

OUR BOX WAS FULL: AN ETHNOGRAPHY FOR THE DELGAMUUKW PLAINTIFFS BY RICHARD DALY (VANCOUVER: UNIVERSITY OF BRITISH COLUMBIA PRESS, 2005) 352 pages.¹

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*Delgamuukw v. British Columbia*³ is arguably the most significant Canadian case in the annals of Aboriginal land rights law. This momentous decision of the Supreme Court of Canada in 1996 fuelled an extensive debate among scholars, governments, and Aboriginal peoples.⁴ The *Delgamuukw* litigation began in the early 1980s, when the Gitksan and Wet'suwet'en First Nations sought to force the British Columbia government to recognize Aboriginal title to their traditional territory, comprising some 58,000 square kilometres in north-central British Columbia. The court action was necessary because of the provincial government's steadfast view that any Aboriginal rights in British Columbia were extinguished after 1871 and that any legal claim would be solely for compensation from the federal government. The federal government was prepared to negotiate with the Gitksan and Wet'suwet'en to achieve a comprehensive land claims settlement, but only if the British Columbia government was willing to negotiate. The *Delgamuukw* litigation was thus part of a strategy to compel the intransigent provincial government to negotiate.

The *Delgamuukw* case is extraordinary for its length, especially the detailed and extensive oral evidence that was presented. The Court could not rule on a number of the factual and legal issues specific to the Gitksan and Wet'suwet'en, such as the extent of their territory, their

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³ [1997] 3 S.C.R. 1010 [*Delgamuukw*]. The case is known as *Delgamuukw*, named for the first of the hereditary chiefs to sign the original statement of claim against the province of British Columbia in 1984.

⁴ See e.g. John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall L.J. 537; William F. Flanagan, "Piercing the Veil of Real Property Law: *Delgamuukw v. British Columbia*" (1998) 24 Queen's L.J. 279; Maureen Tehan, "*Delgamuukw v. British Columbia*" (1998) 22 Melbourne U.L. Rev. 763; and Paul Joffe, "Assessing the *Delgamuukw* Principles: National Implications and Potential Effects in Quebec" (2000) 45 McGill L.J. 155.

claim for Aboriginal title, and their claim for self-government rights. These would have to be decided in a new trial, or negotiated through treaties. However, the Court countered the lower courts' decisions to make some far-reaching determinations in regard to, among other things, the admissibility of Aboriginal oral history as evidence.

Delgamuukw gave insights into the Gitksan and Wet'suwet'en people's culture and their relationships to the local environment. While much of this evidence was ruled inadmissible by the trial judge, the Supreme Court asserted that Aboriginal oral history must not be systematically rejected nor undervalued as a result of its nature as hearsay evidence.⁵ If such a categorical treatment were allowed, the Court felt that this would place an insurmountable obstacle in the way of proving Aboriginal title for the many Aboriginal groups that did not have written records at the time the Crown asserted its sovereignty over their territory in the mid-nineteenth century.⁶ The Court thus decided that the laws of evidence must be adapted in these cases to accommodate oral histories and place them on an equal footing with documentary evidence, as warranted after careful evaluation, on a case-by-case basis.

Crucial to the arguments of the plaintiffs in *Delgamuukw* were expert witnesses, such as anthropologist Richard Daly, who spent several years documenting the Gitksan and Wet'suwet'en people's way of life. In *Our Box was Full*, Daly splendidly reveals his extensive analysis and conclusions concerning the culture, economy, and history of the Gitksan and Wet'suwet'en peoples to the wider academic and legal communities. He shows that for these Aboriginal peoples, the land has meanings that transcend simple, instrumental notions of property or material sustenance. Providing both a food box and a storage box of history and culture, the land is the basis for their identity and survival as a people.

At trial, Justice MacEachern rejected much of Daly's evidence.⁷ He gave short shrift to Daly's testimony of Aboriginal oral history, primarily because he thought Daly's research was based upon participant observation through living in Gitksan and Wet'suwet'en

⁵ *Supra* note 3 at 1065. See further Kent McNeil & Lori Ann Roness, "Legalizing Oral History: Proving Aboriginal claims in Canadian Courts" (2000) 39:3 J. of the West 66.

⁶ *Ibid.*

⁷ *Delgamuukw v. British Columbia*, [1991] 5 C.N.L.R. xiii.

territory for two years after the commencement of the *Delgamuukw* litigation, and that Daly was more an advocate than a witness. By contrast, Justice MacEachern was much more comfortable with experts who appeared for the provincial defendants, who maintained their professional aura by working strictly from documentary source material. But “[w]as not the anthropological work conducted for the government defendants equally subject to sectional interests of social life where dispassionate empirical findings had to transcend such interests?”⁸ Daly’s work directly takes up the challenge of exposing the biases and prejudices of “the current positivistic administrative way of thinking based on fixed text-based categories for containing data rather than on context-based categories developed from various evidentiary sources, including the oral.”⁹ He argues that some courts’ positivistic methodologies for the admission of evidence tend to “reinforce existing ethnocentrism among the power-holders in society.”¹⁰ Because the appellate courts in Canada rely on the trial judge’s findings of fact, the succeeding British Columbia Court of Appeal and Supreme Court judges who considered the case did not have the opportunity to hear Daly’s evidence anew and refused to overturn (with two exceptions) the trial judge’s rejection of Daly’s evidence.

