Lessons from *Delgamuukw v. The Queen*:
The Comparative Potential of Litigation and Negotiation
to Resolve Aboriginal Rights Conflicts

by

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ABSTRACT

An examination of the experiences of the Gitxsan and Wet'suwet'en with dispute resolution processes provides an excellent case study of the cultural frustrations and obstacles that the First Nations frequently encounter with both litigation and negotiation. While in their *Delgamuukw v. The Queen* case the Gitxsan and Wet'suwet'en were determined to present a culturally authentic legal challenge, the inherently limited ability of the Canadian legal system and law to recognize, address and accommodate cultural difference soon became apparent.

With British Columbia's historic concession to participate in negotiations, however, for the first time in the province there was a viable and peaceful alternative to litigation. Consequently, many First Nations began to place their hopes for a resolution of their grievances in the B.C. treaty process. Having achieved a recognition from the B.C. Court of Appeal that their aboriginal rights had never been extinguished, the Gitxsan and Wet'suwet'en also chose to enter the B.C. treaty process.

Although the B.C. treaty process appears to be working well for many First Nations in the province, it is still too early in the process to come to any definitive conclusion as to the probability of its success. An examination of the issues that have arisen in the B.C. treaty process to date, however, leads one to conclude that the same culturally-based frustrations and obstacles are likely to arise regardless of the dispute resolution mechanism adopted. In fact, as the experiment of the Gitxsan and Wet'suwet'en with negotiation demonstrated, negotiated settlements are not without a number of their own problems. Given the complex and entrenched nature of

aboriginal rights disputes, it may well be that any ostensible resolution creates as many problems as it solves, with the result that such disputes may well be insoluable. One thing is certain in the final analysis: negotiation is not the panacea that so many had contended in the bitter wake of McEachern's *Delgamuukw* decision.

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Introduction

Viewed in its historical context, the Gitxsan and Wet'suwet'en's legal action is clearly one of the most important aboriginal rights cases to yet come before the Canadian courts. The issues it raises, the kind of evidence it adduces, and the manner in which it adduces it, all place *Delgamuukw v. The Queen* at the cutting edge of the fight for recognition of aboriginal title and associated rights in Canada. In fact, the court action was very much a product of the process of spiritual and cultural revival underway in many aboriginal communities in Canada, leading to renewed efforts to have their unique aboriginal cultures and aspirations recognized, addressed and accommodated by the wider Canadian society and state. *Delgamuukw*, particularly the culturally aggressive nature of its approach, was the natural culmination of this process. Consequently, there are a variety of considerations which justify not only a detailed examination of the Gitxsan-Wet'suwet'en legal action known as *Delgamuukw v. The Queen*, but also the circumstances, events and developments both leading up to it, and ultimately ensuing from it. *Delgamuukw* offers observers a variety of critically important lessons, no small consideration in view of the fact that "over 50 per cent of Canada may be under Aboriginal claim, including much of the northern territories, and 80 per cent of British Columbia and Quebec.[1]" Since working toward a resolution of native land claims will be something that Canadian society will be engaged with for decades to come, building on past experience is vital.

In fact, the Gitxsan and Wet'suwet'en, along with virtually all the First

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[1]David C. Hawkes and Marina Devine, "Meech Lake and Elijah Harper: Native-State Relations in the 1990s," in *How Ottawa Spends: The Politics of Fragmentation 1991-1992*, Frances Abele editor (Ottawa: Carleton University Press, 1991), p. 53.

Nations of British Columbia, have tried for decades to get governments both to recognize their claims, and to address their grievances through negotiation. Out of frustration after decades of quashed attempts, the Gitxsan and Wet'suwet'en resorted to legal action. In the wake of the bitter failure of the *Delgamuukw* case to either fulfill aboriginal aspirations or to lay an adequate foundation for the resolution of issues under dispute, however, negotiations were promoted by the majority of interested parties and observers as almost the "magic" solution to what are manifestly deeply entrenched conflicts. Yet as the Gitxsan and Wet'suwet'en experience with negotiations in turn demonstrated, this alternative is not without its own form of frustrations and challenges. In short, the Gitxsan and Wet'suwet'en experience provides an excellent case study of the problems and frustrations that arise when attempting to resolve the complex cross-cultural conflicts that comprise aboriginal title and rights issues. It also provides an excellent opportunity to examine the potential strengths and weaknesses of two of the dispute resolution mechanisms most commonly adopted in attempts to resolve cross-cultural conflicts: negotiation and litigation.

Taking the Gitxsan and Wet'suwet'en's *Delgamuukw* actions as our general focus, then, the thesis that follows critically examines the assumption, so popular at present, that in attempting to resolve extremely complex and emotionally charged issues and questions, negotiation is likely to be a more appropriate dispute resolution mechanism than litigation. It concludes that the same problems, obstacles and frustrations are as likely to arise in negotiation as in litigation, and that in the final analysis, the problem is more one of the nature of the conflict, than the choice of dispute resolution mechanism.

The first chapter constitutes a genealogy of the *Delgamuukw* case. Going back

to first contact, it not only establishes the context of the case, but also briefly outlines the various events, frustrations and considerations that eventually compelled the Gitxsan-Wet'suwet'en to look to the courts in 1984 for a resolution of their grievances. It then examines McEachern's ruling and the subsequent reaction to it, which in turn led to a conviction amongst virtually all observers and interested parties that negotiation was to be preferred to litigation for such complex and entrenched culturally-based disputes as aboriginal rights grievances.

Seeking to evaluate this assertion, the next two chapters examine in detail the contention that negotiation is a more appropriate dispute resolution mechanism than litigation for aboriginal rights disputes. With Chapter Two focusing on litigation, and Chapter Three on negotiation, together they offer a detailed comparative analysis of both the potential and pitfalls of litigation and negotiation for such such complex, entrenched, and emotionally-charged disputes. As the *Delgamuukw v. The Queen* experience demonstrated, litigation is not only a high stakes gamble, but it is frequently also an incredibly frustrating and culturally alienating process. In fact, the challenges attendant upon aboriginal rights litigation are arguably much more fundamental than most commentators recognize: the law is inherently incapable of addressing and resolving cross-cultural disputes in a manner that is both sensitive and effective. In other words, the courts simply cannot deliver the level of the cultural recognition and affirmation that the Gitxsan and Wet'suwet'en were clearly seeking from the courts.

While negotiation is often heralded as a more culturally responsive alternative to litigation, evidence suggests that this is probably not the case. As the Gitxsan and Wet'suwet'en's experience with negotiations subsequently demonstrated, many of the same problems, frustrations and challenges are likely to occur in the context of both

dispute resolution mechanisms. Moreover, while the *Delgamuukw* experience suggests that both litigation and negotiation have their place in the process of attempting to find an accommodation between the First Nations and the wider society, the expectations that the parties bring to the process must be reasonable.

In the final analysis, it appears that the problems attendant upon attempts to address and resolve aboriginal rights grievances are more the product of the nature of the conflict than the choice of dispute resolution mechanism. Given the nature of aboriginal rights disputes, the primary obstacle to a satisfactory resolution is ultimately not the dispute resolution mechanism adopted, but rather the cultural constitution of the conflict; without substantive social change, these conflicts are likely to remain insoluable. In fact, a meaningful resolution of aboriginal rights grievances would require a new social compact based upon cross-cultural co-existence and accommodation. Such an accommodation would necessitate a radical redefinition of the most fundamental of the socio-economic values and structures which currently constitute mainstream society. Although evidence increasingly suggests that our current society is no longer sustainable, given the powerful and entrenched nature of the interests which are heavily invested in maintaining the status quo, such a radical reconceptualization of the social contract is not imminent. Consequently, First Nations should pursue both negotiation and litigation in their attempt to attain redress for their grievances. If both avenues prove ineffective for anything other than highly incremental change, as they are quite likely to do, then direct action may continue to be one of the strategies of choice. In fact, if negotiations continue along their present path, then they will arguably contribute to an exacerbation of, rather than a resolution of, existing social, political and economic conflict. In short, aboriginal rights grievances may well be insoluable, certainly in the context of the contemporary social

contract. If any resolution is eventually achieved, it will arguably only occur through considerable social transformation on the part of the larger society.

These arguments will be examined more closely in the pages that follow.

Chapter One

Delgamuukw v. The Queen: From Litigation to Negotiation

i. Ancient Grievances and Frustrations Lead to Litigation:

In 1984, in the Supreme Court of British Columbia, the Gitxsan and Wet'suwet'en peoples filed a comprehensive statement of claim against the provincial government for recognition and restoration of aboriginal ownership and jurisdiction over their traditional territories in the Skeena and Bulkley watersheds[2]. Known as *Delgamuukw v. The Queen*[3], this case was in many respects the culmination of over two hundred years of failed attempts in B.C. to reconcile the interests, rights and aspirations of the new white arrivals with the original inhabitants of the lands they had come to colonize, an action necessitated by the fact that despite generations of struggle, precious little had been achieved[4].

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[2]While the Gitxsan are a Tshimshanic-speaking nation who have historically lived in an area encompassed by the watersheds of the north and central Skeena, Nass and Babine Rivers and their tributaries, the Wet'suwet'en are an Athabaskan-speaking people who have lived immediately east and south of the Gitxsan, traditionally inhabiting the territory contained within the watersheds of the Bulkley and parts of the Fraser-Nechako River systems and their tributaries (Chief Justice Allan McEachern, *Delgamuukw v. the Queen Reasons for Judgment* (British Columbia Supreme Court, March 8, 1991), pp. 5-10, 18). Although distinct in language, these neighbouring nations have long been traditional allies, and with intermarriage between them being commonplace, their cultures had come to be very similar. It was thus not surprising that when they decided to go to court in 1984, they chose to pursue joint-litigation.

[3]'Delgamuukw' is the hereditary name of one of the chiefs who brought the case against the Crown.

[4]The history of the Gitxsan and Wet'suwet'en nations is similar in most respects to that of other First Nations in Canada and British Columbia. As settlement increased, and the process of colonization became entrenched, widespread dispossession of lands

When the first European explorers made contact on the west coast in 1774, however, Britain had already had considerable experience with the process of colonization (Tennant, pp. 10, 16), and a well-established policy existed to regulate the relations between itself, its subjects and the First Nations[5]. While in part informed by a practical need to maintain peaceful racial relations in the face of expanding settlement (McEachern, pp. 22, 23), the policy also attempted to reconcile a degree of justice with the process of colonization. The Crown recognized that colonization would bring a collision of the aboriginal and non-aboriginal way of life, and it sought to minimize this clash of cultures through a policy designed and intended to recognize and reconcile the interests of the original inhabitants with the

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the First Nations had thought to be their own occurred. The establishment of new social and economic structures also led to the systematic marginalization of the aboriginal peoples, and as competition for lands and resources increased, many First Nations found their access to the land and resources upon which their traditional sustenance activities were based either reduced, denied, or increasingly regulated. Not surprisingly, the consequence of all these developments was a variety of social problems arising out of the demoralization and despair frequently attendant upon dramatic social and cultural dislocation (Boyce Richardson, *People of Terra Nullius: Betrayal and Rebirth in Aboriginal Canada* (Vancouver: Douglas and McIntyre, 1993), p. 138; Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* (Vancouver: University of British Columbia Press, 1977), pp. 103, 106; Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990), p. 72).

[5]Michael Jackson, "A Legal Overview: The Case in Context," in *Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet'suwet'en Sovereignty Case*, Don Monet and Skanu'u (Ardythe Wilson) editors (Gabriola Island, B.C.: New Society Publishers, 1992), pp. x-xi; Gisday Wa and Delgam Uukw, *The Spirit in the Land: The Opening Statement of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia, May 11, 1987* (Gabriola, B.C.: Reflections, no date), pp. 72-79; Louise Mandell, "Indian Nations: Not Minorities," *Les Cahiers de Droits*, Vol. 27, No. 1, Mars 1986, pp. 101-107; McEachern, 87-98.

process of colonization.

Although not without ambiguity or contradiction, in general principle the British imperial policy not only recognized a tangible aboriginal "interest" or "title" related to the aboriginal occupation and use of the land which could be acquired through purchase, but it also stipulated that the appropriation of lands for settlement or other purposes was to proceed only after this aboriginal title had been extinguished through a formal treaty of surrender negotiated in a public meeting held between the authorized representatives of both sides (Mandell, 1986, p. 103). The policy emphasized that the continuing rights of the First Nations to their traditional territories were to be respected until surrendered, thereby implying that native consent to the process was a requirement. British policy, however, circumscribed to some degree the native peoples' freedom to do as they wished with their lands, the prohibitions being that the Indians could not sell their lands prior to their being brought within a colony, and then, they could only be sold to the British Crown, and not to any other foreign offical or private person (Tennant, p. 11). Because the First Nations could surrender their lands only to the Crown, however, by implication, the Crown assumed a fiduciary or 'protectorate' obligation toward the First Nations (Mandell, 1986, pp. 103, 105-106).

In addition, the settlement arrangements involved some form of compensation being given to the First Nations in exchange for their traditional territories, as well as the creation of specifically defined rights. One such right was the reservation of specific lands for a First Nation's exclusive use, including village sites and cultivated fields, as well as fishing spots, burial grounds and as much adjacent land as they could cultivate, or as was required for their support. The First Nations also retained the right to carry on their customary sustenance activities over any of the lands that

they had surrendered to the Crown that remained unoccupied (Fisher, p. 76; Tennant, pp. 10-11)

Some form and degree of political independence was also recognized, and although it was not clearly articulated or defined, the relationship between the First Nations and the British Crown envisioned in the Crown's general aboriginal policy appeared in many ways to be more like a relationship between distinct nations than between sovereign and subject. At the same time, however, the aboriginal title and associated aboriginal rights that the Crown recognized, were in no way considered to be inconsistent or incompatible with the overarching British sovereignty gained by means of the 'discovery' and settlement of what is now Canada. On the contrary, the validity of Crown sovereignty was taken as a given, and aboriginal title and other rights or interests were conceptualized as existing alongside, or within, the overall context of underlying Crown ownership and jurisdiction. In other words, the aboriginal interest was seen to constitute a legal burden or qualification on the Crown's underlying title[6].

These first principles were expressed within a host of imperial and colonial documents and correspondence relating to what is now Canada, and were also reflected in a variety of colonial laws, Crown grants, and royal instructions spanning over 100 years (Mandell, 1986, p. 103), with the *Royal Proclamation of 1763* being the most famous formal statement of the Crown's aboriginal policy (Gisday Wa and Delgam Uukw, p. 73; Tennant, pp. 10-11, 27; Asch, p. 57). As the colony of Canada was progressively consolidated, moreover, "each constitutional instrument

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[6]Tennant, p. 11; Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Scarborough: Nelson Canada, 1988 [1984], pp. 41-42, 46).

provided for the protection and continuation of the aboriginal rights first recognized and confirmed in the *Royal Proclamation* and the treaty rights acquired thereafter (Mandell, 1986, p. 107)[7].

While Governor James Douglas was relatively sympathetic to the situation faced by the First Nations with the rise of colonization in British Columbia, and negotiated 14 treaties on Vancouver Island between 1850 and 1854, Joseph Trutch, the Chief Commissioner of Lands and Works from 1864 to Confederation with Canada in 1871, and subsequently, the first Lieutenant-Governor of the new province, was particularly instrumental in setting the hostile tone of British Columbia's Indian policy for years to come. Trutch was the first in a long line of successive government officials in the province to explicitly contend that British Columbia had never acknowledged even the possibility that aboriginal title burdened its lands[8]. In a statement of policy made in 1870, Trutch categorically stated that in B.C., "...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 (as quoted in McEachern, p. 132)." Moreover, if any such rights had ever existed, he argued, then they had long since been addressed through the creation of reserves throughout the

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[7]Although the policy of negotiated surrender was the one favoured by the British Crown, and the one subsequently pursued in settling much of what is now Canada, British common law also came to recognize another method for dealing with the aboriginal interest in land. As articulated by the Privy Council in the *St. Catherine's Milling* decision in 1888, the Crown was held to be vested with the power to unilaterally extinguish the aboriginal interest in land at its sole discretion (Tennant, pp. 213-214).

[8]Terry Glavin, *A Death Feast in Dimlahamid* (Vancouver: New Star Books, 1990), p. 15; Tennant, p. 39; Gisday Wa and Delgam Uukw, pp. 80-81; Fisher, p. 171.

province. British Columbia took a similar line from Trutch onwards, and its "determination to deny any validity whatsoever to the concept of Indian title never wavered[9]."

From the rise of the settlement era, however, the First Nations of the province protested against British Columbia's refusal to take their land claims and aboriginal rights seriously, a protest that increased in tandem with their growing awareness of the different policies being implemented east of the Rockies where, at the time of B.C.'s union with Canada in 1871, the "numbered" treaties were just beginning to be negotiated with the Prairie First Nations (Fisher, p. 175; Tennant, p. 46; Glavin, 1990a, p. 12; McEachern, pp. 27-28, 136). Government repeatedly responded to the First Nations demands that their aboriginal land title be extinguished through treaty with processes to create new reserves or adjust the size of existing ones, usually only after decades of previous encroachments. The First Nations were thereby compelled to become political activists: aboriginal political organizations were formed and protests were mounted, delegations were sent to England to see the King, government commissions and committees were the objects of repeated presentations, protests and pleas, and an attempt was even made to place the B.C. land question before the Judicial Committee of the Privy Council, all in the name of achieving redress for their longstanding grievances.

Canadian governments responded by repeatedly articulating the now-familiar refrain that aboriginal claims and grievances were nothing more than fictitious ideas put into the heads of the First Nations by white agitators such as missionaries and

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[9]Hamar Foster, "How not to draft Legislation: Indian Land Claims, Government Intransigence, and how Premier Walkem nearly sold the farm in 1874," *The Advocate*, Vol. 46, 1988, p. 413.

lawyers (Richardson, 1993, pp. 47, 81, 82, 229; Tennant, pp. 56, 64, 87, 106, 229). They also stepped up their attempts to assimilate the First Nations, in an effort to quash the cultural and political aspirations that were a product of their distinct cultural orientation. Perhaps the most memorable example of such governmental hostility was the de facto prohibition of any land claims activity between 1927 and 1951 (Glavin, 1990a, p. 19; Gisday Wa and Delgam Uukw, p. 15; Tennant, pp. 111-113; McEachern, p. 182). While this ban was lifted in 1951 in response to the growing international climate of racial tolerance and emphasis on human rights that arose subsequent to the horrors of World War II (Tennant, pp. 121-122; Richardson, 1993, pp. 132-133, 141-142), Canadian governments' goal of assimilation was again made explicit in 1969 with the release of the Trudeau government's *White Paper* (Tennant, pp. 149-150; Asch, pp. 8-10, 63).

After almost two hundred years of fruitless attempts to achieve justice, then, British Columbia's aboriginal question was still far from settled. In fact, since treaties had been made over only a small portion of Vancouver Island and the Peace River area of northern B.C., most legal experts considered the vast majority of the province to be encumbered by unextinguished aboriginal title (Hawkes and Devine, p. 55)[10]. While a federal process to create modern treaties was progressing elsewhere in Canada by the mid-1970s, in British Columbia treaty negotiations were stalled due to the province's continuing refusal to participate. British Columbia was still stubbornly maintaining the position that it had first adopted prior to the province's

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[10]Treaty 8, in the northeast corner of British Columbia, was signed in 1898 when the First Nations of the region demanded that they be included in the treaty being signed with their prairie neighbours. Canada acceded to these demands and extended Treaty 8 into B.C. without any involvement on the part of the provincial government, and with only its tacit approval (Tennant, pp. 65-67; McEachern, pp. 172-173).

union with Canada in 1871, refusing to contemplate the possibility that aboriginal title or rights had ever existed in B.C., or to acknowledge contemporary Indian land claims in the province (Tennant, p. 202).

Although the province maintained its stance of intransigence, by the early 1980s generations of political experience and activism had resulted in aboriginal communities and leaders that were far less acquiescent than previously, and increasingly sophisticated, educated, articulate, astute, proud, confident and politically aware and forceful than ever before (Tennant, pp. 180, 189)[11]. Many were fiercely and aggressively proud of their aboriginal heritage, and increasingly dedicated themselves to its preservation. They shared a vision informed by an aggressive cultural agenda designed to ensure the continuing survival and viability of

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[11]A great deal of this modern skill, sophistication and militancy was the direct result of governmental initiatives such as the comprehensive consultation process that preceded the release of the *White Paper*, and the dramatic increase in governmental funding of aboriginal organizations that occurred in the wake of the *White Paper's* failure (Tennant, pp. 152, 162-165, 168). It was also the "so-called ethnic revival in the 1960s (Tennant, pp. 82-83)," as well as the rise of interest group-based 'politics of difference,' that gave the First Nations of Canada the space to step onto the national political stage in a more visible and effective manner than they had ever done previously. In fact, at this time a process of cultural revival and rebirth was underway in many aboriginal communities in Canada, as traditional cultural, social and political practices, spirituality and history were reaffirmed, and traditional structures and processes of governance and social organization were re-established in their communities. The Red Power movement added its voice to those of feminists, gays and ethnic minorities, and the First Nations became increasingly vocal in articulating pride in their cultural identities and traditions (Tennant, p. 167). These wider societal developments and governmental initiatives, including financial support, not only served to raise the confidence, assertiveness and expectations of the First Nations, but also resulted in the establishment of an increasingly visible and effective aboriginal political lobby to more vigorously pursue their aspirations. In a few short decades the First Nations had gone from an invisible group to a political force to be reckoned with (Richardson, 1993, pp. 10, 14).

distinctly aboriginal communities. Many leaders were more knowledgeable of the law and of the complex structures of modern bureaucratic government than at any time in the past, and were increasingly as capable of using them to serve their own ends as were the government officials they confronted. In fact, not only were many First Nations far better equipped to deal with government on its own terms than the previous generation of aboriginal leaders had been, but also, and even more importantly, they were increasingly inclined to do so (Richardson, 1993, pp. 265-266, 292, 358-359).

Among the most militant of the First Nations in B.C. were the Gitxsan and Wet'suwet'en. Having attempted to have their grievances addressed and resolved from almost the time that British Columbia was first created, it was not surprising that they would be particularly frustrated by the lack of substantive progress that had been achieved on aboriginal claims and grievances in the province, either on the political or the constitutional fronts.

The Gitxsan and Wet'suwet'en contended that while they waited for negotiations that never happened[12], the government, in continuing to develop resources in their territories, was not only robbing them of immense wealth that was rightfully theirs, but was also threatening to destroy a way of life that was thousands of years old. In fact, according to the elders, their land and all the resources that it contained was the treasure box or bank from which Gitxsan and Wet'suwet'en life

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[12]Under the federal government's comprehensive claims policy, only one land claim would be negotiated at a time in each province. The Nisga'a were the first to begin negotiations in British Columbia, filing their claim in 1976, one year before the Gitxsan and Wet'suwet'en. Since the province refused to participate in negotiations, however, it was likely to be a very long time before the Nisga'a claim would be settled, and the Gitxan and Wet'suwet'en negotiations begun.

flowed. To ensure the continuity of life, the Chiefs were charged with the responsibility of caring for the treasure box. As one Chief commented, "What the governments are doing to us is robbing our bank....If we went into one of their banks and robbed them of their money, they would throw us into their jails. Our box was full...overflowing, and now it is nearly empty (as quoted by Skanu'u, in Monet and Skanu'u, p. 53)." If they waited much longer they feared, both their territories, and the distinct way of life and culture the land sustained, would be either destroyed or irrevocably damaged.

Tired of empty promises and endless waiting, the Gitxsan and Wet'suwet'en were not above resorting to direct action to pursue their grievances from time to time. Nevertheless, after much careful thought, they also decided to pursue the peaceful option of litigation in an effort to compel the province to join negotiations toward a meaningful settlement of their grievances; a settlement that would lay the foundation for aboriginal self-determination, meaningfully defined, as well as a new relationship of peaceful co-existence and cross-cultural accommodation between the First Nations and the larger society in Canada[13]. Because the federal government had implicitly

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[13]Skanu'u, in Monet and Skanu'u, p. vii; John Cruickshank, "No surrender: B.C. Indians have launched the biggest land claim ever," *Globe and Mail*, September 5, 1987, p. D2.

Although their litigation was a critically important undertaking, however, the Gitxsan and Wet'suwet'en did not place all of their hopes and energies in their upcoming legal suit. While waiting for their case to come before the courts, a delay which could be quite lengthy, they also felt compelled to adopt a much more aggressive concomitant strategy. Faced with a continuation of resource development activities on the land they claimed, if not an acceleration of development as some contended, the Gitxsan and Wet'suwet'en pursued a series of direct actions to ensure, they argued, that when their court case had finally run its course, there would still be something worth claiming. Direct action was an old strategy for the Gitxsan and Wet'suwet'en, a tactic which they had periodically employed from the early days of contact (Monet and Skanu'u, pp. 13-15, 195).

recognized aboriginal title in B.C., and was already ostensibly committed to negotiations, the province was the main object of their litigation (Tennant, p. 13).

When their case finally went before the courts three years later in May 1987[14], a continuing lack of progress on either the political or constitutional fronts no doubt confirmed to the Gitxsan and Wet'suwet'en the wisdom of their 1984 decision to pursue their grievances through the courts. In fact, although the First Nations of Canada had succeeded in having their existing aboriginal and treaty rights affirmed and recognized in the patriated Canadian Constitution, by March 1987 the series of four constitutional conferences held between the First Ministers and representatives of the aboriginal peoples to define those aboriginal and treaty rights to be constitutionally entrenched had not only ended, but also proven to be a dismal failure (Asch, p. 1; Gisday Wa and Delgam Uukw, pp. 17-18; Hawkes and Devine, pp. 38-39). A wide gulf had existed between what the parties to the discussions were seeking, and willing to accept, and ultimately, the conferences had offered the First Nations little in the way of a meaningful examination of their grievances. Despite native hopes to the contrary, then, the constitutional entrenchment of their aboriginal and treaty rights had failed to substantially alter either the intransigence of British Columbia, or the reticence of the federal government[15].

Native frustration and disappointment soon turned to outrage, however, when one month later, on April 30, 1987, the *Meech Lake Accord* was signed by the Prime

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[14]The case of *Delgamuukw v. The Queen* began in Smithers on May 11, 1987. 374 trial days later, and at a cost of close to $25 million, it concluded in Vancouver on June 30, 1990 (McEachern, p. 1; Glavin, 1990a, p. 6; Dan Smith, "B.C. native ruling a tragic throwback," *Toronto Star*, March 19, 1991, p. A17).

[15]Hawkes and Devine, p. 39; Louise Mandell, "Gitksan-Wet'suwet'en Land Title Action," *Canadian Native Law Reporter*, Vol. 1, 1988, p. 16.

Minister and all the provincial premiers. The First Nations of Canada bitterly noted that while the First Ministers could not accept a vague definition of aboriginal self-government after four years of exhaustive elaboration and discussion, they were willing to endorse the equally nebulous concept of Quebec as a 'distinct society' after only a brief period of discussions (Hawkes and Devine, p. 39). For the First Nations, these events were a clear demonstration that the courts were the only remaining peaceful strategy for the aboriginal peoples to pursue, since the will to deal meaningfully with their grievances, claims and aspirations through the political arena and negotiations certainly did not appear to exist.

ii. The Legal Context of *Delgamuukw v. The Queen:*

Although by the late 1980s the courts appeared to be the only remaining peaceful option for pursuing a meaningful recognition, affirmation and accommodation of their claims and aspirations, even the courts were not an entirely unproblematic proposition. Despite a number of critical legal cases and decisions such as *White and Bob*, *Calder*, *Nowegijick*, and *Guerin*, by the mid-1980s the law had contributed little to clarifying, let alone resolving, what were clearly extremely complex and difficult questions[16]. In the past 30 years the courts had undeniably

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[16]The *White and Bob* case arose in the 1960s, at a time when few modern aboriginal rights cases had gone before the courts, and consequently, aboriginal rights litigation was viewed as an extremely risky undertaking. In 1963 the B.C. Court of Appeal offered an extremely sympathetic ruling on the case, and in 1965, the Supreme Court of Canada, although taking a somewhat narrower perspective, also ruled in favour of the aboriginal plaintiffs. *White and Bob* was an important case, not only because it established that the Douglas agreements were, in fact, valid treaties, but also because it inspired the Nisga'a to pursue litigation in a case that was to become one of the most important of contemporary Canadian aboriginal legal

demonstrated a growing willingness to recognize and affirm aboriginal rights. For instance, the courts had elucidated both the source and legal status of aboriginal title, conclusively determining that aboriginal title could arise either through express statute or prerogative recognition, such as through the *Royal Proclamation of 1763*, as had been decided by the Privy Council's 1888 *St. Catherine's Milling* case, or could arise through the common law by virtue of a long-time communal aboriginal use and occupation of specific lands by an organized society for an indefinite but lengthy period prior to the assertion of British sovereignty, as had been collectively established in the Supreme Court of Canada's 1973 *Calder*, 1980 *Baker Lake* and 1984 *Guerin* cases. While both sources were recognized at law, however, in recent years the courts had begun to place greater emphasis on an occupancy-based title over that created through the *Royal Proclamation*[17]. The potential existence of an aboriginal title to the non-treatied regions of British Columbia in Canadian law had been clearly endorsed by the courts, and barring a demonstration of extinguishment, such title was assumed to have continued to the present day[18].

At the same time, however, Canadian law on most aspects of aboriginal and treaty rights was not particularly developed, and a great deal more examination and direction from the courts was required to answer the many critical questions that remained. In fact, many critical issues and questions in the law had yet to be

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decisions (Tennant, pp. 218-219).

[17]This emphasis upon occupancy-based title was a product of the fact that most recent aboriginal rights cases had arisen in areas of the country to which the *Royal Proclamation* was found not to apply.

[18]Jack Woodward, *Native Law* (Toronto: The Carswell Company Ltd., 1989), p. 201.

conclusively determined, resulting in a body of law that appeared to contain many contradictory precedents and findings. The exact nature, territorial scope, and legal and practical significance of the *Royal Proclamation of 1763*[19]; the specific characteristics, content, strength and scope of aboriginal title, especially in relation to the Crown's interest in the land (Woodward, p. 220; Tennant, p. 11; Elliot in Morse, 1991, pp. 86-111); the relationship between aboriginal title and third parties; the variety, content, strength and scope of aboriginal rights (Woodward, pp. 135-136, 138, 140; Elliot in Morse, 1991, pp. 48, 51, 88-89); what exactly was required for the Crown to unilaterally extinguish aboriginal title and associated rights; whether this was, in fact, possible; and if so, whether the federal or provincial Crown was competent to effect extinguishment[20]; whether alienation of land to third parties served to extinguish aboriginal title and rights (Woodward, p. 208); whether such title and rights had previously been extinguished in British Columbia, and if so, when; whether the Crown or the First Nations have the burden of proving such extinguishment (Woodward, p. 206); whether compensation ought to paid in instances of extinguishment (Elliot in Morse, 1991, p. 117); the exact nature, strength, scope and implications of the Crown's fiduciary duty to the First Nations (Woodward, pp. 110-114); and finally, the exact implications of the constitutional entrenchment of existing aboriginal and treaty rights (Elliot in Morse, 1991, pp. 52, 113; Morse,

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[19]Woodward, pp. 75-76, 198-199; David Elliot, "Aboriginal Title," in *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, Bradford W. Morse, editor (Ottawa: Carleton University Press, 1991), pp. 56, 109.

[20]Woodward, pp. 201, 206, 209; Elliot in Morse, pp. 89, 97, 98, 100-101; Bruce Clark, *Indian Title in Canada* (Toronto: The Carswell Company Ltd., 1987), p. 74. Similar questions also are raised by Clark in his *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada*. Montreal and Kingston: McGill-Queen's University Press, 1990.

1991, p. 795; Woodward, pp. 68, 70, 71, 207-208; Tennant, pp. 225-226; Mandell, 1988, p. 16), were all areas of the law that were tentative and incomplete, and still required a great deal more definition, elaboration, clarification and certainty of interpretation from the courts.

Delgamuukw, was a critically important case, therefore, and promised to be nothing short of a landmark legal action. The case would almost invariably be appealed all the way to the Supreme Court of Canada, not only providing a critical opportunity for the courts to settle many of the still-outstanding issues in aboriginal law, but also setting critical precedents not only for British Columbia, but indeed the whole of Canada. Moreover, at stake was a massive tract of resource-rich crown land the approximate size of New Brunswick. Encompassing 22,000 square miles, or 58,000 kilometres, the territory under claim not only comprised approximately 6 percent of British Columbia and the towns of Hazelton, Smithers, Houston and Burns Lake, but also included invaluable agricultural, forestry, fishing, mining and tourism resources. In short, the potential implications of *Delgamuukw* were astounding (Glavin, 1990a, p. 4; Richardson, 1993, p. 299; McEachern, pp. 5-12).

While at the time that the Gitxsan and Wet'suwet'en entered the courts the law was beginning to articulate a contemporary understanding of aboriginal title and associated rights, at the same time the law continued to be fraught with many unsettled questions and contradictory precedents. In fact, reflecting the legal and philosophical debates that had raged during the centuries since the rise of colonialism over the exact nature and source of the rights and interests, if any, the original peoples of a land possessed in regards to a colonizing nation, Canadian jurisprudence had come to encompass a wide range and variety of different and often contradictory views, findings and rulings on aboriginal rights, and consequently, the law was not

without a considerable element of inconsistency and ambiguity. This ambiguity, combined with the nature of legal analysis, meant that there was the potential for a wide range of different possible interpretations and rulings from the courts, and despite the accommodating tone and nature of recent decisions, there was always the possibility that a particular ruling could revert to one of the less sympathetic positions embodied in some of the earlier legal decisions, and radically alter the course of the law. In short, there were still many outstanding and unsettled questions in the law awaiting a conclusive ruling, and a litigant could simply never be entirely certain as to how the courts would construe such issues, or confident as to what kind of decision might be delivered. Because the opportunity existed for a judge to deliver a variety of different rulings, a considerable degree of uncertainty embued the Gitxsan and Wet'suwet'en's legal action. In fact, while litigation was always an uncertain enterprise at best, aboriginal rights litigation appeared to be a particularly large gamble.

Perhaps not surprisingly, some First Nations were critical of the Gitxsan and Wet'suwet'en's decision to put their grievances before such an obviously 'colonial institution' as a Canadian court in the first place. Others, however, were cheering them all the way. With the other avenues for redress of grievances appearing less than promising, the First Nations of Canada, and those of British Columbia in particular, were increasingly placing their hopes in the courts. Not only was *Delgamuukw* the latest chapter in a long fight for justice, it was also a crucial test of the potential ability of litigation to deliver a meaningful resolution of the grievances so long at issue.

iii. Culture as a Critical Variable: The Unprecedented and Innovative Nature of *Delgamuukw v. The Queen:*

As a legal case, however, *Delgamuukw v. The Queen* was of an unprecedented and innovative nature, not only in terms of its scope[21], but also in the nature of its

[21]The dramatic scope of the case is demonstrated in part by the huge volume of information and the large number of witnesses that appeared before the court during the course of the trial. Mel Smith characterizes it as "the mother of all trials (Mel Smith, [Opinion column], "When governments fail to follow the law," *British Columbia Report*. Vol. 3, No. 16, December 16, 1991, p. 11), and as McEachern recounts in the Introduction to his *Reasons for Judgment* the enormity of the task that faced him, this certainly seemed to be an apt description: According to McEachern,

> A total of 61 witnesses gave evidence at trial, many using translators from their native Gitksan or Wet'suwet'en language; "Word Spellers" to assist the Official Reporters were required for many witnesses; a further 15 witnesses gave their evidence on Commission; 53 Territorial Affidavits were filed; 30 deponents were cross-examined out of Court; there are 23,503 pages of transcript evidence at trial; 5898 pages of transcript of argument; 3,039 pages of commission evidence and 2, 553 pages of cross-examination on affidavits...; about 9,200 exhibits were filed at trial comprising, I estimate, well over 50,000 pages; the plaintiffs' draft outline of argument comprises 3,250 pages, the provinces' (sic.,) 1,975 pages, and Canada's over 1,000 pages; there are 5,977 pages of transcript of argument in hard copy and on diskettes. All parties filed some excerpts from the exhibits they referred to in argument. The province alone submitted 28 huge binders of such documents. At least 15 binders of Reply Argument were left with me during that stage of the trial. The Plaintiffs filed 23 large binders of authorities. The province supplemented this with 8 additional volumes, and Canada added 1 volume along with several other recent authorities which had not then been reported (McEachern, p. 1).

He concludes that:

> The parties adduced such enormous quantities of evidence, introduced such a huge number of documents, and made so many complex arguments that I have sufficient information to fuel a Royal Commission. Although I assured counsel that was not my function, they apparently did not believe me (McEachern, p. 3).

approach to litigation. Previous aboriginal rights cases such as *Sioui*, *Simon* and *Guerin* had tended to focus on either a single or small number of narrow and clearly-defined legal issues or questions involving such concerns as protecting aboriginal sustenance activities, or seeking compensation for, and putting an end to, infringements of treaty rights[22]. Even the landmark *Calder* case was limited in scope, in that the action merely sought a declaration that the aboriginal title of the Nisga'a Nation had never been extinguished (McEachern, p. 16).

By contrast, the scope of the *Delgamuukw* action was significantly broader and more ambitious. While the Gitxsan-Wet'suwet'en and their lawyers sought damages from the province and court costs, and eventually modified their position in order that the court could consider a general recognition and affirmation of unspecified aboriginal rights, *Delgamuukw v. The Queen* was above all about the recognition, affirmation and restoration of the Gitxsan and Wet'suwet'en's ownership and jurisdiction over their traditional territories (McEachern, pp. vii, 43)[23]. They argued that such rights arose by means of either the *Royal Proclamation* or long-time use, occupation, possession and administration of their territories, and because these rights

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[22]Michael Kew, review of *The Spirit in the Land*, by Gisday Wa and Delgam Uukw, *Culture*, Vol. IX, No. 2, 1989, pp. 98-99; Larry Pynn, "Landmark land claim case set to begin," *Vancouver Sun*, May 6, 1987, pp. B1, B2.

[23]In this sense, the *Delgamuukw* action was not simply relitigating *Calder* as Douglas Sanders contends. Although Sanders argues that "...almost twenty years after *Calder* went to trial, essentially the same case would be attempted again (Douglas Sanders, "Getting Back to Rights," in *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, Frank Cassidy, editor (Lantzville, B.C.: Oolichan Books and The Institute for Research on Public Policy, 1992), p. 280)," the *Delgamuukw* case was signficantly different. Even if it was merely relitigating *Calder*, however, the *Calder* case had not been conclusive, and further litigation was required to settle the many still-outstanding legal questions.

had never been extinguished, surrendered, or otherwise nullified, they have continued unimpeded from the time that British sovereignty was asserted up until the present day (McEachern, pp. 41, 234). While they argued that their position had historical foundations in the history of relations between governments and the First Nations in the colonial era, the notion that aboriginal rights encompassed both political and property rights was not one that had yet been recognized or accepted by Canadian courts[24]. In their litigation, therefore, the Gitxsan-Wet'suwet'en and their lawyers sought "to demonstrate that these historical foundations reflect fundamental legal

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[24]The claim for aboriginal rights was later added to the case. McEachern argues that although "aboriginal rights" were mentioned very obliquely in several of the paragraphs in the pleadings and arguments in the case, the Statement of Claim did not ask for a declaration respecting aboriginal rights to fish, hunt, trap, gather and so forth. He recounts that early in the trial the plaintiffs' counsel said that the plaintiffs' claim was for ownership and jurisdiction, and they were not seeking any lesser relief (McEachern, pp. 15, 39). According to McEachern, however, this "somewhat extreme" position

> was wisely moderated later in the trial when Mr. Grant made it clear that the plaintiffs were also seeking a declaration of their aboriginal rights. He said that while ownership and jurisdiction were the plaintiffs' primary claims, they wished the Court to grant them whatever other rights they may be entitled to (McEachern, p. 39).

Therefore, despite the fact that the plaintiffs never formally amended their Statement of Claim to include general aboriginal rights, McEachern argued that:

> Because of the course of the trial, and notwithstanding the consistent and firmly stated position of the province to the contrary, I find that a claim for aboriginal rights other than ownership and jurisdiction is also open to the plaintiffs in this action (McEachern, p. 40).

In his decision, consequently, McEachern also considered, as an alternative to the argument for ownership and jurisdiction, whether the plaintiffs had "unspecified aboriginal rights to use the territory (McEachern, pp. vii, 82)."

principles which have contemporary relevance for determining the legal rights of aboriginal peoples[25].

