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Bruce H. Wildsmith\*

The Mi'kmaq and the Fishery:  
Beyond Food Requirements

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*The Mi'kmaq, the traditional Aboriginal nation in Nova Scotia, are struggling to find their place in the modern fishery. Significant milestones have been achieved, including the Denny, Paul and Sylliboy (N.S.C.A.) case establishing the right of the Mi'kmaq to harvest fish for food and the Simon (S.C.C.) case affirming the continuing validity of the Mi'kmaq Treaty of 1752, a treaty that contains an express right to sell fish. Though fishing by the Mi'kmaq for food no longer appears to be a subject of controversy (assuming the needs of conservation have been met), the spectre of commercial aspects to the Mi'kmaq fishery is meeting resistance. This paper explains the background to these developments and comments on the future role of the Mi'kmaq in the commercial fishery. The author argues that the present collapse in the fishery was not the fault of the Mi'kmaq and the Mi'kmaq should be accorded a priority in future harvesting. Further, Mi'kmaq participation and resource management raise issues of self-government that must be resolved through Mi'kmaq governmental mechanisms.*

*Introduction: The Simon Case*

When the first Europeans arrived in present-day North America, they found a land inhabited by Aboriginal people who were self-governing and self-sufficient. The resources of the lands and waters were harvested to sustain the people; the resources were the basis of a life-style and economy. Initially the Europeans sought to share in the bounty of the resources; eventually they sought to settle on the land. In so settling, the Europeans sought to develop relationships and understandings with the Aboriginal peoples, as well as between and amongst the European powers themselves.

The Mi'kmaq are one of the Aboriginal peoples of Canada and traditionally occupied territory they called "Mi'kma'ki". Mi'kma'ki extends through five Canadian provinces from the Gaspé Peninsula of Quebec, along New Brunswick's north shore and as far inland as the St. John River watershed (the traditional territory of the Malecite), all of present-day Prince Edward Island, all of present-day Nova Scotia including Cape Breton Island, and the south coast of Newfoundland. This northeastern corner of North America featured the earliest contact in Canada between European explorers, fishermen and settlers, and the

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Aboriginal occupants; it was the site of part of the struggle between the British and French in the 18th Century for dominance as the preeminent European force in North America.

During this period of European rivalry, the British established the basis for their relationship with the Mi'kmaq through a series of treaties, perhaps best thought of as a chain of covenants, with various links forged during the 1700s. The earliest known Indian treaty directly referring to present-day Nova Scotia was signed in 1725<sup>1</sup> and ratified at Annapolis Royal in 1726<sup>2</sup> and at St. John in 1728<sup>3</sup>. The most recent treaties were in 1761<sup>4</sup>, though other treaties were signed around the time of the American Revolution with Mi'kmaq from the Miramichi, Restigouche, Richibucto and Shediac areas of New Brunswick and the Gaspé in 1779<sup>5</sup>. Over time, these treaties were largely lost to the conscious mind of the colonial authorities, and ignored by historians. Though the Mi'kmaq remembered the treaties and from time-to-time reminded Her Majesty of them<sup>6</sup>, their reminders were without legal or political effect until the Supreme Court of Canada spoke in 1985 in the case of *James Matthew Simon v. The Queen*<sup>7</sup>.

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1. The treaties may be found in various sources. The originals were usually sent by colonial governments to the officials in London, England who were responsible for colonial affairs, namely, the Board of Trade. They are usually housed in the Public Record Office in Kew, a suburb of London. The documents are usually classified as Colonial Office records, and are contained in numerous volumes. One of the severe problems in dealing with Indian treaties is that they were not catalogued systematically, and were at times made with military or civilian officers who did not necessarily report to colonial governors or the Board of Trade; hence, important interactions and documents with Aboriginal peoples may be recorded in a variety of sources that have not been systematically surveyed. Microfilm copies of major colonial documents are found in the public archives and universities in Canada, such as the National Archives of Canada ("NAC") in Ottawa and the Public Archives of Nova Scotia (PANS) in Halifax. A number of documents have been published in typescripted, printed form, easing access and improving legibility of documents that are in the original handwritten. See e.g. W. E. Daugherty, *Maritime Indian Treaties in Perspective* (Ottawa: DIAND, 1983); *The Mi'kmaq Treaty Handbook* (Sydney: Native Communications Society of Nova Scotia, 1987). The 1725 treaties are a series of documents found at C.O. 217/38.

2. C.O. 217/4, p. 320 and 217/38, p. 100-09.

3. For an article providing a Malecite (or Maliseet) perspective on the 1725-28 treaties, see Andrea Bear Nicholas, "Mascarene's Treaty of 1725" (1994) 43 U.N.B.L.J. 3.

4. Various treaties with groups of Mi'kmaq from present-day Nova Scotia were signed in the years 1760-61. One that involved the Cape Breton Mi'kmaq, as well as Mi'kmaq from Miramichi, Shediac, and Pogmouch, was signed on June 25, 1761 and is found at C.O. 217/18. Another with the Mi'kmaq of Pictou and Merigomish was completed October 12, 1762: PANS RG1, vol. 165, p. 187.

5. C.O. 217/54, p. 221-23.

6. E.g., Feb. 10, 1825 Petition of Chief Adelah to Lord Bathurst, attaching copy of 1760 Treaty: C.O. 217/145. The Mi'kmaq also attempted to gain judicial recognition of the *Treaty of 1752* through a court case in the 1920s: *R. v. Sylliboy*, [1929] 1 D.L.R. 307 (S.C.C.).

7. [1985] 2 S.C.R. 387, 62 N.R. 366, 71 N.S.R.(2d) 15, 171 A.P.R. 15, 23 C.C.C. (3d) 238. [hereinafter cited to S.C.R.].

The *Simon* case recognized that the *Treaty of 1752*, signed by the Governor and Council in Halifax with a Mi'kmaq Chief, Jean Baptiste Cope, was a valid Indian treaty, still in full force and effect. To the extent that the Crown felt otherwise, the burden was on the Crown to show termination, extinguishment, or limitation. In *Simon* the Supreme Court states:

Given the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises.<sup>8</sup> [Emphasis added]

As to whether the *Treaty of 1752* was terminated by hostilities, Chief Justice Dickson reflected on what the British authorities had in fact done. He states:

I would note that there is nothing in the British conduct subsequent to the conclusion of the Treaty of 1752 and the alleged hostilities to indicate that the Crown considered the terms of the Treaty at an end. Indeed, His Majesty's Royal Instructions of December 9, 1761, addressed *inter alia* to the Governor of Nova Scotia, declared that the Crown "was determined upon all occasions to support and protect the . . . Indians in their just rights and possessions and to keep inviolable the treaties and compacts which have been entered into with them. . . ." These Royal Instructions formed the basis of the Proclamation issued by Jonathan Belcher, Lieutenant Governor of Nova Scotia on May 4, 1762 which also repeated the above words.

