Drawing out Treaty Law in Newfoundland and Labrador: The *Marshall* Trilogy and *R v Drew*

An oversimplification of the dispute between Indigenous and non-Indigenous fishers that occurred on September 17, 2020 in St. Mary's Bay, Nova Scotia relates to interpretations of *R v Marshall*, a ruling upholding Peace and Friendship Treaties signed between the Mi'kmaq and the British, referred to as the Halifax Treaties. As the dispute unfolds, many fishers in NL are wondering if a similar situation may happen here.

This begs the question - does the Marshall trilogy apply to Newfoundland and Labrador? The short answer is no.

In the Fall of 1999, the Supreme Court of Canada (SCC) handed down the first decision in a trilogy which affirmed Mi'kmaq Treaty rights that has spawned over 20 years of discussion.

Some 238 years prior, His Excellency in and over His Majesty's province of Nova Scotia or Accadia signed a Treaty of Peace and Friendship with Paul Laurent, Chief of the LaHave tribe of Indians at Halifax.

The SCC had to determine whether the trade clause in the Treaty of Peace and Friendship safeguarded the right of the Mi'kmaq peoples to engage in fishing for trade (i.e: commercial fishing) in contradiction of federal fishing regulations.

In a 5-2 decision, the court held that the Mi'kmaq had a Treaty right to fish for trade. This right was 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*'.

The court in Marshall 2 explained that Marshall 1 recognized the Mi'kmaq's Treaty right did not include a Treaty right to gather. Thus, Marshall 2 narrowed the interpretation of Marshall 1.

In the summer of 2005, the SCC handed down the last part of the trilogy (*R v Marshall*; *R v Bernard*). Chief Justice McLachlin (as she then was) stated that Marshall 1 held that:

> "the treaties of 1760-61 conferred on the Mi'kmaq the right to catch and sell fish for a *moderate livelihood*, on the ground that this activity was the logical evolution of a trading practice that was within the contemplation of the parties to the treaties".

The issue was the scope of this right – does it apply to commercial logging? The court in a majority decision decided that it did not. Further narrowing the application of Marshall 1.

Two years prior, in the summer of 2003, on the land of the Beothuk (modern day Newfoundland and Labrador) a dispute arose between Miawpukek First Nation (Mi'kmaq of Conne River) and the province over the right to have hunting cabins in the Bay du Nord Wilderness Area. Issues arose concerning whether Miawpukek First Nation have aboriginal hunting rights based on an alleged presence on the Island before European contact or, alternatively, before British sovereignty.

In addition, the legal issue to be determined was whether Miawpukek First Nation may claim Treaty rights based upon Treaties entered into by the British in the 18th century with Mi'kmaq of Nova Scotia. You may recall the Peace and Friendship between His Excellency and the LaHave tribe signed in Halifax in 1761, referenced above. Other Treaties signed in the Province of Nova Scotia were also presented as evidence.

The trial consisted of 47 days of testimony which included approximately 150,000 pages of historical material, encompassing 2,000 primary holograph documents which were either transcribed from English or translated from French, Basque, Portuguese, or Dutch. In addition, parties filed over 1,000 secondary documents, 33 maps and 11 expert reports.

The court applied the *Van Der Peet* test – a ten step test for determining if an Aboriginal right exists.

The court accepted evidence which demonstrated that the ancestors of the Mi'kmaq of Conne River arrived on the Island of Newfoundland after 1550 A.D., by which time European contact and influences prevented their fishing, hunting and trapping practices from attaining the status of aboriginal rights.

The court determined that the application of the Treaties, the Miawpukek First Nation relied upon, were confined to the province of Nova Scotia. Therefore, the court decided that the Miawpukek First Nation were wrongfully in possession of Crown lands.

The NL Court of Appeal upheld this decision and on May 7, 2007, the Supreme Court of Canada declined to hear an appeal.

R v Marshall does not apply to the province of Newfoundland and Labrador