

History, Law and the Mi'kmaq of Atlantic Canada

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Volume 33, numéro 2, spring 2004

URI : https://id.erudit.org/iderudit/acad33_2re01

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Éditeur(s)

The Department of History at the University of New Brunswick

ISSN

0044-5851 (imprimé)

1712-7432 (numérique)

[Découvrir la revue](#)

Citer ce document

Nurse, A. (2004). History, Law and the Mi'kmaq of Atlantic Canada. *Acadiensis*, 33(2), 126–133.

REVIEW ESSAYS/NOTES CRITIQUE

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THE INTENSE PUBLIC CONTROVERSY SURROUNDING the Donald Marshall Junior eel fishing trials has served regional history well. The original trial (at which Marshall's treaty rights defense was rejected) featured only the testimony of historians. Research used at the trial has been rewritten for scholarly publication, various symposia have been held on the subject and the Supreme Court of Canada included an extended methodological discussion in the decision that finally acquitted Marshall by accepting the legitimacy of his defense.¹ Other scholarly work has developed around Mi'kmaq history, in part in an attempt to translate the work of historians into a wider public discourse that could contribute to the amelioration of tensions between Native and non-Native Atlantic Canadians.² In this regard, the legal and public controversies surrounding Aboriginal treaty rights in Atlantic Canada have helped to advance an important historiographic agenda, illustrating the significance of historical research and contributing to a wider understanding of the processes that have structured interaction between Native and non-Native peoples in the Atlantic region.

William Wicken's *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto, University of Toronto Press, 2002) is an important book that both emerges out of the legal wrangling surrounding regional Aboriginal rights and marks a clear advance in interpreting processes of Native/non-Native interaction in Atlantic Canada. Wicken was one of the key expert witnesses supporting Marshall's defense, but *Mi'kmaq Treaties on Trial* is much more than a "brief for the defense". It is the first extended work since L.F.S. Upton's *Micmacs and Colonists* to address the meanings and implications of the British/Mi'kmaq conflicts that enflamed Maritime Canada in the first 60 years of the 18th century.³ Through cautious and thorough research Wicken not only revises Upton's conclusions but also raises important new questions about the history of Native/non-Native interaction in the Maritimes. My objective in this review is to analyze Wicken's interpretation and suggest how it provides the basis for reorienting research into the regional history of Aboriginal/non-Aboriginal relations. The great merit of this text lies not simply in its effective historical scholarship, but in its nuanced and suggestive interpretation. It is part of an important historiographical shift in writing the history of Atlantic Canadian First Nations, a long-overdue shift that effectively "modernizes" research on Aboriginal peoples in the region.

In 1993, Donald Marshall Junior, a man already well known for the legal

- 1 John G. Reid, William C. Wicken, Stephen E. Patterson and D.G. Bell, "History, Native Issues and the Courts: A Forum", *Acadiensis*, XXVIII, 1 (Autumn 1998), pp. 3-26; *R. v. Marshall* [1999] 3 S.C.R. 456, http://www.lexum.umontreal.ca/csc-ccc/en/pub/1999/vol3/html/1999scr3_0456.html.
- 2 Kenneth Coates, *The Marshall Decision and Native Rights* (Montreal and Kingston, 2000). See also Bruce H. Wildsmith, "The Mi'kmaq and the Fishery: Beyond Food Requirements", *Dalhousie Law Journal*, 18, 1 (Spring 1995), pp. 116-40 and Robert Adlam, "Indigenous Rights, the Marshall Decision and Cultural Restoration", *Acadiensis*, XXXIII, 1 (Autumn 2003), pp. 108-13.
- 3 L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (Vancouver, 1979).

