3. Anthropologists, land claims and objectivity: some Canadian and Australian cases

Introduction

Anthropologists live in a period of growing public awareness of our work in land claims in Canada and here. Some members of the public and many lawyers regard us as lacking objectivity. Our personal involvement with groups of indigenous people and our commitments to them are often obvious, and in turn, these may sometimes give rise to perceptions of bias, prejudice and partiality. In this paper, I neither argue the point nor propose detailed strategies of self-presentation and impression management as, for example, Brodsky (1991) does. Instead, I examine the courts' perceptions of our objectivity in three Canadian cases and the Land Tribunal's concerns for our objectivity in two Queensland land claims. I suggest that our aims should be modest.

I've chosen the Canadian cases for three reasons. First, because they are signal cases to gain legal recognition of common law aboriginal title; second, because anthropologists worked and appeared as expert witnesses in them, and third, because they have been identified as cases where the courts perceived the anthropologists as lacking objectivity (Sherrott 1992: 448). Finally, I've chosen the two Queensland cases because the Land Tribunal examined the principal anthropologists closely to assess their objectivity. I include archaeologists and linguists in my discussion because the courts have regarded their evidence somewhat differently from the evidence of social anthropologists. Archaeologists and linguists will be more involved in native title actions here in the future. The correctness and justice of the Canadian decisions are not at issue; I am concerned to characterise and to understand the three courts' perceptions of anthropologists' credibility and objectivity. To this end, I also include the courts' comments on indigenous oral evidence and the evidence of other experts.

I also touch on some of the issues and points relating to anthropologists and their evidence that have been raised by Sherrott (1992) and by Forbes (1993, 1995a). Sherrott (1992) examined the court's treatment of indigenous oral history evidence in Delgamuukw (1991) and compared it with the treatment of 'the scientific evidence' and 'the Aboriginal way of life evidence'. The former included evidence from archaeologists, a geologist, historians, linguists and a palaeobotanist, while the latter was mainly from two social anthropologists. Sherrott's
(1992: 441) paper was intended as further proof of the earlier assertion of Eric Colvin (who supported indigenous land rights in Saskatchewan) that 'the ordinary judicial system is an inappropriate mechanism for the claims of indigenous peoples'. One of the reasons Colvin used to justify his conclusion was that the 'rules of evidence were not designed to handle the complex historical issues raised by these claims'. Sherrott (1992: 448) is sympathetic to the use of indigenous oral evidence, and he also notes that 'the deep distrust shown by the courts towards anthropologists who have worked closely with Aboriginal Peoples effectively precludes the presentation of potentially vital evidence'.

For his part, John Forbes (1993, 1995a) displays a more conservative view towards the evidence to be presented and considered in native title actions. Forbes (1995a: 56) argues firstly that judicial and quasi-judicial methods of government action are suitable only when all parties are likely to have reasonably equal chances to obtain relevant evidence; second, that there are statements by lawyers and anthropologists that non-claimant parties will not have equal access to appropriate evidence and third, that if these statements and predictions are substantially correct, the distributive process should not be presented to the public as judicial activity, except where extinguishment issues or specific points of law are involved. Additionally, Forbes (1993: 215-7; 1995a: 58-62) is sceptical about the objectivity of anthropologists' evidence and other involvement in land claims. While Sherrott (1992: 441) can be read as sympathetic to 'an alternative to the traditional justice system as a means of determining Aboriginal people's claims', he gives no details and does not pursue the point. In contrast, Forbes concludes:

A frankly administrative scheme might be better for all concerned ... than a patchwork in which pseudo-litigation legitimises part of the expenditure and disposition of public property (1995a: 64).

Whereas Sherrott wishes to facilitate the presentation, admissibility and weight given to indigenous oral evidence, Forbes is concerned by court and tribunal procedures that depart from or dispense with rules of evidence.

**Baker Lake**

In Baker Lake (1979), a number of Inuit organisations and individuals sought a declaration of their aboriginal title with respect to part of the lands in the Baker Lake area of the Northwest Territories. The case is well known for setting out four criteria for establishing 'common law aboriginal title'. The plaintiffs proved '(1) that they and their ancestors were members of an organized society; (2) that the organized society occupied the specific territory over which they assert the aboriginal title;
(3) that the occupation was to the exclusion of other organized societies; and (4) that the occupation was an established fact at the time sovereignty was asserted by England' (Baker Lake 1979: 513). Thus they established their title, and the court also determined that it had not been extinguished by other competent bodies.

The Inuit witnesses, save one, had personal memories of life before they were placed on settlements, and they also spoke of what their 'old people' had told them. They impressed the court greatly:

I have no doubt as to the sincerity of all the Inuit witnesses when they testified to their feelings about the land ... Their attachment to the land and life on it is genuine and deep (ibid.: 529).

