Getting Their Feet Wet: The Supreme Court and the Practical Implementation of Treaty Rights in the Marshall Case

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Judicial decisions which recognize aboriginal or treaty rights to natural resources inevitably lead on to a process of negotiation, as governments and aboriginal and other users of the resource define the access and management regimes which allow for practical implementation of the legal rights. Courts should be cognizant of the impact of their decisions on such negotiations, and provide adequate clarity and substantive guidance to negotiators. This article considers the decisions of the Supreme Court of Canada in the Marshall case from this perspective, and details the shortcomings which made the prospects for successful negotiations less favourable. The weaknesses in the Court's judgments in this case provide the basis for some suggested changes in approach.

Les décisions juridiques reconnaissant les droits des autochtones ou les droits issus des traités concernant l'accès aux ressources naturelles débouchent inévitablement sur un processus de négociation faisant intervenir les divers paliers de gouvernement, la communauté autochtone et les autres utilisateurs de la ressource pour mettre au point les conditions d'accès et le régime de gestion de la ressource qui permettront la mise en application des droits reconnus par la cour. Les tribunaux doivent être sensibles à l'impact de leurs décisions sur des négociations semblables et formuler des décisions claires qui donnent des repères concrets aux négociateurs. L'auteur examine les décisions de la Cour suprême dans le dossier Marshall; il cerne les lacunes qui ont entravé le travail des négociateurs et propose des changements à l'approche utilisée.

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Any intransigence at the bargaining table on the part of governments or, for that matter, Native groups, will be recorded by the eyes and ears in the Supreme Court building. The message from the Supreme Court of Canada seems clear. Those who fail to negotiate in good faith may reap the whirlwind.¹

**Introduction**

On 17 September 1999 the Supreme Court of Canada delivered its decision in the case of *R. v. Marshall*,² confirming the existence of a Mi’kmaq³ treaty right to trade in the products of fishing, hunting and gathering under a series of treaties made with the British Crown in 1760-61, and overturning a conviction⁴ against Donald Marshall Jr. for illegally fishing and selling eels.⁵ By November 17, in an extraordinary turn of events, the Court was dealing with the matter again, denying a motion for rehearing and stay by the intervener West Nova Fishermen’s Coalition, a motion premised on the need for clarification of certain questions arising from the first decision.⁶

In the intervening months, and to a lesser extent in the period since the second ruling, the response to the *Marshall* decision in the East Coast fishing industry involved a degree of confusion, acrimony and violence which has not attached to previous decisions of the Court on aboriginal or treaty rights.⁷ The fact that the first decision closely preceded the

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² [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513 [hereinafter *Marshall #1*]. “Marshall” or the “Marshall case” will be used to refer to the entire course of the litigation.
⁴ *R. v. Marshall*, [1996] N.S.J. No. 246 (Prov. Ct.) online: QL(NSJ) [hereinafter *Marshall: Prov. Ct.*]. The various treaties of relevance to this case are included as appendices to this decision, including the following: Treaty of 1726 (App. III); Treaty of 1752 (App. IV); Maliseet and Passamaquoddy Treaty of February 1760 (App. V); Treaty of March 1760 with LaHave Mi’kmaq (App. VI).
opening of the lobster season, one of the more valuable remaining fisheries in Atlantic Canada, may have raised the stakes in this case. A long history of exclusion of the Mi'kmaq from many resource-based industries, coupled with fears related to an industry and communities in decline, certainly played a role in some localities, as did media and political actors pursuing their own, independent agendas. It is, however, simplistic to ascribe all of the resulting tension to such factors. Other valuable resources have been affected by previous decisions without similar consequences, and a number of individuals and communities, on both sides of the issue, made good faith efforts to move towards accommodation and compromise in the highly charged atmosphere surrounding the implementation of Marshall.

Much of the conflict following on from the September 17 decision arose from the wide divergence of views on what the Supreme Court had meant when it defined the treaty right. It was obvious to all parties that negotiations would be required to implement the judgment in practical terms, but there was little or no agreement on the actual impact of the decision on precisely those issues that would require negotiation, including such critical elements as the geographic scope of the treaty right and the range of resources affected. This lack of common ground created serious obstacles to the initiation of coherent negotiations.

This aspect of the Marshall case provides the starting point for this article. It seems clear to all involved, including the Court, that negotiations are by far the preferable means of reaching settlements on disputes relating to aboriginal rights and treaties. Even where litigation has

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8. For a discussion of some of the hostile press coverage, and the public condemnation of the decision by some provincial premiers, see R.L. Barsh and J.Y. Henderson, "Marshalling the Rule of Law in Canada: Of Eels and Honour" (1999) 11 Constitutional Forum 1 at 11-12, 13 [hereinafter "Of Eels and Honour"]. In the House of Commons the Reform Party (as it then was) took a particularly active interest in the matter, taking the opportunity to connect the decision in Marshall #1 to the Nisga'a treaty in British Columbia and a generalized concern about "where this country is going": see e.g., House of Commons Debates (13 October 1999) at 1305 (B. Gilmour). The release of Marshall #1 during continuing debate on the Nisga'a deal may have contributed to the interest of some parties in aggressively pursuing this issue.
9. In addition to negotiations with government, a separate track developed between aboriginal leaders and non-native fishing groups. See e.g., 33 Canadian News Facts (1999) at 5931. Among those calling for compromise on interim arrangements was Mr. Marshall himself: J. DeMont, "Lobster Wars" Maclean's (11 October, 1999) 20 at 20.
10. The federal government appointed a negotiator on Oct. 15, who was responsible for brokering interim deals with the various band authorities: 33 Canadian News Facts (1999) at 5939; see also Assembly of First Nations Press Release of Oct. 1, 1999, "National Chief Welcomes Government Offer to Negotiate Peaceful Resolution to Fishery Dispute" [hereinafter "National Chief Welcomes Government Offer"].
resulted, it is inevitable that post-judgment negotiations will be required to implement the adjudicated rights in practical detail. These negotiations may involve lawyers (as, some might complain, does everything else), but for cases involving natural resources much of the content of the discussions will be concerned with creating an acceptable management regime to deal with such fundamental matters as the priority allocation of access, the geographic and temporal scope of that access, the range of permissible technological and other limits on exploitation, and the myriad of other factors that make up a complete resource management system.

This examination of the Marshall case is directed primarily to the relationship between the Court’s work and the requirements of the subsequent process of implementation through negotiation. The fundamental question is how, and how well, the Court provides guidance and direction to the negotiation process, and what the experience of Marshall says about ways in which this might be done better. It is not intended to pursue the various doctrinal debates surrounding the interpretation of aboriginal treaties, as the discussion proceeds from the starting point of accepting the principles developed in previous cases, nor is there any detailed consideration of the whether the Court was “correct” in finding the right in this matter. Furthermore, this review is largely restricted to the issues which arose on the facts of this case; there are other arguments relating to the interpretation of treaties in Atlantic Canada which are still very much alive and which were not settled within the factual confines of the Marshall case. These include such matters as the general applicability

12. The question of infringement is considered in Parts II and III, in that it is more closely connected to the issue of guidance for negotiators.
of the Treaty of 1752, which was effectively removed from the case by the defence at trial, and even broader assertions about the concept of a "Covenant Chain" of treaties, an argument which did not become part of this case. Further arguments also exist about the presence of an aboriginal right to trade, as distinct from the treaty right claimed in Marshall, and the impact of movement towards self-government. None of what follows is intended to express a view on these and other issues beyond the narrow boundaries of the Marshall case itself.

13. The Treaty of 1752 was the subject of Simon v. R., [1985] 2 S.C.R. 387 [hereinafter Simon]. This Treaty was concluded between Governor Hopson of Nova Scotia and Major Jean Baptiste Cope (at 392-93), who was described by the Supreme Court, at 407, as "Chief of the Shubenacadie Micmac tribe". There have been claims that the treaty may be more broadly applicable throughout the traditional Mi'kmaq territory. Wildsmith has suggested that intermarriage and movement of the Mi'kmaq since the 18th century means that rights under specific treaties might be made more generally applicable: B. Wildsmith, "The Mi'kmaq and the Fishery: Beyond Food Requirements" (1995) 18 Dal. L.J. 116 at 123 [hereinafter "The Mi'kmaq and the Fishery"]. Henderson argues more directly that Cope and his delegates were formally recognized as the proper representatives of the Mikmaw Nation", and refers to Cope as "Grand Chief" of the "Mikmaw Nation": "Mkmaw Tenure", supra note 3 at 252-53. This latter argument, however, is in conflict with the record of the initial discussions with Cope, which indicates that he did not make this claim for himself, but rather that he would attempt to draw in the other Chiefs; see T. Akins, ed., Selections from the Public Documents of the Province of Nova Scotia (Halifax: Charles Annand, 1869) at 671, extracted in R.H. Whitehead, The Old Man Told Us: Excerpts From Micmac History 1500-1950 (Halifax: Nimbus,1991) at 123. The impression of a narrower authority is enhanced by the inclusion of the obligation to bring in other Chiefs in the actual treaty: see Simon, ibid. at 393. See also the discussion at S.E. Patterson, "Indian-White Relations in Nova Scotia, 1749-61: A Study in Political Interaction" (1993) 23 Acadiensis 23 at 38-39 [hereinafter "Indian-White Relations"]). For a discussion of late 19th and early 20th century Mi'kmaq perspectives on the validity of the 1752 Treaty, see W.C. Wicken, "'Heard It From Our Grandfathers': Mi'kmaq Treaty Tradition and the Syliboy Case of 1928" (1995) 44 U.N.B.L.J. 145 at 148-51, 153-54 [hereinafter "Mi'kmaq Treaty Tradition"].

14. See infra note 58.

15. By this interpretation, earlier and later treaties are connected to form an overall package of obligations. See Marshall, Denny & Marshall, supra note 3 at 83, where the Treaties of 1760-61 are referred to as "accessions" to the 1752 Treaty. See also "Mkmaw Tenure", supra note 3 at 257-58, and "The Mi'kmaq and the Fishery", supra note 13 at 117, 123. For a contrary view, contesting the existence of such a "chain" on the historical evidence, see S.E. Patterson, "Anatomy of a Treaty: Nova Scotia's First Native Treaty in Historical Context" (1999) 48 U.N.B.L.J. 41 at 63-64 [hereinafter "Anatomy of A Treaty"].

16. See "The Mi'kmaq and the Fishery", supra note 13 at 124-26, 132-36. Barsh & Henderson refer to the majority's "failure to distinguish between an Aboriginal right to fish and a treaty right to fish, both of which can legitimately be asserted by the Mi'kmaq", but this ignores the fact that the Court did not have before it any defence based on an aboriginal right to fish. "Of Eels and Honour", supra note 8 at 8, note 74. Both aboriginal title and aboriginal rights to fish and trade were asserted, but rejected on the facts, in the post-Marshall case of R. v. Bernard, [2000] N.B.J. No. 138 at paras. 88, 107-10 (Prov. Ct.) online: QL(NBJ) [hereinafter Bernard], which also dealt again with the 1760-61 Treaties, at paras. 72-87.
I. Sui Generis Treaties; Sui Generis Decisions

The Supreme Court has long recognised treaties between the Crown and aboriginal nations as a unique form of agreement, to which usual principles of international law (or contract law) cannot be readily applied. In the words of Chief Justice Dickson in *Simon*, a treaty of this type "is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law," and this characteristic of the treaties means that they must be subject to special rules of interpretation. This and other interpretive principles applicable to aboriginal treaties were summarised by McLachlin J. in the dissent in *Marshall #1*, including the following:

1. Treaties should be given a "fair, large and liberal construction", with "doubtful expression" or ambiguity resolved in favour of the aboriginal parties;

2. Treaty interpretation must choose "from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time";

3. The "honour of the Crown" is to be presumed in finding common intention, and indeed more generally the interpretation of treaties, and of legislative instruments which affect rights granted under them, "must be approached in a manner which maintains the integrity of the Crown" in the sense that it is "assumed that the Crown intends to fulfil its promises";


[T]he ... description (really a non-description) of Aboriginal rights as *sui generis* is wholly the creation of our own Supreme Court. The description, first coined in *Guerin*, has been repeated in subsequent cases as if repetition will make it into a definition as opposed to an adamant refusal to essay a definition. [footnotes deleted]


18. *Supra* note 2 at para. 78.


4. Courts must take account of the historical context of treaty negotiation, and in particular the fact that the treaties "were the product of negotiation between very different cultures", so that the language may not reflect "with total accuracy each parties understanding of their effect", especially in light of differing linguistic traditions;

5. Words in a treaty should be given "the sense they would naturally have held for the parties at the time", and should not be "subjected to rigid modern rules of construction";

6. Generous interpretation does not extend to changing the terms of the treaty, and courts must choose "from among the various interpretations the one which best reconciles" the interests of the parties;

7. Treaty rights are not "frozen in time", but must be interpreted to allow for their modern evolution.

The Court has also developed a process through which the treaty interpretation principles are to be applied, a process which sets out a series of steps which are themselves defined by additional principles. The four basic steps to be followed in the examination of a claimed treaty right, which were set out in the aboriginal rights context in Sparrow and subsequently applied to treaties, were summarised as follows in Gladstone:

In Sparrow . . . Dickson C.J. and La Forest J. . . . held that an analysis of a claim under s. 35(1) has four steps: first, the court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right; second, a court must determine whether that right was extinguished prior to the enactment of s. 35(1) of the Constitution Act, 1982; third, a court must determine whether that right has been infringed; finally, a court must determine whether that infringement was justified.

The first stage, for which the onus is on the claimant of the right, requires the establishment of a "treaty right that protects, expressly or by inference, the activities in question". Should the Crown claim the termination or extinguishment of the right, however, they bear the onus to show this, and this burden can only be satisfied "by strict proof". The claimant

24. Badger, supra note 22 at para. 52.
25. Marshall #1, supra note 2 at para. 78.
26. Badger, supra note 22 at para. 52.
27. Sioui, supra note 17 at 1069.
30. See e.g., Badger, supra note 22 at 86-95, 96.
32. Marshall#1, supra note 2 at para. 111, per McLachlin J. in dissent [emphasis in original].
again bears the burden of showing that the governmental action, normally legislation,\(^{34}\) constitutes a *prima facie* infringement of the right. The test for *prima facie* infringement set out in *Sparrow*, and applied as well to treaties,\(^{35}\) requires the court to ask a number of questions:

To determine whether the . . . rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.\(^{36}\)

The test has been subject to some subsequent clarification which has made it clear that these questions “do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place.”\(^{37}\)

The final stage of justification, for which the burden of proof is on the Crown, involves a two-part inquiry focusing first on whether the government can “demonstrate that it was acting pursuant to a valid legislative objective”\(^{38}\) which was “compelling and substantial”,\(^{39}\) and, second, that in pursuit of its objectives the Crown has also “acted in a way consistent with upholding the honour of the Crown and its fiduciary obligation to Aboriginal people.”\(^{40}\) A finding on the latter issue may involve consideration of a number of additional issues, including priority of allocation, whether there has been as “little impairment as possible” to achieve the objective, the availability of compensation and whether there has been

\(^{33}\) See *Sioui*, supra note 17 at 1061, citing with approval *Simon*, supra note 13 at 405-06.

