Commentary

Emancipation as Oppression: The Marshall Decision and Self-Government

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The Decision

It was August 1993, and for a second time the name Donald Marshall Jr. would be associated with a court decision in Canada. History was set to repeat itself. Once a symbol of justice miscarried, Donald Marshall Jr. was setting in motion the most important Aboriginal treaty rights case in Eastern Canada, for on that day in August he was arrested for catching 210 kilograms of eels in Pomquet Harbour and selling them for $787.10. Charged with fishing without a license during a closed season, he argued that as a Mi'kmaq he was exercising his treaty rights under the eighteenth-century Peace and Friendship treaties. The case was finally heard by the Supreme Court of Canada, and the decision of that court was released on 17 September 1999, with a further clarification on 17 November of that year. Citing primarily the treaties of 1760-61, the court ruled that Mi'kmaq and Maliseet peoples had the right to hunt, fish, and gather, and to sell their products to make a "moderate livelihood." Although the Mi'kmaq and Maliseet people would not now own all the resources, they could access them subject only to limitations justified by conservation needs or other pressing public objectives (Coates 2000, 3-7; INAC 2001; *R. v. Marshall* #1 1999, § 7)

The Supreme Court decision was hailed as a historic breakthrough by Aboriginal peoples. The right to provide a reasonable living for oneself and one's family by directly accessing resources seemed to many to be a significant step in reversing centuries of dispossession and impoverishment. The decision had come shortly after the New Brunswick case of Thomas Peter Paul, who was tried in 1997 for harvesting wood for commercial purposes. The first decision in favour of Thomas Peter Paul was upheld a year later at the Court of Queen's Bench, only in the end to be overturned in 1999 by the New Brunswick Court of Appeal (*R. v. Thomas Peter Paul* 1996, 1997, 1998). The result, though, despite the eventual defeat, was the expectation that a treaty right to commercial resource gathering existed and would soon be a reality. Both cases prompted Mi'kmaq and Maliseet fishers to purchase the necessary gear and begin to make a living for themselves. Ken Coates wrote in *The Marshall Decision and Native Rights* of the new optimism

that "provincial governments appear to be genuinely committed to new resource-sharing arrangements that have real potential to add to the economic sustainability of First Nations communities" (2000, 164). Although he tempered this judgment in his conclusion by drawing attention to the legacy of "bitter words and nasty actions," especially around Burnt Church, where the worst violence against Aboriginal fishers occurred, Coates nonetheless saw evidence in the bureaucratization of the process of negotiating agreements with reserves that progress was being made (205-206).

Now that ten years have passed, the effects of the Marshall decision can be seen. By exploring the aftermath of the Marshall decision, this essay inquires into the effects that the subsequent agreements between Fisheries and Oceans Canada and the various reserve communities have had both on the attempts to preserve traditional forms of life and on the ongoing governance of reserves. Specifically, I will argue that the fishing agreements have created economic opportunities and jobs at the cost of further eroding traditional political and economic practices, by replacing the direct access to resources provided for by Marshall (and consistent with traditional economic practices) with a system of limited and regulated access. Under these agreements, the management of access will rest with the chief and council. The federal policy of self-government over the past three decades has been to increase the power of the chief and council by devolving areas of authority. The Marshall agreements are structured in terms consistent with this now-established policy of self-government. A number of critics have expressed concern that the political structure of chief and council, which exist under the *Indian Act*, are incommensurate with tradition. Accordingly, this essay will interrogate self-government as a form of governance. While I focus on the Mi'kmaq and Maliseet peoples, the issues illuminated by the Marshall decision and its aftermath are played out in various ways across Canada.

Self-government has a distinct meaning in the context of the governing of Aboriginal communities. It refers to the (usually piecemeal) transference of power from the Crown, represented by the minister of Indian Affairs, to the chief and council, the governing entity established by the *Indian Act*. The powers of chief and council are set out by the various agreements reached between individual reserves and the minister, and they are situated in the overall legislative control of the *Indian Act*. This mode of governing reserve communities and the process of incremental increase in the power of chiefs and councils are supported by the federal government, the chiefs and councillors, and many academics. There are, however, dissenting voices. A few, like Thomas Flanagan, question the possibility of Aboriginal communities having any meaningful control over themselves. Others, like Taiaiake Alfred, strongly support the principle of self-determination

in some form for Aboriginal communities, yet they are critical of the current self-government structure as being underfunded and a foreign or non-Aboriginal form of governance, as well as not going far enough in the devolution of power and not recognizing Aboriginal sovereignty. This essay is a comment from this latter perspective and seeks to provide a critical analysis of the current governing structure of reserves from the standpoint of unqualified support for the right of Aboriginal communities to govern themselves.

