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Leonard Rotman

University of Windsor

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Marshalling Principles From The
Marshall Morass

The Marshall case is the latest in a long series of Supreme Court of Canada decisions concerned with the interpretation of treaties between the Crown and aboriginal peoples in Canada. While the majority and minority judgments agreed on the principles of treaty interpretation to be applied in the case, the significant divergence in opinion between the majority and minority decisions provides important commentary on the differences between articulating and applying these principles. The Marshall case is also noteworthy for the manner in which it addresses similarities and differences pertaining to aboriginal and treaty rights. Because of these various traits, the Marshall case is a microcosm of the increasing legal complexity of Canadian aboriginal rights jurisprudence and the recent tendency of Canadian courts to engage in taxonomy rather than contextual analysis.

La décision Marshall est la plus récente d'une longue série de décisions de la Cour suprême axée sur l'interprétation des traités entre la Couronne et les peuples autochtones du Canada. Les décisions de la majorité et de la minorité expriment un point de vue commun quant aux principes en cause mais elles s'écartent considérablement lorsqu'il s'agit de définir les paramètres d'application de ces principes dans la pratique. La décision Marshall est également intéressante en raison des similitudes et des différences qu'elle fait ressortir dans le droit des autochtones et les droits issus des traités. Elle nous apparaît en quelque sorte comme un microcosme de la problématique de plus en plus complexe des droits des autochtones au Canada et illustre l'engouement récent des tribunaux pour la taxonomie au détriment de l'analyse contextuelle.

* B.A., LL.B., LL.M., S.J.D., of the Ontario Bar. Associate Professor, Faculty of Law, University of Windsor.
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.


The appellant’s position is that the truckhouse provision not only incorporated the alleged right to trade, but also the right to pursue traditional hunting, fishing and gathering activities in support of that trade. It seems clear that the words of the March 10, 1760 document, standing in isolation, do not support the appellant’s argument. The question is whether the underlying negotiations produced a broader agreement between the British and the Mi’kmaq, memorialized only in part by the Treaty of Peace and Friendship, that would protect the appellant’s activities that are the subject of the prosecution.


In determining the signatories’ respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.

Introduction

The judgment of the Supreme Court of Canada in R. v. Marshall generated significant criticism, both of the decision itself and the role of the Court. Some two months after the judgment was released, the Supreme Court, in a rather unusual move, issued a lengthy explanation and clarification of its judgment in Marshall in the context of dismissing an intervener’s motion for a rehearing of the Marshall appeal and stay of the existing Supreme Court judgment pending that rehearing. Between these two events, acts of violence towards aboriginal lobster fishers and the destruction of their equipment cast a gloomy cloud over the effects of the Marshall judgment and the more global issue of aboriginal access to natural resources.

Treaties, by their nature, are consensual agreements between the document’s signatories that indicate the terms of at least a part of the continuing relationship between them. The treaties that were in issue in Marshall are, in this regard, no different than the numerous treaties signed between the British Crown and aboriginal peoples across what is now Canada between the 17th and 20th centuries. What is it, then, that distinguishes the Marshall case from other recent Supreme Court judgments on the interpretation of treaties such as R. v. Sundown and R. v. Badger?

The media attention and the sometimes violent disputes over access to the lobster fishery (as well as over other natural resources such as timber) between aboriginals, non-aboriginal groups, and government provides one reason. Criticism of the majority judgment as creating law rather than interpreting or applying it is yet another. The primary purpose of the Supreme Court’s deliberations in the Marshall appeal was to provide a legal interpretation of the effects of the treaties in question in order to ascertain whether they provided a valid defence to the charges laid against Donald Marshall Jr. for harvesting eels out of season. However, in determining these points, the Marshall case addressed other key issues raised in recent Canadian aboriginal rights jurisprudence. These include the notion of incidental rights, as previously discussed in the aboriginal

5. For more discussion on this point, see L.I. Rotman, "'My Hovercraft is Full of Eels': Smoking Out the Message in R. v. Marshall" 63 Sask. L. Rev. [forthcoming in 2000].
6. While the treaties in question were the Mi'kmaq Treaties of 1760-1, the trial judge relied upon the March 10, 1760 treaty for its wording of the truckhouse clause that formed the basis of Marshall’s claim.
rights context in *R. v. Van der Peet* and in the treaty rights context in *Simon v. R.* and *Sundown*, and the justificatory regime for limiting aboriginal rights created in *R. v. Sparrow*, expanded upon in *R. v. Gladstone*, and applied to treaty rights in *Badger*. Thus, rather than being a simple case of treaty interpretation, *Marshall* is a microcosm of some of the most important recent determinations about the status of aboriginal and treaty rights in Canada.

I. **The Facts**

Marshall, a Mi'kmaq Indian and member of the Membertou First Nation, whose reserve is located near Sydney, Nova Scotia, went fishing for eels with a companion in Nova Scotia in 1993. While the act of fishing for eels is not noteworthy in itself, the fact that the individuals in question went fishing during closed season using illegal nets certainly was. After catching some 463 pounds of eels, they sold them for $787.10. Marshall did not possess a licence to fish, nor did he hold a licence to sell his catch. He was charged with fishing without a licence, selling eels without a licence, and fishing during closed season with prohibited nets. Marshall claimed that the charges were improperly laid, insofar as he was exercising a treaty right to harvest and to sell the eels.

Initially, Marshall relied upon the Mi'kmaq Treaty of 1752 as the basis for his defence. However, following the conclusion of the prosecution's case, the basis of his treaty claim shifted to the Mi'kmaq treaties of 1760-1. These treaties followed on the heels of similar treaties signed with the Maliseet and Passamaquody First Nations. One particular clause of these treaties, the "truckhouse clause," became the focus of his defence. This truckhouse clause, as reproduced in the Treaty of Peace and Friendship entered into by Governor Charles Lawrence and Paul Laurent, Chief of the LaHave tribe at Halifax on March 10, 1760, was held to be illustrative.

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13. As noted in J.Y. Henderson, "Mi'kmaq Tenure in Atlantic Canada" (1995) 18 Dal. L.J. 196 at 198, note 8, while there are many different spellings for the Mi'kmaq, he uses the official phonemic orthography of the Santé Mawiomi (Grand Council) of the Mi'kmaq. Thus, the word "Mikmaq" is singular and "Mikmaw" plural. In this article, the word "Mi'kmaq" is used to denote both the singular and plural, as well as to maintain consistency with the spelling used in current Canadian aboriginal law jurisprudence.
of the same clause that was included in all of the treaties signed during the period in question. The clause reads as follows:

And I [Laurent] 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 Accadia.

To guarantee the Mi’kmaq performance of the treaty obligations, the treaty stipulated that a minimum of two Mi’kmaq prisoners were to be left as hostages with the colonial government.

This truckhouse clause had its genesis in the negotiations between the Maliseet, Passamaquody, and the Governor of Nova Scotia on February 11, 1760. The following exchange was recorded in the minutes of the meeting between the Governor and the Maliseet and Passamaquody:

His Excellency then demanded of them, Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this time. To which they replied that their Tribes had not directed them to propose any thing further than that there might be a Truckhouse established, for the furnishing them with necessaries, in Exchange for their Peltry, and that it might, at present, be at Fort Frederick.

Upon which His Excellency acquainted them that in case of their now executing a Treaty in the manner proposed, and its being ratified at the next General Meeting of their Tribes the next Spring, a Truckhouse should be established at Fort Frederick, agreable [sic] to their desire, and likewise at other Places if it should be found necessary, for furnishing them with such Commodities as shall be necessary for them, in Exchange for their Peltry and that great care should be taken, that the Commerce at the said Truckhouses should be managed by Persons on whose Justice and good


By the end of 1761, it seems that all Mi’kmaq in Nova Scotia had entered into separate but similar treaties. Copies of some of those treaties have not been located and there may be minor variations between some existing treaties because of errors made in transcribing copies. Nevertheless, I am satisfied that all of these Mi’kmaq treaties were materially the same.

15. Cited in Marshall, SCC, supra note 1 at para. 5 [emphasis in original].
Treatment, they might always depend; and that it would be expected that the said Tribes should not Trafic or Barter and Exchange any Commodities at any other Place, nor with any other Persons. Of all which the Chiefs expressed their entire Approbation. [Emphasis added]

Provisions for truckhouses were included in both the treaty with the Maliseet and Passamaquody of February 23, 1760 and the later treaties with the Mi’kmaq, including the treaty in question.

These truckhouses were trading posts established and operated under the authority of the British Crown which provided the Mi’kmaq, Maliseet, and Passamaquody peoples with preferential trading prices for goods deemed to be "necessaries." These truckhouses lasted only a brief time, being replaced by a system of government licensed traders. This later system disappeared by 1780. What is curious about the truckhouse clause in the treaty in question is that it only contains a negative covenant, prohibiting the Mi’kmaq from engaging in the trade of commodities other than through sanctioned British establishments. In contrast, the 1752 Mi’kmaq Treaty contained a positive affirmation of rights, holding that the Mi’kmaq shall possess the "free liberty of hunting and Fishing as usual."

Marshall maintained that the truckhouse clause contained in the 1760-1 treaties supported the existence of a Mi’kmaq right to trade at such truckhouses. This right to trade, it was contended, included a right to obtain goods to trade at those posts. The federal Crown argued that the truckhouse clause merely served as a negative covenant precluding Mi’kmaq trade with anyone other than persons appointed by the British. Thus, in determining whether the charges in Marshall ought to stand, the courts were faced with the task of interpreting the truckhouse clause to ascertain whether it provided Marshall with a treaty right to harvest eels.

II. Judicial History

At trial, Embree Prov. Ct. J. determined that the truckhouse clause granted the Mi’kmaq a positive, though limited, right to "bring the products of their hunting, fishing and gathering to a truckhouse to trade." This right was limited insofar as the Mi’kmaq could trade only

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16. Ibid. at para. 29.
17. Ibid. at para. 6. See also Marshall, Prov. Ct., supra note 14 at para. 117.
18. Interestingly, the 1752 treaty contemplates the existence of truckhouses in this same clause, stating that "if they think a Truck house needful at the River Chibenaccadie, or any other place of their resort they shall have the same built...." One of the potential difficulties in the application of this treaty to Marshall, however, was whether it extended to Cape Breton, a matter that was not resolved in the primary discussion of the 1752 treaty in Simon, supra note 8.
20. Ibid. at para. 116.
at English truckhouses or with licensed traders. Furthermore, the trial judge held that this right to bring goods to trade terminated with the end of the truckhouse system. As he explained in his judgment:

It was a pre-requisite to the Mi'kmaq being able to trade under the terms of the trade clause that the British provide truckhouses or appoint persons to trade with. When the British stopped doing that, the requirement (or if I had taken the Defence view, the option) to trade with truckhouses or licensed traders disappeared. The trade clause says nothing about that eventuality and it is my view that no further trade right arises from the trade clause.21

In rejecting Marshall's claim that the treaties granted him a treaty right to catch and sell fish, the trial judge held that such an interpretation was not even among the "various possible interpretations of the common intention" of the Mi'kmaq and British in signing the treaty.22

Upon appeal to the Nova Scotia Court of Appeal, the trial judge's determination that the Mi'kmaq possessed a positive right to bring the fruits of their hunting, fishing and gathering to a truckhouse to trade was overturned. The Court, per Roscoe and Bateman JJ.A., held that the effect of the truckhouse clause upon the Mi'kmaq did not create a right to trade, but was simply a "mechanism imposed upon them to help ensure that the peace was a lasting one, by obviating their need to trade with enemies of the British."23 Rather than creating a right to trade, the truckhouse clause was said to merely permit the Mi'kmaq to trade at truckhouses. The Court of Appeal concluded that when the truckhouse system ended, so too did any treaty restrictions or entitlements belonging to the Mi'kmaq. The appellate court agreed with the trial judge's determination that the treaties did not confer a right to catch and sell fish. It based this determination on the negative language of the truckhouse clause as well as the fact that, as peace and friendship treaties rather than land cession treaties, no grant of rights could be presumed to emanate from them.

