Why Indigenous treaty rights on fishing, trade require federal protection | Angelique EagleWoman

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Case(s):

U.S. v. Winans 198 U.S. 371 (1905)
Sohappy v. Smith 302 F.Supp. 899 (D. Or. 1969)
United States v. Washington 384 F.Supp. 312 (W.D. Wash. 1974)
Washington v. Washington State Commercial Passenger Fishing Vessel Association 443 U.S. 658 (1979)
R. v. Marshall, [1999] 3 S.C.R. 456

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As both Canada and the United States share a similar history in formation as the offspring of father England, they also share the obligation to uphold treaties with Indigenous nations. In the United States, the treaty rights of Indigenous peoples have been upheld in early U.S. Supreme Court cases.

The U.S. Supreme Court since the decision in *U.S. v. Winans* 198 U.S. 371 (1905) has held that treaties are a grant of rights from Indigenous peoples and any rights not granted, such as self-government, are reserved to tribal nations. "In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them — a reservation of those not granted." 198 U.S. at 381.

The case concerned fishing rights of the Yakama Tribal Nation reserved in the Treaty of 1859 where the state had licensed a private fishing wheel and private owners had threatened the Yakama fishers with violence for fishing at their usual places. As a result of the decision, the Yakama fishers' rights to travel over private lands to exercise their treaty fishing rights were preserved.

But over the years as in Canada, the enforcement of treaty rights in the United States at the local level was often neglected or resisted to the detriment of the Indigenous treaty partner.

What resulted in the United States were the Pacific Northwest "fish-ins," protests occurring from 1964 through 1972. In a series of federal court decisions interpreting nearly identical

treaty language in Oregon and Washington, the rights to fish for salmon and secure up to 50 per cent of the harvest was upheld. In *Sohappy v. Smith* 302 F.Supp. 899 (D. Or. 1969), Judge Robert C. Belloni stated the following in his decision upholding the treaty right to fish in Oregon. “It hardly needs restatement that Indian treaties, like international treaties, entered into by the United States are part of the supreme law of the land which the states and their officials are bound to observe.” 302 F.Supp. at 905.

In Washington state, Judge George Boldt handed down his federal court decision in *United States v. Washington* 384 F.Supp. 312 (W.D. Wash. 1974) where he upheld up to half of the fishing resource to the Indigenous treaty partners. Violence continued and the situation was likened to the efforts to resist desegregation in the South in the United States with open defiance of the federal court orders.

The U.S. Supreme Court took up the issue one final time in *Washington v. Washington State Commercial Passenger Fishing Vessel Association* 443 U.S. 658 (1979) as the state of Washington refused to comply with the federal court’s orders to promulgate regulations protecting the tribal fishing rights and allocation. In applying the Indian canons of construction for treaty language, the court stated the treaty must be construed as the Indians understood it to provide balance to the English legal written version and history. 443 U.S. at 675-676.

The court’s interpretation of the treaty limited the harvest to a maximum of 50 per cent and “the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood — that is to say, a moderate living.” 443 U.S. at 686.

If history is repeating itself in Canada, then the violence that has occurred in Nova Scotia as Mi’kmaq fishers assert their treaty rights to fish for lobsters and sell them requires federal intervention and the application of the rule of law.

In *R. v. Marshall* [1999] 3 S.C.R. 456, the Supreme Court of Canada interpreted the 1760-61 treaties entered into between the British and the Mik’maq peoples as securing the rights to fish, including for eels and sell them which required enforcement for the honour of the Crown. The court imposed the following moderate livelihood limitation: “A moderate livelihood includes such basics as ‘food, clothing and housing, supplemented by a few

amenities', but not the accumulation of wealth (*Gladstone*, supra, at para. 165). It addresses day-to-day needs. This was the common intention in 1760. It is fair that it be given this interpretation today" (para. 59). The interplay of common standards in the decisions of the U.S. and Canada should result in similar practical outcomes.

Since 1977, the Columbia River Inter-Tribal Fish Commission (CRITFC) composed of four of the tribal nations who brought the federal court actions operates under a constitution to regulate treaty fishers, protect the fishing habitat and resolve on an annual basis the treaty fishing allocation. State regulations for conservation are only applicable if there is a lack of enforcement by tribal regulation. Thus, there exists many such tribal regulatory bodies in the United States, such as the Great Lakes Indian Fish & Wildlife Commission.

This year, the Sipekne'katik First Nation, the second largest Mi'kmaq band in Nova Scotia, has issued 11 licences to treaty lobster fishers and is regulating the fishery in the waters adjacent to their traditional lands. First Nations are experienced and capable in regulating natural resources.

Further, treaty rights need not suffer under limitations imposed by provincial regulations. See *Marshall* para. 65. The resistance by those uneducated or under-educated on treaty rights harkens back to the negative reactions in the 1960s and 1970s in the Pacific Northwest. The rule of law requires federal enforcement of Indigenous treaty rights to uphold the honour of the Crown.

It is time for the Canadian government to acknowledge that as the beneficiary of the treaties, receiving land, resources and the ability to establish a government, Canada has the responsibility to also live up to its end of the treaty promises to Indigenous peoples and First Nations. The treaty rights to hunt, fish and harvest resources that have sustained Indigenous peoples since time immemorial are sacred obligations requiring federal protection in Canada.

Angelique EagleWoman, (Wambdi A. Was'teWinyan), is a citizen of the Sisseton-Wahpeton Dakota Oyate and the U.S. She has served as a pro tempore tribal judge, general counsel for her tribe, the first Indigenous law dean in Canada and a distinguished law professor. She currently is the co-director of the Native American Law & Sovereignty Institute at Mitchell Hamline School of Law *in St. Paul, Minn. Follow her at* @ProfEagleWoman.

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