

# MARSHALLING THE RULE OF LAW IN CANADA: OF EELS AND HONOUR

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Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution.<sup>1</sup>

Colouration is variable ... since, in response to changing illumination, eels can alter their skin colouration by pigment redistribution within hours. A copious amount of mucus (slime) may be secreted.<sup>2</sup>

Tricky one, this story.<sup>3</sup> In what way is the Government of Canada like an eel?

Fourteen years ago, in *Simon v. The Queen*,<sup>4</sup> the Supreme Court of Canada ruled that the 1752 treaty between the British sovereign and Grand Chief of the Mikmaw Nation was still in force in Canada, creating a new framework for treaty implementation in which the burden of proving any extinguishment of treaty hunting or fishing rights rests on the Crown. Despite the persistent efforts of Mikmaw authorities to negotiate instruments clarifying the conservational and jurisdictional implications of *Simon* on treaty harvesting and trade, Ottawa and the Atlantic provinces resisted, dithering and nit-picking the Court's ruling while continuing to harass and prosecute Mikmaw hunters and fishermen.

Mikmaw treaty interpretation returned to the Supreme Court last year in *R. v. Marshall*,<sup>5</sup> which reaffirmed, clarified and broadened its ruling in *Simon*. Mikmaw people may fish without external regulation anywhere within the ancestral territory of the larger Wabanaki Confederacy to which they belong, and they may also sell their catch, provided that they satisfy themselves with a "moderate livelihood," and do not endanger the survival of stocks. The "moderate livelihood" of Mikmaw people thereby takes priority over all other uses of fish stocks, once the requirements of conservation have been met. By implication, marine conservation becomes a shared responsibility of Mikmaw leaders as well as the federal and provincial authorities.

The political response to *Marshall* on the docks, in Ottawa and in the Canadian press has been overwhelmingly negative, frequently threatening and occasionally violent. The responsible federal minister refused to meet with Mikmaw leaders for nearly two weeks while the situation on the docks deteriorated. By the time he offered to collaborate with First Nations leaders on an interim conservation program, a number of fishermen, both Mikmaw and non-Mikmaw, had lost confidence in federal and First Nations leadership and were taking matters into their own hands. The federal Opposition called on the House to "suspend" the Supreme Court's ruling, while one Atlantic fishermen's association petitioned the Court directly to stay its decision and reconsider. *Marshall* has arguably become Canada's *Roe v. Wade*,<sup>6</sup> a judicial decision so

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<sup>1</sup> *Reference re: Secession of Québec* (1998), 161 D.L.R. (4<sup>th</sup>) 285 (SCC), at 418 (para. 72).

<sup>2</sup> J. G. Eales, *The Eel Fisheries of Eastern Canada*; Fisheries Research Board of Canada Bulletin No. 166 (Ottawa, 1968) at 2. We note that in surveying customary artisanal Atlantic fisheries of eels, Eales (no relation) makes no reference whatsoever to Aboriginal peoples; even when describing uniquely Mikmaw fishing practices and sites, he implies that the fishermen are white.

<sup>3</sup> Any resemblance between the character of this essay and our friend Thomas King's *One Good Story, That One: Stories* (Toronto: Harper Perennial, 1993) is entirely intentional.

<sup>4</sup> *Simon v. The Queen*, [1985] 2 S.C.R. 387 [hereinafter *Simon*].

<sup>5</sup> [1999] S.C.J. No. 55 (QL) 177 D.L.R. (4<sup>th</sup>) 513 [hereinafter *Marshall*] (17 September 1999) rev'g (1997), 159 N.S.R. (2d) 186 (CA), 468 A.P.R. 186, 146 D.L.R. (4<sup>th</sup>) 257, affirming a decision of the Provincial Court, [1996] N.S.J. No. 246 (QL). For one participant's view of the trial proceedings, see William Wicken, "R. v. Donald Marshall Jr., 1993-1996" (1998) 28 *Acadiensis* 8.

<sup>6</sup> 410 U.S. 113 (1973) (constitutional right of women to seek an abortion during the first trimester of pregnancy). Unlike *Roe*, which was based on the "implied" constitutional right to privacy, *Marshall* is based on express treaty language and an

controversial that it tests the capacity of a democratically elected government to respect the rule of law.

## SLIPPERY FACTS

Donald Marshall, Jr., the same Mikmaw man who was wrongfully imprisoned for a murder he did not commit,<sup>7</sup> was charged with catching and selling eels without a license, during a closed season and with illegal nets, according to federal fishery regulations. In his defence, he asserted a constitutional right to catch and trade fish under Georgian treaties between the Mikmaw Nation and the British Crown. The trial court rejected the treaty defence and convicted him on all three charges. Marshall's convictions were upheld by the Nova Scotia Court of Appeal, but reversed by the Supreme Court in a divided decision.<sup>8</sup>

Writing for the majority, Justice Binnie ruled that a 1760 treaty of peace and friendship with Mikmaw leaders recognized a right to fish, and a right to trade. Federal legislation enacted prior to 1982 had vested the minister of fisheries with wide regulatory discretion, but did not expressly authorize the minister to override Mikmaw treaty rights. As a result, the treaty rights still existed when section 35(1) of the *Constitution Act, 1982*,<sup>9</sup> came into force, shielding "existing aboriginal and treaty rights" from any future extinguishment.

At no point did the majority question the legitimate authority of the federal Parliament to extinguish Mikmaw treaty rights prior to 1982, or to regulate the exercise of Mikmaw treaty rights after 1982 where demonstrably necessary to preserve fish stocks. This is a crucial point in light of the subsequent refraction of the ruling by federal politicians and the press. The majority of the Court upheld a limited right which can be limited (albeit not irreversibly lost) if necessary for conservation, subject to appropriate compensation. Federal regulatory intervention could be forestalled as long as Mikmaw authorities themselves succeed in managing treaty fishing within biologically sustainable levels. Effective Mikmaw self-regulation can achieve

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explicit constitutional guarantee of respect for treaty rights.

<sup>7</sup> Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution: Commissioners' Report — Findings and Recommendations*, vol. 1 (Halifax: The Commission, 1989).

<sup>8</sup> Lamer C.J. and L'Heureux-Dubé, Cory, Iacobucci and Binnie JJ. for the majority; Gonthier and McLachlin JJ., dissenting.

<sup>9</sup> Schedule B to the *Canada Act, 1982*, (U.K.) c. 11.

conservation while according full respect to the underlying treaty right. Federal regulatory deference to First Nations law is well established in the United States,<sup>10</sup> and we are aware of no reason why it should not be practicable in Canada.

The precise content of the fishing right upheld by *Marshall* is less apparent, and the results of the Court's analysis less satisfactory to any of the parties. The majority construed the treaty's guarantee of Mikmaw people's right to hunt, fish, gather and trade for their "necessaries" as the right to provide for their own sustenance, "equivalent to a moderate livelihood."<sup>11</sup> The treaty may protect "a small-scale commercial activity," but not large profit-making or capital accumulation. "If at some point the appellant's trade and related fishing activities were to extend beyond what is reasonably required for necessaries, as hereinafter defined, he would be outside treaty protection, and can expect to be dealt with accordingly."<sup>12</sup>

## SLIPPERY WORDS

Canons of treaty interpretation are central to *Marshall*. The Supreme Court reaffirmed its previous rulings that treaties implicate the honour and integrity of the Crown, therefore reviewing judges must assume the Crown and its agents intended to fulfil their promises faithfully. The courts should not sanction any appearance of "sharp dealing" in the negotiations, the treaty text or in subsequent treaty interpretation.<sup>13</sup> Ambiguous words or phrases appearing in a treaty

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<sup>10</sup> See Felix S. Cohens's *Handbook of Federal Indian Law*, 1982 ed. (Charlottesville, VA: The Michie Company, 1982) at 456-58. Also see *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (unextinguished harvesting rights under an 1837 treaty); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) (federal court deference to tribal courts where both have subject-matter jurisdiction); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (federal court deference to tribal courts where both have personal jurisdiction).

<sup>11</sup> *Marshall*, *supra* note 5 at para. 7. See *R. v. Badger*, [1996] 1 S.C.R. 771 [hereinafter *Badger*] at para. 41.

<sup>12</sup> *Marshall*, *supra* note 5 at para. 8.

<sup>13</sup> *Ibid.* at paras. 49-50, relying on *Badger*, *supra* note 11 at 794 per by Cory J.; *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.), leave to appeal refused, [1981] 2 S.C.R. xi; at 235-36; *Ontario Mining Co. v. Seybold* (1901), 32 S.C.R. 1 at 2 per Gwynne J. (dissenting); *The Dominion of Canada and Province of Quebec. In re Indian Claims* (1895), 25 S.C.R. 434 at 511-12 per Gwynne J. (dissenting).

drafted by the Crown's agents will likewise be construed against the drafters' interests (that is, *contra proferentem*) and not to the prejudice of Aboriginal parties, if another interpretation is reasonably possible.<sup>14</sup> In addition, the honour of the Crown demands that treaty terms should be interpreted "in a flexible way that is sensitive to the evolution of changes in normal practice."<sup>15</sup>

The majority's analysis of the 1760 treaty was nevertheless relatively narrowly focused on the English text of the negotiations and instrument, disregarding Mikmaq perspectives on the intent and meaning of the treaty, and Mikmaq customary laws relating to fishing and trade. The starting-point, both the majority and the dissenting justices agreed, is the facial meaning of the English text, ignoring any linguistic, historical and cultural factors that may have resulted in ambiguities or misunderstandings between the parties. If a facial or literal analysis fails to settle the interpretation of the text satisfactorily, the wider historical and cultural context of the treaty may be examined.<sup>16</sup>

The 1760 treaty followed five years of French military defeats in Acadia and New France. With French power in collapse, the chiefs of the Wabanaki Confederacy (including the Mikmaq, Maliseet and Passamaquoddy nations) who had remained within the French sphere of influence entered into treaties of reconciliation with the British Sovereign, and placed themselves under his protection.<sup>17</sup> When they were asked "whether they were directed by their Tribes to propose any other particulars to be treated upon at this time," the Maliseet and Passamaquoddy negotiators referred to truckhouses "for the furnishing them with

necessaries in exchange for their peltry."<sup>18</sup> When Mikmaq chiefs met with the Governor of Nova Scotia in February 1760, they stated their desire to enjoy the same rights as their Wabanaki allies, and in his May 1760 report to the Board of Trade, Governor Lawrence observed that he had indeed treated with the Mikmaq on "the same terms."<sup>19</sup>

The English text of the 1760 treaty is at odds with these *travaux préparatoires*, however. Instead of obliging the Crown to build truckhouses, it obliges the Mikmaq not to "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." Although this choice of words implies a *restriction* on trade, the trial judge in *Marshall* relied on the evident intention of the parties to *promote* trade, and ruled that the true meaning of the truckhouse clause had been to secure the right of Mikmaq people to sell the products of their hunting, fishing and gathering. However, the trial judge also ruled that the treaty right to trade ceased when the British Empire withdrew its network of truckhouses and licensed traders during the American Revolution.<sup>20</sup> On review, the Nova Scotia Court of Appeal reverted to the facial import of the truckhouse clause, ruling that it was nothing more than a "mechanism imposed upon them to help ensure that the peace was a lasting one, by obviating their need to trade with enemies of the British."<sup>21</sup>

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<sup>14</sup> *Marshall*, *supra* note 5 at para. 51. The Supreme Court has been particularly generous in construing technical legal terminology in treaties in Aboriginal peoples' favour. See, generally, J. Y. Henderson, "Interpreting Sui Generis Treaties" (1997) 36 *Alta. L. Rev.* 46.

