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Pamela D. Palmater*

An Empty Shell of a Treaty
Promise: *R. v. Marshall* and the
Rights of Non-Status Indians

One of the difficult issues presented by R. v. Marshall is that of who is a Mi'kmaq person, or more generally who is entitled to claim to be a beneficiary of the Treaties of 1760-61. This paper examines a number of possible approaches to this matter, including ones based on residence (on or off reserve), descent and the terms of the Indian Act. It notes the deficiencies of existing tests and of Canadian case law that has addressed Aboriginal identity in other contexts. It concludes by noting that the negotiations which must follow in the wake of Marshall present the opportunity for a new, good faith dialogue to establish the rules for ascertaining First Nations membership.

L'une des questions délicates découlant de la décision de la Cour suprême dans le dossier de R. v. Marshall est de déterminer qui est Mi'kmaq. Autrement dit, d'une manière plus générale, à qui accorde-t-on les droits découlant des traités de 1760-1761. L'auteur propose diverses façons d'envisager le problème en utilisant comme critère le lieu de résidence de l'individu (vivant en réserve ou hors réserve), la descendance et les dispositions de la Loi sur les Indiens. Il relève les carences des critères actuels et de la jurisprudence canadienne où il a été question de définir ce que l'on entend par Autochtone dans d'autres contextes. Il termine en soulignant que les négociations qui doivent être entamées dans le sillage de la décision Marshall fournissent une nouvelle occasion d'amorcer un dialogue de bonne foi dans le but d'élaborer les règles régissant l'appartenance aux premières nations.

* The views I have expressed in this article are my own, written for the purposes of adding to the discussion about Aboriginal people and their rights. The views I have expressed are not necessarily those of my employer, the Department of Justice Canada, nor do they necessarily represent the views of the Department of Indian Affairs and Northern Development. This article should never be cited as representative of either Departments' position. I dedicate this article to my two children, Mitchell and Jeremy who inspire me to help find solutions for our great grandchildren many generations to come.

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Introduction

On 17 September 1999, sometime before noon, the Supreme Court of Canada handed down its decision in *R. v. Marshall*.¹ Many people waited anxiously for the decision to be posted on the Supreme Court of Canada website. Modern technology has made it possible for persons of all backgrounds to access this landmark decision instantaneously through the use of computers. The unfortunate part is that the decision, while instantaneous, also provoked an instantaneous reaction that was anything but positive for the “non-status” Aboriginal people living in the Atlantic provinces. As fast as the decision could be printed, so too were the media interpretations of the case printed for public distribution. Newspapers not only headlined the political and departmental interpretations of the case, but also the public views of what this case meant for non-aboriginal people. The non-status Mi'kmaq treaty beneficiaries caught the worst of

1. *R. v. Marshall*, [1999] 3 S.C.R. 456 [hereinafter *Marshall*].

the reaction to the case, as they were the objects of criticism by Aboriginal and non-aboriginal people alike.

The Supreme Court in *Marshall* held that Mi'kmaq peoples have a treaty right to sell the fish they catch pursuant to the *Treaties of 1760-61*.² There are four main issues that have featured in the press and popular conversations since the decision was posted: (1) what a moderate livelihood means with regard to limiting the sale of fish under the treaty, (2) whether the Mi'kmaq fishers would have to abide by the same fishing regulations as the non-aboriginal commercial fishers, (3) what the case would mean for the Passamaquoddy of Maine and (4) who are entitled to call themselves Mi'kmaq treaty beneficiaries? While the first three issues are important and need to be dealt with both on an interim and long-term basis, the focus of this article will be on the position of the non-status Mi'kmaq peoples and their claims as treaty beneficiaries under the decision in *Marshall*. I will attempt to outline some of the legal arguments which support their inclusion as beneficiaries under the *Treaties of 1760-61* based on a review of the case law and policy. I will also review the statistical ramifications of basing beneficiary status on membership in an individual band, which is (generally) currently based on the *Indian Act* membership provisions as opposed to traditional citizenship in an Aboriginal nation. In addition, I will analyze recent cases that support the right of non-status Indians to be recognized in law, in which courts have spoken out about the discrimination non-status Indians experience and articulated a test for entitlement under Aboriginal treaties.

The treaty beneficiaries issue has brought to the forefront the related issue of who has the right to call himself or herself an Aboriginal person or First Nation member. Any future decisions that are made in this regard will have a direct impact on the survival or extinction of the First Peoples of this land. This is not the kind of choice that the Crown, Canadian society or even a few Aboriginal people have the right to make. Aboriginal identity, culture, nationhood and citizenship and/or membership is not truly a legal, political or social issue. Human beings all over the world and from all different cultures join in unions, have children and associate with others in their communities in many different ways. The right to look at one's child and call him or her Scottish or Irish, Acadian, Cree or

2. There were several treaties signed by representatives of the Mi'kmaq, Maliseet and Passamaquoddy Nations during the 1760s. Some of which are as follows: (1) St. John's and Passamaquoddy Treaty, February 23, 1760, (2) Le Have Treaty, March 10, 1760, (3) Richibucto Treaty, March 10, 1760, (4) Penobscot Treaty, May 23, 1760, (5) Mirimichi Treaty, June 25, 1761. The Court in *Marshall* was speaking to a treaty signed in 1760 with a group of Mi'kmaq living in present day Nova Scotia.

Mi'kmaq is a human cultural right that comes with the birth of the child and the internal workings of one's culture. Who one's child can culturally identify with should not be based on outdated, discriminatory legislation or even the most recent case law. Nor should the government or society pigeonhole the Aboriginal identity issue as their political decision to make, based on the present democratic and administrative system imposed upon the First Nations of this continent. Similarly, to call this issue a social one ignores the fact that it is not an issue that society as a whole has a right to determine for Aboriginal peoples. The issue of Aboriginal identity, community membership/citizenship and heritage is a cultural right that belongs solely to the Aboriginal members of each Aboriginal nation.

On the other hand, this right carries with it a tremendous responsibility to ensure that all members of the community are included, protected and respected. It is only once this goal has been met that the Aboriginal struggle for self-government and true independence will be achieved. The principle of fairness will likely mean a joint effort by Aboriginal nations and Canada to arrive at an acceptable resolution of issues related to Aboriginal citizenship, land claim beneficiaries and treaty beneficiaries, with the particular Aboriginal culture as the operative guide. Who Aboriginal people are and how they identify as Aboriginal peoples is their right as human beings based on centuries of culture and tradition, which must be allowed to evolve over time to incorporate the modern realities of our social interactions and changing cultures. Whether Canadian society does not like the fact that Mi'kmaq people can now sell their fish under the *Treaties of 1760-61* is not a sufficient reason to now exclude as many Aboriginal people as possible from even qualifying for the right to call themselves Mi'kmaq. When the Supreme Court of Canada stated that the positive trade interpretation of the treaty is the only one that would uphold the honour of the Crown,³ it does not follow that the honour of the Crown will remain upheld by doing indirectly what was not permitted to be done directly. The Court has given the Crown a directive to honour the right to sell fish under the *Treaties of 1760-61*. If the Crown then chooses to limit who is a treaty beneficiary in such a way that severely limits the numbers of beneficiaries within an Aboriginal group or results in the eventual disappearance of the beneficiaries altogether, then what effectively happens is that the Crown has frustrated the true spirit and intention of this sacred Treaty signed in good faith by our ancestors not so long ago.

3. *Marshall*, *supra* note 1 at para. 4.

In this article, I do not presume to know what the actual legal, political or social positions of the off-reserve Aboriginal peoples' organizations are with regard to this issue. I also do not know what the final positions will be for each level of government or other Canadians. My goal is to stress the fact that now is the time to give serious thought to this cultural issue before final decisions are made that may be detrimental to Aboriginal peoples. An effective and fair decision cannot be made based on criteria such as who the Crown least wants to be sued by, how much of an administrative burden may result, or whether an inclusive interpretation may cost the Crown and society more to implement. All the parties have a chance to deal with this issue and I suggest that this is exactly what should happen over the next decade. While there are better ways to resolve this issue than relying on the legal framework, a review of the law supports an inclusive method of determining treaty beneficiaries. It is to this end that I wish to contribute a brief legal analysis of the rights of non-status Indians as treaty beneficiaries under the *Marshall* decision. A brief review of the facts will set the stage.

In this case, Donald Marshall, referred to by the Court as a "Mi'kmaq Indian," was charged under the *Fisheries Act*⁴ for selling eels without a license, fishing out of season, using prohibited nets and fishing without a licence. Marshall defended the charges on the basis that he had a right under a particular treaty signed in 1760 not only to fish at any time of year, but also to sell his catch. Mr. Justice Binnie of the Supreme Court agreed with Marshall's position and found that both courts below made errors in their judgments. With regard to the trial judge's decision, Justice Binnie criticized the narrow interpretation used:

While the trial judge drew positive implications from the negative trade clause. . . such limited relief is inadequate where the *British-drafted treaty document does not accord with the British-drafted minutes of the negotiating sessions* and more favourable terms are evident from the other documents and evidence the trial judge regarded as reliable. . . . His narrow view of what constituted "the treaty" led to the equally narrow legal conclusion that the Mi'kmaq trading entitlement, such as it was, terminated in the 1780s.⁵

4. *Fisheries Act*, R.S.C. 1985, c. F-14.

5. *Marshall*, *supra* note 1 at para. 20 [emphasis added].

Justice Binnie then went on to review the errors committed by the Court of Appeal:

The Court of Appeal, with respect, compounded the errors of law. It not only read the Mi'kmaq "right," such as it was, out of the trial judgment, it also took the view, at p. 204, that the principles of interpretation of Indian treaties developed in connection with land cessions are of "limited specific assistance" to treaties of peace and friendship where "the significant 'commodity' exchanged was mutual promises of peace." While it is true that there is no applicable land cession treaty in Nova Scotia, it is also true that the Mi'kmaq were largely dispossessed of their lands in any event, and (as elsewhere) assigned to reserves to accommodate the wave of European settlement which the Treaty of 1760 was designed to facilitate. *It seems harsh to put aboriginal people in a worse legal position where land had been taken without their formal cession than where they have agreed to terms of cession. A deal is a deal. The same rules of interpretation should apply.*⁶

The Supreme Court of Canada, after reviewing all the evidence and hearing all the arguments, held that the Mi'kmaq people of the Maritime provinces and the other Aboriginal nations who were party to the *Treaties of 1760-61* have the right to sell their fish to the extent that they could pursue a "moderate livelihood" through this practice.⁷ The scope of the moderate livelihood right was not limited to communities or bands, but applied to "individual Mi'kmaq families." In this case, the rights of Marshall, an individual Mi'kmaq, were upheld. There was no holding in this case that Marshall was fishing under the "authority" of a First Nation or Aboriginal community, nor was there any holding that he was fishing for anyone's benefit but his own or his family's. One might have thought that the judgment was particular enough to provide the basis for which the Crown and the Mi'kmaq could begin negotiations on how to incorporate Mi'kmaq rights into the present fisheries conservation scheme.

The reaction to the decision was so negative, in fact, that the West Nova Fishermen's Coalition, an intervener in the original *Marshall* case, brought a motion before the Supreme Court of Canada to ask for a

6. *Ibid.* at para. 21 [emphasis added].

7. *Ibid.* The "moderate livelihood" was described as basic necessities such as housing, clothing, food and other basic amenities. The Court held that the Crown could impose catch limits that would produce a moderate livelihood for "individual Mi'kmaq families at present-day standards."

rehearing and a stay of the judgment.⁸ The decision in this “new” case was rendered exactly two months after the original *Marshall* case was handed down. Never in the history of Aboriginal rights law in Canada has a non-aboriginal group asked the Court to rehear a case. It stands as a testament to the ongoing battle that Aboriginal people face even after they have won a “victory” in the courts. Just when discussions are about to begin on how to negotiate the inclusion of Mi’kmaq treaty rights into the fisheries legislation, they are interrupted by a plea to essentially change the outcome of the case. The Supreme Court denied the motion for a rehearing and a stay, but went on to make several clarifications on the original holding beyond that which was necessary to dispose of the motion. Thus, we are left with the holding that the individual Mi’kmaq, Marshall and individual Mi’kmaq families have this right to sell eels. This is a far cry from the assertion that only status Indians living on a reserve in present-day Nova Scotia are entitled to these treaty rights. Status Indians are only one group of Aboriginal people in Canada who hold various Aboriginal and/or treaty rights. Their numbers are roughly equal to that of non-status Indians yet the latter group are marginalized by both governments and society and do not receive benefits under the *Indian Act*. The genesis of these different labels for Aboriginal people even within a single nation is the *Indian Act*. It is also this same *Act* that threatens to bring about the legislative extinction of Aboriginal people if both the Crown and Aboriginal people do not act soon.

