INVITED ESSAY/ESSAI SOLLICITÉ

ROUGH WATERS: THE LEGACY OF THE MARSHALL DECISIONS WORKSHOP — A FISHING ORGANIZATION'S PERSPECTIVE

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Abstract

The Maritime Fishermen's Union (MFU), founded in 1977, is one of the largest fishing organizations representing over 1,300 independent inshore owner-operator fishermen in New Brunswick and Nova Scotia. The MFU has membership in all fishing areas of the Maritimes where there are significant coastal Mi'kmaq communities. These communities share the same fishing grounds and often live side-by-side with our members in rural communities, many being Acadian communities with established roots going back to the 1600s. Our members have a long history of association with Mi'kmaq peoples. It is not surprising that our fishermen and communities would be significantly affected by the aftermath of the 1999 *Marshall* decisions and that the MFU would be front and centre in the controversies that followed. This article offers insights into some of the MFU experiences and perspectives relative to Indigenous integration and involvement in Atlantic Canadian fisheries, and options for moving forward.

Résumé

L'Union des pêcheurs des Maritimes (UPM), fondée en 1977, est l'une des plus grandes organisations de pêche représentant plus de 1 300 pêcheurs côtiers indépendants propriétaires-exploitants au Nouveau-Brunswick et en Nouvelle-Écosse. L'UPM compte des membres dans toutes les zones de pêche des Maritimes où se trouvent des communautés côtières Mi'kmaq importantes. Ces communautés partagent les mêmes lieux de pêche et vivent souvent côte à côte avec nos membres dans des communautés rurales, dont beaucoup sont des communautés acadiennes dont les racines remontent aux années 1600. Nos membres ont une longue histoire d'association avec les peuples Mi'kmaq. Il n'est pas surprenant que nos pêcheurs et nos communautés aient été fortement affectés par les conséquences des décisions Marshall de 1999 et que l'UPM ait été au centre des controverses qui ont suivi. Cet article donne un aperçu de certaines expériences et perspectives de l'UPM en ce qui concerne l'intégration et la participation des Autochtones dans les pêches du Canada atlantique, ainsi que des options pour aller de l'avant.

Introduction

The Maritime Fishermen's Union (MFU), founded in 1977, represents over 1,300 independent inshore owner-operator fishermen in New Brunswick and Nova Scotia. Our members are multi-species fishermen (lobster, herring, scallop, groundfish, mackerel, snow crab, tuna); however, lobster has been for many years now the most economically important resource. The fishery is managed by lobster fishing areas (LFAs) and we represent fishermen members, subdivided by locals, in many of these LFAs: five

locals in Eastern New Brunswick (LFAs 23 and 25) and three in Nova Scotia. The Nova Scotia locals are centred around Pictou/Antigonish (LFA 26), the Sydney Bight of Cape Breton (LFA 27), and Bay of Fundy/St. Mary's Bay area (LFAs 34 and 35).

The MFU is one of many fishing organizations in Atlantic Canada and Quebec, but one of the largest and most influential. However, with over twenty inshore fishermen associations representing the interests of approximately 10,000 licence holders and spanning five provinces, there has been the need over the years to form industry coalitions in order to effectively tackle common regional, national, and sometimes international issues. Currently, the most prominent of such groups are the Canadian Independent Fish Harvester's Federation (CIFHF), which has a national mandate to protect the interests of independent owner-operator fishermen across Canada, and, more recently, the Coalition of Atlantic and Quebec Fishing Organizations (CAQFO), as well the Unified Fisheries Conservation Alliance. The two latter groups were created in 2019 and 2020, respectively, for the general purpose of advancing sustainable fisheries integration and reconciliation with Indigenous peoples in eastern Canada. The MFU is a founding member of both the CIFHF and the CAQFO.

The following offers some MFU experiences and perspectives relative to Indigenous integration and involvement in Atlantic Canadian fisheries, as well as some recommendations on moving forward twenty-five years after the *Marshall* decision. Admittedly, MFU and wider commercial fisher sector positions on the same issues vary at times. This article tries to clarify this difference on some of the issues.

Maritime Fishermen's Union Members' Proximity to Mi'kmaq Communities

It is of special interest to this discussion to note that the MFU has membership in all fishing areas of the Maritimes where there are significant coastal Mi'kmaq communities. These communities share the same fishing areas and often live side-by-side with our members' non-Indigenous rural communities, many being Acadian communities having established roots going back to the 1600s. In all cases, they share to this day common community infrastructures, such as schools, churches, hockey rinks, grocery stores, wharves, and there are many instances of mixed families and shared ancestry living in both communities. The following is a list of these shared community areas with locations shown in Figure 1:

1. Chaleur Bay, NB: On the Gaspésie shore there are three Mi'kmaq communities: Listuguj, Gespeg, and Gesgapegiag; on the New Brunswick side are two: Ugpi'ganjig (Eel River Bar) and Oinpegitjoig (Pabineau);
2. Miramichi Bay, NB: The immediately adjacent community is Esgenoôpetitj (Burnt Church) and then there is Natoaganeg (Eel Ground) and Metepenagiag (Red Bank) that are situated further upriver in the Miramichi watershed;
3. Richibucto estuary/Northumberland Strait, NB: In proximity to the town of Richibucto is based New Brunswick's largest reserve, Elsipogtog (Big Cove). There are also two smaller First Nation communities, L'nui Menikuk (Indian Island) and Tjipogtotjg (Bouctouche) along the Northumberland Strait;
4. Northumberland Strait, NS: In the Pictou/Antigonish area there are two adjacent bands, Pictou Landing and Paq'tnkek (Afton);
5. Sydney Bight area, Cape Breton, NS: None of the First Nation communities, save Membertou, are actually adjacent to the Bight, but along the inland waters of the Bras D'Or lakes there is Eskasoni, the largest in the area, We'koqma'q, Potlotek (Chapel Island) and Wagmatcook;

6. St. Mary's Bay/Bay of Fundy, NS: Adjacent to the area are found the Acadia and Bear River First Nation communities. The second- and third-largest First Nations in Nova Scotia are Sipekne'katik (Shubenacadie/Indian Brook) and Millbrook (Truro), both of which are inland, but have fishing activities in the area.

