

HISTORICAL RESEARCH FIRM SPECIALIZES IN LAND CLAIMS

The Lawyers Weekly - March 17, 2000

By Ross Kippen

When the Supreme Court of Canada heard the Donald Marshall case last fall, it was ruling on whether the Mi'kmaq of Nova Scotia possessed certain rights to fish for commercial purposes based on an interpretation of a peace and friendship treaty that had been signed in 1760 with the British government.

The decision to acquit Marshall caused a great deal of controversy and led to violence between native and non-native fishing interests in Nova Scotia. One critic of the ruling was history professor Stephen Patterson of the University of New Brunswick, who claimed that his testimony on behalf of the Crown was taken out of context.

Fred Hosking, president of Public History, agrees that this is a common problem with historical research. "It is not uncommon to have lawyers 'cherry pick' those documents or passages from documents which best support their case, while ignoring others of potentially greater importance."

"It seems to me that all the pieces have to fit together," explains Patterson. "If you choose a few of them and say, that's enough, I don't need any more, you end up distorting what was actually done."

Public History Inc. is a historical research firm that, among other areas, specializes in conducting aboriginal land claims research in support of litigation.

Over the past five years, the firm has conducted historical research and document management in support of litigation for the federal and provincial governments and numerous law firms across the country.

The firm's experience in this area has led it to develop an extensive research and document management process that can be applied to other kinds of research projects.

Their process involves uncovering relevant documentation – anything from copies of old legislation and drafts of that legislation to memos, media clippings, reports, minutes of meetings, and position papers – from archives and government record centres across North America.

“We are basically forensic historians. Not only do we search for documents we know exist, but we have to establish what documents might exist, where they might be located, and their potential relevance.”

Once the documents are located – in some cases over 10,000 of them – the document collection is manually organized before being entered or scanned into an electronic database.

Finally, they analyze them in order to place the events in historical context.

“You can’t judge yesterday’s events through today’s eyes.”

“You have to look at the policies and practices of the day rather than those of today.”

For example, when conducting certain types of aboriginal research, “we will look at not only who signed a treaty or surrender, but try to determine the intent of the agreement as well as each party’s understanding of it.

“Often times we discover that various political or other outside pressures led to the signing of treaty or surrender.”

Public History also participates in many phases of the litigation process, including reviewing and analyzing statements of claim for historical accuracy; assisting in the preparation of statements of defence and providing documentation for responses to statements of factual allegations.

Hosking has seen the results of inadequate preparation.

"In one recent court case a lawyer made a legal argument that was not supported by the historical evidence.

"Unfortunately, the other side did not challenge it, and the statement was accepted as fact by the judge, eventually ending up in the judge's decision."