Upon appeal to the Supreme Court of Canada, the majority judgment, rendered by Binnie J., Lamer C.J.C., L'Heureux-Dubé, Cory, and Iacobucci JJ. concurring, held that the truckhouse clause had the result of providing the Mi'kmaq with a treaty right to obtain goods to trade through their pursuit of traditional hunting, fishing, and gathering activities. This right was found to have survived the termination of the truckhouse system and its successor regime of government licensed traders and was an existing treaty right protected by section 35(1) of the Constitution Act, 1982.

21. Ibid. at para. 125.
22. Ibid. at para. 129.
23. (1997), 159 N.S.R. (2d) 186 at 208 (C.A.) [hereinafter "Marshall, CA"].
While this right to obtain goods was affirmed in *Marshall*, it was explicitly held to be subject to regulation by the Crown. Moreover, the right was limited in its scope to the acquisition of "necessaries," or the equivalent of a moderate livelihood, and did not extend to the "open-ended accumulation of wealth."\(^{24}\)

Binnie J. explained that Marshall’s appeal was allowed 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, as best the content of those treaty promises can now be ascertained."\(^{25}\) The result of these findings was that Marshall was acquitted on all charges.

The dissenting judgment rendered by McLachlin J., Gonthier J. concurring, held that the truckhouse clause conferred a limited right upon the Mi’kmaq to bring goods to trade at locations established by the British, but that this right existed only as long as the truckhouses or their successors remained in place. More importantly, the dissenting judgment found that the treaties "granted neither a freestanding right to truckhouses nor a general underlying right to trade outside of the exclusive trade and truckhouse regime."\(^{26}\) It would have had the charges against Marshall stand.

III. *The Truckhouse Clause*

The distinction between the majority and minority judgments in *Marshall* may be understood through their respective approaches to the interpretation of the truckhouse clause. Each judgment appears to start from the common understanding of treaties as unique agreements which ought to be regarded as encompassing more than the written versions on parchment authored by the Crown’s representatives. Both judgments either articulate or illustrate the canons of treaty interpretation that were established and cited with approval in Supreme Court of Canada cases such as *Nowegijick*,\(^{27}\) *Simon*,\(^{28}\) *Sioui*,\(^{29}\) *Badger*\(^{30}\) and *Sundown*.\(^{31}\) In fact, McLachlin J.’s dissenting judgment provides a useful list of some of these interpretive guidelines:

\(^{24}\) *Marshall*, SCC, supra note 1 at para. 7.
\(^{26}\) *Ibid.* at para. 70.
\(^{28}\) *Supra* note 8.
\(^{30}\) *Supra* note 4.
\(^{31}\) *Supra* note 3. For a discussion of some of these interpretive canons, see L.I. Rotman, “Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence” (1997) 46 U.N.B.L.J. 11 [hereinafter “Taking Aim”].
This Court has set out the principles governing treaty interpretation on many occasions. They include the following.


2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories: *Simon*, supra, at p. 402; *Sioui*, supra, at p. 1035; *Badger*, supra, at para. 52.

3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: *Sioui*, supra, at pp. 1068-69.

4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: *Badger*, supra, at para. 41.

5. In determining the signatories’ respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: *Badger*, supra, at paras. 52-54; *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 907.

6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: *Badger*, supra, at paras. 53 et seq.; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36.

7. A technical or contractual interpretation of treaty wording should be avoided: *Badger*, supra; *Horseman*, supra; *Nowegijick*, supra.

8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what “is possible on the language” or realistic: *Badger*, supra, at para. 76; *Sioui*, supra, at p. 1069; *Horseman*, supra, at p. 908.

9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: *Sundown*, supra, at para. 32; *Simon*, supra, at p. 402.32

Of the various principles of treaty interpretation listed by McLachlin J. in *Marshall*, her judgment appears to focus primarily on points 3, 6, and 8. Her emphasis on these points—in particular, on ensuring that the interpretation of a treaty does not exceed “what is possible on the

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language or realistic”—is responsible for her conclusion that no general right to obtain goods to trade existed under the truckhouse clause.\(^3\)

However, in the context of the *Marshall* decision, there is a more than passing appearance of conflict between McLachlin J.’s use of these points and some of the other principles of treaty interpretation she articulates. In particular, there is a semblance of friction between her judgment and point #2—that treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories.

In her dissent, Justice McLachlin expressly holds that the treaties of 1760-1 “completely displaced” the Mi’kmaq Treaty of 1752.\(^4\) While that conclusion may have been Britain’s understanding of the effect of the latter treaties, it is completely antagonistic to the manner in which the Mi’kmaq viewed them.\(^5\) Perhaps more importantly, the 1752 treaty defence was abandoned by Marshall early in the trial proceedings, thus rendering the treaty’s application to the case inconsequential. While the 1752 treaty may have become irrelevant in the context of the *Marshall* appeal, McLachlin J.’s comments about this treaty indicates that she favoured the British understanding of treaties over and at the direct expense of the Mi’kmaq understanding, which is quite relevant to the *Marshall* case. Although Marshall had abandoned his reliance on the 1752 treaty, he did not concede that the 1760-1 treaties superseded the former. Equally, Marshall’s lack of reliance on the 1752 treaty does not

33. As she stated, *ibid.* at para. 108, “it is difficult to see how a government obligation to provide trading outlets could be stretched to include a treaty right to fish and a treaty right to trade the product of such fishing with private individuals.” [Emphasis added] Note also her statement, *ibid.* at para. 105, that:

[T]he different wording of the two treaties [1752 and 1760-1] cannot be supposed to have gone unperceived by the parties. To conclude that the parties would have understood that a general right to trade would be revived in the event that the exclusive trade and truckhouse regime fell into disuse is not supportable on the historical record and is to “exceed what is possible on the language”, to paraphrase from *Sioui*, *supra*.


35. Further discussion on this point will be found in the text accompanying notes 39-54, below.
compel the conclusion reached by McLachlin J.\textsuperscript{36} For these reasons, it is worthwhile to consider the interplay between the 1752 and 1760-1 treaties, as well as the relationship between treaties more generally.

In spite of her emphasis on maintaining the honour of the Crown,\textsuperscript{37} McLachlin J.’s conclusion as to the effect of the 1760-1 treaties upon the 1752 treaty is inconsistent with the honour of the Crown or the notion of resolving ambiguities in the interpretation of treaties in favour of the aboriginals. If Britain and the Mi’kmaq held divergent notions of the meaning and intention of the 1760-1 treaties vis-à-vis the 1752 treaty, then those differing notions suggest the existence of an ambiguity in the purpose or intention of the treaties. While this divergence of understanding with regard to the purpose of the treaties would not qualify as a “doubtful expression,” it is most certainly an ambiguity and, as such, ought to receive the benefit of that particular canon of treaty interpretation.

In such circumstances, according to principle #2 in McLachlin J.’s list, the benefit of the doubt ought to accrue to the aboriginals’ understanding. Of course, the purpose of point #8—ensuring that, while construing the language of a treaty generously, courts do not alter the treaty’s meaning by exceeding “what is possible on the language or realistic”—is to place a check upon the scope of any liberal and generous interpretation of a treaty. In other words, while the benefit of ambiguity is to fall to the aboriginal party to a treaty, a court may not extend the meaning of the treaty beyond what is reasonable given the circumstances surrounding the treaty. Ascertaining what is reasonable includes accounting for the intentions and understandings held by the parties at the time of the agreement. Given the considerations that must be taken into account, this determination is entirely site and fact-specific.

\textsuperscript{36} Indeed, the comments by Bruce Wildsmith, counsel for Donald Marshall, in a 1995 article demonstrate this sentiment:

Since between 1725 and 1761 all of the various groups of Mi’kmaq from all over present-day Nova Scotia, including Cape Breton Island, signed treaties with the English, and the Mi’kmaq beneficiaries of those treaties intermarried and moved throughout the region, we may conclude that all Mi’kmaq in Nova Scotia today enjoy a right to fish based on the covenant chain of treaties. In all likelihood, all Mi’kmaq enjoy the same set of rights based on the covenant chain, and that set of rights includes the right to sell fish, as expressly set out in the treaties in 1725-26, 1752 and 1779, and as impliedly included in the trading provisions in 1760-61.


\textsuperscript{37} Further discussion of this point will be found in Part IV, “The Honour of the Crown,” below.
Ascertaining what amounts to a “reasonable understanding” of any agreement necessitates the objective and value-neutral assessment of the subjective expectations and understandings of the parties at the time of the treaty. It also requires, in some circumstances, an elaboration or extension of the treaty beyond what was actually contained therein. Such a circumstance may exist where a treaty is silent on a matter that bears significantly on other elements of the treaty. If the 1760-1 treaty is to be regarded as a separate and discrete entity from earlier Crown-Mi’kmaq treaties, as McLachlin J.’s judgment indicates, then the failure of the treaty to address the parties’ agreed-upon position regarding the exercising of hunting, fishing and gathering by the Mi’kmaq is a glaring omission that must be addressed. As indicated below, this interpretation of the place of the 1760-1 treaty vis-à-vis those earlier treaties is problematic.

While McLachlin J. suggests that the historical record indicates that the Mi’kmaq possessed both an understanding of the importance of the written word to the British in the treaty making process as well as a sufficiently sophisticated knowledge of that process to be able to discern the differences between treaties, her judgment does not reveal any recognition of the manner in which the Mi’kmaq traditionally regarded treaties. This would appear to conflict with point #5 and its emphasis on sensitivity to the unique cultural and linguistic differences between the parties when determining the signatories’ respective understandings of a treaty or intentions in negotiating it.

