Indigenous Rights, the Marshall Decision and Cultural Restoration

THE PROCESS OF COLONIZATION AND ITS impact on indigenous peoples is receiving renewed attention from scholars whose work has centered on various aspects of the relationship between settler societies and indigenous peoples. As well, an emerging generation of indigenous scholars has found critically evaluating the experience of colonization a necessary starting point for strengthening the cultural integrity of their societies. Indeed, it has led them to examine, among other things, how the structures created by colonization both restrict opportunities for indigenous peoples and encourage members of settler society to disparage indigenous people for not seizing those opportunities. I was reminded of this – a few years ago now – while engaged in research among Mi'kmaq fishers of the Miramichi River in northern New Brunswick; one fisher's poignant account served to highlight the problem:

> When I was growing up, I was about fifteen years old and I was sitting by the shore one night, cleaning a salmon. I was putting the guts in the river and the smell of the blood was getting in the water. The eels came flocking into shore. Big, huge things. I was fifteen years old and getting out of high school and get this big brain storm; I am gonna make lots of money. I'm going downtown and buy an eel licence. Fifty dollars. Anybody today can buy an eel licence. And you are suppose to be able to sell any eels that you want to sell. I went down and asked for a licence. "No problem, just fill out the application . . .". Then it asked for four or five pieces of ID. At the time I gave my student ID card, my Indian Status card and my birth certificate. He looked at the card and said, "You're an Indian". I said, "Yes, I'm from Eel Ground". "You don't need a licence". "Geese, that's great, I don't need a licence. But can I sell"? "Oh, you can't sell . . . you're an Indian". "If I buy a licence, am I allowed to sell"? "You're not allowed to have a licence, because you're an Indian". But anyone else could walk in that door and buy a licence for fifty dollars because people say, "you're lazy, no good for nothing, you don't want to work or anything – but they don't understand the system we're in".[1]

This contradictory "system" is exactly what three recent publications seek to explore with respect to the struggles for decolonization by indigenous peoples. Paul Haverman's *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Auckland, Oxford University Press, 1999), for instance, is an edited collection of seventeen commissioned essays and one interview which takes a comparative and multi-disciplinary approach to the decolonization efforts of indigenous peoples in three former colonies of the British Empire. Contributors, by focusing on a specific aspect of the relationship between the settler state and indigenous peoples, bring to light fundamental issues about the role of settler legal and political institutions and

1 Sam G. [pseud.], interview by the author, tape recording and transcripts, Eel Ground First Nation, 9 July 1997.

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how these both continue the process of colonial domination and contribute to the emancipation of indigenous peoples.

A section of the book deals with the period spanning the 1970s to the late 1990s – a period marked by indigenous "rights talk". Here three contributors, Richard Bartlett of Australia, Michael Asch of Canada and Paul McHugh of New Zealand, tackle the problem of whether the political discourse of "rights talk" has produced any concrete results. For Asch the question of result involves two different conceptualizations of what constitutes indigenous rights – one at the beginning of this period [the 1970s] to do with "way of life rights" and another after the *Constitution Act* of 1982 to do with "political rights" around such issues as "self-determination" and/or "self-government".[2] Instrumental here has been the role of the Supreme Court of Canada in establishing an interpretive framework for defining these rights. Thus, in *Van der Peet* [1996], the Court asserted that until their incorporation into the Constitution in 1982, these "rights" existed as common law rights, deriving from the fact that "aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries".[3] As "recognized and affirmed" in the Constitution, then, it is these rights which must be "reconciled with the assertion of Crown sovereignty over Canadian territory".[4] As such, though, they are not rights "defined on the basis of the philosophical precepts of the liberal enlightenment" but "rights held only by aboriginal members of Canadian society [and] arise from the fact that aboriginal people are *aboriginal*".[5] For Asch, while this maintains the expansive and liberal approach to "way of life rights", it effectively denies the "fundamental political rights" of indigenous people who were "self-determining and sovereign at the time of European settlement".[6] Indeed, it is in this respect that Asch finds common ground with his co-contributors from Australia and New Zealand in wondering how it is that the Crown came to assert its sovereignty in the first place.

