

Landmark Case

ABORIGINAL TREATY RIGHTS: *R. v. MARSHALL*

Prepared for the Ontario Justice Education Network by Law Clerks of the Court of Appeal for Ontario

R. v. Marshall (1999)

The accused in this case, a Mi'kmaq Indian, was charged with three offences pursuant to the Fisheries Act and Fishery Regulations:

1. The selling of eels without a licence;
2. The fishing without a licence; and
3. The fishing during the close season with illegal nets.

The accused, a Nova Scotia man by the name of Donald Marshall, admitted the offences. Mr. Marshall admitted that he caught and sold 463 pounds of eel without a licence and with a prohibited net within closed times. However Mr. Marshall argued that he should not be found guilty of the charges that were against him because as a Mi'kmaq Indian, he possessed the Treaty right to catch and sell fish pursuant to treaties that had been signed between the British and the Mi'kmaq in 1760-61.

Facts

One morning in August of 1993, Donald John Marshall Jr. and a friend went out fishing for eels. They caught 463 pounds of eel, which they sold for \$787.10. Mr. Marshall was arrested and charged with the selling of eels without a license, fishing without a license and fishing during closed season with illegal nets. It was agreed that Mr. Marshall would be guilty as charged unless an Aboriginal right protected his activities. Mr. Marshall is a Mi'kmaq Indian.

Aboriginal & Treaty Rights

There are two types of Aboriginal rights protected by section 35 of the Canadian Constitution: aboriginal rights and treaty rights (which include land claims). Section 35 states:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal rights protect the right of Aboriginal peoples to continue activities and practices that were integral to their culture and in existence before the British colonized Canada. Treaty rights are rights protected by an agreement between a specific group or nation of Aboriginal peoples and the government.

Treaties

A treaty is a written agreement between the government and an Aboriginal nation. Over the course of history, many Aboriginal nations entered into treaties with the British government for a variety of purposes, and often involved peace agreements, the protection of Aboriginal land claims, or a guarantee of the right to continue their traditional hunting, fishing and gathering lifestyle. These agreements give rights and obligations to both the current government and the Aboriginal nation who signed the treaty.

The Treaties signed by the Mi'kmaq

The 1760-61 treaties came at the end of more than a decade of hostilities between the British, the French and the Mi'kmaq.

In 1749 the British Governor at Halifax had issued proclamations "authorizing the military and all British subjects to kill or capture any Mi'kmaq found", a reward was even offered for those that did. The Mi'kmaq during these times had been regarded as a "considerable fighting force", "accomplished sailors" and a people "not to be trifled with".

The Mi'kmaq who had previously been allied with the French against the British found the political power to be shifting. In 1760, the French had lost their hold of Southern Nova Scotia. In true fact, by this time, the British had almost completed the process of expelling the Acadians from Nova Scotia. With the deportation of the French almost complete, the Mi'kmaq would face the elimination of the trade goods that they had come to rely upon. The Treaties were an opportunity for both the British and the Mi'kmaq to advance their self-interest. Terminating hostilities and establishing the basis for a stable peace would be beneficial for both parties.

This background gives context to the circumstances that set the tone for the signing of the Treaty. In November 1752 the Shubenacadie area Mi'kmaq entered into Treaty with the British, which stated that:

"It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting and Fishing as usual and that if they shall think a Truckhouse needful at the River Chibenaccadie 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, and that in the mean time the said Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best Advantage."

Both Mr. Marshall and the Crown (representing the government) accept the existence of the Treaty but disagree about the existence of oral terms as well as the interpretation of the “trade clause.” Mr. Marshall claims this Treaty gives him the constitutional right to fish for eels and sell the eels he catches. The Crown does not dispute that a Treaty was signed, but disagrees that it gives Mr. Marshall these rights.

The “trade clause” of the Treaty reads as follows:

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 Acadia.

The Crown stated that the Treaty was contained within the written terms of a short document prepared on March 10, 1760. Solely the British transcribed the terms of the Treaty in written form after oral negotiations had concluded.