In taking their case to the courts, moreover, the plaintiffs were seeking not only to force the province into negotiations, but also to pressure the wider society into finding the will and the space to recognize, accommodate and embrace the unique cultural order and distinct aspirations of the First Nations generally, and the Gitxsan-Wet'suwet'en in particular. Consequently, the Gitxsan-Wet'suwet'en decided to pursue an unprecedented and innovative approach to litigation; an approach that was as culturally-oriented and culturally authentic as possible. They offered a unique melding of more or less standard legal arguments with other unconventional arguments and forms of evidence and presentation that were predicated upon aboriginal beliefs, laws, customs and aspirations. As a consequence, more emphasis was placed on culture in the *Delgamuukw* case than in perhaps any other previous aboriginal rights case, with *Delgamuukw* offerring a form of argument, evidence and presentation that the courts had almost certainly not faced before.

For instance, whereas previous aboriginal rights cases had focused upon the issue of whether Crown action to extinguish aboriginal title or rights had to be explicit, or whether implicit action was sufficient, the Gitxsan and Wet'suwet'en contended that extinguishment could only be achieved if they had given their informed consent to it (Mandell, 1988, p. 16).

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[25]Michael Jackson, "Gitksan-Wet'suwet'en asserts full range of hereditary rights," *Kahtou*, Vol. 6, No. 11, June 6, 1988, p. 4.

The principles which evolved to regulate interactions between the First Nations, settlers and their governments, as well as the historical conditions out of which they developed, are discussed by McEachern on pages 87-92 of his *Reasons for Judgment*. These general principles are also formally articulated in the *Royal Proclamation of 1763*.

Moreover, instead of presenting a communal claim as is typically the nature of aboriginal title and rights cases, in *Delgamuukw* each hereditary chief submitted a claim for a specific segment of the overall territory in question, smaller territories and the resources it contained which were said to be owned and managed by the chief and his or her House and its members (McEachern, pp. vii, 5, 15, 39, 40)[26]. That it was the hereditary chiefs of the Gitxsan and Wet'suwet'en that submitted the claims against the Crown rather than the elected chiefs, the tribal council, or the various constituent communities, was also symbolic and significant; it was illustrative of the rebirth and revival of traditionalism and culture underway in many aboriginal communities as the First Nations re-affirmed and re-embraced traditional forms of leadership, governance and community organization[27].

In *Delgamuukw*, moreover, the quantity and kinds of evidence were unique and innovative, as was the method of adducing evidence in court. Arguing that proof of their continuing ownership and jurisdiction was contained within the cultural continuities between their pre-contact ancestors and contemporary Gitxsan and Wet'suwet'en society, the plaintiffs offered tremendous quantities of intensely detailed evidence of their languages, genealogies, customs and oral histories, as well as the archaeological, anthropological, geographical and historical record (McEachern, pp.

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[26]Houses are an institution upon which the Gitxsan and Wet'suwet'en cultural order is structured, each of which is presided over by one or more hereditary chiefs (McEachern, p. 39).

[27]Although the native position was not without some contradiction (McEachern, p. 36), the elected chiefs and band council structures associated with the *Indian Act* were increasingly perceived to be "mechanisms" of "internal colonization" by native activists because they were imposed upon the First Nations to assist with assimilation (Tony Hall, "The Politics of Aboriginality," *Canadian Dimension*, January/February 1993, pp. 6-10).

31-32, 45). While expert witnesses participated in the case, the hereditary chiefs and elders of the Gitxsan-Wet'suwet'en nations were the primary actors, and according to *The Spirit in the Land*, they were "the real experts in this case (Gisday Wa and Delgam Uukw, p. 7; see also McEachern, p. 53; Sanders in Cassidy, p. 280)[28]." In an unprecendented and innovative twist, a major portion of the argument offered to the court was based upon a wide variety of aboriginal evidence delivered, not only through the words and voices of the chiefs and elders, but also frequently through the languages, of the Gitxsan and Wet'suwet'en nations. According to Louise Mandell, *Delgamuukw* was "the first case to advance questions of aboriginal title primarily based on extensive evidence of the people themselves (Mandell, 1988, p. 16)[29]."

Given the culturally-oriented nature of their case, it is not surprising that the Gitxsan-Wet'suwet'en chose to place a great reliance upon oral histories such as the Gitxsan 'adaawk' and the Wet'suwet'en 'kungax,' as well as other forms of oral historical evidence delivered by chiefs and elders (McEachern, pp. 45-48, 55, 57). This approach was also informed to some degree by necessity, however. Being an

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[28]The active role played by the hereditary chiefs and elders in *Delgamuukw* also had a symbolic aspect. Whereas legal counsel usually gives the Opening Statement in a legal case, in a further departure from legal custom, in *Delgamuukw* the Opening Statement was presented by Delgam Uukw and Gisday Wa, the principal plaintiffs for the Gitxsan and Wet'suwet'en, although it was written by the plaintiffs' legal counsel (Skanu'u, in Monet and Skanu'u, p. 19; see also *The Spirit in the Land*, where the Opening Statements of Gisday Wa and Delgam Uukw are reproduced).

[29]See also the comments of Michael Kew in his book review of *The Spirit in the Land* by Gisday Wa and Delgam Uukw. (Kew, pp. 98-99). In fact, according to Dora Wilson, a member of the Gitxsan and Wet'suwet'en Litigation Team, it was the Gitxsan and Wet'suwet'en that drove the litigation agenda. She argues that: "...our lawyers are under our instruction. They don't instruct us. We instruct them. We tell them what to do. That's what they are getting paid for (Dora Wilson, "It Will Always Be The Truth," in Cassidy, p. 200)."

oral society traditionally, the plaintiffs could not effectively prove their alleged ongoing ownership and jurisdiction over their territories, nor the system of House ownership and management of individual territories upon which it was based, in any other way. In fact, the oral historical record of the Gitxsan-Wet'suwet'en comprises the great bulk of what is generally known of their cultures and history, and even the evidence of the expert witnesses who testified during the trial relied in great measure upon the oral historical knowledge of the Gitxsan and Wet'suwet'en (McEachern, pp. 45, 46). Legal precedent such as the *Baker Lake* and *Kruger* cases, moreover, also required a legal argument that was specific to a First Nation in its details, and culturally and historically oriented.

In what was to become an intensely important collective act of cultural reaffirmation and assertion on the part of the nations, the plaintiffs presented themselves as Gitxsan and Wet'suwet'en to the court, telling their stories, singing their songs, describing in detail their way of life and their most cherished beliefs and values, as well as the intricate workings of their political, economic, social, spiritual and legal structures and systems through which they contended they both exercised, and continue to exercise, their ongoing ownership and jurisdiction (Mandell, 1988, p. 16). In doing so, they elaborated at length upon their way of life, and how it both was, and ostensibly continues to be, predicated upon a complex institutional structure comprised of Houses, Clans, Hereditary Chiefs, and feasts that serve not only to structure relations between the Gitxsan and Wet'suwet'en and others, but also relations between the Gitxsan-Wet'suwet'en and their lands and resources (McEachern, pp. 5, 31, 32, 35).

By so generously sharing their culture and way of life in the courts, the Gitxsan-Wet'suwet'en stated that they hoped that their litigation would contribute to

finding a process to place Gitxsan and Wet'suwet'en ownership and jurisdiction, as well as the unique world view and cultural order that it encompassed, within the context of Canada (Gisday Wa and Delgam Uukw, p. 9). Thus while *Delgamuukw v. The Queen* may have been about rights to, and control over, land and resources, more critically, it was also about the survival of a unique and culturally distinct way of life. In going to court the Gitxsan-Wet'suwet'en were not only looking for redress for past injustices, but also for cultural recognition and affirmation from the courts of the dominant society. They were hoping that their legal ruling ultimately would provide a foundation for constructing a meaningful and substantive cross-cultural accommodation with the greater Canadian society at large. The aspirations of the Gitxsan-Wet'suwet'en, however, faced considerable opposition in the courts not only from their longstanding adversary, the province of British Columbia, but also from Canada, the ostensible trustee of not only the interests of the Gitxsan and Wet'suwet'en, but also of all First Nations in Canada.

iv. British Columbia and Canada: The Defendants' Legal Arguments:

As was perhaps to be expected in view of its century-old refusal to even contemplate the possible existence of any aboriginal rights or interests in the province whatsoever, in response to the Gitxsan and Wet'suwet'en's claims for ownership, jurisdiction and aboriginal rights, British Columbia, supported by the federal government[30], argued that no such rights or interests ever existed, and that even if

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[30]While Canada was joined as a defendant for procedural reasons, the Gitxsan-Wet'suwet'en took its participation in the case as a demonstration of hypocrisy and duplicity. In their Opening Statement, for instance, they criticized Canada for joining with the province against them despite its explicit and well-established policy of

they once had, they had long since been either extinguished, settled, or abandoned. All the lands and jurisdiction in the province are vested without qualification in the Crown in right of British Columbia, the province and Canada contended, and consequently, there can be no valid aboriginal claims. Moreover, the province argued, any claim for compensation, in view of constitutional arrangements, would be against Canada (McEachern, p. 295). The province even sought to discredit the claims of the Gitxsan and Wet'suwet'en to be culturally unique, distinct and civilized nations, either in the contemporary or past eras (Pynn, pp. B1, B2; McEachern, pp. 23, 29, 81, 84, 187, 233-234, 293, 295).

v. Expectations of Aboriginal Victory:

While *Delgamuukw v. The Queen* was slowly working its way through the court process, a series of pivotal legal developments and political events were unfolding; events and developments that were not only to fuel a widespread expectation that the time had come to address the province's longstanding aboriginal question, but also were to have critical implications for the course of future events. In particular, expectations of an eventual win in the *Delgamuukw* case were raised by the Supreme Court of Canada when in 1990 it released its decisions in the *Sioui* and *Sparrow* cases, sympathetic rulings that McEachern would be bound by. While litigation was an uncertain enterprise at the best of times, such rulings fed a growing expectation among natives and non-natives alike that a significant victory for the

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negotiating aboriginal land claims settlements, a policy that by its very nature recognizes the validity of aboriginal rights and interests, and the Crown's fiduciary obligations to the First Nations of Canada (Gisday Wa and Delgam Uukw, p. 1).

Gitxsan and Wet'suwet'en was inevitable[31].

It was on the political front, however, that the most critical events were transpiring. By the late 1980s, First Nations throughout Canada had become increasingly activist, and increasingly effective in that role[32]. The Gitxsan and Wet'suwet'en were no different. As their case crawled through the courts, they not only continued, but actually escalated, their strategy of direct action. They felt that resource extraction activities on their traditional territories had increased since their legal fight had begun, and they engaged in a companion strategy of roadblocks and injunctions in an attempt to arrest or at least minimize resource extraction activities until their land claims had been addresssed[33]. In fact, and in contrast to the

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[31]See the comments of Frank Cassidy, Simon Baker, Hamar Foster, and Ethel Blondin in Cassidy, pp. 8, 72, 133, and 253 respectively.

[32]See, for instance: Terry Glavin, "Indians consider 'direct action,'" *Vancouver Sun*, May 29, 1990, pp. B1, B2; Eddie Bartlett and Tim Gallagher, "Harcourt's 'gift' to Zalm: We'd give the Indians title, says the NDP, and the Socreds get ready to call," *British Columbia Report*, Vol. 1, No. 51, August 27, 1990, pp. 6-7, 9; Tom McFeely, "En route to law and order: The B.C. government gets tougher but blockades linger," *British Columbia Report*, Vol. 2, No 1, September 3, 1990, pp. 6-7.

[33]After the Gitxsan-Wet'suwet'en case began in 1984, for instance, a number of injunctions were obtained that imposed a moratorium on certain developments within the territory at question until the land claim was settled. These injunctions gave industry and workers dependent upon the natural resource sector a fearful picture of what might be to come (Ted Byfield, "Warfare on the roadblocks: Native leaders threaten to shoot down RCMP helicopters," *Western Report*, Vol. 3, No. 45, November 28, 1988, p. 20. See also: Terry O'Neill, "A fragile peace: Native roadblocks bring tempers to a boil in B.C," *British Columbia Report*, Vol. 1, No. 47, July 30, 1990, pp. 20-21, 23-24; David Holmes, "Indian self-government is here: Ottawa celebrates a deal, but nobody's sure what it means," *British Columbia Report*, Vol. 1, No. 22, February 5, 1990, pp. 24-25; "What's at stake." *Vancouver Sun*. March 9, 1991, p. B1).

Delgamuukw case which was seen as the fight in the courts, the Gitxsan-Wet'suwet'en characterized their strategy of direct action as the 'war on the land[34].'

1990, the year prior to the *Delgamuukw* decision, was a particularly tumultuous year for political relations between the First Nations and governments in Canada; it often appeared as though the boiling point had been reached. At the very least, it certainly appeared as though the days of government getting away with ignoring aboriginal concerns, or with offering platitudinous and insipid responses to serious concerns, were long over. There was no doubt that these events would fundamentally transform the relationship between native and non-native in Canada (Richardson, 1993, p. 15).

In June of 1990, the critical *Meech Lake Accord* failed at the hands of a solitary Manitoba Cree, Elijah Harper. Harper, a member of the Manitoba Legislative Assembly, refused to give consent to have the *Meech Lake* motion introduced into the Legislature, thereby precluding Manitoba from passing the necessary legislation in time for the federal government to ratify the deal. Harper refused his consent to protest the fact that the *Meech Lake Accord* had failed to give the First Nations of Canada their rightful constitutional place. Harper's refusal not only had serious practical effects, but was also tremendously evocative symbolically. As Boyce Richardson recounts,

> For the first time in modern Canadian history, native people were able to intervene decisively in a matter of essential importance to all non-native Canadians. The intervention was so much in line with the feelings of ordinary Canadians about the accord, and was carried out with such dignity and intelligence, that the image of aboriginal people as a political force was

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[34]See the comments of Don Ryan of the Gitxsan-Wet'suwet'en Tribal Council in Byfield, "Warfare on the roadblocks," p. 20.

transformed at a single stroke (Richardson, 1993, p. 15).

At about the same time as Elijah Harper was peacefully throwing Canada into its latest constitutional crisis, a far greater crisis was developing in Oka, Quebec. There, armed Mohawk warriors squared off against Quebec police, and eventually the Canadian army, over a small area of land proposed for a golf course expansion, and at times it appeared as though Canada was on the verge of civil war. As journalists Geoffrey York and Loreen Pindera contend in their book on the incident entitled *People of the Pines*,

> until Oka, the Canadian army had never been used against domestic rebels since the FLQ crisis of 1970. The territories of Kanesetake and Kahnawake had become the first war zone in Canada since Riel's North-West Rebellion of 1885. One provincial Cabinet minister described Oka as "the greatest crisis we have ever witnessed in Quebec, Canada or even North America[35].

Although the comments of the Quebec Cabinet minister are clearly exaggerated, there was no doubt that Oka was a major crisis for governments in Canada. In fact, as the events at Oka played out, First Nations throughout the country established blockades and undertook other direct actions in an expression of sympathy and support for the Mohawks of Oka. In B.C. the summer of 1990 saw roadblocks cropping up everywhere. B.C. First Nations stated that their roadblocks were not only in support of Oka, but were also a protest against the province's continuing failure to recognize aboriginal rights or title in the province, and refusal to

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[35]Geoffrey York and Loreen Pindera, *People of the Pines: The Warriors and the Legacy of Oka* (Toronto: Little, Brown & Company (Canada) Limited, [1991] 1992, p. 405.

negotiate a settlement with them. In many regions of the province the situation was explosive, with Oka serving as a manifest warning to the province of B.C. of what could happen at home if native grievances continued to be ignored.

In fact, the ever more frequent roadblocks erupting in B.C. as a consequence of disgruntled natives were causing a growing disruption to the B.C. economy, stalling investment as British Columbia developed a reputation among creditors and shareholders as an economically uncertain and unstable climate in which to invest, and fuelling expectations that some sort of accommodation was likely[36]. Michael McCullough, a writer for *British Columbia Report*, argues that

> [t]hough the cost of settling land claims has been pegged as high as $10 billion, a survey commissioned by Indian Affairs and conducted last spring by Price Waterhouse management consultants suggests that B.C. is already suffering economically as a result of the current state of uncertainty. The report indicates unresolved claims were holding up $1 billion in proposed resource investments at a cost of 1,500 jobs. Furthermore, the stalemate is responsible for the annual loss of $50 million in capital projects and the postponement of a further $75 million worth[37].

It was becoming increasingly evident, then, that the province could no longer ignore or evade its outstanding aboriginal question, especially as human rights activists, environmentalists, and now even industry and the general public were

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[36]The economic impact of the blockades erected throughout the province in the summer of 1990 was severe. B.C. Rail, for instance, the object of repeated blockade action, was losing approximately $750,000 per day (Tom McFeely, "En route to law and order," pp. 6-7; see also Cecil Foster, "Blockades bring big losses," *Financial Post*, Vol. 84, No. 35, August 18/20, 1990, p. 1.

[37]Michael McCullough, "Light at the end of the tunnel: Despite conflicting claims, progress is made on the Indian land question," *British Columbia Report*, Vol. 2, No 10, November 5, 1990, pp. 6-7.

putting ever greater pressure on the province to address the situation and thereby end native militancy and the escalating climate of uncertainty in the province. In fact, public opinion polls were indicating that the general public was increasingly in favour of a settlement of native land claims and associated grievances, and believed that the First Nations should have a greater measure of control over their lives. It was clear that a consensus was taking shape in the province that land claims needed to be resolved[38].

With McEachern's decision on *Delgamuukw* expected at any time, and in clear anticipation of what was widely expected to be a significant native victory, on August 8, 1990, after more than a century of intransigence, the provincial government under Premier William Vander Zalm took pre-emptive action and agreed to join negotiations with Canada and the First Nations of the province towards a settlement of their longstanding claims and grievances[39]. The province was clearly convinced that a

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[38]John Brown, the publisher of the B.C. Northwest Times, Hazelton's newspaper, argued that "if there's a general consensus (in the region), it's that it's got to be resolved (as quoted in Terry Glavin, "Mood sombre even as claims win expected," *Vancouver Sun*, March 7, 1991, p. B3). Common sense suggests, however, that support for a settlement of native grievances is likely to be greater in the lower mainland and urban British Columbia than in the north and rural areas of the province where people are much more directly dependent upon the resource sector. In fact, an article in *B.C. Report* contends that "public opinion polls consistently show that most British Columbians favour extending new rights to natives; however, that sentiment is more widely held in the Lower Mainland than in the Interior and North (Robin Brunet, "B.C.'s leap of faith: Critics fear the approval of native self-rule before its real impact is known," *British Columbia Report*, Vol. 4, No. 1, September 7, 1992, pp. 8-9.

[39]Melvin H. Smith, *Our Home or Native Land? What governments' aboriginal policy is doing to Canada* (Victoria: Crown Western, 1995), p. 82; Paul Tennant, "The Place of *Delgamuukw* in British Columbia History and Politics--And Vice Versa," in Cassidy, p. 73; Sanders in Cassidy, pp. 280-281, 283; Bartlett and Gallagher, "Harcourt's 'gift' to Zalm," pp. 6-7, 9.

The Vander Zalm government had been taking fledgling steps in that direction

native victory was inevitable, and was attempting to gain some political mileage and good will on the part of the general public and the First Nations by voluntarily agreeing to negotiate before being forced to by the courts. The province's concession to finally participate in land claims negotiations served in turn to further heighten the already elevated expectations and optimism of many observers, and the First Nations and their supporters in particular, that a native victory in *Delgamuukw* would soon be forthcoming[40].

vi. McEachern's *Delgamuukw* Decision:

Consequently, it was in an atmosphere charged with expectation, anticipation and optimism, as well as confidence in the wake of the province's historic agreement to negotiate, that Chief Justice Allan McEachern finally delivered his long-awaited

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for some time. In March 1987, a provincial Native Affairs Secretariat was created to examine and consider growing demands for the province to address aboriginal grievances. By July 1988, the Secretariat had become a full-fledged Ministry: the Ministry of Native Affairs. Approximately 1 year later, Vander Zalm established the Premier's Advisory Council on Native Affairs. The Council was comprised of several native and non-native members, and was directed to advise the Premier and Cabinet on native policy issues. Although the Council's terms of reference were limited to evaluating provincial social and economic policies to facilitate the development of provincial First Nations communities, not surprisingly, the issues of aboriginal title, rights and land claims were soon under discussion. It was not long after that the province agreed to enter negotiations (Mel Smith, 1995, p. 82).

[40]Paul Tennant has argued that, had the province not expected a native victory in *Delgamuukw*, it is doubtful that it would have ever agreed to negotiate aboriginal claims (Presentation by Tennant during a conference entitled *The New Treaty Negotiation Process in British Columbia,* held in Victoria B.C. on March 24, 1993, and sponsored by the Institute of Public Administration of Canada's Victoria Chapter). Contrary to Tennant's contention, however, it is clear that if the Socreds had not agreed to negotiations, the NDP would have done so very shortly after.

decision on *Delgamuukw_v. The Queen* on March 8, 1990. For many observers, McEachern's decision was to be a bitter climax to a long and difficult battle. It was a decision far different from that which most had expected.

Although McEachern found that the Gitxsan and Wet'suwet'en had established a valid claim to general aboriginal rights, subject to the issue of extinguishment (McEachern, pp. 82, 98, 208, 211, 225)[41], he was unable to accept that these rights included ownership and jurisdiction (McEachern, pp. 81, 193-194, 199, 208, 210-211, 222, 224, 225). He noted that "what happened on the ground before British sovereignty was equally consistent with many forms of occupation or possession for aboriginal use as for ownership (McEachern, p. 222)." Therefore, he argued, "I cannot infer from the evidence that the Indians possessed or controlled any part of the territory, other than for village sites and for aboriginal use in a way that would justify a declaration equivalent to ownership (McEachern, p. 222)." "The reality of Crown ownership of the soil of all the lands of the province is not open to question...," he argued (McEachern, p. 81). "The law recognizes Crown ownership of the territory in a federal state now known as Canada pursuant to its Constitution and laws (McEachern, p. 81)." Except for village sites which gave exclusive rights through the creation of reserves, McEachern argues, "the interest of the plaintiffs' ancestors, at the time of British sovereignty,...was nothing more than the right to use the land for aboriginal purposes (McEachern, p. 225)."

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[41]McEachern found that although the *Royal Proclamation of 1763* had never applied to British Columbia (McEachern, pp. 83, 95-98), the Gitxsan and Wet'suwet'en had established a valid claim to general aboriginal rights by virtue of their longtime communal use and occupation as an organized society of specific lands for aboriginal purposes prior to British sovereignty (McEachern, pp. 82, 98, 208, 211, 225).

In relation to the claim for aboriginal sovereignty, moreover, he contended that there was no substantial difference "between aboriginal sovereignty or jurisdiction in the largely empty lands of the territory on the one hand, and occupation or possession of the same empty lands for aboriginal sustenance on the other hand (McEachern, p. 221)." McEachern, furthermore, stated that:

> I fully understand the plaintiffs' wishful belief that their distinctive history entitles them to demand some form of constitutional independence from British Columbia. But neither this nor any Court has the jurisdiction to undo the establishment of the Colony, Confederation, or the constitutional arrangements which are now in place. Separate sovereignty or legislative authority, as a matter of law, is beyond the authority of any court to award (McEachern, p. 225).

In fact, he argues, "the very fact that the plaintiffs recognize the underlying title of the Crown precludes them from denying the sovereignty that created such title (McEachern, p. 224)." The legal authorities binding on him were also unanimous in their rejection of aboriginal ownership and jurisdiction, he noted, and therefore he must conclude that there is no basis for the plaintiffs claims for ownership and jurisdiction, and they must be dismissed (McEachern, pp. 193, 199, 225)[42].

Aside from ownership and jurisdiction, however, McEachern did find that as

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[42]McEachern did concede, however, that in the legal and jurisdictional vacuum that existed prior to the assertion of British sovereignty, the aboriginal system of jurisdiction and ownership was all that existed in their villages (the land outside their villages being 'vacant') (McEachern, pp. 222-223). Nevertheless, he argued, whatever aboriginal ownership and jurisdiction might have existed was either displaced or extinguished by the assertion of British sovereignty, and the subsequent establishment of both a colony and the concomitant structures of governance, including land alienation, ownership and management, necessary for its operation (McEachern, pp. 81, 222-242, 241-242).

of the date of British sovereignty, the Gitxsan-Wet'suwet'en had established a right to continue to reside in their villages, as well as general aboriginal rights to their territory (McEachern, pp. 212, 226-227). These general aboriginal rights, McEachern argued, were non-proprietary, non-commercial, and non-exclusive communal rights of occupation for residence and subsistence and ceremonial aboriginal use (McEachern, pp. ix, 193-194, 208, 210-211, 231).

With the exception of village sites which were eventually preserved for exclusive aboriginal use as reserves, however, McEachern found that these general aboriginal rights had been extinguished by the Crown through the assertion of sovereignty, and the policy of settling the province. Because the process of colonization, illustrated in the series of colonial laws known as the *Calder XIII*, demonstrated a clear and plain intention to proceed in a manner inconsistent with the ongoing existence of aboriginal rights, McEachern argued, extinguishment had been achieved (McEachern, pp. 239, 241, 244-245, 254). Such extinguishment was possible, he argued, because aboriginal rights have never been absolute; in the absence of contract or treaty, and except for village sites, common law aboriginal rights existing at the time of sovereignty both exist and continue solely at the Crown's pleasure or discretion (McEachern, pp. ix, viii, 208, 229, 235-236, 245). According to McEachern, in other words, aboriginal consent is not a necessary component of extinguishment (McEachern, pp. 234, 237)[43].

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[43]McEachern also dismissed the defendants' argument that the Gitxsan-Wet'suwet'en had abandoned their aboriginal rights to much of their alleged traditional territory by means of long-term non-aboriginal use (McEachern, pp. 56, 284, 291-292). While the general principle of abandonment clearly makes sense, he contended, it is very difficult to apply it in particular cases (McEachern, pp. 291-292).

Finding that the Gitxsan-Wet'suwet'en had neither general aboriginal rights, nor a right to ownership and jurisdiction, McEachern dismissed not only their claim for damages against the province and the province's counterclaim that any valid claim against the Crown could only be against Canada, but also the Gitxsan and Wet'suwet'en's claim for court costs (McEachern, pp. xi, 43, 255-256, 297). The losing side in litigation is usually responsible for paying court costs. In *Delgamuukw*, however, McEachern decided that:

> in view of all the circumstances of th[e] case, including the importance of the issues, the variable resources of the parties, the financial arrangements which have been made for the conduct of th[e] case...and the divided success each party has achieved, there will not be any order for costs (McEachern, p. 297).

The implicit premise underpinning a great deal of McEachern's findings was that the arguments presented by the Gitxsan and Wet'suwet'en in their *Delgamuukw* case were based more upon wishful thinking than upon historical, cultural or legal reality, and that much of their oral historical evidence was "not literally true (McEachern, p. 49)." He also found the anthropological evidence that had been adduced to be particularly problematic (McEachern, pp. 50-51). More critically, however, while he ruled that the plaintiffs' oral historical evidence was admissable, since they could prove their case in no other way[44], in his analysis of weight he

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[44]According to McEachern, the "unwritten oral history and traditions of a House, and the culture of a people are admissible out of necessity as exceptions to the Hearsay Rule because they cannot be proven in any other way (McEachern, p. 57)." He limited the variety of oral historical evidence admissible in court, however, to reputation evidence, which stipulates that community reputation on an issue is admissible in court as long as the reputation alleged is general to a community, and is based on the declarations of deceased persons. He would be going beyond the confines of the law, he noted, if he were to accept as evidence specific statements

found it to be far less reliable and trustworthy than more conventional forms of evidence[45]. In fact, McEachern contended that the vast majority of the evidence adduced by the plaintiffs appeared unrealistically static in its presentation of cultural life over the generations, and was fraught with contradictions, inconsistencies, vagueness and ambiguity which lent an air of incredibility and unreliability to much of it, making it unacceptable as proof at law (McEachern, pp. 31, 46, 55, 57, 58, 257-259, 262, 264, 267-274). For instance, he argued, there existed in his mind much doubt as to the antiquity of the plaintiffs' crests and totem poles (McEachern, p. 213). He also found that evidence relating to the role played by the feast system in Gitxsan and Wet'suwet'en culture was equivocal (McEachern, p. 214).

In the final analysis, he concluded, "serious questions arise about many of the matters about which the witnesses have testified, and I must assess the totality of the evidence in accordance with legal, not cultural principles (McEachern, p. 49)." McEachern noted that while he was "satisfied that the lay witnesses honestly believed everything they said was true and accurate," it was nevertheless obvious to him "that very often they were recounting matters of faith which have become fact to them (McEachern, p. 49)." "If I do not accept their evidence," he contended, "it will seldom be because I think they are untruthful, but rather because I have a different

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purportedly made by deceased persons, or any statement allegedly made by a living person, whether of a general or a specific nature (McEachern, pp. 46-47).

[45]McEachern, for instance, accepted the evidence of the historians without qualification. He argued that because they were primarily collectors of archival and historical documents, he generally accepted just about everything that they put before him (McEachern, p. 52). In terms of the plaintiffs' oral historical evidence, however, McEachern noted that in the end, fortunately, it was not necessary for him to rely upon oral history "to find that some of the ancestors of some of the plaintiffs have been present in the territory for a very long time (McEachern, p. 59)."

view of what is fact and what is belief (McEachern, p. 49)[46]." Therefore, he concluded, "much evidence must be discarded or discounted not because the witnesses are not decent, truthful persons but because their evidence fails to meet certain standards prescribed by law (McEachern, p. 49)." At the same time, however, McEachern also argued that he attempted "to err, if at all, on the side of admissability, rather than exclude anything that might be relevant (McEachern, pp. 53-54)."

In spite of all that he dismissed, both in terms of argument and evidence, McEachern did find that in addition to creating reserves for the First Nations' exclusive use, during colonial times and beyond, the Crown had also repeatedly made them a promise that they could use any of its vacant Crown lands, anywhere in the province and subject to its general laws, for aboriginal purposes until such time as they were required for an adverse purpose, and were therefore no longer vacant (McEachern, pp. x, 229, 245, 246, 248). Land that is returned to the Crown after it has been logged, for instance, becomes vacant again, and is again open for aboriginal use (McEachern, pp. ix-x, 248). "This was a valuable right," McEachern argued, "because it was never the intention of the Crown that the Indians would be required to

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[46]This was his assessment of the Gitxsan-Wet'suwet'en claim for jurisdiction. McEachern argued that in their claim for jurisdiction, the plaintiffs "have put the cart before the horse (McEachern, p. 218)." While in law their claim for jurisdiction "could only be based on precontact practices, not upon the political wishes of a people seeking to establish a new form of government (McEachern, p. 218)," McEachern concluded that what the plaintiffs and their lawyers were describing in their evidence and argument was "a new theory of government - a rationalization - unrelated in any way to aboriginal practices (McEachern, p. 219)."

live or stay on their reserves (McEachern, p. 246)[47]."

Citing the *Guerin* case as providing useful guidance, McEachern also found that when the Crown unilaterally extinguished the aboriginal rights of B.C. First Nations, and made the concomitant promise that they could freely use vacant Crown lands for aboriginal purposes, the fact that this promise was made and acted upon for over one hundred years, along with the general obligation of the Crown to care for the aboriginal peoples, was sufficient to create a legally enforceable, fiduciary duty or trust-like obligation upon the Crown (McEachern, pp. x, 247, 248). This fiduciary duty was not a constitutionally affirmed or recognized right, it was subject to the general laws of British Columbia, and it was not an 'interest' to which Crown lands were subject. At the same time, however, the provincial Crown would nevertheless breach its fiduciary obligation if it sought to arbitrarily limit aboriginal use of its vacant lands (McEachern, pp. x, 248, 249). It was a duty owed by the Crown to the First Nations that not only continued to the present day, but also could be discharged only by the province (McEachern, p. x). Moreover, McEachern contended, just as aboriginal rights could be modernized, "so should the obligations and benefits of this duty be changeable to meet changing conditions (McEachern, p. 248)." As the Crown and the Gitxsan-Wet'suwet'en attempt to integrate their various uses within their traditional territory, McEachern concluded, the parties should proceed in a spirit of reconciliation and accommodation (McEachern, pp. x, 249-250).

vii. Reaction to McEachern's Ruling:

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[47]The veracity of McEachern's assertion in this regard is, of course, open to question.

McEachern's *Delgamuukw* ruling was a decision far different from that which most observers had expected, and was to prove a tremendous disappointment for virtually all interested parties and observers. For instance, while a very small minority of legal and political commentators felt that McEachern's legal findings were accurate[48], the vast majority were of the opinion that not only was McEachern's interpretation of the law incorrect, but so also were his subsequent rulings. The common theme among these critical commentators was that McEachern's interpretation of the law was far too restrictive, a tendency which was attributed to ethnocentrism by several commentators[49]. More specificially, McEachern was criticized for his failure to find that aboriginal title was a proprietary interest[50]; for

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[48]Constitutional lawyer Mel Smith and Political Science Professor and political pundit Terry Morley were two individuals who believed that in *Delgamuukw*, McEachern had got the law right. (Morley expressed these opinions in his column in the Victoria *Times-Colonist* on March 14, 1991, and Mel Smith frequently articulated his opinions in his opinion column in *B.C. Report*, and later in his book entitled *Home or Native Land?*). Dr. Bryan Schwartz, Professor of Law at the University of Manitoba, also expressed his belief that McEachern's decision was quite consistent with the general trend of most recent aboriginal rights rulings, thereby suggesting that McEachern's legal interpretations and rulings were correct (Dr. Bryan Schwartz, "The General Sense of Things: Delgamuukw and the Courts," in Cassidy, pp. 161-177). Even mainstream publications were giving some support for, and credence to, McEachern's decision. In an editorial in *The Province*, for instance, it was argued that "McEachern is right. The natives' problems are social and economic, not legal." The *Vancouver Sun*, moreover, called the First Nations' response to the *Delgamuukw* decision "an ill-informed overreaction (as quoted in Michael McCullough, "Laying down the law: The Gitksan decision reinforces government Indian policy," *British Columbia Report*, Vol. 2, No. 30, March 25, 1991, pp. 6-10)."

[49]Brian Slattery, "The Legal Basis of Aboriginal Title," in Cassidy, pp. 120-121; Roland Penner, "Power, the Law and Constitution-Making, in Cassidy, pp. 248-250.

[50]Hamar Foster, "It Goes Without Saying: The Doctrine of Extinguishment by Implication in *Delgamuukw*," in Cassidy, pp. 137-139, 147.

ruling that the *Royal Proclamation* did not apply to British Columbia (Slattery in Cassidy, pp. 128-129); for his adoption of a restrictive conceptualization of aboriginal rights and the fiduciary duty[51]; for his approach to the plaintiffs' oral historical evidence (Storrow and Bryant in Cassidy, p. 185); for what was alleged to be his misconstruction of the law and legal analysis (Slattery in Cassidy, pp. 120-121; Penner in Cassidy, pp. 247-250); for his problematic conceptualization of the extinguishment issue (Kellock and Anderson in Cassidy, pp. 106-107; Penner in Cassidy, pp. 248-249); and most importantly, for ruling that aboriginal rights had been extinguished (Foster in Cassidy, pp. 139-140, 142-143, 146-147, 148)[52]. A number of legal commentators were also of the opinion, however, that the Gitxsan and Wet'suwet'en had contributed to their loss, and were partly to blame for their case's failure, by choosing an unclear 'hit and miss' approach to litigation that was at the same time inadvisable for its overly ambitious scope and nature (Kellock and Anderson in Cassidy, pp. 97-98, 110; Slattery in Cassidy, pp. 9, 129)[53]. In short,

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[51]Foster in Cassidy, p. 150; Penner in Cassidy, pp. 248-250; Burton H. Kellock and Fiona C.M. Anderson, "A Theory of Aboriginal Rights," in Cassidy, p. 109; Marvin R.V. Storrow and Michael J. Bryant, "Litigating Aboriginal Rights Cases," in Cassidy, p. 184.

[52]Other commentators, however, argued that McEachern's ruling on extinguishment was not problematic, but was simply a reflection of the unsettled nature of the law in this area, with the Supreme Court of Canada having only begun the process of articulating a test for extinguishment (Storrow and Bryant in Cassidy, pp. 179-180).

[53]As noted earlier, however, considerations of political strategy played a greater role in the way the plaintiffs chose to structure their case than the goal of achieving a legal victory; the Gitxsan-Wet'suwet'en did not enter the courts for a legal victory per se (Cassidy, p. 10). In going before the courts, in fact, the Gitxsan-Wet'suwet'en demonstrated time and again that they were more concerned with the cultural authenticity of their approach than with whether or not their legal argument was compelling. As Wet'suwet'en Herb George contends, at the time that they went

the reaction of legal and political commentators clearly demonstrated that aboriginal legal issues were still far from settled, and that attaining a resolution from the courts on these questions was not a cut and dried proposition.

Stakeholders and various interest groups such as farmers, ranchers, and trappers, the forest, mining and fishing industry and their employees, as well as

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before the courts, they were criticized by many lawyers and other First Nations for pursuing a legal position that the courts had demonstrated no precedent whatsoever for being likely to take seriously, namely aboriginal ownership and jursidiction (Herb George, "The Fire Within Us," in Cassidy, pp. 53-54). After considerable debate, however, and fully aware of what the rules of the game were, and the risks inherent in adopting such a broad and ambitious argument, the Gitxsan-Wet'suwet'en concluded that only they could define what their rights as aboriginal people were. If they were to take an incremental approach as some had recommended, and indeed as numerous past cases had shown was likely to be the successful approach, then they would risk losing their identity as Gitxsan and Wet'suwet'en peoples (George in Casssidy, p. 54). They felt that they had to take an approach that was true to themselves and their culture, an approach that was culturally authentic. According to George,

> if we had chosen to play that game the way it was set out, I think that in the end we would more likely have lost that which is so great to us. So we chose instead to challenge the whole bloody game, to say that this game is wrong, to say we don't agree with your referee and your umpire. This is a fixed game. We want to see change. We want to see a radical change. That's the way we approach this game (George in Cassidy, pp. 54-55).

Thus as lawyer Douglas Sanders concludes, *Delgamuukw* was above all a political strategy intended "to get the courts to kick governments (Sanders in Cassidy, p. 281)." The case was

> aimed at changing government policy, opening up negotiations, getting a new deal. The claims cannot be taken literally....Were the Gitksan and Wet'suwet'en going to get title to their territory and jurisdiction? No one expected such a literal win (Sanders in Cassidy, p. 281).

In this sense, *Delgamuukw v. The Queen* was more strategic, and even symbolic, than practical in its intent.

recreational hunters and fishers, also saw McEachern's decision as problematic. Many undoubtedly shared the same general assumptions and conclusions about aboriginal issues that McEachern articulated in his decision, and had probably sighed with relief when the Gitxsan and Wet'suwet'en failed to achieve all that they had aspired to in their litigation. At the same time, however, they also no doubt recognized that the *Delgammukw* decision was not going to solve the challenges and problems that native grievances and land claims presented for them in the first place. They recognized that *Delgamuukw* not only left many questions unanswered, but also that it failed to provide a solution to most of the issues which were creating such a state of economic, legal and political uncertainty in the province[54].

It was not surprising, however, that the most vociferous reaction to McEachern's *Delgamuukw* decision came from the Gitxsan-Wet'suwet'en and their supporters, both native and non-native alike[55]. They reacted first with bitter

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[54]As Michael McCullough argues, it is ironic that many "supposed beneficiaries see the *Delgamuukw* judgment as causing more problems than it solves in the short term (McCullough, "Laying down the law," pp. 6-10).

[55]For an overview of the reaction of many First Nations peoples and their supporters to the *Delgamuukw* decision, see the compilation of articles contained within Cassidy's *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*. Also see Frank Calder, "Colonial mentality criticized," *Vancouver Sun*, March 9, 1991, p. B1, B2.; Mark Hume and Scott Simpson, "Indians' leaders expect violence, 'confrontation,'" *Vancouver Sun*, March 9, 1991, pp. A1, A14. For the Gitxsan-Wet'suwet'en perspective on the case, see Don Monet and Skanu'u's *Colonialism on Trial*.

