



Highlights of the Marshall Decision

On September 17th, 1999 the Supreme Court of Canada ruled, in a 5 to 2 decision, that Donald Marshall Jr., a status Mi'kmaq, should be acquitted on all charges "... set out in the federal fishery regulations: the selling of eels without a license, fishing without a license and fishing during the close [sic] season with illegal traps" (R. v. Marshall, pg 1)

Inside this issue:

<i>The Treaty Right to fish</i>	1
<i>What is a Treaty?</i>	2
<i>Limitation of a Treaty Right</i>	3
<i>"Tests" for justification of regulation</i>	3
<i>"Clarification" of the Marshall Decision</i>	4
<i>About SRSF</i>	6

There appears to be a considerable degree of misinformation and misunderstanding respecting the 'Marshall' decision. We have prepared this document in an effort to address some of the key points that are misunderstood. By and large, we have focused on providing direct quotations from the Supreme Court's decisions respecting Marshall in the hope that reading and thinking about the actual text of the decisions will assist in clearing up some of the misunderstandings and misinformation. We have intentionally limited any commentary either to summative statements or to areas requiring brief clarifications and explanations. Of course, nothing would be better than reading the entire text of the September 17th and November 17th, 1999 decisions. These can be viewed at:

- http://www.lexum.umontreal.ca/csc-scc/en/pub/1999/vol3/html/1999scr3_0456.html
- http://www.lexum.umontreal.ca/csc-scc/en/pub/1999/vol3/html/1999scr3_0533.html



The Treaty Right to fish— for food and for livelihood

Unlike a number of other well-known fishing rights cases, the Marshall case addresses the right of an aboriginal people to a commercial fishery, and not just to a food fishery. The Sparrow decision of 1990, by contrast, dealt only with the question of whether or not Fisheries Act regulations applied to Ronald Sparrow of the Musqueam Band BC, when he was fishing salmon for personal use. On page 25 of that decision the Supreme Court re-affirmed the principle that, *after conservation*, "Indian food fishing is to be given priority over the interests of other user groups".

In the Marshall decision, the Supreme Court ruled that the Mi'kmaq *do* have a treaty right to fish commercially, but it did *not* rule on the issue of how that right might be affected by the rights of non-aboriginal commercial fishers. When considering the application by the West Nova Fishermen's Coalition for a rehearing of the Marshall case (R. v. Marshall, November 17, 1999), the Supreme Court simply stated on page 16 that:

"In the case of any treaty right which may be exercised on a commercial scale, the natives constitute only one group of participants, and regard for the interest of the non-natives, as stated in Gladstone, supra, may be shown in the right circumstances to be entirely legitimate."

To read the treaties online see the Atlantic Policy Congress of First Nation Chiefs website www.apcfn.ca and click on **Treaties**.

Treaties

1725
1726
1749
1752
1760
1776

A good deal of misunderstanding has arisen in regard to the Marshall decision as a result of the fact that different interest groups have attempted to use the Marshall decision to make various kinds of political arguments about the relative priorities of aboriginal and non-aboriginal commercial fisheries. The Marshall decision stops short of setting such priorities but it does establish the general principles, or “tests”, according to which a treaty right to fish can justifiably be regulated by the Government, whether that right involves a commercial fishery, a food fishery, or both.

In order to fully understand the Marshall decision and the issue of legal “tests”, it is first necessary to have a clear understanding of what treaties are and what kinds of obligations they impose on the crown.

What is a Treaty?

Treaties are considered to be formal agreements between peoples or nations respecting issues of mutual concern, agreements that specify each parties responsibilities, duties, roles and benefits.

The Canadian Supreme Court has recently approached their judgment of treaty provisions on the assumptions that they were negotiated in good faith, honour and with every intention to respect and to act upon the various understandings entrenched within the treaties.

