Of grizzlies and landslides: the use of archaeological and anthropological evidence in Canadian aboriginal rights cases

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ABSTRACT

This paper discusses some of the most contentious problems raised by the use of archaeological and anthropological evidence in aboriginal rights litigation in Canada. The first part of the paper deals with the general impact of archaeological and anthropological theories on law. The more specific problems related to the use of archaeological and anthropological evidence in aboriginal rights litigation are the subject of the second part. The final section deals with the reverse problem, that is, the question of the law's impact on the disciplines of archaeology and anthropology.¹

THE IMPACT OF ARCHAEOLOGICAL AND ANTHROPOLOGICAL THEORIES ON LAW

Law, as much as history, archaeology and all other social sciences, is not a neutral, value-free discipline. Changes in the values and beliefs of society at large will generally result in political and, consequently, in legal changes, and those popular beliefs are often fuelled by what science tells us about our world. More specifically, law is influenced by the generally accepted scientific conclusions of contemporary archaeology and anthropology (Ragsdale, 2001). Legal and ethical debates, in their turn, often influence our beliefs and sometimes science itself.

When one looks at aboriginal legal issues, archaeological and anthropological theories have undeniably influenced, and still influence, developments in law. For instance, the scientific paradigm of the 'vanishing Indian' in 19th-century North America claimed that 'Indians' were:

racially, culturally and religiously inferior, vulnerable to disease and alcohol, prone to violence and warfare, and low in resistance or adaptability when faced with the loss of land or the diminishment of natural resources [and it]

led [anthropologists] to the conclusion that tribes were destined, inexorably, to be displaced, if not destroyed, by evolutionary principles. (Ragsdale, 2001: 7–8).

These theories formed the basis of laws whose object was to assimilate, as fast as possible, the Indian population into the general population. On the explicit or implicit basis of these theories, courts felt justified in their conclusions that aboriginal sovereignty was either non-existent or extinguished by the 'higher' culture of the Euro-Americans. It also justified the dominant cultures' policy of dispossession.

At the end of the 19th and the beginning of the 20th centuries, the abandonment of such extreme beliefs in social evolution also influenced new developments in the legislation. Assimilation was discarded and legal reformers sought to preserve and restore tribal cultures. Some even thought that indigenous societies could provide possible models for the majority. In the USA, the result was the adoption of the *Indian Reorganization Act* (1934) that focused, as its title indicates, on restoration rather than assimilation.

Still today, much depends on archaeology and anthropology because, for example, according to

the Supreme Court of Canada, the unique status that aboriginal people enjoy in Canadian law is premised on the fact that, 'when Europeans arrived in North America, aboriginal peoples were already here' (*R. v. Van der Peet*, 1996: 30). It is also based on the idea that they were, and still are, culturally different from non-indigenes. Archaeological and anthropological discoveries have the potential of either defeating or upholding, in the public's mind, the idea that aboriginal peoples' difference is deserving of constitutional protection. They are viewed as 'different' because they are perceived as ecologists, communitarians and, most importantly, as the first inhabitants of the continent. If, by any chance, archaeology and anthropology came to demonstrate the contrary, i.e. that aboriginal peoples have not always been respectful of the environment, that they were not governed under egalitarian principles or that they were not the first inhabitants, then, in the public's mind, the basis of their special status might be questioned and, in consequence, this might lead to demands for legal change.

If the current tribes can be scientifically described as relatively recent immigrants or as themselves the unjustified displacers of predecessor tribes, then post-discovery dispossession by the European invaders may be revisioned as somewhat less egregious or unprecedented, and thereby less supportive of continuing sovereignty and political distinctiveness for the contemporary tribal remnants. (Ragdale, 2001: 42)

In other words, archaeologists, anthropologists and historians are now right in the middle of the battlefield. Their knowledge will either contribute to the justification of the special collective rights legally recognized to the aboriginal peoples, or it will provide ammunition for those who claim that the principle of equality calls for the abolition of special group rights. These changes in archaeological and anthropological doctrines might also impact on how the courts define legal concepts such as aboriginal rights and the Crown's fiduciary duty owed to aboriginal peoples. It might lead to a reassessment of the liberal rules of interpretation applicable to the treaties signed by the Crown with the Indians.