So incensed were some critics of McEachern's decision, that they actually went so far as to deliberately misrepresent aspects of it. Some, for instance, took McEachern's comment that he was forced to be brutal in order to summarize such an enormous bulk of evidence in his *Reasons for Judgment* (McEachern, p. 3), and quoted him as saying that in his *Delgamuukw* decision, "I have been brutal (Tennant notes this occurence, in Cassidy, p. 74)." I witnessed this misrepresentation first hand several years ago while reading an article on the decision in the University of Victoria's student newspaper *The Martlet*. In a preface to his article entitled "Rough

disappointment, and then with expressions of a deep sense of anger, betrayal and frustration that after such a long and difficult fight they had failed to gain either ownership or jurisdiction over their traditional territories, and that even their general aboriginal rights were found to have been extinguished. They offered not only a total condemnation of McEachern's rulings, but also his interpretation and characterization of events, and his choice of language. Words and phrases such as 'primitive' and 'our aboriginal people' were found to be particularly offensive. While some accused him of ethnocentrism, others went so far as to call him racist for what they contended was the restrictive and selective manner in which he approached the Gitxsan and Wet'suwet'en's history, culture and especially their oral evidence[56]. In any case, these critics contended, McEachern's opinions and perspectives were simply inexcuseable, especially in a man of his era, position and education.

Justice: Questionable Judgment on Gitksan/Wet'suwet'en Land Claim," James McKinnon quotes McEachern as follows:

> As the Crown has all along had the right to settle and develop the territory and to grant titles and tenures in the territory unburdened by aboriginal interests, the plaintiffs' claim for damages is dismissed...I have been brutual (James McKinnon, "Rought Justice: Questionable Judgment on Gitksan/Wet'suwet'en Land Claim," *The Martlet*, Thursday March 14, 1991, pp. 10-11).

[56]See, for instance, the comments of Ethel Blondin, George Watts and Tipene O'Regan in Cassidy, pp. 255, 194 and 291 respectively. Tennant and Cassidy also implicitly characterize McEachern's decision as ethnocentric; see Tennant in Cassidy, pp. 73-91, and Cassidy in Cassidy, p. 12). Anthropologists offered the most detailed and sustained critique of what McEachern's critics claim is the ethnocentric nature of his *Delgamuukw* decision. See, for instance, Robin Ridington, "Fieldwork in Courtroom 53: A Witness to *Delgamuukw*," in Cassidy, pp. 211-212, 214, 217, 218, 220, and Michael Asch, "Errors in *Delgamuukw*: An Anthropological Perspective," in Cassidy, pp. 225, 226-227, 228-229, 231-235, 238. It is important to note that charges of ethnocentrism against McEachern were very common, even amongst those who could be considered to support either part or all of his decision.

In fact, McEachern's decision was a crushing blow not only to the Gitxsan and Wet'suwet'en, but to all First Nations, and was interpreted by them as a deeply personal insult to their cultural uniqueness, and even to their very existence[57]. Don Ryan, a spokesman for the Gitxsan-Wet'suwet'en, reported that in the wake of the shock, bitterness and dismay of the *Delgamuukw* ruling, the elders had told him that "this is the last time that the sacred boxes of our people will be opened for the white man to look at[58]." The Gitxsan-Wet'suwet'en peoples felt that they had bared their collective soul in the courtroom, only to be rebuffed and rejected by the judge, and by implication, the society and cultural order that he represented[59].

viii. Litigation Versus Negotiation: The Gitxsan-Wet'suwet'en Experience:

By the time that McEachern's *Delgamuukw* decision was finally rendered, the majority of British Columbians had come to the conclusion that for the sake of peace, stability and justice in the province, aboriginal land claims and associated grievances

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[57]Again, for examples see the collection of articles by First Nations commentators in Cassidy.

[58]*Vancouver Sun*, July 13, 1991, as quoted in Ridington, in Cassidy, p. 207.

[59]Neil Sterrit, "It Doesn't Matter What the Judge Said," in Cassidy, p. 305.

While in many ways the litigation process was a culturally hostile and alienating experience for the Gitxsan-Wet'suwet'en, at the same time *Delgamuukw* did have its beneficial aspects. Not only was the *Delgamuukw* case a critical catalyst driving the province's decision to concede to negotiations, and thus an important political victory, but it also resulted in greater collective knowledge and pride for the Gitxsan and Wet'suwet'en as their communities were brought together to focus on their culture and heritage as they prepared for, and presented, their case. *Delgamuukw* also served, therefore, to galvanize the determination of the Gitxsan-Wet'suwet'en to continue their fight for substantive cultural recognition and accommodation on the part of the courts and the wider society.

had to be addressed. In the wake of McEachern's decision, however, virtually all interested parties and observers contended that for one reason or another, *Delgamuukw* had demonstrated that the courts were incapable of dealing with aboriginal claims and grievances in a sensitive and meaningful manner. Some characterized the problem in *Delgamuukw* as McEachern, and contended that had a more sympathetic and less ethnocentric or racist judge been presiding the outcome would have been considerably different[60]. Others felt that it was partly the nature of the Gitxsan-Wet'suwet'en case that was to blame, and argued that the plaintiffs should have chosen a more limited and pointed approach in their litigation (Kellock and Anderson in Cassidy, pp. 97-98, 110; Slattery in Cassidy, p. 129). Others, however, expressed their conviction that the legal system was simply inherently limited in its ability to deal with complex conflicts of an cross-cultural nature in both a sensitive and a substantive manner[61].

Given the disenchantment expressed with litigation in the wake of *Delgamuukw*, it was not surprising that virtually all interested parties and observers contended not only that negotiations were a far more appropriate mechanism for such conflicts than litigation, but were also to be preferred over the courts, and in turn

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[60]Such a conclusion is implicit in O'Regan's analysis, for instance (Tipene O'Regan, "Understanding the Power Culture," in Cassidy, pp. 291, 296).

[61]This was the position taken by many First Nations, who contended that in *Delgamuukw* British justice had been placed on trial and found to be guilty. Some, such as Bill Wilson, concluded that the Canadian courts were simply incapable of giving them a fair trial (Wilson, in Janice Mucalov, "Indian Warriors: Despite growing tension and frustration in the native community regarding the legal system, lawyers and lawsuits ares still the weapons of choice to settle questions about their rights and land claims--for now," *Canadian Lawyer*, Vol. 15, Issue 4, May 1991, pp. 19-21).

placed their enthusiastic support behind the province's new willingness to negotiate. First Nations, industry, government, lawyers, academics, journalists and others all expressed their conviction that negotiated settlements were a far more appropriate forum for the meaningful resolution of aboriginal grievances than the highly-charged atmosphere of litigation[62]. In his *Reasons for Judgment* McEachern had also expressed such a conviction, concluding that the courts were not the appropriate forum in which to address or attempt to resolve the kinds of issues and questions raised by the Gitxsan and Wet'suwet'en. They are political and not legal issues, he argued, and as such, would be best addressed in the political arena through a process of negotiation, discussion and consultation rather than litigated in the courts (McEachern, pp. 2-3, 299-301).

Cognizant of the fact that the *Delgamuukw* ruling had failed to resolve either the pressing political or legal issues associated with aboriginal claims in the province, the provincial government seemed to take McEachern's comments and advice particularly to heart (Sanders in Cassidy, p. 283). Despite the fact that the *Delgamuukw* ruling stated that no aboriginal rights existed in contemporary British Columbia, let alone ownership or jurisdiction, the province emphasized its commitment to negotiations, and set out to establish the bureaucratic structures and mechanisms required to fulfill their commitment[63]. The province seemed determined

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[62]Aboriginal rights lawyer Hamar Foster was one of the few who expressed reservations with the notion that the political arena was the best place for addressing aboriginal grievances. He notes, quite correctly, that it was frustration with politicians and political processes that drove the Gitxsan and Wet'suwet'en into the courts in the first place (Foster in Cassidy, p. 134).

[63]See, for instance, the comments of then Attorney-General Russ Fraser and Premier Vander Zalm as quoted in Mel Smith, 1995, p. 132.

not to let the McEachern judgment derail its new and accommodating aboriginal policy (Tennant in Cassidy, p. 74; Mel Smith, 1995, pp. 85-89). This commitment to negotiated settlements was strengthened when the NDP government of Michael Harcourt came to power in October 1991.

Despite the growing faith in negotiations expressed in the wake of *Delgamuukw*, however, and the province's demonstrated willingness to negotiate, in February 1992 the Gitxsan-Wet'suwet'en chose to disregard the option of a negotiated settlement in favour of continuing to pursue their case through the courts[64]. In the face of the expressed determination of the Gitxsan and Wet'suwet'en to continue with litigation, the new NDP government decided to extend their more accommodating political posture into the legal arena as well. In March 1992 they fired the 5-member legal team from Russell and DuMoulin that had secured a win for them in the original *Delgamuukw* case, and hired a team from Swinton & Company, led by Bryan Williams, that was more amenable to the native perspective. Attorney-General Colin Gabelmann justified this change by arguing that the province was seeking "a fresh perspective" on its legal argument, and Williams was a well-known lawyer sympathetic to native claims (as quoted in Mel Smith, 1995, p. 133). They also altered key aspects of their previous legal position, arguing now that certain unextinguished, but still undefined, sui generis aboriginal rights existed with respect to the lands of the province, as did certain other rights such as native self-government, although subject to federal and provincal laws[65]. Andrew Petter, B.C.'s

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[64]While the NDP government suggested a short adjournment of the appeal so that the new government could demonstrate its good faith, and the parties would have time to try negotiations, the Gitxsan-Wet'suwet'en instead chose to continue their litigation.

[65]Tom McFeely, "Arguing against itself. The government takes a new tack in the

Minister of Aboriginal Affairs, argued this change in legal position was intended to encourage the Court of Appeal to "move the issues on to the negotiating table (as quoted in Mel Smith, 1995, p. 133)[66]."

In spite of the harsh criticism he received over his *Delgamuukw* ruling, McEachern's decision was partially upheld when the B.C. Court of Appeal ruling was released on June 25, 1993. Not surprisingly, the Appeal Court also rejected the Gitxsan and Wet'suwet'en's claims to ownership and jursidiction. In addition, the majority of the court adopted McEachern's narrow conceptualization of aboriginal rights. Looking beyond the issues as interpreted by McEachern, however, the Appeal Court split on the question of whether the plaintiffs' claim for ownership could be construed to encompass an intermediate claim of aboriginal title. In a clear victory for the Gitxsan-Wet'suwet'en and other First Nations in British Columbia, the Appeal Court also reversed McEachern's finding that aboriginal rights had been extinguished in a blanket fashion during the colonial era, meaning that in contemporary British Columbia, aboriginal rights continued to exist. This reversal was not at all surprising, and in his *Reasons for Judgment* even McEachern had indicated that he knew he was vulnerable on this question (McEachern, pp. ix, xi, 57, 212, 257, 261, 274-279). While upholding a significant component of McEachern's decision, then, the Appeal Court's ruling also demonstrated that McEachern's was not the only view

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Gitksan appeal," *British Columbia Report*, Vol. 3, No. 33, April 20, 1992, p. 8.

[66]See also: Dave Cunningham, "Too successful for the NDP? The government switches counsel in a land-claim dispute," *British Columbia Report*, Vol. 3, No. 29, March 23, 1992, pp. 6-7; Tom McFeely, "B.C. on the block? Fears of a $17-billion giveaway prompt industry to join the Gitksan fray," *British Columbia Report*, Vol. 3, No. 36, May 11, 1992, pp. 6-7.

of the law possible[67].

On October 22, 1993, in the wake of the Appeal Court decision, the Gitxsan-Wet'suwet'en gave notice of appeal to the Supreme Court of Canada, and on March 9, 1994, the Supreme Court granted them leave to appeal. Seemingly concluding that they had attained all that they were likely to achieve from the courts at this time, however, and aware that they might now gain more through pursuing negotiations than litigation, the Gitxsan-Wet'suwet'en decided to join the B.C. Treaty Commission process well underway in the province[68]. Consequently, on June 13, 1994, the

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[67]As is noted above, aboriginal law in Canada contains many different, contradictory perspectives and precedents, and a wide variety of different rulings were therefore possible. McEachern's was one such potential view of the law. That different interpretations of the law exist is also demonstrated amongst commentators.

In the wake of *Delgamuukw*, both Frank Cassidy and Hamar Foster remarked that few observers had expected a ruling such as that which McEachern had delivered (Cassidy, p. 8; Foster in Cassidy, pp. 133-135). Michael Asch, however, argued that such a ruling should not have been so entirely unexpected. Asch contended that:

> the *Delgamuukw* judgment is not a rogue decision. It does not stand outside of Canadian legal precedent and tradition. Rather, this judgment...is in fact consonant with, if not fostered by, that tradition (Asch in Cassidy, p. 238).

In this sense, our examination of McEachern's *Delgamuukw* ruling as an example of the cultural obstacles posed by litigation does not entail the construction of a 'straw man.' McEachern's decision is not without legal precedent; it is simply a particularly stark example of the Canadian legal system's inherently limited ability to address disputes based in cultural difference in a sensitive and meaningful fashion.

[68]The B.C. Treaty Commission was launched on September 22, 1992 (Mark Hume, "Mulroney, Harcourt sign historic treaty with natives," *Vancouver Sun*, September 22, 1992, p. B1). By April 15, 1993 the Commissioners of the new B.C. Treaty Commission had been appointed, and on December 15, 1993, the new process was fully operational and "open for business (B.C. Treaty Commission, *The Second Annual Report of the British Columbia Treaty Commission for the Year 1994-1995*, p. 1)."

Gitxsan-Wet'suwet'en and British Columbia announced that they had agreed to adjourn the appeal for a number of months in hopes of making substantial progress towards a negotiated settlement (Mel Smith, 1995, p. 137). They signed an *Accord of Recognition and Respect*, the appeal was subsequently postponed, and negotiations commenced, with the Gitxsan and the Wet'suwet'en each establishing their own treaty table with the province.

After approximately eighteen months of negotiations, however, serious problems were beginning to appear at the Gitxsan negotiating table. Negotiations were at a stalemate because the Gitxsan were unwilling to participate in the land selection process upon which the treaty settlement process was predicated, and instead were insisting upon co-management of their entire traditional territory. It was a position that the province was unwilling to countenance. Moreover, contrary to the *Accord of Recognition and Respect* which the Gitxsan, Wet'suwet'en and British Columbia had earlier signed confirming their agreement to adjourn the *Delgamuukw* litigation, and to respect each others' laws, traditions and customs while negotiating, the Gitxsan were arguably hampering meaningful negotiations by engaging in roadblocks of forestry operations and making inflamatory political statements. The province contended that the Gitxsan were no longer willing to negotiate in good faith, and on February 1, 1996, responded by suspending negotiations with them. According to Aboriginal Affairs Minister John Cashore, there was "little chance of progress in negotiating aboriginal rights and jurisdictions with the Gitxsan without further direction from the Supreme Court[69]." At that point, the Gitxsan decided to

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[69]As quoted in Stewart Bell, "B.C. suspends Gitxsan treaty talks," *Vancouver Sun*, February 2, 1996. pp. A1, A9.

reactivate the appeal of their *Delgamuukw* case to the Supreme Court of Canada[70].

In the meantime, talks at the Wet'suwet'en table were proceeding significantly more smoothly. While some problems were also beginning to appear there, namely the Wet'suwet'en at times articulating demands for the same sort of co-management strategy being sought by the Gitxsan, the provincial negotiators remained hopeful that these challenges could be overcome. Going back to court with the Gitxsan posed problems for the Wet'suwet'en and the province, however, because it also compelled the Wet'suwet'en to return to court along with the Gitxsan. In hopes that progress could continue to be achieved at the Wet'suwet'en treaty table despite the renewal of the *Delgamuukw* legal action, the province made a special concession with the Wet'suwet'en to litigate and negotiate with them at the same time. This was clearly a major accommodation on the part of the province, since their explicit policy was not to negotiate while litigating. In September of 1996, however, the federal negotiating team withdrew from the Wet'suwet'en negotiating table, effectively suspending their negotiations. The federal government argued that it was unfair to the other First Nations involved in treaty negotiations if the federal government did not consistently apply its rule prohibiting negotiations while litigation was underway. It said that it would rejoin negotiations once the Supreme Court of Canada had reached a decision in the *Delgamuukw* appeal[71]. The *Delgamuukw* appeal is now scheduled to go before the Supreme Court of Canada in June of 1997, with a ruling expected a year later at the earliest (Bell, pp. A1, A9; "Feds pull out of Wet'suwet'en talks," p. A1).

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[70]Philip G. Halket, Deputy Minister, Aboriginal Affairs, "aboriginal affairs explains position," *Interior News*, June 19, 1996.

[71]"Feds pull out of Wet'suwet'en talks," *Smithers Interior News*, September 11, 1996, p. A1.

In the wake of McEachern's *Delgamuukw* decision, many argued that the apparent failure of the *Delgamuukw* case was indicative of the problematic nature of litigation for addressing aboriginal rights; the truth is clearly far more complex. While litigation has its limitations, and was undeniably problematic for the Gitxsan and Wet'suwet'en, at the same time negotiation is clearly not the panacea that many have presented it to be. On the contrary, many of the same obstacles, challenges and frustrations appear as likely to arise in the context of negotiation as in litigation.

It has been almost twelve years since the Gitxsan and Wet'suwet'en first filed their legal claim in the courts, and over nine years since their case first began. In that time their struggle has gone almost full circle: the province's refusal to participate in negotiations forced the Gitxsan and Wet'suwet'en into the courts, while the province's subsequent agreement to negotiate eventually led to their participation in the B.C. treaty process. The apparent failure of negotiations, however, once again has the parties, including the governments, looking to the courts for direction.

In view of the magnitude of this struggle, it seems appropriate to examine the Gitxsan-Wet'suwet'en experiences to determine what lessons might be gained regarding the potential pitfalls and opportunities of both negotiation and litigation for resolving complex cross-cultural conflicts such as aboriginal rights disputes. Is negotiation really as full of potential and promise as interested parties and observers contended in the wake of McEachern's *Delgamuukw* decision? Are the law, the legal system and many judges really as hostile and unaccommodating to aboriginal evidence and aspirations, and litigation therefore as inadvisable and inappropriate, as many would contend? Are politicians, rather than judges and the courts, truly the most appropriate decision makers in conflicts over aboriginal rights? Is negotiation always preferable to litigation in attempting to address complex and culturally-based conflicts

such as aboriginal rights grievances, or is faith in the power of one dispute resolution mechanism over another to address conflicts that are inherently complex simply naive? In short, is negotiation, rather than litigation, truly the most appropriate forum for addressing aboriginal rights grievances and claims?

Is is to these questions that we turn our attention in the next chapter.

Chapter Two

The Pitfalls and Potential of Litigation

i. The Cross-Cultural Limitations of Litigation:

In the wake of *Delgamuukw*, many different perspectives were expressed as to what, if anything, went wrong in the case. As discussed in the preceding chapter, many critics attributed the perceived failure of the Gitxsan and Wet'suwet'en's legal action to what they argued was the personal ethnocentrism or even racism of McEachern, while others felt that the inherently ethnocentric nature of the Canadian legal system, or the overly broad and ambitious approach to litigation adopted by the Gitxsan-Wet'suwet'en were to blame. While each of these explanations contain some measure of truth, it is arguably the latter two that are most persuasive. Even with a much more sympathetic judge presiding over their case, it is unlikely that the Gitxsan and Wet'suwet'en would have achieved much of what they aspired to from their legal action.

While going to the courts in an effort to force the province to concede to negotiations was a goal that was both reasonable and likely to succeed (as future events did, in fact, demonstrate), the Gitxsan-Wet'suwet'en also intended that their litigation would result in a greater measure of cultural recognition and affirmation for both themselves and other aboriginal peoples, not only in the courts, but also in the wider society. The cultural expectations that the Gitxsan-Wet'suwet'en brought to the courts, however, were both elevated and unrealistic, and because these expectations in great measure determined how they chose to structure their case, were bound to result in failure and disappointment. As the *Delgamuukw* action so starkly demonstrated, as a dispute resolution mechanism the Canadian legal system is inherently limited in its

ability to recognize, affirm and accommodate significant cultural difference, and even more fundamentally, it is simply not designed to address or resolve cross-cultural conflicts, let alone ones that have as their ultimate aspiration a radical reconstitution of a society's constituent social contract. The Gitxsan-Wet'suwet'en tested the limits of what the Canadian legal system is capable of offering, and discovered that its ability to deal in matters of culture is considerably more limited than they had seemingly anticipated. In fact, in choosing to pursue their grievances through litigation, the Gitxsan-Wet'suwet'en inevitably encountered a series of structural obstacles which made it next to impossible for their culturally-based grievances, arguments and aspirations to receive a sensitive, effective or meaningful hearing.

As the Gitxsan-Wet'suwet'en quickly discovered, the Canadian legal system is designed to deal with the law and to deliver legal adjudication; it is not designed to deal with issues of culture. In concerning itself solely with the law, moreover, it is designed to deal with law as defined by, and situated within, its own cultural framework and world view. Not only is the Canadian legal system a product of the world view of the dominant culture, but it is also inextricably embued with that cultural perspective. In fact, as the Gitxsan and Wet'suwet'en discovered, existence and knowledge are culturally constituted conceptual frameworks, and the structures and institutions subsequently developed by society to order, rationalize and arbitrate its operation, including its legal system and laws, are themselves highly culturally specific and contextual.

As *Delgamuukw v. the Queen* so clearly demonstrates, the central problem with attempts to litigate native rights disputes is that in doing so, one essentially places the clash of cultural perspectives and aspirations that are at the root of the conflict within the context of a dispute resolution mechanism that is, above all, an

institutional expression of the dominant culture's world view. Because the rules of the legal system, as well as the values and assumptions which inform them, are a product of the world view which it essentially takes as a given, they are all highly culturally specific; they are a product of a particular way of perceiving, naming and organizing human existence and knowledge[72]. The fact that the mechanism is inextricably embued with the values and imperatives of the dominant culture means that it is very difficult, if not impossible, for the legal system to adequately deal with complex issues based in cultural difference such as is the case with aboriginal rights issues. As Placido Gomez says of the American legal system,

> Our legal system is steeped in an Anglo-American tradition that emphasizes guilt, logic, property, individualism, and adversarial proceedings....The tradition, and the concepts embodied within it, are foreign to many Indians and others with culturally divergent world views....Put simply, White people think differently[73].

The system is simply better designed to deal with intra-cultural conflict than with inter-cultural conflict, and is not easily able to either recognize or assess the validity of divergent cultural perspectives; nor is it easily able to find the space to meaningfully accommodate them within the fabric of the larger society, which is,

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[72]As Lloyd Dolha contends:

> Every culture has a code--a set of values that frame that culture--a cultural code. In communities identity is formed from a common history, culture, language and socio-economic structure. For individuals indentity grows out of childhood experiences, the attitudes projected on us, and how we think of ourselves (Lloyd Dolha, "First Nations fighting for traditions," *Kahtou*, Vol. 7, No. 25, December 25, 1989, pp. 17-18).

[73]Placido G. Gomez, "White People Think Differently," *Thurgood Marshall Law Review*, Vol. 16, No. 3, 1990-1991, p. 543.

clearly, what native rights disputes are all about in the first place[74]. Moreover, in cases involving aboriginal rights issues, the problematic nature of this situation is further exacerbated by the fact that the relationship between the native peoples and the state in Canada has historically been of a colonialist nature, and concomitantly, has traditionally been predicated upon a belief in the fundamental inferiority of native cultural systems and values. In view of the cultural aspirations and ambitions that informed the Gitxsan-Wet'suwet'en legal action, then, litigation was bound to be an extremely frustrating, disappointing and alienating process for them.

In fact, given the central role that cultural considerations and aspirations played in the Gitxsan-Wet'suwet'en case, it is not at all surprising that the Canadian legal system presented the Gitxsan and Wet'suwet'en with a number of significant and fundamental challenges and obstacles. It is also not suprising that the most difficult of the obstacles and frustrations they faced arose out of the procedural and evidentiary stipulations of the legal system, for it is in these areas that the epistemological and ontological differences which originate out of different cultural orientations are most pronounced. For the Gitxsan-Wet'suwet'en, and similarly for other First Nations in court, the structural and procedural inflexibility of the Canadian legal system had serious implications not only for their case, but also for their overall experience with the courts and litigation.

In the Anglo-Canadian legal tradition, the intent of civil litigation is to establish the validity of the plaintiffs' grievances, and in turn, the liability of the defendant, through a process of presenting evidence to a neutral arbiter in order that

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[74]Some legal scholars have also examined how legal culture is both distinct from, and inhospitable to, common culture. See, for instance, Herman Turkstra, "Strictly Personal Views on the System: Cultural Conflicts in the Courtroom," *The Advocates' Society Journal*. February 1985, pp. 7-8.

its merits can be evaluated, and the "truth" determined. As the Gitxsan-Wet'suwet'en discovered, litigation is an extremely structured process, with inflexible, strictly established rules, requirements and procedures. The law and legal system clearly stipulate who has "standing," or the right to place a particular conflict or grievance before the courts, how and when a claim or action must be filed, the general format that an argument must follow, and the kinds of evidence that can be presented in the attempt to prove an argument at law.

The rules, requirements and procedures upon which the legal system is predicated, however, do not exist simply to create frustration and annoyance. On the contrary, they have gradually developed over the centuries for extremely good reasons. The are intended to ensure that the entire process is above reproach, and that truth, fairness, impartiality and decorum win the day. The process is intended to be solemn and orderly, with justice both being done, and being seen to be done. In fact, the order and decorum of the court process is intended to contribute to an appearance of impartiality and justice, and the sense that nothing is taken lightly. This legal framework of rules, requirements and procedures also is intended to ensure that everyone receives the same treatment at the hands of the law, regardless of age, gender, race or socio-economic status.

The Canadian legal system may be more or less capable of delivering on these goals in terms of conflicts that arise within the majority culture. As the Gitxsan-Wet'suwet'en discovered, however, in cases where conflicts and arguments are informed by a different cultural orientation, the Anglo-Canadian legal system has built-in barriers to delivering a fair and neutral adjudication. Nowhere was the Canadian legal system's inherently limited ability to address conflicts of a cross-cultural nature more apparent than in terms of its evidentiary requirements,

procedures and restrictions.

ii. Aboriginal Oral Historical Evidence in the Canadian Legal System: The Cross-Cultural Dilemma:

In the Anglo-Canadian legal system, the process of litigation is ostensibly concerned solely with establishing the 'facts' of a case, and consequently, with determining the 'truth.' Based upon a calcuation of their imputed reliability or 'factual' nature, the rules of evidence stipulate what forms of evidence are to be considered admissable to the process, and upon their admission, the relative weight that ought to be accorded to these various kinds of evidence[75]. The ontological notion implicit in these evidentiary rules is that a simple distinction can be posited between that which is 'true' and that which is 'false,' and that some forms of knowledge or information are likely to be more reliable, or more 'truthful,' than others. According to the Gitxsan-Wet'suwet'en, their oral histories are highly reliable and accurate because through a process of public recitation, especially in the feast hall, they are continually subjected to a process of public scrutiny and correction. While oral historical evidence is considered valid and reliable in the aboriginal cultural perspective, however, in the context of the Canadian legal system, it is quite a different story. In *Delgamuukw*, the fact that it was 'oral' historical evidence that was adduced immediately meant that this evidence was placed in a suspect light, and was subjected to considerable analysis and scrutiny. It did not accord with the Anglo-Canadian legal system's assumptions, values and rules as to

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[75]For a discussion of the law of evidence in the Canadian legal system, see Ronald Delisle's *Evidence: Principles and Problems*. Toronto: The Carswell Company Ltd., 1984.

what was considered reliable and trustworthy evidence. And in terms of evidence, "trustworthiness" or "reliability" is the ultimate consideration.

It is assumed that because oral historical evidence is passed from person to person, and all the while retained only in memory, it is prone to distortion or error, and will inevitably be more subjective than written historical evidence. These concerns are deemed to be magnified in a litigious context where the plaintiffs stand to gain a great deal because there is no way for the objectivity or reliability of their oral evidentiary claims to be verified. However, it is generally assumed that written historical evidence such as documents or statistics, because it contains knowledge preserved on paper, information that is considered concrete and quantifiable, is more accurate, and hence 'truthful.' As a consequence of these considerations, then, in litigation written historical evidence tends to be privileged over that which is oral in nature. In fact, in keeping with this series of value judgments, oral historical evidence, deemed 'hearsay,' has traditionally not been admissible as evidence in a court of law[76].

In view of the light in which oral evidence is perceived and addressed in the Anglo-Canadian legal tradition and system, then, Chief Justice McEachern was faced with a considerable task in being compelled to determine the admissibility and resultant weight of the oral historical evidence upon which the plaintiffs' case was so heavily reliant. He was clearly somewhat confused, perplexed and disconcerted by

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[76]In certain circumstances the law will permit what is called the reputation exception to the hearsay rule. In fact, the only oral historical evidence admitted by McEachern in the *Delgamuukw* case was 'reputation' evidence. The highly restrictive nature of what is considered admissible evidence under this exception, however, highlights the degree of caution with which the entire category of oral evidence is approached.

the Gitxsan-Wet'suwet'en's oral historical evidence, and didn't know how to approach it or what to do with it. Singing, dancing and story-telling have a very different cultural value in the world view of the dominant society, and as a consequence, their role, place or value as evidence is not recognized by the Anglo-Canadian legal system or tradition, nor are they reflected in the rules of procedure and evidence that constitute it. In this sense, McEachern's obvious discomfort with Mary MacKenzie's insistence that she sing a song in court was not at all suprising (Monet and Skanu'u, pp. 38-43). While McEachern's critics charge that this is an obvious example of his ethnocentrism or racism, it does not appear that McEachern was being intentionally rude or unaccommodating. McKenzie's desire to sing a song as evidence simply did not fit with his conceptualization of what is constituted by 'evidence.'

As Terry Glavin rightly contends, in *Delgamuukw* McEachern was faced with "a case that demanded an unprecedented departure from normal rules of evidence (Glavin, 1990a, p. 6)." After a great deal of reflection and delay, McEachern eventually decided that the aboriginal oral historical evidence could be admitted; it was a decision that entailed bending the hearsay rule to a degree "almost unknown to our law[77]." In reality, however, McEachern had little choice but to admit the evidence, since it would be very difficult for the Gitxsan-Wet'suwet'en to effectively prove their case in another way. In fact, as Rudy Haugeneder argues, a reporter for the First Nations publication *Kahtou*,

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[77]Terry Glavin, "Trial probed centuries, cosmos: Marathon land-claim suit included shamanic rituals, scientific testimony," *Vancouver Sun*, March 8, 1991, p.A12.

> Usually, witnesses in a civil case have first-hand knowledge of an event. The witnesses in this court case do not have first-hand knowledge. Instead, they possess knowledge, reputed to be thousands of years old, passed down to them from their ancestors. Therefore, the judge is unable to subpoena the originators of the adaawx [the Gitxsan's sacred oral evidence], who are said to have been deceased for centuries....[78]

After admitting the aboriginal oral historical evidence, however, McEachern subsequently did not accord it a weight equal to that customarily given more traditional forms of evidence such as written historical evidence; he perceived in it a number of inconsistencies, errors and inconceivabilities that he argued compelled him to be wary. As noted in the preceeding chapter, McEachern's evidentiary analysis and rulings provoked a reaction of intense fury from the First Nations and their various supporters, both native and non-native. The Gitxsan and Wet'suwet'en in particular, felt that their sacred knowledge and histories were not only misunderstood by an alien system, but were also devalued and rejected by a process of scrutiny, weighing and exclusion that they themselves did not adequately understand. In many instances they blamed McEachern personally for what they alleged was the cultural insensitivity with which he treated the Gitxsan-Wet'suwet'en plaintiffs, and contended that he was ethnocentric, if not down-right racist, in his approach to both them and their evidentiary offerings. To the First Nations and their supporters, McEachern's decision was perceived to be an intensely personal insult to the Gitxsan and Wet'suwet'en and their unique culture and way of life.

Such a reaction on the part of McEachern's critics, however, arguably demonstrates a fundamental miscomprehension and misconstruction on their part of

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[78]Rudy Haugeneder, "*Delgamuukw* Decision Analyzed," *Kahtou*, Vol. 9, No. 9, October 1991, pp. 1, 2.

what litigation is all about, and a manifest misunderstanding of what the legal system is able to offer, or what a litigant is capable of achieving, in terms of cultural recognition or affirmation. Because litigation is based upon certain hard and fast rules of law, a mere judge is not at liberty to alter the rules of evidence or procedure at his will or pleasure. As James L. Gibson argues in an article in the *Law and Society Review*, "judges are expected to be objective, 'insulated,' non-partisan, and apolitical. Their job is to resolve disputes on the basis of internally generated and highly constrained legal criteria...."[79] McEachern offers a similar explanation, protesting that as a judge, he is compelled to act according to the dictates of the legal system, including its rules of evidence. He contends that "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 (McEachern, p. 49)," and expresses his opinion that "the plaintiffs understand that although the aboriginal laws which they recognize could be relevant on some issues, I must decide this case only according to what they call 'the white man's law (McEachern, p. 2)[80].'" As a representative of the legal system of the dominant society, McEachern is obligated to work within the framework of its strict requirements, dictates and constraints, a framework which is inextricably embued with the cultural perspective and world view of the dominant society. In this sense, there was never any question as to whether McEachern would actually admit the Gitxsan and Wet'suwet'en's oral historical

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[79]James L. Gibson, "Environmental Constraints on the Behaviour of Judges: A Representational Model of Judicial Decision Making," *Law and Society Review*, Vol. 14, No. 2, Winter 1980, p. 346.

[80]While McEachern's characterization of the law as "the white man's law" may appear impolitic, he was apparently reiterating a characterization of the law employed by the plaintiffs (Slattery in Cassidy, p. 120).

evidence as equivalent in weight to more customary forms of evidence which accord with the cultural values and assumptions of the dominant society. He was simply incapable of doing so in a truly fundamental way, given how the legal system and its rules of procedure and evidence are permeated with the world view, the values, assumptions, concepts, and priorities of the dominant society and its culture. Contrary to what his critics suggest, in short, McEachern could only deliver so much.

In fact, a closer analysis of the contentious oral historical evidence issue indicates that even if McEachern had attempted to admit traditional oral evidence as equivalent in weight to written evidence, he could not have gone far enough to satisfy the demands and aspirations of the Gitxsan-Wet'suwet'en and their supporters. He simply could not accord traditional native oral evidence equivalent weight to written evidence in the context of the Canadian legal system without radically reconstituting the very values, assumptions and intentions upon which the entire Anglo-Canadian legal tradition, system and law are predicated. In doing so, he would be essentially creating a significantly different Canadian legal system, predicated upon significantly different values and assumptions than those commonplace in mainstream Canadian society, something which is clearly beyond his mandate or jurisdiction to do.

Moreover, such a superficial alteration of the rules of evidence would not be sufficient to account for the fact that there would nevertheless exist a series of even more fundamental structural obstacles impeding the attainment of the goals and aspirations of the Gitxsan and Wet'suwet'en, structural obstacles pertaining to the radically different cultural values and assumptions of the different parties to the action. In fact, it is clear upon closer examination that the world view of the First Nations, and consequently, the values, assumptions, and aspirations that the Gitxsan and Wet'suwet'en were determined to bring to the Supreme Court of British

Columbia in their litigation, are in many cases diametrically different from the values, assumptions and agendas of the dominant culture; the values, assumptions and agendas that inform the Anglo-Canadian law, legal system and legal tradition generally. When we consider that the very nature of all knowledge, existence, and consequently, the law, is culturally constituted, the absolutely essential nature of the problems facing the Gitxsan and Wet'suwet'en in their litigation ought not to be surprising. Despite generations of cultural contact, the expectations and dictates of the Canadian legal system arguably still have very little congruence with the cultural values that many native peoples have been socialized to espouse; in many cases, the values of the dominant society and its institutions remain as alien as their practices[81].

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[81]"'We are different, and don't underestimate the differences we have,' Leroy Littlebear, an Alberta lawyer and native studies professor,'" told a Whitehorse conference in September 1991 (as quoted Timothy Appleby, "Justice system for natives a 'copout:' Tantamount to conceding that they can't be served in mainstream, Campbell says," *Globe and Mail*, January 31, 1992, p.A4).

Drawing a simple distinction between native and non-native is clearly problematic. To do so emphasizes difference at the expense of similarities, when of course, similarities are much greater than differences. It also serves to obscure differences between First Nations, or between those comprising the dominant society, and implies a homogeneity which is non-existent. An overly facile distinction between native and non-native is also rife with political implications; from the beginning of contact constructing the aboriginal peoples in terms of exaggerated differences was employed as a justification for marginalization. In the contemporary era, an exaggeration of differences over similarities has become a central component of the First Nations socio-political strategy, and better serves their socio-cultural and political aspirations than an emphasis on common humanity would.

While pointing out the problems and implications of an over-emphasis or exaggeration of difference is necessary, this is not to suggest that natives and non-natives are completely without distinction; significant differences in values, assumptions, world views and so forth continue to exist. Consequently, it is maintained that the dichotomy between native and non-native world views which is drawn in the following portion of the discussion, although subject to these qualifications, continues to be valid. Nevertheless, it is important to recognize that to over-emphasize, and arguably therefore even to construct, difference at the expense of

A culture's epistemology is intimately bound up with its ontological perspective, and in *Delgamuukw*, both sides were coming from significantly different conceptualizations of the nature of both existence and knowledge. In a case where the crux of a conflict essentially involves a clash of two distinct cultures, it is virtually inevitable that such a seemingly straightforward enterprise as marshalling, admitting, and weighing evidence will quickly become exceedingly complex and controversial. Ways of seeing, understanding and knowing are all culturally constructed and mediated, and therefore are all essentially contested. In the context of attempts to resolve cross-cultural disputes, especially in terms of a highly structured process such as litigation, these conflicts will inevitably be brought into heightened relief.

In this sense, perhaps the most serious obstacle the Gitxsan and Wet'suwet'en encountered in their litigation was the fact that there existed little or no agreement between the two parties to the action over the nature of reality, and consequently, over the issue of what exactly ought to be taken to constitute a valid cultural representation of 'fact,' and thus 'evidence' or 'proof[82].' In other words, not only was there a conflict over the concrete issues put before the courts to resolve, there was an even more fundamental, and hence critical, conflict over the issue of what ought to be seen as the valid criteria for resolving these conflicts in the first place. The very structure and process of litigation as it is currently constituted, as well as the very values and assumptions it embodies, were all under challenge from the

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similiarities, serves to obscure the common ground upon which all humanity walks, and makes the task of achieving a cross-cultural accommodation all that much more difficult, if it is even possible.

[82]See Stan Persky, "Going with the flow of native rights," *Vancouver Sun*, November 3, 1990, p.D2.

Gitxsan and Wet'suwet'en plaintiffs.

Euro-Canadian society generally espouses an ontology of dualism, a positivist epistemology, and a linear conception of time[83]. This means that the world, as well as the place of people and things in it, tends to be conceptualized in a progressive, atomistic and dichotomous manner. The dominant discourse embraces individualism, competition, and emphasizes rights, namely individual rights, over responsibilities. The assumption is that a clear distinction can be drawn between 'fact' and 'fiction,' between 'truth' and 'myth,' between the 'tangible' and the 'intangible,' or between

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[83]It must be noted, however, that such dichotomous distinctions are not immune from criticism; as categories of analysis, they are often criticized as oversimplistic and problematic. For a discussion of the problematic nature of drawing a simple distinction between a Native American cyclical conception of time, for instance, and an European linear conceptualization, see Thomas McElwain, "Seneca Iroquois Concepts of Time," *The Canadian Journal of Native Studies*, Vol. VII, No. 2, 1987, pp. 267-277. Critics contend that dichotomies are in large measure artificial constructs which impose a false order and symmetry on what is by nature shapeless and shifting, an order and symmetry which is then deemed to represent the true nature of reality. Despite these analytical problems and weaknesses, however, in certain contexts dichotomous concepts nevertheless provide a valid and useful approach to comparative analysis. One must bear in mind, however, that as a form of analysis, dichotomies serve to emphasize differences over similarities, and in a sense, therefore, construct a pseudo-reality.

It is also important to recognize the difficulty of accurately assessing how culturally distinct a contemporary First Nations community is from the dominant society. Without undertaking a considerable amount of participant observation, something that was beyond the scope of this thesis, it is difficult to determine whether assertions of cultural difference, and claims of a continuing exercise of traditional structures and practices in the contemporary era are more theoretical than practical, or an assertion informed more by aspirations of establishing lost practices, or political strategizing, than actual reality. It is quite probable, however, that the leadership of aboriginal communities, being more accustomed to operating within the values and structures of the majority society and culture, are less likely to demonstrate obvious characteristics of cultural difference, than community members, and in particular, elders.

the 'material' and the 'immaterial' or 'spiritual.' It is assumed that the 'facts' upon which truth is grounded are discrete, concrete, and quantifiable, and that they are best discovered and assessed by means of a linear, logical and orderly process of progressive examination; it is upon these critically important ontological and epistemological assumptions that the Canadian legal system, and more importantly, its rules of evidence, are predicated[84].

