

# The Case of Too Many Eels

*R. v. Marshall* [1999]

## Teacher Resource

**Curriculum Links:** Understanding Canadian Law (CLU3E), Grade 11, Workplace Preparation

**Legal Focus:** Aboriginal treaty rights

**Estimated Time:** 1 period

### Overall Expectations:

- Describe the historical development of Canadian law.
- Explain how rights, responsibilities, and freedoms have developed in Canada.
- Identify the rights and freedoms outlined in the *Canadian Charter of Rights and Freedoms* and explain how to exercise them.

### Specific Expectations:

- Identify the legal rights and fundamental freedoms outlined in the *Canadian Charter of Rights and Freedoms*.
- Identify individuals and groups who have contributed to the development of rights legislation in Canada (e.g. First Nations groups).
- Explain the importance of minority rights and how they are protected under the *Charter*.
- Conduct research on legal topics using traditional and non-traditional sources of information.

### Description of the Case

One morning in August of 1993, Donald John Marshall Jr., a member of the Mi'kmaq peoples, and a friend went out fishing for eels. They caught 463 pounds of eel, which they sold for \$787.10. Mr. Marshall was arrested and charged under the Fisheries Act and Fishery Regulations with:

1. Selling of eels without a licence
2. Fishing without a license, and
3. Fishing during the closed season with illegal nets

Mr. Marshall admitted that he caught and sold 463 pounds of eel without a licence and with a prohibited net during the closed season. However, he argued that he should not be found guilty of

the charges that were against him because as a member of the Mi'kmaq peoples, he possessed the Treaty right to pursue traditional hunting, fishing and gathering activities as outlined in the Treaty of 1752, the Treaty of 1760-61, as well as the minutes of the oral negotiations held between the British and the Mi'kmaq.

### **The Treaties signed by the Mi'kmaq**

In November 1752, the Mi'kmaq entered into Treaty with the British, which stated that:

“It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting and Fishing as usual and that if they shall think a Truckhouse needful at the River Chibenaccadie or any other place of their resort, they shall have the same built and proper Merchandize lodged therein, to be exchanged for what the Indians shall have to dispose of, and that in the mean time the said Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best Advantage.”

The “trade clause” of the Treaty of 1752 reads as follows:

And I do further engage that we will 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 at Lunenbourg or Elsewhere in Nova Scotia or Acadia.

Both Mr. Marshall and the Crown accepted the existence of the Treaty but disagreed about the existence of oral terms as well as the interpretation of the “trade clause.” Mr. Marshall claimed this Treaty gave him the constitutional right to fish for eels and sell the eels he caught. The Crown did not dispute that a Treaty was signed, but disagreed that it gave Mr. Marshall these rights.

### **Trial Decision**

The trial judge found Mr. Marshall guilty on all charges. The court ruled that the treaty was valid, but that it only gave Mr. Marshall the right to bring the products of his fishing (and hunting and gathering) to a truckhouse to trade. It did not extend outside of the truckhouses, which disappeared several years after the Treaty was signed. Truckhouses were trading posts that existed in the 18<sup>th</sup> century when the Treaty was signed. The court ruled that the trading clause limited Mi'kmaq trading to these government-sanctioned venues. The trade clause failed to address what would happen when these truckhouses disappeared, and therefore the Mi'kmaq's trading rights disappeared along with the truckhouses.

### **Appeal to the Nova Scotia Court of Appeal**

Mr. Marshall appealed the decision to the Nova Scotia Court of Appeal, where he lost. He appealed to the Supreme Court of Canada.

### ***The Final Judgment***

At the Supreme Court of Canada, Mr. Marshall argued that the trial judge was wrong and that the Treaty gave him a right to hunt, fish, and gather products for trading, and that these rights survived

the disappearance of truckhouses. Mr. Marshall argued that the written terms of the Treaty did not represent the entire agreement between the Crown and the Mi'kmaq, and that the historical context, evidence of the negotiations process, and expert evidence demonstrated that there were unwritten terms that had been agreed to orally and not written down by the Crown.