The impacts just described are of a rather indirect nature. Archaeology, anthropology and

history have a much more direct impact on law when they are used as tools of evidence in aboriginal rights litigation.

EVIDENTIARY PROBLEMS IN ABORIGINAL RIGHTS CASES

A court's duty is to render decisions on the basis of the best evidence possible, and this duty does not change where aboriginal and treaty rights are concerned. In Canada, those rights are now constitutionalized under subsection 35(1) of the *Constitution Act 1982*, which states that '[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'.

Cases dealing with aboriginal rights are 'highly site-specific' (Macaulay, 2000: ch.9, p.4). The tests developed by the Courts put the emphasis on specific historical facts. Aboriginal rights cases can rarely serve as precedents in other cases because the factual situation of each tribe is so different from another. Justice Dickson's statement, although made prior to 1982, still rings true today:

[c]laims of aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue, and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis. (*Kruger and Manuel v. R.*, 1978: 109).

In the 1996 *Van der Peet* decision, the Supreme Court of Canada defined, for the very first time, the meaning of the words 'aboriginal rights', in s. 35 of the Constitution. The Court stated that an aboriginal right is 'an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right' (*R. v. Van der Peet*, 1996: 46). To establish such distinctiveness, the claimant must demonstrate, 'that the practice, custom or tradition was one of the things [...] that truly *made the society what it was*.' (*R. v. Van der Peet*, 1996: 55, original emphasis). The time period that a court must consider in identifying whether the practice, custom or tradition claimed meets the standard of being integral to the aboriginal community claiming the right was said to be, 'the period prior to contact

between aboriginal and European societies' (*R. v. Van der Peet*, 1996: 60). This was so because what underlies the aboriginal rights protected by s. 35(1) is the fact that distinctive aboriginal societies lived on the land *prior* to the arrival of Europeans. Consequently, it is to that pre-contact period that the courts must look in identifying aboriginal rights. Antiquity and not Indian sovereignty thus forms the basis of aboriginal rights in Canada. As can be noticed, the test is extremely fact-specific.

A year later, in *Delgamuukw*, the Supreme Court established a similar test for proving a claim of aboriginal title. Whereas aboriginal rights are concerned with pre-contact *activities* and *practices* that were integral to the culture, aboriginal title confers a right to the territory itself: 'the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures' (*Delgamuukw v. British Columbia*, 1997: 111). Proof of aboriginal title requires that an aboriginal group satisfy the following criteria, which are, again, very fact-specific:

- (i) the land must have been occupied prior to sovereignty,
- (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive. (*Delgamuukw v. British Columbia*, 1997: 143)

In treaty rights cases, evidence must also be adduced to understand the meaning to be given to the covenant. Sometimes this requires proof of specific facts surrounding the signing of the treaty or proof of the intentions, or of the understanding, of the parties involved.

The Supreme Court's approach to aboriginal rights, based as it is on 'cultural "distinctiveness"' (Asch, 2000: 120) rather than on a recognition of the survival of aboriginal sovereignty, has been the subject of extremely severe criticisms, not the least being that it fossilizes aboriginal identity (Borrows, 1997; Rotman, 1997; Barsh and Henderson, 1997; Lambert, 1998; McNeil, 1998; Asch, 2000). Those criticisms will not be addressed here except to say that there is some truth in the crude saying: 'people like their savages naked' (cf. Stohr, 1999: 701).

What I wish to underline is that, in view of the Court's approach, aboriginal rights claims necessarily depend on facts and events that occurred hundreds of years ago. And they involve claimants whose traditional culture was non-literate.

Notwithstanding these obstacles, '[c]laims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities' (*Mitchell v. Minister of National Revenue*, 2001: 39). The Supreme Court nevertheless stated that some flexibility was needed and that, 'a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in' (*R. v. Van der Peet*, 1996: 68). In the name of such flexibility, the Supreme Court allowed the admissibility of evidence of post-contact activities to prove continuity with pre-contact practices, customs and traditions. Nevertheless, even if aboriginal rights require 'a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples', such an accommodation must be done in a manner, 'which does not strain "the Canadian legal and constitutional structure"' (*Delgamuukw v. British Columbia*, 1997: 82). Evidentiary principles must not be strained beyond reason (*Mitchell v. Minister of National Revenue*, 2001: 52). The Court is thus torn between equity and certainty.

