

THE MARSHALL DECISIONS AND NEW BRUNSWICK TWENTY-FIVE YEARS LATER — AN INTRODUCTION

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What's the legacy of the Supreme Court of Canada 1999 *Marshall* decisions for New Brunswick twenty-five years later?¹ This is the central question that guides this special issue of the *Journal of New Brunswick Studies/Revue d'études sur le Nouveau-Brunswick*. It is not an easy question to answer and necessitates looking back in order to gauge where we are today and question how we move forward. Here, we are reminded of and inspired by similar work that critically examined Louis J. Robichaud's 1967 Equal Opportunity Program, a program that rebalanced responsibilities and fiscal arrangements between the government of New Brunswick and municipalities to ensure all New Brunswickers received a similar level of services regardless of their local community's ability to pay.²

The Supreme Court of Canada (SCC) *Marshall* decisions were a significant event for New Brunswick, the rest of Atlantic Canada, and more broadly in Canada, that merits ongoing reflection as the academy and society continue the active work of reconciliation.³ The twenty-fifth anniversary of the *Marshall* decisions in 2024 is an excellent opportunity to do so, especially in consideration of the erosion of New Brunswick–Indigenous relations over the last number of years. Examples abound: the cancellation of province–First Nations tax-sharing agreements; ignored calls for a systemic racism inquiry given the 2020 police killings of Chantel Moore and Rodney Levi; the acquittal of the person involved in the hit-and-run death of Brady Francis, a Mi'kmaw youth; and the province's instructing its employees to stop making Indigenous land acknowledgements in the fall of 2021.⁴ All of these topics—tax-sharing agreements, policing, land acknowledgements—are critically reflected upon in this volume. Other examples that illustrate an erosion of New Brunswick–Indigenous relations include the refusal to acknowledge September 30 as the National Day of Reconciliation as a holiday, yet immediately acknowledging the day of Queen Elizabeth's funeral as a holiday, as well as adopting a hostile response to the land claims in 2016 by the Wolastoqey Nation and in 2020 by the Mi'kmaw First Nations.⁵

¹ *R v Marshall* [1999] 3 S.C.R. 456; *R v Marshall* [1999] 3 S.C.R. 533.

² *The Robichaud Era, 1960–70: Colloquium Proceedings*. Université de Moncton. Institut canadien de recherche sur le développement régional, 2001; Robert A. Young, "Remembering Equal Opportunity: Clearing the Undergrowth in New Brunswick," *Canadian Public Administration* 30, no. 1 (Spring 1987): 88–102.

³ Ken Coates, "Breathing New Life into Treaties: History, Politics, the Law, and Aboriginal Grievances in Canada's Maritime Provinces," *Agricultural History* 77, no. 2 (2003): 333–354; Ken Coates, *The Marshall Decision at 20: Two Decades of Commercial Re-Empowerment of the Mi'kmaq and Maliseet*. Ottawa: MacDonald-Laurier Institute, 2019.

⁴ Jacques Poitras, "Higgs Government Pulls out of Gas-Tax Sharing with First Nations," *CBC News*, April 13, 2021, <https://tinyurl.com/47cdmpuy>; Brett Forester, "First Nations Leaders 'Disappointed' As N.B. Premier Resists Push for Systemic Racism Inquiry," *APTN News*, July 9, 2020, <https://tinyurl.com/579b3cz3>; Hadeel Ibrahim and Aidan Cox, "N.B. Employees Told to Stop Making Indigenous Title Acknowledgments, but Won't Face Repercussions If They Do," October 15, 2021, <https://tinyurl.com/3ja28nen>; Robert Tay-Burroughs, "New Brunswick Ban on Land Acknowledgements Is a Death Blow to Nation-to-Nation Relationships," *The Conversation*, November 3, 2021, <https://tinyurl.com/3uc4pztu>.

⁵ Alyson Samson, "'It's 'Very Disappointing': N.B. Recognizes National Day of Mourning for Queen but Not Truth and Reconciliation," *CTV News*, September 20, 2022, <https://tinyurl.com/yrpxrswp>; Mia Urquhart, "Mi'kmaw First Nations Expand Aboriginal Title Claim to Include Almost All of N.B.," *CBC News*, February 15, 2023, <https://tinyurl.com/2mwctek3>; Logan Perley, "Wolastoqey Nation Lawsuit to Claim Title to Half of New Brunswick," *CBC News*, October 5, 2020, <https://tinyurl.com/mut29w3u>.

