

## NAJIWSGEIG — WE GO FISHING

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### Abstract

Malagawatch is a magical territory in Unama'ki, governed by We'koqma'q, Wagmatcook, Membertou, Eskasoni and Potlotek communities, and the starting point of an epic journey of treaty rights recognition. It is where Donald Marshall Jr. and I were taught how to fish and sell eels. It is where we celebrated our first pay cheque, had our first gear conflicts, ate kataw and lusknikn with kastio'mi and drank plenty of strong p̄tewey. This essay shares the fishing adventures of the late Marshall Jr. from my perspective, as his spouse and fishing partner, as we travelled from the shores of the Bras d'Or Lake to the treacherous eel grounds of Judique and onward to Welnek, the waters of Paqtnkek Mi'kmaq community.

### Résumé

Malagawatch est un territoire magique d'Unama'ki, gouverné par les communautés de We'koqma'q, Wagmatcook, Membertou, Eskasoni et Potlotek, et le point de départ d'une épopée pour la reconnaissance des droits issus des traités. C'est là que Donald Marshall Jr. et moi-même avons appris à pêcher et à vendre des anguilles. C'est là que nous avons fêté notre premier chèque de salaire, que nous avons eu nos premiers conflits d'équipement, que nous avons mangé du kataw et du lusknikn avec du kastio'mi et que nous avons bu beaucoup de p̄tewey fort. Cet essai relate les aventures de pêche de feu Junior Marshall de mon point de vue, en tant qu'épouse et partenaire de pêche, alors que nous voyagions des rives du lac Bras d'Or aux traîtres terrains à anguilles de Judique et jusqu'à Welnek, les eaux de la communauté mi'kmaq de Paqtnkek.

### Introduction<sup>1</sup>

My first exposure to “eel” was the sea lamprey terrorizing the fish of the Saugeen River and Lake Huron (Naadowewi-gichigami) in Ontario in the 1970s. As a settler kid, I had the privilege of spending summers in the territory of Ojibwe peoples near Southampton. Curiosity often led us up the river to Denny's Dam to look at the graphic pictures of the invasive predator posted along the river with warning signs to stay away from the dam. Sea lamprey are an eel-like parasite that attach themselves to fish to feed on their blood, leaving ghastly wounds. The dam had a fish ladder to enable the fish to move upstream to spawn but a special trap to catch the lamprey eels and stop them from destroying the Great Lakes fisheries vital to Indigenous peoples' food, social, ceremonial, and commercial fisheries. Every summer we worked ourselves into frenzies when swimming in the lake, imagining the lampreys were attacking us, and

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<sup>1</sup> Welalioq to the Marshall family, JR, the Bernard brothers and all of the eel fishers we encountered on our journey, may justice be yours. I am grateful for the reviewers and their helpful comments. Special thanks to Mario Levesque, Ken Coates, and the fabulous Graydon Nicholas for including me in this special commemoration of the *Marshall* decision.

conflating the lamprey eel with electric eels in our child minds, as the dam was originally a source of electricity but repurposed as an eel barrier in the 1970s.<sup>2</sup>

## Mi'kma'ki

My next encounters with eel occurred in Mi'kma'ki and were spectacularly transformative. Shortly after I moved from Ontario to Nova Scotia, Donald Marshall Jr. and I met, by chance, at the Old Misty Moon, a well-known Halifax music venue, during a Jeff Healey concert in the autumn of 1991. A month before we met, Grand Chief Donald Marshall Sr., an important, long-serving leader of the Mi'kmaw nation and JR's father, sadly passed away. Donald Marshall Jr., the eldest son of Kalolin Marshall (Googoo) and the Grand Chief, came from a close-knit, hard-working, Mi'kmaw-speaking and culturally fluent family, well versed in the rights narratives of the covenant chain of the pre-Confederation Peace and Friendship Treaties.<sup>3</sup> Donald Jr. was born and raised in Membertou and spent summers in We'koqma'q surrounded by love and the many teachings of his extended family. He was an avid fisher.

Junior, or JR as he was known to me, survived a horrendously traumatic miscarriage of justice. When he was seventeen, JR was involved in a life-altering encounter in Wentworth Park, Sydney, Nova Scotia, in which he and his friend, Sandy Seale, were violently attacked by a non-racialized person. Despite JR's efforts to save him, Sandy Seale succumbed to his injuries. JR became the invidious target of the Sydney municipal police force's racially biased tunnel vision. From 1971 to 1982 he suffered eleven years of a life sentence in prison for a murder he did not commit. He managed to prove his own innocence, endured a damning acquittal process when the Court of Appeal prejudicially blamed JR for his wrongful conviction, and then he participated in a lengthy public inquiry to determine what went so wrong in the Canadian legal system that it allowed an innocent person to be convicted of such a crime. The report of the *Royal Commission on the Donald Marshall Jr. Prosecution* was released widely in January of 1990. It vindicated JR and offered some solace by exposing the systemic racism insidiously in operation everywhere in the society that sanctioned his wrongful conviction, and most strikingly in the outrageous failings of police, prosecution, defence, judiciary, corrections, parole, appeal, and compensation services.<sup>4</sup>

By the time we met, JR had been out of jail and in the public spotlight for close to ten years. He was tired of the public gaze, grieving his father, and wanted nothing more than to go home to Unama'ki (Cape Breton) and go eeling. Our good friend Ducey Paul told us about the success her brothers had in fishing eels back home, and JR's interest was piqued. In the spring of 1992, after my university term ended, we left Halifax for "JR's Farm" in Aberdeen, a forty-acre homestead between Wagmatcook and We'koqma'q Mi'kmaw communities on the shores of the Bras d'Or Lake. Within months we found

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<sup>2</sup> Denny's Dam was renovated in 2018 in partnership with the Saugeen Ojibway Nation, the Ministry of Natural Resources and Forestry, the Great Lakes Fishery Commission, and Fisheries and Oceans Canada. The renovations stabilized the dam, improved trapping and reduced the use of lampricide.

