

# The Marshall decision as seen by an “expert witness”

BY STEPHEN PATTERSON

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We in Canada may not yet have come to grips with the full import and meaning of s. 35(1) of our constitution. It guarantees to aboriginal people their existing aboriginal and treaty rights, and that short clause carries in it much more than words of legal import. It is packed with the stuff of history. It cannot be understood in its particulars without reference to history. The customs and traditions that define the rights of aboriginal people have a historical dimension requiring study and analysis according to recognized disciplinary standards. Treaties, written and verbal, are historical artifacts. And importantly, the customs and treaties that are protected by this section are as numerous as the hundreds of First Nations found in Canada today. There is enormous diversity, none of which can be comprehended outside of the historical dimensions of time and place.

The truth of this observation has been well recognized by Canada's courts. The Supreme Court in *Simon*, *Sioui*, *Sparrow*, *Van der Peet*, and *Delgamuukw*—to name only some of the better known cases—has confirmed the importance of history in determining the nature and extent of aboriginal and treaty rights. Determining the date of first contact or the time of the assertion of British sovereignty requires historical knowledge. Ascertaining what customs or traditions are integral to the culture of an aboriginal people can be done only with reference to history. Analyzing a treaty to determine the intent of the parties requires an examination of historical context, and perhaps even the reconstruction of a substantial chunk of history reaching well beyond the treaty itself. When the court calls upon us to consider what it calls “extrinsic evidence,” it is, in fact, requiring a broader examination of historical con-

text. When, as Mr. Justice LaForest says in *Delgamuukw*, the understanding of certain issues is “highly contextual,” he is telling us that a most detailed consideration of historical information is needed to solve the problem.

In a word, our constitution requires that questions involving aboriginal and treaty rights be resolved with reference to both history and law. There is no longer a choice in the matter. As I read the constitution, this clause uniquely constrains the courts, and forces on them a constitutional requirement that they devise a proper method for collecting historical evidence, reading it and interpreting it in a fashion that does justice both to the facts and their full historical context, while at the same time affording a fair hearing of conflicting views of that evidence, and a full con-

sideration of the many ways in which historical truth can be transmitted or communicated.

Although the Supreme Court is well aware of the constitutional requirement to consult history, I suggest that the process by which it carries out this constitutional requirement is still a work in progress. The rules are vague, and with all respect, I would suggest that the rules are inconsistently applied. In 1985, in the *Simon* case involving a Mi'kmaq from Nova Scotia, the court accepted Mr. Simon's reliance on the *Treaty of 1752* because the Crown had produced no evidence to support its claim that the treaty had been extinguished by hostilities. The court had been presented piles of historical documents but no expert testimony. The decision said that it was impossible for the court to determine what was going on along the east coast of Nova Scotia in 1753. If I may interpret this, the court found that the historical record did not speak for itself. As I read *Simon*, it warns that raw historical data must be rendered intelligible by someone capable of interpreting it, and that the court itself will not undertake to do this on its own. To me, the *Simon* decision is a wise acknowledgment by the court that, when it comes to interpreting history, the court has limits. Yet the recent *Marshall* decision raises questions about such limits, and makes me believe that the court needs to decide how it will handle historical questions when the evidence provided by and through the lower courts is inadequate or deficient in some respect.

Let me outline very briefly some aspects of the *Marshall* case to illustrate what I think are some difficulties the courts have in using history to resolve questions of aboriginal and treaty rights. The focus in the case was on treaties

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signed by the Mi'kmaq in 1760 and 1761. All of the natives in the region—Mi'kmaq, Maliseet, and Passamaquoddy—had been fighting against British colonizers for years, and had been particularly active in colonial wars as allies of France. After 1758, when France lost its foothold in the region, all of the native peoples gradually came in to treat with the British. The Maliseet of the St. John River valley were the first to do so, and their treaty was finalized in February of 1760. The Mi'kmaq, a distinctly different people, lived along the east coast of present-day New Brunswick, and throughout present Nova Scotia. They had no central government or common chief, but were organized in about a dozen separate communities or bands, each centred on a river system or bay that defined its hunting and fishing territory. Recognizing this decentralized structure, the British decided to treat with each community separately, and that is the reason we have a series of Mi'kmaq treaties, made over a period of months beginning in March 1760.

The written texts of all the Mi'kmaq treaties were identical. They began with what the British called a “submission.” The Mi'kmaq acknowledged the sovereignty and authority of the British Crown in Nova Scotia and submitted to that authority. They promised not to interfere with British settlers and, where there were misunderstandings, to “apply for redress according to the laws established in his said Majesty’s Dominions.” They also promised not to trade with the French but rather to confine their trade to British truckhouses to be established for that purpose.

