**20th Anniversary celebration and symposium**

**June 18th, 1999**

**"History Goes to Court"**

**Peter Hutchins**

That's right. I was asking how long do we have because, of course, it has been a fascinating day, a great deal said, a great deal of reflection. It is a formidable task to sum it up. I would like to first say to Chief Justice McMurtry and Justices, colleagues, historians and those of you are blessed to be none of the above, that it is a great privilege to be here, I also wish to thank the organizers and in particular Peter but I know that there is always a team behind the leader. Congratulations on a wonderful programme. Now I am billed as providing the practitioner's perspective, I have the great honour to share this portion of the programme with Mr. Justice Spence who is to give the academic perspective. I am not sure if there is a statement here by the organizers of the programme as to the hierarchy of these two disciplines or perspectives, practitioners and the academics, given that I have been thrust into a position that I must address my co-panellist as My Lord. (laughter) I should also disclose that I have practiced in a niche practice, that being aboriginal law, on the aboriginal side, for many years, although I did wander across the line to advise the Minister of Indians and Northern Affairs on self-government in the mid-1980s, and I have taught at McGill University a course on aboriginal peoples and the law starting about 1981 ending a couple of years ago. And why was that, well, of all things because the practice rendered it increasingly difficult and then impossible. Which brings me to this point, of course, that one of the challenges of practitioners is to find the great luxury of time for the essential study and reflection on these matters without bringing down the wrath of our clients and our bankers. For as T.S. Elliot had it, he had measured out his life in teaspoons, or coffee spoons, unfortunately practitioners find themselves measuring out their lives like billable hours or else. And this is problem for someone who is in an area that requires a great deal of

reflection, to acquire an understanding of issues. In aboriginal law, of course, it is the issues of meetings of peoples, assertions of sovereignty, the conduct of the Crown, the flow of history - these are deep and complex issues. Now, I thought the way to deal with this in the small time I had was to perhaps summarize some of the problems I have heard coming out of the group today and then talk a bit about what I see as being the problems, since I prepared the text anyway. And then I would just move into some of the solutions that I heard from the speakers and the floor today and to try to summarize that and end with some of my modest proposals. The structure of this thing really is, one could look at it as history with historians at trial, then we could look at history without historians, and we have touched on that in terms of history being introduced on appeal, through documents without historians actually presenting it. Then we have the fascinating idea of history without lawyers, which sounds like a good idea, and then finally history goes to court. Now, in terms of the problems Justice Campbell identified - one of the problems of the dialogue of the deaf, or the lack of dialogue between the professions - there is an intellectual loss. And it is quite true, there are two solitudes and both disciplines suffer, indeed we all suffer from that, and we lose in his words, 'the advantage, of the dialogue between disciplines which is so necessary.' And he warned us to ensure that history going into the process is good history and history coming out of the process is good history. And I think that is the challenge that Justice Campbell launched for us today, and that has been considered. Now, there are a number of problems. We heard about lawyers' perspectives of self-serving fact-driven history, versus the contextual sweep of history approach by historians. How do we reconcile that? In terms of witnesses we heard complaints, reports about suppression or perceived suppression of historians' work. Because of time, I don't have time to identify the

speakers and I certainly wouldn't want to leave anyone out, so I am concentrating on the ideas and not the individuals. The other question under witnesses is what is the preferred way of entering evidence, viva voce evidence or documentary evidence. And we had some discussion on that. We had a discussion on the tribulations of witnesses, the hardships of cross-examination and this goes for both experts and for Elders as Chief Potts has mentioned and John Borrows mentioned, the problem of First Nation Peoples actually coming to the court and trying to explain or tell their story. Now we have heard about the problems of the role of an expert historian and whether he or she is purveyor of facts, chronological facts, or an interpreter of facts. I think that is a very important question that has to be looked at. On the documentary side we have heard of the problems of handling the mountain of material, there is too much material, it tends to confuse and obscure, what is the answer to that? Are judges just to be loaded down holus-bolus, are there to be summaries presented, are these documents to be explained. This is a key issue certainly in aboriginal litigation where, as I mentioned, in Bear Island as an example, the stuff comes in by the truck load. As for trials themselves, there are different perspectives of what a trial is. Are trials designed, and is one of their purposes to teach history? A very interesting and important question. And we had points of view from both sides, yes they are, or they should, but they are not, and then of course the point of view that they shouldn't in the first place. The problem of jury trials for historical issues, I think that was an interesting discussion too, are juries capable of handling this, or do we leave it to the judges. And, finally, there are the judgments themselves. How do we ensure good history? How to ensure that the precedent created is not forever binding, a very important question? Many speakers talked about the problem in the law is that there is a definitive statement and that's it, whereas historians can