<sup>3</sup> L. Jane McMillan, *Truth and Conviction: Donald Marshall Jr. and the Mi'kmaw Quest for Justice* (Vancouver: University of British Columbia Press, 2018).

<sup>4</sup> Thanks to the generous efforts of Justice Anne Derrick, JR's lawyer and dear friend, the entire record of the *Royal Commission on the Donald Marshall Jr. Prosecution* were digitized by Nova Scotia Archives, and are publicly available at <https://archives.novascotia.ca/marshall/>.

ourselves knee-deep in boatloads full of slithering slimy American eel (*Anguilla rostrata*), trying to earn a livelihood.<sup>5</sup>

## Malagawatch

Mi'kmaq peoples have fished eels in Unama'ki since time immemorial. According to Elders, their ancestors have harvested eels since life began. The significance of Mi'kmaq relationships with marine life were incorporated in every facet of their pre- and early contact life, from cosmological belief systems to political and family organization. The premises of Mi'kmaq traditional fisheries were both spiritual and practical, though focusing mainly on the well-being and survival of families and community members. Mi'kmaq fished, hunted, and collected. Their subsistence activities were governed by the concept of netukulimk, which guided harvesting practices.<sup>6</sup> Subsistence customs reflected the holistic interconnectedness of Mi'kmaq laws embedded in their tribal consciousness governing their behaviour, particularly in relation to establishing means for survival, such as sharing, providing, honouring, and giving thanks for the lives and spirits of the harvest. Netukulimk denoted the proper customary practice of sustainably seeking bounty for the self-support and well-being of family and nation.<sup>7</sup>

The Mi'kmaq prospered in their fisheries for thousands of years. Malagawatch is an important historical place for Mi'kmaq peoples. These ancestral lands are jointly governed by all Unama'ki bands in a unique arrangement. Historically Malagawatch was a customary summer gathering site. It is a spot rich in shellfish, fish, eels, and Mi'kmaq medicines. During aggressive missionary proselytization, it became a safe, secluded location of Catholic worship and St. Anne's Day celebrations in the mid-1700s as European encroachment forced Mi'kmaq families from their traditional territories.

Our fishing careers began in Malagawatch (see Image 1). Chuckie Bernard and his brothers Seven and Lunch (Ducy's brothers), long-time friends and cousins of JR, encouraged him to start fishing for eel. They were making a decent wage and if they sold enough and worked the required number of weeks, they were able to acquire the employment insurance "stamps" to secure a guaranteed income through employment insurance over the lean winter months, when jobs and money were scarce. It was a matter of pride for these men to avoid asking for social assistance from their band offices. There were plenty of eels, lots of fishing spots in the Malagawatch and Basins estuaries, only a handful of mostly related L'nu people fishing, and they had a reliable buyer. K'at (eel) are a culturally important food source for the Mi'kmaq and are very much part of the cultural capital of exchange, kinship reckoning, and food security.<sup>8</sup> They are vital indicators of distribution patterns, ceremonial performance, and medicinal knowledge translation, and are critically important for cultural sustainability, not just in Atlantic communities, but also for Indigenous communities worldwide.<sup>9</sup>

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<sup>5</sup> L. Jane McMillan, "Fishing with Donald Marshall Jr.," in *Contested Waters: The Struggle for Rights and Reconciliation in the Atlantic Fishery*, ed. Fred Wein and Rick Williams (Halifax: Nimbus Press, 2022), 69–74.

<sup>6</sup> L. Jane McMillan, and Kerry Prosper, "Remobilizing Netukulimk: Indigenous cultural and spiritual connections with resource stewardship and fisheries management in Atlantic Canada," *Reviews in Fish Biology and Fisheries* 26, no. 4 (2016): 629–647.

<sup>7</sup> McMillan and Prosper.

<sup>8</sup> L. Jane McMillan, "Mu kisi maqumawik pasik kataw—We Can't Only Eat Eels: Mi'kmaq Contested Histories and Uncontested Silences," *Canadian Journal of Native Studies* 32, no. 2 (2012): 119–142.

<sup>9</sup> Shelley Denny, "ANKUKAMKUA'TU, 'Doing Treaty': An Alternative Fisheries Governance Model for Mi'kmaq Aboriginal Treaty Rights to Fish in Nova Scotia," (PhD diss., Dalhousie University, 2022).

