THE ANATOMY OF DISPOSSESSION: INDIGENOUS PEOPLES, NATURAL RESOURCES, AND THE NEW BRUNSWICK BRITISH COLONIAL PROJECT, 1763–2000[1]

Bill Parenteau

Abstract

This article shows that over the past several generations legal proceedings have proven limited in terms of providing redress of Indigenous grievances. What is needed is a new set of treaties that replace half measures with entrenched rights and self-rule. Through an exploration of the early colonization of Listuguj, the practice of settler squatting, colonial wildlife management, and key Wabanaki court challenges to colonial incursions this article emphasizes the long history of dispossession through colonial defences of dispossession, and Indigenous resistance that led to the *Marshall* decision.

Résumé

Cet article montre qu'au cours des dernières générations, les procédures judiciaires se sont avérées limitées en termes de réparation des griefs des autochtones. Ce qu'il faut, c'est une nouvelle série de traités qui remplacent les demi-mesures par des droits ancrés et l'autonomie. En explorant les débuts de la colonisation de Listuguj, la pratique du squat par les colons, la gestion coloniale de la faune et les principales contestations judiciaires abénaquises des incursions coloniales, cet article met l'accent sur la longue histoire de la dépossession, des défenses coloniales de la dépossession et de la résistance autochtone qui a abouti à l'arrêt Marshall.

Introduction

The *Marshall* case is regarded as a groundbreaking decision which advanced Indigenous rights. To a certain extent this is true. However, it should also be understood as a part of a struggle that had been ongoing for more than two centuries. From the very beginning, British colonial rule dispossessed Indigenous peoples of their resources via a colonial legal framework centred on regulation of land, water, and resources.[2] Colonial administrators also supported settlers who stole land outside of official channels, such as with the practice of "squatting," and this contributed to the appropriation of the territory of Indigenous nations as well. In fact, the consistent resistance to colonial structures of dispossession has

[1] Regrettably, William (Bill) Parenteau passed away while his article was under review. As guest editors, we decided to continue with publication of Bill's article in his honour. Upon learning of this news, Angela Tozer, one of Bill's colleagues and assistant professor of history at the University of New Brunswick (Fredericton), volunteered to undertake revisions based on the external reviewers' comments.

[2] In the context of the 1876 *Indian Act*, Mi'kmaw legal scholar Pamela Palmater names this "legislative and policy-based genocide." See Pamela Palmater, "Genocide, Indian policy, and Legislated Elimination of Indians in Canada," *Aboriginal Policy Studies* 3, no. 3 (2014): 45.

partially defined Indigenous history in Wabanaki territory where New Brunswick is located.[3] This resistance has been characterized by physical defence of communities and their resources, and eventually legal challenges based on treaty rights. Thus, colonialism was not a moment or an era—it is a process that still endures today in the half measures the colonial government offers, the bitterness of non-Indigenous resources' producers, and the Indigenous defence of resource harvesting regimes.[4]

The details of the *Marshall* decision are well known and discussed at length elsewhere. In short, fisheries officers arrested Donald Marshall Jr. (1953–2009) in August 1993 and charged him with catching 463 pounds of eels using an illegal net out of season. The Court of Nova Scotia convicted him in 1996, a decision that the Nova Scotia Court of Appeal upheld in 1997. Almost from the beginning of the case, Marshall insisted that he had a treaty right to fish at will on the basis of the *Treaties* of 1760–1761. Marshall appealed his case to the Supreme Court of Canada and succeeded in reversing the lower court decisions on September 17, 1999. The *Marshall* decision touched off a firestorm of protest and violence among non-Indigenous fishers (violence that still continues). The Supreme Court, responding to the controversy created by the decision, took the unusual decision to clarify the rights of Indigenous peoples to fish, which produced protest among Indigenous fishers. In essence, the Supreme Court retreated, and adopted a partial defence of dispossession by setting out parameters for Indigenous fishing.[5] As this article will show, over the past several generations legal proceedings have proven limited in terms of providing redress of Indigenous grievances. What is needed is a new set of treaties that replace half measures with entrenched rights and self-rule.[6] Through an exploration of the early colonization of Listuguj, the practice of settler squatting, colonial wildlife management, and key Wabanaki court challenges to colonial incursions, this article emphasizes the long history of dispossession through colonial defences of dispossession, as well as Indigenous resistance that led to the *Marshall* decision.