The ontological and epistemological stances which characterize traditional native cultures, however, are significantly different. Although there exist many tribal variations, the traditional aboriginal world view generally embraces an ontology of holism[85], an epistemology which is intuitive and subjectivist, and a cyclical conception of time[86]. This means that the world, and the place and role of people

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[84]According to the dictates of the Canadian legal system, and in particular, its rules of evidence, an argument is accepted purely on the basis of proof of fact. Consequently, where a culture and way of life is on trial, as was clearly the way the Gitxsan and Wet'suwet'en both framed and perceived their legal action, such a distinct culture and world view will again be recognized, accepted and respected according to these same evidentiary criteria; a ruling is ostensibly made purely in accordance with an argument's demonstrated consistency and reliance on fact. Given the nature of what the Gitxsan and Wet'suwet'en were seeking from the courts, it is probably not surprising that the plaintiffs and their supporters found this characteristic of the legal system very difficult to accept.

[85]As Patrick Kelly contends in an article in *B.C. Studies*,

> the heritage of First Nations people is popularly promoted and understood to include traditions, values and beliefs that holistically link the people interdependently to the world around them....[H]olistic values...underlie traditional First Nations culture and language. (Patrick Kelly, "The Value of First Nations Languages," *B.C. Studies*, No. 89, Spring 1991, p. 141.

[86]"'We live in linear time,' [Terry] Glavin contends, 'but Indians really don't--I mean they do, but they also have another view about it. It's all about transformation, the way the tides go in and out. They understand the landscape; they have another dimension (Persky, p. D2).'"

and things in it, tends to be conceptualized in an inclusive and interdependent manner, and an emphasis is placed upon mutual collective obligation, responsibility, or reciprocity instead of upon a discourse of individual rights. Consequently, group cooperation rather than individual competition is traditionally privileged. The notion that a clear distinction can be drawn between 'truth' and 'myth' is rejected. Instead, it is thought that truth can be found in all things; that everything, whether material or ethereal, is embued with potential meaning and significance. In fact, the lines between the two are so blurred that what might be called 'myth' in the perspective of

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In *Delgamuukw*, Glavin argues, the Gitxsan and Wet'suwet'en "talked about cyclical time rather than linear time, and a continuum between animals, humans, the land and the spirits that for the Gitxsan is codified as law in something called the ada'ox, and for the Wet'suwet'en, the kungax (Glavin, 1990a, p. 25)." "Whatever happened in the court case," Glavin argues on a somewhat more romantic vein,

> the constantly circling whirlpool of Gitxsan and Wet'suwet'en names would carry on. Life for some people in the Gitxsan and Wet'suwet'en territories would continue to proceed in the western, linear fashion. But for the Gitxsan and Wet'suwet'en, time would also continue to move in cycles. Maybe even long after people had forgotten what the Supreme Court of Canada was, the people in these mountains would know Delgam Uukw, Mas Gak, Wii Seeks, 'Noola, Sgenna, Yagosip, Wii Muugalsxw, Haa'txw, and the others (Glavin, 1990a, p. 191).

The native conception of time also seems to be much more oriented toward the long term than our conceptualization which tends to be a short term conceptualization, and thus more fixated upon the present. The significant gulf between traditional native orientations to time as compared to that of the dominant society, is usefully illustrated in an anecdote one of the lawyers for the Gitxsan-Wet'suwet'en, Louise Mandell, recounts. "Several months ago," she recalls, "when I was talking to an Indian elder about the evidence he was going to give in a hunting trial, I became concerned that court might be starting momentarily. I asked whether anyone knew the time and the old man replied: 'It's almost summer (Louise Mandell, "Native Culture on Trial," in *Equality and Judicial Neutrality*, Sheilah L. Martin and Kathleen E. Mahoney, editors (Toronto: The Carswell Company Ltd., 1987), p. 358).'"

the dominant society, according to traditional native belief, is seen to contain as much 'fact' and 'truth' as any occurence or event which can be concretely 'proven.' Indeed, in the traditional native perspective, something need not be concrete and quantifiable to be considered 'true[87].' The insistent need of the dominant culture to make distinctions, and to fragment and to categorize, is simply alien to the First Nations' traditionally lateral and more holistic ways of seeing, understanding, and knowing their world and their place in it.

Given the significant ontological and epistemological differences between traditional aboriginal culture and the culture of the dominant society, then, it is not suprising that in entering the courts, the Gitxsan and Wet'suwet'en discovered that the problems they faced in attempting to adduce their aboriginal oral historical evidence was only one of many challenges. It quickly became apparent that a number of the procedural and structural characteristics of the Canadian legal system were not only culturally foreign to them, and therefore frustrating, intimidating and alienating, but also constituted a significant impediment to their attempts to resolve their culturally-based grievances through litigation. They soon discovered that many aspects of the litigation process made the achievement of their culturally-determined and oriented

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[87]In articles entitled "Judicial Attitudes to Aboriginal Resource Rights and Title," and "Footsteps Along the Road: Indian Land Claims and Access to Natural Resources," Nigel Bankes and Murray W. Wagner neatly sum up these differences in the distinction they draw between the "hunter-gatherer" cultural ethos demonstrated by traditional aboriginal society, and the "industrial-capitalist" cultural ethos that is generally shared by the dominant society. This distinction succinctly captures the differences of cultural perspective I have been attempting to outline (Nigel Bankes, "Judicial Attitudes to Aboriginal Resource Rights and Title," *Resources: The Newsletter of the Canadian Institute of Resources Law*, No. 13, December 1985, pp. 1-4; Murray W. Wagner, "Footsteps Along the Road: Indian Land Claims and Access to Natural Resources," *Alternatives*, Vol. 18, No. 2, 1991, pp. 23-27).

aspirations quite a difficult feat.

iii. Adversarial Litigation and the Variable of Culture:

As noted above, litigation is an highly structured and formal process, and for those who are unfamiliar with its rules, procedures and terminology, the entire exercise can appear extremely restrictive, if not incomprehensible, and can result in feelings of considerable frustration. If this is the experience of many individuals of the dominant culture, as is, in fact, the case, then these feelings and experiences are bound to be substantially magnified amongst those who share a significantly different cultural orientation. In *Delgamuukw*, the Gitxsan-Wet'suwet'en's lack of familiarity with legal procedure, and consequently, their frustration with the experience, was also apparent in relation to the adversarial structure of the litigation process.

The adversarial model of litigation has been deliberately adopted in the Anglo-Canadian legal tradition because it is believed that this approach represents the best method for ascertaining the 'truth.' Each side presents their argument and evidence, and then is given the opportunity to question and challenge the facts and interpretation presented by the opposing side. The fact that one's evidence and argument will be subjected to close scrutiny by one's opponent compels each side to marshall all possible relevant information, and present the strongest case possible. It is out of this clash of truths, and the contest for supremacy, that the 'truth' is deemed to be established, in turn enabling the presiding judge to make the best possible ruling[88].

[88]The other main form of legal adjudication is the inquisitorial system. This approach involves a fact-finder who arrives at the 'truth' by investigating and researching the dispute at hand, and then offers a decision. This is the form of adjudication followed in Russia, and a number of other eastern European countries.

Predicated upon the concomitant values of individual rights and equality, the adversarial system is founded upon the assumption that everyone is equal before the law, and that except in extenuating circumstances, no one ought to be treated any differently than anyone else in the process of litigation[89]. Whereas in the British Commonwealth the adversarial form of adjudication is considered to be the highest form of legal adjudication yet to evolve, in a cross-cultural context, the adversarial system quickly becomes problematic.

The potential for adversarial adjudication to be culturally problematic is particularly apparent in aboriginal rights cases such as *Delgamuukw*. Based upon what is called a conflict or competitive model of dispute resolution, the adversarial approach is not at all compatible with traditional native attitudes towards conflict, nor with their traditionally favoured methods of dispute resolution[90]. For First Nations, adversarial litigation tends to be perceived as an extremely hostile, humiliating, intimidating, disconcerting and even insulting, process.

In general terms, the traditional native approach to dispute resolution has tended to be based upon a cooperative or consensus-based approach to conflict resolution[91]. Everyone was given a chance to speak for as long as they wished, and

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[89]Two such extenuating circumstances may be cases involving children or sexual assault cases.

[90]Bradford W. Morse, "Native Peoples and Legal Services in Canada," *McGill Law Journal*, Vol. 22, 1976, p. 516.

[91]John E. Kersell, "A New Approach to Native Rights: The federal government has recently signed agreements in principle on the issue of aboriginal rights with the natives of the Yukon and Northwest Territories. Now is the time to look one step further, at the case for accepting native communities on their own terms as the political base for future development," *Policy Options*, January/February 1989, p.7.

Throughout his analysis, Kersell draws a clear distinction between "communal consensus" and "adversarial individualism." He contends that native culture is

the process of dialogue and discussion continued until a resolution was reached that all could live with, because all had contributed to it and had agreed with it[92]; it was not a strict, formal, logical and linear process culminating in a fiat or ruling, but a cyclical and lateral one where the agreement of all was the ultimate goal, and not the speed, efficiency or precision of the process. Although the input of anyone in the

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"harmony" and consensus-oriented, while the "adversarial individualism" of the dominant society and culture is oriented towards "conflict and dominance by the strong rather than by the wise (Kersell, p.7)." According to Kersell:

> The original citizens of this hemisphere, despite centuries of subjection to our technically triumphant culture, still cling to very different traditions....The ancient Chinese, Indians, Africans and Americans, despite vast cultural and other differences, seem to have shared a broadly similar pattern of communal consensus-seeking. When one looks below the veneer superimposed by European political domination, this pattern can still be detected, especially at the rudimentary level of the primary group/extended family/village (Kersell, p.7).

Hakon Kierulf, makes similar observations about the Sami, the aboriginal peoples of Norway. He contends that:

> the fact that one is bound by the decisons of others are features which are not suited to the mentality of the Sami. When there exist different opinions about how to tackle a common problem, it is the Sami tradition to let everybody have their say. The discussion either leads to agreement or to somebody giving way. Nobody is bound by the decision, but must take the consequences of not following it. The old siida system did not permit disagreement and binding decisions. The principle of consensus was a central feature (Hakon Kierulf, "Linguistic and Cultural Differences Encountered by Indigenous People in Court," *Canadian Native Law Reporter*, 1990, Vol. 2, p. 6).

[92]In relating the events leading up to one of the roadblocks organized by the Gitxsan-Wet'suwet'en in their traditional territories, Terry Glavin notes the nature of their decision making process. He recalls that "it took them a while to make up their minds, but when they did, the decision was by consensus, as decisions usually are when the Gitksan and Wet'suwet'en are considering such matters (Glavin, 1990a, p. 31)."

dialogue was encouraged, however, because of their advanced age and accumulated wisdom, the contribution of the elders was particularly valued and respected, as was that of the hereditary chiefs or any others in a position of higher socio-cultural status.

With a cultural orientation based more in cooperation and consensus than in conflict and competition, the Gitxsan-Wet'suwet'en, like other First Nations, were bound to find the adversarial nature of the Canadian legal system extremely intimidating, humiliating and even insulting. While even many of those of the dominant culture find adversarial litigation disconcerting, for native people, many of whom for cultural reasons tend to act deferentially in the face of authority, this is especially the case. When they are subjected to a constant barrage of questions, and are quite literally drilled and interrogated, as is the custom in an adversarial system, many native peoples tend to think that their honesty is being questioned, that they are being ridiculed or shamed, and they tend to clam up[93]. Not surprisingly, the natural reaction is to become more quiet and reserved and, out of fear or discomfort, to refrain from disclosing valuable information which might otherwise have been shared to the benefit of their case. Others get frustrated and angry, and similarly, may refuse to share any further information. Stanley Williams, for instance, a Gitxsan elder who gave evidence in *Delgamuukw*, became frustrated with being asked either inane questions, or the same question repeatedly. Frustrated with the process of cross-examination, he muttered that if the lawyer kept on asking him questions like that, he was going to put him in a mental institution (Monet and Skanu'u, pp. 100, 102). Another elder, repeatedly questioned and requestioned about her territorial

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[93]See Rae Corelli with Dale Eisler in Regina, John Howse in Calgary and correspondents' reports, "Crime and Punishment, Native-Style," *Maclean's*, July 14, 1986, pp.21-27.

boundaries, responded that "'we've been up and down that hill a lot of times now (as quoted by Wilson, in Cassidy, p. 201).'"

To maintain the maximum credibility of one's evidence and argument with the presiding judge under an adversarially-structured barrage of questions and counter-questions, moreover, requires certain kinds of behaviour and responses which may not be commonplace amongst those originating from more traditionally-oriented First Nations communities, especially among the elderly. The adversarial process of questioning and challenging in the Canadian courtroom, for instance, demands forthright and consistent answers, and direct behaviours; for a witness to back down, or alter their responses in the face of attack, or to otherwise fail to respond in an effective or appropriate manner, can be no less than fatal to the credibility of his or her position.

In the courtroom, then, the cultural meaning with which certain behaviours are vested becomes critically important. According to the native cultural perspective, for instance, avoiding direct or sustained eye contact is perceived to be a demonstration of respect[94], and is thus considered proper social behaviour, especially in such a formal and dignified forum as a court room. In the courtroom, however, such behaviour can give the impression of a lack of respect, although the exact opposite is, in fact, intended. According to the common-sense wisdom and assumptions of the

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[94]As Keith Howard argues, "to look directly into the eyes of another would be intrusive and a sign of disrespect." (Keith Howard, "Trying to cross the chasm between cultures," *The United Church Observer*, Vol. 54, No. 5, November 1990, p.17).

Hereditary Chief 'Noola shares a similar cultural insight with Terry Glavin. He argues that "'We don't look our elders in the face and some white people don't understand, when we're showing respect. They think we're being unmannerly, but we're showing respect ('Noola, as quoted in Glavin, 1990a, p. 69).'"

majority culture upon which the adversarial process of litigation is predicated, in fact, such behaviour may well be taken to indicate a lack of respect, reliability, or perhaps even trustworthiness on the part of the witness; cultural wisdom dictates that a person who does not look you straight in the eye is quite probably someone with something to hide, and thus, may not be entirely trustworthy. It is clear that these different cultural values and assumptions, if not recognized, considered and addressed, could well have the effect of straining relations between the presiding judge and the litigant to the detriment of his or her case.

Another aspect of the adversarial system that proved disconcerting and problematic for the Gitxsan-Wet'suwet'en in their *Delgamuukw* case was the individual rights and equality before the law upon which the process is predicated; notions that are considered no less than sacrosanct in contemporary social self-understanding. Everyone, despite individual variations in age, gender, sexual orientation, race, wealth, social status or religious orientation is deemed to hold the right to be treated in a consistent fashion by the legal system. Each individual to come before the courts is to have his or her case or grievance evaluated and decided according to the very same evidentiary and procedural rules and legal principles and precedents. Contemporary Canadian society is extremely proud of this legal and social commitment to individual rights and equality, and many consider these values to be the embodiment of supreme fairness and justice. In a cross-cultural context, however, once again the theory and practice of such values becomes problematic.

The concept of equality, for instance, and the social leveling that it entails in terms of socio-economic status is not only foreign, but also, antagonistic to the cultural perspective of the Gitxsan and Wet'suwet'en. Although influenced by the democratic values of the dominant culture and society, and its valuing of individual

rights and equality, Gitxsan and Wet'suwet'en society and culture nevertheless continues to be somewhat more hierarchical and status-based than egalitarian in nature. Those holding hereditary names, for instance, a privilege and honour embued with extreme symbolic and practical importance in Gitxsan and Wet'suwet'en culture, or those who are advanced in years, and thus considered to be storehouses of wisdom and knowledge, are all expected to be accorded far greater respect than those who are mere commoners or youthful in age[95]. In the context of Gitxsan and Wet'suwet'en culture, therefore, the individual equality of witnesses before the law, as well as the values and assumptions these practices embody, are not only utterly foreign, but also culturally insulting.

In fact, in their *Delgamuukw* action, this divergence of cultural assumptions and expectations resulted in the Gitxsan and Wet'suwet'en feeling that the Canadian legal system had utterly failed to recognize, respect and accommodate their values. They felt that the courts had shamed and insulted their elders and chiefs in particular, by not showing them the respect due to someone of their advanced age, experience, wisdom and status. They felt deeply insulted and humiliated by a system that would not countenance the notion of intentionally showing one witness more respect than another, or according more weight to the stories and other forms of oral testimony that as elders or the holders of ancient and exalted chiefly names they were eminently qualified to relate to the court, and did so generously. In this sense, rather than viewing the notion of equality before the law as the height of democratic sensibility as

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[95]For a fascinating discussion of the nature of traditional and contemporary Gitxsan and Wet'suwet'en culture and society, and how both the traditional and contemporary facets of existence meld in the present through the continuing role and importance of elders and hereditary chiefs, see Terry Glavin's *A Death Feast in Dimlahamid*.

the dominant society does, the Gitxsan and Wet'suwet'en felt that they had been slighted, humiliated, and shamed by the treatment given their elders and hereditary chiefs in that they were examined and cross-examined in the same vigorous fashion as with any other witness[96].

The fact that the Canadian legal system is also predicated upon the notion of individual rights also caused problems for the Gitxsan and Wet'suwet'en, in that their cultural orientation tends to be more collectivist than individualistic in nature, and tends to privilege responsibility to the community over individual rights. In fact, in many traditional native cultures, responsibilities are as important as rights, and cultural mores tend to emphasize the notion of an individual's responsibility and reciprocal obligation to the whole of society, rather than his or her rights as an individual. While many aspects of First Nations culture have been impacted,

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[96]For elaboration, see Wilson in Cassidy, pp. 199-205, and the excerpts of court testimony and commentaries in chapters 2 and 3 of Monet and Skanu'u's *Colonialism on Trial*.

In truth, of course, equality before the law is clearly more of an ideal than a reality. Courts claim to be impartial and fair, and while this is difficult at the best of times, even in cases involving disputes or grievances between persons oriented toward the dominant culture, in instances where disputes of a cross-cultural nature are at question, such as with aboriginal rights claims, these difficulties are magnified significantly.

In fact, because it is neither their law, nor expressive of their own cultural assumptions and values, on one level it will never be possible for natives to be equal under the law; they will never be able to understand it or authentically express themselves in it in the same manner that people oriented toward the dominant culture will; and it will never embody their values and interests to the same degree. In short, it will never have the same impact on them as it will on persons who are a product of the same cultural perspective as it expresses. But because the legal system employs a discourse of fairness, justice and equality, the system as a whole effectively serves to conceal inequalities and differences of treatment, while at the same time recognizing the values it claims to embody only within the perameters of certain pre-established assumptions, values and ideals.

influenced and altered by contact with the values of the dominant culture, many aboriginal peoples nevertheless still remain much more community and communally oriented that is the case with the dominant society[97]. This is certainly the case with the Gitxsan and Wet'suwet'en[98].

Attempting to use the courts as a vehicle to assert and affirm their collective rights as culturally distinct peoples, and to in turn have them accommodated by the courts and the wider society, was bound to prove frustrating for the Gitxsan and Wet'suwet'en. It is not surprising, then, that the Gitxsan-Wet'suwet'en contended that McEachern had failed to adequately comprehend, recognize and value the complex web of communal responsibilites and relationships, based in the House system, that structured their society; a response that was not only culturally insulting, they argued, but also had serious implications for the ultimate success or failure of their litigation.

iv. Additional Cross-Cultural Obstacles and Frustrations Arising in *Delgamuukw v. The Queen:*

In addition to the adversarial structure of the Canadian legal system, there

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[97]"'In our culture, the rights of the group must come ahead of the individual (Pearl Keenan, an elder of the Yukon's Teslin Tlingit band, as quoted in Appleby, p. A4).'"

[98]According to Keith Howard, a United Church Minister who works with the Gitxsan and Wet'suwet'en, Jim Angus, a Gitxsan hereditary chief,

> lives within a complex web of relationships: family and friends; the larger nation of the Gitxsan peoples; the land entrusted to him as a hereditary chief; and the Creator and Sustainer of the land. The prime moral principle is to fulfil the obligations of all these relationships....I do not think I will ever fully appreciate how viewing the world as a series of relationships with kin alters priorities and responsibilities (Howard, 1990, p. 17).

were a number of other structural and procedural characteristics of litigation that served to erect cultural obstacles in the way of the Gitxsan and Wet'suwet'en's attempt to establish their case in the courts. A common problem that First Nations litigants face in constructing their legal arguments, for example, is the fact that concepts may have very different meanings in different cultures, or a critically important concept in one culture may be completely lacking in another culture. The traditional native conceptualization of property, for instance, is very different from property as defined and embodied within the Anglo-Canadian legal tradition. If a First Nations community wishes to pursue their land claim in the courts, however, they are faced with one of two equally disagreeable options: they can adopt the assumptions, concepts and terminology of the dominant society and its legal tradition, and thus place before the courts an argument that may be less than culturally authentic, or as the Gitxsan and Wet'suwet'en did, they can present an argument that is consistent with their agenda and aspirations and makes sense to them, regardless of whether it is consistent with the concepts and precedents of the Canadian legal system. In either case, their argument is disempowered.

Many Gitxsan and Wet'suwet'en witnesses also had difficulty with the modes of analysis and presentation employed in the Canadian legal system. Judges and lawyers have been trained to utilize a rigorous mode of logical and linear analysis, and the legal system is predicated upon this style of analysis and presentation (Turkstra, pp. 7-8). In fact, in reflection of the values of the dominant society, logic, efficiency and precision are privileged in all aspects of the Canadian legal system[99].

These values are culturally foreign to the First Nations, however, as is the

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[99]Note, for instance, the axiom: 'Justice delayed is justice denied.'

style of analysis and presentation that they engender. Aboriginal peoples traditionally employ a more intuitive, lateral mode of analysis, and this is, in turn, reflected in their style of speech. Elders are particularly unaccustomed to a linear mode of analysis, and consequently, tend to not be proficient in recounting events and experiences in a precise and progressive fashion.

Moreover, in the native cultural context generally, logic, precision and efficiency are not privileged in the same manner as they are in the dominant society and its legal system. In fact, native society operates in a much less time-conscious fashion than is characteristic of the dominant society and culture. It was not surprising that these two cultural orientations clashed in the courtroom, creating frustration for all involved. Justice McEachern, for instance, demonstrated impatience with the quantity and kinds of evidence the plaintiffs adduced, and the manner in which they adduced it. The Gitxsan-Wet'suwet'en, on the other hand, were primarily concerned with the context of the evidence and its broader, even symbolic, meaning. Whereas McEachern frequently wanted the witnesses to get to the point, the witnesses were often unaccustomed to speaking in a direct, pointed and concise fashion[100].

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[100]For examples of how these different cultural approaches to analysis and presentation clashed, see the excerpts of court testimonies contained within Monet and Skanu'u. There the difficulty of taking evidence from elders in particular is demonstrated. It can be a difficult and time-consuming undertaking to interview, examine or cross-examine them because their facility in using English and understanding the judicial process is usually limited, and their responses to questions may therefore tend to be either ambiguous, imprecise or unfocused.

Hakon Kierulf also offers interesting insights into the cultural obstacles the Sami aboriginal peoples face in the courts of Norway. He argues that:

> what is fact, that is to say, what the court bases its decision upon, is decided by the evidence produced in each case. The judges and counsel ask straightforward questions to which they expect precise answers concerning

The Gitxsan-Wet'suwet'en, moreover, also encountered difficulties as a consequence of the fact that court proceedings are conducted in English. As Christie Jefferson contends, for instance, "Many native people (and for that matter many other Canadians) are unable to understand the language of our legislation[101]. In fact, for many First Nations peoples, English is still their second language[102]. Consequently,

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> what happened, when it happened, and why it happened. Most people in society at large do not know about or disregard a distinctive feature of Sami culture, namely a certain dislike of answering direct questions. This aversion is often construed as obstinancy or deviousness and becomes apparent when questions are answered by counter-questions. It is even considered impolite by some Sami groups to give no for an answer....It should be obvious that such a state of affairs can be of decisive significance for the outcome of a case unless the judges and counsel are aware of the situation and respect what it implies, and act accordingly (Kierulf, p. 7).

[101]Christie Jefferson, "White Justice: Should native people respect Canadian law? *Perception*, March/April 1980, Vol. 3, No. 4, p. 24.

[102]Although outdated, some of the comments Morse makes about the language barrier between natives and the Anglo-Canadian legal system are still valid. He argues that:

> Many Native People still do not speak English at all or only with difficulty. One report estimates that over one third of the Native population of Ontario, north of Kenora, speak only Ojibway, Cree or Inuit dialects. This inevitably leads to confusion, misunderstanding, and fear of the judicial system and its officers. The shortage of competent interpreters is a severe problem facing the courts, the accused and the lawyers in pre-trial and trial communications. The fact that much of our law and administrative requirements do not translate conceptually into these native languages compounds the problem (Morse, 1976, p. 523).

While today no doubt fewer First Nations people speak an aboriginal language as their first or only language, among the elders, particularly in more northern or isolated areas, the numbers are probably still significant. Amongst the Tsilhqot'in in the Williams Lake area, for instance, English remains the second language of many individuals.

while an aboriginal person may speak English, he or she may nevertheless not be entirely proficient in his or her use of the language, nor feel confident using it. Lack of confidence with the language may become especially pronounced in a formal or stressful situation such as a courtroom. A witness may misconstrue a question, answer inappropriately, or due to a lack of facility in speaking English, many answer in such a way that does not do full justice to his or her case or argument.

The problems which result from this lack of proficiency with the English language, moreover, are exacerbated by the fact that concepts may not have the same meaning or connotations in English as in a native language. In fact, as Wendy Grant argues, native and non-native speakers of English often use the language differently, and may embue entirely different meanings to the very same words and phrases[103]. According to Bradford Morse:

> The Native People traditionally lived off the land and the sea and their language reflects this relationship by its emphasis on descriptive words rather than abstract ideas. This concrete approach to reality was, of course, also reflected in their approach to law. Law was concerned with right and wrong behaviour and compensating the victims of the latter. The lack of abstract legal concepts has resulted in difficulty in translating many of the terms and ideas of the judicial system into a Native language. There is no word meaning 'guilty' in Inuit and some Indian languages. Yet these languages are not simple, nor is the vocabularly limited. The traditional form of communication was by word of mouth as many tribal groupings had no written language. This emphasis on the oral word rather than the written one is still present today and leads to some difficulty in comprehending the complicated system of

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[103]These comments were made by Grant in an unpublished paper entitled *The New Beginning for Treaty Negotiations in British Columbia*, the keynote address delivered at a conference entitled *The New Treaty Negotiation Process in British Columbia*, held March 24, 1993, in Victoria, B.C. and sponsored by the Institute of Public Administration of Canada's Victoria Chapter.

> written laws and procedures by which the dominant society lives (Morse, 1976, pp. 511-512).

Even more problematically, some native elders do not speak English at all; a fact which constituted yet another fundamental cultural obstacle the Gitxsan-Wet'suwet'en faced in the process of litigating their culturally-based grievances. For many witnesses in *Delgamuukw*, a translator/interpreter was required[104]. Yet translation is not without serious problems in its own right.

Most obviously, the use of a translator/interpreter is cumbersome, and breaks the natural flow of giving evidence. Even more critically, however, translation unavoidably extricates statements from the cultural context which embues them with their proper meaning and significance. According to Patrick Kelly, for instance,

> interpersonal communication messages, both for sender and receiver, are influenced by cultural and knowledge reference points that exist within every person....Language is an important vehicle for cultural expression, for it is largely through language that unique cultural experience is shared. It is well known that some concepts do not translate easily from one language to another....One word or simple phrase in one language can actually mean a complex process in another. Attitudes and community relations are invariably

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[104]According to a Gitxsan-Wet'suwet'en Tribal Council News Release, the 77-year-old hereditary chief Dseeh, [Madeline Alfred] was the first witness in the *Delgamuukw* case to give evidence entirely in her native language. She gave "evidence entirely in Wet'suwet'en with the assistance of a trained, certified, interpreter/translator (Gitxsan-Wet'suwet'en Tribal Council News Release, "Chiefs Testify," *Kahtou*, Vol. 6, No. 2, February 1, 1988, p. 2)."

Terry Glavin recounts the experiences of another hereditary chief who gave some of his evidence in his native language. According to Glavin, Deeskw, a 66-year-old father of five, completed his description of his House's traditional territory "in the Gitksan language because he wanted to make sure he got it right, but also because to speak thoroughly and accurately about this countryside is impossible in English (Glavin, 1990a, p. 86).

> part of language problems. The cultural context of one language may not be easily understood when seen or heard from the perspective of another culture using a different language. Governing principles and philosophical approaches may be different. The challenge of working with language problems is multi-faceted (Kelly, pp. 141-142).

In short, it is virtually impossible to translate the fundamentally cultural context of language and its concepts, including the various distinct connotations, idioms and nuances that might serve to make translation entirely authentic. Consequently, translation invariably results in some measure of meaning being either lost or distorted, inevitably disempowering both the language and the argument it is employed to construct. This is especially true of the spiritual connotations that embue a great proportion of traditional native experience, and consequently, language, and yet are entirely foreign to the positivist tradition upon which much of the Anglo-Canadian legal tradition is constructed. As the Gitxsan-Wet'suwet'en discovered, in attempting to translate their sacred names and concepts into English, they were forced to take them out of their proper cultural context, a context which embued them with a rich symbolic meaning, a symbolism and power that simply cannot be captured in the concepts, assumptions, values and words of another culture's language.

It is not surprising, then, that in *Delgamuukw*, the Gitxsan-Wet'suwet'en were both insulted and frustrated by McEachern's comment that the use of two different names by witnesses, one a traditional native hereditary name, and one a contemporary "Canadian" name, confused him, and he couldn't understand why they didn't just use one name. The Gitxsan-Wet'suwet'en were frustrated and insulted that after repeated attempts to educate McEachern about their culture, he still could not recognize or appreciate the symbolic and cultural importance of their chiefs' hereditary names, something which in their perspective, was central to the power of their argument (See

cartoon in Monet and Skanu'u, p. 90)[105].

Finally, there were at least two additional characteristics of the Canadian legal system that no doubt further served to contribute to the culturally alienating and intimidating experience that litigation clearly proved to be for the Gitxsan and Wet'suwet'en. The first was the highly formal, structured and hierarchical layout of the courtroom, where the judge is at the front, removed from, and elevated up above all others by a raised desk. Celia Craig-Brown, a writer for *New Directions* magazine, recalls of her visit to the Gitxsan-Wet'suwet'en trial that Courtroom 53 "was, of course, a courtroom: the judge on high, the lawyers lined up like crows around him, the witness slightly raised to the judge's left, in isolation[106].

In a courtroom, moreover, a judge is a very imposing figure, sitting up at the front in an elevated position and dressed in a black robe. There are a number of reasons why judges wear black robes: the main reason is to efface the personality of the judge, and by implication, his or her personal opinions and characteristics, thus symbolizing the ostensible neutrality of the Canadian legal system. It is a symbolic reminder that judges are there as neutral representatives of the law, and not as the

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[105]In *A Death Feast in Dimlahamid*, Terry Glavin recounts the importance of hereditary names in Gitxsan and Wet'suwet'en culture and society, and gives the reader a window into how they continue to be transmitted through the generations even today. At one point, for instance, he describes how

> Helena Joseph was taking the name Waigyet, inheriting it from Elsie, and inheriting the rank, territories and privileges that go along with it. Helena's husband was Gisday Wa, the Wet'suwet'en leader Alfred Joseph, and with this high name in their family it would be a particularly powerful family now (Glavin, 1990a, p. 90).

[106]Celia Craig-Brown, "The Gitksan and Wet'suwet'en in Courtroom 53: A Long Way From Home," *New Directions*, September-October 1988, Vol. 4, No. 2, p. 19. Also see Turkstra, p.7.

holders of personal values, assumptions and opinions. As George F. Will contends:

> judges wear robes to efface personal attributes. Robes affirm the fact that judging, properly pursued, requires an austere self-denial -- literally, denial of self. Judges must ensure, by acts of will, that their personalities and politics are irrelevant to their decisions. True, to some irreducible extent, character is destiny even for judges. But the best judges stringently reduce the extent[107].

For First Nations such as the Gitxsan-Wet'suwet'en, however, the symbolism of a judge wearing a black robe may well be rather different. On the one hand, the black robe may appear dignified, perhaps symbolic of "the honour of the Crown" that is so important to the First Nations. On the other hand, however, a black robe is highly evocative of power. In a cross-cultural relationship informed by colonialism, then, the black-robed judge almost becomes a symbol of intimidation and cultural hegemony. For those First Nations witnesses who experienced abuse, intimidation and cultural ridicule in the residential school system, moreover, the black-robed figure of the judge may also be reminiscent of other powerful figures, such as a priest or a nun, and may therefore be doubly imposing and intimidating[108].

In short, then, while the intent of the strict structures and procedures of the Canadian legal system is to provide assurances to a litigant that "justice" is not

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[107]George F. Will, "How to Judge a Judge: Judicial confirmation hearings should not require moral exhibitionism about 'sensitivity,'" *Newsweek*, Vol. 118, No. 3, July 15, 1991, p. 64.

[108]According to Herman Turkstra, the depersonalization offered by the wearing of a robe clearly has a sinister side. "Costumes and rituals are generally useful," he argues, "when we start to function in cruel and inhumane ways. They help the participants to sleep after doing dastardly things (Turkstra, p. 8)."

arbitrary or driven by the vagaries of such variables as the personality of the presiding judge, or the personal attributes of the litigant, for First Nations such as the Gitxsan-Wet'suwet'en who are the product of a different cultural orientation, the result is quite the opposite. The perception is that the system is fixed against them and their claims.

v. The Gitxsan-Wet'suwet'en's Disenchantment with Litigation: The Cross-Cultural Misunderstanding Continues:

Of course, the Gitxsan-Wet'suwet'en did not walk away from their legal action with totally empty pockets, having achieved not only a legally recognized fiduciary duty to use the vacant lands of the province for traditional aboriginal activities, but also, and even more critically, a concession on the part of the province to join negotiations, no less than a tremendous victory in its own right. Nevertheless, the Gitxsan-Wet'suwet'en were extremely disenchanted by McEachern's *Delgamuukw* ruling. As the rhetoric in the wake of the ruling demonstrated, in the Canadian court system they encountered a method of dispute resolution that they found to be profoundly hostile, alienating, humiliating, intimidating, frustrating and insulting. In fact, as their subsequent response to the case demonstrated, it is clear that the greatest degree of native dissatisfaction with McEachern's ruling was engendered by the court's approach to, and treatment of, their culture, and not by his findings per se, although obviously, they would also have liked to receive more from the chief justice than they did. As a result of the inflexible nature of the culturally constituted rules, regulations and procedures they encountered in their litigation, however, they contended that not only did the courts fail to grant them the cultural recognition, affirmation and accommodation they were seeking, but also, and more critically, it

failed to deliver them justice.

In fact, in the wake of *Delgamuukw* some First Nations supporters of the Gitxsan and Wet'suwet'en actually turned the case on its head, arguing that it was Canadian justice, and not the Gitxsan and Wet'suwet'en's land claim that was on trial. Tom Sampson, for instance, Chair of the First Nations of South Island Tribal Council, expressed such a position. According to Sampson:

> It is really not the Gitksan and Wet'suwet'en people that are on trial. It's Canada and it's the colonial system that is on trial. It is not only Canada and the colonial system, but it is the mechanisms used to arrive at decisions. The justice system is really on trial. Justice is supposed to be independent, impartial, and all of those things, but when you look at it, it doesn't look that way. It seems to me that the independence, if there is such a thing in justice, just wasn't there in this particular case, this particular issue. That's what I mean by saying that Canada is on trial -- the colonial system is on trial, and the Canadian justice system is on trial. Because surely as you look at what happened and what was spoken about, and the dialogue that went between the Gitksan and Wet'suwet'en people and the courts, it seems to me that the decision was made long before the court case came to an end[109].

Similar sentiments were expressed by George Watts, chair of the Nuu-chah-nulth Tribal Council, who argued that:

> it's you people who have got to clean up your show, not us. Quite frankly, the justice system and the legal community were found guilty in the Gitksan-Wet'suwet'en case. I suggest it is you who should be appealing if you think that this decision was wrong. You were found guilty. You never delivered justice to this country. You're guilty, not us[110].

While a great deal of these comments are for rhetorical affect, they are

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[109]Tom Sampson, "Canada on Trial," in Cassidy, p. 95.

[110]George Watts, "The Law and Justice: A Contradiction?" in Cassidy, p. 196.

nevertheless, indicative of the numerous fundamental cross-cultural misunderstandings that characterized the *Delgamuukw* action[111]. Sampson and Watts' suggestion that the Canadian legal system had failed to deliver justice to the Gitxsan and Wet'suwet'en peoples, for instance, demonstrates that although the *Delgamuukw* case was informed more by symbolic and strategic considerations than a desire to present a legally compelling argument, the Gitxsan-Wet'suwet'en and their supporters nevertheless had expectations of litigation that it was fundamentally incapable of delivering; they had culturally misconstrued what litigation was all about.

In this sense, their contention that in *Delgamuukw*, the Canadian legal system failed to deliver justice is problematic. In such complex cross-cultural cases such as *Delgamuukw*, civil litigation must necessarily be primarily about procedural justice, and not substantive justice, and in *Delgamuukw*, according to the requirements of the legal system, procedural justice was delivered. In fact, because justice in practice is a relatively subjective commodity, in complex cross-cultural cases procedural justice may be the only kind of justice that the courts can effectively address and deliver. The kind of culturally-oriented 'justice' that the Gitxsan-Wet'suwet'en and their supporters were looking to the courts to deliver is simply not the kind of justice the system is designed or intended to dispense. It was not surprising that the Gitxsan and Wet'suwet'en failed to achieve the kind of cultural recognition and accommodation or 'justice' from the courts that they were looking for; the legal system is simply not designed or intended to deal with the kind of cultural issues that they placed before it. They were, quite simply, looking to the courts for things that courts are inherently

[111]That the Gitxsan-Wet'suwet'en's criticisms in the wake of *Delgamuukw* were to some extent more rhetorical than practical is demonstrated by the fact that they subsequently chose to continue their litigation rather than participating in negotiations.

incapable of delivering.

Civil litigation was designed and structured to adjudicate disputes according to the law. In doing so, it was designed, and thus equipped, to work in an intra-cultural context; it was not designed to mediate or arbitrate between radically different cultures, nor to resolve culturally-based disputes and conflicts. It was certainly not designed to have the very cultural values, assumptions, rules and procedures upon which the very system is constructed fundamentally altered by a judge to meet the needs of a particular litigant as the Gitxsan-Wet'suwet'en and their supporters seemingly expected[112]. On the contrary, and as is discussed above, the legal system is a manifest expression of the dominant culture and its epistemological and ontological values and assumptions, and is not designed to recognize cultural

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[112]As is discussed above, although McEachern was clearly wrong on his extinguishment ruling, and possibly incorrect in his interpretation of the intermediate issue of aboriginal title, his *Delgamuukw* ruling was certainly not the demontration of legal incompetence that so many of his critics contended. His rulings on ownership and jurisdiction were certainly defensible as the Appeal Court subsequently found. At the same time, however, McEachern was clearly guilty of demonstrating his own form of cultural misunderstanding by being culturally unaware and insensitive. He misunderstood some of the cultural issues and evidence that were placed before him, and failed to appreciate the sensitivity with which the First Nations might react to some of his characterizations; while his reference to the Gitxsan and Wet'suwet'en on several occasions as primitive was open to charges of ethnocentrism, his quote from Hobbes the plaintiffs led a life that was "nasty, brutish and short" was in particularly poor judgment (McEachern, p. 13).

At the same time, however, when the Gitxsan-Wet'suwet'en and their supporters blamed McEachern for the nature of his *Delgamuukw* ruling, they were also demonstrating their miscomprehension of the culture of the legal system. As discussed above, while McEachern clearly could have demonstrated greater cultural sensitivity, given the inherent structural limitations of the legal mechanism of dispute resolution for cross-cultural disputes, even the most sympathetic of judges could only have given so much. They clearly misconstrued the nature and scope of the role, power and discretion of a judge, and what he or she is capable of doing.

difference, nor to be cross-culturally aware or sensitive. In a cross-cultural context, in short, litigation has certain inherent limitations.

Moreover, litigation is not designed to execute a public policy-making function, nor to engage itself with issues or activities which have as their primary aspiration a radical reconstruction of the status quo social contract. Litigation is designed primarily to adjudicate offenses and resolve disputes according to the letter of the law, and thus to uphold the law, not to engage in the substantive amelioration of social wrongs and injustices. As McEachern himself contended, the judge presiding over a case is bound to arbitrate the legal issues at question according to the law; according to a process of legal reasoning based on legal argument and precedent and the text of the law, not according to a judge's notion of what is right or wrong, or ought to be. It is not a judge's role to actively engage in large scale social reconstruction[113].

