CAN A "MODERATE LIVELIHOOD" FISHERY REFLECT THE LEGAL PLURALISM OF THE TREATIES OF PEACE AND FRIENDSHIP?

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Abstract

Indigenous signatories to the eighteenth-century Peace and Friendship Treaties in Atlantic Canada did not cede their rights to govern themselves. Yet, governments acted as though no Indigenous jurisdiction or law-making authority remained. In the *Marshall* decisions, the Supreme Court remedied these wrongs somewhat by recognizing a right to pursue a small-scale commercial fishery subject to Crown regulation and limited to the pursuit of a "moderate livelihood." These limits constrained Indigenous control over the exercise of their treaty rights, and conflicts ensued. This article considers this tension in light of the history of legal pluralism that animated the treaties. It then considers whether, and to what extent, the *Marshall* framework can currently facilitate legal pluralism, and whether traditions of pluralism, as marked in the treaties, may help inform more substantive visions of treaty interpretation and implementation.

Résumé

Les signataires autochtones des traités de paix et d'amitié conclus au XVIIIe siècle dans le Canada atlantique n'ont pas renoncé à leur droit de se gouverner eux-mêmes. Pourtant, les gouvernements ont agi comme s'il n'existait plus de juridiction autochtone ou de pouvoir législatif. Dans les arrêts *Marshall*, la Cour suprême a quelque peu réparé ces torts en reconnaissant le droit de pratiquer une pêche commerciale à petite échelle, soumise à la réglementation de la Couronne et limitée à la recherche d'un "moyen de subsistance modéré." Ces limites ont restreint le contrôle exercé par les autochtones sur l'exercice de leurs droits issus de traités et des conflits en ont résulté. Cet article examine cette tension à la lumière de l'histoire du pluralisme juridique qui a animé les traités. Il examine ensuite si, ou dans quelle mesure, le cadre Marshall peut actuellement faciliter le pluralisme juridique et si les traditions de pluralisme, telles qu'elles sont marquées dans les traités, peuvent contribuer à éclairer des visions plus substantielles de l'interprétation et de la mise en œuvre des traités.

Introduction

In the eighteenth century, the region variously known as Mi'kma'ki, Wulstukwik, Acadie, and Nova Scotia was a site of considerable legal complexity. Multiple legal orders existed within and between several distinct political communities. These legal and political regimes overlapped and criss-crossed in complicated ways, shifting as the parties responded to changing circumstances and as they negotiated forms of legal and political accommodation. The Treaties of Peace and Friendship that were negotiated in this context can be understood as a negotiated body of intersocietal law that regulated the relationships between distinct nations, in part by establishing areas of shared and exclusive jurisdiction. Mi'kmaq, Wolastoqey, and Passamaquoddy peoples did not cede their rights to govern themselves according to their

own law and jurisdiction in these treaties; rather, the treaties mediated relations in a legally pluralistic region where jurisdiction was actively contested.[1] In the nineteenth and twentieth centuries, however, British, and later Canadian, governments acted as though no Indigenous jurisdiction or law-making authority remained. Even the rights clearly recognized in the treaties—to hunt and fish, for example—were interpreted narrowly and seldom given effect. In the latter part of the twentieth century, however, courts and governments began to recognize the legal relevance of treaty promises. In *R v Marshall*, the Supreme Court of Canada concluded, significantly, that Treaties of 1760–61 protect a right to fish for commercial purposes.[2]

Yet the court restricted this right in two important respects: it would be subject to Crown regulation and possible infringement, and it would be limited in scale to the pursuit of a "moderate livelihood."[3] These limits constrained Indigenous control over the exercise of treaty rights and, in doing so, set the table for subsequent conflicts when Indigenous peoples asserted the right not only to participate in a commercial fishery but also to regulate their commercial fishing according to their own legal authority and free from state interference. Since the *Marshall* decision, Indigenous assertions of jurisdiction have been met with strong opposition from the Crown and, at times, violence from non-Indigenous fishermen. Access to the fishery and disputes over which (and whose) legal rules ought to determine such access, have been a source of ongoing tension.

This article considers how legal doctrine may more effectively mediate these disputes. It does so by considering the history of legal pluralism that the Treaties of Peace and Friendship sought to mediate and whether, and to what extent, the *Marshall* framework can allow space for Indigenous jurisdiction. It considers how a recoverable tradition of legal pluralism, visible in the treaty relationship, may inform substantive visions of treaty interpretation in the present day. While resolution of the ongoing jurisdictional disputes that have persisted since *Marshall* requires negotiated political solutions, judicial doctrine must be considered in light of the law's distributive effects. Law distributes bargaining power between parties.[4] Legal doctrine sets the terms of negotiations and is one factor determining the relative bargaining power of the parties. Judicial interpretation of treaty rights, therefore, has an important role to play even where negotiated solutions are the preferred outcome.

Legal Pluralism and the Treaties of Peace and Friendship

The Treaties of Peace and Friendship were intersocietal constitutional arrangements that mediated legal pluralism and the autonomy and co-existence of distinct political communities. This framing requires elaboration. Legal pluralism refers to the existence of multiple legal and normative orders in a geographic area.[5] Legal pluralists analyze complex interactions between multiple legal and normative orders. They

[1] James (Sa'ke'j) Youngblood Henderson, *Elilewake Compact: The Mi'kmaw, Wolastoqey, and Passamaquoddy Nations' Confederation with Great Britain, 1725-1779, Vol 1* (Saskatoon: Indigenous Law Centre, 2020); William C. Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Jr.* (Toronto: University of Toronto Press, 2002).

[2] *R v Marshall (No. 1),* [1999] 3 SCR 456; *R v Marshall (No. 2),* [1999] 3 SCR 533.

[3] *Ibid*.

[4] Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

[5] Sally Falk Moore, "Legal Pluralism as Omnium Gatherum," *FIU Law Review* 10, no. 1 (2014): 5. See also Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: Cambridge University Press, 2012) and Jeremy Webber, "Legal Pluralism and Human Agency," *Osgoode Hall Law Journal* 44 (2006): 167. For a comprehensive overview of approaches to legal pluralism, see Brian Z. Tamanaha, *Legal Pluralism Explained: History, Theory,*

often emphasize the legal and normative significance of various types of law, including non-state law and varieties of customary and traditional law.[6] Pluralism, therefore, provides helpful conceptual tools for analyzing regions such as Mi'kma'ki/ Wulstukwik in the eighteenth century, where legal complexity prevailed and partial and attenuated forms of sovereignty and law overlapped in nuanced ways.

