MARSHALL AND BERNARD: TREATY RIGHTS AND A TREATY TABLE

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In *Marshall and Bernard*,[1] the Supreme Court of Canada held that the "truckhouse" clause in 18th century treaties of peace and friendship between two Mi'kmaq communities and colonial officials in Nova Scotia does not create a treaty right to harvest trees for the purpose of sale. Six years earlier the Court, in *Marshall 1*[2] and *Marshall 2*,[3] had held that the same "truckhouse" clause created a treaty right to catch fish for the purpose of sale. On both occasions, the Supreme Court reversed the decisions of provincial Courts of Appeal which initially construed the treaty right too narrowly and then, in reliance on *Marshall 1*, construed the treaty right too broadly. These decisions reset the framework for negotiations between the Mi'kmaq and Maliseet peoples and the governments of Canada and the three Maritime Provinces. The decision of the New Brunswick Court of Appeal in *Bernard*,[4] particularly on the aboriginal title issue, awakened a pressing interest by government in furthering negotiations. The Supreme Court decision has relieved that pressure but the needs and aspirations of the Mi'kmaq and Maliseet peoples must be addressed. To date, negotiations have been sporadic; there is much work to be done.

The reasons for decision of the trial courts, the summary conviction appeal courts, and the Courts of Appeal in the two matters that were joined in the Supreme Court as *Marshall and Bernard* present a case study in the common law method. At all levels of courts, including the Supreme Court, judges sought to divine the true meaning of *Marshall 1* as supplemented by *Marshall 2*; in particular, whether the treaty right to harvest for commercial purposes applies to those resources and products gathered in the 18th century Mi'kmaq economy or only to those resources and products actually traded by the Mi'kmaq in the non-aboriginal economy. In this effort, the courts seemingly used the historical record to justify a conclusion rather than as the means to reach a conclusion. This method may undermine confidence in litigation as the principal means

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[1] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 [*Marshall and Bernard*].

[2] *R. v. Marshall*, [1999] 3 S.C.R. 456 [*Marshall 1*].

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

[4] *Bernard v. The Queen* (2003), 262 N.B.R. (2d) 1 (C.A.); (2001), 239 N.B.R. (2d) 173 (Q.B.) and [2000] N.B.J. No. 138 (Prov. Ct.) (QL).

to resolve aboriginal rights issues and lead to direct negotiations through a treaty table.

The particular significance of *Marshall and Bernard* lies not only in the definition it provides to the scope of the commercial harvesting right of the 18th century peace and friendship treaties but in its clarification of the Court's understanding of the nature of aboriginal title in Canadian constitutional law. This comment is intended to address some of the key points pertaining to the Court's treatment of treaty rights issues so I leave aboriginal title to the more than able treatment of that subject by other contributors to this series of comments. With that caveat, this comment focuses on the judicial treatment of the treaty right; the meaning of the "moderate livelihood" limitation on the commercial exercise of treaty rights; and the identification of treaty rights beneficiaries.

The Treaty Right

In thirty brief paragraphs devoted to the treaty rights issue, McLachlin C.J.C., for the majority in *Marshall and Bernard*, revisited the scope of the treaty right created by the truckhouse clause as interpreted in the Court's earlier decisions in *Marshall 1* and *Marshall 2*.[5] Those decisions did not require the Court to determine definitively the scope of the trade right because the historians who testified as expert witnesses for both sides in *Marshall 1* had agreed that, if the treaty right existed, it included the harvest and sale of fish (in that instance, eels). The Court found the treaty right to be "existing" within the meaning of the *Constitution Act, 1982*, s. 35 and found in the 1760 treaty negotiations an internal limitation on the exercise of that right. The Maliseet negotiators for the initial treaty had asked for a truckhouse where the Maliseet could more conveniently trade for "necessaries", a word which the Court interpreted to limit the trading right (and the implicit harvesting right linked to it) to the achievement of a "moderate livelihood."[6]

In *Marshall and Bernard*, the historians again agreed on the basic facts regarding resource use. They essentially agreed that 18th century Mi'kmaq had not

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[5] Of the seven members of the Court who participated in *Marshall and Bernard*, only McLachlin C.J.C. had participated in *Marshall 1* (in dissent). Binnie J. is the only other member of the Court at the time of *Bernard and Marshall* who had participated in *Marshall 1*; he did not participate in *Bernard and Marshall*. The truckhouse clause reads:

> And I do further promise for myself and my tribe that we will not either directly nor indirectly assist any of the enemies of His most sacred Majesty King George the Second, his heirs or Successors, nor hold any manner of Commerce traffick nor intercourse with them, but on the contrary will as much as may be in our power discover and make known to His Majesty's Governor, any ill designs which may be formed or contrived against His Majesty's subjects. 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 Acadia.