Two archaeologists appeared in Baker Lake. Dr E. Harp Jr, retired from Dartmouth College, provided an overview of the Inuit occupation of the North American Arctic, and Dr J.V. Wright, from the National Museum of Man, provided rebuttal evidence bearing on the Inuit occupation of the Baker Lake area before the historic period. They elicited no unfavourable comments from the court. Dr M.J. Freeman, a social anthropologist at McMaster University, had done much fieldwork previously with Inuit people and he gave evidence on Inuit use and occupancy of land in the Baker Lake area. His conclusions were based on extensive interviews with Inuit people and on a review of the archaeological evidence. The court noted that 'My conclusions and his, on the subject of Inuit land use and occupancy, do not differ significantly, if at all' (ibid.: 535). Another expert witness, Dr P. Usher, a 'Socio-Economic Consultant', had a postgraduate qualification in geography. Sherrott (1992: 448) incorrectly described him as an anthropologist. The court observed:

Dr Usher's evidence had more the ring of a convinced advocate than a dispassionate professional. There was a lot of prognosis ... .

Neither his formal training as a geographer nor his experience in and with the Arctic and Inuit qualify him to form opinions on political, sociological, behavioural, psychological and nutritional matters admissible as expert evidence in a court of Law.

I do accept his competence as a geographer (Baker Lake 1979: 638).

In summary, the court had reasonable regard for the anthropologists' evidence in this case.

Bear Island

In Bear Island (1984), the Temagami defendants claimed to have aboriginal rights in northern Ontario. The Attorney-General of Ontario brought an action against them claiming that all unpatented lands in the area were public lands. The defendants counter-claimed and asked for a declaration that they had a better right to possession of these lands than the Crown did.
The court found that the Crown had competently extinguished aboriginal rights in the area by treaty and other measures. The wider significance of the case lies in its acceptance of Indian oral history as admissible evidence for claims 'where history [was] never recorded in writing' (Bear Island 1984: 353). However, the court commented:

I feel obliged to comment on how disappointed I was that there was so little evidence given by Indians themselves... I expected that all of the older people of the Temagami Band who were able to give useful evidence would have been called. Throughout the trial I had an uncomfortable feeling that the defendants ... did not want the evidence of the Indians themselves to be given, except through the mouth of Chief Potts ... I also note that practically all of the evidence of place names, canoe routes, folklore sites, rock art, settlements and canoe styles came from non-Indians rather than from Chief Potts or any other Indian. The acknowledged 'old people' who knew the most about the oral history were inexplicably not called to give any such evidence' (ibid.: 369).

The court went on to describe Chief Potts' background and his evidence, obviously having little regard for the latter.

There were three archaeologists involved in Bear Island: Mr T. Conway, Dr W.C. Noble and Dr J.V. Wright. In summary, the court found that 'The archaeological evidence failed to prove any connection between the present defendants and any persons or groups on specific territory prior to 1820' (ibid.: 400).

Conway was described as 'a regional archaeologist and anthropologist employed by the Ontario government' (ibid.: 391). He gave extensive evidence about the claim area. The court was scathing in its assessment:

I found Mr. Conway to be the most biased and unreliable witness called at the trial. He exaggerated his archaeological knowledge of the area. He gave me the impression that he would accept as correct any hearsay told to him by a living Indian, regardless of whether or not it contradicted prior recorded statements by Indians to Dr. Speck in 1913, or to others. He would then endeavour to subjectively interpret and distort his own findings to confirm what he was told. He drew conclusions based on minimal or no facts. Most of his archaeological evidence relating to hard facts was proven to be incorrectly interpreted ... I had concluded that his evidence was biased, confusing, inaccurate and unreliable, and that it should be given little or no weight, even before Dr. Noble’s reply demolished it (ibid.: 390–1).

The court found Conway's evidence consistent with what other witnesses said about aboriginal land use, but rejected his interpretation that there had been extensive mining. Finally, it was noted that Conway had written an article after the trial began 'in an almost fictional manner, making it difficult to distinguish between the oral history and his own imagination' (ibid.: 399). The court's rejection of Conway arose from his unreliability as an expert witness, not his status as anthropologist or archaeologist.

