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Shrinking native preferences

When the British drove the French from Nova Scotia in the 1750s, they inherited the French trade with the Mi'kmaq peoples, who had been selling fish and other products to Europeans since the early 1500s. In 1760 and 1761, the British Crown formalized the new commercial relationship through a series of "Peace and Friendship" treaties that specified, among other things, that the Mi'kmaq chiefs would not "traffick, barter or exchange any commodities in any manner but with such persons or the managers of such truck houses as shall be appointed or established by his majesty's governor."

In essence, this meant the British agreed to set up trading lodges ("truck houses") to buy Mi'kmaq goods -- mostly fish -- providing the Mi'kmaq didn't sell their catch to anyone else. By most historical accounts, the arrangement worked out nicely for both parties.

That era is long gone, of course. But thanks to the ambitious native-rights movement that has taken root in Canada's law schools and courts, the ancient quid pro quo set out in these obsolete treaties has been resurrected in an unrecognizable form -- most notably in the 1999 Supreme Court case of R. v. Marshall.

The plaintiff in that case was Donald Marshall Jr., a Mi'kmaq Indian who had caught and sold several hundred pounds of eel out of season. The court acquitted Marshall on the basis that the above-cited "Peace and Friendship" provisions guaranteed the Mi'kmaq the right to a livelihood in certain traditional products -- including fish and eels.

At the time Marshall was decided, the Supreme Court was looking for ways to expand native rights by any means possible. Only two years before, the court had delivered its decision in Delgamuukw v. British Columbia, a case championing the concept of "aboriginal title," according to which Indians could claim territory on the basis that their ancestors regularly hunted on it centuries ago.

But as noted in this space on Wednesday, the Marshall decision had disastrous real-world results. Not long after the case was decided, aboriginal fishermen took advantage en masse, hauling in as many fish and crustaceans as they pleased. When they came into

contact with non-aboriginal fishermen, who were still bound by quotas and seasonal restrictions, the result was predictable: violent racial conflict on the high seas.

Thankfully, the Supreme Court seems to have been chastened by that outcome, and has now backed off its radical expansion of aboriginal rights. In two cases jointly decided Wednesday, a majority of justices refused to extend the protections of the 1760-61 treaties to Mi'kmaq loggers illegally cutting trees on Crown land in New Brunswick and Nova Scotia. Score one for racial peace.

Why is it, you may ask, that the treaties permit Indians to flout Canadian fishing laws, but not logging laws? The short answer is that selling fish and eels to Europeans was fairly common 250 years ago, whereas selling trees was not. The long answer occupies 30 paragraphs in the Supreme Court's decision, and involves an arcane discussion of not only seafood and wood, but also fruits, berries, canoes, baskets, snowshoes and toboggans. Either way, the justices seem to have missed the real point: The intention of the treaty provisions in question was to manage the mechanics of trade between European settlers and native hunter-gatherers operating in a remote, sparsely populated region. The idea that such provisions not only have survived the transition to a modern egalitarian society, but also guarantee members of one race the right to flout Canadian commercial and environmental laws, is absurd.

We doubt we have seen the last Supreme Court decision in this area: Assuming a native litigant can find a historical expert to back up his claim that his ancestors sold this or that product to the Europeans, he has a good shot at gaining legal immunity for his poaching operations. Moreover, the court also gave lip service to the theory of "aboriginal title" promoted in Delgamuukw -- which, if rigorously applied, would put most of the Canadian land mass under "aboriginal title." (Thus the Chief Justice's delicate admission in this week's decision that "many of the details of how this principle applies to particular circumstances remain to be fully developed.")

While we applaud the specific result in this case, we lament the fact that the Supreme Court did not take the opportunity to articulate a more realistic theory of aboriginal rights. Until the court refuses to continue granting natives preferential treatment on dubious pretexts, the parade of litigants will continue.