I conclude from the foregoing that the Treaty of 1752 was not terminated by subsequent hostilities in 1753. The Treaty is of as much force and effect today as it was at the time it was concluded.<sup>9</sup>

Despite these comments and the doctrine of *res judicata*, some hold the view that the language used by the Supreme Court still leaves it open to the Crown to lead evidence and to argue that the *Treaty of 1752* was terminated by subsequent hostilities.<sup>10</sup>

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8. *Ibid.* at p. 405-06 [SCR] [emphasis added].

9. *Ibid.* at p. 404-05.

10. The particular language usually relied upon is the following reference at p. 404: "The inconclusive and conflicting evidence presented by the parties makes it impossible for this Court to say with any certainty what happened on the eastern coast of Nova Scotia 233 years ago. As a result, the Court is unable to resolve this historical question". These comments may then be coupled with the several references at p. 403, 405 and 415 to the treaty not being "terminated by subsequent hostilities in 1753". See *R. v. Johnson (S.G.)* (1990), 122 N.S.R. (2d) 280, 338 A.P.R. 280 (Prov. Ct.); *R. v. Marshall (D.J., Jr.)* interlocutory ruling Nov. 24, 1994 (Prov. Ct.). However, arguably the *Simon* case is a judicial determination *in rem* on the status of a thing, i.e., the treaty. Since the Crown cannot split its case into termination in this year and then later argue for termination in a different year (the Province in fact argued and provided evidence in *Simon* concerning hostilities and subsequent treaties to and including

The *Treaty of 1752* contains two clauses of importance to the right to fish. First, Article 4 of the Treaty says that those taking the benefit of the Treaty “shall not be hindered from, but have free liberty of hunting and fishing as usual” [emphasis added]. The hunting aspect of that clause was the direct subject of the Supreme Court of Canada’s decision in *Simon*.

The second important clause with respect to fishing rights also comes from Article 4 and states:

if they [the Mi'kmaq beneficiaries] shall think a Truck house needful at the River Chibenaccadie [Shubenacadie River], or any other place of their resort they shall have the same built and proper Merchandize, lodged therein to be exchanged for what the Indians shall have to dispose of and that in the mean time the Indians shall have *free liberty to bring for Sale to Halifax or any other Settlement within this Province*, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best advantage. [emphasis added]

This clause obviously contemplates commercial transactions in such natural products as fish. In the *Simon* case, the Supreme Court noted that the treaty protection was not limited to hunting for non-commercial purposes. The Court stated that “article 4 of the Treaty appears to contemplate hunting for commercial purposes when it refers to the construction of a truck house as a place of exchange and mentions the liberty of the Micmac to bring game to sale”<sup>11</sup>.

These clauses must be interpreted in light of the principles set out by the courts for the interpretation of Indian treaties. The most authoritative statement of the principles was provided by the Supreme Court in *Simon*:

. . . Indian treaties should be given a fair, large and liberal construction in favour of the Indians. This principle of interpretation was most recently affirmed by this Court in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29. I had occasion to say the following at p. 36:

It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. . . . In *Jones v. Meehan*, 175 U.S. 1 (1899), it was held that Indian treaties “must. . . be construed, not according to the technical meaning of [their] words . . . but in the sense in which they would naturally be understood by the Indians”.<sup>12</sup>

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1761, but the SCC does not clearly deal with this evidence and these arguments), once the status of the treaty has been finally pronounced, it is binding against the world. See Spencer Bower and Sir A.K. Turner, *The Doctrine of Res Judicata* 2d ed. (London: Butterworths, 1969) at 213.

11. *Supra*, note 7 at 403 [SCR].

12. *Ibid.* at 402 [SCR] [emphasis added].

Thus, in directing that a "fair, large and liberal construction in favour of the Indians" be taken, the Supreme Court mandates that the treaties be interpreted in the way "they would naturally be understood by the Indians." This approach was applied by Chief Justice Dickson to the issues involved in *Simon*, and was later followed in *R. v. Sioui*<sup>13</sup>.

As significant as the *Simon* case is, several other events are important to understanding the Mi'kmaq right to fish. These events are, first, the 1982 changes to the *Constitution of Canada*, second, the decision of the Nova Scotia Supreme Court, Appeal Division, in *R. v. Denny, Paul and Sylliboy*<sup>14</sup>, and third, the recognition in the Charlottetown Accord of the inherent right of Aboriginal self-government and of Aboriginal governments as one the three orders of government in Canada.

Through these milestones, all achieved in the last decade, the Aboriginal and treaty rights of the Mi'kmaq have finally assumed centre-stage in the legal and political discourse between Mi'kmaq and non-Mi'kmaq. Such Aboriginal and treaty rights are the key to understanding the relationship of Mi'kmaq with non-Aboriginal society; they are the foundations from which political and legal arrangements derive. All members of both Aboriginal and non-Aboriginal societies, who must live and interact together, will benefit from a greater understanding of these rights.

The purpose of this paper is to provide a foundation to that understanding, and to suggest aspects of what the future may look like for the Mi'kmaq in the fishery. Though litigation has confirmed the right of Mi'kmaq to harvest fish for food (as long as the needs of conservation have been met), present, on-going litigation and negotiations seek to define the future participation of the Mi'kmaq in both commercial activities and in the co-management of, and self-government in, the fisheries.

### I. Section 35 of the Constitution Act, 1982

Prior to 1982<sup>15</sup>, Aboriginal and treaty rights were vulnerable to adverse government action. The common law did not give much, if any, legal force and effect to such rights. Whenever the colonial (pre-Confederation,

13. [1990] 1 S.C.R. 1025, at 1035-36 (1990), 70 D.L.R. (4th) 427, 109 N.R. 22, [1990] 3 C.N.L.R. 127 [hereinafter cited as C.N.L.R.]. Note that modern, 20th Century treaties may not be subject to the same principles of interpretation. See *Sioui* at 1036, *R. v. Howard* (12 May 1994), Doc. 22999 (S.C.C.).

14. (1990), 94 N.S.R. (2d) 253, 247 A.P.R. 253 (S.C., A.D.).

15. 1982 was the year the *Constitution of Canada* was patriated from Great Britain. This was accomplished by the enactment by the Imperial Parliament in Great Britain of the *Canada Act 1982* (U.K.), 1982, c. 11. S. 35 is contained in Schedule B to the *Canada Act 1982*, namely, the *Constitution Act, 1982*.

i.e., before 1867), provincial, or federal (post-Confederation) governments enacted legislation, the courts enforced the legislation no matter what the Indian treaties or the Indians themselves said. The only legal exception to this preference for non-Aboriginal legislation was accorded by s. 88 of the *Indian Act*<sup>16</sup>.

Section 88 contains the only explicit reference to Indian treaties in any Canadian statute. It provides, in part:

88. *Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province. . . .* [emphasis added]

This provision was interpreted to protect treaty rights (not Aboriginal or other native rights) against conflicting provincial laws, though not conflicting federal laws.<sup>17</sup> Section 88 of the *Indian Act* is central to the outcome in the *Simon* case, for it was s. 88 that directed the court to give legal effect to the terms of the Treaty of 1752 in the face of the conflicting hunting laws of the province. But s. 88 has been interpreted by the courts as not applying to conflicting federal laws. Thus, while there are no instances where a provincial or the Federal government purported to explicitly and expressly extinguish or terminate or limit a treaty, the Supreme Court of Canada sanctioned the indirect restriction of treaty rights by upholding and applying general federal legislation that conflicted with a treaty right.

