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## **History, the Courts and Treaty Policy: Lessons from *Marshall* and Nisga'a**

*J.R. (Jim) Miller*

During the late 1990s, Canadian history found itself enjoying unaccustomed prominence in discussions of treaties between the Crown and First Nations. In a decision of the Supreme Court of Canada on Mi'kmaq treaty rights, history and historians were front and centre, while in the aftermath of the conclusion of treaty negotiations between the Crown and Nisga'a of northern British Columbia, historical evidence was important to defenders of the treaty—the myths of history to the treaty's opponents. The *Marshall* and Nisga'a cases are arguably two of the most important First Nations policy matters of the past dozen years. Along with other treaty cases such as *Sparrow* and *Delgamuukw*, and the other recent major treaty arrangement, Nunavut, they have profoundly influenced the course of Canadian law and history. Moreover, both these cases caused an enormous public uproar in the Maritimes and British Columbia respectively. The *Marshall* decision set off a chain of events that pitted a number of Mi'kmaq communities against the federal authorities in open defiance of Ottawa's regulation; the Nisga'a Treaty provoked an incendiary public debate, a politically inspired court challenge, and a divisive plebiscite on treaty making in 2002. These two instances of treaty policy from opposite ends of the country, to a great extent, revolved around competing visions and interpretations of the Canadian past. The role of history and historians in these important episodes was important at the time, and can be instructive for the future.

The *Marshall* case, or *R. v. Marshall* to give it its official title, was decided by the Supreme Court of Canada on 17 September 1999, and given a clarifying second ruling on 17 November 1999.<sup>1</sup> It involved an appeal, on behalf of Donald Marshall, Jr., of a conviction for violating federal fishery regulations against fishing in the closed season, fishing without a license, and selling the eels that he had caught without a license. That the case focused on Donald Marshall added poignancy to what was in and of itself a significant treaty rights case, for Marshall was the Mi'kmaq man who had been wrongly convicted of murder in 1971, and who had served eleven years

for an act someone else committed before he was released. The subsequent inquiry into the administration of justice in Nova Scotia had exposed a virulent strain of racism, an exposé whose results would be confirmed in other parts of the country in later, similar investigations of Aboriginal peoples and the justice system. Marshall and his lawyers contended that the federal fishery regulations did not apply to him because, as a Mi'kmaq, he enjoyed certain treaty-based rights to fish. Convicted, Marshall appealed unsuccessfully to the Nova Scotia Court of Appeal. That appeal turned down, he and his lawyers obtained leave to appeal the convictions on the basis of treaty rights to the Supreme Court of Canada.<sup>2</sup>

The Supreme Court's ruling in September 1999 relied heavily on eighteenth-century history. The justices listed no fewer than twelve historical works among their authorities. Moreover, the majority decision, written by Mr. Justice Ian Binnie, relied heavily on the majority's reading of developments in the eighteenth century. In fact, Binnie, who was experienced in Aboriginal law cases and the historical issues that often figured in them,<sup>3</sup> was conscious of, and sensitive to, historians' opinions. He noted in the section of his decision on "Expert Evidence" that "the courts have attracted a certain amount of criticism from professional historians for what these historians see as an occasional tendency on the part of judges to assemble a 'cut and paste' version of history."<sup>4</sup> Justice Binnie, who obviously considered himself something of a historian, allowed that "the tone of some of this criticism strikes the non-professional historian as intemperate . . ."<sup>5</sup>

Briefly, the majority decision found that a treaty of 1760–61, between the Mi'kmaq and Britain, had created a treaty right that authorized the Mi'kmaq to fish "for necessities" sufficient to furnish them a moderate livelihood. That historical basis, Binnie concluded, provided a treaty right that was protected by Section 35 of the 1982 Constitution, the clause that "recognized and affirmed" the Aboriginal and treaty rights of the Aboriginal peoples. As such, the majority ruled, federal fishery regulations governing a closed season and requiring licenses to fish and sell the catch abridged the treaty right and were, accordingly, null and void. For their part, the minority of the court, through the written opinion of future Chief Justice Beverley McLachlin, rehearsed much of the same historical evidence and came to the conclusion that "there is no existing right to trade in the Treaties of 1760–61 that exempts the appellant from the federal fisheries regulations."<sup>6</sup>

