



PROJECT MUSE®

---

## Native History on Trial: Confessions of an Expert Witness

Arthur J. Ray

The Canadian Historical Review, Volume 84, Number 2, June 2003, pp. 253-273  
(Article)

Published by University of Toronto Press



➔ For additional information about this article

<https://muse.jhu.edu/article/591020>

# CHR Forum



## Introduction

THE EDITORS

This is the second in a series of articles commissioned by the *CHR* around the theme 'Sites of Historical Practice.' The editors and Advisory Board invited Professor Ray to use his experience as an 'expert witness,' specifically in Aboriginal title and treaty rights litigation, as a point of entry into current debates about the use of history in the courts and the changing interpretive frameworks of historical testimony. We are pleased to be able to publish the resulting essay in the *CHR* Forum.

## Native History on Trial: Confessions of an Expert Witness

ARTHUR J. RAY

Just over twenty years ago I received my first request to appear as an expert witness in an Aboriginal rights case. It concerned the treaty hunting rights of a Cree named Bert Horseman, who lived in the Treaty 8 area of northern Alberta (*R. v. Horseman* 1990). Until that time I had not thought about the relevance that my research and publications might have for Aboriginal title and treaty rights litigation. I had little awareness of this intensifying struggle, and so, I naïvely asked Mr Horseman's attorney, 'What am I supposed to do as an expert?' He promptly replied, 'You will be there to educate the Court about fur trade and native economic history, which is your specialty.' The *Horseman* case proved to be a pleasant experience for me because the Crown had decided not to contest, through cross-examination, the history I presented. Instead, the government chose to focus on points of law. My next appearance in the courtroom was for the Gitxzan and Wet'suet'en of north-central British Columbia who brought a landmark Aboriginal title suit before the

Supreme Court of British Columbia as *Delgamuukw v. Regina*. My appearance in this trial proved to be a very different encounter from that of *Horseman*. The opposing sides hotly contested all aspects of the plaintiffs' and the province's history. As a result, I faced four days of stressful cross-examination by two teams of lawyers who represented the province and the federal government. They not only challenged the evidence I presented to the court but put my scholarly publication record on trial too. This experience, and my subsequent involvement in other treaty and Métis rights cases, sparked my interest in the history of cultural/historical research oriented to claims and other litigation, as well as the presentation of this evidence in court and in other quasi-judicial settings.

My research revealed that the legal community has been concerned about the general issue of using expert witnesses in litigation since the eighteenth century, when scientific experts first became involved following the establishment of modern sciences during the Enlightenment.<sup>1</sup> Since that time, their purpose has been to provide the court (the 'trier of fact') with knowledge that lies beyond the realm of ordinary judgment and experience.<sup>2</sup> Indeed, in theory the expert is supposed to serve the court rather than act as an advocate for one of the litigants. It is in this sense that the expert 'educates' the court, although the adversarial nature of the proceedings means that the forum for doing so is very different from the classroom academic experts are accustomed to. Normally, witnesses who appear in court can testify only about events they have experienced directly. Expert witnesses are not constrained in this way. They are permitted to state opinions based on an assumed state of facts that are not within their personal knowledge. An anthropologist, for example, can testify about information obtained through interviews, and a historian can present evidence about past events collected in a public archive.

Humanists with various types of special cultural/historical expertise (such as anthropologists, cultural/historical geographers, and historians) did not play a major role in litigation until relatively recently, mostly after the Second World War. This development largely resulted from war crimes prosecution and the civil rights movement. The rights movement generated landmark litigation in the areas of Aboriginal title and treaty

1 J.G. Hall and G. Smith, *The Expert Witness* (Chichester: Barry Rose Law Publishers 1992)

2 D.C. Gormley, 'The Role of the Expert Witness,' *Ethnohistory* 2, 4 (1955): 326-46; R. Erickson and R. Simon, 'Expert Witness Testimony and *Amicus Curiae*,' chap. 2 in *The Use of Social Science Data in the Supreme Court* (Urbana: University of Illinois Press 1998), 19-34

rights, constitutional law, racial discrimination, and gay and lesbian rights. Historical/cultural experts made important, and sometimes highly controversial, contributions in many key cases.<sup>3</sup> Most recently, historians have been involved in high-profile litigation dealing with Holocaust denials.<sup>4</sup> This growing involvement has led humanists to join legal scholars in an ongoing debate about the merits and problems of having cultural/historical experts participate in legal proceedings.

I will consider some of these issues as they pertain to Aboriginal and treaty rights litigation in the United States, Canada, and Australia. This type of litigation began in the United States following the creation in 1946 of the United States Indian Claims Commission (USICC), which was established by Congress to address the historical grievances that American Indians held against the federal government. In Canada it began almost twenty-five years later, when the Nisga'a of British Columbia launched their land claim suit known as *Calder v. Regina*.<sup>5</sup> On appeal, the Supreme Court of Canada rendered a split decision on the question of whether Aboriginal title survived in British Columbia. In response, the federal government created a claims process to evaluate First Nations' grievances. First Nations' frustrations with this process, and the patriation in 1982 of the Canadian Constitution, which protected existing Aboriginal and treaty rights, served as catalysts for a flood of rights litigation that continues to the present. A similar development took place in Australia when the Yolngu of the Northern Territory failed in the *Milirrpum* or Gove case (1969) to establish that they held an Aboriginal title to land that was recognizable under the country's common law. The Australian government enacted the *Aboriginal Land Rights (Northern Territory) Act 1976*, which provided the first scheme for Aboriginal groups to claim unalienated Crown lands based on traditional ownership and occupation. Although each country has had a somewhat different claims history, common issues have arisen concerning the participation of expert witnesses in the process. The most central of these issues concern the questions of voice, research, evidence, and the way history is used in the litigation process.

