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One Step Forward...Accommodating Aboriginal Rights in Canada

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I One Step Forward... The Aboriginal Rights Waltz

> "These are our waters and we have the right to fish," said native fisherman John Dedam as the dispute heated up yesterday. "If I have to go to jail, I'll go to jail. If I have to get shot, I'll get shot. We're fed up."
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These are shocking words for Canada, the "Peaceable Kingdom." And yet, similar sentiments of frustration are being heard more frequently as the struggle over Aboriginal rights plays itself out. In this case, John Dedam was expressing the anger and determination of the people of the Burnt Church Mi'kmaq First Nation in their stand-off with the federal government's Department of Oceans and Fisheries over the right to trap lobster. This battle is the latest in a series of skirmishes on the east coast as members of the First Nations attempt to implement what they claim are their constitutional rights while the federal department attempts to regulate the fishery and conserve dangerously depleted fishstocks. Similar standoffs over land and hunting and fishing rights have occurred across Canada as Aboriginal peoples assert their rights.

Why are these battles being fought on the coasts and in the forests now? In 1982, the federal and provincial governments handed Aboriginal peoples a loaded gun when they entrenched Aboriginal and treaty rights in the Canadian constitution. While the courts had begun to recognise Aboriginal land claims since a pivotal decision in 1973, constitutional affirmation of the rights gave Aboriginal peoples the firepower to fight to ensure that their land claims, rights and status in the Canadian political and legal system were respected. The Supreme Court initially responded by expanding the definition of rights and giving force to legal agreements. However, this expansion and consequent assertion of rights has begun to polarize debate in Canada over the extent to which the claims of Aboriginal peoples can be accommodated by the

legal and political structures. Even the courts, once the hope of Aboriginal peoples, have become an uncertain arbiter of rights.

This paper investigates the recent record of the courts on Aboriginal rights. It begins by examining development of jurisprudence on Aboriginal issues and then focuses on a number of recent controversial Supreme Court cases and their aftermath. The paper argues that while the courts are wrestling with the need to accommodate Aboriginal peoples and integrate them more equally into the Canadian legal and political systems, progress has not been linear. Instead, Aboriginal peoples have been engaged in an intricate dance with the Canadian state taking one step forward, one back and one sideways. Tension is mounting as expectations rise and no resolution to the question of rights is found. To avoid an explosion, both parties must quit dancing and learn to live and work together. The Supreme Court is a critical player in this relationship but it is not clear that it will have the perspicacity to lead the way to a meaningful accommodation of Aboriginal peoples and their rights.

II Recognising Rights

The historical record of the judicial and legal treatment of Aboriginal peoples is not one of tolerance or accommodation. Instead, it is more reflective of cultural imperialism or colonialism.[1] Until 1867, the British colonial authorities set the parameters for handling Aboriginal affairs. After 1867, legislative authority over Indians and lands reserved for Indians rested with the federal government under section 91(24) of the *Constitution Act, 1867*. In 1939, "Indians" was held to include Inuit in Canada's north by the Supreme Court.[2] The status of Métis people remains slightly ambiguous. Despite the adoption of the Canadian constitution in 1867, the British Judicial Committee of the Privy Council was the final court of appeal in Canada until 1949 and largely determined the legal regime around Aboriginal rights. The early decisions of the courts set the framework confronting lawmakers in the 20th century, with the effects lingering even today. What did the legal authorities say about Aboriginal status, title and rights?

British law in the 1700s reflected the desire of the colonial authorities to maintain peaceful relations with First Nations. Europeans only challenged the political integrity of First Nations when their military prowess was attenuated and the balance of power shifted in favour of the settlers. Laws and regulations governing and centralizing relations with First Nations emphasized security. Attempts to secure good relations include, for example, the appointment of overseers of Indian affairs following the Albany Congress of 1754, and the Royal Proclamation 1761 requiring British authorization of land transfers from First Nations to colonial settlers. The Judicial Committee of the Privy Council similarly upheld a 1743 Court of Commissioners ruling restricting land purchases to treaties with tribal officers while acknowledging the separate and distinct status of "Indians."[3] However, the unintended consequence of this line of thinking was to lay down a foundation in policy and law for the status of First Nations as independent nations.

The direction of policy and law were consolidated in the Royal Proclamation of 1763. This foremost statement of British policy towards First Nations contains a fundamental ambiguity which overshadows subsequent legal and policy decisions. On the one hand, the Proclamation confirmed the *Mohegan* ruling that Indian

nations were independent and should be dealt with through a centralised treaty process. It delineated a process for the alienation of lands. This recognition of status and limited protection of Aboriginal rights to land has caused some people to view the Proclamation as the magna carta of Indians although evidence is slim that this was the intention of the authors.[4] On the other hand, the Royal Proclamation acknowledged a only a limited sovereignty for First Nations and assumed that Indian tribes and lands were subject to British sovereignty. Under the wording of the Proclamation, First Nations were under British "protection" on "parts of our Dominions and Territories" at the pleasure of the Crown.[5] Treaties reflected the British view that First Nations were independent enough to sign treaties but that they were subject to British authority and held rights by virtue of Crown indulgence. Canadian and American policy and law emerged and diverged out of this statement of policy with the US legal and political authorities tending to maintain the language of "nations" and regulating external aspects of tribal life while Canadian policy evolved to be more thoroughly invasive, regulating all aspects of First Nations life and assigning First Nations to the status of "wards"[6] as circumstance permitted. The role of the courts in Canada was more limited than in the US but still important.

