Culture or Contract:

Off-Reservation Indigenous Commercial Logging in Wisconsin and the Maritimes

GUY CAMPION CHARLTON*

This article compares American and Canadian case law on Indigenous claims to treaty protected logging. It argues that the recent 2005 R. v. Marshall *decision, like the earlier American decision in* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, *applies an assumption that tribal treaty negotiators were uninterested in reserving any treaty rights other than those denominated "traditional" by the court. It examines this assumption through a discussion of the logical evolution of treaty protected*

* The author is a Ph.D. candidate at the Faculty of Law and teaches Comparative Politics in Political Studies at the University of Auckland, New Zealand. A practicing attorney, he holds a law degree from the University of Wisconsin-Madison, and an M.A. in International Relations from the University of Toronto. He would like to thank Professor David V. Williams, Dr. Steven Winter of the University of Auckland and Ms. Theresa Diesch for their encouragement and assistance, and the Great Lakes Indian Fish and Wildlife Commission for providing access to *LCO* briefs.

rights and the moderate-living doctrines. For the most part the imposition of the assumption precludes Indigenous commercial exploitation under treaty jurisprudence while undermining other judicial interpretive methodologies that are more protective of tribal interests.

I INTRODUCTION

Indigenous law in the United States and Canada seeks to reconcile two conflicting streams of constitutional law. On one hand, it seeks to articulate, impose and legitimize an institutional and doctrinal order on the essentially messy process by which North America was colonized. On the other hand, it seeks to reconcile the historic legacy of colonialism with the rights-based claims of Indigenous groups. Law, along with the ideology of rights and state power embedded within it, provides a way by which Indigenous peoples can resist some of the more onerous demands of the state and rectify adverse historical legacies.[1]

Nevertheless, the continued efficacy of Indigenous rights depends on "the capacity and willingness of the majority society to explore unfamiliar intellectual terrain"; as such, the transformative potential of Indigenous law should not be overemphasized.[2] Indigenous law coexists with other jurisprudential and social values and assumptions within the constitutional system. These are imbricated with the sovereign and institutional prerogatives of the national state and the socio-economic dominance of Canadian and American settlers. When applied to particular Indigenous legal disputes, they are reflected in the way the courts frame their questions and construct legal facts and historical narratives.

From an Indigenous perspective, perhaps the most invidious judicial assumption is of an essentialism regarding the nature of Indigenous societies. This takes the form of the idea that there is one "traditional" Indigenous experience that is shared by all Indigenous cultures across North America and without which these cultures would not truly be Indigenous. Moreover, this hypothesized "shared experience" is transhistorical—it does not change with the passage of time, the particular historical context of an Indigenous society, or Indigenous-settler interaction. In treaty disputes, this "traditionalist" assumption has informed judicial evaluations of the nature of treaties and the negotiation process as well as the culture of Indigenous peoples. This has accentuated Indigenous "tradition" and imposed judicially constructed cultural constraints upon the rights retained by Indigenous

1. Sally Merry, "Law and Colonialism" (1991) 25 Law & Soc'y Rev. 889 at 891.
2. Charles F. Wilkinson, "To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa" (1991) Wis. L. Rev. 375 at 379.

groups in the negotiation process, ultimately leading to the denial of treaty claims. At the same time, it has undermined other judicial doctrines and methodologies formulated to protect Indigenous interests.

American and Canadian society and courts have been criticized for creating essentialist constructions and narratives about the character of Indigenous individuals and Indigenous social and economic systems. Harold Berkhofer, Jr., has called these non-Indigenous attitudes "White Indian Imagery," which subsumes stereotypical notions of Aboriginal attitudes towards the environment and development.[3] More recently, Robert A. Williams has argued that the Rehnquist Court's Indian jurisprudence is premised on racist notions of Indian "savagery" and fierce resistance to colonialism, as discussed by Chief Justice John Marshall in his seminal Indian cases *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*.[4] Similarly, in Canada John Borrows and Leonard Rotman have argued that the *Van der Peet* approach to Aboriginal rights "draws on inappropriate racialized stereotypes by attempting to distil the essence of Aboriginality" with reference to pre-contact activities.[5] These criticisms have called for a more accurate historic representation of Indigenous groups as well as their interaction with the settler state.

Legal scholars have for the most part directed their criticism of cultural stereotypes and essentialism towards particular aspects of Indigenous experience.[6] They have emphasized the uniqueness of particular Indigenous groups' cultures and relationships with the settler state. Yet it is not only the exceptionality of a particular historic interaction that needs to be appreciated by the courts; it is also necessary that the courts find and apply more balanced, realistic, and human characterizations of Indigenous treaty negotiators in all treaty contexts. Indigenous participants to treaty conferences, while products of their time and culture, are not provided the same attributes of agency and rationality that courts routinely afford Canadian and American negotiators.

In Canada and the United States, the refusal of the courts to recognize treaty protected Indigenous rights to commercial logging is a recent example

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3. Berkhofer notes there have been several persistent ways by which non-Indian society has interpreted Native North Americans as Indians: "(1) generalizing from one tribe's society and culture to all Indians, (2) conceiving of Indians in terms of their own deficiencies according to White ideals rather than in terms of their own various cultures, and (3) using moral evaluation as description of Indians." Robert F. Berkhofer, Jr., *The White Man's Indian Images of the American Indian from Columbus to the Present* (New York: Vintage Books, 1979) at 24-25.
4. Robert A. Williams, Jr., *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis, MN: University of Minnesota Press, 2005).
5. John Borrows & Leonard I. Rotman, "The Sui Generis Nature of Aboriginal Rights: Does It Make a Difference?" (1997) 36 Alta. L. Rev. 9 at 36.
6. Rebecca Tsosie, "Whiteness: Some Critical Perspectives: The New Challenge to Native Identity: An Essay on 'Indigeneity' and 'Whiteness'" (2005) 18 Wash. U. J.L. & Pol'y 55.

of an essentialist decisional approach premised on a judicially constructed notion of Indigenous "tradition." This article will compare the reasoning of the Supreme Court of Canada in the recent 2005 decision *R. v. Marshall; R. v. Bernard*, with the reasoning used by the U.S. Federal Court in the earlier 1991 case *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*.[7] It will argue that both cases are representative of the limited transformative potential of treaty jurisprudence, which has resulted because the courts continue to apply to the treaty process certain essentialist assumptions and narratives regarding Indigenous culture.

II COMMERCIAL ABORIGINAL LOGGING IN NEW BRUNSWICK AND NOVA SCOTIA

Marshall III involved the harvesting and sale of timber in Nova Scotia and New Brunswick under the treaties of 1760 and 1761.[8] The Mi'kmaq defendants were charged with cutting timber and unlawful possession of logs under Nova Scotia (Marshall) and New Brunswick (Bernard) law. They argued that they did not require provincial authorization to commercially log on Crown lands because the activity was protected by the treaties upheld in the 1999 Supreme Court of Canada decision *R. v. Marshall*.[9] The Indigenous defendants argued that *Marshall I*, which involved small scale commercial eel fishing, enabled them to harvest and sell "all natural resources which they [the Mi'kmaq] used to support themselves in 1760" as well as a logical evolution of these activities through the past two centuries.[10] In the alternative, they argued that commercial logging was permitted on lands over which their First Nation held Aboriginal title. The trial courts in both

7. *R.. v. Marshall; R. v. Bernard*, [2005] S.C.R. 220, [2005] S.C.J. No. 44; [*Marshall III* cited to S.C.R.]; *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 758 F. Supp. 1262 (W.D. Wis. 1991) [*LCO IX*].
8. The *Marshall III* decision covered two separate but similar disputes involving the issue of treaty protected commercial cutting of timber on Crown land in Nova Scotia and New Brunswick. The lower Nova Scotia court decisions in *R. v. Marshall* are found at (2003) 218 N.S.R. (2d) 78 (N.S.C.A.); (2002) 202 N.S.R. (2d) 42 (N.S.S.C.); (2001) 191 N.S.R. (2d) 323 (N.S. Prov. Ct.). Lower court New Brunswick decisions in *R. v. Bernard* are found at (2003) 230 D.L.R. (4th) 57 (N.B.C.A.); [2002], 3 C.N.L.R. 114 (N.B.Q.B.(T.D.)); and [2000] 3 *C.N.L.R.* 184; (N.B. Prov. Ct.).
9. *R. v. Marshall*, [1999] 3 S.C.R. 456 [*Marshall I*]. The 1999 *Marshall* decision was composed of two separate opinions, the main opinion (McLachlin and Gonthier JJ. dissenting) and an opinion dismissing an application for rehearing in which the Court clarified the previous decision. The original Supreme Court decision was delivered 17 September 1999. It is found at [1999] 3 S.C.R. 456. The Court rendered the motion decision unanimously dismissing the application for rehearing on 17 November 1999. The rehearing opinion is found at [1999] 3 S.C.R. 533. I will call the rehearing decision *Marshall II*. The decision rendered on the issue of treaty protected commercial logging in 2005 *R. v. Marshall*, *supra* note 7 is referred to as *Marshall III*.
10. *Marshall III*, *ibid.* at para 14.

provinces rejected the defendants' arguments and the convictions were then upheld on summary appeal. The respective Courts of Appeal reversed.[11] The Supreme Court of Canada reversed the Courts of Appeal and reinstated the convictions. It held that the treaty right did not extend to commercial logging and the Mi'kmaq did not hold Aboriginal title in the area where the logging occurred.