I. Listuguj: Genesis of Dispossession, 1763–1820

The British defeat of the French regime after the Seven Years' War in 1763 radically altered Indigenous rights that the British Crown had clearly recognized with respect to natural resources.[7] In the

[3] As the Yellowhead Institute has noted, corporations use the injunction as a colonial tool to push through development projects that appropriate the territories of Indigenous nations, and land and water defenders object to this theft of their unceded and unsurrendered land. See Yellowhead Institute, "Weaponizing Injunctions," October 14, 2020, https://yellowheadinstitute.org/resources/weaponizing-injunctions-how-canada-criminalizes-indigenous-land-defense/. For example, see the recent injunction to support the Sisson Mining project: Rowan Miller, "Judge Extends Court Injunction against Wolastoqi Land Defenders Resisting the Sisson Mine," *NB Media Co-Op,* September 11, 2023, https://nbmediacoop.org/2023/09/11/judge-extends-court-injunction-against-wolastoqi-land-defenders-resisting-the-sisson-mine/.

[4] As Patrick Wolfe succinctly noted, settler colonialism is a "structure not an event." See Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (2006): 388.

[5] *R v Marshall* (1999) 3 S. C. R.

[6] The federal government's attempts to abolish treaty rights ironically with the 1876 *Indian Act* (a double-edged sword that both dispossesses and holds the federal government accountable to treaty laws) and then with the 1969 White Paper highlights the deeply problematic colonial led initiatives to ameliorate the brutal consequences of colonization for Indigenous peoples. For a discussion on this complex treaty history see Marie Battiste, ed. *Living Treaties: Narrating Mi'kmaw Treaty Relations* (Sydney, Nova Scotia: Cape Breton University Press, 2016). See also Margaret McCallum, "Rights in the Courts, on the Water and in the Woods: The Aftermath of R. v. Marshall," *Journal of Canadian Studies* 38, no. 3 (2004); John G. Reid et al., "History, Native Issues and the Courts," *Acadiensis* 28 no. 1, (1998): 3–26; Kenneth Coates, *The Marshall Decision and Native Rights* (Montréal: McGill-Queen's University Press, 2000).

[7] See Glen Coulthard's critical assessment about the concept of recognition within a liberal framework. Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

first generation of British rule, the colonial administration used the *Royal Proclamation* of 1763, which guarantees Indigenous rights to land and resources, as their instrument of rule. At the time of the *Royal Proclamation* French and British colonizers had not yet surveyed the Listuguj River, and colonial officialdom had minimal presence in this unsurveyed frontier region.[8] As John Reid has noted, the proximity of Indigenous communities to colonial seats of power during this era impacted the extent to which governments could exert control.[9] Until after the American War for Independence, the lieutenant governor general of Quebec administered the Listuguj subregion and he had deputies assigned to the river. In stark contrast to the period after the founding of New Brunswick as a colony (1784) and the rulings of Canadian courts in numerous cases over the course of two centuries, the lieutenant governor applied the 1763 *Royal Proclamation* as the ruling document for administering affairs concerning Indigenous people in Quebec and the Maritime colonies in the 1760s and 1770s. The new British colonial government issued a copy of the *Proclamation* to the Listuguj community and, after a delay, posted it on the door of the parish church at Mission Point.[10] The later non-Indigenous consensus that the *Royal Proclamation* did not apply to Quebec and the Martimes was thus a convenient fiction that facilitated the dispossession of resources and acted as justification for denying Indigenous claims in court. Thus, the Crown protection of the rights of the Mi'kmaq of Listuguj has clear historical documentation as official policy.[11]

