THE *MARSHALL* DECISIONS: REFRAMING THE SUPREME COURT OF CANADA'S GUIDANCE

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Abstract

The *Marshall* decisions should be read, and understood, as one comprehensive decision on the Peace and Friendship Treaties and the treaties' modern-day implications, rather than as three separate decisions. After discussing each of the *Marshall* decisions, our discussion focuses on the Supreme Court of Canada's guidance in respect of the treaties' material provisions, such as the "truckhouse" clause, in each decision. We then trace how the Court's guidance evolved over the course of the *Marshall* decisions, providing increasing clarity and nuance in respect of how the treaties should be interpreted.

Résumé

Les décisions *Marshall* doivent être lues et comprises comme une décision globale sur les traités de paix et d'amitié ("traités") et leurs implications modernes, plutôt que comme trois décisions distinctes. Après avoir examiné chacune des décisions *Marshall*, nous nous concentrons sur les orientations de la Cour suprême du Canada en ce qui concerne les dispositions matérielles des traités, telles que la clause du "relais routier", dans chaque décision. Nous retraçons ensuite l'évolution des orientations de la Cour au fil des arrêts *Marshall*, en apportant de plus en plus de clarté et de nuances quant à la manière dont les traités doivent être interprétés.

Introduction

In the 1700s, the British Crown signed several treaties, commonly known as the "Peace and Friendship Treaties," with various First Nations living in parts of the Maritimes and the Gaspé region in Canada (as these lands are now known). These treaties were intended to encourage cooperation and to end hostilities between the British and the First Nations. They did not expressly cede or transfer lands or resources between the parties, but they did expressly contemplate the First Nations' acquiescence to the British Crown's jurisdiction over the regions in question.[1]

The Peace and Friendship Treaties and their modern-day implications have been subject to debate and dispute. Due to insufficient textual detail and limited historical evidence, there is some uncertainty as to how they should be interpreted, particularly in respect of the scope of their application, the nature of their contemplated rights, and the content of their contemplated rights.

[1] See, for example, the Peace and Friendship Treaties of 1760 and 1761 Between His Majesty the King and the LaHave Tribe of Indians, which states: "I, Paul Laurent, do for myself and the tribe of LaHave Indians of which I am Chief acknowledge the jurisdiction and Dominion of His Majesty George the Second over the Territories of Nova Scotia or Acadia and we do make submission to His Majesty in the most perfect, ample and solemn manner."

In light of this uncertainty, the Supreme Court of Canada's (SCC) decisions regarding the Peace and Friendship Treaties have served as critical tools for informing how these treaties should be interpreted. To date, the SCC has released a handful of these decisions. First, in two decisions—*R v Simon* and *R v Sioui*—the SCC considered the Peace and Friendship Treaty of 1752 (1752 Treaty) and a peace treaty between the British Crown and the Huron-Wendat Nation (Murray Treaty of Longueuil), respectively, to provide guidance on how these treaties and other treaties generally should be interpreted.[2] Then, in a series of three decisions—*R v Marshall* (*Marshall 1*), *R v Marshall* (*Marshall 2*), and *R v Marshall, R v Bernard* (*Marshall 3*) (together, *Marshall* decisions)—the SCC considered the Peace and Friendship Treaties of 1760 and 1761 (1760–61 Treaties) and, building on *Simon* and *Sioui*, provided guidance on how the 1760–61 Treaties should be interpreted.[3]

This article centres on the *Marshall* decisions.[4] We submit that these decisions should be read and understood as one comprehensive decision, rather than three separate decisions, on the 1760–61 Treaties and their modern-day implications. We begin by summarizing *Simon* and *Sioui*, which served as precursors to, and established the groundwork for, the *Marshall* decisions. We then discuss each of the *Marshall* decisions before examining how the SCC's guidance evolved over the course of these decisions. We then explain why the SCC's careful and deliberate refinement of its guidance over the course of the *Marshall* decisions, taken as a whole, is critical to interpreting the 1760–61 Treaties and their modern-day implications and offers insight into how the SCC may interpret other Peace and Friendship Treaties more generally. We conclude by recognizing that the SCC's existing decisions regarding the Peace and Friendship Treaties, including the *Marshall* decisions, offer only a partial approach to interpreting the Peace and Friendship Treaties, and that guidance from future courts is needed to address the outstanding uncertainty around these treaties and their modern-day implications.

[2] *Simon v The Queen*, [1985] 2 SCR 387 [*Simon*]; *R v Sioui*, [1990] 1 SCT 1025 [*Sioui*].

[3] *R v Marshall*, [1999] 3 SCR 456 [*Marshall 1*]; *R v Marshall*, [1999] 3 SCR 533 [*Marshall 2*]; *R v Marshall; R v Bernard*, 2005 SCC 43 [*Marshall 3*].