In *The Marshall Decision and Native Rights* (Montreal, McGill-Queen's University Press, 2000), Ken Coates takes up the "rights talk" in the post-*Van der Peet* period by way of a regionally-based study of Mi'kmaq and Maliseet rights to fishing and forestry resources in the Maritime provinces. Coates' starting point is a decision by the Supreme Court of Canada on 17 September 1999 in the matter of Donald Marshall Jr., a Mi'kmaq from Nova Scotia who was charged with three offences under federal fisheries regulations: selling eels without a licence, fishing without a licence and fishing during a closed season with illegal nets. He admitted to having caught and sold 463 pounds of eels without a licence and with a prohibited net within closed times. The only issue at trial is whether he possessed a treaty right to catch and sell fish under the treaties of 1760 and 1761 which, he argued, exempted him from compliance with the regulations. During treaty negotiations, Aboriginal leaders asked for and received "truckhouses" for the purposes of exchanging their pelts for necessities. At trial this "trade clause" was interpreted as a right to bring the products

2 Michael Asch, "From Calder to Van der Peet: Aboriginal Rights and Canadian Law, 1973-96", in Haverman, *Indigenous Peoples' Rights,* p. 441.
3 *R. v. Van der Peet,* [1996] 2 S.C.R. 507, Section 30.
4 *R. v. Van der Peet,* [1996] 2 S.C.R. 507, Section 43.
5 *R. v. Van der Peet,* [1996] 2 S.C.R. 507, Section 19.
6 Asch, "From Calder to Van der Peet", p. 441.

of hunting, fishing and gathering to a truckhouse for trade. As Coates says, this amounted to the means to a modest income level; he notes that Supreme Court Justice Ian Binnie stated in his majority opinion that "the treaty rights are limited to securing necessaries (which I construe in the modern context, as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth" (p. 11).

Coates also documents the contrasting reactions to the Marshall decision. Aboriginal people, their hopes buoyed that they finally had the means to end their dependency and poverty, began to exercise their right to fish. Non-Aboriginal fishers, threatened by the sudden entrance of a major player into the harvest of the resource, reacted through court challenges and protests on land and on the water, with the RCMP and Department of Fisheries and Oceans officials trying, largely successfully, to minimize property damage to boats, traps and buildings as well as prevent "nasty words spit back and forth" from mushrooming into widespread "group violence" (p. 162). Still, in just one incident, non-Aboriginal fishers destroyed some 3,000 Aboriginal lobster traps in the early morning hours of 3 October 1999 near Burnt Church, an Aboriginal community on the shores of Miramichi Bay in northern New Brunswick.

In response to this confrontation, the intense media coverage of it, often severe criticism of the court's decision and the conflicting claims as to what the Marshall decision really represented, the Supreme Court took further action in November 1999. "In an almost unprecedented step", explains Coates, the Court issued a "clarification" emphasizing the limitations of the Marshall decision: that it did not apply to other resource sectors (future court cases would have to occur) and that "governments had the authority to impose regulations over Aboriginal treaty rights" (p. 18). Coates also documents the responses to this "clarification" and how Aboriginal people in particular felt hard done by; not only had the Canadian court system tried to severely limit their hard-fought victory in the Marshall decision, but for many Aboriginal people this clarification was yet another example of "the system" still trying to marginalize them from the opportunities enjoyed by most non-Aboriginal Maritimers. Indeed, hardest hit appear to be Aboriginal youth who, even in the face of more vibrant First Nations communities and the reinforcement of language and culture, continue to experience a lack of belonging in a world markedly different from that of their ancestors. Yet in the end, asserts Coates, the fury ignited by the Marshall decision subsided to be replaced by an orderly, conservation-oriented Aboriginal fishery, without interference by commercial fishers. During the early months of 2000, most bands entered into fishery agreements with the federal government, exchanging their treaty rights to fish for millions of dollars and job opportunities for communities hit hard by unemployment (the Burnt Church and Indian Brook communities refused to do so).

