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**THE GITKSAN-WET'SUWET'EN
AS 'PRIMITIVE' PEOPLES
INCAPABLE OF HOLDING
PROPRIETARY INTERESTS:
CHIEF JUSTICE McEACHERN'S UNDERLYING
PREMISE IN *DELGAMUUKW***

B. Douglas Cox*

For over 100 years, British Columbia has refused to negotiate land claim settlements with any of the aboriginal peoples living there. This refusal has not been due to a lack of demand and persistence on the part of the aboriginal peoples. In the case of the Gitksan and Wet'suwet'en,¹ attempts to obtain recognition of their rights of ownership and authority over their territory² date back to 1884.³ In the face of the Provincial and Federal Governments' refusal to act, the Gitksan finally turned to the courts to gain their long-asked-for recognition. This was indeed a last resort- an admission that the issue could only be settled in the 'white man's' court.

In May of 1987, the Gitksan entered the Canadian legal system to seek justice. It was an unprecedented opportunity for Chief Justice McEachern of the British Columbia Supreme Court to find a just and lawful process to place the Gitksan within the context of Canada. Almost four years later, the Chief Justice handed down his "Reasons for Judgement" in *Delgamuukw et al. v. The Queen* (8 March 1991).⁴ The decision in *Delgamuukw* was a stunning disappointment. The Chief Justice concluded that according to Anglo-European law the Royal Proclamation of 1763 does not apply in British Columbia and that any sovereignty, jurisdiction, or title the Gitksan may have, which he says is next to none, has in any case been extinguished. Indeed, according to the decision, the Gitksan have no land-based aboriginal rights at all.⁵

The question of whether aboriginal title is proprietary is indeed an important one. The above conclusions were reached with much less effort and rationalization than would have been the case had Chief Justice McEachern found the Gitksan to possess proprietary rights in their territory. Aboriginal rights as non-proprietary in nature are much less capable of holding their own against the proprietary rights asserted by settlers and governments. Further, it is much easier, both psychologically⁶ and legally, for non-proprietary rights to be lost by implication than it is for a proprietary right. With a finding of this sort having this amount of significance, it is surprising that Chief Justice McEachern came to the conclusion in the manner he did. That is, he went to great lengths to construct a 'screen'⁷ through which a vast amount of evidence and legal precedent was sifted.

This paper will begin with a description of the very divergent views that aboriginal peoples and Western society have of the world and how this in turn affects their property systems. I will then analyse how

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Chief Justice McEachern, through a Western view of the world and, specifically, the view that the Gitksan are a 'primitive' people, constructed a screen of judicial bias. I will also analyse the final ingredients of the sifting process and raise serious questions as to whether Chief Justice McEachern's findings of law were based on relevant and accurate findings of fact. In other words, his method of finding fact and selecting legal precedent will be examined to determine the validity of the finding that the Gitksan do not possess proprietary rights.

Two Diametrically Opposed Views of the World: Which View of Property Emerges?

To understand the property concepts of any society, one must have some appreciation of the philosophical premises that are basic to the society's culture- the premises that a society uses to relate to the world.

Within the cycles of the Gitksan existence, there is a continuum among human beings, animals, and the spiritual world.⁸ The Gitksan believe that both human beings and animals when they die have the potential to be reincarnated, if the spirit is treated with the appropriate respect.⁹ The Gitksan society is made up of both human beings and animals who have the intelligence and power to influence the cyclical path of life. The events of the 'past' are not simply history; rather, they are as much a part of the present and the future.¹⁰

This is unlike Western society, where the path of life is largely seen as linear with an occidental concept of time. Time is conceptualized as a straight line with that which is behind being seen as the past, that which is ahead being seen as the future, and that in the immediate surroundings being seen as the present. Once a unit of time flows past, it is never to be recaptured- it is gone forever.¹¹

The Western world and the world of the Gitksan are based upon two very divergent premises. These in turn underpin each of their institutions, with one of the end results being two very different systems of property.¹² The Anglo-European system of property is vertically and hierarchically linear. It is also singular in that it focuses upon the individual's ownership of land. An underlying goal of the system is to facilitate transferability of different property interests. This system necessitates a detailed and expansive registry and documentation system to record and trace owners. If one went back far enough for any piece of land, one would find the source of title in the Crown.¹³

Quite the opposite is the aboriginal or, specifically, the Gitksan view of property. For them, the source of life and, hence, property 'title' (to borrow from common law terminology), is the Creator.¹⁴ Central to their society and property system is the House.¹⁵ Each House is linked to its territory through acts of connection (for example, touching a cane to the land), pole-raising feasts, songs, and crests.¹⁶ These acts filter

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through the overall territory to strengthen the network of human relations between Houses.

The Gitksan's world view causes their institutions to be non-discrete. That is, their political, economic, spiritual, legal, social, ceremonial, educational, and proprietary institutions are interconnected and simultaneously perform a multiplicity of functions.¹⁷ This is done most widely through their Feast System.¹⁸ In the property sense, the Feast is the nexus of the management of credit and debits, the legal forum for witnessing the transmission of chiefs' names, and serves as the means for public delineation and confirmation of territorial and fishing sites in the names of hereditary chiefs. Public recognition of title and authority before an assembly of other chiefs affirms in the minds of all both the legitimacy of successors to the name and the transmission of property rights.¹⁹ As the proprietary representative of the House, the chief has a range of duties concerning the allocation and disposition of rights to use the territory amongst House and non-House members. The chief also 'manages' the resources of the land and defends the territory's integrity against clans of other House groups or Nations.²⁰

As was indicated by the hereditary chief's Opening Address to Chief Justice McEachern, there was much evidence adduced at trial which illustrated Gitksan 'law'.²¹ Though the Gitksan do not divide up their laws and the administration of such laws in the manner of Canadian law, the evidence adduced can nonetheless be seen as paralleling such common law divisions.²² Despite such parallels being argued at trial, Chief Justice McEachern failed to see them so clearly.

