

## Aboriginal & Resource Based Economic Development

### An Overview of Recent Trends and Their Implications for the Business Lawyer\*



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#### 1. Introduction

Peace was bound up with the ability of the Mi'kmaq people to sustain themselves economically. Starvation breeds discontent.

Justice Binnie in *R. v. Marshall*<sup>1</sup>

In recent years, economic development initiatives by and for First Nations have taken many forms and have played out in many forums. Both on and off reserve, some First Nations have been striving to promote and encourage the development of business and industry in a manner that supports the goal of economic self-sufficiency, while at the same time recognizing the principles of sustainable development.

The Supreme Court of Canada's recent decision in *R. v. Marshall* has once again brought into sharp focus the balance that exists between the rights and interests of Aboriginal persons and those of non-Aboriginal persons to commercially develop natural resources. Business and industry should pay close attention to this and earlier Supreme Court pronouncements that consider aboriginal commercial use and development of resources that are, or may be, finite.

Manitoba's constitutional framework and the case law which breathes life into it suggest that a scenario similar to that played out in the East Coast fishery is unlikely, at least in the immediate future, to occur along the shores of our prairie lakes. Nevertheless, the scope and significance of the *Marshall* decision is such that anyone taking the role of legal advisor to business should give pause to consider its ramifications.

Due diligence on the part of business lawyers may now dictate that some consideration and forethought be given to the content of aboriginal and treaty rights in this province. Consultation with First Nations, while statutorily mandated in certain sectors and provinces, should become a critical centrepiece to any business development initiatives that may affect

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the rights or interests of Aboriginal communities. Ensuring that the rules of procedural fairness are adhered to by administrative bodies may present new challenges to the business lawyer, as the courts increasingly draw on administrative law principles to protect the interests of First Nations communities.

It is critical that the lawyer be alert to these challenges, and aware that the law with respect to First Nations is in a state of expansion and evolution. Of equal import, is the need for recognition of the opportunities that these recent developments may offer. Judicial acknowledgment that First Nations have particular rights and entitlements may provide additional impetus within business and industry sectors to view First Nations as prospective partners and joint venturers arriving at the negotiating table in a position of strength.

It is important to understand the context of the Marshall decision. This particular case deals with the treaty rights of a specific First Nation, and there is a significant difference between aboriginal rights and treaty rights. Not all First Nations in Canada are treaty signatories, and cases arising in British Columbia, Quebec and the northern Territories are generally based on aboriginal, as opposed to treaty, rights. Moreover, there are many different treaties in Canada that apply to many different First Nations, which may limit the applicability of a Court's analysis of any specific treaty to cases arising in a different treaty area.

This paper will not deal with the myriad of issues facing the business lawyer with respect to Aboriginal economic development. Rather, this paper will be restricted to a consideration of the Marshall decision and some of the ramifications for the business lawyer in Manitoba which stem from it alone, or as compared to other significant Supreme Court decisions. Brief consideration will also be given to some of the issues surrounding the question of consultation with First Nations. Finally a short comment will be provided with respect to some of the opportunities which may be made available to business, industry and First Nations through increased Aboriginal economic development.

### 2. The Basis of an Aboriginal/Treaty Right to the Commercial Harvesting of Natural Resources

The media reports surrounding the decision of the Supreme Court of Canada in Marshall have been numerous. Editorial pieces across the country have once again questioned the role of the Court as legislator, while others have made doomsday predictions for the Western Canadian economy. First Nations have used the media to herald the decision as the ultimate recognition of their right to a commercial fishery. In recent weeks, the controversy has spread from the waters off of Nova Scotia to the Newfoundland crab fishery and there is speculation that descendants of New Brunswick Mi'kMaqs living in the United States may now claim treaty rights to fish in Canadian waters.<sup>2</sup>

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### 1. R. v. Marshall

The following discussion will attempt to provide a clarification and summary of both the facts and the decision in the case.

