THE IMPACT OF THE MARSHALL DECISION ON FISHERIES POLICY IN ATLANTIC CANADA

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Your file Votre référence
ISBN: 0-612-84024-7
Our file Notre référence
ISBN: 0-612-84024-7

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by

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A major report submitted to the

School of Graduate Studies

in partial fulfillment of the

requirements for the degree of

Masters of Marine Studies

Fisheries Resource Management

Fisheries and Marine Institute

Memorial University of Newfoundland

October 2002

Abstract

The Marshall Decision has had a significant impact on fisheries policy in Atlantic Canada. The Government of Canada through its Department of Fisheries and Oceans has negotiated agreements with most of the Mi'kmaq and Malecite First Nations affected by this decision. The federal government has provided funding to pay for a voluntary buy-back program for fishing licences, gear and to provide training for aboriginal communities. Non-aboriginals negatively impacted by the Marshall Decision have received no compensation and feel that their needs and concerns are being ignored. Most aboriginal communities feel the Marshall Decision represents new opportunities for employment and training and the opportunity to build and foster pride in themselves and their heritage. The Marshall Decision may also lay the groundwork for negotiations with the federal and provincial governments to provide access to other industries and resources. The government still needs to ensure that long term training in the industry is available for all, that compensation is given to those forced to leave the industry and greater consultation is initiated with all affected groups. Unfortunately, the fishery is still a volatile industry. If resources or markets decline, there is no easy solution to insure that aboriginals and non-aboriginals maintain the right to earn a moderate livelihood from the fishing industry.

Acknowledgements

The author would like to acknowledge and thank Mr. Kevin Anderson for his advice, help, encouragement and time. His extensive knowledge and understanding of the subject matter was a great asset. The author would also like to thank the other candidates with whom it has been a pleasure to meet and work. Differing perspectives on the subject matter covered in the various courses often led to lively discussions and a greater understanding of the issues facing fisheries management. Understanding and locating legal cases would not have been possible without the help of Mr. Michael McCarthy. His help was greatly appreciated. A sincere thank-you must also be extended to Dr. Margaret Shears, Madonna King, Ann Angel, Dr. Garth Fletcher, Dr. Sally Goddard and Dr. Elizabeth Perry for their encouragement and support as I completed this masters program and report. Finally, I would also like to especially thank Mr. Jason Noseworthy and my family for their continued patience, encouragement and support as I embarked on this endeavour.

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1.0 Introduction

On the 17th of September, 1999, the Supreme Court of Canada overturned the conviction of Donald Marshall, Jr., thereby reaffirming the rights of the 34 Mi'kmaq and Malecite First Nations in the Maritimes and the Gaspé region of Quebec to fish commercially. This right was not all encompassing but it did give the provision that aboriginals could fish commercially for the purposes of earning a "moderate living". With this decision, the face of fisheries management and fisheries policy changed in Atlantic Canada. The Government of Canada was slow to react. This lack of an action plan resulted in criticism from aboriginals and non-aboriginals alike. More importantly though was the basic fact that aboriginals felt that their rights had finally been recognized.

The rights of aboriginals in Canada can be divided into two categories; aboriginal rights and treaty rights (Reiter, 2000). Aboriginal rights refer to the practices, customs and traditions of aboriginals before contact with Europeans (Allain, 1996b). Treaty rights are defined as rights that were formally agreed to by the aboriginal group and the Crown. Both aboriginal and treaty rights are affirmed in Section 35 of the Constitution Act of 1982 (Reiter, 2000). In the case of R. *v.* Marshall, the defence successfully argued that the Mi'kmaq and Malecite had negotiated a treaty right, an agreement with the British Crown, to fish commercially. To fully understand the Supreme Court's ruling, this paper will first examine key documents that were fundamental to Donald Marshall, Jr.'s successful defence. The Treaties of 1760-61, the Royal Proclamation and the Canadian Constitution Act of 1982 all provide important information. Several court cases also

provide important background information. While the documents and cases discussed are not all encompassing, they do provide sufficient background information to allow for an understanding of the struggles of aboriginals since the arrival of European settlers. It also provides the basis of what Canada's responsibilities are as a nation to ensure that aboriginal and negotiated treaty rights are recognized, respected and protected. This background information provides a greater understanding of the Marshall Decision itself. When examining the impact of the Marshall Decision on fisheries policy in Atlantic Canada it is important to know the players involved, what were the opposing viewpoints of the interested parties in the case and what was the Supreme Court's ruling in what has been now dubbed as Marshall No. 1. The clarification of the Marshall Decision issued in Marshall No. 2 is also examined.

The importance of the Marshall Decision in directing fisheries policy can be seen when we analyze what this decision means to the different groups that have been affected. The role and responsibilities of the Department of Fisheries and Oceans are studied and the impact of the Marshall Decision on current government policy is investigated. The Marshall Decision also impacts both aboriginal and non-aboriginal communities. The issues faced by these communities as a result of the government's changes in the fisheries policy are very different. While this report can not possibly cover all of the potential problems, many of the major issues are addressed. Finally, the potential for the impact of the Marshall Decision to extend beyond the aboriginal groups and the natural resources that are specifically referred to in this Supreme Court case is examined.

2.0 Background

2.1 The Treaties of 1760 and 1761

The "Peace and Friendship Treaties" consist of thirteen agreements negotiated between 1693 and 1779 between the British authorities and the aboriginal groups who primarily resided along the Northeast Coast of North America (O'Donnell, 1989). Native fishing rights are specifically mentioned in five of these agreements (O'Donnell, 1989). Some historians argue that these treaties are simply surrender agreements made by aboriginals with the British in exchange for peace and such things as the release of prisoners. The British were powerful and the aboriginal leaders were in no position to negotiate favourable terms for their people. The opposing argument states that the British and aboriginal groups were equals. The treaties represent the continued effort put forward by both sides to live and co-exist in a mutually beneficial manner. The Malecite and Mi'kmaq peoples were sovereign nations in their own right. Surrendering title and jurisdiction of their lands to the British Crown would be unthinkable (Coates, 2000, p.34). A lack of effective communication skills between the two nations is often cited for the lack of consensus between the groups as to the actual scope of the agreement that was signed.

Historically, the aboriginal groups tended to side with the French colonists but they negotiated agreements with the British. The British Crown wanted to publicly show their commitment to peace with the Indian nations. This was partly achieved through the issuance of "The Proclamation of 1761". It stated that the colonial governments must

respect Indian land rights. In 1761, the Mi'kmaq signed a treaty with the British authorities, thereby making peace with the Britain and reaffirming past treaties. This was important as the British wanted to ensure that the Indian nations maintained the peace with the numerous British colonies.

What is interesting to note about the Treaties of 1760 and 1761 is that these is no mention of a treaty right to hunt or fish in the formal documents. Yet, these treaties served as the basis for the defence in R. *v.* Marshall (Hurlburt, 2000). The British did agree to establish trading posts or truck houses. It can therefore be argued that if there was an agreement to establish trading posts, than the Malecite and Mi'kmaq must have had a right to collect commodities (through hunting and fishing) to trade for goods, such as ammunition, from the British. The argument in the Marshall decision is not that the specific treaties of 1760 and 1761 apply to Donald Marshall. The argument presented focused on the terms surrounding the treaties that should be acknowledged and applied to the case.

2.2 The Royal Proclamation of 1763

The Royal Proclamation of 1763 was issued by representatives of the British Crown to address a number of issues. The British had recently won the Seven Years war with France. Winning that war gave the British the opportunity to claim dominion over the New World. This could only be achieved if British Law prevailed in the new colonies. There was still a threat to British dominance from the spreading Russian occupation in the North and the Spanish presence in the south-west. The British had to gain the

cooperation and trust of aboriginal nations, many of whom had fought for the French in the Seven Year War. It is important to remember that maintaining good relations with the native people was important to the British Crown. The Crown had as its policy in settling inhabited lands that aboriginal or Indian title must be recognized and respected (Allain, 1996b). This policy was driven by doctrine of conquest in the Memorandum to the Privy Council, 1722, stating that the crown had to recognize the existence of individual nations and treat them as equals (Culhane, 1998).

Public policy in Britain was not necessarily practiced by colonial governments. During the Seven Year war with France, promises of generous returns for furs and other goods had been made by the British with several Indian nations in an effort to make allies during the war with the French. After the war, funding to the colonies had been greatly reduced making it difficult or impossible for British officials to meet their obligations with the Indian nations. Failure of British officials to meet their promises to the Indians increased the likelihood that the Indians would trade with the richer settlers. Overall, respect for Indian title to land and basic rights was often ignored. This led to conflicts and rebellions by the Indian nations. The rebellion in 1763, often known as Pontiac's Rising (Cullhane, 1998), led the colonial government to realize that the issue of Indian title to land had to be addressed. More importantly, the Crown and the colonial governments were probably looking out for their own self interests and realized the necessity to act quickly.

There are many factors to consider when examining the Proclamation. As the number of British settlers in Quebec was relatively low in comparison to French, the British saw the vast area of Quebec as a good area to try and attract immigration from settlers of the increasingly crowded New England colonies. In order for this to occur, the British had to ensure that tensions between Indians over land ownership and use remained low. Britain wanted to gain control over the laws and systems of the New World. To further enhance their control, one of the Crown's objectives was to gain a monopoly on trade with the Indians (Culhane, 1998).