What the Gitksan did not expect was the Chief Justice's persistence in following the tendency of lawyers, judges, and Canadian society in general to look at aboriginal societies using a Western view of the world. As Michael Asch has stated by quoting Marvin Harris:

The belief that one's own patterns of behavior are always natural, good, beautiful or important and that strangers, to the extent that they live differently, live by savage inhuman, disgusting or irrational standards.²³

This way of thinking is referred to as ethnocentrism and is generally considered to be unfounded, invalid, and, hence, fallacious.²⁴

In fact, this ethnocentrism was the foundation upon which Chief Justice McEachern's 'screen' of filtration was constructed. He operated on the assumption that aboriginal societies exist at an earlier stage of evolutionary development than the Western World and that aboriginal peoples are 'primitive'. The danger of projecting such a view onto aboriginal land claim cases was seen clearly in *Delgamuukw*. The Chief Justice misunderstood and distorted the Gitksan way of life and culture into shapes and concepts contrary to the Gitksan society's very essence. If what Asch says is true,²⁵ the findings of fact and, hence, findings of law of Chief Justice McEachern are put in serious doubt. Specifically, his finding in law that the Gitksan's rights in the territory are non-proprietary is questionable. This causes his whole decision to be ex-

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tremely suspect since the remainder of his analysis is premised on this finding.

Judicial Bias of Chief Justice McEachern

A. Personal Background and Bias of Chief Justice McEachern

It could be argued that Chief Justice McEachern is a member of the Canadian judiciary just doing what any other judge would have done if confronted with the same scenario as the Gitksan claim. The fundamental error in such an argument is that, let alone the selective and erroneous use of law and selective use of evidence, Chief Justice McEachern carries with him his own past, experiences, biases, and values.²⁶

Chief Justice McEachern was born and raised in British Columbia. He received all of his education and practiced law exclusively within that province.²⁷ His exposure to aboriginal people began in his formative years (1940s), when the view of aboriginals was even more negative and stereotypical than it is today. A substantial portion of his exposure to aboriginal peoples has likely been to the skid-row aboriginals of downtown Vancouver and the extreme cases which came before him in the criminal context. Though some would argue that he was simply stating and using the Anglo-Canadian societal views of aboriginal peoples, it is not unlikely that Chief Justice McEachern truly believed the words he wrote in *Delgamuukw*.²⁸

In 1983, Chief Justice McEachern sat on the Canadian Judicial Council Inquiry Committee which examined the conduct of five Nova Scotia Judges in the Donald Marshall case. In 1986, he decided a case involving the litigation by an aboriginal band against the C.N.R.²⁹ Even in light of such past experiences, the Chief Justice personified the Canadian legal system as an institution with very little knowledge of and relevant experience with land claims and other complex aboriginal issues. As Louise Mandell has said:

Judges have a greater responsibility than other professionals to understand Indian world views and property definitions.... Yet in general, judges have no better knowledge than the general public and arguably, as a group, they suffer from a somewhat poorer exposure to the day-to-day life and struggle of the Indian Nations.³⁰

The *Delgamuukw* decision is strong support for such an argument. In his decision in the Donald Marshall Inquiry, Chief Justice McEachern has been quoted as saying that the judiciary's right to speak out is "one of the prices society pays for a judiciary which says what it thinks should be said."³¹ But like Donald Marshall Jr. who paid a great price, it was

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the Gitksan in this case who bore a heavy cost for which they were not liable. This cost, which included a continued disregard and disrespect for the aboriginal peoples of Canada was generated through the grave errors of the Chief Justice.

B. Bias, Ignorance, Misconception, and Ethnocentrism

1. The Emergence of the 'Primitive' Premise

In terms of the *Delgamuukw* decision itself, the bias and misunderstanding that is too often seen in the Canadian judicial system could lead to the Gitksan being viewed in Western world terms. This in turn formed many of the underlying premises in the judgement. The Chief Justice sifted the evidence and the law so as to substantiate his conclusion that the Gitksan's aboriginal rights are non-proprietary. The main and critical premise was that the Gitksan are 'primitive'.

The first indication of this premise occurred very early in the Reasons for Judgement, when the Chief Justice said:

...it would not be accurate to assume that even pre-contract existence in the territory was in the least bit idyllic. The plaintiffs' ancestors had no written language, no horses or wheeled vehicles, slavery and starvation was not uncommon, and there is no doubt...that aboriginal life in the territory was, at best, "nasty, brutish, and short."³²

The underlying sense of superiority in this statement has powerful implications not only in its devaluation of aboriginal societies as 'primitive', but consequently in terms of territorial claims as well.³³ A legal theory like this one, which is so ethnocentric, cannot be a valid one, especially in light of such vast amounts of evidence to the contrary.³⁴ As suggested by Mr. Justice Hall in his dissent in *Calder et al. v. The A.G. of B.C.*, this is a danger in the legal realm:

The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought of to be wholly without cohesion, laws, culture, in effect a subhuman species.³⁵

Despite warning from the highest court of the land, Chief Justice McEachern proceeded to perpetuate this false and destructive perception of the Gitksan as 'primitive'.

2. Legal Precedent Chosen to Perpetuate this Premise

This 'primitive' people premise arose in the analysis of the first requirement for establishing a claim for aboriginal rights and permeated the entire decision.³⁶ In accepting the four-part test of Mr. Justice Mahoney of the Federal Court in *Baker Lake* as the road map for aboriginal claims, and the antiquated case of *Re Southern Rhodesia*³⁷ as strong authority, Chief Justice McEachern perpetuates ethnocentrism and the 'primitive' people premise.

The first part of the *Baker Lake* test, namely that the claimants and their ancestors be from an organized society, was required to establish "an aboriginal title cognizable at common law."³⁸ In deciding this issue, the Chief Justice quotes a passage from *Re Southern Rhodesia*, which he felt had 'much wisdom':

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low on the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor 'richer than all his tribe'. On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising out of English law. Between the two there is a wide track of much ethnological interest..."³⁹

Michael Asch has commented that the *Delgamuukw* case is not only replete with this ethnocentric view of aboriginals, but the precedent it relies on is also filled with similar error.⁴⁰ The combination of the *Baker Lake* test and *Re Southern Rhodesia* exudes the belief that Western civilization is at the top of civilization and that the primitive nature of aboriginal society will be measured against this benchmark of superiority. It further suggests a misconception about aboriginal culture and society. Using an approach such as this to establish and interpret the Gitksan property system necessarily precludes accurate findings of fact and law.

