



Marshall Fact Sheet



What do the *Marshall* decisions say?

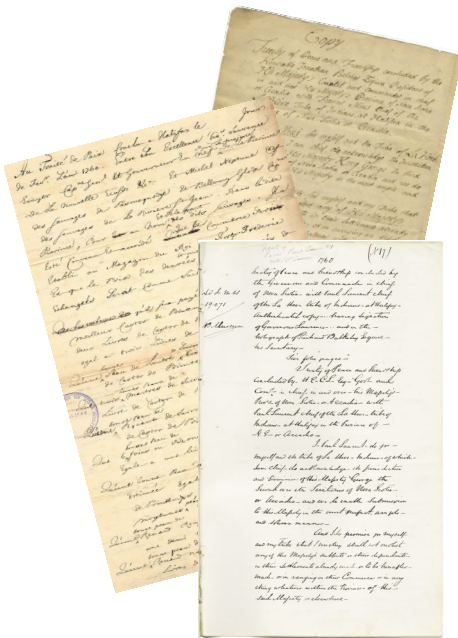
In September 1999, in the *Donald Marshall* case, the Supreme Court of Canada held that a series of Treaties signed 1760-61 by Mi'kmaq and the British Crown are still valid.

Known as the Peace and Friendship Treaties, they provide that Mi'kmaq have the right to harvest and sell fish, wildlife, and wild fruit and berries to provide a moderate livelihood.

In a second decision, released in November of 1999, the Court 'clarified' its earlier ruling. Together, these two decisions are known as *Marshall 1* and *Marshall 2*.



What is a “Moderate Livelihood”?



The most significant clause in the 1760-61 Treaties is the so-called “truckhouse clause” which the Supreme Court said means, in the present-day context, a right to a moderate livelihood. The “truckhouse clause” promised Mi'kmaq (and Wolastoqiyik and Peskotomuhkati) that government-run truckhouses or trading posts would be established for Mi'kmaq to sell their goods such as meat, furs, feathers, fish. In return, Mi'kmaq, Wolastoqiyik and Peskotomuhkati promised only to trade at the truckhouses.

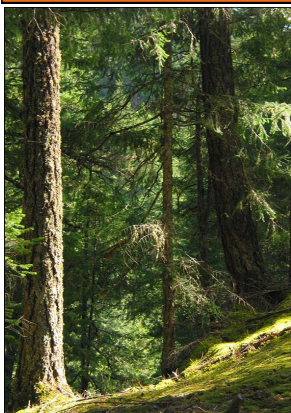
According to the Supreme Court, the promise of a truckhouse and the promise to trade only at a truckhouse is the equivalent of a right “to trade for necessities” (the European goods which, by 1760-61, Mi'kmaq had come to rely on) and not a general right to trade for large economic gains.

“A moderate livelihood includes such basics as “food, clothing and housing, supplemented by a few amenities”, but not the accumulation of wealth...” (*Marshall 1*, para.59)

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in 1760-61 by
Mi'kmaq and the
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Are all natural resources and foodstuffs covered by the Treaties?

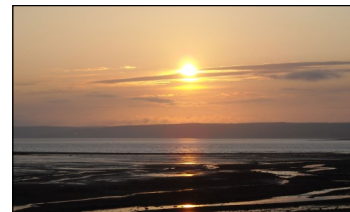


No. Mi'kmaq have the continued right to harvest and sell whatever kinds of products Mi'kmaq had to trade in the 1760s. Items which can be harvested and sold to earn a moderate livelihood does not extend, for example, to logs. The Supreme Court of Canada in *R. v. Bernard*; *R. v. Marshall* ("the logging case") found that when the Treaties were signed there was so much wood available for lumber that incoming settlers would have no need to purchase lumber from Mi'kmaq to build homes, barns, sheds, etc.

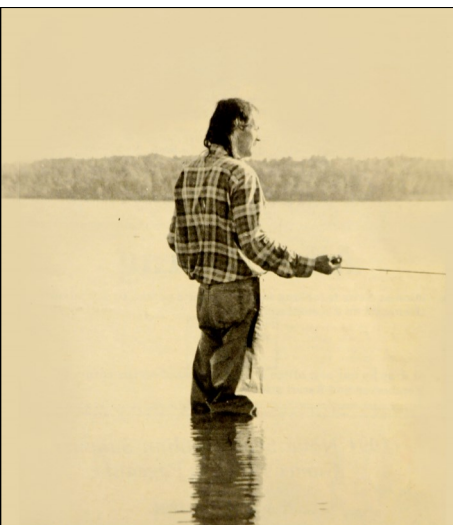
It found that while the Treaties protect Mi'kmaq rights to harvest and dispose of some items, cutting and selling logs (commercial logging) was not protected as a "logical evolution" of a traditional trading activity.

Where can the moderate livelihood Treaty Right be exercised?

While the Supreme Court spoke of the 1760-61 Treaties as "local Treaties" exercised by individual Mi'kmaq with community authority, the territoriality of the 1760-61 Treaties is unclear and the approach of the Assembly of Nova Scotia Mi'kmaq Chiefs is that all Nova Scotia Mi'kmaq have the same rights throughout the Province.



Are there limitations on the Treaty Right to a Moderate Livelihood?



Yes. The Supreme Court indicated that the exercise of Treaty rights, like the exercise of Aboriginal rights, can be limited.

The Crown may limit or *infringe* the right to a moderate livelihood but there must be an over-riding public purpose for limiting the exercise of the right – such as conservation or public safety. Any infringement must be the minimum needed to meet the public objective and the Aboriginal group must be consulted *before* the limitation on the right is imposed. Compensation must be provided for infringement. This is known as "justification"; that is, the Crown must demonstrate that the limits it places on the Treaty right are justified because it is the only way to accomplish the over-riding public purpose.

Resources which are harvested to obtain a moderate livelihood must be equitably shared with non-Mi'kmaq.



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Kwilmu'kw Maw-klusuaqn Negotiation Office (KMKN0) works on behalf of the Assembly of Nova Scotia Mi'kmaq Chiefs in the negotiations and consultations between the Mi'kmaq of Nova Scotia, the Province of Nova Scotia and the Government of Canada.

KMKN0 was developed by the Mi'kmaq for the Mi'kmaq.

The purpose of these negotiations and consultations is to implement our Aboriginal and Treaty Rights from the Treaties signed by our ancestors in the 1700's.



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