<sup>15</sup> *Marshall*, *supra* note 5 at para. 53, citing *Simon*, *supra* note 4 at 402.

<sup>16</sup> *Ibid.* at para. 5. The Court disregarded the third principle established in *Badger*, *supra* note 11 at para. 41, that any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary is that any limitations on the rights of Indians under treaties must be narrowly construed.

<sup>17</sup> *Ibid.* at para. 3-4, 27. The Mikmaq and other Wabanaki nations continued to face in two directions between 1725 and 1760, maintaining amicable ties with French Acadia on the one side, and with the British colonies on the other. J. Y. Henderson, *The Mikmaq Concordat* (Halifax: Fernwood Press, 1997).

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<sup>18</sup> *Ibid.* at para. 29. The provision of truckhouses was expressly included in the 1752 Mikmaq treaty considered by the Supreme Court in *Simon*, *supra* note 4 at 393.

<sup>19</sup> *Ibid.* at paras. 6, 28-29.

<sup>20</sup> *Ibid.* at para. 6, Trial court at 116.

<sup>21</sup> (1997), 159 N.S.R. (2d) 186 at 208. This reasoning was also adopted by the two dissenting justices of the Supreme Court. Compare the unilateral constitutional *quid pro quo* arguments that were deemed to have modified the treaty right to hunt commercially in *R. v. Horseman*, [1990] 1 S.C.R. 901 at 933-36.

Justice Binnie resurrected the trial court's analysis, explaining that the historical evidence, taken as a whole, "demonstrates the inadequacy and incompleteness of the written memorial of the treaty terms."<sup>22</sup> The honour and integrity of the Crown demand that courts vindicate what was originally promised. "Where the British-drafted treaty document does not accord with the British-drafted minutes of the negotiating sessions and more favourable terms are evident from the other documents and evidence the trial judge regarded as reliable," evidence of original intent trumps the final treaty text.<sup>23</sup> This does not represent "after-the-fact largesse," Justice Binnie stressed, but a just and reasonable means of using historical context "to make honourable sense of the treaty arrangement."<sup>24</sup>

Having concluded that the oral undertakings during the negotiations superceded the written text prepared by British representatives, Justice Binnie construed the oral agreement as more than the right to sell fish and wildlife freely. He reasoned that the right to sell necessarily implies the right to continue to harvest fish and wildlife for sale: that is, "a treaty right to continue to obtain necessities through hunting and fishing by trading the products of those traditional activities."<sup>25</sup> In negotiation, Wabanaki leaders had emphasized their desire to obtain their "necessaries" through trade. Justice Binnie conceived that this aim was equivalent to earning a "moderate livelihood," and precludes the use of treaty trade to accumulate capital.<sup>26</sup>

The majority rejected the argument that the Mikmaq right to trade ceased when the British Empire discontinued its network of Crown truckhouses. "The concept of a disappearing treaty right does justice neither to the honour of the Crown nor to the reasonable expectations of the Mi'kmaq people."<sup>27</sup> Rather, it is the duty of the courts to give "effect" to the Crown's original promise. While Justice Binnie did not refer expressly to the principle of international law, *pacta sunt servanda* ("treaties must be given effect"), it would have required the same result.<sup>28</sup>

Turning to the disputed fishery regulations, the majority observed that they left the issuance of licences to the "absolute discretion of the Minister," without providing any explicit guidance for accommodating Mikmaq treaty rights.<sup>29</sup> Since the Crown bears unique fiduciary obligations towards First Nations, Parliament must include express standards in any administrative regime to respects and protect vested treaty rights, rather than relying entirely on the exercise of ministerial discretion.<sup>30</sup> The majority rejected the Crown's argument that treaty rights are "subject *ab initio* to regulations, without any justification required,"<sup>31</sup> moreover, ruling that all infringing federal regulations must meet the division of power test, the consistency

<sup>22</sup> *Marshall*, *supra* note 5 at para. 35. This was not new ground for the Court, but flowed logically from its broad contextual construction of the treaty at issue in *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1036.

<sup>23</sup> *Marshall*, *supra* note 5 at paras. 22–44. The majority criticized the Nova Scotia courts for "giving excessive weight to the concerns and perspective of the British, who held the pen" — that is, for failing to apply the principle of *contra proferentem* in a case where the historical facts justified reading the final instrument with suspicion. "It would be unconscionable for the Crown to ignore the oral terms while relying on the written terms" under the circumstances. *Ibid.* at paras. 12 and 18; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 388, per Dickson J. (as he then was); *Badger*, *supra* note 11 at para. 52 per Cory J.

<sup>24</sup> *Marshall*, *supra* note 5 at para. 14, relying on *Sioui*, *supra* note 22 at 1049; *Simon*, *supra* note 4; *R. v. Sundown*, [1999] 1 S.C.R. 393; and *Taylor and Williams*, *supra* note 13. "The historical context, which has been used to demonstrate the existence of the treaty, may equally assist us in interpreting the extent of the rights contained in it." *Sioui*, *ibid.* at 1068, per Lamer J. (as he then was).

<sup>25</sup> *Ibid.* at paras. 7 and 56.

<sup>26</sup> *Ibid.* at paras. 58–59.

<sup>27</sup> *Ibid.* at para. 40. In the dissent, Justice McLachlin stated that "The fall of the licensed trading system, marked the fall of the trading regime established under the Treaties. This left the Mi'kmaq free to trade with whomever they wished, like all other inhabitants of the colonies" at para. 100. However, "other inhabitants" who wished to trade with the Mikmaq were not free at all, but regulated by the 1763 Proclamation, *infra* note 47.

<sup>28</sup> Articles 26–27 and 31–32 of the Vienna Convention on the Law of Treaties, in Report of the United Nations Conference on the Law of Treaties, UN Doc. A/CONF.39/27 (1969). Also see *Elettronica Sicula Sp. A. (ELSI)*, 1989 I.C.J. Reports 15, at 51 (municipal law cannot override an international treaty obligation); *Right of Passage over Indian Territory*, 1960 I.C.J. Reports 6 (treaty must be construed in accordance with the legal system of the grantor of rights as it existed when the treaty was made); *US Nationals in Morocco*, 1952 I.C.J. Reports 212 (parties must take all necessary steps, in good faith, to implement treaty obligations through municipal legislation).

<sup>29</sup> *Ibid.* at paras. 62–63, referring to the *Fishery (General) Regulations*, SOR/92–53, as amended, *Maritime Provinces Fishery Regulations*, SOR/93–55, and *Aboriginal Communal Fishing Licences Regulations*, SOR/93–332.

<sup>30</sup> See *R. v. Adams*, [1996] 3 S.C.R. 101 at para. 54, and *Badger*, *supra* note 11 at para. 79 (Cory J.).

<sup>31</sup> *Marshall*, *supra* note 5 at para. 55. Strictly speaking, infringement was not before the Supreme Court on this appeal. The Crown maintained that no treaty right still existed in 1982, and accordingly made no attempt to justify the imposition of federal regulations on Mikmaq eel fisheries.

test and the strict justification test set out in *Sparrow*<sup>32</sup> and *Badger*.<sup>33</sup> The silence of Parliament, in its sweeping delegation of discretionary licensing powers to the minister, render the fishery regulations inconsistent and thus unconstitutional on their face.<sup>34</sup>

The majority stressed that catch limits may be imposed on the treaty right for purposes of conservation,<sup>35</sup> but warned that limitations on the method, timing and geographical extent of the harvesting right would be unlawful.<sup>36</sup> Thus the closed season and prohibition on the sale of eels were inconsistent with Donald Marshall's treaty right as a Mikmaq to fish and trade to obtain his "necessaries."

## SLIPPERY HISTORY

The majority would have reached a more far-reaching result had it considered Mikmaq oral traditions and laws, which would have been the basis for Mikmaq leaders' reasonable expectations and reliance interests in the trade clause of the 1760 treaty.<sup>37</sup>

The trial judge found that the Mikmaq had been trading with Europeans, including French and Portuguese fishermen, for nearly 250 years prior to 1760.<sup>38</sup> British jurisdiction over Mikmaq territory was first recognized by European powers in the *Treaty of Utrecht* (1713),<sup>39</sup> article XV of which acknowledges the inherent right of native Americans to trade freely: "they shall enjoy full Liberty of going and coming on Account of Trade [and

shall, with the same Liberty, Resort, as they please, to the British and French Colonies, for Promoting Trade ... without any Molestation or Hindrance, either on the Part of the British Subjects or of the French."<sup>40</sup> There can be no doubt that Mikmaq were among the "subjects or friends to France" contemplated by this provision.

The subsequent comprehensive Wabanaki compact (1725) with the British Crown affirmed these rights, "Saving unto the said Indians their own Grounds, & free liberty for Hunting, Fishing, Fowling and all other their Lawful Liberties & Privileges" as they existed prior to the hostilities between the French and British empires.<sup>41</sup> In 1726, the Mikmaq chiefs acceded to the Wabanaki compact at Annapolis Royal in a treaty which reaffirmed these liberties, with the Crown promising the Mikmaq people that they "shall not be Molested in their Person's, Hunting, Fishing, and [Shooting &] Planting on their planting Grounds nor in any other Lawfull Occasions."<sup>42</sup>

Article III of the *Treaty of Aix-la-Chapelle* (1748) reconfirmed the terms of the *Treaty of Utrecht* "as if they were therein asserted, word for word," and the Mikmaq compact (1752) with the British Sovereign reaffirmed once again that Mikmaq people "shall not be hindered from, but have free liberty of Hunting and Fishing as usual."<sup>43</sup> In addition, the Mikmaq were promised a truckhouse and the "free liberty to bring for Sale to Halifax or any other Settlement within this

<sup>32</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075, which involved an Aboriginal right to fish, not a prerogative treaty.

<sup>33</sup> *Badger*, *supra* note 11. The infringement at issue in *Badger*, however, was the result of Imperial legislation, the *Constitution Act, 1930* and its schedules, rather than Canadian national legislation.

<sup>34</sup> *Marshall*, *supra* note 5 at paras. 64–66; *Sparrow*, *supra* note 32, *Badger*, *supra* note 11.