Case Law Prior to *Marshall III*

The issue of commercial logging, either as a treaty-protected usufructuary right or as a permitted use under unextinguished Aboriginal title in New Brunswick and Nova Scotia, had been litigated prior to *Marshall III*. In these cases, various Maritime Indigenous groups (the Mi'kmaq, Maliseet and Passamaquoddy) claimed cutting rights based on treaties they had signed with the British in 1725-1726, 1752, 1760-1761, and 1779.[12] The Aboriginal title arguments were based on the fact that neither Great Britain nor Canada had signed any land cession treaties with these Acadian groups. Instead, the British signed a series of peace and friendship treaties that contained neither land cessions nor an extinguishment of Aboriginal title.[13]

In 1958 the New Brunswick Supreme Court in *Warman v. Francis* issued an injunction enjoining the various Mi'kmaq defendants from cutting pulpwood on private land that had once been within the original boundary of a reserve set aside for them.[14] The reserve boundaries had been reduced over the years. The Mi'kmaq claimed the right to cut based on the 1752 treaty signed with the British and unextinguished Aboriginal title.

The Court dispensed with the Aboriginal rights and treaty arguments by finding that the law simply did not afford the Mi'kmaq any interest in the land they had occupied or otherwise used. It held that common law Aboriginal title in Acadia had been extinguished prior to the 1713 *Treaty of Utrecht*, which transferred the area from France to Great Britain. As no rights existed, it was unnecessary for the tribe to agree by treaty to extinguish their Aboriginal title. "As far as we [the Court] are concerned with the Micmacs this can only mean that there was no surrender because

11. The Nova Scotia Court of Appeal in *Marshall III* set the convictions aside and a new trial was ordered. The New Brunswick Court of Appeal entered an acquittal in *Bernard*.
12. For a discussion of the complex treaty history in Nova Scotia and New Brunswick, see Stephen E. Patterson, "Anatomy of a Treaty: Nova Scotia's First Native Treaty in Historical Context" (1999) 48 U.N.B.L.J. 41 and Andrea Bear Nicholas, "Mascarene's Treaty of 1725" (1994) 43 U.N.B.L.J. 3.
13. *R. v. Isaac* (1975), 13 N.S.R. (2d) 460 (N.S.S.C.(A.D.)) (Mi'kmaq possess common law Aboriginal right to hunt and fish on Mi'kmaq reserves).
14. (1958), 20 D.L.R. (2d) 627 (N.B.S.C) [*Warman*].

there were no proprietary rights in our law in the circumstances."[15] As such, "[i]f a treaty was made with the tribe it was in the nature of a special agreement based on goodwill and expediency" and it neither recognized nor granted title or use to the tribe.[16]

While historically representative of the law as understood in the Maritimes, the *Warman* Court's denial that Aboriginal and treaty rights existed in the area was eroded in subsequent decades.[17] Beginning in the 1970s, a series of decisions noted that Aboriginal title had not been extinguished in Acadia.[18] Moreover, the various treaties were found to provide the signatory tribes with implicit rights to harvest resources. In the 1985 decision *R. v. Simon*, the Supreme Court found that the 1752 treaty contained a positive grant of rights which provided some protection for Mi'kmaq hunting while off the reserve.[19]

In the 1998 decision *R. v. Peter Paul*, the New Brunswick Court of Appeal reversed an acquittal by the New Brunswick Court of Queen's Bench and directed that a conviction be entered against the defendant Peter Paul, a Mi'kmaq Indian.[20] Paul had cut down maple logs from Crown lands for sale. He defended his actions by relying on the Treaty of 1725 and related contemporaneous agreements and ratifications as well as the Treaty of 1752. The two lower courts held that the Mi'kmaq continued to have the right to log commercially based on the 1725 treaty and/or unextinguished Aboriginal title. Justice Turnbull in the New Brunswick Court of Queen's Bench decision was particularly emphatic that the Mi'kmaq and Maliseet could cut timber as the trees had not been ceded by treaty.[21] The Court of Appeal

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15. *Ibid*. at 630.
16. *Ibid*. at 631-632.
17. See *Rex v. Syliboy* (1929), 1 D.L.R. 307 (Mi'kmaq never recognized as having interest in territory and lacked capacity to enter into treaty); *R. v. Simon* (1958), 124 C.C.C. 110 (N.B.C.A.)(Treaties of 1725 and 1752 did not entitle a tribe to fish in a manner otherwise prohibited by provincial regulation, band needs that they are "natural descendants" of the signatory band with whom the 1725 Treaty was made); *R. v. Francis* (1969), 10 D.L.R. (3d) 189 (N.B.C.A.)
18. *R. v. Isaac* (1975), 13 N.S.R. (2d) 460 (N.S.C.A.); *R. v. Paul* (1980), 30 N.B.R.(2d) 545 (treaty "term" can include items not specifically mentioned, such as an exception, reservation or confirmation of a previously existing right); *R. v. Denny* (1990), 9 W.C.B. (2d) 438 (Mi'kmaq had an Aboriginal right to fish for food on waters incidental and adjacent to the exterior boundaries of the reserve).
19. [1985] 2 S.C.R. 387.
20. (1998), 158 D.L.R. (4th) 231 (N.B.C.A.) [*Peter Paul*]. For a detailed discussion of the controversy and reactions of the various interested parties see Ken S. Coates, *The Marshall Decision and Native Rights* (Montreal & Kingston, Ont.: McGill-Queen's University Press, 2000) at 94-126.
21. *R. v. Peter-Paul (T.) (formerly called R. v. Paul (T.P.))* (1997), 193 N.B.R. (2d) 321; 153 D.L.R. (4th) 131 at 174-175:

> I believe there are several ways one could describe the status of rights in Crown land. A legally correct way would be to consider Crown lands as reserved for Indians. Not exclusively, but their rights to them are protected by treaty. The trees

reversed. While noting that the lower court had taken judicial notice of legally and historically disputed documents, it stated that "the evidence here does not establish that the commercial harvesting of timber was a practice, a tradition or custom that was an integral part of the respondent's culture."[22]

Peter Paul brought the possibility of commercial logging, either under Aboriginal title or under treaty, tantalizingly close for these Aboriginal groups. Despite the appellate decision, the issue remained unsettled. It returned after the 1999 Supreme Court of Canada decision *Marshall I*. The *Marshall I* Court held that the Mi'kmaq had protected treaty rights based on the "truckhhouse clause" found in a series of treaties signed in 1760-1761.[23] The treaty right in *Marshall I* concerned the Mi'kmaq right to net and sell fish without a provincial licence to obtain "necessaries" to sustain a "moderate livelihood."[24] However, the Court refused to discuss the specific content and scope of the treaty right to harvest and trade beyond commercial eel fishing. It simply restricted it to "hunting, fishing and other gathering activities" that were traditionally part of the Mi'kmaq economy.[25] In a

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> on Crown land are Indian trees. Not exclusively, but their rights are protected by treaty. The Crown has jurisdiction and dominion over all land. Undoubtedly the Legislature and Parliament can enact laws which affect Indian treaty rights in New Brunswick. Governments must accept that Dummer's Treaty [Treaty of 1725] was understood to protect Indian land and recognize the Indians' primacy when enacting legislation if it intends to enact laws affecting treaty rights. At the present time Indians have the right to cut trees on all Crown land. If this provision in the *Crown Lands and Forests Act*, *supra*, had met the guidelines set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075; 111 N.R. 241, the law would apply to Mr. Paul. Such a license to Stone Consolidated Inc. would in my opinion be considered an exclusive license. My rationale is that the Act is not applicable to the Indians of New Brunswick. Considerable argument was advanced before me that one must slash a maple tree to first determine if it is bird's eye. This is indeed deplorable, but an owner is legally entitled to do so.

22. *Peter Paul*, *supra* note 20 at 249.
23. The British had entered into a number of separate but similar treaties in 1760 and 1761 with individual Mi'kmaq communities. By the end of 1761 all of the Mi'kmaq villages in Nova Scotia had signed a treaty. The British intended to later sign a comprehensive treaty with Mi'kmaq but this did not happen. The Nova Scotia trial court in *Marshall I* determined that the treaties entered into over the two year period were essentially the same and that the written terms applicable to the dispute were contained in a Treaty of Peace and Friendship" entered into by Governor Charles Lawrence and the Mi'kmaq leader Paul Laurent on March 10, 1760. Agreeing with the trial court, the Supreme Court in *Marshall I* ruled that the clause in all these treaties was essentially similar to the clause found in the Treaty of Peace and Friendship signed March 10, 1760 between the British and the Mi'kmaq. That Treaty in part states that: "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." Quoted from *Marshall I, supra* note 9 at para. 5.The same treaty language is the focus in *Marshall III*.
24. *Ibid*. at 502.
25. *Ibid*. at 466.

subsequent opinion rejecting an application for rehearing, it specifically did not exclude trade in timber from the scope of the right.[26]

Marshall III

In *Marshall III*, the defendants argued that because the Mi'kmaq used forest products for such things as sleds and snowshoes, and occasionally traded wood products in 1760-1761, they could also log commercially, as logging was a modern use of the same material. In short, the 1760-1761 treaty protected the use of specific natural resources by the Mi'kmaq. The right to fish using modern techniques (as held in *Marshall I*) and log (either for timber or paper) with chainsaws was protected because the natural resources exploited by such present-day activities were the same as those used and traded historically. The harvest would be limited to the purpose of gaining a moderate livelihood as well as such limitations that the "government can justify in the greater public good."[27]

The Crown argued for a narrower view of the treaty rights. It argued that the treaties "merely granted the Mi'kmaq the right to continue to trade in items traded in 1760-61."[28] These historically situated activities were protected, but activities that were not within the contemplation of the parties were not. While traditional practices were not frozen in time, the treaty protected modern activities only insofar as these activities were logically evolved from the traditional activities. Thus commercial fishing was a protected activity because the Mi'kmaq fished commercially or were envisioned as undertaking this activity at the time the treaty was concluded and because small time commercial fishing (limited by the moderate livelihood standard) used methods not qualitatively or quantitatively

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26. The *Marshall II* Court, *supra* note 9 at para. 20, wrote the following:

> The September 17, 1999 majority judgment did not rule that the appellant had established a treaty right "to gather" anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower. No evidence was drawn to our attention, nor was any argument made in the course of this appeal, that trade in logging or minerals, or the exploitation of off-shore natural gas deposits, was in the contemplation of either or both parties to the 1760 treaty; nor was the argument made that exploitation of such resources could be considered a logical evolution of treaty rights to fish and wildlife or to the type of things traditionally "gathered" by the Mi'kmaq in a 1760 [A]boriginal lifestyle. It is of course open to [N]ative communities to assert broader treaty rights in that regard, but if so, the basis for such a claim will have to be established in proceedings where the issue is squarely raised on proper historical evidence, as was done in this case in relation to fish and wildlife. Other resources were simply not addressed by the parties, and therefore not addressed by the Court in its September 17, 1999 majority judgment.