[4] We have chosen to narrowly focus on the SCC's decisions to chart how the SCC's guidance has evolved over the course of its decisions only. We believe that this brings a unique perspective to the SCC's decisions given that most of the other literature focuses on one of the SCC's decisions exclusively or on the Peace and Friendship Treaties generally. We admit that there is a rich literature in this field including several books such as, William Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002); L. Jane McMillan, *Truth and Conviction: Donald Marshall Jr. and the Mi'kmaw Quest for Justice* (Vancouver: University of British Columbia Press, 2018); Thomas Isaac, *Aboriginal and Treaty Rights in the Maritimes: The Marshall Decision and Beyond* (Saskatoon: Purich Publishing, 2001); Ken Coates, *The Marshall Decision and Native Rights* (Montreal & Kingston: McGill-Queen's University Press, 2000); Alex Cameron, *Power Without Law: The Supreme Court of Canada, the Marshall Decisions, and the Failure of Judicial Activism* (McGill-Queen's University Press, 2009); and journal articles and book chapters, including William Wicken, "The Mi'kmaq and Wuastukwiuk Treaties," *UNB Law Journal* 43 (1994): 241–53; James Youngblood Henderson, "Constitutional Powers and Treaty Rights," *Saskatchewan Law Review* 63, no. 2 (2000): 719–50; L. Jane McMillan, "Colonial Traditions, Co-optations, and Mi'kmaq Legal Consciousness," *Law & Social Inquiry* 36, no. 1 (2011): 171–200; L. Jane McMillan, "'Mu Kisi Maqumawkik Pasik Kataq—We Can't Only Eat Eels': Mi'kmaq Contested Histories and Uncontested Silences," *Canadian Journal of Native Studies* 32, no. 1 (2012): 119–42; David Bedford, "Emancipation as Oppression: The Marshall Decision and Self-Government," *Journal of Canadian Studies* 44, no. 1: 2010: 206–20; Douglas C. Harris, "Historian and Courts: *R v Marshall* and *Mi'kmaq* Treaties on Trial," *Canadian Journal of Law and Society* 18, no. 2 (2003): 123–32; Robert G. Adlam, "Indigenous Rights, the Marshall Decision and Cultural Restoration," *Acadiensis* 33, no. 1 (2003): 108–13; John Borrows, "Uncertain Citizens: Aboriginal Peoples and the Supreme Court," *Canadian Bar Review* 80 (2001): 15–41; Stephen E. Patterson, "1744–1763: Colonial Wars and Aboriginal Peoples," in *The Atlantic Region to Confederation: A History*, eds. Phillip A. Buckner and John G. Reid (Toronto: University of Toronto Press, 2017), 99–115; and Stephen E. Patterson, "Eighteenth-Century Treaties: The Mi'kmaq, Maliseet, and Passamaquoddy Experience," *Native Studies Review* 18, no.1 (2009): 25–52.

Precursors to the *Marshall* Decisions

The SCC's decisions in *Simon* and *Sioui* introduced treaty interpretation principles in the context of the Peace and Friendship Treaties, which paved the way for the SCC's subsequent and more detailed guidance in the *Marshall* decisions.

Simon

In *Simon*, the appellant (James Matthew Simon), a Mi'kmaq individual, was charged with illegally possessing a rifle during the closed season, contrary to provincial legislation. The appellant admitted to the charges, but he argued that the 1752 Treaty exempts him from prosecution under the provincial legislation by providing him with a treaty right to hunt and fish.[5]

The SCC considered the 1752 Treaty and held that it was validly created by competent parties and that it had not been terminated by Section 88 of the *Indian Act*, which contemplates the applicability of provincial laws of general application in respect of First Nations and other Aboriginal peoples. Specifically, the SCC wrote: "In my view, Parliament intended to include within the operation of s. 88 all agreements concluded by the Crown with the Indians that would otherwise be enforceable treaties, whether land was ceded or not."[6]

Put another way, the SCC confirmed that "treaties" should be given a broad interpretation and should include all agreements between the British Crown and First Nations and/or other Aboriginal peoples.

The SCC's decision in *Simon* affirmed the SCC's liberal approach to interpreting treaties and treaty rights, and it emphasized that treaties and treaty rights are *sui generis* and should be interpreted in a manner that is evolutionary and that gives meaning in a modern contemporary context. In the same vein, the SCC's decision in *Simon* affirmed that treaties that do not expressly cede or transfer lands or resources between the parties are still treaties that can provide substantive rights, and, in doing so, it reversed earlier interpretations of the 1752 Treaty that limited the treaty's effect.[7]

The SCC's decision in *Simon* introduced the concept that the Peace and Friendship Treaties should be revisited to determine what rights they contemplate, but it did not go into detail on the scope of the analysis that would be required for such a determination.

Sioui

The SCC's decision in *Sioui* concerns the rights of the Huron-Wendat Nation ("Hurons") under the Murray Treaty of Longueuil to exercise their cultural and traditional activities in Jacques-Cartier Park in Quebec. At issue, the respondents, members of the Hurons, were charged with cutting trees, starting fires, and camping in a provincial park, contrary to provincial regulations. The respondents referenced several short documents dated September 5, 1760, previously defined as the Murray Treaty of Longueuil, to argue that one of those documents, which states that the Hurons were to be "allowed the

[5] *Simon*, paras 1–6, 17.

[6] *Ibid.,* para 50.

