

*R. v Donald Marshall Jr., 1993-1996*<sup>1</sup>

BETWEEN NOVEMBER 1993 AND JUNE 1996, my life became enmeshed in a court case involving fishing and the sale of fish by a Mi'kmaq resident of Nova Scotia, Donald Marshall Jr. The court case resulted from charges brought against Mr. Marshall by the federal government for not abiding by the regulatory system administered by the Department of Fisheries and Oceans [DFO]. According to the Mi'kmaq community, however, fishing and selling fish is a right implicitly recognized in a chain of treaties signed with the British Crown between 1725 and 1779. Since these treaties are protected under section 35 of Canada's 1982 Constitution, the Mi'kmaq community felt that Mr. Marshall was not violating a federal statute but exercising his constitutional rights. This interpretation was not shared by federal authorities. Though the government recognized that the Constitution protected "existing aboriginal and treaty rights", it argued that further clarifications were needed to determine what rights stemmed from the treaties made with the Mi'kmaq. Since the Supreme Court of Canada had not yet provided such clarifications, lawyers representing the Mi'kmaq community and the federal government began a protracted legal proceeding in which they asked the court to define the Mi'kmaq community's treaty rights in relation to the commercial fishery, and specifically whether that "right" was subject to DFO regulation.

Over the last 20 to 30 years, a number of scholars have provided the courts with their opinion on historical issues. Some have written about their experiences, focusing principally upon the difficulties of explaining the past to an "audience" whose discipline is governed by a different set of rules.<sup>2</sup> This commentary has sometimes involved a critique of the judiciary for either rejecting or misinterpreting academic opinions, a viewpoint most often advanced by historians and anthropologists representing aboriginal communities.<sup>3</sup> My own interest lies in a different direction, in analysing how current social and political forces foster public debates regarding the history of European-aboriginal relations. These debates reveal opposed interpretations of how relationships between the state and Canada's aboriginal population should be managed. The case known as *R. v Donald Marshall Jr.* in which three professional historians testified illustrates this process.

That the charges against Donald Marshall Jr. proceeded to trial reflected various factors which converged between 1993 and 1996: the nature of the charges, the response of the federal government to changes in the aboriginal fishery, the internal

- 1 Research for this article was completed while I was a Social Sciences and Humanities Research Council [SSHRC] post-doctoral fellow and a research fellow at the Gorsebrook Research Institute at Saint Mary's University. I gratefully acknowledge the support of both institutions. Portions of this paper were presented at the Atlantic Canada Studies Conference in Moncton in May 1996. Finally, I would like to thank John G. Reid and Bruce Wildsmith for commenting on earlier drafts of this article.
- 2 Jack Campisi, *The Mashpee Indians: Tribe on Trial* (Syracuse, 1991); G. M. Dickinson and R. D. Gidney, "History and Advocacy: Some Reflections on the Historian's Role in Litigation", *Canadian Historical Review* LXVIII, 4 (December 1987), pp. 576-85.
- 3 See for instance articles by Julie Cruikshank, Robert Fisher and Robin Riddington in a special issue of *B.C. Studies*, 95 (Autumn 1992) and Arthur J. Ray, "Creating the Image of the Savage in Defence of the Crown: The Ethnohistorian in Court", *Native Studies Review*, 6, 2 (1990), pp. 13-29.

social and political dynamics then current within the Mi'kmaq community and the government decision to charge Donald Marshall Jr.