As a small gesture of acknowledgement, Chief Justice McEachern passes the Gitksan claim on this first requirement of *Baker Lake*. He adopts the words of Mr. Justice Mahoney:

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...the relative sophistication of the organization of any society will be a function of the needs of its members, [and] the demands they make of it.⁴¹

However, he qualifies this by saying:

I am quite unable to say that there was much in the way of pre-contact social organization among the Gitksan or Wet'suwet'en simply because there is so little evidence.⁴²

Implicit in this statement is his view that the Gitksan are 'primitive'.⁴³ The Chief Justice supported his views by using historical, written records and opinions produced by the colonial regime and rejecting vast amounts of oral histories and anthropologic evidence adduced by the Gitksan. It should be noted that he did not reject the evidence adduced by the Gitksan outright. Chief Justice McEachern was very liberal in admitting evidence, but made it an academic exercise by giving the Gitksan evidence very little weight, if any at all at the end of the day.⁴⁴

C. Choosing Evidence

1. Anthropological/Oral versus Written History

As Chief Justice McEachern said: "Indian culture...pervades the evidence at this trial for nearly every word of testimony, given by expert and lay witness, has both a factual and cultural perspective."⁴⁵ Having noted this, he continues: "When I come to consider events long past, I am driven to conclude, on all the evidence, that much of the plaintiffs' historical evidence is not literally true."⁴⁶ In essence, Chief Justice McEachern disregards much of the Gitksan culture, an act fatal to understanding the Gitksan property system which is so interwoven with its culture. In turn, this was fatal for the Gitksan case because their evidence was largely in the form of oral and anthropologic works—both of which the Chief Justice viewed with much scepticism.

When it came time to choose between the oral and anthropologic evidence of the Gitksan and written historical documents produced by the province, the Chief Justice felt the choice was obvious. While explicitly disregarding the anthropologists as "add(ing) little to important questions that must be decided in this case"⁴⁷, Chief Justice McEachern held the historical written evidence as undisputable. He said: "I accept just about everything they put before me because they were largely collectors of archival, historical documents....Their marvellous collections largely spoke for themselves."⁴⁸

Not only did Chief Justice McEachern refuse to accept the anthropologic evidence, which in large part was based on oral statements of the Gitksan, but he also discounted the direct oral evidence of lay witnesses. As suggested earlier, the Gitksan way of life, culture, and property are all interconnected with their society operating on the

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spoken word. They have no need for the written form. However, the Chief Justice was sceptical of such evidence from the very outset. For example, he allowed the 'usual' opening statement by two hereditary chiefs, but did so in a disrespectful manner by finding it "legally embarrassing"⁴⁹. Later in the Opening Statement when one witness, Chief Mary Johnson, was relating her part of the *ada'ox*,⁵⁰ she came to a part which called for her to sing. It was part of her history. As described by an observer, "the judge seemed quite upset and was not going to let her sing."⁵¹ The Chief Justice was quoted in the media as saying: "I have a tin ear...so it's not going to do any good to sing it to me...this is a trial, not a performance."⁵² Johnson proceeded anyway, with a three minute song in the Gitksan dialect. The Chief Justice also did not hold the Gitksan oral tradition and, hence, oral evidence in great esteem:

I am satisfied that the lay witnesses honestly believed everything they said was true and accurate. It is obvious to me, however, that very often they were recounting matters of faith which have become fact to them. If I do not accept their evidence it will seldom be because I think they are untruthful, but rather because I have a different view of what is fact and what is belief.⁵³

Though the Gitksan showed absolute respect for Chief Justice McEachern and the judicial system⁵⁴ from the very outset of the trial, he did not reciprocate.

By discounting such oral evidence, which went a long way to establishing a property system, Chief Justice McEachern could not have made any clearer his disrespect and misunderstanding of the Gitksan. The Gitksan came to court and revealed their innermost beliefs and values in a forum very foreign to them, but for which they showed great respect. Yet, after hearing the massive amounts of oral testimony by the Gitksan, Chief Justice McEachern concluded that they have a "romantic view"⁵⁵ of the world and, hence, did not give great weight to their evidence. He attempted to rationalize this by saying that he had to "assess the totality of the evidence in accordance with legal, not cultural, principles."⁵⁶ As explained above, though, his cultural values underpin the entire decision.

It is peculiar that Chief Justice McEachern viewed the oral and anthropologic evidence with such scepticism while holding the historical written work as undisputable. By doing so, he suggested that if what the Gitksan had to say had been written down at the time of each event of history, they would have had a rock solid case.⁵⁷ Chief Justice McEachern strongly criticized the anthropologists' evidence as being non-credible and unreliable due to the expert witnesses becoming "too close to their clients"⁵⁸ and losing their objectivity as a consequence. He continued to state that their findings, though based on "honestly held biases",⁵⁹ were still non-believable.

At the end of the day, he believed neither the expert anthropologists nor the lay witnesses. This is an interesting finding in light of

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Calder, where Mr. Justice Hall of the Supreme Court of Canada had no problem with anthropologic evidence and, on the question of credibility, he quoted the trial judge as saying he felt all witnesses gave evidence with total integrity and there was no issue of credibility.⁶⁰ Further, in *R. v. Sparrow*,⁶¹ the Supreme Court of Canada did not take issue with anthropologic evidence adduced at trial by the Musqueam Band with respect to an aboriginal right to fish.

2. Select Historical Writings Relied Upon

A significant inconsistency and error in Chief Justice McEachern's judgement was his failure to look at the other evidence adduced in *Delgamuukw* with the same scepticism as he looked at the anthropologic and oral evidence. He took at face value the writings of colonial settlers such as Brown, Loring, and Trutch, assuming they were objective because they had been written prior to litigation⁶² by unbiased, removed parties.