In several disputes with Acadians who fled to the Listuguj region after the deportation (1755–63), the Mi'kmaq in Listuguj invoked the clause in the proclamation that protected Indigenous rights to resources several times. In the 1760s and 1770s, resource disputes centred around land, the salmon fishery, and the hay marshes along the river. Acadians and other settlers valued marsh hay as a source of livestock feed. The Mi'kmaq bitterly objected to the encroachment of the Acadians, as the marsh hay provided cover for the hunting of waterfowl and other animals. The tension over marsh hay at times erupted in violence. Mi'kmaq persistent protests to the settler use of marsh hay led the colonial administration to finally take action in 1783 in what amounted to a lease agreement. In accordance with an arrangement that had been practised in some localities, the Lieutenant Governor Nicholas Cox ruled that "each inhabitant should pay" to the Mi'kmaq "one Dollar for liberty to cut and cure a sufficiency of hay on the Meadows and Marshes of Ristiguish....I do confirm the same as well to...His Majesties subjects who may claim the same privilege."[12] With this early ruling regarding hay marshes, colonial authorities attempted to balance Indigenous rights against the settlement and commercial development of the region.

Although important to both parties, the marsh hay issue paled in comparison to the Listuguj salmon fishery over which the Mi'kmaq, settlers, and colonial governments engaged in disputes for more than two centuries beginning in the 1760s. The December 1766 *Proclamation* ordered a reward given for information resulting in prosecution for "any violent interruption of them [Indigenous people] in their hunting upon the Grounds allotted to them by His Majesty's Royal Proclamation."[13] The colonial government coveted the plentiful salmon fishery as a potential source of commercial development of the

[8] The Listuguj (Restigouche) River would eventually become the border between Québec and New Brunswick.

[9] John G. Reid, "Empire, the Maritime Colonies and the Supplanting of Mi'ma'ki/Wustukwik, 1780–1820," *Acadiensis* 38, no. 2 (2009): 78–97.

[10] Library and Archives Canada, Civil and Provincial Secretary's Office, Lower Canada, 1760–1840, Series, Vol. 12, pp. 4561–69, Memorial of William Van Felson, February 10, 1765.

[11] This document is in published correspondence of the British Colonial Office, vol. 4, #1095, pp. 2759–60.

[12] Library and Archives Canada, RG 10, Vol. 14, pp, 264–66, Nicholas Cox, Regulations Tracadegash-Restigouche August 7, 1784.

[13] Correspondence of British Colonial Office, vol. 4, pp 2759–60. Crown protection of the Indigenous salmon fishery was specifically addressed in 1765. See Library and Archives Canada, Memorial of William Van Felson.

region. Moreover, it was regarded as a necessary component of settlement. As in many locales in the Atlantic region, a large majority of settlers came to the Restigouche watershed with few if any tools or capital for livestock. Thus, European settlement depended on the river fisheries as a primary source of protein in the initial and ongoing process of settler colonialism.[14] Given that colonial authorities had, at best, tenuous control of the Listuguj region, settler encroachments became endemic.

Frequent complaints on the part of the Listuguj Mi'kmaq brought the salmon harvesting issue to a head in 1780 on the eve of the major migration of Loyalist settlers after the American War for Independence. The addition of thousands of settlers brought wholesale changes to the relationship of Mi'kmaq to their traditional resource base, which they defined as the Listuguj watershed up to the Cascapedia River on the Gaspé Peninsula. At this point, Major Nicholas Cox, lieutenant governor of the Gaspé, commissioned a report of the Listuguj situation. He again referenced the *Royal Proclamation* of 1763 and concluded that "they must be supported in whatever Rights and Privileges respecting their Hunting [and] etc. they are entitled to at Ristigouche." Significantly, Cox added that local magistrates should "by no means take any step by which a fair and free trader may be injured."[15] This early iteration of the overarching colonial policy brought rapid and sweeping change. Colonial government attempts to balance Indigenous rights with the overall desire for commercial and agriculture development by non-Indigenous people almost always gave precedence to the latter over the former. Such policies were often presented to Indigenous people with fulsome assurances that their best interests would be preserved; however, the clear focus was on commercial development.