<sup>35</sup> *Ibid.* at para. 61.

<sup>36</sup> *Ibid.* at para. 65.

<sup>37</sup> See Wilson, J. in *Horseman*, *supra* note 21 at 907. In *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 263, Justice McLachlin argued the "golden thread" of British legal history was "the recognition by the common law of the ancestral laws and customs the Aboriginal peoples who occupied the land prior to European settlement." According to *Badger*, *supra* note 11 at para. 53, treaties must be interpreted in the light of the legal conceptions of the time the treaty was made. This is a familiar rule of international law. T. O. Elias, "The Doctrine of Intertemporal Law" (1980) 74 Am. J. Int. Law 285.

<sup>38</sup> *Marshall*, *supra* note 5 at para. 38, referring to para. 93 of the trial court's judgment.

<sup>39</sup> Compare *R. v. Côté*, [1996] 3 S.C.R. 139 at para. 48, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 145.

<sup>40</sup> Text in F. G. Davenport, vol. III *European Treaties Bearing on the History of the United States and Its Dependencies* (Washington, DC: Carnegie Institute, 1917–37) at 213.

<sup>41</sup> Text in P. A. Cumming and N. H. Mickenberg, *Native Rights in Canada*, 2nd ed. (Toronto: General Publishing Ltd., 1972) at 297 in Art. 3.

<sup>42</sup> The exchanges of promises made in 1725–1726 have not been published, but may be found in Public Archives of Canada, Manuscript Group 11 CO 217, Nova Scotia A, vol. 4 at 316–21, vol. 5 at 3–4, vol. 17 at 36–41; and vol. 38 at 108 and 116. Sixty-four Aboriginal signatures or totems were affixed to the document. Some copies omit the reference to "Shooting," underscoring the unreliability of the British documentation of what actually was promised.

<sup>43</sup> Public Archives of Nova Scotia, RG1, vol. 430, doc. 2. The 1752 Mikmaq compact was apparently negotiated in French, the common language of the British and Mikmaq representatives and of the Mikmaq interpreter, Abbé Maillard, and it was first published in side-by-side English and French versions. The French original substitutes "par coutume" for "as usual," thus implying "according to their customs (or customary laws)." This is a substantive difference, similar to the interpretative issue in the Treaty of Waitangi, in which the Maori term for "the chiefs' jurisdiction" was incorrectly rendered into English as "the chiefs' titles" (i.e., their honorific names). I. Brownlie, *Treaties and Indigenous Peoples*, The Robb Lectures 1991 (Oxford: Clarendon Press, 1992) at 7.

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.<sup>44</sup> The truckhouse clause in the subsequent 1760 treaty reaffirmed the 1752 compact's truckhouse clause, without expressly withdrawing or modifying its free-trade clause.<sup>45</sup>

Within months of the signing of a definitive treaty of peace between the British and French empires in 1763,<sup>46</sup> ending a century of bitter territorial competition in Acadia and Québec, George III issued the well-known *Royal Proclamation of 7 October 1763*. The proclamation prohibited any future encroachments on the lands of "those Nations or Tribes of Indians with whom We are connected,"<sup>47</sup> and imposed restrictions on British trade with Indians.<sup>48</sup> Justice Binnie observed

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<sup>44</sup> *Marshall*, *supra* note 5 at paras. 15–16. Mikmaq may have expressed their desire for truckhouses in the 1760 negotiations after concluding that central, Crown truckhouses offered fairer terms of trade. *Ibid.* at paras. 32–34.

<sup>45</sup> Compare Justice McLachlin's argument that the 1760 truckhouse clause implicitly extinguished the 1752 free-trade clause, *ibid.* at para. 105. Mikmaq view the 1760–61 treaties as adhesions to the 1752 Mikmaq compact, rather than new alliances. *Ibid.* at para. 26. Indeed, Marshall initially invoked the 1752 compact as the source of his treaty rights to fish and trade. The trial judge was convinced that the Mikmaq had abandoned their 1752 compact by assisting in the subsequent French defence of Cape Breton, however, and this persuaded Marshall to alter his legal strategy and rely instead on the 1760 treaty. *Ibid.* at para. 16. The Supreme Court had already rejected the trial judge's reasoning in *Simon*, *supra* note 5 at 404–06, so it is puzzling why the 1752 compact was ignored by the Supreme Court in *Marshall*. If the 1752 compact was in force when *Simon* was decided in 1985, it was certainly still in force when *Marshall* sold his eels. In any event, the Court has repeatedly ruled that an extinguishment requires clear and plain words. *Badger*, *supra* note 11.

<sup>46</sup> *Treaty of Paris* (1763). Article II renewed and confirmed the *Treaty of Utrecht*, subject to the terms of the new treaty, and Article XXIII restored the former status and rights conquered countries or territories that were not specifically mentioned in the *Treaty of Paris* — such as Mikmaq territories that had been within the French sphere of influence until 1763.

<sup>47</sup> R.S.C., 1985, App. II, No. 1. Rights confirmed by the Proclamation take precedence over other constitutional rights in accordance with s. 25 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (UK), 1982, c. 11, preserving their original priority as Royal prerogative grants.

<sup>48</sup> The Royal Proclamation centralized the regulation of trade in Imperial authorities, required British subjects to obtain licenses from colonial governors to trade with Indians, and required security from the traders. Although trade was to remain "free and open to all our Subjects," any failure to observe the Imperial regulations would result in the forfeiture of traders'

that Whitehall never carried out its plan to consolidate all of the King's treaties with his Indian allies.<sup>49</sup> Mikmaq teachings assert that the consolidation was achieved, however. A great northern conference of the King's Indian allies was convened at Niagara Falls in 1764, with precisely the intent and effect of harmonizing the King's treaty obligations to the Wabanaki Confederacy and other allied Indian nations of the St. Lawrence River and Great Lakes.<sup>50</sup>

Harvesting and trade rights were reaffirmed to all allied Indian nations at Niagara, and free trade was reaffirmed once again as a right of all British Indian allies in the 1794 *Treaty of Amity, Commerce and Navigation* between the British sovereign and the United States (the Jay Treaty).<sup>51</sup> The *Treaty of Ghent*, ending the 1812–1814 British-American war, expressly preserved the prior treaty rights of the Crown's Indian allies.<sup>52</sup> After so many reiterations, it is a wonder to us that there could be any doubt of the Crown's intentions to protect Indian trade.

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licence and security bonds.

<sup>49</sup> *Ibid.* at paras. 5 and 26, referring to the Imperial Board of Trade's comprehensive plan of 1764 for "the future management of Indian affairs." On the Plan of 1764, see J. M. Sosin, *Whitehall and the Wilderness: The Middle West in British Colonial Policy, 1760–1775* (Lincoln: University of Nebraska Press, 1961) at 72–77. It differed very little from the consolidation plan proposed a decade earlier by Edmond Atkin. W. R. Jacobs ed., *The Appalachian Indian Frontier: The Edmond Atkin Report and Plan of 1755* (Lincoln: University of Nebraska Press, 1954).

<sup>50</sup> See, e.g., J. Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 at 10–15, 31–47; D. V. Jones, *License for Empire: Colonialism by Treaty in Early America* (Chicago and London: University of Chicago Press, 1982) at 58; R. S. Allen, *His Majesty's Indian Allies: British Indian Policy in the Defence of Canada, 1774–1815* (Toronto and Oxford: Dundurn Press, 1992) at 35.

<sup>51</sup> *Mitchell v. Canada (Minister of National Review)*, [1999] 1 C.N.L.R. 112 (F.C.A.). The United States regards the Jay Treaty's guarantee of Indians' "full liberty to pass and repass by land or inland navigation ... and freely to carry on trade" still to be in force. See *Akins v. Saxbe*, 380 F.Supp. 1210 (D. Maine 1974). *The Royal Commission on Seals and the Sealing Industry: Seals and Sealing in Canada; Report of the Royal Commission*, vol. 2 (Ottawa: Minister of Supply and Services, 1986) at 267, recommended that Canada urge the US authorities to give full effect to this provision with respect to sales of Inuit marine-mammal products in US markets.

<sup>52</sup> See *American State Papers, Foreign Relations* (Washington, DC: Gales and Seaton, 1832–34) vol. 3 at 705–25 for the original British proposals on this crucial point.

Justice Binnie acknowledged that none of the Mikmaq treaties had involved land cessions<sup>53</sup> or the extinction of any Aboriginal hunting and fishing rights.<sup>54</sup> He failed to take this finding to its logical conclusion, however. If nothing was surrendered, everything was retained. This is the position Mikmaq leaders have asserted since 1749 in treaty negotiations, and since 1973 it has been the basis for a comprehensive claim to all of the Atlantic region and its natural resources — a claim that Ottawa has refused to negotiate on the grounds that it was “superceded by [Provincial] law.”<sup>55</sup> Under these circumstances, the Court was exceedingly modest in its holding that Mikmaq people enjoy merely the right to a “moderate livelihood” from commercial fishing.

## SLIPPERY CROWNS

At the time of these treaties, British law affirmed that the sovereign cannot “legally disregard or violate the articles on which the country is surrendered or ceded,” for they are “sacred and inviolable, according to their true intent and meaning.”<sup>56</sup> The prerogative grant of a “liberty” to Indian nations was perpetually binding on British colonists, and lodged a fiduciary obligation of protection in the Sovereign and his servants.<sup>57</sup> Sir Matthew Hale wrote that “liberties or preeminences” were derived from the King’s *jura regalia* and included Royal grants of exclusive rights to capture wild beasts (*ferae naturae*).<sup>58</sup> Other British jurists of the period also sometimes referred to Royal grants of exclusive rights to fish and hunt as “franchises,” and concurred that a prerogative grant of

this nature cannot be revoked by the Sovereign.<sup>59</sup> “[T]he King cannot take away, abridge or alter any liberties or privileges granted by him or his predecessors, without the consent of the individual holding them.”<sup>60</sup>

The “liberties” of hunting, fishing and trade affirmed by the Sovereign were unsundered Mikmaq rights and responsibilities, and they became irrevocable, under British law, from the moment the treaties were made. As Lieutenant Governor Jonathan Belcher, first Chief Justice of Nova Scotia, assured the assembled Mikmaq chiefs at a treaty renewal ceremony in 1761, British laws “will be like a great Hedge about your Rights and properties, if any break this Hedge to hurt and injure you, the heavy weight of the Laws will fall upon them and punish their Disobedience.”<sup>61</sup> Royal Instructions given to Belcher in 1761 stated that the Sovereign “was determined upon all occasions to support and protect ... [the Mikmaq] in their just rights and possessions and to keep inviolable the treaty and compact which have been entered into with them,” and Belcher issued a proclamation one year later delimiting the Atlantic coastline where Mikmaq hunting and fishing were to remain forever unhindered.<sup>62</sup>

Justice McLachlin reasoned that the 1752 and 1760 treaties merely acknowledged that the Mikmaq people would enjoy the same right to trade as all British subjects in America.<sup>63</sup> If that had been the Sovereign’s intent, the drafters of the treaty instruments could surely have found the words to express it. Other Indian treaties contain distinctly different terms which connote equal sharing rather than an exclusive right, for example “[t]he Rivers are open to all & you have an equal right to fish & hunt on them,”<sup>64</sup> and “[you] are received upon the same terms with the Canadians, being allowed ...