First, there was the alleged offence. The charges stemmed from observations made by a DFO officer in August 1993. The officer's written report was not disputed by the Defence and was later used as the basis of an agreed statement of facts submitted by both parties to the Court. According to this statement, at around ten o'clock on the morning of 24 August 1993, Donald Marshall Jr., a Mi'kmaq resident of Membertou reserve in Cape Breton,<sup>4</sup> his common-law wife, Jane MacMillan, and Peter Martin of Listiguj<sup>5</sup> were fishing for eels in Pomquet Harbour, located on the northern shore of mainland Nova Scotia, just east of Antigonish. Using 'fyke nets', a type of fixed net, the three transferred the eels to a holding pen situated on lands belonging to the Mi'kmaq community of Afton. At about 1:10 p.m., Mr. Marshall "helped weigh and load his eels onto a truck belonging to Southshore Trading Company Limited of Port Elgin, New Brunswick". This company purchases and sells fish. Later the truck was stopped by DFO officers and was found to contain 463 pounds of eels. As a result Mr. Marshall, Ms. MacMillan, and Mr. Martin were charged with three offences under the Maritime Provinces Fishery Regulations. First, the three were accused of fishing eels without a licence contrary to section 4(1) of the Fishery Regulations. This regulation states that "no person shall fish for or catch and retain any fish a) unless the person is authorized to do so under the authority of a licence issued under these Regulations, the Fishery [General] Regulations or the Aboriginal Communal Fishing Licences Regulations". Second, the three were accused with fishing "during the closed time for eels with eel nets, which were not dip nets, contrary to s. 20 of the Regulations". Third, they were accused of selling eels "which had not been caught and retained under a licence issued for the purpose of commercial fishing or such other licence as provided in s. 35 92) of the Fisheries Regulations". This section of the Maritime Provinces Fishery Regulations outlaws selling or bartering fish without a licence issued by DFO or a licence issued under the Aboriginal Communal Fishing Licences Regulations. In contravening these regulations, the three were charged with committing an offence under s. 78(a), an "offence punishable on summary conviction are liable, for the first offence, to a fine not exceeding one hundred thousand dollars...or to imprisonment for a term not exceeding one year, or to both".<sup>6</sup> Over the next several months, the federal government dropped all charges against Ms. MacMillan and Mr. Martin but not against Mr. Marshall.

The second factor which contributed to the case proceeding to trial was the Mi'kmaq community's resentment of the government's attempts to minimize their peoples' economic needs. The charges against Mr. Marshall had been laid during the initial stages of a crisis in the Atlantic fishery, a time when the federal government was being criticized for mismanaging the fishery. This crisis likely contributed to government insistence that Mi'kmaq communities adhere to the DFO's regulatory system and heightened government concern about individuals such as Mr. Marshall

4 Membertou is located on the outskirts of Sydney, Nova Scotia.

5 In English orthography "Restigouche", in the province of Quebec.

6 *R. v Donald Marshall, Jr.*, Nova Scotia Provincial Court, 27 June 1996, pp. 1-3.

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who were not.<sup>7</sup> This was a particular problem since the Mi'kmaq community felt that DFO had deliberately shut them out of the fishery ever since the introduction of the licensing system in 1976. Though unwilling to relax its control, the federal government had made tentative attempts in 1992 to include the Mi'kmaq in the commercial fishery, in the form of the Aboriginal Fisheries Strategy [AFS]. This program had been launched, however, not because of government initiative but as a result of a Supreme Court decision in 1990.<sup>8</sup> In *R. v Sparrow*, the Court had ruled that aboriginal people in Canada had a right to fish for subsistence or ceremonial purposes, a right that superseded that of all other members of society. This right, said the Court, could be limited or curtailed but the onus was upon the government to demonstrate how and why this limitation should be enforced.<sup>9</sup> In 1993, however, at least two Mi'kmaq communities had refused to sign a licensing agreement under the AFS programme: Membertou, the place of Mr. Marshall's official residence and Afton, the location where he and the others were fishing for eels in August 1993.<sup>10</sup>