The Royal Proclamation of 1763 stated that it would be the practice of the British colonies that they would obtain land cessions from the Indians prior to settling an area. The preamble stated that the aboriginals living within the territories claimed by the Crown would be protected. It also stated that rights to the use of their hunting grounds would be protected in areas that the aboriginals had not formally ceded to the colonies.

The wording of the Proclamation is vague. It has been argued that it was only intended to apply to Indian nations west of the Appalachian Mountains. In the legal arena it has been successfully argued that it applies to Canada's Maritimes as well (O'Donnell, 1989). There is no mention of fishing rights in the Royal Proclamation however the courts have ruled that the reference to hunting grounds is taken to include fishing rights as well (O'Donnell, 1989).

2.3 The Canadian Constitution Act of 1982.

Prior to the Constitution Act of 1982, the Supreme Court rarely addressed the concept of aboriginal rights, giving little or no direction to the lower courts. In the majority of cases, aboriginal rights were ignored. Cases where aboriginal and/or treaty rights were used as a defence typically ended in failure. While some judges did sympathize with the plight of the aboriginals, there always appeared to be some reason for the decision not to support the aboriginals claim (Sharma, 1998). In addition, government law often neglected aboriginal and treaty rights. Through history the courts routinely supported government laws that failed to recognize any previously negotiated treaty rights.

The one exception to this general rule was Section 88 of the Indian Act. It contains a specific reference to aboriginal treaty rights which states:

> *"88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application for time to time in force in any province are applicable to and in respect of Indians in the province..."* (Indian Act, 1985).

While this proved useful in protecting aboriginal treaty rights from conflicting provincial law, it did not protect these same rights from similar contradictions found in federal laws (Wildsmith, 1995). Federal law had the power to extinguish aboriginal and treaty rights (Allain, 1996b).

This changed on April 17th, 1982 when the Constitution Act of 1982 was ratified. Section 35 of the Canadian Constitution recognizes and affirms existing aboriginal and treaty rights. Aboriginal rights cannot be claimed if both the aboriginals and non-aboriginals had previously extinguished these rights in a treaty that had been entered into freely by both parties. In addition, the government can limit these rights if it can prove that there is a just reason or cause for the limitation. In the fishing industry, the most valid argument for limits on a confirmed right is conservation (Reiter, 2000).

A large body of case law relating to aboriginal and treaty rights has been created based on the Constitution Act of 1982 (Allain, 1996b). While Section 35 recognized and affirmed aboriginal and treaty rights, it did not define what these rights were. There has been much debate over what these rights encompass and the extent to which it affects various issues. The Mi'kmaq and Malecite First Nations in the Maritimes signed treaties with the British. Therefore they believe, and the court has now ruled, that fishing rights are covered by these treaties.

2.4 Cases Leading up to the Marshall Decision

The Peace and Friendship Treaties in the Maritimes are unique. Treaties were often made with Indians to extinguish rights. The Peace and Friendship Treaties actually reaffirm the right to hunt and fish that existed prior to any contact with the Europeans. It can be said that in the Maritimes, aboriginal and treaty rights coexist (Wildsmith, 1995).

Litigation of aboriginal and treaty rights has been common even before the Constitution Act of 1982. One of the first cases involving First Nations rights to fish in the Maritimes can be found in R. vs. Simon [1959] 124 C.C.C. where a member of the Big Cove Band Mi'kmaq Indians had been convicted for fisheries violations of the New Brunswick Fisheries Regulations made under the Fisheries Act (O'Donnell,1989). The defence stated that the appellant was not governed by these regulations under the Treaty of 1752 (one of the Peace and Friendship Treaties) that states, "....free liberty of Hunting and Fishing as usual" (O'Donnell, 1989). The appeal was lost. The reasons for the decision was that the defence had made no attempt to make a connection between the group of Indians with whom the treaty was made back in 1752 and the individual that had been charged. This judgement was important because it recognized that treaties made with aboriginal groups were legal documents and should be treated as such.

In British Columbia, aboriginal groups were faced with a different situation. They had never signed treaties with anyone surrendering their land, yet both provincial and federal legislation was enacted as if the Nisga's rights had never existed. In 1973, the Calder decision brought these issues to the forefront. The Nisga had been trying to negotiate a treaty with the Government of Canada, recognizing the Nisga's ownership of traditional lands. The case was taken to the Supreme Court of Canada. In the end the decision was split, three to three with the final and deciding vote being decided on a technicality. The case was turned back and the Nisga lost. The group who had decided against the Nisga held that their title to traditional lands had been extinguished by the British and Colonial

governments prior to British Columbia joining confederation. The group that voted in favour of the Nisga felt that in the absence of a formal treaty agreement, the Nisga's rights had never been formally extinguished (Coates, 2000; Allan, 1996b).

Legally, the Nisga had been defeated but a political and moral victory was claimed. The Canadian Government at the time were surprised by the depth of public support for the Nisga's claim. Prime Minister Trudeau and Indian Affairs Minister Chrétien started a series of negotiations over land claims issues with those First Nations who had never previously entered into a formal treaty with the government. In April 2000, the Nisga's agreement finally received Royal Assent (Nisga's Final Agreement Act, 2000). While the Calder decision applies to British Columbia, it was important in finally bringing the plight of Aboriginal groups and their rights into the public's view. Government was forced to listen and pay attention to the aboriginal issues that had been virtually ignored for over two centuries. Court litigated decisions were taking a more favourable view towards aboriginal claims based on treaty rights. Aboriginal issues were being recognized as a valid concern (Coates, 2000).

Section 35 of the Constitution Act of 1982 recognized and affirmed aboriginal and treaty rights. In 1990, in the case of R. vs. Sparrow, the Supreme Court of Canada ruled on the scope of Section 35 of the Constitution Act of 1982 (Allan, 1996b; Borrows, 2001). Mr. Ronald Sparrow, Jr. belonged to the Musqueam Indian Band. He was charged under the Fisheries Act with fishing with an illegal net on the Fraser River in British Columbia.

Mr. Sparrow never denied his actions or the dimensions of the net he used. Instead, the defence in Mr. Sparrow's case argued that he had an aboriginal right to fish and that this right was guaranteed under Section 35 of the Canadian Constitution. The provincial court found Mr. Sparrow guilty as charged. When appealed to the British Colombia Court of Appeal, the decision was overturned. The case was taken to the Supreme Court of Canada. With the case in the Supreme Court, the National Indian Brotherhood intervened in support of Sparrow. The B.C. Wildlife Federation, the Fisheries Council of B.C., the United Fishermen and Allied Workers Union, and provincial governments of B.C., Alberta, Saskatchewan, Ontario, Quebec and Newfoundland all gave their support to the Crown's arguments (Sharma, 1998).

In a historical and monumental decision, the Supreme Court of Canada stated that the aboriginal right to fish for food and ceremonial purposes was protected under the Canadian Constitution. It further stated that this right to fish came ahead of the needs of any other group, including the commercial and sport fishing industries. This right could be regulated but the regulation must only be for a valid reason, such as conservation. In addition, the onus is on the state to prove that this regulation is justified and any regulation of aboriginal fishing rights for food must be done in consultation with the aboriginal group affected (Sharma, 1998).

Following the Sparrow Decision, the courts have had the tendency to give a broad interpretation to Section 35 of the Constitution. In 1990, the Appeal Division of the Nova

Scotia Supreme Court of ruled in the case of three Mi'kmaq men, Denny, Paul and Syliboy, charged with a variety of fisheries offences. The court stated that the men had "an aboriginal right to fish for food in the waters in question" (Coates, 2000). The court, as in the Sparrow case, ruled that this right stood only behind the need for conservation.

Another example of this can be found in the case of Delgamuukw in 1997. In this case, the land rights of the Gitskan and Wet'suwet'en First Nations in north-central British Colombia and the ownership and use of resources on the lands in question were the subject of debate. Again the case travelled through the court system, ending in the Supreme Court of Canada. The Supreme Court overturned the earlier decisions of the lower courts and ordered a new trial. It should be noted, that in its judgement in the Delgamuukw case, the Supreme Court made many statements that were both far-reaching and in some ways, unclear. An important ruling for the First Nations was that oral testimony and oral traditions of First Nations should be admissible in the courts as evidence and be given significant attention when deciding cases involving aboriginals. The Supreme Court also recognized the rights of aboriginals to harvest traditional resources and even indicated that it would be expected that the way in which these harvest occurred would evolve as non-aboriginal fisheries has evolved. It went further to state that these rights are protected under Section 35 of the Canadian Constitution (Culhane, 1998; Coates, 2000). The Supreme Court did place a burden of proof on First Nations. It stated that the use of the resources of the land by First Nations could not be done in such a way as to obliterate the relationship that First Nations have had with the

land since time immemorial. First Nations, in claiming land and rights were left with the burden of proof that they had exclusive and continuous use and occupancy of a land or territory. Another notable statement by the Supreme Court was the requirement that the Crown negotiate in "good faith" with First Nations over territorial and resource rights. In the end, a negotiated decision is more beneficial to all parties involved than a litigated decision (Coates, 2000).