3 A.H. Kelly, 'Clio and the Court,' *Supreme Court Review* 119 (1965): 144; K. Kipins, 'Confessions of an Expert Witness,' *Journal of Medicine and Philosophy* 22 (1997): 325-43

4 'Slugging through the Mud,' *The Economist*, 15 April 2000, 55-6; Richard J. Evans, *In Defence of History* (London: Granta Books 1997)

5 This was the first Canadian case in which an anthropologist (Wilson Duff) gave cultural/historical testimony.

## ISSUES OF VOICE

The problem of voice first arose in the United States shortly after the creation of the USICC, which operated for thirty years. By the mid-1950s anthropologists dominated the proceedings. Although Indians testified about their history, their contribution was minor in comparison with that of academic experts. As one of the participating anthropological experts explained later, this imbalance came about because the lawyers and commissioners were more comfortable with their colleagues than with the Indian plaintiffs. As a result, anthropologists acted as surrogate Indians.<sup>6</sup> The problem with this arrangement was that the Native voice was filtered through current theoretical models or was invented from those models. In 1955, for example, anthropologist Julian Steward, who appeared in several USICC cases on behalf of the government, remarked: 'In using this secondary or predigested evidence, both from the Indian informant and the historical source, the anthropologist redigests it according to his own point of view. He himself becomes "evidence" in that his testimony is based to an incalculable extent upon his theory (explicit or implicit), his experiences among the people, his travels over the territory, his reading of the historic documents and his broader knowledge of primitive people.'<sup>7</sup> Reflecting his time and his perception of anthropology as a social science, Steward did not see the intertwined relationship of 'facts' and theory as being problematic. That is why he said the anthropologist was the 'evidence.'

Given the fluid nature of theory in the humanities and the social sciences, the linkage is clearly problematic in litigation. For instance, the theories about Indian land tenure that anthropologists debated in the 1950s, linked as they often were to evolutionary models, have little purchase today. An important example is Steward's cultural ecological theory about Indian land tenure. He theorized that 'primitive' collectors and hunters, such as the Australian Aborigines and bands of the Great Basin area of the western United States, had not developed notions of ownership and accompanying tenure systems. Steward reached this conclusion on the basis of his reading of the pre-1950s anthropological literature, particularly that pertaining to the Aborigines of Australia; the

6 Nancy O. Lurie, 'The Indian Claims Commission,' *Annals of the American Academy of Political and Social Scientists* 436 (1978): 97-110; Nancy O. Lurie, 'Epilogue,' in I. Sutton, ed., *Irredeemable America: The Indians' Estate and Land Claims* (Albuquerque: University of New Mexico Press 1985), 362-85

7 Julian Steward, 'Theory and Application in a Social Science,' *Ethnohistory* 2, 4 (1955): 292-301

limited fieldwork he had undertaken in the arid American west,<sup>8</sup> and his multilinear evolutionary, cultural ecological, interpretive framework. Subsequent research, much of which was generated by claims cases, has shown that Australian Aborigines, whom anthropologists once regarded as the archetypical primitive, had very complex tenure systems. Recent scholarship has also revealed that Steward's theories about Great Basin groups, such as the Shoshone and Paiute, were shaped in part by his work as an expert for the federal government. His client sought to defeat or pare down Indian claims in a succession of USICC cases.<sup>9</sup> Subsequently, Steward's theories became relevant to First Nations' claims in Canada when experts for the Crown advanced them before the Supreme Court of British Columbia in *Delgamuukw v. Regina* in support of the proposition that the Gitksan and Wet'suet'en tenure system of the early nineteenth century was a product of European contact.<sup>10</sup> This case remains the most important land claim case since *Calder*.

In any event, by the time Aboriginal rights litigation gained momentum in Canada in the 1980s, Native people were no longer willing to have anthropologists serve as their surrogate spokespersons. Accordingly, when the Gitksan and Wet'suet'en launched their landmark title suit, they insisted on speaking directly to the court to explain who they were and to lay out the parameters of their claim. For this reason, they commenced their case with the testimony of their hereditary elders, who were their primary evidence. To the considerable irritation of the trial judge, the Gitksan and Wet'suet'en demanded the right to present this evidence in traditional ways, such as in song. The elders took several months to complete their testimony. Afterwards, their academic expert witnesses appeared in supporting roles. We presented corroborating evidence from a variety of sources. I drew heavily on the archives of the Hudson's Bay Company, which contained detailed information about Gitksan and Wet'suet'en economic life and land tenure practices during the early post-contact period from about 1780 to the 1850s.<sup>11</sup> The com-

8 He undertook most of this research as a graduate student and early in his professional career. Reflecting the time, his work had not emphasized land tenure issues.

9 Sheree Ronaasen, Richard O. Clemmer, and Mary Elizabeth Rudden, 'Rethinking Cultural Ecology, Multilinear Evolution, and Expert Witnesses: Julian Steward and the Indian Claims Commission Proceedings,' in Richard Clemmer, Daniel Meyers, and Mary Elizabeth Rudden, *Julian Steward and the Great Basin: The Making of an Anthropologist* (Salt Lake City: University of Utah Press 1999), 171-2

10 Sheila P. Robinson, 'Protohistoric Developments in Gitksan and Wet'suet'en Territories,' unpublished report for the defendant in *Delgamuukw v. Regina*, Vancouver 1987

11 Arthur J. Ray, 'The Early Economic History of the Gitksan and Wet'suet'en-Babine Tribal Territories, 1822-60,' unpublished report for the plaintiffs in *Delgamuukw v. Regina*, Vancouver 1985

pany's traders had described a system that was similar to one the elders had outlined.

A parallel development regarding the ordering of voices in land claims hearings took place in the Northern Territory of Australia in the early 1980s, according to the terms of the *Land Rights Act (Northern Territory)*. This legislation required claimants to bring their cases before an Aboriginal land commissioner. Mr Justice John Toohey, who served as the first commissioner under the act, established most of the important precedents for conducting the hearings. In the initial claims, the anthropological experts appeared before the claimants, a sequence that privileged their voice. By the fifth hearing (the Mudbura land claim), Justice Toohey changed the order in which he received oral testimony. Initially he did it for pragmatic reasons: the anthropologists could not appear when the hearings commenced. Afterwards, he reflected on the impact this altered scheduling had on the presentation of evidence: 'It cast the anthropologists more truly in the role of recorders,' he said. 'A comprehensive and helpful claim book was available to give a broad picture before the evidence began, but there was not the same tendency to see the anthropological model as one into which the evidence of all witnesses should fit.'<sup>12</sup> Today, many Australian anthropologists will not accept that their role should be limited to that of recorder, even though it is a complex one. Bruce Rigsby notes that anthropologists face the delicate task of differentiating between what an Aboriginal group says it does and what it actually does.<sup>13</sup> Others, such as Francesca Merlan, argue that it is not possible merely to record and report, given that knowledge is a social construct shaped by ongoing power negotiations within social groups.<sup>14</sup> The controversial Hindmarsh Island cultural heritage case served to highlight this issue. It arose when a developer sued an expert witness for allegedly fabricating evidence about Aboriginal 'women's business' (secret sacred rites) that took place on the island in order to block

