

THE MARSHALL DECISION AND GOVERNMENTS' DUTY TO REGULATE

Editor's note: This article appeared in our April issue but, because of an editorial oversight, without corrections requested by the author. Our apologies to readers and to Mr. Isaac. The version posted at www.irpp.org has also been corrected.

Note du rédacteur en chef : nous republions cet article, d'abord paru dans notre numéro d'avril sans les corrections réclamées par l'auteur. Nos excuses à M. Isaac et à nos lecteurs pour cette négligence rédactionnelle. On lira aussi la version révisée au www.irpp.org.

Canada's courts have made clear that in respecting Aboriginal peoples' treaty rights to hunt and fish governments may nevertheless continue to regulate fish and animal stocks and also attend to the interests of non-Aboriginal peoples. The courts have been vague on how this balancing of interests can be achieved—some guidelines may help to move the process along. The current Atlantic Fisheries Policy Review presents an opportunity to the federal government to put into place fisheries regulations that balance the interests of Aboriginal and non-Aboriginal fishers.

Thomas Isaac

Les tribunaux canadiens ont clairement établi que les gouvernements du pays, s'ils sont tenus de respecter les droits de chasse et de pêche reconnus par traité aux Autochtones, conservent le pouvoir de réglementer le niveau des stocks de poissons et d'animaux sauvages et la responsabilité de protéger les intérêts des non-Autochtones. Les tribunaux n'ont cependant pas spécifié la façon d'exercer ce pouvoir. L'auteur propose ici quelques balises qui, si modestes soient-elles, pourraient selon lui contribuer à débloquent la situation. Pour tenter d'appliquer ces balises, on pourrait mettre à profit l'actuelle révision de la politique sur les pêcheries de l'Atlantique.

Almost two years after the Supreme Court of Canada's 1999 *Marshall* decision held that the Mi'kmaq of the Maritimes possess treaty rights to fish, hunt, gather and trade for necessities, the federal government continues to work on a strategy to comply with the ruling. Its goal is to try to establish rules that address the needs of Aboriginal and non-Aboriginal people, as well as other issues such as conservation. On Feb. 9, the Minister of Indian Affairs and Northern Development (DIAND) and the Minister of Fisheries and Oceans (DFO) launched Ottawa's long-term plan. The strategy is two-pronged: DIAND will negotiate long-term agreements (or treaties) while DFO will work with a reported \$500 million over three years to help Atlantic First Nations become more involved in the commercial fishery.

The Minister of DFO has also released a discussion paper that is the basis for public consultations relating to the

Atlantic Fisheries Policy Review (AFPR). The review will focus on developing and then implementing a new policy framework for managing the Atlantic fishery. The AFPR discussion paper states that once DFO determines an acceptable level of harvest for a particular species, Aboriginal rights to fish for food and for social and ceremonial purposes "take precedence over other users of the resource." While this is partly consistent with such Supreme Court of Canada decisions as *Sparrow* (1990), more recent decisions, like *Marshall* and *Gladstone* (1996), call for a balancing of interests. In these decisions, the Court says, for example, that other resource users and other factors, including "non-Aboriginal regional/community dependence," can provide a legitimate justification for limiting the allocation to the Aboriginal fishery.

Since the release of the *Marshall* decision, the public focus on the fishery and the role Aboriginal people play in

it has intensified substantially. Recall the events of last year at Burnt Church, New Brunswick, where members of that First Nation and DFO officers confronted each other on the waters of Miramichi Bay over that First Nation's efforts to protect their right to fish lobster. A strategy that attempts to put Aboriginal fishers in a better economic position than they have been historically is obviously important. Clearly, the economic and social conditions of Aboriginal people in Canada are not good and any attempt to enhance their well-being can only benefit all Canadians. However, the Atlantic fishery requires that proactive management and regulation be balanced with sensitivity toward the constitutionally protected rights of Aboriginal people.