I. *The Vanishing Peoples*

1. *Definitional Issues*

Before I review the statistical data relating to the legislative identification and membership of Aboriginal peoples, it is necessary to explain some of the terminology. The term “status Indian” refers to a person who is registered pursuant to the provisions of the *Indian Act* as an “Indian.” Indians registered under the *Indian Act* are most often referred to as “status Indians.” This registration is not premised on whether one is in fact an Aboriginal person by ancestry, whether the person follows the

8. *R. v. Marshall*, [1999] 3 S.C.R. 533 [hereinafter *Marshall 2*]. Note that in this second case, there was obiter about what the first *Marshall* case was really saying about the *Treaty of 1760*. It seems to differ slightly from the first case in that now the focus of the right is on the local community(ies) who may have signed that particular treaty. It also added that this right was a communal right that was to be exercised under communal authority—something that was not stated in the first case. The second case spoke only of the Mi’kmaq and not the Maliseet and Passamaquoddy as it did in the first case. The court did not specifically address the issue of beneficiaries nor did it overturn any previous decision on beneficiaries. Thus on the beneficiary issue the court was consistent in both *Marshall* and *Marshall 2*.

traditional ways of his or her nation, whether he or she participates in cultural activities or even whether he or she lives on a reserve. To be a status Indian or “government Indian” one must simply meet the requirements of having the right combination of parents on the right dates under the provisions of the *Indian Act*.⁹ In fact there are many people, mainly women, who are registered as Indians and have no Aboriginal ancestry at all, due to past requirements under the *Indian Act*. Yet, there are many more Aboriginal people by ancestry who are not registered under the *Indian Act*. These unregistered persons of Aboriginal ancestry are often referred to as “non-status Indians.” That term is not found in the *Indian Act*, but is widely recognized as referring to this group who have mixed ancestry but who will not or cannot be registered as Indians under the current legislation. The off-reserve community, as it is commonly referred to, comprises both status and non-status Indians and Métis¹⁰ who do not live on reserves.

There are other labels given to Aboriginal people which are representative of the many cultural and political groups to which Aboriginal people belong. The descendants of Aboriginal nations who signed treaties with the Crown are often referred to as “treaty Indians.” Aboriginal people who are members of other nations outside Mi’kmaq and Maliseet territory are referred to as “non-territorial Indians.” There is also a difference between a First Nation and a band as constituted under the *Indian Act*. For example, the Mi’kmaq is one of the First Nations of the continent, but in addition to the off-reserve Mi’kmaq people, there are individual bands of Mi’kmaq in Nova Scotia and other Maritime provinces. The *Indian Act* band itself is not the Nation, but merely a smaller legislated group of a larger Nation whose “governing” or community structure is currently regulated by the *Indian Act*. The Aboriginal Fisheries Strategy (AFS) agreements with the Department of Fisheries and Oceans (DFO) are negotiated with representatives of the on and off-reserve communities that represent the status and non-status Indians.¹¹ Many bands claim that they represent both the on- and off-reserve status

9. *Indian Act*, R.S.C. 1985, c. I-5.

10. Métis people are also Aboriginal people with mixed Aboriginal ancestry. This group will not be the focus of this article as their status in law has yet to be determined, and they have a unique history as compared with First Nations. There is currently some controversy over whether Métis will be recognized as a nation, part of those that descend from the Red River group in Western Canada, or whether they are anyone of mixed ancestry. I will discuss briefly some relevant cases later in this article that may help answer those questions.

11. Further discussion of these fisheries agreements will be found in Part III (2), “Communication Gaps Do Not Seem to Have Narrowed,” below.

Indian members.¹² On the other hand, other Aboriginal organizations such as the New Brunswick Aboriginal Peoples Council, the Native Council of Nova Scotia and the Native Council of Prince Edward Island claim that they represent the off-reserve constituency here in the Maritimes, both status and non-status alike. These three provincial organizations are affiliates of their national organization, the Congress of Aboriginal Peoples (CAP), a group which claims to represent off-reserve status and non-status Aboriginal peoples all over Canada. It is this division between the on- and off-reserve and status and non-status that makes negotiation under the *Marshall* case more difficult than it would at first appear.

There are also legal definitions for some of these groups, some of which are broad and as yet undefined and others which are specifically defined under particular legislation. Section 35(1) of the *Constitution Act, 1982* confirms the rights of Aboriginal peoples in Canada:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Section 35(2) of the *Constitution Act, 1982* defines Aboriginal peoples:

- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

This clause does not further define what is meant by "Indian, Inuit and Métis." The present debate over "Aboriginality" brought on by the *Marshall* case really misses the point. To argue that the only rightful beneficiaries under a treaty are status Indians as defined under the *Indian Act* not only defeats the purpose of even having the treaty, but makes our constitutional provisions appear hollow and deceptive. Surely this was neither the intent nor the purpose of section 35's inclusion in the *Constitution Act, 1982*.¹³ In addition, the federal government has a

12. The historical inability for off-reserve band members to vote for their Chief and Council under the *Indian Act* made this assertion highly questionable. Recent cases, which I will discuss later in this article, may help alleviate current representation problems. Please see Part II (3), "Disenfranchisement is Discriminatory," below.

13. See *R. v. Van der Peet*, [1996] 2 S.C.R. 507, where Chief Justice Lamer discusses the purpose of section 35(1) of the *Constitution Act, 1982* at 538-39 and states: "In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s.35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional status." Therefore, if the special constitutional status of Aboriginal and treaty rights is to remain, there must be Aboriginal peoples to hold these rights.

specific constitutional responsibility for Indians which mandates a higher level of duty to ensure that federal legislation does not bring about the legislative extinction of Aboriginal peoples.¹⁴

Section 91(24) of the *Constitution Act, 1867*, gave the federal government jurisdiction over “Indians and lands reserved for Indians,” but did not provide a definition of the term “Indian.” A reference case¹⁵ in 1939 to the Supreme Court of Canada determined that the Inuit (previously known as Eskimo) were included in the term “Indian” under section 91(24) of the *Constitution Act, 1867*. Yet, the *Indian Act* does not apply to the “race of aborigines commonly referred to as Inuit” as per section 4(1) of the *Act*. The *Indian Act* specifically defines the term “Indian” in section 4(1) as follows:

“Indian” means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.

There is no racial requirement that status Indians have an Aboriginal blood tie or lineal link to an Aboriginal nation. There is academic support for the proposition that non-status Indians are protected under s. 35 of the *Constitution Act, 1982* as Aboriginal people either specifically in the category of Indian, Métis or as a yet unlisted Aboriginal group.¹⁶ Section 35 defines Aboriginal people as “including” certain named groups, but did not limit the content of that group. Some of the non-status people alternatively identify as Métis and assert those rights as well. Jack Woodward explained the significance of the terminology used in section 35:

Prior to the passage of the Constitution Act, 1982, each of the three aboriginal groups had received some form of legal recognition. The use of the word “includes”—rather than, for example, “means”—infers that there may be other peoples who could raise a reasonable claim that they ought to be considered “aboriginal.”¹⁷

14. *R. v. Powley* (2000), 47 O.R. (3d) 30 (Sup. Ct.) [hereinafter *Powley, appeal*]. The court in this case rejected a solely blood quantum requirement for Métis peoples in paragraph 56: “Blood quantum requirements for Métis people should be rejected because they reveal little about how an individual defines his or her own identity in relation to a Métis community. Requiring proof of a genealogical tie to the original Métis inhabitants places . . . too heavy a burden on Métis applicants and too easily leads to the extinguishment of Métis rights through attenuated blood lines.”

15. *Re Eskimos*, [1939] S.C.R. 104.

16. J. Woodward, *Native Law* (Toronto: Carswell, 1990) [hereinafter *Woodward*].

17. *Ibid.* at 3.

Woodward explains that there are different legal meanings applied to the word “Indian.” He observes that a person may be an Indian in one context, but not in another. Indians have been defined according to their membership in a group, which is more of a political determination, whereas others have been defined based on lineal descent by blood, from a native ancestor.¹⁸

In some parts of the country, status Indians are referred to as treaty Indians, and the term non-treaty has been used to signify non-status. These characterizations lead to much confusion, since in the Maritimes the Mi’kmaq and Maliseet are both signatories to many of the local treaties and could therefore be considered treaty Indians, and thereby recognized as “Indians,” regardless of status under the *Indian Act*. Similarly, when the federal Crown speaks of band members, or community members, there is a negative connotation that it is referring solely to status Indians, but that is not necessarily the case. Woodward explains that the Crown has even recognized non-status Indians as “Indians” for some purposes:

Prior to 1985, band membership carried with it Indian status. Since the 1985 amendments to the Indian Act, however, Indian status and band membership are determined separately, and may or may not coincide. Most status Indians have band membership. But a body of band members now exist without Indian status *By virtue of s.4.1 [of the Indian Act], non-status band members are Indians for certain purposes.*¹⁹

Therefore, it cannot be said that the Crown has at no time recognized non-status Indians as Indians, let alone as Aboriginal peoples or treaty Indians. There are also government programs that provide money to assist non-status Indians and off-reserve groups on the basis of their status as Aboriginal people. In addition, land claim settlements make specific reference to the beneficiaries, which include several generations of what would otherwise be non-status Indians.²⁰ Section 3.2.2 of the *Yukon Agreement* has the following as its eligibility criteria:

18. *Ibid.* at 5-10.

19. *Ibid.* at 11 [emphasis added].

20. *Umbrella Final Agreement Between The Government of Canada, the Council for Yukon Indians and the Government of the Yukon* (29 May 1993) (Ottawa: Minister of Indian Affairs and Northern Development, 1993) [hereinafter *Yukon Agreement*].

3.2.2. A Person is eligible for enrollment as a Yukon Indian Person under one of the Yukon First Nation Final Agreements if that Person is a Canadian citizen, and:

3.2.2.1 establishes that he is *of 25% or more Indian ancestry* and was ordinarily Resident in the Yukon between January 1, 1800 and January 1, 1940;

3.2.2.2 establishes that he is a *Descendant* of a Person living or deceased eligible under 3.2.2.1;

3.2.2.3 establishes that he is an Adopted Child of a Person living or deceased eligible under 3.2.2.1 or 3.2.2.2; or

3.2.2.4 upon application within two years of the Effective Date of a Yukon First Nation Final Agreement to the Enrollment Commission by that Yukon First Nation, is determined by the Enrollment Commission in its discretion, and upon consideration of all relevant circumstances, to have a sufficient affiliation with that Yukon First Nation so as to justify enrollment.²¹

Based on the above eligibility criteria, one would have to be of 25% Indian ancestry (blood), or a descendant of such a person.²² There appears to be no limit on how many generations you can go back in order to qualify for membership, so long as the applicant is a direct descendant of the initial person who qualifies. These agreements cover interest in lands and natural resources, presumably what would otherwise have been the subject of Aboriginal rights claims. This agreement questions the validity of limiting treaty beneficiaries to status Indians only. This conclusion is further supported by the fact that the same justifications that may have been used in the early 1900s to exclude non-status Indians are no longer appropriate given section 35 of the *Constitution Act, 1982* and the modern values enunciated by the Supreme Court of Canada.

Larry Gilbert, who has testified in courts on various registration and status issues, notes in his text on Aboriginal membership issues that the mandate of the original provisions of the *Indian Act* was to reduce the Aboriginal population so as to force assimilation. He also believes that this practice has continued into the present:

21. *Ibid.* at 25-26 [emphasis added].

22. *Ibid.* at 25. Chapter 3 of this agreement is entitled *Eligibility and Enrollment*. Section 3.1.0 defines a descendant as a “direct descendant by either maternal or paternal line, notwithstanding any intervening adoption and independent of whether any child of the line was born within or outside a marriage.”

[T]he current Indian Act continues with that tradition. Subsection 6(2) of the present *Indian Act* is a case in point which many observers consider to be a draconian attempt by Parliament to limit the number of Indians in Canada. It is often referred to as the second generation cut-off rule. Subsection 6(2) is simply a new technique for an old habit of Ottawa's: it was often called purging or correcting band lists. . . .²³

This kind of policy justification, namely assimilation, cannot be considered a valid one to support a policy of limiting treaty beneficiaries. Policies based on a desire to end a race or culture of people would not meet the honour of the Crown nor would it meet international standards on human rights.²⁴ The very purpose of section 35 of the *Constitution Act, 1982* is to protect existing Aboriginal and treaty rights. Surely the right to exist as an Aboriginal person would be absolutely essential in order to exercise an Aboriginal right. How could the Crown on the one hand legislate the protection of Aboriginal rights under the *Constitution Act, 1982*, yet also continue to support the legislative extinction of Aboriginal people under the *Indian Act*, on the other hand? Canada cannot in good faith take the "disappearing Indian" approach to determining beneficiary status and still point to section 35 of the *Constitution Act, 1982* as its honourable commitment to protect Aboriginal and treaty rights, if in one hundred years there will be no "accepted" or "government" Indians left.

