September to November 1999

On 17 September 1999, the Supreme Court of Canada issued its decision in *R. v. Donald John Marshall Jr.* Five Justices – Binnie, Cory, Lamer, Iacobucci, and L'Hereux-Dubé – overturned the decisions of the lower courts and dismissed the charges against Marshall. Two Justices, Gonthier and McLachlin, dissented from the majority.

Justice Binnie wrote the decision for the majority. He began by describing Donald Marshall Jr's actions in mid-August 1993 that had led to his prosecution, and then referred to a transaction between two Mi'kmaq women and Nova Scotia minister more than two centuries earlier:

> On an earlier August morning, some 235 years previously, the Reverend John Seccombe of Chester, Nova Scotia, a missionary and sometime dining companion of the Governor, noted with satisfaction in his diary, 'Two Indian squaws brought seal skins and eels to sell.' That transaction was apparently completed without arrest or other incident. The thread of continuity between these events, it seems, is that the Mi'kmaq people have sustained themselves in part by harvesting and trading fish (including eels) since Europeans first visited the coasts of what is now Nova Scotia in the 16th century. The appellant [referring to Donald Marshall Jr] says that they are entitled to continue to do so now by virtue of a treaty right agreed to by the British Crown in 1760. As noted by my colleague, Justice McLachlin, the appellant is guilty as charged unless his activities were protected by an existing Aboriginal or treaty right. No reliance was placed on any Aboriginal right; the appellant chooses to rest his case entirely on the Mi'kmaq treaties of 1760–61.[1]

Justice Binnie first summed up the principal disagreements between the defendant and the government: 'The trial judge ... accepted as applicable the terms of a treaty of Peace and Friendship signed on March 10, 1760 at Halifax. The parties disagree about the existence of alleged oral terms, as well as the implications of the "trade clause" written in that document.' From Justice Binnie's perspective, the problem was that the written text of the 1760 treaty did not sustain the appellant's argument that the defendant had 'the right to trade, but also the right to pursue traditional hunting, fishing, and gathering activities in support of that trade.' The question, according to Justice Binnie, was whether the written text incorporated all agreements made between the Mi'kmaq and the British.[2]