THE DISHONOUR OF THE CROWN: ABORIGINAL FISHERIES IN ATLANTIC CANADA AFTER *MARSHALL*[1]

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Abstract

This article is a legal analysis of the elements of the 1999 Supreme Court of Canada *Marshall* decisions, which affirmed Donald Marshall's treaty right to fish and sell his catch. Despite the court's decision, Mi'kmaw are continually charged by the Crown in its efforts to manage the fishery. The fishery rights in question claimed by Mi'kmaw and other Indigenous groups in Atlantic Canada are based on promises made in the non-ceding Peace and Friendship Treaties. It is argued that the courts and others give insufficient consideration to the distinction between ceding and non-ceding treaties, the considerations of governance, and the specific promises made in these treaties. A civil action initiated by the appropriate group against the Crown is suggested as a measure that would permit the courts to address many of the outstanding issues and serve as an important step toward eliminating conflict and violence in the fisheries.

Résumé

Cet article est une analyse juridique des éléments de l'arrêt *Marshall* rendu en 1999 par la Cour suprême du Canada, qui a confirmé le droit de Donald Marshall de pêcher et de vendre ses prises en vertu d'un traité. Malgré la décision de la Cour, les Mi'kmaq sont continuellement accusés par la Couronne dans ses efforts de gestion de la pêche. Les droits de pêche revendiqués par les Mi'kmaq et d'autres groupes autochtones du Canada atlantique sont fondés sur les promesses faites dans les traités de paix et d'amitié non cédés. Il est soutenu que les tribunaux et d'autres instances ne tiennent pas suffisamment compte de la distinction entre les traités cédants et non cédants, des considérations de gouvernance et des promesses spécifiques faites dans ces traités. Une action civile intentée par le groupe approprié contre la Couronne est suggérée comme une mesure qui permettrait aux tribunaux de traiter de nombreuses questions en suspens et constituerait une étape importante vers l'élimination des conflits et de la violence dans le secteur de la pêche.

Introduction

This article focuses narrowly on case law to outline various legal steps that can be taken in Aboriginal and treaty cases.[2] This foundation is then used to identify what the *Marshall* decisions

[1] Sadly, Natalie Clifford passed away on May 13, 2024. She was a co-founder and partner of Clifford Shiels Legal from 2013–2023, a law firm recognized by the Canadian Bar Association for taking the initiative to practice law differently. Throughout her career, Natalie set an example by representing unheard indigenous voices. She was a steadfast advocate for the Mi'kmaw people relating to fishing rights and otherwise and promoted better recognition of indigenous communities locally and internationally. We hope this article inspires readers to appreciate the need for positive change for the people that Natalie continuously fought for.

concluded from a legal perspective and to delineate issues in need of further consideration. We conclude that the most appropriate forum for the determination of these "further considerations" is the courts. Doing so allows for participation by interested and affected parties, but also allows for judicial guidance to a suitable ending. To date, and in spite of the *Marshall* decisions, much work remains to be done.

Terminology is important and, in this paper, we refer to the Peace and Friendship Treaties (hereafter "Treaties") as consisting of several Treaties entered into by the British Crown in the 1700s.[3] These Treaties were signed by the Mi'kmaw, Maliseet (Wolastoqiyik), and the Passamaquoddy (Peskotomuhkati) peoples. Hubert Francis and Donald Marshall are Mi'kmaw, and while this paper references for the most part the Mi'kmaw, arguments made can apply equally to the other First Nations given similarities in the Treaties and the historical context. We do not use the term "moderate" livelihood in this paper, as that phrase has never been defined and would require judicial determination, so we refer to this as "livelihood" only.

There is a concept in treaty and Aboriginal cases referred to as "justification." It has been used in a myriad of cases and refers to situations where the Crown (or a third party) breaches an established Aboriginal or treaty right, they then must justify their actions. Failure to do so may result in amended regulations, payment of monies or, in reference to fisheries, possibly reallocation of the quota. Justification contrasts with the so-called "duty to consult." The duty to consult arises when there *may* possibly be an infringement of an Aboriginal or treaty right, compared to when there is a "prima facie" infringement. The latter, as verified by the Supreme Court of Canada (SCC) in *Marshall 1*, we refer to as the "Marshall right."

It is also important to note the geography and history associated with what we now know as Nova Scotia, New Brunswick, and the Gaspé region of Quebec. Prior to Confederation, the region alternated between French and British colonial powers and was largely known as Acadia or Nova Scotia. It was also from Nova Scotia that New Brunswick was created in 1784, five years after the last of the Treaties were signed.[4] This article deals only with fishing within the jurisdiction of Canada (salt water for the most part) and does not address provincial fishing or hunting rights within a province or territory in Canada as these rights are regulated (to the extent possible) by the individual province or territory.

This article examines the three cases that make up what are described as the *Marshall* decisions, being *Marshall 1* (trial,[5], appeal,[6] and SCC[7] decisions), *Marshall 2* (SCC decision only[8]), and what is

[2] This article is a legal analysis based on our submissions to the Senate Committee and to the Minister of Fisheries. See Senate of Canada, "Peace on the Water: Advancing the Full Implementation of Mi'kmaq, Wolastoqiyik and Peskotomuhkati Rights-Based Fisheries," July 2022, https://sencanada.ca/en/info-page/parl-44-1/pofo-peace-on-the-water-advancing-the-full-implementation-of-mi-kmaq-wolastoqiyik-and-peskotomuhkati-rights-based-fisheries/; and, Joyce Murray, "Government Response," February 24, 2022, https://sencanada.ca/content/sen/committee/441/POFO/reports/GR1-SS-2_Government Response_b.pdf#/content/content/edit/26689?mculture=en-CA&cculture=en-CA. The academic literature on the topic is thin and the applicable case law advancing us past the Marshall decision is non-existent. Cases from elsewhere not involving the Peace and Friendship Treaties that have advanced this issue have not been applied to the situation here. There is however a rich body of academic, government, and grey literature on other aspects of the *Marshall* decisions and we refer the reader to a sample of this literature in this Marshall Special Issue.

[3] Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada, "Peace and Friendship Treaties," December 10, 2015, https://www.rcaanc-cirnac.gc.ca/eng/1100100028589/1539608999656?wbdisable=true.