[7] *Ibid.* See also Note 1: As noted earlier, while the Peace and Friendship Treaties did not expressly cede or transfer lands or resources between the parties, they did expressly contemplate the First Nations' acquiescence to the British Crown's sovereignty.

free Exercise of their Region, their Customs, and Liberty with the English," provides them with treaty rights to carry out the actions for which they were charged.[8]

The SCC agreed with the respondents and held that the Murray Treaty of Longueuil exempts the respondents (and the Hurons) from the provincial regulations in question. It affirmed that treaties and treaty rights are *sui generis* and should be interpreted in a generous and liberal manner in favour of the First Nation and/or other Aboriginal people concerned. Further, the SCC noted that, at the time the Murray Treaty of Longueuil was made, the British Crown considered the First Nations to be "independent nations" capable of making treaties. As such, even though the Murray Treaty of Longueuil is very brief and was signed by the governor of Quebec only, it was nevertheless a treaty on the basis that it contained certain assurances and promises made to the Hurons, and its contemplated rights cannot be extinguished simply because they have not been invoked or utilized for a long period of time.[9]

The SCC's decision in *Sioui* builds upon its previous decision in *Simon* by expanding the notion of what a treaty may include. Specifically, the SCC clarified that a document does not have to have the word "treaty" printed on it in order to constitute a treaty; rather, whether a document constitutes a treaty will rest on various factors, including the intention of the parties to the document. Like *Simon, Sioui* is a precursor to the *Marshall* decisions, and it paved the way for the SCC's subsequent guidance on the interpretation of treaty rights and the parties' intentions.

The *Marshall* Decisions

The *Marshall* decisions concern the 1760–61 Treaties, which the British Crown signed with individual Mi'kmaq communities, the Maliseet First Nation (also known as the Wolastoqey), and the Passamaquoddy First Nation, and the 1760–61 Treaties' modern-day implications for First Nation signatories who seek to exercise rights contemplated thereunder.

Marshall 1

In 1992, the appellant (Donald John Marshall Jr.), a Mi'kmaq individual, caught 463 pounds of eels in the coastal waters of Pomquet Harbour, Nova Scotia, and sold those eels for $787.10. Shortly thereafter, law enforcement officers arrested the appellant and charged him with three offences under the federal fishery regulations: selling eels without a licence, fishing without a licence, and fishing during the close season with illegal nets.[10]

The appellant admitted to the events. However, he relied on the 1760–61 Treaties' "truckhouse" clause, which established "truckhouses" (a form of trading post) along the coasts of Nova Scotia and New Brunswick, to argue that he had a treaty right to catch and sell fish, and that he was exempted from the federal fishery regulations.[11]

At trial, the Nova Scotia Provincial Court rejected the appellant's (i.e., the accused) arguments. It found that, although the 1760–61 Treaties' "truckhouse" clause provided the Mi'kmaq with a right to

[8] *Sioui*, 1030–1032.

[9] *Ibid.,* 1036, 1043 and 1061–1074.

[10] *Marshall 1*, para 1.

[11] *Ibid.*, para 2.

bring their harvested (i.e., fishing, gathering, hunting) products to a truckhouse to trade, the clause did not provide a corresponding right to harvest to obtain the wherewithal to trade, and that the right to trade had since expired along with the system of truckhouses and the system of licensed traders (in or around the 1780s).[12]

On appeal, the Nova Scotia Court of Appeal upheld the trial judge's decision. However, contrary to the trial judge's reasoning, it found that the 1760–61 Treaties' "truckhouse" clause did not provide the Mi'kmaq with any rights. Instead, it found that the clause represented a regime imposed on the Mi'kmaq to facilitate peace between the British and the Mi'kmaq by removing the Mi'kmaq's need to trade with Britain's enemies.[13]

The SCC overturned the lower courts' decisions. It found that the lower courts erred in concluding that the British Crown's obligations and the Mi'kmaq's rights were set out, in their entirety, within the 1760–61 Treaties' text, whether construed flexibly (as did the trial judge) or narrowly (as did the Nova Scotia Court of Appeal).[14]

The SCC went on to accept the appellant's arguments, and to conclude that the 1760–61 Treaties' "truckhouse" clause provides the Mi'kmaq with an ongoing (i.e., not expired) right to trade certain resources for a "moderate livelihood" and a corresponding right to harvest to obtain the wherewithal to trade.[15]

Marshall 2

Following the SCC's release of its decision in *Marshall 1,* an intervener applied for a rehearing of the SCC's decision to address the federal government's authority to establish fishery regulations (e.g., close season, licencing, etc.) on the appellant's exercise of his treaty right, and for an order that the SCC's decision be stayed in the meantime. The intervener's motion was opposed by the appellant, the federal government, and the other interveners.[16]

The intervener argued that the Mi'kmaq fishery and the non-Mi'kmaq fishery should be subject to the same regulations. It observed that, although Section 35 of the *Constitution Act, 1982* provided constitutional status to the Mi'kmaq's treaty rights, the SCC has established in a series of decisions (including *R v Sparrow*) that these treaty rights are subject to justified regulation. It concluded that the SCC's decision in *Marshall 1*, as well as the lower courts' decisions in that case, failed to consider and decide the issue of justified regulation, and that such failure, if not rectified, would be an injustice to its members.[17]

The SCC dismissed the intervener's motion. It confirmed that the federal government does have authority to regulate the Mi'kmaq's treaty rights provided that the federal government can justify such regulation, as appropriate. However, it noted that, in *Marshall 1*, the federal government's case was premised on the position that the Mi'kmaq did not have a treaty right to catch and sell fish, and, as such,

[12] *Ibid.*, paras 19, 38.