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[113]According to Murray W. Wagner, for instance, aboriginal rights cases:

> have brought tremendous cost: in legal fees, fines, court time, lost time for the accused, lost food, and lost good will. The findings of judges typically made no contribution to development of rational management. When they did, only a narrow issue in law was addressed. The courts are supposed to be, after all, forums for the adjudication of offenses, not creators of policy (Wagner, p. 25).

George F. Will takes a similar position, contending that "redressing grievances is usually the responsibility of the political branches of government, legislative and executive, and that courts cannot step in merely because other agencies have not (Will, p. 64)." According to Will, in fact,

> judges do not have a mandate to decree social ameliorations; they are not licensed to wield power on behalf of whoever is not getting full justice from the political system. The severe ethic of judging requires practitioners of that craft to keep their moral sensibilities on a short leash. Courts do not exist to right all the wrongs that other government agencies have, for whatever

In this sense, the pre-existing social contract which structures a society's institutions and social relations forms a figurative box within which the legal system, the rule of law, and the presiding judge must operate. While a judge can alter the superficial characteristics of the structure, he or she cannot reconstruct its fundamental attributes. A judge is bound to uphold and maintain the constituent nature of society, and its institutions and processes, and the knowledge and experience, not to mention the very conceptualizations, values, and assumptions that he or she brings to a case, are all a cultural expression of this existing social order. In this sense, even if Chief Justice McEachern were to have been totally sympathetic to the aspirations of the Gitxsan-Wet'suwet'en, he was nevertheless inextricably bound by the structural constraints of his own cultural constitution, if not by the dictates of his position. If he had delivered a ruling that was completely out of line with the dictates the Canadian legal system, it would not be very long before his ruling was reversed by a higher court[114].

As McEachern contended, it is simply beyond his jurisdiction to declare the sovereignty of the Canadian state null and void within the territories which the Gitxsan and Wet'suwet'en claim. That the First Nations might expect him to do so, given that it is from the Canadian state that his very power and position derives, is

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reasons, refused to right. Neither the adjective "unwise" or even "unjust" is a synonym for "unconstitutional" when modifying the noun "law (Will, p. 64)."

For a judge to render a decision based upon anything other than strict legal interpretation and reasoning, Will argues, is to 'short-circuit' "democratic processes in order to achieve by judicial fiat ends that are essentially political and properly achieved only by processes of persuasion (Will, p. 64)."

[114]This was, of course, eventually to be the case with certain aspects of McEachern's *Delgamuukw* ruling when it went before the B.C. Court of Appeal.

indicative of the depth and nature of the cross-cultural misunderstanding informing their critique.

Similarily, it was very unlikely that a judge in the Canadian legal system would rule that the Gitxsan and Wet'suwet'en were entitled to the kind of comprehensive ownership of lands and resources in the vast area of their traditional territories that they were looking to the courts to declare. There was no clear legal precedent for such a recognition, and the socio-political and economic implications of such a ruling were a further disincentive to a judge to step out on limb and make such a ruling.

In view of all the cultural obstacles the Gitxsan and Wet'suwet'en faced in their *Delgamuukw* case, then, obstacles that clearly were inherent to the Canadian legal system, and the particular epistemological and ontological constitution of its law, it is difficult to see the validity of Brian Slattery's contention that the Canadian legal system is comprised of a number of different legal traditions and perspectives; that it is not based upon the 'white man's law,' but upon an inclusive law that provides room for meaningful recognition and accommodation of cultural difference. While the criminal law and criminal justice system have proven capable of accommodating cultural difference to some degree[115], there exists serious differences

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[115]Recent literature on criminal justice has addressed the problems the First Nations face in the courts as a result of their distinct cultural orientation, and suggests ways that the system can be altered to be more responsive to their needs. As recent experiments have indicated, traditional native cultural practices (and to some degree, the values which underlie them), can be introduced in the criminal justice system in the form of such initiatives as prison sweat lodges, or in the case of minor criminal matters, through tribally-designed and administered court diversion programs. Such programs are not overly difficult to establish, and statistics indicate a relatively promising rate of success (See, for instance, "Mixing two cultures helps cut crime rate," *Vancouver Sun*, April 16, 1992, p. A11. For a general introduction to First Nations justice issues in a broader context, see: Jeff Morrow, "In Search of Native

between how cultural difference can be addressed and accommodated when it is not only constitutional law, but also civil litigation with the state as defendant, that is at issue. Contrary to what Slattery contends, in fact, it appears that not only the law, but also the legal system which interpretes and applies it, are inherently ethnocentric by nature, and as a consequence, simply cannot deliver the substantive cross-cultural recognition, affirmation, and accommodation that the Gitxsan and Wet'suwet'en were seeking through litigation.

Given the kinds of issues at question in aboriginal rights litigation, moreover, the courts are not likely to be willing to accommodate native aspirations, based in cultural difference, in any particularly substantive fashion. While the state can permit tinkering with the criminal justice system to occur without subjecting its fundamental legitimacy to much question, the situation is significantly different in cases of aboriginal rights litigation. Such cases often involve a battle over land and jurisdiction currently vested in the state, in the context of a dispute resolution mechanism explicitly constructed upon the sacrosanct notion of the sovereignty of this same state. Due to the nature of the issues in question, as well as the legal procedures used to address them, it appears that the system cannot be altered to be more responsive to native cultural difference without at the same time arguably acknowledging the tenuous legitimacy of the state and its constituent institutions in relation to the aboriginal inhabitants of Canada.

In the wake of *Delgamuukw v. The Queen*, therefore, it was not surprising that the Gitxsan-Wet'suwet'en and their supporters were highly disenchanted with

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Justice," *Canadian Lawyer*, Vol. 14, Issue 4, May 1990, pp. 14-19; Paula Kulig, "Balancing Rights: The Native Justice Debate," *Canadian Lawyer*, February 1993, pp. 14-19; James W. Zion, "The Navajo Peacemaker Court," *Perception*, Vols. 15-4/16-1, pp. 48-51).

litigation as a form of dispute resolution[116]. For many interested parties and observers, the case had provided a stark illustration of the problems attendant upon attempts by the First Nations to litigate their grievances. The general conclusion was that litigation had utterly failed to deliver a truly workable resolution; that the courts had failed to resolve, or even meaningfully recognize and address, the underlying cross-cultural conflicts and grievances that had led to the legal action in the first place. In fact, the vast majority of interested parties and observers to the case expressed their disappointment with the nature of the *Delgamuukw* proceedings and McEachern's eventual decision, as well as their concomitant conviction that negotiation was bound to be a form of dispute resolution that was far more culturally sensitive and appropriate than litigation for such complex, contentious and entrenched culturally-based conflicts as aboriginal rights disputes.

Moreover, they argued, negotiation also had much greater instrinsic potential to achieve a truly workable and meaningful cross-cultural accommodation in the constituent fabric of society, and to deliver a substantive resolution of the issues, conflicts and grievances in question. Of course, it was easy for interested parties and observers to support the adoption of negotiation over litigation now that litigation was no longer the only option available. With the province of British Columbia having finally conceded to participate in negotiations with its aboriginal citizens, for the first

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[116]According to Janice Mucalov, the Gitxsan-Wet'suwet'en loss "further diminished Indian regard for legal solutions to their problems and some...believe the white man's law can never settle native claims (Mucalov, p. 20)." Bill Wilson, for instance, chair of the First Nations Congress, the B.C. branch of the Assembly of First Nations, argues that:

> We're wasting our money on litigation....The legal system holds out no promise of egalitarian justice for the Indian peoples--it just throws out scraps of meat from the white man's table (as quoted in Mucalov, p. 19).

time in the province's history negotiated settlements were included among the slate of strategies to be considered by the First Nations in their continuing struggle against the Canadian state and society for recognition and accommodation. Moreover, with negotiation being such a new alternative in the province, its perceived promise or potential had yet to be qualified by any significant examples or experiences demonstrating that it had failed to meet expectations. An assessment of the potential benefits and possible pitfalls of negotiation is the subject of the next chapter.

Chapter Three

The Pitfalls and Potential of Negotiation

i. The Growing Popularity of Alternative Dispute Resolution:

The faith in negotiation expressed in the wake of *Delgamuukw* was in great measure a reflection of the widespread popularity of consensus-based decision-making processes among both government and the private sector at the time. In fact, consensus-based decision making processes, including negotiation, were being more and more frequently heralded by many in government as the magic solution to the increasingly complex conflicts faced by the contemporary liberal state[117]. Even the

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[117]Consensus-based decision-making processes were most popular in the environmental and natural resource policy sectors in the province. In fact, consensus-based decision-making was the fundamental principle upon which the province's Round Table on the Environment and the Economy, and processes created under the Commission on Resources and Environment were predicated. For elaboration on the consensual aspects of these processes, see The British Columbia Round Table on the Environment and the Economy, *Reaching Agreement: Volume 1: Consensus Processes in British Columbia*, Report of the Dispute Resolution Core Group of the British Columbia Round Table on the Environment and the Economy, 1991. The British Columbia Round Table on the Environment and the Economy, *Reaching Agreement: Volume 1: Consensus Processes in British Columbia, Appendix 1, Appendix 2, and Appendix 3*, Report of the Dispute Resolution Core Group of the British Columbia Round Table on the Environment and the Economy, 1991. The British Columbia Round Table on the Environment and the Economy, *Reaching Agreement: Volume 2: Implementing Consensus Processes in British Columbia*, Report of the Dispute Resolution Core Group of the British Columbia Round Table on the Environment and the Economy, 1991. Commission on Resources and Environment, *Report on a Land Use Strategy for British Columbia*, 1992. Province of British Columbia, *A Protected Areas Strategy for British Columbia: The Protected areas component of B.C.'s Land Use Strategy*, 1993. Province of British Columbia, *Land and Resource Management Planning: A Statement of Principles and Processes*, Final Draft, 1993.

For a discussion of attempts to apply consensus-based decision-making processes in Clayoquot Sound, see: Craig R. Darling, *In Search of Consensus: An*

British Columbia Treaty Process that was being established by the provincial government at the time of McEachern's *Delgamuukw* ruling was constructed upon a consensus-based model of negotiation. The desire expressed in the wake of *Delgamuukw* to move away from litigation in favour of more consensus-oriented approaches to conflict resolution, in fact, was all part of a much wider trend called Alternative Dispute Resolution or ADR which had gained widespread support and popularity in many quarters in the United States in approximately the past fifteen to twenty years, although its growth and popularity in Canada had been somewhat more recent[118]. In view of the considerable faith placed in negotiations subsequent to the purported failure of the *Delgamuukw* case, it is valuable to briefly examine not only the history of the ADR movement, but also to assess the theoretical promise of negotiation for such complex culturally-based conflicts, and its probable shortcomings, as well as to examine what our short experience with aboriginal rights negotiations under the B.C. treaty process has taught us.

The ADR movement arose in the United States in the early to mid-1970s, and was the culmination of demands for reform of the legal system arising out of a deep dissatisfaction with both the justice system and the process of litigation among

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Evaluation of the Clayoquot Sound Sustainable Development Task Force Process. University of Victoria's Institute for Dispute Resolution, no date. Malcolm Curtis, "The fight for woods 'is over,'" *Victoria Times Colonist*, August 27, 1996, p. A1, A6. Malcolm Curtis, "A cool August: The heat comes off the forests as protests quieten," *Victoria Times Colonist*, August 28, 1996, p. A1, A7. Malcolm Curtis, "The New Power Brokers: The Support of First Nations is critical to the future of Clayoquot Sound. Both forest companies and environmental groups are beginning to court their favour," *Victoria Times Colonist*, August 29, 1996, pp. A1, A7.

[118]In the wake of *Delgamuukw*, the First Nations enthusiastically supported the new option of negotiation because it was seen to herald a return to the treaty-making tradition articulated in the *Royal Proclamation of 1763*.

lawyers, judges and other interested parties[119]. Much of this criticism originated in frustration over the high costs of litigation, and the long delays in attaining access to the courts in the wake of a society that was not only increasingly complex, but also increasingly litigious[120]. Critics argued that the contemporary judicial system was no longer able to deliver effective, expeditious and affordable dispute resolution processes that were not only satisfying to the disputants, but also offered just, acceptable, workable and lasting resolutions of the conflicts at question. They argued that the present legal system was simply "too slow, too costly, too inaccessible, too manipulative, too adversarial, too legalistic, too overpopulated by lawyers who are alleged to stimulate frivolous claims, and "too" any a number of lesser things.[121]

While criticism of the legal profession, the courts, and adjudicatory systems in general was nothing new, going back at least as far as biblical times[122], the modern genesis of ADR can be attributed to 1976 when the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice was sponsored by

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[119]See Robben W. Fleming, "Reflections on the ADR Movement," *Cleveland State Law Review*, Vol. 34, Fall 1986, pp. 519-529.

[120]According to Robben Fleming, the courts have been subjected to increasing scrutiny and criticism because "today's ever more complex society has asked the courts to decide some of its most sensitive questions...(Fleming, p. 528)."

[121]Fleming, pp. 520, 522; See also Frederick J. Martone, "Adversary Adjudication on Trial," *Arizona State Law Journal*, Vol. 21, Spring 1989, p. 229; John J. Dieffenbach, "Psychology, Society and the Development of the Adversarial Posture," *Ohio State Journal on Dispute Resolution*, Vol. 7, No. 2, 1992, pp. 284-285; Larry Ray and Lawrence Freedman, "Alternative dispute resolution: New Tools for a Tough Task," *The Compleat Lawyer*, Vol. 3, No. 5, Fall 1986, p. 28.

[122]See Fleming, p. 519, and Robert D. Raven, "Perspective: Alternative Dispute Resolution: Expanding Opportunities," *The Arbitration Journal*, Vol. 43, No. 2, June 1988, p. 45).

a group of American legal organizations, including the American Bar Association (Ray and Freedman, p. 28). It brought together the growing number of people involved in the judicial system that wanted to develop new ways to resolve disputes in both a better and a more accessible manner.

The conference was clearly a successful catalyst for new innovations, in that by the late 1970s, the American federal government was experimenting with ADR in Neighbourhood Justice Centres, and in 1980, the American Congress passed the Dispute Resolution Act. Since its modern inception, a wide variety of different groups, including judges, lawyers, academics, bar associations, law schools, 'think tanks,' corporations, community advocacy groups, government agencies, departments and public sector corporations have all become enthusiastic proponents of ADR (Raven, p. 45; Ray and Freedman, p. 30). Private ADR firms have also arisen, as have research-oriented interdisciplinary Dispute Resolution Centres at a number of universities, and a number of journals dedicated solely to ADR[123]. In fact, a growing body of literature now regularly examines the limitations of the legal system for resolving certain kinds of conflicts, and seeks to offer viable, if not preferable, alternatives to litigation. To date, ADR has been successfully applied across a wide spectrum of conflicts of varying complexity involving a variety of different types of disputants; complex environmental disputes, domestic conflicts, divorce, child custody, and visitation proceedings, consumer disputes, minor criminal proceedings, landlord-tenant disputes, and corporate law issues have used ADR successfully (Ray and Freedman, p. 30; Raven, pp. 44-45). In short, the "scope, range, use and

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[123]See, for instance, Fleming, pp. 520, 526, 528; Ray and Freedman, p. 30; Raven, p. 45, and George A. McKeon, "Keeping Cases Out of Court: The Growing Interest in ADR," *Brief*, Vol. 18, No. 8, Summer 1989, p. 11.

applicability" of ADR "are vast and growing, and it is fast becoming an integral part of our legal culture (Raven, p. 44)."

The alternatives to litigation which comprise ADR mechanisms are distinguished by the amount of control a disputant has over the dispute resolution process and outcome, or in other words, how voluntary the procedure and its outcome is. Each dispute resolution mechanism lies somewhere along an axis from negotiation (the most voluntary process offering the greatest degree of disputant control) to mediation, then arbitration, and finally, litigation (the least voluntary process offering the least amount of disputant control)[124]. While the most common ADR mechanisms are arbitration, mediation, negotiation, and in the United States summary jury trials and mini-trials[125], ADR mechanisms can also be combined to form hybrid

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[124]Fleming, pp. 519, 522; Larry Ray, "Emerging Options in Dispute Resolution," *ABA Journal*, Vol. 75, No. 3, June 1989, p. 67.

[125]Arbitration "is a consensual process where a neutral third-party arbitrator listens to both sides, considers the evidence, and issues an award that is often binding and enforceable....Voluntary arbitration has proven effective in contract and international disputes and labor cases (Ray and Freedman, p. 31)."

Mediation is usually a voluntary process, and "allows parties to resolve disputes with the help of a neutral third-party mediator who facilitates communication and provides a forum for resolution (Ray and Freedman, p. 31)." A mediator may be a lawyer, a trained volunteer, or a professional mediator.

A Summary Jury Trial involves expedited presentations of a case by counsel for both parties before a judge and jury. These judicial presentations are intended to provide a brief overview of the case that would be presented to a formal court. The jury's subsequent nonbinding decision gives the parties an idea of the kind of outcome they could expect in a formal court context, and therefore provides a reliable basis upon which to develop a mutually acceptable settlement, and less incentive to gamble with litigation. A Summary Jury Trial is deemed best suited to civil disputes where evaluating factual evidence is a crucial aspect of the case (Ray and Freedman, p. 31).

The Mini-Trial "is a flexible, private consensual proceeding where counselors make expedited presentations of their best cases to the parties and a neutral third party. The third party may render nonbinding opinions as to the probable litigated result of specific legal, factual, and evidentiary issues, and the dispute's probable

mechanisms, such as "med-arb," to meet the needs of a particular client or dispute. ADR can also be conducted either within or outside of a courthouse, and may be conducted under either judicial auspices or by a private practictioner (McKeon, p. 11). According to Robben Fleming, the form which ADR procedures may take is "limited only by the imagination of the people involved (Fleming, p. 522). Ray and Freedman contend, however, that "although objectives vary from technique to technique and setting to setting, voluntary, extrajudicial settlement of disputes in a nonadversarial setting is the common goal (Ray and Freedman, p. 31)."

It must be emphasized, however, that ADR does not seek to replace the courts, but rather to provide valid alternatives as a complement to litigation[126]. It assumes that the availability of different types of dispute resolution procedures best serves both the cause of justice (Fleming, p. 523), and access to justice[127], and an attempt is therefore made to offer a disputant "an expanding menu of choices for resolving disputes (Raven, p. 44)." Although proponents of ADR contend that

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overall court-ordered outcome. Parties enter into confidential settlement negotiations based on information and insight gained through case presentations and the third party's opinions. The desired result of a mini-trial is voluntary out-of-court settlement of the dispute (Ray and Freedman, p. 31)."

There exist a number of other mechanisms such as ombuds programs, settlement conferences and regulatory negotiation to name a few. Negotiation, one of the most common alternatives to litigation, is discussed at length below.

[126]Fleming, pp. 524, 528; Raven, p. 44; see also *Paths to Justice: Major Public Policy Issues of Dispute Resolution*, Report of the Ad Hoc Panel on Dispute Resolution and Public Policy, National Institute for Dispute Resolution (Washington, D.C.: U.S. Department of Justice, 1984) as quoted in Richard A. Salem, "The Alternative Dispute Resolution Movement: An Overview," *The Arbitration Journal*, September 1985, Vol. 40, No. 3, p. 4.

[127]Stephen B. Goldberg, Eric D. Green, and Frank E.A. Sander, *Dispute Resolution* (Boston: Little, Brown and Company, 1985), p. 6.

"alternative dispute resolution techniques are superior to litigation for resolving some types of disputes...(Ray and Freedman, p. 31)," Robben Fleming contends that "virtually no one argues that any given alternative method would be universally applicable to all cases (Fleming, p. 524)."

On the contrary, ADR literature emphasizes that disputes are all different, and that it is the nature of a conflict that determines what dispute resolution mechanism is to be deemed most appropriate, and most likely to be successful. One of the main goals of ADR, then, is to match the dispute with the most appropriate dispute resolution mechanism, whether litigation or one of its alternatives, a process which requires a good understanding of the characteristics, advantages and disadvantages of one alternative over another for certain kinds of disputes (Ray and Freedman, p. 30)[128]. It is only with this effective matching of dispute and mechanism, ADR theorists argue, that a client will have their dispute addressed in an optimal fashion (Ray and Freedman, p. 30). In fact, they contend, if alternatives to litigation are approached and utilized correctly, one can expect to achieve significant improvements in dispute resolution in terms of such things as a lasting, substantive resolution, and greater disputant satisfaction. Ideally, they argue, the effective coupling of dispute with the most appropriate dispute resolution mechanism, "enables courts to spend more time on cases requiring the full panopoly of protections afforded by the litigation process (Ray and Freedman, p. 31)." With the effective use of ADR, then, the entire gamut of dispute resolution mechanisms will arguably operate much more effectively, reducing delay, and thereby increasing access (Goldberg, Green and

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[128]According to U.S. Supreme Court Justice William J. Brennan, Jr., for instance, "the screening process...is as important as the decisional process (Ray and Freedman, p. 32)."

Sander, p. 6).

Although it is critically important, the process of matching a dispute with the most appropriate dispute resolution mechanism can be a complex and difficult undertaking (Ray and Freedman, p. 32). While Ray and Freedman argue that an optimal match requires a close and careful scrutiny of each individual case (Ray and Freedman, p. 32), they note that screening processes frequently falter by automatically channelling a particular type of dispute to one specific resolution process (Ray and Freedman, p. 32).

While additional research is required to conclusively evaluate and determine which characteristics and considerations are most crucial when matching dispute and dispute resolution mechanism (Ray and Freedman, p. 32), the literature suggests that a number of different factors ought to be considered. First, a comprehensive and detailed taxonomy is required, in which the crucial structures and characteristics of each ADR technique, as well as its strengths and weaknesses for different kinds of conflicts are outlined. Secondly, the characteristics of each particular situation or conflict must be carefully examined and assessed.

Ray and Freedman, for instance, contend that the selection of the best dispute resolution mechanism for a particular case should be made according to the following criteria:

* the history of the problem;
* the serious of the injuries;
* the action necessary, and the immediacy with which it is required;
* questions of law;
* the nature of the claim;
* the level of hostility between the parties;
* the power disparity between the parties; and
* the parties' desire to continue or sever their relationship

(Ray and Freedman, p. 32).

They also argue that questions about cost, both financial and personal, must be considered and carefully evaluated. In fact, while the financial cost of channelling a dispute through a particular process is an important consideration, so are the personal and psychological costs that may be borne by a party in chosing a particular ADR mechanism (Ray and Freedman, p. 32). Ray and Freedman further argue, however, that a disputant's personal preference is also an important question to consider, in that a party may wish to pursue a particular mechanism because they feel comfortable with it, or perhaps because they are curious and wish to experiment. Thus while from an objective viewpoint one ADR mechanism may be most appropriate, and therefore preferable, a disputant may nevertheless wish to utilize a less appropriate mechanism for personal reasons.

Finally, although the interface between culture and conflict is a relatively new sub-field of study in ADR, and a body of literature is only now being produced[129], common sense suggests that in a cross-cultural context, additional factors must also be considered in evaluating which dispute resolution mechanism is most appropriate. The most obvious consideration is possible differences in a disputant's cultural orientation toward conflict and dispute resolution. How conflict is conceptualized, and the types of dispute resolution mechanisms that are customary in a particular nation or society, are all issues that are inextricably intertwined with questions and

[129]This new sub-field of ADR arose and has expanded in tandem with a growing interest in multiculturalism, and issues of cross-cultural accommodation and sensitivity generally, among academics. For a summary of some of the literature in this sub-field see: Michelle LeBaron Duryea. *Conflict and Culture: A Literature Review and Bibliography*. Victoria: University of Victoria's Institute for Dispute Resolution, 1992. It is unfortunate, however, that much of the material in the bibliography is not widely available.

considerations of culture. Differences in communication styles, as well as language barriers, may also pose specific challenges in dispute resolution that in turn influence which mechanism is considered most appropriate.

It is also important to recognize that in choosing between a number of different possible dispute resolution mechanisms, whether in an intra-cultural or inter-cultural context, many different, and often contradictory, values, goals and other factors must be taken into account. Unfortunately, many of these values, goals and other considerations may be mutually exclusive, meaning that a difficult process of weighing of options and objectives must be undertaken, and ultimately, a difficult compromise may well be required. These choices are often exceedingly difficult to make, and will frequently involve considerations of strategy.

While the field of ADR includes many different dispute resolution mechanisms, negotiation is still by far the most familiar and popular alternative to litigation (Goldberg, Green, and Sander, p. 7), and has been characterized as "the backbone of ADR (McKeon, p. 11)." According to Robert B. McKay, negotiation may be defined as

> the process by which consenting disputants seek to resolve their differences without the intervention of a third-party facilitator. In the absence of judge, arbitrator, mediator, or other third party, the parties may meet face-to-face, through written or electronic communication, or by representatives of their respective viewpoints who are often, but not necessarily, attorneys[130].

As described by Larry Ray,

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[130]Robert B. McKay, "Ethical Considerations in Alternative Dispute Resolution," *The Arbitration Journal*, Vol. 45, No. 1, March 1990, p. 19.

> negotiation is a voluntary, usually informal, unstructured process used by disputants to reach a mutually acceptable agreement. At the option of the participants the dispute may be kept private. There is no third-party facilitator; disputants may appoint lawyers to represent them. No limits are placed on the presentation of evidence, arguments or interests (Ray, p. 67).

Negotiation is by no means a monolithic model; there are considerable variations between particular styles of negotiation. Traditional styles of negotiation are based upon an adversarial approach to conflict, where posturing and an obstinate pursuit of a particular position is the favoured approach. A consensus-based form of negotiation, however, is predicated upon a cooperative, problem-solving approach to conflict (McKeon, p. 11; Ray, p. 67). Whereas adversarial negotiation is a positionally-based model of negotiation, structured upon the 'win-lose' idea that disputants bring their positions to the table and attempt to achieve them over their adversaries' position, consensus-based negotiations are predicated upon an interest-based model. The interest-based model is structured upon the assumption that disputants share common underlying interests which are masked by the positions they bring to the negotiating table. In discovering the common interests which underly their disagreement, they can arrive at a 'win-win' solution to their conflict where everyone ostensibly gains or wins. It is not surprising, then, that in trying to improve upon the limitations and weaknesses of adversarial litigation for addressing conflicts based in cultural difference, a consensus-based model of negotiation would be chosen above the adversarial model; the adversarial model does not constitute a true alternative to adversarial litigation, being based upon the same approach to conflict.

ii. Negotiation's Potential for Addressing Aboriginal Rights Disputes: Practical Considerations:

In view of the growing popularity of Alternative Dispute Resolution, it is not surprising that in the wake of *Delgamuukw,* consensus-based negotiation models were being enthusiastically promoted by a wide variety of groups and individuals as the dispute resolution mechanism of choice in addressing aboriginal rights grievances and claims. While at the time of McEachern's ruling the B.C. treaty process was not yet operational, and therefore unable to concretely demonstrate the efficacy of negotiations, a large body of general ADR literature seemingly provided a strong case for the position that in theory at least, negotiation might be a far more appropriate dispute resolution mechanism than litigation for approaching such complex culturally-oriented conflicts such as aboriginal rights grievances and claims[131].

ADR theory, for instance, offers a number of practical considerations that suggest that for both the First Nations and government, negotiations may well provide a forum that is preferable to litigation for addressing aboriginal rights grievances. Perhaps most importantly, ADR theorists contend that as a dispute resolution mechanism, negotiation permits a far greater degree of structural and procedural flexibility than is offered by litigation[132]. The structure and procedures of the

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[131]Although the convergence of culture and conflict is just beginning to be explored amongst ADR theorists and practioners, extrapolations from broader ADR theory seems to suggest that for conflicts situated in cultural difference, ADR holds far more potential for a sensitive and meaningful resolution, as well as a more favourable experience generally, than litigation.

[132]Goldberg, Green, and Sander, p. 8; Fleming, pp. 524, 528; Raven, p. 46; Paul D. Emond, editor, *Commercial Dispute Resolution: Alternatives to Litigation* (Aurora, Ontario: Canada Law Book Inc., 1989), p. 21.

negotiation process can be custom-tailored to deal with the unique characteristics of the particular dispute at issue, or the needs and requirements of the disputants, be they cultural or otherwise.

In fact, the disputants are essentially free to design the proceeding in a manner which they feel is appropriate, a freedom which does not exist in the much more restrictive environment of litigation. They are not bound by the strict and complicated evidentiary rules characterizing litigation, but rather they may define their own negotiating rules and procedures, including the extent to which they wish to be bound by formal procedural rules in the first place[133]. The flexible nature of the negotiating process means that the issues and terms of the debate are not predetermined or restricted to the same degree as is arguably the case with the legal system and its laws. Given the cultural aspirations underpinning many aboriginal rights cases, this characteristic of negotiation is likely to be very attractive to First Nations such as the Gitxsan-Wet'suwet'en. Furthermore, the wider context or environment within which disputes arise, and consequently, the nature of disputes, are all far from static. In theory, therefore, a flexible dispute resolution mechanism arguably will be more efficient and effective, and in the long run, more inclined to result in a practicable and enduring resolution, than a more rigid and complex process (Patterson, p. 600).

As a consequence of its flexibility, moreover, negotiation is also presented as a far more creative problem-solving mechanism than litigation, permitting the actors involved the space required to create a resolution that is tailor-made to fit the

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[133]Ray, p. 67; Fleming, p. 522; Roger J. Patterson, "Dispute Resolution in a World of Alternatives," *Catholic University Law Review*, Vol. 37, Spring 1988, p. 592.

particular nature, circumstances and needs of the dispute at issue (Raven, p. 46; McKay, 1990, p. 19). The legal system, by contrast, is predicated upon the principle of binding precedent, and is characterized by a number of inflexible structural and procedural rules and requirements. Litigation thus offers a much more limited number of alternatives from which a potential resolution may be developed. In fact, as Emond argues:

> the judicial process limits remedies to two: damages and injunctive relief. With such limited remedial options there is little opportunity for creative, innovative solutions. The parties are forced to seek money damages as a proxy for the injury suffered. Any negotiation that does occur is conducted in "the shadow of the judicial process" and the parties seek to reproduce at the negotiating table what they hope to win in court (Emond, p. 9).

Furthermore, while the courts may be "well suited to interpreting the law and deciding the facts in cases that involve the application of common sense and good judgment (Patterson, p. 600)," in cases where the issues in dispute are of a particularly technical and complex nature, such as aboriginal rights issues, ADR theory again suggests that negotiation may be a more appropriate approach than litigation. Judges are intended to be legal generalists, and as a consequence, they may not have a good grasp of the complex precedents in aboriginal law, nor be adequately attuned to the various cultural and political issues and sensitivities which will inevitably inform such a case. Therefore, instead of wasting precious time and resources attempting "to educate a court or jury about complex factual issues through testimony and exhibits (Raven, p. 46)," which clearly was the case in *Delgamuukw*, each party's negotiating team can include one or more individuals with substantive expertise in the relevant field or fields (Patterson, p. 600). Such an approach may

also serve to mitigate some of the cultural misunderstandings, ethnocentrism, and perhaps even the perceptions of insult and consequent animosities which arguably characterized the *Delgamuukw* case.

ADR theorists also contend that in negotiation the parties have much more control over both the process and its outcome than would ever be the case with litigation, and are, in fact, closely involved in the development of a resolution to their dispute (McKay, 1990, p. 16; McKeon, pp. 35-36; Goldberg, Green and Sander, p. 7; *Paths to Justice*, as quoted in Salem, p. 4). Since disputants would almost invariably "rather make their own judgments about a proper decision than subject the problem to a judicial mandate (Fleming, pp. 525-526)," ADR processes tend to place very heavy emphasis upon techniques which enable the disputants to have a hand in developing their own resolution (Fleming, p. 526). In fact, "negotiation proceeds from the premise that solutions arrived at voluntarily by the disputants are generally preferable to those imposed by some third party (Emond, p. 19)." Negotiation is therefore deemed to be far more empowering to a disputant than litigation (Emond, p. 19), where the ostensible 'resolution' to the dispute at question is dictated by the presiding judge. Thus, while negotiation provides an interactive process and experience, "courts, for the most part, are reactive: The parties pose a question and the court provides the answer (Raven, p. 46)." Given the colonial history within which aboriginal claims and grievances are situated, as well as the associated experiences of socio-economic and cultural subjugation and domination, a dispute resolution mechanism which offers the First Nations a considerable measure of control is bound to prove far more appealing to them.

ADR theorists also contend that negotiation permits and enables interested parties a much greater and more meaningful degree of participation than is permitted

by litigation where all aspects of the process are formal, structured and regulated. In fact, the procedural rules upon which litigation is constructed establish who is considered to have standing in a dispute in the first place, effectively precluding certain individuals who perceive themselves to be interested parties from participating in the process unless authorized by the courts. According to Emond, however, in negotiation

> there are no predetermined limits on who may participate in the process. The only limits are those agreed to by the parties themselves. Participation is voluntary, direct and relatively unstructured. How and when parties participate is a matter of individual choice, although the many books on "effective negotiation" tend to structure and shape negotiation along more formal and predictable lines. At the other end of the spectrum, participation by affected parties is much more limited. At most, legislative committees hear submissions and managers consult with "affected" members of the public. Often there is no real public input at all (Emond, pp. 21-22).

In litigation, moreover, the participation of disputants occurs in an indirect fashion; the real participants are the lawyers, with the plaintiffs and defendants essentially acting as observers (Emond, p. 8). In fact, according to Raven, "full-scale litigation can eliminate the client, as the lawyers take hold of 'their' case and translate real-world problems into abstract or tactical legal exercises (Raven, p. 45)." While lawyers also often play a central role in negotiation, resulting in all the usual complications[134], ADR mechanisms require much greater client involvement in

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[134]Because a negotiated settlement is often a legal agreement, discussions have the potential to become bogged down in legal technicalities. The final settlement document may thus become a complex labyrinth of legalese that is exceedingly difficult to decipher and interpret. These potential pitfalls of negotiation are discussed at length below.

resolving a dispute, and force the client to become involved at a much earlier stage in the game (Raven, pp. 45, 47). In fact, according to Emond, "negotiation maximizes disputant participation (Emond, pp. 19, 21-22)," and disputants are encouraged "to play a greater role in settling their own differences (Fleming, p. 528). According to Raven, most ADR processes

> require active involvement of the clients. These procedures, even if they do not result in the resolution of the dispute, bring the clients back into the process, where they belong. This is not to say that clients should not be involved early and thoroughly in litigated cases; rather, it is a sad fact of practice that they often are not (Raven, p. 45).

The active participation of the disputants in the dispute resolution process is thought to significantly increase the chances of an eventual resolution to the dispute at issue.

Moreover, because negotiation is not restricted by rules of standing as is the case with litigation, those of the wider society who deem their interests affected, in theory have greater potential for involvement and participation in negotiation than in litigation. The involvement of all interested parties is particularly critical in complex and entrenched conflicts with a wide public importance such as native rights claims or environmental disputes. In such cases the interested parties will include not only the immediate principals to the dispute, but also a large number of public interest groups and organizations which would desire or even demand to actively participate in such proceedings (Fleming, p. 525).

According to Fleming, "any meaningful settlement requires tacit acceptance on the part of many parties in interest who may themselves see the problem quite differently (Fleming, p. 523)." The potential for wider participation in the

negotiating forum than in litigation, in turn increases the chance that a workable, lasting resolution that is perceived as legitimate by all interested parties or public interest groups, and not only the immediate principles or disputants, will be achieved (Emond, pp. 7-8). Widespread participation is critical in view of the fact that interest group participation in a process, and their consent to, and compliance with a resulting agreement is bound to determine whether a resolution is ultimately implemented and lasts.

In fact, one of the great benefits of negotiation is that it enables or encourages disputants to openly examine and resolve their grievances and conflicts together as a community, something which is arguably a necessary requisite for a lasting resolution. This means that a careful prepatory foundation of public consultation, involvement, and education is being constructed for an eventual resolution or settlement, again increasing chances that the resolution will be both successful and lasting. Since a legal decision does not have the consent of all interested parties as a necessary requisite to its implementation, however, it is not likely to be a lasting solution, or even a true "resolution" of the conflict. The fact that litigation does not truly "resolve" disputes is demonstrated by the fact that in the wake of a litigated decision, there is almost inevitably still a need for a negotiated settlement. This is certainly the case in such complex cross-cultural conflicts as aboriginal land claims disputes. While the creation of a prepatory foundation for an eventual resolution enabled by negotiation reduces the chance that an economic or constitutional crisis might erupt in the wake of a particularly critical court ruling, in litigation a judge releases his ruling and it is immediately "the law" and in effect. Consequently, the collective social costs of a litigated decision may well be greater than a negotiated one.

At the same time, however, because negotiation is a relatively flexible, unstructured, and accommodating dispute resolution mechanism, instead of welcoming the participation of a wide number of interested parties, the disputants may choose to keep the process private (Ray, p. 67). While the potential for negotiation to be less restrictive in terms of participation is arguably one of the benefits of negotiation over litigation, the potential to keep the process more private and confidential than litigation is also considered to be an advantage of negotiation, although for different reasons (McKay, 1990, pp. 16, 18; Goldberg, Green and Sander, p. 8; McKeon, p. 35).

While only certain people are deemed to have standing in litigation, any member of the public is free to attend a court hearing as an observer. In contrast to litigation, Patterson notes that ADR procedures offer disputants the option of minimizing "public disclosure of the dispute or the facts surrounding it (Patterson, p. 601)." The fact that negotiations can be kept closed and private at the discretion of the disputants is deemed to increase the probability that in controversial and contentious disputes, a resolution can be arrived upon. A closed and private process allows the disputants the space to focus on their disputes without outside interference, and the confidentiality thus allowed means that political considerations and posturing will not impact upon the process of attempting to achieve resolution in the same manner that would occur should third parties, or even more critically, the media, be permitted to attend.

Whether disputants opt for an open or closed process, one of the greatest consequences of the level of disputant participation enabled by negotiation is that it encourages free and productive communication between them. For instance, while in litigation the parties speak to the judge rather than to one another, in negotiations they

are given the opportunity for face-to-face discussion (Emond, p. 8). The idea is to get the parties talking to each other in an amicable and productive manner. According to McKeon, "this face-to-face communication breaks down the barriers to settlement which arise when the parties are insulated from each other by their attorneys who view the case as a cause to be advocated (McKeon, p. 35)." In fact, effective communication appears to be a critical variable for successful dispute resolution[135]. Whereas the flexible and conciliatory nature of negotiation is conducive to productive discussions, the adversarial nature of litigation, and the highly structured, combative and even accusatory style of communication it fosters, creates a communication environment that for many disputants and disputes, is not only ineffective, but is also counter-productive.

According to ADR theory, the fact that negotiation is more conciliatory and consensus-oriented than the conflict-oriented nature of litigation, also means that negotiation is likely to resolve disputes more amicably than occurs with litigation. Consensus-based alternatives are seen to be structurally predisposed to avoid conflict rather than to aggravate or to exacerbate it as is often the case with antagonistic and adversarial processes such as litigation (Ray and Freedman, p. 31).

The importance of a consensus-based approach to dispute resolution versus one that is more conflict-oriented becomes clear when one recognizes that to attain settlement or resolution of a dispute, there is a need to get beyond posturing,

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[135]In discussing the successful use of ADR procedures in the environmental arena, specifically in regards to the issue of the construction of the Snoqualmie Dam near Seattle, Washington, Mitchell Sviridoff contends that "a lot of problems between groups that seemed to be mortal enemies were solved simply by talking them out (Mitchell Sviridoff, "Recent Trends in Resolving Interpersonal, Community, and Environmental Disputes," *The Arbitration Journal*, September 1980, Vol. 35, No. 3, p. 8)."

suspicions, and potential misunderstandings and misinterpretations to the actual substance of the issues and the conflict. Negotiation arguably does this better than litigation, because negotiation recognizes the validity of a "maybe" or "perhaps" approach to issues, facts and so forth (Emond, pp. 8-9). It deals more in the currency of compromise, and recognizes that the parties in dispute may have the same underlying interests and aspirations; that they may be expressing similar concerns and seeking a similar resolution, although employing different terminology and promoting different positions. In theory, then, negotiation is orientated toward finding common-ground, consensus and compromise, rather than being fixated on difference, challenge and conflict, and is therefore likely to foster a more amicable relationship between disputants.

