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Power Without Law: The Supreme Court of Canada, the Marshall Decisions, and the Failure of Judicial Activism

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Power Without Law: The Supreme Court of Canada, the Marshall Decisions, and the Failure of Judicial Activism

by Alex Cameron
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In *Power Without Law*,[1] author Alex Cameron strongly criticizes "incautious judicial activism"[2] which allows the law to become "too malleable to personal judicial predilection."[3] Cameron makes his arguments primarily through an analysis of a 1999 decision of the Supreme Court of Canada, *R v Marshall (No 1)*,[4] in which the majority of the Court held that Aboriginal peoples in the Maritimes have a treaty right to hunt, fish and gather, and to sell the products of these activities in order to provide themselves with a moderate livelihood. Cameron also comments on two subsequent and closely related decisions, *R v Marshall (No 2)*[5] and *R v Stephen Marshall; R v Bernard*.[6] He characterizes these three decisions as reflecting a worrying trend in judging: a results-based judicial activism that blurs the line between law and policy, and between the role of judges and the role of elected legislatures. Cameron sees this approach to judging as inimical to the rule of law, and thus as an exercise of power without law.

PowerWithout Law is a well-researched, well-written book which presents strong but carefully argued views on issues of legal and political significance. It should be read by anyone interested in the role of judges, the rule of law, Aboriginal and treaty rights, constitutional law, or the use of historical evidence in the courts. Because of the issues it tackles, *Power Without Law* will cause debate and in some cases, sharp disagreement.[7] When the book was published, the Assembly of Nova Scotia Mi'kmaq Chiefs requested that Cameron, a senior constitutional lawyer with the Department of Justice in Nova Scotia, be removed from any cases involving First Nations.[8] While readers may be strongly divided on the merits or pitfalls of judicial activism, this

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1 Alex M Cameron, *Power Without Law: The Supreme Court of Canada, the Marshall Decisions, and the Failure of Judicial Activism*, (Montreal: McGill-Queen's University Press, 2009) [*Cameron*].

2 *Ibid* at 93.

3 *Ibid* at 9.

4 [1999] 3 SCR 456, 178 NSR (2d) 201 [*Marshall No 1* cited to SCR].

5 [1999] 3 SCR 533, 179 NSR (2d) 1 [*Marshall No 2* cited to SCR].

6 2005 SCC 43, [2005] 2 SCR 220, 235 NSR (2d) 151 [*Marshall/Bernard* cited to SCR].

7 For authors who take a very different view of the *Marshall (No 1)* decision, see Catherine Bell & Karin Buss, "The Promise of *Marshall* on the Prairies: A Framework for Analyzing Unfulfilled Treaty Promises" (2000) 63 Sask L Rev 667; Warren J Sheffer, "*R. v. Marshall*: Aboriginal Treaty Rights and Wrongs" (2000) 10 Windsor Rev Legal Soc Issues 77; Bruce H Wildsmith, "Vindicating Mi'Kmaq Rights: The Struggle before, During and After *Marshall*" (2001) 19 Windsor YB Access Just 203.

8 "N.S. Mi'kmaq urge removal of 'unacceptable' lawyer", *CBC News* (2 November 2009) online: CBC News <http://www.cbc.ca/canada/nova-scotia/story/2009/11/02/ns-treaty-book-complaint.html>. In response, the provincial Minister of Justice stated that the book had been written in Cameron's spare time, that Cameron had a right to express his views, and that the Nova Scotia government respected the decision of the Supreme Court of Canada in *Marshall (No 1)*.

book, with its thorough historical analysis and carefully explained reasoning, will help ensure that the judicial activism debate is an informed one. While not persuaded by every aspect of Cameron's arguments, I found the book informative, thought provoking and an excellent read.

Cameron emphasizes in *Power Without Law* that he is providing a legal analysis. He notes that increased Native access to commercial fisheries and other resource-based industries may be a legitimate policy choice, but argues that "policy is the realm of elected governments"[9] and not the realm of judges. Cameron also emphasizes that his book is not intended to be disrespectful of Justice Binnie, who wrote the majority decision in *R v Marshall (No 1)*, or of the Supreme Court of Canada as a whole; nor is it intended as a criticism of Native communities or of Mr. Donald Marshall Jr.[10]

The events leading up to *R v Marshall (No 1)* started in the summer of 1993, when Donald Marshall Jr., a Mi'kmaq from Cape Breton, caught 463 pounds of eels in Pomquet Harbour, Antigonish County and sold them for approximately $800. In doing so, Mr. Marshall engaged in a commercial fishery and because he fished "without a licence in a closed season with illegal nets,"[11] he was in violation of regulations made under the federal *Fisheries Act*.[12] Mr. Marshall argued that he had a treaty right to catch and sell the eels which superseded the *Fisheries Act*.