We believe enhanced dialogue is required for which our special issue of the journal and the associated winter 2023 *Rough Waters: The Legacy of the Marshall Decisions Workshop* held at Mount Allison University can act as initial contributions.⁶

At the heart of the matter are the series of Peace and Friendship Treaties signed between 1725 and 1779 between the British Crown and the Wolastoqiyik, Mi'kmaq, and Peskotomuhkati peoples that established the rules for what was to be an ongoing relationship between nations.⁷ These Treaties, unlike other treaties signed in what we know today as Canada, did not involve a surrender of land or natural resources, though this position is contested by some in this volume. In 1999, the Supreme Court of Canada in the *Marshall* decisions, based on the Treaties of 1760–1761, affirmed First Nations' treaty right to fish, hunt, and gather in pursuit of a moderate livelihood in Canada and subject to government of Canada management for conservation purposes.⁸

Yet issues remain. Unresolved is what exactly is meant by the term “moderate livelihood”—a subsistence income or commercial profit? Also contentious has been oversight of the fishery by the Canadian government for conservation purposes, as the lobster dispute in St. Mary's Bay, Nova Scotia (2020, 2023), involving the Sipekne'katik First Nation illustrates.⁹ The ongoing elvers (American eels) dispute throughout the Maritimes further illustrates the precariousness of the situation.¹⁰

More progress has been made on integrating Indigenous peoples into the fishery. This has taken the form of various policy responses that followed the *Marshall* decisions including the Initial and Longer-term *Marshall* Response Initiatives in 2000 and 2001, the Atlantic Integrated Commercial Fisheries Initiative in 2007, and the Rights Reconciliation Agreements in 2017.¹¹

⁶ The Rough Waters workshop was held April 14 and 15 to explore the topics and review and receive early feedback on early drafts of the special issue's articles.

⁷ Ken Coates, *The Marshall Decision and Native Rights* (Montreal: McGill-Queen's University Press, 2000); Coates, *The Marshall Decision at 20*; Stephen E. Patterson, “1744–1763: Colonial Wars and Aboriginal Peoples,” in *The Atlantic Region to Confederation: A History*, ed. by Phillip A. Buckner and John G. Reid (Toronto: University of Toronto Press, 2017), 99–115; William C. Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002).

⁸ *R v Marshall* [1999] 3 S.C.R. 456; *R v Marshall* [1999] 3 S.C.R. 533; and L. Jane McMillan, *Truth and Conviction: Donald Marshall Jr. and the Mi'kmaq Quest for Justice* (Vancouver: UBC Press, 2018).

⁹ Paul Withers, “Shouts, Scuffles and Arrests in Nova Scotia over Indigenous Lobster Fishing,” *CBC News*, September 11, 2023, <https://tinyurl.com/nc37u7mz>; Natasha Pace, “Fishermen Demand Intervention in Nova Scotia Lobster Dispute,” *CTV News*, September 19, 2020, <https://tinyurl.com/29dwzcm7>; Canadian Press, “A Timeline of Nova Scotia's Lobster Conflict Between Mi'kmaq and Commercial Fishers,” *CTV News*, October 20, 2020. <https://tinyurl.com/2fkpk7bj>.

¹⁰ Moira Donovan, “‘It Doesn't Go Away’: Another Violent Fishing Season in Atlantic Canada,” *The Narwhal*, June 5, 2023, <https://thenarwhal.ca/indigenous-fishing-atlantic-canada/>; John Chilibeck, “N.B. Lawsuit Names Over 100 Alleged Elver Poachers and Enablers, Including Indigenous Chief,” *Saltwire News*, March 15, 2024, <https://tinyurl.com/4kdyvzvf>; Angel Moore, “Wolastoqey Nation Pushes Back Against Closure of Baby Eel Fishery in New Brunswick,” *APTN News*, March 15, 2024, <https://tinyurl.com/2sb7ek54>.

¹¹ Coates, *The Marshall Decision and Native Rights*; Canada, Department of Fisheries and Oceans, *Archived—Audit of the Longer-Term Marshall Response Initiative (Capacity Building)*, Ottawa, June 18, 2009, <https://bit.ly/3x45C0r>; National Indigenous Fisheries Institute, *Atlantic Integrated Commercial Fisheries Initiative: Discussion Paper*, Membertou, N.S., 2018: 2, <https://bit.ly/3gXyAcM>; Melanie Wiber and Chris Milley, “After *Marshall*: Implementation of Aboriginal Fishing Rights in Atlantic Canada,” *The Journal of Legal Pluralism and Unofficial Law* 39, no. 55 (2007), [doi: 10.1080/07329113.2007.10756611](https://doi.org/10.1080/07329113.2007.10756611); Canada, Department of Fisheries and Oceans, *Evaluation of the Atlantic Integrated Commercial Fisheries Initiative (AICFI)*, Ottawa, August 13, 2015, <https://bit.ly/3dxO9pt>.