European, including British, law recognizes that land occupancy provides legal title. On that basis the British Crown recognized that the aboriginal occupants of North America possessed legal rights to the lands they occupied and that it was necessary for the Crown to negotiate treaty settlements with aboriginal groups in order to obtain legal title for the Crown. The Royal Proclamation of 1763 serves as perhaps the clearest statement by the British Crown of this principal.

Historically then, treaty settlements were one of the primary methods by which the Crown was able to obtain title to land and resources throughout North America and thereby to proceed to peacefully colonize and develop large tracts of the continent. With the 1867 British North American Act establishing Confederation, responsibility for existing treaties as well as development of new treaties with First Nations was transferred from the British to the Canadian federal government.

It is important to note, however, that treaties have been negotiated for purposes other than the transfer of legal title to land and resources. Treaties of “peace and friendship” were also negotiated as a means of establishing good relations between the Crown and aboriginal peoples, or of restoring good relations after a period of hostility. The Mi’kmaq treaties of 1752, 1760 and 1761, that were at issue in the Marshall Decision, were explicitly treaties of “peace and friendship”.

Thus in certain cases treaties involved a surrender of land by aboriginal people, but in others involved simply a promise on their part to allow settlers to peacefully occupy and use certain lands. In both cases, however, certain rights were also promised by the Crown (or the federal government) to aboriginal people, rights that range from reserve lands, through health, housing and education services, to affirmed rights to continue hunting, fishing and gathering activities throughout their aboriginal territory.

“This appeal should be allowed because nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi’kmaq people to secure their peace and friendship...”(R. v. Marshall, page 2).



During the 18th century, when the Mi’kmaq signed treaties with Britain, they changed from the seven to the eight-pointed star—including Britain in their alliance.

The seven points of the star represent the seven districts of Mi’kma’ki, the eighth represents Britain.

<http://mrc.uccb.ns.ca/mikmaq.html>

The key issue discussed in the Marshall decision, as it relates to commercial fishing rights, is the intention of the Crown respecting the Mi'kmaq request for a 'trading facility', expressed within the treaties as 'truckhouses' established by the British for the exclusive purpose of trade with the Mi'kmaq. Quoting the judges...

"The trade clause would not have advanced British objectives (peaceful relations with a self-sufficient Mi'kmaq people) or Mi'kmaq objectives (access to the European "necessaries" on which they had come to rely) *unless the Mi'kmaq were assured at the same time of continuing access, implicitly or explicitly, to a harvest of wildlife to trade*" (emphasis added)(*R. v. Marshall*, page 2).

"The trade arrangement must be interpreted in a manner which gives meaning and substance to the oral promises made by the Crown during the treaty negotiations. The promise of access to 'necessaries' through trade in wildlife was the key point, and where a right has been granted, there must be more than a mere disappearance of the mechanism created to facilitate the exercise of the right [truckhouses] to warrant the conclusion that the right itself is spent or extinguished" (*R. v. Marshall*, page 2).

On the basis of these principals the Supreme Court judges concluded that the treaties in question provided the Mi'kmaq with the right to trade in fish. That right, they concluded, was equivalent to a modern day *commercial* fishing right and that right has never been extinguished. But the judges did specify that the treaties themselves contain certain inherent limitations regarding the scope of Mi'kmaq commercial fishing rights.

Limitation of a treaty right

"The accused's treaty rights are limited to securing "necessaries" (which should be construed in the modern context as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth. The surviving substance of the treaty is... a right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities... What is contemplated is not a right to trade generally for economic gain, but rather a right to trade for necessaries [i.e., to achieve a moderate livelihood]" (*R. v. Marshall*, page 3).

"The treaty right is a regulated right and can be contained by regulation within its proper limits. Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right" (*R. v. Marshall*, page 3).

The judges have defined the Mi'kmaq treaty trading right as exercisable only for the purpose of achieving, *for individual Mi'kmaq families*, the equivalent today of a *moderate livelihood*.

