

## Regina v Marshall: Native History, the Judiciary and the Public

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## REVIEW ESSAYS/NOTES CRITIQUES

### *Regina v Marshall:* Native History, the Judiciary and the Public

ON 5 NOVEMBER 1999, the Mi'kmaq of Atlantic Canada rejoiced when the Supreme Court of Canada issued its *Regina v Marshall* judgment, which recognized their treaty right to fish commercially. Non-native fishermen, on the other hand, were outraged and raised a storm of protest. What neither party, nor the larger public, appreciated is that the highly controversial ruling is the legacy of nearly 30 years of modern Aboriginal and treaty rights litigation in Canada. The process began in 1973, when the Supreme Court of Canada issued its *Calder* judgment concerning the aboriginal title claim of the Nisga'a. This ruling signaled the end of the practice of determining Aboriginal and treaty rights solely on the basis of debates that centred on interpretations of the law or were restricted to the close reading of treaty texts. After *Calder*, evidence pertaining to many facets of First Nations cultural and economic history became central to the determination of their rights. Thus, historians (very broadly defined) have played an ever more important role in the litigation process as expert witnesses. Their increasing participation has, in turn, forced the judiciary to develop guidelines for assessing the evidence and interpretations these professionals bring into the courtroom.

*Regina v Marshall* represents a milestone on this long litigation path for at least two reasons. First, it affirmed treaty rights long claimed by the Mi'kmaq. Second, the judgment made it clear that the Supreme Court is becoming increasingly sensitive to public criticisms of the ways its changing perspectives on Native history are influencing the evolution of aboriginal and treaty rights case law. The decision, therefore, raises several questions: What specific issues about the interpretation of Mi'kmaq history did the Marshall case raise? How did the Supreme Court address them? How has the judiciary responded to the criticisms that the public and professional historians have made about the ways it approaches Native history in the courtroom?

The *Marshall* decision provoked so hostile a public reaction that the court felt obliged to take the rare subsequent step of issuing a "clarification" of its judgment.<sup>1</sup> The negative public response to *Marshall* was not a unique event, however. Judicial rulings in the area of Aboriginal and treaty rights have come under increasing attack. Before *Marshall*, for example, the media and the public in British Columbia vigorously assailed the Supreme Court's *Delgamuukw* decision. Most recently, Premier Mike Harris of Ontario harshly criticized an Ontario Court of Appeal ruling (*Regina v Powley*, 2000), which recognized that the Métis of Sault Ste. Marie, Ontario have Aboriginal and treaty rights.<sup>2</sup> Commonly, the critics of Aboriginal and treaty rights decisions publicly accuse the courts of "judicial activism", or of making law.

1 *Regina v Marshall*, 17 November 1999. The original judgment was released 5 November 1999.

2 *National Post*, 21 January 2000. The treaty rights are derived from the Robinson Treaties of 1850.

Two recent publications provide historical perspectives that help explain this rising chorus of criticism against the judiciary. *Indigenous Peoples' Rights in Australia, Canada & New Zealand* (Oxford, Oxford University Press, 1999) is a collection of 17 commissioned articles and an interview that editor Paul Havemann (who is a legal scholar at Waikato University, Hamilton, New Zealand) assembled to present a comparative and multi-disciplinary analysis of the de-colonial struggle of aboriginal people in three former colonies of the British Empire. The contributors argue that the courts have become one of the key venues for the rights struggle for two primary reasons. First, the courts are less subject to public pressure than are the other democratic institutions created by settler societies. Second, advancements in human rights on the international stage have encouraged the judiciary to be more receptive to indigenous peoples' claims than it had been previously.

In the section of the book dealing with the history of colonial settlement, historians, Henry Reynolds of Australia, Ken Coates of Canada and M.P.K. Sorrenson of New Zealand discuss the foundation myths settler societies generated to justify dispossessing and marginalizing aboriginal people. Reynolds explores the way revisionist histories of Australian aboriginal people, which he pioneered, have undercut these mythologies. In particular, these new histories challenged Australia's founding legal myth that the continent was uninhabited (the *terra nullius* doctrine) when settlers arrived. Reynolds notes that opponents of Aborigines' rights have dubbed this path-breaking scholarship "black armband history", because it paved the way for the *Mabo* (1988 and 1992) decisions of the High Court of Australia. These rulings rejected the *terra nullius* doctrine and recognized Aborigines' land rights for the first time. In his essay about Canada, Ken Coates notes that Canadians structured their foundation myth about aboriginal people in reference to the historical experience of Indians in the United States. It is a story that portrays British and Canadian governments as having treated their "colonial wards" better than Americans did.

