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The defence lawyers relied exclusively on the 1760 treaty to defend Donald Marshall Jr. The lawyers from both sides focused on two passages in that treaty. The first is found in the first clause of the 1760 treaty, in which each Mi'kmaq chief made his 'submission to His Majesty in the most perfect, ample, & Solemn manner.' The second is found in the seventh clause, in which the Mi'kmaq agreed that they 'will not traffick, barter, or Exchange any Commodities in any manner but with such persons or Manager of such Truckhouses as shall be appointed or Established by His Majesty's Governor.'

Michael Paré, representing the federal government, argued that in signing the treaty the Mi'kmaq had agreed to become subjects of the king and therefore were now subject to federal fisheries laws: 'These treaties represent the formal acknowledgement by the Mi'kmaq people that they are His Majesty's subjects and that they are submitting themselves to His jurisdiction and authority. By doing so, they became subject to the laws of the Province. This included any and all laws then in existence or to be enacted regulating trade and commerce whether Provincial or imperial.' For this reason, Marshall was subject to federal statutes governing the fishery, since the Canadian government was the direct inheritor of the British colony of Nova Scotia. Paré then argued that even if this wasn't the case, by the seventh clause of the treaty the Mi'kmaq had agreed to restrict their trade to government-run truckhouses: 'At most, Mi'kmaq acting in accordance with the terms of these treaties could bring commodities which they had to sell to the approved truckhouse or to such persons as might be appointed by the Crown. At all times, though, these activities were subject to the overriding legislative authority of the State, the jurisdictional authority of which had been accepted by the Mi'kmaq in these treaties. In any event, the treaties do not create any commercial fishing rights.'¹ Both clauses, Mr Paré argued, reflected the Mi'kmaq people's tenuous political situation in 1760. Since the French had been defeated militarily, the Mi'kmaq had few options other than to make peace with the British and to accept any terms proffered to them.

Bruce Wildsmith disagreed. He did not agree that the first clause of the 1760 treaty gave the government the unilateral right to impose regulations on the Mi'kmaq, as Paré was suggesting. Rather, Wildsmith argued, 'nothing was done by the English before, in, or about 1760 and 1761 to bring to the attention of the Maliseet and Mi'kmaq that they