Ongoing challenges though loom large. Moreover, we need to assess the economic and employment impacts and unravel the concept of “moderate livelihood.” Through this special issue, we seek a holistic understanding of where we are today by examining the journey taken post-*Marshall* to date, and the opportunities and challenges that lie before us as we move forward.

To ensure that a broad set of perspectives and experiences are reflected and considered, our goals for the special issue are (1) to bring together diverse knowledge-holders, including Indigenous leaders, academics, and policy-makers to encourage considerate dialogue and comprehensive knowledge exchange; and (2) to critically reflect on the legacy of the *Marshall* decisions by assessing the current situation, and to examine options for moving forward.

Specific objectives include the following:

1. Developing a better understanding of who Donald Marshall Jr. the person was, both before and after the landmark SCC decisions.
2. Reconsidering the Peace and Friendship Treaties by exploring their complexity and assessing their impact on Crown–Indigenous relations and Indigenous–Acadian relations.
3. Revisiting the *Marshall* decisions to understand Indigenous interpretations of the decisions, the federal fisheries framework/role, the impact on other natural resources and the role of science (Western, Traditional Ecological Knowledge) in fisheries management.
4. Questioning the short-term effect of the *Marshall* decisions on Esgenoôpetitj (Burnt Church) First Nation, policing of the Atlantic fisheries, and the post-*Marshall* policy approaches and agreements.
5. Evaluating the long-term impact of the *Marshall* decisions regarding the concept of “moderate livelihood,” the development of a framework for Indigenous fisheries management, and Indigenous economic development and employment.
6. Critically examine the continued racism and (in)justices surrounding the *Marshall* decisions.

Seventeen articles tackle the challenge, and we leave it to you, the reader, to determine how closely we have achieved our goals and objectives. To that end, we first reproduce the 1760 and 1761 Peace and Friendship Treaties courtesy of the Nova Scotia Archives.¹² We feel this is important and encourage readers to first read and familiarize themselves with the Treaties.

L. Jane McMillan begins our investigation with her article “Najjwsgeig—We Go Fishing,” where she reminds us that behind all the legal decisions and conflicts remains a key individual—Donald Marshall Jr. or simply “Jr.” as he was known to all who knew him. As his former spouse and fishing partner, she shares insights into some of their many fishing adventures.

The Peace and Friendship Treaties are the subject of several articles. Gina Brooks and Rachel Bryant in their article “wikhikhotuwok and the Re-Storying of Menahkwes: Telling History Through Treaty” show and discuss how the creative actions of treaty through basket making, and not just the

¹² We thank the Nova Scotia Archives for permission to reproduce the treaties. We also encourage readers to review all peace and friendship treaties and other Mi'kmaq resources at <https://archives.novascotia.ca/mikmaq/results/?Search=AR5&SearchList1=all&TABLE2=on>.

language of treaty, allow them to share visions of the past—the history of Menahkwesk or Saint John—while simultaneously envisioning a shared future. As they state, “The *Marshall* decision[s] did not create or change the law of treaty...but rather sought to remember it.” How we envision a shared future is up to us.

Can the *Marshall* decisions act as a mechanism to facilitate legal pluralism? Robert Hamilton in “Can a ‘Moderate Livelihood’ Fishery Reflect the Legal Pluralism of the Treaties of Peace and Friendship?” examines this question and whether traditions of pluralism, as marked in the treaties, may help inform more substantive visions of treaty interpretation and implementation. Shedding clarity on the Supreme Court of Canada’s *Marshall* decisions is the focus of Thomas Isaac and Grace Wu’s article “The *Marshall* Decisions: Reframing the Supreme Court of Canada’s Guidance on the Peace and Friendship Treaties.” They trace how the court’s guidance evolved over the course of the *Marshall* decisions, providing increasing clarity and nuance in respect of how the treaties should be interpreted. Taking stock of the situation, Michael Kennedy and Natalie Clifford argue that the courts and others give insufficient consideration to the distinction between ceding and non-ceding treaties, the considerations of governance, and the specific promises made in these Treaties. They conclude in “The Dishonour of the Crown: Aboriginal Fisheries in Atlantic Canada After *Marshall*” with the suggestion of the need for civil action to address outstanding issues.