Two social anthropologists or ethnologists, Dr E.S. Rogers (defence) and Dr C. Bishop (prosecution), gave evidence in Bear Island. Rogers was the preeminent ethnologist of Algonquian-speaking peoples in the eastern
Subarctic region, but had not done fieldwork in the claim area. He gave evidence mainly by analogy, arguing for the continuous residence of the Temagamis in the claim area based on his view that family hunting territories were stable over long periods of time, predating the fur trade (ibid.: 405; Chambers 1990: 26). The court (Bear Island 1984: 371) considered that Rogers' evidence could not be weighed as strongly as it would have, had he done fieldwork with the Temagami people.5

The court described Bishop as 'an eminent ethnologist, acknowledged by Dr Rogers as being one of the persons most knowledgeable about the Indians of north-eastern Ontario' (ibid.: 397), but does not say whether Bishop had done fieldwork with the Temagami people. Bishop proposed that the Ojibwa-speaking Temagami people currently living in the claim area were not its original inhabitants, but had moved there from Lake Huron and the Sault Ste. Marie area as a large group or small groups of families over a period of time (see also Chambers 1990: 26); and that none of the people who lived in the claim area in 1640 had left descendants due to Iroquois raids, diseases, famine and the fur trade. The court said there was no evidence to support Bishop's opinions and dismissed them.

A third ethnologist in the case, whose fieldwork in 1913 provided significant evidence, was Dr F. Speck an Americanist well known for his salvage ethnography in eastern North America earlier this century. The court said:

I accept Dr. Speck's Memoir No. 70 as being the best evidence as to family groups. His information was obtained long before the present controversy arose and was much closer in time to many events... It is not tainted with the partisanship shown by many of the witnesses at this trial (Bear Island 1984: 407).6

Two linguists were involved. Dr J. Nichols is an Algonquianist, a specialist on Ojibwa linguistics, and the court (ibid.: 371) recognised him as an acknowledged expert in his field. He was assisted by Dr J. Chambers (1990: 26; Levi 1994: 4–5), who noted that after the ethnologists repeatedly asserted that the linguistic evidence supported their arguments, the court asked about it and the defence retained Nichols. Chambers also said:

The linguistic evidence seems, simply, incontrovertible. The Temagamis could not have been part of the Sault Ste Marie nation at the time of the Royal Proclamation [1763]; much less at the time of the Robinson-Huron Treaty [1850]. They must have occupied the lands in or very near the region they are claiming as their ancestral home well before those dates. The linguistic evidence allows no other conclusion (1990: 30).

However, while the court accepted that 'the linguistic evidence indicates that a core group of people living at Bear Island had separated from the Ojibwa of Sault Ste. Marie about 500 years ago' and still later from people at Lake Nipissing and today are more closely associated with the
Temiskaming, Matawagami and Mattachewan people, it also said that 'Language can change in two or three generations and therefore any specific language does not specifically prove a connection to others' (Bear Island 1984: 403-4). Thus, the court accepted part of the linguists' evidence, but dismissed their conclusions without really understanding their methodology and how they achieved their results.

There was a second kind of linguistic evidence presented that Chambers (1990) does not mention. Craig Macdonald gave evidence on place names; see below for the court's assessment of it. James Morrison, a researcher for the defendants but not otherwise characterised, gave evidence on indigenous language place and group names. The court observed:

Mr Morrison did a superb research job. He stated that he had a strong commitment to the defendants and that it would be up to the court to separate his sympathies and biases from the use of his actual material. Unfortunately, I find that I must reject many of his conclusions because they are either sheer speculation or because they are interpretations of documents that I find unreasonable. This does not detract from my respect for his technical research (Bear Island 1984: 402).

Later, the court characterised a core group of expert witnesses (Macdonald, Conway and Morrison) for the defence as 'typical of persons who have worked closely with Indians for so many years that they have lost their objectivity when giving opinion evidence' (ibid.: 390).

It dismissed most of Macdonald's evidence as hearsay and noted that better evidence would have been available, had the defence not claimed privilege for a tape recording of a recently deceased elder. Macdonald gave much evidence on place names in the claim area, using data from local Indian people, but the defence called none of them in support. The court decided the evidence was of little value because many names were of recent origin and did not help to identify the lands occupied at any particular time by a band rather than by individual people or families (ibid.: 426).

Macdonald also gave much evidence on canoe routes in the claim area, arguing that it formed a natural geographic area that was:

consistent with the position that there was one group of people living in the area. I do not agree. I felt Mr. Macdonald was extremely biased in favour of the Indians ... in cross-examination, he appeared to have difficulty following the documents put to him to be considered. When asked about the Nipissings that he interviewed in the 1970s ... without any apparent reason he exploded and stated that the court rules were loaded against the Indians. At another time, he mentioned that he was so worked up that he could not remember a person's name ... . All of this indicates that he was clearly emotionally involved and a partisan witness ... there is no question in my mind but that Mr. Macdonald was being highly defensive of the Indians' position, over-emphasizing certain factors ... . He exhibited extreme bias in refusing to acknowledge the obvious with respect to the Skene map ... thus rendering his position ludicrous and of no use (ibid.: 428-9).
Chambers (1990: 30) says that the judge dismissed the expert evidence as 'nebulous' when he announced his decision, and certainly he did not hesitate to give his view of the main body of experts for the Temagamis:

In summary, I believe that a small, dedicated and well-meaning group of white people, in order to meet the aspirations of the current Indian defendants, has pieced together a history from written documents, archaeology and analogy to other bands and then added to that history a study of physical features and other items, together with limited pieces of oral tradition ... This leads me to doubt the credibility of the oral evidence introduced [including Chief Potts' evidence], and affects the weight to be given to the evidence of non-Indian witnesses (Bear Island 1984: 372).