Maritime Fishermen's Union Locals:

(10)	Upper Chaleur Bay, NB	(1 & 3)	Acadian Peninsula & Miramichi Bay, NB
(2 & 5)	Richibucto area & Northumberland Strait, NB	(4)	Northumberland Strait, NS
(6)	Sydney Bight, Cape Breton, NS	(9)	St. Mary's Bay / Bay of Fundy, NS

Mi'kmaq and Maliseet First Nations and the Peskotomuhkati:

(1)	Abegweit	(13)	Oromocto	(25)	Millbrook
(2)	Lennox Island	(14)	Pabineau	(26)	Pictou Landing
(3)	Buctouche	(15)	Peskotomuhkati Nation at Skutik	(27)	Paq'tnkek
(4)	Eel Ground	(16)	St. Mary's	(28)	Potlotek (Chapel Island)
(5)	Ugpi'Ganjig (Eel River Bar)	(17)	Tobique	(29)	Sipenkne'katik (Indian Brook)
(6)	Elsipogtog (Big Cove)	(18)	Woodstock	(30)	Wagmatcook
(7)	Esgenoôpetitj (Burnt Church)	(19)	Acadia	(31)	We'koqma'q (Waycobah)
(8)	Fort Folly	(20)	Annapolis Valley	(32)	Gesgapegiag
(9)	Indian Island	(21)	Bear River	(33)	Gespeg
(10)	Kingsclear	(22)	Eskasoni	(34)	Listuguj
(11)	Madawaska Maliseet	(23)	Glooscap	(35)	Wolastoqiylk Wahsipekuk (Viger)
(12)	Metepenagiag	(24)	Membertou		

Figure 1. MFU locals (fishermen members) and coastal Mi'kmaq communities.[1]

[1] Adapted from Maritime Fishermen's Union, "Governance," Accessed June 13, 2023, https://en.mfu-upm.com/governance; and, Fisheries and Oceans Canada (DFO), "The Marshall Decisions," last modified September 22, 2022.

Understanding the Effects of the Sparrow and *Marshall* Decisions

It is natural then that our members would have a long history of association with Mi'kmaq peoples. Equally, it was not surprising that the MFU would have been front and centre of the controversies since the 1999 *Marshall* decisions.[2]

It is also unsurprising that the current upheaval with respect to the question of satisfying Indigenous rights and access in the fisheries sector gives us a definite sense of déja vu. In the aftermath of the *Marshall* decision, our fishermen and communities were significantly affected, especially during the Burnt Church Crisis in New Brunswick. In November of that same year, Michael Belliveau, our then executive director, had given a detailed presentation to the Federal Parliamentary Committee of Fisheries (FOPO) of the day that outlined the situation as it was developing and potential paths forward to finding solutions that still resonates with us after twenty-five years.[3]

Although there were not many Mi'kmaq commercial fishermen in the first decades after the creation of the MFU, there have nonetheless been individuals who have been and still are members of our organization. However, it was the *Sparrow* decision in 1990 that brought us into more formal contact with Mi'kmaq band leadership.

The *Sparrow* Decision

The *Sparrow* decision (1990) clarifies how to define and implement Indigenous peoples' ancestral right to fish for food and for social and ceremonial purposes.[4] It recognised for the Western Canada band of Musqueams an ancestral right to fish salmon for food, social and ceremonial purposes in a specified area as salmon fishery was an integral part of their way of life before the arrival of the Europeans. The Court stated however, that the Crown could regulate the exercise of the right in conformity with s. 35(1) of the 1982 Act with the appropriate justifications according to a valid objective. This is given that ancestral rights are not absolute, and the Crown retains its legislative powers including the right to legislate with respect to first nations pursuant to s. 91(24) of the *Constitution Act 1867*. In the context of a recognised, proven and defined Musqueam food fishing rights, any allocation of priorities after valid conservation measures have been implemented must give top priority to their food fishing right given its constitutional nature. This principle of priority of subsistence fishing rights over the interests of other user groups applies to any recognised, proven, and defined subsistence fishing right.[5] However, as clearly explained six years later in *Gladstone*, the rights must be clearly defined especially when considering commercial fishing rights as otherwise it would result in giving exclusive access to the resource to groups who have recognized rights.[6] As a direct result of the *Sparrow* decision, the Department of Fisheries and Oceans (DFO; now Fisheries and Oceans Canada) was forced to create what it labelled the food, social, and ceremonial (FSC) fishery. However, the Supreme Court clearly established two main caveats to the

[2] *R v Marshall*, (1999) 3 S.C.R. 456.

[3] Michael Belliveau, Maritime Fishermen's Union Presentation to the Parliamentary Standing Committee on Fisheries & Oceans, Committee Study: The Marshall Decision and Beyond: Implications for Management of the Atlantic Fisheries, November 25, 1999.

[4] *R v Sparrow*, (1990) 1 S.C.R. 1075.

[5] *Ibid.*

[6] *R v Gladstone*, (1996) 2 S.C.R. 723.