Both Afton and Membertou were wary that in signing a licensing agreement and accepting federal jurisdiction, they would be undermining their treaty and aboriginal rights, a point they thought would later be used to impose unilateral regulations in any future negotiations regarding the fishery.<sup>11</sup> For both these communities, the *Sparrow* decision in 1990 had demonstrated that the government was unwilling to implement further changes to an aboriginal fisheries program without direction from the Supreme Court. Indeed, the decision provided hope that the Court might rule favourably on a case involving the commercial fishery. While a court case in British Columbia focusing upon this issue was already on appeal to the Supreme Court, the defendant there was not covered by treaty and thus had based her claim on an aboriginal right.<sup>12</sup> The Mi'kmaq of Nova Scotia, however, had signed a series of treaties with British colonial officials which they believed established the parameters in which their relations with European governments should be governed.<sup>13</sup> Thus, after Mr. Marshall

7 DFO commercial fishing policies for the period in which the alleged offense occurred can be found in *Commercial Fisheries Licensing Policy for Eastern Canada* (Ottawa, 1992).

8 For an explanation of this program, see Melvin H. Smith, Q.C., *Our Home or Native Land? What Governments' Aboriginal Policy is Doing to Canada* ([1995] Toronto, 1996), p. 207; Bruce H. Wildsmith, "The Mi'kmaq and the Fishery: Beyond Food Requirements", *Dalhousie Law Journal* 18, 2 (Fall 1995), pp. 137-40.

9 *R. v Sparrow*, [1990], 3 *Canadian Native Law Reporter*, pp. 160-87; Thomas Isaac, "Balancing Rights: The Supreme Court of Canada, *R. v Sparrow* and the Future of Aboriginal Rights", *Canadian Journal of Native Studies*, XIII, 2 (1993), pp. 199-219; Wildsmith, "The Mi'kmaq and the Fishery", pp. 126-32.

10 Because he is a Mi'kmaq resident of Nova Scotia, Marshall's hearing is recognized under the Indian Act. This Act distinguishes between those people, like Marshall, who are of aboriginal ancestry and those who have lost their "status". The latter are known as "non-status". However, the criteria used by the government have been and continue to be a subject of controversy. For instance, before 1985, women who married non-aboriginal men lost their "status". See, *Enough is Enough: Aboriginal Women Speak Out as Told to Janet Silman* (Toronto, 1987).

11 This was the subject of a protracted argument between the Atlantic Region chiefs and DFO lawyers at an informal meeting in Dartmouth, Nova Scotia in May 1993 at which I was present.

12 The Supreme Court has since delivered judgement. See *R. v Vanderpeet*, [1996], 4 *Canadian Native Law Reporter*, pp. 177-216.

13 Donald Marshall Sr., Alexander Denny and Simon Marshall, "The Covenant Chain", in Boyce Richardson, ed., *Drumbeat: Anger and Renewal in Indian Country* (Toronto, 1989), pp. 73-104.

was charged in October 1993, the two organizations representing the 13 reserves in Nova Scotia, the Confederacy of Mainland Micmacs and the Union of Nova Scotia Indians, agreed to finance his defence.

At least four factors may have influenced the Union and Confederacy to defend Mr. Marshall. These were first, a renewed commitment between the two umbrella organizations representing status Mi'kmaq in Nova Scotia to forge a united political front, second, the particular historical context in which the 18th-century treaties were made which strengthened their constitutional appeal, third the community's logistical ability to mount a defence and finally the identity of the accused, Donald Marshall Jr.

During the months preceding the charges, the two umbrella organizations representing status Mi'kmaq in Nova Scotia had resolved some of their differences and had begun a tentative program of cooperation. This was an important political development since it reversed more than a decade of turmoil in Mi'kmaq politics, beginning in 1984 when some mainland communities had resigned their membership in the union and had formed the Confederacy. This had created two separate political factions operating parallel to each other. By the early 1990s, however, both government reluctance to fund two organizations and the community's realization that political disunity limited their ability to influence policy decisions precipitated a greater degree of political cooperation. The Aboriginal Title Project, which began operation in July 1993 and for which I began work in October of that year, was one such venture. This renewed sense of unity was critical in buttressing the community's ability to withstand government pressures prior to the trial's commencement in November 1994. Government pressure involved attempts to influence the Mi'kmaq to drop their defense of Marshall, a tactical manoeuvre which may have stemmed from internal disagreements among federal departments regarding the advisability of litigating the case.<sup>14</sup> Despite these pressures, lawyers representing both organizations were advised to prepare a defence of Mr. Marshall based upon his treaty right to fish and sell fish.