The laws of the Mi'kmaq, Wolastoqey, and Passamaquoddy peoples were predominant in Mi'kma'ki/Wulstukwik/Peskotomuhkatikuk in the seventeenth and early eighteenth centuries. Most inhabitants of the region were Indigenous and lived by the laws of the communities and nations. Many early European settlers had to engage with Indigenous laws in areas like trade, intersocietal marriage, resource use, and diplomacy. Colonial and imperial law had little impact on the lives of those living in the region. While oral histories are clear about the existence of Indigenous legal orders, such orders were also visible to European observers. In the 1690s, for example, missionary Chrestien Le Clercq observed that the Mi'kmaq of the Gaspé Peninsula distributed hunting grounds "according to the customs of the country, which serve as laws and regulations to the Gaspesians."[7] Some European theorists also recognized the legal and political character of Indigenous peoples. Fransiscus de Vitoria, for example, argued in the early sixteenth century that the peoples of the Americas had rights of property deriving from natural law *and* their own structures of governance and civil authority.[8] Even in the early nineteenth century, when ideologies of Indigenous inferiority had gained more traction, Nova Scotia Judge T.C. Haliburton wrote that the Mi'kmaq "never litigate or are in any way impleaded. They have a code of traditionary and customary laws among themselves."[9]

These laws had many sources and were given expression in Indigenous languages. The Mi'kmaw language includes words expressing many legal concepts, including words referring to "injury, loss, security, empowerment, harmony, revenge, shame, forgiveness, banishment, integration, and balance."[10] The Mi'kmaw legal order was (and is) tied to particular ecologies, sense of place, spirituality, and epistemology; it was grounded in notions of reciprocity and relationality.[11] Mi'kmaw, Wolastoqey, and Passamaquoddy laws governed internal affairs and domestic issues within nations and communities, as well as external or transnational affairs, regulating relationships between nations and communities.[12] Mi'kmaw law, for example, dealt with domestic issues such as dispute resolution, individual freedoms,

Consequences (New York: Oxford University Press, 2021). For an analysis of legal pluralism in the context of Indigenous rights, see Kirsten Anker, *Declarations of Independence: A Legal Pluralist Approach to Indigenous Rights* (London: Routledge, 2014).

[6] Berman, 54.

[7] Wicken, 34.

[8] Fransiscus de Vitoria, "De Indis et de Ivre Belli Reflectiones," [1534], ed. Ernest Nys, trans. John Pawley (Washington, DC: Carnegie Institution, 1917), 120–122.

[9] L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713–1867* (Vancouver: UBC Press, 1979), 143; L. Jane McMillan, *Truth and Conviction: Donald Marshall Jr. and the Mi'kmaw Quest for Justice* (Vancouver: UBC Press, 2018), 83.

[10] McMillan, 73.

[11] Trudy Sable and Bernie Francis, *The Language of This Land, Mi'kma'ki* (Sydney: Cape Breton University Press, 2012), 32. As Sakej Henderson explains, "Mikmaq customary law produced a matrix of processes which provided guidelines in broad outline, not in precise detail." See James [sakéj] Youngblood Henderson, "First Nations' Legal Inheritances in Canada: The Mikmaq Model," *Manitoba Law Journal* 23, no. 1 (1995): 15. See also Henderson, *Elilewake Compact,* 129.

[12] This is developed at length in Robert Hamilton, *Legal Pluralism and Hybridity in Mi'kma'ki and Wulstukwik, 1604–1779: A Case Study in Legal Histories, Legal Geographies, and Common Law Aboriginal Rights* (PhD diss., University of Victoria, 2021).

resources use, marriage, adoption, and remedies and punishment for harms.[13] Further, nations had well-defined structures of internal governance. For the Mi'kmaq, the nation was structured through districts and extended families that were guided by individual "*Sakamow*." These individuals "had collective responsibility along with the "*saya*" (leaders of many extended families) and "*kaptins*" (community spiritual leaders), to guide districts in all matters."[14] The leaders of families, communities, and districts formed the Grand Council (*Sante Mawiomi*), a deliberative body governed by consensual decision making that dealt with matters of national significance.

The Wabanaki confederacy exemplifies Indigenous transnational law in the region. The confederacy included nations inhabiting the present-day Maritime provinces, the Gaspé Peninsula, and parts of New England.[15] The constitutional structure of the confederacy accommodated the autonomy of member nations.[16] It dealt with rights and obligations concerning war and peace, diplomatic protocols and structures of alliance and kinship, regulation of trade, and access to natural resources. Like other Indigenous confederacies, it reflected a need to organize political associations consisting of several distinct nations and capable of responding to shifting political, economic, and social realities in the post-contact period.[17]

In both its internal and transnational dimensions, Indigenous law structured distinct political territories. The laws were connected to a sense of Mi'kmaw, Wolastoqey, or Passamaquoddy *territory.* The Nova Scotia Provincial Court, for example, acknowledged that the Mi'kmaq had "a sense of territoriality" that was demonstrated "from everything they said to the British from 1713 to 1760 and beyond well into the nineteenth century."[18] The Mi'kmaq "made it clear they considered all of Nova Scotia their land, their territory. They repeatedly accused the British of taking their land without permission."[19] This sense of territoriality informed the Indigenous approach to treaty making with the British.

Several other legal regimes shaped social, economic, and political relations in the region in the seventeenth and eighteenth centuries. French and British imperial law, the law of nations, the forms of customary and ecclesiastical law in Acadian communities, as well as the laws of Massachusetts, Nova

[13] McMillan, *Truth and Conviction,* 66–84; Henderson, *Elilewake Compact,* 85–135. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 23–24.

[14] Henderson, "First Nations' Legal Inheritances," 12. Henderson, *Elilewake Compact,* 87.