The majority of judges at the Supreme Court found that the Treaty did give Mr. Marshall the right to catch and sell eel. The historical and cultural context of the talks between the Crown and the Mi'kmaq showed that it was reasonable that both parties expected the Mi'kmaq to have the right to fish, if they had the right to bring fish for trade at the truckhouse. Without a right to fish, the Mi'kmaq's right to trade would be meaningless.

The majority disagreed with the trial judge's conclusion that once the truckhouses had disappeared, the right to trade also disappeared. The majority found that treaty rights are not "frozen in time" and must be read in flexible way that allows for evolution. The disappearance of the truckhouses was nothing more than the disappearance of a place created to allow the exercise of the right to trade, not the disappearance of the right to trade itself.

The majority noted that the right to trade, and the implied right to fish, hunt or gather the wildlife to trade, was limited. The Treaty guaranteed access to "necessaries". The majority concluded that in today's world, "necessaries" would be equal to securing a moderate income. This means Mr. Marshall could sell a limited amount of eel to support his family, but could not operate a large-scale commercial business. As Mr. Marshall was selling only a small amount of eel to support himself and his common-law wife, his activities fell within the Treaty right.

The majority of the Court acquitted Mr. Marshall on all charges, finding that the Treaty protected his activities.

### ***Teaching & Learning Strategies***

1. Ask students to complete *The Big Question*. They should indicate their level of agreement with the statement by placing an X on the line and provide reasons for their answer in the space below. Take a vote to gauge numbers on each side. Invite students to express opinions on both sides of the argument, and ask students to vote again.
2. Review *The Facts of the Case* and *The Relevant Law*, and discuss *The Issue* with students. Clarify any questions and explain how the law applies to the specifics of this particular case.
3. In pairs or small groups, have students complete *The Lawyers' Debate* exercise. Discuss the answers as a class.
4. Using either a teacher- or student-centred reading strategy, review the sections on *The Progression through the Courts* and *The Final Judgment* with students. Answer students' questions as you proceed.

5. Have students complete the *Check for Understanding* exercise and take up the answers as a class.
6. Individually or in partners, have students complete the *Taking a Closer Look* exercise. Be sure to book computer time in advance if you plan to have students complete this during class time. Have students present one of the programs/services they've researched to the class and have a discussion about the variety of programs available and why these are important in helping Aboriginal people to overcome historical disadvantages.

### **Assessment & Evaluation**

- Class discussion
- *The Big Question*
- *The Lawyer's Debate* activity
- *Check for Understanding* worksheet
- *Taking a Closer Look* activity and chart

### **Resources**

Ontario Justice Education Network  
[www.ojen.ca](http://www.ojen.ca)

- Landmark Case - Aboriginal Treaty Rights: *R. v. Marshall*

Supreme Court of Canada Decisions – *R. v. Marshall* [1999]  
<http://csc.lexum.umontreal.ca/en/1999/1999rcs3-456/1999rcs3-456.html>

# The Case of Too Many Eels

## *R. v. Marshall* [1999]

### Student Handout

#### *The Big Question*

Place an X on the line below to indicate your level of agreement with the following statement. Provide reasons for your answers in the space below.

The Canadian government and courts should recognize the agreements made between Aboriginal people and the government in the past.

Strongly Disagree \_\_\_\_\_ Strongly Agree

Reasons: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

#### *The Facts of the Case*

One morning in August of 1993, Donald John Marshall Jr., a Mi'kmaq Indian, and a friend went out fishing for eels. They caught 463 pounds of eel, which they sold for \$787.10. Mr. Marshall was arrested and charged under the Fisheries Act and Fishery Regulations with:

1. Selling of eels without a licence
2. Fishing without a license, and
3. Fishing during the closed season with illegal nets

Mr. Marshall admitted that he caught and sold 463 pounds of eel without a licence and with a prohibited net during the closed season. However, he argued that he should not be found guilty of the charges that were against him because as a

Mi'kmaq Indian, he possessed the Treaty right to pursue traditional hunting, fishing and gathering activities as outlined in the Treaty of 1752, the Treaty of 1760-61, as well as the minutes of the oral negotiations held between the British and the Mi'kmaq.