Donald Marshall, the accused, was charged with three offences against federal fishery regulations: selling eels without a licence, fishing without a licence and fishing during the closed season with illegal nets. The only issue at trial was whether Mr. Marshall possessed a treaty right to catch and sell fish under a treaty with the British Crown in 1760. The Crown contended that no such treaty right existed.

The treaty in question was a Treaty of Peace and Friendship entered into by the Governor of the territory on March 10, 1760. The clause upon which the appellant grounded the treaty right reads as follows:

And I [the Indian Parties] do further engage that we will not traffic, 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.<sup>3</sup>

The majority of the Court noted that the clause as written constituted a restraint on the ability of the First Nation to trade with non-government individuals. While the trial judge had found that this clause encompassed a positive right of the First Nation to proffer the products of their hunting, trapping and fishing to trade, the Nova Scotia Court of Appeal held that the clause was merely a mechanism of ensuring that peace was maintained by preventing trade between the Mi'kmaq and the government's enemies. At the Supreme Court of Canada, the appellant's position was that in addition to encompassing the right to trade, the provision gave the First Nation 'the right to pursue traditional hunting, fishing and gathering activities in support of that trade'.<sup>4</sup>

In recognizing that such a proposition was not supported by the language of the treaty itself, Justice Binnie, for the majority of the Court, displayed a willingness to go beyond the four corners of the document to ascertain the scope of the treaty right. Noting that extrinsic evidence is available 'even in a modern commercial context'<sup>5</sup>, Justice Binnie considered the broader documentary record in an effort to infuse meaning into the language of the treaty. Significant reliance was placed on historical records evidencing the negotiations of the treaty terms with various communities of First Nations throughout Nova Scotia and New Brunswick. The minutes of one of these meetings included the following exchange:

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His excellency then demanded of them, Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this time. To which they replied that their Tribes had not directed them to propose anything further than that there might be a Truckhouse established for the furnishing them with necessaries, in Exchange for their Peltry... 6(emphasis added)

The majority considered the evidence of expert historians relating to the type of commodities, including fish, that would have been brought to the truck house to trade.<sup>7</sup> Evidence was also accepted by the majority as to the sorts of assumptions 'underlying and implicit in the treaty'.<sup>8</sup> Justice Binnie noted the longstanding willingness of courts to 'imply a contractual term on the basis of the presumed intentions of the parties where it is necessary to assure the efficacy of the contract'.<sup>9</sup>

Justice Binnie noted the requirement that the Crown act honourably in its dealings with Aboriginal people, saying that 'an interpretation of events that turns a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant is [not] consistent with the honour and integrity of the Crown'.<sup>10</sup> His Lordship also commented on the need for a flexible approach to treaty interpretation and the requirement to avoid a 'frozen in time' approach to treaty rights.<sup>11</sup>

The crux of the decision of the majority can be gleaned from the following passages:

The promise of access to 'necessaries' through trade in wildlife was the key point, and where a right has been granted, there must be more than a mere disappearance of the mechanism created to facilitate the exercise of the right to warrant the conclusion that the right itself is extinguished...the surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the Badger test...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. The concept of 'necessaries' is today equivalent to the concept of what Lambert J.A. in *R. v. Van der Peet* (1993), 80 B.C.L.R. (2d) 75 (C.A.), 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.<sup>12</sup> (Emphasis added)

Justice Binnie went on to discuss the distinction between a commercial right to fish and a

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right to trade for necessities, noting that ‘catch limits’ enabling the Mi’kmaq to produce a moderate livelihood ‘at present-day standards’ can be established and enforced by regulation without violating the treaty right.<sup>13</sup>

It is worth noting the dissenting judgment in the case which was written by the newly appointed Chief Justice of the Court, Justice McLachlin.<sup>14</sup> While agreeing that extrinsic evidence may be used and that the historical context may be considered in treaty interpretation, Justice McLachlin nevertheless found that no general right to trade was conferred by the treaty. She proposed a two stage approach to treaty interpretation: at the first stage the ‘facial meaning(s)’ of the treaty is determined from its wording, at the second stage these meanings are considered against the treaty’s historical and cultural backdrop. Using this analysis, Justice McLachlin found that neither the words themselves, nor the historical context which gave rise to them supported the interpretation of the majority of the Court.

