
IMPLEMENTING DELGAMUUK'W

Biography of Arthur Ray

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Thank you. I would like to thank the Union of B.C. Indian Chiefs for inviting me to come and the Coast Salish for their openness to their territory.

When asked, I was not clear exactly what was wanted and I suggested that I would talk about research from the perspective of being an expert witness. So that's the focus I want to take. Dara [Culhane] gave an nice broad view of angles of research, but one place the research sometimes ends up, unfortunately, when negotiations fail and all other recourse fails, you end up in court. So some of you will be doing research that you will present as an expert witness, or an expert witness will present it for you; i.e., you will be a part of a research team. So I thought that I would like to talk a little bit about what it is to be an expert witness and the implications that has for research both before and after the Delgamuuk'w decision.

In looking into this, talking to Doug Saunders at the law school, he pointed out to me that using ethno-historical experts -- and I should mention ethno-history simply is a multi-disciplinary approach to studying non-literate peoples that includes a variety of the social sciences, including history, historical geographer, which is what I claim to be -- and there was, according to Doug... he told me that pre-Calder, ethno-historical experts were not used in court because the courts did not regard ethno-historical evidence as being productive of rights. Of course, the Calder case changed that and since then ethno-historians in Canada have played an increasingly important role. But what is interesting is the role of ethno-historians in court has a much longer tradition in the United States. It began really in 1946 with the creation of the Indian Claims Commission, and then over the next 32 years that commission -- which was a tribunal of three judges, at which normal rules of evidence applied -- heard a whole variety of cases and quite a wide variety of information. One of the interesting things that resulted from that, which was an experience parallel to that of the Delgamuuk'w trial, is that the experts offered sharply different opinions on the various claims that were brought forward. These conflicting opinions seriously divided the academic community into two camps, those who worked for Indians and those who worked against them, and strained professional and personal relationships to the point that, within nine years of the creation of the commission, in battling it out in conference papers and so on and publications and what not, the community began to worry whether doing applied litigation research was, in fact, adversely affecting the evolution of the discipline and also had adverse implications for the sub-disciplines that were involved. It led them to ask a number of questions which are still with us today; that is, what role does an expert, ethno-historical witness play in litigation and/or dispute resolutions? Are professional witnesses whores; that is, academic whores, in the sense that you're hired to present a case. And, in the case of litigation, how does the adversarial system influence the way the historical evidence is presented and interpreted in the court room?

Now, most novice experts are completely uncertain about what's expected of them. Certainly it was in my case. My first involvement was in the Horseman case when, in 1985, Ken Strausik asked me if I would be an expert witness. This was a Treaty 8 rights case. The issue was did the native people of the Treaty 8 area commercially hunt and fish for commercial purposes in 1899. I asked him if he was serious, first off. I assumed anybody who had known anything at all about Canadian history would not think that this is a serious question. He assured me it was a serious question. So I asked the second question: what am I supposed to do? He said as an expert witness, you're there to educate the court, which seemed to be a very short, simple answer. I subsequently discovered that this particular issue, in fact, had been one of the issues that arose in ethno-history back in the 1950s and a lot of ink was spilled on it and, basically, the answer Ken gave me was pretty reasonable, in that an expert witness is supposed to be someone who can bring information and opinion about subjects to the court; that the court cannot make decisions on its own on the basis of ordinary judgment and experience, and, in the

case of historical experts, also that means these are experts who have information that is beyond their immediate knowledge; that is, things that they know first hand. Now, one of the problems, of course, in the adversarial situation, as I've already said, experts are not unanimous on just about any topic. They're not in the academic world and they're certainly not when they appear in court. They're usually on one side or the other. And it raises questions about why do experts differ in their opinions. Now one obvious one, of course, is theoretical differences that exist between the various disciplines that make up ethno-history and, secondly, it is the nature of the adversarial process itself: it tends to create contentious opinions. Lastly, or course, is just partisanship on the sides of the people involved because it fosters, as we saw in the case of Delgamuuk'w, an "us and them" mentality between opposing experts, which is still around to this day, I suspect.

One of the ways, then, that the courts attempt to sort through these differences is through the cross-examination, which is an experience unlike any other I have ever been through, in which the object is for opposing counsels, of course, to bring out propositions favorable to their clients and destroy the validity of those who have been brought forward in testimony that are adverse to their case, and use any means possible to do so. Now, in the Horseman case, the cross-examination was rather perfunctory -- so my first experience was rather pleasant, actually -- and the reason was that the attorney in that case for the Crown had decided that the ethno-history was more or less beside the point. He was going to argue it on legal technicalities, which is essentially what he did. So I was not crossed. But when I was being prepped for Delgamuuk'w by Murray Adams -- and I had not attended the trial up until that time for various reasons, strategic partly -- it became clear to me in the course of the discussion that this was not going to be the same kind of cross-examination experience that I had in the Horseman case. So I asked Murray about it, and I volunteered a suggestion to him -- and this is an analogy sometimes made in print -- "oh, I see, that once I finished presenting my case there will be a lively discussion of it." So it would be kind of like presenting it to a graduate student seminar or Ph.D. dissertation defense. And I remember Murray smiling at me and letting out a rather ominous laugh and warned me that it would be a totally different experience. He said it would be like an academic's nightmare. He pointed out that the Crown would seek to cast doubt on the credibility of me as a witness and everything I had to say in court. My subsequent experience, cross-examination over three or four days, I can't remember exactly -- one tries to forget pain -- it was indeed quite gruelling and it wasn't like anything I had experienced as a graduate student -- I certainly hope I haven't made any of my graduate students experience.