\(^{34}\) It has been argued that the Court has moved from a notion of infringement as primarily a narrow regulatory issue, to a broader conception including virtually any governmental actions: see L. Dufrainmont, “From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada” (2000) 58 U.T. Fac. L. Rev. 1 at 22-23.

\(^{35}\) See e.g., *Badger*, supra note 22 at para. 37; *R. v. Coté*, [1996] 3 S.C.R. 139 at para. 33 [hereinafter *Coté*].

\(^{36}\) *Sparrow*, supra note 28 at 1112.

\(^{37}\) *Gladstone*, supra note 31 at para. 43, where Lamer C.J.C. also addressed the possibility that wording such as “undue hardship” in *Sparrow* required more than a “meaningful diminution” of the right, and confirmed that nothing more was required to show an infringement. In addition, he clarified that the questions in *Sparrow* were simply pointing to “factors which will indicate that such an infringement has taken place”.

\(^{38}\) Ibid. at para. 54

\(^{39}\) *Sparrow*, supra note 28 at 1113.

\(^{40}\) “The Mi’kmaq and the Fishery”, supra note 13 at 129.

The possibility of justification of infringements of constitutionally protected aboriginal and treaty rights, which is of course not apparent in the combined effect of sections 35(1) and 52 of the Constitution Act, 1982,\footnote{Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.} has given rise to significant amounts of commentary and controversy. The debate has produced an extensive list of concerns: the propriety of “watering down” constitutional rights and thus removing any real “protection” they might have had;\footnote{Of Eels and Honour”, supra note 8 at 17: The only proper test for a constitutional right is inconsistency, as it is explicitly set out in s. 52(1) of the Constitution Act, 1982. The courts have been charged constitutionally with the duty of determining consistency and nullifying “laws” that are not consistent with fundamental rights.} the conceptual problem of unilateral modification of rights provided for under consensual agreements (in the case of treaty rights);\footnote{For a full discussion of this issue, see “Defining Parameters”, supra note 17 at 152-58. The justification test from Sparrow was explicitly adopted for treaties in Badger, supra note 22 at paras 74-85.} the dangers of consequentialist reasoning that permits the dilution of rights in the face of inevitable results that the Court might find unpalatable;\footnote{D. Newman, “The Limitation Of Rights: A Comparative Evolution and Ideology of the Oakes and Sparrow Tests” (1999) 62 Sask. L. Rev. 543, passim.} the threat of perceived expansions of the possibilities available under Sparrow, as more flexible versions of “compelling and substantial” objectives are developed.\footnote{See the discussion on the expansion of the potential list of objectives in Dufraimont, supra note 34 at 8-12. See also: Gladstone, supra note 31 at para. 75 on the acceptability of an objective of “pursuit of regional and economic fairness”; Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 at para. 165 [hereinafter Delgamuukw], dealing with general objectives of economic development. Dufraimont, ibid. at 9, refers to the Delgamuukw formulation as “a veritable celebration of public interest-based limitations on Aboriginal rights.”} On the other side, there is the view (inherent in the Court’s approach) that pragmatism dictates there be the possibility of balancing competing interests in the lands and resources in question, and that justification of intrusions forms part of a package with the relatively flexible interpretive
principles applied in defining the rights.\footnote{47} This debate over the applicable principles is, as noted earlier, beyond the scope of the question under consideration here, and indeed justification was never directly dealt with in the \textit{Marshall} case, in light of the fact that the Crown did not call evidence on the issue at trial. The principles and process utilised in treaty interpretation are, however, relevant to the question of practical guidance for the conduct of negotiations on treaty implementation, and may have been developed partly with that task in mind.

The Supreme Court has, from the early s. 35 cases onward, been quite frank about two fundamental characteristics of the issues that confronted them. First, there has been repeated acknowledgement of the fact that these complex, multi-faceted problems of rights and resource management are not particularly amenable to resolution by litigation,\footnote{48} and that negotiation is by far the preferred option, as reaffirmed by the Court in \textit{Marshall \#2}:

\begin{quote}
As this and other courts have pointed out on many occasions, the process of accommodation of the treaty right may best be resolved by consultation and negotiation of a modern agreement for participation in specified resources by the Mi'kmaq rather than by litigation.\footnote{49}
\end{quote}

This concern, which is reflected in “repeated judicial calls for First Nations and the Crown not to tax the institutional competence of the judiciary by excessive litigation of disputes”,\footnote{50} is directly linked to the second point which has been recognised by the Supreme Court; their jurisprudence on these issues will inevitably be used to inform and structure the negotiation process which they see as necessary. This view was concisely expressed in \textit{Sparrow}, where the Court noted that “s. 35(1)

\begin{footnotesize}
\footnote{47} See e.g., “The Sparrow Doctrine”, \textit{supra} note 1 at 218:

The checks and balances of the Constitution . . . . do not favour both a “liberal and generous” reading of the rights and a high level of immunity. The Supreme Court attaches great importance to flexibility in a constitutional document to meet changing conditions. Having erected something of a legal fortress around section 35 rights, it will now be cautious and somewhat circumspect in identifying the specific activities that belong within the fortress.

\footnote{48} The nature of the problem has been summarized by Lawrence & Macklem, \textit{supra} note 41 at 257-58 as follows:

The Court’s call for negotiated settlements is especially significant given the detailed and complex political, economic, jurisdictional, and remedial judgments necessary to resolve competing claims to territory and authority . . . . Negotiation permits parties to address each other’s real needs and reach complex and mutually agreeable trade-offs.

\footnote{49} \textit{Delgamuukw}, \textit{supra} note 46 at para. 207, \textit{per} La Forest J.: “[I] wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake”, quoted with approval at \textit{Marshall \#2}, \textit{supra} note 6 at para. 22.

\footnote{50} Lawrence & Macklem, \textit{supra} note 41 at 254.
\end{footnotesize}
... provides a solid constitutional base upon which subsequent negotiations can take place.”51 More recently the point was confirmed in Delgamuukw, where Lamer C.J.C. noted that the broader purpose of reconciliation in s. 35(1) will only be achieved “through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court”.52

In practical terms, this means that decisions of the Supreme Court on aboriginal and treaty rights are, if not unique, at least distinctive in the purpose they serve and the audience to which they are directed. Constitutional jurisprudence is usually thought of as sending messages to the courts, in the form of precedent, and legislatures, through guidance about the acceptable limits of legislative action. Section 35(1) cases, although fulfilling these two purposes as well, are additionally required to provide substantive guidance to multiple parties (government, aboriginal peoples and other users of affected resources) on the structuring of the negotiations which the Court has identified as essential to completion of the process. This has important implications for how a right and its degree of permissible regulation are defined; close attention must be paid to defining at least those elements of the right which will permit the subsequent development of a management regime, and to doing so in a manner which will be clearly understood by those who must carry out this task. For the relatively narrow circumstances of rights to use of particular resources (as opposed to broader title claims) these elements would include at least such fundamentals as the identity of individuals with access to a resource, allocation priorities, geographic scope, resources affected and the substantive scope of allowable management measures.

The process and principles developed by the Supreme Court, beyond their primary use in reaching decisions on the particulars of the cases, also provide the basis for the setting out the necessary guidance for negotiators, as discussed above. The process, with its sequential steps, requires the concrete definition of the substantive scope of the right at the outset, which should allow its parameters to be adequately delineated for the purpose of assessing the range of entitlements. A finding of prima facie infringement obviously allows for at least a partial determination, although limited by the particular facts, of the level of government regulation (and thus management measures) which might be considered acceptable without further justification. The justification stage allows additional information on this issue to be provided, and indeed it has been suggested that part of the thinking underlying the development of the

51. Sparrow, supra note 28 at 1105.
52. Delgamuukw, supra note 46 at para. 186 [emphasis added].
It should be noted that the application of these principles should not be restricted to post-litigation negotiations which flow on from a particular court decision such as *Marshall*, but rather should be applied consistently in all negotiations whether precipitated by litigation or not. The circumstances of *Marshall* were such that this article is focussed on the post-litigation model, but the long-term contribution of these principles to the conduct of negotiations outside the context of litigation should not be forgotten.55

53. See *e.g.*, the following observation by Binnie J., prior to his appointment to the Court:

The *Sparrow* judgment is nothing if not candid about the Court’s strategy ... The Court, quite rightly, does not say where the solution lies, but it has made it clear that in its opinion there must be a negotiated settlement ... This aspect of *Sparrow* seems clear. Section 35 may not itself be the solution, but it can become the Court’s vehicle to force a political settlement of the issues.

“The Sparrow Doctrine”, *supra* note 1 at 221.

54. On the scope and nature of this duty, and the potential for an interpretation that goes beyond its use as an *ex post facto* element of justification to encourage and enhance consultation in all cases of anticipated government intrusion on aboriginal and treaty rights, see Lawrence & Macklem, *supra* note 41 at 254-55 and 267-78.

55. It is, of course, true that this requires a high degree of good faith on both sides, but this does not negate the potential significance of this use of the jurisprudence:

Given the stakes involved, litigation will never disappear from view in cases involving the assertion of Aboriginal title. But the law ought to create incentives on the parties to first attempt to reach negotiated outcomes that define their respective rights.

II. The Judgments in R. v. Marshall

1. The Facts

Mr. Marshall was charged with three separate offences under the *Fisheries Act* and its regulations: fishing for eels without a licence, fishing during a close time for eels with prohibited nets, and selling or offering to sell eels caught outside the authority of an appropriate licence. The trial proceeded on the basis of an agreed statement of facts with respect to both the elements of the offences for which Mr. Marshall was charged and matters relating to his status. It was agreed that Mr. Marshall and another person had fished for eels with a fyke net in Pomquet Harbour, Nova Scotia, that they had landed and kept those eels on lands which are part of Afton First Nation, and that the eels had then been sold to a commercial operator. It was further agreed that Mr. Marshall did not have any relevant licence for this activity and that the date in question was a close time for fishing eels at that location. Finally, it was agreed that Mr. Marshall is a "status Mi'kmaq Indian registered under the provisions of the Indian Act" and "a member of the Membertou Band" near Sydney. The defence to the charges was based on the contention that Mr. Marshall had, pursuant to a "trade clause" in Treaties concluded between the Mi'kmaq and the British in 1760-61, a constitutionally protected "right to fish and to sell the fish." This trade clause, which was common to the various treaties, provided as follows:

> 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 truckhouses as shall be appointed or established by His Majesty's Governor at [truckhouse location closest to the village in question] or elsewhere in Nova Scotia or Accadia.

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58. Ibid. at paras. 6-7. Although the defence at trial originally included the Treaty of 1752, the admission of further evidence of termination by hostilities (beyond what was heard in Simon, supra note 13) led to the withdrawal of the 1752 argument from consideration along with other potential sources of the right, including aboriginal rights, the Treaties of 1725-26 and Belcher's Proclamation of 1762: Marshall: Prov. Ct., supra note 4 at paras. 18, 130; Marshall #1, supra note 2 at para. 16. The earlier treaties were argued at the Court of Appeal with respect to their possible incorporation in the 1760-61 Treaties, but this was rejected: Marshall: C.A., supra note 5 at paras. 28-42. The majority in Marshall #1 took the line that they were "not called upon to consider the 1752 Treaty in the present appeal", although McLachlin J. (as she then was), did address contextual arguments related to the 1752 document in the dissent: Marshall #1, ibid. at paras. 16, 105-06.
2. The Trial Decision

In addition to the agreed facts, the trial judge, Embree Prov. Ct. J. made a number of findings of fact and law with respect to the treaties. After a lengthy review of the historical background\(^6\) and the initial negotiations with the Maliseet and Passamaquoddy,\(^6\) he concluded that in a period beginning in early 1760 and ending late in 1761, “all Mi’kmaq in Nova Scotia had entered into separate but similar treaties” which (despite some variations) were “materially the same” as the first, which had been concluded with the LaHave and Richibucto Mi’kmaq.\(^6\) He also found that the treaties were “valid treaties in law”, having been concluded by qualified representatives on both sides, and in a manner that demonstrated “the existence of an intention to create obligations, the presence of mutually binding obligations and the necessary degree of solemnity”, the characteristics of a valid treaty set out in Sioui.\(^6\) Finally, after an examination of the record of negotiations and surrounding context, he concluded that the written treaties contained “all the promises made and all the terms and conditions mutually agreed to.”\(^6\)

On the critical question of interpretation arising from the Treaties the defence contended that the truckhouse clause, although on its face a negative restriction on Mi’kmaq trade, should be interpreted in light of the prior negotiations and the historical background, in particular the British understanding of the Mi’kmaq way of life at the time, and that this interpretation confirmed a “right to fish and the right to sell fish” under the treaty.\(^6\) Judge Embree accepted as “inherent in these treaties that the British recognised and accepted the existing Mi’kmaq way of life”, and that the “trade clause in the 1760-61 Treaties gave the Mi’kmaq the right to bring the products of their hunting, fishing and gathering to a truckhouse to trade.”\(^6\) He also found, however, that this limited right was “rooted in the circumstances that existed at that time”, when the British were trying to control Mi’kmaq trade with the recently defeated French, and that after

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\(^6\) The trial involved a huge volume of testimony and documentary evidence: 34 days of expert testimony; over 5,800 pages of transcripts; and over 400 documents including numerous historical records: W.C. Wicken, “R. v. Donald Marshall, Jr., 1993-1996” (1998) 28 Acadiensis 8 at 14; see also Marshall: Prov. Ct., supra note 4 at para. 11.

\(^6\) The Maliseet and Passamaquoddy involved lived in the Saint John River valley and the Passamaquoddy Bay area in what is now New Brunswick: Marshall #1, supra note 2 (Appellant’s factum at para. 15) [hereinafter Appellant’s Factum].

\(^6\) Marshall: Prov. Ct., supra note 4 at paras. 69-70.

\(^6\) Ibid. at para. 81; Sioui, supra note 17 at 1044.

\(^6\) Marshall: Prov. Ct., ibid at para. 112.

\(^6\) Ibid. at para. 114.