In addition to this problem, s. 88 makes no reference to Aboriginal rights. Aboriginal rights are a concept distinct from treaty rights since they are rights based on original occupancy of territory rather than an agreement between Aboriginal and non-Aboriginal nations. Nowhere does a statute make reference to the Aboriginal rights of the Mi'kmaq or other Aboriginal peoples. Without statutory (or constitutional) recognition, Aboriginal rights were vulnerable to legislative action by non-Aboriginal governments.

Thus, prior to 1982, Mi'kmaq treaty rights prevailed because of s. 88 of the *Indian Act* when they came against conflicting provincial laws. However, treaty rights did not prevail as against federal laws, and Aboriginal rights did not prevail as against either provincial or federal laws. Against this background, in which for the most part Aboriginal and treaty rights sat in a form of legal limbo, the importance of the constitutional changes effected in 1982 can be assessed.

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16. R.S.C. 1985, c. I-5, s. 88.

17. See e.g. *R. v. Kruger and Manuel*, [1978] 1 S.C.R. 104 (1977), 75 D.L.R. (3d) 434; *R. v. Dick*, [1985] 2 S.C.R. 309.

Section 35(1) of the *Constitution Act, 1982* states:

35. (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

Subsection 35 (2) defines “Aboriginal peoples of Canada” to include “the Indian, Inuit and Metis peoples of Canada”, one of which is clearly the Mi’kmaq.

Of importance is the fact that s. 35(1) recognizes both Aboriginal and treaty rights, and forms part of the Constitution of Canada. The Mi’kmaq in Nova Scotia possess both forms of rights. This is unique because in most of Canada, Indian treaties are designed to extinguish Aboriginal land rights and limit some other rights, such as those to hunt and fish, in exchange for the treaty promises. However, the treaties in the Maritimes are designed to establish a relationship of peace and friendship with the British Crown, and not to cede lands or rights. Therefore, as the Supreme Court of Canada recognized in *Simon*, the *Treaty of 1752* (and the other Nova Scotia treaties) generally confirm pre-existing Aboriginal rights, including the right to hunt and fish. Thus, Aboriginal rights co-exist along side of treaty rights.

The fact that the Mi’kmaq Aboriginal and treaty rights are “recognized and affirmed” in the Constitution of Canada is significant because it gives these rights constitutional protection. The Constitution of Canada is the supreme law of the country, and to the extent that any law is inconsistent with the constitution, it is of no force and effect.<sup>18</sup> Thus, since the Mi’kmaq have by virtue of s. 35(1) a constitutional right to fish, that Mi’kmaq right prevails over inconsistent laws and actions of the federal and provincial governments.

To provide meat to the bare-bones discussion above, the next three sections address the Mi’kmaq right to fish based, first, on treaties, then on an Aboriginal right to fish as reflected in *Denny, Paul and Sylliboy*. The third topic will be the meaning given to s. 35(1) by the Supreme Court in *R. v. Sparrow*<sup>19</sup> and the constitutional protection it offers Aboriginal and treaty rights.

## II. *The Treaty Right to Fish*

As explained above, the *Treaty of 1752* that was the subject of the *Simon* case makes specific reference to the right of the Mi’kmaq to fish and to sell any fish harvested. In addition, the *Treaty of 1725*, originally signed by the Mi’kmaq from Cape Sable and ratified at Annapolis Royal in 1726

18. This has always been the case, but is made explicit by s. 52 of the *Constitution Act, 1982*.

19. [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, 111 N.R. 241 [hereinafter cited to D.L.R.].



by many Mi'kmaq from across Nova Scotia, provided that the Mi'kmaq "shall not be molested in their persons, Hunting, *Fishing* and planting grounds nor in any other their lawful Occasions".

These are the only two explicit references to fishing in the Mi'kmaq documents signed by or with respect to present-day Nova Scotia. However, other documents were signed or adopted by various groups of Mi'kmaq in 1749, the period shortly after the *Treaty of 1752*, in 1760 and 1761, and finally at the time of the American Revolution, in 1779. At the same time the Government in Nova Scotia also signed treaties with the Malecite from the Saint John River and the Passamaquoddy from the bay of the same name at the Maine—New Brunswick border. Many of these treaties, including the *Treaty of 1752*, make express reference to the *Treaty of 1725* and ratify, confirm, and incorporate the 1725 Treaty.

Whether expressed explicitly or not, surely the right to fish, along with the right to hunt and gather, was an underlying assumption on which all the treaties were based. The parties' course of conduct demonstrates this. Before the treaty the Micmac were free to hunt and fish, and did so to provide food and furs; after the signing of the treaties nothing changed. The Micmac were not provided with all their food and clothing for the next year; they were expected to provide for themselves by hunting, fishing and gathering. No one expected otherwise. Indeed the British supplied the Micmac with shot and powder so that they could hunt and, in 1760-61, with truckhouses so they could sell the fruit of their activities!

Thus, it may be reasonably suggested that all the treaties, either explicitly or implicitly, confirm the right of the Mi'kmaq to fish. Certainly the right to fish would form one of the assumptions and premises upon which the treaties are based. Since between 1725 and 1761 all of the various groups of Mi'kmaq from all over present-day Nova Scotia, including Cape Breton Island, signed treaties with the English, and the Mi'kmaq beneficiaries of those treaties intermarried and moved throughout the region, we may conclude that all Mi'kmaq in Nova Scotia today enjoy a right to fish based on the covenant chain of treaties. In all likelihood, all Mi'kmaq enjoy the same set of treaty rights based on the covenant chain, and that set of rights includes the right to sell fish, as expressly set out in the treaties in 1725-26, 1752 and 1779, and as impliedly included in the trading provisions in 1760-61.

As explained above, s. 88 of the *Indian Act* gives treaty rights priority over inconsistent provincial laws. Since virtually all fisheries regulation takes the form of federal laws (based on the legislative jurisdiction over "Sea Coast and Inland Fisheries" conferred on the federal Parliament in s. 91(12) of the *Constitution Act, 1867*), s. 88 is not of any assistance as a basis for giving legal recognition to a treaty-based right to fish.

However, s. 35(1) of the *Constitution Act, 1982*, being a constitutional provision, takes supremacy over federal as well as provincial laws. Therefore, subject to what is discussed below in relation to the *Sparrow* case, a treaty-based right to fish takes priority over inconsistent fisheries laws.

### III. *The Aboriginal Right to Fish: Denny, Paul and Sylliboy*

For more than one hundred years after Confederation, the status of the concept of Aboriginal title and rights remained uncertain in Canadian law. In 1973 the Supreme Court of Canada in *Calder v. A.G.B.C.*<sup>20</sup> for the first time authoritatively settled that Canadian law recognized that Aboriginal people enjoyed special rights based on their original occupancy of the land. *Calder* was summarized by Dickson, J. (later Chief Justice of Canada) in *Guerin v. The Queen*<sup>21</sup>. Writing the principal judgment under the sub-title "The existence of Indian title", he states:

In *Calder et al. v. Attorney General of British Columbia*, [1973] S.C.R. 313, this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands.<sup>22</sup>

In *Calder*, six of the seven judges deciding the case expressly dealt with Aboriginal rights and all six recognized that the concept of "aboriginal title existed in Canada".