12 Justice John Toohey, *Yingawunarri (Old Top Springs) Mudbura Land Claim: Report [5] by the Aboriginal Land Commissioner* (Canberra: Australian Government Publishing Service 1980); Justice John Toohey, *Seven Years On: Report by Mr. Justice Toohey to the Minister of Aboriginal Affairs on the Aboriginal Land Rights (Northern Territory) Act 1976* (Canberra: Australian Government Printing Service 1984)

13 Bruce Rigsby, 'Representations of Culture and Expert Knowledge and Opinions of Anthropologists,' unpublished paper presented to Adelaide Native Title Conference, 6–7 July 2001. Ethnohistorians face a similar problem, that of considering what an Aboriginal group say their ancestors did in light of what various lines of evidence indicate they actually did.

14 Francesca Merlan, 'An Assessment of Von Doussa on Anthropology,' 2002, cited 14 Nov. 2002 <http://anthropology.anu.edu.au/aas>

economic development of the area under the terms of cultural heritage protection legislation. The case revolved around a dispute between two groups of Aboriginal women who held different perspectives about whether this 'business' existed. It raised the methodological question about whether their disagreement should be assessed in terms of an absolute cultural standard or considered as an aspect of an ongoing power negotiation among 'members' of the local group.<sup>15</sup>

Granting a stronger voice to Aboriginal people in rights lawsuits immediately raised thorny issues about the weight to be given to different lines of evidence, especially when they were in conflict. In *Delgamuukw* the trial judge largely ignored the massive body of oral testimony the elders provided.<sup>16</sup> Likewise, he dismissed the evidence of the plaintiffs' anthropological experts partly because it had been gathered by using a participant-observation methodology. The trial judge did so partly because he did not fully understand this methodology. More important, he believed that the objectivity of the plaintiffs' field ethnologists had been compromised by this field technique because it required them to spend extended periods of time in Gitksan-Wet'suet'en communities. Understandably, anthropologists and the plaintiffs' legal counsel roundly criticized the trial judge for his assessment.<sup>17</sup> The judge's decision raised an issue that has not been adequately addressed to date, however. Are all the methodologies normally used for scholarly purposes equally appropriate for litigation-oriented research? The trial judge was concerned that the informants of the plaintiffs' anthropologists also happened to be their clients. This issue has recurred in Australian courts since 1969, and for Northern Territory land commissioners since 1976.<sup>18</sup>

- 15 For contrasting perspectives on this case, see Diane Bell, *Ngarrindjeri Wurrurarrin: A World That Is, Was, and Will Be* (North Melbourne: Spinifedx 1998); Diane Bell, 'The Word of a Woman: Ngarrindjeri Stories and a Bridge to Hindmarsh Island,' in Peggy Brock, ed., *Words and Silences: Aboriginal Women, Politics and Land* (Crows Nest: Allen and Unwin 2001), 117–38; Merlan, 'An Assessment.'
- 16 This avoidance also happened more recently in Australia in *Yorta Yorta v. Victoria* (1998). V. Kerruish and C. Perish, 'Awash in Colonialism,' *Alternative Law Journal* 24, 1 (1999): 3–8
- 17 Stuart Rush, 'The Role of Anthropological Evidence in Land Claims Litigation: The Gitksan-Wet'suet'en,' unpublished manuscript 1991
- 18 Most recently it was a central aspect of *Daniel v. Western Australia* (2000). See Daniel Cohen, 'Daniel and Others (for the Ngarluma, Yindjibarndi, Yaburara, Mardudhunera and Wong-goo-tt-oo Peoples) v. Western Australia,' *Australian Law Reports* 178 (2000): 542–3. For the Northern Territory, see Graeme J. Neate, *Aboriginal Rights Law in the Northern Territory* (Chippendale: Alternative Publishing Co-operative 1989), 239–90. Land Commissioner Toohey addressed the problem in part by retaining his own anthropologist to evaluate anthropological evidence. Rigsby



In any event, when the Gitksan and Wet'suet'en appealed their case to the Supreme Court of Canada, it held that the trial judge had made a fatal error by not giving weight to the plaintiffs' oral evidence and ordered a new trial. When doing so, however, the Supreme Court failed to address the difficult issues that the inclusion of Aboriginal oral history entailed. As one legal critic noted, the fundamental problem was that the Court did not acknowledge that the history of Aboriginal people is problematic in nature.<sup>19</sup> For instance, the admission of oral evidence means that the Aboriginal perspectives of history that shape it also have to be taken into account. Because the Supreme Court did not consider this problem in *Delgamuukw* and did not offer guidelines, it opened the door for debates about this type of evidence in subsequent litigation. For example, in the *Victor Buffalo v. Regina* treaty rights lawsuit of the Plains Cree of Alberta (presently at trial), the opposing parties devoted considerable discussion to competing philosophies of history and to the strengths and weaknesses of oral history vis-à-vis documentary history. This consideration included having cultural/historical experts debate the relative merits of enlightenment and post-modern and post-colonial approaches to history to support or question Cree oral history and their understanding of the terms of Treaty 6 (1876).<sup>20</sup> Similar issues have arisen recently in litigation concerning Treaty 8 (1899).<sup>21</sup>

highlights the merits of the participant-observation method for claims work in Australia in his 'Representations.'