The determination by the Union and the Confederacy to go to trial was based upon a belief that Mr. Marshall stood a good chance of winning any subsequent court case. While the community had long argued that the treaties were the foundation of their relationships with other peoples, governments and the judiciary had either ignored or discounted any of the treaties signed between the British Crown and the Mi'kmaq until the Supreme Court's decision in *R. v Simon*. As the understanding of these 18th-century agreements by governments and the courts have evolved since 1985, the Mi'kmaq leadership's own sense of the treaties' importance has been reinforced. Increased attention to the treaties has also highlighted the community's unique legal position within Canada, bolstering the leadership's willingness to contest policy decisions which they believe undermine treaty relationships.

This unique legal position is due principally to the historical context within which the treaties were negotiated. Unlike the later treaties signed with Western aboriginal

14 In part, these disagreements may have been the result of the particular time period in which the alleged offence occurred and the charges were laid. The offence occurred in the weeks prior to Prime Minister Campbell calling a federal election. The charges were laid during the subsequent election campaign in which the Conservatives were replaced with a majority Liberal government.

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peoples, the Mi'kmaq treaties were negotiated before 1780 or prior to the two events that transformed the legal framework in which treaty relationships were made with aboriginal peoples in British North America. These milestones were the Loyalist exodus from the United States after 1780 and the industrialization of the Canadian economy during the 1800s. One development resulting from these two transformative processes was that henceforward treaties negotiated with aboriginal peoples involved the surrender of lands.<sup>15</sup> As well they included language suggesting the curtailment of certain economic activities sometime in the future. This, however, was generally not true of treaties signed before 1780 as these agreements were negotiated within a political and economic framework which encouraged peoples like the Mi'kmaq to continue supplying furs for Britain's mercantile economy. Though the British signed treaties with other aboriginal groups before 1780, the vast majority were with peoples who were later integrated into the United States. For this reason, there are only a few aboriginal communities now living within the borders of the Canadian state who signed treaties with the British Crown before 1780. In sum, this context provides the Mi'kmaq with a more solid basis than most other aboriginal communities to argue that the language found in their treaties requires a liberal interpretive model since the treaties were negotiated during an economic conjuncture when British officials were unconcerned with modifying the internal political structure of Mi'kmaq society. The practical effect of this within the contemporary political landscape fueled the determination of Mi'kmaq leadership to defend Mr. Marshall.

The third factor influencing the decision to defend Mr. Marshall was that at the time the charges were laid, both the Confederacy and the Union had the ability to compile the historical documentation necessary for mounting a credible defence. Here, the establishment of the Treaty and Aboriginal Rights Research [TARR] Centre at Shubenacadie in August 1992, and second, the commencement of the Aboriginal Title Project in July 1993, made that task possible. The TARR centre was a research body associated with the Union of Nova Scotia Indians. The research conducted by individuals in both organizations was helpful in assembling the documentation for the defense.<sup>16</sup>

A fourth and final factor leading to the trial was that the accused was Donald Marshall Jr., an individual who symbolized to the Mi'kmaq community the inherent injustice of the Canadian judicial system. In 1971, Mr. Marshall, then 17 years old, was convicted for the murder of Sandy Seale and sentenced to life imprisonment. Marshall declared his innocence. The Mi'kmaq community believed him and over the following several years pressed for the case to be re-opened. Finally, in 1982 after 11 years in prison, Mr. Marshall was found innocent following an investigation that

15 See, for instance, the numbered treaties signed with various aboriginal societies in northwestern Ontario, the Prairies and the Northwest Territories between 1850 and 1929. Alexander Morris, ed., *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories* ([1880] Saskatoon, 1991); J. R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations* (Toronto, 1988), pp. 160-9.

