

*21 November 1994, Antigonish, Nova Scotia*

On Monday, 21 November 1994, the trial of Donald Marshall Jr began. Since Marshall had been fishing from the Afton reserve on the northern mainland of Nova Scotia, the case was heard in the nearby town of Antigonish. Later, after representations were made to the Judge regarding the expense of hearing the case in Antigonish, the venue was changed to Halifax. Beginning in early April, all evidence and arguments were heard in the federal court building on Lower Water Street.

The case was heard before Mr. Justice John D. Embree, a provincial court judge. Though Marshall was charged with violating a federal statute, minor criminal offences are usually heard by provincial judges. The prosecution, however, was handled by federal government lawyers. Leading the prosecution team was Michael Paré from the Halifax office of the Department of Justice. He was assisted by Ian McRae, a lawyer with the Department of Fisheries and Oceans in Ottawa.

Central to the historical evidence presented and to the legal arguments made before Judge Embree was how the treaties should be read and interpreted. Thus, the treaty documents were formally submitted to the court. The first witness to explain their significance was the Crown's only witness, Professor Stephen Patterson, who began his testimony on 21 November 1994.

An expert witness occupies a paradoxical position in the courtroom. He or she is there as a friend of the court, offering expert opinion on matters in which the court lacks knowledge. Expert witnesses are not advocates for one side or the other. That said, in *Marshall* and other cases, Patterson testified as a Crown witness and Reid and I testified for the Mi'kmaq. A historian one hundred years from now might conclude from this 'fact' that Patterson was an advocate for the Crown whereas Reid and I were advocates for the Mi'kmaq.

Such a conclusion would be wrong, and shows how difficult it is to make 'facts' into history. None of the witnesses in *Marshall* or later cases saw themselves as advocates. To be sure, our testimony differed regarding how the treaties should be interpreted. But – and this is the important point – those differences reflected contrasting approaches to the study of history. Patterson tended to stress the political power of the British Empire over the Mi'kmaq in the eighteenth century, while Reid and I emphasized the agency of the Mi'kmaq in making the treaties. Expert witnesses, however, sometimes act like advocates and forget their role in the courtroom. For instance, they tend to stress those