Mr. Marshall’s position was that his right to pursue traditional hunting, fishing and gathering activities is found in the Treaty of 1760-61, the Treaty of 1752 (above) as well as the minutes of the negotiations held between the British and the Mi’kmaq.

Trial Decision

Provincial Court Judge Embree was the trial judge. He accepted that the Treaty was supposed to give the Mi’kmaq the right to continue their traditional hunting, fishing and gathering lifestyle. It was clear that the British wanted the Mi’kmaq to be self-sufficient. This desire, along with their desire for peace, was underlying the Treaty.

Judge Embree found Mr. Marshall guilty on all charges. Judge Embree found that the Treaty was valid, but only gave Mr. Marshall the right to bring the products of his fishing (and hunting and gathering) to a truckhouse to trade. It did not extend outside of the truckhouses, which disappeared several years after the Treaty was signed. The truckhouses were trading posts in the late 18th century, the time when the Treaty was signed, and the clause limited Mi’kmaq trading to these government-sanctioned venues. The trade clause failed to address what would happen when these truckhouses disappeared, and therefore the Mi’kmaq’s trading rights disappeared along with the truckhouses. Judge Embree found Mr. Marshall guilty on all charges.

Appeal to the Nova Scotia Court of Appeal

Mr. Marshall appealed the decision to the Nova Scotia Court of Appeal, where he lost again and his conviction was upheld. He appealed again to the Supreme Court of Canada.

Appeal to the Supreme Court of Canada

At the Supreme Court, Mr. Marshall argued that Judge Embree was wrong and that the Treaty gave him a right to hunt, fish and gather products for trading, and that these rights survived the

disappearance of truckhouses. Mr. Marshall argued that the written terms of the Treaty did not represent the entire agreement between the Crown and the Mi'kmaq, and that the historical context, evidence of the negotiations process, and expert evidence demonstrated that there were unwritten terms that had been agreed to orally and not written down by the Crown.

First, a majority of the Court found that Judge Embree erred when he found that the entire agreement between the Crown and Mi'kmaq was written in the Treaty. This conclusion ignored the recorded history of the negotiations and failed to adequately consider the perspective of the Mi'kmaq. As a result, it gave too much consideration to the perspective of the British, "who held the pen." It was important for Mr. Marshall to prove the written agreement was not the entire agreement. The trade clause, on its own, did not support Mr. Marshall's interpretation.

The Chief Justice, speaking on behalf of the Supreme Court of Canada found that if the courts were generally willing to accept outside evidence (like that of the minutes of the negotiations) they should continue to do the same with respect to this contract/ agreement. Outside evidence is often used to show that a written document may not include all of the terms of an agreement and so it should be seen in this case.

Secondly, he stated that in this case, as in previous cases involving Aboriginal Rights, the outside evidence was of historical and cultural context and should be considered to be acceptable evidence for the court to look at and inform its decision.

Thirdly, Chief Justice Lamer concluded that where a treaty was concluded orally and afterwards written up by representatives of the Crown, it would be unfair for the Crown to ignore the oral terms while relying on the written ones.

The Treaty was negotiated after a period of military and political turmoil between the Mi'kmaq and the British. Only six years prior to signing the Treaty, the British Governor of Nova Scotia had issued a Proclamation offering rewards for the killing and capturing of Mi'kmaq throughout Nova Scotia. In signing the Treaty, the British were attempting to expand and secure the northern part of Nova Scotia. Securing the right for the Mi'kmaq to trade was essential to peace, the British believed that "people that trade together do not fight, that was the theory." The Mi'kmaq were hoping to secure access to British goods that they had come to rely upon, such as gunpowder, metal tools and cloth. The evidence showed that the original agreement was that the Mi'kmaq would not trade with the French, just the British. The idea that they would trade with government officials at truckhouses, was a later addition that was added at the suggestion of the Mi'kmaq as a way to ensure they received favourable prices. The underlying documents show the parties worked out the prices for certain types of products, *i.e.* one pound of spring beaver could purchase 30 pounds of flour or 14 pounds of pork. By giving the Mi'kmaq more favourable terms to trade the products of their fishing, hunting and gathering, it fostered a peaceful relationship between the parties and ensured the Mi'kmaq no longer traded with the French. Several earlier agreements and the minutes of the negotiations had given the Mi'kmaq much more favourable terms than the trade clause reflected. The majority found that all of this evidence demonstrated the inadequacy and incompleteness of the written Treaty terms and the trial judge's interpretation did not match with the British-drafted