[4] *R v Marshall,* [1996] N.S.J. No 246, para 80 (*Marshall 1 Trial).*

[5] *Ibid.*

[6] *Marshall v Canada,* 1997 NSCA 89 (*Marshall 1 Appeal)*.

called herein as *Marshall and Bernard* (trial and appeal decisions in Nova Scotia[9] and New Brunswick[10] and combined at the SCC[11]). The lower court decisions contain findings of fact and conclusions that were not in any manner affected by the decisions of the higher-level courts including the SCC. These conclusions of fact, or in some cases statements of law, remain as established facts or law in relation to several issues and therefore should not be ignored. A review of only the SCC decisions does not provide a full picture related to what has been decided and what has yet to be determined.

Marshall 1 was a summary conviction matter (the type of case is a relevant matter as will be shown below) that began with the federal Crown laying charges against Donald Marshall Jr. pursuant to the regulations under the *Fisheries Act* for fishing and selling his catch of eels without a licence. The lower court found that initially a treaty right did exist but that the right was extinguished when the truckhouses (a phrase used in the applicable treaty) no longer existed. The SCC found that the treaty right in the form of a promise by the Crown survived the extinguishment of the truckhouses.

Marshall 2, which was decided less than three months after *Marshall 1* by the SCC, was in essence commentary from the court in response to a third party requesting additional information about the decision in *Marshall 1*. The explanations provided have assisted with the interpretation of certain issues. Some of the explanations provided are still subject to considerable debate. What the SCC did say suggests that there is a lot which has yet to be determined respecting the Marshall right and treaty and Aboriginal rights generally.

Marshall and Bernard was a decision of the SCC related to summary conviction charges laid under the provincial acts of Nova Scotia and New Brunswick associated with commercial logging in each of the provinces. It was alleged that the activity was something that exempted the Mi'kmaw from the provincial acts because of the *Marshall 1* decision. This matter proceeded through the courts in each of Nova Scotia and New Brunswick before being merged into one case by the SCC. The SCC found that the Marshall right did not apply in these circumstances as commercial logging was not an activity protected by the Treaties because it was not carried out by the Mi'kmaw in a commercial manner at the time of the Treaties in question.

Based on case law after the *Marshall* decisions, we propose a method to complete the work started in *Marshall 1*.[12] This will allow all impacted parties to participate and have input into the outcome through well-established court procedures and proceedings which have been applied in both treaty and Aboriginal rights matters.

Legal Processes and Steps in Aboriginal and Treaty Cases

The case law, both before and after *Marshall 1*, outlines the procedures to be taken in Aboriginal and treaty cases. The cases for the most part follow those procedures that were established by the courts

[7] *R v Marshall,* [1999] 3 S.C.R. 456 (*Marshall 1)*.

[8] *R v Marshall,* [1999] 3 S.C.R. 533 (*Marshall 2)*.

[9] *R v Marshall,* 2001 NSPC 2; *R v Marshall,* 2002 NSSC 57; *R v Marshall,* 2003 NSCA 105.

[10] *R v Bernard* [2000] N.B.J. No. 138; *R v Bernard,* 2001 NBBR 82; *R v Bernard*, 2003 NBCA 55.

[11] *R v Marshall,* 2005 SCC 43 (*Marshall and Bernard)*.

[12] The issues raised in this paper are complex and require detailed analysis. As our space is limited, we have attempted to discuss as many of these elements as possible albeit somewhat briefly.

some time ago. These procedures were followed by the SCC in *Marshall 1*. That case fell short of completing these procedures. This was not because of any deficiencies in the analysis but because the courts at all levels, including the SCC, were constrained on how they could proceed. The bottom line of the *Marshall* decisions, in their entirety, establish only the fundamentals of the rights; they leave us in the lurch on some of the most pressing issues faced by all today.

The case of *R v Sparrow* contains the commentary from the SCC on how all treaty and Aboriginal cases should be addressed.[13] The court summarized these steps clearly in *Ahousaht Indian Band v Canada (Attorney General),* as follows:

> Step 1: Is there an existing Aboriginal right?
>
> Step 2: Has the Aboriginal right been extinguished?
>
> Step 3: Has there been a *prima facie* infringement on the right?
>
> Step 4: Can that infringement be justified?[14]

These are the steps followed in treaty cases such as *Marshall 1*.

The issue that arises in these cases, which was also a pivotal issue in *Marshall 1*, is this concept called "justification" which is Step 4 of the above analysis. Essentially this means that the Crown must satisfy the court that their actions or, in this case, the regulations under which they are proceeding are justified according to a test legally referred to as the Badger Test. The case of *Marshall 2* contains the summary below of the three questions required of the Badger Test, which as well extended the four steps identified above for Aboriginal rights to also include treaty rights:

> In *Sparrow*, at p. 1113, it was held that in considering whether an infringement of aboriginal or treaty rights could be justified, the following questions should be addressed sequentially:
>
> > First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized.
>
> At page 1114, the next step was set out in this way:
>
> > If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from Taylor and Williams and Guerin, supra. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.
>
> Finally, at p. 1119, it was noted that further questions might also arise depending on the circumstances of the inquiry:

[13] *R v Sparrow,* [1990] 1 SCR 1075.

[14] *Ahousaht Indian Band v Canada (Attorney General)*, 2009 BCSC 1494, para 28.

> These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.[15]

In relation to fisheries, the discussion revolves around the allocation of quota. Generally speaking, the courts in considering justification, consider the following in order of priority as follows:

1. Conservation
2. Overall public policy
3. Aboriginal and treaty rights (an elevated right)[16]
4. Others sharing in Aboriginal and treaty rights claims.

Matters are thus reduced to quota and the amount that should be allocated to all beneficiaries of the Treaties to satisfy the promise, which is an elevated right, made in the Treaties.[17] The court in the *Marshall* decisions provided (although not required to do so) some guidance on what should be considered to satisfy the Badger Test and the order of priority:

> Resource Conservation and management and allocation of the permissible catch inevitably raise matters of considerable complexity both for the Mi'kmaw peoples who seek to work for a living under the protection of the treaty right, and for governments who seek to justify the regulation of that treaty right.[18]
>
> Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such regulations would not constitute an infringement that would have to be justified under the Badger standard.[19]
>
> "To put the situation in perspective, the recent Aboriginal Commercial fisheries appear to be minuscule in comparison." It would be significant if it were to be established that the combined aboriginal food and limited commercial fishery constitute only a "miniscule" percentage of the non-aboriginal commercial catch of a particular species such as lobster.[20]

The question becomes: Has sufficient quota been properly allocated to entitled beneficiaries of the Treaties given the priority order above as would be required to legitimize the Crown's position that it is

[15] *Marshall 2*, para 32.

[16] *Marshall 1*, para 47.