<sup>53</sup> *Marshall*, *supra* note 5 at para. 21.

<sup>54</sup> See *Simon*, *supra* note 4; *R. v. Isaac* (1975), 13 N.S.R. (2d) 460 (N.S.C.A.); *R. v. Cope* (1981), 132 D.L.R. (3d) 36 (N.S.C.A.); *R. v. Denny* (1990), 55 C.C.C. (3d) 322 (N.S.C.A.).

<sup>55</sup> Hon. J. Hugh Faulkner, Minister of Indian and Northern Affairs, to Alexander Denny, President, Union of Nova Scotia Indians (2 October 1978); Hon. John C. Munro, Minister of Indian and Northern Affairs, to Stanley Johnson, President, Union of Nova Scotia Indians (11 August 1980) [authors’ files].

<sup>56</sup> *Campbell v. Hall*, (1774) 1 Cow. 204 at 208, affirmed by *R. v. Secretary of State*, [1981] 4 C.N.L.R. 86 at 91 (Eng. C.A.). Also see J. D. Chitty, *A Treatise on the Law of the Prerogative of the Crown and the Relative Duties and Rights of the Subjects* (London: Joseph Butterworths & Son, 1820) at 29.

<sup>57</sup> *Badger*, *supra* note 11 at paras. 47 and 94; *Sioui*, *supra* note 22 at 1063; *Simon*, *supra* note 4 at 401.

<sup>58</sup> Sir Matthew Hale, *Prerogatives of the King* (London: Selden Society, 1976) at 201, 227–240. Preeminences were sometimes called sovereignties. H. Broom, *A Selection of Legal Maxims: Classified and illustrated*, 10<sup>th</sup> ed. by R. H. Kersley (London: Sweet & Maxwell Ltd., 1939) at 17.

<sup>59</sup> Chitty, *supra* note 56 at 119, 125; Sir William Blackstone, 2 *Commentaries on the Law of England* (London: Sweet, Maxwell and Stevens & Norton, 1844) at 417; B. Murdoch, 2 *Epitome of the Laws of Nova Scotia* (Halifax: J. Howe Publishers, 1832) at 64; *New Brunswick Power Company v. Maritime Transit Company*, [1937] 4 D.L.R. 376 (S.C.C.) at 395–96.

<sup>60</sup> Chitty, *supra* note 56 at 119, 121, 125, 132.

<sup>61</sup> *Marshall*, *supra* note 5 at para. 47.

<sup>62</sup> *Simon*, *supra* note 4 at 405.

<sup>63</sup> *Marshall*, *supra* note 5 at para. 85: “All inhabitants of the province of Nova Scotia or Acadia enjoyed a general right to trade. No treaty was required to confer such a right as it vested in all British subjects.” This broad generalization lacks historical or legal support and is inconsistent with the express terms of the Royal Proclamation, *supra* note 46.

<sup>64</sup> *Taylor and Williams*, *supra* note 13 at 235.

Liberty of trading with the English.”<sup>65</sup> The principle *pacta sunt servanda* demands giving effect to what was stated or promised, which in this case was a “liberty to trade” without qualification. What was affirmed in the treaties was therefore an irrevocable franchise — rather than whatever right to trade British subjects might have enjoyed, which could be restricted by law at any time.

“Until enactment of the *Constitution Act, 1982*,” Justice Binnie observed, “the treaty rights of aboriginal peoples could be overridden by competent legislation as easily as could the rights and liberties of other inhabitants.”<sup>66</sup> Parliament regulated hunting and fishing notwithstanding Indian treaties until 1982,<sup>67</sup> and Canada’s courts upheld Parliamentary supremacy in some of those cases.<sup>68</sup> In the light of more recent scholarship on Georgian diplomacy and Imperial law,<sup>69</sup> however, the constitutionality of those acts and rulings must be reconsidered. Prerogative grants, by treaty, to Mikmaq and other Indian nations were constitutionally irrevocable when made, as were the various Royal grants and charters to the British colonies. Indeed, the government of Nova Scotia was never formally established by imperial legislation; it functions to this day under an agglomeration of prerogative instruments that includes the Royal commissions, instructions and proclamations as well as various Georgian treaties.<sup>70</sup> Within the Imperial legal regime from which the

Canadian legal system has evolved, prerogative acts take precedence over ordinary legislation — particularly where those prerogative acts consist of solemn promises by the Imperial Sovereign to the Indian nations that placed themselves by treaties under His Royal protection.<sup>71</sup>

The Supreme Court has repeatedly stated that it will not slavishly assume the lawfulness of pre-1982 legislation or regulations when it is interpreting the constitutional rights of Aboriginal peoples.<sup>72</sup> Chief Justice Lamer decried an “awkward patchwork of constitutional protection for aboriginal rights across the nation, depending upon the historical idiosyncrasies of colonization over particular regions of the country,” for to do so would constitute “perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers.”<sup>73</sup> Justice Binnie should have taken courage and dared to give the Mikmaq nation the full measure of its original treaty rights.

## SLIPPERY STANDARDS

We have argued that the “liberty” affirmed to Mikmaq by the Sovereign was an exclusive economic right under eighteenth-century law, and that what was originally intended and understood to be guaranteed is what should be upheld today. The Nova Scotia Court of Appeals had already concluded ten years ago that Mikmaq possess a constitutionally entrenched priority right to fish for their “legitimate food needs,” after conservation has been taken into account.<sup>74</sup> Although the majority in *Marshall* upheld Mikmaq rights to fish

<sup>65</sup> *Sioui*, *supra* note 22 at 1031.

<sup>66</sup> *Marshall*, *supra* note 5 at para. 48. We note that the learned Justice here uses the term of art “liberty” in its modern sense, i.e., to refer to a freedom in the sense of the *Charter of Rights and Freedoms*, rather than to the Royal grants of exclusive economic rights that eighteenth-century jurists would have understood.

<sup>67</sup> *Sparrow*, *supra* note 32 at 1111.

<sup>68</sup> E.g., *Sikyea v. The Queen*, [1964] S.C.R. 642, and *R. v. George*, [1966] S.C.R. 267, but see *Horseman*, *supra* note 21 at 914–16 (Wilson, J.).

<sup>69</sup> E.g., *Delgamuukw*, *supra* note 39 at para. 145; B. Slatery, “Understanding Aboriginal Rights” (1987) 66 *Can. Bar Rev.* 727 at 737–38 and “Aboriginal Sovereignty and Imperial Claims” (1991) 29 *Osgoode Hall Law J.* 681; K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 110–16, 181–83; M. Walters, “British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*” (1992) 17 *Queen’s L. J.* 350.

<sup>70</sup> See e.g. P. W. Hogg, *Constitutional Law of Canada*, 3<sup>rd</sup> ed. (Toronto: Carswell, 1992) at 32; Read, “The Early Provincial Constitution” (1948) 26 *Can. Bar. Rev.* 621. Also see *MacCormick v. Lord Advocate*, [1953] S.C. 396 at 411 (per Lord Cooper) (effect of 1707 Articles of Union between England and Scotland on authority of the British Parliament over Scotland).

<sup>71</sup> *Marshall*, *supra* note 5 at paras. 39–41 (Binnie J.); *Badger*, *supra* note 11 at para. 78 (Cory J.). Also *Sioui*, *supra* note 22 at 1053 and 1063, and *Simon*, *supra* note 4 at 401. Compare Justice Cory’s analysis in *Horseman*, *supra* note 21 at 934, and *Badger* at paras. 46–48 (Imperial Parliament amendments to the *British North America Act* may modify treaty obligations to Indian nations).

<sup>72</sup> *Sparrow*, *supra* note 32 at 1095–1101, 1106, 1111–19; *R. v. Côté*, *supra* note 39 at paras. 49–52; *Simon*, *supra* note 4 at 399; *Taylor and Williams*, *supra* note 13 at 364. See also, S. Henderson, “Interpreting Sui Generis Treaties” *supra* note 14 at 63–71; P. P. Frickey, “Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law” (1993) 107 *Harv. L. Rev.* 381 at 397–98.

<sup>73</sup> *Côté*, *supra* note 39 at paras. 53–54.

<sup>74</sup> *R. v. Denny*, *supra* note 54 at 339, cited with approval in *Sparrow*, *supra* note 32 at 1116–18. The majority in *Marshall* failed to distinguish between an Aboriginal right to fish and a treaty right to fish, both of which can legitimately be asserted by Mikmaq.



and to trade, it imposed a novel and vague ceiling on the enjoyment of those rights: attaining a "moderate livelihood." It is not impossible to extract this standard from references in the *travaux préparatoires* to Mikmaw people's desire to continue to secure their "necessaries" by harvesting and selling wildlife and fish, and the majority was no doubt searching for some basis to limit the treaty right, in a prescient awareness of the severe backlash that even a limited treaty fishery would provoke.

"Moderate livelihood" has no precedent in Canadian jurisprudence.<sup>75</sup> It was imported from a US Supreme Court decision on Indian treaty rights to fish "in common" with other citizens.<sup>76</sup> The American courts have never interpreted "moderate livelihood," however, because the Indian tribes concerned have been self-regulating, and in any event there have barely been enough fish in the affected area for a majority of Indian and non-Indian fishermen to subsist, and meet the debt-service payments on their vessels and gear.<sup>77</sup>

Canada,<sup>78</sup> the United States<sup>79</sup> and the International Whaling Commission<sup>80</sup> have struggled to define "subsistence" for the purpose of setting ceilings on Aboriginal peoples' harvests of fish and wildlife. On the whole, these exercises have converged conceptually with respect to some issues. Subsistence necessarily includes some possibility of barter or sale. Money is required to maintain or replace harvesting gear such as rifles, nets and boats, and to purchase ammunition and fuel. Trade within and between communities was traditionally pursued, moreover, both as a means of improving material living standards and as a form of social security. Trade and money may consequently be necessary for maintaining harvesting capacity, and getting the most material and social value out of what is harvested. At the same time, it has generally be argued that there is no room for capital accumulation in a subsistence-harvesting regime, i.e., for getting richer and re-investing the proceeds of harvesting in unrelated

<sup>75</sup> While "livelihood" has been defined for the purpose of determining what constitutes the "pursuit of a livelihood" without discrimination based on provincial residence, *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, the slippery undefined operative term in *Marshall* is "moderate."