In the case of trader William Brown, the Chief Justice says:

...trader Brown filed numerous reports which are a rich source of historical information about the people (Gitksan)...I have no hesitation accepting the information contained in them.⁶³

Based on Brown's evidence, he further strengthens and perpetuates his 'primitive' view of the Gitksan by concluding:

...it would be incorrect to assume that the social organization which existed was a stable one. Warfare between neighboring or distant tribes was constant, and the people were hardly amenable to obedience to anything but the most rudimentary form of custom. Brown held them in no high esteem...⁶⁴

He further uses Brown to support his disbelief in the House system:

It is significant that trader Brown does not mention Indian Houses in his records. He seems to use the term tribe, band, clan and family interchangeably, or perhaps imprecisely, but I am left in considerable doubt about the antiquity of the House system.⁶⁵

Chief Justice McEachern also places significance on the fact that Brown doesn't mention the Feast System, particularly as a legislative body.⁶⁶ The end result is that by accepting Brown's evidence with such authority, the Chief Justice in one clean swoop strengthens his 'primitive' premise in addition to discounting the House and Feast Systems of the Gitksan. How one colonial settler could carry such weight as to overwhelm the enormous amount of evidence adduced by the Gitksan is

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puzzling. This is especially so when one looks to see who Brown really was and why the Chief Justice failed to attach scepticism to his records. Chief Justice McEachern attaches no relevance to the fact that Brown served with the Hudson's Bay Company and was responsible for expanding the fur trade, a job which did not entail an understanding of the aboriginals of the territory. Another colonial settler whose evidence was used with the utmost respect and belief was Agent R.E. Loring, an 'Indian Agent' appointed by Canada at the request of the province. Chief Justice McEachern selects and accepts many excerpts from Loring's annual reports. He accepts Loring's words describing the Gitksan as a "society in transit, a society of 'heathens'- such as eating dogs and potlatching."⁶⁷ The Chief Justice uses Loring's evidence to help conclude that the Gitksan social structure was not indeed what the Gitksan made it out to be.⁶⁸

Though there are many other examples, the last one cited here is the use of the historical documents prepared by Mr. Trutch, the then Commissioner of Lands and Works and Surveyor General of the Colony. He explicitly accepts with great weight Trutch's comment in an 1870 letter where he wrote:

...the title of the Indians in the fee of the public lands, or of any portion thereof, has never been acknowledged by Government, but, on the contrary, is distinctly denied.⁶⁹

Chief Justice McEachern seemed to go to great lengths to 'save face' for Trutch and goes out of his way to legitimize British Columbia's history. What he fails to acknowledge are Mr. Trutch's true colours, about which a comment by Robin Fisher, the Canadian historian, is enlightening. Describing him as a man charged with the duties of building roads and bridges, establishing townships, and developing the region, Fisher on Mr. Trutch's character says:

... Trutch was very much a product of imperial England's confidence in the superiority of her own civilization. Other races came somewhat lower on the scale of human existence than the English, and the North American Indian was barely part of the scale at all....In 1872 he told the Prime Minister of Canada that British Columbia Indians were "utter savages"....Trutch stereotyped the Indians as lawless and violent, and was frequently preoccupied with the need to suppress by a show of force. Douglas, on the other hand, had argued 'that they should in all respects be treated as rational beings, capable of acting and thinking for themselves.'⁷⁰

Evidence from a person with such views must be questioned. In fact, Chief Justice McEachern's entire fact-finding process is questionable.

The respect he showed for these three sources of evidence (Brown, Loring, Trutch)⁷¹ because of their position in Canadian society

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was not similarly extended to the oral evidence presented by the hereditary chiefs, who arguably held much more significant positions within Gitksan society. In accepting all three of these sources, Chief Justice McEachern deliberately turned a blind eye to the fact that they too may have been based on “honestly held biases” and statements of belief rather than fact.⁷² These biases and beliefs were fatal to the Gitksan evidence and consequently fatal to proving a system of property. Ironically, the Chief Justice’s entire decision in *Delgamuukw* is itself built entirely upon “honestly held biases” and “statements of belief rather than fact”.

A last point regarding the acceptance of evidence of the type mentioned above is that it was done despite acknowledgement by Chief Justice McEachern that it was suspect. He stated that early settlers were preoccupied with the task at hand and did not pay sufficient attention to the real and potential sociological, cultural, and economic difficulties the aboriginals were experiencing.⁷³ Further, if the courts and society of today, nearly two centuries later, cannot fully understand aboriginal peoples, how is it that early settlers can give such an accurate account? Finally, Chief Justice McEachern admits that he wasn’t persuaded that any of Brown, Trutch, and Loring spoke with a complete understanding of the law or facts, but found no need to comment on their *bona fides*.⁷⁴

D. Selective Choice of Jurisprudence

By choosing the province’s submission of the Swiss writer, Vattel, over that of the Spanish writer, Vitoria, adduced by the Gitksan, the Chief Justice once again illustrated his Western view of the world and bolstered his underlying assumption that Anglo-European civilization was superior.⁷⁵ He was quick to avoid Vitoria’s views which were quite contrary to those of Vattel. Namely, Vitoria rejected arguments that “barbarians (aboriginals) could not hold land by reason of their sin against Jesus, or unbelief in the Catholic faith, or their ‘unsoundness of mind’.”⁷⁶ Further, Vitoria declared that the aboriginals in question were true owners both from a public and private law view.⁷⁷

Selective Use and Misapplication of the Law

A. Overview

As with all litigation, there were three main components to the *Delgamuukw* decision. First, there was the analysis of the evidence produced which included admissibility and weight. Second, there was the application of the law (statute and precedent) to the evidence adduced and facts established. The third and overriding component is the interpretation of those two other components by the adjudicator. The first has already been addressed above in conjunction with the third. This section will discuss the second component and how it interacts with the third.

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Once again, from the very outset of his discussion of the legal authorities, Chief Justice McEachern makes an erroneous statement. He says: "I do not propose to refer to very many cases. This is because, although this is an unique case, it is not one of first impression insofar as many of its issues are concerned."⁷⁸ Yet he continues to say that applying the facts to these principles will inevitably lead him to new questions not previously considered.⁷⁹

I suppose this illustrates Chief Justice McEachern's lack of knowledge and misunderstanding of what is at issue in *Delgamuukw*. Never before has a case like this been seen. Never has there been such a vast amount of evidence presented to an adjudicator on such an issue. And never before has it been done in the British Columbia context- one which is unique in its history of the relationship between aboriginal people and Anglo-Europeans. Not only did the Chief Justice throw most of these unique characteristics out the window because of his judicial bias and selective use of evidence, but also any uniqueness left was nullified by selecting and misapplying legal precedent.