[17] *Ibid.*

[18] *Marshall 2*, para 22.

[19] *Marshall 1,* para 61.

[20] *Marshall 2,* para 42.

justified? What is also required here is that the Crown establish that the regulations accommodate the level of justification required under the Badger Test. We are of the view that the Crown has not reached the levels which the courts would require but we do offer a manner in which this process could be achieved.

Summary Conviction Cases

As stated above, the courts generally follow the steps outlined except when they are constrained from completion of these steps in certain cases. For example, in the case of summary conviction matters, as with Donald Marshall, the analysis ends with Step 3, essentially allowing the Crown the option not to justify, if they choose not to. This will be discussed further below, but, as pointed out above, *Marshall 1* and *Marshall and Bernard* were both summary conviction proceedings, albeit the former related to federal summary conviction offences and the latter related to provincial summary conviction offences.

In the summary conviction context, the courts' hands are tied as they are concerned only with guilt or innocence of, in our discussion, Donald Marshall.[21] If the defendant satisfies the court on Step 1, Step 2, and Step 3, and the Crown fails to justify, then the accused is not guilty.[22] Donald Marshall was found not guilty. Note that justification is solely at the discretion of the Crown. The Crown can choose to justify or not and in the *Marshall 1* case decided not to try to justify.[23]

What everyone is left with is the situation where even though the accused is not guilty, it is only with respect to that specific matter before the courts. The Crown can continually charge Mi'kmaw peoples (and the same Mi'kmaw person) repeatedly. If Donald Marshall went fishing and attempted to sell his catch the day after he was found not guilty, he could have been charged with the same offence because there was no justification offered to clarify the law. Nothing can prevent the Crown from doing so and it is apparent that they have continually used this approach both before and after *Marshall 1*.

This is what happened to Hubert Francis and countless Mi'kmaw since *Marshall 1*. Hubert Francis, a Mi'kmaw from Elsipogtog, New Brunswick, fished off the coast of Nova Scotia, New Brunswick, and the Gaspé. He was charged in the Gaspé and eventually convicted at trial without counsel in 2018. Mr. Francis initiated a civil action (discussed below) against the federal Crown and immediately requested advance costs in order that the Crown would be required to pay his legal costs. The federal court at all levels refused his request and the SCC would not grant leave to appeal so the matter could not proceed.[24]

After *Marshall 1*, the New Brunswick Court of Appeal (NBCA) in *Marshall and Bernard* offered that summary conviction proceedings in such matters are very limiting and that the courts should consider allowing civil cases to proceed to address these very broad issues.[25] In civil cases, there are a myriad of remedies available to the plaintiffs (who, we are suggesting, based on the discussions below, are the individual Mi'kmaw people), or, as discussed later, could be a class certified by the courts. This allows the courts to impose remedies against the Crown forcing some sort of compliance with the

[21] *Marshall 2*, para 11.

[22] *Marshall 1*, para 64

[23] *Marshall 2*, para 14.

[24] The authors represented Mr. Francis in various capacities during this process.

[25] *Marshall and Bernard*, para 142.

direction of the court. Note that the SCC suggested this approach in its decision in *Marshall and Bernard* following what was suggested by the NBCA in the same case.

Civil Action

There is a lot that can be accomplished by pursing matters as a civil action. First, it is possible to force the justification issue. Once the first three steps have been concluded in the civil proceeding, the plaintiff is entitled to their remedies unless the Crown can justify.[26] For instance, a remedy could take the form of a declaration that the Crown cannot charge, arrest, or seize equipment from any Mi'kmaw while pursuing their right unless and until the Crown can justify it. This is what was suggested in the Hubert Francis matter. The court in the Nova Scotia branch of *Marshall and Bernard* points to one reason why this type of case should be heard in a civil setting compared to a criminal setting. As they state, "There is little doubt that the legal issues to be determined in the context of aboriginal rights claims are much larger than the criminal charge itself and that the criminal process is inadequate and inappropriate for dealing with such claims."[27]

On the other hand, if the Crown does not wish to have this outcome imposed on them, they can choose to only justify as required. If the Crown is successful in their justification, then the plaintiff does not get their remedy. What is interesting though is that the Crown can choose to justify, avoiding these outcomes associated with the remedies, but they do risk not being able to justify. As discussed above, in the fisheries context, much is determined by the allocation of quota. This is very risky for the Crown. If the Crown chooses to justify, the burden is on the Crown, based upon a balance of probabilities, to establish that their actions and regulations are justified or have been accommodated.[28]

Seemingly, because of the decision of the NBCA in *Marshall and Bernard* (albeit obiter), a civil case was started in British Columbia by the Ahousaht Indian Band related to the right to fish and trade even before the SCC provided its comments in relation to civil matters.[29] The case in British Columbia relates to a small section, approximately sixty miles, of the British Columbia coast. The representative or governing groups (an issue discussed below) for that area started a civil suit to require the Crown to justify or be faced with forced allocation of quota based upon the direction by the court. The first issue was the establishment of the Aboriginal right to fish and trade. The burden for establishing this was on the plaintiffs (governing groups). There was no treaty in place, and if the Aboriginal right was not established no reallocation would be required, as this matter would not have passed Step 1. Note that where there are no treaties in place, the situation is more akin to the "non-ceding" treaties compared to the "ceding" treaties. This is because if there was no treaty, at no point did the group or any individuals give up anything including lands and any Aboriginal rights. This is discussed below where it is shown that the Mi'kmaw gave up nothing even though there is a treaty.

First, after long discussion of the detailed history, the court determined that the Aboriginal right had been established so Step 1 was completed. Then, the court went through the other steps and the Crown was shown to be substantially deficient in its quota allocation. Included was a detailed discussion of the issues. The case is lengthy, approximately three hundred pages, but is an excellent discussion of

[26] *Ahousaht,* paras 24 and 835.

[27] *Marshall and Bernard,* para 143.

[28] *Ahousaht,* para 24.

[29] *Ahousaht.*

what has been established and the way parties have to proceed. Note that matters hinge on the justification required and how the right should be accommodated. The decision in this case was somewhat affected, but not in a substantial way, by the British Columbia Court of Appeal, and leave to the SCC was denied. Also, the case, after lengthy negotiations, was reconsidered by the British Columbia court, in another three-hundred-plus-page decision.[30]

The benefits of proceeding with a civil case are clear from the above. These benefits are discussed further below once we take the four steps through the analysis undertaken by the courts in the *Marshall* decisions.

The *Marshall* Decisions—Processes and Steps Determined

What Makes the Treaties Unique?