27. *Marshall III*, *supra* note 7 at para. 15.
28. *Ibid.* at para. 16.

different from those the Mi'kmaq used in colonial Nova Scotia. Commercial logging, on the other hand, represented a new trading activity in that it was not a logical evolution of the uses made of forest products by Mi'kmaq in the 18th century.

Both sides relied heavily on the earlier 1999 *R. v. Marshall* decision. The Court accepted the narrower interpretation of the treaty right proffered by the Crown.[29] McLachlin C.J.C., writing for the Court, first addressed the scope of the treaty right.[30] She noted that the *Marshall I* case recognized that "[a] critical aspect of the treaties was the trading clause" and that this clause (the "truckhouse clause") amounted to a promise on the part of the British that the Mi'kmaq would be allowed to engage in traditional trade activities so as to obtain a moderate livelihood from the land and sea.[31]

For the Court, the scope of the treaty right concerned the right to trade products such as fish and furs. These products were those "traditionally traded" when the parties entered the agreement and involved activities "within the contemplation of the parties to the treaties."[32] The traditional trade contemplated was between the Mi'kmaq and the French and the Mi'kmaq and the British. The British wished to monopolize this trade after the defeat of the French in Quebec.[33] This right to trade carried with it an implied right to access and harvest those resources that were traded. "But this right to harvest is the adjunct of the basic right to trade in traditional products."[34] It did not protect the continued use of any natural resource used by the Mi'kmaq at the time of the treaties because "[t]he right conferred is not the right to harvest, in itself, but a right to trade."[35]

The Court supported its conclusion by the text of the "truckhouse clause" itself and the intent of the parties as determined from the historical evidence. McLachlin C.J.C. noted that the clause itself "speaks only of trade" and in no sense can the words be interpreted to mean a "general right to harvest or gather all natural resources then used."[36] The historical evidence indicated that the British wished to secure the allegiance of the

29. McLachlin C.J.C. authored the majority opinion joined by Major, Bastarache, LeBel, Fish, Abella and Charron JJ. LeBel and Fish JJ. filed a concurrent opinion where they stated that the protected treaty right "includes not only a right to trade but also a corresponding right of access to resources for the purpose of engaging in trading activities" but that the parties did not "contemplate that forest resources to which the Mi'kmaq had a right of access would be used to engage in logging activities." They also differed with the majority concerning the "exclusivity" requirement necessary to find common law Aboriginal title. *Ibid.* at paras. 110-145.
30. The Court's Aboriginal rights reasoning will not be discussed in this article.
31. *Ibid*. at para. 10.
32. *Ibid*. at para. 13.
33. *Ibid.* at paras. 8 and 18.
34. *Ibid.* at para. 19.
35. *Ibid.*
36. *Ibid.* at para. 20.

Mi'kmaq with the treaty, and the truckhouse clause was a mechanism whereby the mutual interests of the parties could be effectuated. More specifically, the Mi'kmaq wished to continue their access to European goods which they had previously obtained from the French,[37] and the British wished to wean the Mi'kmaq away from French influence and obtain trade benefits, if any, while enabling the Mi'kmaq to continue harvesting natural resources for food and barter purposes. As such, the British and the Mi'kmaq contemplated the continuation of trade relations as they had traditionally been carried on between the French and the Mi'kmaq. The only modification of trade activity contemplated by the treaty was that trade would be exclusively with the British. Thus trade in furs, fish, berries, and fruits were all traditional items and therefore protected because they were within the contemplation of the parties. In addition, the "logical evolution" of these trading activities pursuant to a moderate livelihood was protected.[38]

Given the Court's interpretation of the "truckhouse clause," the issue of commercial logging resolved itself into the question of whether it was the logical evolution, that is, the "same sort of activity, carried on in the modern economy by modern means," as those activities undertaken by the Mi'kmaq in their historic trade with the British and French.[39] Reviewing the trial evidence (and agreeing with the findings of the trial judges), the Court concluded that commercial logging was not a logical evolution of traditional trading activities. The Mi'kmaq could fish but they could not log under the treaties of 1760-1761.

III THE *LAC COURTE OREILLES* LITIGATION AND COMMERCIAL LOGGING

A decade before *Marshall III*, the issue of exercising commercial logging rights in ceded territory located outside reservation boundaries came before the U.S. Circuit Court for the Western District of Wisconsin, as part of the protracted litigation *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt* ("*LCO*").[40]

37. *Ibid*. at paras. 18-21.
38. *Ibid*. at para. 25
39. *Ibid*.
40. *LCO* was a consolidated case for a declaratory judgment that the Lac Courte Oreilles Band of Lake Superior Chippewa retained various usufructuary rights in the northern third of Wisconsin. The first decision, by Doyle J., reported as *United States v. Bouchard*, 464 F. Supp. 1316 (W.D. Wis. 1978) [*Bouchard*], ruled against the tribe. The 7th Circuit Court of Appeals decision, found at 700 F.2d 341 (1983) and commonly referred to as *LCO I*, reversed the lower court's decision and remanded the case for trial. The subsequent District Court and Appellate decisions are likewise referred to with Roman numerals. *LCO II* is found at 760 F.2d 177 (1985) (District Court using a particular date prior to which changes in land ownership from public to private in order to determine which excluded that land from exercise of usufructuary

LCO—which involved the U.S. Circuit Court for the Western District of Wisconsin and numerous appeals to the Seventh Circuit Court of Appeals—concerned the Lake Superior Chippewa's fight for off-reservation hunting, fishing, and gathering rights under the Treaties of 1837 and 1842 in northern Wisconsin, Minnesota and Michigan.[41] The United States, wishing to exploit the timber resources of the area and open it up for settlement, signed a series of treaties with the Chippewa.[42] These treaties ceded land, provided certain annuities for the tribes, reserved various hunting, fishing and gathering rights, and provided for the establishment of reservations in the ceded territory.[43]

The 1837 and 1842 treaties were signed during the time when the federal government was seeking to remove the tribes west of the Mississippi

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right is inappropriate); *LCO III* at 653 F. Supp. 1420 (W.D. Wis. 1987)(court enumerates species used in ceded territory which may be harvested by methods used at time of treaty and modern methods for commercial and subsistence purpose in order to provide Chippewa with a modest living); *LCO IV* at 668 F. Supp. 1233 (W.D. Wis. 1987) (state regulation of usufructuary right must be least restrictive alternative in the interest of conservation); *LCO V* at 686 F. Supp. 226 (W.D. Wis. 1988) (Chippewa could not reach modest living needs from available harvest in ceded territory); *LCO VI* at 707 F. Supp. 1034 (W.D. Wis. 1989) (Chippewa may regulate their own harvest provided they enact and implement certain conservation measures); *LCO VII* at 740 F. Supp. 1400 (W.D. Wis. 1990) (harvestable resources in ceded territory allocated equally between Chippewa and Wisconsin); *LCO VIII* at 749 F. Supp. 913 (W.D. Wis. 1990) (Eleventh Amendment of U.S. Constitution prevents recovery of monetary damages against state for violation of treaty rights); *LCO IX* at 758 F. Supp. 1262 (W.D. Wis. 1991) (treaty right does not extend to commercial timber harvesting); and *LCO X*, the final judgment, at 775 F. Supp. 321 (W.D. Wis. 1991).

41. The 1837, 1842 and 1854 Treaties also involved territory in what is now the state of Minnesota. The Chippewa succeeded in having these rights recognized in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 143 L. Ed. 2d 270 (1999) [*Mille Lacs*].

42. For an overview of the Chippewa's fight to retain usufructuary treaty rights, see generally Ronald N. Satz, *Chippewa Treaty Rights: The Reserved Rights of the Wisconsin Chippewa Indians in Historical Perspective* (Madison: Wisconsin Academy of Sciences, Arts and Letters, 1991).

43. The treaties that reserved usufructuary rights were entered into in 1837, 1842 and 1854. Article 5 of the 1837 Treaty that ceded approximately the northern third of present-day Wisconsin to the United States provided that "[t]he privilege of hunting, fishing, and gathering of wild rice … in the territory ceded, is guarant[e]ed to the Indians during the pleasure of the President of the United States." The 1842 treaty, which provided for a cession of land north of the territory ceded in 1837 (roughly the upper peninsula of Michigan and parts of northern Wisconsin to the south shore of Lake Superior) stated in Article II that "[t]he Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress." *LCO I*, *supra* note 40 at 345. The Treaty of 1854, which ceded the remaining Chippewa lands in Minnesota and established reservations in Wisconsin, stated in Article XI that "such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President." U.S., Wisconsin Legislative Reference Bureau, *Chippewa Off-Reservation Treaty Rights: Origins and Issues Research Bulletin 91-1* (Madison, WI: Wisconsin Legislative Reference Bureau, 1991) at 19.