Consequently, as we will see, in order to establish their claims, aboriginal peoples must resort to evidence unfamiliar to courts – most importantly, oral histories and ancient documentary records of a non-legal nature. Courts are also confronted with expert evidence based on a variety of unfamiliar sources, archaeological and anthropological findings being two of them. Accepting and evaluating these types of evidence poses great problems in the judicial arena.

Oral histories

Their traditional culture being non-literate, most aboriginal peoples will need to invoke oral histories to establish their claim to an aboriginal right (activity) or an aboriginal title (exclusive use of

territory). Such histories are also used to prove that a particular person is a descendant of the signatories of a treaty or to establish the intent or the understanding of the aboriginal signatories.

The aboriginal historical tradition has been described in the *Report of the Royal Commission on Aboriginal Peoples* as:

... an oral one, involving legends, stories and accounts handed down through the generations in oral form. It is less focused on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to presume to classify or categorize the event exactly or for all time. In the Aboriginal tradition the purpose of repeating oral accounts from the past is broader than the role of written history in western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige. (Canadian Royal Commission, 1996: 33)

Oral histories are 'memories of memories' (Gernet, 1996: 8). Their non-literate nature clashes with the Western Judaeo-Christian reverence for the written word (Stohr, 1999). An oral history is the recounting of a story heard from someone else. In strict legal terms, these accounts should not be allowed in court because, technically, they qualify as hearsay. A witness is only allowed to relate facts that he/she has personally experienced. The truthfulness of the testimony can thus be ascertained immediately through cross-examination.

Courts have nonetheless concluded that oral histories are an acceptable exception to the hearsay rule. To conclude otherwise would have made it impossible for aboriginal peoples to make their case. In *Delgamuukw*, the Supreme Court went as far as saying that, not only were these histories admissible, but that they stood on an 'equal footing with the types of historical evidence that courts are familiar with' (*Delgamuukw v. British Columbia*, 1997: 87). Before *Delgamuukw*, oral history was held to be admissible, but little or no weight was given to it, unless corroborated by written or archaeological evidence.

For instance, the trial judge in *Delgamuukw* concluded that oral histories were not helpful except as confirmatory evidence (*Delgamuukw v.*

British Columbia, 1991: 49, 66). He was of the opinion that such evidence could not be relied on, on its own, because it was not 'literally true' (ibid.: 41). He thought that the plaintiffs were 'recounting matters of faith which had become fact to them' (ibid.: 41). The stories qualified as mythology rather than history (ibid.: 37–38, 48); they were extremely vague and lacking in details (ibid.: 48). The trial judge also quoted extensively from anthropologist Bruce Trigger's *Time and Traditions, Essays in Archaeological Interpretation* in which the latter warns against using oral histories uncritically as a valuable source of information (ibid.: 39–40).

The Supreme Court eventually ordered a new trial in *Delgamuukw* precisely because the trial judge had refused to give independent weight to the oral histories of the Gitksan and Wet'suwet'en peoples. This, the Court concluded, did not conform to the sensitive approach to evidentiary issues enunciated in *Van der Peet* and dictated by the unique situation of the aboriginal peoples.

What did the trial courts make of the Supreme Court's admonition in *Delgamuukw* to give equal standing to oral and written evidence? When the case law is examined, a trend seems to emerge. Notwithstanding the Court's entreaty, trial judges have refused to give weight to oral history when important – that is *territorial* – issues were concerned, especially if the oral evidence was not corroborated or if the written record contradicted it. In cases involving *activities* such as a right to trade, oral histories were more successfully relied upon.

The trial courts' failure to give independent weight to oral history is not surprising. I said earlier that the Supreme Court, in *Delgamuukw*, ordered a new trial, so it did not have to assess and weigh the evidence. The Court essentially stated that oral history was admissible. But the problem with such evidence is not its admissibility but the weight it should be given. Unless corroborated, what is the probative value of such evidence? Respect for aboriginal difference is one thing, but judges are called upon to decide, and decide finally, an issue. They cannot live with uncertainty. They thus require the most conclusive evidence possible.

