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History, Native Issues and the Courts: A Forum

Introduction

THE ORIGINAL PANEL DISCUSSION on this topic took place on 10 May 1996, during the 11th Atlantic Canada Studies Conference at the Université de Moncton, and was chaired by Daniel Hickey. My assignment was to review the "historiography" of the participation of Canadian historians in judicial processes relating to native issues. It was not a lengthy presentation. The standard tactic of panel participants, when faced with the demand for a historiographical survey, is to appeal for the sympathies of the audience by pleading inability to do justice to the subject within a short time. My own complaint that afternoon was rather different: that my allotted seven minutes, on the face of it at least, was a good deal more than enough to deal with the sparse Canadian historiography of historians' participation in the courts.

In making that observation I excluded, of course, such works as the several valuable collections of documents and analysis that have been drawn together at least partly with an eye to court processes, including in this region Gary P. Gould and Alan J. Semple's *Our Land, the Maritimes: The Basis of the Indian Claim in the Maritime Provinces of Canada*. I also excluded substantive works that have arisen directly from testimony given in a court case, the example that comes to mind being W. J. Eccles' "Sovereignty Association, 1500-1783". The works that I did seek to include were those that dealt explicitly with the procedural and methodological issues that arise when historians become involved in court proceedings as expert witnesses. In this country there is no real equivalent of Paul Brodeur's 1985 study, *Restitution: The Land Claims of the Mashpee, Passamaquoddy, and Penobscot Indians of New England*. What we have instead, the cynical historiographer might observe, is a sparse accumulation of published comments that fall either into the category of laments about the vagaries of judges — one subject on which historians and lawyers seem to be able to find common ground — or into the category of handy hints for prospective or apprehensive would-be experts.[1]

1 Gary P. Gould and Alan J. Semple, *Our Land, the Maritimes: The Basis of the Indian Claim in the Maritime Provinces of Canada* (Fredericton, 1980); W. J. Eccles, "Sovereignty Association, 1500-1783", *Canadian Historical Review,* LXV, 4 (December 1984), pp. 475-510; Paul Brodeur, *Restitution: The Land Claims of the Mashpee, Passamaquoddy and Penobscot Indians of New England* (Boston, 1985).

John G. Reid, William C. Wicken, Stephen E. Patterson and D. G. Bell, "History, Native Issues and the Courts: A Forum", *Acadiensis,* XXVIII, 1 (Autumn 1998), pp. 3-26.

On closer inspection, however, such a sweeping observation becomes less convincing. Certainly, judges have been criticized by historians, scathingly at times. W. J. Eccles, commenting on the celebrated Temagami case, wrote in 1987 about the reception of his testimony, that "the judge...was not impressed by this or any of the other historical evidence presented. He inadvertently revealed that he had no knowledge of the history of this country....The historical background to the case he dismissed, in his reasons for judgement, as totally irrelevant".[2] Beyond identifying personal shortcomings in the judge, however, Eccles's point raised the important question as to whether courtroom proceedings provide a receptive climate for the development of a mutual understanding between historical and legal practitioners.

This matter was taken up at greater length in 1992 by Robin Fisher, in an article contributed to a special issue of *BC Studies* that stands as the most extensive Canadian treatment to date of the interface between academic experts and the courts.[3] Focused on the case of *Delgamuukw v B.C.,* and in particular on the 394-page judgement delivered by Chief Justice Allan McEachern, the articles dealt largely with the judge's brusque and comprehensive dismissal of the evidence of anthropologists. Historians, as Fisher pointed out, were seen by McEachern in a way that was superficially more friendly. "Generally speaking, I accept just about everything...[the historians] put before me...", the judge declared. But he did not stop there. The virtue of the historians, McEachern continued, was that "they were largely collectors of archival, historical documents. In most cases they provided much useful information with minimal editorial comment. Their marvellous collections spoke for themselves".[4] As Fisher pointed out, this was in its own way a dismissal just as sweeping as the judge's more straightforward refusal to listen to the anthropologists. The distinction drawn between "information" and "editorial comment" bore little resemblance to historians' understanding of the respective roles of evidence and interpretation, and ultimately implied that a xerox machine was the most significant methodological tool of the discipline.[5]