Sparrow decision and the FSC fishery: (1) the right to exploit an FSC fishery is not an individual right, but rather a communal right, which means that it is the First Nations communities that have the right to an FSC fishery from which they can delegate access to individuals within their communities; (2) products derived from the FSC fishery are to be consumed for food, social, or ceremonial purposes and therefore cannot be commercialized. In fact, it is illegal to buy or sell fish harvested for FSC purposes.[7]

According to Belliveau,

> All fishermen in Atlantic Canada have been enormously frustrated by the way the *Sparrow* decision was handled. The MFU throughout this period of the early 1990's made every effort to keep the food fishery in perspective and to avoid inflaming fishermen's fears. However, the unwillingness or inability of the DFO of the day to bring a practical definition to the *Sparrow* decision, to accommodate the right to fish for FSC purposes within a fishing plan that was measurable and enforceable. We were running into some real problems in the Burnt Church (Esgenoopetitj) and Big Cove (Elsipogtog) areas where fishing for food was developing into a significant out-of-season commercial fishery. In one instance, we had Ottawa people from the Mary Antonette Flumien Shop come to New Brunswick with little or no consultation with DFO in Moncton making a deal with the Esgenoopetitj band which by DFO's own admission led to some 750,000 lbs of lobster being fished in one-out-of-season period, all under the rubric of a food fishery.[8]

Belliveau goes on to cite the efforts of the gulf region DFO managers of the day to bring some kind of rational order to the food fishery. As he states,

> They agreed with us that the best way to contain the food fishery was to bring Indigenous peoples into the commercial fishery. This was done to some extent by the negotiation of communal fishing licenses with individual Bands. Part of the approach was to buy up licenses from retiring commercial fishermen and to reallocate them to the Bands in exchange for agreements on the reduction of the food fishery effort. After nine years the food fishery was finally getting definition, limits, and enforcement. In Burnt Church, for example, we had finally reached a point in 1999 where the food fishery had been limited to 125,000 lbs, fished by 585 traps, and was generally enforced. Ironically, that seasons FSC activity had wrapped up only a few days before the *Marshall* decision fell in September of that year.[9]

In any case, even though progress was made, Belliveau states that

> fishermen still very strongly believed that the food fishery should not be fished in July or any other time out-of-season. Most of our fishermen were open to a limited idea of a food fishery, however when it became integrated with assertions of the right to sell commercially, and also when it was prosecuted by some individuals in collusion with non-native poachers and fish buyers, and further, when the Government found no mechanisms

[7] *R v Marshall.*

[8] Belliveau, Maritime Fishermen's Union Presentation.

[9] *Ibid*.

of enforcement, our fishermen lost a lot of their initial openness to addressing indigenous rights to fish.[10]

Understanding the Lobster Fishery

Understanding the lobster fishery is central to understanding the events following the *Marshall* decision and is essential to any long-term fishing agreement between all parties involved in the sharing of this economically important resource. In effect, in 2021, the estimated Canadian economic landed value to fishermen amounted to approximately $2 billion.[11] The export value added by processing and live shipping of lobster added another $1.26 billion ($3.26 billion total) to our lobster industry and coastal economy.[12] However, its real value is in the fact that this wealth is distributed across roughly 8,700 fishing enterprises and Indigenous communities through their commercial-communal access.[13] In all, these enterprises create jobs for tens of thousands of participants directly attached to the fishing industry, including boat captains, deck hands, live shippers, processors, and their plant workers.

Conservation is the fundamental pillar that needs to be established when discussing the management of Canadian fish resources. To maintain a healthy and sustainable lobster (*Homarus americanus;* American lobster) resource, conservation measures need to be in place and enforced. In the lobster fishery, resource conservation is mostly attained through effort control and protection of the reproduction cycle and brood stock. For example, limited entry licensing was implemented in 1967–68 to limit effort on the resource by capping the number of licence holders in the fishery.[14] Minimum carapace size limits were introduced in the late 1800s and improved upon over the years to help protect juveniles and sexually mature lobsters.[15] Egg-bearing female lobster protections have also been introduced a long time ago for the same purposes. There are also many other restrictions that amount to a lobster management plan that is working well for our Canadian fishery, such as forty-one separate LFAs that enable fine-tuning of conservation measures based on local environmental and socioeconomic conditions, fishing seasons, trap limits per fisherman, and trap specifications (set dimensions, hoop entry size, and escape mechanisms for juveniles).

The American lobster grows through a moulting process when it sheds its shell to grow. The frequency and timing of this process is influenced by factors such as the lobster's life stage and water

[10] *Ibid*.

[11] Fisheries and Oceans Canada (DFO), "Seafisheries Landed Value by Province, 2021," Last modified December 21, 2022, https://www.dfo-mpo.gc.ca/stats/commercial/land-debarq/sea-maritimes/s2021pv-eng.htm.

[12] Fisheries and Oceans Canada (DFO), "Canada's Fish and Seafood Trade in 2021: Overview," last modified October 31, 2022, https://www.dfo-mpo.gc.ca/ea-ae/economic-analysis/Canada-Fish-Seafood-trade-commerce-poisson-fruits-de-mer-eng.html.

[13] Fisheries and Oceans Canada (DFO), "Species Information," last modified April 18, 2023, https://www.dfo-mpo.gc.ca/stats/commercial/licences-permis/species-especes/se21-eng.htm.

[14] Fisheries and Oceans Canada (DFO), "Integrated Fisheries Management Plan: Lobster in the Southern Gulf of St. Lawrence Lobster Fishing Areas 23, 24, 25, 26A, 26B," 2014. https://www.glf.dfo-mpo.gc.ca/glf/en/integrated-fisheries-management-plan-lobster.