Litigation, by contrast, is structured around an approach to fact-finding and decision-making that is binary in nature, and therefore has a tendency to pit the parties against one another (Raven, p. 46). It deals only in the currency of yes or no, right or wrong, and factual or infactual (Emond, pp. 8-9). With its right or wrong orientation, and zero-sum decisions[136], litigation tends to give rise to entrenched policy stances and extreme positions. Coupled with the advocacy-oriented nature of the litigation process, the parties are encouraged to exaggerate their claims and adopt extreme and uncompromising positions and attitudes (Emond, p. 17; Patterson, p. 600). According to Patterson, "even though the litigant and his or her lawyer may acknowledge to themselves that the view they advocate is extreme in some respects, the process cannot help but drive parties away from agreement rather than toward

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[136]Maurice Rosenberg, "?Query: Can court-related alternatives improve our dispute resolution system?" *Judicature*, Vol. 69, No. 5, February-March, 1986, p. 255.

agreement (Patterson, p. 600)." The binary nature of litigation may thus serve to exacerbate the dispute rather than resolving it, thereby hindering the development of a settlement. In fact, the adversarial process may even serve to create new disputes out of the old, thus further alienating the opposing sides (Patterson, p. 600). In short, because negotiation attempts to draw the parties' view of the case together rather than apart, thus reducing rather than multiplying the issues in dispute, it is arguably more likely than litigation to actually resolve, rather than exacerbate, culturally-based conflicts or disputes.

In theory, because conciliatory or consensus-based processes are more likely to lead to compromise, they are also more likely to result in a resolution that is both more workable and lasting than could be achieved through litigation. ADR theorists contend that it is the consensus and compromise-oriented nature of the negotiation process that appears most important to solving the problem. As negotiations proceed, disputants become better educated about the issues, as well as about the perspectives of the other party, and this increase in information, and ideally, in understanding and trust, may in turn increase the chances of settlement (McKeon, p. 12). These assumptions underpin the following comments by Mitchell Sviridoff, who contends that

> once the disputants realize that other parties are also reasonable and have reasonable needs, that these can be accommodated without great injury to anyone, and that compromising over them is much less taxing than waging holy war, much of the breach has been mended. There is still work to be done after that point, but there is by then already something to show for it (Sviridoff, p. 6).

ADR theorists contend that litigation, by contrast, tends to settle disputes more

through attrition than through a fair resolution of the conflict at hand.

Because negotiation is compromise-oriented and flexible, moreover, ADR theorists contend that it is also less likely to encourage a disputant to act in a defensive manner, and less inclined to leave him or her feeling alienated, disempowered, intimidated, frustrated, bitter and betrayed (Emond, p. 8; *Paths to Justice*, as quoted in Salem, p. 4). The fact that a compromise, consensus-oriented process may generate far less rancour and bitterness than the adversarial process of litigation, is a consideration that is particularly important in cases where there exists some kind of continuing, and perhaps otherwise satisfactory, relationship, or the parties wish to, or must have, an ongoing relationship[137]. According to Raven, ADR processes

> could solve many of these disputes economically, efficiently, and justly, without damaging the valuable relationships that the parties have created over time. In these circumstances, litigation, by contrast, may harden the parties' positions, and the added expense of litigation may create further resentment, mistrust, and animosity (Raven, pp. 45-46).

Goldberg, Green, and Sander echo Raven's arguments, contending that

> when an ongoing relationship is involved it is important to have the parties seek to work out their own solution, for such a solution is more likely to be acceptable to them than an imposed solution and hence more long-lasting. Thus negotiation, or mediation if necessary, appears to be the preferable process in these situations (Goldberg, Green and Sander, p. 10).

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[137]Raven, pp. 45-46; Salem, p. 9; Howard R. Sacks, "The Alternative Dispute Resolution Movement: Wave of the Future or Flash in the Pan?" *Alberta Law Review*, Vol. 26, No. 2, 1988, p. 241.

Proponents of ADR also contend that negotiations can result in a more meaningful resolution of a dispute than is the case with litigation because the process better enables disputants to get at the underlying causes of the conflict (Raven, p. 45). Because the disputants participate in attempts to find a flexible and creative solution to their conflict, the process encourages the parties to identify underlying problems and conflicts at the outset, therefore focussing the discussions on the disputants' concerns and priorities, rather than on the conflict itself. In this sense, ADR theorists contend, alternative dispute resolution mechanisms may well be "...more sensitive to disputants' concerns, and more responsive to underlying problems (*Paths to Justice*, as quoted in Salem, p. 4)."

Moreover, the fact that in the negotiation process the disputants themselves help to develop a voluntary and mutually-acceptable resolution to their conflict, not only serves to increase their stake in an eventual resolution, but also means that the settlement will have much more legitimacy in their eyes (Ray and Freedman, p. 31; Ray, p. 67; Goldberg, Green and Sander, p. 8). The disputants, as a consequence, will be much more inclined to comply with the terms of the settlement, meaning not only that it will be more likely to be successfully implemented, but also that it will be more likely to be a lasting resolution (Salem, p. 4)[138]. Being actively involved in the settlement of their case, moreover, the disputants are also more likely to believe that

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[138]One could argue that there is a greater chance that a litigated settlement will be eventually implemented than a negotiated settlement, because a court decision is backed by the authority of the state. A negotiated settlement is likely to be a decision with greater legitimacy, however, and therefore may have a greater potential for meaningful implementation. Moreover, a negotiated settlement of significant public importance would probably be given statutory expression, thus rendering it law, and backing it up with the authority of the state as well.

justice has both been done, and has been seen to be done.

In litigation, however, a resolution is a fiat imposed by the presiding judge, and it may not have any legitimacy whatsoever with the disputants. In fact, a judicial ruling may be perceived by either one or both of the disputants to be a win-lose resolution, perhaps with each side believing that it is on the losing end. Nevertheless, a judicial ruling is a decision that all parties must abide by whether they like it or agree with it or not. The notion of winner and loser upon which litigation is predicated is bound to exacerbate hostility, ill-will and animosity between disputants, moreover, and thus may serve to exacerbate a dispute rather than resolve it. At the least, an imposed judicial ruling is not likely to lead to high rates of compliance. In short, a much less coercive approach to dispute resolution such as negotiation may well be more effective and productive, for as Raven contends, in dispute resolution "As in medicine, the least intrusive method often produces the most effective solution." (Raven, p. 47).

Negotiation also appears to be a far less risky undertaking than litigation for both the First Nations and government. "The law" is far less cut and dried than is commonly perceived to be the case, and as a consequence, the judicial process is far less predictable and certain than many would believe (Emond, p. 9). In fact, litigation is often nothing more than a game of chance for those involved. Once the disputants take their grievances to court, the ultimate resolution is in the hands of the presiding judge, and the disputants have control over neither how the judge may choose to approach their case, nor the kind of ruling that is ultimately rendered. Even the rule of *stare decisis*, or the principle that a judge is bound by previous precedent, gives a disputant little certainty. The law frequently contains a number of contradictory principles and precedents, and through not only the process of

distinguishing cases, but also legal reasoning and analysis generally, a wide number of different rulings are usually a possibility. In the area of aboriginal rights in particular, where the law is still unsettled on many critical issues, litigation is arguably an especially great gamble. In negotiated settlements the parties have the option of either agreeing or not agreeing with any resolution or settlement that is proposed. In litigation, by contrast, a judge may give a ruling that neither party is particularly sympathetic to, yet they are essentially powerless to do anything about it. While either disputant can choose to appeal to a higher court, the appellate process is similarly rife with risk and uncertainty.

Because the disputants in negotiation are involved in developing the resolution to their grievances, moreover, negotiation may also result in fewer concessions than a ruling imposed by a judge. In fact, it seems likely that governments will ultimately end up granting fewer concessions to the First Nations if they participate in negotiated settlements to land claims grievances, than if they find themselves in court and facing a judge sympathetic to the aboriginal position. The First Nations may also find that they can concede less through negotiation than litigation, in the sense that they have a veto over any agreement. According to George McKeon, in fact, an early willingness to engage in ADR processes rather than ignoring an issue until it finally lands in court is likely to be more productive, and involve less concessions. He contends that "reason dictates that the earlier and more cooperatively you deal with a problem, the less you will pay to resolve it (McKeon, p. 12)," and "the earlier the ADR process is involved, the better the results (McKeon, p. 12)."

ADR theorists contend that because negotiation is a more flexible and creative process than litigation, it is not only a more effective, but also a more efficient, dispute resolution mechanism (Salem, p. 4; Raven, p. 47). In fact, in theory at least,

such ADR processes as negotiation are said to be both faster and cheaper than litigation; cheaper in terms of both financial and human resources[139].

Because ADR processes are arguably cheaper and faster than litigation, ADR theorists also contend that for average disputants, negotiation is likely to be a more accessible form of dispute resolution than litigation. In fact, because ADR processes are relatively informal, they "can be held virtually anywhere--an office, a school, or even a hotel suite--" which means that in theory, ADR processes offer uniform access that is easy, affordable and universal (Iacono, p. 29). The mobility that is afforded by the informality of ADR processes is particularly attractive when dealing with First Nations issues, since many aboriginal communities are not only poor, but also often geographically remote. The Gitxsan and Wet'suwet'en, for instance, found the financial and personal hardship of their litigation was magnified considerably when their trial was moved from Smithers to Vancouver. The move was particularly

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[139]Raven, pp. 44, 45, 47; McKay, 1990, p. 16; *Paths to Justice*, as quoted in Salem, p. 4; Ray and Freedman, p. 31; Fleming, p. 528; McKeon, pp. 11, 35; Patterson, p. 601; Paul M. Iacono, "Alternate Dispute Resolution," *The Advocates' Society Journal*, December 1986, p. 29.

One issue in ADR, however, is who pays for the process. While litigation is partially subsidized by the taxpayer, this is frequently not the case with ADR. As ADR processes become more established as legitimate dispute resolution mechanisms, however, they are bound to receive either greater state funding or some other form of general support. (Hon. W.P. Jeffries, "Alternative Dispute Resolution: The Advantages and Disadvantages from a Legal Viewpoint," *Commonwealth Law Bulletin*, Vol. 18, April 1992, p. 766).

While concerns of cost and efficiency seem better suited to disputes involving matters such as insurance or personal injury than aboriginal land claims, when First Nations issues are discussed such questions invariably arise. These were certainly salient concerns of many of those who made presentations before the Select Standing Committee on Aboriginal Affairs when it convened in Williams Lake on November 12, 1996 (Personal experience). Also see Paul Sinkewicz, "Locals provide input on Nisga'a deal," *The Williams Lake Tribune*, November 19, 1996, p. A1.

difficult for elders giving crucial evidence in the case. If equal access to dispute resolution processes is an important component of justice, as it clearly is, then the alleged potential of negotiation to be more accessible than litigation is an important consideration.

For the First Nations, moreover, consensus-based negotiation also provides a dispute resolution mechanism predicated upon an orientation to conflict and conflict resolution that is more culturally familiar than is the case with litigation. Whereas adversarial litigation is oriented toward individual rights and conflict in its approach to dispute resolution, the First Nations have traditionally employed a more consensus-oriented and community-based approach to conflict resolution. Because it is culturally foreign, adversarial litigation is often an extremely alienating, disconcerting, and even traumatic, experience for the First Nations. The competitive and combative nature of the process tends to make aboriginal peoples feel as though they are in a battle zone, and as a consequence, the litigation experience is extremely exhausting, especially to elders. Stuart Rush, for instance, one of the lawyers for the Gitxsan-Wet'suwet'en, recalled that the *Delgamuukw* trial "took its toll on everyone...(as quoted in Mucalov, p. 20)." He recalled that "The provincial and federal governments hotly contested every issue," and characterized the process as "a trench battle on both sides of the case (as quoted in Mucalov, p. 20)."

Negotiation does not have the same rigid formality and structural predisposition toward animosity that litigation has however[140]. Because ADR processes like negotiation attempt to foster an atmosphere of conciliation and

[140]Although the formality of the negotiation process can vary, it is certainly a far less formal dispute resolution mechanism than litigation (Goldberg, Green and Sander, p. 8; Iacono, p. 29; Ray, p. 67; Raven, p. 46).

cooperation, they involve both a spirit and an approach to dispute resolution that is much more culturally familiar to the First Nations.

Disputes in native communities were traditionally resolved through a process of consensus-based decision-making in which the entire community, and in particular the elders, played a role. Because negotiation offers a participatory structure and process, it appears to be much more in keeping with the traditional nature of dispute resolution in First Nations communities than litigation. The potential for negotiation to be a relatively inclusive, community-oriented form of dispute resolution, one that offers an opportunity for face-to-face deliberation and discussion, means that in comparision to litigation, it is likely to be a far more appealing process to the First Nations. By virtue of the conciliatory nature of negotiation, moreover, as well as its structural flexibility, elders can be treated with the respect and deference they felt was lacking in their encounter during *Delgamuukw* with the adversarial and individual-rights-oriented process of litigation. In fact, because negotiation is less impersonal, formal, rigid and complex procedurally than litigation, many First Nations, especially elders, will likely feel more comfortable in a negotiating forum than in the courtroom. In view of the status-based cultures of many First Nations, negotiation is also likely to be more compatible with a cultural order based on differential social standing and deference than litigation. In fact, because of the nature and structure of the negotiation process, there is much more room for the collective rights and values so crucial to the First Nations' traditional cultures and their contemporary aspirations to be recognized and embraced.

Negotiation appears, therefore, to be a far more culturally-authentic dispute resolution mechanism for the First Nations than litigation, and because of its cultural familiarity and flexibility, it appears to have the potential to offer First Nations such

as the Gitxsan and Wet'suwet'en the degree of cultural recognition, affirmation and accommodation that they could not attain within the Canadian legal process. In spite of the minor victories the First Nations of Canada have achieved in the courts in recent years, then, if they wish to have their longstanding grievances resolved on their own cultural terms, negotiation may well be a far more effective mechanism than litigation through which to address aboriginal rights issues in a both a culturally appropriate and sensitive manner. In fact, although directing his comments to disputes between states, Robert D. Raven makes a number of points that are equally relevant to inter-cultural disputes such as native rights claims. He contends that

> ADR may be especially well suited to disputes in the international arena. International disputes often involve the most difficult legal questions of jurisdiction, choice-of-law, and venue, which can bog down resolution. In addition, American-style litigation may not be suited to other nations' cultures. Many Asian cultures, for example, employ procedures akin to mediation to resolve their disputes. ADR procedures permit corporations and individuals from different cultures to transact business and resolve their disputes in a forum, and under procedures, of their choice (Raven, pp. 46-47).

Moreover, because of both its general emphasis upon conciliation and its greater cultural familiarity, negotiation is also likely to be a far less culturally hostile forum and experience than litigation for the First Nations. In this sense, negotiation may well have much less emotional cost for the aboriginal disputants, particularly the elders. In fact, for the First Nations and their supporters, only too aware of the cultural obstacles and frustrations experienced by the Gitxsan-Wet'suwet'en in their *Delgamuukw* suit, negotiation no doubt seems like a far less culturally hostile forum in which to present their grievances and pursue their aspirations than litigation.

Most importantly, because negotiation does not limit the presentation of

evidence, arguments or interests in any manner other than as agreed to by the disputants (Goldberg, Green and Sander, p. 8), it is far less culturally restrictive than litigation. In fact, because negotiation requires less stringent standards of proof than litigation, it is able to recognize and accommodate cultural difference in a way that litigation cannot. It is, therefore, much easier for the First Nations to present their case in a manner that is not only persuasive and acceptable, but also culturally authentic.

Moreover, because negotiation, unlike litigation, does not require the rigorous testing and challenging of facts, witness credibility and propositions (Emond, p. 6), the First Nations are less likely to feel that their honesty and integrity is being challenged in the same manner that they felt occurred during *Delgamuukw*. They are less likely to feel that their culture, that their very sense of self, is on trial and being judged by the dominant society; that their cultural authenticity and credibility is being challenged. In contrast to litigation, therefore, in a negotiation forum the First Nations are likely to feel much more in control of both the process and the agenda, of the very cultural currency or terms of discussion upon which the process is predicated. As a consequence, they are also bound to feel much less disempowered by negotiation than by litigation, an important consideration both in symbolic and practical terms. Given the cultural aspirations of many aboriginal peoples, then, negotiation is likely to be a more appropriate dispute resolution mechanism for the First Nations than litigation. It is also more likely to be acceptable to them.

iii. The Symbolic Value of Negotiation for Aboriginal Rights Disputes:

There are also a number of symbolic reasons why negotiation may be a more

appropriate dispute resolution mechanism than litigation for the First Nations. The negotiating forum, for instance, not only enables a First Nation to retain greater control over both the dispute and its resolution, but it also enables the First Nation to avoid taking its grievances to the court system of its opponent to resolve; the court system being an expression of the very state and its power that the First Nation is challenging in the first place. Thus the choice of negotiation over litigation enables a First Nation to avoid symbolically conceding to the sovereignty or jurisdiction of the Canadian state over them, by participating in a dispute resolution mechanism which is predicated upon this sovereignty. While many First Nations refuse to recognize, and vigorously refute and challenge, the legitimacy of the Canadian state's unqualified sovereignty over them, as the Gitxsan-Wet'suwet'en discovered, state sovereignty is something that the Canadian courts will invariably uphold.

On a symbolic level, then, structurally and procedurally negotiation is seen to be much more akin to discussions between equals than litigation, and thus more consistent with the claims of many First Nations to be distinct and sovereign nations[141]. In fact, because the state is frequently perceived not only as an intruder or opponent, but also as a staunch enemy of aboriginal interests, as the dispute resolution mechanism perceived to be most affiliated with the state, litigation does not have a great deal of legitimacy with many First Nations as a truly impartial arbiter of disputes. These perceptions constitute a serious liability against litigation as an effective forum for resolving aboriginal rights disputes. Since the First Nations are bound to associate negotiation with the coercive apparatus of the state much less than is the case with litigation, it will probably be an approach that is less offensive to

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[141]This, of course, is why First Nations tend to support the treaty-making relationship.

them.

Moreover, because they are actively involved in creating a settlement of their disputes, negotiated agreements are likely to have more legitimacy with the First Nations and their supporters, both on a practical and a symbolic level, than a decision imposed as a result of litigation. As Paul Tennant contends, among those sympathetic to aboriginal claims, "both negotiations themselves and the resulting agreements are seen as having great symbolic as well as practical importance (Tennant in Cassidy, p. 81)." In fact, he argues, these people "tend to emphasize sharing, cooperation and partnership as elements of both the negotiation process and the actual terms of settlements (Tennant, in Cassidy, p. 81), and these perceived characteristics of negotiation arguably are more compatible with the values and aspirations of the First Nations than the attributes of litigation.

In utilizing negotiation instead of litigation, the First Nations can also attempt to evade the considerable legacy of distrust, dishonour and bitterness which generations of experience with Canadian law, legal structures, and systems have created in many aboriginal communities. For a variety of historical reasons, the First Nations tend to see the Canadian legal system and its laws as vehicles of abuse, injustice and oppression employed against their peoples, and have long since learned to approach them with apprehension and suspicion[142]. Traditionally, for instance, as

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[142]According to Jeff Morrow, "there is a deepseated and growing anger in the native community with "Canadian" justice (Morrow, p. 14). This anger is reflected in the following comments of Ralph Akiwenzie, Chief of the Chippewas of Nawash at Cape Crocker, Ontario:

> You have a symbol of your justice system--a blindfolded woman holding a set of scales. It has always puzzled me how she could see whether the scales of justice were in balance. I want to tell her, 'Take off your blindfold and see things as they really are (Ralph Akiwenzie, "We want to do it our way:

is reflected in the entire *Indian Act* system of regulation and coercion, as well as in associated legislative acts such as the prohibition of the feast system or land claims activities, the law has been used as an economic and political weapon against aboriginal communities and individuals (Jefferson, pp. 22-23)[143]. The failure of successive governments to live up to the terms or spirit of treaties, or to follow the legal requirement to create them in the first place, has also been "a stumbling block" to the First Nations' "acceptance of the white man's law in its widest terms (Morse, 1976, p. 515)." In fact, as Bradford Morse contends, many aboriginal peoples "perceive the legal system as an enemy since their only contact with this system has been as a defendant in a criminal or child apprehension action (Morse, 1976, p. 516)." According to Darlene Johnston, an Assistant Professor of Law at the University of Ottawa, and a member of the Chippewas of Nawash Band in Ontario, the First Nations have many valid reasons for distrusting the Canadian legal system. She argues that:

> before aboriginal rights were recognized in the Constitution, the law was being used to take away our rights,...so Native people generally have a very negative view of the Canadian legal system, since it's been used as an

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> Unequal justice: For thousands of years, native people made their own laws and punished those who broke them. This right should be restored, a chief argues, because the current system simply isn't fair," *Globe and Mail*, March 6, 1992, p. A13).'"

[143]From early contact, for instance, those in power made efforts to impose the British common law tradition on the Gitxsan and Wet'suwet'en. A familiar illustration of these attempts is the case of Kitwancool Jim, "a Gitksan chief who had, in accordance with Gitksan law, stabbed a white man whom he held responsible for the drowning of his son...." Jim "was arrested, taken out of the area, tried in a southern court and eventually hanged (Hugh Brody, "On Indian Land: The Gitksan and Wet'suwet'en," *Legal Services Society Newsletter*, April 1987, p.9)."

> instrument of oppression rather than protection. Before 1982, the government could break treaties and breach rights as long as it was acting in its own jurisdiction and not provincial jurisdiction it could do what it liked[144].

In view of the considerable legacy of bitterness and mistrust that the First Nations bring to the Canadian legal system and its law, then, negotiation might be a far more appropriate dispute resolution mechanism than litigation for addressing aboriginal rights grievances in a sensitive and meaningful manner. With negotiation there may be fewer hostile memories to overcome for the First Nations, meaning not only that negotiation might be more acceptable to the First Nations on a symbolic, psychological and emotional level, but ultimately also more successful in achieving a cross-cultural resolution of conflicts than may be the case with litigation.

iv. The Strategic Value of Negotiations for Aboriginal Rights Disputes:

There are also certain strategic considerations which commend negotiation to the First Nations above litigation. Most importantly, negotiation is a far less conservative and constraining dispute resolution forum than is litigation, an important consideration given the fact that aboriginal rights claims often aspire to a radical reconstruction of the most fundamental characteristics of the dominant society, its culture and economy. Because native aspirations are above all political, they are likely to have greater success through negotiations than through a highly conservative and constraining forum such as the legal system, given its fundamental orientation toward the status quo.

In fact, although different theories of the law and the judicial role exist, some

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[144]Darlene Johnson, as quoted in Mike Milne, "Casting for justice: fish, land and self-government," *The United Church Observer*, November 1992, p. 36.

of which are more oriented toward judicial activism than others, the legal system clearly contains a degree of inherent structural conservatism that arguably does not exist with negotiation. This is because the legal system is constructed upon law, essentially a highly formal and constricting series of rules and precedents. Legal analysis and decision, moreover, is based on the rule of *stare decisis*, or precedent, and judges are expected to render decisions that are consistent with previous rulings on the same points of law. Although certain precendents may allow judges a degree of creativity and flexibility, the legal system, by its very nature, is a conservative institution. It is oriented toward the maintenance of the status quo, and is inherently backward, rather than forward, looking in its approach.

Negotiation, by comparison, does not have these same structural impediments to change, but rather is more flexible and better able to embrace a "radical" departure from past notions or practices. In fact, the rules, processes and procedures of negotiation are much more fluid, informal and accommodating than litigation, and it can be argued that negotiation is therefore a much more promising instrument for the progressive advancement of native claims. Moreover, while legal decisions resulting from litigation have an impact and influence throughout the province, or even the entire country, a negotiated settlement can be tailored to fit the needs and circumstances of a particular tribal group, and therefore has the potential to be a more sensitive and responsive approach to dispute resolution than is offered by litigation. In short, then, while litigation and the legal system tend to structure the terms of a dispute or debate in a status quo direction, and therefore work against the native aspiration to achieve change, this is much less the case with negotiation. Negotiation arguably provides more space for developments sympathetic to, or accommodating of, the native position than litigation.

According to ADR theory, moreover, the negotiating process may also provide a more satisfying experience for both the First Nations and government than litigation. In theory, because negotiation is ostensibly not only a faster, cheaper and a more conciliatory and just process than litigation, but also offers a disputant more opportunities both to participate in, and control the resolution of his or her dispute, it gives the disputant the feeling that the dispute at issue was really heard (*Paths to Justice*, as quoted in Salem, p. 4)." According to ADR theorists, these factors and considerations may all contribute to leaving each side feeling satisfied with both the process and the eventual settlement, a satisfaction which is less frequently evidenced seldom the case in a lengthy court battle[145].

Finally, many ADR theorists contend that ADR mechanisms such as negotiation can actually resolve disputes more justly than is the case with adversarial litigation (Raven, pp. 46, 47; McKay, 1990, p. 16; *Paths to Justice*, as quoted in Salem, p. 4). In fact, ADR theory suggests that if the First Nations are not only actively involved in the process of dispute resolution and the development of an eventual settlement, but also find that negotiation is much more culturally familiar and

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[145]Salem, p. 4; McKay, 1990, p. 16; Fleming, p. 524; McKeon, pp. 35-36; Robert B. McKay, "The Many Uses of Alternative Dispute Resolution," *The Arbitration Journal*, Vol. 40, No. 3, September 1985, p. 14.

According to Robert D. Raven, in fact, because litigation is an extremely expensive undertaking, the process may serve to significantly increase feelings of resentment, animosity and mistrust in a disputant, not only leading to a reduction in disputant satisfaction with the dispute resolution process and experience, but also in turn increasing the chances that the process ultimately will not be successful in resolving the dispute (Raven, p. 46). Professor of Law Hamar Foster, however, contends that in litigation the primary factor influencing disputant satisfaction is whether they win or lose their case. Winners will tend to overlook issues such as cost or speed of resolution, while losers tend to criticize all aspects of the system (Personal communication).

appropriate than litigation, then they will be inclined to believe that ADR mechanisms such as negotiation offer "a distinctly superior dispensation of justice (McKay, 1990, p. 16)." In native rights disputes, where the desire to achieve 'justice' is particularly salient, these claims are of critical importance. First Nations frequently criticize the Canadian justice system, contending that it is incapable of delivering justice to aboriginal peoples. If negotiation can provide a forum where disputants believe justice is both done and seen to be done to a greater degree than is deemed to be the case with litigation, then this is no small accomplishment. As we will soon discover, however, a closer examination of many of the claims of ADR theorists suggests that the promise of ADR often exists more in theory than in reality.

v. The Pitfalls of Negotiation, and Potential of Litigation, for Aboriginal Rights Disputes:

While ADR theory may lend some credibility to the sentiments expressed by many interested parties and observers in the wake of *Delgamuukw* that negotiation is a far more appropriate forum for addressing aboriginal rights grievances than litigation, other aspects of ADR theory, as well as plain common sense and observation, suggests that in instances involving complex cross-cultural disputes, negotiation is not without some weaknesses and limitations of its own[146]. Not only does litigation have

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[146]According to Robert B. McKay, for example, "ADR is not without its own set of somewhat distinctive problems (McKay, 1990, pp. 16-17);" Robert D. Raven contends that "ADR does not hold only advantages (Raven, pp. 47-48)." Robben Fleming, for instance, speaking of the American situation, wonders how alternative methods of resolution will be provided, administered and financed, and questions whether ADR procedures can be made compatible with such constitutional dictates as the right to a jury trial, the requirements of due process, and the requirement of equal treatment under the law (Fleming, p. 522). Others fear that ADR may create a two-tiered system of justice; one where the disputes of the disadvantaged are either

characteristics that arguably commend it above ADR processes in certain situations, even in relation to complex-cross-cultural disputes such as aboriginal rights grievances, but it is also apparent that many of the purported advantages of ADR are not only more theoretical than practical, but also tend to be naive and idealistic.

In fact, despite the optimism with which treaty negotiations were commenced in British Columbia, and the relatively innovative structure of the British Columbia treaty negotiation process, it has quickly become apparent that when dealing with cross-cultural disputes that are not only entrenched and complex, but also controversial, there is no magic solution. The primary challenge informing attempts to resolve such disputes is much broader and more substantive than merely the choice of which dispute resolution mechanism is most appropriate for a particular dispute. In fact, many of the same issues, challenges, obstacles and frustrations tend to arise regardless of the type of dispute resolution mechanism adopted in a particular circumstance. These issues, challenges, obstacles and frustrations appear to be inherent not only in attempts to engage in cross-cultural dialogue, regardless of the forum, but also in complex disputes predicated upon a clash of radically different perspectives, visions and aspirations.

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chanelled out of the courts and into an inferior system of dispute resolution such as ADR where they receive a second-class form of justice, and where they may be sacrificing their legal rights (Salem, p. 11), or conversely, where the conflicts of the poor are relegated to a backlogged and underfunded legal system, while the rich have their disputes resolved quickly and efficiently in alternative dispute resolution processes (Raven, p. 47).

While proponents of ADR argue that it is not without some limitations, however, at the same time their arguments in favour of ADR often appear naive and idealistic, and at the very least, insufficiently informed by an adequate awareness or conceptualization of the potential difficulties of the implementation of ADR in practice.

The B.C. treaty process, for instance, was established in a manner consistent with the recommendations contained within *The Report of The British Columbia Claims Task Force* released June 28, 1991. Comprised of a chair, as well as 3 First Nations and 3 government appointees, the Task Force was directed to recommend how aboriginal rights negotiations could commence in the province, and what these negotiations ought to include[147]. The Task Force recommended that for a treaty process in the province to be both acceptable and effective, it must be culturally accommodating in its approach, attitudes and underlying principles. As the Task Force contended,

> recognition and respect for First Nations as self-determing and distinct nations with their own spiritual values, histories, languages, territories, political institutions and ways of life must be the hallmark of this new relationship (BC Claims Task Force, p. 16)

The Task Force also recognized that a culturally accommodating and flexible treaty structure and process would be a critical variable in the potential success of aboriginal rights negotiations (BC Claims Task Force, p. 33). It thus recommended that the B.C. treaty process be structured in a relatively innovative manner, an approach that was apparently intended to achieve in practice ADR's purported theoretical potential to deliver efficacious dispute resolution. It recommended a hybrid process which was not only to include the consensus-based approach to negotiation which ADR theorists suggest is one of the most effective means of addressing such conflicts, but also proposed a mediation aspect as a second step in

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[147]The British Columbia Claims Task Force, *The Report of the British Columbia Claims Task Force*, June 28, 1991, Introduction to Report, no page number.

particularly difficult negotiations. The mediation role was to be played by the B.C. Treaty Commission. The commission was to be a neutral and independent body, with a staff chosen by all three principles: the First Nations Summit, the province and Canada. As 'keeper of the process,' its intended role was to monitor and coordinate the treaty negotiation process, to ensure that the process was fair, impartial and comprehensible, that all parties have adequate resources at their disposal, that the parties work effectively to reach agreements, and that the process is kept accountable to the public. The commission, as a 'mediation' or 'facilitation' mechanism, was to be a group of individuals with expertise in the areas of aboriginal issues and dispute resolution (BC Claims Task Force, pp. 35-41)[148]. The recommendations of the B.C. Claims Task Force were accepted by the province, and the six-stage treaty process subsequently established in British Columbia was the one proposed in the Task Force's report (Mel Smith, 1995, pp. 86-90).

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[148]ADR theorists would no doubt argue that the Commission, because it provides a variety of third-party mediation, is a valuable addition to the B.C. treaty process. According to Robert Raven, a "third party can suggest alternatives that the parties did not consider or fully appreciate. In ADR language, the third party can help create a "win-win" outcome (Raven, p. 46)." Discussing the utility of third party ADR processes in the insurance sector, McKeon contends that "sitting down with an opponent and rationally discussing the case before a mutually selected neutral party creates a high probability that the matter will be resolved (McKeon, p. 13)." For elaboration on the structure, role and intent of the various components of the B.C. Treaty Process, see the following documents: The British Columbia Claims Task Force, *The Report of the British Columbia Claims Task Force*, June 28, 1991; Government of British Columbia, *In Fairness to All: Moving Towards Treaty Settlements in British Columbia*, 1994; British Columbia Treaty Commission, *The First Annual Report of the British Columbia Treaty Commission For The Year 1993-1994*, 1994; British Columbia Treaty Commission, *The Second Annual Report of the British Columbia Treaty Commission For The Year 1994-1995*, 1995; British Columbia Treaty Commission, *B.C. Treaty Commission Annual Report 1995-96*, 1996.

Not surprisingly, then, a close analysis of negotiation demonstrates that it is far from a panacea. On the contrary, negotiation has a number of characteristics which, in terms of aboriginal rights grievances, make it cause for concern. ADR, for instance, may serve to remove from the courts some conflicts that can, or should, only be resolved by judicial intervention. (Goldberg, Green, and Sander, p. 6; McKay, 1990, p. 17)." In this sense, it is useful to examine the comments of Lon Fuller, who argues that adjudication is not appropriate for "polycentric" disputes, or in other words, "allocational disputes in which no clear governing guidelines for a decision are available and where any particular solution will have proliferating ramifications (as discussed in Goldberg, Green and Sander, p. 10)[149]." When a client is merely looking for a resolution of his or her dispute, negotiation is clearly not only suitable, even in polycentric disputes, but may well be the preferred process. However, if a disputant is seeking "the establishment, vindication or protection of a legal *right*," for any type of dispute, ADR processes such as negotiation are arguably not appropriate (comment by Norman K. Janes as quoted in Ray and Freedman, p. 30).

In fact, in cases dealing with legal rights, one is usually dealing with an issue of constitutional importance or fundamental principle. Whereas minor issues or

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[149]By Fuller's definition, aboriginal rights grievances are polycentric disputes. The example given by Fuller, however,

> is where two museums received a bequest of a collection of paintings in equal shares with no directions for apportionment. The problem, as Fuller points out, is that the disposition of any single painting has implications for the disposition of every other painting as each museum seeks a complete and well-rounded collection. For disputes such as this a negotiated or mediated solution that seeks to accommodate the desires of the disputants is far better than an externally imposed solution (Goldberg, Green and Sander, p. 10)."

recurring instances of the same or similar issues may be adequately addressed outside of the courts in a less formal or truncated procedure, in cases of critically important, complex, or novel disputes which require a definitive precedent, the courts arguably offer a more appropriate approach[150].

Because such cases are precedent-setting they are of crucial importance, and are arguably more appropriately dealt with in a legal and adjudicative forum where "there is ample opportunity for the full presentation of evidence and argument (Goldberg, Green and Sander, p. 11)," and where a principled, reasoned legal decision can be rendered with a level of detail sufficient for the significance of the issues at question. The body of precedent that is thereby constructed provides invaluable legal guidance for future cases of a similar nature. In contrast to negotiation, in fact, the courts are not only charged with protecting rights, but they also establish valuable precedents, and have powers of enforcement and procedure which are all very important to society and in certain circumstances, to disputants (Fleming, p. 524). As Raven contends,

> any procedure that directs whole subject areas of dispute to alternative mechanisms outside of the courts risks stifling development of the law and denigrating that class of dispute....Even if 99 percent of a certain category of cases ultimately uses ADR procedures, the courts must remain open for the one percent in which one or both parties desire the public proceedings, written decisions, due process, and accountability by appeal of court decisions (Raven, p. 47).

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[150]An example of the latter "is a class-action civil rights lawsuit raising an unsettled constitutional or statutory issue," while an example of the former "is the amount of damages due to individual members of the class (Goldberg, Green and Sander, pp. 10-11)."

As the difficulties that have arisen at the Gitxsan negotiating table in particular have demonstrated, it is useful to have clear legal precedents or jurisprudence to guide negotiations when extremely complex or contentious issues are at dispute, and when the disputants are coming from significantly different positions. According to Robben Fleming, however, such criticisms of ADR may tend to over-emphasize the potential of alternatives to litigation to impinge "upon great and enduring jurisprudential principles (Fleming, pp. 525-526)." "In the totality of cases," she argues, "only a relatively small number involve constitutional questions or matters of fundamental principle (Fleming, pp. 525-526)." Regardless of whether critical legal issues or precedents are at stake, however, many First Nations may still want the potential vindication of their legal rights that the legal system has to offer over the compromise of negotiation. In view of the relatively ancient nature of their grievances, in fact, to compromise may well be seen as selling out or acquiescing, something which many First Nations are loathe to appear to be doing. According to Justice John Sopinka, in certain circumstances such a preference for litigation over negotiation would not be unusual. He contends that, as is demonstrated by the Canadian *Charter of Rights and Freedoms*, "contemporary morality often values the vindication of rights over the balance of compromise[151]." It is certainly the case that in B.C., the opposition of the Union of B.C. Indian Chiefs and its member nations to the treaty process is in great measure informed by fear that the process is designed to achieve pacification and co-option of the province's First Nations, primarily through extinguishment of aboriginal rights[152]. The Gitxsan and Wet'suwet'en's desire to achieve substantial

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[151]Justice John Sopinka, "What Can We do to Make the Current System of Dispute Resolution Work Better?" *Canada-United States Law Journal*, Vol. 17, No. 2, 1991, p. 524.

[152]*Wolf Howls*, a publication of the UBCIC-affiliated Tsilhqot'in Nation, contains

vindication of their legal rights also appeared to be a critical catalyst in their decision to mount the kind of comprehensive and symbolic legal case that they did.

The issue of who is to be seen as the legitimate representative or representatives of a particular First Nation in negotiation is another crucial variable that is bound to mean that the application of negotiation to native rights disputes is less than effective. For a society and culture with a diffused power base, as is the

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a number of articles critical of the B.C. treaty process. See, for instance, "TNG rejects college treaty talks: University College of the Cariboo Dean chastised for meddling with Tsilhqot'ins," *Wolf Howls: The Journal of the Tsilhqot'in Nation*, Vol. 1, No. 5, January 1995, p. 23; "Shuswaps join B.C. Treaty Commission," *Wolf Howls: The Journal of the Tsilhqot'in Nation*, Vol. 1, No. 6, February 1995, p. 6; "About that map," *Wolf Howls: The Journal of the Tsilhqot'in Nation*, Vol. 1, No. 6, February 1995, p. 7; "Jurisdiction: The basic right of ownership and management of Chilcotin land and resources is the exclusive domain of the Tsilhqot'in Nation through its chosen governing structures," *Wolf Howls: The Journal of the Tsilhqot'in Nation*, Vol. 1, No. 8, April 1995, p. 3; "The B.C. Treaty Process is Doomed," *Wolf Howls: The Journal of the Tsilhqot'in Nation*, Vol. 1, No. 9, May 1995, p. 3; "Treaty clashes and crashes: The B.C. Treaty Commission continues to self-destruct because it is anchored in the mire of local politics and election fever expediency-instead of inter-nation diplomacy," *Wolf Howls: The Journal of the Tsilhqot'in Nation*, Vol. 1, No. 12, August 1995, p. 29; "War declared on Tsilhqot'in Nation by Canadian Army and surrounding B.C. Treaty Commission Indians," *Wolf Howls: The Journal of the Tsilhqot'in Nation*, Vol. 2, No. 2, October 1995, p. 4; "A strong mandate to fight back from treaty betrayal set forth in New alliance of native nations not in the B.C. Treaty Commission process." *Wolf Howls: The Journal of the Tsilhqot'in Nation,* Vol. 2, No. 3, November 1995, pp. 4-5; "Treaty process failure panicking politicians," Editorial, *Wolf Howls: The Journal of the Tsilhqot'in Nation*, Vol. 2, No. 5, January 1996, p. 3; "B.C. Treaty Commission public forum bluntly tells government negotiators: 'We don't trust you,'" *Wolf Howls: The Journal of the Tsilhqot'in Nation*, Vol. 2, No. 5, January 1996, p. 19; "B.C. 'treaties' won't cover past injustices," *Wolf Howls: The Journal of the Tsilhqot'in Nation*, Vol. 2, No. 8, April 1996, p. 24; "Powerful reunification of Alliance of Nations: Portraits of discontent from many nations," *Wolf Howls: The Journal of the Tsilhqot'in Nation*, Vol. 2, No. 9, May 1996, p. 5; "Let's admit the BCTC needs an overhaul," Editorial, *Wolf Howls: The Journal of the Tsilhqot'in Nation*, Vol. 2, No. 10, June 1996, p. 3.

case with many aboriginal communities, the question of who speaks for whom, and who is held to legitimately represent whom in negotiation is not only critical, but also frequently problematic. In many communities, traditional hereditary leaders who aspire to ressurrect traditional structures and styles of governance and values fight for power and legitimacy with other leaders who owe their position to the *Indian Act* system of elected band-council governments, and not only have a different perspective on issues, but also different ideas on how they are to be addressed in the community[153].

For negotiations to be either effective or successful, there is a need for negotiators who truly represent their people to be at the table; negotiators who have a broad constituency and are viewed as legitimate by a large majority of their community or nation[154]. The issue of achieving legitimate representation is more

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[153]For example, such a conflict between elected and hereditary leadership exists within the Tsilhqot'in and Haida Nations (Personal experience, as well as communication with an individual who works with the Haida, and wishes to remain anonymous).

