COMMENTARY

NASTY, BRUTISH AND SHORT:" ANTHROPOLOGY AND THE GITKSAN-WET'SUWET'EN DECISION

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On 8 March, 1991, Chief Justice Alan McEachern of the British Columbia Supreme Court rendered his decision in the case of *Delgamuukw v. The Queen.* Better known as the Gitksan-Wet'suwet'en land claim case, *Delgamuukw* dealt with a number of key issues of the land claim process in areas where treaties were not signed. In the first instance, the plaintiffs were asking the court to recognize their ownership over their traditional territories, including their right to govern these territories according to Aboriginal laws. In the alternative, they were asking for a recognition of their unspecified Aboriginal rights to use the territory. Furthermore, the plaintiff's claim entailed an award for damages for the loss of lands and resources transferred to third parties or otherwise lost since the establishment of the British colony. It was argued, in part, that the Aboriginal right to ownership of the land and resources had remained intact despite this colonization, since no treaties surrendering such a right had been enacted.

The Gitksan-Wet'suwet'en claim to some 58,000 square kilometres first entered the courts in 1984, with the filing of the statement of claim. The case went to trial in 1987, and was heard over 374 days, ending in the spring of 1990.

In rendering his judgement, McEachern essentially rejected the evidence presented by the plaintiffs. He ruled that the Aboriginal rights of the plaintiffs did not include ownership of or jurisdiction over the territory, and that Aboriginal rights in general exist at the "pleasure of the Crown" (accepting the Judgement in *R. v. St. Catherine's Milling and Lumber Company [1885]*)[1] and are therefore extinguishable "whenever the intention of the Crown to do so is clear and plain." The plaintiffs were accorded the legal right to use vacant Crown land for "aboriginal purposes," though such a right was not exclusive. The judgement will be appealed.

When the Chief Justice rendered his decision in the Gitksan-Wet'suwet'en case, he expressed a variety of attitudes about the social and cultural organization of the Indians which were alarming. At the same time, McEachern dismissed the extensive evidence of anthropologists called to testify on behalf of the Gitksan and Wet'suwet'en, stating that "the anthropologists add little to the important questions that must be decided in this case."[2] McEachern's views of both the Indians and the anthropologists are not unrelated, and they represent a distortion of both Aboriginal and academic realities.

Let us begin with McEachern's view of the social organization of the Gitksan and Wet'suwet'en peoples. Anthropologists and other scholars have consistently held that the Indians of the Northwest Coast, including

interior groups such as these, demonstrated perhaps the most sophisticated social, political, economic and cultural organization of all Aboriginal peoples in precontact Canada. But the Chief Justice would not be burdened with such notions; indeed, at the outset of his Judgement he made it clear that he would decide such matters for himself. And the manner in which he decided how the Gitksan and Wet'suwet'en have lived was startling.

Chief Justice McEachern quotes from Thomas Hobbes' *Leviathan* in concluding that pre-contact Aboriginal life in this area was "nasty, brutish and short."[3] It was a less than idyllic existence, he suggested, as the Indians were devoid of such essentials of civilization as written languages, horses, and wheeled vehicles.

McEachern's revelations in this case seem to surprise himself. He seems to agree with the Gitksan and some now-deceased anthropologists, that the Gitksan and Wet'suwet'en indeed "lived in some form of social organization long before contact with European influences."[4] The simple thought that a human group which had existed for hundreds, if not thousands, of years might actually have a social organization was a point to be proven in court! But, despite such a pronouncement, McEachern is at a loss to admit to anything more than a "rudimentary form of social organization,"[5] providing the Indians with little more than a "primitive existence."[6] In perhaps the most startling passage of the Judgement, he discounts the evidence submitted by the plaintiffs of the long history of their customs, traditions and institutions, concluding that "they more likely acted as they did because of survival instincts."[7] Animals exist in the wild with survival instincts. Human populations have developed much more elaborate systems of survival both for the provision of basic physical needs and to give meaning to life's more aesthetic, spiritual and intellectual pursuits. These systems are known as cultures. It is apparent from the judgement that McEachern does not see culture when he looks at the Gitksan and Wet'suwet'en. Does he see, as former Assembly of First Nations' National Chief Georges Erasmus suggested in the *Vancouver Sun* (28 March 1991), little more than a pack of wolves?