[15] The lobster fishery has one of the longest histories of fisheries regulation in Canada. Until the late 1800s, the fishery was unregulated: there were no restrictions on who could fish and how much they could catch. In 1873, an Order in Council was signed prohibiting the capture of soft-shelled lobsters, egg-bearing females and lobsters less than 1 ½ pounds. See Fisheries and Oceans Canada (DFO), "Integrated Fisheries Management Plan."

temperature, and can be different across the species distribution range.[16] The main moulting period for lobster in the southern Gulf of St. Lawrence is from early July to early September,[17] whereas in colder water regimes like in the Bay of Fundy, southwest Nova Scotia, and some other areas, this cycle can be later in the fall.[18] The moulting process is also connected with the timing of reproduction, while this period is also critical for the hatching of lobster larvae. This summer-fall period is the most important part of the lobster's life cycle, and therefore needs to be protected. This is in large part why the commercial fishing seasons are in place and why they need to be maintained and respected to protect the lobster resource.

Commercial fishing seasons allow fishing to occur when the lobsters are less likely to be moulting and undergoing important biological processes. This also allows fishing to occur when the shell hardness and quality of the lobster products are optimum for market value. Scattered commercial seasons also helps to stabilize the market by spreading out the lobster supply across the year. These set seasons and regulations should be followed by everyone in order to support the delicate balance between fishing effort, stock recovery, and product value optimization.

The elimination of seasons would also eventually break down the whole Canadian lobster management system and we would be left with the U.S. model that would probably preserve the species—but not at the level that the Canadian system has been able to do under similar ecological conditions. Still, DFO management cannot bring itself to conclude that seasons are important conservation measures even though their own scientists and lobstermen across Atlantic Canada and Quebec see them as integral to the suite of measures necessary for preserving a sustainable resource and fishing industry.

The *Marshall* Decision and Aftermath

The *Marshall* decision in a general sense affirmed the Mi'kmaq, Wolastoqiyik, and Passamaquoddy peoples' treaty rights to access fisheries for commercial gain, or, as the Supreme Court coined it, in pursuit of a "moderate livelihood," a term that was left undefined. The spirit of the *Marshall* decision, however, is clear: Indigenous communities have a right to participate in the commercial fishing industry, and the government of Canada has the legal obligation to help them achieve that goal. Again, however, the Supreme Court issued an important caveat to its decision, as in the case of the FSC fishery access: rights associated with the *Marshall* decision can be limited by the Crown for conservation purposes and other compelling and substantial public objectives.[19] The Supreme Court also explained that the government of Canada could consider economic and regional fairness among other similar considerations when regulating commercial fishing.

[16] S.L. Waddy, D.E. Aiken, and D.P.V. De Kleijn, "Control of Growth and Reproduction," in *Biology of the Lobster, Homarus americanus*, ed. J.R. Factor (New York: Academic Press, 1995), 217–66.

[17] Michel Comeau and Fernand Savoie, "Growth Increment and Molt Frequency of the American Lobster (Homarus americanus) in the Southwestern Gulf of St. Lawrence," *Journal of Crustacean Biology* 21, no. 4 (2001): 923–36. doi.org/10.1163/20021975-99990184.

[18] D.E. Aiken and S.L. Waddy, "Controlling Growth and Reproduction in the American Lobster," *Proceedings of the Annual Meeting—World Mariculture Society* 1976: 415–30.

[19] *R v Marshall,* (1999) 3 SCR 533.

According to Belliveau,

> whatever the MFU thought about the basis of the September decision (even the Judges were divided on that) we always read it as a recognition of a Treaty Right to fish and trade, but a right that was subject to limits and that could be regulated. We had a difficult time finding anything substantively new with respect to fish in the November "clarification," that was not already in the September decision. In other words, we always believed the Government of Canada had the powers to limit and indeed infringe upon a right, subject to the Badger test. Furthermore, the Judges made it explicit in September that the treaty right could be accommodated within a regulatory system and catch limits could reasonably be imposed. We really only had one quarrel with the Supreme Court; we believed they should have provided for an implementation period even if the Crown had not explicitly requested one. We have been put through a great deal of grief since September 17 and in our judgement, it was not necessary.[20]

The Supreme Court clearly gave the government of Canada the right to impose conservation measures in order to protect the long-term sustainability of fish stocks to protect public objectives such as protecting the integrity of owner-operator–based family fishing enterprises and their coastal communities. The government has the powers to accommodate the treaty rights in an orderly fashion. However, the government of the day was blindsided by a Supreme Court decision that they did not expect and therefore had no immediate plan to implement it. The MFU holds the government responsible for the deterioration of the situation in the Miramichi Bay area in 1999.

As stated by Belliveau,

> The Ottawa senior officials looked like Medieval Scholastics 'trying to determine how many angels were on the head of a pin' while the situation in the Miramichi was building towards explosion. Whoever was 'calling the shots' in Ottawa was either woefully ignorant of the nature of the lobster fishery and the history of Sparrow or was cynically Machiavellian and was willing to use a Native/commercial fishermen confrontation as a small price to pay for some larger political objective. We were left with communities that were torn apart. The commercial fishermen's attitudes had hardened, Mi'kmaw peoples felt aggressed, and where no one looked good. We should equally recognize the high-pressure position that many Band leaders have been in as a result of indigenous people's desire to exercise their rights.[21]

Belliveau goes on to add:

> the Burnt Church Band along with many other Bands had no trouble interpreting the Supreme Court decision as an endorsement of a right to fish when, where and how they wished, subject to conservation. Traps were already going in the water on September 18th (only days after the end of the FSC fishery as stated earlier). A week later there were as many as 6,000 traps in the Miramichi Bay. This is the equivalent of 20 full scale commercial operations and represents 10% of the number of operations during the legal

[20] Belliveau, Maritime Fishermen's Union Presentation.