Behind the duelling historical Supreme Court justices stood a trio of adversarial professional historians. The Crown's case rested on interpretation of eighteenth-century events involving the Mi'kmaq and British authorities provided by Professor Stephen E. Patterson of the University of New Brunswick, while Marshall's lawyers turned to St. Mary's University historian John Reid and York historian William Wicken. Patterson was a

specialist in American colonial history, who, at the request of the office of the Nova Scotia attorney general in 1988, had turned his attention to the Mi'kmaq treaties. Professor Reid was a senior and well-known specialist in Maritime colonial history involving Native-newcomer relations who had also done research on treaties between the Abenaki and Britain at the request of the Royal Commission on Aboriginal Peoples (RCAP). Professor Wicken, though a more junior academic historian than Patterson and Reid, had the advantage when the case was first heard of being on the eve of completing his doctoral dissertation on the evolution of the Mi'kmaq in Nova Scotia. According to Wicken's account, Patterson testified for a total of eleven days, Reid for seven days, and he for a daunting fourteen and one-half days of the forty-day trial.<sup>7</sup>

What set the historian for the Crown at odds with his colleagues who testified on behalf of Donald Marshall was their interpretation of key eighteenth-century treaties between the Mi'kmaq and Britain. What was at issue, in fact, was a series of such treaties covering the period from 1725 to the early 1760s. The initial 1725–26 treaty, in large part repeated in another treaty of 1752, contained explicit clauses guaranteeing continuing rights to hunt and fish:

Saving unto the Penobscot, Naridgewalk and other Tribes within His Majesty's province aforesaid and their natural Descendants respectively all their lands, liberties and properties not by them convey'd or sold to or possessed by any of the English Subjects as aforesaid. As also the privilege of fishing, hunting, and fowling as formerly. [Treaty of Boston, 1725]

It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting and Fishing as usual and that if they shall think a Truckhouse needful at the River Chibenaccadie [Shubenacadie] or any other place of their resort they shall have the same built and proper Merchandize, lodged therein, to be Exchanged for what the Indians shall have to dispose of. [Treaty of Halifax, 1752]<sup>8</sup>

These treaties were inspired on the British side by a desire to regularize relations with the Mi'kmaq, who were staunch allies of the rival French, because of ongoing tensions between France and Great Britain in the Maritime theatre, and elsewhere, during the first half of the eighteenth century.

The treaty of 1760, made in Halifax by Mi'kmaq Chief Michael Augustine and extended to other parts of the Maritime region in 1760–61, re-established relations between Britain and the Mi'kmaq after the conclusion of the Maritime phase of the Seven Years' War, a struggle in which the British

had finally bested the French. Its wording on hunting-gathering and trade was significantly different from that of the earlier pacts:

And I do further engage that we will not traffic, barter or exchange any commodities in any manner but with such persons or the managers of such truck houses as shall be appointed or established by His Majesty's Governor at Fort Cumberland or elsewhere in Nova Scotia or Acadia.<sup>9</sup>

Stephen Patterson, who had recorded his interpretation in important academic journal articles, took the view that the 1760–61 treaties were qualitatively different from the earlier treaties, which were predominantly peace and friendship treaties.<sup>10</sup> In his view, the treaties that restored relations after the Seven Years' War represented British imposition of its rule following victory. By them, he argued, the Mi'kmaq, who had for decades bedevilled British control of the region by their adherence to the French alliance, finally bowed to the new reality and agreed to recognize British control over them. Moreover, their economic dependence on access to British trade goods, combined with the French defeat, led to the inclusion of a clause in the 1760–61 treaty that referred to their obligation to bring their trade goods to British "truck houses," or subsidized government trading centres. In Patterson's interpretation, the key Mi'kmaq-British treaty was concluded in an environment of Britain's military victory and connoted Mi'kmaq dependence and submission.

Reid and Wicken, of course, took a contrary view. Their expert testimony emphasized a longer sweep of Maritime treaty making than did Patterson's, which focused more on the 1760–61 agreements. These witnesses for the appellant treated the period from the 1720s to the 1760s as a single unit, and they saw the 1725 and 1752 agreements as models for the later treaties. They were not inclined, as Patterson was, to see a dramatic difference in the changed circumstances in the Maritimes at the end of the Seven Years' War, and they did not think that the 1760–61 treaties, despite their altered wording about gathering and trading rights, connoted Mi'kmaq submission and dependence. Markedly more than Patterson, Reid and Wicken believed that the British felt a necessity to improve relations with the Mi'kmaq after the war, a perception that made the British eager to conciliate the Mi'kmaq in order to reach an agreement. As Wicken has explained,