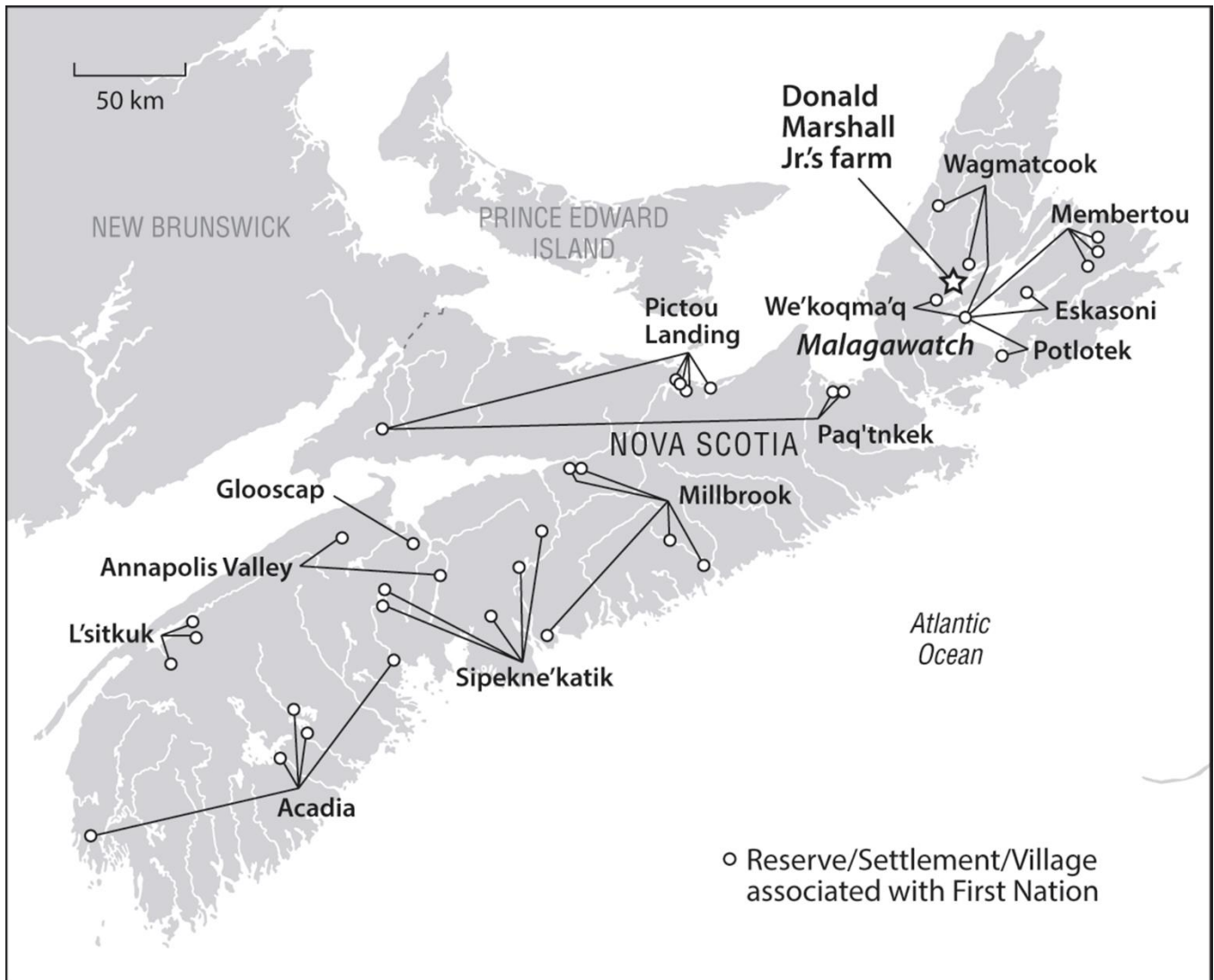


Image 1. Map of Mi'kmaw Communities in Nova Scotia. Source: L. Jane McMillan, Truth and Conviction: Donald Marshall Jr. and the Mi'kmaw Quest for Justice (Vancouver: UBC Press, 2018).

The Bernard brothers took JR out on their boats to show him how to set and empty the traps, loaning him a couple of fyke nets to get started. During the first weeks of fishing, JR had difficulty finding a reliable fishing partner, someone who could be available daily to drive the forty-five-minute journey down rough, muddy, potholed roads to the eel camp in Malagawatch. JR did not have a driver's licence at the time. Women did not generally participate in the eel fishery in those days, but out of necessity I learned how to use the outboard motor and became adept at backing up the boat trailer at the launches. My childhood summers on the shores of Lake Huron helped me to be comfortable on the water while respectful of its power; I was a strong swimmer, a former lifeguard. JR and I were good and safe on the water together.

Despite centuries of colonial efforts to eradicate Mi'kmaq culture, all of the people harvesting in this area spoke fluent Mi'kmaq, and could recite their genealogies going back many generations, including JR. Knowing who you are and where you come from, ta'n wetapeksi'k, framed the principles, the codes

of conduct, the duty to honour ancestors, that the eel harvesters lived by. They were gentle giant warriors, firm in the knowledge of their treaty and Indigenous rights and well versed in the Supreme Court of Canada *Simon* (1985) decision that affirmed the validity of the Mi'kmaw Peace and Friendship Treaties.<sup>10</sup> They knew that their treaty rights meant that they shall “not be hindered from, but have free liberty of hunting and fishing as usual” and that they have the guarantees to trade with immunity: “the Indians shall have free liberty to bring to sale to Halifax or any other settlement within this province, skins, feather, fowl, fish or any other thing they shall have to sell, where they shall have the liberty to dispose thereof to the best advantage.”

None of the fishers had any licences to fish or sell. No one ever talked in favour of fishing licences; there was a shared understanding that neither federal nor provincial regulations applied to them. We did talk about sovereignty and self-governance, and these gentle giants were active in their resistance against the imposition of settler laws that infringed on their rights and freedoms as Indigenous peoples. They refused to be displaced, and advocated for political liberation and social transformation by asserting their livelihood rights. We were all in agreement that the Canadian legal system was failing Mi'kmaw people and imagined an economically secure future free of oppression and racism.

Colonial policies excluded Mi'kmaq participation in resource stewardship and fishing economies. Systemic discrimination, policies of assimilation, and racism undervalued and ignored Indigenous ecological knowledge and criminalized resource procurement practices. Poverty, starvation, and marginalization set in, but the fishing peoples maintained their confidence in their treaty-protected rights and upheld their sacred relationships with resources despite the settler corruption of their traditional livelihoods.

