

## Historians and the Courts

SHOULD NATIVE RIGHTS ISSUES BE ARGUED in the courts or should government and native leaders sit down and negotiate them? The four of us who sat on the panel at the Atlantic Canada Studies Conference in 1996 seemed to have been of one mind on this question: we thought negotiation preferable. I must confess, however, that I am increasingly coming to see the value of litigation. In the relatively short period since the conference, the Supreme Court of Canada has made several landmark decisions setting down a test for determining aboriginal rights (the so-called *Van der Peet* trilogy<sup>1</sup>) and for sorting out the tangled issue of aboriginal title (the *Delgamuukw* case<sup>2</sup>). Under the pressure of litigation, there has been movement in the settlement of land claims in British Columbia and the North. One wonders whether there would have been movement at all without litigation or the threat of litigation. If nothing else, the decisions have laid down a reasoned framework for assessing the question of rights, perhaps smoothing the way for future non-judicial discussions and resolutions of such things at the sharing of resources and the ownership of land. In short, I am more sanguine today that I was two years ago about the value of litigations, including those in which I have participated as an expert witness with other members of this panel.

What is happening in the courts can, however, be easily misunderstood. I have felt that some people have misconstrued my role as a historian/expert witness for the Crown. Some people, including some of my own colleagues, have viewed the process as persecution, rather than prosecution. There is a natural sympathy among most academics for the rights of minorities, and broad support for attention to the serious social and economic problems faced by Canada's aboriginal people. I share this view. But before jumping to conclusions, we should all understand that questions about rights are seldom easily answered. In many of the cases that have come to trial in Atlantic Canada in the last ten years, the very issue has been whether there is a right at stake that prevents the enforcement of a Canadian law against an aboriginal person. Unless we believe that an aboriginal person may do whatever he or she wishes, without respect to Canada's laws, it is essential that we find the boundary between laws that apply to all and laws that must bend to protect aboriginal and treaty rights. This we have not yet accomplished. In Atlantic Canada we have begun a serious exploration of this issue as it relates to the Mi'kmaq and Maliseet peoples. But in my view we are still a long way from resolving the matter, and we are more likely to succeed if at least some historians willingly participate in the process.

The process demands historical reconstruction and analysis. Before 1982, it was rare indeed for historians to be called to give expert testimony in Canada's courts. Since then, it has become commonplace. The source of the change is the repatriated Constitution with its newly entrenched guarantee of "existing aboriginal and treaty rights" provided in section 35 (1). An imprecise and general proposition at best, the clause has required the close consideration of the courts over the past 16 years to determine what constitutes an aboriginal or treaty right (the two may differ), and

1 *R. v Van der Peet*, 13 *Dominion Law Reports* (4th), pp. 289-398 (1996). The other cases in the trilogy were *R. v N. T. C. Smokehouse Ltd.* and *R. v Gladstone*, *ibid.*, pp. 528-61, 648-715.

2 *Delgamuukw v British Columbia*, 153 *Dominion Law Reports*, (4th), pp. 193-284 (1998).

whether such rights continued to exist down to 1982. In some of the early cases to tackle these issues, such as the *Simon* case of 1984 involving the hunting rights of a Shubenacadie Mi'kmaq, the courts were deluged with historical documents without the benefit of any historian to explain their meaning or significance or even to question their relevance. The Supreme Court of Canada threw its hands in the air, so to speak, and determined that it was impossible to tell what went on along the east coast of Nova Scotia in the 1750s. Since no one had proven otherwise, the Court determined that a treaty signed in 1752 by Jean-Baptiste Cope, chief of the Shubenacadie Mi'kmaq, gave Mr. Simon a hunting right, including a right to carry a rifle in the vicinity of his reserve out of season.<sup>3</sup> Since then, other decisions have demonstrated that treaty rights cases require a close examination not only of the treaty in question but equally of the historical context of the treaty. And as a consequence, the parties to such litigations have resorted ever more frequently to the use of historians (among others) to establish the relevant facts and to read and explain documents that have otherwise been ignored for centuries.