It is long past the time that the effects of this kind of destructive legislation be remedied and Aboriginal peoples be treated with dignity and respect. This includes non-status peoples whether they live on or off-reserve. This issue, while largely ignored, will no doubt come to the fore when the Aboriginal nations living in the Maritimes actually sit down with their own members/citizens and the Crown to work out self-government arrangements. The subject of self-government raises issues

23. L. Gilbert, *Entitlement to Indian Status and Membership Codes in Canada* (Toronto: Thomson Canada, 1996) at 12, n. 3 [emphasis added] [hereinafter *Gilbert*].

24. *Canadian Charter of Human Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. See also: *International Covenant on Civil and Political Rights* (1966) 999 U.N.T.S. 171, 1976 Can. T.S. No. 47, in force, including Canada, 1976; *International Covenant on Economic, Social and Cultural Rights* (1966) 993 U.N.T.S. 3, 1976 Can. T.S. No. 46, in force, including Canada, 1976 [hereinafter *ICESCR*]. Part I, Article 1, sections 1, 2 and 3 of the *ICESCR* provide in part as follows: "(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."; "(2) . . . In no case may a people be deprived of its own means of subsistence."; and "(3) The States . . . shall promote the realization of the right of self-determination. . . ." Article 2, section 2 provides further that: "(2) The States . . . undertake to guarantee that the rights enunciated . . . will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Due to time and space constraints, I will have to explore international issues for Aboriginal people in another article.

of taxation, jurisdiction, land, housing and related issues which are dependant on the number of citizens and whether there will be any around when it comes time to negotiate governmental powers. The Royal Commission on Aboriginal Peoples concluded that the test for Aboriginal membership should be based on principles of reasonableness and fairness which take into account Aboriginal cultural, social and political associations. The Commission explained:

Aboriginal peoples are not racial groups; rather they are organic political and cultural entities. Although contemporary Aboriginal groups stem historically from the original peoples of North America, *they often have mixed genetic heritages and include individuals of varied ancestry*. As organic political entities, they have the capacity *to evolve over time and change their internal composition*.²⁵

They even go so far as to say that a pre-condition to qualifying for the right of self-government is that membership in the nation must be arrived at fairly:

Since an Aboriginal nation must be constituted in an inclusive manner to qualify for the right of self-determination, a large-scale membership dispute of this kind could be very significant.²⁶

As with other cultures and societies in our world, so too should the Aboriginal nations be allowed to change and grow over time. The Supreme Court of Canada has already rejected the “frozen in time” approach to Aboriginal rights.²⁷ How then could the Crown or society expect that with regard to Aboriginal people all must be as it was in the year 1200, 1500 or even 1900? Canada has allowed many people from other nations to live in Canada, participate in its politics and become Canadian citizens. Aboriginal nations should be allowed to evolve over time and include their descendants as their own rightful citizens based not only on blood descendancy, but also based on Aboriginal social, political and cultural factors.²⁸ The enactment and administration of the *Indian Act* has caused a division within First Nations where non-status Aboriginal peoples are often discriminated against by their own relatives based solely on whether they are registered under the *Indian Act*.

25. Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996) at 177 [emphasis added] [hereinafter *RCAP*, vol.2].

26. *Ibid.* at 183 [emphasis added].

27. *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

28. See *R. v. Keepness*, [1999] S.J. No. 869 online: QL (SJ) (Sask. Prov. Ct.) [hereinafter *Keepness*] at para.10: “All living cultures must be allowed and encouraged to grow, evolve and take advantage of new technology. The treaties must be interpreted in this light.”

RCAP Commissioners warned that when discussing the rights of Aboriginal peoples and who the members of these Aboriginal communities will be, giving the power to choose membership solely to the bands will mean that a large portion of Aboriginal peoples, mainly the non-status Indians, will be unfairly excluded.²⁹ While the Royal Commission recognized the legitimacy and indeed the right of Aboriginal nations to determine their own citizenship or membership, it also recognized that it should not be an unfettered right.³⁰ The Commission stated that due to the history of Aboriginal peoples in Canada, namely the lack of sufficient land bases and resources, this would undoubtedly factor into the membership issue and some nations might be inclined to restrict membership unfairly.³¹ These factors may well make negotiations under *Marshall* more difficult, but the rights of non-status Indians should not be sacrificed in the interests of a quick deal, as warned by the Royal Commission.

There are many reasons why some bands may discriminate against their own peoples and have done so for many years, to the detriment of the non-status groups. The imposition of a foreign governance system through the *Indian Act*, the reality that there are only so many homes to go around, the dependency on federal funding and the fear of having to share further the limited funds they currently receive under treaty or land claim agreements, serve to perpetuate the discrimination the non-status Indians feel from the status Indians, the Crown and non-aboriginal society. The Crown can no longer be seen to be a part of this discrimination, nor can it silently acquiesce in any band's further practices of discrimination. The Crown has positive fiduciary duties, which require positive action to protect the interests of all Aboriginal peoples, not just administratively recognized status Indians.³² Legislative extinction is the grim reality which faces First Nations who base their Aboriginal and treaty rights upon registration under the *Indian Act*. Certainly Aboriginal

29. *RCAP, vol.2, supra* note 25 at 23. Certainly Statistics Canada has recognized the reality of the non-status group as being part of the Aboriginal make-up of Canada. They have divided the Aboriginal people of this country into four groups, namely: (1) North American Indians registered under the *Indian Act*; (2) North American Indians not registered under the *Indian Act* (i.e., non-status population); (3) Métis people; and (4) Inuit.

30. See P. Palmater, *In the Path of Our Ancestors: The Aboriginal Right to Cross the Canada – United States Border* (LL.M. Thesis, Dalhousie Law School 1999) [unpublished] [hereinafter *Palmater*]. I have reviewed the RCAP's findings in my thesis in more detail with regard to the issue of both treaty and Aboriginal rights.

31. See generally *RCAP vol.2, supra* note 25 and in particular at 163-84.

32. I will deal with the fiduciary responsibilities of the Crown later in this article. Please see Part III, "Fiduciary Duty of the Crown and the Survival of a People," below.

people owe their children seven generations into the future a fighting chance to maintain not only their Aboriginal and treaty rights, but their very existence.³³

2. Will Existing Rules Lead to the Extinction of First Nations?

Various First Nations advocate the view that their membership and indeed, Aboriginal and treaty rights, should be restricted to those who meet the qualifications under the *Indian Act* or their own membership codes, many of which mirror the *Indian Act* provisions. This position has been criticized not only by the non-status Indians who are excluded, but also by some native women's organizations who fear the eventual disappearance of registered Aboriginal peoples through the *Indian Act*. There is an obvious danger in basing Aboriginal and treaty rights on registration under the *Indian Act* for two reasons: (1) in actuality these rights come about from practices exercised from time immemorial, long before the arrival of Europeans and their legislative regimes, and (2) the assimilationist intentions of the *Indian Act* will eventually mean the "extinction" of registered Indians. Stewart Clatworthy and Anthony Smith in their study entitled *Population Implications of the 1985 Amendments to the Indian Act: Final Report*,³⁴ show that this reality is less than a hundred years away for some bands in Canada. With regard to membership issues arising from self-government plans, the study concluded,

It has not been our mandate to explore the changes that self government might make to the registered and member populations. However, this study raises clear concerns about the principles embedded in the current Act [Indian Act] and their consequences. Implicit in self government is a concept of First Nations' citizenship. The Act and the membership codes that have been developed based on it, provide a problematic basis for this concept:

33. When I describe the extinction of Aboriginal peoples I am referring to their legislative extinction—the result of basing Indian status on the current legislative requirements under the *Indian Act*. Aboriginal people will continue as Aboriginal people no matter what legislation the Crown supports, as their identity is tied to culture and heritage and not Crown legislation. But programs, services, land tenure and Aboriginal and treaty rights can all be negatively affected by the legislation of who is and is not an "Indian." If there are no more status Indians, who then will hold reserve land? This is but one of many questions that must be answered as the day draws near for the extinction of status Indians.

34. S. Clatworthy & A.H. Smith, *Population Implications of the 1985 Amendments to the Indian Act: Final Report*. (Winnipeg: Stewart Clatworthy, Anthony Smith, 1992) [hereinafter Clatworthy].

*The descent rules that now govern the inheritance of Indian status appear unsatisfactory as a basis for defining citizenship in self-governing First Nations. *In the long run these rules will lead to the extinction of First Nations.* In shorter term, they will involve the denial of citizenship to many children and grandchildren.

*The rules in the Act create two "classes" of descendants with differing rights. They violate the principle of equality of citizens.

*Membership codes adopted under the Act may become the basis for definitions of First Nations' citizenship. However, with the exception of the one parent codes, these codes are more restrictive than the membership provisions of the Act. If restrictive membership codes come to define citizenship, *First Nations will author their own demise.* The extinction dates that First Nations write for themselves by using these codes to define citizenship will be earlier than those provided by the Act.

*The Act separates political rights from other rights. This approach then admits political systems in which some have power while others do not. It also admits political systems in which all share political power, but only some have access to the other rights and benefits of Indian status. Citizenship codes that follow this road will also embrace inequality as an underlying principle.³⁵

This study presents a clear warning of what is to come for First Nations in Canada if they choose to adopt the same codes as advocated by the Crown under the *Indian Act*. It is telling when the statistics bear out "extinction dates" as opposed to population rates or increases. There is no such extinction date set for non-aboriginal society, apart from worldwide disaster. This is a serious wake up call for Aboriginal peoples with a view to preserving their families, their cultures and their communities. Membership or citizenship codes are indeed an essential part of self-government agreements, but what must be kept in mind are the real implications of how they design each of their codes. Only the most inclusive codes will protect Aboriginal nations from certain extinction.³⁶

There are four basic membership codes presently held by First Nations (bands), namely: (1) one-parent rules, (2) two-parent rules, (3) blood quantum rules and (4) *Indian Act* rules. These membership rules are enacted as per the *Indian Act*. The one-parent rule means that membership is determined on the membership of only one of the parents. This rule appears to be the least restrictive. The two-parent rule states that both parents must be members. This would mean that out-marriage (marriage to non-members) would be prohibited if the children were also to be members. The blood quantum rule means that eligibility for membership

35. *Ibid.* at viii.

36. *Ibid.* at 14-16.

is based on the percentage of “Indian blood” one possesses. The usual method of establishing these amounts is adding the percent of blood of each parent and dividing by two. The *Indian Act* rules are a combination of the one and two-parent rules although stated in much more detail, and the effects of these rules are illustrated in the Clatworthy population predictions. For example, Figure 11 of the study shows the total population eligible for membership under a two-parent descent rule, which goes from approximately 130,000 persons in 1991 to zero persons by 2091.³⁷ The *Indian Act* rules and blood quantum rules show an initial rise in population but then a marked steady decline. It is only the one-parent rule which shows a substantial increase in population, which levels off and remains steady by the year 2091. Clatworthy reviews these findings in more detail in his study and makes the following conclusion about the *Indian Act*:

Legislated inequality is not a satisfactory basis for political and social systems. It violates First Nations traditions which emphasize equal participation, the enjoyment of resources collectively, and decision making by consensus. It is fundamentally alien to the democratic principles of the Canadian political system that wrote the Act. It has the potential to divide First Nations communities by creating within them fundamental differences in opportunities and rights.³⁸

Thus, as the statistics illustrate, it is not merely the *Marshall* case that makes the beneficiaries issue of prime importance. The very “existence,” by registration, of First Nations is threatened by the *Indian Act* and the membership codes adopted pursuant to the Act.³⁹ While the registration issues must be dealt with long before the “extinction” date materializes, so too must the beneficiary status of the treaty be dealt with on both an interim and long-term basis. As I explain in the next section, if beneficiary status is based on Indian status, and the latter group will eventually be extinct, this leaves the Mi’kmaq with less than an empty shell of a treaty

37. *Ibid.* at 48.

38. *Ibid.* at 55.

39. Clatworthy, *supra* note 34. The Clatworthy study used several bands as examples and predicted their growth/decline rates based on their registration and membership requirements. The Golden Lake First Nation shows a steady decline in registration numbers from less than 1200 in 1991 down to 500 by the year 2091. Membership numbers start from less than 800 in 1991 and rapidly decrease to near zero by 2091. This is the most drastic of the examples provided in the study. In addition, this study looked at each First Nation in Canada and compared each to the different population rates used as examples. The following list represents those First Nations in Nova Scotia and New Brunswick which were marked as most resembling the drastic declines as in the Golden Lake First Nation example: Abegweit, Acadia, Beaver Lake, Eel River, Kingsclear, Saint Mary’s and Tobique. These First Nations are only the most drastic examples, while the others face similar results, but over longer periods of time.

promise; it leaves them with nothing at all. This result cannot be said to reflect the true spirit and intent of the treaty; it represents society's general devaluation of First Peoples.