The judgement clearly indicates that the learned Chief Justice, despite his education and training, has absolutely no idea what is culture. He consistently emphasizes that the evidence establishes that not all Gitksan and Wet'suwet'en followed exactly the same spiritual ways, or adhered in exactly the same way to the same institutions or customs. It is as though he demanded to be presented with a code of cultural rules, clearly written and established, and concrete evidence that no one ever deviated from these rules. What a bizarre notion! Had he just looked

around his court room, he would no doubt have seen many individuals who practised a variety of religions, sexual preferences, dress styles, economic pursuits, and so on. Yet, would he not conclude that such diversity is part of the Canadian cultural milieu? Cultures do not proscribe rules, they provide guidelines. Human diversity within cultures is immense. To insist that the Gitksan and Wet'suwet'en exhibit long term and unwavering adherence to a definite set of cultural rules is hypocritical.

So how is it, then, that McEachern came to express such a distorted, reductionist view of Gitksan and Wet'suwet'en culture and society? We realize that judges cannot be expected to be experts in all fields; they are, however, supposed to be experts in law, and the law demands that parties to legal action be given a fair hearing. This includes the presentation of information gathered by "experts," and indeed testimony by experts themselves, to educate the judge in matters beyond his or her own expertise. Such experts are "qualified" precisely to serve this function for the court.

The Gitksan and Wet'suwet'en presented a variety of experts to the court, including anthropologists. The testimony of these anthropologists was, in the end, almost entirely discounted by the judge. In concluding that he could render a decision on the relevant matters of the case without anthropological input, McEachern offered his own view of the plaintiffs' social and cultural organization. It was not a flattering description.

Counsel for the Indians presented three primary anthropological witnesses in the case. Two of these had worked extensively with the two Indian groups in the years preceding the case, while the third had previous experience in the area. They presented written documents based on their research, as well as oral testimony. McEachern was unwilling to accept their evidence, describing them as biased and accepting defense arguments that their methods were unscientific. He was particularly critical of "participant-observation," the standard research technique employed by the Indian's two key anthropologists, Dr. Richard Daly and Dr. Antonia Mills.

Participant-observation is used by both sociologists and anthropologists, but is especially key to anthropological work with other cultures. To do participant-observation, the researcher must live with his or her community of study for an extended period of time, learning their language and absorbing the rules of social organization and cultural communication. The anthropologist is expected to learn about culture as community insiders would understand it, but professional expertise is used to make sense of it to outsiders.

To do this, the participant-observer uses a variety of techniques, including interviews with local "experts" in various subjects, daily

conversations and participation in routine events, and checking written records by and about the community. The more sources of information the researcher uses, the more he or she can "test" any conclusions against this information. In this way the anthropologist can then make an informed assessment about whether, for instance, a story told by one person is confirmed by other people or events. The more the researcher learns about the community as a whole, the more individual bits of information will make sense. This understanding of "context" comes with time and experience, much as a child learns to understand and evaluate the culture he grows up in. Unlike a child, however, the anthropologist learns purposefully and systematically, using rules of testing and verification similar to those used in the so-called "hard" sciences. Participant-observation is a far superior technique for understanding particular cultures than is the arm-chair speculation employed by the 19th century ethnological philosophers. Indeed, how else could one study another culture, if not first hand?

All cultures, including the Gitksan and Wet'suwet'en, have means by which selected individuals become "experts" or scientists, in subjects like community history and the environment, and anthropologists work closely with these experts. This is what Daly and Mills did, but McEachern rejects both Indian experts and the anthropologists who have worked with them as being biased and unreliable-in essence, unscientific. Indeed, he criticizes Daly for mainly interviewing the hereditary Chiefs. However, it is precisely these individuals who make excellent informants, by virtue of their titles, age and the respect accorded them by other society members.

McEachern also dismissed Dr. Daly's evidence because he believes that the participant-observation technique had rendered Daly too biased. McEachern uses as evidence of this point Dr. Daly's own reliance on the statement of ethics of the American Anthropological Association, the largest professional body of anthropologists in the world. The judge misinterprets Daly's ethical commitment to protect the Indian's "physical, social and psychological welfare and to honour their dignity and privacy."[8] The learned judge is clearly not aware that anthropologists, by virtue of their unique research methods,were integrally involved in the global colonial movements of the past, often providing administrators with data on village politics that allowed for more effective colonial rule. In more recent times, evidence has periodically surfaced of anthropologists being tempted and lured, even misled, into serving nationalist interests in various global contexts, such as during the Vietnam war when anthropologists working in south-east Asia were questioned regarding their knowledge of the political sympathies of particular villages. The American Anthropological Association quite rightly responded with an ethical

statement that would limit the chances of such harmful activities. Yet, McEachern concludes that Dr. Daly's adherence to the code of ethics means that his evidence is tendered solely to further the interests of his clients. McEachern seems to have missed another of the ethical commandments to which the professional anthropologist adheres: the anthropologist "should not knowingly falsify or color his findings."[9]