Mr. Justice Dickson in *Guerin* refers with approval to Chief Justice Marshall of the U.S. Supreme Court in *Johnson v. M'Intosh*, who said that "the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent".<sup>23</sup> As Marshall, C.J. put it: "[The original inhabitants] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion".

However, *Calder* left unsettled many questions, such as whether Aboriginal rights survived the granting of land by the Crown and the occupancy of such lands by settlers. For example, in Nova Scotia, the Appeal Division of the Province's Supreme Court upheld a Mi'kmaq right to hunt on reserve lands free of provincial conservation laws, but suggested that the rights had been extinguished off-reserve except in

20. [1973] S.C.R. 313, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1.

21. [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, 55 N.R. 161 [hereinafter cited to S.C.R.].

22. *Ibid.* at 376-77.

23. 8 Wheaton 543 (1823), 21 U.S. 240 cited in *ibid.* at 377.

relation to ungranted Crown lands: *Isaac v. The Queen*<sup>24</sup>. In *Isaac, MacKeigan, C.J.* states:

In Part II of these reasons I conclude that Indians on Nova Scotia reserves have a usufructuary right in the reserve land, a legal right to use that land and its resources, including, of course, the right to hunt on that land. In my opinion that right arises in our customary or common law, was confirmed by the *Royal Proclamation* of 1763 and other authoritative declarations, was preserved in respect of reserve lands when they were originally set apart for the Indians. . . .

That right, sometimes called "Indian title" is an interest in land akin to a *profit a prendre*. It arose long before 1867 but has not been extinguished as to reserve land. . . .<sup>25</sup>

Chief Justice MacKeigan also noted that the British received their title to Nova Scotia from the French but that when Governor Belcher spoke of this issue he

erred in not recognizing the "burden of Indian rights" overlying that title [derived from the French]. Neither the French nor British had extinguished the Indian rights in Nova Scotia.<sup>26</sup>

The Chief Justice also reviews briefly the treaties up to 1779 and concludes:

I have been unable to find any record of any treaty, agreement or arrangement after 1780 extinguishing, modifying or confirming the Indian right to hunt and fish, or any other record of any cession or release of rights or lands by the Indians.<sup>27</sup>

Aboriginal rights are at the heart of the Mi'kmaq right to fish. The Mi'kmaq, like other Indians in Canada, enjoyed at the time of contact and settlement Aboriginal rights. These rights included a right to fish. This right has never been surrendered or given up by the Mi'kmaq, and no government, pre-Confederation or post-Confederation, British or French, Nova Scotian or Canadian, has expressly purported to extinguish the Aboriginal right to fish. The original Aboriginal right to fish was later confirmed by treaties and by the Royal Proclamation of 1763, but pre-existed these documents and operates independently of them.

In 1990 the existence of an Aboriginal right on the part of Mi'kmaq to fish was confirmed by the Nova Scotia Supreme Court, Appeal Division in *Denny, Paul and Sylliboy*<sup>28</sup>. This case involved charges of illegal fishing for salmon without a licence, illegal possession of a salmon, and

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24. (1975), 13 N.S.R.(2d) 460, 9 A.P.R. 460 (S.C., A.D.).

25. *Ibid.* at 469.

26. *Ibid.* at 482.

27. *Ibid.* at 483.

28. *Supra* note 14.

illegal fishing for cod without a licence by members of the Eskasoni Band in the Bras d'Or Lakes, and fishing with a snare for salmon in the Afton River by a member of the Afton Band. All three Mi'kmaq were acquitted on the appeal on the basis that they enjoyed a limited immunity from prosecution since the regulatory regime for fisheries management was inconsistent with their Aboriginal right to fish. Chief Justice Clarke, writing a unanimous judgment of the five-member panel, states that the Mi'kmaq have "an aboriginal right to fish for food in the waters in question" and that "this right has not been extinguished through treaty, other agreement or competent legislation".<sup>29</sup> The Appeal Division goes on to interpret s. 35(1) of the *Constitution Act, 1982* as requiring that a priority be given to Aboriginal fishing after the needs of conservation are met. As Clarke, C.J.N.S. states:

To afford user groups such as sports fishermen (anglers) a priority to fish over the legitimate food needs of the appellants and their families is simply not appropriate action on the part of the Federal government. It is inconsistent with the fact that the appellants have for many years, and continue to possess an aboriginal right to fish for food. The appellants have, to employ the words of their counsel, a "right to share in the available resource". This constitutional entitlement is second only to conservation measures that may be undertaken by federal legislation.<sup>30</sup>

Thus, the Court has clarified that the Mi'kmaq of Nova Scotia, both on Cape Breton Island and the mainland, possess an Aboriginal right to fish for food for themselves and their families, independent of any treaty-based right. This right to fish is subject to the needs of conservation but takes priority over the interests of other user groups, such as sports and commercial fishermen.<sup>31</sup>

#### IV. Section 35(1) and Sparrow

The above discussion shows that Mi'kmaq in Nova Scotia enjoy both a treaty right and an Aboriginal right to fish for food. Section 35(1) of the *Constitution Act, 1982* gives constitutional protection to this rights. The rights are "recognized and affirmed" by the Constitution of Canada. The

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29. *Ibid.* at 262-63.

30. *Ibid.* at 266.

31. Note that *Denny, Paul and Sylliboy* resulted in illegal hunting charges against 14 Mi'kmaq being dismissed on a defence motion made during the course of trial: *Nova Scotia Micmac Moose Harvest Cases*, [1990] 3 C.N.L.R. 87 (N.S. Prov. Ct.). The Crown did not oppose the motion, maintaining at 88 that *Denny* created "a presumption of aboriginal rights" which the Crown, on the evidence led by it, had not rebutted. Apparently it feels that such evidence to rebut an Aboriginal right to hunt might be led in another case, but the Crown in the face of widespread Mi'kmaq hunting since 1990 (and the expiry of two subsequent conservation agreements) has not laid charges or attempted to rebut the existence of Aboriginal rights.

question remains, however, as to what s. 35(1) in fact does by way of protection. The answer, at least in part, was given by the Supreme Court of Canada in *R. v. Sparrow*<sup>32</sup>.

*Sparrow* was a case based on an Aboriginal right to fish. The case did not discuss in detail the Aboriginal right to fish. The existence of the right had not been seriously disputed in the lower courts, and the Supreme Court was not prepared to disturb the findings in those courts. Though the real subject of controversy was the effect of the *Fisheries Act*<sup>33</sup> and its regulations in restricting those rights, the Court stepped beyond the fact that Aboriginal rights are *sui generis* (i.e., unique, one of a kind)<sup>34</sup> to note that existing rights “must be interpreted flexibly so as to permit their evolution over time”<sup>35</sup>. Further, in giving definition to an Aboriginal right, “it is possible, and, indeed, crucial, to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake”<sup>36</sup>.

