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Government Policy on *Marshall* Undermined
by Nova Scotia Supreme Court Decision

OTTAWA - On February 22nd of this year, in the House of Commons, the government stated that the basis of its response to the *Marshall* decision was that all Indian bands in present day Nova Scotia and New Brunswick were covered by similar treaties signed in 1760-61.

"Nonsense," said John Cummins, M.P. (Delta-South Richmond), "the government is wrong."

"I have challenged the government's position many times and now the Nova Scotia Supreme Court in the *Stephen Marshall* logging decision has rejected the government's claim. The Nova Scotia decision sabotages the government's claim that the Supreme Court of Canada's *Marshall* decision compelled them to transfer licences, boats and gear to aboriginal bands throughout the Maritimes."

First the Nova Scotia court dismissed the notion that all of the Indian groups in the Maritimes were covered by the 1760-61 treaties; and second it rejected the idea that all the treaties contained common language requiring the recognition of special aboriginal rights by government. In the first instance the court said: "As many as fourteen of twenty-four bands show no evidence of a treaty in 1760 ... In 1775 Nova Scotia Governors were still being urged to enter into treaties with the Mi'kmaq as evidenced by the instructions to the Governors in 1775." In support of the second the point that many of the treaties did not provide any special benefits to natives the court said: "there were treaties of submission or simple oaths of allegiance that involved no native demands or undertakings from the Crown."

The court left little doubt in the matter when it stated: "not all bands had signed treaties in 1760-61" and "in the absence of agreements at the band level there may not be specific treaties with the same terms and conditions as applied to for example the Cape Breton bands in *R. v. Marshall*."

The Nova Scotia Supreme Court admonished the Supreme Court of Canada for accepting, from the trial decision and adopting as its own opinion, statements unsupported by evidence as to the number of treaties signed and whether or not they contained common language: "It is not clear that all bands had in fact signed treaties. The evidence in relation to other treaties and all other bands throughout Nova Scotia was not before the court in *R. v. Marshall*. In *Marshall #1* the Supreme Court of Canada appears to have simply adopted the comments of Judge Embree as regards treaties throughout Nova Scotia without taking into account the absence of evidence on that point."

"The Nova Scotia Supreme Court decision makes clear that the response of the federal government to the *Marshall* decision is not required by law. Rather the government's response to *Marshall* is driven by an ill-advised policy," concluded Cummins. "The Nova Scotia Supreme Court puts the lie to what the government has been denying time and again in the House of Commons and in the Standing Committee on Fisheries and Oceans."

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