The Aftermath

The Marshall decision was greeted with joy by Aboriginal peoples in the Maritimes, with anger by non-Aboriginal fishers, and with concern by the federal government. The widely publicized anger at Aboriginal persons exercising their treaty right to fish eventually focussed on the Burnt Church reserve in New Brunswick, in large part because the community decided not to negotiate a limitation of the newly won right with Fisheries and Oceans Canada. Most reserves had quickly signed agreements that replaced their rights under the Marshall decision. In these agreements, communities gave up the right to access resources to make a "moderate livelihood" and agreed to limit fishing in return for licenses, fishing boats and gear, training, infrastructure, and so on (Fisheries and Oceans 2000a). Aboriginals were to be limited to a few percent of the total catch of lobster, crab, scallops, tuna, and other lucrative species. This satisfied non-Aboriginal fishers as the catch allotments would come from bought-back licenses, and the agreements ensured that Fisheries and Oceans maintained control over quotas and fishing seasons.

Agreements varied from reserve to reserve depending on the size of the community and its fishing tradition. Red Bank is an example. This Mi'kmaq reserve is situated near the mouth of the Miramichi River. Its population is 530, with about 390 living on-reserve. It signed a three-year agreement with Fisheries and Oceans on 1 June 2001, the main points of which were as follows:

Year 1: 4 licenses, one each for snow crab, rock crab, smelt, and eel; $1,000,000 for a snow crab vessel and gear; $120,000 for training; $50,000 to develop a business plan; $150,000 for shrimp gear; $260,000 to construct a fisheries complex.

Year 2: 4 licenses, one each for snow crab, gulf shrimp, lobster, and rock crab; $225,000 for a lobster boat and gear; $75,000 for training; $200,000 for a science training facility.

Year 3: 2 licenses, one each for lobster and rock crab; $225,000 for a lobster boat and gear; $75,000 for training; $200,000 (if needed) to complete the fisheries and science training facilities (Fisheries and Oceans 2001).

Communities agreed to these terms because they brought much-needed jobs and income to communities that have high unemployment, poverty, poor housing, and chronic social problems.

The position taken by Fisheries and Oceans sheds light on the real consequences of these agreements. In the days soon after the Marshall decision, Aboriginal fishers took to the water to catch lobster and were quickly reigned in by Fisheries and Oceans officers who argued that conservation of total stock had to be given priority. Fisheries and Oceans also used the often aggressive response of some non-Aboriginal fishers as a further argument to regulate the fishery as a means of keeping order (Coates 2000, chap. 6). As the number of Aboriginal traps in the first few years following the decision represented only 1%-2% of the total, the conservation of stocks was not a pressing concern nor could the Aboriginal fishers have had a significant economic impact on the Atlantic fishery as a whole. By 2000, after much fanfare, their catch was still only 4% of the total (Barsh 2002, 9). Rather, Fisheries and Oceans was continuing a long-standing federal government policy of challenging Aboriginal rights, limiting them, and, if possible, negotiating their extinguishment. The 1987 *Comprehensive Land Claims Policy*, released by Indian and Northern Affairs Canada, states that "the purpose of the agreements is to provide certainty and clarity to ownership . . . the claimant group will receive defined rights, compensation and other defined benefits in exchange for relinquishing rights" (cited in Issac 1999, 125-26; see also Coates 2000, 169). The aftermath of the Marshall case fits this model. Court cases regarding treaties or rights that Aboriginal peoples win are always appealed by federal and provincial governments. Where rights are recognized by the courts those who act on them are often still prosecuted by governments (McCullum 2004). Government press releases reveal the contextualizing understanding of Aboriginal-Canadian state relations that motivated government response to Marshall. First, given the overall decline in the East Coast fishery, Fisheries and Oceans did not want the entry of Aboriginals into the Atlantic fishery to affect any existing commercial fishers negatively. Reserves would only be given licenses that were voluntarily retired (bought out). Each reserve was to have a specific (small) number of boats/licences with salaried crews. They would catch and market in the ways and times prescribed by Fisheries and Oceans (2004). Second, the government envisioned Aboriginal access to fish stocks to be a source of long-term employment to 400-500 Aboriginal persons, in addition to monies flowing into reserves through various projects. Fisheries and Oceans was insistent that Aboriginals access the resource in the same way as non-Aboriginal fishers. For example, in 2000 the Shubenacadie, band which had not yet signed an agreement, sought an injunction restraining