3. *The 1760 Treaty Affirms the Right of the Mi'kmaq People*

The non-status and off-reserve groups have defended their rights as beneficiaries under the *Treaties of 1760-61* against criticism from commercial fishermen and First Nations alike. The *Marshall* decision has been used both to support the exclusion of non-status Indians and to criticize it. The Court did not restrict the protection of the treaty to only status Mi'kmaq people registered under the *Indian Act* as "Indians." The Court held that the "Mi'kmaq people" were the beneficiaries of the treaty right to sell eel.⁴⁰ The resulting question is who then are Mi'kmaq people? In order to make such a determination based in law, it is necessary to look not just at the *Marshall* case, but other cases which have addressed this issue in more detail.⁴¹ Recent Supreme Court of Canada cases provide a compelling argument which supports the rights of non-status Indians to be included as treaty beneficiaries. Justice Binnie, writing for the majority in *Marshall* described the treaty right as follows:

In my view, *the 1760 treaty does affirm the right of the Mi'kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed "necessaries."* This right was always subject to regulation.⁴²

The Court made several important findings for the "Mi'kmaq people" and did not limit the territory over which the right could be exercised to a specific reserve. It is notable that even in the facts the accused was described as a Mi'kmaq Indian, as opposed to a status Indian, or a registered band member, associated with a specific band, as many other cases do.⁴³ The Court could have chosen to describe *Marshall* in a

40. *Marshall*, *supra* note 1. The first *Marshall* case also made some important comments about other possible treaty beneficiaries in paragraph 29: "The genesis of the Mi'kmaq trade clause is therefore found in the Governor's earlier negotiations with the Maliseet and Passamaquoddy First Nations." While the second *Marshall* case clarified the fact that the first case was about one Mi'kmaq person selling eels, it does provide an indication of how the Court might view the latter groups bringing similar claims.

41. By this statement I do not suggest that a legal determination of beneficiary status is the most appropriate method of settling this issue. The best way would always have Aboriginal participation/direction which involve cultural factors. It is my assertion that a legal analysis simply assists the non-status groups in their fight for recognition.

42. *Marshall*, *supra* note 1 at para 4.

43. *Marshall 2*, *supra* note 8 at para 1. The intervener in this case, the West Nova Fishermen's Coalition, applied for a rehearing of the Crown's regulatory authority over fisheries and for an order that the Court's judgment dated September 17, 1999, be stayed in the meantime. The application was dismissed.

different way in the second *Marshall* case, but it used such consistent wording as “Mi’kmaq persons” when referring to who could exercise the treaty right to fish.⁴⁴ Presumably the reason why the Court did not specifically address the issue of who amongst the present-day Mi’kmaq nation are “entitled” to call themselves Mi’kmaq is that it had already addressed the issue of determining beneficiaries under a treaty in *R. v. Simon*.⁴⁵ To assume otherwise would leave the Mi’kmaq with an empty shell of a treaty promise, a result specifically rejected in *Marshall*:

I do not think an interpretation of events that turns a positive Mi’kmaq trade demand into a negative Mi’kmaq covenant is consistent with the honour and integrity of the Crown. . . . *In my view, with respect, the interpretation adopted by the courts below left the Mi’kmaq with an empty shell of a treaty promise.*⁴⁶

The Court in *Simon*, a Mi’kmaq hunting rights case, based on the *Treaty of 1752*, warned against the Crown or lower courts imposing difficult burdens of proof on Aboriginal claimants to prove their “entitlement” under a treaty:

The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this Treaty.⁴⁷

The Court held that the test of entitlement to the benefits of a treaty would be a “sufficient connection” with the signatories to the treaty:

In my view, the appellant has established a *sufficient connection* with the Indian band, signatories to the Treaty of 1752.⁴⁸

The Court then went on to review the evidence that the appellant was a registered Indian under the *Indian Act* and a member of a band that occupied the same general area as that mentioned in the treaty. With respect to that evidence, the court held:

44. *Ibid.* at para 38. The court adopted the wording of the Coalition with regard to the holders of the right. The Court also stated that *Marshall* could exercise this right of the community. There was no evidence of community permission or license. The Court also commented on the criticisms made by the Coalition intervenors about the Constitutional protection of Aboriginal and treaty rights: “It is the obligation of the courts to give effect to that national commitment. No useful purpose would be served by a rehearing of this appeal to revisit such fundamental and incontrovertible principles.”

45. [1985] 2 S.C.R. 387 [hereinafter *Simon*].

46. *Marshall*, *supra* note 1 at para. 52.

47. *Simon*, *supra* note 49 at 408.

48. *Ibid.* at 407 [emphasis added].

This evidence alone, in my view, is sufficient to prove the appellant's connection to the tribe originally covered by the Treaty. True, this evidence is not conclusive proof that the appellant is a *direct* descendant of the Micmac Indians covered by the Treaty of 1752. It must, however, be sufficient, for otherwise no Micmac Indian would be able to establish descendancy.⁴⁹

It is noteworthy that the Court referred to the appellant as a "Micmac Indian" and also referred to the original Micmac signatories as "Micmac Indians," knowing of course that in 1752 there was no such practice as registration under the *Indian Act*.

The Court laid out a test under *Simon* that was oblivious to the *Indian Act*, other than noting that registration under the *Act* would be useful as evidence of beneficiary status. The key in *Simon* was "descendancy" and not "registration."⁵⁰ As stated above, the same terminology was used in both *Marshall* cases and there was no mention that Marshall was registered as an Indian or that he was a band member. The significance of the *Simon* case for non-status Indians is that it established a "sufficient connection" test which "accepts" (not mandates) proof of Indian status in a Mi'kmaq band as "sufficient" to establish beneficiary rights under the treaty but did not preclude the introduction of other evidence. On the contrary, the Court suggests that for other claimants maybe more would be needed to prove the "sufficient connection." The "more" evidence that could be produced to support a sufficient connection could be as little as a birth certificate that proves direct descendancy from an Aboriginal person who is a member of a community that was linked to one of the original treaty signatory groups, such as the Mi'kmaq, Maliseet or Passamaquoddy, as in the *Marshall* case. It follows that in *Marshall* similar evidence would be required to establish the "sufficient connection" to the *Treaties of 1760-61* as a Mi'kmaq beneficiary; a requirement many non-status people could meet. There have been several lower court decisions in Ontario and New Brunswick, which have used such a test to

49. *Ibid.* at 407-408.

50. See also *R. v. Nikal*, [1996] 1 S.C.R. 1013 at 1059. That is not to say that the Supreme Court of Canada has never accepted band membership as a link to Aboriginal or treaty rights. On the contrary, in *Nikal* at 1059, the court held: "It must also be remembered that aboriginal rights, by definition, can only be exercised by aboriginal people. Moreover, the nature and scope of aboriginal rights will frequently be dependent upon membership in particular bands who have established particular rights in specific localities." Had the Supreme Court meant to limit beneficiaries to status Indians only, it would have done so. What it did was explain the reality that there are numerous bands in Canada with specific territories who have proven rights within that area. That is a far cry from saying that it is only their registered members who can exercise those rights. The Court specifically left it open to other possibilities by stating that the test will "frequently" be dependent on membership in a band as opposed to solely dependent. This is an important distinction when trying to interpret *Marshall*.

determine “beneficiary status” under a treaty, which I will discuss in the next section of this article. This test could be easily incorporated under the current AFS Agreements to prove the entitlement of non-status Mi’kmaq treaty descendants to commercial fishing rights under the *Treaties of 1760-61*.⁵¹

The Supreme Court of Canada in *Marshall* went to great lengths to show that the treaty’s interpretation would be guided by the understanding of the parties at the time and assisted by using the documents of that time period. Given that neither the *Indian Act* nor status cards existed in 1760, and given that the treaty promised these rights to the Mi’kmaq peoples, it could not now be argued that valid treaty descendants could be excluded from the protection of the treaty without seriously misreading *Marshall*. Canadian courts have been calling for negotiations between the Crown and Aboriginal peoples about their rights. The *Marshall* case was clearly set up to outline the parameters of such negotiations with regard to the commercial sale of the natural resources protected under the *Treaties of 1760-61*. The cases in the next section of this article, coupled with the broad, liberal interpretive principles set out by the Supreme Court in the last decade, are examples of how the “sufficient connection” test could be used to determine “beneficiary status” under the *Treaties of 1760-61*.⁵² The Court in *Marshall* has not come to a conclusion that is

51. While I do not advocate a solely legal method of determining membership/citizenship or treaty beneficiary status, these cases certainly support a more inclusive approach than has been adopted by the Crown. This could be one of the negotiated items under a new or revised agreement between DFO and the non-status groups or DFO, the bands and the non-status groups together on an interim basis.

52. *Marshall, supra* note 1 at para 78. The court in *Marshall* summarized these liberal interpretive principles and while it was done in the dissenting decision, it fairly reflects the principles cited in Supreme Court of Canada cases over the last decade, which are as follows [citations omitted]: “(1) Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation . . . (2) Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories . . . (3) The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed . . . (4) In searching for the common intention of the parties, the integrity and honour of the Crown is presumed . . . (5) In determining the signatories’ respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties . . . (6) The words of the treaty must be given the sense which they would naturally have held for the parties at the time . . . (7) A technical or contractual interpretation of treaty wording should be avoided . . . (8) While construing the language generously, courts cannot alter the terms of the treaty by exceeding what “is possible on the language” or realistic. . . (9) Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context. . . .” While this passage is taken from the dissent judgment of Justice McLachlin, it does provide a good summary of the main principles of interpretation that have come out of the Supreme Court of Canada in the last decade or so.

inconsistent with developments in recent lower court decisions or its own previous decisions relating to Aboriginal and treaty rights.

II. *Informing an Analysis of Marshall*

1. *Non-Registration is Not to be Equated With Non-Entitlement*

In *R. v. Fowler*,⁵³ a New Brunswick court held that in order to be a beneficiary of the *Treaty of 1725-26* (the validity of the treaty was not at issue) it was sufficient for the accused hunter to show his direct lineage to his mother, who was a status Indian and a member of a Maliseet band, a group which could be traced to the original treaty signatories. With regard to this issue of Fowler not being a registered Indian under the *Indian Act*, the Court held:

This evidence all shows that the defendant's ancestors were members of the St. Mary's Band and Oromocto Band. *It further demonstrates that nonregistration is not to be equated with nonentitlement.*⁵⁴

The Court then held:

In this court's opinion Mr. Joseph Fowler has *demonstrated a substantial connection to the Maliseet people*. He has shown that he is a descendant of the Maliseet Indians; that is, the St. John River Indians. This tribe is covered by the treaties aforementioned. These treaties do contain the right to hunt.⁵⁵

The test as to how one could prove their entitlement to the treaty was laid out by the court as follows:

In this court's opinion a defendant asking for entitlement to benefit from these treaty rights *must establish a sufficient and substantial connection with a tribe which was signatory to the treaty* before the court. This court finds that Mr. Joseph Fowler has established such a connection to the Maliseet people.⁵⁶

Therefore, the test that was applied was a "sufficient and substantial connection" test. This was essentially the same test that was found to be appropriate by the Supreme Court of Canada in *Simon*. This test holds that proof of Aboriginal ancestry which directly relates to the tribe or nation of the original treaty signatories is the basis of proving rights under the treaty. In other words, the key to exercising treaty rights is establishing "beneficiary status" as opposed to "registration status."

53. (1993), 134 N.B.R. (2d) 361 (N.B. Prov. Ct.) [hereinafter *Fowler*].

54. *Ibid.* at 367 [emphasis added].

55. *Ibid.* [emphasis added].

56. *Ibid.* [emphasis added].

The court in *Fowler* dealt squarely with the issue of whether only status Indians were afforded protection under section 35(1) of the *Constitution Act, 1982* and held: “Mr. Fowler, in this court’s opinion, is protected under the *Constitution Act*.”⁵⁷ The New Brunswick Crown had argued that if the court allowed Mr. Fowler to take advantage of the treaty rights, then everyone would “claim” to be an Indian. Yet, the court found Mr. Fowler not guilty of the hunting charge and with regard to the floodgates argument put forth by the New Brunswick Crown held that

This will not open the floodgates to unrestricted hunting by everyone claiming Indian ancestry, because . . . each claimant will have to prove a *substantial connection to a signatory of the treaty* in question.⁵⁸

The Province did not appeal the decision in this case. It is likely that the Provincial Crown knew that given the broad, liberal, interpretive principles set down by the Supreme Court of Canada in numerous cases regarding the interpretation of Aboriginal and treaty rights, it would not be successful.⁵⁹ The same can be said of *Marshall*, where neither the Crown nor the Mi’kmaq had any intention of limiting their beneficiaries at the time they concluded the *Treaties of 1760-61*. Such an argument could not be reconciled with the fact that the Aboriginal and treaty rights of non-status peoples are constitutionally protected, not based on their “status” as Indians under the *Indian Act*, but by their “status” as Aboriginal peoples in Canada. The Ontario courts have also addressed the issue of administrative or financial arguments against recognition, as being unfounded.

In *R. v. Chevrier*,⁶⁰ the Aboriginal appellant had been caught hunting in violation of Ontario’s wildlife legislation. The facts stated that he was not registered as an Indian under the *Indian Act*, but was of mixed blood and traced his ancestry to a signatory of the *Robinson-Superior Treaty*. The court reviewed the relevant history and stated that while those of European descent may have trouble accepting the fact that the accused

57. *Ibid.*

58. *Ibid.* at 368 [emphasis added].