3.0 The Marshall Decision

3.1 The Case of R. v. Marshall

No one imagined, including the aboriginal community, that the Supreme Court's decision on September 17th, 1999, in the case of R. *v.* Marshall, would have such depth and scope for aboriginal treaty rights. In August of 1993, Donald Marshall Jr. and a companion were charged with both fishing and selling eels without a licence. These activities were conducted during a closed season using illegal nets. They had caught 463 pounds of eels and sold them for a price of $787.10 (Coates, 2000; Rotman, 2000). Marshall's claim in his defence was that he had a treaty right to fish and sell eels. Marshall was defended by Mr. Bruce Wildsmith, who was the senior legal council for the Union of Nova Scotia Indians and a law professor at Dalhousie University in Halifax, Nova Scotia. Mr. Wildsmith had a history of defending aboriginal issues, especially those involving the use of natural resources by First Nations. The Marshall case was initially built on the Treaty of 1752, however, the focus shifted to the Treaties of 1760-1761 with specific reference

to the "truck house clause" (Rotman, 2000). Prior to this, the Sparrow decision had established an aboriginal right to catch fish for food and ceremonial purposes (Allan, 1996b; Borrows, 2001). Now the court was also being asked to decide if the Mi'kmaq and Malecite of the Maritimes had also negotiated a treaty right to sell the fish they caught, thus participating in an active way in a commercial fishery.

In the first hearing of the case, Marshall was convicted as charged. The decision was brought down in June of 1996 by Judge John Embree. While he ruled that the treaties of 1760 and 1761 were valid, truck houses and Indian Trading Agents no longer existed. As this was the only way that the treaty allowed the Mi'kmaq to participate in commercial activities such as selling of fish, he ruled that the right to sell fish commercially no longer existed (Coates, 2000). As was expected, the case was appealed to the Nova Scotia Court of Appeal and was heard in February, 1997. Once again, Marshall's conviction was upheld. Marshall's defence had argued that the Mi'kmaq had successfully negotiated their continued right to fish commercially through the Treaties of 1760-61. Once again the court disagreed with this stand. The right to trade at truck houses was seen as a means to an end. By agreeing to this stipulation, the British crown was ensuring that they would quickly secure a treaty with the Mi'kmaq. There was no intention or guarantee that the right to fish commercially was expected to last forever (Coates, 2000).

As was expected from the very beginning of the process, the case was appealed to the Supreme Court of Canada. The lawyers started to present their appeals in November,

1998. This court case now had very high stakes attached and as such, there were interventions from outside groups for both sides. Groups such as the New Brunswick Government were concerned with the implications of a favourable decision for Marshall on other resources. The West Nova Fishermen's Coalition was concerned with the impact and implications of an expanded aboriginal fishery on non-aboriginals already employed in a volatile industry. The Union of New Brunswick Indians intervened in support of Marshall and the promise of a new possibility for employment (Coates, 2000).

The arguments in the appeal process could only depend on evidence and testimony presented previously. Marshall's lawyer kept his defence simple. Marshall had a treaty right to catch and sell fish. An aboriginal fishery could be regulated but only with sound and reasonable explanations from the government; aboriginal rights to the resource had to be acknowledged. Marshall's defence can best be described as follows:

> "The crux of the claim lies in the restrictive covenant contained within the 1760 document, which reads in part, ...we will not traffick, barter or exchange any commodities in any manner but with such persons or the manager of such Truck houses as shall be appointed or Established by His Majesty's Governor at Lunenbourg or elsewhere in Nova Scotia or Acadia. (Isaac and Drummie, 2000)."

The Supreme Court deliberated for approximately ten months. In the end, the decision that would later be dubbed Marshall No. 1 was handed down with a majority of Supreme Court justices supporting Marshall. The Supreme Court ruled that "the Mi'kmaq have a constitutionally protected right to fish for "necessaries" which is rooted in solemn mutual promises exchanged between the Mi'kmaq and the British Crown during the 18th century." (Sheffer, 2000). The right to fish commercially was limited to the ability for aboriginals to earn a "moderate livelihood" and did not extend to the "open-ended accumulation of wealth" (Rotman, 2000). The Court also stated that these treaty rights were limited to the area where the Mi'kmaq traditionally lived and that these rights were a community right as apposed to an individual right (Isaac, 2000).

The Marshall Decision took everyone by surprise. Most notably was the Federal Government, specifically the Department of Fisheries and Oceans, who had no plan of action that would help keep the fishing industry in the Maritimes on an "even keel". Even as the Marshall Case entered the Supreme Court, the Federal Government failed to even consider what would happen and their course of action if Donald Marshall Jr. won his case. A writer for The Navigator criticized the government's lawyers for failing to ask the Supreme Court for a "cooling off period" to allow time for interpreting and implementing the Supreme Courts decision (Wadman, 1999).

While the Supreme Court rarely took this type of action, precedent had been set in other Supreme Court Cases. For example, in the 1997 Supreme Court Decision in Eldridge *v.*

British Columbia (Attorney General), the Supreme Court decided in favour of Robin Susan Eldridge, John Henry Warren and Linda Jane Warren. These appellants were all born deaf. Their lawyers successfully argued that the Medical Services Plan failure to provide for sign language interpreters (sign language being their preferred method of communication) violated their s. 15(1) rights of the Canadian Charter of Rights and Freedoms. While the Supreme Court of Canada agreed with the appellants and ruled in their favour, they suspended the effectiveness of the declaration for six months. That would allow sufficient time for the British Columbia government to implement a suitable and effective plan to deal with this situation (Eldridge *v.* British Columbia, 1997). Another example is in the ruling regarding Manitoba's Language Rights. In this case, the Acts of the Manitoba Legislature were ruled to be invalid and have no legal force because they were not written and printed in both English and French. However, the absence of laws would result in legal chaos. Therefore, the Supreme Court temporarily declared the laws valid for the minimum time that would be required for translation, re-enactment, printing and publishing. This only applied to laws enacted prior to the ruling. Any new laws were required to be issued in both official languages (Re Manitoba Language Rights, 1985). If the Supreme Court found in favour of Marshall, which they did, there would have to be wide sweeping changes in the government's policy that would have a significant impact on fishers in Atlantic Canada. If the Supreme Court had been asked, and had granted, a time period in which to implement these changes, maybe some of the violent standoffs and confrontations could have been avoided. The bottom line however

is that given the current climate in the Supreme Court regarding cases involving aboriginal rights the government should have been prepared for the Marshall decision.

Reactions to the Marshall decision were strong on both sides of the spectrum, with a lot of animosity, fuelled by the unknown, between the two sides. The aboriginal community celebrated a huge victory. In the Maritimes and Quebec there were 34 bands that interpreted the Marshall Decision as giving them all the rights and privileges to fish lobster without regulation by the federal government. This would be a tremendous economic boost to a group that were plagued by high unemployment rates. They proceeded to begin fishing during a season closed to non-aboriginal fishers. At the same time, non-aboriginals were voicing their concerns to the federal government that the lucrative lobster fishing grounds and stocks would be destroyed. They called for the government to put a stop to the fishing immediately (Wood, 2000a). The lobster fishery is a multi-million dollar industry and the West Nova Fishermen's Coalition and others in the industry were obviously concerned about how an increased aboriginal presence in the fishery would affect them.

The West Nova Fisherman's Coalition requested that a stay of judgement be issued and a rehearing ordered. The Supreme Court turned down this and all other requests to have the case reopened or the judgement set aside. Instead, the Supreme Court preformed an unusual act; in November of 1999 they issued a clarification of their decision. In that clarification they stated that their ruling covered a narrow area. It only applied to those

items, fish, wildlife and berries, that had been gathered traditionally. The court had not ruled, nor was it asked to rule, on whether this treaty right extended to natural resources and industries that are considered of value today, such as timber, mineral resources and off-shore oil and natural gas. It also stated that the treaty right to fish was still subject to regulation by the Department of Fisheries and Oceans. These regulations must be justifiable but could be imposed for such reasons as conservation or other substantial public purposes. These purposes included economic and regional fairness or recognition of the historical reliance of non-aboriginal groups on the fishery (Backgrounder, 2001). As is the situation in many court cases involving native and treaty rights, the Supreme Court urged both parties to search for solutions to these issues through negotiation rather than litigation.

4.0 An Analysis of the Marshall Decision

The Supreme Court decided in the case of R. *v.* Marshall that the Treaties of 1760-61 did provide a treaty right to fish to earn a "moderate livelihood". A definition of a "moderate livelihood" was not provided by the Supreme Court and for the purposes of this report, it wasn't necessary. For aboriginal communities to be allowed to earn a "moderate livelihood" in the fishery in Atlantic Canada, changes in the allocations of licences and quotas in the different fisheries would have to be made. The Department of Fisheries and Oceans were now required by the courts to provide commercial fisheries access to the Mi'kmaq and Malecite communities of Atlantic Canada. They were also responsible for

ensuring that the fisheries resources were maintained at acceptable levels to maintain a sustainable harvest in perpetuity. In order to accomplish these goals, changes would have to be made in fisheries policy for Atlantic Canada. The impact of these changes is very different for aboriginal and non-aboriginal groups. The federal government must institute these changes and at the same time deal with the many social issues that result.