The essence of her decision is found in the following paragraph:

To achieve the mutually desired objective of peace, both parties agreed to make certain concessions. The Mi’kmaq agreed to forego their trading autonomy and the general trading rights they possessed as British subjects, and to abide by the treaty trade regime. The British, in exchange, undertook to provide the Mi’kmaq with stable trading outlets where European goods were provided at favourable terms while the exclusive trade regime existed. This is the core of what the parties intended. The wording of the trade clause, taken in its linguistic, cultural and historical context, permits no other conclusion. Both the Mi’kmaq and the British understood that the ‘right to bring’ goods to trade was a limited right contingent on the existence of a system of exclusive trade and truckhouses. On the historical record, neither the Mi’kmaq nor the British intended or understood the treaty trade clause as creating a general right to trade.<sup>15</sup>

As already indicated, this decision has been the subject of intense commentary in, and by, the media. While nobody can predict with certainty what the decision’s effects, legal or otherwise will be, this wide body of commentary has on occasion suggested that certain unsupported conclusions be drawn from the case. Accordingly, it is important to be clear as to what the decision does not say. The judgment, as articulated by the majority of the Court, does not support the proposition that the recognized rights are to be unregulated. Nor does the decision support an interpretation that suggests that the geographic boundaries within which the right may be exercised are unlimited. Finally, the decision does not address the issue of allocation of priorities between the users of the fishery or other natural resource activities.<sup>16</sup>

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### 2. Pre-Marshall Decisions Relating to Aboriginal and Treaty Rights

On the heels of the 1990 Supreme Court decision in Sparrow<sup>17</sup>, one legal commentator wrote as follows:

[T]he court's refusal in Sparrow to address the commercial aspects of an Indian food fishery is significant...The Court not only declined the invitation but...its reasoning in Sparrow and in the important recent treaty rights case of R. v. Horseman makes unlikely the future recognition of a significant commercial component to the Aboriginal food fishery.<sup>18</sup>

The legal commentator in question was none other than Supreme Court Justice Binnie, author of the majority opinion in Marshall, who it appears has now had a hand in reversing the tide he forecasted almost a decade ago.

Justice Binnie's nine year old commentary aside, there is no question that Sparrow was in many respects instrumental in forging the course taken by the Supreme Court over the last ten years. With the Marshall decision in mind, it is useful to revisit some of the Court's most significant decisions relating to aboriginal and treaty rights.<sup>19</sup>

#### 1. Sparrow

This was a case dealing with aboriginal rights in which the appellant argued that he was exercising an existing aboriginal right to fish for subsistence and ceremonial purposes. In this decision, the Supreme Court strove to give meaning for the first time to the aboriginal rights guaranteed in s.35(1) of the Constitution Act, 1982.<sup>20</sup> Of particular import for future decisions was the articulation (or reiteration) of certain principles to be applied in construing aboriginal rights. The fiduciary duty of the federal Crown to the Indians with respect to land, identified in *Guerin v. The Queen*<sup>21</sup>, was adopted by the Court as a general guiding principle for s.35(1).<sup>22</sup> The Court also noted the requirement that the decision maker be sensitive to the Aboriginal perspective on the meaning of the rights at stake.<sup>23</sup>

There was no need for the Court to engage in a detailed analysis of the content of the aboriginal right in issue in Sparrow, since there was little debate over whether an 'aboriginal right to fish for food and ceremonial purposes' had existed at some point in time. Instead, the Court concentrated on the questions of (1) extinguishment (in what circumstances will government decision-making result in extinguishment of aboriginal rights), (2) infringement (what kinds of government decision-making results in infringement of aboriginal rights) and (3) justification (when can a government decision-maker justify an infringement of aboriginal rights).