In summary, the court generally had low regard for the defence's experts.

Delgamuukw

The Delgamuukw (1991) action was brought against the Province of British Columbia and the Government of Canada in the supreme court of British Columbia by the hereditary chiefs of the Gitksan and Witsuwit'en peoples of British Columbia in the mid-1980s. It went to trial in May 1987. The plaintiffs asked for a judgement:

(a) that they own the territory;
(b) that they are entitled to govern the territory by aboriginal laws which are paramount to the laws of British Columbia;
(c) alternatively, that they have unspecified aboriginal rights to use the territory;
(d) damages for the loss of all lands and resources transferred to third parties or for resources removed from the territory since the establishment of the colony; and
(e) costs (Delgamuukw 1991: vii).

The court found against the plaintiffs in March 1991. They appealed, and in May 1993, the court of appeal of British Columbia found that aboriginal rights had not been extinguished to the extent found earlier. The plaintiffs then took an appeal to the supreme court of Canada. In early 1994, the supreme court gave the Gitksan and Witsuwit'en hereditary chiefs leave from their action for two years, and they signed an accord with the British Columbia and Canadian governments to negotiate a treaty. Currently, Gitksan and Witsuwit'en negotiators are separately engaged in negotiations with the Province and federal governments, but little progress has been made towards the recognition of continuing aboriginal rights.

The case has generated a considerable literature, most of it critical of the 1991 decision (see Cassidy 1992; Miller 1992; Asch 1992; Murray 1993). During the trial, the court released two judgments. Uukw (1987) and Delgamuukw (1987), which had the effect of facilitating the admissibility of indigenous oral evidence, Sherrott (1992: 444) notes, but nonetheless, the court subsequently accorded little weight to what it heard:
For example, they [the plaintiffs] have an unwritten history which they believe is literally true both in its origins and in its details. I believe the plaintiffs have a romantic view of their history which leads them to believe their remote ancestors were always in specific parts of the territory, in perfect harmony with natural forces, actually doing what the plaintiffs remember their immediate ancestors were doing in the early years of this century. They believe the lands their grandparents used have been used by their ancestors from the beginning of time. They believe their special relationship with the land has always been enlightened. And they believe Indian social organization in the territory has always been more or less as it is now. I am satisfied that the lay witnesses honestly believed everything they said was true and accurate. It was obvious to me, however, that very often they were recounting matters of faith which have become fact to them. If I do not accept their evidence it will seldom be because I believe they are untruthful, but rather because I have a different view of what is fact and what is belief (Delgamuukw 1991: 48–9).

Three archaeologists provided evidence in Delgamuukw. They were Ms S. Albright, Dr K. Ames and Dr G. Mac Donald. However, the court considered that none of the archaeological evidence related unambiguously to the plaintiffs, saying that, 'Any aboriginal people could have created these remains' (ibid.: 59). Dr A.S. Gottesfeld, a geomorphologist, and Dr R. Mathewes, a palaeobotanist and palaeopalynologist, provided evidence to date a prehistoric landslide that offered a naturalistic explanation for an event that figures in some of the oral histories of origin (adaawak) owned by certain Gitksan houses (the indigenous land-owning corporate groups). The court did not reject the possibility that the landslide was connected to Gitksan presence in the area about 3,500 years ago, but it did not find it necessary to accept it either (ibid.: 61–6).

The Gitksan genealogical evidence was compiled by Ms Heather Harris, a Gitksan person by adoption. The court observed that Harris lacked qualifications for the work, did not follow conventional guidelines for such work nor submit work for scrutiny and testing, and was an interested plaintiff. Nonetheless, the court was impressed with Harris' 'competence and industry' and accepted her charts 'as generally reliable evidence of genealogy' (ibid.: 67). The court was less impressed with the Witsuwit'en genealogical charts, and overall, considered it not crucial to the case that the charts were not 'strictly correct' (ibid.: 67–8).