revisit. Well, of course, courts are modifying their findings and even the Supreme Court in our area, there is no question, that in the last 20 or 25 years the jurisprudence has adjusted, and judicial thinking has adjusted dramatically. And if I have a chance I will take you to Justice Taschereau in the St.Catharines Milling case at the end of the last century, and compare that to the statements of the Supreme Court today, or the justices in the lower courts. So there is a dramatic change, and I would suggest that perhaps historians are overstating this static problem of judgements, but it is an issue that we have to look at, that is, how to ensure evolution, how to ensure that judgements with incorrect history are corrected, with all due respect. Perhaps what we are discussing here is a question that again to quote Mr..... to have squeezed the universe into a ball, to roll it towards some overwhelming question, and that overwhelming question is how to preserve the integrity of the two disciplines, the important disciplines that we are looking at today. It is a challenge, I don't think it is an impossible one. Now, in terms of where we go, and I will have to edit this, I think the first point is that lawyers and historians need one another, we need each other certainly in the types of cases we have talked about today. The courts are increasingly saying that fact situations are important. I noticed that in a recent article, a recent interview by Justice Arbour who is going to the highest court, she remarked that the law is much more fact-driven than she believed when she was teaching law, and indeed, it seems to be increasingly fact-driven. Well, what does that tell us, it tells us lawyers that we need to know how to put the facts before the court, and historians are certainly absolutely essential on that point. Now, just to give you a taste of this movement that I mentioned, I was reviewing the early constitutional cases the other day and came across, not for the first time, Justice Taschereau's reasons in St.Catharines Milling and Lumber 1887, Supreme Court of Canada. This is a case,

typical of its time, involving Indian interests but it didn't bother to involve Indians. It was a real problem. And as you may remember Justice LaForest and Justice Dickson in Sparrow raised that problem and said in Sparrow as they traced the unfortunate history of the early part of this century, that the early cases leading to Indian rights were essentially dealing with corporate interests. And certainly while people were talking about the Royal Proclamation, is the Indian interest caught by section 109 of the Constitution Act all these deep and very important questions were litigated out of the presence of First Nation aboriginal peoples. So obviously we would hope, and as has been the case, these have not become binding precedents at the Supreme Court of Canada, although it looks to some of these earlier pronouncements but it has certainly made these changes. Just let me give you a touch of Justice Taschereau's decision, he writes, 'if the numerous quotations on the subject furnished to us by appellants from philosophers, publicists, economists and historians and from official reports and dispatches must be interpreted as recognizing a legal title as against the Crown, all I can say of these opinions is that a careful consideration of the question has lead me to a different conclusion.' And then he goes on to say some amazing things about the rights of aboriginal peoples and how the Crown of course must treat them properly but that this has absolutely nothing to do with law and nothing to do with law binding on the Crown. Well, so much, I say, when you look at that for the disciplines of philosophy, economics, history and whatever publicists do, here is a court that simply dismisses all these disciplines. Justice Taschereau, certainly, with great respect, got it wrong on the question of whether these rights were legal rights, and whether they are constricting and confining on the Crown, and of course the last ten years of jurisprudence has shown it to be so. Two of the problems that I identify with our profession, the legal profession, that caused this

problem, this arrogance, and reluctance to listen openly, I think we have heard some of that today. The arrogance of the law takes the form of assuming that it is the creator of society's rules and standards rather than the reflection, and, I would hope, the conscience of society. And certainly in my area of law, now this isn't restricted just to current day society, but of course society going back centuries. And there are interesting examples in the literature, in the bibliography that have been given to us, William Klingman, on "Historians and the Law," makes that point. He says that attorneys simply will not take the time to discuss the causes of the Civil War, the Tudor system of administration, or the daily lives of French peasants in the 9th century - they just want to get on with it. Another author quotes a federal judge in the United States, as characterizing the use of history by attorneys as follows, 'if it produces victory, it has served its purpose.' Well, there is the law, I think, being rather heavy handed with this. And one of the instances which we certainly are faced with here is the development of legal tests. We haven't heard too much about that issue here, but the law is wonderful about establishing legal tests and then everything, including historical evidence, has to meet the test, or fails to meet the test. So right away you are requiring historians, and you are requiring historical discipline, to look at the hurdle and see if it can get over it. It has always struck me as somewhat dicey to test human behaviour against that paragon imagined by the law, the reasonable man. Well, in our area we have a growing number of tests, Christian and pagan, effective occupation, the date of first sovereignty, the date of first contact, or the moment of contact, organized societies, were these peoples organized societies, activities integral to a distinctive society. These are tests that have been developed by the courts and then the attorneys. The lawyer's job and the expert witness's job is to try to establish whether the fact pattern meets the test. Essentially the struggle is to