### **The Issue**

- How should Aboriginal treaty rights be recognized by the Canadian government?

### **The Relevant Law**

#### **Canadian Constitution**

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

#### **The Treaties signed by the Mi'kmaq**

In November 1752, the Mi'kmaq entered into Treaty with the British, which stated that:

"It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting and Fishing as usual and that if they shall think a Truckhouse needful at the River Chibenaccadie or any other place of their resort, they shall have the same built and proper Merchandize lodged therein, to be exchanged for what the Indians shall have to dispose of, and that in the mean time the said Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best Advantage."

The "trade clause" of the Treaty of 1752 reads as follows:

And I do further engage that we will 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 at Lunenbourg or Elsewhere in Nova Scotia or Acadia.

## Explanation

There are two types of Aboriginal rights protected by section 35 of the *Canadian Constitution*:

- **Aboriginal rights** protect the right of Aboriginal peoples to continue activities and practices that were integral to their culture and in existence before the British colonized Canada.
- **Treaty rights** (which include land claims) are rights protected by an agreement between a specific group or nation of Aboriginal peoples and the government.

A **treaty** is a written agreement between the government and an Aboriginal nation. Over the course of history, many Aboriginal nations entered into treaties with the British government for a variety of purposes, and often involved peace agreements, the protection of Aboriginal land claims, or a guarantee of the right to continue their traditional hunting, fishing and gathering lifestyle. These agreements give rights and obligations to both the current government and the Aboriginal nation who signed the treaty.

Both Mr. Marshall and the Crown accepted the existence of the Treaty but disagreed about the existence of oral terms as well as the interpretation of the “trade clause.” Mr. Marshall claimed this Treaty gave him the constitutional right to fish for eels and sell the eels he caught. The Crown did not dispute that a Treaty was signed, but disagreed that it gave Mr. Marshall these rights.

## *The Lawyers’ Debate*

### Arguments for the Applicant

List three arguments Mr. Marshall would make to convince the court to uphold the treaty rights.

1. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
2. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

3. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

### **Arguments for the Respondent**

List three arguments the government would make to support the conviction for fishing without a license.

1. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

2. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

3. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## ***The Progression through the Courts***

### **Trial Decision**

The trial judge found Mr. Marshall guilty on all charges. The court ruled that the treaty was valid, but that it only gave Mr. Marshall the right to bring the products of his fishing (and hunting and gathering) to a truckhouse to trade. It did not extend outside of the truckhouses, which disappeared several years after the Treaty was signed. Truckhouses were trading posts that existed in the 18<sup>th</sup> century when the Treaty was signed. The court ruled that the trading clause limited Mi'kmaq trading to these government-sanctioned venues. The trade clause failed to address what would happen when these truckhouses disappeared, and therefore the Mi'kmaq's trading rights disappeared along with the truckhouses.

### **Appeal to the Nova Scotia Court of Appeal**

Mr. Marshall appealed the decision to the Nova Scotia Court of Appeal, where he lost again. He appealed to the Supreme Court of Canada.



## ***The Final Judgment***

At the Supreme Court of Canada, Mr. Marshall argued that the trial judge was wrong and that the Treaty gave him a right to hunt, fish and gather products for trading, and that these rights survived the disappearance of truckhouses. Mr. Marshall argued that the written terms of the Treaty did not represent the entire agreement between the Crown and the Mi'kmaq, and that the historical context, evidence of the negotiations process, and expert evidence demonstrated that there were unwritten terms that had been agreed to orally and not written down by the Crown.

The majority of judges at the Supreme Court found that the Treaty did give Mr. Marshall the right to catch and sell eel. The historical and cultural context of the talks between the Crown and the Mi'kmaq showed that it was reasonable that both parties expected the Mi'kmaq to have the right to fish, if they had the right to bring fish for trade at the truckhouse. Without a right to fish, the Mi'kmaq's right to trade would be meaningless.