Simply putting more money into the Aboriginal fishery without resolving the real outstanding issue would be a disservice to Aboriginal and non-Aboriginal fishers alike. At the heart of the Aboriginal fishery issue, including the West Coast, is the lack of a sensitive regulatory regime that applies to all Aboriginal fishers and balances other substantive public interests. Any strategy to lessen the tension surrounding the Aboriginal fishery should clearly include an economic component and a treaty strategy, but it must also include a regulatory component.

The lack of a sensitive and balanced set of rules with respect to the Aboriginal fishery can trace its roots back to the Supreme Court's *Sparrow* decision in 1990. Since that time DFO has put into place *ad hoc* measures to deal with Aboriginal interests and rights in the fishery. For the most part, DFO's measures have raised the expectations of Aboriginal people, leaving them frustrated when those expectations are not met, while also seeding discontent among non-Aboriginal fishers.

Although the focus has been on the *Marshall* decision, all levels of government face even broader public policy decisions concerning the extent to which they are willing to regulate in areas where Aboriginal and treaty rights might be affected, and how they can do so in a manner that respects not only those rights but also the interests of non-Aboriginal people. To date, we have seen policies at both ends of the spectrum. Some governments appear to ignore the constitutionally protected rights of Aboriginal people, while others appear to go out of their way to accommodate Aboriginal people at the expense of either the resources or other resource users.

Neither extreme is tenable or sustainable. Nor do they fulfil the Crown's fiduciary duty to Aboriginal people or uphold the honour of the Crown in dealing with them.

The lack of consistent and well thought-out rules that balance all interests will continue to cause unnecessary litigation, confusion and expense for governments, Aboriginal people and non-Aboriginal resource users. Indeed, it raises the question: Is government duty-bound to proactively regulate resources so as to protect them from undue exploitation, in order to preserve reasonable access to the resource by Aboriginal people?

While the Supreme Court has provided a liberal interpretation of Aboriginal and treaty rights in *Marshall* and other decisions, the Court has also been clear that the ultimate authority to regulate resources rests with government, provided government can justify any potential impairment of Aboriginal and treaty rights. While the courts have laid out general perimeters regarding the rights of Aboriginal people, these judicial decisions are limited in their scope, application and ability to resolve broader disputes. Since the *Sparrow* decision, the Supreme Court has generally confined itself to establishing the broad nature of Aboriginal rights in Canada, leaving more specific questions unanswered.

The Supreme Court strongly endorses negotiated settlements, but insofar as they apply to such resources as fish and wildlife even negotiated settlements have to be placed within an existing legislative framework. Thus, governments sooner or later will have to face the reality that they must deal with the issue of regulating Aboriginal and treaty rights. To date, DFO has been reluctant to set up rules that are sensitive to such rights. Doing so will not be easy, but it is a task that must be undertaken. Otherwise, a regulatory vacuum will continue to exist.

An important question remains: Has the Supreme Court allowed provincial governments to infringe Aboriginal rights, even though these rights are at the heart of federal jurisdiction, as provided for in the *Constitution Act, 1867*? I believe that the Supreme Court has distinguished between, on the one hand, legislation addressing Aboriginal needs and, on the other, laws of general application that might affect Aboriginal people but do not single them out. The Court therefore maintains the province's rightful ability to legislate within its

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areas of jurisdiction. While the *Sparrow* decision stated that s. 35(1) “affords Aboriginal peoples’ constitutional protection against provincial legislative power,” I submit that this means Aboriginal and treaty rights may not be used to negate federal legislative jurisdiction. For their part, provincial legislatures could enact legislation that deals with the provincial role of maintaining the honour of the Crown and the duty to consult in matters that might affect Aboriginal and treaty rights. While the drafting of such provisions would be complex, they are nevertheless a realistic and necessary result of the Supreme Court’s direction to all governments. The Supreme Court affirms this, in part, in *Marshall*, where it states: “The Court was ... most explicit in confirming the regulatory authority of the federal and provincial governments *within their respective legislative fields* to regulate the exercise of the treaty right [subject to justification].”