[21] *Ibid.*

> season. But fishermen have always said that fishing in the closed season at the mouth of the Miramichi river is ten times more effective than during the commercial spring season because the lobster at this time of year is in a "feeding frenzy" having gone through its moulting period and preparing for the long winter hibernation. Long-time, experienced lobster fishermen in the area tell us that where a trap might successfully average one pound a day in the commercial season, the same traps were catching as high as 10 and 20 lbs a day in late September. One is asking a lot, indeed, to have those fishermen stand idly by as their next year's catch is being taken in front of their eyes. The Supreme Court is a distant institution; Donald Marshall was unknown to our fishermen, and seven years of Sparrow were in their system. The DFO apparatus was largely invisible and in paralysis during the build-up period to the conflict. Fishermen saw no movement from the Minister, from the Senior Officials, or from the Local politicians. They felt abandoned to their own defense or lose their next year's fishery. To this day, most fishermen who proceeded to disable three to four thousand traps in the Miramichi Bay area will say they did the Government's job. Fishermen were driven to it and Government had all kinds of advance warning of this inevitable outcome.[22]

Working Toward Accommodating *Marshall*

The Supreme Court had made it clear in its decision that the treaty rights are "communal" in nature even if exercised by individuals. This is clearly the approach DFO has taken in accommodating the food fishery right as well. The Court is also clear that they have not written a blank cheque, that it is a right to fish "in pursuit of a moderate livelihood" (not a guaranteed livelihood), that the acquittal "cannot be generalized to a declaration that licensing restrictions or closed seasons can never be imposed as part of the government's regulation of the Mi'kmaq limited commercial 'right to fish.'"[23] They have also spelled out what is meant in *Badger* that "the regulatory authority extends to other compelling and substantial public objectives" like "recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups."[24]

The interpretive framework, thus, is there to allow for the development of interim and longer-term fisheries' agreements that accommodate treaty rights. We know the Crown has a fiduciary responsibility toward Indigenous peoples, but we also must stress that the minister of Fisheries and Oceans has clear obligations toward our inshore fishermen. Non-indigenous fishermen have every right to view their own relations with DFO through the licensing regime and the management plans as a collective agreement, an unstated covenant.

Significant Investments and Initial Interim Agreements

The years following the *Marshall* decision, in line with its constitutional obligations, the government of Canada, through the DFO, embarked on a plan aimed at carving out a place for Indigenous communities in the commercial fishing industry by creating the Marshall response initiative combined with the Atlantic integrated commercial fisheries initiative. The objective was to redistribute commercial

[22] *Ibid*.

[23] *R v Marshall*, (1999) 3 S.C.R. 533, November 17, 1999.

[24] *Ibid*. Also see *R v Badger*, (1996) 1 SCR 771.

fishing licences to Indigenous communities and build their commercial fishing capacity. The focus in the early years was on getting interim agreements in place with individual First Nations communities and to provide them with licences, boats, gear, and training to expand their commercial fishing activities. Organizations like the MFU collaborated extensively with the government on the establishment of these programs and got many of its experienced fishermen members to participate in the mentorship programs that were needed to get Indigenous fishermen trained and able to fish safely and efficiently.

The fishing licences, boats, and gear would be accessed through a voluntary licence relinquishment program as had been suggested by the MFU and other organizations in the early days post-*Marshall*. This method of access transfer remains to this day the best and only option proposed by fishing associations, except in the cases where emergent or underutilized species become available (e.g., redfish, grey seals, striped bass).

As a result, Indigenous fishers have indeed integrated into the commercial fisheries and continue to take their rightful place to this day. An assessment of this success has been given by Coates:

> Over the past 20 years, the effect of the *Marshall* decision has been seen across the Maritimes: (1) Opportunities for young people have improved. (2) Communities have more money to spend on locally selected programs. (3) Strengthened economic activity in the industry, with total on reserve fishing revenues for the Mi'Kmaq and Maliseet growing from $3 million in 1999 to $152 million 2016.[25]

Furthermore, over the past twenty-five years, some fishing organizations have partnered successfully with individual Indigenous bands or groups on various fisheries-related science and resource sustainability projects, fishing and boat safety training programs, and joint commercial initiatives. In our case, we can count many examples of cooperation over the years (in particular through our MFU science branch Homarus), such as:

- lobster larvae seeding with Eel River Bar, Listiguj, and other First Nations;
- artificial reefs installation with Eel River Bar and Esgenoôpetitj First Nations;
- resource conservation awareness building with Anqotum, an Aboriginal Aquatic Resources and Oceans Management (AAROM) body of the North Shore Micmac District Council;
- alternative lobster and snow crab bait development (with Elsipogtog First Nation through their McGraw Seafood processing plant).

The *Marshall* decision also altered the management regime of the Maritime fishery. It forced the recognition that Indigenous peoples had to have a proper stake in the modern fishing industry, but also a place at the co-management table with government and other industry representatives. Significant access has been transferred to Indigenous groups over the past few decades, but the governance aspect of their fisheries access is still very much in development. Going forward, however, the development of two separate management authorities for fisheries in Canada (one Indigenous and one non-Indigenous) seems

[25] Ken Coates, "The Marshall Decision at 20: Two Decades of Commercial Re-Empowerment of eh Mi'kmaq and Mailseet," MacDonald-Laurier Institute, October 2019, https://macdonaldlaurier.ca/files/pdf/20191015_Marshall_Decision_20th_Coates_PAPER_FWeb.pdf.

to be a concept that is being floated by some Indigenous leaders.[26] This concept would lead to uncoordinated, unruly fisheries. This is already being experimented with within some fishing areas to accommodate specific treaty-based fisheries. Instead, it is the MFU's view that we should continue working on optimizing the current DFO co-management advisory committee structures.

