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Supreme Court Decision May Prove Helpful in B.C.

OTTAWA— "The Supreme Court of Canada decision in *Marshall and Bernard* found that the Mi'kmaq peoples in Nova Scotia and New Brunswick did not 'have the right to log on Crown lands for commercial purposes pursuant to treaty or aboriginal title'," said John Cummins, M.P. (Delta-Richmond East).

The Mi'kmaq had argued that the trade clause of the treaties as interpreted in the *Marshall* I and II decisions of the Supreme Court conferred "*a general right to harvest and sell all natural resources which they used to support themselves in 1760*." The Mi'kmaq argued "*that they used forest products for a variety of purposes at the time of the treaties from housing and heat to sleds and snowshoes and indeed occasionally traded products of wood, all to sustain themselves. Logging represents the modern use of the same products, they assert[ed]. Therefore the treaties protect it*."

The court rejected this notion and made clear that "what the treaty protects is not the right to harvest and dispose of particular commodities, but the right to practice a traditional 1760 trading activity in the modern way and modern context." Logging is not, the court said, "the logical evolution of a traditional Mi'kmaq trade activity."

The *Marshall and Bernard* decision provides real guidance to the courts and treaty negotiators in British Columbia:

- The court clearly demonstrated that there is a common sense limit to treaty rights. Treaties are not open ended documents with unending rights and benefits.
- The court recognized treaty rights as a logical evolution of traditional activities.
- Aboriginal title is not the last word. The Crown can impinge on aboriginal title "if it can establish that this is justified in pursuance of a compelling and substantial legislative objective for the good of the larger society.
- The court noted that the evidence of oral history is only "admissible provided it meets the requisite standards of usefulness and reliability." Oral history evidence in *Marshall and Bernard* proved to be wildly unreliable and an embarrassment to the Mi'kmaq.

The court's reasoned approach to treaty rights in *Marshall and Bernard* offers encouragement to those who seek to reconcile aboriginal demands for special rights with the realities of modern society.

"The Supreme Court has established a standard upon which to both understand existing treaties and to negotiate new ones," concluded Cummins. "It is time to rethink our approach to treaty negotiations and demands for exclusive aboriginal rights."

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See www.johncummins.ca for a variety of documents on *Marshall and Bernard*