"Tests" for justification of regulation of the treaty right to fish

The judges have also clearly stated that the Mi'kmaq treaty trading right can be contained within a regulatory regime, but that the regulations must be justified according to the general principles, or "tests", established by previous Supreme Court decisions, especially the Sparrow and Badger decisions. In the Badger case, a Cree Indian in Alberta was charged with hunting moose without a license on privately owned land. He was acquitted by the Supreme Court in 1996 as a result of the Court's ruling that he possessed a treaty right to hunt over "unused" private land and that his right was not subject to Government regulation in the absence of any justification being provided by the Crown. The judges in the Badger case clearly spelled out the criteria, or tests, that the Crown would have to meet to prove justification - tests that were virtually identical to those laid out in the 1990 Sparrow case. In the Marshall decision the judges thus refer both to the Badger and the Sparrow "tests".

The Supreme Court ruling in R. v. Badger can be viewed at:

http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol1/html/1996scr1_0771.html

The Supreme Court ruling in R. v. Sparrow can be viewed at:

http://www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol1/html/1990scr1_1075.html

The Crown...must ensure that "fair compensation" is paid to aboriginal people in the case of an expropriation, and that consultations are held with any aboriginal group affected by proposed regulations.

What then were the tests laid out first in the Sparrow decision and cited again in the Badger and Marshall decisions? According to the Sparrow decision, the Crown must first of all be able to prove that it has a "valid legislative objective" when it seeks to regulate an aboriginal fishing right. The Court states that "conservation and resource management" are a "valid legislative objective" but provides no detailed guidelines as to what other criteria might be "valid". The judges do state, however, that: "There must be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource (p. 4, R. v. Sparrow).

A further test has to do with "the honour of the Crown in dealings with aboriginal peoples". Because the Crown has "a special trust relationship" towards aboriginal people, it must ensure that regulations that interfere with aboriginal rights cause "as little infringement as possible". It must also ensure that "fair compensation" is paid to aboriginal people in the case of an expropriation, and that consultations are held with any aboriginal group affected by proposed regulations (pp. 3-4, R. v. Sparrow).

Similarly in the Marshall decision, the Supreme Court judges have specified that the Crown, in this case Fisheries and Oceans Canada, *is required to provide the necessary justifications for any regulatory system within which the Mi'kmaq and their treaty trading right are to be contained and subjected*. Failure to provide the necessary justifications for any regulatory measures would constitute an interference with and an infringement upon Mi'kmaq' exercise and enjoyment of their right:

"There was nothing at that time which provided the Crown officials with the "sufficient directives" necessary to ensure that the appellant's treaty rights would be respected...under the applicable regulatory regime [the *Fisheries Act*], the appellant's exercise of his treaty right to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Mi'kmaq treaty rights were not accommodated within the Regulations because, presumably, the Crown's position was, and continues to be, that no such treaty right existed. In the circumstances, the purported regulatory prohibitions against fishing without a license...and of selling eels without a license...do *prima facie* infringe the appellant's treaty rights under the Treaties of 1760-61 and are inoperative against the appellant unless justified under the *Badger* test... Further, the appellant was charged with fishing during the close [sic] season with improper nets... Such a regulation is also a *prima facie* infringement, as noted...in *Badger*..."This Court has held on numerous occasions that there can be no limitation on the method, timing and extent of Indian hunting under a Treaty", apart...from a treaty limitation to that effect. The appellant caught and sold eels to support himself and his wife. Accordingly, the close [sic] season and the imposition of a discretionary licensing system would, if enforced, infringe his right to trade for sustenance. In the absence of any justification of the regulatory prohibitions, the appellant is entitled to acquittal" (emphasis in the original) (*R. v. Marshall*, para. 64, 65, 66, page 28).

"Clarification" of the Marshall Decision

On November 17, 1999 the Supreme Court of Canada issued its decision respecting an application by the West Nova Fishermen's Coalition for a rehearing of the Marshall appeal and, "if granted, for a stay of the judgment pending the re-hearing." (*R. v. Marshall*, file 26014, page 1).