squeeze the distant past or the confusing present into these various boxes that have been constructed. When you think of it, the moment of sovereignty, or the moment of contact, is a rather strange historical term. I mean, do we talk about the moment of enlightenment, the moment of reason. Obviously, not, because historians would have a problem with that concept. So the tests when we look, in my experience of the cases that I have worked on, have been driven by these tests, Delgamuukw, R v. Adams, the whole issue for example of whether Mohawk peoples were actually aboriginal peoples of Canada, in particular in southern Ontario, and southern Quebec. Well, there is an interesting one. Two cases R. v. Adams in the Supreme Court of Canada where the issue was, do Mohawks have an aboriginal right to fish in Lake St.Frances near Cornwall, and in the Mitchell case in which I am involved, which has gone to trial, and now is through to the Federal Court of Appeal, which is the issue as to whether the Mohawks have an aboriginal right to cross the border, the international border, without paying duties and taxes. The issue also involved the Jay Treaty, but I would rather not talk about that aspect of it. But the Crown argued that these people could not claim aboriginal rights or title because they actually belonged to the Mohawk nation, and their home was the Mohawk Valley, that is where their villages were. And that must be where in effect the occupation took place. Well, after these cases the courts have decided, no in fact the Mohawks effectively occupied Lake St.Frances for purposes of fishing, and that the Mohawks effectively occupied that territory crossing the international boundary, border, for the purposes of trade, diplomacy and travel. They weren't always there, they didn't have post offices established, they didn't occupy every square foot but the test was met. Bear Island was an interesting one on the question of effective occupation by the way, and organized society, with Justice Steele holding that although the

Temagami actually occupied this territory in question, they occupied it through the means of family hunting groups, and this for the trial judge did not represent an organized society sufficient to meet the test of organized society, or of sufficient occupation. Happily, although not everything went right in the Supreme Court of Canada, the Supreme Court did overrule that particular holding, but again it was a question of who decides what is effective occupation, who decides what meets that test? And it was rather a narrow view to say that hunters and gatherers who had occupied the territory for centuries didn't meet the test of occupying the territory. Or of living in an organized society. We had, on that question, in Bear Island there was the issue of double standard and we brought before the court something that I have to read as this was a propos - well, let's look at how Canada establishes sovereignty in the Arctic, if effective occupation means occupying every square inch, and having total control over what goes on in the Arctic. We found a telegram from 1951 that was sent back to headquarters by way of establishing that sovereignty had been established at Craig Harbour, on Ellesmere Island and it reads - 'press release, the flag was raised today in fine, calm, clear weather that marked the opening of the Craig Harbour detachment of the RCMP... stop... This outpost which is situated on Ellesmere Island, Northwest Territories of Canada, is 76 degrees, 12 north latitude, is now the most northerly active establishment of the RMCP ... stop ... the ceremony opened with an address by Alex Stephenson, OIC eastern Arctic patrol ... stop ... Captain ..... ....., arrived from .... by helicopter to present flag on behalf of Department of Transport to Inspector Larson of the Craig Harbour detachment ... stop ... flag presented by Inspector Larson to Constable Harold Johnson, Dartmouth, Nova Scotia ... stop ... these two Constables will maintain the establishment assisted by two Eskimo families .... stop ... prayers by Reverend A.G. Russell, Art Low, County Wicklow,

Ireland, visiting ... .missionary ... stop ... service included appropriate anthems .... stop ... Ship passengers, Eskimo families in attendance ... stop ... snow clad mountains, ice bergs, glacier tundra and white caribou for background for an impressive occasion ... stop ... film board unit coverage ... stop ... sovereignty now is a cinch. (laughter)