[13] *Ibid.,* paras 21, 38.

[14] *Ibid.,* paras 19, 40.

[15] *Ibid.,* para 67.

[16] *Marshall 2*, para 1.

[17] *Ibid.,* paras 5–7.

the Crown did not raise the issue of justified regulation. The federal government's election to not justify its fishery regulations cannot be generalized, as the intervener's arguments attempted to do, into a conclusion that the federal government can never regulate the Mi'kmaq's treaty right to catch and sell fish.[18]

Marshall 3

The SCC's decision in *Marshall 3* considers two separate cases. In the first case, Stephen Frederick Marshall (no relation to Donald John Marshall Jr.), a Mi'kmaq individual, and 34 other Mi'kmaq individuals were charged with cutting timber on Crown lands without authorization. In the second case, John Bernard, a Mi'kmaq individual, was charged with possessing timber from Crown lands without authorization. In both cases, the respondents (i.e., the accused) relied on the 1760–61 Treaties' "truckhouse" clause to argue that they had a treaty right to cut and sell timber, and that they were exempted from commercial logging regulations.[19]

At trial, the Nova Scotia Provincial Court and the New Brunswick Provincial Court rejected Marshall's (and the other accused individuals') and Bernard's arguments, respectively. On appeal, the Nova Scotia Court of Appeal and the New Brunswick Court of Appeal reversed the lower courts' decisions to set aside Marshall's (and the other accused individuals') and Bernard's convictions, respectively.[20]

The SCC overturned the appellate courts' decisions, and it restored the respondents' convictions. It found that, in both cases, the trial judges were correct to conclude that the 1760–61 Treaties' "truckhouse" clause did not provide the Mi'kmaq with a right to cut and sell timber. It agreed that the Mi'kmaq were unlikely to have contemplated "commercial logging" during the treaty process, as there is no evidence to suggest that, during that time, the Mi'kmaq engaged in any traditional activities that could have logically evolved into the "commercial logging" that formed the basis of the charges in question.[21]

Evolution of the Supreme Court of Canada's Guidance

Over the course of the *Marshall* decisions, the SCC has evolved and refined its guidance on how the 1760–61 Treaties should be interpreted in respect of the scope of their application (i.e., where they apply), the nature of their contemplated rights (e.g., what their contemplated right of a First Nation to trade certain resources for a "moderate livelihood" entails), and the content of their contemplated rights (e.g., which resources they contemplate for trade).

Scope

Given limitations around the 1760–61 Treaties' text and historical evidence, the issue of the 1760–61 Treaties' scope—specifically, questions of who may rely on the 1760–61 Treaties and where the 1760–61 Treaties apply—has been, and continues to be, a source of challenge and debate for First Nation communities who seek to rely on the 1760–61 Treaties and for public governments (i.e., federal, provincial, and territorial governments) who engage with these communities and their assertions of treaty rights.

[18] *Ibid.,* paras 21, 24, 27, 28, 48.

[19] *Marshall 3*, paras 1–3.

[20] *Ibid.,* para 4.

[21] *Ibid.,* paras 6, 31–35.

In *Marshall 1*, the SCC recognized that the 1760–61 Treaties may be relied on by many of the First Nation communities in Nova Scotia and New Brunswick, and that they may apply across these provinces. Relying on historical evidence from the trial, the SCC noted that, in 1760, the British Crown entered into treaty negotiations with First Nation communities across Nova Scotia and New Brunswick (as these lands are now known), and that, by 1762, the British Crown had signed separate, but similar, treaties with "all of the Mi'kmaq villages in Nova Scotia," the Maliseet First Nation, and the Passamaquoddy First Nation (i.e., the 1760–61 Treaties).[22]

In *Marshall 2*, the SCC refined its guidance on the 1760–61 Treaties' scope to clarify that, although historical evidence suggests that there existed a fairly consistent treaty regime across Nova Scotia and New Brunswick, the British Crown signed a series of *separate*, but similar, treaties with individual Mi'kmaq communities, rather than a single treaty with the Mi'kmaq population as a whole. On the basis of this distinction, the SCC recognized that the 1760–61 Treaties' scope is limited by each First Nation signatory's geography:

> The treaties were local and the reciprocal benefits were local. In the absence of a fresh agreement with the Crown, the exercise of the treaty rights will be limited to the area traditionally used by the local community with which the "separate but similar" treaty was made.[23]

As the *Marshall* decisions concern Mi'kmaq individuals in Nova Scotia and New Brunswick, the SCC limited its guidance on the 1760–61 Treaties' scope to these provinces. To date, the SCC has not provided any guidance on whether the 1760–61 Treaties may be relied on by First Nation communities in surrounding provinces (i.e., Newfoundland and Labrador, Prince Edward Island, Quebec), or whether they may apply across those other provinces.