minutes of the negotiating sessions, the more favourable terms given in other documents and evidence.

The majority of the Court concluded that the trade clause as written would not have advanced British objectives (peaceful relations with a self-sufficient Mi'kmaq people) or Mi'kmaq objectives (access to the European necessities upon which they had come to rely) unless the Mi'kmaq were assured continuing access to wildlife to trade. The Crown's expert historian confirmed this.

Second, the majority found that the Treaty did give Mr. Marshall the right to catch and sell eel. Given the historical and contextual context of the negotiations between the Crown and the Mi'kmaq, it was reasonable that both parties expected the Mi'kmaq to have the right to fish, if they had the right to bring fish for trade at the truckhouse. Without a right to fish, the right to trade is without value.

The majority rejected the trial judge's, Judge Embree's, conclusion that once the truckhouses had disappeared, the right to trade also disappeared. The majority found that Treaty rights are not "frozen in time" and must be interpreted in flexible way that allows evolution. The majority found that the key agreement was not the existence of truckhouses but the promise of access to necessities through trade in wildlife. The disappearance of the truckhouses was nothing more than the disappearance of the mechanism created to facilitate the exercise of the right to trade, not the disappearance of the right to trade itself.

However, the majority noted that the right to trade, and implied right to fish, hunt or gather the wildlife to trade was limited. The Treaty guaranteed access to "necessaries". The majority concluded that in today's world, "necessaries" would be equal to securing a moderate livelihood. This means Mr. Marshall could sell a limited amount of eel to support his family, but could not operate a large-scale commercial business. As Mr. Marshall was selling the eel to support himself and his common-law wife in very limited quantities, his activities fell within the scope of the Treaty right.

Therefore, the majority of the Court acquitted Mr. Marshall on all charges, finding that the Treaty protected his activities.



Classroom Discussion Questions

1. Why would the British have wanted the Mi'kmaq to be self-sufficient? Why might this have been in their best interests?

The trial judge, Judge Embree, found that in the Treaty the British recognized and accepted the existing Mi'kmaq way of life. The British would have wanted the Mi'kmaq to continue their hunting, fishing and gathering lifestyle. They did not want the Mi'kmaq to become a long-term burden on the public treasury. The British were willing to suffer losses in their trading revenues to secure and maintain the friendship with the Mi'kmaq, and discourage the Mi'kmaq from trading with the French.

2. The Court has often found that an expressly defined Treaty right often contains "implicit rights". Implicit rights are rights that are required to support the meaningful exercise of express rights granted in the Treaty. For example, in this case, for the right to trade fish to be meaningful, it must implicitly include the right to fish.

What implicit rights might be properly included in the express right to hunt? What other rights might properly be included in the right to fish?

(Hint: In *R. v. Simon* the Court found that the right to hunt contained an implicit right to carry a gun and ammunition. For the right to fish, what about a boat driver's license?)

3. Two of the Supreme Court of Canada judges disagreed with the majority (also known as the "dissent"). They found that although the trade clause included an implicit right to fish (to get fish to trade), it was limited to the same right to fish that all British citizens would have had. Do you agree? Why is the relationship between Aboriginal people and the Crown different?

(Hint: The Treaty rights of Aboriginal peoples are constitutionally protected)

4. After the Crown and the Mi'kmaq negotiated the Treaty, the Crown wrote down all the terms. What are the dangers when an agreement is reached verbally but only one party has control over what is written down? Do you agree with the necessity of looking at evidence of the underlying negotiations and the reasonable expectations of the parties in this case?
5. The majority found that the honour of the Crown is always at stake in its dealings with Aboriginal peoples. What do you think it means that a party is assumed to deal honourably with another party? How does this assist your interpretation of an agreement between those two parties?