But, in addition to the written documents, we also have minutes of discussions that took place at the time some of the treaties were made. The most extensive record is of the treaty ceremony of June 25, 1761, at which four Mi'kmaq bands, including the Cape Breton community, made their treaty with the British. It seemed fortunate that, in this case involving Donald Marshall Jr., we had

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such full evidence for the treaty with the Cape Breton Mi'kmaq because Mr. Marshall is a member of the Membertou Reserve on Cape Breton Island. This is his treaty, so to speak, and the minutes of the treaty ceremony form what the Supreme Court calls “extrinsic” evidence, or in other words, the historical context that might help us better understand the intent of the parties. Because it seemed to be most relevant to the question of Mr. Marshall’s treaty rights, it became an important aspect of my testimony. I was struck, for example, that the Cape Breton chief, speaking for all of the others, said: “our intentions were to yield ourselves up to you without requiring any terms on our part.” They made no demands and set no conditions. In his lengthy speech, carefully translated by someone who spoke the Mi'kmaq language, he made not a single reference to trade. He concluded thus: “As long as the Sun and Moon shall endure . . . so long will I be your friend and ally, submitting myself to the Laws of your Government, faithful and obedient to the Crown.”

Nova Scotia’s Chief Justice, Jonathan Belcher, spoke for the Crown on this occasion. He said “the Laws will be like a great Hedge about your Rights and properties.” My interpretation of this was that the Mi'kmaq would be treated like all other subjects of the British Crown. Aboriginals would enjoy the freedoms all British subjects enjoy, and the laws would protect them. Importantly, moreover, Belcher put the essential point into clear language. He re-

ferred to the British in Nova Scotia as “your fellow subjects.” In future, he said, natives and non-natives would fight on the same side, as brethren, “that your cause of war and peace may be the same as ours under one mighty Chief and King, under the Same Laws and for the same Rights and Liberties.”

As I read the document, Belcher’s words and those of the Cape Breton chief provide written evidence of the intention of the two parties to the treaty that was signed on June 25, 1761. They seemed to have a meeting of minds. As additional proof of this, much more evidence was presented at trial to show that in the years thereafter, the two parties behaved in a manner consistent with the notion of a common understanding. The treaty partners agreed that the Mi'kmaq were British subjects and, as such, the Mi'kmaq were to be governed and also protected by the prevailing laws of Nova Scotia. A Mi'kmaq chief petitioning in 1825 pointed out that, despite all of the problems confronting him and his people, he had always been “unwilling to contend against the laws which he had pledged himself by treaty to obey.”

My interpretation of this evidence did not go unchallenged at trial. Defence witnesses presented a differing view, as they should. The process requires that courts see the evidence from as many angles as possible. But my point here is that the evidence was extensive, it was well canvassed at trial, the arguments were heard, and on this basis the trial judge made important find-

ings of fact. And because he also largely accepted my interpretation, it is worth my summarizing it here. My interpretation is that the treaties of 1760-61, unlike earlier treaties, did not contain British promises to the Mi'kmaq nor specifically guarantee rights. There is not a word about hunting, fishing, or trading as a right. All of these may be implied, but they need not be the implications of the treaty itself. Rather they are the logical implications of the rule of British law, the common rights of all British subjects that, in the context of the time, were permissive rights rather than constitutionally entrenched rights. They were, for everyone, rights limited by whatever laws and regulations were in place to maintain order, peace, harmony, security of the person and of property, and the greatest good for the greatest number. In my reading of the historical evidence, there is not a hint in any of these treaty negotiations in 1760 and 1761 that the Mi'kmaq, while being welcomed as British subjects, were at the same time granted an exemption from British law.

Let us turn now to the case as heard by the Supreme Court. To my great surprise, both the hearing and the majority decision revolved not around Mr. Marshall's treaty, the treaty of June 25, 1761, and its substantial extrinsic evidence, but rather around the first treaty signed in February 1760, the Maliseet treaty. I was surprised because it appeared to me that the Supreme Court's highly focused attention on the events of February 1760 had no parallel in the lower courts. The Maliseet, after all, are a distinctly different people from the Mi'kmaq, and Mr. Marshall is a Mi'kmaq.

