JAMES A. MICHAEL: Supreme Court's recognition of treaty gives Mi'kmaw fishing rights force of law

JAMES A. MICHAEL

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Re: "DFO, First Nations Rights Reconciliation fisheries negotiation tables 'are not open to members of industry,'" your Aug. 17 story about a survey commissioned by fishing industry associations as part of their lobbying effort to be included in Department of Fisheries and Oceans consultations with First Nations.

To understand this issue, it is important to understand the significance of Aboriginal and treaty rights in the context of the commercial fishery.

The Mi'kmaq in Nova Scotia have a legal right to fish and to sell that fish to earn a moderate livelihood. This is a treaty right recognized by the Supreme Court of Canada. As a treaty right, it is enshrined in the Constitution through Section 35 of the Constitution Act, 1982.

As your story referenced, the Supreme Court of Canada dealt with this issue in the Marshall decision in 1999. The Marshall case came before the court as an appeal of a conviction against Donald Marshall Jr.

Mr. Marshall had been convicted of selling eels without a licence, fishing without a licence and fishing during the close season with illegal nets in Pomquet Harbour, Antigonish County. He caught and sold eels to support himself and his wife.

The court found that the prohibitions on catching and retaining fish without a licence, on fishing during the close time, and on the unlicensed sale of fish interfered with Mr. Marshall's treaty rights as a Mi'kmaw person. This included his treaty right to fish for trading purposes. As the regulations were without justification, Mr. Marshall was acquitted on all charges.

The fishing rights recognized by the Supreme Court are found in the 1760 and 1761 Treaty of Peace and Friendship between the British and the Mi'kmaq, interpreted along with oral agreements as recorded by the British at the time.

As explained in Marshall, the right to earn a "moderate livelihood" through fishing — or hunting and gathering — includes the right for the Mi'kmaq to provide for housing,

food, clothing, and amenities for themselves and their families. This is more than subsistence. As the Supreme Court said, “Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for Aboriginals and non-Aboriginals alike.”

The federal government’s regulation of the fishery must accommodate these Mi’kmaw treaty rights. This includes a duty on the part of the Department of Fisheries and Oceans to consult with First Nations about any potential limitations on these rights.

These consultations must be robust, ongoing and deep. DFO must take into account the interests of all members of the Mi’kmaw community and any potential adverse impacts on Aboriginal and Treaty rights. They must consider what it means in practical terms for fishers to provide for and support themselves and their families through working in the fishery.

The commercial fishing industry associations say they want everyone to follow the rules set by the DFO. Those rules, however, have to include respect for Mi’kmaw treaty rights and the ability to exercise those rights without harassment or persecution. Treaty rights are not just “rules” — they have the force of law.

First Nation communities share the goal of ensuring a sustainable fishery. The legacy of overfishing in this country is not a legacy of First Nations. Any limits, however, must ensure that Mi’kmaw families can earn a moderate livelihood from the fishery.

The Mi’kmaq are not asking for handouts. The Mi’kmaq are seeking to enforce treaty rights to access the fishery and support themselves and their families. The Supreme Court found that the 1760-61 Peace and Friendship Treaty was negotiated in a context of “reconciliation and mutual advantage.” Affirming and implementing treaty rights advances the goal of reconciliation today.

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