River.[44] While the 1837 treaty did not contain a removal clause, because federal officials believed that northern Wisconsin was not promising for agricultural development, the 1842 treaty did provide for removal, and after the 1842 treaty was signed, the American government sought to remove the Chippewa from the Wisconsin ceded territory to Minnesota. In 1850, President Zachary Tyler issued an Executive Order revoking the rights set forth in the 1837 and 1842 treaties and ordered the Chippewa out of Wisconsin.[45]

The Chippewa refused to move west. They stated that they had been informed that they could remain in the ceded territory for an indefinite period "except so far as they might be required to give place to miners" and that they would not be removed unless they "misbehaved."[46] In 1852, after considerable hardship and loss of life, the United States suspended the removal program, and it abandoned the removal policy when it later established reservations for the Chippewa with the 1854 treaty. Even with the reservations, the Chippewa continued to roam and to hunt, fish and gather throughout the ceded territory until the end of the 19th century.

Wisconsin became a state in 1848. Despite the treaties and its inability to regulate Chippewa activity throughout the ceded territory, it assumed that its law covered the entire territory of the state and included the tribes. While some consideration was initially given to Indian activities, the state later criminalized various hunting, fishing and gathering activities.[47] Outside of the established reservations, federal officials took little interest in the Chippewa.[48] In 1879, the Wisconsin Supreme Court in *State v. Doxtater*

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44. Anthony G. Gulig, *In Whose Interest? Government-Indian Relations in Northern Saskatchewan and Wisconsin 1900-1940* (Ph.D. Dissertation, University of Saskatchewan, 1997) [unpublished] at 31-42.
45. The relevant part, quoted from *LCO I, supra* note 40 at 346, stated:

> The privileges granted temporarily to the Chippewa Indians of the Mississippi, by the fifth article of the treaty made with them on the 29th of July 1837 "of hunting, fishing and gathering the wild rice upon the lands, the rivers and the lakes included in the territory ceded" by the treaty to the United States, and the rights granted to the Chippewa Indians of the Mississippi and Lake Superior by the second article of the treaty with them of October 4th, 1842, of hunting on the territory which they ceded by that treaty, with the other usual privileges of occupancy until required to remove by the President of the United States, are hereby revoked and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.

46. Gulig, *supra* note 44 at 40-41.
47. Between 1850 and 1859 state laws allowed Indians to hunt at any time. Between 1868 and 1896 Wisconsin applied its hunting and fishing laws to Indian activities outside of the reservation boundaries but did not enforce its law on the reservation. By 1900 the state was attempting to enforce its law also on the reservations. *Ibid.* at 77.
48. While some federal officials responsible for Indian Affairs in the ceded territory acknowledged that the Chippewa had usufructuary rights to hunt and fish in the territory; statements by other officials in the late 19th and early 20th century suggested that the federal government considered the Chippewa right to be extinguished. *Mille Lacs, supra* note 41 at 182-183.

declared that absent an explicit prohibition in the act admitting the state into the Union, the federal authority could not prohibit state jurisdiction over the tribes.[49] This conclusion—that Wisconsin criminal law extended to tribal members living on treaty-established reservations, whether the act involved a non-Indian or an Indian—directly contradicted federal case law, and after 1884, federal statute. Yet it was also considered the law in other jurisdictions as well.[50] After a 1901 federal court ruling prevented the state from enforcing fish and game law within the reservation,[51] the Wisconsin Supreme Court in *State v. Morrin* ruled that any rights reserved by treaty outside of the reservation boundaries was abrogated by the U.S. Congress when it admitted Wisconsin into the Union without reserving those rights for the Chippewa.[52]

Nevertheless, the Chippewa continued to insist that their treaty rights still existed. In 1972, the Wisconsin Supreme Court revisited the issue of off-reservation treaty fishing in *State v. Gurnoe*.[53] The defendants in *Gurnoe* were members of the Red Cliff and Bad River Bands of Chippewa who were charged with violating state statutes regulating fishing on Lake Superior. They claimed that the treaty of 1854 that set aside lands "for the use of the Chippewa" was also a grant of fishing rights on Lake Superior for those bands who had reservations along the shore.[54] The Court, overruling a 1933 decision regarding the same 1854 treaty, agreed.[55]

After *Gurnoe*, several lawsuits that implicated hunting, fishing, and gathering rights as well as the effect of the 1850 Removal Order were initiated. The Chippewa were initially unsuccessful. In the consolidated case *United States v. Bouchard*, the U.S. District Court held that while the 1850 Removal Order was unlawful—that is, the removal was undertaken even though the Chippewa had not "misbehaved"—the 1854 treaty nevertheless

49. 47 Wis. 278 at 291-292, 2 N.W. 439 (Wisc. Sup. Ct. 1879). Sidney Harring notes that this reasoning and similar approaches to the issue of state jurisdiction over Indians were strong counterpoints to Federal authority enunciated by what are now considered the seminal Indian law cases: *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, *infra* note 50. The Wisconsin Court in *Doxtater* cited those state cases which all stand for the proposition that state authority over Indian is not pre-empted by federal authority except in a few instances. Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal law, and United States Law in the Nineteenth Century* (Cambridge: Cambridge University Press, 1994) at 34-56.

50. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *United States v. Kagama*, 118 U.S. 375 (1886).

51. *In re Blackbird*, 109 F. Supp 139 (W.D. Wis. 1901).

52. 136 Wis. 552 (Wis. Sup. Ct. 1908).

53. 53 Wis. 2d 390 (Wis. Sup. Ct. 1972) [*Gurnoe*].

54. *Ibid.* at 399-400.

55. It stated: "Whether the right to fish in Lake Superior is denominated 'off-reservation rights' or interpreted to be inherent rights under the treaty, the result is the same—the Chippewa are entitled to the right to fish Lake Superior." *Ibid.* at 409.

extinguished any off-reservation treaty rights.[56] The establishment of reservations in the ceded territory, noted the Court, "strongly implies the parties' intention that the 1854 treaty would extinguish the general Indian claim of a right to occupy, and hunt, fish and otherwise obtain food on the earlier ceded lands."[57]

However, the portion of *Bouchard* that related to the question of whether the Chippewa treaty rights to hunt, fish, and gather in the ceded territory had been extinguished was overruled on appeal. The Seventh Circuit Court of Appeals agreed with the District Court concerning the unlawfulness of the 1850 Removal Order, but held that the treaty rights of 1837 and 1842, which involved the use of land for "traditional subsistence activities of hunting, fishing and gathering," could not be extinguished by implication.[58]

> [A] termination of treaty-recognized rights by subsequent legislation must be by *explicit* statement or must be *clear* from the surrounding circumstances or legislative history.[59]

Thus, establishment of reservations by the 1854 treaty did not abrogate earlier treaty rights. The 1854 treaty did not expressly refer "to the termination of the usufructuary rights." Furthermore, the "circumstances and legislative history surrounding the treaty" did not make it clear that Congress intended to abrogate the earlier treaty provisions.[60] The Court concluded that "treaty recognized usufructuary rights pursuant to the Treaties of 1837 and 1842 … remain in force."[61] It remanded the case to determine the content of the reserved rights and the permissible scope of state regulation over the exercise of these rights.

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56. *Bouchard*, *supra* note 40 at 1350:

> In sum, the evidence before this court does not reveal the kind of serious misbehavior by Indians which would have justified removal under the terms of the 1837 and 1842 treaties. Rather it appears that the President and other governmental officials were influenced by the long-term goal of the Interior Department to remove all Indians to locations west of the Mississippi where they could be confined to small areas and forced to adopt what these officials considered to be the civilized ways of the white people. Thus, I hold that the removal order of 1850 was not authorized by the treaties of 1837 or 1842, was beyond the scope of the President's powers, and was without legal effect. Any forcible removal of the Indians which may have taken place pursuant to that order was also without legal effect.

57. *Ibid.* at 1361.
58. *LCO I*, *supra* note 40 at 352.
59. *Ibid.* at 354 [emphasis in original].
60. *Ibid.* at 362.
61. The Court limited the exercise of the right to those portions of the ceded territory that were not privately owned. *Ibid*. at 365.

Whether the rights reserved under the 1837 and 1842 treaties included the right to commercially harvest timber came before the District Court on a motion for reconsideration several years after the District Court determined what type of usufructuary activities were reserved under the treaty in the remanded trial.[62] In the remanded 1987 trial decision, Doyle J. found that the Chippewa harvested the wood and parts of various trees throughout the ceded territory. Moreover, the Chippewa did not simply engage in subsistence hunting, fishing and gathering, but harvested resources in a commercial manner:

> Throughout the nineteenth century, the Chippewa were participants in an international market economy; they were the producers of commodities, primarily furs, and they controlled the resources that flowed into this economy.[63]

As such, the products taken under the usufructuary right "may be traded and sold today to non-Indians, employing modern methods of distribution and sale."[64] Justice Doyle, however, limited commercial activity by finding that "the Chippewa were not motivated by the hopes of profits and the accumulation of material goods."[65]

The Chippewa tribes took the position that the *LCO III* ruling allowed for commercial logging. After settlement negotiations failed, Wisconsin petitioned the District Court to revisit the logging issue. It argued that timber played a unique role in the original treaty negotiations, and a reserved right to harvest timber commercially could not be found because a material basis of the treaty was the acquisition of timber resources. Moreover, commercial logging was an activity unlike that which characterized the Chippewa's use of the forest at the time of the treaties. The tribes argued that the lack of specific evidence of logging by the Chippewa was not determinative of the right to commercially harvest timber under the treaty in the present. They argued that they only needed to show that they were exploiting trees for some commercial activity at the time of the treaties. Logging from this perspective is a modern or advanced form of harvesting trees.