Nevertheless, Mr. Marshall now argued, through his counsel, that his treaty right to trade was derived from a British promise to the Maliseet. Because the Maliseet treaty became the model for treaties with the Mi'kmaq, presumably anything promised the Maliseet was equally promised to the Mi'kmaq. The majority of the Court essentially accepted this reasoning and determined that, while the native right to trade was

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not explicitly stated in any of the treaties, it was implicit in them. The proof, said the majority, was to be found in the extrinsic evidence related to the Maliseet negotiations, specifically the minutes of their meetings with the governor and council in February 1760. In these negotiations, says the majority, the Maliseet demanded a trading right as a condition of their signing the treaty. The British, allegedly fearing the power of the aboriginals and eager to bring about an immediate peace, promised such a right in exchange for the treaty.

It is my observation that the Supreme Court's ultimate decision focused on an episode in the treaty process that was not a central aspect of testimony at the original trial in provincial court, and it was certainly not part of Mr. Marshall's original defence. He originally cast his net widely, claiming rights under many treaties, especially on the liberal promises of hunting, fishing, and trade in the treaty of 1752, the treaty relied upon by Mr. Simon several years ago. The Crown had to respond equally broadly in order to respond to any and all possibilities in what appeared to be a very unspecific defence. The Crown's case was designed to illustrate the rather extensive history of over a dozen treaties signed between 1725 and 1779, with special emphasis on the treaty of 1752, which seemed to

be most in contention, and the treaties of 1760 and 1761. Interestingly, the two expert historians who testified in Mr. Marshall's defence carried the context even further. Far from narrowing the focus of discussion to February 1760, they argued that New England treaties going back to the 1690s provided important clues to our understanding of both British policy and native experience in dealing with Europeans. It was weeks into the trial before Mr. Marshall focused his defence on the treaties of 1760 and 1761. Even then, the Maliseet treaty was given no special attention.

It is my observation that Mr. Marshall's reliance on the Maliseet negotiations of February 1760, as the crux of his defence, was advanced first at the Supreme Court level. This was done by argument. The evidentiary base for examining the question was limited. It had not been extensively canvassed at trial. The majority of the Supreme Court panel decided that the trial judge had erred in law for not examining the extrinsic evidence related to the Maliseet treaty. It is not my place to defend the trial judge, but my observation is that he dealt with the evidence that was placed before him, and that a full examination of the extrinsic or contextual evidence related to the Maliseet treaty was not led by either the defence or the Crown.

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That evidence was not before the court, perhaps because no one had at that time determined that it was the crux of the issue. At least no one openly said that it was.

What is most alarming is that there is more historical evidence on the background of the Maliseet treaty than was led at trial. The full evidence would have included reports from British soldiers describing their initial contacts with the Maliseet at the mouth of the St. John River in the fall of 1759. Here the Maliseet took an oath of allegiance to the British Crown, effectively settling the issue of peace and submission, long before they went to Halifax to sign a formal treaty. The evidence would also have included the orders that went out from Halifax in reply: along with the instruction to bring native chiefs back to Halifax to sign a formal treaty went a proposal from British officials to set up a truckhouse at the mouth of the St. John River to facilitate trade with the natives.

This came several weeks before the treaty discussions in Halifax. The available evidence shows that when Maliseet delegates arrived in Halifax, they confirmed that they wished an opportunity to trade, effectively taking the British up on their offer of a truckhouse. This evidence suggests that trade was not a demand of the Maliseet nor a condition of their treating with the British, but simply a request for an opportunity to trade. But this evidence was not led at trial, or at least was not presented in detail, and it was not available to the Supreme Court, perhaps for the very reason that Mr. Marshall is a Mi'kmaq and details about a treaty the British made with a distinctly different people seemed, at trial, to be somewhat peripheral.

What should the Supreme Court do in a matter such as this? The majority in Marshall decided that the evidence before it was sufficient to resolve the issue. They found that the Maliseet demanded a right to trade as a condition of the treaty. By paragraph 52 of the decision,

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this Maliseet demand is presented as “a positive Mi'kmaq trade demand,” although there is not a piece of evidence to suggest that the Mi'kmaq ever made such a demand. According to the majority of the court, it was aboriginals who first raised the matter of special truckhouses as the place where the trade should take place, not the British who sought to confine trade to truckhouses as a means of preventing aboriginal trade with the French. It therefore was a condition of peace, and the British response was effectively a promise that the honour of the Crown demands must be upheld.

These assertions placed the majority of the Supreme Court in the position of answering important historical questions on the basis of very limited evidence before it. Faced with contrary views from a minority of the court, the majority argued in paragraph 30 that it was the Indians who “first requested truckhouses. The limitation to government trade came as a response to the request for truckhouses, not the other way around.”