Andrew Nurse, "History, Law and the Mi'kmaq", *Acadiensis*, XXXIII, 2 (Spring 2004), pp. 126-33.

discrimination he had suffered and his unjust internment for a murder he did not commit,⁴ was charged with three different offenses under the federal Fisheries Act. Conceding that he had been fishing and selling eels, Marshall argued that he had a treaty right to do so pursuant to the 18th-century Peace and Friendship treaties that ended military conflict between the British Crown and the Mi'kmaq Nation. His defense, supported by the Union of Nova Scotia Indians and the Confederacy of Mainland Micmacs, was built around the continued legitimacy of these rights.⁵ That defense was not novel. Maritime First Nations have a long but little-known history of defending the rights specified in the Peace and Friendship treaties against unilateral state regulation.⁶ What was novel, for Atlantic Canada at least, was the seriousness with which all levels of the judiciary treated historical testimony. The thrust of *Mi'kmaq Treaties on Trial* is to tell both of these stories. First, Wicken's text is a re-interpretation of the extended military conflict for control of Nova Scotia leading to the Peace and Friendship treaties. Second, it is designed to explain how Donald Marshall Junior ended up on trial for violating the federal Fisheries Act, how the treaty rights of the Mi'kmaq Nation were discarded by the colonial then federal states and how Nova Scotia courts used history to justify the original conviction.

Wicken devotes by far the most space to the first of these objectives. In an empirically grounded, careful and nuanced analysis of extant primary records, he examines the competing value systems, negotiations and material circumstances that led first to the 1726 treaty that ended the second major conflict between the Mi'kmaq and the British and, subsequently, to the better known 1760-61 treaties that confirmed peaceful relations between the Crown and Maritime First Nations. In developing his interpretation, Wicken takes issue with the conclusions reached in other historical studies. Most importantly, he clearly rejects the contention, made by a variety of different scholars, that Mi'kmaq culture and autonomy had already been fundamentally compromised by the mid-18th century. While this line of interpretation has a long history, its first significant modern treatment can be found in the now-discredited work of Calvin Martin.⁷

According to Martin, a series of circumstances – including, most importantly, disease – led the Mi'kmaq to reject their own cosmology and abrogate the fine reciprocal balance they had maintained between themselves and the local ecology. For Martin, the influx of European diseases proved little less than an unmitigated disaster, both physically and culturally. In the face of decimating disease, the Mi'kmaq adopted a new and careless ecological ethic that produced drastic overhunting and trade dependency. While Martin's original interpretation has not withstood sustained historical critique,⁸ the basic interpretation implied by his argument has proven more

4 Michael Harris, *Justice Denied: The Law versus Donald Marshall* (Toronto, 1986); Joy Mannette, ed., *Elusive Justice: Beyond the Marshall Inquiry* (Halifax, 1992).

5 Details relating to the trial are drawn from Wicken, *Mi'kmaq Treaties on Trial*, pp. 4-14.

6 *R. v. Syliboy* [1928] 50 C.C.C. 389, <http://library.usask.ca/native/cnlc/vol04/430.html>. See also Janet E. Chute, *The Long Road Back: Origins of the Nova Scotian Mi'kmaq Land and Resource Campaign* (Shubenacadie, 1999).

7 Calvin Martin, "The European Impact on the Culture of a Northeastern Algonquian Tribe: An Ecological Interpretation", *William and Mary Quarterly*, 3rd series, 31 (1974), pp. 3-26.

8 Sheppard Krech III, ed., *Indians, Animals, and the Fur Trade: A Critique of "Keepers of the Game"* (Athens, 1981).

appealing to historians. While rejecting much of what Martin had to say about shifts in Mi'kmaq cosmology, other historical interpretations tended to support the idea that increased interaction with Europeans produced both fundamental cultural change and worked to severely limit political autonomy. In one way or another, L.F.S. Upton, Olive Dickason and Stephen Patterson have made this point.⁹

The most overt is Patterson, who argues that Mi'kmaq autonomy was maintained into the mid-18th century only by the balance of French and British forces in Nova Scotia. With the collapse of French power in the region, Mi'kmaq political autonomy became at best decidedly more limited. In Patterson's view, the Peace and Friendship treaties represent the logical outcome of this changed circumstance. The Mi'kmaq, fighting what they understood to be a losing battle, and the British, negotiating from a position of strength, created a colonial legal system that established British sovereignty over Nova Scotia and the Mi'kmaq. By 1760 the Mi'kmaq leadership had little option but to accept whatever deal was offered. According to Patterson, the terms of the deal are clear: the British Crown, in the form of the colonial administration and then later the provincial and federal states, held sole legal authority over Nova Scotia with the legitimate right to make law unilaterally, including the regulation of the Mi'kmaq economy.¹⁰