For our part, Reid and I argued that the 1761 treaty was the result of a consensual agreement made between the Mi'kmaq and British. We stressed that British power was less omnipotent and more tenuous than Patterson suggested. We argued that the British wanted a treaty to neutralize the Mi'kmaq during the war with France so that British settlement of the region could proceed peacefully. For these two reasons, we argued that the treaty's language was less reflective of British power than Patterson supposed.<sup>11</sup>

Wicken suggested that the British and Mi'kmaq had different perceptions and understanding of what they had agreed to in 1760–61: while British officials might have believed that they had secured Mi'kmaq submission by these pacts, Mi'kmaq had a different understanding that did not contain obligations to obey and submit. Wicken pointed to Mi'kmaq oral history evidence that supported what he said of Mi'kmaq understandings of the agreements.

Clearly, the duelling historical experts left the justices, including the amateur historian who eventually wrote the majority judgement, with an interpretive challenge every bit as daunting as anything professional historians had to confront. Writing for the majority, Justice Ian Binnie found that the restricted language of the 1760–61 treaties contained a general right to fish and trade to achieve a moderate livelihood. His argument rested principally on the concept of “the honour of the Crown” and on his reading of Dr. Stephen Patterson’s expert testimony. The “honour of the Crown,” a guide to interpreting Crown-Aboriginal dealings that was well established in Supreme Court jurisprudence, required that the Court conclude that the right conferred on the Mi'kmaq by treaty not be a restricted, negative requirement to bring trade goods to government-established trade houses, but a general right to trade for necessities. Moreover, Binnie concluded that a treaty right to trade carried with it a “reasonably incidental” right to gather those things that were to be traded. His reading of Patterson’s narration and analysis of the treaty negotiations, and the general context of British-Mi'kmaq relations about 1760, led him to conclude that the British desire to conciliate the Mi'kmaq in order to ensure enduring peace and facilitate British development of Nova Scotia meant that the treaty terms were significant concessions to the Mi'kmaq. Interestingly, Mr. Justice Binnie rested much of his historical analysis on the testimony of Professor Patterson, who had been a witness for the other side. The author of the majority opinion had almost nothing to say about the expert testimony of the historians who appeared on behalf of the appellant.

In her ruling for the two-judge minority, Justice Beverley McLachlin politely, but firmly, disagreed with nearly every point of the majority ruling. As the trial judge had initially, she found that the 1760–61 treaty conferred merely what the plain words of the government text suggested: the Mi'kmaq were required to bring their trade goods to government truckhouses. This, she said, conferred a “right to bring,” but not a general treaty right to trade. In her opinion Justice McLachlin provided her own analysis of the historical context in which the treaties had been made, almost completely ignoring the conflicting testimony of the professional historians who had appeared at the original trial. Firmly she concluded: “There is no existing right to trade in the Treaties of 1760–61 that exempts the appellant from the federal fisheries regulation. It follows that I would dismiss the appeal.”<sup>12</sup>

What is striking about the historical duel at the Supreme Court is that obvious issues of historical context were not effectively explored in the decisions. There was, as noted earlier, a marked difference of language in the 1752 and 1760–61 treaties in relation to trade. The early agreement was expansive and explicit: it said clearly that the Mi'kmaq signatories had a "free liberty of Hunting and Fishing as usual," while the several treaties of 1760–61 contained a Mi'kmaq commitment that "we will not traffic, barter or exchange any commodities in any manner but with such persons or the managers of such truck houses as shall be appointed or established . . ." The difference in language seemed to support the Crown expert's contention that the later treaties, on which the Marshall appeal rested, was a more submissive document concluded at a time when the French, the allies of the Mi'kmaq, had been defeated and the Mi'kmaq consequently were left vulnerable and dependent on the British. Such had been the clear message of Dr. Patterson's scholarly analysis of the period.<sup>13</sup>