Within two years of the beginning of Loyalist migration to the region, Cox was sent to Listuguj to interview the chiefs; it was part of a larger effort to draw boundaries around Indigenous land and resources in the colonies. Fuelled by the pressing compulsion to accommodate the flood of Loyalists, the process was, naturally, fraught with the types of linguistic, legal, and cultural barriers that John Reid and William Wicken have noted in their research on the mid-eighteenth-century *Peace and Friendship Treaties*.[16] The Listuguj Mi'kmaq were asked to produce written evidence of the lands and waters they claimed for their exclusive use and asked to agree to relinquish lands and resources for the greater good of all residents of the watershed. The colonial government, Cox stated, was "anxious to accomplish a final settlement with the Strictest principles of Justice, that all animosities betwixt his Majesties and other Subjects may cease; that proper limits may be fixed to your Hunting Grounds and Fisheries." He went on to write, "In regard to your Claim of the Salmon Fishery in the River Ristigouche we are well assured that from the favourable Sight in which we will represent your pretensions...our Great Chief…will continue to protect you in all your ancient Rights and Privileges."[17] In the end, the Listuguj Mi'kmaq agreed to surrender a large portion of the lands they claimed as hereditary which was the primary objective of the exercise by the Crown. However, the Mi'kmaq meeting with Cox highlights the duplicitous pacification that underscored the use of terms such as protecting "ancient Rights and Privileges" checked against commercial development

[14] Bill Parenteau, "'Care, Control and Supervision': Native People in the Canadian Atlantic Salmon Fishery, 1867–1900," *The Canadian Historical Review* 79, no. 1 (March 1998): 4–5.

[15] British Library, Haldimand Papers, MSS, 21862, Haldimand to Nicholas Cox, Lieutenant Governor, p. 7; Haldimand to Cox, August 16, 1780.

[16] See especially William Wicken, *Mi'kmaq Treaties on Trial: History, Land and Donald Marshall* (University of Toronto Press, 2022).

[17] Library and Archives Canada, RG 4, S Series, Vol. 32, pp.10282–87, Charles Robin to Lord Dorchester, February 14, 1787.

under colonial jurisdiction at the expense of Mi'kmaq sovereignty. Thus, the settler assault on the Listuguj salmon fishery proceeded apace.

The issue of the land entitlement of the Listuguj Mi'kmaq was settled quickly after the Loyalist invasion. The coming of the Loyalists transpired within the context of what John Weaver referred to as the "great land rush," when colonial authorities imposed British principles of land ownership and tenure on Indigenous peoples in Indigenous territories they occupied around the world.[18] The agreement that Major Cox made with the Listuguj in 1786 was quickly acted upon, as individual grants of one hundred acres and larger were issued during the next year. The largest tract of ten thousand acres of land was given to John Schoolbred, a London merchant. It was a Mandamus grant, which the Crown used as in-kind payment for financial contributions of wealthy merchants who supported the Crown; presumably in Schoolbred's case, it was for financial assistance during the American War for Independence. A grant of two thousand acres was issued to the Loyalist Thomas Mann family; Mann was the justice of the peace for Listuguj and a member of the Gaspé Land Commission when it was formed in 1820. In keeping with his position, in the years after the 1787 grant, Mann added considerably to the family holdings. The circumstances of the acquisitions were questionable at best as they involved the exchange of "merchandise" for land. Any land transactions between settlers and Indigenous peoples normally required sanction from the Crown as outlined in the *Royal Proclamation.* Thomas Mann subsequently explained that "the Sauvages relinquished the said lands to the Crown for me and family desirous of having us as the nearest neighbors."[19]

While Lieutenant Governor Cox negotiated a land and resource deal with the Mi'kmaq, commercial fish merchants turned their attention to the salmon fishery. In late 1786, responding to well-placed fish merchants, Governor General Guy Carleton requested that Charles Robin, who would become the dominant fish merchant on the Baie de Chaleur, make a report on the conditions on the Listuguj River. In his report Robin noted the "very considerable" salmon fishery on the watershed and opined that "rivers should be divided into a certain number of Fisheries in order to prevent in the first-place monopolies and in the second Disputes and Confusion which otherwise cannot be prevented." He maintained that the Mi'kmaq practice of spearing salmon by torchlight produced a low-quality product "fit only for the West Indians owing to its wound and the Idleness if the Indians who never or seldom deliver it fresh."[20] An anonymous correspondent—likely one of the largest land owners on the river—further insisted that a settlement with the Listuguj Mi'kmaq would "increase the Demand of British manufacturers, which are essential to a Connection of any importance in the Bay, by means of employing more Seamen and carrying on the Fishery to double the extent the Indians can possibly do."[21] As in so many other cases, merchants with a vested interest in creating new harvesting regimes controlled the resource development policies that created fisheries, which subsequently dispossessed the Mi'kmaq from their resources.