Nature

Perhaps the most contested matter around the 1760–61 Treaties is the nature of their contemplated rights. In particular, questions of what these contemplated rights entail and whether, and to what extent, such rights can be regulated have been at the forefront of recent disputes involving First Nation fisheries, among other industries, in parts of the Maritimes.

In *Marshall 1*, the SCC recognized that the 1760–61 Treaties contemplate the Mi'kmaq's right to trade certain resources for a "moderate livelihood," or for "necessaries," and the Mi'kmaq's corresponding right to harvest to obtain the wherewithal to trade ("moderate livelihood right"). As reflected in the 1760–61 Treaties' "truckhouse" clause, the British Crown and the First Nation signatories agreed to establish truckhouses along the coasts of Nova Scotia and New Brunswick for furnishing the First Nation signatories with "necessaries in [e]xchange for their [p]eltry." Although the British Crown subsequently removed these truckhouses, the SCC noted that the 1760–61 Treaties' "truckhouse" clause (and its contemplated moderate livelihood right) remains intact, as the nature of the clause's contemplated right is that to harvest and trade for "necessaries," rather than that to truckhouses themselves.[24]

[22] *Marshall 1*, paras 3, 5, 26, 27.

[23] *Marshall 2*, para 17.

[24] *Ibid.,* paras 29, 32, 34, 43, 44, 56, 59.

Much of the contestation around the nature of the moderate livelihood right stems from what the right entails—specifically, what do the concepts of "moderate livelihood" and "necessaries" capture? To provide guidance, the SCC clarified that these concepts are intended to capture what is needed to address an individual's "day-to-day needs," understood as "such basics as 'food, clothing and housing, supplemented by a few amenities,' but not the accumulation of wealth." It follows from this guidance that the moderate livelihood right is distinct from, and more restrictive than, a commercial right to a resource, as it is subject to a "sustenance" ceiling that provides a "manageable limitation on what would otherwise be a free-standing commercial right."[25]

The SCC went on to note that the moderate livelihood right is not an unregulated one. Instead, public governments may regulate the right within its "proper limits," informed by the concepts of "moderate livelihood" and "necessaries," and public governments can enforce such regulations without infringing or violating the right. As an example, such regulations may include those that impose "[c]atch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards."[26]

In *Marshall 2*, the SCC refined its guidance on the nature of the moderate livelihood right, including on what the right entails and whether, and to what extent, the right can be regulated.

In respect of what the moderate livelihood right entails, the SCC reworded its original guidance on the concepts of "moderate livelihood" and "necessaries"—i.e., "*such basics as* 'food, clothing and housing, supplemented by a few amenities'"—as "food, clothing and housing, supplemented by a few amenities," and, in doing so, it removed its original qualification that the food, clothing and housing in question be "basic."[27]

In respect of whether, and to what extent, the right can be regulated, the SCC confirmed that public governments may regulate the moderate livelihood right within its proper limits, and it elaborated with two observations:

1. On fishing for trade, the SCC observed that, prior to the 1760–61 Treaties' signing, the Mi'kmaq had fished for trade alongside non-Indigenous individuals, and that, following the 1760–61 Treaties' signing, the Mi'kmaq have enjoyed their right to fish for trade alongside non-Indigenous individuals. Over time, as resources dwindled, the Mi'kmaq's treaty right logically evolved from one to participate in an unregulated commercial fishery into one to participate in a regulated commercial fishery.[28]
2. On hunting for trade, the SCC observed that, prior to the 1760–61 Treaties' signing, the Mi'kmaq had hunted for trade alongside non-Indigenous individuals, and that, following the 1760–61 Treaties' signing, the Mi'kmaq have enjoyed their right to hunt for trade alongside non-Indigenous individuals. On this basis, the Mi'kmaq's treaty right is not one that must be satisfied

[25] *Marshall 1*, paras 59, 60.

[26] *Ibid.,* paras 58, 61.

[27] *Ibid.,* para 59; *Marshall 2*, para 4 (emphasis added).

[28] *Marshall 2*, para 38.

> before non-Indigenous individuals are provided access to the same resources for commercial and recreational purposes.[29]

In short, the moderate livelihood right is one that ensures the Mi'kmaq's *equitable* access, not exclusive access, to certain resources for the purpose of trading for a moderate livelihood, and the right is one that public governments may regulate as such.[30] Interestingly, in the *Marshall* decisions, the SCC does not expressly deal with the issue of "priority." In other cases, the SCC has confirmed more generally that priority should be given to the rights of Aboriginal peoples in the allocation of resources, and that priority does not mean exclusivity.[31]

The SCC went on to clarify that public governments' regulation of the moderate livelihood right would not constitute an infringement or a violation of the right where such regulation does no more than reasonably define the right in terms that can be administered by the regulator and that can be understood by the Mi'kmaq community in question. As such, public governments would only be required to justify their regulation of the right where such regulation imposes limitations that restrict the Mi'kmaq's harvest to quantities below that which are reasonably expected to produce a moderate livelihood, or other limitations that are not inherent in the right itself.[32]

To date, it does not appear that public governments have relied significantly on laws, which include statutes and regulations, to regulate the moderate livelihood right. Instead, public governments (primarily, the federal government) have used agreements and policies to do so.