Colonial authorities dealt with First Nations was through a policy of segregation and reservation as settlers arrived to occupy the lands. The effects of this policy were to qualify Indian sovereignty and land title but not to efface their cultural, political and legal systems. The absence of a significant body of jurisprudence in the nineteenth century on Aboriginal rights and title attests to a form of benign neglect or disregard by colonial authorities. However, the potential for intrusion into the internal structures of First Nation communities was anticipated by the courts in an 1823 ruling which held that the criminal law systems of Upper Canada (now Ontario) applied to Indians committing offences off the reserve communities.[7] By 1867, when the balance of power had shifted and Indians were no longer feared as potential opponents, the Canadian state began to assert vigorously its jurisdiction over Indians. The policy of centralization continued in place with the new constitution which accorded legislative responsibility to the federal government for "Indians, and Lands reserved for the Indians." The Indian Act was the legislative weapon to extend into all facets of First Nation economic, educational, social, political and cultural life within the reserves.

The policy principles of paternalism, civilisation, assimilation, and the erosion of First Nation governance were buttressed by the prevailing legal and political philosophies of the day. Canadian government jurisdiction over Indians in legal matters was substantially extended with the recognition of county court jurisdiction over the Indian Act in 1881, designation of every Indian agent an ex officio justice of the peace for offences committed against the Act in 1886, and the application of criminal law offences to Indians in 1890.[8] Exercise of Indian customary law was sharply curtailed and the courts began to adjudicate more regularly on aboriginal issues.

The courts interpreted Aboriginal rights, treaties and title narrowly in this period. In what was to become the leading case for the next century, *St. Catherine's Milling v. the Queen*,[9] the Judicial Committee of the Privy Council held that Indian sovereignty over the land was subject to the govern-

ment's title. Lord Watson held that the Indian interest in land derived from the Royal Proclamation of 1763 and the tenure of Indians was a personal and usufructuary right that depended on the good will of the Crown. Ultimate title vested in the Crown. Thus, lands could be alienated only to the Crown and the Crown held the right of expropriation over reserve lands. In the *Robinson Annuities* case, the Judicial Committee of the Privy Council ruled that the treaty in question amounted to a personal obligation by the governor and nothing more.[10] Although two subsequent cases, *Henry v. R.* and *Dreaver v. R*, did uphold treaties as legally enforceable, they were not regarded as international compacts between equals or sovereign forces.[11] For example, international agreements did not alter the application of domestic laws to Aboriginal peoples.[12] Similarly, treaties which were inconsistent with federal laws were null and void to the extent of the inconsistency. Provincial laws were also held to apply to Indians and their lands provided that they were of general application.[13] Until the revisions to the Indian Act in 1951, Indians were limited in their ability to challenge these laws since they were prohibited from bringing a suit against the Crown and anyone could be jailed for soliciting money from an Indian to pursue a legal claim without the approval of the Superintendent General of Indian Affairs.[14]

The status of Aboriginal peoples as independent or self-governing nations was further undercut by the courts in the 1950s. In *Lazare v. St Lawrence Seaway Authority*,[15] the Quebec Superior Court upheld the legislative competence of the federal government to expropriate reserved lands. In *Logan v. Styres*,[16] the Ontario High Court ruled against the claim of the Ontario Six Nations that they continued to be allies of the Crown rather than subjects by virtue of the treaties they signed.

These cases, starting with *St. Catherine's Milling*, set the framework for the legal status of Aboriginal peoples and their rights until the 1970s. Judicial decisions tended to uphold legislative competence over Aboriginal rights and restricted powers of First Nation self-governance. Adopting an historical and incremental approach to rights, the courts limited rights to those defined by legislation and treaties. However, the jurisprudence did not resolve whether First Nations retained a residual sovereignty as in the US nor the nature of Crown title or the foundation for the Crown interest in the lands.[17] The nature of the legal relationship between the Crown and Aboriginal peoples remained somewhat obscure.

Just as the winds of change in the postwar period forced a fundamental rethinking of Indian policy in the 1950s and 1960s including extending the franchise to Aboriginal peoples, they swept in a fresh approach to Aboriginal issues in the Supreme Court of Canada changing the direction of the jurisprudence. The Supreme Court overturned the decisions of the lower courts and began to construct a means of accommodating Aboriginal peoples and rights within the dominant legal structures. The signal case was *Calder*.[18] In 1967, the Nisga'a First Nation of British Columbia filed suit before the BC Supreme Court claiming that their title to the land had never been extinguished. In 1969, Justice Gould denied the declaration and found that "if ever there was such a thing as aboriginal or Indian title in, or any right analogous to such, over the delineated area, such has been lawfully extinguished."[19] The Nisga'a appeal to the BC Court of Appeal also

failed when Justice Davey declared that "no declaratory judgment can be delivered that such rights have not been extinguished, because to say that have been extinguished implies that they exist."[20] The lower courts followed the precedents set down in *St. Catherine's Milling* and derived from the Royal Proclamation of 1763.