The *Marshall* decision, as is well known, had an interesting aftermath. Following the September 1999 decision, the Mi'kmaq assumed that they had a general right to fish and harvest other resources limited only by their own conservation codes. Their continuing to fish out of season provoked violent reactions from non-Native fishers and for a time threatened the peace of various regions of the Maritimes, in particular the Miramichi area. Much less noticed was the indignant reaction of Stephen Patterson to the way in which Justice Binnie had used his expert testimony to buttress the majority Supreme Court decision. "Binnie," he told the *National Post*, "ignored all aspects of my testimony that established the context within which my remarks were given and comes to a conclusion that when I said they had rights, it was a section 35 (1) privileged right, quite apart from the rights that any other subject would have. I think that seriously distorts whatever can be drawn from the treaties." Binnie, he charged, had engaged in "a selective use of evidence."<sup>14</sup> When the Supreme Court took the unusual step of issuing a supplementary judgement on *Marshall* in November 1999, it restricted itself to reiterating more emphatically points it had made in its September ruling and did not address the charge of historical misinterpretation. No doubt Justice Binnie ruefully concluded that after *Marshall* the Supreme Court had "attracted a certain amount of criticism from professional historians for what these historians see as an occasional tendency on the part of judges to assemble a 'cut and paste' version of history."<sup>15</sup>

"At 8:27 a.m., our canoe arrived," an excited Joseph Gosnell told assembled reporters. "The journey our ancestors began more than a century ago ended."<sup>16</sup> Gosnell, a major negotiator of the draft treaty between his people, the Nisga'a, and the Crown, was referring to the lengthy history that lay behind the agreement. In 1887, when non-Natives were beginning to invade their lands in the Nass River valley of northern B.C., a delegation of Nisga'a paddled all the way to distant Victoria to bring their complaint to the

government and ask that a treaty be negotiated with them. When they encountered the government, they were forced to meet with its leader in his own residence, because Premier William Smithe wanted to avoid a large gathering in a more public setting. Apparently, Premier Smithe believed that the Nisga'a were acting under the malign influence of some missionaries, and, if he could separate the Natives from their clerical advisors, he could deal with them and their arguments more swiftly and effectively. In any event, he made it clear to the delegation that he and his government would not entertain their case, for the simple reason that they did not, and could not, have a valid claim to the territory they had inhabited since a time far earlier than the arrival of Europeans. "When the whites first came among you," the premier told them, "you were little better than wild beasts of the field." And, of course, wild beasts could have no legitimate claim to lands that Christian British-Canadians were prepared to recognize.<sup>17</sup>

In spite of the rebuff, the Nisga'a did not give up. They continued to make their case for recognition of their right to the lands they inhabited to a succession of commissions that British Columbia and Canada established over the next few decades. They formed the Nisga'a Land Committee in 1907 and, in 1913, petitioned London for recognition of their ownership of their territory. They were also active in the Allied Tribes of British Columbia, which, in the second decade of the twentieth century, worked to get the results of one of those federal-provincial commissions on the B.C. Aboriginal lands issue set aside and replaced with a more equitable settlement of their claims. They were also part of a united First Nations movement from British Columbia that appeared, unsuccessfully, before a joint parliamentary committee in 1926. For their pains, they and their associates the next year saw the Parliament of Canada pass an amendment to the *Indian Act* that made it a crime to give or solicit any money for pursuit of an Indian claim.

A less determined people might have despaired and given up at that point, for the *Indian Act* amendment effectively precluded First Nations from being able to hire lawyers to assist them in their dealings with government. Yet they persisted, especially after Parliament repealed the ban on fund-raising or giving in 1951, and in 1973 they were the party that brought the Supreme Court of Canada to make a landmark ruling on Aboriginal title. In the *Calder* case in that year, six of the seven justices of the court that heard the case concluded that such a thing as Aboriginal title existed in Canadian law. That might not sound like much of an advance now, in the aftermath of the much more expansive Aboriginal title ruling in the *Delgamuukw* decision of 1997. However, in 1973 the *Calder* verdict was dramatic. For example, it caused Prime Minister Pierre Elliott Trudeau to say to some First Nations leaders, "Well, I guess you have more rights than we thought you had when we did the White Paper,"<sup>18</sup> and to establish the Office of Native Claims in 1974 to deal with both comprehensive, or Aboriginal title, claims and



specific claims. The Nisga'a persisted for another quarter-century until they reached agreement with the Crown in the 1990s.