*Sparrow* was a member of the Musqueam Band and was fishing for salmon for food with a drift net some 45 fathoms in length. A food fishing licence had been issued to the Band under the terms of which the permissible length of drift net was set at 25 fathoms. This restriction represented a reduction from that previously permitted the Band under its licence (the previously permitted length seems to have been 75 fathoms).<sup>37</sup> *Sparrow* argued that this reduction and restriction was inconsistent with his Aboriginal right to fish for food and ceremonial purposes. The federal government argued that the right to fish had been, prior to 1982, a regulated right, i.e., a right that Indians could only exercise if they fished in accordance with the *Fisheries Act* and regulations. After 1982, the federal government argued, the effect of the word “existing” in the phrase “existing aboriginal and treaty rights” as contained in s. 35(1), was to retain the pre-1982 position. That is, they argued that the right after 1982 was equally subject to regulation by the *Fisheries Act* and regulations.

The Supreme Court disagreed, holding that the word “existing” meant simply that the right had not been extinguished prior to 1982<sup>38</sup>. In other words, if the right had been extinguished prior to 1982, then the enactment of s. 35(1) in the *Constitution Act, 1982* did not have the effect of reviving the rights. Even though prior to 1982 the right to fish was subject to the *Fisheries Act*, the effect of this was not to extinguish the right to fish.

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32. *Supra* note 19.

33. R.S.C. 1985, c. F-14.

34. *Supra* note 19 at 408 and 411.

35. *Ibid.* at 397.

36. *Ibid.* at 411.

37. *Ibid.* at 397.

38. *Ibid.* at 395.

After 1982, the effect of s. 35(1) was to make the *Fisheries Act* and regulations subject to scrutiny as against the constitutional guarantee. If the *Fisheries Act* and regulations were inconsistent with the constitutional guarantee of the Aboriginal right to fish, then the court could not automatically apply the fisheries regulations. Rather, the Aboriginal right to fish would prevail (unless the government met a stringent standard of justification).

Having recognized the right to fish as existing and as under the protection of the constitution, the Supreme Court went on to consider whether infringements by the government of the right to fish could be justified. One of the significant aspects of the *Sparrow* case is that the Supreme Court, in considering the potential for conflict between Aboriginal rights and important objectives sought by the government, laid out a legal test for determining when actions by provincial and federal governments might prevail even though they infringed the constitutional guarantee of Aboriginal rights. In essence, the Court said that the constitutional guarantee of Aboriginal rights was not absolute, and had to yield to government action that met a high test of justification. Though s. 35 is not part of the *Canadian Charter of Rights and Freedoms*, the Supreme Court implied a limitation upon the rights guaranteed by s. 35<sup>39</sup> very similar to that contained in s. 1 of the *Charter* and elaborated in *R. v. Oakes*<sup>40</sup>.

Thus, in approaching s. 35(1) issues, a court must work its way through a number of steps; it must answer a series of questions; it must consider a number of factors. The process may be summarized as follows.

### 1. *Infringement*

The first question to ask is: Does the legislation in question have the effect of interfering with or infringing an “existing aboriginal right”?<sup>41</sup> The burden to show this *prima facie* interference is on the person arguing that the right is being infringed, normally, an Aboriginal. If someone is arguing that the right has been terminated or extinguished, normally the Crown, the burden is on that person to show extinguishment. Any alleged acts of extinguishment must be clear and plainly intended to effect extinguishment.<sup>42</sup>

In determining if the Aboriginal right has been infringed, certain more detailed questions must be asked:

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39. *Ibid.* at 409.

40. [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

41. *Supra* note 19 at 411.

42. *Ibid.* at 401.

- (a) is the limitation imposed by government unreasonable?
- (b) does the regulation impose undue hardship?
- (c) does the regulation deny Aboriginals their preferred means of exercising the right?<sup>43</sup>

Furthermore, to determine if the protected Aboriginal interest is infringed, one may look at the *effect* of the government's action as well as the government's *purpose*.<sup>44</sup> In other words, even if the government did not intend to infringe an Aboriginal right, the court will find an infringement if the effect or impact of its action is to impair the right.

## 2. *Justification*

If there is a *prima facie* infringement or denial of an Aboriginal right, the next question to ask is whether the interference is justified?<sup>45</sup>

The burden is on the Crown to show that the interference with the right is justified. To meet this burden, the government must address two issues.

### a. *Valid Government Objective*

First, is there a valid legislative objective? The objective sought to be accomplished by the Crown must be "compelling and substantial". In the case of the fisheries restrictions, the Supreme Court states that conservation and resource management is a valid objective. As well, prevention of "harm to the general populace or to aboriginal peoples themselves", would be sufficiently compelling government objectives, while something as broad and vague as the "public interest" would not meet the requirement.<sup>46</sup>

### b. *Honourable Conduct*

The second part of the justification test is whether the Crown has acted in a way consistent with upholding the honour of the Crown and its fiduciary obligation to Aboriginal people. As the Supreme Court states:

[t]he honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.<sup>47</sup>

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43. *Ibid.* at 411.

44. *Ibid.* at 412.

45. *Ibid.* at 412.

46. *Ibid.* at 412.

47. *Ibid.* at 413.

The Court emphasizes the importance of the fiduciary relationship. It states:

In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 34 O.R. (2d) 360 227, (C.A.), ground a general guiding principle for s. 35(1). That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.<sup>48</sup>

This statement of a “general guiding principle” seems to provide a universal basis on which to assess the actions of the federal and provincial governments in respect of *any decision or policy* made by them, not just matters related to Aboriginal and treaty rights. Furthermore, the Court endorses “the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada”<sup>49</sup>.

The pursuit of a conservation objective, the Supreme Court says in *Sparrow*, “in a heavily used modern fishery inevitably blurs with the efficient allocation and management of this scarce and valued resource”, and therefore demands in this context a link to the allocation of priorities in the fishery.<sup>50</sup> The Supreme Court goes on to state, in what may be the most important paragraph in the case concerning the fisheries, the following:

The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities. While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians’ food requirements must be met first when that allocation is established. The significance of giving the aboriginal right to fish for food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.<sup>51</sup>

The Supreme Court specifically refers to the *Denny, Paul and Sylliboy* case and states that the Nova Scotia Court addresses the constitutionality

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48. *Ibid.* at 408.

49. *Ibid.* at 409.

50. *Ibid.* at 413.

51. *Ibid.* at 414.



of the Mi'kmaq's right to fish "in a way that accords with our understanding of the constitutional nature of aboriginal rights and the link between allocation and justification required for government regulation of the exercise of the rights".<sup>52</sup> Perhaps because of the Supreme Court's favourable comments on the Nova Scotia case, the Attorney General of Canada withdrew an application the Crown had filed for leave to appeal *Denny, Paul and Sylliboy* to the Supreme Court of Canada.

The Court in *Sparrow* also notes that, depending on the circumstances, there are other questions that must be addressed by the government when it seeks to justify its actions as being consistent with the honour of the Crown. Has there been as little infringement as possible? If there has been expropriation of Aboriginal rights, is fair compensation available? Has there been consultation with the Aboriginal group in question? This list of considerations mentioned by the Court is not exhaustive, and other factors may be important depending on the circumstances.<sup>53</sup> The key is to assess whether the Crown has acted honourably in keeping with its fiduciary obligation when it pursues a sufficiently compelling objective.

