

## **DRAFT FOR REVIEW ONLY–NOT FOR CIRCULATION**

Who holds the pen...

Jeffrey Simpson (Globe and Mail, Sept 30, p. 18) is right to be concerned about the recent decision of the Supreme Court of Canada in the fishing rights case involving Donald Marshall. But he does not carry his expression of concern far enough. A five person majority of the Supreme Court has managed, with what seems tortured reasoning, to undermine perhaps the most central principle on which human survival ultimately will rest—the recognition that there must be an accepted, legitimate locus of collective responsibility for regulating the aggregate impact of human activity on the biosphere and life support systems for the Earth.

Contrary to Simpson, it can be argued that the Supreme Court's 1990 Sparrow decision set out in clear terms an effective ordering of fundamental priorities in regulation of access to fisheries resources: conservation first, with the responsibility for determining conservation requirements resting with the Minister of Fisheries, accountable to our elected representatives in Parliament (thus representing the rights of future generations and the future Earth); then the aboriginal right to fish for food, social and ceremonial purposes only; then the claims of all, including aboriginal people as individuals exercising common rights of citizenship, to access to the resource and participation in the fishery for commercial, sport and recreational purposes. Where rights conflict, as they do in access to a common pool resource, this ordering of priorities seems right.

What this judgement has now done, apart from precipitating the chaos, conflict and challenge to governments to which Jeffrey Simpson refers, is upset the balance toward which our society has been groping in attempting to integrate the role of conventional and esoteric science, exercised at the national level through the Department of Fisheries and Oceans and reflecting national interests and international commitments, with the role of local and traditional ecological knowledge, reflecting local and community interests. Till recently, the balance has been much too far toward the influence of bureaucratic and technical expertise; recently, however, much has been done to correct that balance and bring into policy and management decisions a fuller range of local interests, perspectives and experience.

In determining that a treaty right can establish for a particular group a claim to access which is independent of any social or national regulation reflecting a system-wide outlook, the judgement sets back this search for balance, and leaves not just the interpretation of complex data and stock assessments or international commitments and obligations, but also the determination of overarching conservation requirements, to isolated local interests. By contrast, even the most optimistic promoters of self-governing institutions and community-based management recognize that such decisions must be nested within the broader institutional settings and constitutional frameworks that reflect the complex dynamics of global ecosystems and the complex mesh of

international obligations in a global village currently engaged in re-interpreting its distributional commitments and ideas of equity.

It is interesting to see how we got here. To a non-expert non-historian it seems (with the benefit of the dissenting judgement written by Madame Justice McLachlin) that a series of ‘Peace and Friendship’ treaties set out terms on which a powerful Mi’kmaq Nation would cease to support and supply the French armies engaged in their final battles with the British in North America. . Included in the 1760 treaty analyzed in the judgement was an explicit provision that the Mi’kmaq would not continue to supply food, clothing and other provisions to the French, but would trade only with the British at ‘truckhouses’ established for the purpose. To assure the plausibility, feasibility and implementability of this prohibition, the British provided reassurances that they would establish such truckhouses as required to permit the Mi’kmaq to ‘trade for necessaries’ on terms at least as favourable as before. Out of this prohibition, which seems clear on its face and eminently plausible in context, the majority of the Court has constructed a treaty right which seems to imply an uncontested and unregulated right of priority access to the commons—the common heritage of humankind—for a single group solely excepted from the responsibility to respect a collectively determined regulation of human impact upon the biosphere.

It did so, interestingly, by going back to the records of what we might now call the consultative process which preceded the formal treaty. In the records of prior meetings of the Governor with Mi’kmaq representatives, presumably conducted in some mix of translations among the native language, French and English, the Governor had posed a question recorded by the British Governor’s Secretary as “Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this time.”. The response was recorded as: “...their Tribes had not directed them to propose anything other than that there might be a Truckhouse established for the furnishing them with necessaries, in Exchange for their Peltry...” From this, and other reference to historical context, the majority of the Court discerned a Mi’kmaq demand for positive trade concessions, accepted by the Crown. It was thus led to conclude that what was formally set out in the 1760 treaty as an express limitation and a prohibited behaviour actually conferred an expansive right both to trade and to fish for trade purposes. The power of the pen—the influence of the anonymous recording clerk—may never have been, or be, greater.

This decision is not a matter of aboriginal rights, which remain to be negotiated. The Court’s earlier *Delgamuukw* decision, contrary to much current rhetoric, does not uphold claims of ownership or grant title to anything. But it does support and entrench a place in the process of negotiating and adjusting claims for access, use and title. This *Marshall* decision, by contrast, seems much more limited. It is about a treaty--in effect, a contract right, albeit a constitutionally protected one.

Elsewhere I have argued that it is essential that we recognize the need to adapt and adjust contract rights in the face of learning and experience and our evolving understanding of

ecosystems, human systems and the interactions and co-dependencies amongst them. Contracts for access by human or corporate beings to common pool resources establish property rights which are essentially and inevitably conditioned by those evolving understandings and their implications for interpretation of what is responsible and socially appropriate use in light of our obligations to other people, future generations and the Earth itself. As our understandings change, the constraints change, and the nature of the use must change. This has, as all change does, distributional impacts. It affects the extent of speculative expectations, and hence the trading value of the rights. But compensation from the community for such adverse impact or loss in the speculative value of rights to Nature is not due to the contractors as a result, any more than it is to those who suffer a loss in the value of human capital, intellectual capital or social capital as knowledge and the world move on, and economic structural adjustment follows, with painful results for many. At most, a claim for compensation for the current value of out-of-pocket investments undertaken in light of explicit performance requirements or promises (as with the Carrier Lumber case in British Columbia) might be entertained.