Three years later, the Supreme Court of Canada rewrote the rules. Although the Supreme Court denied the Nisga'a petition against the province and upheld the presumptive right of the Crown to extinguish title, the decision broke new ground on the recognition of Aboriginal title. The Court split 3:3 on the question of whether the Nisga'a claim to Aboriginal title over the lands in question was valid, with the three judges who denied it declaring that while Aboriginal title had existed originally, it had been extinguished by pre-Confederation enactments. The petition was rejected when the fourth judge denied the claim on procedural grounds. He did not address the question of title. However, for the first time in Canadian legal history, the court recognised that Indian title to the land predated British law. Six justices recognised that Aboriginal title was not derived from statutory enactments but had an independent basis in law. [21] The court had opened the door to a new basis of accommodation in Canadian law for Aboriginal peoples. The Canadian government quickly took up the gauntlet in 1973, announcing a major policy reversal and agreeing to negotiate land claims settlements in non-treaty areas of Canada.

Despite the shift in policy and law, the Supreme Court decision met some resistance at the lower court level.[22] As late as 1984, the Ontario high Court departed from Calder in *Bear Island* to the surprise of court watchers.[23] The Federal Court of Appeal appeared to follow the new direction set by the Supreme Court in *Baker Lake*. The Inuit of that community petitioned the court for an injunction against mining exploration on their lands because it had a negative affect on their rights to hunt and fish.[24] Mahoney, J. accepted that the Inuit possessed an occupancy-based aboriginal title on the grounds that the title asserted by the Inuit, encompassed only the right to hunt and fish as their ancestors had before them."[25] However, all was not as it first appeared in the decision. In essence, the decision narrowed the Supreme Court view of Aboriginal title despite upholding the concept. Mahoney evinced a very limited view of Aboriginal political structures, society and culture as underdeveloped and unsophisticated.[26] In accommodating Aboriginal rights, the court demonstrated a clear ethnocentric bias. The case was not appealed.

Undaunted by the reaction of its opponents, the Supreme Court continued to forge ahead in this new direction. *Bear Island* was quickly overshadowed by the Supreme Court decision in *Guerin*[27] which expanded *Calder*. Although section 35 (recognising Aboriginal rights) of the *Constitution Act, 1982* did not apply in this case since it was not in effect at the time of the land transfer in question, the Supreme Court gave an important indication of the direction it would take in accommodating Aboriginal rights. The Court recognised Aboriginal title based on historic occupation and possession of the lands and confirmed the fiduciary obligation of the Crown to First Nations. The facts of the case were that the Musqueam First Nation of BC had agreed to surrender part of their lands to the Crown who was to lease the lands to a golf club on terms favourable to the First

Nation. (As set down in the Royal Proclamation of 1763, all lands must be alienated via the Crown). The federal government leased the lands but on a less lucrative basis and was found in breach of its trust obligation to the Musqueam people and ordered to pay damages.

This new direction set by the courts in interpreting Aboriginal rights was cemented into form by the enactment of section 35 of the *Constitution Act, 1982*. In 1982, after intensive and prolonged lobbying by First Nation, Inuit and Métis representatives, Aboriginal and treaty rights were formally entrenched in the Canadian constitution. The section declared that "the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed." This formal affirmation and recognition of the existence of Aboriginal and Treaty rights proceeded from the judicial decisions but also gave the Courts a new mandate to adopt an expansive view of rights.[28] How did the courts respond?

In the first blush of constitutional recognition of Aboriginal rights and the adoption of a *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada stepped boldly forth. In 1990, the Musqueam First Nation was again successful in the *Sparrow* case when the Court used section 35 to construe Aboriginal rights liberally. The Court held that an Aboriginal right was extinguished only if the intention to extinguish was "clear and plain." Rights could not be assumed not to exist. Extinguishments required an express act of the legislature. The Court also broke from the mindset of federal court judge Mahoney by declaring that rights had to be understood as evolving, and relegating the view of Aboriginal peoples as "low in the scale of social organisation" to ranks of discredited and discriminatory opinion. The Court jettisoned the notion that Aboriginal rights were static.

The critical point in the *Sparrow* case from an Aboriginal perspective was stated by the Royal Commission on Aboriginal Peoples:

> where a conflict arises between an Aboriginal law and a federal law, and both laws are otherwise valid, Aboriginal laws will take priority except where the federal laws meet the standard laid down in the *Sparrow* case. Under this standard, federal laws will prevail where the need for federal action can be shown to be compelling and substantial and the legislation is consistent with the Crown's basic trust responsibilities to Aboriginal peoples.[29]

The Court enunciated that the guiding principle in the relationship between the Canadian state and Aboriginal peoples should be one of trust not conflict, harmony not discord.[30] In Simon and Sioui, the Supreme Court applied a similar logic to treaties, giving them a broad and generous reading in favour of the First Nations.[31] With a slight hesitation in its step, the Supreme Court held that the rights were not absolute but subject to reasonable limits similar to those envisaged by the reasonable limits clause of the *Canadian Charter of Rights and Freedoms*.