Wicken's interpretation of the Peace and Friendship treaties, the process of negotiation and the events surrounding them could not be more different. His argument is not that the Mi'kmaq nation was unaffected by its extended conflict with the British empire, but that the social, cultural and political changes that took place were less drastic than previous historical studies suggest. At the time of the first treaty in 1726, the form of the treaty, the process of ratification and its specific terms all indicate that the Mi'kmaq struggle to preserve their autonomy against European colonization had met with a measure of success. While trade had altered their economy, it was far from a state of dependency. The Mi'kmaq did maintain good relations with the French on Île Royale, but they were far from puppets of French administrators. Indeed, there were actually few priests on mainland Nova Scotia and the degree to which the Mi'kmaq generally spoke or even understood French has been overestimated. Wicken contends that the Mi'kmaq relied on translators who understood both languages and that within their own communities Mi'kmaq remained the only language spoken.

What is perhaps most important to this interpretation, however, is that the cultural values that animated Mi'kmaq life had not been destroyed. The Mi'kmaq had their own long tradition of treaty making and, if outside information was needed, they would have relied on other Aboriginal peoples (with whom they were allied) rather than the French or British for their understanding of the implications of the treaties.

9 Upton, *Micmacs and Colonists*, especially pp. xii-xiii for a clear statement of his argument; Olive Patricia Dickason, "Amerindians between French and English", in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto, 1991), pp. 45-67; Stephen E. Patterson, "1744-1763: Colonial Wars and Aboriginal Peoples", in Phillip A. Buckner and John G. Reid, eds., *The Atlantic Region to Confederation: A History* (Toronto and Fredericton, 1994), pp. 125-55; Stephen E. Patterson, "Indian-White Relations in Nova Scotia, 1749-61", *Acadiensis*, 23, 1 (Autumn 1993), pp. 23-59.

10 Patterson, "1744-1763", p. 126.

In other words, the assumption that the Crown brought to the Donald Marshall Junior trial – that the Mi'kmaq operated with a near full and complete understanding of European treaty-making processes – is at best an intensely problematic assumption. There is no reason to assume that this was the case and, in the absence of supporting evidence, other interpretations should be evaluated.

For Wicken, understanding a Mi'kmaq perspective on the treaties is not simply a matter of suggesting that an alternative hypothesis is plausible and that the interpretation suggested by the Crown lacks supporting empirical evidence. Instead, Wicken argues the weight of evidence is actually the other way. The British negotiated treaties with the Mi'kmaq leadership in part using the protocols of the Mi'kmaq people. How else, he argues, can one explain the elaborate ceremonies at Halifax in 1760? If the treaty-making process reflected the interests and power of Great Britain alone, why were chiefs treated like dignitaries? Why was a process of ritual confirmation used? Why was a process of community ratification among the Mi'kmaq followed and accepted by the British colonial administration?

In Wicken's view, a close reading of the treaties also supports this interpretation. The treaties, he argues, both in 1726 and later, were the work of local colonial officials and so reflected their assessment of British needs. These may have been different than the perceptions of imperial officials in London. For Wicken, this suggests that there is no reason to believe that imperial conceptions of treaties and their meanings were operative in Nova Scotia in the middle decades of the 18th century. Provisions of the treaties that ensured the Mi'kmaq "unmolested" access to the land and natural resources of the region and that limited British colonization to existing settlements and those "lawfully to be made" suggest that British colonial officials recognized Aboriginal sovereignty. Moreover, such provisions could be legitimately interpreted by the Mi'kmaq as part of a reciprocal agreement through which the British Crown bound itself to respect Mi'kmaq autonomy outside of pre-existing British settlements.¹¹

According to Wicken, a key clause in the 1726 treaty spells out this new relationship. The second part of the second clause of the treaty reads, in part, as follows: the Mi'kmaq "make Submission to his said Majesty in as Ample a Manner as wee have formerly done to the Most Christian [French] King".¹² The Mi'kmaq, Wicken argues, would have interpreted this clause to indicate that their relationship with the British Crown was substantively similar to their former relationship to the French Crown. The important point here is that the relationship between the French and the Mi'kmaq was not one of dominance and subjugation in which the French empire superseded the autonomy of the Mi'kmaq people and controlled the land and resources of the old colony of Acadia. The Mi'kmaq leadership, then, would have viewed this treaty as a continuity in which their legal and political relationship to the British Crown was no different than their former legal and political relationship to the French Crown.