As for the provision of helpful advice for historians as expert witnesses, examples can undoubtedly be found of passages that are practical rather than intellectual in focus, such as the admonition delivered by Donald J. Bourgeois in a 1986 issue of *Canadian Historical Review* that "a tardy witness will give a judge a bad first impression".[6] I should add hastily that I do not intend that to be understood as a dismissive remark. Prior to my own first appearance in a courtroom in 1995, I was delighted to read Bourgeois' article and any others that offered practical advice — the more practical the better, in fact. Yet this article — or, more precisely, it was an entry in the "Notes and Comments" section of the journal — also raised other issues that

2 W. J. Eccles, *Essays on New France* (Toronto, 1987), p. 156.
3 Robin Fisher, "Judging History: Reflections on the Reasons for Judgement in *Delgamuukw v B.C.", BC Studies,* 95 (Autumn 1992), pp. 43-54.
4 Quoted in Bruce G. Millar, "Common Sense and Plain Language", *BC Studies,* 95 (Autumn 1992), p. 57.
5 This statement is paraphrased from Robin Fisher, "Judging History", pp. 46-7, 54.
6 Donald J. Bourgeois, "The Role of the Historian in the Litigation Process", *Canadian Historical Review,* LXVII, 2 (June 1986), p. 202.

were more substantively historiographical, and led on to a stimulating reply the following year by G. M. Dickinson and R. D. Gidney.[7]

To Bourgeois' suggestion that the role of historians in the courtroom closely resembles what they do in the classroom — "the historians should teach throughout the litigation process, first to the litigant and the litigant's counsel, then opposing counsel, and, finally, the court"[8] — Dickinson and Gidney returned a sceptical response. The courtroom could be for the historian, they argued, "in some respects a profoundly alien and, to some extent at least, hostile intellectual environment".[9] The preoccupation of the court with finality of determination, as opposed to the historian's acceptance of ambiguity and conflicting interpretation; the possible oversimplification of evidence through lack of context and the demands of advocacy; the deliberate undermining of the witness's personal credibility: all were identified by Dickinson and Gidney as problems that have both methodological and ethical implications. "Historians", they observed, "have things to contribute to the litigation process....But they should be forewarned of the difficulties, weigh them carefully, and tread warily".[10]

This conclusion advanced by Dickinson and Gidney was reminiscent, in its emphasis on the personal responsibilities and self-awareness of the historian, of the admonition delivered by James Axtell in 1988 that the questions of how and whether to participate in court cases together represented "the sharpest dilemma for scholars of Indian history".[11] Perhaps it is the inevitably personal nature of the decision to become involved, or not to become involved, that explains in part why historians in Canada have not written extensively about their courtroom experiences.

Perhaps too there has been a certain reticence arising from the fact that expert witnesses are paid for their participation, and may be apprehensive of being seen as "hired guns" at the expense of their academic reputation. This question was, very properly, raised during the discussion period following the panel presentations. My own sense is that historians who aspire to be wealthy can find more productive uses for their time, and that any expert witness who abandons academic rigour for an advocacy position will soon lose all credibility. Clearly, members of university faculties have a responsibility to share their knowledge freely with the community, and my experience of legal cases is that they involve a great deal of time in meetings where information and opinions are exchanged and no fee is offered or expected. It is when specific tasks are requested and fulfilled, directly related to court testimony and including court testimony itself, that I believe it is proper for historians to be remunerated for their work. Nevertheless, the reality of daily fees is one of which

7 G. M. Dickinson and R. D. Gidney, "History and Advocacy: Some Reflections on the Historian's Role in Litigation", *Canadian Historical Review,* LXVIII, 4 (December 1987), pp. 576-85. This article was primarily based on judicial processes arising from the issue of public funding of Catholic schools in Ontario, but the arguments advanced were, for the most part, equally applicable to cases involving native issues.

8 Bourgeois, "The Role of the Historian", p. 205.

9 Dickinson and Gidney, "History and Advocacy", p. 578.

10 Ibid., p. 585.

11 James Axtell, "The Scholar's Obligations to Native Peoples", in Axtell, *After Columbus: Essays in the Ethnohistory of Colonial North America* (New York, 1988), p. 251.

readers of this forum should be aware and thus be in a position to draw whatever conclusions they deem best.