- 19 J.R. Fortune, 'Construing *Delgamuukw*: Legal Arguments, Historical Argumentation, and the Philosophy of History,' *University of Toronto Faculty of Law Review* 51, 1 (1993): 80-117
- 20 Thomas Flanagan, unpublished rebuttal report, *Victor Buffalo et al. v. Regina*, 1998; Alexander von Gernet, 'An Assessment of Certain Evidence Relating to Plains Cree Practices,' 2002; Alexander von Gernet, 'Expert Report of Professor Alexander von Gernet Prepared for the Defendants,' unpublished report, *Victor Buffalo et al. v. Regina*, 2002; Alexander von Gernet, 'Oral Documents and Treaty Six,' unpublished report prepared for the Defendants, *Victor Buffalo et al. v. Regina*, 2002; Winona Wheeler, 'Surrebuttal Report to Dr. Alexander von Gernet's "Comments on Winona Wheeler's Indigenous Oral Tradition Histories, An Academic Predicament,"' unpublished report for the Plaintiffs in *Victor Buffalo et al. v. Regina*, 2001. (All copies in author's possession.)
- 21 Most recently, for example, in *Benoit v. Regina* (2002) concerning Treaty 8, Federal Court Justice J.R. Campbell devoted a substantial portion of his judgment to weighing documentary and oral evidence concerning the question of whether the First Nations' elders who signed Treaty 8 (1899) understood that it would for all time exempt them and their descendents from taxation. Justice D.R. Campbell, *Benoit v. Regina: Reasons for Judgment* (Docket T-2288) (Ottawa: Federal Court of Canada 2002)

The introduction of oral history evidence into Aboriginal rights litigation has also created a practical problem that is difficult to address adequately. Aboriginal defendants and plaintiffs control the oral histories – and often own them as hereditary rights. Understandably, First Nations are reluctant to allow opposing counsel's experts to undertake pre-trial oral history research in their communities. As a result, the Crown's lawyers and experts frequently have to rely almost exclusively on the extant scholarly literature. Several problems arise when they do, particularly the fact that most of this literature is based on field ethnography undertaken during the pre-claims era. This was a time when anthropologists did not address many of the issues that are central to Aboriginal rights litigation. Alfred L. Kroeber, the doyen of American anthropology at the middle of the twentieth century, made this point when he was serving as the key witness for the Indians in the USICC California claims hearings of 1955–6. He noted that most of pre-claims anthropological research had been oriented to salvage or cultural-element distribution surveys. This work had emphasized material culture, mythology, and religious beliefs; it had paid little attention to native economic systems, political organizations, or land tenure practices.<sup>22</sup> Thirty years later, when the Gitxan and Wet'suet'en filed their lawsuit, the ethnographic literature concerning their people, and their immediate neighbours, still had the same limitations. For this reason and others, they undertook massive oral and documentary history research projects.

The other problem with pre-1970s scholarship is that some of it, such as that of Steward, was rooted in an evolutionary anthropology that made a number of basic assumptions about 'primitive societies' and was prejudicial to Aboriginal peoples' quest for basic economic rights.<sup>23</sup> One of the most problematic assumptions was the idea that well-defined land tenure systems and notions of ownership were lacking, or poorly developed, in non-agricultural societies. This idea resonates well with Western property theory, which is rooted in the evolutionary notions of such seventeenth-century philosophers as Thomas Hobbes and John Locke.<sup>24</sup> In North America, all modern Aboriginal title cases, beginning with those of the USICC, have had to attack these ideas directly. It was a central

22 A.L. Kroeber, 'The Nature of the Land-Holding Group,' *Ethnohistory* 2, 4 (1955): 303–14

23 Rigsby notes that other anthropologists, most notably I. Hallowell and his student, A.F.C. Wallace, countered evolutionary perspectives with orthodox property theories that can be traced to Sir Henry Maine. Bruce Rigsby, personal communication, 19 Nov. 2002

24 B. Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford: Oxford University Press 1996)

issue in *Delgamuukw*, for example, and in the end the trial judge reverted to Hobbes for a quotation when he described life in pre-contact Gitksan and Wet'suet'en society as being 'nasty, brutish, and short.'<sup>25</sup> In Australia it was the ghost of Locke that had bedevilled the Yolngu in the *Milirrpum* case twenty years earlier.<sup>26</sup> The other problematic notion of evolutionary economic anthropology/history is the belief that production for exchange, or commerce, was not a traditional Aboriginal practice. In Canada, Aboriginal and treaty rights suits commonly attack this idea and the romantic anthropological/historical literature that supports it.<sup>27</sup>

#### ISSUES OF RESEARCH AND EVIDENCE

Another important feature of Aboriginal title and treaty rights litigation is that it concerns an area of law that was comparatively undeveloped before the second half of the twentieth century. While this feature has given academic experts an opportunity to influence the evolving case law, it has also meant that they have had to react to its development and to a succession of judicial guidelines that courts have established regarding the cultural/historical tests Aboriginal plaintiffs have to meet to prove their rights. These shifting guidelines have served to focus litigation-oriented research.

The Supreme Court of Canada has issued a series of judgments regarding evidentiary tests since 1990 which have had important repercussions for the presentation and interpretation of cultural historical evidence at trial. When I took part in the *Delgamuukw* trial, for example, it was widely believed that only those Aboriginal customs that had survived to the present in a largely unaltered form were eligible for legal protection – a belief that came to be known as the 'frozen rights' or 'pizza Indian' theory of Aboriginal rights (authentic Indians do not eat pizza). In *Delgamuukw* this notion strongly influenced the testimony of opposing experts regarding the crucial issue of the post-contact tenure practices of the Gitksan and Wet'suet'en. The plaintiffs and their experts argued that the early post-contact European fur trade had not led the Gitksan and Wet'suet'en to invent the land use and ownership scheme

25 Chief Justice A.C. McEachern, *Reasons for Judgment: Delgamuukw v. Regina* (Vancouver: Supreme Court of British Columbia 1991)

26 Nancy Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition* (Canberra: Australian Institute of Aboriginal Studies 1986)

27 Arthur J. Ray, 'Native Economic History and Treaty and Livelihood Rights: Along the Road from Horseman to Marshall,' *Canadian Indigenous and Native Studies Association Proceedings* (Edmonton: School of Native Studies, University of Alberta 2000)

that the elders and early European fur traders had described. We presented a substantial amount of new oral and documentary evidence in support of this position.