Evidence on the origins and migrations of the Gitksan houses from analysis of adaawak from secondary source translations was presented by Ms Marsden, a Gitksan person by adoption. Marsden was described as holding a Bachelor's degree in anthropology. The court observed:

I am unable to accept Ms. Marsden's theory. I have no doubt it is put forward honestly and in good faith, but her qualifications are not adequate for such a study, it has not been published or subjected to academic or other learned scrutiny, she is an interested party, and she has ignored some verified facts and other learned opinions such as those of Drs. Kari and Gottesfeld because ... they do not fit her chronology (ibid.: 68).
Dr J. Kari and I submitted an expert opinion evidence report (Rigsby and Kari 1987) on 'Gitksan and Wet'suwet'en Linguistic Relations', and Kari was called and cross-examined. The court (Delgamuukw 1991: 68) described us as 'specialists in languages each having a Doctorate in that discipline'. There was a minor embarrassment when cross-examination established that the plaintiffs' research coordinator authored a small part of our introduction. The court said that our evidence supported 'Gitksan and Wet'suwet'en identity as distinct peoples for a long, long time' (ibid.: 73).

In the course of comprehensive evidence on matrilineal house group territories and their external boundaries, Neil Sterritt, a Gitksan chief, geologist and keen student of place names, presented evidence on Gitksan place names, the court did not discuss it in the judgment.

Two historical geographers, Dr Arthur Ray and Dr Robert Galois, provided expert evidence for the plaintiffs, but the court discussed only Ray's evidence in its judgment (ibid.: 73–5). Ray (1991, 1993) has published two papers on his work for the case, and Galois (1994) has published his expert opinion evidence report. The historians for both sides impressed the court greatly:

Generally speaking, I accept just about everything they put before me because they were largely collectors of archival, historical documents. In most cases they provided much useful information with minimal editorial comment. Their marvellous collections largely spoke for themselves (Delgamuukw 1991: 52).

Three social anthropologists, Mr H. Brody, Dr R. Daly and Dr A. Mills, provided expert evidence for the plaintiffs. Mr M. Jackson, one of the plaintiffs' lawyers, has described their briefs:

the 'expert' evidence of anthropologists was not conceived as the primary proof of the claim: rather it was conceived to provide an explanatory text to the statements and descriptions of the Aboriginal peoples themselves given in their own voices and in their own languages. The role of the anthropological expert ... was therefore to write a report and to give evidence which described Gitksan and Wet'suwet'en society from the perspective of the Aboriginal peoples themselves and to do so within a framework which would enable the court to understand and respect that perspective (Jackson 1994: xviii).

The court mentioned Brody only in passing, and dismissed the evidence of Daly and Mills, who had done fieldwork with the Gitksan and the Wit'suwit'en. It chided them for working almost exclusively with the chiefs as this was 'fatal to the credibility and reliability of their conclusions' (Delgamuukw 1991: 50) and said of Daly:

he made it abundantly plain that he was very much on the side of the plaintiffs. He was, in fact, more an advocate than a witness. The reason for this is perhaps found in the Statement of Ethics of the American Anthropological Association which Dr. Daly cites at p. 29 of his report, as follows:

Section 1. Relations with those studied: In research, an anthropologist's paramount responsibility is to those he studies. When there is a conflict of interest, these
individuals must come first. The anthropologist must do everything to protect their physical, social and psychological welfare and to honour their dignity and privacy (ibid.: 50).

Further, the court criticised Daly for placing too much weight on continuing subsistence production, for saying that house members devoted substantial portions of their business and wage incomes to house affairs, for saying that houses 'own the rights to the labour of their sons and daughters, and of their daughters' offspring, and they of course own lands and river sites as well', and for writing a 'highly theoretical' report detached from what happens, 'on the ground' and 'exceedingly difficult to understand' (ibid.: 50–51). The court took a different view on the first point, and considered that the second and third had not been proven at trial. Lastly, the court observed that Daly did not take notes during his two years of fieldwork and that a comprehensive survey of over 1,000 people made in 1979 had been kept from him. The survey had an 80 per cent return, and revealed that 32 per cent of the sample did not attend feasts, only 29.6 per cent hunted and only 8.7 per cent trapped. The court said:

Many of his views of Indian life may have been markedly different if he had access to this substantial body of information in the possession of his clients. For these reasons, I place little reliance on Dr. Daly's report or evidence. This is unfortunate because he is clearly a well qualified, highly intelligent anthropologist. It is always unfortunate when experts become too close to their clients, especially during litigation (ibid.: 51).

The court gave Mills less attention, but said 'she was very much on the side of the plaintiffs' and criticised her for changing her opinion from her written 1986 report, 'where she attributed almost all Wet'suwet'en social organization ... to borrowings from the Gitksan or other Coastal Indians' (ibid.: 51). Finally, the court completed its consideration of the social anthropologists by saying:

apart from urging almost total acceptance of all Gitksan and Wet'suwet'en cultural values, the anthropologists add little to the important questions that must be decided in this case. This is because ... I am able to make the required findings about the history of these people ... without this evidence (ibid.: 51).