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The Court noted that the nature of the constitutional protection afforded by s.35(1) 'demands that there be a link between the question of justification and the allocation of priorities in the fishery'.<sup>24</sup> According to the Court, any allocation of fishing priorities after valid and justified conservation measures have been taken must give top priority to Aboriginal food fishing with sport fishing and commercial fishing bearing the 'brunt of conservation measures'.<sup>25</sup>

### 2. Van der Peet

Like Sparrow, the decision in *R. v. Van der Peet*, addressed the appellant's claim to an aboriginal right to fish. In this case, the right claimed was to fish on a commercial basis. This 1996 decision set out the test for determining the existence of an aboriginal right. Chief Justice Lamer articulated the test as follows:

In order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.<sup>26</sup>

The Court enumerated the factors to be considered by a court when determining whether an aboriginal right has been established. These included the following:

- courts must take into account the aboriginal perspective;
- courts must consider whether the practice, custom or tradition was of central significance to the aboriginal society in question;
- courts must consider whether the practices, customs or traditions have continuity with those practices, customs and traditions that existed prior to contact; and
- courts must consider whether the practices, customs and traditions arose solely as a response to European influences.

In this case, the majority of the Court found that no aboriginal right to a commercial fishery existed for the Sto:lo First Nation. However, in the case of *R. v. Gladstone*, the Supreme Court accepted evidence to support an aboriginal right of another B.C. First Nation to fish commercially for herring spawn on kelp.<sup>27</sup>

### 3. Delgamuukw 28

Like the two previously described cases, this 1996 case involved aboriginal rights claims and did not involve any claims to treaty rights. In the decision, the nature of aboriginal title was first described by the Supreme Court. Chief Justice Lamer concluded that the content of

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aboriginal title, where it still exists, can be summarized by two propositions. He stated:

First, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.<sup>29</sup>

Other important principles which stem from the decision in *Delgamuukw* include:

- The major distinctions between fee simple and aboriginal title are that land under aboriginal title cannot be sold except to the Crown; it is held communally; and its legal sources are a combination of common law and aboriginal law.
- Where it exists, aboriginal title encompasses mineral rights and the lands are subject to exploitation so long as the uses to which they are put do not prevent aboriginal use in the future.
- To establish aboriginal title, the group in question must occupy the land and must be able to demonstrate the existence of their aboriginal title at the time of assertion of sovereignty.

### 3. Manitoba Context:

#### 1. The NRTA and the Horseman decision

As indicated above, the Marshall decision addressed the Mi'kmaq treaty right to a commercial fishery. The following discussion will deal primarily with treaty rights in Manitoba, which means that the context is different from most of the British Columbia cases which deal with aboriginal rights. The context for a consideration of treaty rights in Manitoba is also significantly different than that in the Atlantic provinces.

First Nations in Manitoba derive their Treaty rights from the eleven 'Numbered Treaties' concluded between the federal government and various prairie First Nations between 1871 and 1923.<sup>30</sup> The Numbered Treaties use very similar language when addressing the treaty right to resource use. This excerpt is from Treaty 5, which applies to northern Manitoba:

Her Majesty further agrees with her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered and hereinbefore described, subject to such regulations as may from time to time be made by her Government of Her Dominion of Canada, and saving and excepting such tracts as may from



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time to time be required or taken up for settlement, mining, lumbering or other purposes, by her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefore by the said Government.<sup>31</sup>

After the treaties were signed, full 'administration and control' of Crown lands was transferred from Canada to Manitoba, Saskatchewan and Alberta, by constitutional enactments known as the Natural Resources Transfer Agreements. Manitoba's NRTA, which was signed in 1930, is virtually identical to the other Agreements. Paragraph 13 says:

In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them of hunting, trapping and fishing game for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.<sup>32</sup>

This language was considered by the Supreme Court in the 1990 case of *R. v. Horseman* in which the Aboriginal appellant argued that he was within the rights granted to him under Treaty 8 when he sold the hide of a bear which he had killed while unlicensed.<sup>33</sup> The appellant argued that he was not subject to the statutory provisions which regulated trafficking in wildlife. In a majority of four to three, the Court held that while the original Treaty right included hunting for the purposes of commerce, that right was abrogated by the NRTA which limited the right to hunting for food only. The majority of the court concluded that:

The courts below correctly found that the sale of the bear hide constituted a hunting activity that had ceased to be that of hunting 'for food' but rather was an act of commerce. As a result it was no longer a right protected by Treaty No. 8, as amended by the 1930 Transfer Agreement.<sup>34</sup>

The majority decision in *Horseman* has more recently been upheld in *R. v. Badger* where the Court stated:

This Court most recently considered the effect the NRTA had upon treaty rights in *Horseman*. There it was held that para. 12 of the NRTA evidenced a clear intention to extinguish the treaty protection of the right to hunt commercially...I might add that *Horseman* is a recent decision which should be accepted as resolving the issues which it considered.<sup>35</sup>

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As the NRTA clause applies equally to hunting, trapping and fishing, it would appear that any aboriginal or treaty right to fish, hunt or trap for commercial purposes has been completely extinguished in Manitoba. It would further appear that the judicial statement in *Badger* is the final word on this matter.

Nevertheless, it is plausible that in light of the Court's 'necessaries' analysis in *Marshall*, the interpretation of the term 'for food' found in s.13 of the NRTA may once again be open for challenge. The dissenting judgment in *Horseman* is strikingly similar to Justice Binnie's analysis in *Marshall*. Justice Wilson, speaking for three of the seven justices in *Horseman*, wrote as follows:

The reason or purpose underlying paragraph 12 [of the NRTA] was to secure to the Indians a supply of game and fish for their support and subsistence and clearly to permit hunting, trapping and fishing for food...In my view the distinction that Dickson J. drew in *Moosehunter* between hunting for 'support and subsistence', and hunting for 'sport or commercially' is far more consistent with the spirit of Treaty No.8 and with the proposition that one should not assume that the legislature intended to abrogate or derogate from Treaty 8 hunting rights than the respondent's submission that in using the term 'for food' the legislature intended to restrict Treaty 8 hunting rights to hunting for direct consumption of the product of the hunt.<sup>36</sup>

Following further consideration of Treaty 8, she continued:

But this cannot mean that in 1990 they are to be precluded from selling their meat and fish to buy other items necessary for their sustenance and the sustenance of their children. Provided the purpose of their hunting is either to consume the meat or exchange or sell it in order to support themselves and their families, I fail to see why this is precluded by any common sense interpretation of the words 'for food'. It will, of course, be a question of fact in each case whether a sale is made for purposes of sustenance or for purely commercial profit.<sup>37</sup> (emphasis added)

### 2. 'Land Claims' In Manitoba

In the Numbered Treaties referred to above, First Nations communities were promised certain allotments of 'Treaty Land'. Several First Nations communities in Manitoba have still not received their full allotments. Accordingly negotiations have taken place between Manitoba, Canada and particular First Nations to settle outstanding issues relating to Treaty Land Entitlement ('TLE'). A TLE Framework Agreement settling the amount of land owing to seventeen First Nations and the process for identifying it, was signed in the spring of 1997.