So the question then arises: how do you go about educating the court in an adversarial setting? I think several points I would make based on my own experience, and also having been involved in trial subsequently. I think it's, first of all, not easy -- especially in the heat of battle, as it were -- but it's essential not to fall in the trap of treating the other side as the enemy and, worse, treating them as an uninformed enemy. Going back to the point that Chief [Arthur] Manuel made earlier, if you assume they haven't done their work, you're going to really have an unpleasant experience, I can assure you. The other thing is to try to avoid taking hard questions personally. Again, it's not an easy thing to do. Thirdly, you have to take the questioning as an intellectual challenge as best you can under the circumstance, and to do that I think it's also easier if one assumes that the judge generally does want to try to understand the ethno-history that is pertinent to the case. Now I know everybody that was involved in Delgamuuk'w has done a fair bit of [Chief Justice Allen] McEachern-bashing, but I think it's a mistake to assume that the court is hostile and make your presentations in that vein. So I think the point is that you have to be careful to do thorough research, going back to the point that Chief Manuel made this morning, and assume that the other side will do research, especially if you are doing documentary research, records that are in public domain. You have to assume that the other side's research will be every bit as thorough as yours and maybe more so because, again as Chief Manuel mentioned earlier, they are usually the best funded -- if you're opposing the Crown, anyway.

So much for those generalizations. What about some specific implications from the Delgamuuk'w decision? Of course, from the point of view of research, one of the important things that came up in that trial was that the judge was faulted by the Supreme Court for not giving proper weight to the oral testimony of the Elders, and it is clear that in future cases that the oral evidence will have to give much greater weight than had been by Justice McEachern in the Delgamuuk'w decision. It is on that basis that a new trial was ordered. Now the point of the question is what practical effect will that have on the courts? I can offer a brief observation. This past summer, I was involved in the R. v. Polly case in Ontario. This was a Metis, aboriginal, and treaty rights case, and what was interesting about that case is that, although Metis rights are different in many respects than comprehensive claims here, a number of issues were in play there, though. One was the issue of when was Crown as sovereignty asserted? Did the Metis exist as a people? What was the nature of their culture? What was the nature of their land use? What territories did they occupy, and so on? So, many of the same kinds of questions were brought into play, and the judge in issuing his ruling and in hearing the case, of course, paid close attention to the guidelines laid out in Delgamuuk'w, Vander Peet, Sparrow and all the precedents, most of which were set here in British Columbia. What was interesting in that trial was that the judge did listen very carefully to the Metis Elders, but, also, as was the case in Delgamuuk'w, those Elders were cross-examined very vigorously by Crown counsel. When issuing his

judgment... the other important thing about it, in the Polly case, is the judge cites the Metis Elders quite extensively in his judgment. So he listened, he listened carefully, and quoted them extensively. But I should also mention that traditional documentary evidence still was important in that case.

My role in that case was not unlike the role I played in Delgamuuk'w. I was asked to present an economic history of the area -- this is the Robinson-Huron Superior treaty areas. I was asked to present an economic geography of the native economy of that area at the time of assertion of sovereignty and the conclusion of the Robinson Treaty in 1850. In the case of Delgamuuk'w, I looked at the early economic history of the Gitksan-Wet'suwet'en in terms of their relationship with the Hudson's Bay Company. The documentary evidence was important. And I would say in this case, as in the case of Delgamuuk'w, it was also supportive.

Another thing I think is common notion that somehow that the documentary record is somewhat going to be at variance with the Native perspective of things. I would say that most cases that I have been involved with, I don't see that is in fact the reality and think that there is much to be obtained. The one problem with British Columbia I would say in terms of future litigation -- should it come to that using fur traders, explorers, and records -- is that there are very few for the pre-sovereignty period here in British Columbia. The Gitksan-Wet'suwet'en were fortunate in that some of the most pertinent Bay records on the issue of title happened to be those of William Brown and the Fort Babine journals, district reports, and so on. But most areas of British Columbia will not have that kind of source material. I spent a couple of days going through the all the Bay records pertaining to British Columbia -- and I have put them together in a table, which I could leave for those of you who want. There are very few pre-sovereignty records for most areas, and so the documentary record will not be particularly helpful, from this particular source anyway. I suspect it will be the oral tradition and the archeology for the pre-assertion of Crown sovereignty for most of these areas.

But in any event, in quick summation, that I think one has to bear in mind, if you're doing research for litigation, remember it will be presented by either you or by an expert witness in a rather unusual educating situation -- an adversarial one -- where you have to expect the other side is going to be very well prepared to analyze every aspect of your research. I think that in the future, even though the Delgamuuk'w decision has finally given the Native oral histories and traditions their rightful place, I think the other traditional documentary sources of supporting evidence will remain important and I think they should be explored thoroughly. Thank you very much.