[154]In the B.C. treaty process, either a community or a nation may participate. This option tends to exacerbate issues of representation and legitimacy. In some cases a nation may be divided as some communities choose to participate while others do not, leading to division and strife among the nation. In other cases, a participating community may also be split by cleavages between those who agree with the process and want to take part, and others who are extremely opposed to participation. The Westbank Indian Band of the Okanagan Nation is a good example of both situations. For elaboration see: J.P. Squire, "Protestors disrupt meeting," *Kelowna Daily Courier*, February 3, 1994, p. A1; "Land-claim negotiations upset some," *Kelowna Daily Courier*, February 5, 1994, p. A2; Alistair Waters, "Dissidents threaten occupation," *Kelowna Capital News*, February 6, 1994, p. A1; Ron Seymour, "Staking a claim: Westbank band alone in filing claim, other Okanagan bands still deciding what to do or aren't going to participate," *Kelowna Daily Courier's Okanagan Saturday*, January 28, 1995, pp. A1, A2; Parminder Parmar, "Treaty talks to move ahead," *Kelowna Capital News*, November 27, 1996, p. A3; "Penticton Band will reject BCTC deal cut by renegade Westbank Band," *Wolf Howls: The Journal of*

critical in negotiation than in litigation because in negotiation, the negotiators are probably members, as well as representatives, of the community or nation. They are actively involved in developing the eventual agreement, and in making the various demands and concessions that are all part and parcel of the process of negotiation. Thus to be successful, negotiators clearly require a much greater degree of support and legitimacy among their constituents than is required of the nation's or community's leadership in litigation, where lawyers are hired, an argument is presented, and a judge makes a ruling. In short, because the process of negotiation is much closer to the community or nation than litigation, and is thus more prone to scrutiny, controversy, and the rise of factions and factional discontent, legitimate representation becomes a particularly critical variable in the success of the dispute resolution process.

The fact that achieving legitimacy among its negotiators at the table is much less of a problem for government than for the First Nations, also has serious implications for the effectiveness of negotiations. If factional strife and competition between camps arises on the native side, it is bound to seriously affect the cohesion of their bargaining team, and thus its ability to exert a powerful and compelling bargaining position, thereby significantly reducing their ability to be effective as negotiators. Considering that a level playing field is an important aspect of not only effective, but also just, dispute resolution, the problems arising from internal representational struggles may have critical implications.

Such representational issues may also seriously impact upon the ability of the negotiators to eventually sell a negotiated agreement to their community or nation, or

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the Tsilhqot'in Nation, Vol. 2, No. 5, January 1996, p. 5).

if it is accepted, to make an actual agreement last. Such potentialities were poignantly illustrated by the problems encountered by Ovide Mercredi, Chief of the Assembly of First Nations, when he attempted to have his chiefs ratify the constitutional agreement he made with the First Ministers of Canada as part of the Charlottetown Accord, and failed[155]. Representational issues were also associated with the expressions of discontent that have erupted amongst certain segments of the Nisga'a Nation in the wake of their historical Agreement-in-Principle treaty settlement. Certain segments of the nation are angry that their traditional lands weren't included in the settlement lands, and are rejecting the legitimacy of both the agreement and those Nisga'a negotiators and leaders who made it on their behalf[156].

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[155]David Roberts, "Mercredi pleads for solidarity among Indians: Native deal 'not what we expected,' Manitoba chief tells national leader," *Globe and Mail*, October 8, 1992, p. A7; David Roberts, "Native leaders undeterred by rift over Constitution: Mercredi dismisses view that accord can be renegotiated," *Globe and Mail*, October 9, 1992, p. A4; Robert Matas, "Chiefs fail to vote on accord: Changes needed to get natives to back agreement, Mercredi says," *Globe and Mail*, October 17, 1992, p. A4; "Our people like accord, leaders say," *Vancouver Sun*, October 20, 1992, p. A6; Rudy Platiel, "Split over Charlottetown deal illustrates aboriginal diversity: Fragile alliance of natives has been shaken by vote," *Globe and Mail*, October 26, 1992, p. A4; Doug Ward, "Rejection called kick in the face: Aboriginal leaders say white domination prevails," *Vancouver Sun*, October 27, 1992, p. A3; Stewart Bell, "Aboriginals split over No result," *Vancouver Sun*, October 28, 1992, p. A4; Geoffrey York, "Native voters reject deal," *Globe and Mail*, October 28, 1992, p. A5; Rudy Platiel and Geoffrey York, "Mercredi urges 'quiet revolution:' Resurgence in native militancy to flow from No vote, AFN leader says," *Globe and Mail*, October 28, 1992, p. A5; Tom McFeely, "They won't take No for an answer: The defeat of the accord hasn't reduced native leaders' demands for self-government," *British Columbia Report*, Vol. 4, No. 11, November 16, 1992, pp. 9-10; Michael Doxtater, Wampum Wisdom: Why many natives viewed the Charlottetown agreement as a con," *This Magazine*, Vol. XXVI, January/February 1993, pp. 24-25.

[156]See, "The Nisga'a settlement divides First Nations," Editorial, *Wolf Howls: The Journal of the Tsilhqot'in Nation*, Vol. 2, No. 6, February 1996, p. 3; "Nisga'a 'treaty' deal signed," *Wolf Howls: The Journal of the Tsilhqot'in Nation*, Vol. 2, No.

In many aboriginal communities and nations, moreover, issues of representation and legitimacy are frequently further magnified by the existence of an increasingly radical group of dissidents who do not wish to cooperate with government at all, at least not in the current treaty process, and are determined to threaten and challenge the legitimacy and aspirations of those leaders who are willing to assume a more conciliatory stance with government. As noted earlier, the Westbank Indian Band is a good example of a band that is participating in the B.C. treaty process, yet also has a vocal minority of members who are adamantly opposed to both the process and their community's participation in it. Because of the connotations of litigation being a formal battle against the enemy, in such situations litigation may be better able to marshall the support of the community behind the process, although as the *Delgamuukw* process demonstrated, there are nevertheless bound to be some who agree with going to court, and some who would rather not.

Critics of ADR also contend that in cases where there is a considerable disparity of power between disputants, arising out of differences of wealth, knowledge or skill in negotiation, then ADR processes such as negotiation are inappropriate and inadvisable. In such cases, it is argued, the poorer, less skilled or educated, and therefore weaker of the disputants will be placed at a considerable disadvantage as their more powerful opponent out-manoeuvres, out-smarts or exhausts them financially (Fleming, p. 525; Ray, p. 68; Sacks, p. 241; Salem, p. 11).

Such an argument appears to be extremely relevant in terms of native rights cases. In aboriginal rights negotiation, for instance, a First Nation is negotiating with

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7, March 1996, p. 7; John Power, with notes from Steve Vanagas, "Why no Nisga'a referendum? Governments appear to fear that a pan-B.C. vote would kill the deal," *British Columbia Report*, Vol. 7, No. 33, April 15, 1996, pp. 8-13.

two governments, both of which have far greater resources, both financial and human, with which to muster their strength against their opponent. The First Nation, in turn, gets the financial means with which to fight them from those very governments, governments who in turn not only control how much money is given, but how and when. This arrangment potentially enables the governments to exert a significant degree of control over the First Nation; the First Nation is thus put in the position of not wanting to, or having to be careful not to, figuratively bite the very hand that feeds it[157].

In the B.C. treaty process, the financial disparities between the First Nations and the governments are a particularly critical issue, and a significant source of contention for many aboriginal peoples. While in litigation most government financial support is in the form of grants, in the treaty process the majority of funding is in the form of loans[158]. It also lead the Treaty 8 First Nation to withdraw from

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[157]This situation is bound to create psychological contradictions in the First Nations, in the sense that they are financially dependent upon the very governments that they are fighting, the same government that they contend have no legitimate authority or jurisdiction over them. This contradiction does not arise only in relation to negotiations, however, since in litigation the First Nations are also dependent upon government funding.

[158]According to the Tsilhqot'in Nation near Williams Lake, a nation affiliated with the Union of B.C. Indian Chiefs, this is one of the reasons why they are adamantly opposed to the B.C. treaty process. They contend that in the final analysis, the vast majority of the monetary compensation and resources they stand to gain through a treaty settlement will eventually be returned to the government when they must repay their loans. They conclude that the process is simply another attempt by government to extinguish them as aboriginal peoples (Personal communications).

negotiations[159]. This financing arrangement places pressure on the First Nation not only to settle, but also to settle as soon as possible. If they choose to hold out for a better deal, then in the long run their better deal will cost them more, meaning that it is not a better deal after all. This arrangement also pressures a Nation into staying with the process and reaching a deal, whether they believe it is in their best interests or not. If they withdraw from negotiations prior to reaching a settlement, then they will be in debt with nothing to show for it. The structure of financing upon which the B.C. treaty process is predicated is one of the main reasons why the Union of B.C. Indian Chiefs (UBCIC) and its member communities are so opposed to the process[160].

A government's greater financial power is also likely to enable it to muster a far more capable team of lawyers, experts and consultants, with the result that these inequities of power are perpetuated not only in the negotiating process itself, which is clearly oriented toward a settlement (Fleming, p. 525), but also, and even more critically, in the nature of the resulting agreement. As a dispute resolution mechanism then, negotiation tends to entrench and consolidate existing disparities of

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[159]"Treaty 8 Indians bail out of B.C. Treaty Commission: Tribal Association says BCTC expenses put them in debt," *Wolf Howls: The Journal of the Tsilhqot'in Nation*, Vol. 2, No. 2, October 1995, p. 10.

[160]There is another critical reason why the UBCIC and some other First Nations are so adamantly against the B.C. treaty process. Citing such legal sources as the *Royal Proclamation of 1763*, they believe that treaties can only be made on a nation-to-nation basis. Thus the B.C. treaty process is rejected not only because of the province's participation, but also because individual native communities can participate and make their own treaties. The UBCIC believes that treaties can only be made with the tribal group or nation as a whole, and that there is no legal basis for individual communities to participate on their own. They charge that this is a divide-and-conquer strategy on the part of the government, and conclude that the entire B.C. treaty process is unconstitutional.

power between disputants, rather than equalizing them.

Many of these same considerations also apply in relation to litigation, however. In the *Delgamuukw* case, for instance, the Gitxsan and Wet'suwet'en contended that although the Federal government may have paid their lawyers' costs, it provided ten times as much funding to defend itself and the province of British Columbia[161]. According to Stuart Rush, one of the lawyers for the plaintiffs,

> the trial shut down twice, once for six months, because [the Gitxsan and Wet'suwet'en] ran out of money....They ended up raising some funds from the federal government's test case litigation funding program and over $1 million from holding bingos and raffles and selling community calendars (As quoted in Mucalov, p. 20).

As Terry Glavin recounts,

> At times, the Indians' legal team went without pay, waiting for fundraising projects or for Ottawa to free up some money for the Indians' research. Tribal council leaders worked without wages, Gitksan artists auctioned off button blankets, masks and jewelry and held benefit dinners of moosemeat, wild celery, dried seaweed and herring roe[162].

The Gitxsan and Wet'suwet'en also raised money by means of hundreds of volunteer door-to-door canvassers in a number of Canadian cities (Glavin, "Trial probed centuries," p. A12). Frederick J. Martone contends that

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[161]Office of the Gitksan and Wet'suwet'en Hereditary Chiefs. *Indian Land: The Gitksan and Wet'suwet'en*. Undated information pamphlet; no pagination.

[162]Terry Glavin, "Trial probed centuries, cosmos: Marathon land-claim suit included shamanic rituals, scientific testimony," *Vancouver Sun*, March 8, 1991, p. A12.

> the adversary system assumes that litigants have comparable economic staying power and that opposing lawyers have comparable talent. When these conditions exist, the adversary system sometimes serves us well. More often than not, however, the adversary system breaks down. When litigants of substantial unequal staying power rival each other, the system is sometimes coercive. When lawyers of significantly unequal talent rival each other, the quality of the truth finding process is questionable (Martone, p. 233).

According to Hakon Kierulf, the problems of power inequities arise even before a minority group such as a First Nation even makes it into the courts. According to Kierulf:

> as adversaries, the minority party often has to contend with the public authorities or other powerful institutions or persons, that is to say even before the case comes up before the law courts there is an imbalance which in itself can seem forbidding (Kierulf, p. 3)

The same power imbalances which often makes it difficult for a First Nation to get its dispute into the courts system also applies within a negotiating context. As the First Nations of British Columbia well know, simply getting a government to concede to negotiations in the first place can be a veritable battle in its own right.

Litigation, however, has certain structural features which are intended to have an equalizing effect upon disparities of power which may exist between disputants, the most important of which is the fact that in litigation, a decision is ostensibly made in accordance with precedents and principles, and not with power (Goldberg, Green and Sander, p. 11). The legal system brings the disputants before a "neutral" arbiter, the judge, and having assessed the evidence adduced, a decision is rendered in accordance with the "law." In theory, the law is an abstract pinciple, and against this

abstract principle the parties are made equal; a decision is made according to the facts or merits of the particular case, and according to the letter of the law, not according to the resources or power that each of the parties can marshall, nor according to their various skills and abilities in marshalling persuasive power. The same rules, principles and contraints ostensibly apply equally to all. As Emond contends,

> adjudicative decisions are...*principled* decisions. The application of predetermined and widely accepted principles to the facts of a case is designed to ensure that the stronger *claim* (as measured by rules and principles) prevails, and not the stronger *party* (Emond, p. 17, emphasis in the original).

It should not be surprising, however, that these features are neither entirely effective nor fool-proof. As Emond also recognizes, despite the equalizing effect of the legal system in theory, strength and power are nevertheless factors in litigation (Emond, p. 17). If litigation is indeed more expensive and risky than negotiation, for instance, then it is a risk and option that the rich can more easily choose than those who are less than wealthy, and the wealthy may be thus more likely to truly benefit from litigation than others. In fact, the greater hardship for the less wealthy or weaker party, even in litigation, was evidenced in the *Delgamuukw* case when the trial was moved from Smithers to Vancouver, against the plaintiffs' protestations. The move was made for the convenience of Chief Justice Allan McEachern, and in turn caused considerable additional hardship for the Gitxsan and Wet'suwet'en, and particularly their elders, many of whom had never been out of the Skeena-Bulkley

area, and now had to travel to Vancouver to give evidence in the trial[163].

In native rights cases, moreover, the utility of the various ostensibly equalizing structures of litigation is even more qualified by the variable of cultural difference which, as discussed above, immediately puts the First Nations in a position of disadvantage in the courtroom. Because both the law and the legal system are culturally constituted, embodying the values, assumptions and aspirations of the dominant society's culture, by their very nature they are partial for those embedded in a different cultural context[164]. The mechanism is familiar to, and culturally compatible with, one side, but alien and culturally incompatible with the other side. This means that one side can better use the system to their advantage than the other side. While the structure of litigation has the potential to minimize power disparities to some degree, then, when cultural difference is a variable in a case, it cannot, by its very nature, minimize power inequities that are predicated upon different cultural orientation. In fact, litigation's culturally-oriented constitution invariably serves to increase disparities predicated in cultural difference.

In short, neither litigation nor negotiation can entirely equalize the disparities of power that may exist between disputants. It is perhaps not surprising, then, that some ADR theorists contend that ADR is not so inappropriate for situations involving power disparties as some may argue. In fact, according to Robert B. McKay, "the danger of overreaching by a party with greater resources or more competent

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[163]In this sense, one of the benefits of negotiation is that the process can come to you. In the B.C. treaty process, in fact, the negotiating tables are convened locally, usually in a Band office or community hall.

[164]See, for instance, Hakon Kierulf's observations on the Sami in Norway in this regard, pp. 1-8.

representation" is no greater in ADR processes than in litigation (McKay, 1990, p. 19). The risk is reduced, he contends, by the fact that ADR processes are usually a mutual and voluntary choice by both parties. McKay argues, moreover, that similar to the role played by a judge in litigation, in third-party ADR processes the interests of the weaker party are protected by the participation of an arbitrator or mediator, which "invites protection of the weaker party against an unjust result (McKay, 1990, p. 19)[165]." In the B.C. treaty process this would be one of the roles of the B.C. Treaty Commission, since it is responsible for monitoring and guiding negotiations (BC Claims Task Force, pp. 35-41).

First Nations should not be scared away from choosing to pursue negotiations rather than litigation by fears that its governmental opponents may have stronger and more skillful negotiating teams. On the contrary, after generations of fighting governments and bureaucrats, some First Nations communities have individuals who are extremely tough and effective negotiators, and quite capable of holding their

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[165]For a contrary position, note the concerns expressed by Howard R. Sacks that in mediation a mediator may be unable or unwilling to attempt to equalize any power disparities which may exist. According to Sacks, a private mediator's success, and therefore continuing clientele, is based upon his or her ability to achieve settlements. Consequently, his or his interest is with achieving a settlement, not necessarily a fair settlement. According to Sacks, "the private mediator, unlike a judge or court staff mediator, is unlikely to intervene to insure that all the facts come out (Sacks, p. 241)."

Richard A. Salem contends, however, that

> a number of dispute resolution centres have responded to this criticism by promulgating standards of practice so that mediators can identify and deal with power disparities and provide the option of terminating mediation when parties lack information or skill or for some other reason are unable to represent themselves adequately in a negotiating process (Salem, p. 11).

own[166]. It may nevertheless be the case, however, that other less experienced First Nations may be at a significant disadvantage in negotiating against government. The choice of whether a First Nations is likely to be a strong or weak opponent in negotiation, therefore, and the concomitant choice of whether litigation may be preferable to negotiation, despite its cultural limitations, is a choice that must be made according to the unique circumstances of each dispute. In making such a decision, it may be useful to contemplate the claim of Goldberg, Green and Sander that "in some situations, the mere availability of adjudication provides important leverage for bringing the more powerful party to the bargaining table and reducing inequalities of bargaining power (Goldberg, Green and Sander, p. 11)."

The current nature of legal education, moreover, and in particular, its adversarial orientation, also poses potential problems for the success of ADR. In fact, while lawyers will often be as critical a participant in negotiation as in litigation, particularly in complex cases such as aboriginal rights disputes, in many cases, especially amongst older lawyers, their legal training will not have trained them to be effective negotiators. In fact, because in most cases negotiation skills were not an aspect of their legal education, when they negotiate many lawyers will find themselves relying upon their instincts, rather than upon consciously developed skills and abilities, a tendency that may be frequently to the detriment of their client's interests (McKeon, p. 11). In other words, if a lawyer does not adequately understand how the negotiation process functions, and how it may affect a client's interests, then he or she may fail to use ADR processes such a negotiation effectively,

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[166]Joey Thompson, "Dancing Between Two Worlds: Native Indians are Gaining a Reputation as Canada's Most Astute Negotiators," The Canadian Bar Association's *National*, Vol. 2, No. 2, March 1993, pp. 26-31.

or to their full potential (Patterson, p. 591).

Justice John Sopinka also identifies a number of problems that the current system of adversarily-oriented legal education may pose for the success of ADR. According to Sopinka,

> the system of modern legal education...is unrelenting in its inculcation of the adversarial approach to dispute resolution....The result is that modern legal education often produces lawyers trained in a confrontational spirit which undermines and ultimately ignores innovations aimed at the early settlement of disputes. The primary goal of winning the case often blinds lawyers to the financial and emotional cost to the client (Sopinka, p. 525).

Sopinka does offer a solution, however. He contends that:

> law schools...must foster an atmosphere of conciliation by emphasizing such methods as mediation, negotiation, and arbitration as means of resolving legal disputes. The curricula should give weight to the values of balance and compromise to complement the vindication of rights as the sole principle of dispute resolution. Instead of placing all the emphasis on trial practice, some of the students' time should be devoted to settlement techniques....The governing bodies should stress the values embodied in the *Canons of Ethics* of the Canadian Bar Association, section 2(3), which states: "Whenever the controversy will admit of a fair adjustment the client should be advised to avoid or end the litigation (Sopinka, p. 525)."

Despite the apparent optimism of Sopinka, however, it is nevertheless apparent that such a significant change in values, attitudes and practices will be incremental at best, if such a change can actually ever be achieved. Thus while private ADR practioners who are not a product of an adversarily-oriented law school, but rather a compromise-oriented ADR institute, may become lead negotiators, and thus may attempt to ensure that compromise and conciliation rule the process, lawyers

will still be necessary in highly complex cases such as aboriginal rights disputes. And no doubt lawyers, at least for a while to come, will still be directed by an adversarily-oriented approach to conflict and dispute resolution. In short, ADR solutions such as those posed by Sopinka may well be overly-idealistic in their vision of what can be achieved in a society that is fundamentally premised upon competition and winning, rather than upon compromise and conciliation.

In fact, the claims of ADR proponents frequently appear not only idealistic, but also naive. In many cases this naivete is demonstrated by the fact that what is purported to be an advantage of ADR can also be construed as potentially disadvantageous, or even problematic. Moreover, characteristics of negotiation that are presented by ADR proponents as improvements upon litigation in many instances appear as the very same challenge in both dispute resolution mechanisms. While proponents of ADR contend that the flexibility and informality of negotiation is one of its greatest characteristics and attractions, for instance, enabling a disputant to feel at ease, to present his or her case in an unhindered fashion, and to participate in resolving the dispute in a creative manner, it also appears that in certain circumstances this very same flexibility may also be a drawback.

In some situations the structure, discipline and rules of litigation and the judicial system are arguably not without some benefit to disputants, even in a cross-cultural context. According to McKay, for instance,

> The more informal methodology of ADR (even in arbitration, the most court-like of all ADR processes) introduces an element of uncertainty as to guiding principles. Not only are rules of discovery and evidence and formalities of court procedure notably relaxed (often to considerable advantage) but, in the same way, standards of conduct are less precisely defined for the negotiator, mediator, factfinder, attorney and witness (McKay, 1990, pp. 16-17).

While flexibility may be advantageous in some situations, more formal structures and procedures may well be preferable in other circumstances. In some cases, in fact, the disputants may be better able to use a dispute resolution process to their advantage if the rules of the game are clearly laid out and understood as is the case with litigation.

The flexibility and informality of negotiation, permitting either the total absence of rules or a significant relaxation of them, also raises several troubling issues. For instance, "To what extent is 'puffing,' distortion of facts, or even untruthfulness, acceptable in negotiation? (McKay, 1990, p. 17)." In most serious disputes the parties are likely to be represented by lawyers who are bound by certain professional codes which regulate their profession, and which require them to conduct themselves according to certain specified standards of behaviour. Nevertheless, in contrast to litigation, the more flexible and informal nature of the negotiation process arguably gives disputants and/or their representatives the space to potentially resort to a variety of unscrupulous techniques in an attempt to gain the upper hand in the negotiation.

On the other hand, as ADR processes such as negotiation become more formalized and institutionalized, and as lawyers necessarily become more involved as negotiation advisors, and in drafting settlement agreements, the negotiating forum might lose a great deal of the flexibility, informality and lack of over-'professionalization' that contributed to its proponents commending it in the first place. In fact, as Robert D. Raven contends, "ADR could become more formalized and rigid as lawyers import their usual procedures into the process (Raven, p. 47; see also Fleming, p. 525)." While a greater degree of formalization and institutionalization may have some potential benefit, such as a greater degree of state financing, and a greater degree of procedural certainty, it also brings a host of

associated drawbacks, such as more rigidity, and as a result, arguably less ability to accommodate cultural difference. But such a development may be inevitable in a complex and bureaucratic society, as has been demonstrated in British Columbia's short experience with treaty negotiations.

The Nisga'a Agreement-in-Principle, for instance, is an extremely lengthy, complex, bureaucratic and legalistic document, and should it ever be finalized, is bound to be exceedingly difficult to implement[167]. Moreover, as the B.C. treaty process has demonstrated, on some issues there is only so much flexibility possible, regardless of the dispute resolution mechanism in question. The Gitxsan treaty negotiations broke down, in part, for instance, because the province was unwilling to qualify its jurisdiction and agree to Gitxsan co-management over the whole of its traditional territories. Whether in the courts or the political arena, jurisdiction has been an issue around which there has been little room for flexibility and compromise.

Moreover, while ADR theorists argue that negotiation, unlike litigation, tends to foster trust between disputants, and that this trust in turn contributes to a more effective variety of dispute resolution, this contention also appears naive and idealistic. While negotiations may evade the legacy of oppression and bad memories that the legal system has for the First Nations, aboriginal peoples are no more likely to trust the same governments and structures of authority while sitting down with their smiling representatives around a negotiating table than they are facing them in

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[167]Government of Canada, Province of British Columbia, and Nisga'a Tribal Council, Nisga'a Treaty Negotiations *Agreement-In-Principle*, February 15, 1996. For an analysis of the document from a forest industry perspective, see: Council of Forest Industries' Committee on Aboriginal Affairs, *Overview of the Nisga'a Agreement-In-Principle*, October 1996; Cariboo Lumber Manufacturers' Association, *Submission to the Select Standing Committee on Aboriginal Affairs*, November 12, 1996.

court. The very same feelings of confronting wolves in sheep's clothing are bound to exist regardless of the particular dispute resolution mechanism in question. If such feelings of trust do arise, moreover, they will no doubt exist primarily between the negotiators themselves, and are unlikely to extend into a new trust amongst their constituents as well. In fact, this is arguably where the Charlottetown Accord floundered. In that process, ten premiers, the federal government, two territories and four aboriginal organizations unanimously agreed upon an approach that only months earlier seemed impossible. They were unable to sell it to their constituents at the end of the day, however, and the deal disintegrated.

In British Columbia, moreover, there may be a tendency for natives to be distrustful of the motives informing the province's very willingness to negotiate, especially after decades of intransigence. They will no doubt conclude that if the province is willing to negotiate, it is because they think they'll gain more and lose less through negotiations than through litigation, resulting in a greater wariness on the part of the First Nations.

Despite the contentions of most ADR proponents, then, negotiation will not necessarily foster a greater trust among disputants than occurs within the adversarial, and often hostile, forum of litigation. As was noted above, the flexibility and informality of negotiation may not provide an adequate check and balance against such underhanded tactics as misrepresentation or distortion of facts and circumstances. In negotiation, then, it may be very difficult to ensure that the other side is both trustworthy, and is negotiating in good faith. Should such unscrupulous practices occur and be discovered, trust is likely to be seriously undermined. While it may be no easier to foster trust between disputants in negotiation than in litigation, however, it is ironic that trust may well be a far more critical variable in the success

of negotiation than is the case with litigation; while litigation is a relatively detached and impersonal third-party-oriented process, for negotiation to be successful, negotiators must trust one another considerably.

Moreover, while ADR literature strongly suggests that "...the earlier the ADR process is invoked, the better the results (McKeon, p. 12)," in such complex and entrenched disputes as aboriginal rights grievances, it is arguably already far too late to take advantage of these considerations. This advice is no doubt offered by ADR proponents in an attempt to pre-empt the possibility of further bad feelings and distrust arising between disputants, variables which clearly do not contribute to effective and efficient dispute resolution. Even if ADR proponents are correct in their contention that negotiations are better at building trust than litigation, native rights disputes have a long history in British Columbia, and it may well be that there already exists far too much bad faith and ill will to enable the construction of the foundation of trust necessary for fruitful negotiations. In fact, such bad faith, ill will and distrust can often contribute to the adoption of extreme views, if not simply to a stubborn refusal to reject preconceived notions even in the face of evidence to the contrary. Moreover, without even a rudimentary level of trust it may be very difficult to address and overcome whatever misinformation or ignorance of the other party's interests and positions exists between the disputants. These tendencies are not likely to contribute to effective negotiation. In short, negotiation is not likely to foster trust to quite the degree that its proponents seemingly contend.

In fact, the difficulty of building trust between disputants with a long history of poor relations has been one of the primary challenges facing the B.C. treaty process. The issue of trust has cropped up time and again in relation to such matters as the participation of third parties; the role of the province; the option of either

communities or nations as the party to negotiations, and the fear that government is trying to divide-and-conquer the aboriginal peoples, and ultimately effect the extinguishment of both their rights and themselves as culturally-unique peoples. A particularly controversial issue has been the province's refusal to protect land and resources through interim protection measures until an Agreement-in-Principle has been reached. This has been an issue at the Sechelt treaty negotiation table for example. While the government says it is unfair to other resource users, and detrimental to the economy, to tie up land and resources that might not be on the table a year from now, the First Nations fear that this is a strategy on the part of the province to ensure that at the end of the day they get as little valuable land and resources as possible[168].

That the claims of ADR proponents often appear idealistic and naive, and based more in theory than in practical considerations, is also apparent upon a closer examination of two seemingly contradictory claims of ADR: a) that in complex disputes with broad public implications, the meaningful participation of a wide variety of interested parties is critical for a resolution that has legitimacy, and will, therefore, be lasting because a proper prepatory foundation has been constructed; and b) that in complex and controversial disputes, disputes which usually have broad public implications and affect a wide variety of different interest groups, the ability of the disputants to make the process private and confidential may be the best way to achieve agreement: a private process avoids the public awareness, scrutiny and potential controversy that may make it more difficult, or even impossible, to achieve

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[168]Opposition to the province's stance on Interim Protection Measures was the subject of a presentation made by a member of the Cariboo Tribal Council to the Select Standing Committee on Aboriginal Affairs during its hearings in Williams Lake on November 12, 1996 (Personal experience).

resolution. In a private process there is less need to posture and save face, and it is thus easier to make the difficult concessions that may be necessary to achieve compromise and agreement. A closed process arguably assists the parties in developing a settlement to their dispute that is truly a workable resolution, and is not undermined by politics and posturing. This apparent theoretical tension between the alleged advantages of negotiation over litigation has important implications for the resolution of such complex and controversial disputes as native rights grievances.

In terms of such disputes, it is apparent that a careful compromise or balance must be achieved. On the one hand, a process must be sufficiently open and participatory as to be accountable and representative, thereby enabling the construction of an adequate foundation of public awareness and acceptance to ensure the legitimacy of an eventual resolution. At the same time, a process must also ensure an adequate degree of privacy and confidentiality so that difficult compromises can be made without loss of face or distortion on the part of the media or others for political gain.

In negotiations in practice, however, especially in relation to particularly complex and controversial disputes where difficult political constraints and considerations frequently arise, more often than not the tendency is for the negotiation process to become overly private[169]. The consequences of an overly-private process,

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[169]The difficulty of striking a workable balance between negotiations that are sufficiently private to facilitate difficult compromises, and yet open enough to ensure accountability and legitimacy, has also plagued the B.C. Treaty Commission. In fact, this was one of the most serious shortcomings of the B.C. treaty negotiation process, especially in its early days, and one of the major reasons why Charles Connaghan, the first Chief Commissioner of the Treaty Commission, resigned (Mel Smith, 1995, p. 107, footnote number 40). I had the opportunity to interview Connaghan during the summer of 1993, and at this time he indicated that public education and openness were two critical variables in the potential success of the B.C. Treaty Commission

however, are both considerable and serious. Public trust in government and the process may be significantly undermined, for instance, thus reducing both the potential legitimacy and ultimate success of both the process and any resulting agreement. Ironically, in fact, an overly-private process may also tend to intensify public controversy and conflict around the issues and the process, one of the situations which the adoption of more a private process is intended to avoid in the first place. A serious danger can arise if negotiations are conducted in what is perceived to be a secretive fashion, in that there may be a great potential for a public backlash upon disclosure or implementation, which in turn again reduces the potential of an eventual resolution, let alone one that is workable and lasting. It is arguably unacceptable for a dispute with widespread and critical public implications to be addressed and resolved behind closed doors, without any, or inadequate, public involvement. In fact, a sufficiently open and public process ought to be considered a crucial aspect of fair, just and democratic dispute resolution (Salem, p. 11).

In a democracy, moreover, it is also critical that those involved in resolving such disputes are accountable to the public, both for the way the process is conducted and the eventual resolution of the conflict. According to Emond, "the process of negotiation is only accountable to the disputants (Emond, p. 20)." By contrast, he contends, "political, administrative and judicial processes...are subject to a number of checks and balances designed to preserve the integrity of the process and the public acceptability of the result (Emond, p. 20)." While negotiation may be accountable only to the parties involved, certain measures can nevertheless be taken to ensure that an acceptable balance is struck between a process that is adequately open, and yet also

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negotiation process (Interview with Charles Connaghan, Chief Commissioner of the B.C. Treaty Commission, Kelowna, B.C., Summer 1993).

sufficiently private.

While it is critical that the public be aware, informed and involved, in disputes with wide-reaching public implications, however, in the pursuit of adequate openness and public participation, there is also a danger that negotiation may be structured too far in the opposite direction. While a wide range of interests must be considered and integrated for a resolution to be legitimate, workable and lasting, if negotiations are too open, either in terms of premature disclosure of particularly sensitive information or in encouraging participation from too many interest groups, then the process may become so politicized, or so cumbersome and complex, that nothing is ever accomplished. As the B.C. treaty process has once again demonstrated, striking an effective balance between openness and confidentiality is an extremely sensitive and difficult undertaking. With third parties demanding a more participatory role, and some First Nations wanting a closed process with little or no opportunity for third party or public involvement, it is not surprising that this is one of the most controversial issues relating to the treaty process. Certain nations affiliated with the UBCIC, for instance, do not think that third parties have a meaningful role to play in the treaty negotiation process. Negotiations with First Nations such as the Klahoose and Heiltsuk, moreover, were stalemated for a time due to a failure to reach agreement on openness protocols[170]. These are only two examples of a number of similar situations.

Given the challenge of balancing private and public interests in the negotiation forum, once again it appears that in some ways, and in some instances, litigation may actually provide a superior approach to dealing with some of these perplexing issues

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[170]Personal communication with an employee of the Ministry of Forests in Victoria, B.C.

and challenges. As Patterson argues, in fact, in some disputes it is important to consider "whether and when the public has interests that are more important than...private interests and whether these interests can be met only by traditional litigation (Patterson, footnote 46, p. 601)." In making such a decision, it may be worth considering the comments of Emond, who contends that while negotiation is most responsive to, and concerned about the needs of the disputants, litigation is more concerned about the needs of the public (Emond, p. 21). In situations where there is not the political will to keep the public sufficiently involved and informed in disputes with wide-ranging public implications, in fact, litigation may well be the preferred option. Moreover, the courts are arguably further removed from the political demands, constraints and considerations facing governments and politicians than is the case with negotiation. The law itself is also a body of careful and reasoned principles and precedents that ostensibly contribute to developing a just resolution of disputes. Thus a judge is arguably in a better position to render a compromise decision than a politician; her or his decision can be made without the same political constraints and realities, and is therefore more likely to be balanced, reasoned and impartial than a decision formed in the political fray. An emphasis on accommodation and reconciliation of the interests of all is certainly the direction that the courts have been taking in recent aboriginal rights cases. Considering the opposition to the Nisga'a Agreement-in-Principle that has been expressed by certain vocal dissenters opposed to what they contend is the overly generous nature of the settlement[171], and what many

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[171]See, for instance: Steve Vanagas, "Playing some pre-election hard ball: The NDP suddenly adopts a tough line in Nisga'a and Gitksan treaty talks," *British Columbia Report*, Vol. 7, No. 24, February 12, 1996, p. 9; Steve Vanagas, "A race-exclusive para-state: The Nisga'a deal would create an aboriginal 'homeland,'" *British Columbia Report*, Vol. 7, No. 26, February 26, 1996, pp. 8-9; Mel Smith, Opinion column, "B.C. has fallen for the federal government's land-claims line."

commentators imply is a balancing of rights by the Supreme Court of Canada in its recent *Gladstone*, *VanderPeet*, and *NTC Smokehouse* decisions[172], at present many British Columbians may feel that their interests have a greater likelihood of being acknowledged and accounted for by the Supreme Court than by government negotiators in the B.C. treaty process.

Moreover, the contention that ADR processes such as negotiation are not only faster, cheaper, and less complex than litigation, but also offer a disputant more control, ultimately leading to greater disputant satisfaction, are arguably all naive and idealistic. While such claims may sound persuasive in theory, in practice they are unlikely to materialize. In fact, if the argument of one ADR theorist is correct, namely that producing the compromise and restoration of good relations between disputants that is necessary for a resolution of a dispute requires a careful and patient dispute resolution process (Sviridoff, p. 5), then it seems unlikely that such a process will also be fast. By way of example, the Nisga'a Agreement-in-Principle took

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British Columbia Report, Vol. 7, No. 2, March 4, 1996, p. 12; John Power, with notes from Steve Vanagas, "Why the Nisga'a referendum? Governments appear to fear that a pan-B.C. vote would kill the deal," *British Columbia Report*, Vol. 7, No. 33, April 15, 1996, pp. 8-13; Steve Vanagas, "Bred to be bureaucrats," *British Columbia Report*, Vol. 7, No. 33, April 15, 1996, p. 12; Terry O'Neill, "1,613 reasons to hold a vote: Our straw poll finds huge support for a Nisga'a-deal referendum," *British Columbia Report*, Vol. 7, No. 37, May 13, 1996, pp. 8-11; Robin Brunet, "The $1-billion oversight: Cost of Nisga'a deal called grossly underestimated," *British Columbia Report*, Vol. 7, No. 41, June 10, 1996, p. 15.

[172]For elaboration, see: Mike Crawley, "Court limits aboriginal fishing rights: Three rulings indicate that only activities central to a band's life before first contact are protected," *Vancouver Sun*, August 22, 1996, pp. A1, A2; Andy Ivens and Lora Grindlay, "Supreme Court reels in native-only fishery: Makes commercial salmon 'equal access,'" *The Province*, August 22, 1996, p. A1; Mike Crawley, "Fish ruling 'opens door' to infringement of rights," *Vancouver Sun*, August 23, 1996, pp. B1, B2.

twenty years to achieve, and a final settlement is by no means imminent. Given the refusal of a large number of First Nations to participate in the B.C. treaty process, moreover, and the existence of dissenters even among participating Nations, as well as the potential for a public backlash, settlement agreements under the new treaty process may also be a long time in coming. Observers also contend that the present NDP government, intent on side-stepping any controversy, has deliberately slowed down the pace of treaty negotiations in the province, leading at least one participating First Nation, the Pavilion Band, to protest[173].

It is readily apparent, moreover, that negotiation is not necessarily a less complex process than litigation, meaning that it is not likely to be any faster. In fact, the complexity of the negotiation process probably depends in great measure upon the complexity of the disputes or issues at question. While cross-cultural disputes are complex and difficult enough in their own right, when one factors in the additional variable of inter-governmental negotiations, negotiations which are notoriously complex, contentious and difficult, the process clearly has the potential to be even more protracted. The tendency for such negotiations to bog down over issues that have little or nothing to do with the core disputes or issues may prove extremely frustrating to the disputants, since as the B.C. Treaty Commission process has demonstrated, a great deal of valuable time, resources and good will may be wasted as Canada and the province argue over such issues as jurisdiction or cost-sharing. As

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[173]Christ'l Roshard, "Ts'kw'aylaxw treaty talks tense: Band, province haggle over long list of questions about position paper," *Lillooet News*, December 18, 1996, pp. 1, 2; Stephen Hume, "Pavilion band tables land claims," *Vancouver Sun*, November 20, 1996, p. B4; Robin Brunet, "Less than meets the eye? Clark may be angling for a watered-down Nisga'a deal," *British Columbia Report*, January 6, 1997, p. 8.

Mitchell Sviridoff contends, "...disputes between government agencies and levels of government, can be among the most intractable and can have the greatest consequences for society as a whole (Sviridoff, p. 7)," a consideration which does not bode well for such complex and controversial conflicts as aboriginal rights disputes. In short, intergovernmental bickering and complexities may seriously frustrate the First Nations, and make them doubt the seriousness or good will of the government they are negotiating against; such complexities may be perceived by the First Nations as stalling tactics, which they may, in fact be, and may lead the First Nations to again look to litigation as a means of pushing negotiations ahead.

There are also certain characteristics of government bureaucracies which have the potential to contribute to the complexities of negotiation, not only making government appear to be a difficult and frustrating negotiating partner, but also rendering the negotiation process less than fast, cheap and efficient. Bureaucracies are not at all flexible, nor are they experts in the areas of inter-departmental or inter-ministry co-ordination and communication. Yet for negotiations over such complex and entrenched issues and conflicts to be successful, issues and conflicts which have implications for so many different policy areas and government ministries, an intense degree of internal governmental flexibility, coordination and communication is critical[174].

At present there is also the question of whether the cash-strapped provincial government has the resources to continue with the B.C. treaty process at its present scale, regardless of whether the political will exists or not[175]. An associated issue is

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[174]Ministry of Aboriginal Affairs employee Heather Dixon raised these issues when I interviewed her in April 1993 (Interview with Heather Dixon, Ministry of Aboriginal Affairs, Victoria, B.C., April 1993).