The majority disagreed with the trial judge's conclusion that once the truckhouses had disappeared, the right to trade also disappeared. The majority found that treaty rights are not "frozen in time" and must be read in flexible way that allows for evolution. The disappearance of the truckhouses was nothing more than the disappearance of a place created to allow the exercise of the right to trade, not the disappearance of the right to trade itself.

The majority noted that the right to trade, and implied right to fish, hunt or gather the wildlife to trade, was limited. The Treaty guaranteed access to "necessaries". The majority concluded that in today's world, "necessaries" would be equal to securing a moderate income. This means Mr. Marshall could sell a limited amount of eel to support his family, but could not operate a large-scale commercial business. As Mr. Marshall was selling only a small amount of eel to support himself and his common-law wife, his activities fell within the scope of the Treaty right.

The majority of the Court acquitted Mr. Marshall on all charges, finding that the Treaty protected his activities.

## Check for Understanding

1. Donald Marshall and his friend caught 463 pounds of eel, which they sold for \$787.10. **TRUE/FALSE**
2. Aboriginal rights protect the right of Aboriginal peoples to continue activities and practices that were integral to their culture and in existence before the British colonized Canada. **TRUE/FALSE**
3. All Treaties are oral agreements between the government and an Aboriginal nation. **TRUE/FALSE**
4. Truckhouses are trading posts that still exist today. **TRUE/FALSE**
5. The Treaty of 1752 stated that Aboriginal people had the right to trade only in truckhouses. **TRUE/FALSE**
6. The trial judge ruled that the treaty was valid, but that it only gave Mr. Marshall the right to bring the products of his fishing to a truckhouse to trade. **TRUE/FALSE**
7. Mr. Marshall appealed the trial decision to the Nova Scotia Court of Appeal and was acquitted on all charges. **TRUE/FALSE**
8. The majority of judges at the Supreme Court of Canada found that the Treaty of 1752 gave Mr. Marshall the right to catch and sell eel. **TRUE/FALSE**
9. The Supreme Court agreed with the trial judge that the disappearance of the truckhouses resulted in the disappearance of the treaty rights. **TRUE/FALSE**
10. Mr. Marshall's activities fell within the scope of the treaty because he was fishing only to support his family and not running a commercial fishing business. **TRUE/FALSE**

## Taking a Closer Look

The Federal government provides certain benefits to all Canadian citizens, such as universal healthcare and education programs. In addition to these, federal government programs and services are offered specifically to Aboriginal people whose status is recognized under the *Indian Act* (i.e. Registered Indians).

Using the websites listed below, research three programs or services that are offered to Registered Indians through the Canadian government. Use the chart below to record information about the programs.

### Recommended Websites

#### ***You Wanted To Know – Federal Programs and Services For Registered Indians***

<http://www.ainc-inac.gc.ca/ai/pubs/ywtk/ywtk-eng.asp>

#### ***Indian and Northern Affairs Canada***

<http://www.ainc-inac.gc.ca>

#### ***Ontario Ministry of Aboriginal Affairs***

<http://www.aboriginalaffairs.gov.on.ca>

#### ***Aboriginal Canada Portal***

<http://www.aboriginalcanada.gc.ca>

### Example

#### ***Federal Program/Service: Aboriginal Justice Strategy***

***Description of the Program:*** The federal, provincial, and territorial governments work with Aboriginal communities to share the costs of setting up Aboriginal justice programs which help Aboriginal people to administer their own justice systems.

***Goals/Objectives of the Program:*** The goals of the program are to help Aboriginal communities take greater responsibility for the administration of justice; to help reduce crime and incarceration rates among Aboriginal people; and to better respond to the justice needs of Aboriginal people.

Federal Program/Service	Description of Program	Goals/Objectives of the Program
1.		
2.		
3.		