The Supreme Court stumbled in the 1990s with a series of decisions including the *Van der Peet* trilogy (1996),[32] *R. v. Pamajewon* (1996)[33] and culminating in *R. v. Delgamu'ukw* (1997).[34] On the one hand, the Supreme Court of Canada decision in Delgamu'ukw was expansive. The majority went further than in past cases by: recognising the validity of oral histories as part of the proof of Aboriginal title; defining the content of Aboriginal title with a looser conception of the historical occu-

pancy of lands and Aboriginal matters; extending rights; protecting rights from inadvertent extinguishments; and, by ordering a new trial while counselling Aboriginal nations with land claims to intervene in the case. On the other hand, the Supreme Court was divided over different the central aspects of the decision giving rise to doubts about the possibility of the consensus on the Court in future cases. Further, its decision meant that Aboriginal nations would have to fight for their rights on a case-by-case basis without having a clear sense of which direction the court would take. Common sense and the American precedent reveal that litigation depletes the limited financial and professional resources of most First Nation communities. With this in mind, then Chief Justice Antonio Lamer admonished both sides to engage in good faith land claim settlement negotiations rather than litigation and to recognise that "we are all here to stay." The ambivalence of the Court on Aboriginal issues was setting in.

The decision delivered by Lamer CJ was highly theoretical with its practical implications unplumbed. Lamer CJ placed Aboriginal rights and title on a spectrum: at one end are cultural practices not tied to land, in the middle are site-specific activities, and at the other end is Aboriginal title, a right to the land itself. He outlined four characteristics of Aboriginal title: it is communal; it is alienable only to the Crown; there is an inherent limit to it; and governments may infringe aboriginal title but might be required to pay compensation for the consequent loss to the community. In reviewing this decision Thomas Flanagan, a vocal critic of Aboriginal rights, explains that "Aboriginal title, sounds like a more robust property right and as such is a new departure."[35] He argues that the decision creates an atmosphere of uncertainty, compounded by the dissenting justices rejection of the Lamer formulation. Further, he notes the decision might be of limited consequence in the province of BC, where the Gitksan and Wet'suwet'en, live given that Aboriginal title has not been attached to those lands.

The legacy of the Supreme Court and, in particular, former Chief Justice Antonio Lamer is one of uncertainty. Under the direction of Lamer C.J., the Supreme Court interpreted Aboriginal rights and title in a broader manner than in the past. The Court provided a framework for understanding and identifying Aboriginal title. It revised the rules of evidence to incorporate oral testimony as reflected in Aboriginal practices. And it provided an incentive to both sides to negotiate rather than to litigate settlements: to First Nations by adopting a case-by-case approach that it costly and time consuming; and to the state by opening the door to many First Nations as interveners in future cases and by indicating that when asked the Court would not hesitate to assert its answers. The substitution of legal answers for political compromises is not usually attractive to political leaders. While this decision has the effect of broadening Aboriginal title and rights, and do provide the legal basis for accommodating the interests of Aboriginal peoples to a greater extent than at any previous point in Canadian history, the theoretical nature of the decision and divided court opinion on the question of Aboriginal title left the future direction of jurisprudence ambiguous. The stage was set for the *Marshall* waltz.

III The Supreme Court Acts and Reacts

The effects of the *Marshall* cases and the train of judicial reasoning which they

represent are only beginning to be felt now. This case involved a treaty right, not an Aboriginal right. Donald Marshall, a local celebrity known for being wrongfully convicted and then exonerated of a murder, was arrested with another member of the Mi'kmaq nation and charged with three offences under the federal fisheries regulations for landing and selling 463 pounds of eels, value $787.10, in August, 1993. The key issue in the case was whether or not they possessed the right to catch and sell fish by virtue of the 1760-1 treaties. Marshall argued that the Mi'kmaq promise contained in the treaty, not to "traffick, barter or Exchange any Commodities in any manner but with such persons, or the Manager of such Truck houses as shall be appointed or established by His Majesty's Governor,"[36] implied the positive right to fish, hunt and gather, and to sell the products of those labours. The trial judge agreed that the treaty did involve the positive right to bring their produce to the truck houses but that the right was extinguished when the system of truck houses and licensed trade disappeared. Marshall was convicted on all three counts. The Court of Appeal of Nova Scotia took a narrower view than the trial court, upholding the convictions on the grounds that the clause only represented a mechanism for ensuring peaceful relations, not a recognition of rights. The clause amounted to a restriction on activities not a conferral of rights. Marshall appealed.

Rightfully so, as it turned out. On 17th September 1999, the Supreme Court, (Gonthier and McLachlin JJ. dissenting) allowed the appeal and acquitted Marshall of all charges on the grounds that "nothing less would uphold the honour and integrity of the Crown."[37] Binnie J., writing for the majority, allowed that if the dispute had "arisen out of a modern commercial transaction between two parties of relatively equal bargaining power" or been derived exclusively from the one document, then the Court would have had to find that the Mi'kmaq had not protected their interests adequately.[38] In his decision, he chose to rebut the reasoning of the Nova Scotia Court of Appeal, and instead to follow Delgamu'ukw by accepting the use of extrinsic evidence introduced by the Mi'kmaq to determine the common understanding of the treaty terms. The majority decision held that the right claime be the Mi'kmaq existed in law and practice. Binnie J. further found that Marshall's actions fell within the purview of the treaty because he had been securing the "necessaries of life" and not engaging in larger scale trade activities.[39] Thus, he interpreted the right as extending beyond personal use to moderate economic gain. Binnie J. also noted the failure of the Crown to offer any argument that the right was extinguished prior to 1982 and any justification for the fishing restrictions.