The *Sparrow* case involved an Aboriginal right to fish, not a treaty-based right. Would the same or a similar justification test apply for treaty rights? In particular, how could overriding the terms of a treaty ever be consistent with upholding the honour of the Crown? If the terms of a treaty are clear, on what basis can limitations be implied? Likely some limitations will be read into either treaties themselves or their constitutional protection. In the *Simon* case the Supreme Court read the requirements of public safety into the exercise of the treaty right to hunt.<sup>54</sup> Likely, a court would read resource conservation into a treaty right to fish on the basis that the continued existence of the resource was a fundamental assumption of the guarantee. However, one may reasonably suggest that a justification test that applies to treaties ought to be more rigorous and stringent in light of the fact that they contain specific promises by the Crown. One may assert that the clearer and more express a treaty promise, the higher the standard of justification imposed on the Crown. Probably, express promises must be upheld and cannot be ignored or overridden by governments, for to do so would change the deal made and amount to unilateral abrogation. Therefore, it may be that treaty rights enjoy greater protection than Aboriginal rights and any infringement is subject to stricter scrutiny requiring stronger justification.<sup>55</sup>

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52. *Ibid.* at 414.

53. *Ibid.* at 416-17.

54. *Supra* note 7 at 403 and 414.

55. Note that the Ontario Court of Appeal in *R. v. Bombay (M.) et al.* held that the framework provided in *Sparrow* is equally applicable to treaty rights, citing *R. v. Joseph*, [1990]

Another implication of *Sparrow* relates to the role of Aboriginal people in the co-management of the fisheries resource. *Sparrow* emphasizes the importance of protecting the resource. The Court refers to "Parliament's ability and responsibility" to create and administer "overall conservation and management plans regarding the salmon fishery".<sup>56</sup> However, the Court also says that such plans must "treat aboriginal peoples in a way ensuring that their rights are taken seriously".<sup>57</sup> The Court also emphasizes the dependence of Aboriginal people on the resource for food and ceremonial purposes, their priority over other resource users, the fiduciary obligation of the Crown, and the importance of compensation and consultation. Indeed at one point the Supreme Court states: "Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place" and adopts a quotation from an article by Professor Noel Lyon in which he notes: "Section 35 calls for a just settlement for aboriginal peoples".<sup>58</sup> Arguably these factors and statements suggest that Aboriginal people have a legal stake in resource conservation and management, have the legal right to challenge government action detrimental to the resource and the environment on which renewable resources depends, and have the right to be consulted and to engage in fair negotiations to settle resource management issues. The Mi'kmaq have a major role to play in resource management decisions, and governments must provide Aboriginal groups with meaningful participation in the development of conservation and management plans.

### V. *Self-Government*

The notion of co-management in the preceding paragraph raises the issue of self-government. One of the self-government questions concerns the mechanism by which the Mi'kmaq community interacts with non-Aboriginal governments to determine such matters as management plans. This function has long been carried out, often through organizations such as the Union of Nova Scotia Indians, the Confederacy of Mainland Micmacs, and the Native Council of Nova Scotia. Another question related to self-government concerns the internal governing of the Mi'kmaq Nation. This second aspect of self-government is important to fisheries because it concerns the ability of the Mi'kmaq to create conservation and

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4 C.N.L.R. 59 (B.C.S.C.). See *R. v. Bombay*, [1993] 1 CNLR 92 (Ont. C.A.) at 94, (1993), 61 O.A.C. 312 [hereinafter cited to O.A.C.].

56. *Supra* note 19 at 416.

57. *Ibid.*

58. *Ibid.* at 406.

management regimes that will apply to its members. For example, if the Mi'kmaq and the federal government develop together a management scheme that applies to a particular resource, the implementation of that regime might best be done by the federal government regulating non-Mi'kmaq and the Mi'kmaq taking responsibility for implementation vis-a-vis Mi'kmaq. In so doing, the Mi'kmaq would be governing themselves.

The so-called "Charlottetown Accord" on constitutional renewal in Canada was defeated in a referendum held in October, 1992. One of the key clauses of the deal agreed to by representatives of all ten provincial governments, the two territories, the Federal government, and four Aboriginal organizations, recognized that Aboriginal peoples have the inherent right of self-government. The Premier of Nova Scotia and the leaders of the Liberal and New Democratic parties made a joint presentation to the House of Commons—Senate Joint Committee on the Constitution wherein they recognized that Aboriginal self-government was an inherent Aboriginal right. Though the legal effect of these agreements and statements may not be certain, they help all understand that Aboriginal peoples such as the Mi'kmaq were traditionally self-governing and that the right to exercise powers of self-government and be self-governing may be an Aboriginal right already included in s. 35(1). Certainly the Mi'kmaq take the view that the right of self-government is inherent, and is both an unextinguished Aboriginal right and a treaty right included in the covenant chain.

Support for this view can be derived from legal sources. For example, in such recent decisions from the Supreme Court of Canada as *R. v. Sioui*, the Court regularly refers of the Huron in that case as a "nation". These comments are made by the Supreme Court:

Both Great Britain and France felt that the Indian *nations* had *sufficient independence* and played a large enough role in North America for it to be good policy to maintain *relations* with them *very close to those maintained between sovereign nations*.

The mother countries did everything in their power to secure the *alliance* of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in *treaties of alliance* or neutrality. This clearly indicates that the Indian nations were regarded in their relations with European nations which occupied North America as *independent nations*. . . . [*N*]ation-to-nation relations had to be conducted with the North American Indians. . . . As the Chief Justice of the United States Supreme Court said in 1832 in *Worcester v. State of Georgia* ... '*she [Great Britain] considered them as nations capable of maintaining the relations of peace and war: of governing themselves, under her protection: and she made treaties with them, the obligation of which she acknowledged*' [emphasis in original]. Further, both the French and the English recognized the critical importance of

*alliances* with the Indians, or at least their neutrality, in determining the outcome of the war between them and the security of the North American colonies.

Following the crushing defeats of the English by the French in 1755, the English realized that control of North America could not be acquired without the *co-operation* of the Indians. Accordingly, from then on they made efforts to *ally* themselves with as many *Indian nations* as possible.

....

England also wished to secure the friendship of the Indian nations by treating them with generosity and respect for fear that the safety and development of the colonies and their inhabitants would be compromised by Indians with feelings of hostility.

...

It [British Crown] also *allowed them autonomy in their internal affairs, intervening in this area as little as possible*.<sup>59</sup>

In *Worcester v. Georgia*<sup>60</sup>, the case quoted above, Chief Justice Marshall of the U.S. Supreme Court discussed the relationship between the British and the Indians this way:

Fierce and warlike in their character, they might be formidable enemies, or effective friends. Instead of rousing their resentments, by asserting claims to their lands, or to dominion over their persons, their alliance was sought by flattering professions, and purchased by rich presents. The English, the French, and the Spaniards, were equally competitors for their friendship and their aid. Not well acquainted with the exact meaning of words, nor supposing it to be material whether they were called the subjects, or the children of their father in Europe; lavish in professions of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched, and their right to self government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country; and this was probably the sense in which the term was understood by them.