With every attempt to organize and resist assimilation or fight for treaty rights, new laws were passed to restrict political organization and the pursuit of land claims and resource rights. Contrary to the articles in the Peace and Friendship Treaties, Section 141 was added to the *Indian Act* in 1927 to outlaw the hiring of lawyers and legal counsel, effectively denying Indigenous peoples access to fight for their rights in the Canadian legal system post-Confederation. Against such adamant structures of discrimination, efforts to receive recognition of their sovereignty and the right to practice Indigenous legal traditions, including treaty-protected hunting and fishing rights, were largely unsuccessful until later in the twentieth century. Customary and culturally prescribed participation in fisheries for food, ceremonial, or commercial use was prohibited through the regulatory laws and procedures autocratically imposed by agents of the Crown.

There was a strong sense of Mi'kmaw agency during the expressions of decolonization camaraderie at the Malagawatch camp. After the nets were set, and checked, everyone would gather for warmth in one of the wooden shacks to share p̄tewey (tea) and hot four cent cake with kastio'mi (molasses) and brag about big eels or complain about settlers interfering with the gear. There was some competition as to where each person should or could set their nets, but this was usually playful, and in general everyone looked out for each other. Indeed, if one of the community members committed a malicious act in terms of gear conflict or stealing catches from fellow members, they would be accused of turning “white” or going “colonizer,” something to be avoided as it was associated with being selfish and thinking only of oneself.

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<sup>10</sup> Tuma Young, “L'nuwita'simk: A Foundational Worldview for a L'nuwey Justice System,” *Indigenous Law Journal* 13, no. 1 (2018): 75–102. *Kisa'muemkewey* refers to the treaty diplomacy processes of the Mi'kmaq.

The Bernard brothers were ingenious: they could jerry-rig anything and the camp was full of inventions to enhance fishing and fish processing. We enjoyed eating well from earth's bounty (Image 2). Each fisher had special culinary skills, replicating recipes passed on over generations and experimenting with new technologies. Some of the best smoked eels were cured at the Malagawatch compound and JR could make a katawapul (eel stew) so delicious that it carried us to blissful dreamland (eels have soporific qualities). The L'nu fishers were deeply compassionate and generous people, often rescuing strays and making sure everyone had enough, even if it meant taking less for themselves. One season a wounded eagle was found on the shore. Chuckie and Seven put together a shelter, caught food, and nurtured the bird back to health. The day it was able to fly again was a joyous moment. We regularly explored the coves searching for eagle nests and feathers.



*Image 2. "JR's Favourite: Kataw and Luski." Photo credit: Keith Christmas, ca. 2008.*

Once we got into the routine of eeling, we purchased four used nets and bought a small outboard motor for the twelve-foot wooden dory that was built by a man named Francis from Wagmatcook. It was a heavy, sturdy boat painted dark pine green; it was safe but slow. We did not have a trailer at that time and had to load all of the gear on the back of the half-ton truck, which was precarious and more than once we lost a net or pole off the back.

Importantly, the boys introduced us to the buyer and showed us how to build and anchor a holding pen to keep the eels alive and safe from predators until they were sold. The eel buyer was a one-armed French Canadian from New Brunswick who worked for South Shore Trading Company, travelling across the Maritime provinces in a truck that had oxygenated water tanks to keep the fish alive. Roderick was amicably called the One-Armed Bandit, as we would never know the price per pound until he showed up in the yard, and with gear and employment insurance payments we sometimes felt that not enough money was getting into our pockets.

On paydays the holding pens were towed to shore from deeper-water moorings. Eels were transferred from the holding pens using dip nets, weighed and then dumped by a hydraulic lift into the truck's tank. Once tallied, cheques (minus gear and employment insurance payments) were made out to each captain. Paydays always attracted a crowd, and of course were often the happiest days—even small cheques were a welcome relief. After the compulsory trip to town for gas, food, and beer, the fishers would reunite in the evening to celebrate around a campfire, eat fish and lusknikn, swapping heroic and humorous tales. We laughed a lot in those days. JR, full of smiles, was enjoying his freedom and his livelihood (Image 3).



*Image 3. "First Payday." L to R: Winston Bernard, Seven (Peter) Bernard, Dickie Young, Lunch (Lawrence) Bernard, Donald Marshall Jr., Charles (Junior) Bernard, Jane McMillan, Chuckie Bernard, John Wayne Bernard, Grace Welch, John John Bernard. Photo credit: Phil Welch, 1992.*

Eeling is unpredictable and labour intensive. The fyke nets, hauled by hand, are heavy when wet and awkward to set even in the calmest weather. One never knows what will be in the traps until they are hauled into the boat. Over the years we saw some incredible species—massive jellyfish blooms, mermaid’s purses, even beaver. We usually set the nets in mud with poles cut and trimmed from the woods at JR’s farm. Initially we enjoyed the challenges of eel fishing. Even though he loved to sleep in, determined to make a living, JR would get up early, when the waters were most calm, to check the nets. JR felt connected to the natural world and to his people, which enabled him to feel a sense of belonging and general well-being, feelings he had not experienced since his violent removal from his community as a teenager and his many years in prison.

Earning a livelihood instilled a sense of purpose and optimism. Being self-sufficient was a shared goal; everyone was keen to break the shackles of colonial oppression and dependency. These were liberating times in so many ways.