16 Individuals associated with the two organizations included Gillian Allen, Bob Beal, Laverne Copage, Kristie Gehue, Lorraine Greer-Etter, Jim Michael and Wallace Nevin, as well as Denise McDonald who was attached to the regional office of the Assembly of First Nations.

concluded that Seale had been murdered by Roy Ebsary.<sup>17</sup> The Nova Scotia government later established a Royal Commission which in 1989 recommended a restructuring of the judicial system to ensure that similar miscarriages of justice did not hurt other minority members of the province. Though I do not know precisely why Mr. Marshall chose to ignore DFO regulations, his actions and the decision to support his treaty right to the commercial fishery illustrate a persistent trend since the 1970s in how the Mi'kmaq community perceives itself and its relationship with provincial and federal governments. No longer willing to see their people become victimized in the same manner as Mr. Marshall had been in 1971, community members have actively sought political solutions to provide a better economic future for their youth. This includes providing employment in the fishery.

If the subsequent trial was contentious, it was because opposing social and political forces — representing the federal government on the one hand and the Mi'kmaq community on the other — had imperceptibly made their way into the court room. Key players on both sides had decided that litigation was the only way to resolve their differences, despite numerous discussions since the charges were first filed in October 1993. The Defence understood the history of Mi'kmaq-European relations to be one in which Mi'kmaq lands had been confiscated and their rights eroded, leading to an economic dependence upon government agencies. For the Defence, these rights had not been legally undermined by the treaties made with the British Crown and so the trial could be viewed as a means to regain some community control over the fishery. In contrast, the federal government focused upon the compromises made by the Mi'kmaq in their treaty relationships with settler governments as a result of the immigration of European peoples to North America in the 17th and 18th centuries. This emigration had ultimately forced communities to accept the legal and political jurisdiction of the British government to ensure their own survival. Thus, according to the federal government, any changes to the fishery could only be implemented through DFO. Implicitly, however, this policy was premised upon protecting the property rights of the non-Mi'kmaq population, and therefore any unlicensed fishing was viewed as a threat to the public interest. These opposing opinions collided in the courtroom. Though professional historians were the only witnesses, the trial was less about them than about how their historical opinions related to differing societal opinions regarding how the state should manage its relations with indigenous peoples.

The trial was heard before His Honour Judge John D. Embree of the Nova Scotia Provincial Court. Because of difficulties in finding trial dates convenient to all sides, it was held in selected blocks of time between November 1994 and February 1996. Though the onus was upon the Defence to prove why Marshall should not be subject to federal statutes, the Crown agreed to present its evidence first when the trial began on Monday, 21 November 1994.

The legal team representing the federal government was composed of Michael Paré, a Halifax-based employee of the Atlantic Regional Office of the federal Department of Justice, and Ian MacRae, then an Ottawa Lawyer with DFO. In prosecuting Marshall, the government relied exclusively upon the testimony of Professor Stephen Patterson from the University of New Brunswick. Professor

17 See Michael Harris, *Justice Denied: The Law versus Donald Marshall* (Toronto, 1986) and Joy Mannette, ed., *Evasive Justice: Beyond the Marshall Inquiry* (Halifax, 1992).

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Patterson was initially on the stand for nine days, which included eight days of direct examination by Mr. Paré and one day of cross-examination by the Defence.<sup>18</sup> However, since the Crown had introduced its evidence first, it had the opportunity to respond to the Defence's evidence after the completion of their case. So Professor Patterson again took the stand almost a year after his initial appearance, testifying from 10 to 13 October 1995.