The dissenting opinion offered by Gonthier and McLachlin JJ. supported the decision of the NS Trial Court. McLachlin J. upheld the convictions on the grounds that the right to truck and trade existed only as long as the regime outlined in the treaties did. The dissent allowed the use of extrinsic evidence on the grounds that courts must take the context surrounding treaties into account in their decisionmaking. However, McLachlin J. outlined a two step process for the consideration of treaties: first, a textual examination of the treaty should be conducted; and second, differences in meanings arising from the treaty wording should be considered against the historical context to determine the common intention of the signatories.[40] McLachlin's approach to the case facts leads to the

conclusion that the treaty was intended to prevent the Mi'kmaq from aligning themselves with the French, not to establish a general right of trade that would persist.[41] She adopted a more restricted view of the right and saw extinguishment as a logical consequence of the changing times.

The decision produced an explosion in the east coast fisheries. Aboriginal communities heralded *Marshall* as recognising their right to manage the fisheries. Donald Marshall was seen as being vindicated again. In the Miramichi bay, Aboriginal fishers began setting lobster traps out of season and asserting their right to manage the fisheries. Non-Aboriginal fishers responded by interfering with the traps and voicing concerns over the depletion of fish stocks. Local police and RCMP monitoring the dispute were reluctant to intervene despite acts of violence and vandalism against the Aboriginal fishers and their property. The dispute became increasingly nasty and divided along race lines with lifelong friendships and partnerships breaking down. As the crisis escalated and both sides refused to back down, the federal government found itself unable to resolve the dispute.

On 5 October 1999, National Chief of the Assembly of First Nations Phil Fontaine applauded the Mi'kmaq people for their courage and restraint, and called upon the federal and provincial to reinforce the Supreme Court decision and begin implementing the terms of the treaty "with due regard for security and safety." He declared that:

> First Nations rights are human rights. No one would question the right of women or other identifiable segments of society to fight against discriminatory practices, yet some commentators are trying to deny the rule of law as upheld by the Supreme Court in such cases as Delgamu'ukw or Marshall that uphold the inherent, Aboriginal, and treaty rights of First Nations peoples.[42]

The National Chief was joined by voices across the nation in calling for a resolution to the conflict. The tension around the dispute was heightened by the declarations by other First Nations in various parts of Canada, and even the US, that the Marshall decision extended to their rights to hunt, fish and gather in their traditional territories. A judicial decision on treaties was popularized to justify the extension of Aboriginal rights in practice.[43]

As the crisis gathered fury, the West Nova Fishermen's Coalition (hereafter Coalition) applied to the Supreme Court for a rehearing of the decision and stay of the judgement until then. The Supreme Court dismissed the application but in an unusual move, issued thirty pages of reasons clarifying the earlier decision.[44] First, the Court made it clear that the exceptional circumstance that would compel a rehearing did not apply in this case. Second, the appellant was entitled to an immediate acquittal, not a delay while the political actors considered the policy ramifications of the decision.

Third, in a move eerily similar to the Askov/Morin "clarification,"[45] the Supreme Court declared that the majority opinion in *Marshall* had answered the questions put forward in the Coalition's application: "These questions, together with the Coalition's request for a stay of judgment, reflect a basic misunderstanding of the scope of the Court's majority reasons for judgment."[46] The Court stressed that its decision should be construed narrowly and that the reasons should not be generalised to include other rights. The decision dealt with the right of the

individual to fish for eels under the terms of a treaty, nothing more. To remove any doubt, the Court stated:

> The September 17,1999 majority judgment did not rule that the appellant had established a treaty right "to gather" anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower. No evidence was drawn to our attention, nor was any argument made in the course of this appeal, that trade in logging or minerals, or the exploitation of off-shore natural gas deposits, was in the contemplation of either or both parties to the 1760 treaty; nor was the argument made that exploitation of such resources could be considered a logical evolution of treaty rights to fish and wildlife or to the type of things traditionally gathered by the Mi'kmaq in a 1760 aboriginal lifestyle.[47]

In effect the Court restricted the interpretation of the decision without rehearing it. . For clarity, the Court reaffirmed the jusrisdiction of the federal government over fisheries and its power to regulate the industry in the interests of conservation. These actions moved the interpretation of the majority decision in the case closer to the position developed in the minority opinion. In a nod to Aboriginal peoples, the Court reaffirmed the right of Aboriginal peoples to be consulted on limitations to their rights,[48] and reminded all participants "that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake."[49] In a clean backstep, the Court had withdrawn what had been heralded as a significant step forward in the interpretation of Aboriginal rights.