Before we can analyze the *Marshall* decisions, it is necessary to review the underlying facts and peculiarities in which each case was considered. *Marshall 1* was a treaty rights case as distinguished from an Aboriginal rights case. Donald Marshall chose not to litigate this matter as an Aboriginal rights case and therefore all of the issues associated with the Aboriginal right that could be pursued by the Mi'kmaw remain open for interpretation and determination by the courts.[31] This is particularly true because the Treaties are "non-ceding." With respect to the Mi'kmaw, the Treaties consist of a series of treaties starting in 1725 and ending in the late 1770s. In the *Marshall* case, of all the treaties that would apply, the 1760–61 Treaty was agreed to be the one upon which the decision would be based.[32]

On a related matter, note that the hearing at trial of the Donald Marshall matter took more than thirty days stretching over eighteen months. Many decisions and six years later, the SCC rendered its decision, finding Marshall not guilty. This raises questions of the time and funding needed for individuals to assert their Treaty rights.

The courts in the *Marshall* decisions have added much to the discussion with the decisions used by many litigants in more recent Aboriginal and treaty cases. The problem is that discussions do not always include the peculiar issues unique to the Treaties.

What makes the *Marshall* decisions unique relates to the nature of the Treaties. For example, the overall structure of the governance (or lack thereof) of the Mi'kmaw people, the age of the Treaties in that they predate what we know today as Canada, the United States, provinces, and "bands." The geography of the area, and the way these artificial lines have been drawn across the historic Mi'kmaw territory, serve to create confusion and a myriad of laws that apply to the areas covered by the Treaties. In addition, the Treaties are substantially different from other Aboriginal treaties because of the *positive promise* contained in them as well as their "non-ceding" character.

[30] *Ibid.*

[31] *Ibid.*

[32] *Marshall 1 Trial,* para 81.

Comparison to Other Treaties—Treaty 9

The treaties are non-ceding. This has now become somewhat of a buzz phrase used everywhere. In the geographic areas covered by the treaties, this is the case.[33] What does this mean? It means that by the terms of the treaties, the Mi'kmaw gave up nothing, including any Aboriginal rights (as is the case in *Ahousaht* where there is no treaty) as there was no "ceding" language as is found in most treaties elsewhere. In contrast to this, for instance Treaty 9, which applies to Northwest Ontario states that "the said Indians do hereby cede, release, surrender and yield up to the government of the Dominion of Canada…all of their rights, titles and privileges whatsoever to the lands."[34] As can be seen from this excerpt, the language in Treaty 9 is clear and unambiguous, whereby the First Nations signing the treaty grant and "cede" all of the lands and rights and privileges thereto to and in favour of the Crown in all of the possible areas to which they have a claim. In exchange for this, the First Nations were granted "reserves" and promises that they (the group and their descendants) would receive an annuity payment of some sort.

In the ceding treaties, which cover most of the geographical area of Canada, there are also provisions with the Crown right to "take up" the land. Although the area covered by a treaty (including all rights, titles, and privileges) has been ceded, the land can be used for certain purposes by the First Nations' peoples until such time as those areas are "needed" by the Crown (or the colonizers or resource developers). Such wording is found in Treaty 9, which again is provided for comparison purposes only:

> And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country…and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[35]

What is interesting about these types of clauses is that the Crown in the ceding clause had received all the rights, titles, and privileges, and then granted some back in a *restrictive manner*, but subject always to the Crown ending all or claiming part of its grant back. This means that the First Nations only get back what the Crown specifically says in the treaty.

Also in Treaty 9, there is a clear statement that activities are subject to regulations. This means that these areas would not be subject to the priorities normally afforded to First Nations when their right is "elevated" as with the treaty right in the *Marshall* decision or in the case of the Aboriginal right in *Ahousaht.* [36] This elevated right is described in *Marshall 1* as "The point is that the treaty rights holder not only has the right or liberty 'enjoyed by other British subjects' but may enjoy special treaty protection against interference with its exercise."[37]

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[33] *R v Marshall,* 2003 NSCA 105, paras 98 and 239.

[34] Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada, "Treaty Texts—Treaty No. 9," August 30, 2013, https://www.rcaanc-cirnac.gc.ca/eng/1100100028863/1581293189896#chp3.

[35] *Ibid.*

[36] *Marshall 2,* para 24; *Ahousaht,* para 58.

[37] *Marshall 1,* para 47.

In the ceding treaty example given, Treaty 9, there is an Aboriginal right to fish, which is subject to the right being removed at any point in the future and subject to regulation.[38] This is simply not the case with the Peace and Friendship Treaties. This illustrates the critical distinction between "ceding" and "non-ceding" treaties, particularly as it relates to land and fishing rights. The Mi'kmaw ceded nothing in the Peace and Friendship Treaties while others, as in Treaty 9, gave up everything only to be granted some rights (including fishing) back in a very restricted manner subject to termination.

The "take up" clause is included in many treaties and applies to vast areas of Canada. However, there is no such clause in the Peace and Friendship Treaties, so its applicability is questioned. This fundamental distinction is not made by many in their analyses and procedures, including the courts. Many have attempted to draw conclusions from the ceding treaties and have allowed these determinations to be applied to the non-ceding treaties, like the Peace and Friendship Treaties. This has, in our view, detracted from the power and clarity contained in the positive promises in the non-ceding treaties and, in particular, the Peace and Friendship Treaties. Caution is therefore needed in analyzing treaties and Aboriginal rights and applying conclusions to considerations at hand. There is already significant confusion in this area, and it should not be compounded further.

Governance Model

Another issue which makes the Peace and Friendship Treaties unique is that they could not have been anything but non-ceding because the signatories had no authority to bind the Mi'kmaw people. This arises from the "governance" model, or lack thereof, of the Mi'kmaw people at the time of the treaties and even today. In that regard, we first point to those articles of Treaty 9 related to the governance and "capacity" of the signatories to act on behalf of those persons to be bound by the treaty:

> And, whereas, the said Indians have been notified and informed by His Majesty's said commission that it is His desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to His Majesty may seem meet, a tract of country, bounded and described as hereinafter mentioned, and to obtain the consent thereto of His Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good-will between them and His Majesty's other subjects, and that His Indian people may know and be assured of what allowances they are to count upon and receive from His Majesty's bounty and benevolence.
>
> And whereas, the Indians of the said tract, duly convened in council at the respective points named hereunder, and being requested by His Majesty's commissioners to name certain chiefs and headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be found thereon, and to become responsible to His Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several chiefs and headmen who have subscribed hereto.[39]

Treaty 9 contains a clear statement that the signatories are true representatives of the "nation" and can make all arrangements on their behalf. This is the same in most of the treaties (ceding and non-ceding)

[38] In the case of Treaty 9, regulation would be by the province of Ontario as the treaty covers much of the geographic area of northern and northwestern Ontario.