The Court's ruling, written by Crabb J., agreed with Wisconsin and found that the Chippewa had not reserved the right to commercially harvest timber. Justice Crabb noted that "[a]scertaining what the Chippewa were

62. The trial is called *LCO III*, *supra* note 40.
63. *Ibid.* at 1428.
64. *Ibid.* at 1465.
65. The Court further went on to state: "The Chippewa developed an economic strategy that incorporated both their traditional economy and the market economy in such a way that they were able, on the one hand, to transact business with non-Indians who were participating in the Euro-American market economy and, on the other, to transact social and political relations with one another in the traditional manner." *Ibid.* at 1429.

actually doing at the time of the treaties is a prerequisite to determining what they understood they were reserving."[66] For the Court, the evidence presented in *LCO III* did not show that the Chippewa exploited a commercial timber resource at the time. They had used "a variety of plants and plant materials for many purposes: nutritional, medicinal, religious and magical," but these uses did not include logging.[67] Commercial timber, as opposed to the use of particular products from particular trees, was a resource use with which the Chippewa had no experience at the time of the treaties.[68] Logging, moreover, could not be characterized as a modern adaptation of a traditional harvesting method because it was a resource use that had existed for "centuries."[69] It was a separate harvest activity concentrating on the tree trunk which led to the destruction of the forest resource. In contrast, the Chippewa harvested wood resources in a manner that essentially preserved the living trees.

Notwithstanding that the nature of the Chippewa's historical tree harvesting precluded the retention of a commercial logging right, the Court found that the Chippewa had negotiated away that right. The tribes had disputed the issue of whether they understood that they were selling the timber when they entered into the 1837 and 1842 treaties. Despite recognizing ambiguities in the scope of the 1837 and 1842 treaties, the Court found that by the time of the 1854 treaty negotiations, the Chippewa understood they were selling the timber when they ceded the land.[70] A closer issue for the Court was whether the Chippewa "were selling timber resources other than pine such as hardwoods."[71] At the time, hardwoods could not be floated downstream to market, so the exploitation awaited steam power and railroads. These developments could hardly have been within the contemplation of the American negotiators at the time. In addition, the tribes argued that they only negotiated away cutting rights to the standing pine, but reserved the regrowth. They cited the Treaty Journal to support these contentions.[72] The Court dispensed with these issues by stating that the issue had not been argued in the trial court. However, it tied the analysis together by noting the following:

> It is much more plausible to read the quoted statements as referring to the Chippewa's desire that enough trees be left to enable them to continue to hunt

66. *LCO IX*, *supra* note 7 at 1270.
67. *Ibid.* at 1269.
68. *Ibid.* at 1271.
69. *Ibid.*
70. "[E]ven if the Chippewa were uncertain in 1837 or 1842 whether they had sold their pine timber to the United States, they knew in 1854 that they had done so. Plaintiffs concede that they understood then that they were selling their timber." *Ibid.* at 1272.
71. *Ibid.*
72. *Ibid.* at 1272-1273.

> in the woods and gather the forest products they needed, rather than to read them as reserving a right to harvest non-pine timber or second-growth timber.[73]

In short, the Chippewa Treaties of 1837, 1842 and 1854, like the Mi'kmaq Treaties of 1760-1761, were found not to have reserved any right to commercial logging.

IV TREATY RIGHTS AND JUDICIAL CONSTRUCTS

The Canadian and American case law on the treaty protection of commercial logging, as reviewed in the previous sections, is notable for at least one reason: that despite differences in the parties, the treaty texts, the historical contexts within which the treaties were negotiated, and the constitutional and jurisprudential environments surrounding them, the judicial decisions bear a striking resemblance to each other. Neither the Chippewa nor the Mi'kmaq have a treaty-protected right to engage in commercial logging—be it for subsistence, a moderate livelihood, or as a profit-driven business—despite the fact that each tribe used and traded wood products at the time the treaties were negotiated. The refusal of the courts to find commercial logging rights contrasts with the judicial findings that the Indigenous groups in question retain treaty-protected usufructuary rights that enable them to sell other natural resources such as fish and white-tailed deer.

Why the difference between hunting and fishing, on the one hand, and logging, on the other? It is certainly difficult to discount the possibility that the economic and political salience of the activity to the non-Indigenous population affected the outcome. After all, commercial logging remains an important industry in New Brunswick, Nova Scotia and Wisconsin.[74] Yet the determination by Canadian and American judiciaries alike that the Indigenous groups involved could not have anticipated and bargained for anything but "traditional" usufructuary rights suggests another key factor in

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73. *Ibid.* at 1273.

74. According to the Canadian Broadcasting Corporation, the forestry industry creates 19,000 jobs in New Brunswick and 11,000 in Nova Scotia. New Brunswick's government owns 50 per cent of the province's land base, while Nova Scotia owns about 25 per cent. "Logging fight not over, Native leaders say" *CBC News* (20 July 2005), online: CBC.ca <http://www.cbc.ca/story/canada/national/2005/07/20/logging-aboriginal050720.html>. According to the Wisconsin Department of Natural Resources, Division of Forestry, *Wisconsin Forest at the Millennium Report: An Assessment* (November 2000), online: WNDR <http://dnr.wi.gov/forestry/assessment/WI_F_At_Millenium_pdfs/forbk.pdf> in 1994 timber production accounted for approximately 6 per cent of Wisconsin's GSP—roughly $15 billion of $242 billion. Over 1,800 companies in the timber industry employed over 99,000 people, with a total payroll of more than $3.6 billion. The timber activity includes both sawtimber and pulpwood and value-added processing. See Wisconsin Department of Natural Resources, Division of Forestry, *Wisconsin's Statewide Forest Plan: Ensuring a Sustainable Future* (2004), online: WDNR <http://dnr.wi.gov/forestry/assessment/swfp/Files/SFPlanFINAL.pdf>.

their decisions: the continued role of certain essentialist assumptions about the nature of Indigenous usufructuary rights in North America as part of Indigenous social structures, economies and societies. Indeed, a major juridical premise that appears to underlie the analysis is that Indigenous treaty negotiators could only have intended—and *did* intend—to reserve or retain natural resources and uses that were "traditional." This "traditionalist" assumption privileges non-Indigenous interests and the prerogatives of the European settler state, which include commercial exploitation. It also circumscribes treaty rights that are potentially incompatible with dominant notions of the state's political and legal sovereignty and ideology. Small-scale fishing fits within the judicial construct, but logging by Indigenous lumberjacks does not.

In *Marshall III*, the Supreme Court of Canada, reiterating its holding in *Marshall I*, found that the Mi'kmaq only intended to reserve usufructuary rights to harvest those resources that were traditionally harvested in "a 1760 [A]boriginal lifestyle":[75]

> The historic records and the wording of the truckhouse clause indicate that what was in the contemplation of the British and the Mi'kmaq in 1760 was continued trade in the products the Mi'kmaq had traditionally traded with Europeans. The clause affirmed that this trade would continue, but henceforth exclusively with the British.[76]

For the Court, commercial logging was not the type of activity traditionally carried on by the Mi'kmaq nor was it a modern evolution of wood uses and trade taking place in 1760. Fishing, hunting and harvesting fruits and berries were means by which the Mi'kmaq gathered the natural resources with which they traded.

The Court's characterization of a use (in this case, commercial logging) as non-traditional leads to a judicial assumption that Indigenous negotiators were unable to anticipate that such a use might be undertaken in the future—or, arguably, even to contemplate future uses distinct from present uses—and to reserve such a use in the treaty. Trade in logs could not have been within the contemplation of the Mi'kmaq negotiators because logging was not an activity in which the Mi'kmaq as a "culture" would have engaged. As Justice LeBel states in his concurring opinion in *Marshall III*:

> There are limits to trading activities and access to resources that are protected by the treaty. The parties contemplated access to types of resources traditionally gathered in the Mi'kmaq economy for trade purposes.[77]

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75. *Marshall III*, *supra* note 7 at para. 24.
76. *Ibid*. at para. 21.
77. *Ibid*. at para. 116.

The *LCO IX* Court approached the issue in a similar way. It sought to determine the nature and scope of the rights included within the treaty text by examining what the "practices and customs" of the Indians were at the time the treaty was negotiated.[78]

> Ascertaining what the Chippewa were actually doing at the time of the treaties is a prerequisite to determining what they would have understood they were reserving.[79]

What the Chippewa "were actually doing" is crucial to the Court's analysis because in order to prove the existence of a reserved right, the Indians must show that they were "in fact using the resource" and that they exercised the claimed right, as "subsumed within their larger, [A]boriginal right to their land and water."[80] The Court found that logging was not within the circle of activities in which the Chippewa had engaged—that is, logging was not what the Chippewa were interested in at treaty time. They did "not harvest trees for use as logs or for saw boards"; rather, "[t]hey were seeking particular trees for their unique characteristics."[81] As such, the Chippewa could not have intended to retain the commercial logging rights in the ceded territory:

> Logging large areas of trees would have had no purpose for the Chippewa: their mobile hunting and gathering life-style gave them no reason to build log homes or barns or to clear the land. To the contrary, they depended heavily on retaining many different species of trees and other forms of plant life from which they derived many specialized products and which served as habitat for the animals they hunted.[82]

It is not so much that the "traditionalist" judicial construct used in *Marshall III* and *LCO IX* comprehends historical Indigenous activities and trade in an inaccurate manner. A contextually sensitive inquiry into historical practices is basic to common law methodologies. Custom, usage and precedent are considered the source of the common law and initially delimit the content and scope of legally cognizable practices, and clearly no Indigenous logging existed on the same scale as that carried on by the settlers. Moreover, it is difficult to interpret the complexities of behaviour, politics and decision-making mechanisms across cultural and historical boundaries.[83]

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78. *LCO IX*, *supra* note 7 at 1270.
79. *Ibid*.
80. *Ibid*.
81. *Ibid*.
82. *Ibid*. at 1271.
83. J.R. Miller, "'I Can Only Tell What I Know': Shifting Notions of Historical Understanding in the 1990s" in J.R. Miller, ed., *Reflections on Native-Newcomer Relations: Selected Essays* (Toronto: University of Toronto Press, 2004) 61-81.