Fisheries and Oceans from seizing their lobster boats and traps, basing their argument on the Marshall decision and the newly won right to fish, a right Fisheries and Oceans would not recognize (Issac 2001, 69-70).

Traditional Forms of Life

Federal government policy has been to trade money for rights where possible and, barring that, to manage or regulate Aboriginal and treaty rights to resources so that their expression is similar to that of non-Aboriginals. In other words, Aboriginal rights must be exercised in ways that are consistent with modern economic and political life; they are not to be exercised traditionally or Aboriginally. State policy is meant to make Aboriginal persons equal Canadians. This was the goal of the 1969 White Paper (Indian Affairs and Northern Development 1969) and it is the goal of the Reform/Alliance/Conservative party and its advisors, most famously Thomas Flanagan (Flanagan 2000, 110-12). Aboriginal persons can even be "Citizens Plus," to quote from Alan Cairns's influential book (2000). That is, they can be equal Canadians with a few extras to compensate for historic injustices: free post-secondary tuition; tax-free status on reserves; a few boats and licenses given by the government; money to end land claims; and so on. What they cannot be is Aboriginal in economic or political culture. They can be Mi'kmaq or Maliseet (as part of Canadian multiculturalism) in dress, food, spiritual ceremonies, and even language, but not so in political organization or economic practice (Cairns 2000, 182-88).

Part of the self-image of Canadians is that Canada was formed as a nation to retain a distinctive, and non-American, identity. What is forgotten is that just as important a reason in building the railroad, founding the Royal Canadian Mounted Police, creating a national and capitalist economy, and "settling" the North-West Territories was the dispossession of Aboriginal nations and the replacing of traditional forms of life with modern economic and political institutions. An important element of this process of exterminating Aboriginal traditional life has been the practice of "economicide"—the extermination of an economic culture. Traditional economies all over the world are primarily characterized by direct access to resources. In contrast to modern economies where everything is owned, regulated, and fenced off, traditional peoples do not limit each other's right to nature. No one can prevent others from fishing, hunting, and gathering (Leacock 1954, 2). Of course, this is something of an exaggeration—the issue is one of relative freedom of access; but the point is clear. Political autonomy, consensus democracy, and the absence of institutions of repression such as police and jails—these characteristics of traditional societies all stem from an independence of economic activity. The

river is there for all to use. There are no private fishing lodges or salmon pools, no licenses or taxes. It is this openness of access that the Canadian state has increasingly foreclosed since Confederation, a policy continued by Fisheries and Oceans in its negotiations in the wake of Marshall.

Before examining how the Marshall agreements have contributed to undermining Aboriginality further, let us look more closely at what is meant by the concept. Traditional Aboriginal life has been extensively examined. Academic studies by anthropologists, the traditions and stories of communities themselves, living remnants of traditions, the culture of Aboriginal peoples who still live traditionally, and documents such as the Iroquois *Great Law of Peace*, which spell out values and culture in great detail, all reveal to us what pre-contact life was like. It is much more difficult to determine what living well means to Aboriginal peoples today. Even traditionalists such as Taiaiake Alfred do not yearn for life as it was in 1450. Instead, many have as a goal a balance between traditional and modern, with the essence, or central core of traditional culture, (re)presented in ways that are more commensurate with modern practices (Alfred 1999, 77-78).