[39] Government of Canada, "Treaty Texts—Treaty No. 9".

in Canada and has given rise to the concept of "treaty nations," presumably in the sense that these signatories acted as authorized representatives by executing the treaty. This is consistent with what Canada would do on behalf of Canadians and those who are Canadian would be bound by those decisions.

However, such an interpretation did not apply to the Mi'kmaw people at the time of the treaties or even today. The trial decision in *Marshall 1* found as a fact that the Sakamow (chief) who signed the treaties were at most consensus gatherers and could not "bind" the people in any effective manner as a normal governing body could.[40]

In the Nova Scotia branch of *Bernard* in *Marshall and Bernard*, the court identifies that "There were chiefs, often more than one, in each area where the Mi'kmaq lived. The chiefs had little power. They had to rely mainly on consensus."[41] This case also found that based on the evidence before it, there was no Mi'kmaw Grand Council at the time of the 1760–61 Treaties:[42]

> Chief Augustine knows a great deal about Mi'kmaq culture and history. He is a man of great dignity. He did not tailor his testimony to suit the defendants' case. For example, he said the Mi'kmaq had not had exclusive occupation of Nova Scotia at the time of British sovereignty. He also said neither the Mi'kmaq nor the British would have thought at the time that the 1760–61 treaties provide for commercial logging. I found him thoroughly truthful, but I was not persuaded by him that the Grand Council or the seven districts were ancient Mi'kmaq traditions. The written record proves otherwise.[43]

Given there was no overall governing body, this raises the question of what constitutes the Mi'kmaw people. Seemingly it was and is a large group of people occupying, at the very least, those areas covered by the Mi'kmaw treaties who are culturally and linguistically linked. As the court stated, "There were clearly links between the communities and regions before then. Otherwise, there would have been much greater differences in dialect across the territory."[44] What one can conclude is that at the time of the treaties there was one Mi'kmaw "nation," that is, an identifiable group only. The courts, to date, have not established any governance model for the entire group or its individual parts at the time of the treaties. This is not the case with respect to most treaties in Canada.

As we know from *Marshall 1* and other cases, every treaty is separate and distinct from other treaties. Yet, a common view is that individual First Nations are similar, which implies that their governance structures are the same. Have the First Nations in Canada lost their individuality? This cannot be the case now nor could it be said that this was the case when the treaties were signed. We must look at the uniqueness not only of the treaties (and their background), but also the nature of the First Nation in question and their governance model to draw any form of conclusion.

Many suggest that the bands have authority over the Mi'kmaw and therefore have authority over the right found to exist in favour of Donald Marhsall. If we accept that, based upon the quotations above, that the Mi'kmaw were one nation at the time of the treaties (without a governance model, which

[40] *Marshall 1 Trial*, para 28.

[41] *R v Marshall,* 2002 NSPC 2, para 128.

[42] *Ibid.*, para 125.

[43] *Ibid.*, para 63.

[44] *Ibid.*, para 50.

has been determined, at least as far as the courts are concerned), the question is what has happened since to affect the nation so that the bands could become the governing bodies.

The bands were created in the twentieth century and as of today there are more than thirty-five Mi'kmaw bands. Has the Mi'kmaw "nation" been divided into at least thirty-five sections without any overall governing body appointed or deemed to have been appointed by the Mi'kmaw people? This position seems somehow entrenched in many minds, and this is not surprising if one tries to apply the terms of Treaty 9 to the treaties.

Each of the Treaty 9 signatories were a governing body in the true sense of the word. They could cede on behalf of their people, and some of the authority ceded was granted back to the signatory bodies in Treaty 9, as well as the right to govern over the reserves. The latter was only in conjunction with the *Indian Act* which was enacted in 1876 to create bodies known as "bands" to oversee and govern matters on the reserves only. The Crown, by creating the *Indian Act*, could not also grant other powers that would be contrary to the treaties or, where there is no treaty, the Crown could not grant powers that otherwise vested in others, such as hereditary chiefs or other groups who had some vested governing authority.

Again, with respect to the Mi'kmaw, none of this could occur as there was no governing body and, as found in *Marshall and Bernard*, there was no overall governing body such as the Grand Council. Note that other than in the trial decisions, the SCC did not weigh in on this issue; thus, who has the right remains an outstanding issue to this day, which creates even more confusion on the water.

Who Has the Marshall Right?

The bands and associated reserves in Atlantic Canada were created beginning around the mid-1900s under the provisions of the *Indian Act* of 1876. As such, who got the fisheries right under the treaties? To whom were the promises made, if not to any governing body?[45] The right was granted to the Mi'kmaw everywhere and they were entitled to trade in fish (as established by *Marshall*) at the truckhouses located anywhere in Nova Scotia (which included New Brunswick at the time), or Acadia. No restrictions in the treaties are associated with this at all. For example, the following statement is included in the treaty and in *Marshall 1:*

> And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at Lunenbourg or Elsewhere in Nova Scotia or Accadia.[46]

All of the Mi'kmaw persons, and all of their descendants, due to the nature of the treaties, could enjoy that right. Nothing has been established at law in relation to the treaties to determine otherwise. The only precedent that has been set in this regard has been established based upon ceding Treaties with governing bodies.

If the Mi'kmaw people had the rights, they did not give up that right to anyone including their respective bands at all. How could they? How did the Mi'kmaw bands created under the *Indian Act* with

[45] *Marshall 1*.

[46] Government of Canada, "Peace and Friendship Treaties"; *Marshall 1*, para 5.

only jurisdiction to deal with on reserve issues get any authority over the ability of any Mi'kmaw to fish anywhere (outside of all reserves), let alone in the areas restricted as dictated by the Crown attributable to that band in some arbitrary form? Where in the *Marshall* decision do we find the ability of the Crown to so dictate this, again without justification?