Coates maintains that the Marshall decision is a legal case in a long line of other such cases, from *St. Catherine's Milling and Lumber Company* (1888) through *Syliboy* (1928), *White and Bob* (1965), *Calder* (1973), *Guerin* (1985), *Simon* (1985) and *Sparrow* (1990) to *Van der Peet*, *N.T.C. Smokehouse and Gladstone* (1996) and *Delgamuukw* (1997). Together, these cases form not only a body of law on issues of resource, treaty and Aboriginal rights but they have also come to symbolize a hope for greater opportunity. Apart from *Simon* (1985), though, none of these cases are specific to the Maritimes. *Thomas Peter Paul* (1997, 1998) concerning the harvesting

of bird's eye maple with the intention of selling it for profit, represented one of the first. At issue was whether First Nations have a treaty right to harvest trees for commercial purposes. Although Thomas Peter Paul lost on appeal, what it did bring about was serious negotiation on the part of the government of New Brunswick and the allocation of five per cent of the total permissible timber harvest for the province to First Nations collectively.

At the root of this whole matter, says Coates, are the growing attempts by Aboriginal groups to transform their food fishery into a commercial venture to generate a moderate level of income, and, more ambitiously still, to focus attention on other resource sectors such as logging, mining and offshore natural gas deposits. At the moment, though, all that seems likely is the realization that the commercial potential of the fishery is perhaps one of the logical outcomes of the *Aboriginal Fisheries Strategy* (AFS) initiated in 1992 following *Sparrow*. Three issues, though, are likely to remain. First, the exercise of "aboriginal and treaty rights", subject as they are to regulation, will entail consideration of the "rights" of other users beyond matters of conservation; second, the Court's ruling that these rights not extend to the open-ended accumulation of wealth may make it difficult for Aboriginal people to capitalize their fishing operations for commercial purposes; third, the issue of resource management and allocation, highlighting as it does the fiduciary-like duty of government to consult with Aboriginal people, has, at least for Aboriginal people, raised broader concerns regarding logging, mining and offshore natural gas deposits. While part of this is rooted in Aboriginal harvesting practices as this relates to the sea, forests and land and their inherent benefits, another part sees activities such as logging, mining and oil and gas exploration as inseparable from the same landscape which supports hunting, fishing and gathering. In this sense, local Aboriginal knowledge is more than just knowledge about habitat and harvesting practices; it is knowledge rooted in evolving relations with Euro-Canadian society, an experience with various regulatory regimes developed throughout the course of this history, and an appreciation for the impact of resource development, particularly as it affects habitat and what one hunts, fishes and gathers.

If there is, Coates writes, "a fundamental bias in the debate surrounding the *Marshall* case, it is the predominance of non-Aboriginal perspectives. . . . First Nations perspectives and insight are generally not well canvassed" (xii). Given the approach taken by Coates, there remains a question as to whether he has remedied this situation. Indeed, there lingers a sense of lost opportunity in failing to seek out and give greater "voice" to both Mi'kmaq and Maliseet perspectives.

The "voice" and to some extent vision of indigenous peoples is what is captured in Marie Battiste's edited collection *Reclaiming Indigenous Voice and Vision* (Vancouver, UBC Press, 2000). The editor is a Mi'kmaq educator from the Potlo'tek First Nation in Nova Scotia. The book is the product of an International Summer Institute on the Cultural Restoration of Oppressed Indigenous Peoples held over the space of ten days during the summer of 1996 at the University of Saskatchewan. Here participants from Australia, New Zealand, South America, Europe and North America met in search of remedies for the "colonization of the minds and souls of their peoples".

Organized around the four directional points of the Medicine Wheel, the book explores four principle aspects of colonization through the contributions of seventeen

of the Summer Institute's participants. This begins with the experience of the colonial process [western door: mapping colonialism] followed by an examination of the underlying assumptions of colonialism [northern door: diagnosing colonialism]. The third area considers how best to help restore wellness among colonized peoples [eastern door: healing indigenous peoples] while the fourth and final section of the book examines the possibilities for a restoration of indigenous cultures [southern door: visioning the indigenous renaissance]. Here, in this final section of the book, five contributors – Gregory Cajete of the United States, Marie Battiste of Canada, Graham Hingangaroa Smith of New Zealand, Linda Tuhiwai Te Rina Smith of New Zealand and James Youngblood Henderson of Canada – offer their perspectives on the challenges facing the strengthening of indigenous cultures.