The same holds for contracts or treaties negotiated two hundred and forty years ago, in a world vastly different in circumstances and scale, and even more different in beliefs and understandings. Even if the treaty had explicitly entrenched a positive property right, rather than simply expressing an explicit restriction on a much more limited implicit right—that is, even if the Court were correctly interpreting a positive right rather than creating it from what seems almost its contrary—the same general argument would hold. That treaty right, interpreted as a right to Nature, or a claim on access to a portion of an ecosystem and biosphere which is a common human heritage, is conditioned by the overarching obligation to its stewardship as based on our best current understanding of those obligations in light of our best current understanding of ecosystem function and risk.

Of course, the Mi'kmaq people, status or not, collectively are at least as able and as likely as any other local group—quite possibly more likely, because more settled and less driven by speculative motives—to interpret and act on those responsibilities, and more likely than are corporate as opposed to community entities. But the point is that our current appreciation of the limits on our knowledge of ecosystem function should make it clear that no local group can by itself hope to have a sufficient understanding of the system and resulting obligations; these, tentative as they are from day to day, have at any time to be interpreted in light of the crucial global linkages and international obligations which surround them. Local and traditional knowledge is part of the process of interpretation; equally essential and crucial is the understanding brought by the processes of science, of formal interpretation of the evidence, and formal processes of processing and filtering experience. Local responsibility is part of the decision. But to rely in this crowded commons on the social conscience of the Mi'kmaq Nation, by itself, is no more sufficient than to rely on any other single group with its own distinct interest.

Social learning and adaptive management relate, respectively, to the profound swings in

understanding and belief that result from broad social movements and evolving interpretation of the world around us, and to the shorter term need to act on the evidence in that world on the basis of changing understanding from experience with policy and management understood as experiment and learning opportunity. Both social learning in the long term and adaptive management in the shorter term mean that our understandings of the social constraints and conditions underpinning responsible exercise of property rights involving access to common resources or impacts on ecosystem function must evolve and change.

The attempt to set out such understandings in full in explicit contractual terms whose interpretation is unchanging over time is therefore fundamentally misguided.

Property rights and investor rights are conditioned on social understandings; they do not entrench claims for compensation for the possible loss of dreams of speculative gain. Property rights emerging from “sweat equity” may be subject to such claims for compensation; the speculative value of Nature’s creations is not up for appropriation in a similar fashion.

The ‘rule of law’ cannot mean a right to a black letter, contract-based and accounting-driven individual right as against a common heritage. What it can–must--mean is a claim to a place in a fair process of interpretation, changing over time, of the rights of all. The Court’s judgement in the Delgamuukw case underlined the Crown’s obligation to guarantee that those now living in communities that were here before Europeans can regain an assured and respected place in such a process of interpretation and adjustment. It did not assure an entrenched claim to property, and the Native activists who are now jumping the queue and pre-empting the negotiations process in British Columbia or elsewhere have no foundation in any such ‘rule of law’. The Marshall judgement conveyed only a bounded right to a limited group, but both the bounds and the limits are probably too ill-defined to be workable. The decision has to be considered a significant setback to a process which has been working its way toward a reasonably balanced interpretation of some fundamental principles.

Up to the Marshall case, one might have argued that the stream of SCC decisions respecting aboriginal rights was working positively and optimistically toward a redress of past injustice in a manner which promised progress through negotiations within a framework of constitution and rights that, with respect and goodwill, could bring together a Canadian community. The judgement in the Marshall case reflects an illusion of a more constant and certain world that justifies a more expansive interpretation of contract or treaty rights. This illusion jeopardizes the hope for a more robust environmental policy permitting Canadians to move toward a more sustainable culture in a complex and constantly changing world.

The sad thing is it did not have to be that way. The majority decision itself suggests that this treaty right was always a regulated right. It asserts clearly that catch limits may be imposed by the Minister of Fisheries and Oceans in order to constrain incomes within the bounds of a ‘moderate livelihood’. Such limits would accommodate, not infringe upon, the right, and would

not need further justification. What is missing is a similarly clear recognition that in addition closed seasons or area closures or gear restrictions imposed by the Minister of Fisheries for conservation purposes are also consistent with exercise of the treaty right and are binding on all, Mi'kmaq and non-native alike. Ideally such regulations should emerge from a consultative process involving the participation of all those affected, on the ground. But in any case they must apply to all.

Somehow we have to move beyond this decision. It is not just that extrinsic evidence as to cultural or historical context must be considered in fleshing out the full understanding of the written treaty, as the judgement itself declares. What is essential is the subordination of the specific language of contracts to the changing social foundation in which they must be set. It is not just "Good luck to the government in sorting out this mess" as Simpson suggests in closing. It is a need for good luck to us all in surmounting a particular view of contracts as opposed to commitments that threatens efforts to achieve conservation goals and limit within reasonable bounds the ecological impacts of human activities. What may be at stake is not just order in the regulation of the East Coast fishery; it may well be order in a sustainable society itself.

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