

27 June 1996, Antigonish, Nova Scotia

On 27 June 1996, Mr Justice John D. Embree delivered his decision in *R. v. Donald Marshall Jr.* The decision filled forty-six typescript pages, with another nineteen pages of appendices.

Judge Embree first described the historical context in which the treaties had been signed. This included an extensive discussion of the French and English colonization of eastern North America, and of the events preceding the signing of the 1760 treaty. He emphasized that by 1760 the Mi'kmaq had become dependent on European trade goods, including guns and powder, and that they could no longer obtain these items from the French. Moreover, the British defeat of French forces in North America had given Great Britain more confidence 'than ever before in their strength of their position in Nova Scotia.' At the same time, according to Judge Embree, the British still felt uneasy: they 'wanted peace and a safe environment for their current and future settlers. Despite their recent victories, they did not feel completely secure in Nova Scotia.'

Judge Embree then outlined the significance of this analysis for understanding the 1760 treaty: 'It is my opinion that this combination of factors contributed greatly to the atmosphere in which the Treaties of 1760–1 were entered into. The Mi'kmaq had lost their major ally and supplier. Their ability to carry on effective hostilities against the British was substantially reduced. The Mi'kmaq would have perceived the British to be in a superior military position in the Province. At least as importantly, their justification for continuing hostilities against the British largely disappeared when the French departed. The Mi'kmaq also needed a new supplier of European goods and the British had become the primary potential source of those goods.'¹

What did this mean in evaluating the treaty? On this point, Judge Embree was unequivocal: 'The British wanted their King to be King over all of the land and territory where the Mi'kmaq lived and beyond. The British expected that their King would be the King of everyone who lived in Nova Scotia. By 1760, the Mi'kmaq would have been under no misunderstanding about that.'²

Judge Embree added that the Mi'kmaq would have been perfectly capable of understanding British intentions, since they would have been able to converse in European languages: 'I am satisfied that the Mi'kmaq community had members who could communicate in French. So did the British. They could communicate directly with each other.'³