\(^6\) Ibid. at para. 116 [emphasis added].
the elimination of the restriction on trade and the demise of the truckhouses within a few years, “no further trade right” arose from the trade clause.⁶⁷

3. The Nova Scotia Court of Appeal

The Nova Scotia Court of Appeal affirmed the conviction, primarily on the basis of its conclusion that the trial judge had applied the proper interpretive principles, and that he had not erred in law in concluding that “the wording of the truckhouse clause . . . interpreted in its historical context, did not bear the meaning ascribed to it by the appellants.”⁶⁸ In addition, it rejected the appellant’s argument that the trial judge’s finding of a “right to bring” products for trade at truckhouses resulted in a treaty infringement through the failure of the Crown to provide either truckhouses or a similar mechanism, and that this infringement “renders the regulatory scheme established by the government . . . of no force and effect as regards the Mi’kmaq.”⁶⁹ The Court of Appeal held that this conclusion by the trial judge had to be read in the context of the right being requested by the defence, which was a general right to trade resulting from a right to trade fish, and in light of his overall interpretation of the truckhouse provision “as imposing a restriction on Mi’kmaq trading.”⁷⁰ Given this, and the trial judge’s conclusion that “the only implication from the demise of the truckhouses and licensed traders was that the Mi’kmaq were free to trade in the same manner as all other residents of the territory”, the Court of Appeal rejected the claim that the trial judge had “found that the Treaties of 1760-61 granted a treaty right to trade at truckhouses.”⁷¹

4. The Supreme Court of Canada #1

Mr. Justice Binnie, writing for the majority in the Supreme Court,⁷² reviewed the applicable principles of treaty interpretation, and concluded that both the trial judge and the Court of Appeal had erred in law on critical issues. The majority found that the trial judge had failed to consider

⁶⁷. *Ibid.* at para. 125. Accordingly, the trial judge found, at para. 127, that the defendant had not met his burden of proving the existence of a treaty right which afforded protection to his activities.

⁶⁸. *Marshall: C.A.,* supra note 5 at paras. 25-26, 69. The Court of Appeal also rejected arguments that the trial judge erred in allowing the admission of evidence on the termination of the Treaty of 1752 (at paras. 83-99), and in finding that earlier treaties were not incorporated in the Treaties of 1760-61 (at para. 40).


⁷⁰. *Ibid.* at paras. 77-78.

⁷¹. *Ibid.* at para. 82.

⁷². Lamer C.J.C., L’Heureux-Dubé, Iacobucci and Cory JJ., concurring; McLachlin J. (as she then was) wrote the dissent, Gonthier J. concurring.
possible oral promises outside the confines of the written treaties,\textsuperscript{73} and that the Court of Appeal erred in rejecting the applicability of extrinsic evidence in the absence of ambiguity on the face of the treaty, and more significantly in holding that different treaty interpretation principles applied to treaties of peace and friendship where no land cession was involved.\textsuperscript{74}

Having rejected the findings of the courts below, the majority proceeded to a review of the historical record of events leading up to the Treaties of 1760-61, with a particular focus on the negotiations of 1760. This record was used to support the conclusion that the objectives of the British included the encouragement of the Mi'kmaq in the maintenance of their traditional hunting, fishing and gathering activities (including trade of the products), both to encourage peace and to ensure that they were able to be self-sustaining, while the Mi'kmaq were concerned to replace the loss of their French trading partners.\textsuperscript{75} The truckhouse clause was seen as a part of this overall strategy which "would be effective only if the Mi'kmaq had access both to trade and to the fish and wildlife resources necessary to provide them with something to trade."\textsuperscript{76}

\textsuperscript{73} Marshall \#1, \textit{supra} note 2 at para. 20. This finding of an error in law at trial is puzzling. The Court, at para. 19, quotes from the conclusion reached by the trial judge, that no other oral promises existed, and represents this as the question he asked to reach that conclusion. It is absolutely clear from the trial decision that the trial judge correctly, and repeatedly, turned his mind to the possibility of oral promises, as is shown in the following passage:

\begin{quote}
Were there other statements or promises made orally which the Mi'kmaq considered were part of these treaties and which have an impact on their meaning? ... Are there any other aspects of the historical record... which reflect on the contents or the proper understanding of the contents of these treaties?
\end{quote}

\textit{Marshall: Prov. Ct., supra} note 4 at para. 92; see also paras. 84-90, 98. It is difficult to see how the purported error in law can be drawn from this record.

\textsuperscript{74} Marshall \#1, \textit{ibid.} at paras. 9, 21. The second error, the rejection of treaty interpretation principles, does not bear close examination. In para. 21 the majority said that the Court of Appeal "also took the view... that the principles of interpretation of Indian treaties developed in connection with land cessions are of 'limited specific assistance' to treaties of peace and friendship... The same rules of interpretation should apply." In fact, the Court of Appeal did not say this, but rather the following:

\begin{quote}
Although the general principles of interpretation enunciated are applicable, these cases are of limited specific assistance in interpreting the \textit{Treaties of 1760-61}. In those \textit{Treaties} the significant "commodity" exchanged was mutual promises of peace.
\end{quote}

\textit{Marshall: C.A., supra} note 5 at para. 66. The point, which is clear from the surrounding context, was that one could not simply assume that the conclusions reached by applying the principles would be the same when the facts were different. The Supreme Court's use of a partial quote and an inaccurate paraphrasing alters the sense of what the Court of Appeal said.

\textsuperscript{75} Marshall \#1, \textit{ibid.} at paras. 22-25.

\textsuperscript{76} \textit{Ibid.} at para. 32 [emphasis in original]. The majority does not seem to consider, either here or in para. 43, where the issue is raised again, whether this objective might equally have been served by ensuring the same right of access as all British subjects to resources in question. The assumption seems to be that only full treaty protection would suffice.
This view of the historical context and the objectives of the parties was coupled with the majority’s finding that the record of negotiations disclosed “more favourable terms” which did not find their way into the written version of the treaty prepared by the British, which only reflected the negative restriction on Mi’kmaq trade. The combined effect of these findings was a series of conclusions which are scattered throughout the decision but which might be summarised as follows. First, although the negative restriction on trade is all that appears in the written text, a positive obligation to provide a trading mechanism arises from promises made in the course of oral negotiations, and from an interpretation of the objectives of the parties at the time. Second, in order for this promise to have had any meaning, it must be interpreted as including an implied promise of access to the things which would be traded. Third, this right was limited to trading to obtain “necessaries”, which in its modern version is to be construed as a “moderate livelihood”, rather than unrestricted “commercial activity”. Finally, the modern evolution of this promise is not the actual provision of truckhouses or equivalent mechanisms, but rather the continued right to trade and access to the relevant resources. These conclusions, taken together, were summed up by the majority in their statement of the treaty right:

77. Ibid. at para. 20:
   While the trial judge drew positive implications from the negative trade clause (reversed on this point by the Court of Appeal), such limited relief is inadequate where the British-drafted treaty document does not accord with the British-drafted minutes of the negotiating sessions and more favourable terms are evident from the other documents and evidence the trial judge regarded as reliable.

78. Ibid. at paras. 40-41, 54, 56.
79. Ibid. at paras. 42-43.
80. This use of the word “necessaries” and its significance are not well-supported on the facts. The word only appeared in the record of negotiations with the Maliseet and Passamaquoddy, a record which may never have been shown to the Mi’kmaq: Marshall #1, supra note 2 at para. 29 of the majority decision. See also para. 97, where McLachlin J., in dissent, quotes the relevant passage from the Nova Scotia Executive Council Minutes of February 11, 1760. Furthermore, the term does not appear in any of the key documents actually shared between the parties: the Treaties, the price list and the Act put forward to implement the Treaties. For the treaties see Marshall: Prov. Ct., supra note 4 at Appendices V, VI. For a reproduction of the agreed price list, see B. Murdoch, A History of Nova Scotia or Acadie Vol. II (Halifax: James Barnes, 1866) at 385. The statute in question was An Act To Prevent Any Private Trade Or Commerce With The Indians, S.N.S. 1760, 34 Geo.II, c. 11, which referred only to “any kind of Provisions, Goods or merchandize whatsoever”: see Marshall: Prov. Ct., ibid. at para. 72.
81. Marshall #1, ibid. at para. 59. At some points the majority used the term “sustenance” as interchangeable with “moderate livelihood”, drawing on a discussion of “sustenance” in the dissent of McLachlin J. (as she then was) in Gladstone: ibid. at para. 60, citing Gladstone, supra note 31 at para. 165.
82. Marshall #1, ibid. at paras. 53-56.
My view is 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 subject to restrictions that can be justified [by the Crown].

The majority went on to deal with the submission of the Crown that, even if a right to fish and hunt had been conveyed, it was “subject ab initio to regulations”, and therefore the regulations in place did not require any justification by the Crown under the test set out in Sparrow for aboriginal rights and applied to treaties in Badger and other cases. This argument was dismissed, as was a similar contention advanced by McLachlin J. in the dissent, that the Mi’kmaq had obtained “only the liberty to hunt, fish, gather and trade ‘enjoyed by other British subjects in the region’...”

The basis of this rejection, which relied on a distinction between the possibly shared content of the rights and the different levels of constitutional protection which they are accorded, is discussed in greater detail in Part IV(2), below.

In the final stage of its consideration, the majority briefly considered the regulations in question and found that they did constitute a prima facie infringement of the appellant’s treaty right, largely by reference to previous cases in which licensing schemes and other such restrictions have been found to be infringements. In the absence of any arguments on justification of the regulations, which had not been dealt with at trial, the majority found that the regulations were “inconsistent with the treaty rights of the appellant” and “therefore of no force or effect or application to him, by virtue of ss. 35(1) and 52 of the Constitution Act, 1982”, allowed the appeal and ordered an acquittal.

5. The Supreme Court of Canada #2

In the motion brought by the intervener West Nova Fishermen’s coalition, the Court was requested both to grant a rehearing of the appeal to allow for clarification of a number of questions relating to the impact of the first decision, and to stay the effect of the earlier judgment pending that rehearing. The Court’s response, in its ruling of 17 November 1999, can best be understood as two decisions in one. The requests for a rehearing and stay were both disposed of in fairly short order on narrow issues. On the request for a rehearing, the Court noted that while the rules

83. Ibid. at para. 56.
84. See the discussion in the text accompanying note 30.
85. Marshall #1, supra note 2 at para. 45.
86. Ibid. at paras. 45-48.
87. Ibid. at paras. 62-66.
88. Ibid. at para. 67, quoting from the constitutional question posed by Lamer C.J.C.
89. Marshall #2, supra note 6 at paras. 1, 9.
of the Court gave it jurisdiction to consider an intervener’s application for a rehearing, this would only happen in “exceptional circumstances”. The Court found that there were no such exceptional circumstances in this case, and that the motion also violated “the basis on which interveners are permitted to participate in an appeal in the first place, which is that interveners accept the record as defined by the Crown and the defence.”

Although this conclusion made consideration of the stay unnecessary, the Court also noted that the appellant was “ordinarily entitled to an immediate acquittal”, and that the Crown had not applied for a stay of the wider effects of the decision.

The rejection of the intervener’s motion on the procedural issues effectively settled the matter, but the Court then went on to provide a second “decision within a decision”, in what amounts to an extraordinarily long passage of *obiter dicta*. At the heart of these portions of the ruling is the Court’s repeated contention that the decision of September 17 had been perfectly clear on all of the issues now raised for clarification by the Coalition, and that the failure of the Coalition (and others) to understand the earlier decision did not justify a rehearing. Despite these assertions, the Court went on to simply restate (in its view) some of the fundamental aspects which had been so clear in the first decision. If, however, we are to gain a better sense of the actual degree of clarity in *Marshall #1*, and the resulting utility of the message provided to subsequent negotiations, it is necessary to examine some of these “non-clarifications” in more detail, and to compare them with their counterparts in the earlier decision.

III. “We’re Sorry, We’ll Read That Again”: *Marshall #1 vs. Marshall #2*

Despite the assurances of the Court in *Marshall #2*, significant areas of doubt emerge when we compare and contrast the two decisions with respect to both the essential elements of the right and the extent of permissible government regulation, two of the central issues on which parties to negotiations would require guidance. Differences in emphasis or outright contradictions can be identified with respect to at least four critical elements: the beneficiaries of the right; the geographic application of the right; the resources to which the right applies; and the

91. *Marshall #2*, *ibid.* at paras. 8, 47.
92. *Ibid.* at para. 11: “These questions [posed by the intervener], together with the Coalition’s request for a stay of judgment, reflect a basic misunderstanding of the scope of the Court’s majority reasons for judgment dated September 17, 1999.” See also *ibid.* at para. 25 on the question of the scope of regulatory power in the hands of the government: “With all due respect to the Coalition, the government’s general regulatory power is clearly affirmed. It is difficult to believe that further repetition of this fundamental point after a rehearing would add anything of significance to what is already stated in the September 17, 1999 majority judgment.”
substantive content of the right, which is linked to the question of what will constitute a *prima facie* infringement.

1. Beneficiaries of the Right

A fundamental requirement in the formulation and subsequent implementation of a right, whether under a treaty or otherwise, is the identification of those who are entitled to its exercise. Previous treaty cases have certainly taken care to address the question of who acquires the right, for obvious reasons. Unless the claimants of the right can show they are persons entitled to exercise it, there can be no finding of a *prima facie* infringement, and thus no further steps in the interpretation process need be addressed. This issue is also crucial to post-litigation implementation, in that subsequent decisions on everything from the establishment of licence schemes to individual prosecutions will depend on this definition of the entitlement.

The trial decision, while denying the effect argued by the defence for the Treaties of 1760 and 1761, did conclude that they were “valid treaties” which “apply to all Mi’kmaq in Nova Scotia today and were applicable to the Defendant . . . at Pomquet Harbour. . .” Mr. Marshall, as was noted in the agreed statement of facts, is “a status Mi’kmaq Indian registered under the provisions of the Indian Act (Canada). . .” No specific consideration was given to the question of non-status Mi’kmaq, nor of status Mi’kmaq living off-reserve, although this has been a subject of debate in the past. The Supreme Court did not really address the issue,
other than to note that the appellant and his fishing companion were “both Mi’kmaq Indians”, and presumably relied on the trial court’s finding on entitlement.

Following the decision, part of the public debate which emerged was focussed on differences of opinion within the Mi’kmaq community as to which individuals and groups were actually entitled to exercise the right affirmed by the Supreme Court. The ruling on the rehearing did not specifically address the question of non-status aboriginal persons or off-reserve Mi’kmaq, and Mr. Marshall’s residence was not clear from the agreed statement of facts, so the scope of the finding is likely limited to what the Court had before it—the case of a status Mi’kmaq who was a member of an identified Band—and the cases of other individuals, if not brought in to the process through negotiations between the government and Mi’kmaq authorities, will have to await subsequent litigation. This view is strengthened by how the majority did deal with a related issue in Marshall #2, when they clarified a point not addressed in the original decision, and added a description of the right as “collective” in nature, and tied to communities with connections to particular treaties:

[T]he exercise of the treaty rights will be limited to the area traditionally used by the local community with which the “separate but similar” treaty was made. Moreover, the treaty rights do not belong to the individual, but are exercised by authority of the local community to which the accused belongs. . . .

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97. Marshall #1, supra note 2 at para. 1. The Native Council of Nova Scotia, an organisation which represents off-reserve aboriginal persons in Nova Scotia, was represented as an intervener in both Marshall #1 and Marshall #2.

98. The Assembly of First Nations took the view that the rights extended to “every individual of the [Mi’kmaq] Nation, whether they live on or off reserve”: See “National Chief Welcomes Government Offer”, supra note 10. This opinion was not universally shared: See e.g., the position of D. Paul, “Recognition of Aboriginal Rights Poetic Justice” 10/11 Mi’kmaq Maliseet Nation News (November 1999) 19 at 19.