The Marshall Decision has been described as:

> "....another example of the Supreme Court attempting to balance Aboriginal and treaty rights with the rights of other Canadians, including the authority of governments to regulate the expression of those rights within justified limits."(Isaac, 2000).

This is a fair assessment of the problems and duties the Supreme Court faces when asked to litigate decisions of this nature. More importantly are the questions of "How will the federal government's fisheries policy change?", and "What will be the impact on both aboriginal and non-aboriginal peoples and communities and their way of life?".

4.1 The Department of Fisheries and Oceans

In cases such as R. *v.* Marshall, the policy and laws of the federal government are directed by the litigation of a Supreme Court of Canada case. The Minister of the Department of Fisheries and Oceans has control and responsibility of fisheries policy. In

this situation, the federal government must ensure that when making decisions regarding fisheries policy and law they adhere to the Supreme Court ruling. For example, as a result of the Supreme Courts decision in R. *v.* Marshall the allocation of licences and quotas in the fisheries of Atlantic Canada must include Mi'kmaq and Malecite communities and provide a "moderate livelihood" for these groups.

It is important to remember that the Marshall decision did not take away the federal government's right to regulate the fishery. Part of the federal government's responsibility is to ensure that all aspects of the fishery, including conservation and economic viability are taken care of. This point was re-iterated in February, 2002, when the Supreme Court of Canada handed down its decision in the case of Ward *v.* Canada. This case provides an excellent example of what the Supreme Court feels is the extent of the responsibility of the federal government over Canada's fishing industry. Ford Ward did have a commercial sealing licence that allowed him to harvest hooded and harp seals. Among the 50 seals that he had harvested, a number of hooded blueback seals were found. Under Section 27 of the Marine Mammals Regulations the sale, trade or barter of whitecoats (young harp seals) or bluebacks (young hooded seals) is prohibited. Therefore, Ward was charged under Section 27 of the Marine Mammals Regulations. Ward made a constitutional challenge to the Supreme Court stating that Section 27 was ultra vires the Parliament of Canada. Wards challenge was lost. In this case, as in the case of R. *v.* Marshall, the Supreme Court of Canada has said that the Department of Fisheries and Oceans is not only responsible for the conservation of fish stocks. They are also

responsible for the "maintenance and preservation of the fishery as a whole, including its economic value." (Ward *v.* Canada, 2002). This once again reaffirms the Supreme Court's stand in Marshall that the Department of Fisheries and Oceans' right to regulate a fishery can be for the economic good of all.

The biggest criticism of the Federal Government when the Supreme Court handed down its decision in September of 1999 was that it had no action plan in place to deal with the a Supreme Court ruling in favour of Marshall. There had been no thought as to how the federal government would execute its responsibilities if Marshall won his appeal. As a result, chaos erupted. In the November 1999 edition of The Navigator, one headline read "Ottawa fiddles, fishery burns" (Wadman, 1999). The lack of government planning and action was being blamed for increased tensions between aboriginal and non-aboriginal fishers, the destruction of gear and a generally volatile atmosphere in the region (Wadman, 1999). In the weeks directly following the decision, the Minister of Fisheries made numerous statements (September 20, October 1, and October 10, 1999) and released letters (September 27, 1999) calling for calm and asking for time. Despite the fact that the Supreme Court had deliberated for over ten months to reach a decision, the federal government now needed more time to fully understand the ruling and its implications. They also needed time to devise an action plan for implementing the changes required by the Supreme Courts decision. With the exceptions of Burnt Church and Indian Brook, First Nations affected by the Marshall decision agreed to a self

imposed moratorium on fishing to give the government time to negotiate interim agreements.

Many issues had to be considered when the government began to devise their plan to bring aboriginal people into the commercial fishery. One of the most important issues is that commercially exploited fish stocks are considered a renewable resource, if they are managed properly. However, most commercially exploited species in Atlantic Canada were already being harvested at the maximum allowable levels. The federal government was given the responsibilities of making fishing licences available to aboriginal communities, while continuing to maintain the fish stocks at acceptable levels. Devising a suitable action plan was further complicated by the federal government's responsibility to ensure that the economic good of the non-aboriginal peoples and communities who had a historic tie to the fishery was maintained. Displacement of one group or community at the expense to another group would not be seen favourably. Fishing is the main, and in some cases only, industry in the area. Without the fishing industry as a source of employment, people, especially the younger workers of the area, would have to relocate to find jobs.

When formulating an action plan, the government also had to consider the close proximity of the aboriginal and non-aboriginal communities in these rural areas. Interference by the government with a person's ability to earn their livelihood in a manner they are accustomed would result in intense, emotional reactions. These people were neighbours. The social consequences of mandatory relinquishment of fishing

licences would have severe consequences, including the possibility of human tragedy. In addition, but much less important, is that politically, this move would have been suicidal. Given this situation, the only plausible way to allow for new participation in a fishery already utilized to its maximum was to obtain the necessary number of licences required through a voluntary "buy back" program.

In February, 2000 the government declared that to accomplish its goal of expanding the native lobster fishery, it would buy back greater that 1000 commercial fishing licences, including boats and gear ("Statement", 2000). Those persons who wished to leave the fishery or retire would be given the opportunity to sell their licences and their gear back to the government for considerable profit. When the federal budget came down during the same month, $160 million had been allocated for use by the Department of Fisheries and Oceans to deal with the Marshall Decision (Wood, 2000b; Backgrounder, 2001). The money would be used for the purchase of licenses and other projects, including training, which would be aimed at bringing the aboriginal groups into the fishery.

It took longer to reach negotiated interim settlements than expected but by August, 2000, 27 aboriginal bands had signed agreements. Only Burnt Church and Indian Brook refused to sign (Wood, 2000b). The government has worked steadily since that time to negotiate deals in the long term. The agreements have been negotiated based on the size of the aboriginal group and that groups wants and needs. Some agreements have provided for boats, gear and training. In addition, the Department of Fisheries and Oceans fisheries

policy has also allowed aboriginal communities to diversify into other sectors relating to fisheries such as aquaculture and ecotourism (Department of Fisheries and Oceans, 2001a). Such agreements will allow for a greater range of opportunities for the aboriginal communities.

The government has instituted another review process that includes aboriginal fishing issues but its goals are to provide a method for the long-term development of policy and decision making processes. The Department of Fisheries and Oceans was directed by the Minister to do an Atlantic Fisheries Policy Review. This directive, which came prior to the Marshall Decision, was aimed at providing a thorough look at current fisheries policies, determine where priorities within the region were in competition and clarify the department's priorities and objectives. From this review, the department's goal was to develop and commit to a long-term fisheries management plan (Department of Fisheries and Oceans, 2001b). Part of this plan would have to deal with aboriginal fisheries and treaty rights. It was obvious from the public consultations that fishing communities consider themselves to be stakeholders in the fishing industry and as such want to play an active role in fisheries management (Department of Fisheries and Oceans, 2001c). The reality of the present situation is that when markets for fish are good and quotas provide sufficient landings to allow fishers to earn a good living, fishers and their communities are happy. Problems arise when stocks become depleted and markets collapse. The final report on the Atlantic Fisheries Policy Review has yet to be released. Therefore, it was beyond the scope of this report to speculate about the Department of Fisheries and

Oceans recommendations for its long-term policy initiatives. Ultimately, all fishers in Atlantic Canada want a sustainable, viable, renewable fishing industry. Only time will tell if this is an achievable goal.

Throughout the Department of Fisheries and Oceans' continued negotiations with the First Nation communities and the Atlantic Fisheries Policy Review public consultations, the department has maintained the regulation of the fisheries. When communities such as Burnt Church failed to reach a settlement, quotas and regulations have been set. Violations of these regulations have resulted in the seizure of boats and gear. The federal government has spent large sums of money for enforcement and control of the fishery in Atlantic Canada and especially in the Burnt Church/Miramichi Bay area since the Marshall Decision. The federal government has maintained its right to control the fisheries in Atlantic Canada for the good of all Canadians.

4.2 Non-aboriginal communities in Atlantic Canada

The Marshall Decision helped a nation focus on the hardships of the aboriginal communities in Atlantic Canada. It forced government to change their policy with respect to who is involved in the fishery, how licences and quotas are allocated and how and where funding is spent. The resulting changes have caused great concern for non-aboriginal fishers who have earned a livelihood from working in the industry. A lack of knowledge and a fear of the unknown can cause people to react in ways that are

uncharacteristic. In the early days following the Marshall Decision there was much talk of racism against aboriginals coming to the surface in the Maritimes. This is a falsely held opinion. In most cases, over 50 percent of the sediment expressed by callers to regional CBC radio-talk shows was in favour of extending aboriginal rights (Coates, 2000). Even fishers have acknowledged that the aboriginal communities deserve and have a right to participate in the fishery. An excellent example of the willingness of non-aboriginals to work with the aboriginal communities was in Area 35 of the commercial lobster fishery. The commercial fisherman of this area and the Annapolis First Nation worked out a community-based cooperative solution which enabled the commercial lobster fishery to go ahead in the South West Nova in the fall of 1999 ("Statement", 1999c).