I recite the lengthy history of the Nisga'a claim for a simple reason: opponents of the Nisga'a Treaty totally ignored the historic basis of the agreement and focussed on ahistorical objections. Briefly, the numerous and voluble critics of the Nisga'a Treaty objected that by it Canada *gave* too much territory to the Nisga'a, *granted* them a "race-based" government with excessive powers in the territory they retained, and *handed over* to them a "race-based" fishery.<sup>19</sup> In the forests of paper and oceans of ink—not to mention the hours of open-line radio shows—that were expended on the Nisga'a agreement, there was relatively little attention paid to the historical context of the treaty and the historical justification for its main terms.<sup>20</sup> That inattention to the past is unfortunate, for history has much to offer those who seek to understand the significance of the Nisga'a Treaty.

Take, for example, the charge of treaty opponents that Canada *gave* the Nisga'a too much territory. Perhaps the least important counter-argument is that the approximately 2,000 square kilometres involved is about 8 percent of what they had claimed as their traditional territory. This tract is a tiny portion of British Columbia, or of Canada. In addition, the Nisga'a hold these lands in fee simple, not as a reserve. In other words they are landholders like other British Columbians. More important than these arguments of proportion and status, however, is the historically grounded point that the Nisga'a Treaty *gives* the Nisga'a nothing; it merely allows them to retain 8 percent of what they and Canadian law regarded as theirs. To understand the historical case for this point it is necessary to consider the Nisga'a assertion of Aboriginal title and the evolution of Canadian law on Aboriginal title.

The Nisga'a never accepted that their title had been extinguished or somehow transferred to the Crown. Just a few months after their disheartening encounter with B.C.'s premier in Victoria in 1887, their leaders met in the Nass Valley with a royal commission that was looking into Native lands in the province. When the parties met at Nass harbour, the Nisga'a chiefs were first amused and then astounded to discover that the government representatives believed that the Indians had no rights to the lands they were standing on. Charles Russ, a Nisga'a, responded: "We took the Queen's flag and laws to honour them. We never thought when we did that she was taking the land away from us." He and his colleagues also made it clear that they were not opposed to sharing their lands with non-Natives, but they wanted a treaty that would recognize and protect their rights. "We want," Russ explained, "the words and hands of the chiefs on both sides, Indian and Government, to make a promise on paper—a strong promise—that will be not only for us, but our children and forever." If the government would do that, "it will be finished."<sup>21</sup> Of course, that statement of ownership, that offer

to share, and that demand for a treaty to regulate matters were not responded to by the government, and the Nisga'a, as noted earlier, fought consistently and persistently for recognition of their territorial rights. With the Nisga'a Petition, in the Allied Tribes movement, and later in court actions, they continued their rejection of the idea that non-Natives had acquired their lands, and they sought recognition of their continuing ownership and an agreement.

While the Nisga'a fought their century-long campaign, the judicial system slowly came round to a view of Aboriginal title that in many ways resembled theirs. The 1888 decision of the Judicial Committee of the Privy Council (JCPC), then the highest court in the British Empire, in the *St. Catharines Milling* case found that Aboriginal people had rights of usage on lands thanks to the Royal Proclamation of 1763. Aboriginal right to the land, the JCPC said, was "a personal and usufructuary right dependent on the goodwill of the Sovereign." In addition, this right was only a "burden" on the underlying title enjoyed by the Crown. The implication of this finding was that the Crown, acting through Parliament, could extinguish this right of usage. It was this view of limited Aboriginal title, of course, that permitted arbitrary infringements on Aboriginal territorial rights, including in the B.C. case the refusal of both levels of government for a long time to acknowledge that First Nations there held Aboriginal title that needed to be addressed. The next advance in judicial understanding of Aboriginal title came in 1973 in *Calder v. The Attorney General of British Columbia*, in which the Supreme Court of Canada, by now the highest court for Canadians, concluded that Aboriginal title was not solely dependent on the goodwill of the sovereign and of the Parliament of which the Crown is a part. Rather, they found in *Calder*, Aboriginal occupancy of lands "amounted to a form of title that was enforceable at common law, whether the government acknowledged this or not."<sup>22</sup>

The latest phase in the evolution of judicial thinking on Aboriginal title was the 1997 *Delgamuukw* decision, in which the Supreme Court of Canada held that Aboriginal title was "a right to the land itself," rather than just the right to use and enjoy it. This decision, and other high court rulings of the 1990s such as the *Sparrow* decision of 1990 on the Aboriginal right to fish, laid down strict requirements that governments had to meet if they were intent upon extinguishing an Aboriginal right. Thus, in the 110 years between the encounter of the Nisga'a with B.C. Premier Smithe in Victoria and the *Delgamuukw* decision, judicial understanding of Aboriginal rights to territory developed to a point that in significant ways resembles what Charles Russ told the commissioners in Nass Harbour in 1888.

