

4-1-2010

Alex M. Cameron, Power Without Law. The Supreme Court of Canada, .the Marshall Decisions, and the Failure of Judicial Activism

Dianne Pothier
Dalhousie University

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Indian and Aboriginal Law Commons](#)

Recommended Citation

Dianne Pothier, "Alex M. Cameron, Power Without Law. The Supreme Court of Canada, .the Marshall Decisions, and the Failure of Judicial Activism" (2010) 33:1 Dal LJ 189.

This Book Review is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

Book Review

Power Without Law: The Supreme Court of Canada, the Marshall Decisions, and the Failure of Judicial Activism by Alex M. Cameron. Montreal & Kingston: McGill-Queen's University Press, 2009. 244 pages.

Alex Cameron's book, *Power Without Law*, is a scathing critique of the Supreme Court of Canada's 1999 decisions in *R. v. Marshall*¹ upholding Donald Marshall Jr.'s Mi'kmaq treaty claim. Cameron's book has attracted a lot of attention because of the author's position as Crown counsel for the government of Nova Scotia.² Cameron was not involved as a lawyer in the *Marshall* case itself. As a fisheries prosecution, *Marshall* was a matter of federal jurisdiction pursuant to s. 91(12) of the *Constitution Act, 1867*,³ and Nova Scotia chose not to intervene. However, Cameron did become involved in a subsequent case dealing with the same series of treaties but different accused, *R. v. Stephen Marshall*; *R. v. Bernard*,⁴ which involved logging and was thus a matter of provincial jurisdiction. Cameron, who had been a staff lawyer in the civil litigation section of the Nova Scotia Department of Justice, was appointed as a Crown attorney (co-counsel) in the Public Prosecution Service (PPS) for the purposes of the appeals in the *Stephen Marshall* case. It was that involvement that brought Cameron to the view that the Supreme Court of Canada had wrongly decided the 1999 *Marshall* case, (8) and ultimately to write the book.

I am certainly in no position to claim that Supreme Court of Canada decisions should be immune from criticism. Moreover, the *Marshall* case has been subject to critique from multiple perspectives, for example in a special issue of this journal,⁵ and in an extensive comment from Donald Marshall's counsel.⁶ In this book review I do not hope to engage all the issues the *Marshall* case raises, nor to address all the points that Cameron

1. *R. v. Marshall (No. 1)*, [1999] 3 S.C.R. 456, application for rehearing dismissed in *R. v. Marshall (No. 2)*, [1999] 3 S.C.R. 533. The full text of *Marshall (No. 1)* is included as an Appendix to Cameron's book. (152-213)

2. "N.S. lawyer's book critical of native-fishing ruling" CBC News (4 October 2009), online: <<http://www.cbc.ca/canada/nova-scotia/story/2009/10/03/ns-book-treaty-rights.html>> .

3. *Constitution Act, 1867*, Stats U.K. 30 & 31 Vict., c. 3.

4. 2005 SCC 43, 2 S.C.R. 220. The *Stephen Marshall* case from Nova Scotia and the *Bernard* case from New Brunswick were heard together in the Supreme Court of Canada, with a combined judgment, since they raised identical issues.

5. "Forum on *R. v. Marshall*" (2000) 23 Dal. L.J. 5.

6. Bruce Wildsmith, "Vindicating Mi'kmaq Rights: The Struggle Before, During and After *Marshall*" (2001) 19 Windsor Y.B. Access Just. 203.

makes. Instead, the goal of this review is to propose that the thesis of Cameron's book is fundamentally flawed.

The title of Cameron's book captures his underlying point, that there is no recourse against the Supreme Court of Canada, as the highest court of appeal, if it makes a decision in disregard of the law, and refuses to correct its errors. It is Cameron's contention that the Supreme Court of Canada did just that in *Marshall*, contrary to fundamental constitutional principles, undermining both the rule of law and democracy. (9) In support of this view, Cameron addresses not only the role of courts but also the role of lawyers appearing before courts.

In *Marshall (No. 1)* Justice Binnie, for the majority, held that Donald Marshall had a valid treaty defence because "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship, as best the content of those treaty promises can now be ascertained."⁷ Cameron's book challenges that premise, contending that there was no positive Mi'kmaq treaty right subsisting at the time of the Marshall prosecution.