Although unsuccessful at trial[13] and the Nova Scotia Court of Appeal,[14] at the Supreme Court of Canada Mr. Marshall was acquitted of the *Fisheries Act* charges. The majority of the Court held that a treaty signed in 1760, the *Treaty of Peace and Friendship*[15] (hereinafter referred to as "the 1760 Treaty"), gave Aboriginal peoples in the Maritimes the right "to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed "necessaries,"[16] where "necessaries" were later described as "equivalent to a moderate livelihood."[17] While the 1760 Treaty made no explicit reference to such a trading right, the majority of the Supreme Court of Canada held that the right existed through the combined effect of oral terms that were negotiated, but not included in the written document, and a clause in the 1760 Treaty which stated that the Mi'kmaq would trade only through government-established truck houses (trading posts).[18]

Cameron is blunt in his censure of the majority decision in *R v Marshall (No 1)*, characterizing it as "disregard[ing] procedural impropriety, compelling evidence, and

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9 *Supra* note 1 at 10.

10 *Ibid* at 11-12.

11 *Ibid* at 49.

12 RSC 1985, c F-14.

13 *R v Marshall*, [1996] N.S.J. No 246 (QL) (NS Prov. Ct.).

14 *R v Marshall*, [1997] 159 NSR (2d) 186 (NSCA), 146 DLR (4th) 257 (NSCA) [cited to NSR].

15 *Treaty of Peace and Friendship*, 10 March 1760, cited in *Marshall No 1*, *supra* note 4 at para 3.

16 *Marshall (No 1)*, *supra* note 4 at para 4.

17 *Ibid* at para 7.

18 *Ibid* at para 5, "[a]nd I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by his Majesty's Governor at Lunenbourg or Elsewhere in Nova Scotia or Accadia."

well-established legal doctrines..."[19] in order to arrive at a decision more in keeping with the majority's sense of "fairness."

Cameron's main criticism focuses upon Justice Binnie's use of history. He notes that Justice Binnie ignored factual rulings made by the trial judge; for instance, despite a contrary finding by the trial judge, the Supreme Court of Canada concluded that the 1760 Treaty impliedly incorporated terms from earlier treaties. According to Cameron:

> So Justice Binnie's decision hinged on an analysis of historical facts. His assessment of those facts differed from and contradicted the historical facts as described by the trial judge. This is remarkable given that appeal courts, and particularly the Supreme Court of Canada, very rarely interfere with the factual findings of trial judges.[20]

Cameron also argues that Justice Binnie both assumed historical facts that were not before the Court and disregarded historical evidence that was before the Court. At trial, counsel for Mr. Marshall told the Court that the defence was based on a 1752 treaty; counsel noted an awareness of the 1760 Treaty but said that it was not pertinent to the case. Therefore, the expert called by the Crown had no occasion to provide evidence regarding the 1760 Treaty that became the focus of the Supreme Court of Canada decision. According to Cameron, "when the case was heard at the Supreme Court of Canada that court fashioned its own version of the history of Nova Scotia...."[21]

Further, in Cameron's view, Justice Binnie disregarded pertinent historical documents that were presented before the Court and he made unwarranted assumptions about the historical events during the period of 1759-1761. The Court had before it quite detailed records of the treaty signing process. A key document was a 1761 treaty,[22] which was signed by several Mi'kmaq chiefs, including the chief of the Cape Breton Mi'kmaq, after a speech by the Lieutenant-Governor of Nova Scotia in which the Mi'kmaq were described as submitting themselves to the British King as a "merciful conqueror."[23] Only after the treaty was signed did any chief speak, and he is recorded as saying that "[w]e must have wretchedly perished unless relieved by your humanity, for we were reduced to extremities."[24] Cameron argues that this record is perfectly in keeping with the difficult position in which the Mi'kmaq would have found themselves between 1759-1761: "their French ally and provisioner was defeated, their Acadian friends were gone or scattered, British military power was ascendant and British settlements were growing."[25]

Despite the documentary record, Justice Binnie concluded that the British had only a weak hold on Nova Scotia at the time and that the Mi'kmaq must surely have

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19 *Cameron, supra* note 1 at 9.

20 *Ibid* at 93.

21 *Ibid* at 51.

22 *Ceremonials at Concluding a Peace with the Several Districts of the General MickMack Nation of Indians in His Majesty's Province of Nova Scotia*, 25 June 1761, cited in *ibid* at 55.

23 *Cameron, supra* note 1 at 55.

24 *Ibid* at 56.