The SCC in *Marshall 2*, paragraph 17 alluded to "authority" and areas in which the treaty right could be exercised. In the trial decision in *Bernard*, Judge Curran stated the following:

> How can this apparent contradiction between the facts and the interpretation made by the Supreme Court be resolved? I think the answer is that, because of intermarriage, movement between communities and consolidation of the population, every current Mi'kmaq community in Nova Scotia contains direct descendants of all the 18th century Mi'kmaq communities.[47]

This discussion respecting governance is a continuing problem in other areas of Canada, particularly where there are no treaties. For instance, in *Ahousaht,* there is considerable discussion with respect to the representative plaintiffs.[48] It was determined that the plaintiffs could establish a governance model on behalf of their group prior to the adoption of the *Indian Act* in 1876. This means that all the powers under the *Indian Act* were merged with those pre-existing powers of the governing body. In another matter in British Columbia, there was considerable discussion on who held the ability to govern over those traditional lands outside of the reserves—the hereditary chiefs who apparently held that right historically or the bands created under the *Indian Act*.[49]

If we look at the Mi'kmaw, we see a similar pattern. The court in the Nova Scotia branch of *Bernard* in *Marshall and Bernard,* makes the following observation:

> Since at least the 19th century the Mi'kmaq have divided their territory into seven districts. Each district has an hereditary chief. Together the chiefs form the Grand Council. The Cape Breton chief is the Grand Chief of all the Mi'Kmaq. Dr. von Gernet says the districts and the grand chief almost certainly did not exist, at least not in a formalized and structured way, before the mid-1700s. He said the concepts did not emerge out of whole cloth at that time, but in earlier times the structure was much looser. He said there were clearly links between the communities and regions before then. Otherwise, there would have been much greater differences in dialect across the territory.[50]

Given the present state of this issue, it would seem that no group with any legitimacy can claim to have authority over the so-called Marshall right to fish and trade. The right belongs to each Mi'kmaw. The SCC found that Donald Marshall was pursuing *his* right:

> The appellant says the treaty allows *him* to fish for trade. In my view, the 1769 treaty does *affirm* the right *of the Mi'kmaq people* to *continue* to provide for *their own* sustenance by

[47] *R v Marshall,* 2001 NSPC 2, para 125. See similar comments by the SCC in *Marshall and Bernard.*

[48] *Ahousaht.*

[49] *Wet'suwet'en Treaty Office Society v British Columbia (Environmental Assessment Office*), 2021 BCSC 717.

[50] *R v Marshall,* 2001 NSPC 2, para 50.

> taking the products of *their* hunting, fishing and other gathering activities, *and trading* for what in 1760 was termed "necessaries." [emphasis added][51]

Clearly, judicial guidance is required on this issue as a contrary view has emerged. Coupled with this is the question of who can exercise the Marshall right and where the right can be exercised. First, nowhere in the *Marshall* decisions does it indicate that Donald Marshall acted with any authority of his band. Indeed, he fished far from the reserve governed by his band (which was located in Sydney) in Pomquet Harbour, which is close to Antigonish, on mainland Nova Scotia.

There are no restrictions in the Treaties as to the area where a Mi'kmaw could exercise the right. To the contrary, there was a promise to all Mi'kmaw that they could trade at a truckhouse. How can the Crown or anyone restrict the right? The short answer is that they cannot. Recall that "if Donald Marshall could fish legally near Afton, it would seem that *any Nova Scotian Mi'kmaq could exercise surviving rights anywhere in Nova Scotia*" [emphasis added].[52]

This means that any Mi'kmaw, anywhere in the area covered by the Treaties, could take the fruits of his or her gatherings, which are deemed to include fish, to a truckhouse established by the British. Truckhouses, a term used in the 1760–1761 Peace and Friendship Treaties, were intended to be used to "traffick, barter or Exchange and Commodities."[53] The British stated that these truckhouses should be in every jurisdiction covered by the Treaties and trade. No restrictions were placed on (a) where the fish came from; (b) where the Mi'kmaw were located; or (c) any authority having been obtained to conduct this activity. The Treaties "reflected a grant to the *Mi'kmaq of the positive right* to bring the products of *their* hunting, fishing and gathering to a truckhouse to trade" [emphasis added].[54]

In *Marshall and Bernard*, the SCC stated the following:

> In view of this conclusion, it is unnecessary to discuss the scope of "moderate livelihood," *and the issues of cultural attributes and community authority*. It is also unnecessary *to consider what territory different treaties may have covered*, the precise terms of the treaties, the specific people who concluded treaties, and the need for different respondents to prove membership of a tribe that concluded an applicable treaty. [emphasis added][55]

As such, no final decision on this has been issued except what is found in the trial decision (N.S.) of *Bernard*.

There have been no definitive findings by the courts (e.g., SCC) on the issue of who holds the Marshall right (the bands, only members of the bands, or the individual Mi'kmaw), where the right may be exercised, if the right is permitted to be exercised, and if the right is permitted to be exercised but only to a moderate living standard (which has yet to be defined). This was discussed at the trial level of *Marshall* and in *Bernard* but was not necessary for the ultimate decision.

[51] *Marshall 1*, para 12.

[52] *R v Marshall,* 2001 NSPC 2, para 125.

[53] 1760-1761 Peace and Friendship Treaties.

[54] *Marshall 1*, para 61.

[55] *Marshall and Bernard,* para 36.

We believe that these and other issues must be determined by the courts before any resolution (and peace on the water) can be attained. This is for the benefit not only of the Crown but also for the beneficiaries of the promise (whoever that is determined to be) and all parties who claim an interest in the outcome.

As an aside, an interesting point was raised by the Crown in its defense on the Hubert Francis matter when they stated, "However, Canada respectfully disagrees with the Plaintiff's view of the current law and says it has not infringed his asserted rights. Given this current disagreement, further judicial guidance is required."[56] For the Crown or any defendant for that matter to conclude that there is a disagreement on the issue that requires judicial clarification is extremely unusual.

The *Marshall* Decisions and *Sparrow* Test

What did the *Marshall* decisions decide? To explore this, we use the *Sparrow* steps outlined above. *Marshall 1* was a summary conviction proceeding (guilt or innocence was all that could be determined). Donald Marshall defended the charge under the *Fisheries Act* by establishing that he was the beneficiary of a promise to all Mi'kmaw contained in the 1760–61 Treaties. Again, only the treaty right, not the Aboriginal right, was pursued. Below are some quotations from that decision that provide the reader with some context:

> I would allow this appeal because *nothing less would uphold the honour and integrity of the Crown* in its dealings with the *Mi'kmaq people* to secure their peace and friendship. [emphasis added][57]
>
> It is apparent that the British saw the Mi'kmaq trade issue in terms of peace (as the Crown expert Dr. Stephen Patterson testified, "people who trade together do not fight, that was the theory." Peace was bound up with the ability of the Mi'kmaq people to sustain themselves economically. Starvation breeds discontent. The British certainly did not want the Mi'kmaq to become an unnecessary drain on the public purse of the colony of Nova Scotia or of the Imperial purse in London, as the trial judge found. To avoid such a result, it became necessary to protect the traditional Mi'kmaq economy, including hunting, gathering and fishing. A comparable policy was pursued at a later date on the west coast where, as Dickson J. commented in *R. v. Jack* (1979), [1980] 1 S.C.R. 294 (SCC) at p. 311:
>
> > What is plain from the pre-Confederation period is that the Indian fishermen were encouraged to engage in their occupation and to do so for both food and barter purposes.[58]
>
> The trade clause would not have advanced British objectives (peaceful relations with self-sufficient Mi'kmaq people) or Mi'kmaq objectives (access to the European "necessaries" on which they had come to rely) unless the Mi'kmaq were assured at the same time of

[56] The defense filed by the Crown.