<sup>76</sup> *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979) at 686-87: "Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood — that is to say, a moderate living." The treaty at issue in *Washington* secured Indians' right to fish "in common" with other citizens, implying (as the US Court explained) a fair share, while the treaties at issue in *Marshall* refer to a "free liberty" of fishing, implying an unrestricted right.

<sup>77</sup> R. L. Barsh, "Backfire from Boldt: The Judicial Transformation of Coast Salish Proprietary Fisheries into a Commons" (1991) 4 *Western Legal History* 85; also see the Indian tribal income, employment and fish-landing data in D. J. Cocheba et al., *Potential Effects of OCS Oil and Gas Exploration and Development on Pacific Northwest Indian Tribes: Final Technical Report, MMS 91-0056* (Washington, DC: US Department of the Interior, 1991).

<sup>78</sup> *Report of the Royal Commission*, note 51 at 261 and 267. Under the *Inuvialuit Final Agreement* (Ottawa: D.I.N.A., 1987), for example, Aboriginal communities have a preferential right to hunt and fish for food, including personal and community use, and including the sale or barter of the inedible by-products such as hides, tusks and bone. *Ibid.*

<sup>79</sup> The *US Marine Mammal Protection Act* of 1972 permits the harvesting of marine mammals by Aboriginal peoples for "nonwasteful" uses such as food and clothing, as well as the sale of handicrafts made from inedible by-products. The 1980 *Alaska National Interest Lands Conservation Act* (ANILCA) Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified at 16 U.S.C. §§ 3101-3233) (1982) devolved federal responsibility for wildlife conservation to the State of Alaska subject to a condition that the State establish and maintain a priority for "nonwasteful subsistence uses" of wildlife by Native and non-Native residents. The State defined "customary and traditional uses" as "direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation, for the making of handicrafts" from inedible by-products, and for "customary trade, barter or sharing." See K. I. Atkinson, "The Alaska National Interest Lands Conservation Act: Striking the Balance in Favor of 'Customary and Traditional' Subsistence Use by Alaska Natives" (1987) 27 *Natural Resources Journal* 421; M. L. Bruzzese, "*US v. Alexander*: Defining and Regulation 'Subsistence Use' of Resources among Alaska Natives" (1993) 33 *Natural Resources Journal* 461.

<sup>80</sup> M. M. R. Freeman, "The International Whaling Commission, Small-type Whaling, and Coming to Terms with Subsistence" (1993) 52 *Human Organization* 243 at 245. Freeman has defined subsistence as "a system or mode of production in which the allocation and procurement of resources and the distribution and consumption of products is organized around family and kinship groups," and in which production and distribution aim chiefly to maintain and enhance social relationships. M. M. R. Freeman, "Subsistence, Sustainability and Sea Mammals: Reconstructing the International Whaling Regime" (1994) 23 *Ocean & Coastal Management* 117 at 122.

income generating activities such as stocks or real estate.

The problem with this approach in the *Marshall* context is that moderate livelihood is more than "subsistence."<sup>81</sup> Moderate livelihood should permit some improvement of living standards and should not bar Mikmaq treaty harvesters from using their fishing income to diversify the economies of their communities in the same ways that are already permitted to neighbouring fishermen. Suppose, for example, that a group of Mikmaq fishermen decided to invest in a fish-processing plant. If successful, their venture would benefit all local fishermen, but it would also probably take the owners out of the category of "subsistence" harvesters as that term is generally understood.

There is an alternative basis for interpreting "moderate livelihood" by analogy to Mikmaq customary law. In Mikmaq jurisprudence, the duties of hunters and fishermen to respect animals as well as other human beings are captured by the concept of *netukulimk*, which may be rendered in English as "moderation and respect," or, as some Mikmaq elders have explained, "taking only what you need."<sup>82</sup> In October 1986, following the Supreme Court's *Simon* decision, the Mikmaq Grand Council proclaimed interim conservation guidelines based upon *netukulimk*, which were applied through the elected chiefs and a national arbitration board.<sup>83</sup> In *Van der Peet*,<sup>84</sup> Justice McLachlin (as she then was) and Justice L'Heureux-Dubé suggested in their concurring opinions that First Nations' customary laws were incorporated automatically into the common law at the moment of the Crown's accession to sovereignty over the

territory.<sup>85</sup> By this reasoning, Mikmaq harvesting rights continue to be governed by Mikmaq customary law — the *lex loci*.<sup>86</sup> *Netukulimk* is not inconsistent with the Supreme Court's notion of "moderate livelihood."

Mikmaq authorities themselves should have a constitutional right to interpret the meaning of "necessaries." We think it reasonable to infer that Mikmaq leaders would have intended their descendants to live at least as well, on average, as their new British treaty allies and neighbours. A plausible (and, we believe, very modest) floor for the interpretation of the right to obtain their "necessaries," or a "moderate livelihood," would therefore be the *mean per capita income* of Atlantic Canada's non-Mikmaq households.<sup>87</sup> Surely, the Mikmaq nation did not place itself under British protection, nor open its vast coastal territory to British settlement, with the intention that its descendants live forever *more poorly* than their British guests. Such a result would fly in the face of the original intention of the Mikmaq chiefs to secure their "mutual advantage"<sup>88</sup> from the treaties.

## SLIPPERY POLITICIANS

A similar treaty-rights decision was taken by the US Supreme Court nearly twenty years ago, in a west coast controversy that produced comparable levels of local violence.<sup>89</sup> In the American case, however, the federal government firmly defended the indigenous treaty-holders against the Washington State government

<sup>81</sup> "Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike." *Marshall*, *supra* note 5 at para. 59.

<sup>82</sup> R. L. Barsh and J. B. Marshall, "Mi'kmaw (Micmaq) Constitutional Law" in B. E. Johansen, ed., *Encyclopedia of Native Legal Traditions* (Westport CT: Greenwood Press, 1998) at 192–209. In the Wabanaki treaty negotiation, this concept may have been put forward by the Mikmaq and then poorly translated by the English as "necessaries." A similar concept can be found in Cree jurisprudence. Hon. D. M. Arnot, Treaty Commissioner for Saskatchewan, *Statement of Treaty Issues: Treaties as a Bridge to the Future* (Saskatoon: Office of the Treaty Commissioner, 1998) at 13.

<sup>83</sup> The text of the guidelines is set out in Union of Nova Scotia Indians, *The Mi'kmaq Treaty Handbook* (Sydney and Truro, NS: Native Communications Society of Nova Scotia, 1987) at 14–15.

<sup>84</sup> *Van der Peet*, *supra* note 37.

<sup>85</sup> *Ibid.* at 599–600 (L'Heureux-Dubé J.) and 642–44 (McLachlin J.). We welcomed this approach in R. L. Barsh and J. Y. Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 McGill L. J. 993 at 1007–08.

<sup>86</sup> In *Delgamuukw*, *supra* note 39 at paras. 147–48, the Lamer Court held that Aboriginal perspectives and laws are protected by s. 35(1) of the *Constitution Act, 1982*, *supra* note 9. Also see *Van der Peet*, *supra* note 37 at para. 41.

<sup>87</sup> As explained *supra*, we believe that the best interpretation of the Mikmaq intent, and the terms agreed by the Crown, is an *exclusive* liberty or franchise to fish and hunt for sale. Setting mean per capita income as a floor reflects the idea of a just and equitable sharing of resources, which has been suggested elsewhere as a reasonable construction of the *post-Confederation* "numbered" treaties made in the west, with the inhabitants of the former Rupertsland. See *Statement of Treaty Issues*, *supra* note 82 at 12–16, 66–68, 87 (the "principle of mutual benefit").

<sup>88</sup> *Marshall*, *supra* note 5, para. 3.

<sup>89</sup> See F. G. Cohen, *Treaties on Trial: The Continuing Controversy over Northwest Indian Fishing Rights* (Seattle and London: University of Washington Press, 1986).

and the State's non-Indian licensees. In *Marshall*, federal support for Mikmaq has been equivocal at best. This contrast illustrates the crucial differences between American federalism and Canadian federalism, in principle and in practice. We question whether Ottawa retains sufficient power or legitimacy to enforce any provision of the national constitution, or any Supreme Court ruling interpreting the constitution, against a province or a vociferous sector of Canadian society. In other words, does constitutional supremacy and the rule of law persist in Canada?

Editorial opinion in the centrist *Globe and Mail* has been uncharacteristically antagonistic to Aboriginal Peoples, and to the Supreme Court as an institution. Accusing the Supreme Court of being "blind" to reality and creating "chaos," the editors argued that the 1760 treaty "clearly" did not contain a preferential right to harvest or trade fish.<sup>90</sup>

The spectre of the Supreme Court functioning illegitimately to create an unintended right based on vague and quasi-historical interpretations is certainly raised by this judgment. It is an example of the court's oversensitivity to the burdens of history, and its desire to assume and ameliorate them, whatever the specific language of a law, treaty or even the Constitution itself.

Justice Binnie took the unusual step of defending the Court's integrity publicly,<sup>91</sup> while the Tory premiers of Alberta and Ontario made headlines by threatening to take political steps to "rein in" the judges.<sup>92</sup>

If the editors of the *Globe and Mail* represent Canada's relatively educated mainstream, constitutional supremacy and the rule of law are moribund. In accusing the Supreme Court of "illegitimacy," the editors seem to equate "legitimacy" with popular opinion. "Mr. Dooley" (the turn-of-the-century Irish American satirist Finley Peter Dunne) complained that

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<sup>90</sup> "The burden of language in the Mi'kmaq case" *The Globe and Mail* (6 October 1999) at A10; "The Supreme Court all at sea" *The Globe and Mail* (5 October 1999) at A12. The francophone press accorded comparatively little attention to *Marshall*, although *Le Devoir* defended the Supreme Court's decision as "balanced," and squarely blamed the Mikmaq for the subsequent violence. Michel Venne, "Le prix de l'incurie" *Le Devoir* (5 October 1999) at A6.

<sup>91</sup> Brian Laghi, "Top-court judge denies activism" *The Globe and Mail* (21 October 1999) at A4.

<sup>92</sup> John Ibbitson and Steven Chase, "Ontario joins Alberta: Rein in top court" *The Globe and Mail* (25 October 1999) at A1.

"th' supreme court follows th' illiction returns," rather than upholding the constitution."<sup>93</sup> By a curious twist of history, the Canadian national press *demand*s that the Supreme Court bow down to the polls. Do Canadian journalists have any conception of judicial independence, the division of powers or the role of the judiciary in ensuring that we remain "a nation of laws and not of men"? Apparently not. Canadians do not yet appreciate what it means to have a constitutional system, as opposed to a government of privileged majorities and political bosses posing as democracy.