For their part, the British had good reason to accept the terms of these treaties, even if they promised a general acceptance of Mi'kmaq autonomy and ceded rights to the

11 Wicken, *Mi'kmaq Treaties on Trial*, ch. 5.

12 Wicken, *Mi'kmaq Treaties on Trial*, p. 110.

use of natural resources. In particular, the wars against the Mi'kmaq and other Native peoples of northeastern North America had been costly.¹³ Maintaining the armed force necessary to fight the Mi'kmaq and other Native peoples cost the British treasury more than it liked; the wars harmed the fishing economy of New England by making fishing off Nova Scotia a dangerous pursuit. Wicken reports that colonial officials in Nova Scotia and Massachusetts were under direction from London to reduce the cost of the colonial enterprise. Moreover, the results of war were uncertain. Even as late as the 1760 treaty ceremony at Halifax, it was not clear that the British would emerge victorious in eastern Canada or that the territory would be retained after a European peace treaty between the belligerent great powers. In this circumstance, the British were willing to accept Mi'kmaq rights and guarantee a commercial trade in natural resources as the price of peace. Set in this context and with these considerations, Wicken argues that Marshall's later defense has historical weight behind it. The treaties do not subjugate the Mi'kmaq people to the British Crown; they established rights to use of land and resources and a commercial right to that use.

It is one thing to assert these conclusions; it is another to provide supporting evidence. This is a point often lost both in historiographic debate and in Canadian courts' determination of what constitutes historical "fact". In the original Delgamuukw trial in British Columbia, for example, the trial judge reached questionable conclusions about history based on whose argument he found more believable. Recent scholarly studies critical of Aboriginal rights have tended to follow this same line of argument but in reverse. Tom Flanagan, for example, in his well-known *First Nations, Second Thoughts*, comes close to dismissing historical studies that lend support to Aboriginal rights claims as little more than intensely biased and ideologically driven misrepresentations of the past.¹⁴

Historical research is profoundly affected by narrative strategies, but good history is not detached from empirical evidence.¹⁵ One of the ways in which Wicken attempts to differentiate *Mi'kmaq Treaties on Trial* from other studies of British-Mi'kmaq conflict and the Peace and Friendship treaties is methodological. His approach, he says, represents an effort to read the treaties as "oral text[s] written into alphabetic form".¹⁶ Here, Wicken continues a line of distinction noted in the courts. This distinction is crucial to the second story that Wicken seeks to tell: the historical process that led to the original Marshall trial. According to Wicken, the process that led Marshall to trial developed out of the conflict of oral and textual treatments of the Peace and Friendship treaties. The passage of time, the marginalization of the Mi'kmaq Nation and the increased power of European settlers and the colonial state obscured the

13 Wicken, *Mi'kmaq Treaties on Trial*, p. 82. See also Kenneth Morrison, *The Embattled Northeast: The Elusive Ideal of Alliance in Abenaki-Euro-American Relations* (Berkeley, 1984).

14 Tom Flanagan, *First Nations, Second Thoughts* (Montreal and Kingston, 2000). For critical treatments of the process through which different courts have drawn conclusion about historical "fact", see Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Burnaby, BC, 1998) and Arthur J. Ray, "Creating the Image of the Savage in Defence of the Crown: The Ethnohistorian in Court", *Native Studies Review*, 6, 2 (1990), pp. 13-29.

15 Hayden White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe* (Baltimore, 1973); Peter Gay, *Style in History* (New York, 1974).

16 Wicken, *Mi'kmaq Treaties on Trial*, p. 140.

context and meaning of the treaties, leaving later generations with only the written treaties, devoid of historical context. The end result was a simplistic and biased understanding of the treaties on the part of colonial and later provincial and federal officials: "In this way, the British simplified future understandings of the treaty by extracting the written treaty from the oral context in which it had been created, remembered and later modified. Mi'kmaq perspectives became less important".¹⁷