The courts, including the Supreme Court, have provided some comments on how governments can improve their regulatory regimes as they relate to the rights of Aboriginal people. In summary: [emphasis added]

- Discretionary authority conferred by statute must outline specific criteria for the granting or refusal of that discretion when Aboriginal or treaty rights may be affected.
- Where discretionary authority is exercised and where Aboriginal or treaty rights may be affected, governments must always be prepared to explain their decisions in a justifiable and transparent manner.
- Regulations that, at their core, affect Aboriginal or treaty rights, such as hunting or fishing, must be drafted in a manner so as to be clear and unambiguous in their meaning and intent. If the goal is safety, conservation or some other compelling public interest, then this should be stated clearly in the regulation.
- Where it is clear that regulations might affect Aboriginal or treaty rights, the regulations should contain a mechanism to provide for meaningful consideration of these rights, as well as be able to demonstrate that such consideration occurred.
- Regulations aimed at accommodating Aboriginal and treaty rights, such as setting catch limits that provide for a “moderate livelihood” for Mi’kmaq, the issue in *Marshall*, do not require justification since they would not infringe any rights. How this principle would apply to rights other than fishing is unclear.

These are just a few examples of what could be done to meet the standard of justification which the courts have imposed on governments. Some might argue that these suggestions seem very general and perhaps even obvious. Perhaps so, but they go to the heart of governments’ responsibility in these matters, which to date have largely not been acted upon.

They are also suggestive of two problems that commonly arise in this public policy debate. First, the courts have, until recently, been vague about the specifics of what

governments can do when regulating in areas affecting Aboriginal and treaty rights. Second, governments have hesitated to proactively regulate in these areas since they are relatively new on the Canadian legal scene, are fraught with uncertainty, and have the potential to cause unrest. In one sense, these suggestions underscore the reasonableness of the Court’s attempt to balance governmental authority with the rights of Aboriginal people. Only trial and error, together with more-detailed judicial reasoning on what is permissible, will produce a measured and balanced approach to regulating activities that affect the constitutionally protected rights of Aboriginal people in a fair and transparent manner.

Though these suggestions may appear modest, they would in fact require a wholesale re-examination of thousands of pages of laws and regulations. This is the onus that the courts have placed on governments. While the suggestions may appear to impede or restrict governmental authority, the very opposite is true. By re-tooling the existing regulatory regime, governments could significantly reduce their exposure to having their laws and decision-making processes overturned or deemed inapplicable when affecting Aboriginal people.

The Atlantic Fisheries Policy Review has the potential—though whether it will or not is unclear at this point in time—to fill the regulatory gap that has existed since the 1990 *Sparrow* decision. Whether what emerges from its activities is an economic fishing agreement or a full-fledged modern treaty, there will still be a need for fishery regulations. The AFPR is not clear in stating that new regulations will be put in place that not only recognize the rights of Aboriginal people, but also balance those rights with the rights of other resource users, as confirmed by *Marshall*.

Helping Aboriginal fishers enhance their commercial presence is both important and consistent with the goal of encouraging Aboriginal people to become full participants in Canadian society. Even so, although DFO is under no obligation to provide \$500 million, it does have an obligation, made clear to it many times by the courts, to get its regulatory house in order. Economic incentives or new treaties are only one part of an incomplete picture. Without a comprehensive and sensitive regulatory regime within which to operate, these economic incentives can only be *ad hoc* and short term. A long-term solution requires governmental leadership and sustainable regulation that is thoughtful and balanced.

Thomas Isaac has advised extensively in the area of Aboriginal law, is a former Chief Treaty Negotiator for the BC government and was Assistant Deputy Minister in the Northwest Territories’ Cabinet Office responsible for the creation of Nunavut. He is currently with the law firm of McCarthy Tetrault LLP in Vancouver, BC.