In *Marshall 3*, the SCC declined to revisit its guidance on the nature of the moderate livelihood right, as it found it to be unnecessary following its conclusion that the 1760–61 Treaties did not provide the Mi'kmaq with a right to cut and sell timber.[33]

Content

For the most part, the content of the 1760–61 Treaties' contemplated rights—i.e., the resources to which the contemplated rights extend—remains unresolved. To date, the SCC has considered this issue on a case-by-case basis, and it has refined its guidance in an incremental manner to account for the resource(s) in question in each case.

In *Marshall 1*, the SCC framed the content of the 1760–61 Treaties' contemplated rights as being broad in scope. It noted that the 1760–61 Treaties' "truckhouse" clause captured traditionally harvested and traded resources, including "beaver, marten, otter, mink, fox, moose, deer, ermine and bird feathers," among other resources, with a focus on "peltry."[34]

Further, the SCC recognized that the British Crown's objectives in agreeing to the 1760–61 Treaties' "truckhouse" clause was to further its "imperial peace strategy"—i.e., to facilitate peaceful

[29] *Ibid.,* para 38.

[30] *Ibid.,* paras 37, 38.

[31] Thomas Isaac, *Aboriginal Law*, 5th ed (Toronto: Thomson Reuters Canada Limited, 2016), 34–36.

[32] *Marshall 2*, paras 37, 39.

[33] *Marshall 3*, para 36.

[34] *Marshall 1*, paras 19, 29, 31, 56.

relations with the Mi'kmaq as a self-sufficient Indigenous people, and to promote ongoing colonial settlement. In this regard, the SCC noted that such a strategy would only be effective if the Mi'kmaq had access "to trade and to the fish and wildlife resources necessary to provide them with something to trade," suggesting that "fish" may have been another resource that was available in the context of the "truckhouse" clause. Notably, the SCC did not provide any guidance in respect of the species of fish that were available in this context.[35]

In *Marshall 2*, the SCC refined its guidance on the content of the 1760–61 Treaties' contemplated rights to note that, "while treaty rights are capable of evolution within limits,…their subject matter (absent a new agreement) cannot be wholly transformed." It follows that, in interpreting the content of the 1760–61 Treaties' contemplated rights, consideration should be given to how, and in respect of which resources, the First Nation signatory traditionally exercised the rights.[36]

The SCC clarified that, based on the available evidence, the 1760–61 Treaties confirm the Mi'kmaq's treaty rights to harvest and trade as including fish and wildlife, and it elaborated on its guidance from *Marshall 1* to recognize that these treaty rights also include those resources that were "traditionally gathered" by the Mi'kmaq in an Aboriginal economy, and that were, thus, reasonably contemplated by the parties as being included. The SCC's phrasing of "traditionally gathered," and what resources may be categorized as such, remains unclear. Specifically, its phrasing appears to extend the rights to every "traditionally gathered" resource that the parties may have reasonably contemplated, but, in *Marshall 2*, its reference to "traditionally gathered" resources is limited to the context of "fruits and berries," without any guidance as to other "traditionally gathered" resources, suggesting that its phrasing may be somewhat narrower in scope.[37]

Ultimately, the SCC concluded that "it will be open to an accused in future cases to try to show that the [treaty rights were] intended [at the 1760–61 Treaties' signing], by both sides to include access to resources other than fish, wildlife, and traditionally gathered things, such as fruits and berries," which other resources may potentially include logging, minerals or offshore natural gas deposits.[38]

In *Marshall 3*, the SCC reiterated its guidance from *Marshall 2* to confirm that, while the 1760–61 Treaties' contemplated rights and their underlying activities may evolve within limits, such rights and activities cannot be wholly transformed from their traditional counterparts at the time that the 1760–61 Treaties were signed. Put another way, the modern activity in question must be essentially the same as the traditional activity, carried on in the modern economy by modern means, such that the treaty right is not unfairly confined by economic and technological changes.[39]

The SCC went on to refine its guidance from *Marshall 1* and *Marshall 2* to note that, in determining the content of the 1760–61 Treaties' contemplated rights, consideration must be given to whether the Mi'kmaq's activity in question constitutes either the modern equivalent *or* the logical

[35] *Ibid.,* paras 32, 35, 43, 44.

[36] *Marshall 2*, para 19.

[37] *Ibid.,* paras 19, 38.

[38] *Ibid.,* para 19.