The implications of this history for the argument of the treaty critics that Canada gave the Nisga'a too much territory, of course, is that the criticism is completely unfounded. Canada could not give the Nisga'a too much territory for the simple reason, as the Nisga'a had always and the Supreme

Court of Canada eventually said, that the land was not Canada's to give. In the absence of land-related treaties covering the Nass Valley, the Nisga'a retained Aboriginal title to the territory until the Nisga'a Treaty, "a promise on paper—a strong promise," dealt with it.

The charges that the treaty conferred "race-based" rights, including rights of self-government and a share of the fishery, are similarly ill-founded when viewed historically. With these objections, as with the complaint that the treaty *gave* too much territory to the Nisga'a, there are important contextual considerations that should be taken into account, quite apart from the important point that "race" is a social construct and not material reality. The fact of the matter is that the power of self-government in the continuing Nisga'a territory is vested in a community that is not racially "pure"—as though any group is—after more than a century of contact and interaction with non-Natives, and that citizenship in the territory will be decided by Nisga'a law. Moreover, Aboriginal rights are not based on "race," but rather on prior occupation. If the Nisga'a were all blonde and blue-eyed—as some status Indians are—they would still enjoy Aboriginal rights if their ancestors had occupied their territory prior to the coming of Europeans. The definition of Nisga'a citizenship remains open for the future, and keeps alive the possibility that Nisga'a citizenship will be defined in ways that are not ethnically exclusive.

While it is a mug's game to predict the future of citizenship, Nisga'a or any other, there are patterns in the past that provide some clues as to what might happen when the Nisga'a define the membership of their political community. While there certainly are instances in the past in which First Nation leaders have advocated rejection of all things European, just as there are now First Nation intellectuals who endorse exclusive notions of Indianness, overall First Nations have not behaved historically in ethnically exclusive ways. It is a striking, though insufficiently recognized, detail of Native-newcomer history that First Nations have accepted and integrated non-Natives into their communities and even accorded them positions of leadership. During seventeenth-century warfare in the eastern woodlands, the loss of warriors led many First Nations, notably the Iroquois, to incorporate both settler and Aboriginal captives into their communities. The Mohawk at Kahnawake in Quebec, for example, incorporated both warriors from other nations and New England settlers taken in battle into their families to replace lost comrades. In some cases captives even rose to be leaders of their new communities. Timothy Rice of the Massachusetts colony became "the eldest chief and chief speaker" of Kahnawake, while Oliver Spencer became a leader among the Shawnee.<sup>23</sup> Plains peoples also regularly accepted non-Natives as members of their communities, as the history of the fur trade documents very well. This practice even persisted after the arrival of the Canadian settlement frontier. In the early 1880s, the Indian Agent at Muscowequan in Saskatchewan reported "many French half-breeds" in the

band.<sup>24</sup> The Blood nation in southern Alberta incorporated an African-American, Henry Mills, and his children into their ranks, referring to Henry as the “Black White man.”<sup>25</sup> All in all, the history of First Nations’ community formation since the coming of the Europeans has been inclusive.

In fact, it was only when the legislature of the united Province of Canada (the colony formed by the union of Lower and Upper Canada in 1840) began to define “Indian” legislatively in 1850–51, that racial exclusiveness was introduced to the concept of Indian-ness. After Confederation, the *Gradual Enfranchisement Act* of 1869 introduced a blood quantum to the definition of “Indian,” and the *Indian Act* between 1876 and 1985 systematically made the definition even more exclusive. The creation of an Indian Register in 1951 added to the powers of the Indian Affairs department to police its definition. Canadian history shows that if anyone has been consistently racist in defining “Indians,” it has been Euro-Canadian society and the Parliament of Canada. This behaviour by the Euro-Canadian majority stands in marked contrast to the usual practices of First Nations communities throughout Canadian history. Given that history, there is every reason to expect that Nisga’a citizenship and government will, if left to the First Nation itself, not be race-based.