In *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto, University of Toronto Press, 1998), Sidney Harring explores this legend from the perspective of legal history. He notes that nation-building histories of Canada normally depict the country as having developed from "an orderly frontier, regulated by the rule of law", which extended to all inhabitants "the privilege of British justice" (p. 16). According to Harring, the "centrality of the rule of law" (p. 17) is supposed to be what distinguishes Canadian history from that of other colonial societies, especially that of the United States.

He devotes most of his book to debunking this mythology. Harring shows that, even though Canada's legal heritage has some distinctive regional characteristics (Atlantic Canada; Quebec; Ontario, the Prairie Provinces and the Northwest Territories; and British Columbia), judicial conservatism, or formalism, dominated colonial jurisprudence. It had virtually the same impact on First Nations everywhere. Invariably settlers' economic interests were protected whenever they clashed with those of Aboriginal people. Harring shows that in British North America the net effect of this was the dispossession and economic marginalization of Aboriginal people. In Atlantic Canada, it meant that the Mi'kmaq fared as poorly with their treaty and fishing rights as they did with their land rights.

In light of this history, it is not surprising that recent judicial decisions respecting Aboriginal and treaty rights, such as *Marshall*, provoke outrage in some quarters. The

Supreme Court clearly has moved away from the judicial conservatism of the recent past that benefited the interests of settlers and their descendants at the considerable expense of Aboriginal people. Redressing this long-standing imbalance of legal rights necessarily upsets the established economic order. It is to be expected that those who are adversely affected will continue to demand that the judiciary reverse its course. If we are to realize the goal of creating a more inclusive Canadian society, however, it is essential that the judiciary resist this pressure.

The Marshall case raised the specific historical question of whether the Mi'kmaq had an historical treaty right to fish commercially that exempted them from existing conservation regulations. Finding an answer to this question involved determining the nature and intent of the 1760-61 treaties that the Mi'kmaq had concluded with British colonial officials. Accordingly, during the trial in the Nova Scotia Provincial Court, and in the appeals to the Nova Scotia Appeal Court and the Supreme Court of Canada, the wording of the 10 March 1760 treaty between Governor Charles Lawrence and Mi'kmaq leader Paul Laurent came under close scrutiny. This was because Laurent's accord served as the model for a series of additional agreements between other Mi'kmaq groups and the British in 1760 and 1761. The courts considered these treaties in reference to the cultural/historical context in which they had been negotiated. The Supreme Court had established the principle of taking a contextual approach in a series of decisions that it issued in the 1980s and 1990s.<sup>3</sup> Writing for the majority in *Regina v Marshall*, Justice W. Ian Binnie succinctly described this precept as follows: "extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty".<sup>4</sup> The court noted that interpreting treaties in this fashion was in keeping with the practices of modern commercial contract law, which permits the introduction of extrinsic evidence because written agreements frequently do not include all of the terms the parties approved. The Supreme Court had already established the precedent for approaching First Nations treaties in this manner in its decisions in *Regina v Sioui* (1990) and *Regina v Sundown* (1998).<sup>5</sup>

In *Regina v Marshall* conflicting interpretations focused on the "trade clause" of the 1760 peace treaty where Laurent, on behalf of his followers, stated:

And I do further promise for myself and my tribe that we will not either directly nor indirectly assist any of the enemies of His most sacred Majesty King George the Second, his heirs or Successors, nor hold any manner of Commerce traffick nor intercourse with them, but on the contrary will as much as may be in our power discover and make known to His Majesty's Governor, any ill designs [to] which may be formed or contrived against His Majesty's subjects. And I do further engage that we will not traffick, 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 Lunenburg or Elsewhere in Nova Scotia or Accadia.<sup>6</sup>

3 The most relevant case law is: *Regina v Taylor and Williams* (1981), *Guerin v Regina* (1984), *Regina v Sioui* (1990), *Regina v Badger* (1996) and *Delgamuukw v British Columbia* (1997).

