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Comment

A Reply to Professor Pothier's Review of *Power Without Law: The Supreme Court of Canada, the Marshall Decisions, and the Failure of Judicial Activism*

The Spring 2010 edition of the Dalhousie Law Journal contains an article by Professor Dianne Pothier,¹ discussing my book, *Power Without Law: The Supreme Court of Canada, The Marshall Decisions and the Failure of Judicial Activism*.² In the review, Professor Pothier strongly disagrees with the book's critique of the Supreme Court of Canada's majority decision in *R. v. Marshall*.³ In particular, she disagrees with the argument that the alleged treaty right of aboriginals to hunt, fish, gather and trade for necessities, described in Justice Binnie's majority decision, is constitutionally flawed. Professor Pothier also suggests that the argument is the central thesis of the book. This is not so. The book enumerates numerous factual and interpretative mistakes found in the decisions of both the trial Court and the Supreme Court of Canada. All of them are problematic. For example, the book describes findings of fact made by the Supreme Court of Canada in the face of contrary evidence and the findings of the trial judge. It also describes the inability of the Crown's expert to discuss a document that the Supreme Court of Canada considered vital. It comments on the fact that the argument adopted by the majority of the Supreme Court of Canada was first advanced in that Court, and was never tested in the lower courts. The constitutional flaw in the majority analysis of the treaty right is simply one among many other serious deficiencies in the two judgments. But it is the one Professor Pothier chooses to dispute.

The first point made by Professor Pothier adds a gloss to the treaty right in *Marshall*, and argues that the treaty right, so characterized, is constitutionally sound. The treaty right described by Justice Binnie was a "specially protected" "enforceable" "legal" right to hunt, fish, gather and

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

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

3. *R v Marshall*, [1999] 3 SCR 456. Several of Professor Pothier's disagreements are peripheral. For example, Professor Pothier suggests that the rights in s 35(1) must be guaranteed, because s 35(4) says the "rights referenced to in subsection (1) are guaranteed equally to male and female persons." But this simply means that males and females are equally guaranteed the rights that are "recognized and affirmed" in subsection (1). The juxtaposition of the language of "guarantee" in s 35(4) confirms that the language of "recognition and affirmation" in s 35(1) is *not* a guarantee.

trade for necessities.⁴ The constitutional problem is that no such treaty right was legal or enforceable in the absence of a law enacted by the House of Assembly. We know that Governor Lawrence was well aware of his constitutional limitations. He knew that the provision of the treaty limiting trade to truckhouses required the House of Assembly to enact legislation; he asked them to do that and they obliged, but that was the only legislation he sought. Professor Pothier cites the *Labour Conventions Case* to the effect that only the “obligations of a treaty which involve alteration of law” require a statute.⁵ It follows, she says, that since the treaty right to hunt, fish, gather and trade described by Justice Binnie was already the liberty of anyone in the colony, including Natives, such a treaty right did not require legislation. So, she argues, the book is in error and the treaty right is constitutionally founded. To the extent that the treaty right was subject to a limit of “necessaries,” something she admits would have required legislation, Professor Pothier proposes the following interpretation, “if there were no expectations that the Mi’kmaq would in fact seek to gather and trade beyond the level of necessities any time soon, there would have been no urgency in bringing forth any such implementing legislation.”⁶

Professor Pothier’s approach is a mutation of the reasoning advanced by McLachlin J. (as she then was) in dissent. McLachlin J. wrote that upon signing the Treaties, native people merely “inherited” the general right of all citizens to hunt, fish and trade.⁷ Justice Binnie rejected the suggestion that the native right was just a general liberty. He used his Barrington Street⁸ example to state that the native right was a treaty right that “enjoyed special treaty protection against interference with its exercise.”⁹ Professor Pothier argues, as noted, that because the native treaty right to hunt, fish and trade was no different from the “domestic” liberty to hunt, fish and trade, legislation to implement that treaty right was unnecessary. But a native treaty beneficiary would have been unable to enforce the treaty right to hunt, fish and trade. He could have enforced only the general liberty to hunt, fish and trade. That is not the “special treaty protection” that Justice Binnie contemplated. Professor Pothier seems to think otherwise. She says “the treaty right Justice Binnie found was, prior to 1982, legal and enforceable so long as there was no inconsistent legislation.”¹⁰ In this,

4. *Supra* note 3 at paras 45 and 47.