As stated previously, the federal government had set aside $160 million in its February, 2000 budget to pay for agreements and initiatives that allowed aboriginal communities to participate in the fishing and other related industries (Wood, 2000b). Much of these funds went to buy back licences from fishers looking to leave the fishery. There has been little discussion however of how these programs will affect the traditional non-aboriginal fishing communities. The fishery is part of a traditional way of life. These communities and their economic viability have been traditionally tied to the fishing industry. When there is a successful fishing season, the community prospers. If there is a poor year in the fishery, the effects are felt in the community. The question then becomes, what happens

if a large portion of fishing licences are removed from a community or area whose existence is linked to the fishing industry?

This is by no means a new problem faced by the rural communities whose existence has been linked to the fishing industry. History demonstrates that the government has repeatedly introduced programs and legislation aimed at reducing or restricting capacity. These measures were often in response to changing conditions in the fishery but the result is the same. The moratorium that was imposed on the Northern cod stocks in 1992 provides a recent example. In Newfoundland alone over 700 communities were dependent on the fishery. Over 12,000 fishermen and 15,000 plant workers experienced the loss of their employment and the source of their income in Newfoundland alone (Task Force on Incomes and Adjustment in the Atlantic Fishery, 1993). In this case the government introduced the Northern Cod Adjustment and Recovery Program (NCARP) to provide funding for those affected. Under that program over 871 groundfish licences were removed from the industry (Department of Fisheries and Oceans, 2001b). Under The Atlantic Groundfish Strategy (TAGS), which was implemented with the ending of the NCARP program, another 545 groundfish licences were retired (Department of Fisheries and Oceans, 2001b). Based on these figures, it was not surprising that Newfoundland's population dropped by 13,000 between 1993 and 1996 (Human Resources Development Canada, 1998).

In the current situation, fishermen who sold their licences and gear back to the government were more than adequately compensated. Many of the fishers selling their licences and leaving the industry were retiring. In an effort to ensure that enough licences would be made available voluntarily, government paid extremely high prices for licences and gear. The government was offering prices of between $300,000 to $350,000 for a licence and fully equipped boat. The same licence and boat would have been sold for $80,000 to $100,000, five years ago (Augustine and Richard, 2002). The government, in an effort to secure fishing licences, had artificially inflated the price. Young crew members would not have the financial resources available to compete for licences at that price. Crew members of lobster boats have said that it is now extremely difficult, if not impossible, to save enough money to buy a licence. The only ones who can afford to pay the high price of a licence today is Ottawa or a handful of small companies that can still afford them ("Native fishery", 2001). Another point to consider is that even if an ordinary citizen could finance the purchase of a fishing licence at this price, would it be economically viable? It is very likely that the cost of purchasing the licence at the government inflated prices is so high that the purchaser could never make enough money fishing to pay for the cost of the licence and the gear.

There were also outcries from non-aboriginal fishers that the licences bought back and transferred to the aboriginal communities were not being utilized. One example cited a traditional fishing community in north eastern New Brunswick where 21 crab fishermen had lost their jobs. Some of the fishermen were in their 50's making it extremely difficult

for them to find alternate employment. The captains who had previously employed them had sold their boats and their licences had been transferred to the aboriginal communities. A spokesman for the crab fishermen's federation in the northern New Brunswick area indicated that the quotas transferred were not being fished by aboriginals and that boats that were sold had not been used ("Native fishery", 2001). The knowledge that members of their community were unemployed and the quotas that they use to fish were not being utilized led to frustration and anger. In a report from the Miramichi Bay Community Relations Panel it was noted that boats that would have normally been fishing were left anchored at overcrowded docks because native fishers could not afford the gas to run them (Augustine and Richard, 2002). Another example from the panel indicated that only 13 of 48 licences that had been bought from non-aboriginals for aboriginals were actually being used as the native communities lacked the knowledge required to effectively utilize the licences (Augustine and Richard, 2002). The obvious question becomes why should non-aboriginals be denied a right to earn a living when there are fishing quotas that are not being fished?

Fishing is a traditional industry. Therefore, licences were traditionally passed through generations within a family. Sons often went into the "family business". Fishers who were looking to retire from the fishery had a huge decision to make if they had family who wished to take over their licence. As stated previously, the government was offering between $300,000 to $350,000 for their licences and gear (Augustine and Richard, 2002). This would be a good sum of money on which to retire and to share with their family. In

addition, they would probably never have the opportunity again to gain this level of profit from the sale of their fishing licences and gear. For the fishers that did decide to sell the "family business", the probability that their sons and/or daughters would remain in the area were greatly diminished. The sale of the licence back to the government could bring to the end a long standing tradition of a particular family residing in the same community over multiple generations.

Like many rural communities, employment is often available in only one sector, in this case fishing. If the source of employment is gone, there would be no reason for the young unemployed crews or offspring of retired fishers to stay. This out migration could bring the death of many of the rural business and communities whose survival was dependent on the fishing industry. In one area where 44 boats and licences had been transferred to First Nations communities through the signing of one-year agreements, a cooperative that has been around for close to a century had lost over $700,000 in the last year alone. Fifteen people were no longer members and with them went 25% of its business. It has been driven to bankruptcy (Augustine and Richard, 2002).

Another issue facing displaced workers was their lack of training in other industries or professions. The government has made monies available for training of First Nations people entering the fishery but there was no re-training mentioned for the workers that the government had displaced. Non-aboriginal fishers feel that in an effort to find a speedy solution to the current crisis, government failed to recognize the needs of and the

impact on non-aboriginals (Augustine and Richard, 2002). The reaction by the government to the Marshall Decision can be best described as a group running about, putting out little fires as they flare up, without an effective action plan on how to stop the fires from happening or recurring.

Employment opportunities for persons whose only experience is in the fishing industry are few. While the owners of the licences received more than adequate compensation, the crew that worked with the fisher on his vessel received no compensation. The younger crew members lost their jobs. There is the possibility that some of these workers could be hired to train aboriginals in navigation, the effective use of today's fishing technology and current fishing practices but this would not provide sufficient employment for all of the crew members that have been displaced.

The government should acknowledge the impact their decisions have had on rural communities in Atlantic Canada. Re-training should be offered to non-aboriginals to help ease the transition. If people must leave their communities for alternate sources of employment because of the government's policy, then the government should be required to help equip these people with the skill they need to earn a livelihood elsewhere. The federal government adopted similar policies in the past with the initiation of the NCARP and TAGS programs. In response to the collapse of groundfish stocks and the displacement of thousands of workers, the government provided funding not only for licence buy-back and retirement but also for training, relocation assistance and

counselling (Human Resources Development Canada, 1998). The failure of the government to plan in advance for the Marshall Decision has resulted in serious holes being left in their fisheries policy.

As the Department of Fisheries and Oceans seeks resolution to the problems it faces since the Marshall Decision, non-aboriginals have accused the government of seeking the speediest and easiest answers to their problems; not the best solution for all parties involved. Non-aboriginals feel that the government has failed to keep them informed on, and involved in the negotiation process with the aboriginal communities in their area. This opinion has been specifically aimed at the negotiations with Burnt Church in the Miramichi Bay area. Lobster is the most lucrative fishery in the area. One quote in the recent report by the Miramichi Bay Community Relations Panel states that "Lobster is the only fishing that allows for a living."(Augustine and Richard, 2002). In the area in question, only spring fishing occurs. Over the years, fishers in the area have seen the benefits of conservation, through education. By protecting the lobster at the time when they are most vulnerable (in the fall), the lobster stocks in the area have remained at historically high levels. As a result, fishers continually reap the benefits of a lucrative lobster fishery. If the government negotiates fall commercial fishing licences for lobsters with the Burnt Church community, local fishers have charged that the government has failed to listen to their concerns, they could potentially damage the lucrative lobster stocks of the area and they would be ignoring the advice of science.

When the issues facing non-aboriginal people and communities were considered, one point became very apparent; the Government of Canada, through the Department of Fisheries and Oceans cannot expect that fishery policy changes, aimed at helping aboriginal communities, operate in a vacuum. These policies would also significantly impact the non-aboriginal people and communities of the same areas. That reality carries the responsibility outlined by the Supreme Court of Canada to the Department of Fisheries and Oceans; manage the fishery for the good of all. This mandate required the government to adopt a careful, unemotional and impartial decision making process. The fisheries resource must be protected. Furthermore, these decisions should have a minimal impact on the non-aboriginal fishers who chose to remain in the industry.

4.3 Aboriginal Communities in Atlantic Canada

The rights of thirty-four first nations in the Maritimes and the Gaspé region of Quebec were reaffirmed by the Marshall Decision. Employment, industry training and education and the social impacts of the decision were examined. It was also important to consider the issues surrounding the failure to reach negotiated settlements with some First Nations groups, particularly Burnt Church. Figure 1 provides a map of the area affected and the location of the various First Nation communities.