The trial case in *Delgamuukw* provides a very good example of the difficulties related to the use of oral history in litigation. In that case, two tribes

were claiming an aboriginal title on a large part of British Columbia's territory. One of these tribes, the Gitksan tribe, made use of the following story to demonstrate that they were present since time immemorial near a place now called Seeley Lake. According to one elder's story, one day, a very long time ago, after the men had finished the day's fishing, young 'maidens' from the tribe made headdresses out of the backbones and tails of the fishes; delighted with their new ornaments, they started to dance and sing. Suddenly, their festivities were interrupted by a thunderous noise coming from the mountain beside the lake. A gigantic grizzly bear was coming down the side of the mountain 'tramping down the trees'. The warriors came out of the village to confront the animal. The grizzly went down to the lake, crossed it and trampled the warriors to death. Its gruesome task finished, it went back from where it had come. The elder summed up the morality of the story in the following way:

That's why the wise elders told the young people not to play around with fish or meat or anything, [...] because the Sun God gave them food to eat [...] [T]hey should just take enough to eat and not to play [*sic*] with it, that's why this tragedy happens [*sic*] to them. (*Delgamuukw v. British Columbia*, 1991: 53).

What can a judge do with such evidence? 22,000km² of territory were at stake in *Delgamuukw*. The elder in this case was undeniably sincere and honest. But, is this story, on its own, sufficient evidence to establish a claim of aboriginal title? How can the defendant cross-examine the elder to determine the veracity of her story? As Justice Lambert of the British Columbia Court of Appeal remarked:

How can a defendant's counsel attack it by the traditional method of cross-examination? How dark was it? How good was the eyesight of the people there? How many fingers am I holding up? Could the bear have been only 80 feet tall? (Lambert, 1998: 264–265).

Nevertheless, such evidence can certainly be of great use if corroborated. Again, *Delgamuukw* provides an eloquent example. A geomorphologist testified at trial that a major landslide had occurred

about 3500 years ago. A landslide of such magnitude that it would have produced a tremendous noise, a great cloud of smoke and debris, and that huge swathes of forests would have been cleared away. A great mass of debris would also have ended up at the bottom of the lake. A palaeobotanist confirmed these findings. He had taken a core-sample from the bed of Seeley Lake and analysed a layer of clay situated about 1.5m below the lakebed. He concluded that the clay layer was 3380 years old and the result of a rise in the lake's water level occasioned by a landslide blockage of the stream outlet. Scientific evidence together with the oral history constituted a much more convincing proof of the Gitksan presence on British Columbian territory prior to sovereignty, than just the oral history alone.

In the *Mitchell* case (2001), the Supreme Court reassessed, and backtracked, on what it had earlier said about oral histories in *Delgamuukw*. To be admissible, said the Court, evidence had to be both useful and reliable. Oral histories satisfied the usefulness test because they offered evidence of ancestral practices, and their significance, that would not otherwise be available, and because they provided the aboriginal perspective on the right claimed. The reliability test rests upon an inquiry into the witness's ability to know and testify to orally transmitted aboriginal traditions and history. On the issue of weight, the most contentious of all, although the Court repeated what it had earlier said in *Delgamuukw*, it underlined that:

[p]lacing 'due weight' on the aboriginal perspective, or ensuring its supporting evidence an 'equal footing' with more familiar forms of evidence, means precisely what these phrases suggest: *equal* and *due* treatment. While the evidence presented by aboriginal claimants should not be undervalued [...] neither should it be artificially strained to carry more weight than it can reasonably support. (*Mitchell v. Minister of National Revenue*, 2001: 39)

More particularly, the Court indicated that the *Van der Peet* approach did 'not operate to amplify the cogency of evidence adduced in support of an aboriginal claim' (*Mitchell v. Minister of National Revenue*, 2001: 39).