[6] In *Marshall 1*, *supra* note 2 at para. 59, referring to Lambert J.A., in *R. v. Van der Peet* (1993), 80 B.C.L.R. (2d) 75 at 126.

engaged in the commercial harvest of trees for sale to British colonists in Nova Scotia (an activity which the Mi'kmaq did not undertake until well after the treaty period). The historians also agreed that the Mi'kmaq had made items such as "bows from maple, arrows from cedar, birch bark baskets, canoes of birch bark ... lances, spears and dishes all made with a variety of wood products" as well as snowshoes and toboggans[7] and that such derivative items were the objects of occasional trade with the colonists incidental to the main trade in furs. Given this state of the trial record, the trial and summary conviction courts in Nova Scotia and New Brunswick essentially differed from their respective Courts of Appeal on whether modern commercial logging is a logical evolution of historical Mi'kmaq resource activity. The trial and summary conviction courts held that it was not and the Supreme Court agreed.

McLachlin C.J.C. summarized *Marshall 1* as interpreting the truckhouse clause as a British promise that the Mi'kmaq "would be allowed to engage in traditional trade activities so as to obtain a moderate livelihood from the land and sea."[8] With that simple introductory statement, the treaty right issue in *Marshall and Bernard* was decided. The 1760-61 treaties protected only those *trade activities* contemplated by the treaty parties and, because the Mi'kmaq did not harvest trees for sale as trees or logs, the modern activity of commercial logging could not fit within the contemplated scope of the treaty right. McLachlin C.J.C. rejected the argument of the Mi'kmaq respondents that the scope of the treaty right was defined by what was traditionally gathered in the 18th century Mi'kmaq lifestyle and economy. She emphasized the significance of the truckhouse clause as a trade clause; that, by 1760-61, the Mi'kmaq and Europeans had been trading for 250 years; that the British sought to replace the French with exclusive trading rights with the Mi'kmaq; and that "the truckhouse clause was concerned with traditionally traded products."[9] McLachlin C.J.C. reinforced the logic of her reasoning with the wording of the clause itself:

> The Mi'kmaq affirmed "that we will not 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." Nothing in these words comports a general right to harvest or gather natural resources then used.[10] ...
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> This is consistent with the assertion in *Marshall 2* that the fundamental issue is whether trade in a particular commodity 'was in the contemplation of [the] parties to the 1760 treaty' (para. 20). It is also consistent with the reference in *Marshall 2* to treaty rights to "the type of things traditionally 'gathered' by the Mi'kmaq in a 1760

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[7] *Ibid.*

[8] *Marshall and Bernard, supra* note 1 at para. 10.

[9] *Ibid.* at paras. 18-19.

[10] *Ibid.* at para. 20.

aboriginal lifestyle" (para. 20) like "fruits and berries" (para. 19).[11]

Turning her attention to the logical evolution aspect of aboriginal treaty rights interpretation, McLachlin C.J.C. restricted its application to the historical activity and not the specific resources. As she stated, "the activity must be essentially the same" though exercised by modern means in a modern economy.[12] In the instant matter, the trial judges in *Marshall* and in *Bernard* found on the evidence that 18th century Mi'kmaq did not trade in logs or similar forest products so that modern logging could not be a logical evolution of such activity. McLachlin C.J.C. also noted that the evidence in *Bernard* did not "suggest that the British ever contemplated trade in anything but traditionally produced products, like fur or fish."[13]

There are several critical points to make about these majority reasons.

First, McLachlin C.J.C. grounded her analysis in the majority reasoning of Binnie J. in *Marshall 1* and *Marshall 2* rather than on the trial record of either matter under appeal (other than her conclusion from the evidence in *Bernard*). As noted above, the parties in *Marshall 1* focused on the existence or not of the treaty right rather than on the scope of that right (because of the common position that the treaty right, if it existed, included the right to trade fish) and the Court did not have to determine definitively the scope of the right. In relying on *Marshall 1* and *Marshall 2*, McLachlin C.J.C. undertook the same exercise that bedevilled the courts in New Brunswick and Nova Scotia in seeking answers in the Delphic words of Binnie J. But McLachlin C.J.C. had the distinct advantage of merely declaring the divined answers. Considering the limited focus of the parties in *Marshall 1* and the fact driven nature of aboriginal rights, aboriginal treaty rights and aboriginal title litigation, it is somewhat anomalous to rely upon a previous judicial interpretation of a treaty clause when that interpretation was not itself fully grounded in the evidentiary record. Indeed, the Mi'kmaq defendants had argued that various conclusions drawn from *Marshall 1* and *Marshall 2* were based on *obiter dicta* but the courts rejected such characterization of the considered opinion of the Supreme Court.[14]

Second, McLachlin C.J.C.'s literal reading of the truckhouse clause illustrates the interpretive approach of the pre-*Marshall 1* era when the trial and appeal courts in that case relied upon the literal negative wording of the truckhouse clause as limiting Mi'kmaq trading rather than as supporting any positive right to trade. It also mirrors her own dissent in *Marshall 1* when she construed the truckhouse clause as not conferring a

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[11] *Ibid.* at para. 24.

[12] *Ibid.* at para. 25.

[13] *Ibid.* at para. 33.