Predictably, the Crown and its experts took a contrary stance. They made the general point that European contact was culturally destabilizing. In support of this proposition, they mostly cited the acculturation and evolutionary cultural ecology literature of the pre-1970 era, particularly the work of Steward and those who built on his ideas.<sup>28</sup> They also cited the post-1970 scholarship that emphasized Native agency (to which I had been a contributor).<sup>29</sup> Very little of this literature, however, was based on research that had been undertaken in Gitxsan and Wet'suet'en territory. In other words, the Crown's experts sought to make it applicable by applying ethnographic analogies. Anthropologists traditionally used this approach to fill in 'gaps' in the local archaeological/ethnographic record. It is based on the assumption that historical parallels can be drawn with other societies that are thought to be similar in character or at the same stage of cultural evolutionary development. It is an approach of dubious merit when applied in litigation settings to counter newly acquired data. Nonetheless, it has been an effective technique in court, as it was in the *Delgamuukw* trial. Judges often regard new claims-oriented research suspiciously when it contradicts the extant pre-claims scholarly literature. They consider the former work to be purposeful (which it clearly is) and, therefore, biased, and the latter to be 'more objective' and accepted science. In today's postmodernist and post-colonial theoretical climate, many, if not most, scholars would flatly reject such a dichotomy because much of this older scholarship was rooted in a scholarly discourse that privileged Western cultural values and institutions.

Somewhat ironically, when the 365-day trial was in its closing phase, and after all the historical evidence had been presented, the Supreme Court of Canada established different ground rules. In its *Sparrow v. Regina* (1990) decision concerning First Nations' fishing rights, the Court completely rejected the 'frozen rights' notion. It held that traditional practices could exist in a modern form. In *R. v. Van der Peet* (1996) the Supreme Court elaborated on this idea, stating that First Nations claiming an Aboriginal right had to prove that the contemporary practice at issue could be traced back to the time of initial contact with Euro-

28 Julian Steward, 'Carrier Acculturation: The Direct Historical Approach,' in Jane Steward and Peter Novick, eds., *Evolution and Ecology: Essays on Social Transformation* (New York: Columbia University Press 1961), 732-44

29 Robinson, 'Protohistoric Developments'

peans. This doctrine is now known as the 'doctrine of continuity.' It means First Nations no longer have to downplay the dynamic aspects of their history to improve their chances of establishing their rights, providing, of course, that Canadian courts do not adopt the theory that rights can be eroded by the 'tide of history,' as the Federal Court of Australia has done recently in *Yorta Yorta v. Victoria* (2001).<sup>30</sup> I have no doubt that the historical debates that took place during the *Delgamuukw* trial would have been very different had the research and testimony of experts addressed the continuity doctrine instead of the frozen rights notion.<sup>31</sup>

In its *Van der Peet* decision, the Supreme Court of Canada also ruled that the only Aboriginal activities eligible for protection as rights are those customs or traditions that are distinctive to the culture of the Aboriginal group making the claim. This requirement seems to be based on the notion that cultures can be broken down into distinctive elements, each of which can be ranked according to its significance to the whole. It recalls a cultural-element-distribution approach to the study of Native cultures that was common practice in North American anthropology at the beginning of the twentieth century. Anthropologists abandoned it long ago in favour of more holistic approaches. The problematic nature

30 Kerruish and Perish, 'Awash in Colonialism,' 3–8; J. Cockayne, 'Case Notes: Members of the Yorta Yorta Aboriginal Community v. Victoria,' *Melbourne University Law Review* (2001): 1–26 (cited 9 Nov. 2001 at <http://www.worldlii.org/cgi-worldlii/disp.pl/au/journals/MURL/2001/25.html> 25). Recently, the High Court upheld this decision. When doing so it distinguished between cultural practices that are rooted in pre-contact traditions and those that the court determines to have been created after contact. The latter types of practices are not protected by the common law. *Members of the Yorta Yorta Aboriginal Community and State of Victoria and ORS*, 12 Dec. 2002 <http://www.austlii.edu.au/cgi>

31 In Australia, a key element of the continuity question in title cases concerns proving that Aboriginal groups have maintained connections to their ancestral lands. Claims research has, therefore, often emphasized genealogical data and tenure practices, particularly the rules by which traditional 'caretakers' assume control of the lands vacated by groups that have died out. See Julie Finlayson, 'Aboriginal Tradition and Native Title Representative Bodies,' in D.E. Smith and J. Finlayson, eds., *Fighting Over Country: Anthropological Perspectives* (Canberra: Centre for Aboriginal Economic Policy Research, Australian National University Research Monograph No. 12, 1997), 141–52; Ian Keen, 'A Question of Interpretation: The Definition of "Traditional Aboriginal Owners" in the Aboriginal Land Rights Act,' in L.R. Hiatt, R., ed., *Aboriginal Landowners: Contemporary Issues in the Determination of Traditional Aboriginal Land Ownership* (Sydney: Oceania Monograph 27, 1984), 24–45; Jeremy R. Beckett, 'The Murray Island Land Case and the Problem of Cultural Continuity,' in W. Sanders, ed., *Mabo and Native Title: Origins and Institutional Implications* (Canberra: Centre for Aboriginal Economic Policy Research, Australian National University Research Monograph No. 7, 1994), 7–24

of this perspective is readily apparent when it is applied in Métis rights cases in Canada, as happened at trial in *Regina v. Powley* (1998). These people forged a new culture and identity from their Aboriginal and European roots. Thus, few of their cultural traits are unique. What makes them a distinctive nation is the way they combined elements from these two different cultural worlds.

*Regina v. Powley* highlighted another fundamental problem with the distinctive trait approach to rights. How broadly or narrowly are they to be defined, and whose standard should be applied? In *Powley*, the litigation arose because a Métis had been charged with hunting a moose in violation of Ontario game laws. The defendants claimed they had an Aboriginal and treaty right to do so. There were two ways to approach the problem from a historical perspective. One involved taking a narrow focus that looked solely at historical moose-hunting practices in the area where the claimants lived. The other involved considering moose hunting as an aspect of a more basic cultural practice – that of hunting large game for livelihood purposes. The Crown opted for the species-specific approach because it is compatible with Western economic perspectives and modern game laws. This approach also makes it more difficult for Aboriginal groups to find evidence from archival and other records that deal with specific practices, places, and times. The Métis opted for a more general approach to avoid the latter problem. In addition, it is more compatible with their world-view and the realities of their historical experience. I presented documentary evidence that showed they had an opportunistic economy that combined hunting, fishing and trapping, wage labour, trading, and farming. The relative importance of each activity varied over time in response to wildlife population cycles and economic opportunities.<sup>32</sup> Partly in light of this evidence, the trial judge accepted the Métis perspective.<sup>33</sup> The Ontario court of appeal upheld his judgment. The province has appealed the case to the Supreme Court of Canada.<sup>34</sup>