This second story, which Wicken makes more by implication than extended analysis, is as important as his treatment of the treaty-making process. Here, Wicken provides a similarly nuanced framework for future studies that utilizes a different interpretive approach to the process of colonization. He portrays colonialism as a process of economic, social and political marginalization that entailed the legalistic subjugation of the Mi'kmaq. He sees this as a discursive process in which historical knowledge and the rules of national interaction in the Atlantic region were increasingly organized by a particular textualized approach to problems of rights and autonomy.¹⁸ It would be interesting to follow up this argument with analyses of the ways in which the textual culture of Aboriginal/non-Aboriginal interaction in the Atlantic region developed between 1760-61 and the Donald Marshall Junior trial. Such a study would be difficult but it would clearly add to the story Wicken has told in *Mi'kmaq Treaties on Trial*. Without more extensive research, however, the most we can say at this point is that Wicken has ventured an interesting and innovative hypothesis in his approach to this part of the story.

The implications of Wicken's text extend beyond a potentially innovative narrative that could enrich our understanding of the process of colonization. In this regard, two further issues are important. First, in terms of narrative, *Mi'kmaq Treaties on Trial* suggests a different way of writing the history of Aboriginal/non-Aboriginal interaction in Atlantic Canada. Instead of writing this history as a process of cultural demise, it is possible to build on Wicken's analysis to sketch out a different history of interaction in which the processes of historical change did not completely overcome Mi'kmaq resistance to colonization and within which some measure of cultural, economic and political autonomy was maintained.

To be clear on this point: the disturbing violence of a colonial order for a people like the Mi'kmaq needs to occupy a prominent place in any future narrative of Native/non-Native interaction. Such a clear recognition of the violence of the colonial order, however, need not be the entire story. To say this differently, the narrative of Mi'kmaq/non-Mi'kmaq interaction in the Atlantic region need not be solely a story of the increasing marginalization of Native peoples.¹⁹ The narrative of marginalization

17 Wicken, *Mi'kmaq Treaties on Trial*, p. 221.

18 For a similar approach to cultural development in Canada, see Gerald Friesen, *Citizens and Nation: An Essay on History, Communications and Canada* (Toronto, 1999).

19 This is the impression one might gain from reading general studies of Atlantic history focusing on the post-1760 era. For example, see J.M. Bumsted, "1763-1783: Resettlement and Rebellion" in Buckner and Reid, *The Atlantic Region to Confederation*, pp. 156-83; Ann Gorman Condon, "1783-1800: Loyalist Arrival and Acadian Return" in Buckner and Reid, *The Atlantic Region to Confederation*, pp. 184-209; Graeme Wynn, "1800-1810: Turning the Century", in Buckner and Reid, *The Atlantic Region to Confederation*, pp. 210-23; D.A. Sutherland, "1810-1820: War and Peace", in Buckner and Reid, *The Atlantic Region to Confederation*, pp. 234-60.

neglects many things, including the ways in which the Mi'kmaq and other First Nations actually interacted with the state, gender relations, the social history of daily life and processes of cultural change and development, and the actual course of the legal and political history of resistance to colonialism. In point of fact, other historians have already begun to explore the dynamics of colonialism as a legal order for Maritime Aboriginal peoples, the points of interaction between Aboriginal peoples and the state and the effects of colonialism on regional First Nations cultures.²⁰

Writing this history will provide a complex narrative in which state action and inaction, ecological changes brought by non-Aboriginal settlement, personal character traits, ideas and the dynamic character of First Nations culture interact to structure lived historical experience.²¹ As with the lived experiences of other Atlantic Canadians, detailed studies of Maritime First Nations histories will reveal people living complicated lives, torn between differing ideals, interacting with their children in complex ways and struggling to extend the realm of freedom beyond the subjugation of the colonizing state. An effective way to develop this type of historical research would be to follow the work of previous social historians and write community studies. Such studies would, necessarily, need to involve the communities themselves. They may, in fact, be conducted by community members. By examining particularly the era after the Peace and Friendship treaties from a social-historical perspective that takes into account the dynamics and power of the colonial state, historians could write regional First Nations histories on a level with other areas of regional historical enquiry.