In *Mitchell*, the Court had to determine whether the Mohawks of Akwesasne had an aboriginal

right to bring goods across the St Lawrence River for the purposes of trade. Such an aboriginal right would have precluded the imposition of duty under the *Customs Act*. There was an undeniable geographical element to the claim (the establishment of a North–South axis of trade), since the Mohawks wanted the Court to recognize their ‘right to convey goods across an international boundary for the purposes of trade’ (*Mitchell v. Minister of National Revenue*, 2001: 57). The trial judge had found in favour of the claimants on the basis of oral history and archaeological evidence. Although there was ample evidence to demonstrate that trade was a central feature of Mohawk culture prior to contact, the Supreme Court nevertheless overruled the trial decision stating that there was ‘no support in the evidentiary record’ (*Mitchell v. Minister of National Revenue*, 2001: 42) to establish an ancestral Mohawk practice of transporting goods across the St Lawrence River for the purposes of trade. Although the oral histories were to the effect that there had been commercial exchanges between the Five Nations and their northern neighbours, archaeological evidence demonstrated the contrary. On the basis of D.K. Richter’s (1992) book, *The Ordeal of the Longhouse: The Peoples of the Iroquois League in the Era of European Colonization*, the Supreme Court concluded that ‘long-distance Mohawk trade, at least at the time of contact, fell along an east–west axis’ (*Mitchell v. Minister of National Revenue*, 2001: 44).² Constant warfare between the Mohawks and the northern tribes precluded the possibility of trade on a North–South axis. The geographical element of the claim had thus not been proven.

In conclusion, even useful and reliable oral evidence cannot stand unless corroborated by other evidence. Some archaeologists agree with such an approach, stating that, even for the purposes of the anthropological discipline, oral history must be subjected to both internal and external tests in order to determine its reliability and validity (Gernet, 1996: 9).

Stohr (1999: 701) states that ‘[o]n the one hand, courts protect [aboriginal] practices only to the extent that they are “traditional” while disparaging oral history, the only evidence available to prove the tribal past’. There is some truth in this, but on the other hand, giving independent weight to oral

history puts those denying the existence of the claim in a next to impossible position. As one judge said, ‘They are unlikely to be able to persuade a member of the same First Nations community to give convincing evidence of a contradictory oral history. So they will have to rely on experts to try to disprove the oral history, or they will have to rely on cross-examination’ (Lambert, 1998: 264). And who would dare cross-examine a respectable elder on the reliability of his/her testimony? Finally, by putting too much emphasis on oral history, courts run the risk of overevaluating oral histories. They seem to ignore that other types of evidence, some much more reliable, do exist (including archaeological and ethnographic sources).

For oral history to stand a chance in court, it will have to be adapted to the litigation environment. Firstly, courts should be reminded that the differences between oral and written narratives should not be overemphasized: ‘[b]oth ... are selective characterization of events, both are subject to bias, and both can easily perpetuate fictions’ (Gernet, 1996: 5). Secondly, the main problem with oral histories is that they are generally offered in testimony during trial. Unable as they are to assess their validity, judges have a tendency to reject them. One way of avoiding such a result is to write down the stories so as to enable their analysis by expert witnesses better equipped than judges to assess them (Gernet, 1996: 15–16).

Before moving on to the use of documentary records, I want to underline two other difficulties related to the use of archaeological evidence. Firstly, one problem faced by all claimants in an aboriginal rights case is that, very often, there is no archaeological evidence available because no research has been done. Secondly, judges often consider the identification and interpretation of archaeological evidence insufficiently precise, or detailed, to be of any help in establishing proof of occupation by a specific tribe. In *Delgamuukw*, for example, findings consisting in cache pits and house remains dating back 3000 years or more were introduced to establish the claimants’ presence on the claimed territory. They were dismissed by the trial judge, who concluded that, ‘[a]ny aboriginal people could have created these remains’ (*Delgamuukw v. British Columbia*, 1991: 50).

Documentary records

Documentary records refer to historical documents, including reports of the Hudson Bay Company agents, the diaries of early clerics, traders and explorers. These documents are admissible if their authors are considered disinterested and if the document came about before the claim was contemplated.