32 Arthur J. Ray, 'An Economic History of the Robinson Treaty Area Before 1850,' unpublished report for the defendants in *Regina v. Powley*, Sault Ste Marie, Ontario, 1997

33 Justice Charles H. Vaillancourt, *Reasons for Judgment, Regina v. Powley* (Sault Ste Marie: Ontario Court of Justice (Provincial Division) 1998)

34 A somewhat parallel issue has arisen in Australia with regard to land owning/controlling groups and succession issues. Small groups, such as parti-clans, have been more adversely affected by post-contact epidemics and other disruptive forces than have larger (variously defined) regional groups. It is therefore often easier to substantiate continuity claims for the latter. Focusing on larger regional groups also makes it possible to deal with the various entitlements and rights that traditionally

In Australia the rules regarding the cultural/historical evidentiary tests that Aboriginal claimants are expected to meet have also changed over time. In the Northern Territory, for example, the *Aboriginal Land Rights (Northern Territory) Act* of 1976 required Aboriginal people to prove that their traditional land tenure practices were similar to those described in this piece of legislation. When the Labor government of Gough Whitlam decided to grant land rights to Aboriginal people in the Northern Territory, it faced the difficult problem of drafting appropriate legislation. To facilitate this task, in 1972 it established a commission of inquiry into Aboriginal land rights under the direction of Justice Sir Edward Woodward, who had served as the lead counsel for the Yolngu in their land rights case. Woodward invited all the anthropologists who had worked in the Northern Territory to make submissions and recommendations and appointed anthropologist Nicolas Peterson as his adviser. At the time, anthropologist Alfred Reginald Radcliffe-Brown's male-oriented conception of Aborigines' societies remained the dominant, although not unchallenged, anthropological model. He had developed it during the period from the early 1930s through the mid-1950s on the basis of relatively limited field data. Radcliffe-Brown thought that patrilineal and patrilocal descent groups (patriclans) owned particular territories. They sustained their claim through the inherited rights that male members held to the sacred sites of their territory. In contrast, the local land-using group included the wives of the clan members and their unmarried female children. Radcliffe-Brown and others referred to this more inclusive group as the 'horde.' Significantly, on the eve of the Gove case and the Woodward Commission, a major debate began among leading Australian anthropologists, most notably between L.R. Hiatt and W.E. Stanner, about the limitations of the Radcliffe-Brown model as it pertained to the land rights of the non-clan members of the horde.<sup>35</sup>

Given the shifting anthropological ground, it is understandable that some of the submissions and testimony before the Woodward Commission contended that Radcliffe-Brown's model overemphasized male rights at the expense of those of women (reflecting the era in which he had formulated it), glossed over spatial variations in tenure practices, and

linked the smaller groups together. See Rod Hagen, *Lumpers, Splitters and the Middle Range: Groups, Local and Otherwise, in the Mid-Murray Region* (Canberra: Centre of Aboriginal Economic Policy Research, Australian National University Research Monograph No. 13, 1999), 73–84.

- 35 L.R. Hiatt, 'Traditional Land Tenure and Contemporary Land Claims,' in Hiatt, ed., *Aboriginal Landowners*, 11–23; Keen, 'A Question of Interpretation'; and R.M. Berndt, 'The Gove Dispute: The Question of Australian Aboriginal Land and the Preservation of Sacred Sites,' *Anthropological Forum* 1 (1985): 258–95

gave little attention to economic ties to the land. It also became clear from the submissions of anthropological experts that their divided opinions mostly concerned (and continue to concern) the question of the relative importance of the patrilin vis-à-vis larger social groupings in Aboriginal land use and tenure schemes (band, tribe, and language group).<sup>36</sup> Stanner pointed out one of the reasons for the debate: in 1969, when preparing for the *Gove* case, he informed the Yolngu's legal team that his fellow anthropological colleagues had not devoted sufficient attention to the complex relationships that existed between the patrilin and other social units in Aboriginal society.<sup>37</sup> These facts, and conflicting anthropological theories about them, posed serious problems for Woodward, who faced the daunting task of making recommendations for a piece of legislation that would be sufficiently broad to cover all groups in the Northern Territory (and perhaps eventually those living elsewhere) without being impossibly cumbersome.<sup>38</sup> This challenge led him to emphasize the loosely defined 'local descent group,' even though he acknowledged in his interim report that Aboriginal land tenure practices were extremely complex.<sup>39</sup> Woodward reasoned that if these groups held communal titles, they would continue to discharge their traditional responsibilities to all members of their related local land-using groups.<sup>40</sup> In this way, Aborigines would be able to protect their land entitlements by traditional means. The federal government mostly accepted Woodward's recommendations when it drafted the 1976 act, which enshrined key features of an anthropological model in Australian law.

As soon as the Northern Territory Land Rights Tribunal began operating under the direction of Land Commissioner Toohey, problems arose with respect to the ways in which the local descent group should be characterized. At first, Toohey and the researchers who supported Abori-

36 Hiatt, 'Traditional Land Tenure'; A. Rumsey, 'Language Groups in Australian Land Claims,' *Anthropological Forum* 6, 1 (1989): 69–80; Peter Sutton, 'Atomism versus Collectivism: The Problem of Group Definition in Native Title Cases,' in Jim Fingleton and Julie Finlayson, eds., *Anthropology in the Native Title Era: Proceedings of a Workshop* (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies 1995), 1–10; Finlayson, 'Aboriginal Tradition,' 141–52

37 Melbourne University Archives, Woodward Collection 102/26, box 3, W.E.H. Stanner to F.X. Purcell, 6 Feb. 1969

38 Sir Edward Woodward, interview, Melbourne, 21 Oct. 2002

39 Sir Edward Woodward, *First Report of the Aboriginal Land Rights Commission* (Canberra: Australian Government Printing Service 1973)