[14] See *R. v. Sellars*, [1980] 1 S.C.R. 527 wherein Chouinard J. quoted with approval Robertson C.J.O. in *Ottawa v. Nepean Township et al.*, [1943] 3 D.L.R. 802 at 804: "What was there said may be *obiter*, but it was the considered opinion of the Supreme Court of Canada, and we should respect it and follow it even if we are not strictly bound by it."

general right to trade.[15] To focus narrowly on the wording of the treaty clause without considering evidence of historical context to determine the common intention of the parties is to give greater weight to the understanding and purpose of the drafter of the treaty, the British colonial officials, than to the Mi'kmaq understanding of their promises. In *Marshall 1*, Binnie J. expressed consciousness of the limitations inherent in the use of historical evidence to determine the intentions of the parties to a treaty process[16] and outlined the rules governing the admissibility of extrinsic evidence to aid in treaty interpretation: (1) in general, to prove the historical and cultural context of a treaty; (2) to prove that the written treaty does not contain all the negotiated terms; and (3) to ascertain the complete terms of a treaty which had been concluded orally and then put in written form by the representatives of the Crown.[17] The parties in *Marshall 1* and *Marshall and Bernard* presented extensive historical evidence at trial (documents and the testimony of historians qualified as expert witnesses) to support their respective positions that the historical record either supported or negated the claimed treaty right. McLachlin C.J.C.'s failure to justify each particular of the judicial reasoning process by reference to this wealth of material is troubling and is an invitation to further litigation and judicial divination.

Third, McLachlin C.J.C. effectively reads the truckhouse clause as if it read "we will not traffick ... any Commodities that we have not traditionally traded." Surely consideration of the purpose underlying the treaty clause, that is, to promote peace and to maintain the Mi'kmaq lifestyle and economic self-sufficiency, and consideration of the evidence of occasional trade in products derived from natural resources, such as baskets, toboggans, snowshoes and canoes, suggests strongly that an internal limitation to items traditionally traded is too narrow. Such a reading fails to give sufficient weight to the reality that trade between individual Mi'kmaq and colonists followed the basic principles of supply and demand and that these principles would indicate a focus on what resources the Mi'kmaq accessed and therefore had available for trade.

Fourth, McLachlin C.J.C. ignores the use of the word "Commodities" in the truckhouse clause and the relationship of that word to the evidence of the items traded by 18th century Mi'kmaq which were neither fish nor pelts. Such items would include the baskets, toboggans, and other wooden items mentioned above.[18]

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[15] *Marshall 1*, *supra* note 2 at para. 87.

[16] Binnie J. was particularly mindful of criticism by professional historians on the use of history in Canadian aboriginal rights jurisprudence – criticism he characterized as at times "intemperate". *Ibid.* at para. 37.

[17] *Ibid.* at paras. 10-12. Binnie J. quoted Cory J. in *R v. Badger*, [1996] 1 S.C.R. 771 at para. 52: "when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement..." In dissent, McLachlin J (as she was then) discussed nine principles applicable to treaty interpretation at paras. 78-83.

[18] Paragraph 31 in *Marshall 1*, *supra* note 2, regarding the evidence of the barter schedule negotiated by the parties to the 23 February 1760 treaty with the Maliseet and Passamaquoddy is ambiguous in its use of the word "merchandise". Binnie J. used the word to describe various items of peltry and then referred to the barter schedule as providing that one pound of spring beaver would purchase 30 pounds of flour and 14 pounds of pork. Binnie J. stated that the British incorporated the negotiated list into an Order in Council dated 23

Fifth, paragraph 20 in *Marshall 2*, referred to in the passage from *Marshall and Bernard* quoted above, does not necessarily support the consistency claim made by McLachlin C.J.C. In that paragraph, Binnie J. discussed the limited scope of the Court's decision in *Marshall 1*. He noted:

> No evidence was drawn to our attention, nor was any argument made in the course of this appeal, that trade in logging or minerals, or the exploitation of off-shore natural gas deposits, was in the contemplation of either or both parties to the 1760 treaty; nor was the argument made that exploitation of such resources could be considered a logical evolution of treaty rights to fish and wildlife or to the type of things traditionally "gathered" by the Mi'kmaq in a 1760 aboriginal lifestyle.

He further stated that it would be open to future claimants to assert and prove that the 1760 treaty encompassed such rights, stressing that those types of resources were simply not addressed by the parties in *Marshall 1*. It is this paragraph that justices in both the New Brunswick and Nova Scotia Courts of Appeal cited in support of a broader interpretation of the treaty right; a right that is limited not to items historically traded, but historically gathered. In his concurring reasons, LeBel J. (for himself and Fish J.) referred to *Marshall 2* as supporting a gathering-centred approach to the treaty right.[19]

Sixth, the activity restriction of the logical evolution test is consistent with the activity centred application in cases such as *Sparrow*.[20] In his concurring reasons, LeBel J. gave a slightly different expression to the logical evolution element than that expressed by McLachlin C.J.C. by stating that the "modern activity must bear some relation to the traditional use of forest products in the Mi'kmaq economy."[21]

In *Bernard*, Daigle J.A. applied the logical evolution test to the evidence of 18th century Mi'kmaq gathering practices to find that the treaty right included the modern commercial harvesting of logs. He rejected the argued distinction between the harvesting of logs and the gathering of tree parts for the uses identified in the evidence (put more bluntly, the distinction between the act of cutting down a tree and the act of gathering branches and other tree parts from a standing tree or gathering those that had

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February 1760 which provided "[t]hat the Prizes of all other kinds of Merchandize not mention'd herein be Regulated according to the Rates of the Foregoing articles." It is not clear if the word "Merchandize" referred to the items traded by the Maliseet and Passamaquoddy or by the British. If it is the former meaning, then the order in council contemplates a broader selection of trade items by the Maliseet and Passamaquoddy and, by extension, the Mi'kmaq.