Although the bulk of Cameron's book is about the *Marshall* decisions, and the subsequent applications of them, he also makes brief commentary on earlier cases. In particular, his assessment of the Supreme Court of Canada's first decision interpreting s. 35 of the *Constitution Act, 1982*,⁸ *R. Sparrow*,⁹ is that the "Court started badly." (35) He relies especially on the Court's failure to distinguish between the "guaranteed" language of the *Canadian Charter of Rights and Freedoms*¹⁰ compared to the "recognized and affirmed" language of s. 35(1), which Cameron assumes reflects less stringent protection. (34) However, Cameron neglects to mention that s. 35(4) also uses the word "guaranteed."

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are *guaranteed* equally to male and female persons.¹¹

Cameron also asserts, without authority, that what is culturally significant in a fishing case is the manner of fishing, not the reliance on the resource. (34-35) Cameron characterizes the reasoning in *Sparrow* as "flawed," (34)

7. *Supra* note 1 at para. 4.

8. Section 35(1) reads:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

9. [1990] 1 S.C.R. 1075.

10. Part 1, *Constitution Act 1982*, Stats U.K. 1982, c. 11, Sch. B.

11. Subsection (4) was added by the *Constitution Amendment Proclamation, 1983*, S1/84-102, [emphasis added].

representing “an approach that fosters discord rather than native – non-native reconciliation.” (35) It is rather telling that Cameron assumes that a narrow interpretation of Aboriginal rights is needed to avoid discord. He is clearly approaching the interpretation exercise from a non-Aboriginal perspective. He is on a very different wavelength than the Supreme Court of Canada.¹²

Cameron alleges that in *Marshall (No. 1)* Justice Binnie engaged in improper judicial activism in reading in a treaty right without legal foundation. Cameron’s second chapter, entitled “Judicial Activism and Its Critics,” is standard, well-trodden territory. I agree with Greg Flynn¹³ who comments in his review of the book that Cameron’s analysis of judicial activism lacks “nuance and balance.”¹⁴

Cameron’s underlying argument against the Supreme Court of Canada’s majority decision in *Marshall (No. 1)* is that its treaty interpretation ignored fundamental constitutional principles about the relationship between the executive and the legislature, dating back to the Glorious Revolution of 1689, which embraced Parliamentary supremacy. Cameron contends that the creation of a legislative assembly in the colony of Nova Scotia in 1758 constrained the treaty making powers of the British Governor. (18-20, 115-17)

Marshall (No. 1) concerned charges against Donald Marshall Jr. for events in 1993 involving allegations of “three offences: the selling of eels without a licence, fishing without a licence and fishing during the close season with illegal nets.”¹⁵ The only defence raised was a treaty defence, which ultimately was confined to the 1760-61 treaties between the Mi’kmaq and the British. The pertinent clause, which varied between the treaties only with respect to the location of the truckhouse, reads as follows:

And I do further promise for myself and my tribe that we will not either directly nor indirectly assist any of the enemies of His most sacred Majesty King George the Second, his heirs or Successors, nor hold any manner of Commerce traffick nor intercourse with them, but on the contrary will as much as may be in our power discover and make known to His Majesty’s Governor, any ill designs which may be formed or contrived against His Majesty’s subjects. And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner

12. That is not meant to suggest that the Supreme Court of Canada’s overall approach to the interpretation of s. 35 is not itself overly restrictive in some respects. For a critique of Supreme Court of Canada Aboriginal jurisprudence from a perspective diametrically opposed to Cameron’s, see, for example, John Borrows, “Uncertain Citizens: Aboriginal Peoples and the Supreme Court” (2001) 80 Can. Bar Rev. 15.

13. Assistant Professor, Department of Political Science, McMaster University.

14. (2010) 53 (no. 2) Canadian Public Administration 289 at 291.

15. *Supra* note 1 at para. 62.

but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at Lunenburg or Elsewhere in Nova Scotia or Accadia.¹⁶

On the face of the underlined portion of the clause, the only express treaty provision is a negative covenant on the part of the Mi'kmaq. And, as Cameron points out, the British Governor understood that such a negative covenant could not be enforced against the Mi'kmaq without legislation from the local assembly. (115) Justice Binnie referred to the brief history of such legislation.

Accordingly, on March 21, 1760, the Nova Scotia House of Assembly passed *An Act to prevent any private Trade or Commerce with the Indians*, 34 Geo. II, c. 11. In July 1761, however, the "Lords of Trade and Plantation" (the Board of Trade) in London objected and the King disallowed the Act as a restraint on trade that disadvantaged British merchants.¹⁷

Cameron further asserts that, since there was no other legislation to implement the treaty, there could have been no positive treaty right agreed to by the Governor.