25 *Ibid* at 55.

entered into negotiations before agreeing to sign the treaty. More specifically, in his view, these negotiations must have included a demand for trading rights. Cameron notes that while Justice Binnie referred repeatedly to Native demands for truck houses in the period before the signing of the 1760 Treaty, no evidence of such demands was offered at trial. According to Cameron, the truck house clause arose out of a proposal made by the British and accepted by the Mi'kmaq; however, instead of seeing the clause as limiting Mi'kmaq trade to the truck house system, the Supreme Court of Canada read it as ensuring a continuing right to hunt, fish and gather for commercial purposes.

Cameron also contends that even if the 1760 Treaty did create trading rights, the right should have been limited to those items traditionally traded by the Mi'kmaq in 1760 –a view subsequently accepted by the Supreme Court of Canada in *R v Stephen Marshall*; *R v Bernard*. There was no evidence before the Court in *R v Marshall (No 1)* of fish or eels being traded at the truck houses. In fact, the only evidence before the Supreme Court of Canada regarding a traditional trade in eels was one incident where a minister newly arrived in Nova Scotia recorded in his diary that "[t]wo Indian squaws brought seal skins and eels to sell."[26] Also before the Court was evidence that such a sale was illegal, violating legislation which prohibited trade between private individuals and Indians. Despite this lack of evidence regarding a traditional trade in eels, Justice Binnie found that Mr. Marshall's actions fell within the treaty right.

Cameron notes that the decision in *R v Marshall (No 1)* led to "uncertainty, insecurity, incredulity and resentment in the non-native community, heightened expectations among natives, and violence."[27] Within months of the decision, the West Nova Fishermen's Coalition, one of the interveners before the Supreme Court of Canada in *R v Marshall (No 1)*, applied to the Court for a rehearing and a stay of its previous decision. The application was unsuccessful but the Court took the extraordinary step of clarifying *R v Marshall (No 1)*.

In this clarification, known as *R v Marshall (No 2)*, a unanimous Court confirmed that the Native fishery could be regulated by the federal government; described the emphasis of the 1760 right as "assuring the Mi'kmaq equitable access to identified resources for the purpose of earning a moderate living;"[28] limited the gathering rights in the 1760 Treaty to "the types of the resources traditionally "gathered" in an aboriginal economy...;"[29] and stated that the treaty rights in question applied only in the area traditionally used by an Aboriginal community. Cameron notes (as have others) that this last point indicates Mr. Marshall should not have been acquitted, since he caught the eels far from his community in Cape Breton.

Although Cameron clearly feels that the Court in *R v Marshall (No 1)* created a treaty right that did not exist, he does not welcome the decision in *R v Marshall (No 2)*. In his view, the application by the West Nova Fishermen's Coalition had no merit

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26 *Marshall (No 1), supra* note 4 at para 2.
27 *Cameron, supra* note 1 at 6.
28 *Marshall (No 2), supra* note 5 at para 38.
29 *Ibid* at para 19.

and should not have been heard: Mr. Marshall had been acquitted of charges and thus there was no issue to rehear or decision to stay. Once again, Cameron sees the Court as having acted expediently to reach the result it wanted. He characterizes *R v Marshall (No 2)* as an attempt to "calm fears of excessive native claims...and restore confidence in the Supreme Court of Canada"[30] and argues that this represented "an exercise of pure judicial power, without foundation in law and falling outside the procedures that properly govern our courts."[31] He recognizes that the Court was responding to the furor created by *R v Marshall (No 1)* but argues that "when public opinion is the dominant concern of our judges in rendering their judgments, then the rule of law is sorely wounded."[32]

The *R v Marshall (No 2)* decision did not noticeably dampen Native claims to commercial fisheries and the federal government entered into negotiations with bands across the Maritimes to settle "*Marshall (No 1)* fishing rights."[33] In initial agreements, Native communities received fishing vessels, licences, gear, and training at a cost of approximately half a billion dollars and further agreements are likely to increase that cost.[34] In expressing concern that the flawed decision in *R v Marshall (No 1)* led to such wide-scale agreements, Cameron is at pains to make a distinction between law and policy:

> It may well be that as a matter of policy it is a good thing to widen native participation in various fisheries. That may be the appropriate approach to assist native communities if, in the past, they have been unfairly hindered from participating in the fishery, or as an economic development initiative for native bands. But policy should not be characterized as constitutional obligation....[T]he discussion of federal native policy in the public forum should not be taking place under the guise of constitutional requirement.[35]