99. The recent case of Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, dealt with the application of equality rights under s. 15 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, to the question of voting by off-reserve members of bands under the Indian Act, R.S.C. 1985, c. I-5 [hereinafter Indian Act]. While s. 15 was found to be infringed, however, the case was narrowly stated: See e.g., para. 25, on the importance attached to such a fundamental aspect of political participation as voting. The application of Corbiere to issues such as access to resource rights under treaties is both speculative and beyond the scope of this article.

100. Marshall #2, supra note 6 at para. 17. This point was reiterated elsewhere in the decision. See also para. 13: “In his defence, the appellant established that the collective treaty right held by his community allowed him to fish for eels . . . .” Caron, supra note 96 at 258 notes that it may be possible in future cases to argue on the basis of a “‘substantial connection’ to the successor of the original treaty group” although he notes that “there is little to direct us on the question of what factors are determinative in establishing . . . substantial connection.” In R. v. Fowler, [1993] 3 C.N.L.R. 173 (N.B. Prov. Ct.) at 180, it was found that a “substantial connection” of a non-status individual to a community covered by the Treaty of 1725 was established through being a descendant of members of the relevant First Nation.
This description of the right as a collective one, exercisable "by authority of" the community, did not appear in Marshall #1.\textsuperscript{101} and it seems likely that this addition was made to deal with a problem identified in the immediate aftermath of Marshall #1. As negotiations proceeded between Mi'kmaq authorities and the federal government over interim management arrangements, there was some question whether any agreements entered into with Mi'kmaq authorities at the band level could actually be enforced against individuals who fell within the treaty right, and who disagreed with what the band authorities might concede.\textsuperscript{102} This interpretation would seem to rely on the view that, even if the treaty right were held collectively (by its very nature), individuals within the group nonetheless acquired a personal right to exercise it. Removal or limitation of that individually-held right would thus require a new or amended treaty, and lesser mechanisms like management arrangements would not suffice. The new formulation of the right in Marshall #2 was linked to the Court's suggestion that the ultimate solution is best found through negotiation.\textsuperscript{103} What was missing from the majority decision in Marshall #1, but provided in Marshall #2, was the identification of a limited number of parties with whom agreements could be concluded, as opposed to a large number of independent actors, each with their own interests to negotiate.

This issue of possible dissenters to agreed measures and the capability of government (as opposed to aboriginal self-government) to enforce against them has not been fully dealt with in the treaty rights context. In Sundown the Court did identify the treaty right as a collective one, and confirmed that one member of the First Nation holding the right could not "exclude other members . . . who have the same treaty right," but did not

\textsuperscript{101} The majority decision did refer to the rights of the "Mi'kmaq people" and "Mi'kmaq treaty rights": Marshall #1, supra note 2 at paras. 4, 64. There was, however, no reference to the "collective" right nor to the exercise of authority over individual beneficiaries, and the final formulation of the right, referred to the "appellant's treaty right to fish for trading purposes" and "his right to trade": ibid. at para. 66.

\textsuperscript{102} See e.g., the reaction of some members of Burnt Church Reserve to a possible moratorium, which they were prepared to defy even if agreed by the leadership: "Beyond Burnt Church", supra note 7 at 34. This issue would not arise if it were a right to self-government in relation to fishery resources that was being asserted in Marshall. This was not, however, part of the claim, although it has been argued that it was an important missing part of the picture: "Of Eels and Honour", supra note 8 at 2.

\textsuperscript{103} Marshall #2, supra note 6 at para. 22: "[T]he process of accommodation of the treaty right may best be resolved by consultation and negotiation of a modern agreement for participation in specified resources by the Mi'kmaq . . . ."
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need to deal with the additional point of how individuals might be dealt with should they operate outside terms agreed by the band.\textsuperscript{104} It is possible that this has been considered to be implicit in the nature of the right, and that the problem of individual non-compliance with regulations implementing agreements can be dealt with either by finding that such regulations accommodate the right and therefore do not\textit{ prima facie} infringe it,\textsuperscript{105} or because they are justifiable under the Sparrow test. In any event, the finding in Marshall #2 that the right is both collective and exercised “by authority” of the collective offers a structure for dealing with this issue.\textsuperscript{106}

2. Geographic Scope

Closely related to the question of \textit{who} may exercise the right is the issue of \textit{where} that right may be exercised, a question that has been explicitly addressed in previous cases.\textsuperscript{107} Given the outcomes at trial and in the Court of Appeal, where the existence of the claimed right was rejected, this was not definitively dealt with until the matter came before the Supreme Court, and its treatment there left significant room for confusion. First, the majority judgment of 17 September 1999 offered little or no guidance on the\textit{ general} geographic scope of the right, despite some obvious questions which would seem to arise, such as the extent of the colonial boundaries encompassed by the Nova Scotian authorities, and how expansive a maritime jurisdiction was claimed by the British at the time.\textsuperscript{108}

\textsuperscript{104} Sundown, supra note 28 at para. 36. See also Caron, supra note 96 at 258, where it was noted that by 1994 it was still “unclear whether the Indian collectivity . . . can deny treaty benefits to individuals . . . [with a substantial connection] or regulate, in any way, the exercise of those benefits by the individual.”

\textsuperscript{105} This option is recognized in the ruling on the rehearing, where negotiation of an agreement is linked to “the process of accommodation”: Marshall #2, supra note 6 at para. 22.

\textsuperscript{106} This issue will continue to present problems, involving as it does “complex questions of balancing the individual and collective aspects of treaty rights . . .”: Caron, supra note 96 at 258. These problems will likely be resolved by negotiation, rather than by litigation. If a government decided to prosecute on the basis of regulations which put in place the terms of an agreement, it would be up to the individual accused to challenge the regulations.

\textsuperscript{107} See e.g., the consideration of this issue in Sioui, supra note 17 at 1066, and Badger, supra note 22 at paras. 49-66.

\textsuperscript{108} It might be argued that the colonial authorities had no capacity to make treaties respecting waters beyond the immediate area of coastal jurisdiction claimed at the time. This would presumably be answered, however, by the response that the rights are not frozen in time, and must have evolved to encompass new areas of coastal state jurisdiction: Sundown, supra note 28 at para. 32. Alternatively, it could be argued that the treaty could cover trade and other rights of individuals fishing from Nova Scotia into adjacent waters, especially if prior Mi’kmaq practice indicated that this would have been expected by the parties.
The more perplexing problem, however, relates to possible geographic limits on an individual's exercise of the right, assuming an area is within the ambit of one of the 1760-61 Treaties. In the period following the Court's September decision, the assumption that seemed to govern the fishing activities of those Mi'kmaq engaged in the lobster fishery was that the right could be exercised anywhere within the areas explicitly covered by the treaties (and possibly beyond).109 In the ruling on the rehearing motion, however, the Court returned to this issue, with the following description of the treaty rights in question:

The Court's majority judgment noted . . . that no treaty was made by the British with the Mi'kmaq population as a whole. . . . The treaties were local and the reciprocal benefits were local. In the absence of a fresh agreement with the Crown, the exercise of the treaty rights will be limited to the area traditionally used by the local community with which the "separate but similar" treaty was made. . . .110

This point is further emphasised by the Court's description of the onus that would fall on an accused in a future case under one of the 1760-61 Treaties once the Crown had proved the factual elements of the offence:

The onus will then switch to the accused to demonstrate that he or she is a member of an aboriginal community in Canada with which one of the local treaties . . . was made, and was engaged in the exercise of the community's collective right to hunt or fish in that community's traditional hunting and fishing grounds.111

Such a clear statement on the local nature of the rights in the September decision112 would have constituted an important limitation, one which would necessarily have been a significant element in future decisions on prosecutions of individuals acting outside their traditional areas, or in negotiations on the entitlements of particular communities to resources

109. Mi'kmaq fishing in the post-Marshall #1 period included a brief attempt by a few Nova Scotia Mi'kmaq to enter a snow crab fishery in Newfoundland, which would appear to have been beyond the conceivable scope even of the combined treaties, which dealt with the old boundaries of Nova Scotia. Their belongings were burned and they were forced to leave. Aboriginal leaders, both in Newfoundland and Nova Scotia, denounced the violence but indicated their lack of support for such activities in other areas: 33 Canadian News Facts (1999) at 5948. Even more ambitiously, a group of Passamaquoddy from Maine announced their intention of coming to Canada to fish for lobster: "A Fishery on the Boil", supra note 7 at 45.

110. Marshall #2, supra note 6 at para. 17 [emphasis in original].

111. Ibid.

112. This "local" approach is similar to that adopted in Simon, where a connection to the local community was required. The Court in Simon did not, however, demand that the appellant prove that he was a "direct descendant of the Micmac Indians covered by the Treaty of 1752" [emphasis in original], which would involve an "impossible burden of proof". Rather, it was sufficient to show that he was a member of the band presently "living in the same area as the original Micmac Indian tribe, party to the Treaty of 1752": Simon, supra note 13 at 407-08.
in areas outside their own traditional lands. The problem is that the majority judgment in Marshall #1 did not say any such thing. The only reference to this issue that the Court, in Marshall #2, can point to in the September decision is a passage which was concerned with the complexity of ascertaining the words of the alleged treaty, and which noted in passing that "the British signed a series of agreements with individual Mi'kmaq communities in 1760 and 1761" and that the trial judge "found that by the end of 1761 all of the Mi'kmaq villages in Nova Scotia had entered into separate but similar treaties." There is no mention of the "local" nature of the right and the "reciprocal benefits", nor of this element of the burden of proof on a defendant, and the matter is not raised throughout the rest of the analytical parts of the judgment. Even by the standards of the Supreme Court, burying the critical "locality" limitation in this passing reference seems positively Delphic.

This point is further emphasized by an apparent contradiction between the two decisions. The ruling on the rehearing clearly stated, as noted above, that the onus is on the defendant to show that they were "a member of an aboriginal community in Canada with which one of the local treaties" was made, and that they were "engaged in the exercise of the community's collective right to hunt or fish in that community's traditional hunting or fishing grounds." In the agreed statement of facts, Mr. Marshall was described as being a member of the Membertou Band, whose lands are located near Sydney on Cape Breton Island. It was further agreed that the fishing took place "at or near Pomquet Harbour", and that the holding pens and boats were kept "on lands which are part of the Afton Indian Reserve", on the mainland of Nova Scotia in Antigonish.

113. This will obviously lead to significant debate about the actual scope of "traditional lands". In Simon this issue was not fully settled under the 1752 Treaty, in that Dickson C.J. only said that "at a minimum" the Treaty recognized some hunting rights on the reserve, and that the appellant was on a road adjacent to the reserve, so that his activities were "incidental" to even the minimal interpretation of the right: ibid. at 406. The opening now exists after Marshall to determine where the "maximum" geographic scope of traditional hunting and fishing areas might be defined. The first case to apply both Marshall #1 and Marshall #2, dealt extensively with the question of territorial extent of local Mi'kmaq communities, but in the context of a claim to aboriginal title: Bernard, supra note 16 at paras. 93-110. Bernard also considered the defence of treaty rights under the 1760-61 Treaties, but it was rejected, at para. 87, on the basis of the nature of the items traded (logs), so that the territorial aspect was not considered.

114. Marshall #2, supra note 6 at para. 17, quoting from Marshall #1, supra note 2 at para. 5. This limited purpose is clear from what follows the quoted extract, which is a reference to the trial judge's finding that the "written terms applicable to this dispute were contained in a Treaty of Peace and Friendship, entered into . . . on March 10, 1760, . . .": Marshall #1, ibid.

115. Nor was it discussed in the trial decision, where, as noted earlier, it was simply found that the treaties applied to Mi'kmaq in Nova Scotia: Marshall: Prov. Ct., supra note 4 at para. 132.


118. Ibid.
County. Neither the trial record nor the appeal decisions stated which of the "separate but similar" treaties would have applied to Afton (although presumably this would have been a necessary step in the process of proof identified by the Court), but it is unlikely on the historical record that it would have been the same one as for Membertou. The two nearest communities of Mi'kmaq identified as having signed a treaty in this period are Merigomish and Pictou, a whose representatives concluded a treaty in October 1761. Cape Breton was covered by a treaty which was finalized on 25 June 1761. On the basis of these facts it would appear, at least prima facie, that Mr. Marshall was outside his "community's traditional hunting or fishing grounds", and therefore had demonstrated no entitlement to a treaty right in that area, if we accept what the Supreme Court said in the rehearing ruling about their intent in the original judgment.


120. Whitehead quotes a source which refers to one treaty done for Merigomish and Pictou, on 15 October 1761: T. Akins, History of Halifax City (1973) at 64-66, as cited in Whitehead, ibid. at 153. Wildsmith also refers to one treaty, but on 12 October 1762: "The Mi'kmaq and the Fishery", supra note 13 at 117, note 4. The 1761 date is confirmed in Murdoch, ibid. at 407, and seems consistent with the approximate 18 month period of treaty-making referred to by Patterson in "Indian-White Relations", supra note 13 at 55. The difference in dates is not significant to the main point, which is that there were separate treaties for the two areas.

121. "Indian-White Relations", ibid. at 72; "The Mi'kmaq and the Fishery", ibid. It should be noted that the treaties signed on 25 June 1761 included the "Pokemouche", and one published list of modern band locations gives the erroneous impression that Afton First Nation is on the Pokemouche River. The river is actually in New Brunswick, and it is clear from the same source that the geographical description for Burnt Church was inadvertently repeated for Afton: L.F.S. Upton, Micmacs And Colonists: Indian-White Relations In The Maritimes, 1713-1867 (Vancouver: University of British Columbia Press, 1979) at 183, 186.

122. This would be true even on the slightly relaxed standard for proving entitlement employed in Simon, as discussed supra note 112. The distance between Afton and Membertou, and the existence of two separate treaties, indicate that Mr. Marshall would not meet this standard of proof.
It is, of course, possible that there were other facts or legal arguments that supported Mr. Marshall’s assertion of a treaty right in the Afton area, but if so they do not appear anywhere in the four judgments in this case. In the absence of anything to the contrary, the onus of establishing the entitlement to a treaty right applicable to the person and activity in question does not appear to have been met, at least not to the standard set by the Court in Marshall #2. In sum, unless there was other information before the Court to which they do not refer, we are left with the following conclusion: if what the Court said about this issue in Marshall #2 is true, then what the majority concluded in Marshall #1 cannot be correct. If they were applying a “local” qualifier to the treaty right, they had only two options on the basis of the facts as stated. They could have upheld the conviction, on the basis that the defendant had not shown any entitlement to a valid treaty right, or they could have sent it back for trial if they felt the facts were not sufficiently clear on this point. Affirmation of the treaty right and its application to the benefit of the defendant would not appear to have been an available alternative. Small wonder, then, that there was some degree of confusion about the geographic extent of the right available to individuals in the wake of the September decision.