The Mi’kmaq traditionally regarded treaties as integral elements in the fostering of harmonious relations with other nations. Thus, they entered into such agreements with other aboriginal nations and with European nations. However, they did not view each individual treaty as an end unto itself. Rather, each treaty was regarded as a link in a chain of agreements—some agreed to in the past, others yet to be signed—that established the parameters of nation-to-nation relations with other inde-
pendent groups. In this way, an individual treaty both built upon earlier treaties and was built upon by subsequent ones. Contemporary descriptions of the Maritime peace and friendship treaties by the Mi'kmaq illustrate this understanding:

The eighteenth century agreements between the Mi'kmaq nation and Britain were, and still are, regarded by us as a form of brotherhood. When there was some injury or threat of conflict we met to exchange reassurances and renew our engagements. That is why, over several decades, one finds half a dozen or more seemingly separate treaties between the Mi'kmaq and the British Crown. The surviving documents are often incomplete summaries of meetings that typically required many days and were repeated every few years as necessary. By themselves, the documents are fragments; considered together, they constitute a great chain of agreement. In other words, the treaty documents... should be seen not as distinct treaties but as stages and renewals of a larger agreement or pact that developed during the 1700s between the Mi'kmaq and the British.

The Mi'kmaq understanding of treaties and their relationship to one another follows the same pattern that sits as the foundation of the relationship between Britain and the Iroquois (Haudenosaunee) Confederacy in the seventeenth and eighteenth centuries. Beginning with the Treaty of Albany, 1664, the nations entered into a series of compacts whose purpose was to establish, reaffirm, and renew their relationship. This series of compacts became known as the Covenant Chain. The imagery of the chain reflected the strength of the bond between the nations; it also permitted the adding of "links" through the extension of treaty relations with other aboriginal nations. When parties joined the Covenant Chain alliance, the image used to indicate their entry was the placing of their arms through one of the chain's links:

We have not much to give or say but return our hearty thanks for the good you do us, as we have always been in the Covenant chaine, but of late New England, Virginia, Maryland and adjacent Collonys did not put in their annes into the chain; pray animate them to make us strong, and assist us according to the Covenant made between us and altho' an angry Dog

40. See, for example, Wildsmith, supra note 36 at 117.
should come and endeavour to bitt the chaine in peices with his teeth, yet we will keep it firme both in peace and warr and do renewe the Old Covenant, that so that tree of welfare, may flourish and that his Roots may spread thro’ all the Country.\textsuperscript{43}

The symbolic effect of having Britain and the aboriginal nations place their arms through the Covenant Chain and grasping it tightly demonstrates that the chain was regarded by the parties as an alliance that existed only through the cooperation of independent nations.\textsuperscript{44}

In spite of the permanency and strength of the Covenant Chain, both symbolically and in reality, it was expected that the parties would regularly renew their respective undertakings.\textsuperscript{45} As Henderson explains:

The Aboriginal Nations conceived of Treaties as living agreements rather than mere documents. . . . To preserve the kinship, as within a natural family, the Aboriginal nations and the representatives of the King were obliged to meet from time to time to renew the friendship, to reconcile misunderstandings, and to share with each other understandings, experiences and wealth. Thus most of the treaties were in reality renewal ceremonies of subsisting relationships. In documentary form these ceremonies mostly consisted of a transcript of the proceedings and the substance of the agreement summarizing the nature of the international kinship. This was often characterized by the metaphor of the chain.\textsuperscript{46}

This process of renewal was often described as the “polishing” of the chain. Such polishing came in different forms: sometimes, it was accomplished through the exchange of presents or belts of wampum; at other times, it involved a restating of the nations’ solidarity, commitments of further undertakings of union, or the extension of the chain to include other aboriginal groups. If, however, the chain was neglected through a lack of renewed commitment, it would be described as “tarnished” or

\textsuperscript{43} "The Maquasse propose for themselves," \textit{New York Colonial Manuscripts}, XXXVII, as reproduced, \textit{ibid.}, vol. 3 at 779 [in response to “His Excelley the Governor’s answer to the Maquasse, Oneydes, Onnondages, Cayouges and Sinnekes and Skachkook Indians, at Albany the 4th day of June 1691,” \textit{ibid.} at 778].
\textsuperscript{44} See P.C. Williams, \textit{The Chain} (LL.M. Thesis, Osgoode Hall Law School 1982) [unpublished] at 64: “The Covenant Chain is also characteristic of Iroquois symbols in that it is designed so that no one nation has preeminence: each nation with its arms in the chain is equal to the other . . . . Though some nation might have specific functions in maintaining or renewing the chain, the equality of the nations within it is an important part of its power and strength.”
\textsuperscript{45} \textit{Ibid.} at 65.
\textsuperscript{46} Henderson, \textit{supra} note 13 at 240.
“rusted” and thus subject to weakening or breaking altogether. This vision of the polishing of the Covenant Chain was described to Sir William Johnson, Superintendent-General of Indian Affairs at a general congress at Fort Stanwix in November, 1768:

We remember that on our first Meeting with you, when you came with your ship we kindly received you, entertained you, entered into an alliance with you, though we were then great & numerous and your people inconsiderable and weak and we know that we entered into a Covenant Chain with you and fastened your ship therewith, but being apprehensive the Bark would break and your ship be lost we made one of iron, and held it fast that it should not slip from us, but perceiving the former chain was liable to rust; We made a silver chain to guard against it Then, Brother, you arose, renewed that chain which began to look dull, and have for many years taken care of our affairs by the command of the Great King, & you by your labors have polished that chain so that it has looked bright and is become known to all Nations, for all which we shall ever regard you and we are thankfull to you in that you have taken such care of these great affairs of which we are always mindfull, and we do now on our parts renew and strengthen the Covenant Chain by which we will abide so long as you shall preserve it strong & bright on your part.

The representations of Lieutenant-Governor Jonathan Belcher to the Mi’kmaq in 1760, following the conclusion of the Seven Years’ War between the British and French, demonstrates that the imagery of the Covenant Chain was a fundamental part of the Mi’kmaq understanding of the treaty-making process with Britain. At that time, a delegation of Mi’kmaq from British and French jurisdictions met with Belcher and the Legislative Assembly to renew and extend the Wabanaki Compact (1725), which had itself renewed earlier treaties dating back to 1693. Belcher began his representations by describing the protection and allegiance that had been established under the 1752 treaty. “Protection

47. Note, for example, “Report of Proceedings with the Confederate Nations of Indians, at a Conference held at Canajohary,” 4 April 1759, as reproduced in NYCD, supra note 42, vol. 7 at 388:

... I do now therefore, in the name of the great King of England, my master & in behalf of all his Subjects Your Bretheren by this Belt renew, strengthen and brighten that Ancient Cov’ Chain, and in his Name & on their parts, I do assure you it shall be held so fast & the terms of it so punctually observed that you shall have no just cause to reproach us; The Sun now shines clear upon us & while we hold this Cov’ Chain firmly in our hands & are careful to keep it from contracting any Rust we shall be able to drive away all Clouds which may attempt to come between us, & continue to see & smile upon each other as Bretheren ought to do.

48. “At a General Congress with the several Nations at Fort Stanwix Tuesday Nov. 1st 1768,” as reproduced in NYCD, supra note 42, vol. 8 at 126.

49. For further discussion of the Wabanaki Compact and its relationship to other treaty relations in the Maritimes, see Henderson, supra note 13.
and allegiance are fastened together by links," he said. In continuing with this imagery, Belcher explained that "[i]f a link is broken the chain will be loose. You must preserve this chain entire on your part by fidelity and obedience to the Great King George the Third, and then you will have the security of his Royal Arm to defend you." Upon the conclusion of an agreement, Belcher and the district chiefs buried the hatchet and removed the war paint from their bodies to indicate that peace had been agreed to and to bar any future reference to the hostilities thus concluded. Belcher then stated that peace had been concluded "by these solemn instructions to be preserved and transmitted to you with charges to your Children’s, never to break the Seals or Terms of this Covenant." As a result of this exchange, Henderson concludes that "the metaphor of the ‘Covenant Chain’ entered into Mi’kmaq sacred order."

From the Mi’kmaq perspective, then, it may be seen that the 1760-1 treaty was not an isolated agreement, but part of a long series of treaties between Britain and the Mi’kmaq dating back to the late seventeenth century. For these reasons, it ought not be assumed that the 1760-1 treaty superseded the 1752 treaty unless it can be shown that that effect was the common intention of the parties. Given the Mi’kmaq perspective on treaty relationship, it is unlikely that such intent was held by them. For this reason, there can be no element of “commonality” in the understanding of the parties on this point.

The fact that the 1760-1 treaties did not mention the renewal of previous treaties while the treaty of February 23, 1760 with the Maliseet and Passamaquody did expressly contemplate a renewal of earlier compacts does not conclusively determine whether the Mi’kmaq understood the 1760-1 treaties as having incorporated earlier compacts. Minutes of a meeting of February 29, 1760 with the Governor and Council record the following exchange, which occurred with Paul Laurent and Michel Augustine:

51. Henderson, supra note 13 at 258, note 239.
52. Ibid. at 258.
53. Ibid.
55. Before such a conclusion may be appropriately reached, it must be asked, for instance, whether all of these treaties were written by the same person under the same circumstances, or whether the person who took notes at the treaty negotiations was the same person who penned the final written version of the treaty.
His Excellency then Ordered the Several Articles of the Treaty made with the Indians of St. John's River and Passamaquody to be Communicated to the said Paul Laurent and Michel Augustine who expressed their satisfaction therewith, and declar'd that all the Tribe of Mickmacks would be glad to make peace upon the same Conditions.  

While the trial judge accepted and relied upon this evidence, as well as expert evidence indicating Mi'kmaq treaty-making traditions which affirmed the Covenant Chain model, he nevertheless concluded that the 1760-1 treaties did not renew earlier treaties. However, the trial judge did find that these Mi'kmaq treaties made peace "upon the same conditions" as the earlier Maliseet and Passamaquody treaty. It would seem reasonable, without any indication to the contrary, to assume that "making peace on the same terms" would include the entire terms of the Maliseet and Passamaquody treaty, which included an express ratification of earlier treaties.

The trial judge based his conclusion, in part, on the fact that Paul Laurent "spoke English and would have understood the terms of the treaty he and the other two Sakamow signed on March 10th [and] would also have recognized the different wording and format in the Maliseet and Passamaquody treaty." What is not revealed here is whether the terms of the Maliseet and Passamaquody treaty that were communicated to Laurent at the February 29th meeting described above were read to him or shown to him. Also, we do not know whether Laurent, who "spoke English," spoke it well, possessed a sophisticated understanding of the language, or could read English. If he did not possess a sophisticated understanding of English and could not read, how would he have recognized the different wording and format in the Maliseet and Passamaquody treaty? Are we to assume that the mere fact that Laurent spoke English entailed that he could discern the subtle distinctions between the treaties? Again, we have the presence of ambiguity here.

It would appear that the only solid evidence indicating that the 1760-1 treaties were the same as the Maliseet and Passamaquody treaty, save for the renewal of earlier agreements, is the absence of any express renewal in the former. If, however, the earlier treaty was not shown to Laurent, then one cannot be sure of the manner in which it was explained.