Bill Wicken has written sensitively of the negotiation between tradition and modernity in *Mi'kmaq Treaties on Trial* (2002, chap. 1). Here he shows how the Mi'kmaq, even up to Donald Marshall, have balanced and interwoven technologies, social relations, and economic practices that move seamlessly between cultures and epochs. John Borrows has used a similar sensibility to criticize the failure of Canadian courts to see Aboriginal traditions as living and evolving in relationship with modernity (Borrows 2002, chap. 3). The struggle is to find "functional equivalents" of traditional practices that will produce the same (or nearly) spiritual, social, and intellectual understandings and relationships. For example, traditionally if one person hunted or fished successfully, the whole group benefitted as the food was shared. This sharing created close bonds between persons and decreased antagonisms. If this practice cannot be retained completely, equivalences such as co-operative enterprises can be established where either the produce or the income is distributed (Bedford 2001, 100). Alfred, who has written more extensively on this than anyone else, has argued, for example, that a middle ground composed of traditional and modern forms of governance is possible: "Mediating between these extremes, one could argue that most communities would simply be better served by governments founded on those principles drawn from their own cultures that are relevant to the contemporary reality. In a practical sense, this is what is meant by a return to traditional government" (Alfred 1999, 29).

As mentioned above, traditional economies were based on free, unmediated access to natural resources, on sharing of food, tools, and other resources, and on taboos on excessive accumulation through such periodic events as giveaways.

Rough equality of goods and the autonomy of each to provide for themselves without hierarchies of ownership had significant impact on political relationships. The absence of coercion, exclusion from access, and significant economic disparities meant that political life was similarly lacking in hierarchy and relations of domination and obedience. Anthropologist Marvin Harris has enumerated some of the many terms we have to signify obedience to a power that stands above us (1977, 102). He notes that traditional societies have no such words and no such relationships. The first Europeans to arrive on Turtle Island, for example, were confounded by the absence of figures of authority who could command obedience (Leacock 1975, 608-609). *The Great Law of Peace* discusses the role of chiefs but in terms unlike those of modern politics. The chief was to act as the clan determined. Independent action, or "strong leadership," was punishable by death (Wampum, 59). No one could be forced to fight a war; no mechanisms existed to enforce labour or extract surplus value. As a consequence, the politics of consensus was practised. Communities typically attempted to persuade and compromise in building as close to unanimity as could be achieved.

Self-Government

The Marshall decision agreements signed with various reserves were negotiated with chiefs and band councils established by the federal *Indian Act.* First passed in 1876, and remaining in large measure the same since then, the *Indian Act* is the legislative tool by which the federal minister responsible for Indians governs them and their communities. The act gives extensive discretionary power to the minister and his or her representatives (*Indian Act* 1985, ss. 4 (2) 18, 20, 28, 118). Beginning in the 1970s, and gaining momentum in the decades that followed, successive governments stood back from these powers and began the process of implementing self-government. Centuries of oppression and paternalism had led Aboriginal communities to a desire for autonomy and the right to govern themselves. They resented the interference in their lives, the lack of respect they received, and being treated as if they were children. More importantly, they identified their poor living conditions, poverty and unemployment, prejudice, the undermining of families and cultures through residential schools, and the destruction of tradition with the imposed forms of governance as found in the *Indian Act.*

The response was to call for self-management as the central element of the solution to the myriad problems reserve communities faced. The Assembly of First Nations (AFN), which is composed of all the chiefs of the various reserves, for example, called for self-government as a Constitutional right. Since then, important gains have been made, even if much more progress is needed to achieve the

AFN's vision of autonomous reserves (Belanger and Newhouse 2004, 188-89). One of the first experiments in self-government occurred on the Sechelt Reserve in British Columbia in the 1980s (Etkin 1988, 74-76). Here, significant authority normally held by the minister responsible for Indian Affairs was transferred to the chief and council (*Indian Act* 1985, ss. 69 (1), 81, 83). This became the model for future self-government initiatives. With a few exceptions, such as the Nisga'a agreement, most progress has involved power-by-power devolution to the chief and council of the reserve in question. Transferred powers include health care and public health initiatives, primary and secondary education, welfare and social services, local policing, wildlife management, economic development, and local municipal services. In each case, the right to decide on these policy questions and the money needed to carry out decisions are devolved to the local chief and council.