The difficulty, then, is not in these aspects of judicial reasoning, but rather in the assumptions involved in reconstructing the intentions of Indigenous negotiators in long-past treaty negotiations. As already suggested above, these assumptions represent a conception of Indigenous culture informed by European rather than Indigenous values, and one that arguably sees Indigenous culture as both static and monolithic, being sensitive neither to historical change within Indigenous groups nor cultural difference between them. Such assumptions seem to make it possible for courts to treat all Indigenous cultures in North America as essentially the same, generalizing from one Indigenous group in one particular historical context to all Indigenous groups across wide expanses of time and place. Moreover, as applied to an understanding of the treaty relationship, they lead to the imposition of a European perspective not only on Indigenous political organization, decision-making, rhetoric and legal understandings, but also on the assumptions, values and aspirations that Indigenous groups brought to treaty negotiations.[84] This leads in turn both to the idea that it was not within the contemplation of Indigenous communities to adapt rationally to changing social and economic arrangements initiated by non-Indigenous settlement and to a simplistic view of Indigenous negotiating positions, effectively undermining the various judicial methodologies created to protect Indigenous interests.

These various assumptions can readily be shown to be problematic. First, and perhaps most important, Indigenous tradition and traditional activities were not—and are not—static or homogeneous. Rather, they change with local circumstances, the economy, and the particular Indigenous group and culture. As European penetration proceeded, Indigenous societies and economies were unlikely to sustain the very same practices that had been carried on when there was little or no European contact. Indigenous activities necessarily changed in order to adapt to the population collapse that accompanied European contact, the demand for land and furs, as well as Indigenous demand for European goods.[85] The nature of European penetration changed over time and Indigenous behaviour also changed. Initially there was an acceptance of tribal customs and traditions that were in turn integrated into Indigenous–European relations. As the British asserted their military and demographic strength, a new period of colonialist expansion emerged, which destroyed the traditional Aboriginal subsistence

84. *Ibid.* at 72-75.

85. See, for example, Richard White & William Cronon, "Ecological Change and Indian-White Relations" in Wilcomb Washburn, ed., *The Handbook of North American Indians: History of Indian-White Relations*, vol. 4 (Washington: Smithsonian Institute, 1982) 417.

base.[86] This later period included efforts to control and eliminate Indigenous groups through physical removal and assimilation.

Second, the above assumptions ignore the bargaining aspect of the treaty process. Treaties do not arise from cultural practices but are incorporative agreements that can lead to legally binding obligations.[87] Treaty rights result from negotiations that facilitated relations between Indigenous peoples and settlers and/or led to the extension of colonial and national jurisdiction to these peoples and their lands.[88] Prior to an agreement (and despite the increasingly one-sided nature of such agreements as the 19th century progressed), each side made rational decisions, which involved, among other things, their particular objectives (cultural, economic, strategic or jurisdictional), the relative strength of their bargaining positions, the relative weighting of their present versus future interests, and the perceived permanence of the agreement. This process is evident in the differing treaty terms across the continent and histories of particular treaty relationships. It is also reflected in other judicial assumptions that are used in Indigenous treaty cases. For example, where a treaty is not the result of a war, American courts have assumed that the two parties bargained in good faith.[89] Canadian courts, which have more readily recognized the adhesive nature of treaties, apply liberal canons of interpretation that emphasize Aboriginal understandings of the treaty agreement, in order to preserve the idea that treaty negotiation included a bargaining aspect.

An important element of the bargaining process was that treaties would set forth the parameters of Indigenous-settler relations prospectively. The prospective nature of treaty negotiation implies that the parties both intended some evolution of treaty-protected activities and arguably anticipated new uses and technologies. The treaty process did this by incorporating

86. Richard White, *The Middle Ground Indians, Empires, and Republics in the Great Lakes Region 1650-1815* (Cambridge: Cambridge University Press, 1991); James E. Fitting, "Patterns of Acculturation at the Straits of Mackinac" in Charles E. Cleland, ed., *Cultural Change and Continuity Essays in Honor of James Bennett Griffin* (New York: Academic Press, 1976) 321.

87. Prior to the *Constitution Act, 1982*, the rights and obligations set forth in British and Canadian treaties were not legally enforceable or were subject to the exercise of unilateral parliamentary authority. See Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 132-141. In the United States, Indian treaties have always constituted legally enforceable obligations subject to the authority of the U.S. Congress to unilaterally abrogate such rights provided it does so unambiguously. See generally Charles F. Wilkinson & John M. Volkman, "Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows or Grass Grows Upon the Earth'—How Long a Time Is That" (1975) 63 Cal. L. Rev. 621.

88. Leonard I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test" (1997) 36 Alta. L. Rev. 149.

89. "When the signatory nations have not been at war and neither is the vanquished, it is reasonable to assume that they negotiated as equals at arm's length." *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 at 675 (1979).

Indigenous protocols and law in the negotiation or ratification process and the treaty terms as well as providing for the continued vitality of Indigenous practices and law. Judicial solicitude towards treaty rights has led to the determination that treaties remain valid until explicitly extinguished, as well as to the presumptions that treaty rights are not frozen in time and that a treaty protects modern activities to some extent.

Third, there is reason for skepticism of the "traditionalist" assumption that regardless of the historical period and the cultural, commercial and subsistence practices of a given Indigenous group, Indigenous negotiators always eschewed the right to amass wealth through commercial exploitation because to do so would have been "untraditional." On this view, the Chippewa, for example, "lacked the profit incentive integral to western capitalism" and worked only to satisfy their immediate needs rather than to accumulate material goods and surpluses of food."[90] Similarly, Mi'kmaq trade activities never historically generated "wealth which would exceed a sustenance lifestyle," and the Mi'kmaq would have presumably not wished to exceed this low level.[91] This state of non–profit-driven cultural "satisfaction" is taken to have held despite extensive interaction and accommodation with the settler profit-based economy. Thus, even though the Mi'kmaq and the Chippewa were integrated into the western trading system—for at least two centuries—at the time of their respective treaties, they remained firmly wedded to pre-contact cultural norms of what was considered appropriate accumulation.[92] In other words, according to this assumption, these two groups—separated by culture and geo-politics and by half a continent and approximately 80 years—both wanted and negotiated for essentially the same thing.

Judicial interpretations of culturally circumscribed ideas about accumulation are equated with intent, just as are judicial determinations of whether a use is traditional. There is a strong presumption that Indigenous groups only wished to retain their traditional lifestyle. For the Chippewa, a judicial finding of a reserved right is dependent on whether they were in fact using the resource, rather than on the independently ascertained intent of the negotiators. For the Mi'kmaq, the Court determined that the intent of the negotiators was simply to continue trade in the type of things, such as fruit and berries, traditionally gathered by the Mi'kmaq in a 1760 Aboriginal (*i.e.*,

90. *LCO III*, *supra* note 40 at 1425.
91. *Marshall I*, *supra* note 9 at para. 74.
92. "Throughout the nineteenth century, the Chippewa were participants in an international market economy; they were the producers of commodities, primarily furs, and they controlled the resources that flowed into this economy. The exchange of commodities, furs in particular, was a way of life for both the Indians and non-Indians in the nineteenth century." *LCO III*, *supra* note 40 at 1428.

subsistence) lifestyle.[93] This analysis precludes the historical possibility that an Indigenous group may have chosen to forego a historical right and use, in order to secure the right to new uses in the future so as to adapt to changing economic and ecological circumstances. It also precludes the recognition of any expansive commercial usufructuary treaty rights through the "reserved rights doctrine"[94] or liberal canons of treaty interpretation—the latter having been used, for example, by the New Brunswick and Nova Scotia Courts of Appeal in *Marshall III*. Absent clear textual references of intent by Indigenous negotiators, in order to be protected by treaty, it must be proven that the protected uses were, at minimum, culturally or intellectually apprehended by the Indigenous group at the time of treaty negotiation. From this perspective, commercial logging cannot be reserved.

Logging as an Evolution of Use and Trade of Wood Products

The judicial construct discussed above equates the intent of Indigenous negotiators with an essentialist picture of Indigenous society based on the "traditionalist" assumption that negotiators sought to maintain the status quo in their societies. Nevertheless, the judicial finding that negotiators did not intend to reserve logging rights because logging was not a traditional practice does not wholly eliminate the possibility of treaty logging rights. American and Canadian doctrines of treaty interpretation allow for the evolution of treaty-protected practices; therefore, treaty rights may cover activities that were not within the contemplation of the negotiators. In both the United States and Canada, the courts have held that where a treaty right has been found, it may be exercised using modern methods and technologies. New uses that evolve from the uses carried out at the time of the treaty are also protected. The argument for commercial logging rights implicated a logical evolution analysis because both the *LCO I* and *Marshall I* courts had earlier found that the respective treaties at issue in the cases provided a usufructuary right to commercially harvest various products, including wood products, and that the Chippewa and the Mi'kmaq were not restricted to historical harvesting methods.

93. *Marshall III*, *supra* note 7 at para. 24.

94. This American legal doctrine, which has its source in international law, is an interpretive rule based on the status of the tribes as sovereign entities and possessors of territory and rights prior to the assertion of American sovereignty. Under the reserved rights doctrine, all members of the signatory tribes retain whatever rights they possessed which are not conveyed or relinquished. The rights reserved generally include all rights associated with the residual sovereignty of the tribes which is consistent with their dependent status, such as laws pertaining to local government over tribal members and rights to hunt, fish and gather as well as access rights to territory to carry out these activities. *United States v. Winans*, 198 U.S. 371 (1905); *Winters v. United States*, 207 U.S. 564 (1908); See also *United States v. Wheeler*, 435 U.S. 313 (1978); *Mille Lacs*, *supra* note 41.