MFU's Perspective on Remaining Issues and Resurging Upheavals

The lobster fishery is fully subscribed, meaning that new effort could eventually bring it to collapse if fishers were allowed to circumvent access and conservation rules. The initial "fishing agreements" signed between DFO and many Indigenous communities in the post-*Marshall* years began expiring in the mid-2010s. At this point, some groups had begun pushing the government for increased access to fish stocks via additional commercial fishing licences/quota and further support to help them with the management side of their fisheries. In some cases, some Mi'kmaq bands, especially in Nova Scotia, had been lobbying for the establishment of a new "moderate livelihood fishery" concept separate in definition to previous DFO commercial-communal fishery access, and even falsely stating that the government had done nothing since the *Marshall* decision in 1999 to accommodate their right to fish in pursuit of a moderate livelihood.

Starting in 2019, some Indigenous groups and individuals were holding "protest" moderate livelihood fisheries. In the St. Mary's Bay area in particular, commercial fishing was done outside of the commercial season and with traps unsanctioned by DFO in order to pressure government into giving them additional access to the commercial fishery through the moderate livelihood fishery concept. Besides being clearly illegal, these protest fisheries constituted a direct threat to the well-being of lobster stocks as they constituted overfishing for this area. In short, these actions undermined the very notion of science-based fisheries management and therefore threatened the long-term viability of the entire fishing industry in that area, and, by extension, the well-being of all coastal communities, including Indigenous communities, that now greatly benefit from healthy fish stocks for their communal, commercial, and FSC fisheries.

These proposals for the creation of small-scale "moderate livelihood fisheries" were defended as being benign because of their proposed "relatively" small scale, but they fundamentally contradict the conservation management principles and objectives that govern commercial fisheries where every harvesting activity, no matter its scale, is licensed, regulated, monitored, and controlled with seasons, effort controls, and/or catch limits. In practical terms, unless the management of moderate livelihood fisheries is fully integrated and consistent with policies, rules, and regulations governing existing commercial fisheries, and all fisheries are conducted within a unified stock conservation, assessment, and management regime, organizations such as the MFU will have no choice but to vigorously oppose this development through every peaceful and legitimate means at our disposal. In our view, the pursuit of a "moderate livelihood" through fishing can be attained through the commercial access to the resource transferred to Indigenous groups since the 1990s, but not, however, through FSC access or a new separate fishery concept.

Furthermore, to this day, we have had an exhausting yearly struggle with DFO officials to bring the FSC fishery under some reasonable and identifiable set of controls and limits in many areas of Atlantic Canada. Where they have been conducted as disguised out-of-season commercial lobster fisheries, they have had a direct and real impact on commercial fishermen, who among other things have been displaced

[26] Standing Senate Committee on Fisheries and Oceans (POFO), Committee Report: Peace on the Water—Advancing the Full Implementation of Mi'kmaq, Wolastoqiyik and Peskotomuhkati Rights-Based Fisheries, 44th Parliament, 1st Session, (2022).

and forced to fish farther away from their traditional grounds. They have also seen their livelihoods affected by lower revenues and increased costs.

Finally, DFO still cannot see closed seasons on lobster as a conservation measure. This has been and continues to be a source of great consternation to our members. Some FSC fisheries are being practised during the month of July, while all other lobster fisheries are banned precisely for conservation reasons. Again, the science is clear on this issue: any fishing activity during this time has an extremely negative impact on the final gestation period and hatching of delicate lobster eggs, which is precisely the reason DFO has historically closed commercial lobster fishing during this period.

Our fishermen cannot, and rightly so, tolerate a situation where suddenly a food fishery right becomes a kind of "black hole" where no regulation is imposed on Indigenous lobster fishing and where in some instances Indigenous rights are used as a screen for elaborate non-Indigenous-dominated poaching rings. We have sought limits, definitions, and enforcement of the food fishery combined with improved entry opportunities for Indigenous peoples into the commercial fishery. The *Marshall* decision, in the early days, was actually seen and thought of as a positive way forward toward bringing it under control by fusing food, social, and ceremonial Indigenous rights to the commercial access right—everything under one umbrella in a sense.

Lack of Industry Engagement by DFO and Rising Tensions

After the *Marshall* decision in 1999, the federal government of the day had made a commitment to industry representatives that any future negotiations for resource access and governance would be openly discussed with commercial fishing organizations and Indigenous groups.

Starting in 2018, a new negotiations process between the government of Canada and Indigenous bands was initiated—right and reconciliation agreements—in order to begin addressing the end of the initial interim agreements. However, despite industry efforts, DFO and the government of Canada in general have not given fishermen organizations any meaningful place in these new negotiations process, leaving fishers and their organizations in the proverbial dark.[27] This is in major contrast to the post-*Marshall* decision period (early 2000s) where Canada had actively engaged industry representatives. In fact, officials involved in the current process have advised industry representatives that there will be no access to the details of the negotiations and agreements regardless of the fact that they will potentially have an effect on fishermen livelihoods and their communities.