[39] *Marshall 3*, para 25.

evolution of the Mi'kmaq's traditional practice of that activity at the time they signed the 1760–61 Treaties.[40]

Applying this refined guidance to commercial logging, which was at issue in *Marshall 3*, the SCC found that the Mi'kmaq's commercial logging activities did not constitute a modern equivalent *or* a logical evolution of the Mi'kmaq's traditional use of forest products at the time they signed the 1760–61 Treaties:

1. The SCC noted that the Mi'kmaq's commercial logging activities were substantially different from their traditionally limited use of forest products. Based on the available evidence, logging was a European activity, rather than a traditional Mi'kmaq activity, in which the Mi'kmaq began to participate only decades after the 1760–61 Treaties were signed.[41]
2. The SCC noted that, based on the available evidence, neither the British Crown nor the Mi'kmaq would have contemplated trade in logs at the time the 1760–61 Treaties were signed, with the former unlikely to have contemplated trade in anything but traditionally harvested products, such as fish or fur.[42]

The SCC concluded that the 1760–61 Treaties do not protect, and the content of their contemplated rights do not include, commercial logging.[43]

As noted above, the SCC has limited its guidance on the content of the 1760–61 Treaties' contemplated rights to those resources at issue in each case at bar. As such, there remain uncertainties as to whether such content extends beyond those resources considered in the *Marshall* decisions and, if so, what resources.

Taking the *Marshall* Decisions as a Whole

The SCC's careful and deliberate refinement of its guidance on the 1760–61 Treaties over the course of the *Marshall* decisions, taken as a whole, is critical to interpreting the 1760–61 Treaties and their modern-day implications. As illustrated in the previous section, the SCC's guidance in each of the *Marshall* decisions build on each other to form our current understanding of the 1760–61 Treaties and their modern-day implications. As such, to take one of the *Marshall* decisions on its own would be to obtain only a partial and incomplete understanding of these matters.

This section sets out some examples of how the SCC's guidance has shaped our current understanding of the 1760–61 Treaties' scope, nature, and content, and why each *Marshall* decision is critical to this understanding, in order to demonstrate the importance of taking the *Marshall* decisions as a whole.

[40] *Ibid.,* paras 25, 117.

[41] *Ibid.,* paras 21, 25, 32, 34.

[42] *Ibid.,* paras 21, 25, 33, 34.

[43] *Ibid.,* para 35.

Scope

The SCC's evolution of its guidance on the 1760–61 Treaties' scope has provided a preliminary, but informative, framework through which to determine who may rely on the 1760–61 Treaties and where the 1760–61 Treaties apply:

1. In *Marshall 1*, the SCC recognized that the 1760–61 Treaties may be relied on by many of the First Nation communities in Nova Scotia and New Brunswick, and that they may apply across these provinces, on the basis that, by 1762, the British Crown had signed separate, but similar, treaties with "all of the Mi'kmaq villages in Nova Scotia," the Maliseet First Nation, and the Passamaquoddy First Nation (i.e., the 1760–61 Treaties).[44]
2. In *Marshall 2*, the SCC refined its guidance on the 1760–61 Treaties' scope to emphasize that the British Crown signed a series of separate treaties with individual Mi'kmaq communities, rather than a single treaty with the Mi'kmaq population as a whole.

Taking *Marshall 1* and *Marshall 2* together, the SCC's guidance suggests that the 1760–61 Treaties' scope is limited by each First Nation signatory's geography. Although the 1760–61 Treaties' text may be similar, or even identical, from one First Nation signatory to the next, each treaty must nevertheless be examined on an individual basis, as each First Nation signatory's traditional territory and treaty rights may be unique.

Nature

The SCC's evolution of its guidance on the nature of the 1760–61 Treaties' contemplated rights—specifically, the moderate livelihood right—has provided a starting point from which to assess what these contemplated rights entail and whether, and to what extent, such rights can be regulated.

In *Marshall 1*, the SCC recognized that the moderate livelihood right is intended to provide the First Nation signatory with "such basics as 'food, clothing and housing, supplemented by a few amenities,' but not the accumulation of wealth." In *Marshall 2*, the SCC reworded its original guidance to recognize that the moderate livelihood right is intended to provide the First Nation signatory with "food, clothing and housing, supplemented by a few amenities." In doing so, the SCC removed its original qualification that the food, clothing and housing in question be "basic."[45]

The SCC's evolution of its language may encourage, and/or exacerbate, ambiguity and uncertainty around the nature of the moderate livelihood right. In *Marshall 1*, when the SCC limited the moderate livelihood right to "basics," the right's economic outcome could be interpreted as a fairly minimal amount (perhaps akin to that provided through social welfare systems). However, in *Marshall 2*, with the SCC's removal of its original qualification, the right's economic outcome could be interpreted as a greater amount (perhaps akin to the median Canadian household income or the local equivalent). Indeed, many Canadians, including high-income individuals, spend a substantial amount of their income to meet their "day-to-day needs" in the form of food, clothing, and housing (above that which could be interpreted as "basics").

[44] *Marshall 1*, paras 3, 5, 26, 27.

[45] *Ibid.,* paras 59, 60; *Marshall 2*, para 4.

Further, in *Marshall 1*, the SCC noted that public governments may regulate the moderate livelihood right within its "proper limits," informed by the guidance above, and that public governments can enforce such regulations without infringing or violating the right. In *Marshall 2*, the SCC confirmed that public governments may regulate the moderate livelihood right within its proper limits, and it elaborated that the moderate livelihood right is one that ensures the Mi'kmaq's *equitable* access, not exclusive access, to certain resources for the purpose of trading for a moderate livelihood, and that the right is one that public governments may regulate as such.[46]

The SCC's discussion in *Marshall 1* and *Marshall 2* around the regulation of the moderate livelihood right, taken together, helps inform our understanding of the treaty right itself. Namely, the right appears to be expansive in that each individual Mi'kmaq family is entitled to a "catch" that is sufficient, under reasonable expectations, to produce a moderate livelihood (which may be akin to the median Canadian household income or the local equivalent). However, from available guidance, it is unclear whether the "catch" may be offset by other resources available for exploitation, or by other sources of income (i.e., whether the "catch" may be reduced to account for other sources of income that allow the individual Mi'kmaq family to produce a moderate livelihood).