The main problem with such written evidence is that, contrary to oral evidence, its reliability is generally not questioned. It can stand on its own without any need for corroboration. The fact that it was the product of Europeans, and that it expresses the prejudices and misconceptions of their time, does not seem to bother some judges. For instance, in *Delgamuukw*, although the trial judge was quite concerned about the reliability of oral history, he said that he had 'no hesitation accepting the information' (*Delgamuukw v. British Columbia*, 1991: 64) contained in the reports of William Brown, the first Hudson's Bay Company agent to have visited the Gitksan country in 1822. The judge's attitude as to what evidence should be admissible was undoubtedly culturally biased.

Expert evidence

Archaeologists and anthropologists have not always been seen as friendly by aboriginal peoples. The 'imperial archaeologists' and 19th century ideas of evolution and progress that they adopted, played an important role in justifying the adoption of laws aimed at assimilating the 'inferior races' (Ragsdale, 2001: 7-9). But now, whether they like it or not, aboriginal peoples have been forced to resort to archaeologists and anthropologists to collect evidence that is considered acceptable by the courts to corroborate their oral evidence.

There are various problems faced by social science experts in aboriginal litigation. Firstly, the archaeologist or anthropologist has to establish that they are qualified in their field of expertise and, more specifically, that they are qualified to testify about the tribe or territory involved in the litigation. Secondly, the opinion will only be reliable if the methodology of research and analysis is generally accepted in the discipline. This opens the door to the debates raging in the discipline itself.

FACTUAL BASIS OF THE OPINION

The biggest problem with expert evidence is that usually it is not based entirely on facts of which the expert has personal knowledge. As such, it offends the rule against hearsay. For example, an expert will usually ground his/her opinion on findings made by other scientists in the field. In view of the impossibility of proving every single fact that has gone into the formulation of the opinion the rule is that, 'in circumstances where the factual basis of an expert's opinion is a mixture of proven and unproven facts or hearsay, the weight given to the opinion will depend on the amount and quality of the admissible evidence' (Macaulay, 2000: ch.9, p.80). Learned treatises are also admissible in evidence (if they meet the test of trustworthiness), so that the opinion of the expert witnesses may be assessed during cross-examination. In a preliminary ruling in the *Delgamuukw* case, the trial judge said that, admitting other written work, the authors of which have not been called to testify, allows a court to assess the weight to be attached to expert evidence (*Delgamuukw v. British Columbia*, 1990: 37-38).

The other problem with expert opinion, especially that of cultural anthropologists, is that it is often based on oral histories, the testimony of others. We have already seen what kind of problems such evidence poses.

BIAS OF THE EXPERTS

An expert witness, although paid a fee by the party who hired him, must nevertheless be as impartial as possible. Bias will undermine the credibility of a witness – including an expert witness – and sometimes completely discredit him/her. The problem is that, very often, expert witnesses have developed strong emotional ties with the aboriginal people involved in the claim. This has unfortunate consequences, as illustrated by the following excerpt from the 1985 *Bear Island* case:

While [Mr Macdonald] is very familiar with the Temagami area in general, it was obvious from his comments that he viewed the court process as being rigged against the Indians and that, from his two references to 'we' in the context of being part of the defendants' team, he was biased in favour of the defendants. He [...] is typical of persons who have worked closely with Indians for so many

years that they have lost their objectivity when giving opinion evidence. (*Attorney General for Ontario v. Bear Island Foundation et al.*, 1985: 37)

Cultural anthropologists engaged in participatory research have great difficulties establishing that they are not biased in favour of the aboriginal group they studied: 'For anthropologists to understand a culture, they must learn about it. However, once anthropologists engage in field study, a recognized technique of their profession, their objectivity is called into question' (Asch and Bell, 1993: 545–546). At trial, in *Delgamuukw*, the evidence of two cultural anthropologists who had both lived for more than two years with the Gitksan was rejected. The trial judge said of one of them that he was 'more an advocate [that is, a lawyer] than a witness', while the other's testimony was rejected in the following manner: 'I place little reliance on Dr Daly's report or evidence. This is unfortunate because he is clearly a well-qualified, highly intelligent anthropologist. It is always unfortunate when experts become too close to their clients, especially during litigation (*Delgamuukw v. British Columbia*, 1991: 41 and 43).

THE IMPACT OF LAW ON THE ARCHAEOLOGICAL AND ANTHROPOLOGICAL DISCIPLINES

Law engenders moral and ethical problems for the historian, the archaeologist and the anthropologist. It also creates epistemological problems, at least for the historians in Canada.