[19] *Marshall and Bernard, supra* note 1 at para. 116: "In *Marshall 2*, the court emphasized that only those types of resources traditionally gathered in the Mi'kmaq economy... would reasonably have been in contemplation of the parties to the treaties." (at paras. 19-20)

[20] *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

[21] *Marshall and Bernard, supra* note 1 at paras. 113, 117 and 125.

already fallen). Daigle J.A. considered modern commercial logging as logically evolved from the harvesting of spruce for wigwam construction.[22] Robertson J.A. interpreted *Marshall 2* to restrict application of the logical evolution test to resources not traditionally gathered in the 18th century Mi'kmaq lifestyle and economy. Resources traditionally gathered would have been in the contemplation of the treaty parties and the logical evolution test would determine whether modern gathering of resources not traditionally gathered represents a logical evolution of the resources traditionally gathered.[23] That the Mi'kmaq had "occasionally" traded wood products provided, for Robertson J.A., the foundation from which the larger commercial logging operation evolved as a protected treaty right. In *Marshall*,[24] Cromwell J.A. (as had Daigle J.A. in *Bernard*) stressed the functional role of the logical evolution test to support the Mi'kmaq lifestyle and economy. In this appreciation of the treaty right, both the resource and the activity are considered as well as the logical evolution from the traditionally gathered resources and the traditional modes of hunting, fishing and gathering. For Cromwell J.A., it is not appropriate to focus solely on whether specific products were either traded at the time of the treaty or were in the contemplation of the parties to the treaty.[25] Indeed, whether a specific item or resource was traded is not a pertinent factor in this approach. As mentioned, McLachlin C.J.C. rejected these approaches to the concept of logical evolution by limiting its application to the specific activity in issue.

Seventh, recognition of an internal limitation such that the treaty right applies to traditionally traded items (and presumably items within reasonable contemplation of the parties to the treaty) is a less generous reading of the treaty right and fundamentally at odds with the purpose of the truckhouse clause as identified in *Marshall 1* of ensuring continuation of peace and aboriginal self-sufficiency in terms of the Mi'kmaq lifestyle and economy. A focus on resources historically hunted, fished and gathered is immediately more consistent with that purpose.

In *Bernard*, Daigle J.A. agreed with Robertson J.A. that *Marshall 1* and *Marshall 2* did not limit the treaty trade right to items that had been both gathered in the traditional Mi'kmaq lifestyle and economy and traded with the British. Detailed analysis of the earlier *Marshall* decisions led Robertson J.A. to reject such a narrow approach for three reasons: (1) the "gathered and traded" limitation is incompatible with the spirit of those decisions; (2) *Marshall 2* did not express the "traded" limitation; and (3) such a limitation would essentially equate the treaty right to an aboriginal right to harvest and trade logs (i.e. integral to Mi'kmaq society at the time of contact with

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[22] *Bernard* (CA), *supra* note 4 at para. 202 (Daigle J.A.).

[23] *Ibid.* at para. 141 (Robertson J.A.).

[24] *R v. Marshall* (2003), 218 N.S.R. (2d) 78 (C.A.); (2002), 202 N.S.R. (2d) 42 (Sup. Ct.); and (2001), 191 N.S.R. (2d) 323 (Prov. Ct.) [*Marshall (logging)*].

[25] *Ibid.* at paras. 58-59. Cromwell J.A. summarized his position at para. 59: "...the relevant treaty right consists of the right to trade the fruits of the traditional 1760s Mi'kmaq gathering lifestyle and economy, remembering that both the resource and gathering itself may evolve. It is not necessary... to show that trade in the specific resource was contemplated at the time of the treaties."

Europeans though with the time period shifted to the time of the treaty).[26] The Nova Scotia Court of Appeal in *Marshall* took a different approach to the scope of the treaty right based on a close reading of *Marshall 1* and *Marshall 2*. Like Daigle J.A. in *Bernard*, Cromwell, J.A., for the majority, emphasized that the underlying purpose of the treaty trade right was to ensure "ongoing access to the fruits of the traditional Mi'kmaq lifestyle and economy for sustenance through trade."[27]

Eighth, the scope of the treaty right in terms of what was traded historically and what was in the contemplation of the parties is a question of fact so that the findings in *Marshall and Bernard* are not necessarily determinative for future litigation on the same clause.