So Temagami obviously had a rather, I would submit, stiffer test. I have spoken about Mitchell, the Mitchell proceedings were very, very interesting, there was a three month trial with a great deal of conflicting evidence about what they were doing. I think obviously a very good job was done by the trial judge in that case sorting it out, but the point was that he certainly was facing contradictory evidence. The one thing that prompted my question earlier was, although there was a huge amount of documentation, he did depend very heavily, if you read that judgment, on the opinion evidence of the historians. That really was very, very important for Justice Mc..... He weighed the credibility, but he did have to depend on the credibility because as I said, we are talking about centuries of activity, we are talking about hundreds, thousands, tens of thousands of transactions and this can not all be led by way of documentary evidence. What about history without historians? I just wanted to raise the issue, the example of R. v. S..... in the Supreme Court of Canada, which I participated in for the intervenor. That case is famous and some people think infamous because a great deal of historical information and documentation was introduced at the Supreme Court level that had not been introduced at trial, and Justice Lamer, after a half a day of argument on whether it was admissible, declared it to be admissible, and most useful for the case. Now, there has been a great deal of debate about how can this be, and if it is then what is the use of a trial. But the fact of the matter is that that documentation was

absolutely crucial to an understanding of this case. The Murray Treaty of 1760, which was a simple two paragraph document signed by General James Murray, certainly needed some contextual material, and that contextual material wasn't put in at trial. So what happened when it isn't put in at trial, is it just too bad for the S.... brothers, just too bad for the plaintiff, or is there a remedy? And there must be, I submit, a remedy of some description. Let me get back to the possible solutions we have heard here. The attitudinal solutions, it seems to me, the people were saying there is more need for a mutual respect of the professions, and certainly training to sensitize both professions to the problems of the other. There were structural suggestions, an independent fact-finder, in the place of or in parallel with the traditional adversarial trial process. The Royal Commission model, a constituent assembly, a panel of experts, greater consultation between experts, training of judges, training of lawyers, the naming of an amicus curiae, I think that that is an important idea we should consider. It seems to me that there were some useful discussions about trying to sort out what the parties agree to, what they don't agree to prior to trial, and this goes on in pre-trial conferences and discoveries, but usually that is just the lawyers. But I think what should happen is that the historians should get involved in that pre-trial process and let's have a screening, let's figure out what we agree on, and what we don't agree on, and save everybody's time. So that is this question of experts collaborating, and trying to establish a middle ground and then just going ahead on the contested issues. Historians need a code of ethics, well, I won't comment. I would like to add also that we could look at the reference case model for dealing with some of these issues. That rather than again take the S.... brothers or Mr. Adams, or Delgamuukw, and present that specific case and ask them to meet the standards or tests, or have the test indeed created through this process, the litigation dealing with an individual

or an individual First Nation, is difficult and causes problems and perhaps doesn't result in the best tests. So why not some sort of a reference type of case where there can be a free discussion before the court, the court can have expert evidence, as we have seen in the Quebec Reference case, I think. Some people don't think that that was a useful exercise, but I think we all learnt something about our Constitution through that. So just to wrap up, I would think that that this has been a very, very useful day. I think the thrust to day has been, "history goes to court, how are historians treated in the courts?" Well, we are here, we are the lawyers, you tell us how we treat you and the historians have been asked to respond to that. I have a suggestion that perhaps a future symposium organized by the Osgoode Society for Canadian Legal History should be entitled, 'Law Goes to History Night.' Thank you very much. (applause)

**History goes to Court**

**Notes for an Address**

Chief Justice McMurtry, Justices, Colleagues, Historians and those of you blessed to be none of the above. First my very great thanks to the organizers of this excellent program notably Prof. Peter Oliver. It is a privilege to have been asked to participate and to be the beneficiary of this terrific debate on a fascinating topic.

Now I am billed as providing the "Practioner's Perspective". I have a great honour to share this portion of the program with Mr. Justice Spence who is to give the Academic's Perspective. I am not sure if there is a statement here by the organizers as to the hierarchy of these two perspectives, the practioner's and the academic's given that I have been thrust into a position where I must address my co-panelist as "My Lord", but then that is what practioners do...

I must disclose immediately that although I have been a practioner for almost 27 years, the practice has been a niche practice, what some in the early years were tempted qualify as a dead end niche. I practice in the area of Aboriginal law. I act on the Aboriginal side, although I have had some interesting forays across the line acting as special advisor to the Minister of Indian and Northern Affairs in the mid-1980's and assisting governments with the preparation of legislation pursuant to modern treaties. I also wandered into academia around 1981 to create and teach the course on Aboriginal peoples and the Law at the Law Faculty, McGill University continuing until three years ago when, surprise, the practice made it totally impossible to continue.