59. The following cases have reviewed the liberal interpretive principles of interpreting treaties and statutes relating to Aboriginal people. These basic principles were also summarized in the dissent in *Marshall*, *supra* note 1; *Sparrow*, *supra* note 27; *Nowegijick v. R.*, [1983] 1 S.C.R. 29; *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.); *Jack v. R.*, [1980] 1 S.C.R. 294; *Van der Peet*, *supra* note 16; *R. v. Adams*, [1996] 3 S.C.R. 101; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*]; *R. v. Badger*, [1996] 1 S.C.R. 771 [hereinafter *Badger*].

60. [1989] 1 C.N.L.R. 128 (Ont. Dist. Ct.) [hereinafter *Chevrier*].

was indeed an Aboriginal person, it was no less true that “[t]his accused has inherited the right to hunt granted to his ancestors.”⁶¹ The court also addressed the floodgates argument in part as follows:

This decision will not lead to unrestricted hunting by everyone claiming to have an Indian ancestor because relatively few, other than status Indians, will be able to prove their descent from a signatory tribe

[W]hites who rely upon these resources must do so recognizing that these resources have come to them subject to prior claims.⁶²

A similar result can be found in *R. v. Powley*,⁶³ where a man and his son defended charges for unlawfully hunting game by providing evidence that they were Métis and as such had valid “Métis rights” to hunt. Neither of the men was a status Indian and the provincial wildlife legislation only excluded status Indians from the application of the *Act*. The court held that the Powleys were of mixed ancestry and therefore Métis, and that the Métis had a right to hunt for food. As a result, there was no justification for excluding Métis rights in the provincial hunting legislation. Vaillancourt Prov. Ct. J. held:

If the Métis exercise their Aboriginal rights without the benefit of a licence, they not only risk legislative sanctions but they are *forced to skulk through the forests like criminals* as opposed to hunters exercising their constitutional rights.⁶⁴

Here the court made a decision based on descendance as opposed to separate rights unique to a Métis nation. The Superior Court which heard the appeal recently, upheld the trial judge’s findings and held that extinction for Aboriginal peoples was not an option and set out a test for Métis identification.⁶⁵ Both *Powley* and *Fowler* relied on the previous *Chevrier* case which upheld the treaty entitlement of a non-status Indian who proved a sufficient connection to the tribal signatories. Based on the *Powley* case, any position that would in effect treat non-status Indians as criminals that have to hide their treaty activities for fear of prosecution, would not meet with a favourable response from the courts.⁶⁶ The Ontario

61. *Ibid.* at 130.

62. *Ibid.*

63. [1999] 1 C.N.L.R. 153 (Ont. Prov. Ct.) [hereinafter *Powley*]. *Aff’d Powley, appeal, supra* note 14.

64. *Ibid.* at 155 [emphasis added].

65. *Powley, appeal, supra* note 14. The court stated in paragraph 16: “Surely, at the heart of s.35(1), lies a recognition that aboriginal rights are a matter of fundamental justice protecting the survival of aboriginal people, as people, on their lands.”

66. *Ibid.* They also went on to uphold the legitimacy of Métis political organizations in paragraph 30: “To deny people access to their constitutional rights because a community may now only be beginning to put together aspects of its identity and culture is to reward the very practices that the statement of reconciliation admits were wrong.”

Superior Court which recently upheld this decision agreed with the trial judge that it was time to deal with the rights of Métis peoples in a fair and just manner through discussions, consultations and negotiation.

It is interesting to note the fact that Donald Marshall Jr. was living off-reserve at the time he was charged. There was also no indication that he was fishing for the benefit of his community or under authority from his community.⁶⁷ He was an individual Mi'kmaq person exercising his right to fish for eel and sell it under the *Treaties of 1760-61*.⁶⁸ The Crown's argument that community authority is a prerequisite for exercising treaty rights and that the Aboriginal community is an *Indian Act* band, does not correspond with the current legislation and case law regarding the powers of bands in Canada. In the recent *Bernard* case, the defendant's lawyer, Bruce Wildsmith (who was also Marshall's lawyer), questions the Crown's assumptions with regard to band powers to control the treaty harvest of wood and compares it to the treaty fishery. He explains that it is

not clear who or how community governmental powers [are] to be exercised today with respect to harvesting wood outside the bounds of a reserve—the Eel Ground and Red Bank Bands achieve their legal recognition through the *Indian Act*, which specifies what powers may be exercised by them. The *Indian Act* lists the powers of Band Councils in ss.81, 83 and 85.1. No power conferred with reference to timber or wood. And even if there was such a power, it would only apply within the boundaries of the reserve. *There is no recognized power for a Band to regulate activities of its members off-reserve.*⁶⁹

67. *Marshall 2*, *supra* note 8. In the “clarification” of the original *Marshall* decision, the court did expand on what it meant as to the exercise of the right to sell fish. They stated that this right was communal and could only be exercised by a member of a Mi'kmaq community under authority of that community. The court did not define what the test was for establishing (1) an Aboriginal community, (2) community membership or (3) what authority was required to fish. Therefore *Marshall* cannot be said to stand for the proposition that only status registered band members of a Mi'kmaq band can exercise the right under the *Treaties of 1760-61*.

68. *Marshall*, *supra* note 1. See also *R. v. Bernard*, [2000] N.B.J. No. 138 online: QL (NBJ) (Written Summary of Oral argument, defendant) [hereinafter *Bernard*], where the lawyer for the defendant, Bruce Wildsmith, maintains that there has never been a requirement that an individual defendant must have community permission to exercise his or her Aboriginal or treaty rights. He also stated on page 3 of his oral submissions that community permission was “not required in or part of any evidence in any native rights case—not in *Marshall*, *Simon*, *Badger*, *Gladstone*, etc.”

69. *Bernard*, *ibid.* at 3 [emphasis added].

Wildsmith then goes on to cite *R. v. Lewis*,⁷⁰ a recent Supreme Court of Canada case that dealt with band authority over the fishery and held that this power was never the intention of Parliament when it enacted the *Indian Act*. The Court in *Lewis* explained that

If Parliament had intended to grant regulatory powers to Indian Band Councils beyond the limits of their reserves, it would have specifically provided for such powers. The interpretation proposed by the appellants would create numerous and difficult uncertainties which would not, in my view, have been the intention of Parliament. . . .

An expansive interpretation of the by-law-making power would also create the problem of determining the "off-reserve" reach of a by-law. . . .

. . . I believe it is clear that Parliament's intention in enacting s. 81(1) as a whole and in particular paragraph (o) was to provide a mechanism by which Band Councils could assume management over certain activities within the territorial limits of their constituencies. . . .

[A] correct interpretation of s. 81(1)(o) of the *Indian Act* allows the by-law to be applied only within the actual reserve boundaries and therefore it does not extend to the River.⁷¹

While I agree with Wildsmith's analysis, it is important to distinguish between the powers of band councils within the *Indian Act* and the powers of Aboriginal nations that may result from future land claims agreements or self-government agreements. The point still stands that on the one hand, the Crown objects to band powers regulating natural resources beyond the reserve boundaries, yet on the other hand, the Crown seeks to rely on those same powers to control the native fishery off-reserve.

Despite these recent court rulings, non-status Aboriginal people are still made to feel inferior or less worthy than those registered under the *Indian Act* as Indians. Non-status Indians in New Brunswick and Nova Scotia have been characterized as criminals in the media by the non-aboriginal fishers who condemn the *Treaties of 1760-61* outright. They are also discriminated against by some of the Chiefs and the status groups who fear sharing the resource. One Aboriginal lawyer, when speaking of the non-status Indians after the *Marshall* case, went so far as to say: "As far as we are concerned, they are fishing illegally."⁷² The bands cannot ask the Crown to make the choice of who Aboriginal people are for the purposes of treaty beneficiary lists, as the responsibility also rests with them. The Crown has a general fiduciary duty towards all Aboriginal

70. [1996] 1 S.C.R. 921.

71. *Ibid.* at paras. 78-81.

72. S. Hughes, "Illegal Fishing Threat Floated" *The [Halifax] Chronicle Herald* (23 September 1999) at A-2.

people which demands fairness, respect and honourable dealings.⁷³ Those who would advocate that non-status peoples be prohibited from exercising their rights under the *Treaties of 1760-61*, would force non-status Indians to feel like criminals when they participate in their traditional hunting and fishing activities.⁷⁴ When this happens, they are denied their human dignity. Nowhere in the *Indian Act* does it purport to assume control over the beneficiaries issue for land claims, self-government, Aboriginal or treaty rights. That right vests with the Aboriginal peoples themselves to control membership in a fair and inclusive manner in keeping with traditional values and a protectionist view of future generations. If the Crown is going to unilaterally assume this duty, it must at least do so with its fiduciary duties in mind.⁷⁵

73. The more recent case of *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1999), 171 F.T.R. 91 (Sask.) dealt with distinction between band membership under the *Indian Act* and entitlement to treaty rights by virtue of membership in a First Nation. While the decision of the Federal Court in this case is problematic on other issues, best left for another article, it did make a notable distinction on para. 27: "Membership in a first nation, and the enjoyment of any aboriginal and treaty rights which may flow from such membership, is quite different from membership in a Band and the enjoyment of the rights which flow from that status. Of course, the two may and often do overlap, but that does not make them the same."

74. *Powley*, *supra* note 63 at 155. In *Powley, appeal, supra* note 14 at para. 64, the court varied the test set out at trial, that addresses the identity issue for Métis which is relevant to my discussion on non-status Indians: "A Métis is a person who, (a) has some ancestral family connection (not necessarily genetic), (b) identifies himself or herself as Métis and (c) is accepted by the Métis community or a locally-organized community branch, chapter or council of a Métis association or organization with which that person wishes to be associated." See also *R. v. Howse*, [2000] B.C.J. No. 905 online: QL (BCJ) (B.C. Prov. Ct.), where Waurynchuk Prov. Ct. J. cited the *Powley* case in support of his finding that certain accused were Métis, and adopted the test set out in *Powley*. He found that Métis as Aboriginal Peoples have an Aboriginal right to hunt for food. Notable were his comments at para. 31 regarding the treatment they have received as Aboriginal people: "All of the defendants share a common ancestry, common family upbringing, common association with shame, ostracization, and discrimination, common hunting, fishing and food gathering experiences. Unfortunately they all experienced the unnecessary inappropriate comments of the conservation officers." He went on to state in the same paragraph: "The evidence establishes that Métis people have suffered discrimination and prejudice from all sides including the inequality of treatment by provincial governments across Canada. Specifically, the inequality of treatment by the Wildlife Conservation officers and their political masters. It would be difficult if not impossible for the British Columbia Provincial Government and the Wildlife Branch to argue that they have not had enough time since the coming into force of the Constitution Act, 1982 to set up a process to determine the practice, customs or traditions of aboriginal Métis claims . . ."

75. I will briefly discuss the fiduciary duty of the Crown towards Aboriginal people later on in this article. Please see Part III, "Fiduciary Duty of the Crown and the Survival of a People," below.

2. *Endemic Practice of Discrimination Against Non-status Indians*

Judges, professors and Aboriginal peoples are not the only ones to have commented on the discrimination felt by Aboriginal people as a whole. Even the Royal Commission on Aboriginal Peoples (RCAP) found room to comment on the discrimination and poor social conditions of off-reserve Aboriginal people, also referred to as “urban Indians.” In addition, the lower courts of this country have also taken judicial notice of the discrimination felt by the non-status groups in particular. One lower court judge found out that even mentioning these bleak realities for non-status Indians has not met with a favourable response. The *Lovelace* case, discussed below, is judicial testimony to the current atmosphere in Ontario for the non-status groups. The Ontario Court of Appeal in *Lovelace v. Ontario*, overturned the motions judge’s decision in favour of the non-status Indian organizations who felt they were unfairly left out of the benefits of the provincial Casino Rama project signed by the government with only the First Nations (in the “band” sense). The Appeal Court felt that the motions judge was biased in his view of the Ontario Crown:

Most notably, it is manifested in a suspicious attitude toward the government that caused him to misapprehend some of the evidence before him.⁷⁶

This conclusion came about as the motions judge had made some important comments about the way in which the Ontario government has treated non-status Indians:

The evidence, I find, establishes an *institutionalized, endemic practice of discrimination against non-status Aboriginals by Ontario*; it is preposterous of Ontario to argue that the project is consistent with the ultimate goal of ending discrimination; on the contrary, the project serves to magnify the unfairness and disadvantages experienced by non-status Aboriginals.⁷⁷

76. *Lovelace v. Ontario* (1997), 33 O.R. (3d) 735 at 748, [1998] 2 C.N.L.R. 36 at para. 38 (C.A.) [hereinafter *Lovelace appeal*]. The appeal court overturned the trial decision at [1997] 1 C.N.L.R. 66 (Ont. Ct. Gen. Div.) [hereinafter *Lovelace trial*].