The evidence tendered by the parties to any litigation is always tempered by the relevance factor. For example, in *Bernard*, the identification of trade items other than furs "received very little attention" at trial.[28] The historical evidence presented by the parties led the trial judge to conclude that 18th century Mi'kmaq-British trade was primarily fur oriented and that the Mi'kmaq harvested trees to serve their personal lifestyle needs with some derivative products being "occasionally traded with the British."[29] The evidence did not support any finding that trees were harvested and traded as logs by the Mi'kmaq and the trial judge concluded that trade in logs was not within the contemplation of the treaty parties and did not represent a logical evolution of the protected activities. Historical findings in relation to one treaty community, however, should not be extended to all treaty communities, particularly in relation to natural resource use. That historical evidence may vary in its details is well illustrated by a comparison of the evidence of Mi'kmaq forest harvesting as reflected in *Marshall and Bernard* with the evidence of Maliseet forest harvesting considered in *R. v. Sappier*[30] which the New Brunswick Court of Appeal accepted as sufficient to justify recognition of an *aboriginal right* to "harvest trees for personal use."

The 1760-61 treaties with the Mi'kmaq communities in *Marshall and Bernard* were negotiated more than three decades after the 1725-26 treaty relied on in *R. v. Sappier*. The later treaties were modelled on the treaty of 23 February 1760, the negotiations for which informed the Court's interpretation of the treaty at issue in *Marshall 1*. That treaty with representatives of the St. John's (Maliseet) and Passamaquoddy Indians expressly referred in its first preambular paragraph to the Boston treaty of 1725 (Dummer's Treaty) and then reproduced each of its articles, followed by each article of an 1749 renewal treaty. A reading of the successive treaties

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[26] *Bernard* (C.A.), *supra* note 4, at paras. 145-47 (Robertson J.A.).

[27] *Marshall (logging)* (C.A.), *supra* note 24 at paras. 55-56.

[28] *Bernard* (C.A.), *supra* note 4 at para. 147 quoted by Robertson J.A. (for ease of reference).

[29] *Ibid.*

[30] (2004), 242 D.L.R. (4th) 433. Leave to appeal to the Supreme Court granted 21 July 2005 (see [2004] SCCA No. 415). See also *R. v. Gray*, [2004] NBCA 57 also on appeal to the Supreme Court (see [2004] SCCA No. 416).

and the repeated reaffirmation of the 1725 Boston treaty serves as a Mi'kmaq, Maliseet and Passamaquoddy version of the covenant chain device of the New York treaties with various First Nation communities.[31] The covenant chain served as a reminder of past agreements and a commitment to peaceful coexistence. The evidence in *Marshall 1* indicated that the colonial officials read the 1760 Maliseet and Passamaquoddy treaty to the Mi'kmaq negotiators and then offered a treaty on the same terms. The 1725 and 1749 treaties do not contain more generous trade clauses than the 1760 treaty but the 1752 Mi'kmaq treaty with Governor Hopson does. It states: "the said Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell..." In *Marshall 1*, McLachlin J. (as she then was) in dissent disregarded the argued significance of this treaty as an influence on Mi'kmaq understanding of the 1760-61 treaties because the new treaties "completely displaced" the 1752 treaty and "the different wording of the two treaties cannot be supposed to have gone unperceived by the parties."[32] With respect, this is hardly a basis upon which to determine constitutional rights. The point here is the same as in the first comment above, that significant conclusions should be grounded in the evidentiary record rather than on surmises. To use an expression from another legal category, there should be an articulable cause.[33]

Finally, in relation to the treaty right, the end result is probably unassailable regardless of perceived deficiencies in the justification of the legal analysis in *Marshall and Bernard*. A stand of trees suitable for commercial logging is a special thing. It is not random but rather determined by economics. The value of the logs at delivery must exceed the costs of harvesting and transportation and be compared with the opportunity costs of pursuing some other activity for financial gain. In this perspective, commercial logging is not a logical evolution of the gathering of smaller trees and branches, either living or already fallen naturally, for wigwam construction or to make wooden items for personal use and occasional sale. Logging concerns the whole tree trunk. On the evidence, that is not a resource gathered by 18th century Mi'kmaq.[34]

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[31] See for example, Document 50 "The Great Treaty of 1722 Between the Five Nations, the Mahicans, and the Colonies of New York, Virginia, and Pennsylvania" in B. Graymont and A.T. Vaughan, *Early American Indian Documents: Treaties and Laws, 1607-1789*, Vol. IX (Washington, D.C: University Publications of America, 1985) at 113 (in particular).

[32] *Marshall 1*, *supra* note 2 at para. 105.

[33] At trial in *R v. Marshall (Marshall 1)*, [1996] N.S.J. No. 246 Judge Embree discussed the context and language of the negotiations (French with the Maliseet and Passamaquoddy and English with the Mi'kmaq) and that the difference in wording was noticeable. But Judge Embree relied upon the actual wording of the treaty rather than its underlying values so his analysis invites reconsideration.

[34] *Lac Courte Oreilles Band of Chippewa Indians v. Wisconsin*, 758 F.Supp. 1262 (Dist. Ct. 1991) at 1268 and 1270: "... commercial timber is a unique and specific object of harvesting. Harvesters of commercial timber look for a collection of trees of a size, quality and density that make them valuable to harvest. This is not what the Chippewa harvesters were interested in exploiting at treaty time. They were seeking particular trees for their unique characteristics, for example, the gum of the balsam or the roots of the jack pine. They did not harvest trees for use as logs or for saw boards."