Daly and Mills (1993) and Mills (1994: 10–33; 1995) provide strong responses to the court's criticisms. In summary, the court had higher regard for what it considered to be more objective and scientific evidence from the natural scientists, archaeologists, linguists and historians, and it had no regard for the evidence of the social anthropologists.

Lakefield and Cliff Islands National Parks land claims

The Queensland Land Tribunal has not reached determinations in the Lakefield and Cliff Islands National Parks land claims, and their findings
are not yet published. The principal anthropologists, Diane Hafner and myself, played more varied roles in the claims than did the Canadian anthropologists in theirs. We wrote the claim books and prepared other submissions, did organisational and logistic work, proofed witnesses, did translation and interpreting, spelled indigenous language words, local place names and personal names for the Tribunal's recordists, and examined witnesses, amongst other tasks. We also were recognised as expert witnesses (Freckleton 1985), which allowed us to offer opinion evidence in addition to factual evidence. Two other anthropologists, Marcia Langton and Peter Sutton, examined claimant witnesses, and Sutton examined me for much of my opinion evidence. Hafner and I were present throughout the hearings, and we camped with the claimants and Tribunal members and staff for a fortnight's hearings on Lakefield National Park. There were more opportunities for the Tribunal members to assess whether we were biased, partial or prejudiced than had we simply appeared and acted as expert witnesses.

The Tribunal examined Hafner and me early in the hearings about our academic qualifications and fieldwork experience, our knowledge of the Australian Anthropological Society and American Anthropological Association Codes of Ethics and whether we adhered to them, our personal relationships with claimants, matters of confidentiality and our views on whether harm might be done to the claimants if certain information and evidence were not restricted. During our expert evidence, the Tribunal examined us separately on our research methodology, and Hafner was questioned about her mode of proofing witnesses. When the Tribunal releases its findings, we will learn what its members' perceptions of our objectivity were. Certainly the Tribunal was concerned to get evidence of the character and extent of our involvement in the preparation of the claims, of our research methodology, and of our adherence to professional codes of ethics.

My objectivity and competence were called into question by some interested parties, including local pastoralists, who were upset that I named some white men alleged to have fathered children with Aboriginal women and included evidence in the claim books of local pastoralists' mistreatment of Aboriginal people. In this regard, I was struck by the similarity of criticism made that foreign language interpreters sometimes lack objectivity and display bias and partiality in their courtroom work during an evening's session at the recent conference of the International Association of Forensic Linguists. One judge put a forceful case that interpreters should function strictly as conduits for information between the persons being interpreted for. She said that judges and juries wish to assess witnesses' evidence and their truthfulness directly without having interpreters interpose their own views in the process of translation and
interpreting (as distinct from interpretation). She also considered that any action which detracted from that goal and compromised interpreters' appearance of impartiality was undesirable as, for example, when an interpreter might help a witness about to take the stand. Others put the view that translation and interpreting are never simple and straightforward, but always involve subjective judgment and interpretation by interpreters who try to communicate where there may be little or no cross-cultural understanding. In the event, the session reached no consensus. Anthropologists also do much interpretation in their varied roles in land claims.

Conclusion

I have described how three Canadian courts perceived the objectivity of anthropological and other expert evidence, as well as described the Queensland Land Tribunal's concerns to assess the anthropologists' objectivity in two land claims. I suggest that we Australian anthropologists have been particularly susceptible to charges of lack of objectivity not only because of our perceived close relationships with Aboriginal people and commitments to them, but also because we (and perhaps certain anthropological linguists) play roles in land claims other than as expert witnesses. We provide many opportunities for others to observe us and to assess our objectivity.

Neal (1995) and Rummery (this volume) have proposed a solution to the problem which would utilise senior anthropologists as expert witnesses and separate them from the other expert roles where they are likely to be identified as representatives of and advocates for the claimants. That position has merit and bears further thought and open discussion. Professor C.R. Williams (1994: 7; cf. Rosen 1977: 569-71) has considered a more radical solution after reviewing some problems of evidence, especially in the adversary system, and he has written sympathetically of American and Canadian proposals for court appointed experts: 

On the application of a party or upon her or his own motion the Judge may appoint one or more independent experts to inquire into and report on any question of fact or opinion relevant to the case. The expert should be named by the Judge and should, where possible, be an expert agreed upon by the parties. The Judge should give the court expert instructions regarding the expert's duties and those instructions should, if possible, be agreed upon by the parties. The court expert should prepare a written report which should go to the judge and the parties. At the trial the report is admitted in evidence, and the court expert may be called to testify by the Judge or any party, and may be cross-examined by any party. Where a court expert is appointed, any party may call one expert to give reply evidence on any question of fact or opinion reported on by the court expert. No party, however, may call more than one such witness without leave of the court (Williams 1994: 7).
Nonetheless, the general problem remains of the perception of the objectivity of the other anthropological experts working on the claims. There is a need for further advice to all the anthropologists working on a claim to strengthen the perception of their objectivity and perhaps thereby to bolster their credibility.