57. Ibid. at para. 105.
58. Ibid. at para. 108.
59. Ibid. at para. 106.
60. This distinction would have been subtle if Laurent's understanding of treaties was that they were always part of a larger series of compacts, which would have been commonly held by the Mi'kmaq, as discussed earlier.
to him or in how much detail. In any event, if Laurent’s understanding of
treaties was that they were part of a larger series of compacts, then the
absence of explicit wording indicating such would not have provided him
with reason for concern. Given that earlier treaties and negotiations
between the British and the Mi’kmaq did make reference to earlier
compacts, it could be argued that a precedent had been set which could
only be deviated from by express indication of such a change. The simple
absence of written terms expressly indicating the incorporation of previ-
ous treaties would not qualify as an express indication of change when the
agreements were drafted by the British using their language. Ambiguities
in contracts, as per the CONTRA PROFERENCE rule in contract law, are always
interpreted against the party that drafted them. Finally, Binnie J.’s
majority judgment in Marshall indicated that the 1760-1 treaties were
intended to have been consolidated into a comprehensive Mi’kmaq treaty
that was never brought into existence. This suggests that the individual
treaties may have been incomplete, given that they were going to be
brought under an umbrella treaty that was never executed.

The nature of the representations made to the Mi’kmaq by the British
Crown’s representatives is also of considerable importance in ascertain-
ing the common intentions of the parties regarding the 1760-1 treaty.
These representations are the key to ascertaining Britain’s obligations
under the treaty and the Mi’kmaq understanding of how Britain viewed
the treaty. What the Lords of Trade or other high-ranking British colonial
administrators at Whitehall thought the effect of the treaty was is not
relevant if it was not incorporated into the representations made to the
Mi’kmaq. The agreements between the parties were signed by the
Mi’kmaq on the basis of the actual representations made by Crown’s
representatives, not the thoughts or perceptions of officials back in
Britain. Thus, if it could be demonstrated that the representations made
to the Mi’kmaq linked the 1760-1 treaty to earlier treaties, such as the
1752 treaty, then the former ought to be understood to incorporate the
terms of the earlier treaties. For these reasons, although McLachlin J.’s
judgment appears to rely more overtly on these interpretive canons, their
effects are more apparent within Binnie J.’s majority judgment.

Binnie J.’s emphasis on what the Nowegijick judgment described as
the “large, liberal and generous” principles of treaty interpretation
resulted in his placing considerable emphasis on the circumstances under
which the treaty was signed, the parties’ respective positions and inter-

61. Marshall, SCC, supra note 1 at para. 5.
62. Refer back to the discussion on this point, above, in the text accompanying notes 49-54.
marshalling principles from the marshall morass

ests, and the relationship between the parties’ treaty negotiations and the final written product produced. For these reasons, he affirmed the use of extrinsic evidence, even absent any ambiguity on the face of the treaty. He also held that it would be unconscionable in circumstances such as in Marshall, where the treaty in question was concluded verbally and written up after the fact by the Crown’s representatives, for the Crown to ignore the oral agreements made while adhering only to the terms its representatives included on the parchment copy of the treaty. Binnie J. took pains, however, to distinguish the use of such generous interpretive rules from what he described as “a vague sense of after-the-fact largesse.”

The use of these interpretive canons is necessary, according to Binnie J., because of the “special difficulties” of ascertaining what the parties had agreed to, as well as the fact that the aboriginal groups did not have their own written record of the negotiations. Thus, he explained that certain assumptions are to be made by courts regarding:

i. the Crown’s approach to treaty making (honourable), and
ii. the Crown’s approach to treaty interpretation (flexible, based on the Crown’s approach to treaty making) as to:
   iii. the existence of a treaty,
   iv. the completeness of any written record, and
   v. the interpretation of treaty terms once they are found to exist.

At the end of the day, Binnie J. held that the court’s function is “to choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles the interests of the Mi’kmaq and those of the British Crown.”

Based on these interpretive requirements, Binnie J.’s majority judgment held that the written treaty did not truly represent the totality of the

64. Marshall, SCC, supra note 1 at para. 12.
65. Ibid. at para. 14.
66. Ibid. It may be observed that Binnie J.’s remarks about the aboriginal peoples’ lack of written documentation regarding treaty negotiations is an indication of the privileging of written over oral accounts of events that is a fundamental element of the law of evidence. The bias exhibited by the common law of evidence towards literacy is not necessarily based on the objective and inherent superiority of written versus oral record keeping. Rather, it may be seen to be based largely on the values and practices of the cultures which imbued the written word with such importance, particularly in comparison with oral accounts.
68. Ibid.
treaty negotiations, insofar as it did not set out any Mi'kmaq rights, but imposed negative restrictions on their activities. Thus, he held that the trial judge's finding that the written treaty, generously interpreted, encompassed all of Britain's obligations to the Mi'kmaq was in error. He maintained that that finding not only failed to provide adequate weight to the concerns and perspective of the Mi'kmaq, but placed excessive emphasis on the concerns and perspective of the British.69 The fact that Britain "held the pen" was not a justifiable reason for skewing the balance of British and Mi'kmaq interests in ascertaining the common intention of the parties.70 Not surprisingly, Binnie J. also found that the narrow construction of the written treaty by the Nova Scotia Court of Appeal was not an adequate reflection of the parties' common intention. These factors all have a bearing on the discussion of the "honour of the Crown" found in both judgments in Marshall.

IV. The Honour of the Crown

Both the majority and dissenting judgments in Marshall refer to the "honour of the Crown" in discussing the principles to be used when interpreting Crown-Native treaties. Acknowledging the role of the honour of the Crown in this context is not novel to the Marshall decision. Recent Supreme Court considerations of treaties, such as Badger71 and Sun-down,72 also note that the honour of the Crown must be considered in the context of treaty interpretation. This recognition is not an entirely recent phenomenon, though. The honour of the Crown in the treaty context has been recognized in some Canadian treaty rights cases dating back to the nineteenth century. Indeed, Binnie J. expressly refers to the dissenting judgment of Gwynne J. in Province of Ontario v. Dominion of Canada and Province of Quebec: In re Indian Claims, where he stated:

[What is contended for and must not be lost sight of, is that the British sovereigns, ever since the acquisition of Canada, have been pleased to adopt the rule or practice of entering into agreements with the Indian nations or tribes in their province of Canada, for the cession or surrender by them of what such sovereigns have been pleased to designate the Indian title, by instruments similar to those now under consideration to which they have been pleased to give the designation of "treaties" with the Indians in possession of and claiming title to the lands expressed to be surrendered by the instruments, and further that the terms and conditions expressed in those instruments as to be performed by or on behalf of the Crown, have

69. Ibid. at para. 19.
70. See text accompanying note 104.
71. Supra note 4.
72. Supra note 3.
always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which with the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown.\textsuperscript{73}

In that same case, Sedgewick J. added to Justice Gwynne's sentiment when he explained that "in all questions between Her Majesty and 'Her faithful Indian allies' there must be on her part, and on the part of those who represent her, not only good faith, but more, there must be not only justice, but generosity."\textsuperscript{74} Prior to these early judicial statements, Sir William Johnson, Superintendent-General of Indian Affairs, indicated the need to maintain the honour of the Crown in a letter to the Lords of Trade in 1756:

At this critical and interesting conjecture I am sensible the utmost attention should be paid to our Indian Alliance and no measures left untried that may have the least tendency [sic] to strengthen and increase it. Wherefore I would humbly propose a steady and uniform method of conduct, a religious regard to our engagements with them a more unanimous and vigorous exertion of our strength than hitherto, and a tender care to protect them and their Lands against the insults and encroachments of the Common enemy as the most and only effectual method to attach them firmly to the British Interest, and engage them to act heartily in our favour at this or any other time.\textsuperscript{75}

Although, as Binnie J.'s judgment in \textit{Marshall} indicates, the notion that treaties implicate the honour of the Crown has been recognized by Canadian courts as far back as the latter part of the nineteenth century, it is important to note that an equal number of decisions have come to the opposite conclusion. Binnie J.'s judgment does not illustrate the existence of this fundamental duality.

While Gwynne J. did recognize that the honour of the Crown is enmeshed in its treaty dealings with aboriginal peoples, his judgment was a dissenting one. In the appeal of the \textit{Re Indian Claims} decision to the Privy Council, Lord Watson expressly contradicted this notion of treaty promises incorporating the honour of the Crown when he stated that "Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities . . . beyond a promise and agreement, which was nothing more than a

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\textsuperscript{73} [1896] 25 S.C.R. 434 at 511-12 [hereinafter "\textit{Re Indian Claims}"]], as cited in \textit{Marshall, SCC, supra} note 1 at para. 50. See also \textit{Ontario Mining Co. v. Seybold} (1901), 32 S.C.R. 1 at 2, as cited in \textit{Marshall, SCC, ibid.}

\textsuperscript{74} \textit{Re Indian Claims, supra} note 73 at 535.

\textsuperscript{75} "Sir William Johnson to the Lords of Trade, Fort Johnson, 8 March 1756," as reproduced in \textit{NYCD, supra} note 42, vol. 7 at 43.
\end{footnotesize}
personal obligation by its governor . . . ”76 Lord Watson had expressed a similar sentiment almost ten years earlier in *St. Catherine's Milling and Lumber Co. v. The Queen*, in which he explained that aboriginal peoples' interest in their lands was a “personal and usufructuary right, dependent upon the good will of the sovereign.”77 His statement in the *Re Indian Claims* appeal that the treaty annuity promise was not legally binding, but only a political obligation of the governor was later cited, with approval, in both *R. v. Wesley*78 and *R. v. Sikyea.*79

It was only with the British Columbia Court of Appeal's judgment in *R. v. White and Bob* in 1964 that Crown-Native treaties began to be more regularly recognized as solemn commitments that implicated the honour of the parties involved.80 Shortly thereafter, in *R. v. George*, Cartwright J. indicated that treaty obligations were intertwined with the notion of the honour of the Crown:

We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.81

While Binnie J.'s majority judgment in *Marshall* makes repeated reference to the need to uphold the honour of the Crown by providing an expansive and contextual interpretation of the truckhouse clause, McLachlin J.'s dissenting judgment states only that the integrity and honour of the Crown is presumed when searching for the common intention of the parties in a treaty context.82

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77. (1888), 14 App. Cas. 46 at 54 (P.C.). A similar sentiment had been expressed by Justice Taschereau in the Supreme Court of Canada’s judgment in *St. Catherine’s Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577 at 649:

The Indians must in the future . . . be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control.