The reaction was vehement albeit confused as both sides attempted to "put their spin" on the decision. Aboriginal leaders were quick to point out that the rejection of the application by the Coalition reinforced "earlier decisions advocating respectful nation-to-nation resolution of treaty rights."[50] Non-Aboriginal fishers declared that the Court had retracted its earlier support for Aboriginal rights to fish, hunt and gather. The federal government observed that its right to manage the fisheries was intact. Calls went up for a resolution to the stand-off. The federal government began negotiations with individual communities to determine new quotas for fishing and succeeded in negotiating one year plans with most of the communities involved in the dispute. However, the Burnt Church First Nation has refused a settlement and maintains that it has the right to regulate the fishery themselves. In August 2000, they began to implement this right with the dispute growing more heated as fishers place lobster traps and police either remove the traps or try to dissuade the fishers from this activity. In a community referendum, the First Nation voted 308 to 28 to reject federal management. However, as the conflict wears on, intimations of negotiations are surfacing.

V The Supremes Dance On

How have the Canadian Courts fared in achieving an accommodation of Aboriginal rights within the legal and political structures of the nation? While too much emphasis should not be placed on one case or the actions of one First Nation, the trend of decisions seem to have created the conditions where conflict would occur but some grounds for resolution would be found. *Marshall* represents the culmination of judicial interpretation of Aboriginal issues, particularly by the Supreme Court of Canada. Six general conclusions can be drawn from this overview of the development of jurisprudence on Aboriginal rights and the current state of opinion on Aboriginal and Treaty rights.

First, since taking over from the Judicial Committee and becoming the final court of appeal for Canada in 1949, the Supreme Court of Canada has moved itself from the margins of the debate over Aboriginal issues to the centre. In the nineteenth century, the record of the courts was more limited. By the end of the twentieth century, the Supreme Court had arrogated to itself the power to determine the nature and extent of Aboriginal rights. Recognition of Aboriginal peoples and their rights in the *Constitution Act, 1982* only served to confirm and advance the role of the courts. As a result, judicial reasoning is assuming precedence over political compromises in the development of the dialogue on Aboriginal rights. With the adversarial nature of adjudication, Canada is heading down a path more similar to the US model where conflicts are fought in the courts and answers imposed on the parties. Litigiousness is replacing a dialogue of understanding. However, given the Canadian policy history of interference with Aboriginal governance and lives, perhaps the courts are the logical alternative until political representatives convince Aboriginal peoples that they will negotiate in good faith.

Second, the record of the Supreme Court on Aboriginal rights is ambivalent at best. *Calder* was a breakthrough in repudiating *St. Catherine's Milling* and recognising Aboriginal title, but the Court hesitated in extending Aboriginal title to modern times. *Guerin* was critical in asserting the importance of the fiduciary obligation of the federal government to Aboriginal peoples. *Sparrow* was important for the liberal construction of section 35 of the *Constitution Act, 1982*, the limitation placed on political authorities by the requirement that rights had to be extinguished by an express act of the legislature, and the jettisoning of an offensive stereotype of Aboriginal societies. It did however, add the Canadian caution that Aboriginal rights would be subject to limits which the Court found justifiable. *Delgamu'ukw* was significant in its recognition of the use of oral histories in evidence, expansion of the definition of the content of Aboriginal title, and advice to First Nations to use the intervener status in cases to their best advantage when faced with a government that is obstructionist in negotiations, but the decision was more theoretical and less grounded in practical consequences. Like the cases immediately preceding it, *Delgamu'ukw* left First Nations with no option but to pursue their rights on a costly case-by-case basis. *Marshall* was critical in updating the understanding of treaty rights to fit a modern context but the Supreme Court majority buckled in the face of controversy.

A fundamental ambivalence runs through the chain of cases. While the court was emboldened after the enactment of the *Charter*, it soon began to qualify the assertion of Aboriginal and treaty rights and add cautions to the point where it back-stepped appreciably in *Marshall*. The Court demonstrates a fundamental unease with the concept of Aboriginal rights and is unwilling to depart from the practice of viewing them from a western liberal paradigm.[51]

Third, the record of judicial decisions might be advancing the interpretation of Aboriginal rights in fits and starts, but the inconsistencies may play a role in triggering public controversies and a backlash against Aboriginal rights. Non-Aboriginal fishers claimed that the decision in *Marshall* was a surprise, while Aboriginal fishers claimed it was the logical culmination of the previous cases. To a certain

extent, both were right. In its struggle to accommodate Aboriginal rights while upholding the western liberal democratic legal and political structures, the Court is failing in its duty to provide for the certainty of law. Parliament is not stepping into the breach. When fearful, people are more apt to become angry. It is not surprising then, that the conflicts over Aboriginal rights are becoming sharper.[52]

Fourth, the high profile of the court cases and judicial decisions in the media is attracting a closer scrutiny of Aboriginal affairs. In the past twenty years, the concepts of land claims, aboriginal rights and treaties have passed from a restricted circle of experts to common parlance. This trend was accelerated by the constitutional negotiations, but the Court decisions have contributed steam to the process. While Canadians are supportive of the claims of Aboriginal peoples to decent standards of living,[53] they are more critical of claims that might accord Aboriginal peoples "special rights." This was, for example, one of the justifications given by the federal Reform party when it filibustered the Nisga'a Treaty in the House of Commons. That landmark document, which finally addresses the longstanding grievances of the Nisga'a people as fought for in the court decisions mentioned above, has been the subject of heated controversy in both Houses of Parliament, the BC legislature and the population at large. While the Supreme Court and judiciary are not to blame for this outcry against Aboriginal rights (indeed the BC court dismissed the attempt of the BC Liberal party to have the treaty declared illegal this summer.), it is inevitable that the battle in the courts spills into the public spaces in the nation. And if there is not strong leadership, then public opinion is more likely to polarize.