An alternative path forward is offered by Bill Parenteau¹³ who argues in “The Anatomy of Dispossession: Indigenous Peoples, Natural Resources, and the New Brunswick British Colonial Project, 1763–2000” that a set of new treaties that replace half-measures with entrenched rights and self-rule is needed. Graydon Nicholas agrees, as is revealed in his keynote address at the *Rough Waters Workshop* “A Modern Treaty in the Maritimes: Is It Time?” In his powerful speech, Graydon, originally from the Tobique First Nation, a Wolastoqey elder, lawyer, judge, and former lieutenant-governor of New Brunswick (2009–2014), shares his personal reflection of experiences as an Indigenous lawyer defending Indigenous persons in the exercise of their treaty rights in the courts in New Brunswick and the Supreme Court of Canada, including instances of racism, institutional and otherwise. While a modern treaty may be desirable, he concludes that “unless it is based on international law, unless it is based on the *United Nations Declaration on the Rights of Indigenous Peoples*, [and] unless it fulfills the *Truth and Reconciliation Commission: Calls to Action*, it will not be done.”

Progress is slow and questionable at times. John G. Paul, Executive Director of the Atlantic Policy Congress of First Nations Chiefs Secretariat, in his “Commentary—Reflections on the Twenty-Fifth Anniversary of the *Marshall* Decisions,” provides an overview of some of the many successes that have resulted from the *Marshall* decisions. While successes exist, Patrick Augustine, a Mikmaw from Elsipogtog First Nation, reminds us that benefits have been unevenly felt in First Nations communities such as Elsipogtog, creating new challenges. His article entitled “Donald Marshall Junior and the Modern-Day Manifestation of Treaty Benefits” argues for the need for a thorough understanding of the Peace and Friendship Treaties to ground new claims going forward, including land claims. Similarly, the mixed results of the economic impact of the *Marshall* decisions found by Burç Kayahan, Stephen Law, and Barry Watson in “The *Marshall* Decisions and Economic Well-Being Indicators in Atlantic

¹³ Regrettably, William (Bill) Parenteau passed away while his article was under review. As guest editors, we decided to continue with publication of Bill’s article in his honour. To learn more about Bill, his work and legacy, see Mark J. McLaughlin, “A Tribute to Bill Parenteau: On the Importance of His Work to New Brunswick History,” *Journal of New Brunswick Studies/Revue d’études sur le Nouveau-Brunswick* 16, no. 2 (2024): 1–9.

Canadian Communities” reinforce Patrick Augustine’s findings. They also emphasize the importance of examining multidimensional measures of economic well-being. In addition, Omer Chouinard, Sebastian Weissenberger, and Jean Philippe Sapinski provide details of their in-depth assessment of the *Marshall* decisions’ impact on the economy, employment, and development on the Elsipogtog First Nation in their research note “Méconnaissance des traités entre les Premières Nations et la Couronne britannique, conflits entre pêcheurs commerciaux et Premières Nations et perspectives de réconciliation.”

Success for whom is an important question, and Martin Mallet offers some perspective as the Executive Director of the Maritime Fisherman’s Union (MFU). His article “Rough Waters: The Legacy of the *Marshall* Decisions Workshop—A Fishing Organization’s Perspective” provides insights into some of the MFU experiences and perspectives relative to Indigenous integration and involvement in Atlantic Canadian fisheries, and options for moving forward. As he concludes, while much progress has been made, historical conflicts need to be set aside with non-Indigenous and Indigenous fishing interests coming together to address the increasing threat from corporate concentration and control. Coming together may be hard given ongoing First Nations discontent with the government’s approach of integrating First Nations into Canada’s fishing regulatory framework and the lack of substantive engagement with the “moderate livelihood” concept, as Michael Nolan reveals in his article “Treaties, Courts, and Government Programs: A Full Look at the *Marshall* Decisions.”

Also arguing that a better understanding of our colonial past is required is Alex Cameron in “‘Under the Same Laws and for the Same Rights and Liberties’—Territory, Law, and Reconciliation under the 1760–1761 Treaties.” Using land acknowledgements that he terms have become “fashionable,” Cameron states that “an ideology of historical grievance” has emerged “suggesting that non-native presence on ‘unceded’ native territory is unlawful.” Echoing Kennedy and Clifford’s article in this volume, Cameron argues that the Peace and Friendship Treaties are unique and that jurisprudence guiding aboriginal title in western Canada, especially British Columbia, is of limited value. As Cameron concludes, “Unlike British Columbia, aboriginal title on the east coast is properly regarded as title which, by treaty, is governed by the ‘same laws’ as non-native title.”