And that, of course, is one of the challenges for practioners. To find that great luxury of time for the essential study and reflection without bringing down the wrath of ones clients and ones bankers. For as T.S. Elliot's Prufrock measured out his life with coffee spoons, we measure out our lifes with billable hours - or else!

But on to the subject at hand - the uneasy relationship of history and law.

While reviewing some of the early constitutional cases recently I came across a passage penned by [Chief] Justice Taschereau in the case of *St.Catherine's Milling and Lumber Co. v. the Queen*, (1887) a case typical of its time that involved Indian interests but did not bother to involve Indians. You may remember that this particular lapse was noted by Chief Justice Dickson and Justice La Forest in their landmark decision in *R. v. Sparrow* of 1990.

> The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises.
>
> p. 1103

In any event Chief Justice Taschereau had this to say on the matter of the possible contribution of other disciplines to the understanding of the early history of our Confederation:

> ...If the numerous quotations on the subject furnished to us by appellants from philosophers, publicists, economists and historians, and from official reports and despatches must be interpreted as recognizing a legal Indian title as against the crown, all I can say of these opinions is, that a careful consideration of the question has led me to a different conclusion.
>
> The necessary deduction from such a doctrine would be, that all progress of civilization and development in this country is and always has been at the mercy of the Indian race. Some of the writers cited by the appellants, influenced by sentimental and philanthropic considerations, do not hesitate to go as far. But legal and constitutional principles are in direct antagonism with their theories. The Indians must in the future, every one concedes it, be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control.

*St.Catherines Milling & Lumber Co.* at 649

So much for the disciplines of philosophy, economics, history and whatever publicists do.

Aside from how wrong the Learned Chief Justice could be on the matter of the existence of legal obligation and the judicial deference to be shown toward political power, (pace, Chief Justice Dickson and Justice La Forest in *Sparrow*) this passage illustrates for me two of the major problems facing the legal profession, at least its practioners. These would be, not necessarily in order of prevalence, arrogance and reluctance to listen openly.

The arrogance of the law takes the form of assuming that it is the creator of society' rules and standards rather than the reflection (and I would hope the conscience) of society and certainly in my area of law this is not restricted to contemporary society but extends back many centuries.

The reluctance to listen openly comes from the advocacy imperative, requiring one to understand, articulate and flight for one's client's position.

Now notwithstanding Justice Taschereau, is it to be presumed that philosophers and economists have nothing to say about what society is today, what it was in times past and what transpired between the two (Charles Taylor or Michael Ignatieff might have something to say about this)? And is it seriously to be contended that historians have nothing to offer on the subject. Yet the law will have its way.

Based on my experience, I would like to discuss briefly two aspects of the law insisting on "having its own way" - one substantive and one procedural.

<u>On the substantive issue</u>, the law is hugely prone to establishing "legal tests".

It has always struck me as somewhat dicey to test human behaviour against that paragon, imagined by the law - the "reasonable man".

As if that was not enough, we have in our area of the law which, of course, involves the sorting out of the phenomenon of the meeting of peoples, the sharing of land and resources, the efforts at co-existence and the inevitable hierarchical struggle.

The law arrived at a number of tests to wrestle centuries of human endeavour, conflict, greed and brutality into a civil code. And so we have tests such as Christian and pagan, effective occupation, the date of first sovereignty, the date of first contact, organized society, activities integral to a distinctive society.

I have been involved in cases in which the opposing sides battle over the meaning of these tests and struggle to squeeze the distant past or the confusing present into these particular boxes. The problem that the law has is that it must determine at any given moment in history who had rights and who did not, who had duties and who did not, who was right and who was not, who got to keep the prize and who did not.

The test for the "moment of sovereignty" or the "moment of first contact" becomes very important. In my experience, there has always been a huge problem for historians particularly those unfortunate ones who end up testifying in court and trying to explain history. Would we ask historians to indicate the year, not to say the month, the day or the moment of "Enlightenment" or the moment of "Reason". Quite rightly we think in terms of the Age of Enlightenment or the Age of Reason. But when it comes to the meeting of European (interests) with Aboriginal Peoples (interest) the law wants a date.

