippery ways. In his discussion of British Columbia's entry into Confederation, for example, he quotes Cail's opinion that "it is possible" that neither Trutch and the other British Columbia delegates, nor the federal officials, "intended to be anything less than candid" when they met in Ottawa to negotiate the Terms of Union in 1870.²⁰ Even at face value, that is a meaningless statement. The "possibility" that they intended to be candid allows equally for the possibility that they did not, and the fact that they "intended" to be candid does not exclude the possibility that they were obscure about particular issues when it came to the point. More importantly, as Cail goes on to demonstrate, it is difficult to escape the conclusion that Trutch, who was the key negotiator for British Columbia, failed to explain colonial policy on Indian land in British Columbia clearly to the federal representatives. Admittedly, there is no verbatim record of the negotiations in Ottawa, but all the evidence points to that conclusion, as does the federal government's consternation when it later found out the true nature of Indian land policy in the westernmost province.²¹ McEachern, however, then slips away from

¹⁷ *Delgamuukw v. B.C.*, 132.

¹⁸ Margaret A. Ormsby, *British Columbia: A History* (Toronto: Macmillan, 1958), *passim*; and Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: University of British Columbia Press, 1974), 169-243.

¹⁹ Robin Fisher, "Joseph Trutch and Indian Land Policy," *BC Studies* 12 (1971-72): 3-33, and *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* (Vancouver: University of British Columbia Press, 1977), 162-68 and 171-72. See also Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990), 39-44.

²⁰ *Delgamuukw v. B.C.*, 132; and Cail, 185.

²¹ Cail, 185-88; Fisher, *Contact and Conflict*, 177 and 186.

the issue by noting, I think incorrectly, that the evidence on the character of Trutch is equivocal and so he will not enter the controversy. "Such matters," he concludes, "are better left to historians." One can only wish that he really meant it.²²

McEachern's smorgasbord approach to historical interpretation is not confined to Canadian history. At one point he digresses "for a moment to mention a few excerpts from history, not related to British Columbia . . ." He then devotes a couple of paragraphs to pronouncing judgment on New Zealand history and law relating to Maori land. He refers briefly to the Treaty of Waitangi, which was signed in 1840 between representatives of the British government and the Maori people. Its provisions have not always been honoured, but the treaty was and is seen in New Zealand as the country's founding document. It provides an interesting contrast to Canadian treaties with Native people because, rather than extinguishing aboriginal title, it guaranteed Maori possession of their lands, forests, and fisheries for as long as they wished. Signed nine years before the founding of the colony of Vancouver Island, it might also be taken as an indication of British policy on aboriginal land rights. But McEachern passes quickly over the treaty itself, noting that "it is not necessary to detail all the circumstances which arose in that colony as a result of the Treaty of Waitangi . . ." Instead, he quotes at length from a report of a select committee of the British House of Commons to the effect that native people had only "a qualified dominion" over the country that was confined to a right of occupancy. This was the view of George Gipps, who as governor of New South Wales also served briefly from Sydney as governor of New Zealand. McEachern quotes Gipps' opinion because it is very close to his own view of Gitksan-Wet'suwet'en land rights. What he fails to mention is that Gipps' interpretation was unacceptable to the British Secretary of State for the Colonies as the basis for policy, partly because it contradicted the principles of the Treaty of Waitangi.²³ There was, as McEachern observes, no similar treaty signed in British Columbia.

²² *Delgamuukw v. B.C.*, 132.

²³ See *Delgamuukw v. B.C.*, 133-34, where McEachern gets the name of the governor of New South Wales wrong and, though it is difficult to be sure in the absence of an exact citation, seems to refer to the wrong select committee of the House of Commons. On the Treaty of Waitangi see Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin, 1987), *passim*; and, for a brief comparison between New Zealand and western Canada, see Robin Fisher, "With or Without Treaty: Indian Land Claims in Western Canada," in William Renwick (ed.), *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Wellington: Victoria University Press, 1991), 49-66.