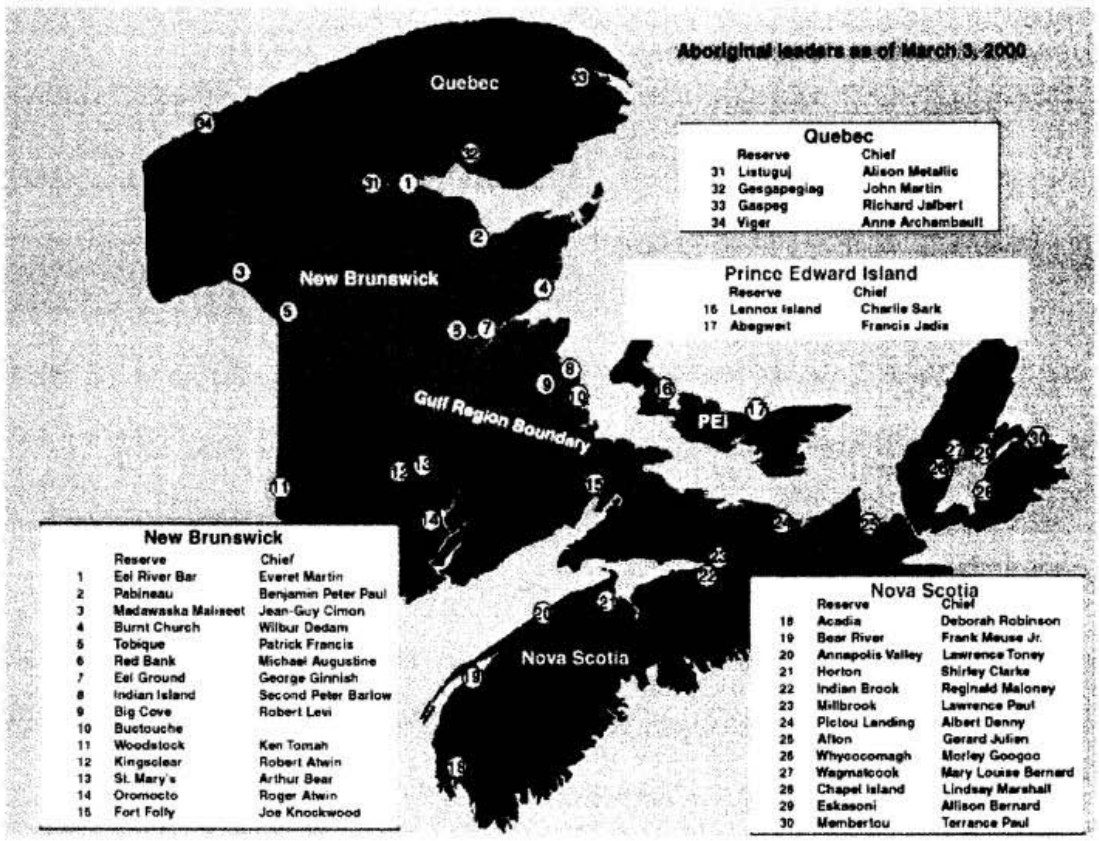

Figure 1: A map of the area and location of the First Nations communities impacted by the Marshall Decision (Department of Fisheries and Oceans, 2002).

4.3.1 Employment

For the aboriginal communities in Atlantic Canada, the Marshall Decision marked another step towards recognition of their treaty rights; treaty rights that had been ignored for too long. The opinions on the importance of the Marshall Decision to aboriginals in Atlantic Canada are varied. The clarification of the Supreme Court's Decision in November, 1999, was seen by many aboriginals as a slap in the face. The Supreme Court stated that it "did not rule that the appellant had established a treaty right to 'gather' anything and everything capable of being gathered. The issues were much narrower and

the ruling much narrower." (Coates, 2000). The Supreme Court ruling determined that the Treaties of 1760-61 gave aboriginals the right to harvest fish commercially. Whether this decision is seen as a monumental step for aboriginals or aboriginals see this as the Supreme Court bowing to the political pressure, the Marshall Decision has provided greater access for aboriginals to the fishery and it has forever changed fisheries policy in Atlantic Canada. The impact of these changes in fisheries policy on aboriginal peoples and their communities are positive.

Increased employment opportunities are the most beneficial outcome of the Marshall Decision. According to numbers released in the Government of Canada's *Backgrounder The Marshall Judgement and the Federal Government's Response* (2001), more that 220 fishing enterprises have been transferred to aboriginal communities. This translates into a 174% increase in the number of commercial lobster enterprises that are currently owned and operated by aboriginal communities since the Marshall Decision. First Nations now hold 10 tuna licences where they previously only held one and during the 2000 fishing season in the southern Gulf of St. Lawrence and Scotia Shelf, 7% of the crab quota was allocated to aboriginal fishers. They also harvested 5% of the shrimp in Quebec (Backgrounder, 2001).

Increased access to the fishery also means increased access to more that 520 seasonal jobs directly in the industry. The government estimates that the landed value of the catches from the increased participation will equal $21 million (Backgrounder, 2001).

This can be converted to almost $14 million in earnings and profits for aboriginal communities. These figures also translate into a decrease in unemployment in aboriginal communities. The Minister of Fisheries and Oceans announced in a statement issued on October 23, 2001, that in the Big Cove First Nation several hundred people were now employed either directly or indirectly in the fishery. Unemployment in that community had dropped from just over 90% to just over 70%; a significant decrease ("Statement", 2001).

By October, 2001, the federal government had actually signed 24 agreements under the longer term response to the Marshall decision, announced in February, 2001. Agreements in principle had been reached with five other First Nation communities ("Statement", 2001). Each agreement is negotiated independently and is based on the size, needs and specific requirements of each aboriginal community. Both the interim agreements that expired on March 31, 2001 and the long-term agreements provided aboriginal communities with access to fishing licences and gear. Some First Nation communities also negotiated funding in their agreements for diversification from traditional fishing. For example, the deal signed with the Red Bank First Nation on April 20, 2000 provided the community with 3 licences each for smelt and eel. More importantly though was the almost $3 million contribution for a lodge, boardwalk and trails, and hospitality training, plus guide and safety training in support of the development of an eco-tourism industry (Atlantic Policy Congress of First Nations Secretariat Inc., 2001a). Another example of diversification is the Waycobah First Nation. In this case the government provided $1.9

million; part of which was used to set up a fishery retail outlet (Atlantic Policy Congress of First Nations Secretariat Inc., 2001b). This outlet is creating both jobs and income for the community (Statement, 2001).

4.3.2 Education and Training

Aboriginal people have been afforded the opportunity to participate and be educated and trained in new fishing technologies and practices. This is another positive impact resulting from the changes that have been made in fisheries policy as a result of the Marshall Decision. With the advances in technology in the fishing industry, access in the form of licences and boats was insufficient to ensure that aboriginal communities were able to become active and efficient participants in the fishery. Access to fishing licences and gear is of little use if the people or group in possession of the licences do not have the knowledge to utilize them. For this reason, agreements with the aboriginal communities also included provisions for capacity-building. While this includes money for harbour and resource management, and wharf and infrastructure development, it also covers such items as training in navigation, seamanship and sustainable fishing ("Backgrounder", 2001). Initially, the resources required to provide this training were not readily available within the communities. This was the logic behind the formation of the Technical Working Group for First Nations Fisheries Training.

The Technical Working Group for First Nations Fisheries Training was formed shortly following the Marshall Decision. Its members include researchers, educators, government

personnel and aboriginal fishers. The mandate of this group was to engage aboriginals in the design, development and delivery of courses that would help them learn to become responsible and efficient fishers. They could then pass that knowledge on to the other members of their communities while keeping in mind their unique community requirements ("Eight", 2001). One initiative of the group was the Mentor Certification Pilot Program. On October 26, 2001, the Department of Fisheries and Oceans and the Executive Director of the Atlantic Policy Congress of First Nation Chiefs, jointly announced that eight candidates from the aboriginal communities of Pictou Landing, Afton, Chapel Island, and Membertou, Nova Scotia and Abegweit, Prince Edward Island had successfully graduated from this three-week course. The candidates chosen were experienced fishers from within the communities. They received one week of classroom training from instructors at both the Coady International Institute and the Nova Scotia Community College School of Fisheries together with elders from the aboriginal communities who provided advice on the cultural and traditional aspects of the instruction. This was followed by two weeks of "on the job training" where the candidates provided mentoring to 24 potential crewmembers from the communities using their newly acquired teaching skills. This initiative provides a good example of the types of initiatives needed to develop and build capacity within aboriginal communities ("Eight", 2001).

4.3.3 Social Impacts

The Miramichi Bay Community Relations Panel was tasked specifically with reviewing and reporting on the current state of relations between aboriginal and non-aboriginal communities in the Miramichi Bay area ("Dhaliwal", 2002). The focus of the subsequent report dealt directly with the communities in the area. Many of their observations about the social climate in the aboriginal communities (reserves) can be generalized to the broader population of aboriginals living on reserves in Atlantic Canada.