Given the tensions and interest conflicts that have long characterized the relationship between Aboriginal communities and the Canadian state, this co-incidence of position on the self-government question is unexpected. Certainly, no one would have anticipated this in 1969. Indeed, the federal government has been only too ready to give authority over a wide range of issues to reserve governments; and chiefs and councils are only too ready to accept the authority and the money that goes with it. The profound irony that underlies all Aboriginal politics for the past 35 years is that self-government, which is seen as the institutional means of preserving autonomy and cultural integrity, has been the important transmission belt whereby the tension between Whiteness and Aboriginality, between tradition and modernity, has been largely resolved in favour of modern, "White" forms of life. The logic of the process has been simple and powerful. A paternalistic and racist state interfered in almost every minute aspect of life on reserves, undermining traditional life by banning spiritual ceremonies, forbidding the use of Indigenous languages, imposing patriarchical customs and practices, and forcibly taking children from families to educate them into Whiteness. The communities felt—reasonably so—that if they could govern themselves they would prevent this erosion of culture and relieve some of the worst oppressions; yet the achievement of self-government has been a false panacea. As Alfred has written, "The imposition of elected politics in place of consensual models, and the emulation of Western politicians, has made Native politics just as much a matter of cynical manipulation of power as any other kind" (1999, 45). He notes the result:

> People have been turned into the tools of their own oppression. We need to recognize and acknowledge the co-optation, and to locate our roles within the system. On the one side there are indigenous nations with their traditions and values, and on the other side there is mainstream society. We all

> live somewhere in between; but if our thoughts and actions consistently further the other society's objectives rather than our own, or if progress towards justice for our people is sacrificed to satisfy the other's imperatives, then the degree of co-optation is unacceptable. (77-78)

The cruel result of the past two decades of political debate and action regarding the future of Aboriginal communities and cultures has shown that self-government, the hoped for solution, has often had the opposite effect. Self-government has not worked well in the terms of modern, Western governance. There have been improvements in education and life expectancy, but income and employment levels still remain low. In addition, these modest gains have been more than off-set by the destructive effects that the current form of self-government has had on community solidarity and morale. More importantly, however, is the fact that the form of self-government—as mandated by the *Indian Act*—is inconsistent with traditional political and economic life (Boldt and Long 1988, 45-47).

Returning again to the Marshall agreements in light of the above, it seems clear that the agreements were written in terms of the framework established by this ongoing process. Rather than helping (re)create an Indigenous economy of autonomous activity directly acting on nature, these agreements have created jobs with contracts, bosses, exclusive and restricted access to resources, economic advantage for some individuals, and continued deprivation for those lacking the opportunity. In short, traditional life continues to be eroded. Second, more authority passes to the chief and band council. The agreements give the elected chief and council control over the money and jobs that are being traded in exchange for the communal right to fish to make a moderate livelihood. In the context of self-government, the power to decide if the agreements are to be signed, what the agreements will say, and what will be done with the resources that follow to the communities all fall to the chief and council. This only creates greater distance between traditional forms of governance and the current Western-style electoral politics and authority structures of reserve governments. It further concentrates economic and political power in few hands, however democratic may be their election and however well-intentioned or skilled they may be.

Marshall and Reserve Governance

An April 2006 Fact Sheet released by Fisheries and Oceans Canada (DFO) reveals some of the concerns that this process of signing agreements that are then administered by the chief and council has created in Indian Brook (Shubenacadie). Presented as a series of "myths," the issues raised are revealing:

> **Myth #2**—DFO is negotiating with a group that does not represent the community.
> **Reality**—At the request of Indian Brook, in a special meeting chaired by INAC [Indian and Northern Affairs Canada] on October 14, 2005, a *majority of the Indian Brook Band Council* [my italics] agreed to interim fisheries arrangements.
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> **Myth #3**—DFO is working with Indian Brook Fisheries Inc.
> **Reality**—The fisheries arrangement is between DFO and the Indian Brook First Nation. DFO is working with a majority of the Indian Brook First Nation Band Council. The members of Council who make up this majority have established Indian Brook Fisheries Inc., an incorporated company registered with the Nova Scotia Registry of Joint Stocks. The establishment of incorporated companies to manage the fisheries assets (licences, vessels, equipment, etc.) held by a First Nation is not unusual. Several other First Nation communities have done this to provide good management of their commercial fisheries operations and to ensure financial accountability to the Band which owns the company.
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> **Myth #5**—DFO is giving money to individuals and funds are not going to the Band.
> **Reality**—All payments are made by DFO to the Shubenacadie First Nation ... The Band's use of a Band-owned company or other approach to the day-to-day operation of its commercial fishery is an internal matter.
>
> **Myth #6**—DFO does not care what is happening to the money it has given Indian Brook.
> **Reality**—DFO is following all procedures in disbursing funds to the Indian Brook First Nation. Invoices, receipts and other financial documentation are required to ensure financial accountability in accordance with Treasury Board guidelines. Accountability within the Indian Brook First Nation is an internal Band matter and one that must be addressed in the financial statements of the Council and/or the company established by the Council. (Fisheries and Oceans 2006)

The concerns of band members that some benefit from the agreements and some do not, and that the process is inequitable are clear. This essay is not concerned with whether or not "proper" democratic and bureaucratic procedures were followed. The articulation of the objections of the people of Indian Brook to the agreements in terms of rule—following and procedural justice misses the point but reveals the real difficulty. It misses the point in the sense that the important issues are that a communal right has been exchanged for jobs for a few and decisions about resource allocation will be authoritatively made by a small political elite (however chosen). The protest does in a deeper way highlight the truth, however. Whether or not the band council was correct in entering into this agreement according to the procedures and rules laid down by the Canadian state and the *Indian Act* is immaterial. The fact that Fisheries and Oceans was compelled to release its "Myth vs. Reality" document suggests that many in this community were concerned that giving monies to some individuals rather than to the community as a whole is problematic.

The years subsequent to the signing of the Marshall fishing agreement demonstrate that the worries of the Indian Brook community were well founded. In 2005, a majority group of the band council formed a company. Under the Marshall process of negotiating rights for money, licences, and fishing equipment, Fisheries and Oceans signed a $5 million agreement with this company, despite objections by the chief and the remaining minority of councillors. Although boats and equipment were purchased, there were accounting and other financial irregularities with salaries being paid to the councillors who owned the company. By 2007, the company had sold all the equipment back to the person from whom it had originally been purchased for $1.2-1.5 million. The former chief MacDonald argued that Fisheries and Oceans "always said that they signed the agreement with council, but they didn't sign with council or the Community. They signed with some renegade Councillors, and that's where the whole problem was, and DFO knows it" (MacIntyre 2007, 1-2).

The subtext here is the issue of governance inherent in the very institution of self-government. The *Indian Act* spells out the power of the chief and council as the agency of self-government, as well as the election procedures. Chiefs and council are elected every two years by band members. Once elected, the chief and council—with roles that are not clearly defined *vis-à-vis* one another—rule on day-to-day matters. The lack of specificity regarding procedures and the balancing of powers between chief, council, and community has come to mean that the chief usually makes most decisions, although the above example shows that this is not always the case. The concern to appear to not interfere with the self-governance of reserves has led Indian Affairs to adopt a strict hands-off policy. Power has been

effectively downloaded to the chief, or chief and council, and the minister is very careful not to overturn decisions or actions taken by a chief even when such decisions are challenged by community members or when they appear to be contrary to the *Indian Act*.

The discretionary powers of the chief are extensive and his or her control over the lives of members is enormous. This is especially true in those communities where there is little employment outside the reserve and independent of the political system. The chief controls the jobs that are funded through Indian Affairs, jobs that may outnumber those off-reserve. Chiefs control housing, educational access, economic development, and social and health services policy. In Kahnawake, for example, employment off-reserve, and hence independent of the political process, is high. Few are dependent upon the money that flows through the chief and council for their livelihood. Politics can, for them, be much more about policy direction and the future of the community. It is not, as it is for so many in Maritime reserves, the primary source of income and survival.