4 *Regina v Marshall*, section 11.

5 These are cited in *ibid.* section 14.

6 *Ibid.*, section 5.

This clause raised three legal questions: First, did the British enter into this agreement on the assumption that the Mi'kmaq had the right to harvest resources from the land and sea for commercial purposes? Second, has this right continued to the present? Third, if the answer to the second question is affirmative, are there limits to that right?

The historical experts supporting Marshall answered the first question positively. They also held that this right continued after the 1780s, when the British discontinued the truckhouse system they had built in response to Mi'kmaq requests. A key piece of extrinsic evidence offered to back up these interpretations was a short-lived British-Mi'kmaq peace agreement of 1752. In this treaty the British promised "the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting and Fishing as usual and if they shall think fit a Truckhouse needful at the River Chidenaccadie, 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. . . ."<sup>7</sup> British-drafted minutes of negotiating sessions also were introduced in support of the Mi'kmaq understanding of the 1760-61 treaties. In the eyes of the judiciary these minutes proved to be very important because they revealed that the terms the British and Mi'kmaq agreed to were more favourable than those contained in the treaty text.

The other primary and secondary sources that Marshall's experts introduced convinced the court that the Mi'kmaq had long-established trading contacts with Europeans (French and English) and they had become dependent on this trade for basic necessities, most notably firearms. The standard historical reference works cited included those of William Daugherty, Olive Dickason, R.O. MacFarlane and L.F.S. Upton.<sup>8</sup>

Based on the evidence and testimony presented at trial, the trial judge accepted the proposition that the clause restricting the Mi'kmaq to trade with the British should be interpreted positively, i.e. it was based on the assumption that these people had a right to commercially harvest fish and wildlife. Otherwise, he reasoned, creating the truckhouse system would have been pointless. Significantly, in reaching similar conclusions on this important point, both the trial judge and the Supreme Court majority were heavily influenced by the Crown's historical expert, who stated at trial: "the truckhouse clause is based on the assumption that natives will have a variety of things to trade, some of which are mentioned and some not".<sup>9</sup> When citing this passage, Binnie remarked: "there was an unusual level of agreement amongst all of the professional historians who testified about the common intention of the participants regarding the treaty obligations entered into by the Crown".<sup>10</sup>

The opinions of the judiciary were divided, however, over the crucial question of

7 Ibid., section 15.

8 William Daugherty, *Maritime Indian Treaties in Historical Perspective* (Ottawa, 1983); Olive Patricia Dickason, "Amerindians Between French and English in Nova Scotia, 1713-1763", *American Indian Culture and Research Journal*, X, 4 (1986), pp. 31-56; R.O. MacFarlane, "Indian Trade in Nova Scotia to 1764", *Canadian Historical Association Report* (1934), pp. 57-67. "As Long as the Sun and Moon Shall Endure": A Brief History of the Maritime First Nations Treaties, 1675 to 1793 (Fredericton, 1986) also was considered.

9 Ibid., section 38.

10 Ibid. Subsequently this witness, Dr. Stephen Patterson, protested that he had been quoted out of context. *Daily Gleaner* (Fredericton) 18 September 1999, p. A2.

whether Mi'kmaq commercial fishing rights survived the abandonment of the truckhouse system after the 1780s. The trial judge and the Nova Scotia Appeal Court concluded that the right expired with the end of this system. The latter court reached this conclusion on the basis of the testimony of the Crown witness. It noted that this historian had used the terms "right" and "permissible" interchangeably. This led the appeal court to reason that the "trade clause gave rise to no 'rights' at all".<sup>11</sup> The majority of the Supreme Court interpreted his testimony very differently, however. Justice Binnie pointed out that the trial transcripts showed that counsel had specifically asked the Crown's expert if the 1760 treaty recognized that the Mi'kmaq had a "right" to fish and trade fish. He replied affirmatively saying that the British recognized that these people: "'had a right to live in Nova Scotia in their traditional ways' . . . which included hunting and fishing and trading their catch for necessities".<sup>12</sup> Binnie noted further that other evidence presented at trial had demonstrated that trading with Europeans was a 250-year-old Mi'kmaq tradition by the time they signed their treaties with the British. In other words, the treaty at issue protected a longstanding custom.