40 The other reason for emphasizing the 'local descent group' was that it would force the regional land councils, which were located in urban centres, to consult with the country people they represented. Nicolas Peterson, interview with author, Canberra, 14 Nov. 2002



ginal claimants construed it narrowly in patricentric Radcliffe-Brownian terms. Very quickly, however, claimants raised the issue of female rights.<sup>41</sup> In response, beginning with the sixth and seventh claims (Utopia and Willowra, respectively), Toohey interpreted the act more liberally, so that traditional owners could be defined in more inclusive terms that formally acknowledged rights that derived, on the one hand, from patrilineal descent and, on the other, by complementary filiation with mother's (father's) descent line.<sup>42</sup> This approach made it easier for claims researchers to freely address the spatial diversity of Aboriginal tenure practices. Their work made the complexity and spatial diversity of Aboriginal tenure systems ever more apparent as the claims process unfolded. The *Mabo* decisions of the High Court, and the federal and state title acts that followed in their wake, perpetuated this trend. Aboriginal title was recognized under the common law after *Mabo*, rather than through beneficial legislation, as had been done in the Northern Territory in 1976. Under the new system, Aborigines living outside the Northern Territory, and the researchers who assisted them, no longer had to show that the tenure practices of claimants approximated those imagined in any particular academic model. Rather, they merely had to establish that they had a well-articulated scheme for ownership and occupation.<sup>43</sup> This system has posed new challenges for Australian anthropologists, however. Just as Aboriginal claims research increasingly called for a systems analysis type of approach that was typical of Radcliffe-Brownian structuralism, academic researchers began to emphasize social fluidity.<sup>44</sup>

#### HISTORY AND THE CLAIMS LITIGATION PROCESS

Maori activist and historian Sir Tipene O'Reagan has noted that Aboriginal rights advocacy research makes the political and economic implications

- 41 Justice John Toohey, *Claim by the Warlpiri and Kartangarurru-Kurintji: Report [2] by the Aboriginal Land Commissioner* (Canberra: Australian Government Publishing Service 1979); Toohey, *Yingawunarri (Old Top Springs) Mudbura Land Claim*
- 42 Justice John Toohey, *Annual Report by the Aboriginal Land Commissioner, Mr. Justice Toohey to the Minister for Aboriginal Affairs* (Canberra: Australian Government Printing Service 1981); Hiatt, 'Traditional Land Tenure.' One of the pressures favouring a broader definition of land rights related to the fact that substantial tracts of land had been alienated and could not be claimed under the act. Broader definitions of rights enabled more Aborigines to have a partial stake in the remaining claimable lands. Nicholas Peterson, interview with author, Canberra, 6 May 2002
- 43 John Avery, 'Discussion 1,' in Fingleton and Finlayson, eds., *Anthropology*, 18–20
- 44 Peter Sutton, 'The System as It Was Straining to Become: Fluidity, Stability, and Aboriginal Country Groups,' in J.D. Finlayson et al., eds., *Connections in Native Title: Genealogies, Kinship and Groups* (Canberra: Centre of Aboriginal Economic Policy Research, Australian National University Research Monograph No. 13, 1999), 13–57

of cultural/historical studies explicit rather than implicit.<sup>45</sup> In Canada, the recent *Regina v. Marshall* case concerning the commercial fishing rights of the Mi'kmaq serves as a forceful example of O'Reagan's point. At trial, one of the historians who appeared on behalf of defendant Donald Marshall provided contextual and textual analyses of British-Mi'kmaq colonial treaties to advance the thesis that these historical agreements implicitly accepted the commercial practices and rights of the Mi'kmaq.<sup>46</sup> When, on appeal, the Supreme Court of Canada upheld this interpretation, it provoked a storm of protest from the non-Native fishing community, whose members feared that their economic interests would be undermined by it.<sup>47</sup> This political fallout led the Court to issue a revised decision a short while later – a step rarely taken by the Court (*R. v. Marshall*, 5 and 17 November 1999).

Because the political/economic implications of litigation-oriented research is so starkly apparent, expert witnesses, regardless of whom they represent, have long been regarded suspiciously by academics and the public alike. The fact that their research is presented in the adversarial and theatrical setting of the courtroom/classroom is an added reason for this suspicion. In this arena, experts are often pushed to the limits (and sometimes beyond) of the interpretations that are currently acceptable in their profession. This 'push' can result in dredging up outdated theoretical perspectives, as the Crown's experts were accused of doing in *Delgamuukw*,<sup>48</sup> or inventing new ones on the witness stand. For these reasons, experts have been called hired guns, jackals, and whores; their work is often dismissed as mere 'courtroom history,' which selectively uses data and theory to further their clients' goals.<sup>49</sup>

For these reasons, the participation of academic experts in Aboriginal rights litigation has, from the outset, caused deep divisions within professional ranks. To illustrate, USICC hearings were highly adversarial from the beginning, and this confrontation had a polarizing impact on

45 Tipene O'Reagan, 'Old Myths and New Politics: Some Contemporary Uses of Traditional History,' *New Zealand Journal of History* 26, 1 (1989): 5–27

46 William Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto: University of Toronto Press 2002)

47 Arthur J. Ray, 'Regina v. Marshall: Native History, the Judiciary, and the Public,' *Acadensis* 29 (spring 2000): 138–46

48 Dara Culhane, *At the Pleasure of the Crown* (Vancouver: Talon Press 1998), 155–82

49 G. Byrnes, 'Jackals of the Crown? Historians and the Treaty Claims Process,' in Dalley B. Phillips, ed., *Going Public: The Changing Face of New Zealand History* (Auckland: Auckland University Press 2000), 110–22; J.M. Kousser, 'Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing,' *The Public Historian* 6, 1 (1984): 5–19

the relatively small field of American anthropology of the 1950s. Anthropologists quickly became divided into two feuding camps of scholars: one worked for the Indians and the other for the federal government. At commission hearings and professional conferences, carrying over into scholarly publications and personal correspondence, they battled over a wide range of issues. Questions about the objectivity and ethics of experts loomed prominently among them. Anthropologists often accused each other of substituting 'theory' for 'facts,' or of not differentiating one from the other, when it served to advance their clients' cases. Steward's remarks, which I cited earlier, were responses to allegations of this sort. He made them in a paper he delivered at one of two conferences that anthropologists held in 1954 and 1955 in the hope of bringing their feuding to an end. Many of those present, Steward among them, feared that these divisions threatened to undermine their efforts to establish anthropology as a respectable science in the eyes of politicians and the public. This concern peaked in the age of McCarthyism, when many politicians viewed anthropologists suspiciously, especially when they were critical of past or current government policies.