Aboriginal Treaty Rights: Worksheet

**Should Aboriginal rights protected by section 35 be limited in any way?
What legal authority exists to justify limiting these rights?**

The Canadian *Charter of Rights and Freedoms* includes many rights and freedoms. It includes freedom of conscience and religion, of thought belief, opinion and expression, freedom of the press, freedom of peaceful assembly and freedom of association. It includes the right to vote, the right of citizens to enter, remain in and leave Canada, to move and take up residence in any province. It includes a host of legal rights such as the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice, the right to be secure against unreasonable search or seizure, the right not to be arbitrarily detained or imprisoned and the right on arrest or detention to be informed of the reasons for the arrest or detention and a right to retain and instruct counsel.

The *Charter* does not include Aboriginal rights. Aboriginal rights can be found in section 35 of the Constitution. So although Aboriginal rights are constitutionally protected, such rights are not technically contained in the *Charter*.

This is significant for several reasons. One of the most important is that the rights protected by section 35 are not qualified by section 1 of the *Charter*. Section 1 of the *Charter* reads as follows:

The Canadian *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

All rights contained in the Canadian *Charter of Rights and Freedoms* are subject to “reasonable limits” as defined in section 1. Aboriginal rights are not. However, the courts have decided in a case called *R. v. Sparrow* that the rights in section 35 are not absolute and are subject to regulation by federal laws as long as the laws met a standard of justification, which was very similar to section 1 of the *Charter*.

This means that if a law is determined to infringe, or diminish, Aboriginal rights under section 35, the Courts have decided that it is appropriate to determine if the infringement was justifiable.

So when are government limits on Aboriginal rights justified? It is a two-part test: (1) When the infringement furthers a compelling and substantial legislative objective? and (2) Is the limit consistent with the special fiduciary relationship between the Crown and the Aboriginal peoples?

For example, assume that a certain group of Aboriginal peoples have a constitutional right to catch fish to eat for food. This right would not necessarily extend to catching fish to sell the fish for commercial purposes (i.e. to make lots of money).



There is a scarcity of fish. In an attempt to conserve and manage the fish stock, the government puts limits on the amount of fish an Aboriginal person can catch. The courts have determined resource conservation and management to be a “compelling and substantial legislative objective” capable of limiting Aboriginal rights. Thus, this law would likely meet part one of the test.

However, part two of the test, the “special fiduciary relationship” between the Crown and the Aboriginal peoples, would only be met if the law made sure that the Aboriginal people were given priority for catching fish for food over non-Aboriginal people catching fish to sell to make money.

Questions:

1. Do you think it was appropriate of the courts to limit Aboriginal rights under section 35 given that the framers of the *Constitution 1982* and *Charter* chose to not limit the rights via section 1 of the *Charter*?
2. Why do you think the courts thought it was appropriate to limit the Aboriginal rights found in section 35? What other “legislative objectives do you think would be compelling and substantial”?
 - a. Pursuit of economic and regional fairness?
 - b. Recognition of the historical reliance upon and participation in the fishery by non-aboriginal groups?
3. Assume a group of Aboriginal people have a right to harvest timber in a certain, geographical area. Assume the government has sold logging rights in that same geographical area to a commercial logging company. Is the government allowed to do this? Why or why not?
4. Treaty rights stem from an agreement between the Crown and a group of Aboriginal peoples. Is it appropriate to be able to limit rights that have been defined through a specific agreement between the Crown and the holder of the right? Wouldn't it have been better to have the Crown write any necessary limitations into the Treaty itself? What are potential problems with that approach?

(Hint: Shortages of resources and environmental concerns are products of the last century. It would have been impossible for the Crown to foresee a fish shortage requiring a limitation on an Aboriginal Treaty right to fish.)