My response to these findings is that the court needs to rethink what it means by “extrinsic evidence.” From a historian's viewpoint, it means the broad context of an event, and it should include all the available historical information that is germane to the topic. In this instance, there is historical information that was not led at trial, or at least not examined and explained at trial, because neither

side pursued it. Rather than fill in the gaps itself, the court might well have phrased unresolved issues as historical questions. Did the Maliseet first raise the idea of truckhouses? Did the Maliseet demand trading rights as a condition of their making peace? Did the Mi'kmaq likewise demand trading rights? Were the unwritten promises to the Maliseet, as identified by the majority, communicated to the Mi'kmaq and did they therefore become unwritten promises to the Mi'kmaq?

All of these are historical questions for which evidence is available. Having identified the crucial questions, it seems to me that the Supreme Court might have ordered the matter back to the trial court where expert historical evidence might have been called in order to answer these questions. Justice did not demand that the Supreme Court itself grope with inadequate findings of fact, nor that it compensate for those deficiencies by attempting to reconstruct a complex history.

But such comments deal with the *Marshall* decision on the narrow grounds on which it turned—the meaning and significance of the Maliseet treaty. A full critique of the decision would go much further, as the following brief comments might indicate. For example, the court determined that the Mi'kmaq treaties of 1760-61 were local treaties of local application. Presumably each protects the rights of successor

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monolithic concept. There is no single oral tradition; rather, there are many oral traditions, which sometimes contradict one another.

- What weight should be given to oral traditions that do not just pro-

vide information to resolve ambiguity but rather directly contradict the wording of treaties and statutes?

As these questions are gradually dealt with, the importance of *Marshall* for

struggles over control of land and natural resources everywhere in Canada will come to outweigh greatly the value of Donald Marshall's 463 pounds of eels, or even the tons of crab and lobster now at stake in the Atlantic fishery. ❁

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communities in territories approximating the territories of the original signing group. (This at least is the conclusion drawn by government agencies who are attempting to implement the decision.) Yet the anomaly of the majority decision is that it was not based on an examination of the Cape Breton treaty that presumably would protect Mr. Marshall's rights, but rather on a Maliseet treaty and the first of the Mi'kmaq treaties, both signed months before the Cape Breton treaty. Moreover, Pomquet Harbour, the location of Mr. Marshall's eel fishing, is not on Cape Breton Island, but rather on the Nova Scotia mainland at least 50 kilometers from Cape Breton. Effectively, the Court did not examine either the local treaty or the relevant territory of Donald Marshall Jr.'s community, the Membertou Reserve on Cape Breton Island.

Second, if the court agrees that these are local treaties, yet in wording they are identical, it would be logical to assume that what makes each a distinctive treaty is its context, including whatever extrinsic evidence there is of oral agreements. There was such an oral agreement in the Cape Breton treaty negotiation: a British promise that the Mi'kmaq present on this occasion could practise their Roman Catholicism and that the British would help acquire a suitable priest for them. This is what was most important to the Cape Breton chief. The British willingness to listen to such a request and to make a promise in reply suggests that they recognized the decentralized polity of the Mi'kmaq and the distinctive voices of each group. If oral agreements are equally part of a treaty, then one must interpret each in its own context and reject the notion that all of the

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Mi'kmaq treaties were identical simply because of their written form. Does this not equally suggest that the extrinsic evidence surrounding the Maliseet treaty has no relevance to the Mi'kmaq treaties unless it can be demonstrated that the Mi'kmaq raised similar concerns? If each was in fact a good faith negotiation, does each not have to be examined in its full context to determine what made it a local treaty of local application?

There is a constitutional requirement that aboriginal and treaty rights cases draw on history as well as law. My argument is that the two are equal, and meeting the constitutional test requires the application of the highest professional standards of both disciplines. In a word, bad history cannot make good law. The Marshall case represents both an honest attempt to blend history and law, and an illustration of some of the problems yet to be resolved in doing so. At trial, both the Crown and the defence, drawing on the lesson of the *Simon* decision, presented hundreds of documents through historians serving

as expert witnesses. The historians did far more than recite facts; they provided their professional skill in interpreting difficult material, and they explained the methods they employed in coming to the conclusions they made. Both sides, perhaps, provided far more than the courts either needed or wanted, and it may well have been reasonable for the Supreme Court to narrow the focus as it did in its final decision. But in doing so, the court could have asked for more evidence in its fullest historical context, and sent questions back to a trial court if the evidence at hand was insufficient. *Marshall* suggests that the process by which history is incorporated into aboriginal and treaty rights decisions still requires some attention. Among other matters, the court especially needs to rethink what it means by "extrinsic evidence." And it needs to provide clearer links between centuries-old treaties and their native beneficiaries in the present. The object, surely, is to ensure that the highest standards of legal and historical interpretation are afforded Canadians who rely on s. 35(1) for protection. ❁