In cases in which I have been involved such as *Delgamuukw* (in the Court of Appeal) *R. v. Adams*, *Mitchell v. M.N.R.* there has been a huge debate over the date of the assertion of sovereignty or the date of contact between the two peoples. This is because the

law had set up tests to determine which First Nation had title and rights in function of who was doing what where in the case of title, at the time of the assertion of sovereignty, and in the case of Aboriginal rights, at the time of contact.

But what is the "date" of sovereignty. It is the moment that Cartier raised the cross in the Gaspé, the moment Captain Cooke spotted the Pacific West Coast or the year that Champlain sailed up the St-Lawrence, or the moment of the establishment of permanent settlements at Quebec or Montreal or the establishment of the seigniorial system along the banks of the St.Lawrence. And over which territories did this edict run, just the territories occupied and used or all territories aspired to.

Remembering the *Bear Island* case (in which I acted in the Supreme Court of Canada for the intervenor, Assembly of First Nations), one of the issues had been whether the Temagami could claim title. The Trial Judge found that they could not as they did not occupy the territory as a "organized society" although they clearly occupied and used it as family hunting units. In the Supreme Court, we invoked the double standard present in requiring full, effective and social control by First Nations over every inch of their territory while Canada could even in the 1980's and 90's blithely claim sovereignty over the Arctic and Arctic archipelago with a near invisible presence.

To put the matter in perspective, we produced in our material the following press release send by cable dated September 5, 1951 giving some idea of the test that the Government of Canada.

**[read]**

In the *Mitchell* case one dealing with the Aboriginal and treaty right of the Mohawks of Akwesasne to cross the Canada/U.S. border without paying duties and taxes, the issue was once again, what the Mohawks were doing, where they were travelling, what they

were trading in at the time of contact. Among the historians, of course, this matter of contact lacked legal precision. One of our experts persisted on claiming 1492 as the moment of contact because that was the defining moment for the future of First Nations and because at that moment European diseases and trade good commenced their voyage throughout the New World. This was a form of contact. The Crown's witness insisted that the moment of contact was the day upon which Champlain engaged a party of Iroquois militarily, prompting one counsel to ask if this was a theory of contact "through bullet to the head".

The Trial Judge in *Mitchell* acknowledged the diverse historical views of the moment of contact ultimately adopting 1609. The passage coming to this conclusion is a good example of the Trial Judge faced with applying a so-called legal test to three historical opinions:

> In this case, three different dates have been suggested for the date of first contact relevant for the Mohawks: 1535, 1609 and 1634. Dr. Venables suggested that 1535 was the appropriate date because he concentrated on the meeting between the St. Lawrence Iroquoians and Jacques Cartier. However, the plaintiff's case is based primarily on the routes of the Mohawks of Akwesasne in the Mohawk Valley in New York State. In 1609, the Mohawks first encountered Europeans in a battle which took place on Lake Champlain. This was a hostile encounter but it appears to provide sufficient contact to meet the test of the Supreme Court of Canada with respect to the date of first contact, i.e. the arrival of Europeans in an area where Chief Mitchell's ancestors travelled. The first evidence of Europeans coming into a Mohawk village and actually visiting with them is in 1634 when the Dutch surgeon Harmen van den Bogaert travelled to the Mohawk villages. From a Mohawk point of view, this is the date of first contact because war is not an acceptable form of contact.
>
> I find the date of first contact as 1609, in keeping with the Supreme Court of Canada approach. In ***Adams*** it was 1603, but the Supreme Court of Canada examined the period from 1603 to the 1650s in order to assess the evidence of the aboriginals' right to fish. Accordingly, in my view I should examine the evidence concerned up to 1650, bearing in mind the date of first contact as 1609, which was confirmed by the plaintiff's expert, to determine whether the Mohawks of Akwesasne have an aboriginal right to bring personal

> and community goods across the Canada - United States border duty free and to trade with other First Nations during that period.
>
> I will now examine the evidence relating to the Mohawks' social organization and culture and the Mohawks' relationship to the territory in what is now known as Akwesasne.
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> *Mitchell v. M.N.R.*, [1997] 4 C.N.L.R. 103, pp. 121-122

By the way on the matter of Mohawks social organization and culture and the use of the territory, Mr. Justice McKeown continue to receive conflicting advice from the historians.