Justice Binnie concluded that the written treaty terms did not fully represent the deal between the Mi'kmaq and the British. He relied on negotiations between the British and the Maliseet and Passamaquody, which he held were imported into the treaties with the Mi'kmaq. He found:

My view is that the surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessities through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the *Badger* test.¹⁸

Cameron contends, in contrast to Justice Binnie's analysis, that the Crown has no authority to determine trade rules by treaty without supporting legislation. (19)

But it is one thing to make a treaty, and it is quite another to give it effect. It has been the law for hundreds of years that rights, privileges, or prohibitions in a treaty are of no effect – they are not law – without legislation. (113)

16. *Ibid.* at para. 5 [emphasis added by Justice Binnie].

17. *Ibid.* at para. 33. In this context, the truckhouses fell into disuse within a few years, and the substituted system of government licensed traders had fallen into disuse by 1780; *ibid.* at para. 6.

18. *Ibid.* at para. 56. Justification was not argued by the Crown in *Marshall*.

However, Cameron leaves out an important qualifier, set out by the Judicial Committee of the Privy Council in the landmark *Labour Conventions Case*:

Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, *if they entail alteration of the existing domestic law*, requires legislative action.¹⁹

The negative covenant in the 1760 treaty, because it was a restriction not previously recognized in colonial law, did require legislation to enforce it. However, the positive right to gather and to trade that Justice Binnie implied into the treaty, and that was the basis for Donald Marshall's acquittal, was, in 1760, the right of all colonists in Nova Scotia. There was then no need for implementing legislation because it did not change the pre-existing law. Cameron is correct in saying that that the limitation to "necessaries" that Justice Binnie read in could not have been enforced against the Mi'kmaq without colonial legislation.²⁰ (116, 123) However, if there were no expectation that the Mi'kmaq would in fact seek to gather and trade beyond the level of "necessaries" any time soon, there would have been no urgency in bringing forth any such implementing legislation. The key right that Marshall was relying upon was in substance, in 1760, one shared with all colonists, but with a different status. Justice Binnie emphasized this point.

The Crown objects strongly to any suggestion that the treaty conferred "preferential trading rights". I do not think the appellant needs to show preferential trading rights. He only has to show treaty trading rights. The settlers and the military undoubtedly hunted and fished for sport or necessaries as well, and traded goods with each other. The issue here is not so much the content of the rights or liberties as the level of legal protection thrown around them.²¹

The 1760-61 treaties made the Mi'kmaq British subjects at a time when fishing and hunting were largely unregulated. Cameron notes that fishing rights of Nova Scotia colonists could be traced back to the Magna Carta. (123) What Justice Binnie found was a treaty promise to the Mi'kmaq to continue gathering and trading rights, even if, in future, broader restrictions were placed on the general populace. Whether that treaty promise would be honoured was, prior to 1982, entirely dependent on

19. [1937] A.C. 326 at para. 8 [emphasis added].

20. This point could be used to buttress Bruce Wildsmith's argument challenging Justice Binnie's conclusion that the right was limited to "necessaries"; *supra* note 6 at 225.

21. *Supra* note 1 at para. 47.

good will, based on Cameron's point about Parliamentary supremacy. But the significance of the entrenchment of s. 35 of the *Constitution Act, 1982* is that, thereafter, constitutional supremacy regarding Aboriginal treaties trumps Parliamentary supremacy. Cameron contends that Justice Binnie:

failed to note the very basic constitutional point that the treaty right he discovered in 1999 by reference to discussion in 1760 could have no legal effect in the intervening 239 years. That alone should have given him pause. It is really not very plausible that the British agreed in 1760 to give native peoples a treaty right that was neither legal nor enforceable. (119-20)

However, the treaty right Justice Binnie found was, prior to 1982, legal and enforceable so long as there was no inconsistent legislation. Donald Marshall was charged under inconsistent federal fisheries legislation which, after 1982, could be challenged as unconstitutional.