Not, one suspects, that it would have made much difference to the chief justice if there had been, since he does not set much store by treaties with indigenous peoples. Part of the argument for the claim that the Gitksan-Wet'suwet'en retain title to their land is that, unlike some other native people within British Columbia and throughout much of Canada, they have never surrendered it by treaty. McEachern responds to this assertion by denigrating the treaties signed with native people, referring to them as an "historical 'farce'..." He is here echoing the views of Clement F. Cornwall, one of the most rabid of British Columbia's settler-politicians on the issue of Indian land, who noted in 1887 how, in other parts of Canada, Indian title was "extinguished by the farce of purchasing the same for infinitesimally small sums..." Cornwall at least understood that treaties were to extinguish title. McEachern further undermines the importance of these agreements by describing them as merely a means of "buying peace..."²⁴ Significantly, Joseph Trutch also attempted to diminish the Douglas treaties on Vancouver Island by claiming that they were simply "for the purpose of securing friendly relations" with the Indians and not, as the documents themselves clearly state, to extinguish title.²⁵ Whatever the defects and limitations of the Douglas treaties on Vancouver Island and Treaty 8 in the Peace River country, most historians would argue that they do at least represent moments when the government negotiated with Native people over their land. At the end of McEachern's brief discussion of treaties we are still left with the question of why the Gitksan-Wet'suwet'en should not be treated in the same way as, say, the Songhees or the Beaver Indians.

Each one of these examples of loose and shoddy use of historical detail is bad enough on its own, but collectively they add up to a general and much more substantial point. No one who writes about the past, whether historian or judge, is perfect. We all make mistakes of fact and interpretation. Yet for most historians there is a threshold beyond which the proliferation of minor errors and distortions begins to add up to major doubts about the credibility of the entire piece of work. As an historian, I would also expect sloppy thinking about the past to be associated with unclear thinking about the law. I am not, of course, in a position to assess the judge's use of legal precedent, though one who is presumably qualified to comment has already suggested that he is as arbitrary in his use of the law as

²⁴ *Delgamuukw v. B.C.*, 165-66.

²⁵ Joseph Trutch, memorandum, enclosure in Musgrave to Granville, 29 January 1870, British Columbia, *Papers Connected with the Indian Land Question, 1850-1875* (Victoria: R. Wolfenden, 1875), appendix, p. 11.

he is in his use of history.²⁶ It would be bad enough if the "Reasons for Judgment" in *Delgamuukw v. B.C.* were merely slipshod on matters of detail, but many of McEachern's general presumptions about the way native people responded to the coming of Europeans are also ahistorical. By viewing the past in terms of the present, he develops interpretations that are very different from those of most historians who write on First Nations peoples in Canada.

When McEachern reflects on "what really went wrong" in relations between natives and Europeans, he concludes that the indigenous people were unable to adapt to change because of their "lack of cultural preparation for the new regime. . ." Thus, as he puts it, "Indian dependence upon the white society was one of their greatest problems." This opinion is expressed in the judgment itself and repeated in the particularly offensive *ex cathedra* pronouncements at the end, which are innocuously entitled "Some Comments."²⁷ McEachern's cited authority for this view is George Woodcock, whose research on Native history in British Columbia seems to be largely confined to reading books written by himself.²⁸ It is a notion that is at least fifty years out of date in the historical literature.

Historical writing on native people in Canada goes back more than 250 years, but work by academic historians can probably be said to have begun in the 1930s.²⁹ Certainly the first university-trained historian to pay significant attention to the indigenous people of Canada was Harold Innis, whose book *The Fur Trade in Canada* was first published in 1930.³⁰ Later in the decade G. F. G. Stanley wrote *The Birth of Western Canada*, in which he argued that the Indians of the prairies were doomed because "the savage, centuries behind in mental and economic development, cannot readily adapt himself to meet the new conditions."³¹ At the same time, in British Columbia another historian, who was also a judge, F. W. Howay,

²⁶ See Foster, especially 349-51.