Fifth, despite its admonitions to Aboriginal and non-Aboriginal politicians and representatives to negotiate in good faith and find compromises, the judicial decisions have provided limited common ground upon which meaningful political compromise could be found. For a true union to occur, there must be give on both sides. In grafting Aboriginal precepts onto existing structures without fundamentally altering those structures, the courts not provided a basis for mutual understanding. Instead, the rights of Aboriginal people are thrown against the claims of the state. The right to fish is trumpeted while the government right to managed the fisheries is played back in response. Both sides yell but is either really listening? And yet we should not lose sight of the important positive effects of the Supreme Court decisions. The Nisga'a did get a treaty. Aboriginal peoples are exercising more control over resource management and use. Aboriginal self-government is becoming a reality despite judicial hesitance. The federal government did negotiate a temporary solution with most First Nations involved in the Miramichi east coast fisheries dispute. There is a basis for accommodation but whether it will be sufficient in the long run to accommodate Aboriginal diversity has to be seen.

Finally, the uncertainty over the direction the Supreme Court will take in accommodating Aboriginal peoples and their rights lingers. Chief Justice Antonio Lamer, a strong proponent of Aboriginal rights and justice for Aboriginal peoples, stepped down from the Supreme Court in January 1999. The new Chief Justice, Beverly McLachlin, wrote the minority opinion in *Marshall* and is rumoured to have authored the Court opinion in the Coalition application for a rehearing of

the case. Where the Court will go under her direction is questionable. However, when she assumed office as Chief Justice, I took it as significant that a number of Aboriginal colleagues and friends queried the meaning of her appointment and one said, "the word is that she is not a friend to us." Time will tell.

In *Delgamu'ukw* and *Marshall*, the Supreme Court of Canada called for negotiation not litigation. However, negotiation entails recognising and respecting the equality of Aboriginal Peoples as a distinct part of Canadian society. Where there is dialogue, there is the possibility of compromise and mutual understanding; but where dialogue breaks down, there is only misunderstanding and the possibility of violence. In reflecting on the need for negotiation, Antonio Lamer said "Let's face it, we're all here to stay." His message is compelling. Let's hope that the political and judicial leaders of the day are up to the challenge of finding a means of moving towards accommodation in harmony.

Notes

1 For a discussion of colonialism and imperialism in this context, see Alan C. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State*, (Vancouver: UBC Press, 2000), pp. 19-28.

2 *Re Eskimos* [1939] S.C.R. 104. Paul Chartrand reminds us that among the Indian Act amendments of 1951 was s. 4(1) which expressly excluded Inuit from the definition of "Indian" despite the ruling. See Paul Chartrand, "The Constitutional Context of Section 91(24)," a paper prepared for the Congress of Aboriginal Peoples, March 1999.

3 Russel Lawrence Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty*, (Berkeley: University of California Press, 1980), p. 32.

4 Douglas Sanders, "Native Rights," in *Report of Discussions on the legal status of Indians in the Maritimes*, (Toronto: Indian and Eskimo Association of Canada, 1970), 21.

5 *Royal Proclamation, 1763*.

6 US and Canadian policy both interfere with First Nation internal governance at various points to varying degrees. However, the point here is that the general policy framework in the US was predicated upon the notion of First Nations as Domestic Dependent Nations as Chief Justice John Marshall declared, while Canadian policy was based on principles of christianisation, colonisation and assimilation.

7 Douglas Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada," in Stanley Beck and I. Bernier eds., *Canada and the New Constitution*, (Montreal: The Institute for Research on Public Policy, 1983), pp. 241, 242.

8 Bradford Morse, *Indian Tribal Courts in the United States: A Model for Canada?* (Saskatoon: University of Saskatchewan, Native Law Centre, 1980), p. 19.

9 [1889] 14 App. Cas. 46, at 54 (P.C.).

10 *Attorney General for the Dominion of Canada v. Attorney General for Ontario* [1897] A.C. 199.

11 2 Ex. C.R. 417 and Angers, J. unreported, 10 April 1935 (Ex.). See Douglas Sanders, 1983, p. 245; Norman Zlotkin, "Post-Confederation Treaties," in Bradford Morse, *Aboriginal Peoples and the Law*, (Ottawa: Carleton University Press, 1985), pp. 399-401.

12 *Francis v. the Queen* [1956] S.C.R. 618.

13 For a more thorough discussion of these points and the cases, see Peter Hogg, *Constitutional Law of Canada*, (Toronto: Carswell, 1992), pp. 670-78.

14 Cairns, 2000, p. 20.

15 (1957) Que. S.C. 5.

16 (1960) 20 D.L.R. (2d) 416. See Douglas Sanders, 1983, pp. 241-2.

17 Catherine Bell and Michael Asch offer a slightly different assessment of these decisions and place more emphasis on the influence of US jurisprudence in these cases. See "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation," in Michael Asch, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*, (Vancouver: UBC Press, 1997), pp. 45-49.