During the same time, and to make matters even worse, there was a significant lack of effective enforcement on the part of DFO regarding increasing out-of-season and illegal fishing efforts by some Indigenous groups or individuals in various areas, but especially in the St. Mary's Bay area, as stated earlier. Many fishing organizations, including the MFU, had been warning the DFO for years that this situation was getting worse, rapidly escalating, and getting out of hand with the potential for violence. In

[27] Allister Surette, "Federal Special Representative Final Report: Implementing the Right to Fish in Pursuit of a Moderate Livelihood: Rebuilding Trust and Establishing a Constructive Path Forward," March 31, 2021, https://www.dfo-mpo.gc.ca/fisheries-peches/aboriginal-autochtones/moderate-livelihood-subsistance-convenable/surette-report-rapport-mar-2021-eng.html; Fisheries and Oceans Canada (DFO), "Exploring the Relationship Between Indigenous and Non-Indigenous Fishers in Canada's Fisheries Sector," unpublished manuscript, 2022; and, Standing Committee on Fisheries and Oceans (FOPO), "Committee Report: Implementation of Mi'kmaq Treaty Fishing Rights to Support a Moderate Livelihood," 44th Parliament, 1st Session, 2022.

particular, the MFU was drawing many parallels with the escalating situation and its past experience in the Miramichi Bay area in the early 2000s. Some fishermen would eventually take matters into their own hands and attempt to defend the principle of conservation upon which they have built their livelihoods. The DFO was warned that if unrest broke out, that it would be DFO's own doing since our leaders had repeatedly asked for support in the form of a robust enforcement and communication effort of existing conservation and protection rules. The MFU, along with other fishing associations, also requested meaningful participation into the new negotiation process, which would also have served to better inform fishermen on any plans for upcoming access transfers. This communication process with fishermen on the ground would have greatly alleviated growing fears that their livelihoods were at risk.

In the lead-up to the events of September 2020 in the St. Mary's Bay area, the final straw that pushed some fishermen to act was the complete absence of central leadership and meaningful communications from the minister of the day and DFO officials. This void was filled by social media and mainstream media sensationalists and populist radicals. Fishermen were coined as racists by mainstream media and politicians as the reason behind the conflict over Indigenous rights and access to the fisheries. However, it is by far and foremost a fisheries' management conflict based around the federal government's incompetence and irresponsible politics.

Moving Beyond the *Marshall* Decision After Twenty-Five Years

Many of the recommendations emanating from the initial FOPO committee report in 1999[28] were applied by subsequent governments, and, as stated in the 2019 McDonald-Laurier report, *The Marshall Decision at 20* by Ken Coates, they have resulted in a wide range of important benefits for Indigenous communities across the Maritimes and Gaspé Peninsula.[29] This has been the result of a successful commercial fisheries integration for many Indigenous groups, which the MFU and other organizations also helped foster following meaningful dialogue and understanding. However, despite these positive impacts many challenges remain. The following is a list of these remaining challenges and possible paths forward to addressing them.

1. A Societal Responsibility Involving All Canadians

The first principle guiding any accommodation of the Native treaty right should be that Canadian society as a whole should bear the cost of the accommodation, not only local commercial fishermen. Where more fisheries access may be needed, this can only be done through a sufficient government financial allocation that provides for a voluntary licence relinquishment program, compensation to First Nations communities where exercise of rights have been delayed, economic development funds for these communities, and appropriate capacity-building both in terms of fishing and co-management.

The courts are too often used to resolve Indigenous treaty rights. The process is too slow, and, in the meantime, significant government decisions and agreements are being made on the fishery without a clear legal direction. Reports highlight that the fishery is being overly targeted for the purpose of reconciliation.[30] This brings us to the need for modern treaties that respect the essence of original treaties

[28] Standing Committee on Fisheries and Oceans (FOPO), "Committee Report: The Marshall Decision and Beyond: Implications for Management of the Atlantic Fisheries," 36th Parliament, 2nd Session, 1999.

[29] Coates, 4.

[30] Coates, "The Marshall Decision at 20."

to share the land, resources, and economies in the modern era. Indigenous peoples on the east coast have been led to believe that fish resources are their greatest economic opportunity. However, they in essence signed treaties in the 1700s that should make them part of the greater Atlantic Canadian economy. Not everyone is born with interests to make a living in the fishing industry in any community. Where then are the other sectors of our economy with respect to real reconciliation across Atlantic Canada?

2. Defining "Moderate Livelihood"

The moderate livelihood definition and implementation of resource access rights remain at the top of this list of challenges. However, our understanding of past and current processes was, and still is today, that this implementation would be done through DFO-regulated, commercial-communal access. In our communities, as mentioned previously, the tensions that have occasionally arisen between Indigenous and non-Indigenous fishermen have been about out-of-season fishing and illegal sales of fish harvested for food, social, and ceremonial purposes. The development of a new moderate livelihood fisheries access without the same seasons and rigorous regulation and enforcement as commercial fisheries would exacerbate such tensions. However, the expansion of First Nations participation in the existing commercial fisheries is not a problem, if a proper voluntary licence relinquishment program protocol is used by the government for redistribution to First Nations communities or individuals themselves.

A major contributing factor to Mi'kmaq prosperity in the Macdonald-Laurier report was when bands fished their own gear, and the proceeds went back into their communities. Issues remain especially for those groups that lease their licences to non-Indigenous fishermen or corporations. It is within these bands where the moderate livelihood fishery concept seems to be most prevalent. Indigenous management of commercial-communal licences can instead be used and distributed to its individual members in a way where their access is adjusted to their internal definition of a moderate livelihood for their members (e.g., number of traps per member). This is self-governance within the scope of federal fisheries management that enables one set of conservation rules for all users within a common fishery. The moderate livelihood concept—as we see it, being a small-scale artisanal commercial fisherman—could fit within the commercial fishing season just as another class of fishing licence (e.g., Class A and B licences), the number of commercial traps per fisherman being decided by the First Nations communities.

3. One Set of Rules—Conservation and Fishing within Season

We request that the DFO commit to a complete ban of all commercial fisheries outside of existing commercial seasons and other conservation measures be the same for all stakeholders. However, in areas where, based on DFO science, these principles may be currently contested, a science review and, potentially, further science could be warranted. During any scientific review process, no out-of-season commercial fishing should be allowed. If further research is warranted, this could be an opportunity for Indigenous and non-Indigenous groups to collaborate on common scientific and traditional knowledge gathering interests.

