

Historians and the Culture of the Courts

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

STEPHEN E. PATTERSON

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

the historians whose research gives judges the opening to interpret them in a new light. Whether there will come yet a further stage in the sociology of treaty knowledge, when deeper thinking about the 18th-century treaties undercuts, rather than magnifies, their legal standing, is an intriguing speculation.

Another commonplace in considering issues of Amerindian entitlement is the notion that the question of the relationship of aboriginals and the dominant culture in the 21st century is too important to be determined by judicial interpretation of treaties struck 250 years earlier. Judges, were they permitted to speak on such matters, would agree. They know, better than most, that trials are not royal commissions. Institutional constraints prevent their addressing social questions in the round; their task is confined to weighing up relative rights of the particular A and B standing before them. Even this they tend to do modestly, usually taking the least adventurous path to the chosen result. This can mystify observers and be immensely aggravating to litigants, who have fought through some headline issue only to have their case turn almost on a technicality. A familiar case in point is the Supreme Court of Canada's 1985 decision on Nova Scotia's "Cope" treaty of 1752. The Court could have used the occasion of *R v Simon* to decide: whether the treaty applied to Micmacs other than the Shubenacadie band; whether it allowed Shubenacadie band members to hunt beyond the limits of their reserve; whether the treaty was abrogated by subsequent hostilities. All of these issues are of great interest. Instead, in a ruling of singular narrowness, the court held merely that Shubenacadie band members had a treaty right to possess a hunting rifle *outside* the reserve in preparation for hunting *inside* the reserve and, further, that the Crown had not discharged the onus of proving that the treaty had been abrogated by subsequent hostilities (although the Court refrained from deciding that there was a legal doctrine of abrogation or what its content was). Rather than resolving important substantive issues, the Supreme Court seized the occasion to enunciate what have proven cornerstone propositions of treaty interpretation, thereby contriving both to assist litigation in the future while abstaining from pronouncing on rights. This is one variant of a marked trait of judicial behaviour in the common-law tradition: avoid deciding the substantive point while throwing out hints or tentative ideas with a view to provoking academic or legislative debate.

Why do courts so often evade the "real" issues at stake in a manner which, to an historian, seems unrigorous or simply disingenuous? Why condemn other parties to bring them forward again in the future? To this perennial question there are multiple shades of answer, but all derive from the proposition that, in the common-law mindset, the shortest way is best. Dramatic legal change upsets vested rights, and this is not to be done lightly. Hasty pronouncements are apt to fall into ill-considered error. No point should be decided until well thought through, or until it can be avoided no longer. In the main courts do not control their agenda. Only rarely can they turn litigants away with the plea that multifarious issues, such as those of aboriginal entitlement, are better resolved at the bargaining table. In the constantly shifting field of aboriginal entitlement, in particular, where much depends on a body of historical knowledge that seems to revolutionize each decade, there is all the more reason to avoid "early" pronouncement on the big issues.

And there is more. In our tradition judges are generalists. Though as a class judges take themselves quite seriously, in some respects they have a good sense of their limitations. In an aboriginal case turning centrally on developments in the 18th

century the chances of drawing a judge with any fixed idea whether the Loyalists came before or after Confederation are not great. To anyone with even modest historical background, the reported law cases on the Maritime treaties make for painful reading. To this there have been two exceptions. One in *Syliboy* (1928), the earliest reported aboriginal case. In his now maligned analysis, judge (and prolific amateur historian) George Patterson (1864-1951) exhibited a fierce learning in Nova Scotia history that can only have come from personal research. But this is uncommon. Except in rarest circumstances judges consider it inappropriate to conduct their own investigations of issues litigated or to direct counsel how to develop the case. In court they sit as passive receptors of information, as did the trial judge in the ongoing Donald Marshall fisheries prosecution for more than 40 days. But here he was afforded assistance from our colleagues Patterson, Reid and Wicken. Having read all of the thousands of pages of transcript, I would affirm that the state of research put before the trial judge in *Marshall* was, in important respects, much in advance of anything yet reduced to print, while yet wondering how the judge, who might have studied history last in high school, could really take it in.

When historians come forward to give opinion evidence within their (sometimes closely contested) sphere of expertise, they are not summoned by the judge and do not appear as friends of the court. One suspects that most scholars would regard themselves as disinterested, appearing practically *pro bono publico*. But an historian who comes into court in the guise of a sort of angelic figure to spread light among the benighted may be disappointed at encountering suspicion of an undue zeal in the cause of the side calling (and feeing) him or her. Perhaps this is a small price to pay for that new wing on the house, but another surprise follows. The lawyers, especially the lawyer for the other side, will display practically no interest in bringing out the truth *per se*, but only the truth as it bolsters one party or undercuts the other. Advantage may be taken of the fact that you are in the delicate position of having to recall everything you know (on 18th-century Nova Scotia, for example) entirely off the top of your head. Complex four-point answers will be interrupted on point two to such an extent that you never do get to “on the other hand”, and end up misrepresenting your own views. You will be asked your authority for propositions asserted in a footnote published in 1979. You will be asked how your theory of the trade laws squares with the household diet disclosed in Simeon Perkins’ journal. It may occur to you that the experience is not unlike that of a surreal game show or PhD oral, in which contestants are rated on what they can say of the internal workings of the Board of Trade or the precise relationship of Jonathan Belcher of Nova Scotia to Jonathan Belcher of Massachusetts off the top of their head. The fact that you might, with a little notice, prepare a lucid composition on the subject is simply irrelevant.

The most profound disjuncture between the culture of historians and the culture of the courts is the different way the two pursue the search for truth. Historians ask questions, sometimes in a very self-conscious manner, gather evidence and enter into an exercise of evaluation leading to a conclusion on the balance of probabilities. This is not how judges evaluate evidence or draw conclusions. In the legal system one always works within the context of some presumption. The effect of any presumption is to skew the search for truth. Presumptions reflect a presupposition that some status quo or existing right continues unless there is a clear case for superseding it. Hence, one may say that the cast of all legal presumptions is conservative, though the effect

of a conservative presumption can be radical on occasion. The strong legal presumption of innocence, which allows probable murders to walk free, is merely a vivid instance of how presumptions sacrifice formulations of factual truth in service to the higher value of continuing the liberty of the accused.

Legal presumptions, some rebuttable more readily than others, are ubiquitous. A minor example from Maritime treaty jurisprudence is the Supreme Court's almost casual creation in *Simon* of a presumption that once an instrument is recognized as an Amerindian treaty, it is *presumed* to have continued in effect. Only clear evidence will warrant a legal finding that it was abrogated by the outbreak of subsequent hostilities. Such a presumption leads readily to the possibility that an expert historian might conclude that a treaty was abandoned by mutual consent, yet a judge would be compelled to the opposite conclusion because the evidence was not clear enough to overcome the legal presumption that treaties, once formed, continue. It is not just that historians and lawyers evaluate truth differently but that the legal system privileges the stability that comes from continuance of the status quo over mere ascertainment of truth.

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