When so much of the money and economic activity of the community is funnelled through the political system, the real authority of the chief over the community becomes excessive. A few commentators have cited corruption and nepotism as the cause of governance problems on reserves. Whatever corruption may exist, it is not the real issue. More fundamentally, self-government as a policy has led to an overcharged politics. Simply put, the stakes are too high. Democratic politics seem to function well when the stakes are relatively low. That is, the minority is able to accept the "tyranny of the majority" when the consequences of being on the losing side are not so great. In the case of reserve politics, not only are the powers of the chief extensive but few have the means independent of the political system to get along with life while ignoring political outcomes. The voting patterns in reserve elections reveals how overcharged the political system is. While Canadian political and opinion leaders decry the low turnout in provincial and federal elections, the opposite problem plagues reserves. Elections for chief and council often have turnout rates of over 95% (Bedford 2003). No one can afford not to vote—or be seen not voting—because the outcome can impact them so dramatically. Elections are bitterly contested and tensions run very high, because factionalism, family alliances, and friendship networks mean that your job, house, and access to funds can hang in the balance.

Additionally, the small size of the communities and the governing structures mean that the political and bureaucratic institutions can never be adequately articulated. The principle of separation of powers (that legislative and executive power are exercised by different and competing bodies), of competing parties and an opposition (which help insure equity and proper procedure), and of

bureaucratic differentiation as various departments and ministers each deal with one aspect of policy only are all missing on reserves. A small cadre of politicians and a few bureaucrats who owe their position to the chief govern the reserve. Greatly exacerbating this concentration is the fact that these overburdened structures have the task of managing poverty. As far as the Canadian state is concerned the role of the chief and council under self-government is to keep a lid on the seemingly hopeless grind of poverty, unemployment, and social problems. Self-government does not mean imagining a better future and discussing ways to implement a vision of the good life. Rather, it means holding things together and deciding how inadequate resources are to be distributed.

It is in this context that the Marshall agreements were negotiated. At this point, neither side—the chiefs nor the federal government—want to, or can, see past the logic of self-government. The federal government has been able to maintain the status quo for a small sum of money, and the chiefs get both jobs and money for their communities, as well as yet more power for themselves.

The Marshall agreements only serve to make the political realm even more overburdened. The chiefs now have more jobs and money to control than they had previously. There are not enough jobs for everyone, just as there are not enough houses. If the chief gives a job or a house to one, another must go without. Corruption or not, this system is bound to create what Habermas called a "legitimation crisis" (1973). Antagonisms, jealousy, and nepotism are inevitable. Elections become ever more charged as the outcome might mean the difference between a fishing job or more time on welfare. An important opportunity has thus been lost to begin the process of healing and reviving traditional economic and political forms. Instead, the policy of eliminating Aboriginality, of suppressing traditional culture and life in favour of modernity and Whiteness, continues. After Marshall, the Maritime reserves are a little richer and have a few more jobs, but the wounds are no closer to being healed, traditions are no closer to being preserved, and communities are no closer to being united. If the first Marshall case showed our justice system to be a farce, the second reveals the tragedy in the refusal to create an honourable place for Aboriginal persons and Aboriginality as a way of living in the world.

References

Alfred, Taiaiake. 1999. *Peace, Power, Righteousness: An Indigenous Manifesto*. Toronto: Oxford University Press.

Barsh, Russell. 2002. "Netukulimk Past and Present: Mikmaw Ethics and the Atlantic Fishery." *Journal of Canadian Studies* 37 (1): 15-42.

Bedford, David. 2001. *The Tragedy of Progress: Marxism, Modernity and the Aboriginal Question*. Halifax: Fernwood.

——. 2003. "Aboriginal Voter Participation in Nova Scotia and New Brunswick." *Electoral Insight* 5 (3): 16-20.

Belanger, Yale, and David Newhouse. 2004. "Emerging from the Shadows: The Pursuit of Aboriginal Self-Government to Promote Aboriginal Well-Being." *Canadian Journal of Native Studies* 24 (1): 129-222.

Boldt, Menno, and J. Anthony Long. 1988. "Native Indian Self-Government: Instrument of Autonomy or Assimilation?" In *Governments in Conflict? Provinces and Indian Nations in Conflict*, ed. J.A. Long and M. Boldt, 38-56. Toronto: University of Toronto Press.

Borrows, John. 2002. *Recovering Canada: The Resurgence of Indigenous Law*. Toronto: University of Toronto Press.