Be that as it may, the existing literature does provide a useful introduction when taken together. In what ways does this forum add significantly to it? The most extended contribution is that of William C. Wicken. Wicken's assignment was rather different from those of the rest of us, in that he was given the responsibility of introducing the case in which Donald Marshall, Jr., had mounted a treaty-based defense against charges of contravening fisheries regulations. While the panel discussion did not focus exclusively on the Marshall case, it was this proceeding that had provided the immediate cue for its inclusion in the conference programme and was also fresh in the minds of all the participants. Three of us (Patterson, Reid, and Wicken) had testified at the Marshall trial, while the fourth panellist (Bell) had recently completed the daunting task of reading through the many pages of testimony. Much of the early part of Wicken's contribution, therefore, is taken up with a summary of the factual background to the case, the reasons for its eventual high profile, and the broad outlines of the arguments presented on either side. Wicken then goes on to argue that the contentions advanced by historians at the trial not only offered alternative explanations of the evidence but also could be correlated with contrasting notions of the proper relationship between the state and aboriginal peoples. Reminding us that the legal arena (like the university) is no ivory tower, but rather reflects and even embodies the contests and contradictions that exist in society at large, Wicken thus suggests the need to deconstruct historical testimony so as to grapple with its social and political implications.

The contribution of Stephen E. Patterson also begins by reflecting on the wider significance of court proceedings in the context of aboriginal and treaty rights. Having subscribed at the time of the original panel discussion to the view that legal avenues were a poor substitute for direct negotiation between the state and native leaders, Patterson draws upon ten years of experience in the courts to illustrate his growing belief in the inherent value of litigation as a means of resolving crucial issues. As did Bourgeois in 1986, Patterson maintains that the methodologies of history and the law — despite the imperfections of each — are essentially compatible, and that the courtroom can be a productive if sometimes stressful environment for the historian.

In the contribution of David G. Bell, the expertise of the legal scholar is united with that of the historian. Bell, taking a position consistent with that of Dickinson and Gidney in 1987, emphasizes the differences between the respective cultures of historians and the courts. These differences are expressed in part, Bell argues, in the unfamiliarity of many historians with the demands of the adversarial process, in which understanding the past for its own sake runs a poor second to the need to buttress one legal argument or torpedo another. At a deeper level, the disjunctures extend to divergent ways of defining truth. The evaluation and balancing of evidence that is central to historical analysis, Bell concludes, contrasts with the reliance of jurists on presumptions that ensure the continuation of a legal status quo — though not necessarily one that upholds a political or social status quo — unless a case is decisively made for overturning it.

In short, all of us agree that historical testimony has gained increasing significance in the ongoing redefinition of relationships between the Canadian state and aboriginal inhabitants. More debatable is the issue of where and how historical and legal

methodologies intersect. To me, the two seem different and distinct, and yet the past is central to both when they are used to grapple with the troubled relationship between native and non-native peoples. History enjoys no monopoly of the past, but its practitioners have techniques for examining it that cannot be ignored by others without serious risk of misunderstanding. Legal cases involving aboriginal and treaty rights in eastern Canada, moreover, have unique and complex elements that arise from the need to consider evidence of events going well back into the 17th century, as opposed to the more recent focus of cases further west. As long as historians recognize the differences between legal and academic arenas, are clear in their own minds about what they are doing and why, and are prepared for questioning specifically and robustly aimed at testing their credibility, then I think their presence in the courtroom has much to recommend it from all points of view.

No doubt there will be scope to carry these debates on into the future. Already, since the panel discussion in 1996 (and perhaps one reason why it has taken so long to get it into print) the same three historians who testified in the *Marshall* case have testified again in a case involving the extent of Mi'kmaq persons' liability to pay the federal Goods and Services Tax. Also since that time, in December 1997, the Supreme Court of Canada has overturned the *Delgamuukw* decision and sent the case back for retrial. Meanwhile, the Supreme Court's hearings on the "guilty" verdict returned on Donald Marshall, Jr., took place in November 1998, and a decision is awaited. The role of the historian as expert witness is thus, by implication, the subject of ongoing judicial review — as well as scholarly review at events such as the Moncton panel discussion. The courtroom, in my experience at least, is not invariably a setting resistant to the articulation of historical interpretations within an appropriate and nuanced context. The dangers are certainly there, counterbalanced — as concluded by Bourgeois — by the opportunity to be "a valuable participant...in the litigation of important issues in today's society".[12]

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12 Bourgeois, "The Role of the Historian", pp. 204-5.