The Defence team was composed of Bruce Wildsmith, a Dalhousie law professor, who has provided legal representation for the Union of Scotia Indians for the past 20 years, and Eric Zscheile, lawyer for the Confederacy of Mainland Micmacs since 1992. Professor John G. Reid of Saint Mary's University and I testified for the Defence. Professor Reid's testimony lasted seven days during the early weeks of May, which included five days of direct examination by Mr. Wildsmith and two days of cross-examination by Mr. Paré. After the completion of Professor Reid's testimony, I took the stand, testifying for 14 and one-half days, ten and one-half days of direct examination and four and one-half days of cross-examination.<sup>19</sup>

Collectively, the testimony of the three historians took 34 days and filled more than 4,000 pages of transcripts. Most of this testimony focused upon the historical documents submitted to the court by both parties. These evidence books constituted the most important component of the trial, as they addressed the respective positions advanced by each side. The Crown submitted five volumes containing 141 documents given to the Defence two weeks prior to Professor Patterson's initial testimony on 21 November 1994. The Defence, on the other hand, submitted 231 documents contained in nine bound volumes.<sup>20</sup> Though an initial multi-volume set of documents had been given to the Crown on 20 March 1995, a large number of these were later deleted and a final bundle provided to the Crown one week prior to the beginning of Professor Reid's testimony on 8 May 1995.

Much of the Crown's documentation dealt with the political and economic context in which the treaties of 1752 and 1760/61 were negotiated. The Crown's focus upon this period stemmed directly from pre-trial discussions in which Mr. Wildsmith and Mr. Zscheile had stated that the Defence would rely upon the 1752 and 1760/61 treaties.<sup>21</sup> The Crown's documents came from three principal archival sources, the correspondence of British colonial officials based in Nova Scotia, the minutes of Nova Scotia's Council and letters sent to Versailles by French officials at Louisbourg.<sup>22</sup> These documents tended to focus the Court's attention on an

18 This testimony was spread out over a six month period, 21 to 29 November 1994 and 18 to 20 April 1995. The initial testimony had been given in Antigonish, Nova Scotia but the trial switched to Halifax in April to save travel and accommodation costs, as only the Judge was a resident of Antigonish.

19 Like that of Professor Patterson, my testimony was interrupted by a lengthy adjournment. My direct examination ended in June. My cross-examination began more than two months later on 18 September.

20 These numbers are not definitive as additional documents were submitted to the Court throughout the trial. In other cases, documents were presented to a witness but not entered into evidence. At the present I cannot say with certainty the exact number of documents that were formally submitted to the Court. Judge Embree commented in his written decisions on 27 June 1996 that "over four hundred documents were tendered" during the course of the trial.

21 After the completion of Professor Patterson's testimony in mid-April 1995, the Defence decided to rely solely on the 1760/61 treaties.

interpretative model emphasizing the gradual economic dependency of Mi'kmaq communities upon European, and specifically, French colonial society. This emphasis provided the foundation therefore to argue that with the final defeat of New France in 1760, Mi'kmaq choices were constrained by their need for access to European goods. This, according to Professor Patterson, was the context in which the treaties signed in 1760 and 1761 should be understood. For instance, one of the key passages of the 1760/61 treaties reads:

And I do further engage that we will not traffic, barter or exchange any commodities in any manner, but with persons, the managers of such truck-houses as shall be appointed by His Majesty's Governor at Fort Cumberland, or elsewhere, in Nova Scotia or Acadia.<sup>23</sup>

The methodological problem posed in interpreting this passage, the meaning of which was contested by both sides, is whether it can or should be read literally. Professor Patterson addressed this problem in his testimony. Though recognizing the inherent difficulties of translating European legal concepts into the Mi'kmaq language, Professor Patterson emphasized that more than 200 years of contact had meant some individuals were capable of translating from French and English into Mi'kmaq and vice versa. More importantly, the community's erstwhile ally, France, had been defeated in battle by Great Britain, its forces scattered and vanquished. This, according to Professor Patterson, would have left no doubt in the minds of the Mi'kmaq community of the power of the British military to enforce its will upon others. Therefore, according to this interpretation, in 1760/61 the Mi'kmaq surrendered to the British, accepting what terms they could to guarantee their own survival. In doing so, they acted pragmatically, making the best deal they possibly could under difficult circumstances.<sup>24</sup>