Despite McEachern's acknowledgement of Daly as a "well qualified, highly intelligent anthropologist," McEachern concludes that he "accept[ed] everything" that the Indians told him. What a curious contradiction. An individual acknowledged on one hand to be qualified, intelligent and ethical is, on the other hand, determined to be biased and to have been duped by individuals who, only a few short generations ago lived a "nasty, brutish and short" life.

Dr. Antonia Mills is criticized to a lesser extent than Daly, but here McEachern demonstrates another of his curious learned viewpoints. Mills is, in effect, accused of altering her research findings from an earlier draft as a result of her work for the Wet'suwet'en. Nowhere does the judge appreciate that her on-going research might have led her to revise her views. After all, this is what science is all about; there are few unchallenged laws of any sort in the social sciences, and certainly rethinking and rewriting are an integral part of scientific inquiry. What is most striking is that McEachern does not feel compelled to condemn one of the expert historians who has done exactly the same thing.

There is little to say about Chief Justice McEachern's views of the testimony of Hugh Brody. Despite informing us in the judgement that he would discuss this internationally renowned anthropologist's testimony in due course, nary a word is written. Perhaps by saying nothing McEachern was, indeed, passing his ultimate judgement on the discipline of which he knows so little.

McEachern's views of anthropology must be placed in the context of his views on history and the work of historians, for these he admires. Indeed, he announces that "I accept just about everything"[10] that the historian and his documents have to offer. Old documents, written by non-professional observers for reasons entirely unrelated to the land issue at hand, therefore become paramount, while contemporary accounts offered by professional social scientists are dismissed.

Written accounts by fur traders, missionaries and the like are well known to be self-serving and extremely limited in scope. That such reports are heavily biased is accepted as fact by researchers In the field. Indeed, prominent historical geographer Arthur Ray was called during the trial precisely to interpret one important trader's document for the court. Yet, it

was the anthropologists who were accused of bias. We do not wish to discount the contribution that historians can and do make to such discussions; but one can imagine how the original authors of these documents would have been received in McEachern's court could they have testified. How is it that the word of a dead trader be paramount to that of living social scientists?

To be blunt, the Chief Justice does not know what an anthropologist is, nor what one does. He seems to have little understanding of what anthropological data looks like, and how it is obtained. This, in itself, is not a fault. He is, after all, a lawyer and a judge, not an anthropologist. The problem is that he did not listen to what he was being told. In rejecting so completely the empirically-based contemporary anthropological evidence in favour of historical documentation, he has, in effect, determined anthropology not to be a social science. The result has been to present a portrait of the Gitksan and Wet'suwet'en as primitive peoples at the time of first European contact, living a hand-to-mouth existence guided by their animal instincts and governed only by the most rudimentary form of social organization: a people who could not possibly have had any legitimate concept of ownership of the land.

It is a startling judgement, one which reinforces the negative stereotypes many non-Native Canadians harbour about the Aboriginal peoples. The Gitksan and Wet'suwet'en expected a fair hearing; they did not get it. The Chief Justice simply could not leave behind his own cultural ethnocentrism and biases, and when the anthropologists attempted to translate the Indian culture into terms he could understand, he would have none of it. All this from a man who could write in his judgement, "I must not see with uncultured eyes what may not be there."[11] He did not see with uncultured eyes, for his eyes were full of culture. His own.

Notes

1. *R. v St. Catherine's Milling and Lumber Company (1885)* 10 O.R. 196; aff'd 13 Ont. App. R. 148; aff'd (1886) 13 S.C.R. 577: Aff'd (1888) 14 H.L. 47, (J.C.P.C.).

2. *Delgamuukw et al v The Queen*, Reasons for Judgement. Smithers Registry No. 0843. The Honourable Chief Justice Allan McEachern. 8 March 1991. p. 51.

3. *Ibid.*, p. 13.

4. *Ibid.*, p. 19.

5. *Ibid.*, p. 74

6. *Ibid.*, p. 250.

7. *Ibid.*, p. 213.

8. Principles of Professional Responsibility, Adopted by the Council of the American Anthropological Association, May 1971.

9. *Ibid.*.

10. Reasons for Judgement, p. 52.

11. *Ibid.*, p. 262.