

R. v. Marshall

[1999] 3 S.C.R. 456

[1999] 3 S.C.R. 533

Background

Treaty of 1760

"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 Accadia." (5)



Treaty Interpretation

R. v. Badger, [1996] 1 S.C.R. 771

"... when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement..." (14, at *Badger*, para 52)



Treaty Interpretation

R. v. Badger, [1996] 1 S.C.R. 771

"As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction." (14, at *Badger*, para 52)



Treaty Interpretation

Documentary Record

"necessaries" (para 29)



Treaty Interpretation

Expert Historical Evidence
(para 37)



Treaty Interpretation

"Having concluded that the written text is incomplete, it is necessary to ascertain the treaty terms not only by reference to the fragmentary historical record, as interpreted by the expert historians, but also in light of the stated objectives of the British and Mi'kmaq in 1760 and the political and economic context in which those objectives were reconciled." (41)



Scope of the Treaty Right

"The concept of "necessaries" is today equivalent to the concept of ... a "moderate livelihood". Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike. A moderate livelihood includes such basics as "food, clothing and housing, supplemented by a few amenities", but not the accumulation of wealth ... It addresses day-to-day needs." (59)



Conclusion

"The appellant caught and sold the eels to support himself and his wife. Accordingly, the close season and the imposition of a discretionary licensing system would, if enforced, interfere with the appellant's treaty right to fish for trading purposes, and the ban on sales would, if enforced, infringe his right to trade for sustenance. In the absence of any justification of the regulatory prohibitions, the appellant is entitled to an acquittal." (66)



Reaction



Motion for Rehearing and Stay

West Nova Fishermen's Coalition
(intervenor)



Justifiable Infringement

Gladstone (cited at para 41)