²⁷ *Delgamuukw v. B.C.*, 128-29 and 299.

²⁸ See *Delgamuukw v. B.C.*, 129, where Woodcock's book is incorrectly cited as *History of British Columbia*; and cf. George Woodcock, *British Columbia: A History of the Province* (Vancouver/Toronto: Douglas & McIntyre, 1990), 126ff. For a somewhat more detailed comment on the limitations of Woodcock's research see Robin Fisher, "To See Ourselves," *The Beaver* 71 (August/September 1991): 53-54.

²⁹ Bruce G. Trigger, "The Historian's Indian: Native Americans in Canadian Historical Writing from Charlevoix to the Present," *Canadian Historical Review* 67 (September 1986): 315-42.

³⁰ Harold H. Innis, *The Fur Trade in Canada: An Introduction to Canadian Economic History* (Toronto: University of Toronto Press, 1956).

³¹ G. F. G. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1960), 194. Stanley's book was first published in 1936.

held similar views about the Native people of the west coast. According to Howay, the early fur trade "seriously dislocated the finely balanced economic and social fabric of the Indians."³² The common thread running through these works was that Native cultures were unable to respond to the pressure of, first, the fur trade economy and, later, the coming of European settlers.

Recent historians, who have done more detailed and sophisticated research, have drastically revised these early views. They have shown that Native cultures were dynamic and evolving at the time of contact, and that they continued to adapt after the arrival of Europeans. Far from being passive, Indians responded rationally to the newcomers, devised strategies for coping with their demands, and even shaped the Europeans' interests to suit their own.³³ Most fur trade historians now argue that the trade was a co-operative economic and social system in which Native people played an integral and determining role. One of the leading exponents of this view of the fur trade is Arthur Ray, and his work also figures prominently in this judgment. Ray has already explained how his specific evidence on the Gitksan-Wet'suwet'en as traders was mishandled by the judge.³⁴ The pressure on Native cultures increased immensely with the coming of settlement, and there can be no doubt about the oppression that the indigenous people suffered at the hands of Europeans. And yet, even in the face of this new onslaught, they remained adaptive. Opportunities were extremely limited, but that did not mean that Native people were not able to exploit the few that existed. Thus McEachern's opinion that "their culture had not prepared them for the disciplined life of a tax paying agriculturist" is not shared by historians.³⁵ They have shown that, on the contrary, some Native groups, both in British Columbia and on the prairies, became very successful farmers, even to the point of producing a surplus.³⁶

³² F. W. Howay, W. N. Sage, and H. F. Angus, *British Columbia and the United States: The North Pacific Slope from Fur Trade to Aviation* (Toronto: Ryerson, 1942), 13. Though this book was jointly authored, Howay wrote the section on the fur trade.

³³ For a summary of these views, see Bruce G. Trigger, "Early Native North American Responses to European Contact: Romantic versus Rationalistic Interpretations," *The Journal of American History* 77 (March 1991): 1195-1215.

³⁴ Arthur J. Ray, "Fur Trade History and the Gitksan-Wet'suwet'en Comprehensive Claim: Men of Property and the Exercise of Title," in Kerry Abel and Jean Friesen (eds.), *Aboriginal Resource Use in Canada: Historical and Legal Aspects* (Winnipeg: University of Manitoba Press, 1991), 301-15.

³⁵ *Delgamuukw v. B.C.*, 128.

³⁶ Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal & Kingston: McGill-Queen's University Press, 1990), 36-49 and 162-76; Rolf Knight, *Indians at Work: An Informal History of Native Indian Labour in British Columbia, 1858-1930* (Vancouver: New Star Books, 1978), 66-77.

This promising development was nipped in the bud, however, as Indians were left with too little land and given too few opportunities by government policy-makers who, among other things, represented white settlers who feared competition from Native farmers. Thus ethnohistorians now argue that native people did not immediately become dependent on Europeans, and, when they did, it was not because of their inability to cope with the new order, but because they were given no opportunity to adapt.