77. *Lovelace trial*, *supra* note 76 at 76 [emphasis added]. After *Lovelace, appeal*, *supra* note 76, appeal dismissed, [2000] S.C.J. No. 36, online QL (SCJ). Even though the non-status groups lost at the Supreme Court, I would submit that it only stands for the government’s ability to participate in affirmative action type programs to benefit certain groups of Aboriginal people. This does not equate to non-status Indians not having other rights under the *Indian Act*, the *Constitution Act, 1982*, or otherwise.

It is notable that no court made the same accusation of the Supreme Court of Canada in *Sparrow*, when it took notice of threatening government objectives towards Aboriginal people:

Our history has shown, unfortunately all too well, that Canada's *aboriginal peoples are justified in worrying about government objectives* that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests.⁷⁸

In actuality, the motions judge in *Lovelace* seems to have assessed the situation quite accurately by Supreme Court standards. Suffice it to say that the courts of this country and RCAP have noted the poor treatment afforded Canada's Aboriginal peoples and the double discrimination felt by non-status Indians. The very word "non-status" itself denotes a people without a position in this society; a people without any status at all, be it in the non-aboriginal world or the Aboriginal world. How can it be said that it is *not* discrimination when many parties involved in the *Marshall* case hold that non-status Indians are little more than a people without "status"; a non-status Indian? The fact remains that these Aboriginal people are connected to both the First Nations of this land and the land itself, no less so than the government's "registered" Aboriginal peoples.⁷⁹ The following case from the Supreme Court of Canada condemns this kind of discrimination and its ratio is arguably applicable to the plight of the non-status Indians under *Marshall*.

3. *Disenfranchisement is Discriminatory*

The *Corbiere*⁸⁰ case sets out a clearer method by which the non-status groups may make their claim that their disenfranchisement, based on the second-generation cut-off rule under the *Indian Act* registration provisions, is discriminatory, violates section 15(1) of the *Canadian Charter of Rights and Freedoms* and cannot be saved under section 1 of the *Charter*. The success of this kind of claim could bring many non-status Indians under the jurisdiction of the *Indian Act*, and therefore give them "automatic" treaty beneficiary status if the test under *Marshall* is going to be status Indians only. That is why the *Corbiere* case is so important

78. *Sparrow*, *supra* note 26 at 1110 [emphasis added].

79. *Indian Act*, R.S.C. 1985, c. I-5, as am. by R.S.C. 1985, c.32 (1st Supp.), s. 4. This legislation has also been referred to as "Bill C-31." While the term "off-reserve" has always been synonymous with non-status, the amendments to the *Indian Act* which reinstated many non-status women, commonly referred to as Bill C-31, now means that the off-reserve are comprised of large numbers of both status and non-status Indians. The unfortunate part of reinstatement for many was that they were still discriminated against and prevented from participating at the band level.

80. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [hereinafter *Corbiere*].

in this analysis of treaty beneficiaries as well as for its important comments about this kind of discrimination felt within Aboriginal groups. In *Corbiere*, the non-resident members of the Batchewana Band sought a declaration that section 77(1) of the *Indian Act*, which stated that only residents who were ordinarily resident on the reserve could vote in band elections, violated the right to equal protection under the law as set out in s. 15 (1) of the *Charter*. The Supreme Court held that the exclusion of off-reserve band members infringed their s. 15 *Charter* rights and could not be saved under s. 1. The Court also held that this distinction, made under the *Indian Act*, was not based on merit, but rather, determined rights based solely on race and residency. Residency was considered a personal characteristic that could be changed only with great expense, and in some cases was not changeable at all. The Court dealt squarely with the reality that there is little money provided to the bands for housing on reserves and most of the off-reserve members were already settled in their homes off the reserve. A move to accommodate the statutory requirement that they can vote only if ordinarily resident on the reserve would mean dragging their children out of school, moving away from their local places of employment and uprooting whole families. This kind of sacrifice was found to be a personal characteristic which was only changeable, if at all, with great expense. The off-reserve members were found to be part of a “discrete and insular minority”, defined by race and place of residence, who had experienced disadvantage and prejudice at the hands of the non-aboriginal majority. The *Indian Act* served to perpetuate this disadvantage and treat them as “less worthy” and “less Aboriginal.”

Noteworthy was the Court’s comment that administrative and financial difficulties held up by the Crown as a defence to recognizing their rights, could not justify a complete denial of a constitutionally protected right. Even the historical justifications that consisted of wiping out the “Indian enemy,” or “assimilating” Indians into the population in order to “rid” the country of the Indian problem,⁸¹ could not be used by the Crown today given the principles of good faith, honour, and fiduciary duty towards all Aboriginal peoples. The same analysis could be made with respect to the discrimination experienced by non-status peoples in the exercise of their treaty rights under *Marshall*. The issue is whether

81. New England History, *Letters of Colonel Thomas Westbrook and Others*, Documentary History of the State of Maine, vol.47: “Attack them with your best courage and conduct and do your utmost to take, kill and destroy them . . . By all possible means, find out, suppress, and destroy the Indian enemy.” See also generally Gilbert, *supra* note 23.

discrimination based on non-registration under the *Indian Act* that has the effect of preventing persons from exercising valid treaty rights would be considered an analogous ground for a section 15 challenge. Not only are status Indians who live off reserve prevented from partaking in the culture and governance of the status members who live on reserve, so too are the non-status Indians prevented from exercising those same rights. Any decision to exclude them would be an arbitrary one based on outdated ethnocentric ideals not in keeping with Aboriginal cultural and human rights. That kind of decision by the Crown may well be found to be without merit and not justifiable under section 1 of the *Charter* by the next court who hears the issue.

The argument was raised in *Corbiere* that, since section 15 of the *Charter* relates to everyone and that a claim by the off-reserve would be based on discrimination that affects only that small group, the claim would not be permitted. The Court's response would be equally applicable to the issue currently facing non-status Indians:

[W]e note that the analogous ground of off-reserve status or Aboriginality-residence is limited to a subset of the Canadian population, while s. 15 is directed at everyone. In our view, this is no impediment to its inclusion as an analogous ground under s. 15.⁸²

Therefore the non-status groups would not be prohibited from arguing that discrimination based on registration, blood quantum or parental registration are analogous grounds by virtue of being a subset of Aboriginal people in Canada. The Court also cited at length from *RCAP* the sections which emphasized the importance of maintaining cultural ties

82. *Supra* note 80 at para. 15. *Lovelace v. Ontario*, *supra* note 77. While the Supreme Court of Canada dismissed the appeal by Lovelace, they did so on the narrow issue of the ability of the provincial government to exercise its constitutional spending power in making casino arrangements and did not touch on "Indianness". The Court did not hold that non-status groups were not to be considered Aboriginal peoples, but were Aboriginal peoples with the same history as registered First Nations. Justice Iacobucci specifically noted the systemic discrimination felt by these Aboriginal groups in paragraph 6: "With respect to s. 15(1), in my view the exclusion of the non-band aboriginal communities from the First Nations Fund does not violate s. 15 of the Charter. I reach this conclusion despite a recognition that, regrettably, the appellant and respondent aboriginal communities have overlapping and largely shared histories of discrimination, poverty, and systemic disadvantage that cry out for improvement." The Court also emphasized the fact that there was no dispute as to the appellant's aboriginality or self-identification. Specifically, Justice Iacobucci explained in paragraph 10: "Indeed, this is a case which immediately invokes a deep appreciation for the diversity of Canada's aboriginal population . . . Given this complexity, it is neither possible nor desirable to draw bright lines between or among any of the aboriginal communities involved in these proceedings." Finally the Court reiterated that the appellants' basic claims were supported by the Court in *Corbiere* and *RCAP* and held in paragraph 90: "Again, I acknowledge that the appellant aboriginal communities have experienced layer upon layer of exclusion and discrimination."

despite being forced, through the *Indian Act*, to be separate from one's community. Some of the Court's cited passages from *RCAP* include comments about the importance of identity to Aboriginal people as a whole:

Throughout the Commission's hearings, Aboriginal people stressed the fundamental importance of retaining and enhancing their cultural identity while living in urban areas. *Aboriginal identity lies at the heart of Aboriginal peoples' existence*; maintaining that identity is an essential and self-validating pursuit for Aboriginal peoples in cities.⁸³

. . . Identification with an ancestral place is important to urban people because of the associated ritual, ceremony and traditions, as well as the people who remain there, *the sense of belonging, the bond to an ancestral community*, and the accessibility of family, community and elders.⁸⁴

This is the very claim that the non-status Indians make who are prevented by legislation, policy and enforcement measures from keeping that connection with their families, elders and communities based on little more than an outdated policy designed to assimilate Indians into the larger society. This legislation discriminates against non-status Indians and prevents them from exercising their basic human rights to be recognized as part of one's community. Aboriginal identity is truly the basis of Aboriginal peoples' existence and dignity. Take away their identity and you have killed a people; a loss I do not think can be tolerated in the age of internationally recognized human rights and cultural protection.

Poor economic conditions, the *Indian Act* and strict rules relating to funding, make it difficult from an economic perspective for the bands to accept these people, even if they wanted to put them on their membership lists. With regard to the above comments by *RCAP*, the Supreme Court held that this engages the dignity aspect of the s. 15 analysis and results in the denial of substantive equality:

Taking all this into account, it is clear that the s.77(1) *disenfranchisement is discriminatory*. It denies off-reserve band members the right to participate fully in band governance on the arbitrary basis of a personal characteristic. *It reaches the cultural identity of off-reserve Aboriginals in a stereotypical way*. It presumes that Aboriginals living off-reserve are not interested in maintaining meaningful participation in the band or in preserving their cultural identity, and *are therefore less deserving members of the band*.⁸⁵

83. Canada, *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4, (Ottawa: Supply and Services Canada, 1996) at 521 [hereinafter *RCAP*, vol. 4] [emphasis added].

84. *Ibid.* at 525 [emphasis added].

85. *Corbiere*, *supra* note 80 at para. 18 [emphasis added].

The Court also noted that the off-reserve group were the objects of discrimination and constituted an underprivileged group:

The political rights in question are related to the race of the individuals affected, and to their cultural identity.⁸⁶

This fact is no less true for the non-status Indians and it is perhaps even more so in their case. The political rights affected by the *Indian Act* for the off-reserve are comparable to those of the non-status who are completely denied any cultural or political participation at all. The Supreme Court also found that this discrimination, while rationally connected to the aim, namely to give a voice to those members most affected by band decisions, could not be saved under section 1:

The restriction of s.15 rights is however not justified under the second branch of the s.1 test; it has not been demonstrated that s. 77(1) of the *Indian Act* impairs the s.15 rights minimally.⁸⁷

Therefore, valid aims can be saved under section 1, if the effect of the legislation minimally impairs the rights of the offended group. Not only is this fact *not* true for the non-status groups, but it actually affects them in the most intrusive way; it legislates the total denial of all participation, benefits and, most importantly, *recognition* for themselves and their children. One would be hard pressed to imagine a law that could be more offensive to one's right to participate in culture and community, than a total denial of those rights.

The right to be recognized as an Aboriginal member of one's community, and the right to participate in its governance and culture is as essential to a non-status Indian, as it is for a status Indian. Pride, self-worth and dignity are directly related to how one self-identifies. The Supreme Court in *Corbiere* cited *Law v. Canada (Minister of Employment and Immigration)* with regard to the issue of human dignity:

Human dignity means that an individual or group feels self-respect and self-worth. . . . *Human dignity is harmed by unfair treatment* premised on personal traits or circumstances which do not relate to individual needs, capacities or merits. . . . *Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued.* . . .⁸⁸

The non-status groups have cried upon deaf ears and yet still fight for their cultural, political and human rights to be recognized and respected. For many non-status Indians, the decision to live off the reserve, or not participate in their community's governance or cultural activities, is not

86. *Ibid.* at para. 19.

87. *Ibid.* at para. 21.

88. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 53 [emphasis added].

a choice they made of their own volition, but one that was forced upon them by the *Indian Act* without regard to their rights. This *Act* has the effect of cutting off these Aboriginal people from their families and making an arbitrary distinction between siblings, cousins, parents and other family members based solely on personal characteristics, qualification under the *Indian Act*, blood quantum and the status of one's parents to pass on "status." This kind of distinction is without merit and offensive in the highest degree and has led to discrimination by society as a whole towards non-status Indians, a condition similar to that of the off-reserve as noted in *Corbiere*:

First, band members living off-reserve form part of a "discrete and insular minority," defined by both race and residence, which is vulnerable and has at times *not been given equal consideration or respect by the government or by others in Canadian or Aboriginal society*. Decision makers have not always considered the perspectives and needs of Aboriginal people living off reserves, particularly their Aboriginal identity and their desire for connection to their heritage and cultural roots.⁸⁹

Registration is treated as a statutory privilege akin to obtaining moose hunting licenses, an arbitrary luck of the draw. Yet, beneficiary status should be more akin to Aboriginal familial, social and cultural associations much the same as a child would be considered part of a family simply by birth, adoption or association. The right to call one's grandchild a grandchild, does not cease after the second generation, and indeed this would be unspeakable in the non-aboriginal community. The Supreme Court of Canada in *Corbiere* specifically noted the details of the prevailing stereotypical attitudes about what makes a "true" Aboriginal person:

People have often been only seen as "truly Aboriginal" if they live on reserves. The Royal Commission wrote:

Many Canadians think of Aboriginal people as living on reserves or at least in rural areas. This perception is deeply rooted and persistently reinforced. . . . *There is a history in Canada of putting Aboriginal people 'in their place' on reserves and in rural communities*. Aboriginal cultures and mores have been perceived as incompatible with the demands of industrialized urban society. This leads all too easily to the assumption that Aboriginal people living in urban areas must deny their culture and heritage in order to succeed—that they must assimilate into this other world.⁹⁰

89. *Corbiere*, *supra* note 80 at para. 71 [emphasis added].

