

Canada Watch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

SPECIAL EDITION ON THE SUPREME COURT'S 1999 CONSTITUTIONAL CASES

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The importance of the Marshall decision

BY TOM FLANAGAN

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The courts in the last decade have repeatedly looked at historical sources in interpreting the meaning of treaties, even where the treaty text seemed plain enough on its face.

Anyone who reads newspapers or watches television knows that the Supreme Court's decision in the *Marshall* case has touched off heated quarrels over the allocation of Atlantic fish stocks, leading to problems that are far from being resolved. In the longer run, *Marshall* also has implications that are equally far-reaching for the interpretation of treaties all across Canada.

Both the majority and minority opinions in *Marshall* agreed in explicitly repudiating the rule of interpretation for treaties proposed by Justice Estey in the *Horse* case (1988), where he wrote that "extrinsic evidence is not to be used in the absence of ambiguity" in the wording of a treaty. It is not surprising that Estey's rule of interpretation has been overturned; it was always unpopular with aboriginal advocates, and it has never been consistently followed, not even in the case in which it was promulgated. The courts in the last decade have repeatedly looked at historical sources in interpreting the meaning of treaties, even where the treaty text seemed plain enough on its face. In that sense, *Marshall* was only a more adventurous application of the current judicial approach to the interpretation of treaties.

Marshall, however, did not deal with aboriginal oral traditions. The Supreme Court used conventional historical sources to support the proposition that the parties had an oral understanding of the treaty not expressed in the written text. The true importance of *Marshall* for the future does not emerge until it is "read together" (as lawyers like to say) with the Supreme Court's *dicta* about aboriginal oral traditions in *Delgamuukw* (1997). In that case, Chief Justice Antonio Lamer laid down the following principle:

Notwithstanding the challenges created by the use of oral histories

as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.

The chief justice was concerned that, in cases like *Delgamuukw*, involving facts from a time when no written records existed, it might be impossible for native plaintiffs to make out much of a case if oral traditions were not given independent weight.

There are, to be sure, some important differences between *Delgamuukw* and treaty litigation. In *Delgamuukw*, there was no treaty; the plaintiffs were offering their oral traditions as evi-

dence about their occupancy of land before the time when white settlers were present to write down their observations. In contrast, treaty cases focus on the interpretation of a text, and aboriginal oral traditions recount events that are also recorded in conventional documents. Indeed, aboriginal peoples had already become at least partially literate when the later treaties were signed. Be that as it may, there is little doubt that the courts will read *Delgamuukw* and *Marshall* together and will begin to make more extensive use of aboriginal oral traditions in interpreting treaties.

The confluence of *Delgamuukw* and *Marshall* will pose novel challenges both to the judicial process and to the understanding of treaty rights. Aboriginal oral traditions about the meaning of treaties are often startlingly different from what the written text appears to say. Let me give three examples from current treaty litigation in Alberta—cases with which I am familiar because of my work as a historical consultant. I am sure that hundreds of similar instances could be adduced wherever treaties have been signed in Canada.

BENOIT

No treaty mentions the topic of taxation. However, the commissioners sent by the federal government to negotiate Treaty 8 (1899) found many aboriginal people "impressed with the notion that the treaty would lead to taxation." They therefore reassured the crowd assembled at Lesser Slave Lake that Treaty 8 "did not open the way to the imposition of any tax." At the same time, they emphasized that "whether treaty was made or not, they were subject to the law." The government of Canada has

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always interpreted these reassurances as meaning that Treaty 8 in itself did not impose any taxes but that Canada retained legislative power to levy taxes upon status Indians or to grant tax exemptions, as has been done under the *Indian Act*. Now the plaintiffs in the *Benoit* case are arguing that the commissioners' promises are an enforceable part of the treaty, and that those promises must be interpreted in the light of aboriginal oral traditions that say, in the words of one informant, that "tax was prepaid."

RIOALTO

According to Treaty 8 (and all the other numbered treaties), "the said Indians do HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP TO THE government of the Dominion of Canada, and for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever" to the lands described in the treaty, although "they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered . . . saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes." Alberta has always interpreted these words to mean that, because aboriginal title has been surrendered, the province has the unfettered ability to grant tenures upon Crown lands, even though aboriginal people may still hunt, fish, and trap there. Plaintiffs in the *RioAlto* case now say their approval must be obtained before the province can allow the cutting of seismic lines on so-called traditional lands where band members hunt and trap, even though these are not reserve lands. According to the plaintiffs' oral tradition, "our people have always naturally understood [the treaty] to mean that the Crown would respect our traditional ways and not undertake or approve any activity which would adversely affect our abil-

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SAMSON

The *Samson* case has been widely publicized because the plaintiffs, the Samson Cree Nation of Hobbema, allege that the government has mismanaged their natural resource revenues for decades, and they are claiming over a billion dollars in compensation. There is also an important treaty-interpretation aspect to the case. Treaty 6 has a land-surrender clause similar to the one just cited from Treaty 8. Plaintiffs, however, say they only surrendered the surface of the land, which would seem to make them still owners of huge amounts of oil and natural gas beyond the boundaries of their reserve.