[175]As noted earlier, some political observers contend that since its re-election, the

whether the line agencies involved with treaty negotiations can provide the necessary degree of information and staff resources required for participation without a dramatic increase in capacity, a capacity that may well be decreased in the near future rather than increased. Problems of government capacity and limited resources suggest that the treaty negotiation process is more likely to be protracted and expensive, than fast, cheap and efficient.

Because of the intense complexity of these types of conflicts and disputes, in fact, and their potential to be extremely controversial and acrimonious in nature, negotiations over aboriginal rights issues are almost guaranteed to be protracted. Thus while litigation has been criticized for resolving disputes by attrition rather than by a fair resolution, negotiation arguably has the same potential tendency. In fact, the following comment by Frederick Martone seems just as relevant to negotiation as to litigation. According to Martone, "[b]ecause litigation can be expanded at will...only those players who can bear the expense use the system (Martone, p. 229)."

While negotiation is unlikely to be cheaper for the state, it is particularly doubtful that it will be cheaper for the First Nations. As noted above, in the B.C. treaty process funding is primarily by loan, whereas litigation has traditionally been funded through grants. The highly complex and multi-party nature of negotiations over complex and entrenched disputes, also means that the disputant control that is arguably a characteristic of negotiation, while possibly greater than in litigation, may not be as great as many ADR proponents have suggested. Furthermore, the claim that a disputant finds greater satisfaction through the experience of negotiation over litigation is also open to challenge. According to Sally Engle Merry, for instance,

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NDP government has deliberately slowed the pace of treaty negotiations in the province.

user satisfaction is arguably no greater with ADR than with litigation[176]. First Nations that are beginning to be frustrated by the B.C. treaty process, such as the Pavillion Band, for example, may well disagree with the notion that negotiation offers greater disputant satisfaction.

In fact, as the B.C. treaty experience has only begun to demonstrate, it is extremely doubtful whether, in general terms, negotiation can offer a form of dispute resolution that is cheaper and faster than litigation, not to mention offering a disputant more control and greater eventual satisfaction. On the contrary, negotiation may well be considerably slower and more expensive, both financially and politically, than litigation, or at the very least, equivalent. In fact, the potential for ADR to deliver faster, cheaper and more effective dispute processing than court processes, even in cases of relatively minor criminal matters, has been questioned by some commentators[177]. Such questions and considerations are likely to prove even more justified in terms of complex conflicts centred upon attempts to restructure the fundamental nature of the contemporary society and economy, as is often the case with aboriginal rights cases. In short, negotiation is unlikely to lead to either greater disputant control or satisfaction than occurs in litigation, and instead, the eventual outcome of negotiation may as frequently be litigation as actual settlement[178].

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[176]Sally Engle Merry, Review of Goldberg, Green and Sander's *Dispute Resolution*, in *Harvard Law Review*, Vol. 100, 1986-1987, pp. 2057-2073.

[177]See, for instance, Stephen J. Schulhofer, "The Future of the Adversary System," *The Law School Record*, Vol. 33, Spring 1987, p. 10.

[178]In fact, discontent with the slow pace of negotiation under the B.C. treaty process is beginning to be expressed by even the more moderate of the First Nations in the province, and if things don't improve, they say, a return to roadblocks and litigation may be their only alternative (Stewart Bell, "Treaty-making process spared in budget cuts, Cashore says," *Vancouver Sun*, October 28, 1996, pp. A1, A9).

The contention that consensus-based negotiation not only results in an agreement and resolution, but also one that is both workable and lasting because the disputants actively participated in the settlement, is also arguably naive and idealistic. Consensus-based negotiation is based on the idea of identifying common interests rather than focussing on positions which tend to emphasize the differences between the disputants. In practice, however, agreement and resolution is extremely difficult to achieve, even in many of the simplest of disputes. When dealing with complex, entrenched and controversial cross-cultural disputes, achieving agreement or compromise is bound to be particularly challenging. Even achieving some degree of common ground in such disputes is bound to be difficult, not to mention actually attaining a resolution[179]. In fact, the First Nations in B.C. can't even agree on the nature and structure of the treaty process that should be established in the province, a fact which does not bode well for the eventual achievement of resolution on the substantive issues in question.

The same problems with language, and with different cultural reference points, are also as likely to arise in negotiation as in litigation, and while negotiation may well provide a more accommodating environment within which to address these obstacles, they will nevertheless be a significant challenge to overcome. In fact, these numerous different socio-cultural values, assumptions and expectations are bound to make sustaining a meaningful dialogue and discussion difficult, and achieving an actual settlement or resolution very challenging.

Given the probable existence of a large cultural gulf between the two parties,

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[179]What may appear to be a consensus in such instances, particularly in complex and entrenched cross-cultural disputes, may well be a superficial modus vivendi based upon an illusory resolution or accommodation, and if so, is bound to fall apart either sooner or later.

then, it will no doubt also be difficult to define and agree upon what the agenda, or terms of reference, for negotiations themselves should be. The different parties are likely to conceive of the conflict itself in very different terms, and to have surprisingly different conceptualizations of the negotiating process, not only of what it is possible to achieve, but also in what time frame. As the Gitxsan negotiations demonstrated, it is very difficult to attain agreement on an issue such as jurisdiction, for instance, when the state wants to maintain its jurisdiction and resource management powers, and the First Nation, viewing them as illegitimate, wishes to assume them itself. While a negotiated settlement requires that some sort of modus vivendi, or compromise, be achieved, in many cases the conceptualizations and aspirations which inform the positions of the two sides to the dispute are diametrically opposed, making an eventual settlement improbable[180].

Having finally attained the opportunity to negotiate with government after such a long struggle, moreover, the First Nations may bring unrealistic and elevated expectations to the negotiating table, a factor which may further contribute to subverting the possibility of achieving common ground, and attaining an actual settlement. While industry and many B.C. citizens contend that the Nisga'a

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[180]The Gitxsan-Wet'suwet'en, for instance, contend that they espouse "economic transactions based on sharing, on affection, rather than competition (*The Gitksan-Wet'suwet'en Test Case: Delgam Uukw v.s. The Queen*. Information pamphlet published by the Office of the Gitksan and Wet'suwet'en Hereditary Chiefs. Undated. Unpaginated)." They argue that they want their chiefs to be able to obey "their own laws which say that the land they inherited from their grandparents must be looked after so that it can be passed on in good health to their own grandchildren." (Office of the Hereditary Chiefs, *Test Case*, no pagination). It appears that the Gitxsan-Wet'suwet'en position is informed by significantly different values, aspirations and *interests* than that of the majority culture, which does not bode well for the achievement of eventual consensus, even through a negotiation process predicated upon compromise and conciliation.

Agreement-in-Principle is a very generous settlement, for instance, a segment of the Nisga'a Nation is opposed to the agreement because the land of certain Houses has not been included in the treaty settlement lands. These individuals believe that in failing to retain the land of all their Houses, the Nation's negotiators gave away too much ("Nisga'a deal signed," *Wolf Howls*, p. 7). With the province's participation in land claims negotiations leading to increased aboriginal expectations on the one hand, and an increase in fear and insecurity among many non-natives on the other hand, it is also bound to be extremely difficult to extricate political posturing and politics generally from discussions over aboriginal rights issues. While such an extrication may well be a critical component of achieving resolution, because cultural difference is itself a political position, among both natives and non-natives alike, this is not likely to happen[181].

Furthermore, whereas negotiation may be considered more culturally authentic, and thus appropriate, as a dispute resolution mechanism for aboriginal rights disputes, this contention is arguably also both romantic and idealistic. While the First Nations have traditionally employed consensus-oriented negotiation approaches to decision-making, and often wish to retain or resurrect traditional decision-making styles today, in the contemporary socio-political climate within many native communities, consensus is arguably as difficult to achieve in a native community as among the wider population. In fact, when the Xeni Gwet'in, a

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[181]While the First Nations tend to over-emphasize cultural difference as a political strategy, many non-natives similarly under-emphasize cultural difference, contending that everyone must continue to be equal under the law as has ostensibly always been the case. (See, for instance, the comments of Ted Armstrong, chair of the Cariboo Treaty Advisory Committee, as quoted in Pirjo Raits, "Views differ on issue of treaty settlements," *Williams Lake Advocate*, November 20, 1996, p. 7).

relatively traditional Tsilhqot'in community near Williams Lake made an important decision over logging in their traditional territory recently, the decision was made by secret ballot and not by consensus, even though consensus tends to be the preferred decision-making method in the community (Personal experience). In cases of complex, entrenched and controversial conflicts based in cultural difference, then, even traditionally familiar, consensus-based negotiations arguably have as much potential to be difficult and protracted, or to break off without resolution, as they do to result in a settlement.

When dealing with agreements that will become constitutionally entrenched treaties, moreover, the parties in aboriginal rights negotiations may be hesitant to define certain terms or rights in a negotiated agreement, or to concede substantive ground or issues, for fear of making concessions they regret, or concessions that may limit their ability to effectively pursue or achieve certain rights or aspirations in the future, either through litigation or otherwise. In other words, they may be very reluctant to commit themselves to specific language in an agreement, with the result that certain clauses are left ambiguous by default. The language of the agreement may also be left vague as a necessary requirement of political compromise; when dealing with highly contentious issues, such a strategy might be a necessary component of reaching agreement[182]. In both instances, however, the ambiguity of the agreement may lead to serious conflict down the road at the implementation stage

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[182]This is the conclusion reached by the Council of Forest Industries' (COFI) Committee on Aboriginal Affairs when assessing certain ambiguous components of the Nisga'a Agreement-in-Principle. See, for instance, p. 9, where it is asserted that: "[a]s in other areas where the parties apparently reached an impasse, equivocal language attempts to mask the fact that the item remains essentially unresolved (COFI, *Overview of the Nisga'a Agreement-In-Principle*, p. 9).

of the process, as parties again find themselves in conflict over the perceived meaning of the ambiguous clause. Such conflicts may well lead to further difficult and protracted discussions, or even litigation, over the interpretation of the negotiated agreement. While such ambiguity in agreements may at times also be quite inadvertant, the consequences will likely be the same. Given the enormous scope and complexities of modern land claim settlements, in fact, it would be quite a miracle if the implementation of such agreements as the Nisga'a Agreement-in-Principle did not become contentious or problematic at some point down the road. Given the fact that such agreements will be constitutionally entrenched, moreover, flexibility at the implementation stage will be limited, and litigation may well be the result.

While there is a good chance that ADR mechanisms "might not conclude the dispute in an authoritative fashion (McKay, 1990, footnote 11, p. 16)," litigation by contrast, invariably results in some kind of decision. A dispute is brought before a judge, and he or she eventually gives a ruling. Even in view of the lengthy appellate process that is a component of litigation[183], in a highly contentious and complex dispute, a disputant may be more likely to achieve some kind of decision through

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[183]According to Martone, attaining a decision through litigation isn't as straightforward as it may appear. He argues that:

> multiple levels of appellate review serve the lawmaking function of *stare decisis*, but they undermine the finality necessary to achieve dispute resolution with speed, justice, and reasonable cost. As long as one of the litigants is willing to continue to play, the other litigant is powerless to achieve resolution. The system does not take into account the diminishing returns associated with lengthy appellate review. Can the increased level of "correctness" be worth the additional years and costs associated with delayed finality? (Martone, p. 230).

Despite these weaknesses of litigation, however, negotiation may well be an even more problematic process.

litigation than negotiation. In a situation where one party refuses to either acknowledge or discuss an issue, and therefore negotiation isn't even an option to consider, litigation also forces the reticent party to face the issue in court. Consequently, through litigation some kind of decision will result, and whether it proves to be an actual solution or not, or is eventually viewed as legitimate or not, it is at least something that the parties can work with, and in this sense, is arguably better than no action or discussion whatsoever. This situation was what existed in B.C. prior to the Gitxsan-Wet'suwet'en instigating the *Delgamuukw* case, and as *Delgamuukw* subsequently demonstrated, litigation can achieve some quite invaluable victories, not the least of which was an agreement by the province to negotiate.

While some ADR theorists also suggest that mechanisms such as negotiation may be more effective and efficient at resolving disputes because they are better able to get at the underlying sources of conflict, moreover[184], the opposite may just as well be the case[185]. The emphasis upon consensus, conciliation, compromise and

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[184]Patterson, for instance, argues that litigation "tends to create new disputes that further alienate opposing sides and divert attention from the underlying dispute (Patterson, p. 600). The implicit assertion is that negotiation can better get at the sources of conflict underpinning the dispute.

[185]In discussing the application of mediation to inter-personal disputes, for instance, Stephen J. Schulhofer argues that "there is no evidence...that neighbourhood mediation, when it occurs, has been more successful than adjudication in reaching the underlying causes of conflict. In practice, mediators have tended to deal only with the superficial aspects of disputes, and the research suggests that mediation is no more effective than prosecution in preventing recidivism. Indeed, inter-personal disputes, those ostensibly best suited to mediation, turn out to be the most problematic (Schulhofer, p. 10)." In fact, he contends, according to Royer F. Cook, Janice A. Roehl, and David I. Sheppard, "'in most of the cases which are resolved the dispute is not tremendously complex or deeply rooted....[W]hen the dispute involves individuals with strong ongoing bonds or for whom there are rather serious underlying problems, the likelihood of achieving a lasting resolution diminishes (Cook, Roehl, and Sheppard, *Neighborhood Justice Centres Field Test: Final*

accommodation that characterizes ADR mechanisms such as negotiation, may actually serve to obscure the true nature of the conflict, and thus obscure from the disputants where the true nature of their interests lie. Goldberg, Green and Sander question whether there is a possibility that ADR's "emphasis on accomodation and compromise," may serve to "deter large-scale structural changes in political and social institutions that only court adjudication can accomplish," and wonder whether "it will thus serve the interests of the powerful against the disadvantaged? (Goldberg, Green and Sander, p. 14)."

In fact, conflict arguably plays an important social role, and in some ways overt conflict is both useful and empowering for the powerless. Conflict has the potential to act as a catalyst for unified action, creating the perception of a common enemy, and serving to unite people around a common cause and goal. Moreover, conflict also has the potential to reveal the underlying structural nature of the inequities giving rise to such conflicts, and thus serves to emphasize the necessity and importance of substantive structural change. An emphasis upon consensus, conciliation and accommodation, however, may serve to mask the existence, or nature of existing conflicts, and hence further disempower the powerless. In this sense, consensual dispute resolution processes may well become a forum for co-opting the disputant, and more or less perpetuate the status quo; this may be especially the case in disputes which are based upon a radically different social, political, economic or cultural perspective. According to the opponents of the B.C. treaty process, for instance, the process is designed to pacify and co-opt the First Nations by dividing and conquering them, and thereby keeping them in a state of subjugation[186].

Evaluation Report 89 (1980), as quoted in Schulhofer, p. 10).'"

[186]On the other hand, of course, one could argue that those First Nations who

It is important, therefore, to examine the apparent motives of government when it prefers and promotes the negotiating forum over litigation, since while avoidance would probably be the strategy of choice in dealing with land claims, when it is not a viable option, negotiation tends to be favoured. Government fears that natives could win in a big way in the courts. The risk, and thus concomitant uncertainty and apprehension, that can surround a native action against the Crown is well illustrated by the case of *Delgamuukw v. the Queen*. Thus, for governments wishing to address native issues in a climate of socio-political calm and economic stability, negotiated settlements have much to commend them. Negotiations are arguably much less visible politically, and are a process that the government can better manage and control. In this sense, and as its First Nations opponents perceive, the preference for negotiation may well be indicative of an attempt on the part of the state to better contain, marginalize, co-opt and manage the challenge to its legitimacy posed by the First Nations and their aspirations. As Professor Owen Fiss contends, ADR processes may serve to direct certain problems and issues, "either expressly or subtly, away from the courts (as discussed in Raven, p. 47; see also the comments of McKay, 1990, p. 17). The insinuation is that the courts may well provide a better dispute resolution process in such cases, and the choice of ADR over litigation may be informed, therefore, by ulterior motives that are less than entirely benign. In fact, while in the wake of *Delgamuukw* the Gitxsan-Wet'suwet'en and their supporters argued that there was no room for cultural recognition and accommodation in the

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would criticize others for participating in the B.C. treaty process may be as guilty of denying individual First Nations their autonomy, and therefore as guilty of imposing homogeneity upon them, as the colonial authorities were in the past (although the coercive power exercised by the colonial powers is clearly absent from the actions and criticisms of these militant First Nations).

courts, negotiation can be a forum of cultural co-option just as surely as litigation; it may simply be more subtle, and arguably therefore, more dangerous.

At this point, then, it is useful to evaluate the contention made by McEachern in his *Delgamuukw* ruling that because aboriginal rights grievances are by nature more political than legal, the most appropriate forum for their resolution is the political arena, a forum such as negotiation in other words, and not the courts[187]. Was McEachern, and the large number of observers and interested parties who, in the wake of *Delgamuukw*, promoted negotiation as the answer, correct? Are negotiations a more appropriate forum than litigation for the resolution of complex, entrenched and culturally-constituted disputes such as aboriginal rights grievances?

It is difficult to say, since there is not yet any conclusive verdict as to whether ADR can actually deliver all that its proponents claim. At present, its alleged potential still remains more theoretical than actual. While some have faith in the ability of processes such as negotiation to resolve disputes more efficiently and effectively than litigation, others remain extremely skeptical. According to an individual in the Ministry of Forests in Victoria, for instance, while everyone in government seems to be jumping on the consensus-based decision-making process bandwagon, such processes are fundamentally incapable of delivering what they promise; they are about pie in the sky by and by, he argued, and simply don't

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[187]According to McEachern, "The parties have concentrated for too long on legal and constitutional questions such as ownership, sovereignty, and rights....It is my conclusion...that the difficulties facing the Indian populations of the territory, and probably throughout Canada, will not be solved in the context of legal rights (McEachern, p.299)."

work[188]. As the short experience with aboriginal rights negotiations in British Columbia so far indicates, in practice negotiation is not the panacea that ADR theory and its proponents may suggest. Given the importance and precedent-setting nature of the Gitxsan and Wet'suwet'en's varying experiments with different dispute resolution processes, however, it is worth examining their experiences to determine what lessons they have to offer on the question of whether negotiation or litigation is the most appropriate, and hence preferable, approach to aboriginal rights disputes. It is to this question that we turn our attention in the final chapter.

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[188]Personal communication with an employee of the Ministry of Forests in Victoria who wishes to remain anonymous.

Conclusion:

Lessons in Dispute Resolution: The *Delgamuukw* Experience

Having examined the history of the Gitxsan and Wet'suwet'en's struggle for redress of their grievances, it is apparent that while in some ways negotiation may be a more culturally appropriate dispute resolution mechanism than litigation, it is far from the panacea that many had presented it to be in the wake of McEachern's *Delgamuukw* ruling. Litigation also has its strengths, and ought not to be categorically dismissed as a dispute resolution mechanism for aboriginal rights conflicts. In fact, the main lesson of the *Delgamuukw* experience is that a strategic choice of either litigation or negotiation, according to the circumstances at hand, is most effective.

As ADR theorists contend, the choice between dispute resolution alternatives should be informed by a recognition of the strengths and weaknesses of a particular mechanism, and an understanding of the nature of the dispute. The choice of mechanism should arguably also be driven by strategic considerations of what is most appropriate at a particular time, for a particular dispute, and in particular circumstances. Such a strategic choice is both advisable and necessary because when dealing with culturally-based conflicts, both litigation and negotiation have their strengths and weaknesses, and one is not always superior to, and necessarily to be preferred above, another. In fact, as the experience of the Gitxsan and Wet'suwet'en have demonstrated, the two processes are not mutually exclusive; each can be effective, and worth pursuing in certain circumstances.

Although litigation clearly has its limitations, it can also be a very valuable approach. For the Gitxsan-Wet'suwet'en, the *Delgamuukw* case had important

symbolic purposes, and even if the litigation failed to deliver the desired legal results, it nevertheless was an effective political strategy. Along with direct action activities, it was an important factor in forcing the province to agree to negotiate[189]. At the time that the *Delgamuukw* case ended, moreover, negotiations were still a very new option in British Columbia, and their potential was still largely theoretical. At that time, the B.C. treaty process was only beginning to be established, and negotiation was a risk that the Gitxsan-Wet'suwet'en were not willing to take. In fact, their decision to continue with the appeal of *Delgamuukw*, suggests that they were not as entirely disenchanted with litigation as their rhetoric in the wake of McEachern's decision might have indicated.

Negotiation can also be a very valuable approach, however. Consequently, when it looks as though a disputant has exhausted the potential of one dispute resolution alternative, such as litigation, then it may be advisable to adopt another approach. This is clearly the strategy pursued by the Gitxsan and Wet'suwet'en. Although the B.C. Court of Appeal reversed McEachern's ruling on extinguishment, a critical alteration of the earlier ruling, it upheld the remainder of his decision, leading the Gitxsan and Wet'suwet'en to conclude that they had got all they were likely to get from the courts at that time. Since it now appeared as though they would get more through negotiating than litigating, the Gitxsan and Wet'suwet'en decided to try their hand at the province's new treaty negotiation process.

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[189]While a detailed discussion of direct action is beyond the scope of this thesis, it is worth noting that the Gitxsan and Wet'suwet'en have found direct action to be an extremely effective strategy. It is also an extremely risky strategy, however. It may backfire, and rather than increasing public support, something which is an important variable in determining whether a government has the political will to address a particular issue, it may actually serve to turn public sympathizers against the protestors.

As the Nisga'a Agreement-in-Principle has clearly demonstrated, however, aboriginal rights negotiations have the potential to be an extremely uncertain, difficult and protracted process[190]. In fact, it took the Nisga'a twenty years of negotiating to finally achieve an Agreement-in-Principle. Neverthess, if a government is willing to participate with some level of good faith, then at the end of the day a deal may be possible. At this time, however, it is uncertain whether the Agreement-in-Principle will eventually be ratified. While many Nisga'a believe they gave up too much in the process, an opinion shared by many First Nations, including no doubt the Gitksan, a vocal minority of non-natives in the province believe the deal is far too generous[191]. Given contemporary political and economic realities in B.C., many observers of provincial affairs would no doubt agree with aboriginal law expert Hamar Foster that the Nisga'a deal is a good one (Personal Communication with Hamar Foster). In short, like their choice to undertake litigation, the Gitxsan and Wet'suwet'en's decision to pursue negotiation was not without a measure of risk.

In choosing to utilize a particular dispute resolution mechanism, moreover, a disputant must also have reasonable expectations of what a mechanism is able to deliver. He or she must be willing to work within these parameters, and determined to make his or her approach as effective as possible despite any such weaknesses, limitations or obstacles which may be inherent to the process. In fact, each particular dispute resolution mechanism should be used to its fullest potential, and only by having reasonable expectations of what it can offer will an optimal use of the

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[190]The Nisga'a Agreement-in-Principle was not a product of B.C.'s new treaty negotiation process. However, as the first modern treaty produced in B.C., it will in many ways set the perameters for settlements developed under this new process.

[191]See, for instance, the articles cited under footnote number 55 in Chapter Three.

mechanism be achieved.

In this sense, it is not surprising that the Gitxsan and Wet'suwet'en failed to attain the cultural recognition, affirmation and accommodation from the courts that they were looking for. In expecting the courts to deliver something that it was not designed to address, their expectations were totally unrealistic. They arguably could have saved themselves a great deal of time, grief and frustration if they had mounted a case that was much less culturally aggressive. The apparent failure of the Gitxsan and Wet'suwet'en to adequately comprehend the true nature and limitations of the Canadian legal system meant that in the final analysis, they failed to use litigation to its full potential.

At the same time, however, it is important to recognize that the Gitxsan and Wet'suwet'en's litigation was as much informed by symbolic objectives as it was by practical considerations. As is discussed above, the Gitxsan-Wet'suwet'en quite deliberately choose to mount a case that was unprecedentedly comprehensive, innovative and aggressive, not only in terms of its culturally-oriented nature, but also in relation to the nature of its legal argument. In this sense, they were not concerned with using the dispute resolution mechanism to its fullest potential, but rather as Herb George contended, were interested 'in challenging the whole game (George in Cassidy, p. 55)[192].' The kind of case they mounted, as well as the rhetoric they expressed in the wake of McEachern's decision, were all part of this symbolic and strategic challenge, an assertion of what they contended was their cultural uniqueness and political and legal independence.

As the Gitxsan-Wet'suwet'en experience has demonstrated, however,

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[192]George's comments were also, no doubt, in part a rationalization expressed in the face of defeat.

ultimately it is not so much the choice of dispute resolution mechanism that is the critical variable, but the nature of the conflict at issue. Cultural conflicts simply cannot be separated from epistemological and ontological considerations or issues, and these tend to be the same regardless of the dispute resolution mechanism adopted. In fact, politics and posturing are an inevitable aspect of aboriginal rights issues; the somewhat confrontational stance that such political posturing leads to will arise as surely in negotiation as in litigation, and may be even more common in negotiation. In other words, it is both naive and idealistic to assume that given the same type of conflict, the same problems will not arise in the context of both negotiation and litigation. In the case of sensitive, complex and entrenched cross-cultural conflicts, then, negotiation is clearly not the panacea that so many seemingly thought.

Aboriginal rights disputes, moreover, are of such a nature that no simple solution exists, if a solution exists at all. In fact, such conflicts may well be insoluable. The agenda of many First Nations, for instance, including the Gitxsan and Wet'suwet'en, is not only to redefine the nature of the relationship between the First Nations of British Columbia and the dominant or mainstream society, but also, and even more critically, to radically restructure the most essential nature of the social contract upon which contemporary Canadian society, including its political and economic systems, is predicated. Given the existing structures of power, however, there is bound to be intense resistence to anything but minor or superficial social, cultural, or economic change. Many First Nations, on the other hand, will be unwilling to compromise their aspirations, especially on issues such as ownership or jurisdiction, for fear of being co-opted or qualifying their position down the road. Given the nature of both the conflict, then, and the aspirations and expectations of the Gitxsan and Wet'suwet'en, it was virtually inevitable that their negotiations would

eventually fall apart.

Despite the claims of ADR theorists, it is also very unlikely that an ADR process such as negotiation will actually deliver a disputant better justice or greater satisfaction. In fact, the very issue of what constitutes justice is problematic. For many people, justice is defined in terms consistent with their own personal interests. For First Nations who define justice as the resurrection of aboriginal ownership and sovereignty over their entire traditional territory, for instance, or retaining each of their House's lands after treaty settlement, justice will arguably not be forthcoming either through the courts or through negotiation. For third parties who believe that the First Nations were conquered long ago, and their rights therefore extinguished, any contemporary treaty settlement is bound to be seen as an injustice to the general population, as well an an affront to democracy with its emphasis on the sacrosanct nature of individual rights and equality of all.

While justice may arguably be defined in relatively straightforward terms on a theoretical level, perhaps as a balance of the rights of all, achieving justice on a practical level is extremely challenging. The challenge of achieving justice in practical terms, moreover, becomes increasingly difficult as the dispute in question becomes more sensitive, complex and entrenched, and the number of interested parties increases[193]. This is clearly the case with aboriginal rights cases, since they

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[193]Achieving 'justice' is likely to be far simpler in a relatively cut and dried minor criminal proceeding, for instance, than in such complex, entrenched and multi-party disputes as most aboriginal rights cases. In the case of a break and enter offense, justice may be considered done if the stolen property is restored to the owner, and the thief is adequately punished for his or her transgressions. In aboriginal rights cases, the land under claim may be held as a grazing tenure. While the tenure holder may receive compensation if the grazing tenure is transferred to a First Nation as part of their treaty settlement, the ranching enterprise may no longer be viable if it depended upon a number of such grazing tenures. In resolving old injustices, then, new ones

frequently attempt to alter the distributional and structural attributes of society and its political, social and economic institutions and processes. In terms of such cases, regardless of the resolution achieved, and regardless of the forum through which it is delivered, what exactly constitutes justice, and whether it has been delivered, will be extremely controversial and inherently contested issues. Especially in complex multi-party disputes, in fact, in attempting to settle old justices, new ones are invariably created. Despite what ADR theorists contend, then, negotiation is no more likely to render a "just" decision than litigation, nor is it likely to deliver a more just decision.

Because negotiation is arguably not able to deliver better or greater justice than litigation, then, nor is it likely to offer a disputant a more satisfying process. Rather, it is likely that the very same frustrations and annoyances will arise in both contexts. Thus while in some ways negotiation may appear to be a more culturally familiar, and thus a more appropriate, approach to resolving such complex cultural disputes as aboriginal rights grievances, it is not likely to be quite as acceptable and satisfying to the First Nations as some might suggest or hope.

Furthermore, McEachern's contention that negotiation is a more appropriate dispute resolution mechanism for political disputes than litigation, because negotiation is in the realm of the political rather than the legal, is fundamentally misdirected. It is based upon a false dichotomy between that which is political and that which is legal, a distinction which does not stand up to scrutiny. While McEachern tacitly argues that the courts and the process of legal adjudication are not political, but rather legal processes, on the contrary, virtually everything is political, including the law,

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are created, and in such circumstances, one party or another is bound to feel that 'justice' was not served.

the courts, the process of legal adjudication, and even the choice of dispute resolution mechanism. If the courts are dealing with a conflict relating to issues of power and the distribution of resources, then this activity is inherently political.

What might happen when the *Delgamuukw* case finally goes before the Supreme Court of Canada in early 1997, and the probable consequences of the ruling, is also a critical question. Judging from the recent *Van der Peet*, *Gladstone*, and *NTC Smokehouse* cases on aboriginal rights, the Supreme Court is likely to continue along a similar path as that taken in the *Delgamuukw* decisions. It is likely to continue to reject the notion of aboriginal sovereignty and ownership, and continue to espouse a relatively narrow conceptualization of aboriginal rights[194]. Most of all, it will probably continue to emphasize an approach based upon a reconciliation and accommodation of aboriginal rights and interests with those of the wider society. On the other hand, the Court may choose to place the issues back in the hands of the politicians by deciding the case on the technical issue of whether new arguments can be introduced at the appellate level or not (Personal Communication with Frank Cassidy and Hamar Foster). The crucial question, however, is how the Gitxsan and Wet'suwet'en will react to the eventual Supreme Court ruling. Will they accept the court's direction if it adopts a reconciliation-based approach, or will they become increasingly militant, and again resort to direct action? Judging from their history, a more confrontational reaction is arguably the most likely scenario.

As valuable as the Gitxsan and Wet'suwet'en experiences may be, however, they are clearly not representative of all First Nations in British Columbia. In view

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[194]While on the whole these cases adopted a narrow conceptualization of aboriginal rights, the *Gladstone* case has given credence to the possibility that in certain circumstances, aboriginal rights may have a commercial aspect.

of the considerable support for the B.C. treaty process among the more moderate of the province's First Nations, it is valuable to briefly assess whether the province's treaty process is likely to prove successful. While at present many First Nations are finding the B.C. treaty process satisfactory, it is questionable whether the process will be successful in the long term. The verdict is still out as to how well it will actually work in practice; many questions still have to be answered, and many different variables have to be played out. Numerous cracks are beginning to appear in the foundation of the process, suggesting that the B.C. treaty process may not be the magic solution to the province's longstanding 'Indian problem' as so many had both hoped and contended.

The vast majority of people today, however, recognize that a settlement of aboriginal rights disputes is absolutely necessary for the economic, social and political stability of the province. A humane and democratic society must also be willing to rectify the injustices of the past. In this sense, the B.C. treaty process is a critically important undertaking with laudable objectives. At the same time, however, the process of reaching accommodation through negotiation is bound to be exceedingly difficult, and the structure of the B.C. treaty process, as well as the manner in which it is currently being implemented, demonstrates some serious weaknesses. The problems of inadequate public consultation and education, and the resolution of overlap issues necessary for final agreement are only two characteristics of the current process that will invariably cause problems in the future. The intent of the treaty process and eventual agreements is to not only create an economic and social base for productive and self-reliant First Nations communities, but also to establish a process for ongoing dialogue and productive relations between the First Nations, the wider society and its governments. Early signs from both the First Nations and non-native

populations indicate that this is bound to prove difficult.

One of the major weaknesses with the B.C. treaty process, for instance, is the fact that so many First Nations refuse to recognize its legitimacy, and therefore refuse to participate in it[195]. Groups that haven't bought into the process, such as the UBCIC for instance, are not only uncompromising in their opposition to the process, but also have been becoming increasingly militant as time passes. They may seek to deliberately undermine the process by sowing seeds of dissension, and trying to win moderates over to their side, or may do so inadvertantly by militant actions which result in reducing support for First Nations issues among the dominant society. Even if they do nothing and just bide their time, their refusal to accept the process as legimitate does not bode well for its potential ability to truly resolve and settle aboriginal land claims and rights issues in the province. The success of the process, therefore, is likely to be dependent in large measure upon whether those First Nations that are opposed to the process can be drawn in, or whether they will instead win participating nations over to their point of view as the process gradually unfolds and invariably gives rise to frustration as the weaknesses of the process become apparent[196].

Even in terms of the nations that do support the process, however, a number

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[195]Steve Vanagas, "Battle of the bands: Native groups are deeply divided going into treaty talks," *British Columbia Report*, December 27, 1993, pp. 6-7; Lloyd Dolha, "Extinguishment Agenda Exposed," *Kahtou*, Vol. 9, No. 11, December 1991, pp. 1-3.

[196]In cases where neighbouring First Nations' traditional territories overlap, for example, a final resolution of one nation's claim will not be possible until the overlap issue is resolved with the neighbouring nation. If one nation is participating in the B.C. treaty process, and another views it as entirely illegitimate, and therefore refuses to participate, the situation has the potential to become explosive.

of serious problems exist that are also likely to prove inauspicious for the longterm success of British Columbia's approach to treaty settlements. To be successful, a treaty settlement requires that the rights and interests of a large number of interested parties be carefully balanced in a sensitive and equitable manner. For this to occur in an optimal fashion, it is critical that the process be open and accessible, and that the general public be well informed and consulted. Perhaps because of the intensely sensitive and political nature of these issues, the B.C. treaty process has arguably been less open and accessible than ought to be the case. Even more critically, a lack of public education has made the issue of treaty settlements and the process underway to achieve them less visible and comprehensible to the general public than is advisable. As the treaty process progresses in the province, B.C. citizens will begin to increasingly ponder the implications of land claims settlements for both themselves and British Columbia. If this reflection and analysis occurs in a climate of fear fuelled by inadequate information or misinformation, a backlash, potentially disastrous for the province, may well ensue.

In other words, the success of the process will be dependent upon continuing support for the process, however tacit, among the general population. If a backlash does arise, it could lead to a change not only in government, but also in aboriginal policy in a less sympathetic and accommodating direction. If the Liberals replace the NDP in the next provincial election, then it is quite probable that the Nisga'a Agreement-in-Principle will never be ratified. With the expectations of the more moderate of the First Nations raised significantly by the promise of meaningful negotiated settlements, such a change in policy could prove nothing short of disastrous. Even the moderate First Nations could quickly become militant, with the probable consequence being a return to the blockades and concomitant uncertainties

that plagued this province in the not-too-distant past. At present, of course, the majority of British Columbians appear to recognize the desirability of an accommodation with the First Nations, but the presence of a politically engaged and vocal minority means that this tacit, and perhaps somewhat apathetic, support may be tenuous.

If all players are willing to seize it, the opportunity for accommodation and reconciliation exists more today than ever before. In the case of such complex and entrenched culturally-based disputes, however, it is questionable whether there exists the good will necessary to achieve compromise. The treaty process is predicated upon accommodation, and the courts have been adopting a similar approach, but compromise is always an inherently difficult exercise, especially in culturally-based conflicts where emotionalism, exaggeration and political posturing are rife. What is a generous approach to one side, may well be seen as a sell out to the other, meaning that an accommodation cannot be achieved. This has certainly been demonstrated in the case of the Nisga'a Agreement-in-Principle, and is bound to be the case in many future settlements. While many, moreover, would interpret recent legal decisions as sympathetic and accommodating, in many cases they fall far short of the vision that a number of First Nations are seeking. A prime example is the question of how one defines aboriginal rights: the definition articulated in recent legal decisions is far narrower than many First Nations are willing to countenance.

Treaty settlements, moreover, will bring into heightened relief the distinctions between being native versus non-native, and the process is therefore as likely to increase the level of social tension between these groups as to decrease it[197]. A

[197]This is not to say that the prospects for racial peace in the province would have been greater if the B.C. Court of Appeal had upheld McEachern's ruling in its entirety, and no treaty process had been established in the province. Whether the

critical question to ask is whether different groups can be treated in a significantly different fashion in a democracy that is fundamentally predicated on equality and equal rights, without laying the seeds for future civil strife. In this sense the Quebec experience does not bode well for how the recognition of collective rights for a cultural minority, as opposed to individual rights and equality for all, are bound to be received in B.C.

It is critical to ask, therefore, what the future holds. While reconciliation and accommodation are critical objectives, many on both sides are not at all interested in finding a middle ground, and clearly do not even recognize the legitimacy of the other side's position at all. Moreover, while the B.C. treaty process is presented to the public as a means of settling aboriginal claims and grievances, and thereby attaining finality and certainty on these issues, the fact that no extinguishment of aboriginal rights is required, means that ultimately there will be no truly conclusive settlement. Instead of achieving certainty, then, the process is arguably laying the foundation for increased racial tension and strife in the province in the future.

In the present treaty process the province has been repeatedly criticized for not taking the interests of third parties sufficiently to heart, and for keeping the process insufficiently open. For the process to be even remotely successful, there is a need for a much greater degree of openness and public education. Things have been improving as of late, however, and there are signs that the government is beginning to take demands for greater openness more seriously[198]. For instance, the B.C. Treaty

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B.C. treaty process will eventually lead to less racial tension than might have otherwise existed in the province without such developments, however, is a question best addressed 20 to 30 years in the future. For the province to continue to refuse to address these questions, however, would have been unconscionable.

[198]Terry O'Neill, "Letting a little light shine in: The NDP is under pressure to

Commission has been holding public open houses, open negotiations have been held with the public invited to observe, and an all-party Select Standing Committee on Aboriginal Affairs, headed by MLA Ian Waddell, has been travelling the province soliciting and evaluating third-party input on the Nisga'a deal. However, there are still considerable demands for greater public involvement and input. While a number of public advisory committees have been created in the province to provide input into treaty negotiations, third-party interests want to actually sit at the table. The First Nations generally remain adamant, however, that this is not an option. Many want a government to government negotiating relationship and argue that third-party interests have no right to be there.

Even if there was the will to achieve accommodation, however, could accommodation actually ever be achieved? Anything less than accommodation on their own terms will be considered assimilation by some First Nations, and assimilation is something that many First Nations remain extremely opposed to, and determined to fight against. At the same time, the aspirations, values and cultural perspectives of the First Nations and those of the majority society still remain considerably different, and without a radical shift in culture and values on the part of all, accommodation is not a possibility. Many social critics argue that what would be required for such an accommodation would be a much more decentralized, community-based power structure, where the power of the state and the corporation is

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allow public involvement in treaty talks," *British Columbia Report*, September 19, 1994, p. 7.

replaced by the community as the locus of power and economic control[199]. While this would arguably be a form of compromise, bringing the visions and aspirations of the First Nations and the dominant society closer together, such a scenario is not likely to develop. The extant powers are not about to give up their economic and political jurisdiction, and most First Nations are not about to give up on their fight to achieve their aspirations. In fact, given the nature of the aspirations of many First Nations, the inherently conservative nature of the Canadian public, and the structures of power that will be inevitably affected by any change or settlement, such disputes and issues are likely to remain exceedingly controversial and acrimonious for a considerable time to come.

In the final analysis, the jury is still out on whether a resolution of aboriginal rights disputes can be achieved. As an examination of the Gitxsan and Wet'suwet'en experience with dispute resolution demonstrates, however, working toward such an accommodation or resolution is bound to be a difficult and protracted undertaking, and it seems likely that any possible resolution will be more in the form of an ongoing series of discussions over disputes than a final treaty settlement. In short, conflict in the area of aboriginal issues is bound to be around in perpetuity. While new and innovative Dispute Resolution Mechanisms may claim to incorporate the magic solution to resolving such complex, entrenched and culturally-based conflicts, such claims are bound to prove groundless or exaggerated as has proved to be the case with negotiation. The best that can be hoped for regarding such disputes is that the disputants manage them in such a fashion that violent confrontation is avoided. The

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[199]See, for example, Frank Cassidy and Robert L. Bish. *Indian Government: Its Meaning in Practice*. Lantzville, B.C.: Oolichan Books and The Institute for Research on Public Policy, 1989.

conflicts themselves, however, will never be eliminated; by their very nature they are perennial and insoluable. Such are the lessons of *Delgamuukw*.

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Lessons from *Delgamuukw v. The Queen*: The Comparative Potential of Litigation and Negotiation to Resolve Aboriginal Rights Conflicts

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