> On the use of control of territory, the Trial Judge found:
>
> Regardless of the conflicting characterization of the Mohawks' use and control of the territory in the St. Lawrence Valley, in my view, the Mohawks whose homelands were in the Mohawk Valley prior to the arrival of the Europeans, regularly exploited the area in the St. Lawrence Valley which is now part of Canadian territory. It is not clear from the evidence whether the Mohawks consistently used the area as a hunting and fishing territory or whether the area was mainly a battle and raiding ground with other First Nations. However, it is clear that the territory around the St. Lawrence River, in what is now Canada, was regularly travelled by the Mohawks. The plaintiff in the case before me, as in the ***Adams*** case, did not claim aboriginal title to the tract of land over which he claims that his ancestors exercised their aboriginal rights, nor, as was explained in ***Adams***, is a claimant required to have aboriginal title to the land over which an aboriginal right is claimed to have been exercised. I am satisfied that the Mohawks frequently travelled North into Canadian territory from the homelands in the Mohawk Valley, and freely crossed what is now the Canada/United States boundary.
>
> *Mitchell, supra*, pp.128-129

Again in regard to whether the Mohawks could claim an Aboriginal right to trade, Justice McKeown applied legal tests to the evidence:

> It is significant that trade was considered to be so fundamental to the Iroquois that they referred to it in their earliest treaties with the Europeans, and indeed insisted that clauses related to trade be inserted. From this evidence I conclude, in conformity with the tests set out by the Supreme Court of Canada in ***Gladstone and Van der Peet, supra*** that trade was an integral part of the distinctive culture of the Iroquois in general and the Mohawks in particular. Since the Mohawks were part of the Iroquois league at that time, trade must have been an integral part of their distinctive culture.
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> *Mitchell, supra*, p. 141

The Supreme Court judgment in *Adams* provides interesting examples of a Court grappling with conflicting evidence but finding a common thread through the conflicting historical evidence to set aside the legal test:

> This general picture, regardless of the uncertainty which arises because of the witnesses' conflicting characterizations of the Mohawks' control and use over this area from 1603 to 1632, supports the trial judge's conclusion that the Mohawks have an aboriginal right to fish for food in Lake St. Francis. Either because reliance on the fish in the St. Lawrence River for food was a necessary part of their campaigns of war, or because the lands of this area constituted Mohawk hunting and fishing grounds, the evidence presented at trial demonstrates that fishing for food in the St. Lawrence River and, in particular, in Lake St. Francis, was a significant part of the life of the Mohawks from a time dating from at least 1603 and the arrival of Samuel de Champlain into the area. The fish were not significant to the Mohawks for social or ceremonial reasons; however, they were an important and significant source of subsistence for the Mohawks.
>
> This conclusion is sufficient to satisfy the *Van der Peet* test. The arrival of Samuel de Champlain in 1603, and the consequent establishment of effective control by the French over what would become New France, is the time which can most accurately be identified as "contact" for the purposes of the *Van der Peet* test.
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> *R. v. Adams*, [1996] 3 S.C.R. 101, paras 45-46

The *Sioui* case in which I was involved for the AFN as Intervenor in the

Supreme Court of Canada is another example of courts grappling with history. Here as ntervener in the Supreme Corut we introduced historical material (which we argued were legislative facts) without the aid of historians. Justice Lamer said:

> I should first mention that the admissibility of certain documents submitted by the intervener the National Indian Brotherhood/Assembly of First Nations in support of its arguments was contested. The intervener was relying on documents that were not part of the record in the lower courts. The appellant agreed that certain of these documents, namely Murray's Journal, letters and instructions, should be included in the record provided this Court considered that their admissibility was justified by the concept of judicial notice. I am of the view that all the documents to which I will refer, whether my attention was drawn to them by the intervener or as a result of my personal research, are documents of a historical nature which I am entitled to rely on pursuant to the concept of judicial knowledge. As Norris J.A. said in *White and Bob* (at p. 629):
>
> ...
>
> The intervener the National Indian Brotherhood/Assembly of First Nations provided the Court with some very interesting evidence in this regard. It submitted the minutes of a conference between Sir William Johnson and the representatives of the Eight Nations, including the Lorette Hurons, held in Montréal on September 16, 1760 (*The Papers of Sir William Johnson*, vol. XIII, 1962, at p. 163). Although the appellant objected to the Court considering this document. I feel it is a reliable source which allows us to take cognizance of a historical fact. Its being submitted by the intervener does not in any way prevent the Court from taking judicial notice of it. Indeed, I can only express my appreciation to the intervener for facilitating my research.