Moral and ethical problems

The duty of a court is to settle an issue once and for all. Such certainty is anathema in the social sciences. In the academic world, no one has the pretence to settle an issue once and for all. What happens, then, when an expert is asked, in exchange for a fee, to furnish information for one of the party to a legal claim? Firstly, this might go against the explicit rules of ethics of his/her profession. For instance, in *Delgamuukw*, one of the disqualified cultural anthropologists had quoted in his report the following passage taken from the Statement of Ethics of the American Anthropological

Association: 'In research, an anthropologist's paramount responsibility is to those he studies. When there is a conflict of interest, these individuals must come first. The anthropologist must do everything within his power to protect their physical, social and psychological welfare and to honour their dignity and privacy' (*Delgamuukw v. British Columbia*, 1991: 41).

The expert's dilemma is great if we remember that, in participating in the litigation process, social scientists somehow give legitimacy to the legal tests that fossilize aboriginal identity to what it was prior to contact with the Europeans. Secondly, because litigation necessarily involves a winner and a loser, the danger is real that the historical analysis will not be as dispassionate, or as balanced, as it should be, so that a black-and-white portrait of history will be drawn (Beaulieu, 2000: 542–543). Furthermore, in Canada, litigation has created two classes of social scientists. The noble ones, defending aboriginal groups, and the not-so-noble ones, working for government. The problem is that such Manichean division is not the ideal context for a truly scientific study of aboriginal issues (Beaulieu, 2000: 543–545). Furthermore, it seems that sometimes the nobility of the aboriginal cause serves as an excuse for methodological deficiencies and lack of rigor. In the words of a leading historian in Quebec, 'La noblesse de la cause suffit-elle à garantir la rigueur de la démarche et à immuniser les chercheurs contre tout biais idéologique?' (Beaulieu, 2000: 546).

If they wish to act as expert witnesses social scientists must resist the temptation to take sides in a way that would jeopardize their professional integrity. The credibility of the discipline and of the experts themselves is at stake.

Epistemological problems

Another intriguing consequence of litigation in Canada is that some of the Supreme Court's 'historical' findings have had repercussions in the historical discipline itself. Some historical questions are now 'taboo'.

For example, in the *R. v. Sioui* case (1990), at issue was the legal nature of a document of 1760 signed by General Murray a few days prior to New France's capitulation. The document guaranteed

the Hurons, in exchange for their surrender, British protection and the free exercise of their religion, customs and trade with the English. The Court had to decide whether or not this document was a treaty within the meaning of s. 35(1) of the *Constitution Act*, 1982. In a controversial decision, the Court said it was, whereas many historians believed the document to be simply a safe conduct. What is of interest for the purposes of our discussion is that, since then, historians who persist in referring to it as a safe conduct stand a chance of being held out as racists by other historians in highly credible social science reviews (for an example of such an accusation, see Savard, 1996: 80).

The solution, it seems, would be for historians and other social scientists to criticize, not one another, but the courts for having developed such discriminatory tests for establishing a claim of aboriginal rights (Beaulieu, 2000: 549–550).

CONCLUSION

In conclusion, social science expert witnesses are often disconcerted by the ‘all or nothing’ methods of the courts, particularly when interpretations that they have presented within academic debate are treated as decisive facts within a courtroom ruling. Courts are not unaware of the problem. In the words of the Supreme Court of Canada:

The law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can. (*R. v Marshall*, 1999: 37)

One should remember that to abandon precedents and the internal logic of the legal discipline to improve the situation of aboriginal peoples might be at the cost of the courts’ own legitimacy. The better solution might be to put in place an administrative tribunal staffed with lawyers, social scientists and aboriginals. This appears to be the only solution that would at once enable an accurate assessment of all the pertinent facts and avoid some of the pitfalls described in this article.