In his contribution, Graham Hingangaroa Smith brings a Maori perspective to this challenge of restoration by focussing his remarks on three areas of engagement: the "new formations of colonization", the "commodification" of indigenous knowledge and, finally, the strategies of resistance which the Maori have found effective in dealing with the problems surrounding colonization. Before considering these areas, Smith begins by responding to a number of the challenges raised by the Summer Institute. Here Smith argues for a positive and proactive stance in setting an indigenous agenda for change as opposed to the "reactive modes of action" suggested by the postmodern critic of colonization or similar efforts at "deconstructing" colonization. Further, Smith outlines his difficulty with "science" and the notion of what counts as "science" – a positivistic way of framing the world and social relations which is clearly at odds with indigenous ways of thinking. Thus, for Smith there is the real danger of emphasizing competition over co-operation, the individual over the collective and regulation over responsibility. As an alternative, Smith suggests the need for indigenous people to develop theoretical understandings and practices out of indigenous knowledge as a means toward sound critiques of western theoretical constructions and as an effective tool for interventions and transformative action. Finally, Smith contends that indigenous people need to exercise caution in how they characterize or "label" themselves. In other words, a label can easily become a self-fulfilling prophecy. Indigenous people need to recognize, Smith maintains, that within democratic models of "one person, one vote, and majority rule", being numerically a "minority group" needs to be appreciated for what it is – a political "playing field" which is seldom level.

With this, Smith turns his attention to what he terms the "new formations of colonization". Central here, according to Smith, is the fact that the process of colonization has essentially moved offshore – involving multinational corporations operating through multilateral trade agreements. For indigenous people such as the Maori, it means their interests – culturally and in other respects – are increasingly vulnerable to a colonial system and pressures well beyond the borders of New Zealand. Here, as well, an already unequal situation for the Maori both politically and economically is simply made worse.

Smith next addresses the question of the "commodification" of indigenous knowledge. This is when, according to Smith, knowledge becomes a "good" which can be traded or purchased. For the Maori, such a process can work to undermine the collective and co-operative nature of their intellectual and cultural property rights. Among the examples offered by Smith, the commodification of treaty "rights" is

perhaps the most contentious, since defining these rights as simply "property rights" significantly narrows the range of government responsibility. Finally, Smith tackles the question of Maori resistance strategies. In a country where the Maori represent only 15 per cent of the population on a significantly diminished land base, working reactively to fit into the "system" no longer seems a viable option. Prominent here has been the need to develop an alternative Maori schooling system which would address issues of Maori language and knowledge, methods of learning and ways to both develop and strengthen family, the extended *whanau* unit. In this respect, a certain measure of self-determination has been realized.

So for now, at least, questions about the nature of indigenous peoples' culture and colonization, or how it is the Crown came to assert its sovereignty in the first instance, remain suggestive of lines of inquiry outside the present task of restoring the cultural integrity of indigenous society.

From the "rights talk" of the 1990s to efforts at cultural restoration in the first decade of the new century, there are important lessons here to do with the evolving relations between settler societies and indigenous peoples. Despite Smith's call for indigenous people to work outside the "system", at least in the Canadian context much of what has been achieved is the direct result of working within the system. To be sure, indigenous societies here as elsewhere have been transformed through decades and sometimes centuries of contact with settlers. While it is tempting to describe this process simply as "assimilationist", it ignores, then as now, the role of indigenous societies in this process. There is also a need to recognize that the system from which indigenous societies seek redress is also the same system to which they are inextricably bound both politically and economically. Still, according to Smith, there is a need for indigenous societies to set their own agenda for social change, one which builds on the theoretical understandings and practices of indigenous knowledge systems, partly as a critique of western theoretical constructions, but more importantly as an effective tool for interventions and transformations. This is the forward-looking, positive and proactive stance Smith sees as essential for cultural restoration.

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