The documents collected and submitted by the Defence historians contested this viewpoint, supporting an argument that the political and military superiority of the British was less overwhelming than suggested in Professor Patterson's testimony. This argument was also supported by various documents but encompassed a broader spatial and temporal space than did the Crown's submission. Our purpose was to provide the Court with an understanding of the historical context of Mi'kmaq-European relations which preceded and followed the crucial treaty-making period of

22 These can be found in Colonial Office Series 217, Public Record Office (PRO), London; RG 1, vols. 186-8, Public Archives of Nova Scotia, Halifax; and Correspondence générale, Louisbourg, AC, CIIB, Archives nationales, Paris. Though other sources were used by the Crown, the ones listed above form the principal component of their submission.

23 Treaty with Richibouctou, 10 March 1760, CO 217/145, PRO. There were a total of eleven separate treaties signed with various Mi'kmaq communities in 1760/61. All had identical wording except in respect to the location of the truckhouse where trading was to occur. This location varied according to the residency of the Mi'kmaq. Treaties were made with the following communities: La Heve, Richibouctou, Musquadaboit, Cape Breton, Miramichi, Pokemouche, Shediac, Pictou and Malagomish, Missaquash, Cape Sable and a second unexplained treaty with La Heve. Extant copies are available for only seven of these treaties.

24 This is my interpretation of Professor Patterson's testimony. His views are also expressed in Stephen Patterson, "Indian-White Relations in Nova Scotia, 1749-1761: A Study in Political Interaction", *Acadiensis*, XXIII, 1 (Autumn 1993), pp. 23-59.



the 1750s and early 1760s. Thus the Defence's documentation focused first upon New-England-Abenaki relations between 1678 and 1727, arguing that the political and legal relationships made by the Abenaki — allies and neighbours of the Mi'kmaq — laid the foundation for the treaties made with the Mi'kmaq.<sup>25</sup> This viewpoint formed the basis of the testimony of Professor Reid who noted, for instance, that four Penobscot,<sup>26</sup> who had been delegated to represent the Mi'kmaq and other neighbouring peoples in discussions with Lieutenant-Governor William Dummer of Massachusetts, negotiated the first Mi'kmaq treaty in 1726.<sup>27</sup> Secondly, we focussed upon an evolving relationship between the Mi'kmaq and the British, one which did not begin in 1752 or in 1760 but rather had been initiated soon after the conquest of Port Royal by New England forces in 1710. Thus, the Mi'kmaq, like the Abenaki, had negotiated a series of agreements with British authorities, each one becoming the foundation for later discussions, a relationship formally begun in 1726. Finally, we used documentary evidence to stress that Mi'kmaq communities were less integrated into European economic, social, and political structures than suggested in Professor Patterson's testimony. It followed that when the treaties of 1760/61 were negotiated the Mi'kmaq were not as vulnerable militarily as Professor Patterson had suggested. For all of these reasons, Professor Reid and I argued that determining the Mi'kmaq understanding of their treaty relationship was difficult and required reconstruction of the cultural context in which Mi'kmaq relationships with other peoples were mediated between 1726 and 1761. This reconstruction led us to conclude, for instance, that the treaties should not be read literally. Rather, we argued that different cultural meanings were attached to certain passages, particularly those that involved conceptual terms, such as "submission" or which were at variance with established patterns of economic and political behaviour in Mi'kmaq society.<sup>28</sup> I particularly disagreed with Professor Patterson's interpretation of the truckhouse clause found in the 1760/61 treaties quoted above. I was not convinced that Mi'kmaq would have interpreted the clause as meaning that they could only trade at truckhouses established by the British colonial government. Rather, I argued that the clause regulated the British side of the trade but not the Mi'kmaq side.<sup>29</sup>

In summary, the historical issues in the trial focused on different opinions regarding relationships which evolve between pre-state and state societies. Professor

25 The Abenaki is a generic term used here to describe peoples living between the Saco and Penobscot Rivers in present-day Maine. Whether or not there was a people who identified themselves as "Abenaki" is not a question often asked by researchers.