ENDNOTES

1. This paper was first read at the Institute of Archaeology in March 2002 and is based on Canadian case law up to that date.
2. *Mitchell v. Minister of National Revenue* (2001: par. 43–47) states:

The archaeological evidence consisted of two works, submitted by expert witnesses, purportedly documenting an historical north–south trade in copper and ceremonial knives, respectively. Sexton, J.A., writing for the majority of the Federal Court of Appeal in upholding the trial judge’s finding of a cross-border trading right, placed significant emphasis on the former. He concluded at para. 50 that D.K. Richter’s book, *The Ordeal of the Longhouse: The Peoples of the Iroquois League in the Era of European Colonization* (1992), demonstrated that the Iroquois living in what is now the State of New York traded in copper which originated from the north shore of Lake Superior. Justice McKeown recognized that this was clear archaeological evidence of North–South trade across what is now the Canada–United States border.

This is, with respect, an overly generous interpretation of both the book and the trial judgment. The book merely states that plates of worked copper originating in the Great Lakes region were particularly prized as gifts by the members of the Five Nations Confederacy (Richter, *supra*, at p. 28). It indicates that this copper *originated* to the north of the Mohawk Valley, not that the Mohawks obtained this copper through direct trading with their northern neighbours. Indeed, Richter’s book confirms that long-distance Mohawk trade, at least at the time of contact, fell along an east–west axis. The Mohawks traded with the Wenros and Neutrals to the west (in the Niagara Region, south of the Great Lakes) and the Mohicans in the east, but not with their enemies in the disputed territory to the north. Richter contends that warfare between the Five Nations and their northern neighbours precluded the possibility of trade (at pp. 28–29):

The lack of any need for large-scale trade helps explain not just the isolationism of Five Nations villages from each other and outsiders but their wars with such sixteenth-century neighbours as the Hurons, the Susquehannocks, the Algonquins, and the St. Lawrence Iroquoians. Because relationships among people rested on the alliances of spiritual power that came from reciprocity, a *lack* of reciprocity, as epitomized by the absence of trading

relationships, could easily lead to a presumption of hostility. Just as a shaman or an other-than-human person could be expected to wreak havoc when denied respect and reciprocity, so too could people of another village with whom no exchange relationships existed. [Underlining added; italics in original].

Richter then proceeds to note that the opposite dynamic prevailed where trading occurred between nations: reciprocal trade facilitated and signified peaceful relations between communities. In a passage not quoted by McKeown, J., Richter concludes that the copper plates, originating in the Great Lakes region and prized by the Confederacy for their spiritual power, were obtained indirectly along the east–west trade axis, not directly from the north as implied by the trial judge and asserted by the Court of Appeal (at p. 29):

[A]mong the few neighboring peoples with whom all of the autonomous villages of the Five Nations seem to have been regularly at peace during the period when Europeans first arrived on the Turtle's Back were the Neutrals and Wenros to the west and the Mahicans and River Indians to the east. Each sat astride routes to the sources of exotic commodities associated with spiritual power that were not available in the homelands of the Five Nations: Great Lakes copper and other minerals linked with spiritual power came from beyond the country of the Neutrals and Wenros, and shell beads arrived from the coast of Long Island Sound presumably by way of the Mahicans and River Indians. [Emphasis added].

Consequently, while Richter's book may support the pre-contact existence of north–south trade routes, it refutes the direct involvement of the Mohawks in this trade. This is a significant fact, given the reliance by the trial judge on this evidence in concluding the aboriginal right was established, and in rejecting the testimony of the appellant's expert witness, Dr von Gernet, to the effect that he had 'yet to find a single archaeological site anywhere in Ontario dating to the prehistoric, the protohistoric or the early historical period which has in any way ever been associated with the Mohawks' (p. 30).

The second item of archaeological evidence relates to an alleged trade in chalcedony ceremonial knives, raised by the claimant's expert witness, Dr Venables, on the basis of W.A. Ritchie's *The Archaeology of New York State* (1980). Again, Ritchie describes the Iroquois trade networks

as falling "chiefly westward toward the Upper Great Lakes, where also the strongest cultural ties are found" (p. 196, emphasis added). The only evidence of northerly trade is found in a single 'smoky chalcedony ceremonial (?) knife', from which Ritchie postulates a potential trade route 'evidently to the north in Quebec' (p. 196) established somewhere between 3000 BC and 300 BC. This evidence, standing alone, can hardly be called compelling.

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