Cameron also contests the application of the March 10, 1760 treaty with the LaHave Mi'kmaq to the later dealings with the Cape Breton Mi'kmaq, based on evidence of a treaty signing ceremony at the Governor's farm in Halifax on June 25, 1761. Cameron describes the speech of the Cape Breton Chief as "the language of unconditional surrender." (100) In a review of Cameron's book Andrew Nurse,²² a historian, criticizes the historical accuracy of Cameron's "assumption that the word 'submission' meant 'surrender.'"²³ To buttress Nurse's point, if unconditional surrender were the real story, why would there have been need for any treaty at all? Justice Binnie's underlying point is that, to be genuine treaties of peace and friendship, the Mi'kmaq must have gotten something positive out of them.

Cameron also says Justice Binnie's finding of a treaty right is inconsistent with the minutes of a November 30, 1759 meeting of the Nova Scotia Executive Council. Cameron notes that the "Maliseet chiefs had sworn allegiance to the King and promised to live in peace. In other words they surrendered." (96) In response the Executive Council advised "a favourable reception, and an opportunity of extending their Trade, by the establishment of Truckhouses amongst them, under such Regulations as shall be agreed upon." (96) Cameron concludes that this document is inconsistent with Justice Binnie's finding of a Maliseet "demand" two months later. (98-9) According to Cameron, the Maliseet had already surrendered, and were simply accepting a British proposal. (98) However, if one assumes the swearing of allegiance was part of an on-going process leading up to the conclusion of treaties, the minutes of the November

22. From the Center for Canadian Studies, Mount Allison University.

23. (2010) 36 Can. Pub. Pol'y 130 at 130.

30, 1759 Council meeting can be seen as confirming Justice Binnie's interpretation of the treaty. Beyond the purely negative covenant expressly included in the treaty, the British were supportive of "extending" trade, i.e. a positive covenant.

Justice Binnie's judgment in *Marshall (No. 1)* was written for an audience of lawyers familiar with Aboriginal and treaty rights jurisprudence. Moreover, it showed little appreciation of its application beyond eels. And it was clear that the federal government had no contingency plan for losing *Marshall* in the Supreme Court of Canada. This was a recipe for trouble arising out of disputed interpretations of what the case stood for, especially in relation to the lobster fishery. This set the stage for *Marshall (No. 2)*,²⁴ in response to the application for a rehearing and stay by the West Nova Fishermen's Coalition, an intervenor in *Marshall (No. 1)*. Cameron is on firmer ground in his critique of *Marshall (No. 2)*, (85-88) and there is remarkable similarity in the comments of Cameron and Bruce Wildsmith, as counsel for Donald Marshall.²⁵ While purporting to dismiss the application for a rehearing and stay, the Supreme Court of Canada issued extensive reasons in *Marshall (No. 2)*. Although the written submissions were only about the propriety of a rehearing and consequential stay, the reasons for decision engaged the substance of the West Nova Fishermen's Coalition's challenge to *Marshall (No. 1)* and more. *Marshall (No. 2)* is written for a wider audience, but it did much more than explain *Marshall (No. 1)* to non-expert readers. In significant respects, it changed *Marshall (No. 1)*.²⁶ Cameron accurately describes the impact of *Marshall (No. 2)*. "Still, the decision in *Marshall (No. 1)* was not overruled. It was merely tempered." (88)

In the *Marshall/Bernard* case Chief Justice McLachlin claimed that the "appellant Crown ... accepts *Marshall 1* and *2*".²⁷ That was accurate in respect of the New Brunswick Crown, but not the Nova Scotia Crown. Cameron is understandably miffed and perplexed that the Supreme Court of Canada misrepresented his position. (137-39) But there is no basis for his apparent assumption that, if only the Supreme Court of Canada had acknowledged his argument that *Marshall (No. 1)* was wrongly decided, they would have had to agree with him. Cameron is right to say that the *Marshall/Bernard* decision "substantially restricted its earlier decision in *Marshall (No. 1)*". (139) It should not be surprising that Chief Justice

24. *Supra* note 1.

25. *Supra* note 6 at 229-35.

26. *Marshall (No. 2)*, *supra* note 1 at paras. 17, 38, confined the exercise of the treaty to each local community (in which case Marshall should have been convicted since he was not fishing in his home community), identified the treaty right as a collective right requiring community authorization (which Marshall did not have), and introduced a new treaty qualifier of "equitable access."

27. *Supra* note 4 at para. 16.

McLachlin, as a dissenter in *Marshall (No. 1)*,²⁸ would strive to limit its precedential value. But it was unrealistic for Cameron to expect that the Supreme Court of Canada would expressly overrule *Marshall (No. 1)*.