Daly’s castigation of the courts’ treatment of Aboriginal histories and land claims should remind us all of how law provides a master narrative that frames and organizes the political and economic life of society in a way that favours some groups and disfavors others. During imperial rule, legal narratives rationalized the imposition of “civilized” legal orders on so-called primitive peoples. Post-colonial scholars have highlighted issues missing from the master narratives of history and law. Edward Said’s seminal *Orientalism* revealed the power of Western epistemologies to enter and examine other cultures under colonial auspices, allowing the production and codification of a range of knowledge about such cultures.¹¹ The ability of oppressed groups to represent and speak for themselves is therefore central for strategies to

⁸ Richard Daly & Val Napoleon, “A Dialogue on the Effects of Aboriginal Rights Litigation and Activism on Aboriginal Communities in Northwestern British Columbia” (2003) 47:3 Soc. Analysis 108 at 111.

⁹ *Supra* note 1 at 5.

¹⁰ *Ibid.*

¹¹ Edward W. Said, *Orientalism* (New York: Vintage Books, 1979).

transcend colonialistic relations. To Gayatri Spivak, however, the colonized “subaltern”—a term also used by Daly to describe Aboriginal peoples¹²—cannot speak, because that subject is only constituted as a subject through the positions that have been permitted by the colonizer.¹³ They supposedly cannot speak, because their voice is invariably modulated through some colonizing discourse or narrative, such as that challenged by Daly in *Delgamuukw*. However, Trinh Minh-Ha¹⁴ and Bell Hooks,¹⁵ among other post-colonial scholars, have explored how the subaltern can contest and subvert dominant modes of representation and stereotyping. In a similar vein, Daly’s work can be understood as an attempt to provide an authentic voice to the Gitskan and Wet’suwet’en people’s culture and relationships with their environment. As an active participant in their land claims for several years, Daly brings a unique perspective of their culture and economy that is detailed, respectful, and ultimately, empowering to the Aboriginal subjects.

Contrary to the skeptical views of Justice MacEachern, Daly’s work reveals that the plaintiffs have not been swept away by the tide of history, and that they continue to live out their rich and complex heritage today, albeit often under very different conditions from those before Pax Britannica and colonization. One of the reasons put forward by Justice McEachern for dismissing the Wet’suwet’en land claim in his judgment was that the Wet’suwet’en had “some minimal level of social organization but the primitive condition of the natives described by early observers is not impressive.”¹⁶ In other words, the Wet’suwet’en lacked the requisite degree of social organization at the time of contact to allow them to establish a claim to aboriginal title in the present.

Chapter one of *Our Box Was Full* is devoted to this offensive juridical arena in which Daly’s research was presented. It examines the complexity of trying to present the histories of the Gitskan and

¹² *Supra* note 1 at 24.

¹³ Gayatri C. Spivak & Walter Adamson, “The Problem of Cultural Self-representation” in Sarah Harasym, ed., *The Post-Colonial Critic: Interviews, Strategies, Dialogues* (New York: Routledge, 1990) 50.

¹⁴ *When the Moon Waxes Red: Representation, Gender and Cultural Politics* (New York: Routledge, 1991).

¹⁵ *Black Looks: Race and Representation* (Toronto: Between the Lines, 1992).

¹⁶ *Supra* note 7 at 17.

Wet'suwet'en people's lives over the past two centuries of contact and colonization. From here, Daly reveals the seminal factors involved in the relationship between these two peoples and their environment that drove them to demand recognition of their land title and self-government. A central theme of the book—and Daly's evidence in the *Delgamuukw* case—is the nature of social interaction in feasting and gift-giving kinship societies such as those of the Gitskan and Wet'suwet'en peoples. "What counts in gifting," argues Daly, "is not what is given but, rather, the nature of the giving."¹⁷ In particular, "[g]ift-giving associated with feasts may be viewed as a socially reckoned template for everyday relations of credit and debt, and, ultimately, a demonstration of the appropriate management of family lands and fishing sites."¹⁸

Chapter two provides an ethnographic chronicle of a major potlatch feast as an illustration of the ethics of social interaction and reciprocities in these societies through the making, exchange, and consumption of material goods. The feast is imbued with ceremonial, social, and political significance. As Daly puts it, the feast "is the socially and jurally approved familial institution that sanctions the system of land tenure, the kinship politics, and the distribution of values, all under the ... chiefly robe ... of gifting and reciprocity."¹⁹