Elders of Treaty No. 6 will testify that a fundamental basis of the treaty was that the Plains Cree would share the land with agricultural or farming settlers. However, Treaty No. 6 did not provide for a surrender of any right in the land beyond an ability to enjoy a plough's depth to permit white settlers to till the surface of the soil in order to be able to farm and feed themselves. The Cree belief is that the land, in the sense of the whole country or island of Canada, belongs to the Creator. The Cree understanding was that the Europeans or white settlers who pursued their different way of life on lands where crops could be grown would be sharing them with Plains Cree who were following the traditional way of

life. The mountains, the lakes and the other areas of the land which the Plains Cree considered to be unsuited to agriculture would be left as their territory. The ploughshare or plough blade metaphor is used by Cree speakers to describe this understanding of sharing by which the whites could use only what was necessary to sustain themselves.

These three cases, and many others like them, were all underway before the Supreme Court handed down its decision in *Marshall*. Now, however, counsel for plaintiffs in these cases will argue that *Marshall*, together with *Delgamuukw*, raises the credibility of aboriginal oral traditions. It seems that for a long time to come, the litigation community—judges, lawyers, expert witnesses, as well as the parties themselves—will be grappling with questions to which at present there are no clear answers. To mention only a few:

- Who is a credible oral informant? Any band member? Any elder? Someone whose ancestors were present at treaty negotiations?
- How does one assess the credibility of oral traditions passed down over several generations? How much error can be expected to creep in through the process of intergenerational transmission?
- How does one decide between oral traditions that conflict with one another, as when two different aboriginal communities both claim to have used and lived upon a certain territory? Oral tradition is not a

monolithic concept. There is no single oral tradition; rather, there are many oral traditions, which sometimes contradict one another.

- What weight should be given to oral traditions that do not just pro-

vide information to resolve ambiguity but rather directly contradict the wording of treaties and statutes?

As these questions are gradually dealt with, the importance of *Marshall* for

struggles over control of land and natural resources everywhere in Canada will come to outweigh greatly the value of Donald Marshall's 463 pounds of eels, or even the tons of crab and lobster now at stake in the Atlantic fishery. ♦

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communities in territories approximating the territories of the original signing group. (This at least is the conclusion drawn by government agencies who are attempting to implement the decision.) Yet the anomaly of the majority decision is that it was not based on an examination of the Cape Breton treaty that presumably would protect Mr. Marshall's rights, but rather on a Maliseet treaty and the first of the Mi'kmaq treaties, both signed months before the Cape Breton treaty. Moreover, Pomquet Harbour, the location of Mr. Marshall's eel fishing, is not on Cape Breton Island, but rather on the Nova Scotia mainland at least 50 kilometers from Cape Breton. Effectively, the Court did not examine either the local treaty or the relevant territory of Donald Marshall Jr.'s community, the Membertou Reserve on Cape Breton Island.

Second, if the court agrees that these are local treaties, yet in wording they are identical, it would be logical to assume that what makes each a distinctive treaty is its context, including whatever extrinsic evidence there is of oral agreements. There was such an oral agreement in the Cape Breton treaty negotiation: a British promise that the Mi'kmaq present on this occasion could practise their Roman Catholicism and that the British would help acquire a suitable priest for them. This is what was most important to the Cape Breton chief. The British willingness to listen to such a request and to make a promise in reply suggests that they recognized the decentralized polity of the Mi'kmaq and the distinctive voices of each group. If oral agreements are equally part of a treaty, then one must interpret each in its own context and reject the notion that all of the

[I]f the court agrees that these are local treaties, yet in wording they are identical, it would be logical to assume that what makes each a distinctive treaty is its context, including whatever extrinsic evidence there is of oral agreements. There was such an oral agreement in the Cape Breton treaty negotiation.

Mi'kmaq treaties were identical simply because of their written form. Does this not equally suggest that the extrinsic evidence surrounding the Maliseet treaty has no relevance to the Mi'kmaq treaties unless it can be demonstrated that the Mi'kmaq raised similar concerns? If each was in fact a good faith negotiation, does each not have to be examined in its full context to determine what made it a local treaty of local application?

There is a constitutional requirement that aboriginal and treaty rights cases draw on history as well as law. My argument is that the two are equal, and meeting the constitutional test requires the application of the highest professional standards of both disciplines. In a word, bad history cannot make good law. The Marshall case represents both an honest attempt to blend history and law, and an illustration of some of the problems yet to be resolved in doing so. At trial, both the Crown and the defence, drawing on the lesson of the *Simon* decision, presented hundreds of documents through historians serving

as expert witnesses. The historians did far more than recite facts; they provided their professional skill in interpreting difficult material, and they explained the methods they employed in coming to the conclusions they made. Both sides, perhaps, provided far more than the courts either needed or wanted, and it may well have been reasonable for the Supreme Court to narrow the focus as it did in its final decision. But in doing so, the court could have asked for more evidence in its fullest historical context, and sent questions back to a trial court if the evidence at hand was insufficient. *Marshall* suggests that the process by which history is incorporated into aboriginal and treaty rights decisions still requires some attention. Among other matters, the court especially needs to rethink what it means by "extrinsic evidence." And it needs to provide clearer links between centuries-old treaties and their native beneficiaries in the present. The object, surely, is to ensure that the highest standards of legal and historical interpretation are afforded Canadians who rely on s. 35(1) for protection. ♦