Cairns, Alan. 2000. *Citizens Plus: Aboriginal Peoples and the Canadian State*. Vancouver: UBC Press.

Coates, Ken. 2000. The Marshall Decision and Native Rights. Montreal: McGill-Queen's University Press.

Etkin, Carol. 1988. "The Sechelt Indian Band: An Analysis of a New Form of Native Self-Government." *Canadian Journal of Native Studies* 6 (1): 73-105.

Fisheries and Oceans Canada. 2000a. "Dhaliwal Announces Marshall Fishing Agreements Coming into Place," 7 April, *www.dfo-mpo.gc.ca/media/newsrel/2000/hq-ac12_e.htm*.

——. 2000b. "Update on Fisheries Affected by the Supreme Court's Marshall Decision." 29 August, *www.dfo-mpo.gc.ca/media/statem/2000/20000829_e.htm*.

——. 2001. Fisheries Agreement between DFO and the Red Bank Band.

——. 2004. "The Marshall Decision Maritimes Region." December, *www.mar.dfo-mpo.gc.ca/communications/maritimes/FactSheets04E/MarshallDecisionE.html*.

——. 2006. "The Interim Fisheries Arrangement with Indian Brook First Nation." April, *www.mar.dfo-mpo.gc.ca/communications/maritimes/factsheets06e/IndianBrookE.html*.

Flanagan, Thomas. 2000. *First Nations? Second Thoughts*. Montreal: McGill-Queen's University Press.

Great Law of Peace. 1973. Akwesasne: White Roots of Peace.

Habermas, Jurgen. 1973. *Legitimation Crisis*. Boston: Beacon Press.

Harris, Marvin. 1977. *Cannibals and Kings*: Origin of Cultures. New York: Vintage.

Indian Act, Revised Statutes of Canada 1985, c. I-5.

Indian Affairs and Northern Development. 1969. "Statement of Government of Canada on Indian Policy [White Paper]." Indian and Northern Affairs Canada, *www.ainc-inac.gc.ca/ai/arp/ls/pubs/cp1969/cp1969-eng.asp*.

Indian and Northern Affairs Canada. 2001. "The Marshall Judgement and the Federal Government's Response." February, *www.ainc-inac.gc.ca/nr/prs/j-a2001/01106bk149_e.html.*

Isaac, Thomas. 1999. *Aboriginal Law: Cases, Materials and Commentary.* Saskatoon: Purich.

——. 2001. *Aboriginal and Treaty Rights in the Maritimes: The Marshall Decision and Beyond.* Saskatoon: Purich.

Leacock, Eleanor. 1954. *The Montagnais "Hunting Territor" and the Fur Trade.* American Anthropological Association Memoir 78. Menasja, WI: American Anthropological Association.

——. 1975. "Class, Commodity and the Status of Women." In *Women Cross-Culturally: Change and Challenge,* ed. Ruby Rohrlich-Leavitt, 601-16. The Hague: Mouton.

MacIntyre, Mary Ellen. 2007. "Band Sells Boats to Man behind Initial Deal." *Chronicle Herald,* 17 December, 1-2.

——. 1999. 3 S.C.R. 456.

——. 1999. 3 S.C.R. 533.

McCallum, Margaret. 2004. "Rights in the Courts, on the Water, and in the Woods: The Aftermath of R. v. Marshall in New Brunswick." *Journal of Canadian Studies* 38 (3): 204-18.

R. v. Marshall #1 [1999] 3 Canada Supreme Court Reports 456.

R. v. Marshall #2 [1999] 3 Canada Supreme Court Reports 533.

R. v. Thomas Peter Paul (1996) 182 New Brunswick Reports (2d) 270 (New Brunswick Provincial Court).

R. v. Thomas Peter Paul (1997) 193 New Brunswick Reports (2d) 321 (New Brunswick Court of Queen's Bench).

R. v. Thomas Peter Paul, [1998] 3 Canadian Native Law Reporter 221 (New Brunswick Court of Appeal).

Temple, Dominique. 1988. "The NGO's Role in Economicide." *Interculture* 21 (1): 36-47.

Wicken, William. 2002. *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall.* Toronto: University of Toronto Press.