B. *St. Catharines* as Binding Authority?

Chief Justice McEachern relied almost exclusively on *R. v. St. Catharines Milling and Lumber Company*,⁸⁰ a Nineteenth Century Privy Council decision, to reach his conclusion that the Gitksan aboriginal rights are non-proprietary. He says the antiquated *St. Catharines* decision is:

...powerful authority, binding on me, that aboriginal rights, arising by operation of law, are non-proprietary rights of occupation for residence and aboriginal user which are extinguishable at the pleasure of the Sovereign.⁸¹

Having laid the groundwork described in the previous section, namely, the ethnocentric and 'primitive' view of the Gitksan, Chief Justice McEachern is able to rely on legal precedent such as this with much greater ease. He continues to say:

I was also treated to extensive arguments about the legal ingredients of ownership. Most of these authorities were American cases which were decided in a totally different legal and factual context from the situation in British Columbia and they do not overcome the binding authority of *St. Catharines*'s [sic] Milling about the nature of non-proprietary aboriginal interests. It seems to me, with respect, that the Privy Council got it right when it described the aboriginal interests as a personal right rather than a proprietary one.⁸²

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1. Aversion to American Authority

Chief Justice McEachern's aversion to American case law in deference to *St. Catharines* is further illustrated by the comment: "I...am dubious about the usefulness of American authorities because they arose in a historical context so different from this province."⁸³ What he fails to realize is that the Canadian authorities upon which he places so much reliance, especially *Calder*,⁸⁴ do themselves rely on American authorities. The *Calder* decision is significant in this respect because it was dealing with a similar context to the Gitksan, the Nishga of Northern British Columbia. Apparently, the Supreme Court of Canada saw the American authorities as very applicable in British Columbia. Upon viewing the *Calder* decision, it is apparent that both the majority judgement of Mr. Justice Judson and the dissent of Mr. Justice Hall relied extensively on such authorities. One must question why Chief Justice McEachern indirectly relied on American authorities through such cases as *Calder*, instead of relying on them directly. More to the point, indirect use of such authorities by way of Canadian case law places American authorities two steps removed from analysis. Hence, there is no opportunity to independently assess these decisions on their merits or how they may have affected the Canadian authorities relying upon them.

2. Supreme Court of Canada Authority to the Contrary

In affording *St. Catharines* such weight, while at the same time disregarding American case law, Chief Justice McEachern erred in three ways. First, the finding of the Chief Justice that Gitksan rights are non-proprietary is inconsistent with at least three Supreme Court of Canada cases. The first is the *Calder* decision. This decision does not receive the weight it deserves due to a split court (4:3), with the deciding judge doing so on a peripheral issue. However, the judgement of Mr. Justice Hall for the dissent is enlightening and persuasive in supporting proprietary rights for the Gitksan. Through extensive use of American case law,⁸⁵ Mr. Justice Hall seems to indicate that aboriginals have a legal as well as a just claim to the territory they occupy.⁸⁶

Calder also goes a long way to illustrate the error which Chief Justice McEachern committed in *Delgamuukw*. In a very enlightening passage regarding Mr. Justice Gould's decision in the British Columbia Supreme Court, Mr. Justice Hall states:

"[In] an interesting and apt line of questions by Gould, J., in which he endeavoured to relate Duff's evidence as to Nishga concepts of ownership of real property to the conventional common law elements of ownership...disclose that the trial Judge's consideration of the real issue was inhibited by a preoccupation with the traditional indicia of ownership."⁸⁷

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Mr. Justice Hall continues and quotes Lord Haldane in *Amodu Tijani v. Secretary, Southern Nigeria*⁸⁸ as saying:

There is a tendency, operating at times unconsciously, to render that title [native] conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.⁸⁹

Chief Justice McEachern's preoccupation with equating primitive people with non-proprietary interests as well as using common law property terms to describe the Gitksan property system makes his analysis suspect. A judge must have a flexible mind and be able to acknowledge that there may be different systems of property which at the end of the day operate under similar premises and result in a similar state of affairs. By looking through a lens of the Western world and focusing in on the 'primitive' culture, Chief Justice McEachern not only committed the above mentioned errors, but lost sight of the fact that possession itself is proof of ownership.

If the Chief Justice had not committed the above errors, the burden of establishing that the Gitksan's rights have been extinguished would have rested squarely on the province and the case would have taken on a different face. It is arguably a lot more difficult to prove extinguishment of a proprietary right than a non-proprietary right.⁹⁰

The second and third Supreme Court of Canada decisions are highlighted together by the words of a unanimous decision in *Canadian Pacific Ltd. v. Paul*, where it was said:

Courts have generally taken as their starting point the case of St. Catharine's [sic] Milling...in which Indian title was described...as a "personal and usufructuary right". This has at times been interpreted as meaning that Indian title is merely a personal right which cannot be elevated to the status of a proprietary interest so as to compete on an equal footing with other proprietary interests. However, we are of the opinion that the right was characterized as purely personal for the sole purpose of emphasizing its generally inalienable nature; it could not be transferred, sold or surrendered to anyone other than the Crown...The inescapable conclusion from the court's analysis [the Supreme Court of Canada in previous cases] of Indian title up to this point is that the Indian interest in land is truly *sui generis*. It is more than the right to enjoyment and occupancy although, as Dickson J. pointed out in Guerin, it is difficult to describe what more in traditional property law terminology.⁹¹

This statement by the Supreme Court of Canada, made only three years before, casts doubt on the authority of *St. Catharines* and

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supports at least a finding that the Gitksan's rights were greater than a personal right, as described by Chief Justice McEachern in *Delgamuukw*.

3. True Meaning of *St. Catharines*

The second reason why Chief Justice McEachern should not have weighed *St. Catharines* so heavily is because Lord Watson's suggestion in that case that aboriginal rights depend "upon the good will of the sovereign" does not necessarily suggest that these rights must therefore be non-proprietary. As suggested by one writer, in that context, everyone's rights exist at the pleasure of the sovereign.⁹²

4. Relevance of the *St. Catherines* Context

The third reason for questioning the authority of *St. Catherines* is its antiquity and the context in which it occurred. It is a case over a century old, since which time much has transpired in the realm of understanding aboriginal peoples and within the surrounding case law. Chief Justice McEachern's belief that its principles are "too well established for me to challenge or question at this date" is nonsense.⁹³ He has all the reason to question them. Specifically, *St. Catherines* decided the aboriginal rights issue as a side issue to the main issue of the case. Further, the aboriginals whose rights were being decided were not even present to argue the contrary.⁹⁴ Chief Justice McEachern's reliance on this case further illustrates his desire to allow only those ingredients to sift through the screen which contribute to his final product that the Gitksan have no proprietary rights in the territory.