3. Resources Included

The conflict precipitated by the September 17 decision centred on the application of Marshall #1 to other resources, and indeed it seems obvious that from the perspective of the appellant and the various supporting aboriginal groups, this case was not taken to the Supreme

123. It is possible, for example, that the traditional hunting and fishing district of the Cape Breton Mi’kmaq may have extended, if only for some purposes, over the waters in question, or that Mr. Marshall may have acquired some form of entitlement by residency or family connection.

124. There are at least three such arguments which might have been possible, but which were either no longer in issue or do not seem to have been argued. The concept of the Covenant Chain, supra note 15, could be used to impose the totality of combined treaty obligations across the Mi’kmaq territory, but this was neither argued nor accepted here. Similarly, the arguments surrounding the 1752 Treaty might have been used, but as noted supra note 58, that Treaty was no longer directly before the Court except in a contextual sense. Finally, it has been argued that Mi’kmaq intermarriage and movement since the 1700s justifies assertion of the treaty rights by any individual throughout the wider territory: see “The Mi’kmaq and the Fishery” supra note 13 at 123. This is, however, contrary to the more localized approach taken in Simon, supra note 13, and in any event the Court makes no mention of any evidence having been offered on this issue.
Court simply to establish a right to fish and trade eels. The immediate controversy arose with respect to the lucrative lobster fishery, but broader claims were also made as to the impact of the decision on logging, minerals and oil and gas. The majority in Marshall #1 defined the scope of resources and activities covered by the treaty right in different words at different points, but focussed fairly consistently on the rights to obtain and trade in the produce of hunting, fishing and “gathering” activities, as reflected in their modern evolutions:

The appellant says the treaty allows him to fish for trade. In my view, the 1760 treaty does affirm the right of the Mi’kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed “necessaries.”

This definition gives rise to two general issues with respect to its application to new activities or resources. First, what criteria should be used to determine those things that fall within the potentially open-ended notion of “gathering”, and, second, what limits, if any, will be placed on the range of species included in the more self-explanatory categories of hunting and fishing? With respect to the first question, the majority in Marshall #1 did refer to the relevant resources and activities as “traditional”, which could be taken to imply that only things traditionally gathered at the time of the Treaty should be brought within the definition

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125. This fact seems to have been recognized by Court in both decisions, although at one point in ruling on the rehearing, the Court did point out that Marshall #1 was limited to “precise charges relating to the appellant’s participation in the eel fishery” and that it was therefore “limited to the issues necessary to dispose of the appellant’s guilt or innocence”: Marshall #2, supra note 6 at para. 11. While this is, of course, a technically correct view of the ultimate task of the Court, it ignores the broader impact of the Court’s role in defining the right which was then applied to the appellant’s case, and is not really consistent with how the case was approached in general.

126. This was in part due to the unfortunate timing of the decision, just far enough in advance of regional season openings to permit the organization of aboriginal fishing in the closed times, but too close to allow for much in the way of negotiations.


128. As noted by McLachin J. in her dissent, the restriction to traditional categories of activities does not “freeze” the exercise of the right in its historical form for all purposes: “Treaty rights... 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.” Marshall #1, supra note 2 at para. 78, citing Sundown, supra note 28 at para. 32 and Simon, supra note 13 at 402.

129. Marshall #1, ibid. at para. 4. See also para. 7 (“hunting, fishing and gathering activities in support of... trade”); para. 66 (“treaty right to fish for trading purposes”); para. 56 (“hunting and fishing”).
of "gathering" (allowing, of course, for some degree of evolution). The relevance of this criterion is a legitimate inference to be drawn from the majority's use of the term "traditional", but the issue was not addressed explicitly until the ruling on the rehearing motion, and in the interim some quite ambitious alternative definitions were put forward. While leaving open the possibility of future arguments on extension to new resources, the Court provided the following interpretation of what they had meant by "gathering" in the first decision:

The word "gathering"... was used in connection with the types of the resources traditionally "gathered" in an aboriginal economy and which were thus reasonably in the contemplation of the parties to the 1760-61 treaties. While treaty rights are capable of evolution within limits... their subject matter (absent a new agreement) cannot be wholly transformed.

The... majority judgment did not rule that the appellant had established a treaty right "to gather" anything and everything physically capable of being gathered.

The focus, then, is to be on what was in the "contemplation of the parties at the time" and that can be determined by what was "traditionally 'gathered' in an aboriginal economy" at the time. This description is consistent with what was said in Marshall #1, as noted above, but nowhere is the criterion of prior inclusion in the aboriginal economy so...

130. See ibid. at para. 7, where the majority gave the following description of the appellant's position: "[T]he truckhouse provision... incorporated... the right to pursue traditional hunting, fishing and gathering activities..." See also para. 56, for a reference to "a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities...

131 Supra note 127. The situation was probably not ameliorated by the comments of Mr. Nault, the Minister of Indian Affairs, to the effect that the Marshall decision probably extended to logging and other resources: J. Gedded "Turmoil In Native Affairs", Maclean's (November 1, 1999) 26 at 26.

132. Marshall #2, ibid. at paras. 19-20. The Court additionally noted, at para. 20, that no argument had been made in Marshall #1 "that exploitation of such resources could be considered a logical evolution of treaty rights to fish and wildlife or to the type of things traditionally 'gathered' by the Mi'kmaq in a 1760 aboriginal lifestyle." It was left open for this argument to be raised in the future "where the issue is squarely raised on proper historical evidence...

133. It is not entirely clear why this should be the governing principle, as it could equally be argued that the subset of things which were gathered and traded with Europeans might be a more accurate guide. In the absence of some evidence of difference between the two categories, however, this point was not open for decision here.
clearly stated. It is likely that some of the latter debate on this issue might have been more productive had the point been directly addressed and the underlying assumptions clarified in *Marshall #1*, although in fairness to the Court those assumptions do not actually seem to have changed between the two rulings.\(^{134}\)

The second question raised above, whether there will be limits on the actual species covered by treaty-protected fishing and hunting activities, was not really settled by either of the two decisions. This case was, as the Court said, about eels,\(^{135}\) but the clear assumption that ran through both *Marshall #1* and *Marshall #2* was that the right certainly applied to hunting and fishing more generally, without the same definitional problems that arise with "gathering".\(^{136}\) However, the linkage of "hunting and fishing" to the term "traditional"\(^{137}\) may make it possible to argue, as for "gathering," that only the taking of those species traditionally exploited by the Mi'kmaq at the time should fall within the treaty right. This does not seem likely to be a major factor on land, where there are no major new species of interest for hunting, but it could become an issue with respect to fishing for some offshore species if they were not within the scope of Mi'kmaq fishing in the 1760s.\(^{138}\) Given the subject matter of this appeal,

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134. This finding from *Marshall #2* has already been applied in *Bernard*, supra note 16 at paras. 81, 85, 86. Lordon Prov. Ct. J. considered the question of commercial logging and applied the definition of "gathering" from *Marshall #2* (para. 81). He found, at para. 85, that there "was no traditional trade in logs and that trade in wood products produced by the Mi'kmaq such as baskets, snowshoes, and canoes was secondary to the fur trade and was occasional and incidental." In addition, at para. 86, he rejected the idea that a trade in raw commercial logs was a "logical evolution" from limited trade in items which were processed or made by the Mi'kmaq, and which bore the "stamp of Mi'kmaq culture."

135. See supra note 125.

136. This is reinforced by the wording in the ruling on the rehearing, which separates the open question of "gathering" from the apparently settled one of "fish and wildlife":

> It is of course open to native communities to assert broader treaty rights ... [with respect to resources], but if so, the basis for such a claim will have to be established in proceedings where the issue is squarely raised on proper historical evidence, as was done in this case in relation to fish and wildlife [emphasis added].

*Marshall #2*, supra note 6 at para. 20.

137. See the discussion supra note 130.

138. The obvious response to this, of course, would be that the rights are not "frozen in time" and so the "logical evolution" of fishing would be based on "fishing for whatever is available", just as the Mi'kmaq of the 1760s would have targeted new species as they became available. On the question of "frozen rights", see the comments of McLachlin J. as quoted supra note 128. Confirmation of this approach would ameliorate a potential problem with *Marshall #2* identified by Barsh & Henderson; the possible wearing down of Mi'kmaq communities through the government forcing litigation on each and every species and for each and every community: "Of Eels and Honour", supra note 8 at 17.
which dealt with a traditionally-fished species, the issue was not definitively settled in Marshall and it can be expected that it will be raised again in the future.\textsuperscript{139}

4. Substantive Scope of the Right

The definition of the substantive scope of a treaty right involves both its core elements, such as a right to hunt, fish or trade (including activities incidental to the primary right), and any agreed limitations on the right found in the treaty, such as the restriction to a moderate livelihood incorporated in Marshall #1. A comparison of the two Supreme Court decisions in Marshall shows some significant differences in how the treaty right was defined, both with respect to the initial parameters of the right and the nature of the agreed limitations. In Marshall #1 the treaty right was defined in fairly straightforward terms to contain both the underlying right to trade for "necessaries" and the incidental right to obtain products to trade, so that the modern evolution of the right was "a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the Badger test."\textsuperscript{140}

This approach was confirmed in parts of the ruling in Marshall #2,\textsuperscript{141} but in at least one critical passage the Court offered what appears to be a fundamentally different characterization of the essential elements of the right:

[The Mi'kmaq treaty right to hunt and trade in game is not now, any more than it was in 1760, a commercial hunt that must be satisfied before non-natives have access to the same resources for recreational or commercial purposes. The emphasis in 1999, as it was in 1760, is on assuring the Mi'kmaq equitable access to identified resources for the purpose of earning a moderate living.]\textsuperscript{142}

\textsuperscript{139} A separate basis for such an argument would be that some offshore areas would be effectively eliminated by the new restriction to "the area traditionally used by the local community": Marshall #2, supra note 6 at para. 17. This would of course raise further questions about the meaning of "used" in this context. For example, would navigation through an area be a "use" that could then be applied to fishing for a species found there?

\textsuperscript{140} Marshall #1, supra note 2 at para. 56. In referring to the Badger test, the majority was presumably referring to the Sparrow test, applied to treaties in Badger. See supra, note 44.

\textsuperscript{141} See e.g., Marshall #2, supra note 6 at para. 14.

\textsuperscript{142} Ibid. at para. 38 [first emphasis in original, second emphasis added]. This approach is generally consistent with the view expressed in Gladstone that a commercial fishery (in that case under an aboriginal right), did not have the same "internal limitation" as a food fishery and would not necessarily be given as high a priority in terms of allocation. Both the process and substance of the allocation, however, would still have to "reflect the prior interest of aboriginal rights holders": Gladstone, supra note 31 at para. 62.
This statement shifts the focus from a simple assertion of an entitlement on the part of the Mi’kmaq to a right based on some equitable share of certain resources, alongside other users. Apart from reconceptualizing the Mi’kmaq right on its own, a definition based on “equitable access” necessarily affects the question of priority of rights and access of other users. All of this is phrased, not as part of a Sparrow justification exercise, but rather as a description of the right itself. If this was indeed the “emphasis” both in 1760 and 1999, then how clearly did the September decision develop this characterization of the treaty right as one based on “equitable access” along with other users? The fact that the words “equitable access” did not appear in the September decision, let alone in the paragraphs which defined the treaty right, gives some cause for doubt about the centrality of this concept to the majority’s reasoning. The Court in Marshall #2 pointed to three specific references in Marshall #1 as evidence of its clear and consistent stance on the nature of the treaty right, but even a brief consideration of these justifications casts doubt on whether this version of the right was intended to be the focus of the first decision. The first is a passage in which the majority, while demonstrating that the “traditional ways” of the Mi’kmaq “included hunting and fishing and trading their catch for necessaries,” included the following, literally parenthetical, remark about trading with the French and Portuguese:

Trading was traditional. The trial judge found . . . that the Mi’kmaq had already been trading with Europeans, including French and Portuguese [sic] fishermen, for about 250 years prior to the making of this treaty.\footnote{144. Ibid.}

This passing reference to the previous trading activities was included in Marshall #1 solely to make the point that the Mi’kmaq had been trading their products for some time. The majority never subjected this finding of fact to any analysis which would suggest that it confirmed coexisting rights of others, or limited those of the Mi’kmaq. Yet, in the ruling on the

\footnote{143. Marshall #1, supra note 2 at para. 38.}

\footnote{144. Ibid.}
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rehearing, this comment was transformed into a clear statement of a conclusion that was vital to the description of the right:

[T]he September 17, 1999 majority judgment noted the trial judge’s finding that the Mi’kmaq had been fishing to trade with non-natives for over 200 years prior to the 1760-61 treaties. The 1760-61 treaty rights were thus from their inception enjoyed alongside the commercial and recreational fishery of non-natives.”

This use of the word “thus” can only be described as ambitious in the context, in that the fact that some non-British fishermen were buying fish from the Mi’kmaq offers little by way of proof about the rights of British subjects to catch it. The more fundamental problem, however, remains the lack of any analysis in Marshall #1 that supports the meaning given to these words in Marshall #2. Much like the Court’s treatment of the locality issue, one might be inclined to forgive observers who failed to understand the critical importance of this cryptic reference to the reasoning in the September decision.

The second finding pointed out by the Court in support of their prior clarity on this issue is found in a paragraph in the September decision in which the majority “recognized that, unlike the scarce fisheries resources of today, the view in 1760 was that the fisheries were of ‘limitless proportions.’” Again, this does not bear close scrutiny. In the paragraph in question, Binnie J. was quoting a comment from an earlier decision, not to support any requirement of equitable sharing, but rather to make the point that it was not surprising that the right to fish was not mentioned in a treaty in 1760. It is beyond any reasonable interpretation to suggest that this comment was intended to make the argument ascribed to it in the later ruling, nor would it be reasonable to expect a reader to reach that conclusion.

145. Marshall #2, supra note 6 at para. 38 [emphasis added]. Apart from the exaggeration of the intent of the original statement in Marshall #1, this characterization raises the interesting question of how, in the absence of startling new historical information on an early European colonial tourist industry, the presence of French and Portuguese fishing in the 16th, 17th and 18th centuries shows that the “recreational” fishery coexisted with the treaty rights “from their inception” in 1760-61.

146. This right could presumably be found, on the reasoning in Gladstone, in the “common law right to fish in tidal waters” dating back to the Magna Carta: Gladstone, supra note 31 at para. 67. Walters has argued that an exclusive aboriginal fishery could be argued for in areas of Ontario, where the colonial legal history was distinct from British Columbia (the location in Gladstone): see M.D. Walters, “Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada” (1998) 23 Queen’s L.J. 301 at 367-68.