79. (1964), 43 D.L.R. (2d) 150 at 154 (N.W.T.C.A.): “While this [Lord Watson’s statement in the *Re Indian Claims* case] refers only to the annuities payable under the treaties, it is difficult to see that other covenants in the treaties, including the one we are here concerned with, can stand on any higher footing.”
82. *Marshall, SCC, supra* note 1 at para. 78. At para. 110, McLachlin J. also states that “[t]he honour of the Crown is presumed and must be upheld.”
It appears, then, that while both judgments emphasize the importance of the honour of the Crown, the dissent views the Crown's honour solely as a governing principle to be used when interpreting treaties generally. In other words, from this latter perspective, it is not to be presumed that the Crown intended to act dishonourably when looking at the terms or intent of a treaty. McLachlin J. indicates this understanding of the place of the honour of the Crown in the context of Crown-Native treaties by her favourable reference to the Badger judgment, where Cory J. stated that:

[T]he honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.83

A similar sentiment was expressed in the Sikyea case,84 where a conflict existed between promises made under Treaty No. 11, signed in 1921, and the domestic implementation of the Migratory Birds Convention, 1916.85 In his judgment in Sikyea, Johnston J.A. acknowledged the tenuous status of treaties in the early stages of the twentieth century, but nevertheless reasoned that the Crown, in removing treaty promises made to the signatories to Treaty No. 11 through its implementation of the Migratory Birds Convention Act, could not have done so deliberately, but through sheer mistake.86 As he explained:

It is, I think, clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its Regulations. How are we to explain this apparent breach of faith on the part of the Government, for I cannot think it can be described in any other terms?...I cannot believe that the Government of Canada realized that in

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83. Badger, supra note 4 at 92. This statement was also cited, with approval, by Binnie J. in Marshall, SCC, supra note 1 at para. 49.
84. Supra note 79.
85. Specifically, the sanction, ratification and confirmation of the Convention by Canada through the Migratory Birds Convention Act, S.C. 1917, c. 18 and the Convention's implementation into Canadian domestic law through the Migratory Birds Convention Act, R.S.C. 1952, c. 179.
86. R.S.C. 1952, c. 179. While Johnson J.A. does not refer to the "clear and plain" test, that was the standard that existed for the infringement or extinguishment of treaty rights prior to their constitutional protection in the Constitution Act, 1982.
implementing the Convention they were at the same time breaching the treaties that they had made with the Indians. It is much more likely that these obligations under the treaties were overlooked—a case of the left hand having forgotten what the right hand had done.  

In contrast to the dissent’s view in *Marshall* that the honour of the Crown is to be presumed in the context of treaties, the majority’s view of the honour of the Crown requires not only that the Crown be presumed to have acted honourably throughout its treaty negotiations with aboriginal peoples, but also that the “honour of the Crown” tints the interpretation of specific clauses of treaties to ensure that those clauses are meaningful when examined in the overall context of the treaty and the common intention of the parties in entering into it. In this manner, Binnie J.’s majority judgment is similar to the unanimous judgment of the Court in *Sparrow*, in which it was made clear that section 35(1) of the *Constitution Act, 1982* incorporates the Crown’s fiduciary obligations to aboriginal peoples.  

Therefore, while the *Marshall* judgment does not introduce the understanding that the honour of the Crown plays an important role in the interpretation of Crown-Native treaties, it does provide significant commentary on the Supreme Court’s understanding of the role of the honour of the Crown in treaty interpretation. The two judgments in *Marshall* demonstrate that, while the honour of the Crown is acknowledged as being involved in treaty interpretation, its precise role is the subject of some contention. As Binnie J.’s judgment indicates, though, the majority of the Court has endorsed the notion that the honour of the Crown plays an active role in the interpretation of treaties rather than serving merely as a guiding principle, as indicated by McLachlin J.’s judgment. For this reason, he distinguished between the interpretation of the truckhouse clause in the context of an eighteenth century Crown-Native treaty versus an ordinary commercial situation in the following manner:

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87. *Supra* note 79 at 158. In ruling that the conviction against Mr. Sikyea for shooting a migratory bird out of season must be sustained, Johnson J.A. made the following statement, *ibid.* at 162:  

In coming to this conclusion, I regret that I cannot share the satisfaction that was expressed by McGillivray J.A. in *R. v. Wesley* [*supra* note 78] when he was writing his judgment dismissing the appeal in that case:  

It is satisfactory to be able to come to this conclusion and not to have to decide that “the Queen’s promises” have not been fulfilled. It is satisfactory to think that legislators have not so enacted but that the Indians may still be “convinced of our justice and determined resolution to remove all reasonable cause of discontent.”  

While I do not believe that in ordinary commercial situations a right to trade implies any right of access to things to trade, I think the honour of the Crown requires nothing less in attempting to make sense of the result of these 1760 negotiations. 89

The need to extrapolate beyond the literal meaning of the truckhouse clause—something that would not be required in the ordinary commercial context—is therefore rooted in the nature of the relationship between the Crown and the Mi'kmaq and the context in which the agreement was negotiated and signed rather than out of any gratuitous sense of benevolence. 90 This is what incorporating the “honour of the Crown” into the interpretation of treaties is truly about.

V. The Use of Extrinsic Evidence

By determining that the truckhouse clause carried with it both a right to bring goods to trade and the right to obtain goods that could be traded, the majority relied considerably on the use of extrinsic evidence. Consistent with this reliance on extrinsic evidence, Binnie J.’s judgment reveals the majority’s emphasis on the context in which the treaty was negotiated and signed. Indeed, he questioned “whether the underlying negotiations produced a broader agreement . . . memorialized only in part by the Treaty . . . that would protect the appellant’s activities that are the subject of the prosecution.” 91 This approach to interpreting the treaty differed significantly from that taken by the Court of Appeal, which had held that “[w]hile treaties must be interpreted in their historical context, extrinsic evidence cannot be used as an aid to interpretation, in the absence of an ambiguity.” 92

Binnie J. held that the Court of Appeal’s prohibition on the use of extrinsic evidence absent an ambiguity ought to be rejected for at least three reasons. He demonstrated that, even in modern commercial contexts, extrinsic evidence could be used to indicate that a written document is not inclusive of all the terms agreed to. 93 Also, he indicated that recent cases had determined that extrinsic evidence relating to the historical and cultural context of a treaty could be received absent the existence of an

89. Marshall, SCC, supra note 1 at para. 44.
90. This was indicated earlier by Binnie J. when he stated, ibid. at para. 14 that “‘Generous’ rules of interpretation should not be confused with a vague sense of after-the-fact largesse,” as referred to, supra note 65.
91. Ibid. at para. 7. For this reason, even though Binnie J. found that, under a strict interpretation of the truckhouse clause viewed in isolation, there was no basis for holding that a right to obtain goods for trading existed, he stated that this limited examination was not sufficiently extensive to provide the basis for a final determination on the treaty’s meaning.
92. Marshall, CA, supra note 23 at 194. It is legitimate to ask how a treaty may be interpreted in its historical context if no evidence outside of the four corners of the treaty is to be used.
93. Marshall, SCC, supra note 1 at para. 10.
ambiguity in the treaty. Finally, he cited the case of Guerin v. R. for its proposition that where the Crown agrees to certain oral terms and later produces a written agreement which excludes those terms, it would be unconscionable to allow the Crown to ignore the oral terms, yet rely on the written terms.

Justice Binnie recognized that the Court of Appeal's findings on the use of extrinsic evidence were premised largely upon the precedent in R. v. Horse, where Estey J. held that such evidence was not to be used absent an ambiguity in the treaty itself. However, Binnie J. held that the more flexible approach to interpretation emphasized by Lamer J., as he then was, in R. v. Sioui and affirmed by Cory J. in Badger was more appropriate in the context of treaty relationships. As he explained:

"Generous" rules of interpretation should not be confused with a vague sense of after-the-fact largesse. The special rules are dictated by the special difficulties of ascertaining what in fact was agreed to. The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty (Sioui, supra, at p. 1049), the completeness of any written record (the use, e.g., of context and implied terms to make honourable sense of the treaty arrangement: Simon v. The Queen, [1985] 2 S.C.R. 387, and R. v. Sundown, [1999] 1 S.C.R. 393), and the interpretation of treaty terms once found to exist (Badger). The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles" the Mi'kmaq interests and those of the British Crown (Sioui, per Lamer J., at p. 1069) (emphasis added).

In considering the context of the treaty, Binnie J. noted that the March 10, 1760 treaty did not mention the right to hunt and fish "as usual," as had been included in the 1752 Mi'kmaq Treaty that formed the basis of the arguments in Simon. Rather, the former simply contained a negative
covenant that prevented the Mi'kmaq from trading with Britain's enemies. The evidence that had been accepted by the trial judge was that it was "inherent in these treaties that the British recognized and accepted the existing Mi'kmaq way of life" and that "the British would have wanted the Mi'kmaq to continue their hunting, fishing and gathering lifestyle" so that they would not "become a long-term burden on the public treasury." Justice Binnie found it difficult to accept the trial judge's conclusions that, while the Mi'kmaq possessed treaty rights to "bring the products of their hunting, fishing and gathering to a truckhouse to trade," the written 1760-1 treaties "contain, and fairly represent, all the promises made and all the terms and conditions mutually agreed to." As he noted, "[i]t cannot be supposed that the Mi'kmaq raised the subject of trade concessions merely for the purpose of subjecting themselves to a trade restriction." As a result, Binnie J. concluded that the trial judge erred in failing to give adequate weight to the "concerns and perspective" of the Mi'kmaq people while giving excessive weight to the concerns and perspective of the British "who held the pen."

Binnie J. held that the trial judge's "overly deferential attitude" to the treaty was "inconsistent with a proper recognition of the difficulties of proof confronted by aboriginal people," both in the treaty and aboriginal rights contexts. According to Justice Binnie, this overly narrow view of what constituted "the treaty" led the trial judge to determine, in an equally narrow fashion, that the Mi'kmaq entitlement to trade terminated in the 1780s. Meanwhile, he overturned the Court of Appeal's finding that the canons of treaty interpretation developed in connection with land cession treaties were of "limited specific assistance" to peace and friendship treaties. As he explained, "[a] deal is a deal. The same rules of interpretation should apply."

In examining the context of the treaties, he relied upon the testimony of the Crown's expert witness, Dr. Stephen Patterson, the experts of the appellants, Dr. John Reid and Dr. William Wicken, as well as the trial judge's findings founded on that evidence. Based on the historical evidence presented, the trial judge had concluded that the 1760-1 treaties were the culmination of more than a decade of intermittent Mi'kmaq-
British hostilities. Justice Binnie concluded that the primary purpose of the treaties was to secure peace between the combatants, which was to be obtained by arranging trade relations between them. This purpose was expressed by Governor Lawrence to the Board of Trade on May 11, 1760, when he stated that “the greatest advantage from this [trade] Article ... is the friendship of these Indians.” According to Binnie J., this peace was to be maintained by ensuring that the Mi’kmaq could remain economically self-sufficient. For this reason, Britain sought to protect the traditional Mi’kmaq economy, which included hunting, fishing, and gathering, and ensured their ability to trade the fruits of their endeavours to obtain European trade goods such as blankets, clothing, gun powder and shot.