[15] James (Sa'ke'j) Youngblood Henderson. "Mi'kmaw Tenure in Atlantic Canada," *Dalhousie Law Journal* 18 (1995): 239; Wicken, *Mi'kmaq Treaties,* 40; Harald E.L. Prins, *The Mi'kmaq: Resistance, Accommodation, and Cultural Survival* (Orlando: Harcourt Brace, 1996), 117–19. Most accounts place the creation of the confederacy in the mid-late seventeenth century, a response to conflict between Algonquian Indigenous nations and an attempt deter the expansion of the New England colonies. Henderson writes that the confederacy was established to "end the constant fighting among the Lnu'uk nation." See James (Sa'ke'j) Youngblood Henderson, *Wabanaki Compact: The Foundation of Treaty Federalism in North America, 1621–1728* (Saskatoon: Indigenous Law Centre, 2020), 6. See also Lewis Mitchell, *Wapapi Akonutomakonol: The Wampum Records, Wabanaki Traditional Law,* edited and translated by Robert M. Leavitt and David A. Francis (Fredericton: Micmac-Maliseet Institute, 1990), 56–60; John Grenier, *The Far Reaches of Empire: War in Nova Scotia, 1710–1760* (Norman: University of Oklahoma Press, 2008), xiv.

[16] Henderson, "Mi'kmaq Model," 7.

[17] Frank Speck, "The Eastern Algonkian Wabanaki Confederacy," *American Anthropologist* 17, no. 3 (1915): 492. See also Patrick J. Augustine, "Mi'kmaw Relations," in *Living Treaties: Narrating Mi'kmaw Treaty Relations,* ed. Marie Battiste (Sydney: Cape Breton University Press, 2016), 57; Nancy Shoemaker, *A Strange Likeness: Becoming Red and White in Eighteenth-Century America* (Oxford: Oxford University Press, 2006), 83–85.

[18] *R v Marshall*, 2001 NSPC 2.

[19] *Ibid*.

Scotia, and New France all impacted the lives of individuals and communities in the region and shaped it as a socio-legal space (or as related social-legal spaces). The complex entanglements of these distinct regimes gave rise to novel forms of legal layering, contestation, and hybridization. The several distinct peoples who were active in the region drew on many different types of law in making claims to legal and political authority. To say that the Treaties of Peace and Friendship were a negotiated body of intersocietal law that mediated legal pluralism is to set them in this context and to see them as legal tools that were used to mediate complex relationships between political communities.

To describe the era as legally pluralistic, however, is not to idealize it. Hostility and violence were endemic during many periods. The violence was between political, law-governed communities, and the treaty relationship was an effort at facilitating their co-existence through the articulation of shared legal norms. The next question is *how* the Treaties of Peace and Friendship mediated this evident legal pluralism. A follow-up question is whether the treaties can be understood as ceding the right of Indigenous peoples to be governed according to the legal orders just outlined. Four broad subject matters dealt with in the treaties illustrate how they structured legal and political relationships: (1) sovereignty, submission, friendship, and protection; (2) land; (3) criminal law; and (4) hunting, fishing, and lawful occasions.

The treaty negotiated in 1725 and ratified in 1726 is the earliest recognized Peace and Friendship Treaty. It was renewed in several subsequent agreements and its terms help provide context for later agreements.[20] The written part of the 1725–26 treaty is made up of two documents: the "Articles of Peace and Agreement," which detail the promises made by "the Indians," and the "Reciprocal Promises," which detail the promises made by the Crown.

The scope and nature of the Crown sovereignty recognized in the treaties and the nature of the Indigenous submissions that were made must be considered in historical context and in consideration of the way these concepts were used and understood at the time. The Articles of Peace and Agreement in the 1725 Treaties address the Treaty of Utrecht, a treaty signed between Britain and France in 1713 and under which the British acquired sovereignty in Acadia from the French, explicitly:

> Whereas His Majesty King George by the Concession of the Most Christian King made att the Treaty of Utrecht is become ye Rightfull Possessor of the Province of Nova Scotia or Acadia According to its ancient Boundaries, wee the Said Chiefs & Representatives of ye Penobscott, Norridgewalk, St. Johns. Cape Sables & the said Tribes Wee represent acknowledge His Said Majesty King George's Jurisdiction & Dominion Over the Territories of the Said Province of Nova Scotia or Acadia & make our Submission to His Said Majesty in as Ample a Manner as wee have formerly done to the Most Christian King.[21]

The British wanted Indigenous recognition of the interests they had acquired from the French, understanding that absent such recognition they held only a bare legal sovereignty recognized by European sovereigns but without acceptance by Indigenous peoples. Framed differently, they understood that, while the Treaty of Utrecht was binding as between the European nations that signed it, it could not have an

[20] There is some debate about whether the Treaties of 1760–61 signed between the British and the Mi'kmaq ought to be considered renewals of the previous treaties. The 1760 Treaty with the Wolastoqey is explicit on this point. The Mi'kmaq versions are not, though a contemporary account from the British states they were made "on the same terms" as that treaty. The trial and appellate courts in *Marshall* held that it was not a renewal. William Wicken argues that it was. Current accounts of the oral history suggest that all the treaties ought to be considered a related chain.

[21] *R v Marshall*, 2001 NSPC 2, 61.

impact on Indigenous peoples until terms were negotiated with them: the laws of one legal regime had to be brought into another. The clause above seems on its face to achieve the British goals of having their sovereignty and jurisdiction recognized and acquiring Indigenous submission to the overarching sovereign authority of the Crown.

Differing understandings of this clause, however, were from the outset central to the disparate understandings the British and Mi'kmaq had of their new treaty relationship.[22] Such disagreement persists. As Sakej Henderson wrote of former Grand Chief Alexander Denny, "Alex rejected the idea that the written copies of treaties in the archives were comprehensive or correct; they offered only a partial, English perspective alongside Mi'kmaw orally transmitted knowledge and law."[23] Beyond the distinction between the oral and written accounts of treaty agreements, however, the terms of the written version itself are open to interpretation. The notion of "submission," for example, must be nuanced by considering the other concepts used alongside it. The terms "friendship" and "protection," in particular, require attention. These terms appear frequently in the treaty record. In the *Reciprocal Promises* in the 1725–26 Treaty, John Doucet, lieutenant-governor of Nova Scotia, promised "the said Chiefs & their Respective Tribes all marks of Favour, Protection & Friendship." The 1752 Treaty is described at the head of the document as "Treaty or Articles of Peace and Friendship." The second article promises that "the said Indians shall have all favour, Friendship & Protection shewn them from this His Majesty's Government."[24] Article 6 states that the Mi'kmaq will visit the governor each October to receive presents and "Renew their Friendship and Submissions." Governors' commissions and instructions repeated the same. Governor Cornwallis was instructed to "send for the several heads of the said Indian nations or clans and enter into a treaty with them promising them friendship and protection on our part."[25] Friendship and protection are clearly given prominence in the treaty negotiations, instructions to Crown officials, and treaty documents themselves.