Content

The SCC's evolution of its guidance on the content of the 1760–61 Treaties' contemplated rights has centred, in large part, on the scope of such content—i.e., the resources that are captured and the resources that are not:

1. In *Marshall 1*, the SCC considered the content of the 1760–61 Treaties' contemplated rights as being broad in scope, including any traditionally harvested and traded resource.[47]
2. In *Marshall 2*, the SCC expanded the content of the 1760–61 Treaties' contemplated rights to any traditionally harvested resource, and, in this context, it noted that other resources, such as logging, minerals, or offshore natural gas deposits, may be demonstrated by future accused and explored by future courts.[48]
3. In *Marshall 3*, the SCC narrowed the content of the 1760–61 Treaties' contemplated rights from that set out in *Marshall 2*, noting that the 1760–61 Treaties' "truck house" clause was concerned with traditionally traded products, and that the "truck house" clause would not include a modern activity (in that case, commercial logging) where it has no connection to a traditional activity.[49]

Following *Marshall 3*, the SCC appears to establish two criteria for determining the content of the 1760–61 Treaties' contemplated rights:

1. The resource to be harvested or traded must have been historically harvested or traded; and

[46] *Marshall 1*, paras 58, 61; *Marshall 2*, paras 37, 38.

[47] *Marshall 1*, para 56.

[48] *Marshall 2*, paras 19, 20, 38.

[49] *Marshall 3*, paras 18, 19, 21, 34.

2. Even if the resource was harvested incidentally, the modern form of harvest must be, at most, the logical evolution of the historic practice, and it must not be a complete transformation.[50]

While the SCC's approaches in the *Marshall* decisions may appear similar in that they all contemplate traditionally harvested or traded resources, a closer examination reveals a significant distinction between these approaches; namely, the SCC's guidance in *Marshall 3* moderates and narrows its guidance in the previous decisions. For example, on its face, the SCC's approach in *Marshall 3* appears to preclude the content of the 1760–61 Treaties' contemplated rights from including minerals and offshore natural gas deposits, as, to date, there does not appear to be any basis to suggest that these resources would satisfy the two criteria set out above, thereby rejecting its initial contemplation in *Marshall 2* of the possibility for these resources to be included.

Conclusion

The SCC's alteration of its guidance over the course of the *Marshall* decisions should be understood as a careful and deliberate refinement of such guidance in order to form a more substantive lens through which to interpret the 1760–61 Treaties and, along with the SCC's decisions in *Simon* and *Sioui*, to gain insight into how the SCC may interpret other Peace and Friendship Treaties more generally.

Despite the SCC's deliberate and nuanced guidance in the *Marshall* decisions, it is important to recognize that the *Marshall* decisions offer only a partial approach to interpret the Peace and Friendship Treaties, and that they are, in and of themselves, unable to serve as a comprehensive framework for such interpretation. To this point, a comprehensive framework would require other authorities on the Peace and Friendship Treaties, such as lower court decisions and commentary, as supplementation to the *Marshall* decisions and the SCC's other decisions, which authorities are beyond this article's scope.

As noted throughout this article, the *Marshall* decisions concern, and are limited to, the 1760–61 Treaties. Additional guidance on these treaties, including their scope, nature, and content, have been provided through lower courts that have followed and built upon the SCC's guidance in the *Marshall* decisions.[51] This additional guidance must be read together with the *Marshall* decisions in order to flesh out the current framework for interpreting the 1760–61 Treaties and their modern-day implications. This article does not consider this additional guidance from lower courts, as doing so is beyond its scope.

Finally, as evidenced by the SCC's decisions in *Simon* and *Sioui*, which considered the 1752 Treaty and the Murray Treaty of Longueuil, we note that the 1760–61 Treaties are merely a portion of the Peace and Friendship Treaties that exist. To date, the SCC has not considered other Peace and Friendship Treaties, such as the Treaty of 1725, signed with individual Mi'kmaq, Passamaquoddy, and Wolastoqey communities, and the Treaty of 1759, signed with the Mi'kmaq Band of Cape Breton, in great detail. Further guidance from future courts, including lower courts, is needed to address the outstanding uncertainty around the Peace and Friendship Treaties and their modern-day implications.

[50] *Ibid.,* para 25.

[51] See, for example, *Newfoundland (Minister of Government Services & Lands) v Drew*, 2003 NLSCTD 105; *Newfoundland (Minister of Government Services & Lands) v Drew*, 2006 NLCA 53; *R v Sappier; R v Gray*, 2006 SCC 54; *Québec (Revenu) c Jenniss*, 2014 CanLII 83137 (QC CA).

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