Although it is the constitutional fiduciary of the Mikmaq nation, the federal government equivocated on the Supreme Court's authority from the day of the ruling. In one of his only publicized comments on *Marshall*, the Prime Minister indicated that he was weighing the Reform Party's suggestion of asking the Court to suspend its judgment.<sup>94</sup> This was particularly ominous in light of the fact that Ottawa's refusal to implement *Simon* fully had led Mikmaq to relitigate their treaty rights in *Marshall*. The federal minister of fisheries dithered for three weeks before getting directly involved.<sup>95</sup> The federal minister of Indian affairs waited for more than a month, and then blamed the provinces for the delay in implementation talks with the Mikmaq.<sup>96</sup>

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<sup>93</sup> Louis Fuller, ed., *The World of Mr. Dooley* (New York: Collier Books, 1982) at 89. "A man that'd expict to thrain lobsters to fly in a year is called a loonytic," Mr. Dooley also observed, "but a man that thinks men can be turned into angels be an illiction is called a rayformer an' remains at large." *Ibid.* at 72. Preston Manning take note.

<sup>94</sup> K. Cox and E. Anderssen, "Ottawa, Micmacs try to resolve fishing feud" *The Globe and Mail* (29 September 1999) at A4. Also see D. LeBlanc, "Ottawa gropes for response to fish battle" *The Globe and Mail* (5 October 1999) at A1; and B. Myles, "Confusion à Ottawa" *Le Devoir* (5 October 1999) at A1.

<sup>95</sup> Two weeks after the *Marshall* ruling, the minister was still putting off meeting with Mikmaq leaders while he sought legal advice. "Ottawa, Micmacs try to resolve fishing feud" *supra* note 94. When direct meetings with DFO finally began on October 2, even non-Native leaders condemned the delay. K. Cox and D. LeBlanc, "Anger over fishing rights explodes" *The Globe and Mail* (4 October 1999) at A1.

<sup>96</sup> H. Scofield, "Scope of aboriginal ruling in dispute" *The Globe and Mail* (23 October 1999) at A5. When Mikmaq boats and traps were destroyed and some area fish-packing plants wrecked because they did business with Mikmaq, the RCMP waited for ten days to lay charges, while DFO officers and the Coast Guard wasted no time impounding Mikmaq boats and gear for alleged infractions even after the *Marshall* ruling. The appearance (at least) of selective enforcement of the law was not lost on Mikmaq leaders. "Anger over fishing rights explodes" *supra* note 95; K. Cox, "25 charged in dispute over fishery" *The Globe and Mail* (13 October 1999) at A3; K. Cox,

The press has blamed judicial "ignorance" and Mikmaq "militancy" for a situation created by centuries of paternalism, the systematic exclusion of the Mikmaq from the commercial fishery and government mismanagement of marine resources. Ottawa has not only categorically refused to negotiate Mikmaq comprehensive treaty claims in the Atlantic region, when similar claims (and new treaties) have been in negotiation everywhere else in Canada,<sup>97</sup> but has meanwhile permitted *increases* in Atlantic fish landings,<sup>98</sup> and supported development projects

undermining the Atlantic region's marine ecosystems.<sup>99</sup> Now that Atlantic fishermen are truly desperate, it is convenient for Ottawa to play the "race card," blame Aboriginal people for overfishing,<sup>100</sup> and accuse Aboriginal leaders of using or threatening violence.<sup>101</sup>

One month after *Marshall*, Mikmaq leaders won another treaty victory: barring completion of the Sable Island offshore oil project until environmental concerns are adequately addressed.<sup>102</sup> Belying their characterization as eco-vandals in the press and by

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"Fisheries seizes native lobster traps" *The Globe and Mail* (23 October 1999) at A6.

<sup>97</sup> Note 55, *supra*. The exclusion of most of the Atlantic region from Canada's comprehensive claims policy, as set out in Department of Indian and Northern Affairs, *In All Fairness* (Ottawa: DIAND 1981), was criticized by the Department's own Task Force to Review Comprehensive Claims Policy in its final report, *Living Treaties: Lasting Agreements* (Ottawa: DIAND 1986) at 45-46, but Ottawa still refuses to discuss Mikmaq comprehensive claims, "Scope of fishing ruling in dispute," *supra* note 96.

<sup>98</sup> From 1952 to 1988 DFO allowed Atlantic landings to increase by two hundred per cent, from one to three billion pounds of fish and shellfish. There was evidence of declining cod, haddock, lobster and herring stocks by the 1960s, but the region's fishermen were encouraged to shift to relatively unexploited species such as capelin, which comprise the food for larger predators including cod. F. H. Leacy, ed., *Historical Statistics of Canada*, 2nd ed. (Ottawa: Statistics Canada, 1983)

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table series N12-24; *Canada Year Book 1999* (Ottawa: Minister of Industry, 1998) at 358.

<sup>99</sup> There has been no thorough scientific assessment of the impacts on Atlantic coastal ecosystem and fisheries of industrial contamination (steel mills, coal mines, pulp and paper processing) or of construction in rivers and estuaries. In 1992 the Mikmaq Grand Council tried unsuccessfully to mobilize Native and non-Native Nova Scotians in a joint "Campaign to Protect the Bras d'Or Lake Ecosystem." By comparison, Ottawa has invested substantial effort in the assessment of industrial impacts on the Great Lakes. Health Canada, *State of Knowledge Report on Environmental Contaminants and Human Health in the Great Lakes Basin* (Ottawa: Health Canada, 1997).

<sup>100</sup> Making scapegoats of Indians and foreigners also diverted public attention from the mismanagement of the West Coast salmon fishery in the past. R. L. Barsh, *The Washington Fishing Rights Controversy: An Economic Critique*, rev. ed. (Seattle: University of Washington, 1979) at 28-30; D. Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993) at 171-74.

<sup>101</sup> There has been a persistent use of terms such as "war" and "battle" in English press coverage of post-*Marshall* events, while the francophone press has been using images from the Mohawk confrontation at Oka. See e.g., "Ottawa gropes for response to fish battle" *supra* note 94, with its front-page photograph of "the flag of the militant Mi'kmaq Warriors Society;" Mark MacKinnon, "'We're not backing down': war chief" *The Globe and Mail* (11 October 1999) at A4; J. LeMont, "Lobster Wars" *MacLeans* (11 October 1999) at 20-21; and the editorial page cartoon "Homard à la canadienne" *Le Devoir* (5 October 1999) at A6. Similarly, the press characterized Mikmaq as "defiant" and aggressive during the 1988 dispute over Mikmaq moose harvesting. T. Bernard and P. J. Prosper, "Policy as Depicted in the 1988 Mi'kmaq Treaty Moose Harvest" in S. Inglis, J. Mannette and S. Sulewski, eds., *Paqtatek* (Halifax: Garamond Press, 1991) at 77-89.

<sup>102</sup> B. Laghi, "Native ruling could delay megaproject" *The Globe and Mail* (22 October 1999) at A1; B. Laghi, "Mi'kmaq seek to halt Sable Island pipeline work" *The Globe and Mail* (23 October 1999) at A2; K. Cox, "The megaproject whose name is mud" *The Globe and Mail* (30 October 1999) at A20.

Ottawa,<sup>103</sup> Mikmaq authorities are using their constitutional standing under *Marshall* — something non-Native fishermen lack — to protect the marine environment.<sup>104</sup> In the days following the *Marshall* ruling, Mikmaq leaders had also approached non-Native fishermen with a proposal for a common conservation and allocation strategy.<sup>105</sup> In the ten years prior to *Marshall*, Mikmaq leaders had worked with their non-Native neighbours on a wide variety of conservation initiatives, from blocking the construction of gravel pits and landfills, to opposing the application of herbicides in coastal forests, to fighting the dredging of Sydney Channel and the dragging of the bottom of the Bras d'Or Lake.<sup>106</sup>

In the weeks that followed the Supreme Court's decision, however, Ottawa's actions have divided Atlantic fishermen along racial lines<sup>107</sup> and undermined the credibility and authority of Mikmaq traditional and elected leaders. The Mikmaq had offered to delay treaty fishing for thirty days in the wake of *Marshall*, but were

rebuffed by Ottawa. Three weeks later, the federal minister took public credit for coaxing them to agree to the moratorium that they had originally proposed themselves.<sup>108</sup> By that late stage, both the minister and Mikmaq leaders had suffered a loss of trust on the docks, and two out of thirty-five Mikmaq communities refused to cooperate.<sup>109</sup> The minister chose to take firm action against these two communities over the objections of Mikmaq leaders, eliminating what little trust remained between Ottawa and the Mikmaq leadership, and between Mikmaq leadership and Mikmaq fishermen.<sup>110</sup>

Ironically, the press accorded their greatest sympathy to the federal minister of fisheries who was portrayed as a well-intentioned but misunderstood hyphenated Canadian, sandbagged by incompetent advisers in his own department.<sup>111</sup> By focusing on the irony that Canada's first Sikh federal cabinet minister stands accused of racism by Aboriginal leaders, the *Globe and Mail* diverted attention from the reality that ministers do not act as individuals, but on behalf of governments. We, too, sympathize with the minister, who may find himself in a conflict of personal beliefs and political loyalties. Excessive sympathy for elected officials elevates "men" over laws, however.

What we have not heard is any public acknowledgment of past wrongs, regrets or sympathy from the politicians or press for the centuries of wrongful exclusion of the Mikmaq from the commercial fishery and their manufactured poverty. We have heard no redress or compensation package for the governmental mistakes in interpreting the treaties denying the Mikmaq the benefit of these rights. We hear no reconciliation of the past wrongs or any coherent partnership for sharing future that respects constitutional rights as much as colonial privileges.

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<sup>103</sup> Most press reports have given misleading impressions of the magnitude of the post-*Marshall* Mikmaq lobster fishery, for example by reporting that Mikmaq had taken 120,000 pounds of lobster out of season without clarifying (until a week later) that this represented barely 0.005 per cent of the region's average annual lobster landings. "Anger over fishing rights explodes," *supra* note 95; M. McAfee, "Even experts can't agree on lobsters" *The Globe and Mail* (11 October 1999) at A4. Only about one hundred Mikmaq actually went fishing for lobster in the weeks after the ruling, "Ottawa, Micmacs try to resolve fishing feud" *supra* note 94, but even if as many as 2,000 Mikmaq choose to exercise fishing rights in the future (K. Cox, "Figuring out a 'fair share' controversial and costly" *The Globe and Mail* (8 October 1999) at A7), it would represent only a ten per cent expansion of the Atlantic fleet.

<sup>104</sup> The Mikmaq have used their constitutional rights and standing in the past to protect the marine environment, *Union of Nova Scotia Indians v. Canada*, [1997] 4 C.N.L.R. 280.

<sup>105</sup> K. Cox, "Tensions mount as natives use right to fish off-season" *The Globe and Mail* (29 September 1999) at A7; K. Cox, "East Coast fishery moves toward co-operation" *The Globe and Mail* (9 October 1999) at A10; K. Cox, "DFO blasted for seizing lobster traps" *The Globe and Mail* (22 October 1999) at A5.