147. Marshall #2, supra note 6 at para. 38.


149. “The right to fish is not mentioned in the March 10, 1760 document ... This is not surprising. As Dickson J. mentioned with reference to the west coast in Jack ... in colonial times the perception of the fishery resource was one of ‘limitless proportions’.” Marshall #1, supra note 2 at para. 42.
The final point raised on this issue concerned a passage in *Marshall #1* in which the majority held that treaty rights must be interpreted flexibly and are not "frozen in time," which the Court in *Marshall #2* saw as supporting the argument that the treaty right was now a right to participate in the "largely regulated commercial fishery of the 1990s." The quoted paragraph, however, dealt only with the more specific finding that the appellant could not insist on the provision of truckhouses in the modern era. The mere fact that the principles of flexibility and evolution of rights were mentioned in the majority judgment, in the context of an entirely different issue, is not a substitute for the application of those principles to the questions of priorities and access in the definition of this treaty right.

In sum, none of the passages in *Marshall #1* referred to by the Court in *Marshall #2* is particularly concerned with the issue of equitable access or the rights of others to the fishery. It is difficult to avoid the impression that the ruling on the rehearing represented a retreat from, or at least a reformulation of the right set out in *Marshall #1*. At the very least, this examination suggests that the majority was less than clear on the issue in the first decision.

With respect to additional agreed or internal limitations on the right, there are further differences between *Marshall #1* and *Marshall #2* which give rise to some concern. In the former, the only internal limit on the right that was specifically identified was the restriction to securing a "moderate livelihood," and it was clearly stated that any activities beyond that would be "outside treaty protection." The corollary to this position was that any regulations, such as catch limits, which still allowed for a moderate livelihood would not result in a *prima facie* infringement and would thus

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150. *Ibid.* at para. 53, cited at *Marshall #2*, supra note 6 at para. 38: "It was established in *Simon*... that treaty provisions should be interpreted 'in a flexible way that is sensitive to the evolution of changes in normal' practice, and *Sundown*... confirms that courts should not use a 'frozen-in-time' approach to treaty rights."


152. The court held that the appellant could not "claim to exercise his treaty rights using an outboard motor while at the same time insist on restoration of the peculiar 18th century institution known as truckhouses." *Marshall #1*, *supra* note 2 at para. 53.

153. Allowing, of course, for the fact that the original version of the right also appears in *Marshall #2*, as was noted earlier, *supra* note 141. Barsh & Henderson certainly view this finding as a serious modification of the right, although they concentrate on "equitable access" as modifying only the "moderate livelihood" aspect, rather than the entire character of the right: "Of Eels and Honour", *supra* note 8 at 16.

154. This is particularly evident when one considers the much more extensive treatment which this issue received in such cases as *Sparrow*, *supra* note 28 at 1114-17, and *Gladstone*, *supra* note 31 at paras. 59-64.

not require justification. In the ruling on the rehearing the Court adopted a more specific and arguably more extensive approach to the question of inherent limitations on the treaty right, partly by enumerating limits which were supposedly “apparent” in Marshall #1, but also through revisiting the question of a “moderate livelihood” and its interaction with a finding of prima facie infringement. The result is wording that varies in tone if not in substance from the first decision, in a way that may affect what has to be proved by parties in subsequent cases. In Marshall #1 the majority described the relationship between the “moderate livelihood” limitation and a finding of prima facie infringement as follows:

Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi’kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such regulations would not constitute an infringement that would have to be justified under the Badger standard.

This wording was repeated and endorsed in Marshall #2, but the Court also went on to provide a further rephrasing on this important issue:

Only those regulatory limits that take the Mi’kmaq catch below the quantities reasonably expected to produce a moderate livelihood or other limitations that are not inherent in the limited nature of the treaty right itself have to be justified according to the Badger test.

Although this is not a clear contradiction of what was stated in Marshall #1, there is nonetheless an important difference in emphasis. In the formulation of the first decision, the majority said that catch limits that could be “expected to produce a moderate livelihood” would not violate the treaty right and would require no justification. What this might imply is that only those catch limits that satisfy a particular criterion (i.e., allowing for a moderate livelihood) will escape being found to be a prima

156. Ibid. at para. 61.
157. These included the locality issue, the collective aspect of the right, the restriction to “traditionally gathered” resources and the need for equitable sharing of access: Marshall #2, supra note 6 at para. 38. Some of these, such as equitable access, are better characterized as descriptors of the basic elements of the right, rather than additional limitations, but the impact is the same in that regulations dealing with either could possibly accommodate the treaty right. These examples have been dealt with above, and it is at least doubtful whether they were as clearly stated in the majority judgment in Marshall #1 as the Court in Marshall #2 seems to believe.
158. Marshall #1, supra note 2 at para. 61.
159. Marshall #2, supra note 6 at para. 36. See also the statement at para. 24: “At para. 58 [of Marshall #1], the limited nature of the right was reiterated: . . . ‘The treaty right is a regulated right and can be contained by regulation within its proper limits’.”
160. Ibid. at para. 39 [emphasis in original].
facie infringement of the treaty right. One would expect, therefore, that the catch limits would have to be shown to be capable of producing the requisite livelihood, or else they would constitute an infringement requiring justification. The wording in the extract from Marshall #2 is different, in that it states that only those “regulatory limits” (not catch limits) that take the available catch below the requisite level, or are otherwise outside the inherent limitations of the right, will require justification. The implication here is that unless the claimant can show the regulations have the sort of effect described, they will not be considered to be a prima facie infringement. It is arguable that the same interpretation could be drawn from the relevant passage in Marshall #1, given that the overall onus on the claimant to prove the prima facie infringement. At the very least, however, this paragraph in Marshall #2 made the point far more clearly: it is for the claimant of the right to show that the impugned regulation actually infringes on this right as defined, including its inherent limitations.

The importance of these shifts in emphasis in the definition of the right and its inherent limitations becomes clear when we consider the impact on the finding of prima facie infringement. If the right is one of equitable access, then presumably the defendant would have to show that the impugned regulations somehow interfered with or prevented them from obtaining their equitable share of the resource. This would be a very different question from that asked in Marshall #1 with respect to prima facie infringement, which concentrated entirely on interference with the “treaty right to fish for trading purposes”, and made no mention of interference which would prevent “equitable access” as part of a regulated fishery. 161 Similarly, if (as stated in Marshall #2), there is no prima facie infringement until the right to earn a moderate livelihood is impaired, there was no attempt in Marshall #1 to determine whether the regulations in question actually interfered with the appellant’s ability to earn a livelihood, as opposed to a simple right to engage in the activity.162

161. Marshall #1, supra note 2 at paras. 64-65. Of the particular regulations under which Mr. Marshall was charged, the clearest infringement would seem to result from the prohibitions on catching fish without a licence, and selling fish caught without a licence, but even here the actual impact on the “access” is not considered by the majority, but rather is assumed. The impact of the third regulation, dealing with closed times for the net used, is dealt with further below: see infra note 211 and accompanying text.

162. One could argue that different questions are involved when one is considering a right to “earn a moderate livelihood” as opposed to a food fishery; should the same level of interference suffice for both? For example, would the payment of a licence fee at a level which did not reduce the return below a moderate livelihood still be a prima facie infringement? This issue is discussed further in Part IV(2), below.
5. Summary

It is clear from the discussion above that there were important differences between Marshall #1 and Marshall #2 on central elements of the treaty right in question, ranging from who could exercise it and where, to what the substantive content and permissible level of regulation might be. While some of this could be attributed to the Court’s backtracking in the face of controversy, it is significant that on the issues that caused the greatest difficulty, the original decision was either silent or overly vague. The decision, then, may have been more in need of clarification than the Court was willing to admit in Marshall #2 (though this is not to say that they had to clarify in the relatively restrictive manner that they did). It is at least possible that this apparent confusion on the part of the Court itself was shared by those attempting to work out the implications of the first decision.

IV. From Interpretation to Implementation: Some Sources of Difficulty in Marshall

The Marshall case, as noted earlier, did not present any new challenges for the interpretation of treaty rights, and no new principles were introduced; it was largely a matter of application of existing principles to the particulars of this case. If it is accepted, as argued above, that there were important gaps in the first decision, and significant changes in the second, with respect to key elements of the treaty right and its legitimate regulation, what was it that led to these difficulties? At least three relevant problem areas are identifiable in Marshall #1: the lack of precise and clear delineation of the parameters of the right, confusion as to the extent and nature of legitimate regulation of the right, and a cursory consideration of the issue of prima facie infringement.

1. Precision and Clarity: The Parameters of the Right

It was suggested above that an understanding of the role of the Supreme Court in aboriginal and treaty right cases must encompass the important requirement of providing guidance, not just to lower courts and legislatures, but to the parties who must negotiate and implement the practical realities of the rights which have been affirmed by the Court.163 When the issues concern access to natural resources, the right should be defined so as to be reasonably clear on issues of importance to the creation of a

163. The question of the clarity of the Court’s intentions has certainly been raised with respect to previous cases, as in the following comment on Sparrow: “The Sparrow decision is in the grand tradition of Supreme Court of Canada cases that have raised ambiguity about the content of Aboriginal rights to a high art form.”: “The Sparrow Decision”, supra note 1 at 221.
management regime. As indicated in the preceding section, however, a consideration of the two decisions in *Marshall* indicates that the Court fell well short of the mark in the search for clarity on essential issues which would obviously require negotiation. It would be difficult if not impossible to create an agreed management system without some notion of its geographic extent and the priority of allocations, to name just two issues.

There is, however, a serious difficulty which confronts the Court in its attempts to provide sufficient structure on these issues, one which is at the heart of its repeated calls for negotiated settlements. While it may be desirable to settle as much as possible in the context of the case before it, the Court is limited by the nature of the appellate process, and particularly by the facts. A broad settlement of all of the issues which arise from the Treaties of 1760-61 would not be possible within the confines of the case presented without wandering into unacceptable speculative debate about matters not before the Court. For example, without full consideration of the different facts that would be relevant, the exact contours of the rights held by the Maliseet and Passamaquoddy could not be settled in a case dealing with the Mi'kmaq. Nor, as the Court itself points out in *Marshall #2*, could it lay out an exhaustive list of all the resources that would or would not be covered by the treaty right in a future case.

How, then, is the Court to fulfil its role of providing the parties with usable parameters for negotiation while respecting its limited mandate in an adversarial system? The negative aspects of the experience in *Marshall* indicate that there are at least two issues which the Court would do well to keep in mind. The first is the necessity of approaching the definition of rights in a systematic manner, based on the steps of the interpretive process set out in previous cases (as discussed in Part I, above). In *Marshall #1* the majority at times simply passed over issues (such as the entitlement of the individual and the actual parties to the treaties) which had in other cases been routinely addressed and dealt with, and was at least vague on others (such as the nature of the *prima facie* infringement). A more methodical approach to the initial definition of the right, and ultimately to the question of its infringement, might have led the majority to fill in the more obvious gaps. This issue was raised, in the context of

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164. See the discussion in the text accompanying notes 48 to 50.
165. As noted in the comments of the Court in *Marshall #2*, supra note 6 at paras. 11, 19, 20, 31.
justification and regulatory options, in the dissent, where it was argued that sensible consideration of these issues required a precise definition of the “core” of the right:

To proceed from a right undefined in scope or modern counterpart to the question of justification would be to render treaty rights inchoate and the justification of limitations impossible. How can one meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope? How is the government, in the absence of such definition, to know how far it may justifiably trench on the right in the collective interest of Canadians?\(^\text{167}\)

The second issue referred to above involves the need to set out with greater precision the criteria used to make a particular finding, so that parties can approach other factual issues with some ability to predict how they might be treated were the matter to be litigated. With reference to the question of resources covered by the treaty right, the examination above suggests that it should at least have been possible for the Court to say why eels were included, rather than jump immediately to what may have been an obvious conclusion for that resource, but not for others. An understanding of the criteria applied to determine the status of eels could then be applied by negotiators to other resources. The same is true of the question of beneficiaries of the right; in Marshall #1 it seems to have been assumed that Mr. Marshall was entitled to treaty protection by virtue of being a status Mi’kmaq (possibly living on reserve), but nowhere did the Court actually indicate whether this would be required of future claimants. Similarly, some reference in the first decision to the notion of “traditional lands” as a geographic limitation would certainly not have disposed of the factual debate over the extent of such lands accruing to each community, but it would at least have set up a basis for discussions that was not provided until the Court returned to this issue in Marshall #2.

The approach suggested here does not require anything new of the Supreme Court, for it has in the past used its findings on fairly specific facts to set out criteria that might be sensibly applied to other situations falling under the same treaty or a similar aboriginal right.\(^\text{168}\) In Marshall #1 the majority seems to have lost track of this important element of its role in such cases, and returning to it after the events of the fall of 1999 only engendered suspicion and distrust about the Court’s motivation in

\(^{167}\) Marshall #1, supra note 2 at para. 112.

\(^{168}\) There are numerous examples of this type of fairly detailed treatment of such issues. See e.g., Simon, supra note 13 at 407-08 on the issue of identity of claimants; Badger, supra note 22 at paras. 49-66 on geographical extent; Sioui, supra note 17 at 1066-72 on geography and 1031-32 on identity; Sparrow, supra note 28 at 1116 and Gladstone, supra note 31 at paras. 57-64 on the issue of priority and allocation.
taking away that which they certainly seemed to have given. There is, of course, no guarantee that even a completely clear exposition of the criteria behind the Court’s conclusions will obviate the need for further litigation, given the complexity of the issues and the likelihood of fundamentally opposed views in some cases, but it should at least improve the odds.\textsuperscript{169}

2. "Subject To Regulation": The Nature of the "Hedge"

A recurring theme in both \textit{Marshall #1} and \textit{Marshall #2} is the continuing capability of government to regulate the activities of those who are exercising the defined treaty right,\textsuperscript{170} although (as discussed above) there are some differences in emphasis between \textit{Marshall #1} and \textit{Marshall #2} on this point. Apart from the confusion generated on the particulars of the judgments, however, the Court seems to have had some more general difficulties with the application of the tests and principles related to the whole question of legitimate regulation.

Earlier cases have set out a fairly clear distinction between the two stages at which government regulation of aboriginal or treaty rights might be found to be acceptable: either the regulation may not constitute a \textit{prima facie} infringement if the claimant cannot show a sufficient level of interference, or the regulation may be justifiable under the test developed for aboriginal rights in \textit{Sparrow} and later applied to treaty rights in \textit{Badger}.\textsuperscript{171} The onus for proving a \textit{prima facie} infringement, as noted earlier, is on the party claiming the right, while the onus for justification shifts to the Crown. The distinction between these two circumstances is clear, but the Court in the \textit{Marshall} decisions seems to have had some difficulty in maintaining it.