What did these terms mean? Friendship denoted peaceful relations and alliance. Protection speaks to the development of a direct relationship with the Crown, partly based on principles of Indigenous diplomacy and kinship, under which the Crown assumes obligations of protection. It reflects a relationship of suzerainty, in which the Crown acquires sovereignty, but also assumes obligations of protection.[26]

Read in this way, the term "submission" must be understood not as an unqualified submission to absolute Crown sovereign and legislative authority, but as compatible with the ongoing existence of Indigenous law and jurisdiction. Historical examples further the point. In the *Royal Proclamation, 1763*, for example, the British recognized Indigenous "Nations" existing within areas over which they had acquired sovereignty.[27] In the plan of 1764, which was designed to implement the *Royal Proclamation, 1763,* the British recognized that Indigenous nations had their own "civil constitution[s]."[28] The British acknowledged, in other words, that Indigenous nations had internal constitutional structures prior to

[22] *Ibid.*, 101.

[23] *Ibid*. See also Wicken, *Mi'kmaq Treaties,* 94.

[24] Bruce D. Clark, Micmac Grand Council, and Lisa Patterson, *The Mi'kmaq Treaty Handbook* (Truro: Native Communications Society of Nova Scotia, 1987).

[25] As reprinted in Henderson, "The Mikmaq Model," 8.

[26] Henderson, "Mi'kmaq Model," 8.

[27] *The Royal Proclamation*, dated 7 October 1763, reprinted in Clarence S. Bringham, *British Royal Proclamations Relating to America, 1603–1783* ed. (New York: Burt Franklin, 1911).

[28] Daniel K. Richter, *Trade, Land, Power: The Struggle for Eastern North America* (Pittsburgh: University of Pennsylvania Press, 2013), 177–201.

British and European assertions of sovereignty and the ongoing existence of Indigenous forms of governance in areas over which they asserted sovereignty.[29] British sovereignty and Indigenous self-government were not conceived of as mutually exclusive, and, in the British mind, self-governing nations could exist in areas subject to British sovereignty. This was also true for Chief Justice of the United States Supreme Court John Marshall. Writing in the early nineteenth century in a decision that Canadian courts have relied on extensively, Marshall CJ illustrated this by connecting the language the British, and later Americans, used—i.e., "treaty" and "nation"—with historical practices of treaty making and diplomacy. He held:

> The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, by the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.[30]

Marshall CJ referred to Indigenous nations as "domestic dependent nations," a term he used to express the idea that, while Indigenous nations' rights of governance were *limited* by colonization, they maintained rights of internal self-government and self-determination.[31] In interpreting treaties, he held that courts must not adopt an interpretation of treaties that would "convert a treaty of peace covertly into an act annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed."[32]

Again, while a surface textual reading of the Treaties of Peace and Friendship *might* support the idea that the Indigenous signatories intended to cede their political existence, a contextualized approach suggests another interpretation. While the treaties recognize the Crown acquisition of sovereignty, the attributes of that sovereignty must be assessed in relation to the legal nature of sovereignty at the time, the presence of terms such as "friendship" and "protection," the reality on the ground, and the perspectives of the Indigenous treaty partners. On this basis, the treaties ought not be read as eliminating Indigenous political existence, but as preserving it and establishing a framework for mediating the ongoing existence of multiple political communities.

This framework is evident in three further examples: land, criminal jurisdiction, and hunting and fishing rights. Land was a central concern to the treaty signatories, as Indigenous parties sought to limit intrusions into their territories and the British sought to solidify their control through settlement.[33] The Treaty of 1725–26 included important obligations regarding land use and settlement. In Clause 3 of the Articles of Peace and Agreement, the Wabanaki agreed "That the Indians shall not molest any of his

[29] See, for example, Mark D. Walters, "Mohegan Indians v. Connecticut (1705–1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America," *Osgoode Hall Law Journal* 33 (1995): 785.

[30] *Worcester v Georgia*, 31 US 515 (1832).

[31] *Ibid.*, 519.

[32] *Ibid*.

[33] Jeffers Lennox, *Homelands and Empires: Indigenous Spaces, Imperial Fictions, and Competition for Territory in Northeastern North America, 1690–1763* (Toronto: University of Toronto Press, 2017).

Majesty's Subjects or their dependents in their Settlements already made or Lawfully to be made or in carrying on their Trade or other affairs within the said Province."[34] In the Reciprocal Promises, Doucet agreed that "the said Indians shall not be Molested in their Persons, Hunting Fishing and Shooting & planting on their planting Ground nor in any other of their Lawfull occasions."

Clause 3 creates ambiguity. The first part of the clause is unambiguous: the Wabanaki agreed not to molest settlements that had already been made. They further agreed not to "molest" any future settlements that were lawfully made. In other words, they consent to future settlements that occur "lawfully." The challenge is in defining what lawfully was intended to mean given the absence of a definition in the written text itself. A resolution to that question is beyond the scope of this paper. What is notable for current purposes is the shared development of a process and set of norms governing land use and settlement. While views of the intention of the parties to this agreement and its legal effect are disputed, the point here is that the agreement itself represents an attempt to structure shared legal principles and norms to mediate the relations between political communities, particularly with respect to land use.

The treaties also dealt with criminal jurisdiction in a manner that preserved and facilitated legal pluralism. The Articles of Peace and Agreement of the 1726 Treaty include three clauses dealing with criminal jurisdiction. In the first, the Wabanaki agreed that "if there Happens any Robbery or outrage Comitted by any of our Indians the Tribe or Tribes they belong to shall Cause satisfaction to be made to ye partys Injured." Indigenous law would guide the community's response to the offender, ensuring they met their collective obligation to provide restitution. Disagreements between Wabanaki and settlers would be submitted to the British for resolution through British law: "In the case of any misunderstanding, Quarrel or Injury between the British and the Indians no private revenge shall be taken, but Application shall be made for redress according to His Majesty's Laws." The Wabanaki also agreed to assist with enforcement of British laws, agreeing that "the Indians shall not help to convey away any Soldiers belonging to His Majesty's forts, but on the contrary shall bring back any soldier they shall find endeavoring to run away."[35]

The Reciprocal Promises of the 1726 Treaty outline British obligations regarding criminal jurisdiction: "If any Indians are Injured By any of his Majesty's Subjects or their Dependents They shall have Satisfaction and Reparation made to them According to his Majesty's Laws whereof the Indians shall have the Benefit Equall with his Majesty's other Subjects."[36] Article 8 of the 1752 *Treaty* reads: "All Disputes whatsoever that may happen to arise between the Indians now at Peace, and others His Majesty's Subjects in this Province shall be tryed in His Majesty's Courts of Civil Judicature, where the Indians shall have the same benefit, Advantages and Priviledges, as any others of His Majesty's Subjects."[37]

In this way, civil and criminal matters were dealt with through shared and exclusive jurisdictions. The parties would deal with internal matters internally, through their own laws. Where an individual harmed an individual from the other community, the community of the offender had an obligation to ensure restitution. Conflicts between Wabanaki and settler individuals were to be brought to the colonial courts, with the Wabanaki agreeing not to pursue personal revenge and the Crown promising that Wabanaki individuals have all the rights and privileges of a British subject when coming before His

[34] Clark, Micmac Grand Council, and Patterson.