With respect to the general problem of our objectivity, I believe that Neate (1995a: 26–9) has cast it correctly as one of the weight to be given to our evidence. To maximise the weight of our evidence, we must speak openly about our research methodologies (which may include the interpretation of primary archival and other documents, the interpretation of archaeological data and analyses, the interpretation of oral history texts, linguistic semantic analysis, historical-comparative linguistic methodology, survey methodology, as well as participant-observation fieldwork), about our involvements in the preparation of the claim and about the ethical precepts and practices we are committed to (including our views on confidentiality). We must speak and be seen to speak truth, not untruth.12 And as Neate also suggests, our credibility and lack of bias can be strengthened by reference to the ‘ongoing process of review of ... [our] work by other anthropologists who have no connection with the claimants’ (1995a: 27–8). This can be done by reference to our professional literature and by calling other anthropologists to assess our work.

Maley and Candlin (1995) have examined transcripts of evidence-in-chief and cross-examination of expert witnesses across a variety of Australian courts. They found that expert witnesses were ‘most frequently and savagely challenged on the relevance of their expertise and their impartiality’ (Maley, pers. comm.) Maley recommends to prospective expert witnesses that: they establish that they do primary research, not just do consultancies, teach or have a qualification; they take care who they accept work from; they avoid associating themselves and their evidence with known interest groups; and they align themselves and their evidence with the work of well known scholars in their field of expertise. The first and final recommendations recognise that our expert status and reputations come largely from within our disciplines and from our peers. This acknowledges the importance of publication in refereed learned journals and the like.

Finally, there is a considerable amount of anthropological work done in the land claims arena that does not result in scholarly publication. That is not healthy for the main business of anthropology. Kew has addressed the topic in his Preface to Mills’ published expert opinion evidence report on the Witsuwit’en:

questions will be raised in academic circles – Did Mills get it right? Are her ‘facts’ correct? Can her account be trusted? The courts will answer such questions – in the manner of courts. But should anthropologists, as experts, merely submit these
reports and be content as courts decide which field methods are appropriate, which theoretical models have current relevance, and which expert's analysis provides the better explanation? Of course not. For anthropologists, those questions can only be answered properly within the discipline of anthropology – in the give and take of academic seminars, conference discussions, and journal exchanges. As anthropologists are called upon more frequently to conduct research and to prepare reports for court cases (as well as to produce supporting documents for treaty negotiations), there will be pressures to sidestep the academic seminar, as it were, and to let others call the shots. The author of this book and the Witsuwit'en and Gitksan chiefs are to be commended for the foresight which has led them to bring this study to publication. This achieves, for the story of Witsuwit'en law and government, a shift in venue from the court of law to a wider set of assessors (Kew 1994: xvi).

I commend Kew's views. We need to open our research up to our wider set of peers in anthropology and cognate disciplines, as well as to the public. We have nothing to hide and we have much to learn from one another.

Notes

1. I thank Richard Daly, Hank Lewis and unnamed colleagues at the University of Alberta, Yon Maley, Tonia Mills, Graeme Neate, William C. Noble, Peter Sutton, and Nancy Williams for information, helpful criticism and suggestions on an earlier draft of this paper. I alone am responsible for any errors and for the views expressed.

2. I have given much thought to the phrasing of the propositions expressed in this sentence and in the end, I decided to qualify the first clause with often and the second with sometimes. I cannot speak for the Canadian situation, but it is the case here that most anthropologists working on land claims have not had previous fieldwork experience with their Aboriginal clients. Barnes (1994: 58–9) has distinguished friends-for-the-time-being from friends-for-life in a discussion of deception in ethnographic fieldwork. Friends-for-the-time-being seems an apt characterisation of the more common relationship between anthropologists and their clients. See also Barnes (1979: 115–6).

The meanings of 'objectivity', 'bias', 'prejudice' and 'partiality' are as defined in The Macquarie Dictionary and other national standard language varieties of English. I assume they are shared by the courts, tribunals, myself and other speakers of Standard English.