In terms of the accountability of government lawyers, Cameron is surprisingly inconsistent. On the one hand, he applauds the fact that an inquiry from Nova Scotia Crown counsel set in motion a process that ultimately resulted in New Brunswick Premier Bernard Lord directing counsel for the New Brunswick Attorney General to remove a concession from their draft Supreme Court of Canada factum in *Bernard* that Cameron considered inappropriate.²⁹ (136) On the other hand, Cameron extols the virtues of the lack of political interference in Nova Scotia, owing to an arms length Public Prosecution Service for which there is no New Brunswick parallel.

By law, the PPS in Nova Scotia is independent of government. Politicians and bureaucrats cannot dictate to prosecutors whether or how to prosecute a case. Prosecutors prosecute as they see fit, subject, of course, to legal and ethical constraints, but entirely free of political influence. So the legal arguments that would be advanced in the case would be my responsibility jointly with the lawyer from the Appeal Section of PPS who was assigned as my colleague in the appeal. Nova Scotia's position on native treaty claims and native title claims would be based strictly on law and evidence. No one would dictate to us the positions we would argue. We alone would be responsible for the success or failure of those positions. (8)

When it became known that Cameron's team would argue in the Supreme Court of Canada in *Stephen Marshall* that the 1999 *Marshall* case was wrongly decided, political pressure was applied.

Native chiefs in Nova Scotia petitioned the provincial Minister of Justice, asking him to order that this argument not be made. ...[T]he Nova Scotia Public Prosecution Service is effectively independent of the political arena. As a result, the chiefs' petition went nowhere. (137)

It is accurate to say, as a matter of fact in the *Stephen Marshall* case, that the "chiefs' petition went nowhere" (137) and that "[n]o one would dictate to us the position we would argue." (8) However, as a matter of law, Cameron is absolutely wrong in saying that "politicians ... cannot dictate to prosecutors." (8) The *Public Prosecutions Act* expressly acknowledges the power of the Attorney General to do so. Section 4 sets out the authority of the Director of Public Prosecutions (DPP).

28. And the only judge to sit on both *Marshall (No. 1)* and *Marshall / Bernard*.

29. The concession was "a treaty right, under the Halifax treaties, to be consulted and accommodated in respect of New Brunswick's natural resources." (135-36)

4 There shall be a Director of Public Prosecutions who

....

(b) may conduct all prosecutions independently of the Attorney General *except that the Director of Public Prosecutions shall comply with all instructions or guidelines issued by the Attorney General in writing and published pursuant to this Act*,³⁰

Section 6 stipulates the power and duties of the Attorney General, including authority, after consultation with the DPP, to issue instructions or guidelines either generally³¹ or in respect of particular prosecutions.³² The important caveat is the requirement that these guidelines or instructions are in writing and are published in the Royal Gazette.³³ Thus the Attorney General can indeed dictate, but not covertly. The website of the Public Prosecution Service explains:

This procedure preserves the ultimate prosecutorial authority of the Attorney General. This is a means of ensuring accountability to the electorate for the manner in which public prosecutions are conducted.³⁴

Written, public instructions by the Attorney General are clearly contemplated as extraordinary, but the option is a critical element of political accountability. Indeed, prosecutions involving a claimed Aboriginal or treaty rights defence might well be an appropriate occasion to invoke that option. For example, if the government has negotiated an interpretation of Aboriginal or treaty rights with Aboriginal representatives (either as a final agreement or as an interim agreement pending further negotiations), it would be incumbent upon the government to preclude prosecutions inconsistent with the negotiated agreement. Given the legal position that the honour of the Crown is always at stake,³⁵ it cannot be the case that the Crown lacks the capacity to ensure that its own understanding of honour is upheld.

Dianne Pothier
Schulich School of Law at Dalhousie University

30. S.N.S. 1990, c. 21, as am. by S.N.S. 1999 (2nd Sess.), c. 16, at s. 4 [emphasis added].

31. *Ibid.* at s. 6(a).

32. *Ibid.* at s. 6(b).

33. *Ibid.* at s. 6(b) contains a very limited exception where full publication is not required. This exception is not relevant to the present discussion.

34. Public Prosecution Service, "PPS Independence" (23 April 2003), online: <<http://www.gov.ns.ca/pps/independence.htm>>.

35. *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41.