This leads us to question Indigenous–state relations across key policy sectors in New Brunswick—economic development and policing. Nicole O’Byrne and Karen McGill in their article “‘Aboriginal Government through the Negotiation of Practical Arrangements’: Indigenous–State Relations in 1990s New Brunswick,” examine the province’s tax revenue–sharing agreements and argue that they were a manifestation of an evolving and modern treaty relationship in which resources and revenue are shared for the benefit of all people living in the territory. Their cancellation by the New Brunswick Higgs’ Conservative government ignores this principle that was confirmed and amplified by the *Marshall* decisions. Similarly, Josephine L. Savarese uses the *Marshall* decisions as a springboard for analysis to probe policing in criminal justice and natural resource settings in her article “‘It’s Time to Truly Implement the *Marshall* Decision!’ Analyzing Police Encounters with Indigenous Communities through Film and the First *Marshall* Decision.” Her goal is to bring “nuance to the revisioning and re-thinking of policing” across the region.

The journey of putting this special issue together was a long one. It began in the summer of 2021 with the editors coming together to explore the idea. What would the volume look like? What type of contributions would we seek? What are the timelines involved? Planning and seeking funding for a workshop to bring contributors together became a key component for us. It turned into the two-day *Rough Waters: The Legacy of the Marshall Decisions Workshop*, which was supported with funding from the

Social Sciences and Humanities Research Council of Canada. The workshop provided us with a significant opportunity to engage students in the process. This engagement is the focus of Mario Levesque's article "Service Learning Lessons Learned from Organizing The Rough Waters *Marshall* Workshop."

Feedback on initial drafts was provided and revised drafts sent out for double-blind peer review with at least one Indigenous and one non-Indigenous reviewer for each article. In addition, the complete volume was sent to another external reviewer who provided valuable feedback on the volume as a whole. Combined, the special issue was a formidable undertaking and also included obtaining ethics approval from Mount Allison University and Mi'kmaw Ethics Watch.

As editors, we owe thanks to many people. First are the contributors without whom there would be no special issue. We greatly appreciate their contributions, insights, and patience as we worked to bring the special issue to fruition in 2024, the twenty-fifth anniversary of the *Marshall* decisions. We thank the twelve Mount Allison University students who played a key role in organizing the workshop in the winter of 2023, Amber Solomon, an Indigenous artist and Mount Allison student, who gave us permission to use her artwork for the workshop, as well as university staff. All played a key role in making the workshop a success. Funding in support of creating this volume from Mount Allison University's President's Research and Creative Activities Fund is also greatly appreciated. Lastly, we thank the *Journal of New Brunswick Studies/Revue d'études sur le Nouveau-Brunswick* for their warm reception to our *Marshall* decisions special issue idea, and their encouragement, support, and patience throughout the process.

As editors, Graydon, Ken, and I have greatly enjoyed putting together this special issue and meeting and interacting with everyone. Old acquaintances were rekindled, and new relationships were formed. In the spirit of fostering a greater understanding of issues, we hope readers also enjoy this special issue. Thank you! Wela'liq! Woliwon! Merci!

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To comment on this article, please write to editorjnbs@stu.ca. Veuillez transmettre vos commentaires sur cet article à editorjnbs@stu.ca.

Mario Levesque is an Associate Professor of Canadian Politics and Public Policy at Mount Allison University. His teaching and research focus is on Canadian politics and public policy with an emphasis on Atlantic Canadian politics, especially disability policy and environmental policy. Mario has published in various journals, including *Canadian Public Policy*, *Canadian Public Administration*, *Canadian Parliamentary Review*, and *Journal of Parliamentary and Political Law*.

The Hon. Graydon Nicholas, former Lieutenant-Governor of New Brunswick (2009–2014), Chancellor, and Endowed Chair in Native Studies, St. Thomas University, is originally from the Tobique First Nation. Graydon is a Wolastoqey elder, lawyer, judge, and activist. He worked with the Union of New Brunswick Indians as its legal counsel, chair, and president. As a jurist, he has argued cases before the Supreme Court of Canada and was a provincial court judge (1991–2009). With former SCC Justice La Forest, he authored the 1999 *Report of the Task Force on Aboriginal Issues*.

Ken Coates, Professor Emeritus, Johnson-Shoyama Graduate School of Public Policy, University of Saskatchewan, and President, Coates Holroyd Consulting Inc., has previously published on such topics as Arctic sovereignty and Aboriginal rights in the Maritimes. He was short-listed for the Donner Prize for his book *The Marshall Decision and Aboriginal Rights in the Maritimes*. He has also recently published the book *From Treaty Peoples to Treaty Nation* with Greg Poelzer.

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