3. Nonetheless, the courts in Australia and Canada have shown increasing willingness to admit evidence on the basis that it is within an exception to one or more of the rules of evidence. Importantly, Australian tribunals are expressly not bound by the rules of evidence – see, for example, the National Native Title Tribunal in Native Title Act 1993 s.109 and the Land Tribunal in Aboriginal Land Act 1991 s.108 – nor is the Federal Court of Australia when it deals with native title matters (see Native Title Act 1993, s.82).

Sherrott's view is not applicable in Australia. I know of no land claim in the Northern Territory or Queensland where judicial 'deep distrust' has precluded the admission of any evidence from suitably qualified anthropologists. Their evidence has been admitted, subjected to scrutiny and then accepted or rejected after due consideration.
4. The following text and that of Michael Jackson's quoted later support the view that the primary or best evidence comes from the claimants in many cases. In the United States Indian land claims, it was the anthropologists, historians and other experts who provided the bulk of primary evidence, but in Canada and Australia, the courts and tribunals have shown a distinct preference for indigenous oral evidence. This raises the question of the role of the expert witness: to provide factual information in a more readily accessible form to the court or tribunal than that gained by way of oral evidence from claimants; to assist the court or tribunal to understand the oral evidence of claimants (for example, by providing background or a context in which questions may be put and and answers understood); or to do both? In support of the third position, note Maurice's comment in the Matarangka claim:

Dr Merlan's materials prepared in support of the claim were so thoroughly researched and carefully written that, for the most part, the Aboriginal evidence served simply to demonstrate the degree of excellence she had achieved in her description of social organisation, relationships between people and land, sites, mythology, totemism, recruitment of outsiders, succession, local group structure, hunting and gathering activities - the list could go on (Aboriginal Land Commissioner 1990a: 29).

5. This conclusion is similar to the Court's conclusion in Milirrpum in comparing Professor Stanner's evidence with Professor Berndt's. Stanner had not done fieldwork with the Yolngu plaintiffs and Berndt had.

6. The court's comments raise the question whether the earlier work of, say, Roth and Tindale should be preferred or given more weight because it might be seen to be more objective. I think that misses the point. The weight to be given to any evidence should reflect the scrutiny and testing of it - recall that error is a kind of untruth.

7. In comparison, when the Land Tribunal (Aboriginal Land Tribunal 1994: 68–103) assessed the archaeological and related evidence in the Simpson Desert National Park land claim, it found that the claimants were descended from the Wangkangurru and Wangkamadla people who lived on or used the claimed area for substantial periods in the past.

8. Asch (1992: 236–7) has rebutted the court's view that the Code of Ethics requires anthropologists to always advocate their clients' point of view. He did this by reference to its discussion in a widely used introductory textbook and to the circumstances of its adoption during the Vietnam War. In the former, the Code was intended to insure the rigour and comparability of research results, and in the latter, it was intended to expose persons who used anthropological cover to engage in espionage and to insure that anthropologists did not engage in activities that might lead to serious consequences, such as death, for their informants.

9. Contra Forbes (1995a: 68, fn 88), Sutton was not sworn and did not appear as expert witness.

10. The implications of such a general principle in specific cases would be considerable because the demand for anthropological consultants exceeds their supply. There are only a small number of senior Aboriginalist anthropologists in the country and, further, they have worked with a limited number of groups. We might ask what
effect the principle would have had on the preparation and presentation of the Flinders Islands-Melville National Parks claims, had Peter Sutton been called only as expert witness by the claimants. Similarly, what effect would it have had on the preparation and presentation of the Lakefield-Cliff Islands National Parks claims, had I been called only as expert witness either by the claimants or by counsel assisting? As well, is it practical and reasonable to expect junior anthropologists who have no fieldwork experience with a group to prepare a claim without involving a senior anthropologist who has long experience with them (ignoring the customary professional courtesy of contacting and consulting with them)? It seems to me that every claim warrants considering whether the application of the principle would aid or harm the presentation of the claimants' case.

11. Williams' proposal is akin to the situation in the Northern Territory where the Land Commissioners have often had their own anthropological consultant for particular claims (Neate 1989: 170–2). Sometimes the consultant has been available for cross-examination, other times evidently not. It seems to me that the appointment of an anthropological expert by a court or tribunal would not in itself guarantee their objectivity. It is the scrutiny and testing to which such a person and their evidence are subjected that confirms their objectivity or lack thereof.

12. 'Truth', a common abstract mass noun in Standard English, has its dictionary meaning here and elsewhere in the paper. Beyond this, I regard truth not as an absolutistic notion, but as always socially situated and culturally constituted in tokens of its use. I offer no suggestions for establishing the truth-values of its tokens, and like Bailey I consider it important to try to ascertain 'the consequences of having one or another value-truth (which is always a basic lie) prevail' (Bailey 1991: 129). Tokens of truth and (untruth) have rhetorical and other pragmatic value.