The Crown argued on the appeal that the treaty fishing rights, if any, were "subject ab initio to regulations", with the result that "no \textit{Badger} justification would be required."\textsuperscript{172} The essence of this argument is that regulations could not be said to infringe upon a treaty right if it was agreed by the parties that it could be regulated in that way.\textsuperscript{173} A closely related point was raised by McLachlin J. in the dissent, where she stated that the Mi'kmaq "acquired all rights enjoyed by other British subjects" and that

\begin{itemize}
  \item \textsuperscript{169} See "Of Eels and Honour", \textit{supra} note 8 at 1, 17 for a pessimistic assessment of the likely outcome in Atlantic Canada; see also Lawrence & Macklem, \textit{supra} note 41 at 279, on the desirability of reducing litigation, despite the impossibility of eliminating it.
  \item \textsuperscript{170} See e.g., the comments of the Court in \textit{Marshall #2}, \textit{supra} note 6 at paras. 15, 21, 24-25, 33.
  \item \textsuperscript{171} See the discussion in Part I "\textit{Sui Generis Treaties; Sui Generis Decisions}," above.
  \item \textsuperscript{172} \textit{Marshall #1}, \textit{supra} note 2 at para. 55.
  \item \textsuperscript{173} For the full argument, see \textit{Marshall #1}, \textit{supra} note 2 (Respondent’s Factum at paras. 105-32) [hereinafter \textit{Respondent’s Factum}].
\end{itemize}
their trading interest "continued to be protected by the general laws of the province." This finding essentially completed the argument of the Crown, in that the position taken by the Crown was that the right was subject to regulation ab initio, not just in some respects, but to the same extent as would apply for all other British subjects. Both of these arguments were rejected by Binnie J. in two significant passages in the majority judgment. These conclusions, however, raise problems of inconsistency both with respect to what the Court has found in previous cases, and with other aspects of its own decisions in Marshall.

The Crown's argument on "ab initio" vulnerability to regulation received very short shrift from the majority in Marshall #1:

The Crown's attempt to distinguish Badger is not persuasive. Badger dealt with treaty rights which were specifically expressed in the treaty... to be "subject to such regulations as may from time to time be made by the Government of the country". Yet the Court concluded that a Sparrow-type justification was required. This use of Badger is consistent with an interpretation of that case advanced in Sundown, but Badger is not as clear an authority on this point as is made out here. To begin with, the breadth of the majority's use of this case is premised partly on a misstatement of important facts from Badger. It is true that the written treaty in Badger contained the very general regulatory provision cited above, but this version was explicitly rejected by the majority in Badger, given the importance of oral promises

174. Marshall #1, supra note 2 at para. 103.
175. Respondent's Factum, supra note 173 at para. 108.
176. Marshall #1, supra note 2 at para. 55. Badger involved provincial hunting regulations which conflicted with treaty rights under Treaty No. 8. The impact of the case is somewhat confused by the operation of the Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, Schedule 2) at para. 12 [hereinafter NRTA], which in this case operated to "constitutionalize" provincial regulations respecting game (within defined limits) which would otherwise be invalidated by virtue of their conflict with federal jurisdiction through s. 88 of the Indian Act; Badger, supra note 22 at para. 70.
177. Sundown, supra note 28 at para. 38, referring to Badger:

Badger held that both Treaty No. 8 and the NRTA specifically provided that hunting rights would be subject to regulation pertaining to conservation. It was put in these words at para. 70:

[B]y the terms of both the Treaty and the NRTA, provincial game laws would be applicable to Indians so long as they were aimed at conserving the supply of game. ... Thus, provincial laws that pertain to conservation could properly restrict treaty rights to hunt provided they could be justified under Sparrow.

This interpretation, however, ignores the fact that the passage cited does not say anything about justification, and (as argued below), Badger clearly provides for permissible regulation where agreed under the treaty.
made separately by agents of the Crown. The result was a treaty right to hunt and fish which could be limited by government regulation, not generally as implied in the passage above, but only for conservation purposes. Badger, then, concerned a treaty right that was explicitly subject to government regulation, but only for specific purposes of conservation. In the passage quoted above, Binnie J. suggested that Badger required a Sparrow-type justification even where the treaty provided an explicit and complete regulatory escape clause, and that this in itself dispensed with the argument about ab initio powers to regulate. The fact that Badger actually contained a more limited permission for government action casts some doubt on this broad assertion.

Further to this, however, we need to consider why and how the impugned regulations in Badger were found to constitute a prima facie infringement and thus to require justification. Cory J. only required a Sparrow justification of the conservation regulations after conducting an analysis of whether those regulations constituted a prima facie infringement of the treaty right, and in the course of that consideration it was made clear that conservation regulations could have been enacted by the provincial government without resulting in such an infringement. When the decision is considered in its entirety it is clear that the prima facie infringement in Badger was found because the regulations in question went beyond what was needed to pursue legitimate regulation for conservation purposes, largely as a result of the “manner in which the

178. Badger, supra note 22 at paras. 39-40. The Appellant attributed the limitation to conservation issues solely to the prior awareness of the existence of such legislation already in place, referring to a comment by Cory J. on the earlier case of Horseman, supra note 23: Appellant’s Factum, supra note 61 at para. 20. It seems clear, however, that the regulatory power was put in place by the Treaty (as modified by the NRTA) and was restricted to conservation because of the oral promise and similar limiting language in the NRTA: Badger, ibid. paras. 39-40, 69.

179. Badger, ibid. at para. 40: “The Treaty . . . imposed two limitations on the right to hunt. First, there was a geographic limitation. . . Second, the right could be limited by government regulations passed for conservation purposes.”

180. One puzzling aspect of the finding in Badger is that the safety regulations in question were found not to be a prima facie infringement of the treaty right, based partly on a finding that the regulations made “eminently good sense” and were “reasonable regulations aimed at ensuring safety”: Ibid. at paras. 88, 89. This language is similar to the tests applied at the justification stage, rather than in dealing with infringement. However, the regulations could probably have been dealt with at the infringement stage in any event, on the basis that they did not significantly interfere with the exercise of the right.

181. Ibid. at paras. 72, 86-94.

182. Ibid. at para. 70, dealing with permissible regulation as opposed to consideration of justification: “[B]y the terms of both the Treaty and the NRTA, provincial game laws would be applicable to Indians so long as they were aimed at conserving the supply of game. However, the provincial government’s regulatory authority under the Treaty and the NRTA did not extend beyond the realm of conservation.”
licensing scheme was set up,” and in particular the presence of a whole range of restrictions which made it virtually impossible to exercise the right. These restrictions included, as well as “conservation” restrictions related to hunting areas and kinds of game, a complete lack of any provision for “hunting for food” licences, and a requirement that aboriginal hunters would have no “preferential access” to the limited number of general licences.

In the absence of any real access to appropriate licences, the limits on the treaty right in Badger resulted, not from the need to conserve, but from applying the conservation requirements to all without any priority to holders of treaty rights. At the heart of this finding was a requirement of reasonableness which the majority imposed on the government’s use of its power to regulate for conservation. A finding of prima facie infringement resulted only when the government actions were “clearly unreasonable”, which is well beyond the standard that the Court would have applied had it been considering justification:

[T]he provincial government may make regulations for conservation purposes, which affect the Treaty rights to hunt. Accordingly, Provincial regulations pertaining to conservation will be valid so long as they are not clearly unreasonable in their application to aboriginal people.

In sum, then, Badger did contemplate cases in which a power to regulate the treaty right existed ab initio, and where regulations within the specified category could therefore be found not to constitute a prima facie infringement, and that such cases would not be subject to a Sparrow justification. In other words, the Crown was not attempting to distinguish Badger, as in Binnie J.’s view, but rather to apply it, as was made clear

183. Ibid. at para. 86.
184. Ibid. at paras. 92-94. In addition, only sport and commercial licences were actually being issued, and the regulations potentially allowing subsistence hunting were extremely restrictive.
185. Ibid. at para. 90; see text accompanying notes 38 to 41 on the standard in Sparrow.
by the Respondent.\textsuperscript{186} There is some wording in \textit{Badger} which might, if taken out of context, support the notion that all provincial regulations would have required justification, even if they were squarely within the conservation category, but the overall approach taken in the decision does not support this view.\textsuperscript{187}

Binnie J. gave a more extensive response to McLachlin J.'s suggestion that the rights held by the Mi'kmaq were the same as those enjoyed by other British subjects. He accepted, for the sake of the argument, that "in terms of the content of the hunting, fishing and gathering activities, this may be true,"\textsuperscript{188} but went on to find as follows:

There is of course a distinction to be made between a liberty enjoyed by all citizens and a right conferred by a specific legal authority, such as a treaty, to participate in the same activity. Even if this distinction is ignored, it is still true that a general right enjoyed by all citizens can nevertheless be made the subject of an enforceable treaty promise.\textsuperscript{189}

\begin{itemize}
\item \textsuperscript{186} \textit{Respondent's Factum, supra} note 173 at para. 122. The early use of this approach was confirmed in \textit{Horseman}, just prior to \textit{Sparrow}, where Cory J. for the majority found that the inclusion of government regulatory power within a treaty (apart from the \textit{NRTA} s.88 issue) could result in appropriate regulations being upheld: "[I]t must be remembered that Treaty No. 8 itself did not grant an unfettered right to hunt. That right was to be exercised 'subject to such regulations as may from time to time be made by the Government of the country.'": \textit{Horseman}, \textit{supra} note 23 at 934-35.

Barsh & Henderson argue that the finding in \textit{Badger} that "treaty rights are 'always' subject to regulation . . . does not apply \textit{ipso facto} to hunting fishing and trade under the Mikmaw treaties in Atlantic Canada", where the \textit{NRTA} does not apply, and additionally that the fishery regulations were, unlike the \textit{NRTA}, not constitutional in character: "Of Eels and Honour", \textit{supra} note 8 at 16. This argument misconstrues the impact of the \textit{NRTA} in \textit{Badger}, which was simply to "place the Provincial government in exactly the same position which the Federal Crown formerly occupied.": \textit{Badger}, \textit{ibid.} at para. 96. The finding on the provincial regulations in \textit{Badger}, therefore, applies equally to the federal regulations in \textit{Marshall}, which are "in exactly the same position" for the purpose of treaty interpretation on issues such as \textit{prima facie} infringement and justification. For a discussion of this point, see K. Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 Dal. L.J. 185 at 215-16.

\item \textsuperscript{187} \textit{Badger, ibid.} at para. 90, where the majority referred back to earlier cases and noted that the court "has held on numerous occasions that there can be no limitation on the method, timing and extent of Indian hunting under a Treaty." It is clear from the following paragraphs, however, that the phrase "under a Treaty" includes the right as fully defined, including permissible areas of regulation. As noted \textit{supra} note 177, the interpretation put forward in \textit{Sundown} does support the majority's view in \textit{Marshall #1}.

\item \textsuperscript{188} \textit{Marshall #1, supra} note 2 at para. 45 [emphasis in original].

\item \textsuperscript{189} \textit{Ibid.} at para. 45.
\end{itemize}
The logic of this argument is not, however, entirely convincing. If the treaty right is defined in such a way that it has inherent limits (as was explicitly the case in Badger), then those limits are an important part of the content of the right that should be protected. If the right is "protected" without reference to its limiting as well as its permissive aspect, then its content is being altered and expanded in the process of protection. Thus, if it is accepted for the sake of argument that the treaty right in Marshall was one which was properly defined as "a right to enjoy the same fishing, hunting, and gathering rights as other British subjects" and the rights of other British subjects were so defined that they were subject to regulation, then only that limited right would be subject to treaty protection.190 On this point, Binnie J. turns to Lieutenant Governor Belcher's statement to Mi'kmakq representatives assembled for a treaty signing that "[t]he Laws will be like a great Hedge around your rights and properties" and analogizes as follows:

Until enactment of the Constitution Act, 1982, the treaty rights of aboriginal peoples could be overridden by competent legislation as easily as could the rights and liberties of other inhabitants. The hedge offered no special protection. . . . On April 17, 1982, however, this particular type of "hedge" was converted by s. 35(1) into sterner stuff that could only be broken down when justified according to the test laid down in R. v. Sparrow. . . .191

The argument raised by both the Crown and McLachlin J. did not, however, question the strength of the hedge, but rather what is found inside it—the content of the right. The majority held that "[t]he issue here is not so much the content of the rights or liberties as the level of legal protection thrown around them",192 but this is a false dichotomy, for it is only the content of the right that tells us what is inside the hedge and thus protected.

It is possible that the Court is moving to adopt the interpretation of Badger first advanced in Sundown, which would require justification even of regulatory actions agreed in the treaty.193 This would, however,
involve a blurring of the distinct concepts of *prima facie* infringement and justification, and fail to acknowledge the possibility that treaties, unlike aboriginal rights that existed independently of any agreement, could include agreed provisions that certain types of regulation would be permissible, and therefore not a breach of the treaty. This would not, moreover, explain the most puzzling aspect of the majority's reaction to this argument, which is its own endorsement of the concept of *ab initio* vulnerability to regulation elsewhere in the decision. It is clear from *Marshall #1* that regulations which allow for the securing of a moderate livelihood will not constitute a *prima facie* infringement of the treaty right, yet this is nothing more than the recognition of a regulatory power incorporated in the right from the beginning by agreement of the parties, which is precisely what the Crown was arguing for, albeit on a much more expansive basis.

Alternatively, it is possible that the majority simply misapprehended the nature of the argument made by the Crown on this point, assuming that what was being suggested was that the right was subject to regulation *ab initio* whether or not agreement to that effect could be found in the treaty. This would assimilate the Crown's argument to one already raised and rejected in earlier cases, that the mere presence of government regulations prior to 1982 would be enough to extinguish aboriginal or treaty

194. The significance of this difference between aboriginal and treaty rights is highlighted in the Respondent's argument: *Respondent's Factum*, supra note 173 at para. 129. On the distinctions between aboriginal and treaty rights in this respect, see "Defining Parameters", *supra* note 17 at 158:

The rights guaranteed to Aboriginal peoples in treaties with the Crown are the result of consensual negotiations . . . . Each side obtained valuable consideration from the other, but only after giving up something equally desired . . . . As negotiated rights, treaty rights may be comprised of any rights agreed to by the parties involved.

195. More narrowly, it is possible that the Court will allow this argument only where regulations of a similar type were already in place at the time of the treaty could such actions escape a justification exercise, an issue which was mentioned in passing in *Badger*, *supra* note 22 at para. 70, referring to the finding in *Horseman*, *supra* note 23 at 935. See *supra* note 178 on the use of this argument by the Appellant, and the contrary impression given by other passages in *Badger*. This argument would not, moreover, explain the moderate livelihood category, as no such contemporaneous regulations were referred to by the majority.

196. For a discussion, see the text accompanying note 156.
Getting Their Feet Wet: The Supreme Court and Practical Implementation of Treaty Rights in the *Marshall* case

rights. In *Sparrow*, the Supreme Court found that the Crown, in arguing that regulatory action could extinguish aboriginal rights, had confused "regulation with extinguishment". Here, however, the Court appears to be confusing regulation pursuant to an agreement with extinguishment. In this case the Crown's argument was not about unilateral extinguishment by regulation, but about a treaty-based agreement to allow regulation, and thus would not even rely upon the existence of such regulations prior to 1982 (as did the Crown's case in *Sparrow*).