So far as the argument that other aspects of the Nisga’a Treaty are objectionable because they are “race-based” and confer privileges such as fishing rights on a specific group is concerned, this too misses the historical point. As Hamar Foster has pointed out, it is somewhat hypocritical of Canadian and British Columbia society—dominated by people of European ancestry that subjected First Nations to inferior treatment, including denial of the right to vote until forty years ago—to turn around and whine that some sacred Canadian principle of equality before the law is being violated because the Nisga’a are guaranteed a minimum share of the fishery.<sup>26</sup> Moreover, the simple fact is that a variety of groups are singled out for special treatment in the Canadian Constitution. Until the “fixed link” was being constructed, Prince Edward Islanders were constitutionally guaranteed maintenance of steam communication year-round between themselves and the mainland. The Protestant minority of Quebec, and the Roman Catholic minority of Ontario, were promised in the 1867 Constitution that their denominational educational rights were placed beyond provincial legislature control and that the federal government could intervene to remedy any infringement of those rights that the province might subsequently legislate. The people of Quebec were constitutionally promised a distinctive legal system in 1867. The 1982 constitutional package included a “notwithstanding clause” that permits provinces to pass legislation that would otherwise be unconstitutional, opening the possibility of citizens in some province or provinces being subjected to laws from which citizens elsewhere are protected. Beyond the constitutional realm, there are numerous

instances of differential treatment, including at law, of certain classes of Canadians. Both the armed forces and the Royal Canadian Mounted Police have their own disciplinary codes. The notion of one, undifferentiated constitutional and legal regime for all Canadians is a fable.

Critics who overhear about what they perceive to be violations of equal treatment for all groups within Canada need to get in touch with our history. So far as First Nations and First Nations' rights are concerned, that history includes, in particular, section 35 of the 1982 Constitution that states: "the Aboriginal and treaty rights of the Aboriginal peoples are hereby recognized and affirmed." A subsection says, for the benefit of those who mistakenly argued that the Nisga'a Treaty was a Constitutional amendment, that this protection covers all existing and future treaties. The fact of the matter is that recognition of special group rights is central to Canada's history, and that the Canadian Constitution since 1982 has said explicitly that Aboriginal peoples are, in some important respects, privileged over other collectives. As noted earlier, such Aboriginal rights are not based on race. They are founded on the historical reality that Native peoples lived in Canada prior to European occupancy. Both history and the law of the land provide for differential treatment of several classes of people. Canadians should just learn to deal with the fact that Aboriginal peoples enjoy such rights.

Both the *Marshall* case and the Nisga'a Treaty—important Canadian landmarks of the 1990s—demonstrate the relevance of Canadian history to policy making, especially the treaty-making and interpretation process. In *Marshall*, the courts wrestled with a large volume of contradictory historical interpretation in coming to their conclusions—competing conclusions—about a Mi'kmaq treaty right to fish and trade. This case was by no means unique in the prominence it gave to history. The 1990 *Sioui* decision concerning the treaty right to carry out religious observances, in spite of limitations flowing from Quebec provincial law and other high court rulings of the last fifteen years, have also turned on Native-newcomer history. If *Marshall* demonstrates anything about history, in addition to its relevance to a broad range of Aboriginal litigation, it shows the desirability of compulsory Canadian history courses in secondary schools and post-secondary institutions. The Nisga'a Treaty, and its aftermath, illustrates another facet of the relevance of history to treaty policy issues. Had champions of the treaty been able to disseminate their explanations of the historical context in which that important agreement emerged, much of the ill temper and disturbance that characterized public debate in British Columbia might have been avoided.<sup>27</sup>

Of course, this plea for recognizing the relevance of history to this critical policy area has an obvious weakness: it assumes that courts will be capable of interpreting history properly and that opinion-makers will be interested in hearing historical justifications with open minds. Whether or not this country's historical experience validates those assumptions is a topic for another day.