Because *R v Marshall (No 1)* referred not just to fishing rights but also to hunting and gathering, not surprisingly, it led to treaty claims to commercial activities involving other resources as well. In 2005, the Supreme Court of Canada heard the *R v Stephen Marshall* and *R v Bernard* cases, where the defendants claimed, in Nova Scotia and New Brunswick respectively, a treaty right to harvest and sell logs from Crown lands without a licence. In each case, the treaty claim was joined with a claim of Aboriginal title to the areas in which the logging had occurred. Alex Cameron was lead counsel for Nova Scotia in *R v Stephen Marshall*. Both the treaty and Aboriginal title claims were rejected by the Supreme Court of Canada. The Court held that the right to cut and harvest timber did not flow from the 1760 Treaty because the treaty provided only for "continued trade in the products the Mi'kmaq had traditionally traded with Europeans,"[36] and there had not been any such traditional trade in logs. Cameron notes that since there was no evidence before the court in *R v Marshall*

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30 *Cameron, supra* note 1 at 88.
31 *Ibid.*
32 *Ibid* at 148.
33 *Ibid* at 127.
34 *Ibid* at 127-28.
35 *Ibid* at 134, 148.
36 *Marshall/Bernard, supra* note 6 at para 21.

(No 1) of a traditional trade in eels, on this analysis, Mr. Marshall should have been convicted.

Although *R v Stephen Marshall; R v. Bernard* continued the trend from *R v Marshall (No 2)* of qualifying the broad language of *R v Marshall (No 1)*, and although the outcome was the one that Cameron argued for on Nova Scotia's behalf, he is critical of the Court's reluctance to acknowledge its errors and overrule *R v Marshall (No 1)*. In his view, the Court was once again engaging in results-based judging rather than careful legal reasoning. Loathe to set aside a decision that was hailed by Native communities as a substantial victory, yet aware of the threat that broad treaty rights to commercial fishing and logging posed to non-Native communities reliant on these resources, the Court, in Cameron's view, dodged the difficult legal issues and instead made its decision based on policy.

This then, is the heart of Cameron's critique: while the *Constitution Act, 1982*[37] does limit parliamentary sovereignty and does affect the respective roles of judges and legislatures, it does not mandate the kind of judging that Cameron argues was at play in each of the three decisions that he examines – judging based on desired outcomes, on judges' personal views about fairness and on policy arguments. He criticizes *R v Marshall (No 1)*, *R v Marshall (No 2)* and *R v Stephen Marshall/R v Bernard* not simply because mistakes were made, as "[m]ere mistakes should not worry us unduly as long as they are acknowledged and corrected."[38] Instead, Cameron argues that "beneath the mistakes a more insidious problem appears to lie. The problem is uninhibited judicial activism."[39]

Different readers will have different views on the proper scope of judging in the post-Charter era, and not everyone will draw the line exactly where Cameron does when he contends that even where constitutionally entrenched rights are at stake, "in a parliamentary democracy, substantial – very often overriding – respect must [still] be accorded to the democratic will of elected legislators...."[40] The value of legal commentary depends, however, not on whether everyone agrees with the position taken (surely an impossibility, given the particular issues at stake here) but on whether the author offers an interesting, legally-grounded perspective, and this Cameron certainly does. This book is no mere polemic against constitutionally entrenched rights or against the Supreme Court of Canada. Cameron canvasses views on both sides of the debate on judicial activism and explains lucidly what limits he sees the rule of law as placing on judges. In discussing *R v Marshall (No 1)*, he painstakingly sifts and analyzes the historical evidence that was available to the Court, pointing out precisely why, in his view, Justice Binnie's version of Nova Scotia history did not accord with the evidence before the Court. Cameron's critique of the later cases makes it clear that he is not simply indulging in denigrating a decision he does not agree with: even where the outcome was far closer to the position Cameron would (and did)

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37 *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

38 *Cameron, supra* note 1 at 149.

39 *Ibid* at 147.

40 *Ibid* at 28.

advocate, he is equally critical of what he perceives to be poor legal reasoning and results-oriented analysis.

Power Without Law is aimed at both a legally-trained and lay audience. In order to make the book broadly accessible, Cameron includes brief explanations of parliamentary sovereignty, the division of powers under the *Constitution Act, 1867*, the impact of the *Charter of Rights and Freedoms*, and the differing roles of trial and appeal courts. These, although quite concise, may feel redundant to a reader with legal training; similarly, for those familiar with the Supreme Court of Canada jurisprudence on Aboriginal and treaty rights, on a few occasions the background discussion may seem slightly repetitive. Yet, both aspects of the book would likely be welcome aids for readers less familiar with the decisions or with some of the legal and constitutional concepts discussed. There is no easy way to write a book that will appeal to a diverse audience, and on the whole, Cameron achieves this admirably.

Power Without Law is an eminently readable book on an important and timely topic. It deserves to be read widely, by lawyers and non-lawyers alike.