Over the rest of his book, Daly details various features of the social structure, kinship ties, economy, and customary laws of the Gitskan and Wet'suwet'en. In Chapter three, Daly gives an account of their traditional diet and ecology, and their seasonal subsistence foraging practices. This was an important part of the evidential requirements for the *Delgamuukw* litigation, which required demonstration of the Indians' use and management of the land. Daly stresses the continuity of many of the environmental activities of the Gitskan and Wet'suwet'en.²⁰ Salmon, for instance, remains the staple of their diet.²¹ Chapter four examines the matrilineal kinship structure of their economy, which Daly explains is vital for the allocation of rights of

¹⁷ *Supra* note 1 at 45.

¹⁸ *Ibid.* at 58.

¹⁹ *Ibid.* at xxvi.

²⁰ *Ibid.* at 109, 129-30.

²¹ *Ibid.* at 148.

access to trap, fish, and partake in other resource-harvesting sites. Chapter five considers the role of foragers in relation to storage, accumulation, and social hierarchy. Daly discusses the many ways by which women “provide the dynamism and coherence of the feasting system.”²² In Chapter six, on “Gifts, Exchange and Trade,” Daly looks at the impact of commerce and new trade opportunities for the Gitskan and Wet’suwet’en. He argues that “the economic exchange occurring in the local community, where a chief’s power was lodged and sanctioned, remained in the sphere of the gifting. On the other hand, external exchanges were more market-related”²³

Finally, in Chapter seven, Daly canvasses the native system of landholding and the governance of natural resources such as fishing sites and trapping lines. While colonial authorities “denied the indigenous sense of place, home, and customary system of landholding,” this has “always been hotly contested” by the Gitskan and Wet’suwet’en.²⁴ Daly carefully shows how land ownership is predicated upon “a system of negotiated, consensual kinship and affinal relations.”²⁵ Landed property is owned by each kinship group (“the House”), while usufruct rights for picking berries, or taking fish for instance, could be shared with a wider pool of relatives and friends. Unfortunately, the ability of the Gitskan and Wet’suwet’en to sustain their land economy has been severely hurt by the environmentally unsustainable logging, mining, and other intensive developments sanctioned by the hostile provincial government.²⁶

At the heart of *Our Box was Full*, therefore, are the kinship and gift exchanges that tie the Gitskan and Wet’suwet’en communities together and to their lands. Daly also observes that the metaphor of the gift enables us to appreciate what the Gitskan and Wet’suwet’en chiefs brought to the courtroom in *Delgamuukw* and, in turn, what Daly wishes to reveal to the wider Canadian society:

²² *Ibid.* at 209.

²³ *Ibid.* at 230.

²⁴ *Ibid.* at 237.

²⁵ *Ibid.* at 243.

²⁶ *Ibid.* at 282.

In the courtroom ... both the plaintiff witnesses and their so-called expert witnesses engaged in the risky business of gift-giving. They made contributions to a community in search of truth, offering public education about an ancient way of life

The gifting of one another with ideas [and] counter-ideas ... is essential to the well-being of any community. In this sense, the academic and scientific communities are no different from kinship-based communities. Gifting provides structural strength to the community. However, it has little currency in those fields of human endeavour where gift relations have been superseded by contracts, as in courts of law.

The contents of *Our Box was Full* were given in the court and returned unopened, but in order to avoid the breaking of the ring, this book has been prepared and given as a contribution to what, it is hoped, might become a future community of understanding.²⁷

The Supreme Court of Canada's judgement in *Delgamuukw* gives hope that such an understanding may arise. The Court's understanding of Aboriginal title and the "continuity of the relationship of an [A]boriginal community with its land"²⁸ fits comfortably with Daly's portrayal of Aboriginal relationships with the land.

Overall, *Our Box was Full* provides fascinating insights into the background to the *Delgamuukw* case and sheds invaluable light on the role of anthropology in Aboriginal rights litigation. Daly provides a fine account of the Gitskan and Wet'suwet'en land-tenure systems; he identifies the complex network of laws governing access to and use of House territories, which are deeply embedded in concepts of kinship and reciprocity. The scholarship is enriched by the fact that Daly was an actor immersed in the land claim process, not a detached observer. He has compiled arguably the most comprehensive ethnography of the Gitskan and Wet'suwet'en people's economy and society. The book should appeal to scholars and students of anthropology and Native studies. It is also essential reading for legal practitioners and academics who desire to understand the role of expert witnesses and Aboriginal oral histories.

²⁷ *Ibid.* at 46-47.

²⁸ *Supra* note 3 at 1089, Lamer C.J.