[57] *Marshall 1,* para 4.

[58] *Ibid.*, para 25.

> continuing access, implicitly or explicitly, to wildlife to trade. This was confirmed by the expert historian called by the Crown, as set out below.[59]
>
> The *findings of fact made by the trial judge taken as a whole demonstrate that concept of a disappearing treaty right does justice neither to the honour of the Crown nor to the reasonable expectations of the Mi'kmaw people.* [emphasis added][60]
>
> The *appellant* caught and sold the eels *to support himself* and his wife. Accordingly, the close season and the imposition of a *discretionary* licensing system would, if enforced, interfere with the *appellant's* treaty right to fish for trading purposes, and the ban on sales would, if enforced, infringe *his right* to trade for sustenance. [emphasis added][61]

It is important to note that the SCC frames its decision around the promise and the historical context associated with the promise. The court used a contractual analogy.[62] We believe that this analogy is the best way to properly categorize the Marshall right—it is a treaty right based upon a *positive promise* given by the Crown.

Step 1

The quotations above and below clearly establish the right as required by Step 1:

> The majority of this Court concluded that the truckhouse clause amounted to a promise on the part of the British that the Mi'kmaq would be allowed to engage in traditional trade activities….The Mi'kmaq had traded in fish at the time of the treaties. Marshall's activity could be characterized as fishing in order to obtain a moderate livelihood. It was thus the logical evolution of an aboriginal activity protected by the treaties. Marshall was acquitted.[63]

Step 2

The right was found not to be extinguished, that is, not removed arbitrarily by the government prior to the entrenching of its Aboriginal and treaty rights in s. 35 of the Constitution of 1982.

> In my view, the 1760 treaty does affirm the right of the Mi'kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed "necessaries"…*no argument was made that the treaty right was extinguished prior to 1982*, and no justification was offered by the Crown for the several prohibitions at issue in this case. [emphasis added][64]

[59] *Ibid.*, para 35.

[60] *Ibid.*, para 40.

[61] *Ibid.*, para 66.

[62] *Marshall 1*, para 43.

[63] *Ibid.*, para 10.

[64] *Ibid.*, para 4.

Step 3

Step 3 is an interesting step in the process as it related to the *Marshall 1* decision. Step 3 asked if there has been a *prima facie* infringement. The SCC stated at paragraph 64:

> In the circumstances, the purported regulatory prohibitions against fishing without a licence (Maritime Provinces Fishery Regulations, s. 4(1)(a)) and of selling eels without a license (Fishery (General) Regulations, s. 35(2)) do prima facie infringe the appellant's treaty rights under the Treaties of 1760–61 and are inoperative against the appellant *unless justified* under the Badger test. [emphasis added][65]

This quotation is a direct reference to Step 3 and definitively established that Donald Marshall's right (not his band, not any governing body, but *his* individual right) has been the subject of a *prima facie* infringement. Two are two considerations. First, this statement has seemingly not affected the Crown. The Crown continues to charge Mi'kmaw to this day, and it is not known how many Mi'kmaw have been stopped from fishing. Second, the Crown has never justified the enacted regulations which could be accepted by the courts or indeed is acceptable to any individual Mi'kmaw like Hubert Francis who was arrested and charged resulting in considerable expenses.

We can conclude from the above, that, in the civil context, the plaintiff (like Hubert Francis, a Mi'kmaw) has already established Steps 1, 2, and 3.

The *Marshall and Bernard* Case

Recall that the *Marshall and Bernard* case turned on a completely different set of facts. Nova Scotia and New Brunswick Mi'kmaw were charged with summary conviction offences resulting from charges under the forestry regulations, and the cases proceeded through the courts in each of the provinces until combined by the SCC. Note these cases both turned on the application of the Treaties to provincial statutes. It was found that unlike commercial fisheries, commercial logging activities were not a "pre-treaty" activity under the Treaties as the activity of commercial logging was not one being conducted by the Mi'kmaw at the time of the Treaties. The *Marshall* and *Bernard* cases did not pass Step 1. However, these cases did provide further discussion of the Marshall right and the conclusions that could be reached.

Where the *Marshall* Decisions Fall Short?

The question that requires addressing is whether Donald Marshall could fish today (as Hubert Francis and many others did) without being charged? The answer is likely no, so why not?

The Crown (through the minister of fisheries, in the Response) states that it has justified the regulations apparently by "sprinkling" some of the fishing quota on bands. We are not sure of the amounts or the areas to which the quota applies throughout the region. Presumably in turn, the bands allow certain members of the bands (or other third parties) to take up the quota so allocated.[66] The agreements allocating the quota to bands may also contain some sort of non-disclosure clause. Other

[65] *Ibid.*, para 64.

[66] *Marshall 1*, para 47.

provisions may also disallow any legal actions to be undertaken to suggest that the Crown was not adhering to the promise in the Treaties. While unverified, such questions should be asked of the Crown.

We have a clear statement that Donald Marshall was not guilty because the Crown could not or would not justify.[67] Is the Crown suggesting that what they have undertaken somehow accommodates the right to the level required by *Badger*, outlined above? Note that the SCC set a proposed bar in *Marshall 1* necessary for the justification test.[68]

Can the Crown now justify what it would not do previously? If not, can they continue to charge people for illegal fishing until such justification is achieved? In the Response, the minister states that the Department of Fisheries is closely following the model set out in *Ahousaht*. The court needs to provide guidance to determine if that statement is true or not.