Section 35 (1) has prompted two quite different types of cases. Some few are clearly test cases: they are part of a carefully constructed strategy on the part of aboriginal leaders and their communities to test certain laws as they apply to aboriginal people. In some instances, government is just as interested in the court's answer as the aboriginals are, and has agreed to assume the aboriginals' costs. But many other section 35 (1) cases are entirely the products of individual choice: an aboriginal person is accused of breaking a law and he or she argues a treaty right to do so. Many of the latter have had no obvious native community support. It is, of course, possible for the native community to adopt an individual's case, presumably because there is widespread belief in the accused's rights. In such cases, what may have begun as an isolated individual's defence may turn into a broad test of the community's rights, and the individual usually then receives the professional and financial assistance of the community. The case involving Donald Marshall Jr.'s right to fish eels at Pomquet Harbour for commercial purposes was of this sort.<sup>4</sup> While the case may not have begun as a test case, the Crown and the trial judge eventually came to the conclusion that it was, with the result that while the trial decision went against Mr. Marshall, no penalty was either sought or imposed. The matter remains under appeal to the Supreme Court of Canada.

The first case in which I became involved was not a test case. The accused operated a small store on the Millbrook Reserve in central Nova Scotia where he sold tobacco products to natives and non-natives alike. He was charged with selling at wholesale without a registration certificate and with failing to collect and remit the provincial health services tax as required by provincial statute. He claimed a treaty right under section 35 (1), immediately triggering its distinctive process. Through his lawyer, he proffered the Treaty of 1752 as his defence, arguing that clause 4 of the treaty gave the Mi'kmaq "free liberty to trade to the best advantage". While at one point the trial was adjourned for a lengthy period to allow the accused to seek and receive the

3 *Simon v The Queen*, 24 *Dominion Law Reports*, (4th), pp. 390-413 (1986).

4 *R. v Marshall (D. J.) Jr.*, as appealed to the Nova Scotia Court of Appeal, is reported in 159 *Nova Scotia Reports* (2d), pp. 186-214 (1997).

assistance of the Union of Nova Scotia Indians and their lawyer, when the trial resumed he reported his failure to do so. The case began and remained very much one aboriginal person's challenge to a law of Nova Scotia based on a purported treaty right.

The office of the Attorney General of Nova Scotia first approached me in 1988 respecting this case. The trial had not begun although the accused had indicated his intention to offer the Treaty of 1752 in his defence under section 35 (1). The Attorney General's office had been down this road before. This was the same office that had argued the *Simon* case several years before, and had lost. Clearly the lesson learned from that experience was that historical documents (of which the Crown had submitted dozens if not hundreds to the Supreme Court) do not speak for themselves. At first, my caller wanted information only: What did I know about the Treaty of 1752? Was a truckhouse set up as suggested in clause 4? Had Mi'kmaq ever enjoyed "free liberty" to trade without restriction or regulation of any kind? These were reasonable questions to ask of a person who had immersed himself in 18th-century colonial history, including aspects of early Nova Scotia history. The call was prompted by discovery in the *Dictionary of Canadian Biography* of my sketches about 18th-century Halifax merchants. Of particular relevance was Benjamin Gerrish, the first commissary of the Indian trade and the man who set up the first government-operated truckhouses where the trade centered for a time in the 1760s. I could answer some of the questions immediately; others I undertook to research. When I had done this, they sprang the ultimate question: would I testify to these matters at trial?

I agreed, but with enough foresight to insist on adherence to certain principles. I would deal with historical documents and would place them in historical context as best I could. There were limits to my knowledge, and I would not testify beyond the limits. They must be prepared to hear me say: "I do not know". I would do what a historian could do — read documents, place them in context, define terms historically, etc. — but I would not make their case for them. That was their business, not mine. As it turned out, I was the only expert witness called. The Crown submitted several dozen documents; the Defence submitted one, the Treaty of 1752. My testimony was used by both the Crown and the Defence in their oral and written submissions. The Defendant lost his case. Eventually the decision was considered important enough to have been reported for the consideration of other lawyers and courts, although a provincial court decision has no precedential value in law.<sup>5</sup> The case was not appealed.