In this case the debate rages on beyond the unanimous decision of the Supreme Court of Canada. The point of contention both in the proceedings and apparently continuing to this day is whether the document signed by General Murray in 1760 just before the fall of Montreal granting free passage to the Hurons back to Lorette and guaranteeing their activities constitutes a treaty from which treaty rights flow. The Supreme Court found that it did. There continues to be a debate in the academic literature and in the press as to whether the Supreme Court of Canada got it right in *Sioui*.

An example is a recent piece in Le Devoir entitled *Quand l'histoire manipule la justice* by Nelson Martin Dawson in collaboration with Eric Tremblay. Just to give you a sense of the debate the authors write:

**Insert**

These examples show that in the Court room at least, the law has the last word. History and the historians of history are used to fill in the blanks of a pre-determined legal tests. But as my good friend Robert Venables who teaches history at Cornell and who in fact was one of expert witnesses in *Mitchell* wrote to me having seen the program for this symposium:

> To help each discipline understand how the other thinks and works. I believe that it was Oliver Wendall Holmes who said, regarding the U.S. Supreme Court, something to the effect that "This is not a court of justice. It is a court of law." The same could be said, I think, for Canadian courts. But history is not a noble search for justice either. In the West, history since the Greeks has been by the winners, for the winners, to extol the winners. History has also usually been ideologically based, on Christianity or Marxism, for example. If the law and history are now attempting to be pluralistic, it is because both disciplines are responding to the cultures in which they operate, and thus they are still tied to cultural factors.
>
> With all that in mind, the courtroom is also not a history class run by historians, and it is not a philosophy class run by philosophers. I think that this context could be used to start the folks thinking about what I believe should be a major premise of the "constructive dialogue between the disciplines of history and law." Which is that historians and other expert witnesses are playing on your field, with your rules. We have both always realized this, or at least for a century or so, because we are trained in different schools: not for nothing is a law school separate from a graduate school. Thus while I believe the dialogue must be a two-way street, one lane – the law – has to set the speed limit, the load limit, and when to declare the road closed. (While it would be nice to integrate the world, we need to deal with the practical.)

**Procedural**

The other issue of importance for both our professions is what the Court room experience does to each of us.

For the historian it appears to be in the words of Charles Johnston another of our witnesses in *Mitchell* quote: "the problem that, through the pressure - cooker of the

litigation process, the historian becomes an advocate himself instead of staying on the proper course of professional detachment and disinterest". Chuck Johnston continues:

> The pursuant of balance, the hallmark of the academic in and (hopefully) out of the lecture hall, is not exactly, for obvious reasons, on the lawyers' agenda.

I wonder, at least in regard to the areas in which I am involved raising as they do complex historical and constitutional issues, as to whether balance and the pursuit of truth should not be more prominent "on the lawyers agenda".

In these cases, the facts are the stuff of the clash of peoples and societies, the evolution of peoples in societies. Even if we are dealing with static events, they are often events buried in the past. It is not a case of "did the buttler do it".

Again to quote Venables responding to one of the questions proposed for this symposium:

> <u>Can historians, as witnesses, simply tell history as it really was?</u>
>
> This is a Monty Python question. No one knows what really happened, not even the participants.
>
> On the other hand, historians cannot tell history in court the way that they would tell history in their writings or in a university course. In court, historians cannot easily concede to the "other side" that the other side has an interesting or debatable point.
>
> I would like to venture a long-term, probably pie-in-the-sky wish. I believe that it would be great if there was a step in the legal process that preceded the beginning of a trial. Perhaps in the judge's chambers, the lawyers and the expert witnesses for all sides, having exchanged written reports, sit down and negotiate what all sides see as common ground, what all sides see as impossible to resolve, and what all sides agree can be practically settled. this would mitigate the winner-loser syndrome which I believe is so tragic in the legal process. In major cases of Constitutional impact, I would invite a

representative of Parliament and a representative of the cabinet member whose area is most affected.

The law is moving towards more managed processes with case management, manditary mediation and other techniques. Bob Venables' suggestion that expert witnesses should actually be involved in some of the processes prior to trial is an intriguing one.

I would suggest that the Bench and Bar should make a concerted effort to ensure that their members are to a certain extent trained in history. History courses should be a pre-requisite for entry into law school, law school should include mandatory history courses and, dare I suggest it, the Bar admission courses and exams should include history as a subject-matter.

Perhaps a future symposium organized by the Osgoode Society for Canadian Legal History should be entitled "Law goes to History Night".

Speech\Osgoode