The Chippewa and the Mi'kmaq argued that because they used and traded wood products at the time of the treaty, commercial logging was simply an evolution of the treaty-reserved use. The form of the resource usage in commercial logging might be different but the use itself was not.[95] The *LCO IX* Court sidestepped this argument but in doing so reinforced the notion of a traditional Indian culture. In the *LCO* litigation, the use of modern technology for traditional harvesting activity was never in much dispute. As set forth in *LCO III*, the Chippewa "are not confined to the hunting and fishing methods their ancestors relied upon at treaty time. The method of exercise of the right is not static. Plaintiffs [the Chippewa] may take advantage of improvements in the hunting and fishing techniques they employed in 1842."[96]

The *LCO IX* Court held that logging was not a "categorical" evolution of a protected treaty right because Chippewa wood uses in 1937 and 1842 were not the progenitors of commercial logging. Commercial logging is not a modern evolution of a traditional wood harvesting activity but is a completely different type or category of resource use that had existed for centuries. The crucial difference between the use and trade in wood products by the Chippewa and logging was that logging destroyed the forest resources without management, where the management in question is based on non-traditional scientific methodologies. Logging also used the trunk of the tree, a part of the tree that the Chippewa did not traditionally use. Logging was "an activity that is wholly different in purpose and effect from utilizing parts of trees for specialized purposes" in which the Chippewa engaged.[97]

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95. *Marshall III*, *supra* note 7 at para. 14:

> The respondents argue that the truckhouse clause, as interpreted in *Marshall I* and *II*, confers a general right to harvest and sell all natural resources which they used to support themselves in 1760. Provided they used a form of the resource either for their own needs or for trade at the time of the treaties, they now have the right to exploit it, unless the government can justify limitations on that exploitation in the broader public interest. The respondents argue 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 made of wood, all to sustain themselves. Logging represents the modern use of the same products, they assert. Therefore the treaties protect it.

LCO IX, *supra* note 7 at 1271:

> Plaintiffs argue that the lack of evidence of logging activity in 1837 and 1842 is not determinative of their right to engage in this form of harvest. They argue that it is necessary only to prove that they were exploiting trees for some commercial purpose at treaty time because the law of the case is that plaintiffs may use any harvesting methods employed in 1837 and 1842 and developed since, and logging is simply an advanced form of harvesting. Therefore, they maintain, they may apply logging techniques to the forest resources they were exploiting in other ways at treaty time.

96. *LCO III*, *supra* note 40 at 1430.
97. *LCO IX*, *supra* note 7 at 1271.

The difference is underscored by social, economic and cultural factors and is reinforced by the Court's "traditionalist" assumption about Indigenous negotiators. "Logging large areas of trees would have had no purpose for the Chippewa: their mobile hunting and gathering life-style gave them no reason to build log homes or barns or to clear the land."[98] This lifestyle generated certain uses and management practices that could be labelled "traditional":

> The uses the Chippewa made of trees in 1837 and 1842 were essentially uses that preserved the living trees. They did not take the trunk of the tree that loggers concentrate on; they used the sap, bark, branches, leaves, needles and roots. Even when they used wood in large quantities as fuel for their extensive maple sugar and syrup-making it is reasonable to assume that they used fallen, dry logs for this purpose rather than green living trees. This use of forest products contrasts sharply with commercial logging, which destroys the forest resource unless it is managed carefully as an element of an overall silviculture plan.[99]

The lifestyle of hunting and gathering not only precluded logging and the use of cut logs but, more importantly for the interpretation of treaty terms, precluded a Chippewa understanding of the use:

> There is no evidence to suggest that at that time the Chippewa would have had the equipment, knowledge and skills necessary to take timber from the forest, or that they would have even contemplated doing so.[100]

In other words, the Chippewa could not, according to the court, have seen the value of logging as an economic activity at the time or anticipated its value in the future.[101] And of course, the Chippewa could never have bargained for or intended to retain in the treaties anything that they did not contemplate or understand. It is curious that the *LCO IX* Court found that the Chippewa would not have "contemplated" logging for themselves, even though previous *LCO* courts had found both in fact and in law that the Chippewa had understood that they were selling their timber to the American negotiators.[102]

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98. *Ibid*.
99. *Ibid*. at 1271.
100. *Ibid*. at 1270-1271.
101. Crabb J. noted that in *LCO III* Judge Doyle refused to admit into the record evidence that in 1873 the Chippewa were producing and selling lumber, shingles, and rails and that they were employed in cutting wood and sawing logs. There was no record before the court suggesting that any logging was happening prior to 1873. Judge Doyle held that the evidence had no probative value on the question of Indian activity in 1837 and 1842. *Ibid.* at 1271.
102. *Ibid.* at 1271-1272:

> Defendants [Wisconsin et al.] are correct that both this court and the Court of Appeals for the Seventh Circuit have held that the Chippewa understood they were ceding their rights to the pine timber when they entered into the treaties. *See United States v. Bouchard, 464 F. Supp. 1316 (W.D. Wis. 1978), rev'd on other grounds*

In *Marshall III*, the Supreme Court of Canada likewise incorporates the "traditionalist" assumption about Indigenous negotiators into the logical evolution analysis, thus privileging the judicial reconstruction of 18th century Mi'kmaq culture. Instead of analyzing the possibility that a claimed activity is sourced in or evolved from a particular historical practice, the Court articulated an approach whereby a "traditional" use at the time of the treaty is matched with a particular, analogous modern practice.[103] In attempting to connect its logical evolution analysis with its analysis of what was in the contemplation of the negotiators, the Court focused heavily on the traditional practices of the Mi'kmaq, as it understood them. The central importance of traditional practices in the Court's matching approach to logical evolution seems to exclude modern-day uses that are destructive of *any* traditional practice because the destruction of a traditional practice would undermine a purpose of the treaty, which was to allow the continuance of such practices. (Note that this view of logical evolution also imports an idealized, even stereotyped, conception of the Indigenous environmental ethic, which may preclude economic development that involves environmental destruction.) The juxtaposition of modern exploitative activity with pre-colonial and pre-capitalist practices "freezes" the logical evolution of traditional uses reserved by the treaty.

In *Marshall III*, the Supreme Court of Canada interpreted the characterization of the treaty right set forth in the 1999 *Marshall II* rehearing as leaving little room for the argument that commercial logging was an evolution of 18th century Mi'kmaq commercial wood uses. The Court essentially limited the scope of the treaty right to what it understood to be within the historical contemplation of the parties:

> The word "gathering" in the September 17, 1999 majority judgment was used in connection with the types of the resources traditionally "gathered" in an [A]boriginal economy and which were thus reasonably in the contemplation of the parties to the 1760-61 treaties. While treaty rights are capable of evolution within limits, as discussed below, their subject matter (absent a new agreement) cannot be wholly transformed.[104]

> *sub nom. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt (LCO I), 700 F.2d 341, cert. denied, 464 U.S. 805, 78 L. Ed. 2d 72, 104 S. Ct. 53 (1983),* in which Judge Doyle found as fact that at the council grounds in July 1837, Commissioner Dodge "told the chiefs that the area [the government wished to purchase] was barren of game and not good for agriculture, but it 'abounded in pine timber, for which their Great Father the President of the United States wished to buy it from them, for the use of his white children. . . .'" *Id.* at 1322. *See LCO I, 700 F.2d at 363:* in 1837 and 1842 the "Chippewa then believed that they were merely granting the United States a right to the timber and minerals that were the primary impetus for Governmental interest in the land."

103. *Marshall III, supra* note 7 at paras. 50-51.
104. *Marshall II, supra* note 9 at para. 19.

The uses that "cannot be wholly transformed" are the "traditional" uses of a particular resource found in the culture and society of the signatory people. Activities outside of this historical practice are by definition outside of the treaty right:

> Logging was not a traditional Mi'kmaq activity. Rather, it was a European activity, in which the Mi'kmaq began to participate only decades after the treaties of 1760-61. If anything, the evidence suggests that logging was inimical to the Mi'kmaq's traditional way of life, interfering with fishing which, as found in *Marshall 1*, was a traditional activity.[105]

The idea that logging is "inimical" to traditional Mi'kmaq life at once assumes a static notion of Aboriginal social activity and infers from this the intention of the Indigenous negotiators. The intention attributed to these negotiators, consistent with "traditionalist" assumptions, is that they could not have comprehended reserving an activity that would be destructive of other traditional uses, given their limited understanding of the changing situation and their determination to preserve their traditional lives. On this view, the idea that some present uses could be bargained away for future opportunities is simply beyond the mindset of Aboriginal peoples, who would be interested only in activities that did not destroy the environment. As LeBel J. notes in his concurring opinion,

> there was some evidence before the New Brunswick courts that logging may even have *interfered with* the Mi'kmaq's traditional activities, such as salmon fishing, at or around the time the treaties were made …. Given this evidence, it is doubtful that the right of access to forest resources for trade would be for the purpose of engaging in logging and similar resource exploitation activities.[106]

Under these circumstances, where logging was not a traditional activity and actually interfered with other traditional activities, trade in commercial timber could not be treaty protected. LeBel J. concludes,

> Trade in logging is not the modern equivalent or a logical evolution of Mi'kmaq use of forest resources in daily life in 1760 even if those resources sometimes were traded. Commercial logging does not bear the same relation to the traditional limited use of forest products as fishing for eels today bears to fishing for eels or any other species in 1760 .... Whatever rights the defendants have to trade in forest products are far narrower than the activities which gave rise to these charges.[107]

105. *Marshall III*, *supra* note 7 at para. 34.
106. *Ibid*. at para. 122 [emphasis in original].
107. *Ibid.* at para. 32.