The creation of six truckhouses occurred following the signing of the 1760-1 treaties. The advantageous terms offered to the Mi’kmaq at these truckhouses were regarded by Binnie J. as “an investment in peace and the promotion of ongoing colonial settlement.” However, he concluded that, on the basis of Dr. Patterson’s testimony at trial, the only way this strategy of ensuring peace would work was to protect Mi’kmaq access to trading and to the resources necessary to provide them with goods to trade. The trial judge’s determination that the right to obtain goods to trade ceased upon the termination of the truckhouse system and its successor regime was said by Binnie J. to be in error and based upon the trial judge’s overly deferential attitude to the written treaty.

Binnie J.’s inference of a treaty right to hunt, fish, and gather from the context of the March 10, 1760 treaty was supported by his reliance on the “officious bystander test” from contract law, whereby courts may imply a contractual term on the basis of the parties’ presumed intentions where such action is necessary to assure the efficacy of the contract. As he stated:

111. As quoted, ibid. at para. 32.
112. Ibid. at para. 25.
113. Ibid. at para. 32.
114. Ibid.
115. Ibid. As he stated later in his judgment, at para. 35, “[t]he trade clause would not have advanced British objectives (peaceful relations with a 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 continuing access, implicitly or explicitly, to wildlife to trade.”
If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations.\textsuperscript{116}

He then cited the \textit{Sioui} and \textit{Sundown} cases as examples of treaty cases where the Court found the need to expand beyond the literal terms of a written treaty.\textsuperscript{117}

McLachlin J., on the other hand, did not find that there was a need to expand the truckhouse clause to include rights other than the negative right to trade only at British truckhouses. As she stated, the treaty clearly limited the ability of the Mi'kmaq to trade other than with the British under the regime established by treaty. She held that the historical record demonstrated that neither the Mi'kmaq nor the British intended or understood the truckhouse clause to have created a general right to trade.\textsuperscript{118} She also determined that the post-treaty conduct of the parties warranted reaching the same conclusion.\textsuperscript{119} As she explained:

The treaty reference to the right to bring goods to truckhouses was required by and incidental to the obligation of the Mi'kmaq to trade with the British, and cannot be stretched to embrace a general treaty right to trade surviving the exclusive trade and truckhouse regime. To do so is to transform a specific right agreed to by both parties into an unintended right of broad and undefined scope.\textsuperscript{120}

The fact that McLachlin J.'s finding had the effect of turning the Mi'kmaq into "citizens minus" with greater restrictions, but no greater liberties, than British subjects was not deemed to be of any consequence since she held that that was the arrangement freely entered into by the Mi'kmaq.\textsuperscript{121} Yet, while McLachlin J. did not find that the truckhouse clause was properly interpreted in the manner proposed by the majority judgment, her judgment nonetheless indicates her reliance on extrinsic evidence to support her conclusions. Therefore, both the majority and dissenting judgments indicate that the use of extrinsic evidence to

\begin{itemize}
\item \textsuperscript{116} Ibid. at para. 43.
\item \textsuperscript{117} Ibid. at para. 44. Further discussion of this point will be found in Part VI, "Incidental Rights," below.
\item \textsuperscript{118} Ibid. at para. 96.
\item \textsuperscript{119} Ibid. at para. 99.
\item \textsuperscript{120} Ibid. at para. 102.
\item \textsuperscript{121} The term "citizens minus" was used by Binnie J. at para. 45 of his judgment in \textit{Marshall}, SCC, \textit{ibid.} and is a play on the phrase "citizens plus" coined by the 1966 Hawthorn Report on Indian conditions in Canada, which used the phrase to indicate the fact that aboriginal peoples in Canada possess all of the rights of non-aboriginal Canadians plus special aboriginal and treaty rights not possessed by those others: see H.B. Hawthorn, ed., \textit{A Survey of the Contemporary Indians of Canada}, 2 volumes (Ottawa: Information Canada, 1966, 1967).
\end{itemize}
interpret treaties is proper and necessary to reveal the true intentions and understandings of the parties.

The need to look to extrinsic evidence is premised on the notion that the written versions of treaties do not necessarily capture the entirety of agreements made between the Crown and aboriginal peoples. Ignoring extrinsic evidence has the effect of privileging the Crown's perspective over the perspectives of the aboriginal signatories, insofar as the Crown's representatives were the ones who penned the written terms of the treaties. Using extrinsic evidence allows for the incorporation of evidence that indicates the aboriginal perspective on the meaning of the treaty, as well as contextual evidence, in the forms of either oral history, wampum belts, or written accounts by treaty negotiators or other people associated with the signing of treaties that also assists in the process of interpretation. The use of extrinsic evidence also provides for the inclusion of the "necessary implications" of a treaty provision, also known as "incidental rights."

VI. Incidental Rights

The majority judgment in Marshall confirms that rights that are incidental to, or a necessary sub-component of, treaty rights are, themselves, protected rights under section 35(1) of the Constitution Act, 1982. This principle had previously been approved in both Sundown and Simon. What this meant in the context of Marshall was that the treaty right to bring goods to trade at truckhouses, or their successors, entailed a further right to obtain goods that could be brought to the truckhouses for trading purposes. As Binnie J. stated, possessing a right to bring goods to trade is meaningless without a corresponding right to obtain goods that could be brought to trade. As he explained it, "[t]he trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown."123

These incidental Mi'kmaq rights to obtain goods to trade were found not to be dependent on the continued existence of the truckhouse or its successor regimes. This finding was premised upon the rejection of frozen rights theory that had been sanctioned by the Supreme Court on

122. Other difficulties associated with relying exclusively upon the written terms of treaties may be seen in "Taking Aim," supra note 31.
123. Marshall, SCC, supra note 1 at para. 52.
numerous instances. The effect of this conclusion was summed up by
the majority's statement that "where a right has been granted, there must
be more than a mere disappearance of the mechanism created to facilitate
the exercise of the right to warrant the conclusion that the right itself is
spent or extinguished." This statement may be seen to be similar in
effect to the "clear and plain" test for the extinguishment of aboriginal or
treaty rights.

The "clear and plain" doctrine of extinguishment is a fundamental part
of Canadian aboriginal rights jurisprudence. It requires a demonstration
of a clear and plain intention on the part of the Crown to extinguish the
rights in question for that extinguishment to be effective. Such inten-
tion may exist, for example, in a treaty, or via legislation. What is not
sanctioned, then, is either the idea of "extinguishment by regulation" or
"extinguishment by implication." The majority's finding in Marshall that
the incidental rights to obtain goods to trade outlived the truckhouse
system is synonymous with the ineffectiveness of "extinguishment by
regulation" or "extinguishment by implication." Had the majority not
held that the rights in question outlived the truckhouse system, then, by
implication, the rights could have been extinguished by an initiative that
was not "clear and plain."

These "incidental" rights to obtain goods to trade that were found to
exist by the majority judgment in Marshall were not unlimited, but
restricted in their scope to the garnering of a moderate livelihood that did
not include the accumulation of wealth. Such a moderate livelihood was
said to include basics such as food, clothing, and housing, which could be
"supplemented by a few amenities," as was held in the Gladstone case.
While this moderate livelihood was not restricted to bare subsis-
tence, it extended only to day-to-day needs. The majority did not,
however, define what would constitute a reasonable livelihood, either in
the context of the Marshall case or more generally. Instead, it stated that
catch limits that would produce a reasonable livelihood based on contem-

124. Note, for example, Simon, supra note 8, Sparrow, supra note 10, and Badger, supra note 4, among others, which hold that the exercise of aboriginal or treaty rights may not be restricted to the historic manner in which they had been used by aboriginal peoples. In addition to determining that the right was not restricted to its exercise in conjunction with trading activities at truckhouses, the majority's rejection of frozen rights theory also entailed that the Mi'kmaq could not demand the restoration of the truckhouse system: see Marshall, SCC, supra note 1 at para. 53.

125. Marshall, SCC, supra note 1 at para. 54.


127. Supra note 11.


129. Ibid.
porary standards could be established by regulation and enforced without violating the treaty right.\textsuperscript{130}

What is interesting about the sanctioning of incidental rights in Marshall is that such action, while consistent with the earlier Sundown case,\textsuperscript{131} appears to contradict the principle established in Van der Peet.\textsuperscript{132} In that case, in the context of aboriginal rights, Lamer C.J.C. held that practices, customs, or traditions that "piggyback" on aboriginal rights are not protected by section 35(1). Neither Sundown nor Marshall addressed this apparent inconsistency.

Ought it to be assumed, based on the sanctioning of incidental rights in Marshall, Sundown, and the earlier treaty case of Simon, coupled with the rejection of incidental rights in Van der Peet that practices incidental to treaty rights are protected rights under section 35(1) while practices necessary to the use of aboriginal rights are not similarly protected? Existing precedent would appear to indicate that this is, indeed, the case. The fact that the rationale for the rejection of incidental rights in Van der Peet was not addressed in either Marshall or Sundown would seem to buttress this assumption.

The contemplation of "necessarily incidental" rights associated with treaties is equally important to the exercise of aboriginal rights where the ability to make use of the right in question requires engaging in a particular practice to facilitate the exercise of the right. One example of necessarily incidental rights associated with an aboriginal right may be seen in the Jack and Charlie case.\textsuperscript{133}

In Jack and Charlie, the appellants, members of the Coast Salish Nation, were convicted of hunting deer out of open season. At the request of one of their relatives, the appellants had killed a deer for use in a ceremony in which the burning of raw deer meat was required.\textsuperscript{134} The appellants insisted that the killing of the deer was necessary in order to carry out the ceremony. The Supreme Court disagreed, holding that it had not received sufficient evidence to indicate either that the deer was killed as part of the ceremony or that fresh deer meat was required. The only restriction on the method of obtaining the deer meat presented in evidence was procuring it by theft, which would render the meat unsuitable. Further, Beetz J. found that while the appellants had alleged in their

\textsuperscript{130.} Ibid. at para. 60.
\textsuperscript{131.} Supra note 3.
\textsuperscript{132.} Supra note 7.
\textsuperscript{134.} The ceremony entailed the burning of the deer meat to satisfy the spirit of the relative's deceased great-grandfather. For further discussion of this case, see the reference infra, note 135.
factum that the use of defrosted raw deer meat was sacrilegious, there was insufficient evidence led to indicate the truth of that assertion.\(^{135}\)

While the Supreme Court of Canada denied the appellants the ability to claim the incidental right to kill a deer out of season in order to facilitate the exercise of the burning ceremony in *Jack and Charlie*, it would seem that, in appropriate circumstances, the exercise of such incidental rights would be vindicated. However, in *R. v. Van der Peet*,\(^{136}\) an aboriginal fishing rights case, Lamer C.J.C.'s majority judgment determined that necessarily incidental rights, or rights that "piggybacked" upon recognized aboriginal rights, were not themselves protected under section 35(1) of the *Constitution Act, 1982*.\(^{137}\) His judgment held that an aboriginal activity could only be a constitutionally-protected aboriginal right if it was an element of a practice, tradition, or custom integral to the distinctive culture of the aboriginal group claiming the right that could be traced to pre-contact practices.\(^{138}\)