Eels also helped reduce the alienation JR experienced as a wrongly convicted person. Fishing reintegrated JR with his community and he adhered to customary practices, particularly the ethos of sharing.<sup>11</sup> JR freely distributed the biggest and best eels, beautifully cleaned, among Elders who always asked for eels wherever they ran into him, no matter if he was at a funeral or a wedding or buying groceries. Eels are a favoured food of the Elders and JR’s eel-cleaning skills were admired by many. Fresh eels are notoriously difficult to manage because they are indeed slippery and wiggly.

When mawiami (powwows) or Treaty Day celebrations required eels for the traditional katawapul (eel stew), JR went out of his way to ensure organizers had enough, spending hours bent over the sink gutting and preparing big feeds for the feasts. JR’s identity was shifting from the wrongly convicted person to an avid eel harvester, exercising his treaty rights and earning a livelihood. His father, the late Grand Chief, would have been proud.

Once the spring eel run died down, the group at Malagawatch dispersed to fish elsewhere. As the eels migrate so too must the eel harvesters. Migratory practices are a routine part of Mi’kmaq cultural practice, historically and today. Mi’kmaq peoples travel throughout their vast territories to hunt, fish, harvest berries and sweet grass, and collect medicines. In keeping with this tradition, JR spent his time searching for potential eel grounds and scouting for eel grass, building better holding pens, and daydreaming about a lighter, faster boat. On a daily basis, JR made predictions about nets full of eels, based on phases of the moon, the wind, the amount of rain, or anything else that he could derive meaning from. Heavy rains and thunderstorms always meant a good run of eels, and gleefully JR would forecast “lots of eels tomorrow, baby” as he eagerly rubbed his hands together.

Today Malagawatch is no longer the site of the eel camp. Colonialism disrupted many customary practices and cut short too many lives.<sup>12</sup> Cultural resurgence is under way, a great testament to Mi’kmaq resistance; the historical significance of the landscape of that special place is celebrated. Residents are working to protect their heritage and the environment. It remains one of the best eel fishing grounds on the Bras d’Or Lake and the seascapes are stunning. I cherish fond memories of shore fires, roasting hand-

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<sup>11</sup> McMillan, *Truth and Conviction*.

<sup>12</sup> Sherry Pictou, “What is Decolonization? Mi’kmaq Ancestral Relational Understandings and Anthropological Perspectives on Treaty Relations,” in *Transcontinental Dialogues: Activist Alliances with Indigenous Peoples of Canada, Mexico, and Australia*, ed. R. Aída Hernández Castillo, Suzi Hutchings, and Brian Noble (Tucson: University of Arizona Press, 2019), 36–64.



harvested quahogs and oysters, watching eagles soar above, drinking strong tea, sharing fishing and wiklatmu'j (pukulatmu'j) stories. We learned a great deal from the Bernard brothers and the people of Malagawatch. I am grateful they launched us on our eel adventures.

## Judique

After Malagawatch, we moved to waters closer to JR's farm and fished there for several weeks. The catches were not large, but sufficient for a time. JR wanted to try out new spots, but mobility is a challenge as the gear is very heavy and awkward to manage, so we did not have the ability to traverse long distances. Toward the end of our first year of fishing we relocated the gear to the southern-most point of Cape Breton Island, Judique Pond, a site known for its muddy bottom and eel grass. It is a popular spot for winter spearing and ice fishing. No one to our knowledge had set any nets there so the thinking was that it should be full of eels. Upon arriving in Judique, JR spoke to the residents adjacent to the pond to see if they would mind if we set the nets there. We guaranteed that we would not make any mess and there were no objections. The locals were curious about what we were up to and some asked for a feed of eels, which JR happily provided.

Judique, as part of Mi'kma'ki, was Indigenous territory, but no Mi'kmaq were residing in the area. In order to protect our gear and the eel holding pen we hired our dear friend Albert Doucette, who had been living with us at the farm, to camp out overnight and keep watch. Albert was a wonderful character who confronted many challenges in his life. A residential school survivor, Albert was one of the first students to speak out about the harms he endured at the church-run Shubenacadie school and was ostracized for it. He was brave, and a strong, highly skilled woodsman. He put up JR's wigwam on the shore close to the boat and the eel pen. We travelled the roads back and forth daily to bring Albert supplies and check the nets. The pond was productive, the eels were large and healthy, but the long drive on rough roads was hard on the truck. We arranged to sell the catch and planned to return to waters closer to home. The night before the sale was a Saturday and that meant a country dance at Valley Mills fire hall or at the Lion's Den. Albert loved to dance, so he decided to hitchhike out of Judique, leaving the gear unprotected.

The next day was payday. We met up with the gang from Malagawatch who were going to help us load the gear so we could make our move back to Aberdeen. When we went to bring the eels to shore to get ready for the buyer, we were dismayed to find the pen empty. In the night, someone smashed the lock and either took or dumped the catch. We were mad. The fellows from Malagawatch were very angry and went knocking on doors to see if anyone knew what had happened. No one admitted to anything; further confrontation was avoided after threats and posturing simmered down. We returned home and fished the rest of the season without incident, but we did not fish Judique again.

## 1993

By the next season, spring 1993, we managed to save enough money to pay for the borrowed nets and buy seven more from the South Shore Trading Company. There is nothing like fishing with new nets—no broken hoops or holes to be mended; the purse strings all worked. We were ready to fish. The extra nets helped make the effort viable income. We experimented with fishing in deeper waters and moved from sticking poles in the ground to holding down the nets with tire rims and attaching five-litre plastic bottles as buoys. When we took JR's young nephews and son out on the boat, they called it "wheeling."

