

JAMES A. MICHAEL: Fisheries minister adrift in approach to treaty rights

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A fishing vessel from the Sipekne'katik First Nation sails out towards the fishing grounds after seven moderate livelihood licences and tags were given to some of its members following a ceremony at the Saulnierville wharf on Sept. 17, which was the 21st anniversary of the Supreme Court Marshall decision. Also outside the mouth of the harbour were dozens of commercial lobster vessels from LFA 34. Commercial fishermen see this as out-of-season commercial fishing. - Tina Comeau



JAMES A. MICHAEL

Re: your [Sept. 17 story](#), "Lobster protest: Fishermen demand DFO enforcement of out-of-season commercial and illegal fishing," on protests by non-Aboriginal fishers in response to the launch of Sipekne'katik self-regulated moderate livelihood fishery.

Your article quotes the statement issued by Fisheries Minister Bernadette Jordan in response to the protests, in which she says: "Until an agreement is reached with DFO, there cannot be a commercial fishery outside the commercial season."

She frames the issue backwards. The Mi'kmaq have a treaty right to fish. The Mi'kmaq do not have to wait for the DFO to reach an agreement with them to exercise that right. It is the minister and the DFO that must justify limitations on treaty rights before they can impose them on the Mi'kmaq.

The minister fails to accept the fact that the DFO cannot simply impose its regulations on the Mi'kmaq in the face of a treaty right. She says in her statement that, "Fishing without a licence is a violation under the Fisheries Act and anyone fishing outside the activities authorized under a licence may be subject to enforcement action."

The minister conflates her authority to regulate the fishery generally with her ability to impose restrictions on treaty fishing rights.

This is the very issue that was the subject of the Marshall case. Donald Marshall Jr. was charged with fishing out of season without a licence contrary to federal fishery regulations. The Crown sought to impose its regulations on Marshall as a Mi'kmaw person exercising his treaty rights.

The Supreme Court of Canada acquitted him of those charges. The Crown had not justified its regulations as a legitimate restriction on his treaty right. If Minister Jordan's rationale were correct — that DFO is entitled to apply its regulations to First Nations members — Marshall would not have been acquitted.

This is not to say that there can never be restrictions on the exercise of treaty rights. The Supreme Court addressed this in Marshall II, a follow-up decision in the Marshall case. The court held that limitations on treaty rights can be imposed for a pressing and substantial public purpose, after appropriate consultation with First Nations, and if they go no further than is required.

Conservation is a compelling public objective. DFO, however, must still consult with First Nations before imposing limitations on treaty rights to meet that objective. DFO must also establish that its regulations infringe treaty rights as little as is required.

By enshrining treaty rights in Canada's Constitution, they are given a special status in the law. In Marshall II, the Supreme Court recognized that this could lead to differences in conservation and management rules for the non-Aboriginal fishery and those exercising treaty rights. This is inherent in the fact that the Crown has greater authority to regulate the non-Aboriginal fishery than it has to restrict treaty rights.

The Supreme Court expressly rejected the notion that treaty rights should be denied if they are disruptive to non-Aboriginal people.

In launching its self-regulated fishery, Sipekne'katik is not proposing lawlessness. The band has developed a comprehensive management plan for a moderate livelihood fishery. The management plan includes safeguards to ensure a sustainable fishery. These include restrictions on the number of livelihood fishery traps that can be set and closed seasons. The harvesting rules prohibit catching lobsters under a set size, lobsters with eggs attached and molting (soft-shelled) lobsters.

It has been 21 years since the Marshall decision. If the minister plans to regulate the exercise of the treaty right to fish for a moderate livelihood, she is obliged to consult the Mi'kmaq first on the content and the reasons for the regulations. The management plan adopted by the band is a place to start.

James A. Michael is a lawyer practising First Nations law with Pink Larkin in Halifax. He is a member of the Sipekne'katik First Nation and became the first Mi'kmaw lawyer in Nova Scotia when called to the bar in 1993.

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