4. No New Effort

We ask that the one licence in, one licence out protocol be continued as exercised in the initial Marshall response initiative. However, socioeconomic studies should be done in areas where significant impacts from licence buybacks may be expected. It would also be important to prioritize communities that are no longer leasing out their existing commercial access to non-Indigenous interests.

5. One Common Fisheries Management Authority

Over many decades, fishing organizations across Atlantic Canada have worked diligently with the federal government to establish a co-management approach that is often cited internationally as a model for other countries to strive for. This model, based on a precautionary ecosystem approach, seeks to balance fishing output with the ecosystem's ability to regenerate and sustain itself such as, for example, the use of effort or quota-based management and fishing seasons protecting reproduction periods. It also must consider socioeconomic and traditional input from fish harvesters, Indigenous and non-Indigenous. These DFO administered "advisory committees" provide the basis for meaningful representation and dialogue for fisheries management across Canada.

The model is not perfect, but I will cite our Canadian lobster resource management as a resounding example of this model's success. It currently generates tens of thousands of fisheries-related livelihoods for both Indigenous and non-Indigenous folks. Therefore, any additional access needs to be considered through the lens of this well-balanced management system, while also taking into consideration the socioeconomic importance and dependence of hundreds of coastal communities on this fishery.

Any changes to fisheries management in common use species need to have all users at the table (e.g., DFO advisory committees). Why can we not all be at the table to discuss these issues? Structures already exist through DFO advisory committees. The Coates,[31] Surette,[32] and Stratos[33] reports have clearly stated that all stakeholders need to be at the table to find solutions and that non-Indigenous harvesters are currently not being properly consulted.

6. Enforcement Consistency

The law needs to be enforced equally on all violators of the *Fisheries Act*. Such is not the case currently. The FSC fishery is still very much a "black hole" on the enforcement of conservation and intended management plans, which needs to be seriously addressed. Success at this level has always been the foundation for all other fisheries-related relationship building and commercial access with non-Indigenous fishermen. The enforcement needs to be depoliticized and must become independent of government intervention.

7. Communication and Consultation

It is critical that open and transparent consultative dialogue commences immediately with the federal government, fishing organizations, and First Nations communities on the sustainability of the stock and determination of the existence and extent of claimed ancestral and treaty rights. The current negotiation process needs to be revamped so non-Indigenous representatives are included in the process. There is the obligation to consult with First Nations on certain topics if there is a presumption of the existence of a right. This obligation of consultation is not exclusive of other stakeholders. The fact that a

[31] *Ibid*.

[32] Surette, "Federal Special Representative Final Report: Implementing the Right to Fish in Pursuit of a Moderate Livelihood."

[33] Stratos Inc., "Exploring the Relationship Between Indigenous and Non-Indigenous Fishers in Canada's Fisheries Sector—Report from an External Engagement Process," Final report, prepared for the Strategic Policy Branch of the Department of Fisheries and Oceans Canada, May 2022, Cat. No. Fs23-672/2022E-PDF.

First Nation group has a recognized right does not necessarily grant the same right to another group.[34] Given that recognition of ancestral and treaty rights binds future governments as a result of the protection granted under section 35 of the Constitution and the impact on stakeholders, a detailed DFO communications and consultation plan is also required to educate the public and industry on the current reconciliation process as it relates to the fishery, as well as to the advancements made over the past twenty-five years. In general, the fishing industry has been a leader over the years in reconciliation efforts across Canada, and there are many positive success stories to be told; however, this part of the story is not well communicated to the general public.

Conclusion

The MFU supports the basic principles of the *Marshall* decision and Indigenous commercial access to fisheries under federal management. However, one of our greatest critiques of the decision is that it did not establish a timeline for government to implement the said decision and any measurable implementation targets. This has created uncertainty around not knowing where their family-based owner-operator businesses will be in the near-, mid-, or long-term future, which is the basis for the high level of anxiety that exists today among our fishermen. Finally, addressing these concerns will require national and regional forums where differing perspectives can be heard and acceptable solutions developed. We understand that negotiations must take place on a nation-to-nation basis, but fishermen need to be consulted and be part of the process. If not, another generation will be talking about the same issues and unrest in another twenty-five years. There is still no legal definition for "moderate livelihood," no timelines for resolving the issues, and no targets to what access transfer is needed to "satisfy the right." Currently, poor communications, inconsistent enforcement of the *Fisheries Act*, and no plan that we know of is a continued recipe for alienating Indigenous and non-Indigenous peoples that have lived together in shared coastal communities for hundreds of years.

What then should we hope that our common fisheries look like twenty-five years from now? Hopefully we will have resolved government responsibilities toward satisfying rights implementation in terms of access that strikes a balance between Indigenous and non-Indigenous community access needs to a limited resource. Also, it is hoped that we will have figured out how to co-manage our common fisheries resources together seated at the same table. We are currently trending toward more Indigenous involvement with boots on the boats fishing, in the offices managing, in the plants processing, and in the markets marketing the final fish products. This is an incredible accomplishment in only twenty-five years! However, coming from an owner-operator community where we are constantly fighting to preserve the independence of fishermen in our industry for the greatest benefit of our communities, I feel that we are all—Indigenous included—under threat from corporate concentration and control. This may be a fight that we can wage together.

To comment on this essay, please write to editorjnbs@stu.ca. Si vous souhaitez réagir à cet essai, veuillez soit nous écrire à editorjnbs@stu.ca.

[34] *R v Van Der Peet*, 1996 CanLII 216 (CSC), *para.* 51–70; *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 CSC 56 (CanLII), *para.* 46; *R v Marshall*, 1999 CanLII 666 (CSC) (Marshall 2), *para.* 20.

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