[35] Clark, Micmac Grand Council, and Patterson.

[36] *Ibid*.

[37] *Ibid*.

Majesty's Courts.[38] As a result, "Each community had the liberty and capacity to create and interpret law within their space….The terms of the treaties established that consensual rules validated and legitimated boundaries and bridged the two co-existing legal inheritances."[39]

Finally, in a clause relating to hunting, fishing, and land use, the Reciprocal Promises in the 1726 Treaty stated: "That the Said Indians shall not be Molested in their Persons, Hunting Fishing & Shooting & planting on their planting Ground nor in any other their Lawfull occasions." The interpretation of the Peace and Friendship Treaties in courts has been largely confined to hunting, fishing, and lumber harvesting rights. Rights to hunt and fish for food, social, and ceremonial purposes have been broadly recognized throughout the Maritime provinces, as has the right to harvest lumber for personal purposes.[40] The references to "planting on their planting Ground" and the freedom to pursue "Lawfull occasions" have received little treatment. The New Brunswick Provincial Court held that

> the definition of "Occasions" clearly means need and the Signatories to the Treaty of 1725 had a need to use the product of the forest to maintain their traditional way of living. It was not unlawful to cut and carry away wood from the forest in 1725, and therefore liberally construing the expression "Lawful Occasions" would vest in the Signatories that treaty right.[41]

In other words, "lawful" includes those things that are not *un*lawful. Like the clauses on land, these clauses are explicit in structuring a shared legal referent for determining the legality of specific activities. While questions remain as to the definition of "occasions" and what body of law "lawfull" referred to, the treaty framework itself can clearly be seen as negotiating the parameters of the legal relationships between the parties in a manner that preserves their internal autonomy.

Treaty law applied to both Indigenous and non-Indigenous signatories individually and collectively. Thus, we find treaty provisions establishing guidelines for the behaviour of these individuals and collectives. The concluding clause of the Articles of Peace and Agreement of the 1726 Treaty, for instance, reads that "every one of the aforegoing Articles…shall be punctually observed and duly performed by Each & all of us the Said Indians."[42] The Reciprocal Promises ensures that Mi'kmaq prisoners will be released as a mark of "true Observation & Faithfull Performance of all and Every Article Promised on His Majesty's part by the Government." Promises made on behalf of the king himself bound English subjects in specific ways, such as the promise that the Wabanaki would "not be molested" in various activities by "His Majesty's Subjects or Their Dependents." Illustrating the importance of the treaties to both communities, a proclamation announcing the terms of the 1752 Treaty was printed "on beautifully printed broadsides bearing the royal coat of arms and in both English and French" and posted at the English settlements and forts.[43] Treaty law was geographically extensive, covering lands used by the Mi'kmaq, Wolastoqey, and Passamaquoddy for hunting, fishing, and planting, their areas of settlement, and existing British settlements.

[38] Henderson, "Mi'kmaq Model," 18.

[39] *Ibid*., 19.

[40] See Thomas Isaac, *Aboriginal and Treaty Rights in the Maritimes: The Marshall Decision and Beyond* (Saskatoon: Purich, 2005).

[41] *R v Sappier,* 2003 NBPC 2; [2003] NBJ No.25, para 35.

[42] Clark, Micmac Grand Council, and Patterson, 24.

[43] Stephen E. Patterson, "Indian-White Relations in Nova Scotia, 1749–61: A Study in Political Interaction," *Acadiensis* 23, no. 1 (1993): 49.

The territory was not considered as subject exclusively to British law, even by the British. Uniform centralized authority was not possible, nor what the treaty parties envisioned. Instead, they developed a body of intersocietal law outlining areas of shared and exclusive jurisdiction under an umbrella of negotiated norms. Pluralism was maintained by the negotiation of shared legal orders that could accommodate a plurality of internal normative and legal orders.[44]

It might be argued that this picture of the treaties is unfounded. Read on their face, the later Peace and Friendship Treaties, in particular, suggest a submission to British authority and jurisdiction. By the latter half of the eighteenth century, British power in the region was significant, and Indigenous nations were not only relatively weaker than they had been before but lacked French allies.[45] It might be argued, then, that a contextualized reading supports the notion that the treaties constituted submission to absolute British authority. A competing approach, of course, rejects outright that the words of the treaty reflect the intention or understanding of the parties at all. From a strictly legal perspective, guidance from the Supreme Court requires that the common intention of the signatories be considered, and that ambiguities and uncertainties be resolved in favour of the Indigenous signatories.[46] The claim I have made here—that the treaties mediated legal pluralism—survives either reading. Even a literal reading of the submission to the jurisdiction and sovereignty of the Crown, one that takes the English usage of the terms in the treaties on face value, need not be fatal to a recognition that Indigenous laws survived the signing of the treaties. Indeed, contemporary observers confirmed this, and few historians dispute it.

How does this relate to the question of a moderate livelihood fishery? The central point of conflict in the Maritime fishery has been *jurisdiction.* Do Indigenous signatories have any jurisdiction in relation to the exercise of their rights? Understanding the treaties as mediating pluralism—that is, as structuring the co-existence of multiple jurisdictions—can provide a way of understanding the treaty relationship as supporting plural jurisdictions rather than extinguishing Indigenous law and internal self-government. While the full history of the treaties is complex, this aspect is a recoverable tradition that can be drawn on today. The next question is how, or to what extent, judicial principles of treaty interpretation can reflect this.