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The Agreement provides for the selection of Crown lands and, in a few cases, money to purchase land where there is insufficient unoccupied Crown Lands in the vicinity of a particular community. Qualifying land which is selected is intended to be designated as 'Reserve' land within the meaning of the Indian Act. The Framework Agreement includes guidelines for the selection of lands, including lands subject to third party interests (e.g. mineral rights). While an in-depth consideration of this Agreement is beyond the scope of this paper, familiarity with the TLE Framework Agreement is encouraged for any lawyer advising clients who are either contemplating, or who are already in the process of conducting, resource related business on Crown lands.

By virtue of the existence of treaties in Manitoba, it is currently through the TLE selection process that First Nations claims to land will unfold. However, earlier this year, a number of First Nations in Manitoba, Saskatchewan, and Alberta indicated their intention to challenge the legitimacy of the treaty-making process, and of the Natural Resources Transfer Agreements which followed them, in all three provinces.

It appears that the challenge would be premised on the view that the Numbered Treaties were not land cession agreements. This view posits that, notwithstanding the written version of the treaties, the actual understanding of the Aboriginal signatories was that the land was to be shared with the European settlers and was not in fact to be 'ceded' at all.<sup>38</sup>

The position being put forward is that all subsequent government actions which are inconsistent with this reality constitute an infringement of aboriginal or treaty rights. This would include the passage of the NRTA and would thereby extend to all judicial decisions which have been made on the presumption of NRTA legitimacy.

It is noteworthy that in *Horseman*, Justice Cory, speaking for the majority of the Court alludes to the question of the NRTA's legitimacy. In addressing the abrogation of the commercial right to hunt, he says:

[A]lthough it might well be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 Agreement without consultation with and concurrence of the Native peoples affected, nonetheless the power of the Federal Government to unilaterally make such a modification is unquestioned and has not been challenged in this case.<sup>39</sup>

### 3. General Ramifications

In light of Manitoba's constitutional framework as judicially interpreted by the Supreme Court

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in Horseman and Badger, it would appear at first blush that there is no immediate issue in this province with respect to Aboriginal claims to a treaty right to fish on a commercial basis. The same can be said for both hunting and trapping in the province. But as has been repeatedly noted in news broadcasts across the country, some First Nations take the position that the applicability of the Marshall decision extends to the harvesting of other natural resources on some commercial scale.

Accordingly, persons involved in any manner in any natural resource industry in this province should not sit back secure in the notion that this particular case will have little effect. The following is a summary of some of the issues which have either been alluded to in the foregoing discussion or which also arise by virtue of the matters discussed therein.

1. Beyond merely acknowledging the existence of the Mi'kmaq treaty right to a 'limited' commercial fishery, the Marshall decision reaffirms a commitment by the Court, articulated previously in cases such as Sparrow, Van der Peet, Badger and Delgamuukw, to look to the aboriginal perspective when interpreting historically based claims by a First Nation against the Crown. This commitment appears to include going beyond the written record to ascertain the perspectives and intentions of the parties to the Agreement.

As was discussed earlier, this principle may ultimately be used as a basis of Manitoba First Nations claims relating to the Numbered Treaties. Legal Counsel for the Manitoba Metis Federation has recently suggested that it will rely on Marshall to argue that the court should consider the underlying negotiations between Louis Riel and the federal government which gave rise to the rights of the Metis, embodied in the Manitoba Act of 1870, upon which Metis land claims in Manitoba are based.<sup>40</sup>

It is possible that in interpreting agreements entered into in the course of business transactions between Aboriginal and non-Aboriginal parties, courts may move towards an application of the 'aboriginal perspective' principle. While one cannot envision the precise parameters within which such an interpretation would take place, it is nonetheless useful for business lawyers to be able to advise their clients of the existence of this trend prior to entering into negotiations. The Marshall decision should serve as an alert to the danger, long familiar to the commercial lawyer, of relying solely on a written agreement without regard to principles of unconscionability, prior negotiations and intention of the parties.

2. Should a judicial reconsideration of the prairie treaties be effected with a subsequent determination that the Numbered Treaties did not fully extinguish aboriginal title, then a situation of 'comprehensive I

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