Non-aboriginal Canadians have often seen First Nations and their reserves as something that can only survive through hand-outs and government support. Over the years, this has become a self fulfilling prophecy. The First Nations of Atlantic Canada have become a people with nothing to loose. This has been spawned by a lack of self respect and self worth, idleness and despair. As a result of these feelings, there is an increase in the incidence of ill-adapted and self-destructive behaviours. In such environments, a high priority is not placed on education. For example, the Panel provided a demographic profile of the Burnt Church Mi'kmaq community and compared it with that of a nearby non-aboriginal settlement. In the Burnt Church community, only 5% of the population had graduated from high school and only 2.6% had graduated from university. In the neighbouring non-aboriginal community, 11% of the population had obtained a high school diploma and 8.6% had undergraduate university degrees or higher (Augustine & Richard, 2002).

In the wake of the Marshall Decision, more and more aboriginal people have found employment and received training. The positive impact of education and employment go beyond providing a means of earning a living. With these changes have come changes in attitude. A participant in the Mentor Certification Pilot Program and member of the Membertou First Nation commented that:

> The past three weeks showed us, as mentors, that there is a lot of experience and knowledge in our communities. We are able to train our own people and to have the success and confidence to do so without hesitation. ("Eight", 2001).

The Minister of Fisheries and Oceans stated in his press release on October 23, 2001, that "Millbrook First Nation has a new fishing vessel, a new wharf, and a new degree of optimism." ("Statement", 2001). The Marshall Decision has provided a renewed sense of hope. Employment and the possibility of providing a "moderate livelihood" for ones family has given aboriginal peoples a sense of self worth, pride and purpose. With this comes a renewed sense of pride in ones history and heritage.

4.3.4 The Case of Burnt Church (and other aboriginal communities who have refused to sign deals)

As interim deals between the federal government and aboriginal communities expired on March 31, 2001, both sides worked diligently towards an agreement on the template for

the wording of longer term agreements. First Nations Chiefs engaged the advice of their lawyers to ensure that any agreements that they signed now would not haunt them or affect their newly recognized treaty right to fish. Specifically, the Atlantic Policy Congress of First Nations Chiefs wanted to ensure that any deal signed with the Federal government would not define, relinquish or extinguish aboriginal treaty rights ("Ottawa", 2001). Yet, even with these assurances only 30 of the 34 First Nations were expected to sign deals ("Ottawa", 2001).

One of the groups not expected to sign a deal with the Federal Government was the Burnt Church First Nation. Burnt Church has been in the spotlight since the Marshall Decision came down in September of 1999. One of the reasons Burnt Church gained such notoriety was that it was one of the few First Nations communities located on the water. Most reserves in Atlantic Canada were created on land no one wanted. For that reason, most are land locked. Burnt Church had access to the resource and was exercising their treaty right prior to the Marshall Decision (Barnsley, 2001). Violent clashes among aboriginals, non-aboriginals, fishery officers and the RCMP have made the headlines in newspapers, television shows and the international arena. Since the ruling, the Burnt Church community has refused to accept the authority of the Federal Government to regulate their treaty rights, for any reason.

With other aboriginal communities receiving extensive funding in the form of fishing licences, boats, gear, training and other resources, it is hard to understand why a few

communities, including Burnt Church have refused to sign deals with the federal government. Some believe that the agreements offered by the Department of Fisheries and Oceans only amount to a different face on the same old welfare check. The only requirement to get this check is that you must sign an agreement with the Department of Fisheries and Oceans. Thus, instead of being offered a treaty-based fishery, you have a delegated authority (Bear, 2001). Others voiced concerns that any deals signed with Ottawa now would be used to limit aboriginal rights in the future ("Nova Scotia", 2001).

The Miramichi Bay Community Relations Panel had several meetings with different individuals from within the Burnt Church community in the hopes of being able to recommend a suitable action plan that would help ease tensions between the aboriginal and non-aboriginal communities in the area. There were many opinions voiced by different members from within the community. Hearsay information indicated that the motives of those representing the community were questionable. The finances of the community are currently under third party management and one member of the community was quoted as saying "Third party management is a good thing." (Augustine & Richard, 2002). Extremists from within the community believe that Canada as a nation and as a government has no authority over their lives. Most individuals wished to have an action plan in place that allowed them to "...facilitate the 'Strengthening of their heritage.'" (Augustine & Richard, 2002). To the panel that was asked to listen to the peoples of the Miramichi Bay area, this means allowing the people of the aboriginal community to live with self-respect, pride and self-reliance. The overall theme that ran

through these discussions was that the members "...want consultation, not imposition" (Augustine & Richard, 2002).

The general feeling among aboriginals of the Burnt Church community is that consultation is unlikely to happen. A recent article in The Telegram, on Saturday, March 2, 2002, began with

> "A New Brunswick reserve has been backed into a corner by the federal government into discussing a deal that could end the yearly round of violence in the Miramichi fishing ground."

In the same article, an activist and fisher from Burnt Church has been quoted as saying,

> "What are we going to do? Wait until Indian Affairs starts distributing food to our people? ...We've got some of our people in jail. Our boats have been seized and we have no gear."

The opinion put forward in the article was that the federal government was slowly using all the powers within their means to force the Burnt Church community to sign a deal. Consultation did not appear to be an option. It is unfortunate that at a time when many First Nations see hope, promise and prosperity, others fail to recognize the opportunities that lie before them.

4.4 Tribal Indian Treaty Rights in the United States

Canada is not unique in its struggles with the issues of aboriginal access to commercial fisheries. During the late 1960's and the 1970's Indian tribes in the Pacific Northwest and the Great Lakes region began successfully exerting their treaty right to fish in areas off their reservations (Goodman, 2000). In Washington State, the state government had imposed take and season restrictions that permitted only sport fishing in the Columbia River Basin area. As a result of these regulations, the tribes in the Pacific Northwest were prevented from exercising their treaty right to fish. The case of United States v. Washington in the 1970's was launched in response to this problem. Judge George Boldt, in the now famous Boldt Decision, ruled that Washington State's regulatory scheme was discriminatory against tribal fishing (Goodman, 2000; Perron, 2001). He also ruled that natives would receive 50% of the total fish harvest. Further, in a later case of Washington v. Washington State Commercial Fishing Vessel Ass'n, the judge there ruled that the treaty rights of the natives to the natural resource should be sufficient to provide the tribes with a moderate livelihood. Finally, in Phase II of United States v. Washington, Judge Orrick ruled that the tribes' treaty allocations included both wild fish and hatchery fish populations (Perron, 2001).

The Boldt decision was challenged by the state of Washington and its citizens. The argument was that Boldt's allocation of resources to the tribes was unconstitutional and discriminated against non-Indian fisherman (Perron, 2001). In the end, the Supreme Court affirmed the Boldt decision. The negotiated treaty right could not be regulated by

state government regulations and it found that the negotiated rights to the natural resource were such as to provide the tribe with a moderate living (Perron, 2001).

Since the Marshall decision, many similar arguments have been made by non-aboriginals in Atlantic Canada. As happened in the United States, the court did not back down on its decision. In Canada, a clarification was issued in Marshall No. 2, but ultimately, the Department of Fisheries and Oceans had to provide access to commercial fisheries foe aboriginal peoples. In both situations, native peoples signed treaties with European settlers that ensured that native people would continue to have access and rights to fish commercially. In the American treaties, this was more clearly laid out than in Canada, but the result is the same. Access to commercial fishing had to be provided to native peoples.

Indian tribes in the Pacific Northwest place a great importance on the fishery. Exercising the tribes' treaty right to the fishery is a mainstay of the economy and fishing for both commercial and subsistence use is part of the tribes' unique identity. They also see the fishing activity as a way to pass their culture and heritage through the generations (Goodman, 2000). The reasons given explaining the importance of fishing to the tribes in the United States are the same explanations and arguments expressed by aboriginals in Atlantic Canada as to why they feel that fishing is an important part of their heritage.

Similar circumstances to the Pacific Northwest situation also occurred in other states as well. Generally, the allocation of 50% of the allowable harvest has been the standard

since the Boldt decision (Treaty Rights, 2001). However, the court decisions themselves are not as important as the actions that resulted in response to the court decisions. Since that time, steps have been taken that have resulted in Indian tribes in the United States taking a very active role in fisheries management. Many tribes have comprehensive natural resource departments employing a range of experts in various fields associated with resource management (Goodman, 2000).Tribes were required to put in place the necessary tools to effectively regulate their fishery. They had to have a fisheries biologist on staff that could help with the writing of appropriate regulations and monitor the fishery. They also had to ensure that they could enforce their fisheries regulations and prosecute any offenders (Tough questions, 1977).

Many of the court cases involving the execution of treaty based fisheries in the United States occurred over 20 years ago. Today, more that two decades after the Boldt Decision, a cooperative approach to natural resource management has evolved among tribal governments, agencies, industry and the general public in the state of Washington. These groups are currently working together to develop an effective salmon enhancement project that would benefit all concerned parties (Northwest Indian Fisheries Commission, 2002). The tribes in the Washington state area have also joined forces. In 1974 they formed the Northwest Indian Fisheries Commission (Northwest Indian Fisheries Commission, 2002). This group provides the Indian tribes a united voice on fisheries management policy and activities. Within the organization, there are various divisions and programs that provide administrative support, technical information, support and

planning assistance in such areas as harvest management, database management, fish health, habitat management and protection and public information and education services (Northwest Indian Fisheries Commission, 2002). These systems and programs provide useful models on which to build the fisheries policy and management strategies for Atlantic Canada. Fisheries policy in Atlantic Canada is at a similar point in its development as the policies of Washington State were when the Boldt decision was brought down in the 1970s. The federal government can study this case and those of other countries who have experienced similar situations. By studying similar cases in other countries we, as a nation, can learn from the success and the failures of others. By applying these principles to our own situation, we have the tools to formulate an even better and more effective fisheries policy for Atlantic Canada.