The first part of the season went well; the catch was good. While fishing in the area of Little Narrows we were approached by local Department of Fisheries and Oceans officers (DFO) who simply asked what we were up to. They knew JR from the media attention surrounding his wrongful conviction and regular encounters on the waters. We told them we were fishing for eels. The officers asked JR to make sure that he identified his traps with his name and band number so that they could recognize them when they did their patrols. Fisheries officers were considered to be only a slight nuisance because they were nosy, but they were not generally confrontational or adversarial. At no time did these officers, whom we met on the water with some regularity, ask for evidence of any licences. JR's maternal uncle Ekkian Googoo was fishing in the vicinity and had similarly benign interactions with the DFO.

## Welnek

In July, the eel runs are generally low in Cape Breton lakes, so we took our gear out for cleaning and mending. In August, we received word from JR's cousin that the eels on the mainland were plentiful and we should try our luck in Paqtnkek. Four other Mi'kmaw eel fishers were working their nets in that region. We hauled the gear down the steep, muddy road by the church. JR chose a spot directly off the reserve lands known as Welnek, a breathtakingly beautiful estuary. The catches were fantastic, the largest, most muscular eels we had seen. In one week, we had more eels than ever before. Peter Martin, whom we knew from eeling in Cape Breton, was fishing in the same area; his catches were also good. Instead of going back and forth to Cape Breton every day, we would spend an evening or two a week in the home of JR's cousin and his family in Paqtnkek, who were very generous in letting us shower and sleep there. This allowed us to keep an eye on the eels and our gear, and save on gas.

After a good week, we were approached by DFO officers on August 17, 1993. This time the officers asked to see commercial fishing and boat licences. We had neither. JR explained that he was Mi'kmaw and did not need a licence because he had a treaty right to fish.<sup>13</sup> The officers did not know of any treaty right and told us we were required to have licences to fish. They also told us we were fishing in a closed area; however, there were no postings anywhere to indicate the area was closed. We started to get uneasy. The officers asked for our names and addresses and wanted to take a net for inspection or evidence, the purpose of which was not made clear. We directed them to a net that we had just emptied, and they hauled it out. The officers approached Peter Martin as he was checking his nets. Like JR, Peter was asserting his treaty rights, unlicensed. The officers confiscated one of his nets.

We returned to shore confused, assuming that there was some kind of misunderstanding. We wanted the net back; that gear was expensive. JR called the DFO officer and was told that in order to fish Welnek we had to have permission from the Chief of Paqtnkek, Kerry Prosper, because the band had a communal licence agreement. The DFO warned us to remove our nets within forty-eight hours or all three of us, JR, Peter and me, would be charged. We called Chief Prosper right away and were told that Paqtnkek had not signed a communal agreement with the DFO, and we had his permission to fish in the area. This information was immediately relayed to the DFO who took no further action at that time.

JR is a band member of Membertou. Concerned over the interruption of his livelihood activities and the confiscation of his nets, he reached out to Membertou Chief Terrance Paul. Chief Paul, a trusted friend, told JR to keep fishing and reassured JR that the DFO had no right to interfere with his right to

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<sup>13</sup> McMillan, *Truth and Conviction*.

fish. Chief Paul indicated that if DFO charged him, he and the other chiefs would support him. But we were worried. We did not want any charges. JR wanted absolutely nothing to do with the legal system.

We fished for several more days without incident and then, while having lunch on shore, were again approached by DFO officers who had questions about the catch and the buyers. When we asked why they wanted to know, they told us they were doing research on “Native” fishing in the area.

The following day, August 24, 1993, we checked the traps, taking turns clearing and re-setting the nets and running the motor. Our backs were sore from the heavy lifting. There were so many eels in the nets that the hoop frames were beginning to break and the boat was unstable under the weight. We were thrilled. Roderick came to pick up our catch. The price per pound was \$1.70. We wrestled 463 pounds from the holding pen to the weighing station; \$787.10 was a great payday for us. We were not aware the DFO officers were in the woods taking pictures documenting the sale. While on his way to purchase other catches the buyer was detained by the DFO, who took away the records of sale and photographed the company truck.

Two days later we returned to Welnek to check the nets, but the nets were gone. JR’s livelihood was abruptly disrupted, his income security immediately jeopardized. The DFO confiscated our eleven nets, valued at approximately \$250 each. Peter Martin’s gear was also seized.

Ninety days after the initial interaction with DFO in Welnek, we received a knock at the door of JR’s farm. On November 15, 1993, we were officially charged with illegal fishing in a closed season, fishing with illegal gear, and fishing commercially without a licence. In a joint meeting of the Union of Nova Scotia Mi’kmaq and Confederacy of Mainland Mi’kmaq, the chiefs and executives agreed on December 9, 1993, to fund our defence. It was a great relief to have the support of the Mi’kmaq nation, but the emotional and physical toll of having to confront the Canadian legal system again was a tremendous burden on JR.

While the court case was under way at the Nova Scotia provincial court in Antigonish, we kept fishing. To replace the confiscated gear, we applied for a loan from Ulnooweg’s Aboriginal Business Development Program, but were initially denied because they believed the “project may be ineligible due to the fact that Aboriginal persons only have the right to fish year-round if they are involved in the food fishery...and that to be able to fish commercially you must possess a licence from the Department of Fisheries and Oceans.” The rejection letter stated, “Until the legislation has changed, or you obtain a licence to fish commercially, we will be closing your file.”<sup>14</sup> With the help of dear friends, we secured a grant, rather than a loan, from Ulnooweg and bought that lighter, faster boat of our dreams. We zipped around the Bras d’Or Lakes exploring every cove in search of eels. The charges against me were dropped early in the trial as the focus was on the question of whether or not JR, as a Mi’kmaq person, had a treaty right to catch and sell fish. For a few more years we continued to exercise JR’s livelihood rights fishing commercially, unfettered by licences and regulations, but our hearts, and backs, were not in it.