The logical evolution analyses in both Canadian and American decisions on commercial logging rights is somewhat anemic, depending on judicial assumptions of Indigenous culture that cannot be separated from those relied on by the courts to determine the intent of Indigenous negotiators. This may be due to the fact that it is difficult to find a logical or principled distinction between the use and trade of wood products in the 18th and 19th centuries and the modern day felling of trees once it is conceded that the Mi'kmaq and Chippewa retain the right to trade commercially. The analysis of *Marshall III* turns on the cultural practices of the Mi'kmaq as understood by the Court, not whether logging is an activity that can be sourced in historical Mi'kmaq uses of wood. Logging was simply "inimical" to the Mi'kmaq way of life. Likewise, despite the analysis of logging as an activity in *LCO IX*, there is no real attempt to disaggregate the activities in which the Chippewa did engage to determine a logical evolution of the wood use activity. Instead, the Court relies on "tradition" and ignorance of logging activities to deny treaty protection. The conservation ethic of Indigenous peoples, which arose to protect the continued existence and robustness of the resource, is interpreted by the judiciary as a cultural prohibition on those resource uses which can destroy the resource without "management" or interfere with other uses such as fishing.[108] This cultural prohibition is given effect through the failure of such destructive or interfering uses to pass the logical evolution analysis. Yet if the logical evolution doctrine were to examine the activities themselves, the resulting analysis might yield a different result. If "cutting" the tree down to use and trade the trunk is the crucial distinction, these Indigenous groups no doubt had the means to harvest timber at the times of treaty negotiation, even if such means were in fact obtained from the Europeans. Axes and hatchets were a trade item in the Aboriginal–European fur trade.[109] Even if we accept the emphasis on preserving living trees for the purpose of preserving specialized uses, there is nothing inherently at odds with Indigenous logging because commercial forest management focuses on the ecological integrity of the forestry practice, not the survival of individual trees.

The American and Canadian focus on specific traditional activities, with a limited right to development grafted onto these activities—that is, modern development automating or improving the efficiency of the treaty-time harvest method without qualitatively changing or increasing the quantity harvested—can be contrasted with the more purposive approach to treaty interpretation taken by New Zealand's Waitangi Tribunal in the *Muriwhenua*

108. *LCO IX*, *supra* note 40 at 1268.

109. White, *supra* note 86 at 128-141; Philip K. Bock, "Micmac" in Bruce G. Trigger, ed., *The Handbook of North American Indians: History of Indian-White Relations*, vol. 15 (Washington: Smithsonian Institute, 1982) at 109.

Fishing Claim.[110] In *Muriwhenua*, the Māori claimants sought to have access to in-shore and deep-water fisheries as guaranteed by the second article of the 1840 *Treaty of Waitangi*. While the Tribunal extensively reviewed Muriwhenua traditional fishing practices, it found that Muriwhenua was not limited to the technologies or in-shore fisheries that were exploited in 1840.[111] For the Tribunal, Indigenous culture and tradition is not a stultifying force but a progressive one. The historical record evidences Indigenous change in the face of European penetration:

> [M]aori tradition does not prevent Maori from developing either their personal potential, or resources, for traditionally Maori were developers. In terms of the equipment at their disposal they substantially modified the natural environment. There was considerable adaptation and development when Maori first arrived here and Maori adopted with alacrity to new development forms when Europeans first came. It is the inherent right of all people to develop their potential.[112]

The Cultural Limitation on Exploitation of Resources

Another reflection of the "traditionalist" assumption is the determination by both American and Canadian courts that the harvest is subject to an internal cultural limitation and that maintaining this limitation had been the intention of Indigenous negotiators. Resource use rights are limited to what the Supreme Court of Canada calls a "moderate livelihood" and what the American courts call the "moderate living" standard.[113] The doctrine in both

110. New Zealand, Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22)* (Wellington: Waitangi Tribunal Department of Justice, 1988).
111. *Ibid.* at 236-237.
112. *Ibid.* at 238.
113. *LCO VII*, *supra* note 40 at 1415:

> [The Chippewa] were aware that settlement by non-Indians had occurred and was occurring …. The Chippewa would be competing to some degree with the non-Indians for the kind of natural resources the Chippewa had been exploiting. This competition and accommodation would be on a scale which would not threaten in any degree the moderate living the Chippewa would continue to enjoy from the exercise of their usufructuary rights and their trading. This guarantee was permanent …. In the absence of a lawful removal order or in the absence of fresh agreement on the part of the Chippewa, the presence of non-Indian settlers would not require the Chippewa to forego in any degree that level of hunting, fishing, and gathering, and that level of trading necessary to provide them a moderate living off the land and from the waters in and abutting the ceded territory and throughout that territory …. The Chippewa at treaty time did contemplate their subsistence and did understand that the usufructuary rights they reserved would be sufficient to provide them with a moderate living [footnotes omitted].

In *Marshall I*, *supra* note 9 at para. 71 the Supreme Court of Canada states:

countries explicitly limits Indigenous resource harvesting to a low level of profit. It is based on a judicial reconstruction of historical Indigenous resource use patterns, which is arguably a stereotyped picture of Indigenous traditions against over-exploitation of natural resources.

The *Marshall III* and *LCO IX* Courts held that that this culturally circumscribed level of exploitation was the intent of the Chippewa and Mi'kmaq negotiators. In other words, the Courts held that when the Chippewa and Mi'kmaq secured commercial uses under their treaties, they nevertheless limited the level of exploitation to that of historical practices based on a subsistence culture/economy. Such a judicial reconstruction effectively precludes any commercial resource exploitation beyond the level needed to generate enough income for subsistence, which would otherwise have been obtained from traditional exploitation of the territory.

The notion of traditional use and low exploitation is apparent in *Marshall I*, where the Mi'kmaq successfully asserted their right to fish commercially under the 1760-1761 treaties:

> In this case, equally, it is not suggested that Mi'kmaq trade historically generated "wealth which would exceed a sustenance lifestyle." Nor would anything more have been contemplated by the parties in 1760.[114]

Similarly, where the Chippewa could harvest natural resources for sale, their harvest could be no more than the harvest would otherwise be for traditional subsistence purposes:

> The Chippewa relied on hunting and gathering for their subsistence. They harvested resources for their own immediate, personal use and for use as trade goods in commerce. The Chippewa traded goods for items which contributed to their subsistence. Neither in harvesting resources for commercial purposes nor in harvesting resources for their own use did the Chippewa strive for more than

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> The recorded note of February 11, 1760 was that "there might be a Truckhouse established for … furnishing them with *necessaries*" What is contemplated therefore is not a right to trade generally for economic gain, but rather a right to trade for necessaries. The treaty right is a regulated right and can be contained by regulation within its proper limits [emphasis in original].

In para. 72 of *Marshall I*, the Court states:

> The concept of "necessaries" is today equivalent to the concept of what Lambert J.A., in R. v. Van der Peet described as 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. This was the common intention in 1760. It is fair that it be given this interpretation today [footnotes omitted].

114. *Marshall I*, *supra* note 9 at para. 74.

> a moderate, satisfactory living. They were indifferent to acquiring wealth beyond their immediate needs.[115]

In short, both American and Canadian courts have ruled that the Indigenous peoples of North America were not infected with the desire to accumulate wealth. These peoples would have no need to exploit a resource, for subsistence or for trade, in a manner beyond that needed for personal use. Mi'kmaq and Chippewa cultures have been understood to have an internal cultural limitation that keeps the scope of economic and trade activity at relatively low levels.[116] The commercial exploitation of resources, presumably similar to that engaged in by Euro-American and Euro-Canadian settlers, is thus culturally incomprehensible and therefore was not part of the intention of Indigenous negotiators as treaty negotiations proceeded. The idea that Indigenous negotiators might forgo one right in exchange for another new activity or anticipate an accumulative economy is simply beyond the scope of this judicial construction.

V CONCLUSION

In the 2003 Massey Lectures, Thomas King observed that Indigenous fiction writers have not set many stories in the North American past. He suggests that this has occurred because

> Native writers discovered … that the North American past, the one that had been created in novels and histories, the one that had been heard on the radio and seen on theatre screens and on television, the one that has been part of every school curriculum for the last two hundred years, that past was [and is] unusable, for it had not only trapped [N]ative people in a time warp, it also insisted that our past was all we had.[117]

Similarly, in *Marshall III* and *LCO IX*, it is apparent that judicial attitudes about how treaty terms are given meaning or constructed through a judicial evaluation of the historical treaty context are "trapped" in a time warp. The intention of Indigenous negotiators is deemed to be limited by the judicial reconstructions of their cultural understanding and social practices at the time of the treaty, and judicial presumptions against an intention to exploit resources commercially. This continued judicial application of an assumed historical context and cultural mind-set biases treaty interpretation against Indigenous interests. Any usufructuary rights reserved under the treaty must

115. *LCO III*, *supra* note 40 at 1424.
116. Gordon Christie, "Justifying Principles of Treaty Interpretation" (2000) 26 Queen's L.J. 143 at 185.
117. Thomas King, *The Truth About Stories: A Native Narrative* (Minneapolis, MN: University of Minnesota Press, 2003) at 106.

be the same or similar to historical practices. Indigenous peoples are presumed to have the capacity to negotiate and agree to a treaty but not to protect any of their interests except for the historical status quo as understood by the courts. Despite the treaty, the "past" is all an Indigenous group has reserved in the present.

These attitudes have been crucial to the results in *Marshall III* and *LCO IX*; they also inform much of American and Canadian treaty jurisprudence. With "traditionalist" cultural assumptions in place, the intent and the understanding of the treaty terms is collapsed into a pseudo-historical inquiry of the Indigenous society at the time the treaty was signed. In some instances, where the treaty text is ambiguous or lacking strong textual support for the rights claimed, such an approach can favour the Indigenous position. However, where the Indigenous group is seeking to exploit resources in a "non-traditional" manner that may compete with the dominant society, as in the case of commercial logging, such an approach seriously undermines the Indigenous group's ability to have these rights recognized by the courts.