Moderate Livelihood

In *Marshall 1*, Binnie J. found the treaty right to commercial harvesting subject, in its exercise, to the internal limit of a "moderate livelihood." He credited this expression to Lambert J.A. in *Van der Peet*, and clarified its meaning, explaining that it "includes such basics as 'food, clothing and housing supplemented by a few amenities', but not the accumulation of wealth."[35] *Marshall and Bernard* does not illuminate this concept further.

The "moderate livelihood" concept did not originate with Lambert J.A. in *Van der Peet*. He found the phrase in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*,[36] a 1979 decision of the United States Supreme Court which proved significant in Wisconsin litigation spanning the decade of the 1980s concerning the Lac Courte Oreille Band of Chippewa Indians, the *LCO* cases.[37] In that series, commencing in 1983, the LCO band successfully challenged the validity of an 1850 order issued by President Zachary Taylor that the Chippewa be removed from lands in the state, and thereby reasserted rights arising from treaties of 1837 and 1842. Through a number of decisions, the federal courts in Wisconsin defined the parameters of an existing right of the Chippewa to make a "moderate living" from hunting, fishing and gathering activities and in related trading. That right did not include the right to engage in commercial logging because, as explained above, given the distinct nature of stands of trees suitable for commercial harvesting, the Chippewa did not harvest logs at the time of the treaties. Adopting a resource centred approach to the treaty rights, the series includes a decision on natural resource access in which 21 mammals, 9 birds, 11 fish and 236 plants are listed as resources utilized within the Chippewa lifestyle and economy at the time of the treaties and thus protected by the treaty harvesting right.[38]

The economic implications of the moderate livelihood concept is fully discussed in *LCO V*.[39] The court associated the concept with "zero savings level of income" calculated on the basis of the consumer unit or household income. Statistics Canada uses similar calculators to assess low income levels in Canadian society. The most recently developed calculator is the "market basket measure" (MBM) which "attempts to identify a standard of living lying between the poles of subsistence and social inclusion ... allowing for the acquisition of resources necessary for taking part in the life of the community."[40] The measure is intended to reflect the cost of food,

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[35] *Marshall 1*, *supra* note 2 at para 59, quoting *R. v. Gladstone*, [1996] 2 S.C.R. 72, at para. 165.

[36] 99 S.Ct. 3055 (1979). Lambert J.A. also referred to *United States v, Michigan*, 471 F.Supp. 192 (U.S. Dist. Ct. 1979).

[37] See generally J. P. McEvoy, "*Marshall v. Canada*: Lessons From Wisconsin" (2000), 12 N.J.C.L. 85.

[38] *Lac Courte Oreilles Band of Chippewa Indians v. Wisconsin (LCO III)*, 653 F.Supp. 1420 at 1426-27 (1987).

[39] *Lac Courte Oreilles Band of Chippewa Indians v. Wisconsin (LCO V)*, 686 F.Supp. 226 (1988).

[40] P. Giles, *Low Income Measurement in Canada* (Ottawa: Statistics Canada, 2004) at 15.

clothing, housing, transportation and other necessary goods and services calculated for the nuclear family of two adults and two children in different locations (urban and rural) in all provinces. For 2000, the only year for which this calculation is available, the MBM value for New Brunswick is set at $24,299 for rural areas and $24,632 for urban areas with less than 30,000 persons; the MBM for Fredericton is $23,940.[41]

It is therefore possible to calculate for each Mi'kmaq and Maliseet community the total value of natural resource harvesting (including the value-added of derivative products) achievable through the exercise of existing aboriginal rights and aboriginal treaty rights. The rights are collective with each treaty community and exercised individually so community regulation of these rights is important to ensure that all rights beneficiaries actually benefit. The disconnect between the expectation interests of individual community members and the limited economic value of aboriginal rights and aboriginal treaty rights is problematic for the community itself as regulator and for the broader society and its government as regulators as well. It will be difficult to explain to individual harvesters that the constitutionally protected right has financial limits to its exercise. That the expectation interest is very high is evident to those who have been privileged to attend public discussions of aboriginal legal issues where, invariably, an individual will assert the treaty right, for example, to fish for lobster to gain the full income of the average lobster fisher, usually stated as exceeding $100,000. It will also be difficult for individuals to accept an income limit on all of their harvesting activities and to accept that one cannot evade the limit by engaging in different harvesting activities in different seasons. More significant, however, is the impact on the harmony of the Mi'kmaq and Maliseet communities when they seek by regulation to ensure the collective enjoyment of the benefits of collective rights.