<sup>106</sup> In a tragic twist of fate, many of the fishermen who have been mobilized against the *Marshall* ruling are descendants of the Acadians who were hidden from British troops by their Mikmaq neighbours. Tu Thanh Ha, "Indians once sheltered Acadians" *The Globe and Mail* (9 October 1999) at A10. What is even more ironic, the trial judge in *Marshall* reasoned that the military efforts of Mikmaq to protect their Acadian neighbours and kinsmen comprised a breach and renunciation of the 1752 concordat. *Supra* note 5 at para. 63.

<sup>107</sup> West Coast fishermen have recently accused the same federal minister of trying to divide them along racial lines. M. MacKinnon, "Fishermen threaten Ottawa with civil disobedience" *The Globe and Mail* (5 November 1999) at A8.

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<sup>108</sup> K. Cox, "Native leaders propose fish truce" *The Globe and Mail* (7 October 1999) at A1.

<sup>109</sup> Tu Thanh Ha, "Natives defy call to stop fishing" *The Globe and Mail* (8 October 1999) at A1.

<sup>110</sup> K. Cox, "Native scrap lobster fishing moratorium" *The Globe and Mail* (14 October 1999) at A4.

<sup>111</sup> M. MacKinnon, "The minister on the hook" *The Globe and Mail* (23 October 1999) at A22. We have yet to hear any public or press sympathy for the poverty imposed on Mikmaq people for their wrongful exclusion from the fishery for many, many years.

## CONCLUSION: SLIPPING AWAY

Mikmaq are quintessentially people of the sea.<sup>112</sup> Seafarers everywhere learn to read the subtle language of the ocean's changing colours and textures which speak to the wise of distant storms. When the wind turns and gales blow, it is too late to make safely to shore. A sailor who is deaf to the warnings of the sea will surely wreck.

Canadians have been adrift for centuries on a sea of ambivalent nationalism. As yet, no safe harbour has been found — not Meech Lake, nor Charlottetown, certainly not the empty posturings in Ottawa or Québec city. Only a residual colonial mentality with its strategy of authoritarianism and majority privilege provide a wretched compass.

As legal advisers to an indigenous nation, we fought Pierre Elliott Trudeau bitterly over his initial refusal to take First Nations seriously as constituent polities of Confederation. His formula for the survival of Canada as a state remains conceptually sound in our view, however.<sup>113</sup> Plural societies must choose one of two courses. They may adopt a transcendent national vision, which ultimately overwhelms their diverse identities and jealousies: the American melting pot, cooking on the fire of American self-confidence, exceptionalism and imperialism. Alternatively, a plural society may accept its diversity as a given, even as an asset, and stitch the seams of the state with an overarching constitutional framework that guarantees the cultural security of each group and the personal security of every person: a minimal central state entrusted with enforcing the rule of law and protecting fundamental rights.<sup>114</sup>

The minimal Canadian central state grows ever more minimal, however, to the point that it is no longer capable of serving its protecting and unifying function. If *Marshall* is a bellwether — and we fear that it is — the federal government is growing unwilling or unable to cooperate with the Supreme Court in guaranteeing the constitutional rights of Aboriginal Peoples and Canadians. Ottawa has fumbled badly, and accused the Court of meddling and manufacturing violence in a case involving a few hundred angry fishermen, a minute share of the dwindling Atlantic fishery, and a great deal of misinformation. This is a retreat from constitutional supremacy and betokens ill for future constitutional controversies in which the political stakes may be even higher, such as a dispute over language rights in Québec, Aboriginal lands in British Columbia or privatizing health care in Alberta.

The current controversy over *Marshall* reminds us of another "Marshall" case: *Worcester v. Georgia*,<sup>115</sup> decided more than 150 years ago by the US Supreme Court under the direction of its outspokenly federalist Chief Justice, John Marshall. The State of Georgia had defied federal authority by seizing the lands of the Cherokee Nation and imprisoning Cherokee leaders in violation of the Cherokees' treaties with the United States. In *Worcester*, the relatively young Supreme Court flexed its constitutional muscles and declared the state's actions *ultra vires*. Chief Justice Marshall was concerned about the fate of the Cherokees, to be sure, but equally if not more so, the fate of the Union. As well he should have been: President Andrew Jackson refused to implement the court's ruling, choosing instead to use federal military power to force the Cherokees to leave their homeland. "The Union is in most imminent danger of dissolution," former President John Quincy Adams opined. "The ship is about to founder."<sup>116</sup> And founder it did, although the proximate cause of the bloody Civil War, nineteen years later, was enforcing federal laws against slavery rather than

<sup>112</sup> C. A. Martijn, ed., *Les micmacs et la mer* (Montréal: Recherches amérindiennes au Québec, 1986).

<sup>113</sup> As best set out in his manifesto, *Le Fédéralisme et la société canadienne-française* (Montréal: Editions HMH, 1967), in English, *Federalism and the French Canadians* (Toronto: MacMillan, 1968).

<sup>114</sup> W. Kymlicka, *Finding Our Way* (Toronto: Oxford University Press, 1998) at 158, argues that Anglophone Canada has resisted relinquishing its majority privilege, exercised through Parliament, of defining and allocating the fundamental rights enshrined in the *Charter*.

<sup>115</sup> 31 U.S. (6 Pet.) 515 (1832); J. C. Burke, "The Cherokee Cases: A Study in Law, Politics and Morality" (1969) 21 *Stanford L. Rev.* 500.

<sup>116</sup> A. Beveridge, *The Life of John Marshall* (Boston: Houghton Mifflin, 1919) at 544.

upholding treaties with Indian tribes.<sup>117</sup> The Union survived and rebuilt, at the cost of half a million lives.

This is a cautionary tale for Canada. *Marshall* is a test of the existence of the rule of law in Canada — a country which relies even more fundamentally on constitutional supremacy and the rule of law as its unifying force, than ever did the United States.

"The Court has done its duty," US Supreme Court Justice Joseph Story wrote to a friend a few days after Chief Justice Marshall's *Worcester* decision. "Let the nation do theirs. If we have a government let its command be obeyed; if we have not, it is well to know at once, and look to consequences."<sup>118</sup> Tricky story, this one, for the rest of Canada.

## POSTSCRIPT: A SLIPPERY COURT

But the mystery of the colonial is this: while he remains alive, his instinct, always and forever creative, must choose a way to change the meaning and perspective of this ancient tyranny.<sup>119</sup>

Two months to the day after issuing its judgment in *Marshall*, the Supreme Court denied the motion of the West Nova Fishermen's Coalition to intervene and seek a stay of judgment and re-hearing. The motion was denied on procedural grounds<sup>120</sup> and the Court chided the applicant for misunderstanding its original ruling,<sup>121</sup> as well as making political rather than legal arguments for the suspension of a constitutional right.<sup>122</sup> Astonishingly, the Supreme Court then proceeded to

rephrase its rulings and its reasoning in *Marshall* and address issues relating to the scope of federal regulatory authority which had not previously been raised or argued by the parties. The result is a further muddying of the conceptual waters and the dilution of the treaty rights that the Mikmaq people have enjoyed for a mere two months.

The *National Post* publicly congratulated the Justices for coming to their senses, listening to their critics and adopting "a new sense of judicial restraint and humility."<sup>123</sup> Never has the US or Canadian Supreme Court reversed itself so precipitously in the face of public criticism.

While advising its critics that it cannot fully define the scope of Ottawa's "power to regulate the treaty right" based upon the record before it, the Court in *Marshall II* reassures them of the *existence* of such a power, referring to *Badger*.<sup>124</sup> *Badger* involved reconciling Treaty No. 8 with the *Constitution Act, 1930*,<sup>125</sup> and concluded that treaty rights may be modified by the clear intent and express terms of a constitutional instrument.<sup>126</sup> *Badger* held that the licensing requirements of the applicable provincial *Wildlife Act* nonetheless constituted a *prima facie* infringement of the surviving, albeit modified treaty hunting right.<sup>127</sup> Since the Crown had submitted no evidence to justify limiting the treaty hunting right, the Court ordered a new trial on that issue, noting that any demonstrably legitimate "conservation component" of

<sup>117</sup> With his usual perspicacity, Alexis de Tocqueville observed in the wake of the *Worcester* case that either Indian tribes, or slavery, would be the cause of a bitter struggle over the future of the Union. *Democracy in America* (New York: Harper and Row, 1966) at 308–09, 344–45.

<sup>118</sup> W. Wetmore Story, *Life and Letters of William Story* (Boston: 1851) at 87, quoted in R. L. Barsh and J. Y. Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley, CA: University of California Press, 1980) at 60.

<sup>119</sup> G. Lamming, "The Pleasures of Exile" cited in S. Selmon and H. Tiffin, *After Europe* (Sydney, New South Wales: Kangaroo Press, 1989) at v.

<sup>120</sup> *R. v. Marshall*, decided 17 November 1999; [1999] S.C.J. No. 66 (Q.L.) 179 D.L.R. (4<sup>th</sup>) 193 [hereinafter *Marshall II*] at para. 9. The Court held that the Coalition lacked standing to seek post-judgment relief from a criminal proceeding to which it had not originally been a party. The judgment on the was issued per curiam (i.e. by "The Court"), yet curiously the opinion is written in the first person.

<sup>121</sup> *Ibid.* at paras. 2 and 11.

<sup>122</sup> I.e., that the exercise of the right would be disruptive. *Ibid.* at para. 45.

<sup>123</sup> "Supremes retreat: Rather than clarifying rights, the court's ruling compromises them" *National Post* (19 November 1999) at A19. Compare K. Makin, "Top court issues rebuke in fish furor" *The Globe and Mail* (18 November 1999) at A1, which depicts the Court as angry and defiant.

<sup>124</sup> *Marshall II*, at paras. 2, 14, 24–25, 31–32, 35–36; *Badger*, *supra* note 11.

<sup>125</sup> R.S.C. 1970, App. II, No. 25; *Badger*, *supra* note 11 at paras. 47, and 100 (Cory J., with La Forest, L'Heureux-Dubé, Gonthier and Iacobucci JJ. concurring).

<sup>126</sup> *Badger*, *supra* note 11 at paras. 46–47, 84. In *R. v. Horseman*, *supra* note 21 at 933, Cory J. opined that the Natural Resources Transfer Agreement (NRTA) had modified Treaty No. 6 by extinguishing the treaty right to hunt commercially, while expanding the geographic scope of the treaty right to hunt for food. Writing for the majority in *Badger*, Cory J. drew the same conclusion as to the effect of the *Constitution Act, 1930* on the hunting rights affirmed by Treaty No. 8.