This case raised questions for me about what courts do and how that might be compared with what historians do. Courts are adversarial by their nature. Historians may not think of their work as adversarial, but they thrive on good arguments and many of us believe that the historiographical process depends on a dialectic of clashing views. But in the first case, I was not confronted by opposing experts, and I felt that I should have been, as I have been ever since. Surprisingly, rival experts often agree with one another; but fairness requires a check, and strong views must withstand challenges. A second observation is that the courts see history essentially as "fact". Courts are intensely empirical and are not much interested in broadly stated theories

5 *R. v Johnson* (S. G.), 133 *Nova Scotia Reports* (2d), pp. 280-91 (1993).

of history or methodological discourses with no clear empirical conclusions. Judges determine the facts of a case on the basis of what they hear at trial, and lawyers who understand their trade well try to deliver the facts as clearly and simply as possible. For the historian/witness, there may be no simple “yes” or “no” answer to a complex question. Normally we like to qualify our judgements, especially where shades of grey make more sense than black or white. But a witness can be ordered, as I have been, to answer the question directly, “yes or no”. At the same time, courts vary in their level of tolerance for our scholarly idiosyncrasies. After listening to another historian/witness ramble on for 15 or 20 minutes in answering a fairly straightforward question, a judge sitting in Miramichi said in resigned tone, “That’s the longest ‘no’ I have ever heard”.

Historians and the courts may differ in their search for truth, but it is clear to me that they also share common ground. They both seek the truth. Moreover, both understand that the truth goes well beyond the words of a single agreement like a treaty. Courts recognize, as historians do, that the written documentary remains of the past often reflect the views and biases of the powerful, and that the illiterate, or uneducated or less articulate, can have views that perhaps were not preserved in written form. As a consequence, treaty rights cases in Canada have gone well beyond an examination of treaty texts themselves. Courts insist on context, they seek to understand how the words of a treaty would have been understood by the aboriginals signing it, and where there is ambiguity, the rule has been established that the matter must be resolved in favour of the aboriginal person. Decisions of the last ten or 12 years have insisted on balance and fairness. On the other hand, the courts have determined that we should try to understand what both parties to a treaty intended, and they have rejected arguments that may serve a present purpose but for which there is no apparent historical support.

We may speak of the courts generically, but in fact they vary a lot from jurisdiction to jurisdiction and from one level to another. Some adhere very narrowly to the evidence placed before them while others assume a role in interpreting historical material or even in conducting their own research. So-called “activist” judges have made decisions based not on what they learned in court but on what they found in the library, although increasingly this approach is falling into disfavour. With all respect to “activist” courts, I believe with Professor Brian Slattery that “day-tripping”, as he calls it, does not work. Historians do not practice law, and in my view, jurists should not practice the historian’s craft. There is more than professional jealousy at stake here: there is the very real possibility that a most one-sided selection of the documents may occur, or that facts might be ripped out of context, or that archaic language, spelling or terminology will be misunderstood. The 1998 decision of the New Brunswick Court of Appeal in the *Thomas Peter Paul* case (involving native logging rights on Crown Lands) made precisely this point in criticizing a decision of a lower court.<sup>6</sup> Even considered on legal grounds alone, it hardly seemed appropriate for a judge to render a decision that neither side had argued at trial, and which neither side had had the opportunity of commenting on or, if necessary, refuting. All of this underscores the need for professional historians to provide their skills at the trial level, where the hard questions can be asked and where the rules of cross-examination

6 *R. v Paul*, 196 *New Brunswick Reports* (2d), pp. 292-328 (1998): esp. pp. 306-15.

afford ample opportunity for both sides to assess the evidence of witnesses.

At the same time, I think that history and the law have enough in common, as methodologies, to permit mutually beneficial cross-fertilization. At least I can speak to the professional benefits I have enjoyed. I have learned a lot from my role as an expert witness. I have learned from fellow witnesses, especially my colleagues on this panel. Importantly, too, I have acquired new knowledge about the archival resources available in Atlantic Canada, and of related work with which I was previously unfamiliar. The pressure to conduct an exhaustive search for documents, and to consider all the possible interpretations of them, may be a standard expectation of the historian, yet there is nothing like having to do so for court to steel one's resolve and push one beyond one's sometimes too comfortable ivory-tower limits. The challenge of being prepared for court is stimulating. If the process places undue emphasis on immediate recall and exaggerates the importance of minutiae, it nonetheless forces a fair and full canvassing of historical materials in a way that no other exercise does (with all respect to the process of peer-review). At the least, it creates an immediacy to the exercise that can be found in no other form of scholarly encounter. One must admit, also, to a certain satisfaction in discovering that one's fascination for and love of the 18th century actually matters. There are people in our time who need to know, and current issues that cannot be resolved without historical expertise. I have always cringed at the suggestion that history should be "relevant", but in this case, it is.