Significantly, the problematic relationship of cultural/historical facts, evidence (the facts marshalled to test or advance a theoretical perspective), and 'theory' was often a central issue in ICC hearings.<sup>50</sup> The Northern Paiute Nation case (Docket Numbers 87 and 17) is an excellent example. Steward appeared in these hearings as a government (defendant) witness. While he was being cross-examined on 19 and 20 May 1954, the plaintiffs' lawyer attempted, without success, to make Steward give 'yes' or 'no' answers to a series of questions about whether some of the statements contained in one of his scholarly publications, which he had submitted in evidence about Great Basin Indian social organization (1938), were accurate statements of facts or interpretations.<sup>51</sup> Eventually, this line of questioning provoked Steward to remark:

I have a feeling that Mr. Cobb [the plaintiffs' cross-examining lawyer] regards the scientific process as one of taking hunks of external reality he calls facts. You put them into a machine you call science. You start the machine going and conclusions come out. If the facts are correct, the machine will always produce the same kind of thing. The point I make is that facts are relative only

50 Historian Richard Evans, among others, notes that it is important to make distinctions among facts, evidence, and theory. Evans, *In Defence of History*, 75-102

51 Julian Steward, *Basin-Plateau Aboriginal Sociopolitical Groups: Bulletin 120* (Washington: Smithsonian Institution, Bureau of Ethnology 1938)

to point(s) of view, and some data may be facts for one point of view and not for another. Moreover, all these so-called facts go into different machines, different points of view, and come out differently. That is why I say it is not a question of saying whether this first monograph is wrong in fact.<sup>52</sup>

In this way, concerns about the provisional nature of culture history arose in USICC hearings well before American anthropology and history turned towards a more self-reflexive and less positivist perspective in the 1970s.<sup>53</sup>

When claims-oriented research became a major component of Australian anthropology almost twenty years later, the problematic relationship among facts, evidence, and theory became an increasing concern to those anthropologists who were involved. In contrast to Steward's perspective, these anthropologists have generally pointed to the need to separate evidence from theory in claims briefs and when testifying before the courts. In fact, the practice directions for expert witness issued by the Federal Court of Australia in 1998 require that theoretical assumptions be clearly stated.<sup>54</sup>

Separating facts from theory is certainly important, but as New Zealand historian Alan Ward has noted, the continuing drift towards a more relativist outlook in the humanities has meant that the boundary between fact and theoretical interpretation has become ever more blurred.<sup>55</sup> It also means that differentiating between advocacy and detached objective reporting is less clear. Thus, the courts, necessarily one of the bastions of positivism, face an ever more difficult and frustrating struggle in their attempt to make such differentiations and deal with the fluid nature of cultural/historical evidence. Canadian Supreme Court Justice J.J. Binney highlighted the problem in 1998 in the course of rendering

52 Julian Steward, 'Transcript, Indian Claims Commission, *The Northern Paiute Nation and the Bands Thereof v. the United States of America*, 1954,' unpublished transcript, Washington National Archives and Records Administration

53 J. Appleby, L. Hunt, and M. Jacob, *Telling the Truth about History* (New York: W.W. Norton 1995), 241–70; A. Barnard, *History and Theory in Anthropology* (Cambridge: Cambridge University Press 2000)

54 The practice guideline specifically states that submissions must 'give details of the expert's qualifications, and of the literature or other material used in making the report.' Also, 'all assumptions made by the expert should be clearly and fully stated.' Chief Justice M.E.J. Black, *Practice Direction Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* (Canberra: Federal Court of Australia 1998)

55 Alan Ward, 'History and Historians before the Waitangi Tribunal,' *New Zealand Journal of History* 24, 2 (1990): 151–67

his decision in the controversial *Marshall* case. He wrote: '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.'<sup>56</sup>

What Binney failed to acknowledge was that the litigation process itself plays a destabilizing role by stimulating new research and encouraging the re-examination of extant scholarship.

#### CONCLUSION

The Aboriginal and treaty rights claims litigation/settlement process began more than a half-century ago in the United States and about two decades later in Australia and Canada. From the outset it has been an interactive and cumulative process involving the Aboriginal, academic, and legal communities. In all three countries, it has been a driving force for path-breaking interdisciplinary cultural/historical research about indigenous people. This work made the economic, legal, and political implications of Native history starkly apparent long before it became an issue in post-colonial and postmodern studies in the academy. Likewise, this applied research raised concerns about listening to Native voices and the concomitant problems of competing lines of evidence well before they took a central place in academic discourses. Partly for these reasons, ethnohistorians have always found it challenging to take part in the process as expert witnesses.

The adversarial nature of the process greatly enhances the challenge they face. Although expert witnesses are there to assist (educate) the court, their evidence and testimony is challenged (tested) directly by opposing counsel through cross-examination. Cross-examining counsel normally are assisted by their own team of experts. In hotly contested cases, experts often find it difficult to avoid taking such challenges personally and becoming emotionally involved. From the beginning, the adversarial nature of the process frequently has had a divisive impact on the community of experts who have taken part. A key reason is that opposing lawyers often explore the limits of the theoretical differences that exist among experts. Consequently, expert witnesses are often pushed or pulled towards the boundaries of currently acceptable historical interpretation. These boundaries are ever changing as a result of new research and the fluid nature of theoretical discourses in the academy.

<sup>56</sup> *Regina v. Marshall*, 5 Nov. 1998

In the face of all these challenges, it is clear that historical experts have to be guided by the highest ethical and professional standards to maintain their integrity and avoid becoming merely advocates who do 'courtroom history.' Also, they must bear in mind that their primary responsibility is to the court rather than to their clients.

I presented preliminary versions of this article at the symposium 'Truth and Proof: The Humanist as Expert,' sponsored by the Australian Academy of Humanities in Canberra, 14–15 November 2002, and to the Justice Department of Canada, Toronto Office, 28 November 2002. I would like to thank the Canada Council Killam Fellowship program and the Social Sciences and Humanities Research Council of Canada for the financial assistance that made this research possible. I also express my appreciation to members of the Australian anthropological community, especially John Bern, Francesca Merlan, Nicolas Peterson, and Bruce Rigsby, for their generous advice and help. I thank Justice John Toohey and Sir Edward Woodward for granting me lengthy interviews. I appreciate the generous access to his papers that Sir Edward provided, and I thank the staff of the Melbourne University Archives, where they are held. I am indebted to Stuart Rush, QC, and Professor Dianne Newell for commenting on early drafts of this article, though I am responsible for any errors and omissions.