26 These were Loron Sanguaram, François Xavier, Arexus and Meganumbe, who were from villages located along the Penobscot River in what is now eastern Maine.

27 Discussions can be found in "At a Conference with the Indian Tribes", Boston, 16 November to 2 December 1725, CO 5/898: 178r-88r, and treaties in "The Submission and Agreement of the Delegates of the Eastern Indians", 15 December 1725 CO 5/898: 173r-174v.; Articles Signed by William Dummer, Boston, 15 December 1725, CO 5/898: 175r-6r; Articles Signed by Major Paul Mascarene, Boston, 15 December 1725, CO 217/4: 348r, 348r, PRO.

28 In his testimony, Professor Reid focused in part on the difficulty of translating conceptual ideas from English into aboriginal languages.

29 This argument is partially advanced in William C. Wicken and John G. Reid, *An Overview of the Eighteenth Century Treaties Signed Between the Mi'kmaq and Wuastukwiuk Peoples and the English Crown, 1725-1928*, report submitted to the Royal Commission on Aboriginal Peoples, 1993. Also see

Reid and I differed with Professor Patterson on three important issues: first, on the power of the British state and its ability to enforce its jurisdiction over indigenous communities; second, on the influence of European contact and settlement in restructuring indigenous institutions; and third on the capacity of European and indigenous communities to arrive at a mutual understanding of their legal relationship. While Professor Patterson emphasized the integration of the Mi'kmaq into European norms of behaviour, we stressed that the Mi'kmaq had resisted integration and struggled to preserve their identity and economic independence.

While these were the historical problems debated at trial, at issue as well were different visions of how this history should be integrated into the existing constitutional relationships between aboriginal communities and the Canadian state. The position advanced by the Crown's lawyers appeared consistent with the view that the essence of the democratic state is that no one person or group of people should enjoy special privileges or rights. In this context the 18th-century treaties could be regarded as laying the foundation for the integration of the Mi'kmaq into a nascent state structure which in the future would mediate contending interests for the benefit of the general public. In contrast, the position advanced by the Defence was that the Canadian state's power could be seen as historically based upon the expropriation of lands inhabited and used by aboriginal peoples. In terms of the Mi'kmaq, this transfer of land was never formally or legally transacted. Thus, one interpretation of this historical argument might be that the state does not act in the best interests of the Mi'kmaq community since its economic and political power in the Atlantic region has been based upon dispossessing the Mi'kmaq of their lands.

The trial judge found Donald Marshall Jr. guilty as charged. The decision was appealed to the Nova Scotia Court of Appeal which upheld Mr. Marshall's conviction in a unanimous decision handed down in March 1997. The Supreme Court of Canada then agreed to hear the appeal. Oral arguments were made to seven Justices headed by Chief Justice Lamer on 5 November 1998.<sup>30</sup> The Court's ruling is expected sometime in 1999, or almost six years after the initial charges were laid against Mr. Marshall.

One of the immediate consequences of the trial has been to spark further academic debate regarding opposed interpretations of Canada's history and how this past should be integrated into our Constitution. Now the challenge is to broaden the scope of this debate into the public realm, among both aboriginal communities and the non-aboriginal public. This may facilitate a political process that will resolve these contentious historical, legal and political issues.

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Emerson W. Baker and John G. Reid, *The New England Knight: Sir William Phips, 1651-1695* (Toronto, 1998), pp. 165-9; William C. Wicken, "The Mi'kmaq and Wuastukwiuk Treaties", *University of New Brunswick Law Journal*, 43 (1994), pp. 241-53.

30 The case was heard by C. J. Lamer as well as by Justices Binney, Cory, Gonthier, Iacobucci, L'Heureux-Dubé and McLachlin.