Certain it is, that our history furnishes no example, from the first settlement of our country, of an attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self government, as far as respected themselves only.

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59. *Supra* note 13 at 145-46 [emphasis added].

60. 31 U.S. (6 Pet.) 515 (1832).

*The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." . . . The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth.<sup>61</sup>*

These excerpts help demonstrate that certain assumptions underlie the treaty process, and are arguably incorporated into them by implication. The conduct of the parties before, during, and subsequent to the signing of the treaties reflects the assumption that the Indian parties to the treaties were regarded by the Crown as discrete, cohesive entities, i.e., "nations", enjoying a measure of independent autonomy. They could decide whether to sign treaties or not. Their internal integrity was unaffected by the treaty process. Subject to the specific terms of the treaties, the Indian parties had *after*, as well as before signing, internal sovereignty, i.e. "autonomy in their internal affairs". The Crown did not presume to interfere in internal Indian affairs. The Crown approached the Indian nations on the basis that problems were to be solved through co-operation, negotiation, and *quid pro quo* bargaining, rather than unilateral imposition.

The history and policy were the same in Nova Scotia. There is no evidence of any attempt by the British in the years immediately following the signing of treaties to interfere with the internal affairs of the Mi'kmaq or to limit their ability to harvest the fisheries resource. Self-government was an Aboriginal right that pre-existed the treaties and that was incorporated by implication into them as a treaty right.

Interestingly, the Supreme Court of Canada in *Sparrow* also clarified the collective, as opposed to individual, nature of Aboriginal rights. At one point the Court stated that Aboriginal fishing rights "are rights held by a collective and are in keeping with the culture and existence of that group".<sup>62</sup> At a second point the Court also calls the Aboriginal right to fish for food a "collective aboriginal right".<sup>63</sup> These statements support the view that the Aboriginal rights of a particular group belong to the Aboriginal nation as a whole, and therefore may be protected and

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61. *Ibid.* at 546-560 [emphasis added].

62. *Supra* note 19 at 411.

63. *Ibid.* at 417.

controlled by the Aboriginal nation against the actions of an individual Aboriginal person or group of individuals.

Thus, the point may be made that the Mi'kmaq are an Aboriginal nation possessing the inherent right of self-government. As such, they have the right to regulate the fishing activities of its members. Co-management of the fisheries resource is a realistic goal. The Mi'kmaq, for their part, have sufficient powers of self-government now to uphold their side of any management plans through regulatory regimes they put in place. To the extent that any non-Aboriginal government doubts this now, clarification of powers of self-government through federal Indian legislation is one possible solution. However, surely it meant something when all governments in Canada recognized the existence of an inherent right of Aboriginal self-government. This political recognition propels the Mi'kmaq toward legal recognition of their right to govern themselves.

#### VI. *Present Developments—Future Directions*

Several additional developments suggest future directions. First, at the time of writing an important court case is unfolding. Donald Marshall, Jr., the Mi'kmaq who has become symbolic of injustice to Aboriginal people through the white-dominated court system,<sup>64</sup> faces several fisheries charges arising out catching and selling eels at Pomquet Harbour, Antigonish County. The basic facts of the case are agreed upon, and the case is being used as vehicle to litigate the Aboriginal and treaty rights of the Mi'kmaq to sell, trade, barter or exchange fish. Of central importance is the application and interpretation of the "free liberty to trade" clause of the *Treaty of 1752* and the "trade at truckhouse" clauses in the 1760 and 1761 Mi'kmaq treaties. Likely, an Aboriginal right to trade will also be asserted. The treaty provisions and different evidence of Aboriginal trading practices may result in a different outcome than that reached in several British Columbia decisions presently before the Supreme Court of Canada: *R. v. Vanderpeet*<sup>65</sup>, *R. v. Gladstone*<sup>66</sup>, *R. v. N.T.C. Smokehouse Ltd.*<sup>67</sup>, and *Nikal*<sup>68</sup>.

64. See B.H. Wildsmith, "Getting at Racism" (1991) 55 Sask. L. R. 97.

65. (1993), 80 B.C.L.R.(2d) 75 (C.A.) – leave to SCC granted March 10, 1994 87 B.C.L.R.(2d) (C.A.) at xxxiii.

66. (1993), 80 B.C.L.R.(2d) 133 (C.A.) – leave to SCC granted March 10, 1994 87 B.C.L.R.(2d) at xxxii.

67. (1993), 80 B.C.L.R.(2d) 158 (C.A.) – leave to SCC granted March 10, 1994 87 B.C.L.R.(2d) at xxxii.

68. (1993), 80 B.C.L.R.(2d) 245 (C.A.) – leave to SCC granted March 10, 1994 87 B.C.L.R.(2d) at xxxiii.

Perhaps the outcome in *Marshall* will be similar to that in the Cape Croker treaty case from the Bruce Peninsula area of Georgian Bay in Ontario, *R. v. Jones and Nadjiwon*<sup>69</sup>. There the Chippewas of Nawash Band of the Saugeen Ojibway were found to have a treaty-based, as well as Aboriginal, right to fish commercially based on a long-standing practice of such fishing and assurances made to them during a land surrender in 1836. Of significance also is *R. v. Bombay (M.) et al.*<sup>70</sup>, another treaty case. There the defendants were in “lay terms . . . charged with fishing out of season, fishing with a prohibited net, and selling fish out of season”.<sup>71</sup> The treaty in this case provided that the Indians “shall have the right to pursue their avocation of hunting and fishing throughout the tract surrendered”. The Ontario Court of Appeal found that this right had been *prima facie* infringed, that the Crown had not met (or attempted to meet) its burden to show a *Sparrow* justification, and so quashed the convictions.

A second matter of note is the enactment of the *Aboriginal Communal Fishing Licences Regulations*<sup>72</sup>. These Regulations authorize the Minister of Fisheries to issue communal licences to Indian bands, tribal councils and other organizations to carry on fishing and related activities. In addition to dealing with species, quantities, gear, locations and times of harvesting, the licence may deal with the “disposition” of the fish caught under the licence. This, according to the “Regulatory Impact Analysis Statement” published along with the Regulations<sup>73</sup>, may include the sale of the fish. Further, though the Regulations themselves do not refer to Aboriginal Fishing Agreements, the policy as reflected in the “Regulatory Impact Analysis Statement” is to seek a negotiated Aboriginal Fishing Agreement with each band or organization, and then to issue the communal licence under the Regulations based on the Agreement. If no Agreement is reached, the Minister may seek to impose a communal licence unilaterally. Agreements to date in Nova Scotia have always, despite objection from the Mi'kmaq, linked financial incentives (a so-called Contribution Agreement) with a harvesting plan. In other words, the Federal government will provide funds to bands to hire conservation officers and do fisheries enhancement and management work *if* the band signs an Agreement. And in the Agreement, the band is expected to specify the details of its proposed fishing activities. Of some controversy is a clause in most agreements that prohibits the band and its members

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69. [1993] 3 C.N.L.R. 182 (Ont. Prov. Div.).

