



9 April 2002

The *Donald Marshall* Decision Found Not to Apply to Logs Does It Apply to Lobster?

OTTAWA – “The *Stephen Marshall* decision of the Nova Scotia Supreme Court is good news for Maritime fishermen,” said John Cummins, M.P. (Delta-South Richmond). “Before conceding further lobster or shrimp licences on the assumption that aboriginals have a special treaty right to these resources, fishermen would do well to carefully study this recent logging rights appeal decision.”

The Nova Scotia Supreme Court found in the *Stephen Marshall* logging rights decision that –

- **The Supreme Court of Canada was mistaken in its *Donald Marshall* decision to assume that all bands had signed treaties in 1760-61:** “In *R v. Marshall* the issue of whether all tribes signed treaties was not decided based on evidence ... the issue of which bands had treaties will be decided by another court on another day”.
- **Large areas of New Brunswick and Nova Scotia may be without treaties, and therefore no treaty rights would arise in those areas:** “The Crown notes ... fourteen of twenty-four bands show no evidence of a treaty in 1760... in 1764 there were still bands who had not signed treaties.”
- **Treaty rights may not arise in all cases where treaties do exist:** “Other evidence is suggestive of that fact that there were treaties of submission or simple oaths of allegiance that involved no native demands or undertakings from the Crown.”
- **The Marshall treaty right arises only where there is a specific treaty with a historic aboriginal community - where there is no treaty, there can be no treaty right:** “To ignore the issue of whether there were treaties with particular bands would render [the Donald Marshall decision] meaningless.”
- **“Logging was not a central, significant or defining feature of the Mi’kmaq people or their economy at any time prior to contact or after contact including the period when treaties were signed.” Was the commercial harvest of lobster a defining feature of the Mi’kmaq people?**
- **“Mi’kmaq technology would not have allowed Mi’kmaq to exploit mature timber resources... it would take forever to try and cut larger trees down with a stone axe” Would Mi’kmaq technology have allowed the Mi’kmaq to commercially exploit lobster?**
- **“There was no evidence the Mi’kmaq sold or traded in timber up to the time of the treaties... no evidence the M’kmaq participated in that industry or trade prior to 1760-61” Is there evidence the M’kmaq participated in a commercial harvest or trade in lobster?**

“This decision makes it clear that the government response to the *Donald Marshall* decision was based on Liberal policy rather than any legal obligation arising from the decision,” concluded Cummins.

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