The second important implication relates to Wicken's reading the Peace and Friendship treaties as "oral texts". He argues that this approach allows historians to more effectively determine the meanings of the Peace and Friendship treaties for the Mi'kmaq people of the 18th century. His focus on the orality of 18th-century Mi'kmaq culture mirrors a general trend toward the increased acceptance by Canadian courts of the legitimacy of oral histories maintained by Aboriginal peoples.²² The distinction made here is that Aboriginal and non-Aboriginal peoples organize historical memory differently. Non-Native Canadian society organizes its memory through written texts; Native societies, as oral societies, kept records through other mnemonic devices and oral traditions. To privilege the written text in, for example, a treaty rights or land claim trial is to bias the results against Aboriginal peoples and

20 Bill Parenteau and James Kenny, "Survival, Resistance, and the Canadian State: The Transformation of New Brunswick's Native Economy, 1867-1930", *Journal of the Canadian Historical Association*, new series, 13 (2002): pp. 49-71; Ruth B. Phillips, *Trading Identities: The Souvenir in Native North American Art from the Northeast, 1700-1900* (Montreal and Kingston, 1998); Bill Wicken, "Mi'kmaq Land in Southwestern Nova Scotia, 1771-1823", in Margaret Conrad, ed., *Making Adjustments: Change and Continuity in Planter Nova Scotia, 1759-1800* (Fredericton, 1991).

21 Theresa Redmond, "'We Cannot Work Without Food': Nova Scotia Indian Policy and Mi'kmaq Agriculture, 1783-1867", in David T. McNab, ed., *Earth, Water, Air and Fire: Studies in Canadian Ethnohistory* (Waterloo, 1998), pp. 115-25; Janet E. Chute, "Mi'kmaq Fishing in the Maritimes: A Historical Overview", in McNab, *Earth, Water, Air and Fire*, pp. 95-113.

22 For a discussion of the changing ways in which the courts have approached Aboriginal and treaty rights cases, see Brian Slattery, "Making Sense of Aboriginal and Treaty Rights", *Canadian Bar Review*, 79, 2 (July 2000), pp. 196-224 and John Borrows, "Uncertain Citizens: Aboriginal Peoples and the Supreme Court", *Canadian Bar Review*, 80, 1&2 (March-June 2002), pp. 15-41.

thus infringe on principles of natural justice to which Canadian society is, theoretically at least, committed.²³ The expansion of oral history in Aboriginal rights (treaty and otherwise) and claims trials, therefore, makes sense if one accepts the values to which liberal intellectuals have argued Canada should be committed.

As a legal principle, the courts' acceptance of oral history is to be commended. Whether or not this distinction makes sense for 21st-century historical research is another question. Historians now have a generation of intensive experience with oral history, and good historical research has never been about excluding potential sources of information.²⁴ In some ways, in fact, Wicken's methodological strategy of reading the Mi'kmaq Peace and Friendship treaties as "oral texts" – best understood only by a rigorous analysis of the contemporary cultural and linguistic barriers and the specific social and political aspirations of the two parties – is simple, effective historical research.

If my analysis of Wicken's methodology is correct, the implications are important for a reconsideration of First Nations history in the Atlantic region. They suggest, for example, that distinctions drawn between different paths to historical knowledge (oral versus textual) might not be as wide as they first appear and that the work of professional historians (using Wicken's work as a model) empirically corroborates the oral historiography of Maritime Aboriginal peoples. In other words, the ideological distinction that critics of Aboriginal rights, like Flanagan, draw is more mystification than reality. In place of this, the real distinction might be between good historical research and weak historical research where sources of information, proper contextualization and attention to linguistic nuance are ignored in favour of biased treatments of the Aboriginal past.

Such a conclusion might seem controversial. In effect, I am arguing that Wicken's research provides a model for future scholarship and suggests a new historiographical agenda that is already developing. This model should be relatively easy for historians to implement because it asks very little of them. In effect, it does not ask them to methodologically or heuristically retool. It asks them only to be good historians and to explore the dynamics of regional First Nations history with the same care, attention to evidence and detail that revolutionized the study of regional history in the last generation. If this can be accomplished, even more of the great merits of *Mi'kmaq Treaties on Trial* will be realized.

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23 Pierre Trudeau, "The Values of a Just Society", in Pierre Trudeau and Tom Axworthy, eds., *Towards a Just Society: The Trudeau Years*, trans. Patricia Claxton (Markham, Ont., 1990); Michael Ignatieff, *The Rights Revolution* (Concord, Ont., 2000).

24 Paul Thompson, *The Voice of the Past: Oral History* (New York, 1978).