5. *Labour Conventions Case*, [1937] AC 326 quoted in Pothier, *supra* note 1 at 193.

6. *Supra* note 1 at 193.

7. *Marshall*, *supra* note 3 at para 86.

8. Barrington Street, Halifax—“a common thoroughfare enjoyed by all,” *ibid* at para 47.

9. *Ibid*.

10. *Supra* note 1 at 194.

Professor Pothier is mistaken. This assertion, for which no authority is cited, that the executive, by treaty, can affect domestic legal rights except only if inconsistent legislation stands in the way, is entirely unfounded. It is not law, and has never been, that treaties are enforceable domestic law except in the presence of inconsistent legislation. As Professor Hogg notes, "Canada's constitutional law, derived in this respect from the United Kingdom, does not recognize a treaty as part of the internal (or "domestic") law of Canada."¹¹ Treaty obligations are not law. Performance of treaty obligations requires legislation unless the present law already reflects the treaty obligations. But in either case, enforcement is the enforcement of the law, not of the treaty. The fact is that the treaty right described by Justice Binnie was not law and was not enforceable at any time prior to 1982. Had he recognized that, one might reasonably think he would have recognized the implausibility of the treaty right he propounded. After all, his erroneous idea that the treaty right he envisaged was specially protected, legal and enforceable was how he distanced himself from Justice McLachlin's dissent. Justice Binnie ignored the doctrine of Parliamentary sovereignty.

Beyond this, the treaty right described by Professor Pothier in advancing her argument is not true to the treaty right described by Justice Binnie. Justice Binnie did not describe the treaty right as an unrestricted right that might, in the future, be subject to some possible legislative limit restricting it to "necessaries." He said it was "not a right to trade generally for economic gain but rather a right to trade for necessities,"¹² which he went on to define as "food, clothing and housing, supplemented by a few amenities."¹³ Inherent in the right he described was a limitation on the right.¹⁴ Such a right had no parallel in domestic law and was constitutionally null without legislation. Moreover, the Magna Carta, which Professor Pothier acknowledges applied in Nova Scotia at the relevant time, was a statute inconsistent with the treaty right described by Justice Binnie. It precluded interference in the public right to fish. So the treaty right construed by Justice Binnie which purported to limit that right to fish was not simply unenforceable, it was unlawful.

11. Peter Hogg, *Constitutional Law of Canada*, 5th ed, loose-leaf (Thompson Carswell, 2007) vol 1 at 11-5.

12. *Marshall*, *supra* note 3 at para 58.

13. *Ibid* at para 59.

14. Indeed the very 11 February 1760 document that Justice Binnie relied upon in divining the right to hunt, fish, gather and trade for necessities, contains the term "necessaries" (para 58), which led Justice Binnie to describe the treaty right as a restricted right.

In Pothier's description of the treaty right, part of the supposed right, the right to hunt, fish and trade, did not require legislation because it reflected domestic law. Except that the part of the treaty that would restrict the right to trade to "necessaries" did require legislation to be enacted at some future time. And another part of the treaty—the truckhouse bit—required legislation which Governor Lawrence asked the House of Assembly to enact and which they did enact. One can imagine Governor Lawrence pacing in his office wondering how to explain this all to the Board of Trade. Lawrence did not ask the House of Assembly for the legislation proposed by Professor Pothier, restricting the treaty right to "necessaries," when he asked for the legislation restricting native trade to truckhouses. That would suggest that the treaty right proposed by Professor Pothier is as illusory as that propounded by Justice Binnie.

The second point advanced by Professor Pothier relates to Justice Binnie's suggestion that in negotiations between natives and the British, natives made "demands." It was those supposed demands which formed the foundation upon which Justice Binnie built the controversial treaty right to hunt, fish and gather for trade. Unfortunately Justice Binnie ignored, among other evidence, the detailed minutes of the Governor's Farm Ceremony, on 25 June 1761, where the Cape Breton Chief, "in the name of all the rest" said, "our intentions were to yield ourselves up to you without requiring terms on our part," "dispose of us as you please," "receive us into your arms; into them we cast ourselves." Native people surrendered and there was no native demand upon which to build the treaty right suggested by Justice Binnie. Professor Pothier cites another book review by Professor Andrew Nurse as authority that such language as that contained in the record of the 25 June 1761 Ceremony really was not the language of surrender. Professor Nurse did not testify at the trial in *Marshall*. But an expert historian called by Mr. Marshall did testify to that effect. As the book explains,¹⁵ his evidence was rejected by the trial judge.¹⁶ The book also mentions that the Crown's expert, whose evidence was accepted by the trial judge but ignored by the majority of the Supreme Court of Canada, testified that the treaty terms were "dictated by the British."¹⁷