Finally, 2,222 days after the initial confiscation of gear, the tireless efforts by the legal team led by Bruce Wildsmith with support from Eric Zscheile and several newly called Mi’kmaq lawyers and scholars, surmounted the crushing losses at the Nova Scotia Provincial Court and Court of Appeal. Many of the legal researchers were new Mi’kmaq lawyers and law students who had benefitted from the

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<sup>14</sup> Correspondence on file with author.

Indigenous Blacks and Mi'kmaq Initiative at Dalhousie University, a recommendation of the Marshall Inquiry to improve access to education and expand diversity in the law school, bar, and bench with the goal of ending systemic discrimination and racism in the courts. On September 17, 1999, with the Supreme Court of Canada's affirmation of the right of Donald Marshall Junior to catch and sell fish, hope was restored, for a moment.

The *Marshall* decision reverberated across the country, inspiring Indigenous communities to unite in collective action to secure their rights to resources. The federal government, the Department of Fisheries and Oceans, and settler fishers were not prepared for the decision. The judgment led to immediate conflict and controversy in the Maritimes and Gaspé regions of Atlantic Canada, grabbing international headlines and marring the Mi'kmaw, Wolastoqiyik, and Peskotomuhkati legal victory. Non-Indigenous fishers resisted the Supreme Court's findings on the grounds that they believed they held traditional rights to the waters and were unwilling to share the strained—but lucrative—resources with anyone, especially “Indians.”<sup>15</sup>

The case marked an unprecedented turn in colonial relations. It opened a window to remedy patterns of dependency and subjugation in favour of sustainable community advancement, a return to the concept of netukulimk (responsible harvesting) through the affirmation of traditional knowledge and treaty and Indigenous rights in contemporary contexts. The eel disappeared from the headlines as the controversy and violence shifted to lobster and who had access to this profitable fishery. Fears that Indigenous people would take to the waters and harvest everything at once were heightened when the DFO, following its own narrow interpretation of the Supreme Court decision, showed excessive force in restricting Mi'kmaw access to the waters. Video footage of hulking DFO vessels battering small Mi'kmaw dories, forcing the occupants overboard into the open ocean, and other violent confrontations played out on the nightly news, revealing deep-seated racism and treaty ignorance.

Despite the Supreme Court ruling, Mi'kmaw claims to self-governance of territories, resource management, and equitable access were in practice denied. Media accounts propelled animosity toward Indigenous harvesters by perpetuating negative stereotypes and exaggerating instances of overfishing and the use of illegal gear. JR called for peace on the water and encouraged Mi'kmaw communities to unite. Among the Mi'kmaw his efforts were considered heroic. In recognition of his peacekeeping efforts he received the Wolf Project Award from Elder William Commanda and the Circle of All Nations and was honoured as Citizen of the Year in Membertou. But when he went out in public, JR was often accosted by settlers, blind to centuries of colonial harms, who blamed him for disrupting “generations of family businesses” and “taking food out of their children's mouths.”<sup>16</sup>

At the time of the Supreme Court decision, we were no longer fishing eels for livelihood. JR had a serious respiratory illness. In 2000, upon returning home from a national Assembly of First Nations conference in Newfoundland celebrating the Marshall and Sparrow decisions and their impact on Indigenous rights, JR's lung collapsed. By 2002 we relocated to Toronto in order for JR to be placed on a

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<sup>15</sup> L. Jane McMillan, “Committing Anthropology in the Muddy Middle Ground,” in *Transcontinental Dialogues: Activist Alliances with Indigenous Peoples of Canada, Mexico, and Australia*, ed. R. Aída Hernández Castillo, Suzi Hutchings, and Brian Noble (Tucson: University of Arizona Press, 2019), 65–92.

<sup>16</sup> McMillan, *Truth and Conviction*.

list to receive a lung transplant; it was his only chance for survival. Fortunately, we were blessed with an organ donation May 5, 2003.

JR survived the surgery and when he was healed, returned to Mi'kma'ki and continued to fight for treaty implementation and advocate for unity within the Mi'kmaw nation. On his last fishing trip, he harvested eels, and cleaned them for a community feast in Membertou (Image 4).

On September 17, 2009, the tenth anniversary of the fishing decision, Mi'kmaw leadership and guests gathered in Halifax. It was the first anniversary without Donald Marshall Junior, who had died on August 6 of that year at the age of fifty-five. The Mi'kmaw nation were mourning not only the loss of JR, but also the failure of the government of Canada to honour the Supreme Court decision and implement the rights set out in the 1760–61 Treaties. Chief Terry Paul admonished the government for its failure to recognize Mi'kmaw livelihood rights and demanded change.

In 2019, at the twentieth anniversary of the fishing decision hosted by the Assembly of Mi'kmaw Chiefs, the DFO, in a symbolic gesture of reconciliation, returned the eel nets they had confiscated in 1993; it took twenty-six years. Despite the “commercial re-empowerment” of Mi'kmaq, Wolastoqiyik (Maliseet,) and, to a lesser extent, the Peskotomuhkati (Passamaquoddy) communities, people were not in a celebratory mood at the gathering in Membertou. The leadership and fishers expressed great frustration at having no protection in exercising their livelihood rights.<sup>17</sup> Mi'kmaw harvesters reported that their gear was regularly vandalized, boats burned, and traps cut; threats and intimidation were the order of the day. The DFO and RCMP could or would not do anything overtly to stop it.