Rights Beneficiaries

The critical word in subsection 35(2) of the *Constitution Act, 1982* is "includes." It indicates that the enumeration of the three subsets under the phrase "aboriginal peoples of Canada" is not exhaustive. Accordingly, non-status aboriginal persons may also be recognized as "aboriginal" for purposes of section 35 rights. In the context of subsection 35(2), the descriptive word "aboriginal" must be distinguished from the word "Indian" and its interpretation for the purposes of the *Constitution Act, 1867*, s. 91(24), "Indians and Lands Reserved for Indians." Parliament must be able to define who is included in the term "Indian" for the purpose of its exercise of legislative jurisdiction and has done so through the *Indian Act*.[42] But neither an under-inclusive nor an over-inclusive

[41] *Ibid.* at 17. The other two measures are (a) the "low income cutoff" (LICO) which focuses on the relationship between after tax income and the costs of food, clothing and shelter for seven sizes of family unit in five residence categories and (b) the low income measure (LIM) which differentiates the basic needs of each person in the household based on age and applies an equivalency factor to the after tax adjusted income spent on basic needs for one adult. For the year 2000, the LICO for a four person family in an urban area with a population of less than 30,000 is $22,100 and in an urban area with a population between 30,000 and 99,999, it is $24,186. The year 2000 LIM for the family unit of two adults and two children is $24,936. *Ibid.* at 10-14.

[42] R.S.C. 1985, c. I-5, s. 5 *et seq.* The *Indian Act* expressly excludes the Inuit people from its operation and is silent in relation to the Métis people and other non-status aboriginal persons.

definition established by Parliament can be controlling for constitutional purposes.

Recent litigation has been directed at identifying the rights beneficiaries in New Brunswick. The courts' approach to treaty rights requires that a claimant who is non-status for the purposes of the *Indian Act* must establish lineal descent from a treaty rights beneficiary and a substantial connection to the treaty community, Mi'kmaq or Maliseet.[43] This requirement raises questions about whether a person who is not accepted as a member by the treaty community should be recognized as a beneficiary of a collective treaty right. It may be that the treaty beneficiary community has itself split into different identifiable groups with each group enjoying the same treaty rights as the root treaty community. In this context, the substantial connection requirement serves to limit the pool of potential treaty beneficiaries. This is a significant limitation for those individuals who self-identify and are accepted as members by such organizations as the Aboriginal Peoples Council (representing non-status and off-reserve persons with an ancestor with Indian status as of 1867) but who are not accepted as members by the treaty community. Such individuals, without a substantial connection to the community, would be excluded from treaty rights under the present test.

Some claimants have asserted Métis rights. In general, it is primarily culture that sets the Métis apart from other Aboriginal peoples. Many Canadians have mixed aboriginal/non-aboriginal ancestry, but that does not make them Métis or even aboriginal. Some of them identify themselves as First Nations persons or Inuit, some as Métis and some as non-aboriginal. What distinguishes Métis people from everyone else is that they associate themselves with a culture that is distinctly Métis. The Royal Commission on Aboriginal Peoples[44] (RCAP) recognized the historical reality of the Métis Nation of Western Canada – its unique culture associated with resource use and "the unique Métis language, Michif." The Royal Commission, however, recognized that communities and cultures other than the Métis Nation may also be considered Métis and that application of the term "Métis" to such communities is of recent origin. The RCAP approach is supported by the Supreme Court decision in *Powley*.[45] The Supreme Court rejected the view that all persons of "mixed Indian and European heritage" are Métis and limited application of the term to "distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forbears."[46] In New Brunswick, defendants have yet to satisfy the three element *Powley* indicia to determine aboriginal identity as Métis, *viz.* self-identification, community acceptance and ancestral connection.[47] But that does not foreclose the future acceptance of non-Indian aboriginal

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[43] *R v. Fowler* (1993), 134 N.B.R. (2d) (Prov. Ct.).

[44] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4 (Ottawa: Canada Communications Group, 1996) at 201-02.

[45] *R. v. Powley*, [2003] 2 S.C.R. 207.

[46] *Ibid.* at para. 10.

[47] *R v. Harquail* (1993), 144 N.B.R. (2d) 146 (Prov. Ct.); *R v. Chiasson* (2001), 239 N.B.R. (2d) 1 (Prov. Ct); *R. v. Castonguay* (2003), 265 N.B.R. (2d) 105 (Q.B.); *R. v. Chiasson* (2004), 270 N.B.R. (2d) 357 (Q.B.); and

communities in New Brunswick, communities which may then exercise appropriate aboriginal rights but not historical aboriginal treaty rights.

Consideration of treaty beneficiaries, even in such a cursory manner as at present, would be particularly incomplete without mention of the Passamaquoddy Indians. Recall that the 23 February 1760 treaty upon which the subsequent Mi'kmaq treaties were modelled was negotiated with Maliseet and Passamaquoddy representatives. Notwithstanding their participation in the treaty process of 1760 and in previous treaties, the Passamaquoddy are not today recognized as a nation with treaty or other aboriginal rights in New Brunswick. The traditional Passamaquoddy territory, Qonasqamkuk, encompassed large areas on both sides of the St. Croix River which in 1842 became the international border between Canada and the United States, between New Brunswick and Maine. Today, the Passamaquoddy seek to reassert their rights in relation to traditional lands in and around the town of St. Andrews by the Sea, where they claim to exist as the St. Croix Schoodic Band, Passamaquoddy Tribe.[48]

Aboriginal rights, aboriginal title and aboriginal treaty rights are collective rights. If the collectivity effectively and voluntarily abandoned those rights, it is difficult to comprehend how such rights can be reasserted 200 years later. The Passamaquoddy, as a nation, entered into a treaty relationship with the then state of Massachusetts in 1794 and literally moved to lands allotted to them in the modern state of Maine, lands which they have occupied ever since. This was not an isolated act; in 1777, the Passamaquoddy chose to support the colonies in their revolution against Britain. In effect, the Passamaquoddy as a recognized nation abandoned their treaty allegiance to the Crown and then abandoned their lands within the territory of that Crown.[49]

R v. Daigle (2004), 271 N.B.R. (2d) 382 (Q.B.).