Professor Pothier goes on to say that "to be genuine treaties of peace and friendship, the Mi'kmaq must have gotten something positive out

15. Cameron, *supra* note 2 at 58-60.

16. *R v Marshall*, [1996] NSJ no 246 (PC) at para 127 where Embree PCJ states, "The interpretation offered on behalf of the Defendant of the trade clause and the treaties, placed in the historical context which is suggested as the appropriate one is not the one that I accept."

17. Cameron, *supra* note 2 at 99.

of them.”¹⁸ They did. They got peace, friendship and truckhouses; not a trifling result after a half century of conflict.

Professor Pothier’s third point references the 30 November 1759 minutes of the Nova Scotia Executive Council, which Justice Binnie ignored. This document is important because it shows that natives did not demand truckhouses, as Justice Binnie suggested, but rather that the truckhouses were proposed by the British to the Maliseet. Since the treaty right crafted by Justice Binnie has as its foundation a supposed native demand reflected by a supposed demand for truckhouses, the document contradicts that right. The document says that Council proposed, “an opportunity of extending their trade by the establishment of truckhouses amongst them.” Professor Pothier says that this “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.”¹⁹

By negative covenant, Professor Pothier means the treaty clause restricting native trade to truckhouses. By “positive covenant” Professor Pothier means the treaty right to hunt, fish and gather for trade fashioned by Justice Binnie. But that treaty right was founded upon a “demand” for which there is no evidence, something Professor Pothier does not refute. Moreover, it is true that the British were “supportive of “extending” trade.” But the document she quotes says only that the British proposed “extending their Trade...by the establishment of Truckhouses.”²⁰ It does not go beyond that. And even Justice Binnie admitted that the establishment of truckhouses alone did not support Mr. Marshall’s argument.²¹ So there was no evidence to support the “positive covenant” described by Justice Binnie.

Finally, Professor Pothier takes exception to a very subsidiary point. The point was that counsel in the subsequent native rights case of *R. v. Marshall*²² would base argument strictly on law and evidence and would not be dictated to. Professor Pothier says it is “absolutely wrong” that “politicians...cannot dictate to prosecutors in Nova Scotia.”²³ She points to s. 6(a) of the *Public Prosecutions Act* which authorizes the Attorney General to issue written general instructions respecting classes

18. *Supra* note 1 at 194.

19. *Ibid* at 195.

20. *Ibid* at 194.

21. *Marshall*, *supra* note 3 at paras 4, 7.

22. *R v Marshall*, [2005] 2 SCR 220.

23. *Supra* note 2 at 196.

of prosecutions, to prosecutors.²⁴ But Professor Pothier is too hasty. The passage she criticizes is followed immediately by this: “Prosecutors prosecute as they see fit, *subject...to legal...constraints...*but entirely free of political influence.”²⁵ Moreover, Professor Pothier’s analysis is itself wanting in suggesting that politicians dictate to prosecutors in this Province. She fails to note s. 6(b) which authorizes the Attorney General to make specific instructions respecting a specific prosecution; as a matter of practice, that authority is almost never exercised. Moreover, it is only the Attorney General that can issue instructions. The Attorney General’s constitutional role is unique and markedly different from that of any other “run of the mill” politician: “It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions.”²⁶ So there is no particular error in saying that politicians cannot dictate to prosecutors in this Province. Only the Attorney General can do so, but only in a narrow non-partisan context, and in specific cases it is something that is almost never done.

Professor Pothier goes on to criticize this author’s supposed inconsistency in applauding the independence of Nova Scotia prosecutors, while extolling the intervention that forced New Brunswick to withdraw a proposed concession in *R. v. Marshall*.²⁷ There is no inconsistency. Prosecutor’s decisions should be insulated, but those that are not reasonably founded in evidence and law are properly reversed, whatever the applicable regime.

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24. *Public Prosecutions Act*, SNS 1990, c 21.

25. *Supra* note 2 at 197 [emphasis added].

26. *Krieger v Law Society of Alberta*, [2002] 3 SCR 372 at para 30.

27. *Supra* note 22.