Having affirmed that the Mi'kmaq still have a treaty right to fish commercially, the Supreme Court next had to determine if there were any limits to that entitlement. The court approached this issue from the perspective of the precedents for interpreting Native history that it had established during the past decade. In *Simon v Regina* (1985) the Supreme Court established that treaty provisions must be interpreted flexibly to allow for the evolution of changes in normal practice. In *Regina v Sparrow* (1990), the court extended this idea to include Aboriginal rights, ruling that these entitlements are to be "affirmed in a contemporary form rather than in their primeval simplicity and vigour".<sup>13</sup> These rulings signaled the abandonment of the older "frozen rights" approach, which had limited Aboriginal and treaty rights to the practices Native people followed when they made initial contact with Europeans, or Britain asserted its sovereignty over their territory or they signed a treaty. This newer approach to treaty issues was reconfirmed in *Regina v Sundown* (1999) on the eve of Marshall decision.

Justice Binnie observed that one of the crucial pieces of evidence introduced at trial was a British treaty negotiating memorandum dated 11 February 1760 that stated a truckhouse might be established to supply the Mi'kmaq with "necessaries".<sup>14</sup> From this he reasoned that the treaty did not intend to protect a general right to trade for economic gain. Binnie proposed that the modern equivalent of what the 1760-61 treaties sought to protect would be the right to earn a "moderate livelihood" through trade. This idea comes from recent case law respecting Aboriginal fishing rights in British Columbia.<sup>15</sup> In a series of cases the judiciary had to confront the fact that West Coast First Nations engaged in the extensive exchange of fish and fish products well before Europeans arrived. Also, they had incorporated the newcomers into their

11 *Regina v Marshall*, section 38.

12 *Ibid.*

13 *Regina v Sparrow* (1990), p. 26.

14 *Regina v Marshall*, section 29.

15 *Regina v Van der Peet* (1996), *Regina v Gladstone* (1996) and *Regina v NTC Smokehouse* (1996).

trading networks before Britain asserted sovereignty in the region in 1846. It was clear, therefore, that in British Columbia, Aboriginal livelihood rights had to have a commercial component. This posed a problem. Unlike ceremonial and subsistence rights, which are self-limiting and allow room for the participation of non-natives in the fishery, commercial rights have no clear boundaries unless, perhaps, they can be defined in restrictive terms.

British Columbia Appeal Court Justice Douglas Lambert proposed a “history-based” solution in his 1993 dissenting opinion in *Regina v Van der Peet* (1993), which concerned the commercial salmon fishing rights of the *Stó:lo*. He drew on a recent American case regarding Indian rights (known as the Boldt decision) and his understanding of British Columbia Native history to reason that the contemporary Aboriginal fishing rights of the *Stó:lo* should be broad enough to supply “sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with other financial resources, with a moderate livelihood”.<sup>16</sup> Although the Supreme Court did not support Lambert in granting commercial fishing rights to the *Stó:lo*, largely because a majority of the justices believed that the evidence presented had not demonstrated that salmon trading was of central importance to these people, the Supreme Court did take up his moderate livelihood concept in *Regina v Gladstone* (1996). This case addressed the Heiltsuk’s right to sell herring roe-on-kelp. In this instance, the Supreme Court of Canada found that the evidence presented at trial had demonstrated conclusively that these people traditionally had trafficked in substantial quantities of herring roe. Justice Beverley McLachlin concurred with the majority on this issue, but she interpreted the significance of this activity differently. She concluded that the Heiltsuk traditionally traded roe primarily to supply themselves with “the necessities of life, principally other food products”.<sup>17</sup>

Significantly, in *Regina v Marshall*, Binnie referred to the ideas of Lambert and McLachlin and concluded that “in this case, equally, it is not suggested that Mi’kmaq trade historically generated ‘wealth which would exceed a sustenance lifestyle’”.<sup>18</sup> By interpreting Native economic history in this narrow manner, the Supreme Court believed it was justified in acknowledging the Mi’kmaq had a treaty-protected commercial fishing right while simultaneously placing a murky limitation on that right.