In *Marshall*, however, Binnie J.'s majority judgment characterized the right to obtain goods to trade as necessarily incidental to the right to bring goods to trade and, therefore, an equally protected treaty right. While this element of *Marshall* stands in direct contrast with the *Van der Peet* judgment, it is consistent with the discussion of incidental rights in other treaty rights cases. For instance, in the Supreme Court's judgment in *Simon*,\(^{139}\) the Court explicitly stated that practices that were reasonably incidental to treaty rights were themselves protected rights. In *Simon*, a Mi'kmaq member of the Shubenacadie Indian Brook Band (No. 2) was charged with unlawfully possessing a rifle and shotgun cartridge, contrary to section 150(1) of the Nova Scotia *Lands and Forests Act*.\(^{140}\) Simon maintained that he possessed a treaty right to hunt pursuant to the Mi'kmaq Treaty of 1752 and that his possession of the rifle and cartridge...
was a necessary incident of the exercise of that right. In addition to finding that Simon possessed a treaty right to hunt pursuant to the 1752 treaty, Dickson C.J.C. held that for that right to be effective, it must also include activities "reasonably incidental" to the act of hunting. These "incidental rights" were found to include "travelling with the requisite hunting equipment to the hunting grounds." In the Supreme Court's recent examination of treaty rights in Sundown, Cory J.'s unanimous judgment also affirms the protection of rights incidental to the exercise of treaty rights. The respondent, a Treaty No. 6 Cree Indian, constructed a 30 foot by 40 foot log cabin in a provincial park in Saskatchewan in 1992 to facilitate his exercise of his treaty hunting rights. He was charged with constructing a dwelling on park land without a disposition or the prior written consent of the minister. In his defence, Sundown maintained that he needed to build the cabin in order to hunt. Members of his band engaged in "expedition hunting," a hub-and-spoke style of hunting that had long been practised in the area where the park was established. These hunts were carried out over extended periods of time, ranging from overnight to two weeks in duration. Hunters would establish a base camp that they would venture from each day and return to in the evening to smoke fish or game, prepare hides, and sleep. The cabin constructed by Sundown was used for these very purposes.

In determining that the construction of the cabin was necessarily incidental to Sundown's treaty right to hunt and therefore protected by s. 35(1), Cory J. held that to understand the term "reasonably incidental" as it was used in Simon, it must be asked whether "a reasonable person, fully apprised of the relevant manner of hunting or fishing, [would] consider the activity in question reasonably related to the act of hunting or fishing." This "reasonable person" was dispassionate, fully apprised of

141. Supra note 8 at 403.
142. Ibid. at 403.
143. Supra note 3 at 409.
the treaty holder’s rights, and aware of the manner in which the First Nation in question hunted and fished at the time the treaty was signed.\footnote{Ibid. Although it should be emphasized that Cory J. explained, \textit{ibid.} that it was necessary to avoid a “frozen rights” approach to the exercise of the rights in question: That knowledge must, of course, be placed to some extent in today’s context. For example, in the past it was reasonably incidental to hunting rights to carry a quiver of arrows. Today it is reasonably incidental to hunting rights to carry the appropriate box of shotgun shells or rifle cartridges. A form of shelter was always necessary to carry out the expeditionary hunting of the Joseph Bighead First Nation. At the time of the treaty, the shelter may have been a carefully built lean-to. That shelter appropriately evolved to a tent and then a small cabin. Thus, the reasonable person, informed of the manner of hunting at the time of the treaty, can consider it in the light of modern hunting methods and can determine whether the activity in question – the shelter – is reasonably incidental to the right to hunt.}{144} In constructing a definition of what constitutes an activity “reasonably incidental” to a right to hunt, Cory J. stated that it would be one “which allows the claimant to exercise the right in the manner that his or her ancestors did, taking into account acceptable modern developments or unforeseen alterations in the right.”\footnote{\textit{Ibid.} at 409-10.}{145} According to Cory J., such incidental activities “are not only those which are essential, or integral, but include, more broadly, activities which are meaningfully related or linked.”\footnote{\textit{Ibid.} at 410.}{146} He did restrict the scope of reasonably incidental activities to those that were incidental to an actually practised treaty right.

From \textit{Sundown}, Cory J. established that determining whether an activity was reasonably incidental to a treaty right was “largely” factual and historical. The focus of such inquiry was not premised upon the essentiality of the activity in order for the right to be exercised, but upon whether the activity was understood, both historically and contemporarily, as “significantly connected” to the right in question. Since there was no dispute that Sundown’s band traditionally hunted in an expeditionary style and that without shelter this method of hunting would be impossible, Cory J. determined that a shelter was a necessary, and hence reasonably incidental, element of his treaty-protected method of hunting.

It should be noted that \textit{Sundown}, like \textit{Marshall}, did not demonstrate any recognition of the contradiction between the treatment of reasonably incidental rights in \textit{Van der Peet} and \textit{Simon}. Although Cory J. discussed the \textit{Van der Peet} case in his judgment, no mention of Lamer C.J.C.’s distinction between primary and incidental rights was made.\footnote{The fact that neither \textit{Sundown} nor \textit{Marshall} distinguished Lamer C.J.C.’s statements on incidental rights in \textit{Van der Peet}, or cited \textit{Van der Peet}’s discussion of this issue at all is rather peculiar, insofar as Lamer C.J.C. sat on the \textit{Sundown} and \textit{Marshall} appeals.}{147} From these cases, as indicated earlier, a situation has developed whereby
practices reasonably incidental to the exercise of aboriginal rights are not constitutionally protected, but practices reasonably incidental to the exercise of treaty rights are. Although *Van der Peet* is an aboriginal rights case, while *Simon, Sundown,* and *Marshall* are treaty rights cases, there is nothing inherent in those cases, or in the nature of aboriginal rights—as opposed to treaty rights—to suggest that practices that are reasonably incidental to the former and which facilitate their practice ought not be protected along with those rights, while practices reasonably incidental to treaty rights ought to be protected as part of those same rights.¹⁴⁸

Of further note is that in *Sundown* Cory J. held that in determining what constitutes a reasonably incidental act related to the contemporary exercise of treaty rights one must account for unforeseen alterations in the right. Similarly, in *Marshall* Binnie J. expressly held that courts are not to understand treaty rights as if they are “frozen-in-time.”¹⁴⁹ These findings are directly opposed to the tenor of Lamer C.J.C.’s majority judgment in *Van der Peet,* where he stated that constitutionally protected aboriginal rights are restricted to those practices which predated European settlement or can be traced to such practices. Why aboriginal rights were deemed in *Van der Peet* not to be capable of unforeseen alteration in light of post-contact events while treaty rights may be capable of such alteration post-treaty is not made clear through the judgments. Again, there is nothing inherent in the distinction between aboriginal and treaty rights that would warrant such a differentiation being made.

The failure of *Marshall,* and *Sundown* before it, to address the *Van der Peet* judgment’s treatment of incidental rights and the evolution of rights, just as *Van der Peet* did not attempt to reconcile its findings with those in *Simon,* has seemingly resulted in the treatment of those rights by the Supreme Court in a juristic vacuum. However, the Court has sometimes regarded aboriginal and treaty rights interchangeably, as in the application of the *Sparrow* justificatory test to treaty rights in cases such as *Badger* and *Côté* and the “creation” of the *Badger* test in *Marshall.*¹⁵⁰ What is problematic about this development is that the Supreme Court has not explained why it treats aboriginal and treaty rights separately at times and interchangeably at others.

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¹⁴⁹ *Marshall, SCC,* supra note 1 at para. 53.

¹⁵⁰ Further discussion of this point will be found in Part VII, “Justification and the ‘Badger’ Test,” below.
While aboriginal and treaty rights must be recognized as independent forms of rights, in some circumstances it is not inappropriate to discuss them together. That being said, it is clear that they should only be discussed together where that discussion recognizes the important distinctions between them. Unfortunately, this has not always happened in Canadian jurisprudence. Most recently, the failure to distinguish between aboriginal and treaty rights may be seen in the adoption of the Sparrow justificatory test to treaty rights in cases such as Badger, Côté, and Sundown.

VII. Justification and the “Badger Test”

Both the majority and dissenting judgments in Marshall unequivocally endorse the notion that the justificatory test originally established in relation to aboriginal rights in Sparrow, subsequently expanded upon in Gladstone, and ultimately sanctioned in its expanded manner in Delgamuukw applies equally to treaty rights. In fact, there is repeated reference to the application of the “Badger test” which is said to denote this principle.

Interestingly, in the Badger case there was no mention of any “test” that would allow for the justification of limitations on treaty rights. Rather, Cory J.’s majority judgment held that the principles established in Sparrow would apply equally to treaty scenarios. However, his endorsement of this conclusion was significantly equivocal. Specifically, in Badger Cory J. stated that, although the justificatory test formulated in Sparrow was applied to aboriginal rights and made no mention of its potential bearing upon treaty rights, the test applied to treaty rights “in most cases.”

As well, although noting that treaty rights, unlike aboriginal rights, were the result of mutual agreement, he held that both forms of rights could be unilaterally abridged. He did find, however, that there were “significant aspects of similarity” between aboriginal and treaty rights. Included in this similarity were the “unique, sui generis nature” of both forms of rights, their implication of the honour of the Crown, and the wording of section 35(1) of the Constitution Act, 1982, which he held “supports a common approach to infringements of Aboriginal and treaty rights.”