90. *Ibid.* [emphasis added].

Like the denial of voting rights for off-reserve band members, the stereotype given to Aboriginal people as noted above, namely that unless they live on a reserve, they must assimilate into the “other world,” has gone from a stereotypical view by society to an enforced legislative regime under the *Indian Act*.

The *Indian Act* has reinforced this view that to be “truly Aboriginal” one must be registered under the *Act* and live on a reserve. This *Act* is based not on merit, but solely on a policy that was specifically designed to assimilate Indians into the “other world.” These policies come with a heavy price, as non-status Indians suffer the same feelings of isolation, marginalization, depression and disconnection as other off-reserve Indians. The choice has been taken from non-status Indians as to whether they want to live near their communities or participate in their governance. This makes the discrimination for non-status Indians all the worse, as it did for the off-reserve in *Corbiere*:

[t]he fact that those affected or their ancestors may well have had *no choice* but to leave the reserve signals that *the interest in keeping a connection with the band of which they are members is particularly important to them* because the separation from other members of the band and the reserve may well have been undesired or unchosen.⁹¹

The Court also reviewed the past and present policies of the Crown and held that:

[t]his history shows that *Aboriginal policy, in the past, often led to the denial of status* and the severing of connections between band members and the band. *It helps show why the interest in feeling and maintaining a sense of belonging to the band free from the barriers imposed by Parliament* is an important one for all band members, and especially for those who constitute a significant portion of the group affected, who have been directly affected by these policies and are now living away from reserves, in part, because of them.⁹²

With regard to non-status treaty rights under *Marshall*, *Corbiere* and the RCAP provide indicators as to how to deal with the issue. There is still an opportunity to sit down and work out solutions to these issues. The courts have also impressed upon the Crown the need to negotiate these issues with Aboriginal peoples as opposed to repeatedly seeking resolution through litigation. The fiduciary duty of the Crown to behave in a fair and reasonable fashion with regard to the rights of Aboriginal people mandates that a new plan of action be introduced to meet this obligation on the part of the Crown.

91. *Ibid.* at para. 84 [emphasis added].

92. *Ibid.* at para. 89 [emphasis added].

III. *Fiduciary Duty of the Crown and the Survival of a People*

1. *The Honour of All Canadians is Also at Stake*

Even if there were some doubt on the part of the Crown as to whether the heirs of the treaty signatories include the present-day non-status descendants, the fiduciary duty of the Crown and the liberal interpretive principles outlined by the courts, mandate that they be included. The court in *Van der Peet* was very clear about this fact:

Because of this fiduciary relationship, and its implication of the honour of the Crown, *treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation* [cite omitted]. This general principle must inform the Court's analysis of the purposes underlying s. 35(1), and of that provision's definition and scope.

The fiduciary relationship of the Crown and aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1), *such doubt or ambiguity must be resolved in favour of aboriginal peoples.*⁹³

Before a decision can be made with regard to the rights of non-status Indians as treaty descendants, there must be, at a minimum, a process of meaningful consultation with the Aboriginal groups affected. There currently exist Aboriginal Fisheries Strategy agreements with the non-status groups after an Aboriginal food fishery right was upheld in *Sparrow*. It would follow then, that since a treaty right to sell the fish has been upheld by the Supreme Court in *Marshall*, that negotiations would be the best way to work out an agreement with the non-status groups as to its scope. The Supreme Court in *Delgamuukw*⁹⁴ set out the rules for consultation which basically held that the more intrusive the measure, the more strenuous must be the consultation. The non-status groups are asking for consultation and negotiation of this recently recognized treaty right to sell fish for a moderate livelihood. The Supreme Court stated that true reconciliation of Crown sovereignty with the constitutionally protected rights of Aboriginal peoples is best achieved through good faith negotiations. This duty is not just a duty to act in good faith once negotiations have begun, but also a duty to enter into negotiations in the first place. With regard to these good faith negotiations, the Supreme Court of Canada in *Delgamuukw* held:

93. *Van der Peet*, *supra* note 13 at paras. 24-25 [emphasis added].

94. *Supra* note 59.

Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this court, that we will achieve what I stated in *Van der Peet*, *supra* at para. 31, to be a basic purpose of s. 35(1)—“the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”⁹⁵

Canada is not the only country that is currently dealing with the issue of the scope of fiduciary duty towards Aboriginal peoples. The *Walley*⁹⁶ case from Australia lists several indicators of bad faith on the part of the Crown in dealing with Aboriginal peoples during negotiations which were summarized as follows:

- failure to make a proposal in the first place,
- failing to respond to reasonable requests for relevant information within a reasonable time,
- shifting position just as agreement seems in sight, and
- adopting a rigid non-negotiable position⁹⁷

These are but a few of the indicators. The courts in this country have not yet made a list of what is bad faith in terms of negotiations and it is hoped that they will never have to make one. Recently, Stuart Rush in his paper *An Update to the Duty to Consult and the Duty to Bargain on Good Faith*,⁹⁸ explained the recent *Halfway River*⁹⁹ case and its characterization of this duty as a positive obligation:

The majority confirmed the general law that the Crown’s duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concern, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.¹⁰⁰

95. *Ibid.* at para. 186 [emphasis added].

96. *Walley v. Western Australia* (1996), 67 F.C.R. 366 (Fed. Ct. Aus.); (1996), 137 A.L.R. 561.

97. S. Rush, Q.C., “An Update on the Duty to Consult and the Duty to Bargain in Good Faith” (Annual Aboriginal Law Conference, Vancouver, 23-24 September 1999) at 14-15 [hereinafter Rush]. These are just some of the items that Rush listed in his paper as being indicative of bad faith negotiations.

98. *Ibid.* at 14-15.

99. *Halfway River First Nation v. B.C.* (1999), 64 B.C.L.R. (3d) 206 (B.C.C.A.) at para. 160.

100. Rush, *supra* note 101 at 5.

Principles like good faith and honour should act as a constant and consistent measure of the tone of the Crown's dealings with Aboriginal peoples whether in negotiations or other dealings such as treaty interpretations. The Court in *Marshall* again stressed this point:

As this and other courts have pointed out on many occasions, the process of accommodation of *the treaty right may best be resolved by consultation and negotiation of a modern agreement* for participation in specified resources by the Mi'kmaq rather than by litigation. The Chief Justice emphasized in [Delgamuukw] . . . at para. 207:

On a final note, I wish to emphasize that *the best approach in these types of cases is a process of negotiation and reconciliation* that properly considers the complex and competing interests at stake.

The various governmental, aboriginal and other interests are not, of course, obliged to reach an agreement. In the absence of a mutually satisfactory solution, the courts will resolve the points of conflict as they arise case by case.¹⁰¹

The need for immediate consultations and negotiations cannot be stressed enough. The honour of our country is at stake, as noted recently by a court in Saskatchewan:

In a democracy such [as] Canada, when the honour of the federal Crown is at stake, the honour of all Canadians is also at stake.¹⁰²

There have yet to be any unreasonable claims advanced by the off-reserve and non-status groups to the fishery resource. At the same time, these groups cannot keep waiting on the sidelines hoping that the Crown will deal with them in good faith and commence negotiations. For these groups, they have been waiting long enough for recognition, respect and a fair chance to advance their claims.

The Congress of Aboriginal Peoples (CAP) have recently decided that they can no longer be ignored by the Crown in their pursuit to protect the rights of off-reserve Métis and non-status Indians and have brought an action against the federal Crown. It is interesting to note that one of the items they thought most important was a declaration that

The Métis and non-status Indian people of Canada have the right to be negotiated with in good faith by the Federal Government. . . .¹⁰³

In addition, they have asked for declarations that they are Indians within the meaning of section 91(24) of the *Constitution Act, 1867*. They also seek a declaration that the Federal Crown owes them a fiduciary duty as

101. *Marshall 2*, *supra* note 8 at paras. 22-23 [emphasis added].

102. *Keepness*, *supra* note 32 at note 3.

103. *Congress of Aboriginal Peoples v. Canada (Minister of Indian Affairs and Northern Development, Attorney General)* (14 December 1999) T-2172-99 (Fed. Ct.) (Statement of Claim, Plaintiffs) at para. 25(c).

Aboriginal peoples. Their requested declaration states that a refusal by the Crown to negotiate in good faith with this group violates: (1) their Aboriginal rights under s. 35(1) of the *Constitution Act, 1982*; (2) the fiduciary duty owed to them as Aboriginal people; (3) their equality rights under section 15(1) of the *Charter*; and (4) Canada's principles of democracy and respect for minorities. If *Marshall* was an indication of the need for open discussions between the Crown and Aboriginal peoples, the CAP claim certainly raises some serious issues for this country. Society and government can no longer hold firm and hope that the courts will hold in their favour. The reality in 2000 is that if the CAP claim is not successful, there will be other claims until the courts resolve these issues. Is this what was intended by the *Treaties of 1760-61* or was something more than litigation in the minds of our ancestors?

The Supreme Court of Canada in *Badger* held with regard to treaty interpretation that the courts must pick an interpretation of the treaty that gives effect to the understanding of the parties at the time of its signature.¹⁰⁴ When dealing with any Aboriginal accused or claimant, the Supreme Court in *Gladue*¹⁰⁵ "urged the courts to take judicial notice of the historical factors which have led to the current circumstances in which Indians find themselves."¹⁰⁶ Certainly, no Aboriginal nation in this country could have contemplated that the Crown would enact legislation to tell the nations who their members would be for the purposes of exercising treaty rights. The historical fact is that any current political divisions among Aboriginal people have been created by the Government's actions, laws and policies around the *Indian Act* and that cannot now be used as a defence to limiting treaty beneficiaries under *Marshall*. The chain of treaties signed by the Mi'kmaq in the 1700s referred to their heirs and descendants forever. There is no ambiguity in these words and even if there were the courts are obligated to interpret it in favour of the Aboriginal claimant and hold that the intention was to include treaty descendants as they knew them at the time. Those descendants would be not only their current members but also those that were adopted into the community and born of the community's members for generations into

104. *Supra* note 59.

105. *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 65: "The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from a bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders." In this case, the Court made some very significant statements about the reasons why there are so many Aboriginals in federal and provincial jails which relates to the general state of affairs for Aboriginal people in their daily dealings with government and society as a whole.

106. *Keepness*, *supra* note 28 at para. 41.

the future. Even the first *Indian Act* in 1868 had a more inclusive criteria for determining “Indian” status. Section 15 of that *Act* stated in part:

Firstly. All persons of Indian Blood, reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and their descendants;

Secondly. All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and the descendants of all such persons. . . .¹⁰⁷

A position which based disqualification for treaty rights on the present day *Indian Act* would lead to the eventual disappearance of all treaty beneficiaries. This position advocates a “disappearing treaty right” which would allow the Crown to do indirectly what it cannot do directly; namely, deny the exercise of these treaty rights. This was not what was intended by the Mi’kmaq when they agreed to this treaty. Nor is this what was intended by the *original Indian Act* which legislated descendancy as the key to status. The court in *Marshall* warned against such limiting interpretations:

The findings of fact made by the trial judge taken as a whole demonstrate that the concept of a disappearing treaty right does justice neither to the honour of the Crown nor to the reasonable expectations of the Mi’kmaq people. It is their common intention in 1760 . . . to which effect must be given.¹⁰⁸

The common intention in 1760 was that the Mi’kmaq and their heirs and descendants forever would have the benefit of the treaty protected Aboriginal rights to pursue their traditional fishing activities and sell their products to support themselves and their families. The Mi’kmaq agreed to the treaty as a measure of safeguarding their trading rights for all future generations to come. The treaty was neither for the purpose of putting to paper who was a Mi’kmaq in 1760, nor who they would be in 1999. To interpret the treaty in such a restrictive manner ensures that the treaty rights eventually disappear, not directly, but indirectly by virtue of the diminishing class of beneficiaries.

The trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown. *In my view, with respect, the interpretation adopted by the courts below left the Mi’kmaq with an empty shell of a treaty promise.*¹⁰⁹

107. *Indian Act*, S.C. 1868, c.42, s.15.