When he wrote the majority opinion in *Marshall*, Justice Binnie began by noting 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”. He continued: “while the tone of some of this criticism strikes the non-professional historian as intemperate, the basic objection, as I understand it, is that the judicial selection of facts and quotations is not

16 Emphasis added. This United States Supreme Court case is indexed as *The State of Washington v Washington State Commercial, Passenger, Fishing Vessel Association*, 443 U.S. 658 (1979). It upheld the decision of Judge Boldt of the U.S. District Court for the Western District of Washington State in *United States v State of Washington*, 384 F. Supp. 312 (1974). Lambert cites this in *Court of Appeal for British Columbia, Reasons For Judgment, Her Majesty the Queen v Dorothy Marie Van Der Peet* (1993), pp. 126-8.

17 *Regina v Gladstone*, section 30.

18 *Regina v Marshall*, section 60.



always up to the standard demanded of the professional historian, which is said to be more nuanced".<sup>19</sup> He then defended the judiciary's approach by noting that the courts frequently have to "determine" certain historical facts in order to resolve the disputes that are brought before them. This means that "litigating parties cannot await the possibility of a stable academic consensus".<sup>20</sup>

Significantly, two of the critiques Binnie cited appeared in the *Canadian Historical Review* in 1986, at a time when it was widely anticipated that Aboriginal and treaty rights and charter rights litigation soon would create a large demand for historical experts. The *Canadian Historical Review* contributions cautioned prospective expert witnesses that the adversarial nature of legal proceedings created a combative environment in the courtroom, which is completely alien from that of the classroom. The kinds of advice offered in these *Canadian Historical Review* articles are common in guides for expert witnesses.<sup>21</sup>

Two other articles Binnie cited, those of Robin Fisher and Arthur J. Ray, were primarily intended as criticisms of the judiciary, albeit they were directed specifically at the conduct of the trial of the Gitksan and Wet'suwet'en's Aboriginal title suit (known as *Delgamuukw v Regina*) and at the reasons for judgment offered by British Columbia Supreme Court Chief Justice (as he then was) Allan McEachern.<sup>22</sup> These particular commentaries formed but a fraction of a substantial body of scholarly literature on *Delgamuukw*, most of which is highly critical of the judiciary's approach to history in this landmark case.<sup>23</sup> Scholars have been so publicly critical not only because of the trial judge's disparaging remarks about traditional Gitksan and Wet'suwet'en culture, but also because of the very nature of Aboriginal and treaty rights litigation, which forces the courts to evaluate ethno-historical evidence. This evidence is highly interdisciplinary and multidisciplinary in character. Judges must evaluate archaeological data, oral histories, ethnographic information, a wide array of documentary evidence and environmental data. They have to weigh this often-

19 *Regina v Marshall*, sections 36 and 37. The references that Binnie cited were: G. M. Dickinson and R.D. Gidney, "History and Advocacy: Some Reflections on the Historian's Role in Litigation", *Canadian Historical Review*, LXVIII, 4 (December 1987), pp. 576-85; Donald J. Bourgeois, "The Role of the Historian in the Litigation Process", *Canadian Historical Review*, LXVII, 2 (June 1986), pp. 195-205; Robin Fisher, "Judging History: Reflections on the Reasons for Judgment in *Delgamuukw v B.C.*", *B.C. Studies*, 95 (Autumn 1992), pp. 43-54; and Arthur J. Ray, "Creating the Image of the Savage in Defence of the Crown: The Ethnohistorian in Court", *Native Studies Review*, VI, 2 (1990), pp. 13-29.

20 *Regina v Marshall*, section 37.

21 See Jean Graham Hall and Gordon Smith, *The Expert Witness* (Chichester, 1992) and Michael Reynolds and Philip King, *The Expert Witness and his Evidence*, 2nd ed. (London, 1992).

22 These appeared as *Delgamuukw v Regina: Reasons For Judgment*, Supreme Court of British Columbia, No. 0843 Smithers Registry, 1991.

23 In addition to works cited by Binnie are: Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v The Queen: Proceedings of a Conference Held Sept. 10 & 11, 1991* (Vancouver, 1992); Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Burnaby, 1998); Bruce G. Miller, Guest Editor, "A Theme Issue Anthropology and History in the Courts", *BC Studies*, 95 (Autumn 1992); Antonia Mills, *Eagle Down Is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver, 1994); and Arthur J. Ray, "The Historical Geographer and the Gitksan and Wet'suwet'en Comprehensive Claim: The Role of the Expert Witness", in Garth Cant et al., eds., *Indigenous Land Rights in Commonwealth Countries: Dispossession, Negotiation and Community Action* (Christchurch, N.Z., 1993), pp. 81-7.



conflicting information in light of the competing disciplinary perspectives, theories and methodologies that experts use to present it in court. Undoubtedly, the marathon *Delgamuukw* trial best illustrates the problems judges can face. During the 318 days of evidence, 61 witnesses made court presentations that resulted in 23,503 pages of transcript evidence. In addition, opposing counsel submitted 3,039 pages of commissioned evidence and 9,200 exhibits (including expert reports) totaling almost 50,000 pages.