4.5 Beyond the Marshall Decision

The Marshall Decision has brought a renewed recognition of aboriginal problems and issues. Without this court challenge and judgement it is unlikely that aboriginals in Atlantic Canada would have had the same opportunity to participate in the commercial fishery as they do today. There also appears to be a greater willingness in the federal government to build working relationship with aboriginal communities through negotiations rather than be forced to react to court litigated decisions.

Since the Marshall Decision there have been various examples of this new commitment. For example, on February 9, 2001, the Minister of Indian Affairs and Northern

Development announced the appointment of a Chief Federal Negotiator to begin the process of reaching an agreement in the determination of the "scope and nature of the Mi'kmaq rights to land, resources and self-government" in Nova Scotia ("Statement by Robert Nault", 2001). Exploratory talks are also expected to begin in New Brunswick, Prince Edward Island and Quebec. On Friday, April 12, 2002, CBC News Online reported that the Federal Government would sponsor a six-month study to review complaints by aboriginal peoples in Newfoundland who claim they have been denied recognition under the Indian Act since Newfoundland joined confederation.

Another interesting example lies within the Conne River Mi'kmaq Band, located in south-central Newfoundland. The Conne River Band is currently in the courts in an attempt to gain recognition under the Marshall Decision. Their fight has been supported by a resolution tabled at the All Chiefs Forum of the Atlantic Policy Congress of First Nation Chiefs and Secretariat held on March 27 and 28, 2002 (Atlantic Policy Congress of First Nations Secretariat Inc., 2002). The federal government believes that the Peace and Friendship Treaties of 1760-61 do not apply to the Mi'kmaq residing in Newfoundland.

Since 1994, there has been an allocation transfer program under the Aboriginal Fisheries Strategy. This program, which was the government's response to the Sparrow Decision, helps facilitate the transfer of commercial fishing licences to aboriginal communities. As of May, 2001, the Conne River Band in Newfoundland has gained control of and operates

four commercial fishing licences. Although the Allocation Transfer Program had existed since 1994, a Fisheries Department staff officer for aboriginal fisheries in the Newfoundland Region indicated that it was "not until the last year that the need of the Conne River Band was identified" ("Newfoundland", 2001).

While it is probable that any of the events listed above would have occurred without the Marshall Decision, it is highly improbable that they would have received such immediate and timely action. Following the Marshall Decision, the Minister of Indian and Northern Affairs met with Mi'kmaq and Malecite chiefs to assess and address the standard of living in their communities, and discuss the importance of economic development and the impact of limited space on aboriginal communities social requirements. These items have been issues for many years. Would these items have been addressed in the year 2000 if the court had not handed down the same ruling in the Marshall Decision? One can only speculate about this point, but it does give cause for consideration. Whether or not the Marshall Decision has caused Ottawa to take action, a change can be seen in the federal government's approach. The Minister for Indian and Northern Affairs stated that:

> I strongly believe that it is our responsibility – not the role of the courts- to define the relationship between Aboriginal people, governments and Canadians in general. ....I sincerely believe that it is time for all of us to try and to reconcile our interests through honourable, respectful and good faith negotiations. ("Statement by Robert Nault", 2001).

The question of whether or not treaty rights will be extended to other natural resources such as logging, mining, oil and natural gas are still issues that need to be addressed. As negotiations between aboriginal communities in Atlantic Canada, the federal and provincial governments continue, there is no doubt that these items will be brought to the table and become a part of the long-term government response under the Department of Indian and Northern Affairs to both aboriginal and treaty rights. As the economic base of the aboriginal communities gains strength and social conditions improve it is natural for these groups to evolve and become partners in the exploitation, use and benefits of Canada's other natural resources. Their culture, customs, heritage and way of life is important to them. It is clear that the aboriginal communities wish to regain their self-respect, pride and self-reliance. Government should consider using aboriginal views in the management plans for our natural resources instead of ignoring their traditional knowledge and wisdom. Such actions will help Canada grow as a nation.

5.0 Concluding Remarks

How important to aboriginal issues is the Marshall Decision of 1999? Any answer to this question would be based on the subjectivity and the opinions of the person answering it. It is more important to consider the facts. Huge changes have been made in the federal government's fishery policy as a result of the Marshall Decision. These changes have the potential to continue beyond the fishery into other public policy issues. Government is

proposing and initiating discussions on numerous issues that are important to aboriginals in Atlantic Canada. By being proactive in their approach, the government has a greater chance of avoiding the chaos and confusion that was seen as a result of the Marshall Decision.

When considering the Marshall Decision, we can not forget the impact it has had on non-aboriginal communities. Initial figures of earning for aboriginals and non-aboriginals in the Miramichi Bay area were compared in the report released in March 2002. When figures were corrected using a Purchasing Power Parity adjustment factor, it was found that there was little difference in the income of peoples in rural fishing communities and the aboriginal communities (Augustine & Richard, 2002). This tells us that any change that affects the ability of any members of these small communities to earn a living has the potential to cause significant negative impacts. Out migration, especially among the communities' youth, the closure of small business and possibly the death of some small communities are probable outcomes of the changes in the government's fisheries policy. Many of the affected individuals will not receive any compensation. Their plight has not been considered as the government rushes to abide by the Supreme Court's rulings.

Aboriginal communities will benefit from the Marshall Decision. They now have access to fishing licences, boats and gear that many didn't have before. Other aboriginal communities have been supplied with the resources that have allowed them to diversify into other related and lucrative industries. Training that incorporates traditional values

and beliefs are being offered. In addition, aboriginal peoples are learning the skills to train themselves. It also appears that since the Marshall Decision, the government has become more attentive to the social problems that haunt many aboriginal communities. Self-respect, pride and self-reliance are becoming realities for aboriginal peoples.

As fisheries policy in Atlantic Canada evolves, there are still a number of problems and issues that need to be addressed. Training, relocation assistance and counselling for displaced non-aboriginal crew members should be provided. The government has set a precedent when changes in government policy have resulted in fishers losing their jobs. The displaced crew members should expect no less. In addition, all fishers, both aboriginal and non-aboriginal need to keep pace with the increasing sophistication of the fishing industry. Mentoring is an effective way to train new fishers in industry practices using the tools of their culture to effectively communicate the ideas. Long-term training opportunities still need to be available to all groups to ensure that licence holders and crew members are knowledgeable in the latest technology in the areas of safety, seamanship and production of a quality product.

The federal government needs to encourage increased consultation among itself, aboriginal fishers and non-aboriginal fishers. Cooperation among the stakeholders will build a better understanding of all of the issues and greater support for the resulting fisheries policy. Participation, knowledge and understanding of fisheries policy decisions may also bring greater compliance with the regulations and acceptance of the decisions

among the groups involved in the fishing industry. The federal government also needs to study the situations and experiences of other countries that were faced with similar problems and learn through their successes and their mistakes.

All of the discussion to date has been based on the idea that there will be sufficient resources to provide a moderate livelihood to aboriginal groups. As the government moves forward with changes in its fisheries policy and the final report is released on the Atlantic Fisheries Policy Review, we have to wonder what will happen if the fish stocks that are sustaining fishermen today also collapse. Once again, similarities can be drawn between the Marshall Decision today and the Boldt Decision in the United States. Today, tribes affected by the Boldt decision are suffering due to the continuing degradation of fish habitat as salmon stocks in the Pacific Northwest continue to decline and approach extinction. Money damages are being sought by tribes and many tribes are preparing for litigation to recover their losses. The ultimate wish is that the fish and their habitat are restored but if that can not happen, the tribes want to be compensated for their losses (Perron, 2001). While aboriginals in Atlantic Canada view increased access to the fishery as a means to build self-esteem and foster pride in one's self and one's heritage, the natives of the Pacific Northwest in the United States view a restored fishery in the same light. In Atlantic Canada we must wonder what would be the action of aboriginals if there are insufficient fisheries resources to allow for them to earn a moderate livelihood. If natural fish stocks do decline below sustainable levels and aboriginals can no longer earn a moderate livelihood from traditional fish stocks, will there be legislation that allows

aboriginals preferred access to the most desirable aquaculture sites? These are all questions to think about and consider as the government charts its course towards its new long-term Atlantic Fisheries Policy.

The judge in the Supreme Court of Canada case of Delgamuukw in 1997 made a very important statement; "We are all here to stay!" Yes, it is true that aboriginals have suffered greatly at the hands of European settlers, the British Crown and later the Canadian government. Treaty and aboriginal rights need to recognized and respected, as do the aboriginals peoples and groups that these treaties and rights represent. At the same time, as a country, we still need one governing body that is responsible and accountable to all Canadians. With that in mind, it is important to look forward to solutions rather than to dwell in the hurts and wrongs of the past. Consultation with all parties, aboriginals and non-aboriginals is an important part of the process. Negotiation, not litigation is the key.

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