70. *Supra* note 55.

71. *Ibid.* at 313.

72. SOR/93-332.

73. Canada Gazette Part II, vol. 127, no. 13, June 30, 1993 at 2901.

from fishing except as outlined. Since the Department of Fisheries and Oceans has not attempted to deal comprehensively with all species at all times and places, but rather has restricted its interest to several major species, namely, Atlantic salmon and lobsters, the net effect is to prohibit fishing for species even under conditions that pose no conservation concern. Thus, under agreements that deal with salmon and lobster, Mi'kmaq would be prohibited from fishing for trout, eels, gaspereau, shad, perch, cod and pollack even when no conservation concerns are raised.

Recently, several bands were successful in securing from the Minister agreements that reverse the onus, that is, that permit fishing and activities in the exercise of Aboriginal and treaty rights where the agreement did not deal with the species in question. Thus, if the band has not agreed to limit its fishing activities with respect to a given species, then it may exercise its Aboriginal and treaty right to fish, if it has any. It is not clear whether such a major change in emphasis will be continued in future agreements.

Of interest is the fact that the *Aboriginal Communal Fishing Licences Regulations* do not prohibit fishing without such a licence. The tenor of the Regulations is to provide a mechanism for the Minister to issue such licences, and for the protection from prosecution of those fishing under the authority and subject to the conditions of the communal licence. But the Regulations are silent about the position of those Aboriginal persons fishing without an applicable communal licence. What of these fishers?

When the *Aboriginal Communal Fishing Licences Regulations* were enacted on June 16, 1993, consequent amendments were made to the *Maritime Provinces Fishery Regulations*<sup>74</sup>. Now s. 4(1)(a) provides, in its relevant parts:

4. (1) . . . [N]o person shall fish for or catch and retain any fish unless
  - (a) the person is authorized to do so under the authority of a licence issued under these Regulations, the *Fishery (General) Regulations* or the *Aboriginal Communal Fishing Licences Regulations* . . .

Thus, in short, though the *Aboriginal Communal Fishing Licences Regulations* do not make such a licence compulsory, s. 4(1)(a) above makes a licence of one sort or the other compulsory. This seems inconsistent with the spirit of *Sparrow*, which seems to place emphasis on respecting Aboriginal preferences, consultation, and conservation-based limitations. No doubt s. 4(1)(a) must be assessed against the constitutional guarantees of s. 35; however, such a provision places the burden and risk of litigation on any Aboriginal person who seeks to exercise a right to fish free of unnecessary prohibitions.

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74. SOR 93/55.



If not licensing by the Minister of Fisheries and Oceans, then what? This leads to the last matter: how do the Mi'kmaq wish to exercise their Aboriginal and treaty rights to fish?

The Mi'kmaq, through the Union of Nova Scotia Indians and the Confederacy of Mainland Micmacs, have formed an organization called the "Aboriginal Fisheries Services" to work towards implementation of the Mi'kmaq role in the fishery. Central to the work of the Aboriginal Fisheries Services is a proposal to form a "Mi'kmaq Fish and Wildlife Commission".<sup>75</sup> Though the Chiefs and Mi'kmaq leadership still have the proposal under consideration, it was shared in August and September 1994 with both the Federal and Nova Scotia governments for their reaction and possible negotiation. Obviously the Commission as proposed would deal with Mi'kmaq harvesting in a holistic way, including animal life as well as aquatic resources. The Mi'kmaq proposal draws heavily for a model on the Great Lakes Indian Fish and Wildlife Commission, which administers the off-reserve harvesting program of 13 Chippewa Bands in Minnesota, Michigan and Wisconsin, based on Federal government funding of \$ 3 million. Of particular note is the plan to use the proposed Commission as a vehicle both for the regulatory aspects of Mi'kmaq by Mi'kmaq and for the interaction of Mi'kmaq with Federal and Provincial agencies for the co-management of the resources. Professional wildlife and fisheries biologists and other environmental and conservation specialists, as well as enforcement officers and resource managers, might make up part of the Commission structure, enabling a parity of expertise and authority on both sides of the negotiating table.

Though armed with rights, institutional structures, and possibly a sympathetic public, Mi'kmaq are not immune from certain realities. First, most fish stocks of importance are tightly regulated, posing conflicts with Mi'kmaq aspirations. For example, the lobster fishery is not, it seems, in collapse. Yet entry is limited to existing players. Only gradually and modestly have the Mi'kmaq entered the commercial lobster fishery, and

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75. One of the on-going concerns with any pan-Mi'kmaq institutional structure is how to integrate the various Mi'kmaq constituencies. The Union of Nova Scotia Indians and the Confederacy of Mainland Micmacs are two organizations through which the 13 *Indian Act* bands and Chiefs work. A third major organization is the Native Council of Nova Scotia, an organization whose traditional membership was non-status Indians but whose present leadership asserts representation of off-reserve Mi'kmaq. Since all status Mi'kmaq are members of the 13 bands, some tension exists over who represents whom. The issue is heightened because of issues over who are beneficiaries of land claim settlements in Nova Scotia, a subject presently being studied by the Treaty and Aboriginal Rights Research Centre of Nova Scotia. Suffice to say for present purposes that the Native Council has set up a body called the "Netukulimkewe'l Commission" to manage its role in harvesting fish and wildlife.

not without disputes with government and hostilities with existing fishermen.

Second, for many species, stocks surplus to the needs of conservation are in short supply. Mi'kmaq ask why, if there is any surplus at all, are they not sharing the harvest? After all, Mi'kmaq did not cause or contribute to the collapse—they are not responsible for the shortage.

And third, for the Mi'kmaq, financial resources are and have always been in short supply. The Mi'kmaq do not have the infrastructure—boats, nets and other equipment, processing facilities, etc.—to exploit many harvesting opportunities. Yet, should not a priority be accorded them to participate, perhaps through entry preferences, buy-outs of existing operators, and co-ventures?

### *Conclusion*

Three historic realities that cannot be ignored argue for a Mi'kmaq priority in the commercial fishery. First, the fisheries resource was the traditional linchpin of Mi'kmaq society and the Mi'kmaq economy. Then the Mi'kmaq were shunted out of the commercial fishery through economic marginalization, the lack of capital, and government policies restricting harvesting and limiting entry. And finally, the present collapse and crisis was not of their doing.

The future of the fisheries must take account of the Mi'kmaq. Though the paper has focussed on the Mi'kmaq of Nova Scotia, the same point may be made of the Mi'kmaq and Malecite in the other Atlantic provinces and Quebec; their histories are intertwined. Beyond a mere sharing of the resource as a source of food, the Mi'kmaq must be included on a priority basis in the commercial aspects and economic benefits of the fishery. Further, as in all aspects of the Mi'kmaq life, enhanced participation in decision-making is essential. The management of the resource must be a shared responsibility and a cooperative effort. And most fundamentally, Mi'kmaq must, as an aspect of self-government, have responsibility for Mi'kmaq and the regulatory aspects of Mi'kmaq participation.