A particular problem identified by the trial judge in *Delgamuukw* was the acceptability of the Gitksan and Wet'suwet'en traditional oral histories, and the supporting testimony of ethnographers, which conflicted with the general rule against the admissibility of hearsay. Although he waived the rule, in the end he gave no weight to these lines of evidence. The Aboriginal and anthropological communities protested vigorously. Even members of the legal profession voiced concern about the exclusion of the oral histories.<sup>24</sup> On appeal, the Supreme Court of Canada addressed this crucial issue by ruling that "the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents".<sup>25</sup> It pointed out that this already was the practice in treaty rights litigation. The Supreme Court determined, therefore, that the trial judge had erred by not giving proper weight to oral histories.<sup>26</sup>

Although the Supreme Court did, therefore, address one of the issues of concern to Aboriginal people and ethnohistorians, other concerns that Fisher and Ray expressed cannot be dealt with so readily. Fisher objected to what he termed the trial judge's "xerox, scissors, and paste" approach to Gitksan and Wet'suwet'en history, which involved citing historical documents out of context.<sup>27</sup> Unfortunately, this practice has not been limited to the *Delgamuukw* case. As Fisher noted with respect to *Delgamuukw*, the courts have a tendency to view historians primarily as "collectors of archival, historical documents".<sup>28</sup> Also, until recently the legal profession commonly held the notion that "documents are plain on their face". In *Delgamuukw*, for instance, counsel sometimes challenged the admissibility of historians, using this assertion to say that the court did not need historical experts to explain what archival evidence meant.<sup>29</sup>

Ray's criticism of the litigation process, as it unfolded in *Delgamuukw*, focused on the problem of using documentary records to portray the cultural history of the First Nations. This concerned using 18th- and 19th-century value-laden commentaries and observations of Eurocanadians about Aboriginal people as though they were objective or scientific facts. This was especially problematic in *Delgamuukw*, where the

24 Clay McLeod, "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking down the Barriers of the Past", *Alberta Law Review*, XXX, 4 (1992), pp. 1276-90.

25 *Delgamuukw v Regina* (1997), section 87: 27.

26 *Ibid.*, section 107.

27 Fisher, "Judging History", p. 44.

28 *Ibid.*, p. 45.

29 "Proceedings At Trial", Supreme Court of British Columbia, Smithers Registry No. 0843, 20 March 1989, p. 13330.

defendants (the Provincial Crown in particular) advanced what was, in effect, a variant of the *terra nullius* legal theory. This legacy of British Columbia's colonial past is the notion that the Gitksan and Wet'suwet'en had not attained a sufficiently high level of cultural and economic development to assert effective sovereignty over their traditional territory before Europeans arrived. Given the agendas of the colonizers and the intellectual climate of the 18th and 19th centuries, it is easy to find racist and evolutionist commentaries in the archival record that would seem to support such an outdated perspective on Native history.<sup>30</sup>

In conclusion, *Regina v Marshall* highlights how the evolution of Aboriginal and treaty rights in Canada is an interactive process involving the First Nations, the public at large, the judiciary and the academic community. Each Aboriginal or treaty rights case raises general and particular historical questions that can significantly affect the lives of members of specific Native communities and those of their non-aboriginal neighbours. Expert witnesses have to address the questions raised in reference to guidelines and procedures that the judiciary uses to assess their evidence and interpretations. In turn, the judiciary's understanding of Native history continually changes as a result of the participation of ethno-historical experts.

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30 Julie Cruikshank notes that trial judge McEachern was attracted to outdated evolutionary cultural anthropology. Julie Cruikshank, "Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition as Evidence in *Delgamuukw v B.C.*", *BC Studies*, 95 (Autumn 1992), pp. 25-42.