## Endnotes

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1. Unless otherwise indicated, information on the *Marshall* decision comes from the 17 September 1999 ruling, which can be found at: [www.lexum.umontreal.ca/csc-scc/pub/1999/vol13/html/1999scr3\\_0456.html](http://www.lexum.umontreal.ca/csc-scc/pub/1999/vol13/html/1999scr3_0456.html).
2. For historical background on the Marshall case, see K. Coates, *The Marshall Decision and Native Rights* (Montreal and Kingston: McGill-Queen's University Press, 2000), especially chapters one and two.
3. Mary Locke Macaulay. Vancouver lawyer, private communication, 17 January 2003.
4. *R. v. Marshall*, paragraph 36.
5. *R. v. Marshall*, paragraph 37.
6. *R. v. Marshall*, 116.
7. W.C. Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002), 9–10. See also K. Coates, *The Marshall Decision and Native Rights*, especially chapter two, "Paying the Price for History: Mi'kmaq, Maliseet, and Colonists from Treaties to Irrelevance."
8. W.E. Daugherty, "Treaty of Boston and Treaty of Halifax," in *Maritime Indian Treaties in Historical Perspective* (Ottawa: Indian and Northern Affairs Canada, 1983), 75–77, 84–85. The Treaty of Boston was "Ratified and Confirmed by all the Nova Scotia Tribes" in 1725 and after. See also "Treaty of Halifax," in *Maritime Indian Treaties*, 84. Wicken, *Mi'kmaq Treaties*, 74, says that the Annapolis Treaty of 1726 was an "exact copy" of the Treaty of Boston.
9. Daugherty, "Mi'kmaq Treaty 1760," in *Maritime Indian Treaties*, 86. The precise wording of the clause varied from group to group and place to place where the agreement was signed in 1760–61. Justice Binnie quoted (paragraph 5) a treaty negotiated with Paul Laurent, chief of the La Have Indians, which referred to a truckhouse at Lunenburg.
10. See especially S.E. Patterson, "Indian-White Relations in Nova Scotia, 1749–61: A Study in Political Interaction," *Acadiensis* 23, no. 1 (Autumn 1993): 23–59.

11. Wicken, *Mi'kmaq Treaties on Trial*, 12.
12. *R. v. Marshall*, paragraph 116.
13. Patterson, "Indian-White Relations in Nova Scotia," especially 58–59.
14. *National Post Online* (28 October 1999), "Court accused of 'distorting' history: Professor says his testimony used out of context: Supreme Court judge 'simply ignored' historical evidence in ruling on native fishing."
15. *R. v. Marshall*, paragraph 36.
16. *Globe and Mail* (13 February 1996).
17. British Columbia Legislature, *Sessional Papers 1887*, 264. Quoted in T. Molloy, *The World Is Our Witness: The Historic Journey of the Nisga'a into Canada* (Calgary: Fifth House, 2000), 21. (Molloy was the chief federal negotiator of the Nisga'a treaty.) See also P. Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849–1989* (Vancouver: University of British Columbia Press, 1990), 57–58.
18. Trudeau, as quoted by Flora MacDonald, M.P., House of Commons, *Debates* (11 April 1973), 3207.
19. Opponents also argued that Indians had been conquered, that present generations should not have to pay for the transgressions of their ancestors, and, in the case of some constitutional lawyers, that the Treaty created a third order of government, thereby amending the constitution and requiring adherence to the formal constitutional amendment procedure. The first argument was not ahistorical, merely historically inaccurate. No First Nation was defeated militarily by Europeans in Canadian history. The second argument defies classification, and the third belongs to the legal realm. There were also arguments from some First Nations that the Treaty was objectionable because the Nisga'a had conceded too much in negotiations. I am indebted to Keith Carlson for these additional points.
20. Important exceptions to this generalization are H. Foster, "Honouring the Queen's Flag: A Legal and Historical Perspective on the Nisga'a Treaty," *BC Studies* no. 120 (Winter 1998–99): 11–35; and Molloy, *The World*.
21. Papers relating to the Commission appointed to enquire into the state and condition of the Indians of the Northwest Coast of British Columbia, *BC Sessional Papers 1888*, 432–33; quoted in Foster, "Honouring," 12–13.
22. Foster, "Honouring," 26.
23. J. Axtell, "The White Indians," in *Natives and Newcomers: The Cultural Origins of North America* (New York and Oxford: Oxford University Press, 2001), 207. For a spectacular example of a young Massachusetts woman who became so incorporated into Kahnawake society that she refused to return permanently to the New England colony and claim an inheritance, see J. Demos, *The Unredeemed Captive: A Family Story From Early America* (New York: Vintage Books, 1995).



24. Canada, Parliament, "Report of the Department of Indian Affairs for 1883," *Sessional Papers*, 1884, no. 4, 72.
25. H.A. Dempsey, *The Amazing Death of Calf Shirt and Other Blackfoot Stories* (Calgary: Fifth House, 1994), 103.
26. Foster, "Honouring," 29.
27. As Keith Carlson informs me, the situation was not much helped by the fact that the B.C. New Democratic Party government portrayed the Nisga'a pact exclusively as a cultural agreement that returned dignity to the Nisga'a. In other words, neither the government that championed the Treaty nor its opponents paid much attention to historical context.