151. Supra note 4 at 105.
152. Ibid. at 105-6.
153. Ibid.
From these statements, it would appear that Justice Cory’s conclusion that the infringement of treaty rights ascribes to the same justificatory standard as the infringement of aboriginal rights comes not from the nature of treaty rights as compared with aboriginal rights, but from the fact that both forms of rights co-exist in section 35(1) and therefore are to be treated in an identical fashion. Indeed, his conclusion is based on the same principles established in two earlier Ontario Court of Appeal cases, R. v. Bombay54 and R. v. Fox.55 In Bombay, Austin J.A. arrived at this conclusion in the following manner:

The Sparrow case dealt with Aboriginal rights. The language of the decision of the Supreme Court of Canada in that case, however, is equally applicable to treaty rights. In R. v. Joseph, [1990] 4 C.N.L.R. 59 (B.C.S.C.) Murphy J. held that the framework provided by the Supreme Court in Sparrow “applies also to treaty rights.” I agree.56

Nowhere else in the judgment was there any mention of reasons for the application of the Sparrow test to treaty rights. In Fox, it was simply said that “[i]n R. v. Sparrow, supra, the Supreme Court of Canada set out the framework analysis for assessing the constitutionality of legislation affecting treaty and Aboriginal rights recognized and affirmed under s. 35(1).”57

From these cases, it may be seen that there is no principled basis upon which the Sparrow test was applied to treaty rights. Indeed, the statement in Fox is simply incorrect, since the Sparrow case said nothing about the application of its justificatory standard to treaty rights. As I suggested in an earlier article, “it appears as though the placing together of [aboriginal and treaty rights] in s. 35(1) was solely responsible for the Sparrow test’s application to treaty rights, not because of any reasoned analysis of why treaty rights should be treated like Aboriginal rights with respect to their limitation by governmental legislative initiatives.”58 Badger simply continued this trend. When the Supreme Court of Canada released its subsequent judgment in R. v. Côté, it sanctioned the application of the Sparrow test to treaty rights without providing any further rationale for such a conclusion other than citing Badger.59 As Lamer C.J.C. explained in that case:

156. Supra note 154 at 94.
157. Supra note 155 at 136.
As a general rule, where a claimant challenges the application of a federal regulation under s.35(1), the characterization of the right alternatively as an Aboriginal right or as a treaty right will not be of any consequence. As the Sparrow test for infringement and justification applies with the same force and the same considerations to both species of constitutional rights: R. v. Badger, [1996] 1 S.C.R. 771, at paras. 37, 77 and 78 and 79.160

Interestingly, while the Côté case approved the principle established in Badger, it did not make any reference to a “Badger test.”

Between Côté and Marshall came the Sundown case.161 While the Marshall case contemplates the existence of a Badger test, Cory J.’s unanimous judgment in Sundown makes no reference to such a test. In Sundown, the Court held that the applicable standard for justifying limits on treaty rights was the test articulated in Sparrow. If a “Badger test” which applied justificatory standards to existing treaty rights contained in section 35(1) was in place, why would Cory J. not have made reference to it, but instead to the justificatory test for the infringement of aboriginal rights in Sparrow? This curiosity is magnified by the fact that Cory J. delivered the majority judgment for the Court in Badger.

With all of the media reference to judicial activism surrounding the Marshall judgment and the contention that the Supreme Court has “created” rights through its interpretation of the truckhouse clause, perhaps the judicial creation of the Badger test is yet another manifestation of such activism. The primary distinction, however, between the majority’s interpretation of the meaning and effect of the truckhouse clause and its contemplation of a Badger test is that the former is premised upon a “necessary implications” argument, similar to that found in cases such as Alberta Government Telephones162 and Bombay (Province of) v. Bombay (City of),163 whereas the latter is simply contemplated without

160. Ibid. at 40-41. Later in the Côté judgment, at 55-56, Chief Justice Lamer held that “it is quite clear that the Sparrow test applies where a provincial law is alleged to have infringed an Aboriginal or treaty right... The text and purpose of s.35(1) do not distinguish between federal and provincial laws which restrict Aboriginal or treaty rights, and they should both be subject to the same standard of constitutional scrutiny.” While Lamer C.J.C. placed his emphasis on section 35(1)’s failure to distinguish between federal and provincial laws which restrict such rights, he did think to ask whether there was reason to distinguish between aboriginal and treaty rights for the purpose of justification.

161. Supra note 3.


163. [1947] A.C. 58 (P.C.). This “necessary implications” argument holds that where a statute that expressly applies to one, but not both, levels of government would be frustrated or rendered absurd unless it was read to apply to both levels of government, the statute, by necessity or logical implication, must be understood to apply to both levels. See also Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1.
reference to where in *Badger* such a test was developed or where it otherwise came from. As a result of the lack of reasoning by the majority judgment in *Badger* pertaining to the application of the *Sparrow* test to treaty rights, perhaps the justificatory test for treaty rights could equally have been called the "Côté test," since Côté provided no greater rationale for this conclusion than did *Badger*.

Given the above discussion, if the Supreme Court in *Marshall* has determined that there is such a beast as the "*Badger* test," it remains to be seen whether that test is identical to the *Sparrow* test. The principles espoused in *Marshall* appear to indicate that the tests are the same. If that is the case, then it ought be asked why there is a need for a *Badger* test at all. If the "tests" are the same, it would seem sufficient to state, as was done in *Badger*, that the *Sparrow* test applies equally to aboriginal and treaty rights. In *Marshall*, however, Binnie J. stated that the *Sparrow* test was "adapted to apply to treaties in *Badger,*" thereby bringing into question the extent of the adaptation. The Supreme Court's decision to simultaneously uphold both the *Sparrow* and *Badger* tests, applying to aboriginal and treaty rights respectively, could be read to suggest that there is either a matter of redundancy at play or that the tests are not the same. While the former is a distinct possibility, having two identical tests described by different names depending on whether the principles they contain were applied to aboriginal (*Sparrow*) or treaty (*Badger*) rights could also indicate the Court's recognition of the significant distinction between aboriginal and treaty rights. Indeed, Cory J.'s majority judgment in *Badger* bears this suggestion out, as indicated by the following commentary:

> There is no doubt that Aboriginal and treaty rights differ in both origin and structure. Aboriginal rights flow from the customs and traditions of the Native peoples. To paraphrase the words of Judson J. in *Calder* ... they embody the right of Native people to continue living as their forefathers lived. Treaty rights, on the other hand, are those contained in official agreements between the Crown and the Native people. ... They create enforceable obligations based on the mutual consent of the parties.  

If the Supreme Court has recognized that aboriginal and treaty rights are not the same, but has nevertheless stated that the *Sparrow* justificatory test applies to treaty rights and has gone as far as to describe that test's application to treaty situations as the *Badger* test, then perhaps the second possibility posited above—that the tests are not the same—is the correct

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164. *Marshall, SCC*, supra note 1 at para. 48. Note the use of the word "adapt" as opposed to "adopt," thereby suggesting some degree of change.

165. *Supra* note 4 at 105.
one. More importantly, since the Court has recognized the distinction between aboriginal and treaty rights, it is questionable how it could apply the Sparrow standard, which is based on unilateral restrictions of rights in appropriate, or necessary, circumstances,\(^\text{166}\) to treaties which are consensual documents between parties. Indeed, in Sundown, Cory J. referred to his judgment in Badger, where he stated that “[t]reaties may appear to be no more than contracts. Yet they are far more. They are a solemn exchange of promises made by the Crown and various First Nations.”\(^\text{167}\)

Where an exchange of solemn promises exists, how can it be that one of the parties to that exchange may unilaterally alter the nature of the agreement reached? Perhaps more telling of the application of the Badger test in this regard is that the only party that may unilaterally alter the nature of a treaty agreement is the Crown. The majority’s sanction of the application of the Sparrow test to treaty rights in Marshall, renaming this application the Badger test in the process, derogates significantly from the positive aspects of its interpretation of treaties. The reaffirmation of the Badger test in Marshall No. 2—where the Court stated that “The Court in Badger extended to treaties the justificatory standard developed for aboriginal rights in Sparrow, supra”—is a continuation of the unquestioned, unprincipled assumption that began in Badger and was continued in Marshall.\(^\text{168}\)

While the repetition of propositions results in a familiarity that may connote authority, even in law,\(^\text{169}\) such repetition is unwarranted where the propositions being repeated have no principled or legitimate basis.

\(^{166}\) In Sparrow, supra note 10, justification was to be used only where it was “absolutely necessary,” while in Gladstone, supra note 11, the Court held that justification was applicable where it was “pressing and substantial.” While this distinction may be purely semantical, it is suggested that this change in the wording used is indicative of the lessening of the standard for justification from Sparrow to Gladstone. This lessening of the justificatory standard may also be seen in the shift from Sparrow’s finding that “public interest” was too vague to serve as a legitimate basis for justifying limitations of aboriginal rights to Gladstone’s ruling that competing, but non-constitutionally-protected interests of non-aboriginals could be validly used to justify limiting aboriginal rights where the public interest would be served by such a finding.

\(^{167}\) Supra note 3 at 407 [emphasis added].

\(^{168}\) Supra note 2 at para. 32.

\(^{169}\) I have argued that the same effect may be seen in relation to the Guerin case, supra note 95, and the authority of its proposition that “the Crown” holds fiduciary obligations to aboriginal peoples, which has been relied upon by subsequent judicial considerations without any discussion of which emanation of the Crown owes those duties or the ramifications of a finding of fiduciary relations between the Crown and aboriginal peoples in Canada: see L.I. Rotman, Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada, (Toronto: University of Toronto Press, 1996).
When considering the juristic merits of the application of the *Sparrow* or *Badger* tests to treaty rights, something more than the hollow rhetoric that has been expressed in cases such as *Marshall* is required for those tests to properly be applied to treaty rights.

**Conclusion**

For all of the criticism that the case has received, the Supreme Court of Canada’s judgment in *Marshall* neither creates any new legal principles, nor does it truly extend the application of existing doctrine. It is, at its roots, an affirmation of the status quo, notwithstanding the outlandish claims of some about its devastating effects on non-aboriginal access to natural resources or the incessant claims that the Supreme Court is, once again, “creating” law rather than interpreting it. Indeed, it may be plausibly argued that one of the reasons for the release of *Marshall No. 2*\(^{170}\) in the form that it took was to address and dismiss such claims. In any event, these predictions more closely resemble the prognostications of Chicken Little than Nostradamus.

The importance of the *Marshall* judgment as a precedent rests not upon the affirmation of the various canons of treaty interpretation that had previously been sanctioned by the Supreme Court in cases such as *Sundown* and *Badger*, but with the manner in which the majority judgment gave practical effects to those interpretative canons. Perhaps the true legacy of the *Marshall* case lies in its recognition that the spirit and intent, rather than merely the literal terms, of a treaty are worthy of judicial recognition and implementation. Binnie J.’s statement that “the surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities”\(^{171}\) is illustrative of this appreciation of a broader-based understanding of what constitutes a treaty. The Privy Council expressed a similar sentiment in the *New Zealand Maori Council* case, where Lord Woolf explained, in relation to the *Treaty of Waitangi, 1840*, that:

\(^{170}\) *Supra* note 2.

\(^{171}\) *Marshall, SCC*, *supra* note 1 at para. 56.
Both the Act of 1975 and the State-Owned Enterprises Act 1986 refer to the "principles" of the Treaty. In their Lordships' opinion the "principles" are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. (Bearing in mind the period of time which has elapsed since the date of the Treaty and the very different circumstances to which it now applies, it is not surprising that the Acts do not refer to the terms of the Treaty). With the passage of time, the "principles" which underlie the Treaty have become much more important than its precise terms.\(^{172}\)

By incorporating the spirit and intent of treaties into their legal interpretation, a more well-rounded appreciation of the understanding of the parties at the time the treaty was signed is possible. That enables courts to apply historic treaties and treaty rights in a meaningful, contemporaneous way which allows for the evolution of those rights, but maintains fidelity to the original purpose of the treaties and the understandings of the parties thereto. If this is to be the *Marshall* case's ultimate legacy, then it will properly occupy an important place in the history of Canadian aboriginal rights jurisprudence for this proposition alone.

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