<sup>127</sup> *Badger*, *supra* note 11 at paras. 70, 74–94. The infringement could either have been a result of the NRTA, which transferred federal regulatory authority to the province, or of the provincial legislation which exercised the transferred authority.

the provincial licensing scheme would not necessarily infringe on the treaty right.<sup>128</sup>

*Marshall II* misapplies *Badger* to Mikmaq treaty rights.<sup>129</sup> Unlike Treaty No. 8, Mikmaq treaties did not expressly delegate any regulatory authority over hunting, fishing or trade to "the Government of the country."<sup>130</sup> Unlike the Prairie provinces, furthermore, the Atlantic region was never affected by Imperial enactments amending the Canadian constitution with respect to pre-existing Indian treaty rights. The federal *Maritime Provinces Fishery Regulations* do not have the constitutional status of the *Constitution Act, 1930*, if indeed they are truly federal laws at all.<sup>131</sup> Hence, while the Court's remark in *Badger* that treaty rights are "always subject to regulation" may be legally correct with respect to hunting under Treaty No. 6 and Treaty No. 8, it does not apply *ipso facto* to hunting, fishing and trade under the Mikmaq treaties in Atlantic Canada.

*Marshall II* goes even further than *Badger*, in fact, announcing that "regulations that do not more than reasonably define the Mikmaq treaty right" do not constitute an infringement of that right, and as such do not require any justification.<sup>132</sup> Even in the face of an express provision in Treaty No. 8 acceding to "regulations ... by the Government of the country," *Badger* ruled that any limitation as to the method, timing or extent of hunting would infringe on the treaty right and require clear justification.<sup>133</sup> It mystifies us how a constitutionally entrenched treaty right can be

"defined" ministerially without changing it.<sup>134</sup> Still further, the Court in *Marshall II* redefines the concept of "moderate livelihood" invoked in *Marshall* as "equitable access" to the fishery, rather than as a priority right which must be satisfied before the non-treaty quota is allocated.<sup>135</sup>

Justice McLachlin has stated elsewhere that no part of the Constitution of Canada can be "abrogated or diminished" relative to any of the other parts.<sup>136</sup> Chief Justice Lamer has likewise explained that "[n]o single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."<sup>137</sup> "Aboriginal and treaty rights" are now integral parts of the Canadian constitutional edifice and their protection represents an important "underlying constitutional value."<sup>138</sup> This is why government must adequately justify any action that interferes with these rights and pay fair compensation for any infringement of them. As the Supreme Court concluded in *Delgumukw*, "compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights ... [i]n keeping with the duty of honour and good faith on the Crown."<sup>139</sup>

In *Marshall II*, however, the Court invites Ottawa to re-impose restrictions on the Mikmaq treaty right and to justify its actions by alleging that the restrictions are merely definitional, or are aimed at achieving what Ottawa considers an "equitable" balancing of Mikmaq and non-Mikmaq interests. A right reserved by treaty, and enshrined in the national constitution, has thereby been relegated to ministerial notions of equity in a

<sup>128</sup> *Ibid.* para. 90. The Court added that s. 88 of the *Indian Act* (applying provincial laws of general application to Indians) does not authorize provincial legislatures to restrict treaty rights.

<sup>129</sup> *Marshall II*, *supra* note 120 at paras. 29, 32 and 43.

<sup>130</sup> The phrase "the Government of the country" is ambiguous, and could have been understood by First Nations as referring to their own authorities.

<sup>131</sup> The fishery regulations are drafted in cooperation with the provinces, although they are enacted as federal laws in accordance with a constitutional convention. See *Simon*, *supra* note 4.

<sup>132</sup> *Marshall II*, *supra* note 120 at para. 37 [emphasis added]. Compare the Court's discussion, *ibid.* at paras. 24 and 32, of the strict justification test in *Badger*, *supra* note 11.

<sup>133</sup> *Badger*, *supra* note 11 at paras. 90-94. The Court conceded that reasonable regulations aimed at ensuring the safety of other hunters, such as gun safety courses, would be justified and not infringe upon the exercise of the treaty right. *Ibid.* at para. 89.

<sup>134</sup> Regrettably, the same mystical judicial reasoning characterized the majority judgment in *Van der Peet*, *supra* note 37, where it undermined the original test in *Sparrow* for the existence of an Aboriginal right. Barsh and Henderson, *supra* note 85; A. Zalewski, "From Sparrow to Van der Peet: The Evolution of a Definition of Aboriginal Rights" (1997) 55 U. T. Fac. L. Rev. 435.

<sup>135</sup> *Marshall II*, para. 38. Also see para. 42, in which the Court admonishes Ottawa to embrace the principle of "proportionality" in allocating fish between Mikmaq and non-Mikmaq fishermen.

<sup>136</sup> *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 373 [hereinafter *New Brunswick Broadcasting*].

<sup>137</sup> *Québec Secession Reference*, *supra* note 1 at para. 49; see also para. 91 on this concept of "symbiosis."

<sup>138</sup> *Ibid.* at para. 82; also at para. 32. See, similarly, *Delgumukw*, *supra* note 39 at paras. 174-75, and *Van der Peet*, *supra* note 37 at para. 28.

<sup>139</sup> *Delgumukw*, *supra* note 39 at para. 169.



highly charged political environment.<sup>140</sup> This is not a "right" at all. The Court has returned the treaty ball to Ottawa after its fumble, and left federal discretion barely hampered by vague judicial standards.

*Marshall II* thereby revives and legitimizes the process by which the Mikmaq originally lost the enjoyment of their treaty rights. It is even worse than a return to the parliamentary supremacy principle, which has been limited (at least in principle) by section 52 of the *Constitution Act, 1982*. *Marshall II* vindicates a kind of *administrative* supremacy over Aboriginal peoples, in which ministerial discretion can unilaterally override fundamental constitutional rights without the need for justification or compensation. As such, it is a cynical colonial wink to the Crown's attorneys and to the mandarins in Ottawa.

Ministerial discretion to define the quantum of *Charter* rights treads upon the principles of "equality before and under the law," and of "equal protection and equal benefit of the law,"<sup>141</sup> and is incompatible with the essential purpose of having a national constitution. The *Charter* itself guarantees the right to an "appropriate and just remedy" whenever fundamental rights have been "infringed or denied,"<sup>142</sup> so that even if a restriction on treaty harvesting rights can be justified on conservation grounds, compensation must be paid to the affected rights-holders. Compensation potentially serves as a check on abuses of government regulatory power, and it is simple justice to Mikmaq fishermen who should not bear the cost of the deterioration of fish stocks over the past century. Yet *Marshall II* is silent about compensability.

In a final gesture of deference to public opinion, moreover, the Court goes to great lengths to characterize the treaty right as *local* (community-by-community) rather than belonging to the Mikmaq

nation as a whole,<sup>143</sup> and as *species-by-species*.<sup>144</sup> These rules will result in endless and inextricable confusion and litigation. They place an onus on each of the thirty-five Mikmaq communities in the Atlantic region to re-litigate *Marshall* not once, but many times — for lobsters, for salmon, for cod, for every tree and berry and herbal medicine they traditionally utilized. We doubt that there is money or energy enough in Mikmaq society to undertake such a task. Meanwhile, the federal minister has regained most of the regulatory discretion he exercised prior to *Marshall*. Is this an effective way to protect the rights enshrined in the *Charter*?

The only proper test for a constitutional right is *inconsistency*, as it is explicitly set out in section 52(1) of the *Constitution Act, 1982*. The courts have been charged constitutionally with the duty of determining consistency and nullifying "laws" that are not consistent with fundamental rights. In its original *Marshall* judgment, the Court struck down the *Fisheries Act* because it delegated regulatory authority to the minister without including a guarantee of Mikmaq treaty rights. In *Marshall emendatus*, the Court itself is delegating regulatory authority to the minister to "define" a constitutionally entrenched right. As a result, it is not (strictly speaking) a *right* at all.

Mikmaq people's Aboriginal rights to hunt and fish were recognized and protected at common law before they were expressly affirmed by treaty.<sup>145</sup> In our view, treaties converted the common-law rights into irrevocable prerogative "liberties," with constitutional security from the moment the treaties were executed.<sup>146</sup> If there is no difference in the regulability of Aboriginal rights and treaty rights, then the treaties were nullities; they had no effect on the inviolability of Aboriginal hunting and fishing practices. Surely, the Supreme Court did not intend to obliterate treaty rights by collapsing them into Aboriginal rights — or to render the treaties little more than evidence that Aboriginal rights existed at treaty time! Yet *Marshall II* appears to have this effect.

<sup>140</sup> The Court leaves the determination of what constitutes a "moderate livelihood" to ministerial discretion. *Marshall II*, *supra* note 120 at para. 39. It warns Ottawa that Mikmaq treaty rights cannot be wholly transformed without making new agreements (supplemental to the original treaties), involving consultation and negotiation with the Mikmaq, yet states that government ministers are not obliged to reach such agreements. *Ibid.* at paras. 19, 21 and 23.

<sup>141</sup> Section 15(1) of the *Charter*. Although s. 1 of the *Charter* subjects the exercise of fundamental rights to "such limits prescribed by law as can be demonstrably justified in a free and democratic society" [emphasis added], *Marshall II* assures Ottawa that limits on s. 35 rights need *not* be demonstrably justified — a clear case of *unequal* protection.

<sup>142</sup> Section 24(1) of the *Charter*. Also see *Delgamuukw*, *supra* note 39.

<sup>143</sup> *Marshall II*, *supra* note 120 at para. 17.

<sup>144</sup> *Ibid.* at paras. 20–21.

<sup>145</sup> *Van der Peet*, *supra* note 37; *Sparrow*, *supra* note 32. The Mikmaq Compact (1752) also contained express provisions for the justiciability of Mikmaq rights in British courts.

<sup>146</sup> The Court contends that Mikmaq always understood that their treaty rights would be regulated, relying solely on an opinion of the Crown's expert witness on colonial history. *Marshall II*, *supra* note 120 at para. 24. We are unable to detect any empirical foundation whatsoever for his inference. Must experts' opinions be accepted as true, if there is no evidence to support or reject them?

The greatest tragedy of this judicial retreat is its effect on the tentative coalition-building between responsible leaders of the Mikmaq and non-Native fishermen. The great majority of fishermen were working out their differences among themselves, in spite of the mixed signals and bungling of Ottawa. Now, the Court has explicitly put the mandarins back in control, casting the grassroots efforts of the past months into the sea. The lesson here is simple. Big government must prevail, however incompetent it has proven itself to be. Grassroots democracy is simply not Canadian. Compromise, muddling and changing the rules as you go along (while pretending to be a government) is apparently the essence of Canadian civics.

At the end of the day, the Supreme Court has proven that there is one and only one basic principle in Canadian constitutional firmament that never changes: "Don't put your balls in a vise over an Indian."<sup>147</sup>

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<sup>147</sup> 65 *Official Transcripts of the Royal Commission on the Donald Marshall, Jr., Prosecution* (Halifax 1986) at 1673. This was reportedly what Robert Anderson of the Nova Scotia Attorney-General's department told legal aid attorney Felix Cacchione, when the latter suggested re-opening Marshall's murder conviction.

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