McEachern's view of Native history is still firmly entrenched in the nineteenth century as interpreted by the historians of the 1930s. Since his method of determining the past is very different from that used by today's historians, it is hardly surprising that his conclusions would be also outdated. First McEachern fails to understand that the pre-contact cultures were viable and dynamic, then he argues that they were unable to adapt to European pressure, all of which undermines any valid claim to jurisdiction over their territory. In British Columbia there is a long tradition of judicial and political leaders listening to, but not hearing, Native people. The McEachern judgment obviously falls within that tradition. What is startling about this judgment is its author's failure to listen to the custodians of the past in his own culture. But then again, perhaps it is not so surprising.

For there is also a developing tradition in this province of lawyers and judges presuming to be historians, whether in or out of the courtroom. Having made judgments about legal issues that have a historical dimension, they presumably feel that they are thereby qualified to write history. Sometimes, as in *Delgamuukw v. B.C.*, they write a version of history into legal judgments, and sometimes they write books about the past. The lawyer, David Ricardo Williams, for example, has written biographical studies of several British Columbian figures. His books are long on knowledge of the law, but short on research into the historical context in which these men operated. They are particularly inadequate when they deal with native culture and history. His account of the Gitksan fugitive, Simon Peter Gunanoot, is based on legal rather than ethnographic knowledge, and his chapter on Indians in his biography of Matthew Baillie Begbie contains a number of errors of fact and interpretation.³⁷ But perhaps the most egregious example of a former judge posing as an historian is Thomas R. Berger's recent book, *A Long and Terrible Shadow*.³⁸ Berger takes a

³⁷ David Ricardo Williams, *Simon Peter Gunanoot: Trapline Outlaw* (Victoria: Sono Nis Press, 1982) and "... *The Man For a New Country*" *Sir Matthew Baillie Begbie* (Sidney: Gray's Publishing, 1977), particularly 100-18.

³⁸ Thomas R. Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas 1492-1992* (Vancouver/Toronto, Douglas & McIntyre, 1991).

little over 150 pages to pass judgment on 500 years of native history over an entire continent. He concludes that native history in North America has been an unwavering, downhill line from Columbus to the present day. The evidence for this generalization comes from personal experience and the selective reading of a tiny fraction of the secondary works on Native history and culture. His notion, that by going into Native communities today he can read the past back in a direct line to the time of contact, is called the fallacy of the ethnographic present in anthropological circles.³⁹ His reading on Native history in North America includes virtually nothing on the fur trade in Canada — that 300-year period during which, many historians argue, Indians and Europeans had a co-operative rather than an antagonistic relationship.

What these judges and lawyers are often doing is shaping the past to serve the needs of the present, which is not quite the same thing as writing history. It is also an approach that obviates the need for detailed research. We can safely assume that none of these legal professionals, let alone the bar associations, would let an historian walk in off the street and take over one of their cases just for a change of pace. But then, of course, any one can be an historian — or thinks s/he can! Once in a position to judge the law, evidently one may also judge history.

The interface between the discipline of history and the legal system is still a problematic one. The courts often expect historians to be merely collectors of documents. If judges do move beyond McEachern's idea that written documents are self-evident, then they tend to demand a greater certainty of interpretation than history can provide. Both professions need to think more clearly about these problems, and McEachern's judgment may at least serve the useful purpose of stimulating that debate. Academic historians are certainly partly to blame for the facile view of history expressed in *Delgamuukw v. B.C.* They need to find ways to get their work beyond the halls of academe. Judges and lawyers, on the other hand, should expect historians to have a higher function than the xerox machine. They should be called upon to provide a disciplined analysis of the past. If judges are going to use history as a basis for defining the law, then they need to listen to historians, and historians need to make themselves heard.

³⁹ This point is explained by Bruce Trigger in one of the few books on Canadian native history that Berger does cite in his notes, see Trigger, *Natives and Newcomers*, 114-18.