The *Marshall* Decisions and Indigenous Jurisdiction

In *Marshall,* a majority of the Supreme Court of Canada held that the Treaties of 1760–61 protect a right to a commercial fishery, a major victory for the Indigenous signatories. Both the majority and dissent articulated principles of treaty interpretation that have potential to give effect to substantive treaty implementation in renewed partnerships.[47] There remain, however, important limits to the *Marshall* decision, and those limitations have contributed to ongoing conflict over access to and control of fisheries. While recognizing a right to access or participate in a small-scale commercial fishery, the Supreme Court did not recognize Indigenous jurisdiction or law-making authority in relation to the exercise of that right. This has been a source of ongoing conflict, as Indigenous peoples often understand the treaties as

[44] For an analysis in another context, see Michael J. Witgen, *An Infinity of Nations: How the Native New World Shaped Early North America* (Philadelphia: University of Pennsylvania Press, 2012), Juliana Barr and Edward Countryman, eds., *Contested Spaces of Early America* (Philadelphia: University of Pennsylvania Press, 2014).

[45] See generally Grenier, *The Far Reaches of Empire*; John G. Reid, *Essays on Northeastern North America: Seventeenth and Eighteenth Centuries* (Toronto: University of Toronto Press, 2008).

[46] *Marshall (No. 1)*, para 78.

[47] *Ibid.,* para 70.

protecting not only the right to engage in activities but also the authority to regulate the exercise of their rights and to have a role in resource management. Sipekne'katik Chief Mike Sack put this clearly in 2021, more than twenty years after the *Marshall* decision:

> We're going to continue to fish our own season, a treaty-rights based fishing season, and we'll determine what our season is going to be and how we're going to fish and everything around that. We have a treaty right, and that's what we're going off of. You know, they're trying to loop everything into the Marshall II decision that gives them [the Department of Fisheries and Oceans] a say in what we do, and they completely don't have any say in it.[48]

The nature of the dispute is clear: the Mi'kmaq of Sipekne'katik not only assert the right to fish and to sell their catch to obtain a moderate livelihood, which all relevant parties agree *Marshall* provides, they also assert that the treaty protects their authority to regulate and manage their own fishery. The treaty protects not only access to a resource but the authority to determine and regulate the parameters of that access. The Crown rejects this position, arguing a treaty-protected moderate livelihood fishery is nonetheless legally subject to Crown regulation. This likely informed the legal advice provided to the minister of the Department of Fisheries and Oceans before she announced in the spring of 2021 that future Mi'kmaw fishing would be regulated and federal fishing seasons enforced.[49] These recent conflicts are replays of those that occurred immediately following the *Marshall* decision when Mi'kmaw fishers at the Esgenoôpetitj First Nation began fishing under their own licencing regime and were met with enforcement from the Department of Fisheries and Oceans.

This disagreement stems in part from the limitations on the treaty right recognized in *Marshall* and the follow-up decision, *Marshall 2*. Two specific aspects of the decisions limit Indigenous jurisdiction. First, the right is subject to Crown regulation and possible infringement. Second, it is limited in scale to the pursuit of a "moderate livelihood."[50] The first limitation has two distinct elements, *regulation* and *infringement*. The Supreme Court held in its earliest cases interpreting Aboriginal rights under Section 35 of the constitution that the Crown may infringe such rights, subject to judicial oversight through a justification test. The court began with the idea that "no rights are absolute" and developed a justification for applying that idea to Aboriginal rights that it grounded in Crown sovereign authority. The court later extended this idea to treaty rights in *Badger*.[51]

While the justifications for this move are debatable and have come under frequent scrutiny, the impact may be somewhat muted, at least in respect of the early articulations of the infringement test. The burden for justifying an infringement of a s.35 right is high. *Marshall,* however, nuanced *Badger* in a way that created a new problem and has contributed to uncertainty, frustration, and conflict. The *Marshall* court's treatment of the relationship between *regulation* and *infringement* is the root of the issue. The Supreme Court has developed a framework for determining when an infringement can be justified by the

[48] "Sipekne'katik Chief Says He Won't Play by Ottawa's Rules for Mi'kmaw Fishery," *CBC Radio—As it Happens*, March 4, 2021. https://www.cbc.ca/radio/asithappens/as-it-happens-thursday-edition-1.5936833/sipekne-katik-chief-says-he-won-t-play-by-ottawa-s-rules-for-mi-kmaw-fishery-1.5936840.

[49] "Fisheries Officers Will Enforce the Rules If Mi'kmaq Fish Out of Season, Says Minister," *CBC Radio—As It Happens,* March 9, 2021. https://www.cbc.ca/radio/asithappens/as-it-happens-the-tuesday-edition-1.5942485/fisheries-officers-will-enforce-the-rules-if-mi-kmaq-fish-out-of-season-says-minister-1.5942494.

[50] *Marshall (No. 1)*.

[51] *R v Badger*, [1996] 1 SCR 771.

Crown.[52] The Indigenous party must first establish that their right was infringed by showing a *prima facie* infringement. The bar for this, in early cases, was low. Examples that might serve of evidence of infringement include if a limitation is unreasonable, limits the preferred means of exercising the right, or imposes undue hardship. If an infringement is established on this basis, the Crown then must demonstrate that the infringement was justified.[53]

In *Marshall,* the court emphasized that not every limitation on, or regulation of, a right constitutes an infringement requiring justification; the Crown may regulate the exercise of treaty rights without justifying that regulation as an infringement:

> Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such regulations would not constitute an infringement that would have to be justified under the *Badger* standard.[54]

Rather than the criteria used in earlier cases—the "preferred means of exercising the right" seems particularly relevant in this context—the court held that as long as regulations "accommodate" the right there is not an infringement.[55] This creates a lack of clarity about what level of restraint the constitution places on the Crown's authority and whether any space remains for Indigenous decision making. It is not clear, that is, how extensive Crown regulations may be before they amount to an infringement requiring justification. The consequences are significant, as the burden for justifying an infringement of a right is much higher than merely "accommodating" the right.

The second meaningful limitation in *Marshall* is an internal one: the moderate livelihood standard. While the court recognized a commercial right to fish, it was careful to circumscribe that right. The right is limited in scope and does not "extend to the open-ended accumulation of wealth."[56] The court arrived at this conclusion by holding that the parties to the treaty understood the promise of access to trading posts as including a right to obtaining "necessaries."[57] This, in the modern context, includes the right to obtain a moderate livelihood through trade. The now well-known "moderate livelihood" standard emerged as the modern evolution of an historical right to obtain "necessaries" through trade. The commercial right to fish is therefore limited at the outset: the rights holder may trade in goods only to obtain a moderate livelihood. Regulations on the exercise of this right need not be justified so long as they "accommodate" the right by ensuring any regulatory regime permits access to the resource to the extent required to obtain a "moderate livelihood."