In their application the West Nova Fishermen's Coalition emphasized that the impact of the Marshall decision would not be limited to the eel fishery but would also affect other fisheries, especially the lobster fishery. They argued that the Marshall decision should be set aside until such time as arguments could be presented to the Court that would satisfy its tests regarding justification of the Crown's intent to regulate Mi'kmaq treaty fishing rights.

As noted in the Supreme Court's November 17th decision, however, the Crown was opposed to the West Nova application, and expressed no interest in bringing forward arguments concerning justification. The Court denied the West Nova application on the basis that there were not any exceptional circumstances in law requiring a rehearing of the Marshall case.

Though commonly referred to as the "clarification", the implications of the Court's November 17, 1999 decision are not at all clear. The Court simply continued to emphasize throughout its "clarification" that the Crown has regulatory authority respecting the Mi'kmaq limited commercial "right to fish" but that the regulatory mechanisms must be *justified*.

"The factual context of justification is of great importance and the strength of justification may vary depending on the resource, species, community and time...The Minister has available for regulatory purposes the full range of resource management tools and techniques, *provided their use to limit the exercise of a treaty right can be justified on conservation or other grounds*" (*R. v. Marshall*, file 26014, page 2).

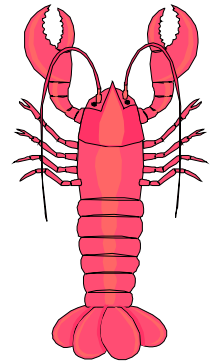
While the Court was not specific about what might constitute "other grounds" for limiting a treaty right, they did state in their clarification that protection of the interests of non-native commercial fishers "may be shown in the right circumstances to be entirely legitimate".

Provision by the Crown of substantial and factual justifications for regulation of treaty fishing rights involves much more than the repeated insistence that the existing regulatory system has been designed in the first instance to satisfy conservation needs. Certainly the collapse of the groundfish and, at different times, various pelagic fisheries reveals that the Crown's regulatory system has entirely failed to achieve its conservationist goals.

Arguably, the recent track record of Fisheries and Oceans management should provide the Mi'kmaq with little by way of confidence in the conservationist and management effectiveness of the DFO regulatory system.

Additionally, to our knowledge, little if any effort has been expended on providing the Mi'kmaq with detailed, factual justifications for the existing regulatory system. In the end, clarification concerning the relative strength of Mi'kmaq treaty fishing rights will depend on the quality of the working relationships developed between Mi'kmaq and non-native marine harvesters at various wharves and 'on the water'.

As the Supreme Court itself stated in its Marshall clarification, negotiation, not litigation, should be the preferred strategy for resolving conflicts over access to commercial fisheries.



The concern raised by the West Nova Fishermen's Coalition in their application for a rehearing was that the impact of the Marshall decision would not be limited to the eel fishery but would also affect other fisheries, especially the lobster fishery.



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About SRSF . . .



Social Research for Sustainable Fisheries

Social Research for Sustainable Fisheries (SRSF) is a partnership linking university researchers and capacity with Mi'kmaq and non-Mi'kmaq fisheries community organizations. Although administered at St. Francis Xavier University, SRSF engages and represents a working collaboration between Guysborough County Inshore Fishermen's Association, the Gulf Nova Scotia Bonafide Fishermen's Association, the Mi'kmaq Fish and Wildlife Commission, and St.FX as well as other university-based social researchers. Additional fisheries and community organizations are linked with SRSF through relations with these core partners.

SRSF is funded by the Social Sciences and Humanities Research Council of Canada (SSHRC) through its Community-University Research Alliance (CURA) programme. The basic purposes of SRSF are: to develop fisheries-focused social research linkages between university researchers and community organizations, to build social research capacity, and to facilitate specific fisheries social research activities that will examine the concerns of the partnered community organizations. Social research capacity, experience and linkages are developed through research-focused workshops and specific research projects.

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