108. *Marshall*, *supra* note 1 at para. 40 [emphasis added].

109. *Ibid.* at para. 52 [emphasis added].

The only position which could possibly give meaning to the treaty is one which recognizes the right to sell fish by all Mi'kmaq peoples regardless of the *Indian Act*. Given the direction provided by the Supreme Court of Canada with respect to beneficiaries, and given the progress that has been made between the Crown and Aboriginal peoples through such successful negotiations as the *Yukon Agreement*,¹¹⁰ there remains a strong case to be made not only for the inclusion of non-status Indians into their communities, but also for a way to work out the management of these rights through negotiated agreements that could be based on the current AFS agreements between DFO and the Aboriginal groups or something totally new. These AFS agreements have not been without their problems as indicated in the following historical overview of these agreements.

2. *Communication Gaps Do Not Seem to Have Narrowed*

After *Sparrow*, DFO negotiated agreements with the Aboriginal groups in Nova Scotia, New Brunswick and other provinces with regard to the Aboriginal food fishery which included the non-status Indians. These agreements were part of the overall Aboriginal Fisheries Strategy and were intended to address the exercise of the right to fish for food, social and ceremonial purposes in a limited fashion. The purpose of the limitation was to ensure that conservation of the fish stocks would be properly addressed. DFO has a number of these AFS agreements with both the First Nations and the provincial Aboriginal organizations that represent the off-reserve Aboriginal people which consist of both status and non-status people. The Native Council of Nova Scotia (NCNS) and the New Brunswick Aboriginal Peoples Council (NBAPC), for example, each hold food fishery agreements with DFO. While DFO did include a statement in these agreements that they cannot be used as evidence of Aboriginal or treaty rights, another section did state that the agreements have resulted from discussions based on "current legislation, jurisprudence and government policy. . . ."¹¹¹ The two main groups that DFO negotiated with in the Atlantic region were the Councils of many of the individual bands and the off-reserve Aboriginal organizations. The AFS agreements that are signed with these off-reserve organizations are similar to some of the agreements signed with the First Nations. These agreements limit the amount of fish that may be taken under the food fishery by the particular Aboriginal group. In exchange for the limits on

110. *Supra* note 20.

111. *Fisheries Agreement Between Her Majesty the Queen as represented by the Minister of Fisheries and Oceans and the New Brunswick Aboriginal Peoples Council* (13 June 1997) s. 1(4) [hereinafter *Fisheries Agreement*].

the food fish that can be taken, the Aboriginal group may receive funding to train Aboriginal people to be fisheries guardians, funding to acquire fishing boats and related equipment, and funding to staff a fisheries coordinator and/or other staff to run their fisheries program. While commercial allocations of certain fish stocks were also included, the groups felt that they did not go far enough to match the rights protected under the *Treaties of 1760-61*. It has been this commercial aspect of the AFS agreements that seems to have generated the most controversy in British Columbia after *Sparrow*, and in the Maritimes after *Marshall*.

The authors of a background paper entitled *The Aboriginal Fisheries and the Sparrow Decision*¹¹² reviewed the AFS agreements roughly a year or so after the first AFS agreements had been in place. The background paper noted DFO's characterization of the AFS agreements as the federal government's response to the need to expand Aboriginal peoples' role in the fisheries while at the same time conserving fish stocks in order to have a "profitable" fisheries for *all* parties.¹¹³ In 1993, they had this to say about the manner in which DFO handled the issue of commerciality:

This obvious lack of past and present transparency will likely be detrimental to the smooth operation of the AFS; as well, the confusion created by senior officials' statements . . . has only exacerbated feelings of insecurity among the parties concerned. This absence of transparency has also led some individuals to overstep the rules, which has added a little more pressure and confusion to a situation that was chaotic from the outset.¹¹⁴

The above quotation serves as an ominous prediction, given the news broadcast on ASN on Sunday, October 3, 1999 which reported that over a hundred non-Aboriginal fisherman with knives went to the docks in one New Brunswick community and allegedly destroyed many Aboriginal lobster traps. The non-Aboriginal fishermen have criticized DFO's method of incorporating Aboriginal rights and for not better informing the public, among other things. The authors of the background paper noted this problem six years ago:

[T]he communication gaps do not seem to have narrowed. As we have noted, the apparent lack of communication is a lack of listening more than anything else, by DFO as well as by non-aboriginal commercial fishing groups; this is a problem that only intensifies with time, and one that DFO has not yet been able to solve.¹¹⁵

112. J. Allain & J. D. Fr chette, *Aboriginal Fisheries and the Sparrow Decision, Background Paper* (Ottawa: Library of Parliament, 1993).

113. *Ibid.*

114. *Ibid.* at 18.

115. *Ibid.* at 25.

Assuming for a moment that AFS agreements will soon be negotiated with all the Mi'kmaq groups for the purposes of managing the treaty rights with valid conservation measures, the issue of beneficiaries will have to be addressed. This process will be a difficult one but in light of the fact that the *Treaties of 1760-61* apply to all Mi'kmaq people including non-status Mi'kmaq, some process will have to be worked out to accommodate this reality.

There are AFS agreements currently in place with both the Aboriginal organizations that represent non-status Indians in New Brunswick and Nova Scotia. The agreements for these groups and many other First Nation groups have been in place for several years. There are specific sections in the AFS agreements that deal with the beneficiary issue, that is "who," in these organizations are entitled to fish. These provisions serve as an example of possible interim measures for controlling the conservation aspect of the fishery through identification. Section 5(2) of the NBAPC AFS agreement for example, provided:

5. (2) *Subject to this subsection*, all members of the Aboriginal Organization who have a membership card are designated to fish.

7. (1) The Aboriginal Organization will designate persons to fish by issuing designation cards. Each card will be personal and non-transferable and will bear a unique card number and the name of the person designated.¹¹⁶

In regard to the Aboriginal food fishery (as opposed to a commercial fishery), all members of the NBAPC were entitled to exercise these rights.¹¹⁷ Membership in these kinds of Aboriginal organizations have changed over the years and some now base membership on the ability of the applicant to demonstrate their ancestral link to an Aboriginal person. Many organizations across Canada have instituted cut-off dates which put a limit on how far back one can trace ancestry to qualify for membership. While some of these organizations also represent Aboriginal peoples from outside Mi'kmaq and Maliseet territory, they may also

116. *Fisheries Agreement*, *supra* note 111 at 12-13 [emphasis added].

117. *Ibid.* Section 9(1) provides: "This Agreement will take effect on execution by both Parties and, subject to subsections (2) to (8), will continue in effect until March 31, 1998 or until this Agreement is replaced by a treaty or land claim agreement, whichever is the earlier." These AFS agreements deal with the issuance of tags for limited species as well as a method of recording catches to ensure that proper numbers can be used in those calculations. They make provision for the training and funding of Aboriginal Fisheries Guardians whose stated mandate it is to monitor the fishery. These duties would include recording catches, monitoring habitat activities and enforcement. The agreement also provided a section that dealt with economic development for the Aboriginal Organization, co-operative management of the fishery and funding to support these activities. Other issues such as ongoing consultation, ratification of the agreement and its term were also included.

have different policies with respect to their ability, if any, to hunt and fish in New Brunswick and Nova Scotia. The purpose of this example is merely to show that this issue is not a new one and DFO has attempted to deal with it prior to *Marshall*. There are ways to deal with the identification of treaty beneficiaries aside from simply cutting out a large group of Mi'kmaq people. The need to begin open, good faith discussions cannot be overstated. In addition to all the recent enforcement cases involving Aboriginal peoples,¹¹⁸ CAP's new claim may help bring the non-status issue to the forefront, or its opponents may come up with a different claim. Either way, these issues will not go away any time soon. The opportunity to resolve the issue peacefully, with give and take on all sides, will only last for so long. The courts decided *Marshall* for us and government and society seemed wholly unprepared. Must we also use the courts to settle the very identity and worth of our country's First Peoples? Is this a gamble worth making for Canadians or for Aboriginal peoples?

118. Often the media have reported that the Aboriginal groups have complained of the treatment they receive from enforcement officials during and after treaty test cases. Certainly the courts have commented that the Crown cannot keep treating Aboriginal people in the same manner as they have been for the last several centuries. In *Keepness*, *supra*, note 28 an accused was pursued on his own reserve by undercover officers under a unit called "WASP" for the alleged sale of deer meat. Not only was the accused found not guilty, the court made some comments about the disturbing actions of the Crown's agents. Judge Linton Smith stated at paras. 64-67: "I have already noted my concerns about the manner in which agents of the province conducted their investigation in this case. In preparing this decision, I have become aware of other judgments which have also commented negatively on the conduct of provincial wildlife officers concerning the way they dealt with Aboriginal people. In the recent decision of my colleague, Judge Moxley in *R. v. Ironeagle and Cyr*, [November 8, C.E. 1999] the learned judge ordered a judicial stay based on the *improper entrapment* of the accused by the investigating wildlife officers. In *R. v. Sasakamoose* . . . my colleague, Judge Carter noted that *alcohol had been employed by a provincial conservation officer* in the course of an investigation of illegal sale of fish . . . [A]nyone familiar with Aboriginal people will know that right thinking members of that community, especially the elders, will be appalled to learn that Her Majesty's agents would have taken alcohol onto a reserve or employed its use in their investigation of Aboriginal people . . . If these three cases are indicative of the approach that Saskatchewan wildlife officers are taking to enforcing the law in Aboriginal communities, *they will soon lose their credibility with Aboriginal people*. It may well be time for senior officials of the provincial government to analyse the ways in which Aboriginal people are being investigated by their officials so they can make the necessary reforms." [emphasis added]

If the Wildlife enforcement officers of Saskatchewan are any indication of how the Crown treats Aboriginal people in the Maritime region with regards to their traditional fisheries or wildlife activities, some serious changes are urgently needed. The attitude toward Canada's Aboriginal peoples manifest itself in both overt actions and policies as well as more subtle acts such as was noted by the judge in *Keepness*. The very name of the Crown's enforcement group in Saskatchewan was highly offensive. Judge Smith comments at n. 11 say it all with regard to the need for change in Canada's attitude "I cannot imagine a more insensitive choice of names ("WASP" universally stands for "White Anglo-Saxon Protestant"). In this case, the police actions in question took place on an Indian reserve and the person being investigated was Aboriginal. All of the personnel participating in the police action were white males. I do not know whether this name was chosen out of insensitivity or racism. Either way, it shows an approach to enforcing the law which needs reform."

Conclusion

“Aboriginal identity lies at the heart of Aboriginal peoples’ existence.”¹¹⁹ The Royal Commission could not have summed up what this issue means to non-status Indians any better than this. In this article I have reviewed the *Marshall* case as it pertains to the issue of treaty beneficiaries and the further clarifications provided by the Court in *Marshall*. Neither decision specifically excluded non-status Indians, rather they referred to the treaty rights of the Mi’kmaq people and their individual families and their communities. It cannot be said that non-status Mi’kmaq persons are prohibited from partaking in treaty activities because they are not registered under the *Indian Act* and therefore not band members and therefore cannot live on the reserve and therefore are not members of their community. This would mean that an arbitrary law enacted decades after the treaty was signed, could now say who has treaty rights, without specifically stating as much in the *Act*.

I can offer little in the way of concrete provisions for future AFS agreements at this early stage other than suggestions for beginning a dialogue between the parties as soon as possible. Issues such as this one regarding the rights of non-status Indians, if left to the media and secrecy, can only lead to further political turmoil, more costly litigation, further division within the Aboriginal community and a total breakdown of communication. The people who would suffer the most in that scenario would be the Aboriginal peoples. We should all work in the spirit of partnership and see this issue as an opportunity to benefit from the management skills of both the Mi’kmaq tradition and the current science of DFO conservation measures. A successful partnership on this front could lead to peaceful resolutions of other resource issues relating to hunting, fowling and gathering. No one will know whether negotiations could have been successful unless they try and no one can lose by increasing communication. This could be a new beginning for Crown-Mi’kmaq relations if we can just be creative enough to exchange new ideas on how to work together and be open enough to consider them. The next steps are the most important ones and may well set the tone for Aboriginal-Crown relations for the next five hundred years. Certainly the CAP litigation means that the issue of federal responsibility for all Aboriginal people, including non-status Indians, must be addressed immediately. Is there any reason why Canada and Aboriginal people cannot resolve the issue in the spirit of our treaty making ancestors? There is no other alternative if our First Peoples are to continue to grow and

119. *RCAP, vol.4, supra* note 83 at 521.

evolve within their own cultures. No less would be acceptable for other Canadians and their own particular identities. This incredible power over Aboriginal people must be exercised with caution. We no longer need diseases, wars or scalping bounties to wipe out a people. Today, silent acquiescence by society towards the current legislation and policy towards non-status Indians is all that is necessary to bring about the extinction of these Aboriginal people. The non-status Aboriginal Peoples of this continent deserve to exist and retain their dignity, pride and connection to their ancestors as part of their cultural evolution.