Opinions differ about whether these limitations are legally sound, to say nothing of their moral or political justifiability. These issues need not be resolved here. For current purposes, we need only note

[52] *R v Sparrow*, [1990] 1 SCR 1075.

[53] *Ibid*.

[54] *Marshall (No. 1)*, para 61; *Marshall 2*, para 37.

[55] *Ibid*. For analysis of this shift, see Robert Hamilton and Nicholas P. Ettinger, "The Future of Treaty Interpretation in *Yahey v British Columbia*: Clarification on Cumulative Effects, Common Intentions, and Treaty Infringement," *Ottawa Law Review* 54, no. 1 (2023): 109.

[56] *Marshall (No. 1)*, para 17.

[57] *Ibid*.

that these limitations set the parameters within which the parties exercise authority and jurisdiction and, further, that they allocate bargaining power between the parties. Disagreements about the scope and justifiability of the limitations have therefore shaped conflicts in the region and the legal and political arguments parties have brought forward. These arguments are also shaped by contested understandings of the nature of the treaties and the rights they protect.

The Supreme Court has held that the scope of the rights protected in the treaties is determined by considering the common intention of the parties to the treaty when it was signed. The same is true of the limitation on the rights.[58] In this, *Marshall* implicitly concludes that it was the intention of the Indigenous parties to submit themselves to absolute Crown authority in exercising the rights recognized in the treaty and in carrying on the way of life the treaties were intended to protect. While contradictory evidence was provided as to the nature of the Indigenous submissions in the treaties, which remains contested in both the legal and historical discourses, the court in *Marshall* did not identify any evidence as supporting such a conclusion, nor make such a conclusion explicit. A richer understanding of the common intention of the parties can be found with a fuller picture of the legal pluralism that imbued the treaty relationship and the negotiated form of constitutionalism it shaped.

Treaty Interpretation and Legal Pluralism

Marshall was a significant development in treaty interpretation. The majority emphasized the importance of the common intention of the parties to the treaty to determining treaty rights: the text of the treaty alone, often not reflective of the negotiations and penned in the language of only one party, would be secondary to a contextual analysis of the intentions of the parties to the agreement. The dissent provided an exhaustive summary of relevant principles of treaty interpretation that have been cited extensively since. The result—the recognition of a commercial fishing right—was a significant development in Canadian law. Yet, for reasons outlined above, the conclusions in *Marshall* do not provide space for Indigenous jurisdiction. Can treaty interpretation doctrine reflect the function of the treaties as mediating legal pluralism?

Part of the answer was developed in a different treaty rights case from Mi'kma'ki fifteen years before *Marshall.* In *Simon,* the Supreme Court was asked whether the Treaty of 1752 included a right to hunt and whether that right was protected from provincial intrusion.[59] Answering this required the court to consider the legal status of the treaty and whether the Mi'kmaq had the capacity to enter treaties. This latter question was a remnant of the 1928 *Syiliboy* decision.[60] In *Syliboy,* the Nova Scotia Court had held that the Treaty of 1752 was not a treaty at all. The Mi'kmaq, Judge Patterson held, did not have the capacity to enter treaties. In *Simon,* the Supreme Court of Canada revisited the issue. The court held that the Mi'kmaq *did* have the capacity to enter treaties. The Treaty of 1752 was, in fact, a treaty.[61] The nature

[58] *Ibid.,* para 59.

[59] *Simon v The Queen,* [1985] 2 SCR 387.

[60] *Rex v Sylliboy,* 1928 CanLII 352 (NS SC).

[61] *Ibid.,* para 21. For a comparative analysis of *Sylliboy* and *Simon* similar to the one provided here, see Gordon Christie, "Justifying Principles of Treaty Interpretation," *Queen's Law Journal* 26, no. 1 (2000): 143. The *Simon* court was highly critical of *Sylliboy:* "It should be noted that the language used by Patterson J. illustrated in this passage reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. With regard to the substance of Patterson J.'s words…his conclusions on capacity are not convincing." See *Simon,* 399.

of this revision is important. It depends on a recognition that Indigenous peoples were political entities, possessing political agency. It is a foundational shift that recognizes the legal standing of Indigenous peoples as *peoples.*

Marshall, however, fails to recognize the nature of this shift or to follow it all the way through. *Marshall* excludes Indigenous jurisdiction by insisting the Crown maintains regulatory authority and, in seeking to ascertain the common intention of the treaty parties at the time of the treaty's signing, the political agency and legal regimes of the Indigenous signatories were visibly absent. The implicit conclusion that the Indigenous signatories *intended* to subject the exercise of their rights to Crown regulation and to a regime in which the "open-ended accumulation of wealth" would be held by the Crown and settlers but not available to Indigenous parties was possible in part because of the limited political agency the Court assigned the Indigenous signatories. The generative potential of the recognition of the political character of Indigenous peoples in *Simon* was tempered.[62]

How can principles of treaty interpretation help courts carry through the shift inaugurated in *Simon*? Two changes in emphasis are central. First, Indigenous law and governance can inform the "common intention" analysis. In *Restoule,* the Ontario Superior Court of Justice noted the importance of Indigenous laws and governance to treaty interpretation. The court summarized the approach:

> The role of Anishinaabe law and legal principles presented at trial was part of the fact evidence into the Indigenous perspective. The Plaintiffs did not ask the court to apply Anishinaabe law. Rather, the Plaintiffs and Canada submit that the court should take respectful consideration of Anishinaabe law as part of the Anishinaabe perspective that informs the common intention analysis.[63]

The court did not venture to apply Anishinaabe law. Nor did the parties ask the court to do so. Rather, the court was asked to consider Anishinaabe law as evidence of the "aboriginal perspective" when seeking the ascertain the common intention of the parties to the treaty. Understanding the Indigenous perspective on the nature and purpose of the treaty required an understanding of Anishinaabe legal principles and practices. To that end, the court examined not only the covenant chain alliance and history of Anishinaabe treaty making with the British Crown, but Anishinaabe structures of governance and legal principles.