And following September 17, 2020, the twenty-first anniversary of the *Marshall* decision, we witnessed, with horror, the attacks on Mi'kmaw livelihood harvesters escalate, revealing an astonishing level of racism when Sipekne'katik, Potlotek, and Pictou Landing exercised their legal livelihood fisheries. The extent of racialized violence was so dangerous that the Assembly of Nova Scotia Mi'kmaw Chiefs declared a state of emergency on September 18, 2020, to protect Mi'kmaw harvesters, their families and supporters. The Assembly coordinated assistance across organizations to protect the safety and security of Mi'kmaw affected by political unrest. But the violence continued to escalate as commercial fishing operations accused Mi'kmaw livelihood harvesters of threatening the conservation of the lobster stocks. During an emergency debate in the House of Commons in October 2020, Prime Minister Trudeau said, “There is no place for racism in our country. The appalling violence in Nova Scotia must stop now. It's unacceptable, it is shameful, and it is criminal. Above all there is a right to live and fish in peace without being subject to threats and racism.”<sup>18</sup>

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<sup>17</sup> Ken Coates, “The Marshall Decision at 20: Two Decades of Commercial Re-Empowerment of the Mi'kmaq and Maliseet,” MacDonal Laurier Institute Publication, 2019. 52 pp.

<sup>18</sup> Peter Zimonjic, “MPs Hold Emergency Debate on N.S. Lobster Fishery Dispute,” *CBC News*, October 19, 2020, <https://www.cbc.ca/news/politics/parliament-debate-nova-scotia-lobster-dispute-1.5768468>.



*Image 4. JR fishing for food for social and ceremonial purposes with a fyke net. Photo credit: Keith Christmas, ca. 2008.*

Assimilation is not an option. Mi'kmaw leadership has consistently held firm that, as Indigenous peoples of Mi'kma'ki, they have treaty and constitutionally protected rights to exercise governance over all of their fisheries, including food, social and ceremonial, communal commercial, and livelihood, and that they want community-led, self-government agreements to uphold, protect, and honour those rights. The livelihood fishery is a legal fishery. It is not a symbolic fishery: it is a substantive fishery where the exercise of Mi'kmaw jurisdiction must be prioritized in order to meet the terms and obligations of the treaties. As stated in their submissions to the Royal Commission on Aboriginal Peoples, in terms of jurisdiction, "We have the freedom to manage and regulate our harvest, with levels based on need and on conservation. After we have taken what we need, other governments can manage what's left over on behalf of their citizens, but subject to our consent and our ability to establish that non-Indian use does not threaten the resources."<sup>19</sup>

In the absence of nation-to-nation recognition of self-government for fisheries, or the establishment of an Atlantic First Nations Fisheries Authority, individual communities such as Potlotek and Pictou Landing have advanced netukulimk livelihood plans to secure their economic well-being, protect and honour the resources, and hold harvesters accountable. Other communities have decided to coordinate their efforts by forming regional collectives. For example, the Kespukwitk Netukulimk Livelihood Fisheries Management Plan, a collaborative fishery management plan for Acadia, Bear River, and Annapolis Valley First Nations to exercise their treaty rights, was established in November 2021, with the support of District Chief Dr. Sherry Pictou and other Chiefs of the Assembly.<sup>20</sup> Harvesters designated under the plan are currently authorized to fish up to 3,500 jakej (lobster) traps, up to seventy per harvester during established seasons in the waters of the traditional Kespukwitk District, which is one of the seven districts of Mi'kma'ki traditionally governed by the Grand Council.

The resurgence of netukulimk as the sacred foundation for treaty implementation is characteristic of Mi'kmaw ingenuity and emblematic of Mi'kmaw leadership. Netukulimk livelihood plans exemplify the Mi'kmaw philosophy to use the natural bounty provided by Creator for the self-support and physical, social, cultural, spiritual well-being. Mi'kmaq leadership are actively advocating for and building the legitimacy of netukulimk livelihood plans, both within their communities, which have long been suffocated by oppressive colonial policies of assimilation, but also within the communities that have failed to recognize and honour Mi'kmaw inherent and treaty rights. It is an empowering and holistic approach to living well within the world and with each other, while simultaneously asserting self-governance through culturally led harvesting practices and standards of sustainability.<sup>21</sup> JR would be proud to be part of this ancestral legacy. As he would say, "Legends don't die."<sup>22</sup>

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<sup>19</sup> Union of Nova Scotia Mi'kmaq, "Treaty Federalism and the Covenant Chain," Presentation to the Royal Commission on Aboriginal Peoples (Alex Christmas, Reg Maloney, Roderick Googoo, Carl Gould), 1992.

<sup>20</sup> Kespukwitk District Netukulimk Livelihood Fisheries Protocol—As declared by Annapolis Valley First Nation Bear River First Nation Acadia First Nation. November 2021, <https://acadiafirstnation.ca/resources/735-kespukwitk-netukulimk-livelihood-protocol-nov-2021-bravfna/file.html>.

<sup>21</sup> L. Jane McMillan, Kerry Prosper, Morgan E. Moffitt, Anthony Davis, "Netukulimk Narratives: Pathways to Rebuilding Sustainable Indigenous Nations," in *Sustainability Planning and Collaboration in Rural Canada: Taking the Next Steps*, eds. Lars K. Hallström, Mary A. Beckie, Glen T. Hvenegaard, and Karsten Mündel (Edmonton: University of Alberta Press, 2016), 241–268.

<sup>22</sup> McMillan, *Truth and Conviction*, 177.

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