[48] See: <http://www.wabanaki.com/stolen_land.htm>. The family history of some band members is recounted in *St. Andrews v. Lecky* (1993), 133 N.B.R. (2d) 14 (T.D.), Jones J.

[49] The history of the Passamaquoddy is recounted in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 at 373-74 (Me. C.A. 1975):

> In 1777, the Tribe pledged its support to the American Colonies during the Revolutionary War in exchange for promises by John Allan, Indian agent of the Continental Congress, that the Tribe would be given ammunition for hunting, protection for their game and hunting grounds, regulation of trade to prevent imposition, the exclusive right to hunt beaver, the free exercise of religion, and a clergyman. In addition, an agent would be appointed for their protection and support in time of need. Allan, as Superintendent of the Eastern Indian Agency, reported to the federal government on several occasions in 1783 and 1784 that the Passamaquoddy Tribe had greatly assisted the revolutionary cause and urged Congress to fulfill these promises made on the Government's behalf.
>
> (...)
>
> In 1792, the Passamaquoddy Tribe petitioned Massachusetts for land upon which to settle, and Massachusetts appointed a committee to investigate, one member of which was the same John Allan. Allan reported that during the Revolutionary War the Passamaquoddy Tribe had given up its claims to lands known to be its haunts on the condition that the United States would confirm its "ancient spots of ground" and a

Abandonment has been recognized as a valid form of extinguishment of aboriginal rights.[50] Individual claimants would perhaps be better served to assert Maliseet heritage.[51]

Conclusion

Ultimately, *Marshall and Bernard* serves as a reminder that the critical concept in aboriginal title, aboriginal rights and aboriginal treaty rights is "aboriginal" and that the constitutional guarantee of such rights are the starting point of aboriginal participation in the broader Canadian society rather than its limit. The treaty right to engage in commercial harvesting of natural resources is defined by the aboriginal lifestyle and economy of at the time of the treaty. The concept of aboriginal title is defined by the aboriginal connection to the land. "Aboriginal" is the defining characteristic and it relates to the historical culture, lifestyle, traditions and distinctive activities of a people within a territory. In contemporary society, aboriginal constitutional rights are not maximums but minimums. They serve to guarantee continuation of the aboriginal quality to the life of a people. If a harvester wishes to harvest more in value than the standard of a moderate livelihood, that harvester can do so, not through the exercise of a constitutional right, but through conformity to the regulation of that activity applicable to the non-aboriginal community. As the Supreme Court has stated more than once,[52] the purpose of recognizing the panoply of aboriginal rights is to reconcile the fact of prior occupation of the continent with the sovereignty of the modern Canadian state, including the aboriginal peoples themselves.

The courts have repeatedly called on the parties to negotiate rather than litigate – in other words, to use the historic treaties as the basis for the creation of a modern treaty. Aboriginal peoples do not live in the past but in the present and for the future. Treaty renewal can occur if the resolve is present to undertake that task. It is time for a treaty table in New Brunswick. The reasons for decision in *Marshall and Bernard*, by stating conclusions without grounding those conclusions in the evidentiary record, may

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suitable tract for the use of both the Tribe and all other Indians who might resort there. Soon after, in 1794, Massachusetts entered into an agreement, also referred to as a treaty, with the Passamaquoddy Tribe by which the Tribe relinquished all its rights, title, interest, claims or demands of any lands within Massachusetts in exchange for a 23,000 acre tract comprising Township No. 2 in the first range, other smaller tracts, including ten acres at Pleasant-point, and the privilege of fishing on both branches of the Schoodic River. All pine trees fit for masts were reserved to the state government for a reasonable compensation. An additional ninety acres at Pleasant-point were later appropriated to the use of the Tribe by Massachusetts in 1801.

[50] *A.G. Ontario v. Bear Island Foundation*, [1985] 1 C.N.L.R. 1; aff'd, [1989] 2 C.N.L.R. 73 (Ont. C.A.) though without comment on this point. See also F.S. Cohen, *Handbook of Federal Indian Law* (1982 Ed.) (Charlottesville: Miche Bobbs-Merrill, 1982) at 493.

[51] In conversation with Maliseet elders, the Passamaquoddy are referred to as "cousins". The Passamaquoddy and Maliseet are often considered the same people occupying different river systems. For discussion, see B.J. Bourque, "Ethnicity on the Maritime Peninsula, 1600-1759" (1989), 36 Ethnohistory 257 at 268 *et seq.*

[52] E.g. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 43 per Lamer C.J.C.

serve to motivate the parties to begin that process. As LeBel J. concluded, in his separate reasons for decision, a summary conviction proceeding is not the appropriate forum in which to determine such issues.[53]

[53] *Marshall and Bernard, supra*, note 1, at para. 142-144 (Fish J. concurring).