Whether premised on a new approach to agreed powers to regulate, or on a narrow misreading of one argument in this case, there are certainly indications of confusion and a blurring of boundaries in the Court's treatment of permissible regulation. In some instances this is simply a matter of stating that the right is "subject to regulation" without specifying whether this was intended to cover either or both of the available means for legitimizing a regulation. In some passages, however, the Court seemed to "mix and match" the tests without really being aware of the significance of moving back and forth between the two. This occasional tendency in *Marshall* (which is counterbalanced by correct

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197. This interpretation of the majority's response to this argument is supported by their final comment that the protection offered to Mi'kmaq treaty rights, even if they were the same as those of other inhabitants, would not be detracted from "unless those rights were extinguished prior to April 17, 1982": *Marshall* #1, supra note 2 at para. 48. See also *Marshall* #2, supra note 6 at para. 6, where the only two identified categories of acceptable regulation are those which reached the level of extinguishment, and those which are justifiable. On the test for extinguishment see *Sparrow*, supra note 28 at 1099, where it was made clear that simple regulation without "clear and plain" intention to extinguish was insufficient. For treaties, given their consensual nature, consent of the aboriginal parties would also be required: *Sioui*, supra note 17 at 1063.

198. *Sparrow*, ibid. at 1097.

199. The Respondent was quite clear in restricting the argument to cases where the parties could be said to have agreed to the regulatory power; see *Respondent's Factum*, supra note 173 at para. 129: "An infringement of a treaty only arises if the regulatory control imposes a restriction or limitation which goes beyond the scope of those controls to which the parties could reasonably be said to have agreed." It may be that the majority could accept this for a narrow, well-defined set of permissible regulations, but a virtually complete range of "agreed" regulatory powers looked too much like the complete removal of the right. This is not, however, a point of principle, but rather a determination to be made on the facts of a case.

200. See e.g., *Marshall* #1, supra note 2 at paras. 4, 38.

201. For example, a statement that the Crown had not put forward evidence of "justification" is accompanied by an example of justificatory evidence that might have been led. The example, however, is from *R. v. Nikal*, [1996] 1 S.C.R. 1013 [hereinafter Nikal] at paras. 91-92, and it deals with evidence from an analysis of *prima facie* infringement: *Marshall* #2, supra note 6 at para. 27. See also "Of Eels and Honour", *Marshall* note 8 at 4, note 31, where it is stated that "infringement was not before the Supreme Court" as the Crown argued there was no treaty right and "accordingly made no attempt to justify" the regulations. The point of the Crown's alternative argument, as discussed above, is that if there was a right, it was subject to regulation and thus there was no infringement.
treatments elsewhere) does not necessarily raise problems of principle, in that it is easily dealt with by a more systematic application of the sequential steps already established in the earlier cases, but it certainly increased the possibility of doubt and confusion in the aftermath of the decisions.

None of this, of course, in any way answers the question of whether the regulatory power argued for by the Crown in Marshall could have been found within the treaties of 1760-61. The proposed scope is extremely broad, and it is not supported by the sort of explicit language that was present in Badger. The essence of the argument is founded on the general submission of the Mi’kmaq to British laws, and it would be entirely open to a court to find that this is simply too little, in the face of treaty interpretation rules requiring resolution of ambiguity in favour of aboriginal parties, to open up the regulatory door quite this wide. This would, however, be a question to be determined on the facts of the treaty before the court, rather than by merging the interpretation stages of prima facie infringement and justification.

203. Some of the confusion on prima facie infringement and justification in Marshall might be attributed to a sense on the part of the Court that, onus notwithstanding, the distinction is not a terribly important one for practical purposes. What matters is that the Court is “most comfortable when it is in a position to ‘balance rights’: “The Sparrow Doctrine”, supra note 1 at 225. A finding of no prima facie infringement is a conclusive one; the Court loses any opportunity to carry out what it might see as appropriate balancing.

The problem with this reasoning in the Atlantic region lies in s. 88 of the Indian Act and future challenges to provincial legislation. The NRTA does not apply in this region, so that, unlike Badger, an infringement of a treaty right by provincial legislation leads to conflict with the federal legislation. As in Simon, supra note 13 at 414-15, this leads to the inapplicability of the provincial legislation due to the conflict with s. 88, and without any need for reference to s. 35(1) of the Constitution Act, 1982. The problem, from a provincial perspective, is that there is no obvious reason for the justificatory arguments available under s. 35(1) to be applied to a simple matter of federal vs. provincial powers under s. 88. The result of a finding of infringement, then, could be complete inapplicability with no option to justify. This issue was addressed in Coté, although it did not need to be settled as s. 88 was found not to be engaged. However, Lamer, C.J.C. did state the following:

[I] note that, on the face of s. 88, treaty rights appear to enjoy a broader protection from contrary provincial law under the Indian Act than under the Constitution Act, 1982. Once it has been demonstrated that a provincial law infringes “the terms of a treaty”, the treaty would arguably prevail under s. 88 even in the presence of a well-grounded justification. The statutory provision does not expressly incorporate a justification requirement analogous to the justification stage included in the Sparrow framework. But the precise boundaries of the protection of s. 88 remains a topic for future consideration.

Coté, supra note 35 at para. 87. It is difficult to see a principled basis for incorporating the justification stage in such a case, but this is in any event beyond the scope of this paper. See also the passing reference to provincial infringement (subject to justification) of aboriginal rights under s. 35(1) in Delgamuukw, supra note 46, as discussed in Wilkins, supra note 186 at 206-19. This is a distinct issue from a s. 88 claim proceeding without reference to s. 35(1).
3. Finding Prima Facie Infringement

Apart from the problem of clearly distinguishing between infringement and justification, the majority's actual determination of the prima facie infringement in Marshall #1 gives some cause for concern. Binnie J. noted that the regulations in question placed "the issuance of licences within the absolute discretion of the Minister", and that there was "nothing in these regulations which gives direction to the Minister to explain how she or he should exercise this discretionary authority in a manner which would respect the appellant's treaty rights." He then referred to the applicable test for finding a prima facie infringement, as derived from Sparrow, which requires an inquiry into the unreasonableness of the intrusion, the hardship caused and the possible denial of "preferred means" of exercising a right. While the test is clear, what is missing is the actual application of the test to the facts as found in this case. The majority refers to previous decisions in which licensing schemes with the characteristics noted above were considered and seems to assume that a similar licensing scheme in this case will also amount to an infringement. No mention is made of the fact that all of the previous cases involved aboriginal or treaty rights to fish or hunt for food (or ceremonial purposes) only, and not for trade.

What the majority has done in this portion of the judgment is to consider whether the regulations (e.g., licensing schemes) are infringements in isolation from the right, as indicated by their description of the decision in Adams as having "applied [the Sparrow] test to licensing schemes", and found an infringement. The test is not to be applied to the "scheme", but to the impact of a scheme on a treaty right; an infringement results, not from the mere presence of a type of regulation, but from the interaction of that regulation with a particular right. This view is confirmed by a consideration of the analyses conducted in the cases cited by the majority, in which licensing provisions were found to be infringements (or not) only by virtue of the degree of interference they represented to the particular right in question. In Nikal the majority

204. Marshall #1, supra note 2 at para. 64.
205. As quoted in the text accompanying note 36.
206. Marshall #1, supra note 2 at para. 64. The cases referred to are: Badger, supra note 22; Coté, supra note 35; Nikal, supra note 201; R. v. Adams, [1996] 3 S.C.R. 101 [hereinafter Adams].
207. Badger, ibid. at para. 37; Nikal, ibid. at 88-89; Adams, ibid. at para. 45; Coté, ibid. at para. 57.
208. Marshall #1, supra note 2 at para. 64.
209. See e.g., Badger, supra note 22 at paras. 88-95; Adams, supra note 206 at paras. 50-55. In Coté, supra note 35 at paras. 77-80, it was held that a fee for entering a controlled zone in a vehicle was not a sufficient interference with a right to fish for food.
rejected the notion that every license was an infringement, and considered such issues as availability, expense and inconvenience in determining whether there was an infringement.\textsuperscript{210}

A similar analysis was never conducted in \textit{Marshall} \#1, despite the fact that a right to fish (or hunt) and trade to earn a moderate livelihood is a very different thing from a right to fish or hunt for food, and thus the regulations might have very different impacts. The ban on sales without a license might seem clear, but even there one must at least ask whether it would actually interfere in any significant way with the earning of a "moderate livelihood", as opposed to an ability to catch fish and nothing more. For example, one of the offences involved the imposition of a closed season for the type of net in question at ten specified locations in the Province of Nova Scotia and the adjacent tidal waters.\textsuperscript{211}

While this might be taken to interfere to a sufficient degree with a right to fish for food, could the same be said about the ability to earn a moderate livelihood from such activities? It might be found to be such an interference, but the problem is that the majority never asked this question, which is what would be required to properly apply the test for \textit{prima facie} infringement. In fact, the defence never actually led evidence showing a \textit{prima facie} infringement of the right as found by the Supreme Court, for the simple reason that it had not been argued in this form at trial.\textsuperscript{212} The end result was that the majority, rather than apply the test to the facts of this case, simply transferred the conclusions reached when the test was applied in previous cases involving very different rights.

4. Summary

Three common themes run through all of the general issues discussed above. First, in \textit{Marshall} \#1 the Court exhibited a tendency to leave unstated, or poorly stated, the criteria underlying its findings on particular aspects of the treaty right. The failure to explain how the Court reached conclusions on elements such as beneficiaries, resources and geographic scope made it more difficult to extrapolate from the limited facts of this case to the other situations that would inevitably arise in negotiations.

\begin{footnotes}
\item[210.] Nikal, supra note 201 at paras. 97-101. The more restrictive passages from Nikal are quoted in Marshall \#2, supra note 6 at para. 27.
\item[211.] Maritime Provinces Fishery Regulations, S.O.R./93-55, s. 20, Schedule III. Mr. Marshall was charged under a provision dealing with all species of fish. Separate close times for fishing eels with particular gear are also provided under s. 35 of the Regulations, for more limited locations.
\item[212.] Marshall: Prov. Ct., supra note 4 at paras. 6-7. The right as put forward did not contain the critical limiting factor found by the Supreme Court. The proper course here would be for the Court to give the Appellant the opportunity at trial to introduce evidence of how this right was infringed.
\end{footnotes}
Second, the Court seems to have made important findings of a factual nature based, not on the application of the appropriate tests to the facts before them, but rather on the basis of conclusions reached when those principles were applied to different facts. Thus, the entire finding on *prima facie* infringement is derived, not from an application of the *Sparrow* test to the right as found here, but from the fact that regulations of this type had been infringements when they were applied to very different rights in other cases. Finally, if the changes in *Marshall #2* are any guide, much of the obscurity evident in *Marshall #1* resulted from the Court assuming that characteristics of rights defined in earlier cases would be “read into” its decision in the present case, even if they were not explicitly stated. As a result, the ideas of “equitable access” and entitlements of others, as well as the collective and local nature of the right, were left unstated and discernible only by reference to the previous jurisprudence of the Court.

None of these problems would be as serious in a “typical” case where the most directly interested parties are judges, legislators and lawyers, who should be accustomed to dealing with the limited impact of particular factual findings and the importance of reading one decision with those that went before. Here, however, the decision is necessarily targeted at a wider audience comprising government resource managers, as well as aboriginal and non-aboriginal users of the resource, all of whom may tend to look to this case in isolation, and to rely more heavily on the inferences to be drawn from the particular facts.

**Conclusions**

In *Marshall #1* the Supreme Court failed to provide the clear definition of the treaty right in question, including the permissible degree of regulation, which might have assisted in the structuring of subsequent negotiations. This contributed to the confusion in the period that fol-

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213. Ironically, this is precisely the issue the Nova Scotia Court of Appeal was addressing in the passage dealing with the difference between peace treaties and land cession treaties, an observation treated as an error in law by the Supreme Court. The point made by the Court of Appeal was that one could not necessarily analogize from the results of cases based on very different facts, even if the same principles were being applied in both situations. See *supra* note 74.

214. Similarly, the crucial finding of fact on the meaning of the word “necessaries” and the intent of the parties to limit the right was founded in part on irrelevant findings of fact made in earlier cases on aboriginal rights: see *supra* note 80.

215. So, for example, when a person from Membertou was found to be under treaty protection while fishing in Pomquet, with nothing further to explain why, it is understandable that some might draw broad conclusions about the geographic scope of the right. Additionally, when a right is granted with no explicit mention of its priority or of the rights of other users, it may be unreasonable to expect the lay reader to import unstated limits developed in other cases.
lowed, for the decision was vague enough on central points to provide all readers with support for their own most ambitious hopes, or worst fears. This is not to say that the violence and intimidation on one side, and the exaggeration of the permissive scope of the decision on the other, would not have occurred in any event, but the manner in which the right was defined by the Court, as distinct from the finding of the right, certainly made productive negotiations less likely.

*Marshall #2* was in part an attempt to amend or reverse portions of the decision, while denying that this was being done, and this led inevitably to an appearance of backtracking and “caving in” by the Court, regardless of the content of the changes which were made. Furthermore, it has left a muddled situation for the immediate future, with all sides in the dispute having a decision of the Supreme Court to which they can point in support of mutually contradictory positions on important elements of the management regime that now needs to be negotiated.  

The combined effect of the two decisions, with their markedly different versions of the right and its potential for regulation, is to make the successful conclusion of negotiated settlements less rather than more likely. On the Court’s own view of what is necessary and desirable in these disputes, this is unfortunate, to say the least.

The *Marshall* case did not involve the development of new principles for treaty interpretation, but was concerned with the application of those principles which have been put in place in previous cases. The systematic and explicit application of the techniques and principles which already exist could have avoided much of the difficulty which the Court experienced in *Marshall*; the Court needs to apply the tests to the present facts, rather than simply import the conclusions reached in previous cases on different facts. In addition, however, the Court would do well to consider its appropriate role as it moves into a period in which treaty rights cases involving application of existing law should be more common than cases giving rise to new law. Much of the difficulty experienced in *Marshall* occurred when the Court was dealing with elements of the case which required a strong factual basis, such as the

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216. The substantive portions of the second decision are, of course all *obiter*, but clearly very persuasive *obiter* that a lower court judge would be unlikely to ignore.
217. A possible exception is the treatment of regulatory powers actually agreed within a treaty, and the resulting confusion of *prima facie* infringement and justification in *Marshall #1*, as discussed in Part IV(2) “Subject to the Regulation: The Nature of the ‘Hedge’,” above. This is by no means a definite conclusion by the Court, however, and other portions of the decision contradict it.
finding on *prima facie* infringement, and for which their findings could send dangerous if inadvertent messages to precisely the audience that should be anticipated. For cases with such a dense and complicated factual content, the Court should perhaps be more willing to do as it has done in the past and send these issues back for determination by the trial court, where the grasp of the factual record will be more complete.²¹⁸

²¹⁸ See *e.g.*, *Badger*, supra note 22 at para. 98, where Cory J. stated that, despite the failure of the Crown to lead any evidence of justification, the conservation issue was "of such importance" that a new trial was required. The same could be said of *Marshall*, where the Crown could not have led evidence regarding the legitimacy of interference with this right, given that it was never argued by the defence in the form found by the Court. On the question of *prima facie* infringement, see the text accompanying note 212.