Conclusion

The Gitksan-Wet'suwet'en turned to the courts as a last resort to gain recognition of their long-asked-for ownership and authority over their territory. It was not an easy decision to make, for by doing so they were admitting that the issue could only be settled in the 'white-man's' court. The irony of this is that even this last resort would not recognize their rights.⁹⁵ More accurately, Chief Justice McEachern did not recognize them beyond personal, user rights. However, both fact and law suggest that the Gitksan-Wet'suwet'en are indeed entitled to proprietary rights. For example, though the Gitksan and Anglo-European notions of property appear different, the effects of these notions on their respective societies are similar.

Chief Justice McEachern's underlying premise that the Gitksan-Wet'suwet'en are 'primitive' peoples incapable of holding proprietary interests disregarded such a possibility. By constructing a 'screen' through which evidence and law could be sifted, the Chief Justice was able to construct and support his 'primitive' people premise. Judicial bias did not necessarily need to result in the findings made by Chief Justice McEachern. Vast amounts of evidence was adduced, volumes of written arguments produced, and years of oral argument given. In his position

as judge, he could have, and should have, used this information to see the 'whole picture', but he failed to do so. As the Judicial Inquiry Committee said:

True impartiality is not so much not holding views and having opinions, but the capability to prevent them from interfering with a willingness to entertain and act on different points of view. Whether or not a judge [is] biased . . . becomes less instructive an exercise than whether or not the judge's decision or conduct reflected an incapacity to hear and decide a case with an open mind.⁹⁶

Chief Justice McEachern had a narrow perspective when deciding *Delgamuukw*. Not only did he carry his preconceived views of aboriginals into the court, he refused to truly listen and understand contrary evidence adduced by the Gitksan-Wet'suwet'en. Through the selective use of evidence and law, the Chief Justice was able to conclude that it is impossible for the 'primitive' Gitksan-Wet'suwet'en people to hold proprietary rights. This conclusion is based on an erroneous premise emerging from a faulty fact-finding process and misapplication of precedent, which puts his entire analysis into question.⁹⁷ It is easy to extinguish or lose by implication personal rights. Proprietary rights, on the other hand, cannot be dismissed so easily. Given this, Chief Justice McEachern's analysis would have been entirely different if proprietary rights had been found to exist. Hopefully, this will receive the attention of the Gitksan-Wet'suwet'en counsel on appeal.⁹⁸ However, the paradox of litigation looms. That is, as *Delgamuukw* climbs the judicial ladder, the binding authority of the decision increases, while the ability of the courts to fully understand and appreciate the Gitksan-Wet'suwet'en claim diminishes. Chief Justice McEachern had the opportunity to hear the evidence in its true and real form. However, the appeal court will have access only to the trial transcript- unless an exception is made.

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1. Though this paper has focused on how the 'primitive' premise and selective use of evidence and law led to an erroneous finding that the Gitksan-Wet'suwet'en do not hold proprietary rights in their territory, there is an even greater tragedy in this decision. The Gitksan-Wet'suwet'en came to the court as a last resort, yet did so with great respect. They divulged and shared with the court the very essence of their people in addition to their innermost feelings. In return, however, all they received was disrespect. The Gitksan-Wet'suwet'en culture and society was trivialized and ignored, while at the same time they were seen as 'primitive' peoples. This is the true tragedy of *Delgamuukw*, for though the long-deserved recognition of the Gitksan-Wet'suwet'en's true rights to their territory may be forthcoming, these people have suffered irreparable harm at the hands of our judicial system.1. Hereinafter, 'Gitksan' will mean 'Gitksan-Wet'suwet'en'.

2. An area covering 54,000 sq. km. (22,000 sq. miles) in central British Columbia- an area the size of Nova Scotia.

3. "Gitksan-Wet'suwet'en Land Title Action" [1988] 1 C.N.L.R. 14 at 17. This article is a reproduction of the Plaintiffs' opening statement.

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4. *Delgamuukw, also known as Ken Muldoe, suing on his own behalf and on behalf of all the members of the House of Delgamuukw, and others v. Her Majesty in right of the Province of British Columbia and the Attorney General of Canada* [1991] 5 C.N.L.R. 1 (B.C.S.C.) (hereinafter *Delgamuukw*).
5. What he did find was that, subject to the general law of the province, the Gitksan have a continuing legal right to use unoccupied or vacant Crown land for aboriginal subsistence purposes- in essence, no greater rights than any other citizen of the province.
6. 'Psychologically' from the decision-makers' perspective. As will be seen later, this factor assisted Chief Justice McEachern in reaching his decision.
7. The term 'screen' will be used periodically to refer to the sum of its components, which will be discussed later.
8. The comments of the Gitksan view of the world may to a great extent apply to other aboriginal peoples. However, due to the fact that each group of aboriginal people has its own unique characteristics, I have not generalized. Further, these comments are taken from *supra*, note 1.
9. *Supra*, note 3 at 24.
10. *Ibid.*
11. Leroy Little Bear, "Aboriginal Rights and the Canadian "Grundnorm"" in J. Rick Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McLelland and Stewart Ltd. 1986) 243 at 244.
12. The very use of the words 'property', 'systems of property', and all other common law property terminology is indicative of one of the problems in the issue being discussed in this paper. As will be seen later, it is problematic to try to pigeon-hole aboriginal concepts of 'property' into foreign and common law categories.
13. *Supra*, note 12 at 249. See also at 244-257 for detailed discussion on the aboriginal/ British common law property dichotomy.
14. As will be discussed later this is just one point on which Chief Justice McEachern does not believe the Gitksan. At *supra* note 4 at 14 he says "there is no evidence to support such a theory and much good reason to doubt it."
15. A House is a matrilineage of people so closely related that its members usually know their relations. Each House is identified by its crests, oral histories, and songs. These represent something greater than history, title, and authority- they go to the very spiritual power of each House, its *daxgyet*. See *supra*, note 3 at 26.
16. *Supra*, note 3 at 28.
17. *Ibid.*
18. This includes pole-raising, funeral, headstone, shame, potlatch, and other feasts.
19. *Supra*, note 3 at 28.
20. *Ibid.*
21. *Ibid.*, at 32.
22. For a complete list of suggested equivalent areas, see *supra*, note 3 at 32-33. This paper will not focus on a detailed analysis of the technical similarities, yet is operating on the premise that there is sufficient evidentiary proof of such similarities.
23. M. Asch, "Errors in the *Delgamuukw* Judgement: An Anthropological Perspective" (Paper delivered at Delgamuukw and the Aboriginal Land Question, Victoria, B.C., 10, 11 September 1991) at 6 [unpublished].
24. *Ibid.*
25. See *Supra*, note 24.
26. One writer has said with respect to any writing:

A discussion of values is sensitive to the influence of the writer's own values....I have tried to deal with the different positions in a spirit of impartiality, but I warn the reader that the selection and emphasis of different values and their consequences are value laden choices. The criteria I develop by which to judge the various options reflect certain values and not others....some of (my readers) will, without doubt, reach conclusions very different from my own.

See Mark Holmes, "The Funding of Private Schools in Ontario: Philosophy, Values and Implications for Funding" in *Report of the Commission on Private Schools in Ontario* (October 1985) at 112 (Commissioner: B.J. Shapiro). This quotation is not meant to

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rationalize Chief Justice McEachern's approach, but simply to highlight the implications of a decision-maker's own values on his/her decision.

27. *Canadian Who's Who, 1990*, (Toronto: University of Toronto Press, 1990) at 633.

28. Even if these were the views of society, which I suggest they are not, this would still not make the approach acceptable, nor correct.

29. A. Derrick and C. Lazier, "Judicial Bias/The Role of the Judge in *Delgamuukw*" (Paper delivered at Aboriginal Peoples and Canadian Law: An Exploration of the Land Claims Made- Workshop on *Delgamuukw v. The Queen*, Halifax, N.S., 26, 27 October 1991) [unpublished].

30. Louise Mandell, "Native Culture on Trial", in Sheilah L. Martin and Kathleen E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) at 358.

31. Nova Scotia, Department of the Attorney General, "Report of the Canadian Judicial Council Inquiry Committee Established Pursuant to ss. 63(1) of the *Judges Act* at the Request of the A-G of Nova Scotia" at 23 of McEachern C.J.'s report (August 1990); *R. v. Marshall* (1983), 57 N.S.R. (2d) 286.

32. *Supra*, note 4 at 11.

33. Chief Justice McEachern was specifically asked by the hereditary chiefs in their opening statement not to take this erroneous view of their people, *supra* note 3 at 23. Incorrectness aside, the irrelevance of such a statement would have been obvious had the Chief Justice acknowledged that not too long in the past the Western World was in a similar state.

34. Though I do not have access to the trial transcript, this can be inferred from the Opening Statement, *supra*, note 3; the judgement itself, *supra*, note 4; and from Michael Jackson, counsel for Gitksan.

Such a view is not unique to the Canadian judiciary. In *Milirrpum v. Nabalco Pty. Ltd. and Commonwealth of Australia*, (1971), 17 F.L.R. 141 (S.C.,N.T.), the court was presented with complex and extensive evidence on the aborigines social rules and customs to establish a legal proprietary right in the land. Like in *Delgamuukw*, despite persuasive evidence to the contrary, Justice Blackburn concluded at 273:

In my opinion,...there is so little resemblance between property, as our law, or what I know of any other law, understands the term, and the claim of the plaintiffs for their clans, that I must hold these claims are not in the nature of proprietary interests.

35. (1973), 34 D.L.R. (3d) 145 at 169 (SCC) [hereinafter *Calder*].

36. The four requirements are outlined in *Hamlet of Baker Lake v. Minister of Indian Affairs* (1979), 107 D.L.R. (3d) 513 at 542 (F.C., T.D.) [hereinafter *Baker Lake*]. In *Delgamuukw*, *supra*, note 4 at 212, Chief Justice McEachern says "I am satisfied that the tests stated by Mahoney, J. accord generally with the authorities and I am content to adopt them."

37. [1919] AC 211.

38. *Supra*, note 4 at 183, quoting Mr. Justice Mahoney in *Baker Lake*, *supra*, note 3 at 558-559.

39. *Supra*, note 38 at 233-34.

40. *Supra*, note 24 at 20. Asch suggests further that these precedents combine to allow for a finding that a society could be so primitive as to have no societal organization or law, a state of affairs not realistic or possible.

41. *Supra*, note 4 at 213, quoting Mr. Justice Mahoney in *Baker Lake*, *supra*, note 36 at 559.

42. *Ibid.*

43. *Supra*, note 4. Further examples of this are: finding that the Gitksan "roamed" (at 209) over the land; they "[eked] out an aboriginal life" (at 41); and prior to contact, the Gitksan have maintained "bare occupation [of the land] for the purposes of subsistence" (at 199).

44. See, for example, *supra*, note 4 at 38-39.

45. *Supra*, note 4 at 40.

46. *Ibid.*, at 41.

47. *Ibid.*, at 53.

48. *Ibid.*

49. L. Pynn, "Chiefs say court on their land" *The Vancouver Sun* (13 May 1987).

50. *Ada'ox* is the official sacred culture of a Gitksan House which in large part explains the

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state of the Gitksan institutions at any given point. The Wet'suwet'en equivalent is *kungax*.

51. Anita Webster, "A Landmark Land Claim" (1988) 12:4 *Can. Lawyer* 28 at 29.

52. *Ibid.* This remark can be found in the actual trial transcript and further illustrates his ethnocentrism and misunderstanding of the Gitksan.

53. *Supra*, note 4 at 41.

54. For example, Chief Mary Johnson asked before going forward with her song, "Is this o.k. your highness?"- Michael Jackson, counsel for the Gitksan.

55. *Ibid.*, at 40. One must ponder whose views are more 'romantic'-the Gitksan's in speaking their way of life or the judiciary that rests its laurels upon such concepts as 'discovery', 'extinguishment', and this whole superiority ideology.