18 *Calder v. Attorney General B.C.* (1973) D.L.R. (3d) 145 (S.C.C.).

19 [1969] 8 D.L.R. (3d) 82 (BC).

20 [1970] 13 D.L.R. (3d) 67 (BCCA).

21 [1973] 34 D.L.R. (3d) 145 (SCC). For an insightful discussion of the Nisga'a struggle, see Thomas Berger, *Fragile Freedoms: Human Rights and Dissent in Canada*, (Toronto: Irwin, 1982), pp. ;

22 See the analysis of lower court decisions offered by Kent McNeil, "The Meaning of Aboriginal Title," in Michael Asch, 1997, pp. 145-54.

23 *Attorney General Ontario v. Bear Island Foundation et al*. [1984] 49 O.R. (2d) 353.

24 *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* [1979] 107 D.L.R. (3d) 513.

25 Ibid.

26 Bell and Asch, 1997, pp. 55-64.

27 *Guerin v. R* [1984] 55 N.R. 161.

28 Some provinces were vary wary of the potential effects of this new clause to the extent that the clause was dropped in the negotiations and only reinstated in the final days of discussions at the insistence of Manitoba, Saskatchewan and Ontario. See Douglas E. Sanders, "The Indian Lobby," in Keith Banting and Richard Simeon, *And No One Cheered: Federalism, Democracy and the Constitution Act*, (Toronto: Methuen, 1983), pp. 318-21. For the actual accounts of the first ministers, see Lenard Cohen, Patrick Smith and Paul Warwick, *The Vision and the Game: Making the Canadian Constitution*, (Calgary: Detselig Enterprises, 1987), pp. 73-75.

29 Royal Commission on Aboriginal Peoples (RCAP), *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution*, (Ottawa: Minister of Supply and Services, 1993), pp. 38-9. See also, RCAP, *Treaty-Making in the Spirit of Coexistence: An Alternative to Extinguishment* (Ottawa: Minister of Supply and Services, 1995).; RCAP, *Restructuring the Relationship*, volume two of the Report of the RCAP, (Ottawa: Minister of Supply and Services, 1996), pp. 560-68.

30 For one of the leading commentaries on *Sparrow*, see W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" *Queen's Law Journal* 15 (1990) 217.

31 *R. v. Sioui* (1990) 70 D.L.R. (4th) 427 (SCC); Simon v. Queen (1985) 24 D.L.R. (4th) 390 (SCC).

32 [1996] 2 S.C.R. 507. . Including *R v. N.T.C. Smokehouse Ltd*., [1996] 2 S.C.R. 672, and

R. v. Gladstone, [1996] 2 S.C.R. 723. See Bradford Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in R. v. Pamajewon," *McGill Law Journal* 42 (1997), 1011-1042; Russel Lawrence Barsh and James Youngblood Hnderson, "The Supreme Court's Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand," *McGill Law Journal* 42 (1997), 993-1009.

33 [1996] 2 S.C.R. 821.

34 [1997] 3 S.C.R. 1010.

35 Thomas Flanagan, *First Nations Second Thoughts*, (Montreal and Kingston: McGill-Queen's, 2000), p. 128. He offers a controversial interpretation of the case in the pages that follow, pp. 129-133.

36 *R. v. Marshall* [1999] 3 S.C.R. 456 at 468.

37 Ibid., 466, 496-499.

38 Ibid.

39 Ibid., 470-1.

40 Ibid., 514.

41 Ibid., 526.

42 Assembly of First Nations, "National Chief calls for Reinforcement of Supreme Court's Marshall Decision," *Press Release*, October 5, 1999.

43 For a brief discussion of the decision and its aftermath to October 1999, see Thomas Flanagan, 2000, pp. 138-141.

44 *R.V. Marshall*, [1999] 3 S.C.R. 533.

45 In *R. v. Askov* [1990] 59 C.C.C. (3d) 449, the Supreme Court ruled that a 23 month delay for trial was unreasonable and suggested a guideline of 6-8 months. This resulted in excess of 50,000 criminal charges being stayed or withdrawn (although many would have faced the same result had they proceeded along anyways). The public outcry caused the court to revisit the issue in *R. v. Morin* [1992] 71 C.C.C. (3d) 1, and clarify that 6-8 months was a guideline, not a deadline to be applied in a purely mechanical manner.

46 *Marshall* [1999] 3 S.C.R. 542.

47 Ibid., 548-549.

48 Ibid., 564.

49 Ibid., 550.

50 Assembly of First Nations, "First Nations see Marshall Ruling as Impetus for Discussion," *Press Release*, November 19, 1999.

51 For alternative views on handling rights, see Brian Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada," *Osgoode Hall Law Journal* 34:1 (1995), pp. 101-112; and Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences," *Canadian Human Rights Yearbook* 6 (1989-90), 3-46.

52 Blockades are much more common now. In addition there have been a series of significant stand-offs between the state and First Nations involving guns or force at Oka in Quebec, Ipperwash in Ontario, and Gustafsen Lake in BC.

53 See Assembly of First Nations, "Environics Poll News Release: Poll Results Show Canadians Support First Nations," *Press Release*, December 1999.