For example, the court noted that

> the principles of [Anishinaabe] governance were based on sacred laws, among other sources. According to Elder Fred Kelly, two of the organizing principles of Anishinaabe law and systems of governance were pimaatiziwin (life), where everything is alive and everything is sacred, and gizhewaadiziwin (the way of the Creator), which encompasses the seven grandfather teachings or seven sacred laws of creation.[64]

The court examined council fires, the use of fire as a metaphor in political thought, and the kinship and clan structures of Anishinaabe society as *legally relevant* to assessing what the parties to the treaty

[62] See Ryan Beaton, "De Facto and De Jure Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada," *Constitutional Forum* 26, no. 4 (2018): 25.

[63] *Restoule v Canada (Attorney General)*, 2018 ONSC 7701, para 13.

[64] *Ibid*., para 21.

agreed to.[65] Further, the court accepted expert evidence that "Anishinaabe governance also included the values of trust, responsibility, reciprocity, and renewal, and the understanding that the world is deeply interconnected and people must rely on one another to thrive."[66] The court concluded that, among other relevant considerations, the common intention of the parties must be understood with reference to "the Anishinaabe perspective, particularly looking at the concepts of respect, responsibility, reciprocity, and renewal as manifested in Anishinaabe stories, governance structures, and political relationships, including alliance relationships."[67] Further, the common intention must be interpreted in a manner "that promotes the treaty's reconciliatory function,"[68] and treaties must be interpreted in light of the purpose of historic treaties: "to reconcile the pre-existence of Indigenous societies with the assertion of Crown sovereignty."[69] The use of the word "societies" here recognizes the political character of Indigenous nations that entered treaties with the Crown, and serves to remind us that the purpose of treaties, and indeed of giving aboriginal and treaty rights constitutional protection, is to reconcile the pre-existence of these societies with Crown sovereignty. Inherent in this is a recognition that Crown-Indigenous treaties recognize the political character of Indigenous people *qua* peoples and strive to reconcile that with the Crown's sovereignty. This understanding of treaties cannot, to return to Chief Justice Marshall's framing, be read as consistent with an interpretation of the treaties of peace that would annihilate the political existence of one of the parties.

A similar shift in emphasis can be seen in the *Yahey* decision of the British Columbia Supreme Court.[70] *Yahey* considered whether a treaty infringement can be made out based on the piecemeal erosion of treaty rights caused by the cumulative impacts of industrial development and Crown decisions concerning resource use. The court concluded that it can. That in itself may be of relevance when considering the question of infringement in the Peace and Friendship Treaty context.

What I want to emphasize here, though, is a different aspect of the decision. Central to finding that Blueberry River First Nation's treaty rights had been infringed by cumulative impacts was the conclusion that Treaty 8 promises to protect not only participation in particular activities, but the *way of life* associated with those activities. The court held: "Treaty 8 guarantees the Indigenous signatories and adherents the right to continue a way of life based on hunting, fishing, and trapping, and promises that this way of life will not be forcibly interfered with."[71] This conclusion was based on the particular context of Treaty 8 and the oral promises made during those negotiations. A similar analysis, however, may be relevant to the Peace and Friendship Treaties. At the *Marshall* trial, for example, Judge Embree said of the 1760 Treaties, "I accept as inherent in these treaties that the British recognized and accepted the existing Mi'kmaq way of life."[72] As the Supreme Court noted, "the trial judge found that the British wanted the Mi'kmaq to continue their traditional way of life."[73] Further, an expert witness for the Crown stated: "In recognizing the Micmac by treaty, the British were recognizing them as the people they were. They understood how

[65] *Ibid*., paras 20–32.

[66] *Ibid*., para 21.

[67] *Ibid*., para 411.

[68] *Ibid*., para 322.

[69] *Ibid.*

[70] *Yahey v British Columbia*, 2021 BCSC 1287.

[71] *Ibid.,* para 175.

[72] Marshall trial, para 116; *Marshall (No. 1),* para 19.

[73] *Marshall (No. 1)*.

they lived and that that meant that those people had a right to live in Nova Scotia in their traditional ways."[74] That this way of life included trade in resources formed the basis of the majority's decision that the "truckhouse" clause was intended to protect a right to trade.

Any "internal limitations" to the treaty must be read as consistent with the ongoing protection of this way of life. In the case of the interpretation of Treaty 8 in *Yahey*, that meant the promise that the Crown may take up lands for a variety of purposes must be read as consistent with a promise that Blueberry River's way of life would be protected. In the context of the 1760–61 Treaties, the internal limitation is the moderate livelihood standard.[75] This limitation must be read as consistent with the ongoing protection of the Wabankai way of life and with their *political existence.*

Taken together, these approaches to treaty interpretation, which amount to moderate shifts in emphasis rather than dramatic departures from precedent, present tools through which the legal pluralism of the Peace and Friendship Treaties may be reflected in contemporary law. The principles of law and structures of mediated pluralism outlined above can be drawn on in ascertaining the common intention of the parties to the treaties. In particular, the notion that Indigenous signatories to the Peace and Friendship Treaties intended to cede jurisdiction in relation to their own hunting and fishing, central activities to their way of life, should be closely considered in light of the analysis in *Restoule* and *Yahey*. No treaty decision in the Maritimes has considered the role of Indigenous legal orders when seeking to understand the common intention of the parties to the treaty, nor have they foregrounded the protection of a way of life associated with the rights protected in the treaties.

Conclusion

The treaties mediated legal pluralism. They were by no means perfect, and they failed to prevent the unilateral imposition of colonial rule. Negotiations have been unable to resolve current conflicts. One reason for this is that the Crown, relying on court decisions, has been able to deny Indigenous jurisdiction. Emphasizing the role of Indigenous law when ascertaining the common intention and understanding the treaties as protecting a *way of life* would help develop treaty interpretations that would recognize Indigenous jurisdiction and, in so doing, balance the negotiating tables so that effective negotiated solutions could be reached. Is it possible to hold that the Indigenous signatories intended to forever cede jurisdiction in relation to the activities required to sustain their way of life and sustenance without converting "a treaty of peace covertly into an act annihilating the political existence of one of the parties"? Surely, as Chief Justice Marshall held, "had such a result been intended, it would have been openly avowed."[76] It is time for judicial doctrine to recognize as much and to better reflect the legal pluralism that early treaties mediated.

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[74] *Ibid.*, para 37.

[75] *Ibid*.

[76] *Worcester v Georgia*, 31 U.S. 515 (1832) at 519.

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