56. *Ibid.*, at 41.

57. This is not at all to suggest that they should have.

58. *Supra*, note 4 at 43. For a discussion of the role of anthropologists in aboriginal land claims, see *supra*, note 24 at 16-18 and D. Elias, "Rights and Research: The Role of the Social Scientist in the Legal and Political Resolution of Land Claims and Questions of Aboriginal Rights" [1989] 1 C.L.N.R. 1.

59. *Ibid.*, at 42.

60. *Supra*, note 36 at 169; referring to Mr. Justice Gould in *Calder v. A.G. of B.C.* (1970), 8 D.L.R. (3d) 59 at 63 (B.C.S.C.).

61. (1991), 70 D.L.R. (4th) 385 (S.C.C.).

62. At numerous points in his decision, Chief Justice McEachern emphasizes the importance of this attribute of evidence. Two issues come to mind. First, it could be argued that since the Gitksan have made claims as far back as 1884, litigation has occurred in a preliminary way ever since. Therefore, the historical records may themselves be open to dispute. Second, given that the Gitksan way of life is built upon the oral word, collecting and writing oral data only becomes necessary upon litigation. Demanding such a requirement of the Gitksan evidence creates a no-win situation.

63. *Supra*, note 4 at 64.

64. *Ibid.*

65. *Ibid.*, at 65.

66. *Ibid.*, at 200.

67. *Ibid.*, at 155.

68. *Ibid.*, at 158-161.

69. *Ibid.*, at 119.

70. Robin Fisher, "Joseph Trutch and Indian Land Policy" in J. Friesen and H.K. Ralston, eds. *Historical Essays on British Columbia* (Toronto: McClelland and Stewart Ltd., 1976) 257. It is significant that Douglas, who was mentioned by Fisher, had opposing views to Trutch and, though there was no reason for his views to be disregarded, they carried no weight in the decision. See *supra*, note 4 at 97-118, esp. 115. These early observers' influence on Chief Justice McEachern is clearly apparent in his words: "the primitive condition of the natives described by early observers is not impressive", *supra*, note 4 at 20.

71. It is interesting to note that although the Chief Justice acknowledges that there are comments to the contrary, he chooses either not to quote them (*supra* note 4 at 168-169) or gives them little weight.

72. As referred to earlier (*supra*, notes 54,59), these are Chief Justice McEachern's comments on the anthropologists and oral witnesses, respectively.

73. *Supra*, note 4 at p.116. One must ask why bona fides is so irrelevant in the realm of these witnesses, yet fundamental in assessing the Gitksan witnesses.

74. *Ibid.*, at 169.

75. *Ibid.*, at 68-69.

76. James Youngblood Henderson, "The Doctrine of Aboriginal Rights in Western Legal Tradition", in Menno Boldt and J. Anthony Long, eds. *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*. (Toronto: University of Toronto Press, 1985) at 188.

77. For a more extensive discussion on this topic see generally *ibid.*

78. *Supra*, note 4 at 173. Note the previous discussion on the choice of legal precedent to perpetuate the 'primitive' premise. This section deals with the selection of precedent which holds aboriginal interests to be non-proprietary.

79. *Ibid.*, at 173,174.

80. (1885), 10 O.R. 196; Aff'd (1886) 13 Ont. App. R. 148; Aff'd (1886), 13 S.C.R. 577; Aff'd (1888), 14 App. Cas. 46 (J.C.P.C.) [hereinafter *St. Catharines*].

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81. *Supra*, note 4 at 179.
82. *Ibid.*, at 208, 209. It is significant that upon analysing *St. Catharines* at the Supreme Court of Canada level, he agreed with the minority view of Mr. Justice Tashereau, rather than the dissent of Mr. Justice Strong. It is the dissenting Mr. Justice Strong, at 175, 176 of *Delgamuukw*, who said quite clearly that aboriginal rights are proprietary.
83. *Supra*, note 4 at 174.
84. *Supra*, note 35.
85. *Johnson and Graham's Lessee v. M'Intosh* (1823), 8 Wheaton 543; *Worcester v. State of Georgia* (1832), 6 Peters 515; *United States v. Santa Fe Pacific R. Co.* (1941), 314 U.S. 339. All decided by the Supreme Court of the United States.
86. *Supra*, note 35 at 196.
87. *Supra*, note 60 for Mr. Justice Gould's decision. Mr. Justice Hall's quote is found at *supra* note 36 at 187.
88. [1921] 2 AC 399 at 403.
89. *Supra*, note 35 at 187.
90. Though arguably given his overall approach in *Delgamuukw*, he would have found another route to the same conclusion.
91. [1988] 2 SCR 654 at 677-678; *Guerin v. The Queen* (1984), 13 D.L.R. (4th) 321 at 339.
92. Hamar Foster, "It Goes Without Saying: Precedent and the Doctrine of Extinguishment by Implication in *Delgamuukw et al. v. The Queen*" (1991) 49:3 *The Advocate* 341 at 345.
93. *Supra*, note 4 at 179.
94. As one commentator has suggested, if aboriginal title is recognized as proprietary, then these old cases may be defective since all parties in a proprietary dispute must be present. They are necessary parties. See William B. Henderson, "Canadian Legal and Judicial Philosophies on the Doctrine of Aboriginal Rights", in Menno Boldt and J. Anthony Long, eds. *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 225.
95. This is not to suggest that if a different judge had sat, or on appeal, the same result would have occurred. In fact, I would suggest it would be different- at least in the sense of not possessing the blatant disrespect and bias in Chief Justice McEachern's decision and not utilizing a 'primitive' people concept as an underlying premise.
96. *Supra*, note 31 at 26-27 of the report of Richard C.J., Laycraft C.J., Abella and Bellamare.
97. As George Erasmus, the then head of the Assembly of First Nations, said of *Delgamuukw*: "If it can be proved that natives had a higher level of social organization, the basis for the judge's ruling would collapse." The [Halifax] Chronicle-Herald, (28 March 1991) at A-9.
98. Michael Jackson, counsel for the Gitksan-Wet'suwet'en has indicated this is likely to be raised on appeal. (Address to Aboriginal Peoples Class, Halifax, N.S., 6 November 1991) [unpublished].