Other spin-off benefits may be found in my teaching. In the classroom, I now seldom approach questions involving natives or the native-European encounter without reminding students of the significance of the material in our own time. I have devised a graduate course in encounter history that includes an examination of the role of the historian as expert witness. I have planned a new course based on historical problems identified in major Supreme Court cases, to be offered in the Law and Society Program at the University of New Brunswick in the near future.

The four members of the panel enjoyed a spirited discussion with members of the audience after our presentation in Moncton in 1996. One person asked whether we ever questioned our own objectivity, given that expert witnesses appear for one side or the other on hotly controverted issues. The question is a good one, even though every historian will agree that the answer has to be "yes", however much we may qualify the answer. But put another way, questioning one's objectivity and questioning one's historical interpretation are in many ways reciprocal exercises for any historian. The real issue is whether we are prepared to learn from new evidence, or rival perspectives or new methods for uncovering truth. In my view, this is what a historian does as he or she matures and grows. In my case, I think that court experience has helped me do that. There finally is something to be said for the overall societal impact of treaty rights litigations. Despite their adversarial character, the process actually is sharpening the understanding of both government and aboriginals about what is at stake and what reasonably can be done to reconcile the interests of the Canadian state and Canada's first peoples. Historians are contributing to this process by appearing as expert witnesses. Like all other historians, they daily confront the persistence of their own mind-set and bias as they sort through the evidence their research uncovers. Like all other historians, they in the end are forced to come to conclusions, the best ones they can given the constraints of the evidence. In the final analysis, the historian as expert witness is simply a historian, doing what he or she has

been trained to do, with all its well-known imperfections.

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### Historians and the Culture of the Courts

AT FIRST VIEW THE COMMON law's method is historical. Lawyers and judges respond to present-day legal problems by analysing how courts handled analogous questions in times past. Law libraries, which consist mainly of case reports running back centuries, offer uniquely elaborate aids for making this vast archive yield up wisdom. Method begets temperament. A common lawyer delights in precedents, not principles. Yet, as my colleague Margaret McCallum observes ruefully, law is a "historical" discipline whose practitioners lack curiosity about history. Lawyers' orientation is instinctively backward-looking, to anchor interstitial novelty safely within the matrix of the past, but they do not seek, except in limited or unusual instances, to contextualize the case artefacts they draw on. So much is this the case that legal precedents not uncommonly come to "stand for" anachronistic propositions, unmentioned in them. Lawyers trust, and one might say reverence, the past to an extent without secular parallel; but, unlike historians, they do not seek to understand it. In this, as in a number of important respects, legal culture can be uncongenial to the expert coming into court to offer historical opinion evidence. Although the reflections that follow are prompted by close observation of the reception of expert witnesses in one particular litigation context, I think them true to the experience of historical witnesses generally where issues are contested ones.

It is almost trite to observe that historians are consulted extensively nowadays in constitutional litigation. Although this is ascribed commonly to the overtly social and political choices judges face deciding Charter cases, the most intensive use of historical evidence has been in coming to terms with various forms of aboriginal entitlement. Most notable has been British Columbia's *Delgamuukw* case, now into a second decade, where the first trial took 318 days for mostly expert evidence and set something of a record. In the East the outstanding instance is the fisheries prosecution of Donald Marshall, where the only evidence called in 42 days of trial was that of historians. The coming of the historians, in various permutations of expertise, has long been sought, and now been welcomed by courts embarrassed at confronting complex ancient interactions and their documentary artefacts without reliable guidance. Already one can say that interjection of scholars into Maritime aboriginal claims has had notable impact. The prospect of litigation has been an immense stimulus to research into Amerindian-European relations. Historical understanding of 18th-century Nova Scotia will never be the same, a change evident already in contributions of S. E. Patterson and J. G. Reid to *The Atlantic Region to Confederation: A History* (1994). In legal-political terms, invocation of scholarly expertise has strengthened enormously the bargaining position of contemporary aboriginals. While in the Maritimes there has yet to be credible judicial affirmation of aboriginal entitlement, the more seriously questions of treaty meaning (in particular) are addressed, the more content and potential these delphic instruments are seen to have. The primary influence reshaping judicial response to the treaties is shifting public opinion, but it is