Although *Marshall 1* was the first step, it is only the start of a longer road. As outlined above, there are many issues yet to be clarified or even addressed. There have been, and will continue to be, significant consequences for the many people already drawing their own conclusions. We do not know whose view will ultimately prevail. The one party to all this which is still causing the most angst is the Crown in its ability to continue to control the fishery as it affects the Mi'kmaw as it did even before *Marshall 1*. It continues to lay charges even though justification reviewed by a third party, the courts, has not occurred.[69] In other words, even though *Marshall 1* established the continued existence of the fishing right, the fact that it had not been extinguished, and, further, that the regulations were a *prima facie* infringement of the right, the courts could not do anything more in that type of proceeding.[70] So how do we move forward?

Resolution—Initiate Civil Case

We believe that a civil suit be initiated so the many unresolved issues in *Marshall 1* can be clarified and resolved so everyone can then move forward with confidence. A civil proceeding grants many benefits to all as pointed out initially by the New Brunswick Court of Appeal[71] and the SCC[72] including more flexibility of evidentiary matters and, more importantly, the right for all interested parties to participate as intervenors in the proceedings.

Judicial intervention is required to provide direction to the Crown. This is difficult because the Crown wishes to maintain complete control over the fishery. The argument often used is that the Crown needs to police conservation. No one is arguing about that, but the argument is what happens to all quota after limits are set for conservation purposes. Does the quantum of allocation of the quota to the bands after conservation considerations comply with *Badger*? There is seemingly a major gap in the understanding of how this should play out and how and the extent to which the Crown has "justified."

[67] *Marshall 2*, para 32.

[68] *Marshall 1,* para 61.

[69] *Marshall 2*, para 45.

[70] The Courts could only decide guilt or innocence.

[71] *R v Bernard*, 2003 NBCA 55.

[72] *Marshall and Bernard.*

All involved parties need to have the courts go through the justification process. Recall that the onus is now switched in a civil proceeding after Step 3 to, in this case, the Crown. The Crown has to establish, on the balance of probabilities, that the elements of the Badger Test are satisfied and that it has accommodated the right. The court is the appropriate forum to give the Crown the opportunity to justify, and if they fail to do so, it could open the doors to meaningful change in the future.

Who is the Plaintiff?

There are many unknowns that will have to be resolved as this matter proceeds. First, who has the Marshall right? The bands or individual Mi'kmaw? What apparently was the Mi'kmaw Grand Council? This issue, which has yet to be determined, is fundamental to moving this matter forward and would serve as the basis for any of the parties in proceedings into the future. Currently, the Crown decides to do what it wants, misapplying other treaty situations across the country to the Treaties and to the Mi'kmaw people who do not have any overall governance structure in place to deal with the issues. The Mi'kmaw "nation" has been divided into over thirty-five separate entities by the Crown. Does that mean, as the minister of fisheries stated, that each one is a Mi'kmaw nation? Does this mean that the territory covered by the Treaties has been divided up into more than thirty-five parts with certain allocated portions for fishing for each part as arbitrarily determined by the Crown?

One way to deal with this would be to create a class action lawsuit: the class sues the federal Crown in a civil suit to have the Crown initially stop charging Mi'kmaw people *until* they have justified the regulations according to the order of the court. This is not outside the realm of the realistic as the SCC has already suggested the civil route, which has been followed in *Ahousaht*.

The next step is that the "class" must be certified. To do so, the class, as defined, has to have the right and all of the class have to have the same right. It is proposed that the class consists of all those persons who can trace their lineage back, as a Mi'kmaw, to the Treaties. There are numerous examples of the definition of class in Aboriginal and treaty cases. This brings up the question of what is the extent of the lineage that would be required? We provide no comment on this at this stage. Once the action is started, we can move into the *Sparrow* steps and, as outlined above, *Marshall 1* has already taken us through Steps 1, 2, and 3. As such, we are at Step 4, justification.

Hubert Francis sued the federal Crown for a declaration that he can fish and failed to get an order for advance costs. The matter was taken to the Federal Court of Appeal and the SCC would not entertain the appeal. The issue of whether Hubert had "standing" was brought forward repeatedly by the Crown who alleged, by comparing his situation to other situations (for the most part ceding treaties without a positive promise as in the Treaties) and simply stating that his band had the right. The right existed before the creation of the band and was never given to the band under a Treaty, but the Crown continues to state that the band now has the right. The class certification will be a preliminary issue that must be addressed and, given our experience, this will likely go to the SCC during the certification process.

The other advantage for everyone, including the Crown, is the ability for the plaintiff to represent the beneficiaries in the discussions respecting justification. It is that group that must advance the argument on whether there is or has been sufficient accommodation. As of now, no persons (including the bands) acting individually or collectively can advance these overriding conversations as there is no overall governance body in place that has the power or the capacity to represent all the holders of the Marshall right (or the territory to which it applies) or to use the *Marshall 1* contractual analogy, the beneficiaries of the promise.

The civil case will serve to further clarify many, if not all, the outstanding issues left hanging because of the *Marshall* decisions. This is for the benefit of all parties concerned. It will answer definitive questions: Who has the Marshall right? Who are the beneficiaries of the promise that created the right? Who can initiate a legal action? Answers to these questions will have the effect of requiring the Crown to "justify" the regulations and have the court order how justification can be achieved by the Crown and order the necessary accommodations.

Conclusion

We have reviewed the *Marshall* decisions and have concluded that several issues remain undecided by the courts. This lack of clarity is a substantial contributor to the lack of "Peace on the Water," which is the title of the report by the Senate Committee and, in our view, is not much assistance in the pursuit of peace. Much of the lack of clarity results from the legal system constraints on the courts in the *Marshall* decisions leading to their inability to properly seize on and provide guidance on many of those issues that are at the bottom of the continued disharmony. The other aspect of this issue that has not been addressed with any clarity is the unique nature of (a) the Treaties and (b) the governance structure (or lack thereof) of the Mi'kmaw Nation.

The Marshall right is based upon a *promise* contained in the Treaties however, there remains to this day substantial disagreement on who could be categorized as the beneficiaries of that promise or to whom the promise was made. This is but one of the fundamental determinations required. Also, many arguments presented as solutions arise from other treaties and other First Nations with their own unique histories and governance models.

Some suggest that "modern" treaties are required. We fail to understand why a "modern" treaty would solve any of these issues when one of the treaty partners will not, apparently, uphold its present promises at all. Furthermore, how much would the right be whittled down in the new replacement treaty? Who would sign on behalf of the Mi'kmaw people? Finally, will the Crown require ceding? The Mi'kmaw could give away much of the power contained in the Treaties, in our view. A civil suit, we believe, could and would provide a resolution to many of these issues.

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