After 1790, the salmon fishery on the Listuguj became in practice a common property resource, but not as Robin and others in the colonial administration imagined. Settlers flooded into the fishery, and by 1800 had already created situations that contributed to the deterioration of the Atlantic salmon population. Settlers that practised the unregulated setting of gill nets created an acute problem that compromised the

[18] John Weaver, *The Great Land and the Making of the Modern World, 1650–1900* (McGill-Queen's University Press, 2006).

[19] Archives National du Québec, Mission des Peres de Saint-Anne de Restigouche, Article #14h, Report of Nicholas Cox on meeting with Mi'kmaq, June 29–30, 1786.

[20] Library and Archives Canada, "Charles Robin to Lord Dorchester."

[21] Library and Archives Canada, RG 1-L3L, vol. 110, NA, The Grant of North of the Restigouche to the Indians, March 2, 1787.

migration of salmon upriver for spawning. In 1807, the Quebec government passed an *Act for the Better Regulation of the Fisheries*. The act introduced a closed season for salmon fishing from August 15 to December 1 and limited the length of nets to no more than one-third the width of the river in any given locale. It prohibited the purchase of fish from Indigenous people during the closed season but allowed that "nothing in the Act shall restrain or be construed to extend to prevent Indians from catching salmon for their own and their families use."[22] The Department of Fisheries and Oceans revived the idea of an Indigenous food fishery two centuries later and presented it as a new entitlement but, in reality, had the same intent as the 1807 act: circumscribing and controlling Indigenous resource harvesting.

On the ground, the colonial government could do little to control unrestrained salmon fishing because of the proximity from the seat of colonial power, local office holders, merchants seeking benefits from Indigenous resources, and the continuing expansion of the settler population. In 1824, the Quebec government made a substantial revision of the 1807 *Fisheries Act* that again diminished the position of the Listuguj Mi'kmaq in the fishery. The new act banned the selling of salmon above the first rapids on the Listuguj (most Indigenous people speared salmon on or close to upriver spawning beds). It also prohibited the practice of spearing fish by torchlight altogether. And, finally, the act introduced a closed time during the legal season from sundown on Saturday to sunup on Monday, eliminating two evenings when the Listuguj Mi'kmaq normally harvested. As in other cases, the Mi'kmaq bitterly protested the changes and petitioned for relief from the hardships that had been created.

The Listuguj salmon fishery was one of the first to be subjected to a process that would become common. That is, exclusive rights recognized by the Crown were converted to shared rights or privileges and finally subjected to a regime that allowed them to harvest only at the pleasure of colonial authorities. Governor General Lord Dalhousie's unequivocal rebuke to a petition by the Listuguj Mi'kmaq for redress makes abundantly evident the end game of this process of dispossession. "On this occasion," the governor general declared, "I must endeavour to put an end to the idea which the Indian tribes entertain, of an exclusive right to the hunting and fishing. No such exclusive rights belong to either the Indians or the Whites." Dalhousie did authorize the shipment of relief supplies to the community in consideration of the "hardships of their destitute state this year arising out of the hardships occasioned by the act of the parliament…but by no means as acknowledging any claim on the part of this tribe to such indulgences." It was a long way from Major Cox's pledge in 1786 that, in keeping with the *Royal Proclamation*, "they must be supported in whatever Rights and Privileges respecting their Hunting [and] etc. they are entitled to at Ristigouche."[23]

The Loyalist Thomas Mann, the justice of the peace for Listuguj and a member of the Gaspé Land Commission at its formation in 1820, and who received a grant of two thousand acres, had a tense relationship with the Mi'kmaq. The relationship of the Mann family to the Listuguj Mi'kmaq was, in reality, far less cozy than was presented to colonial authorities, and stresses how the situation on the river more generally was prone to confrontations. In 1813, Sir John Johnston, superintendent of Indian Affairs for North America, received a petition that Thomas Mann wrote on behalf of thirty Anglophone settlers that insisted they had "long suffered in silence" and requested redress for depredations; these included "the pilfering of salmon and destruction of settler's fishing nets and the killing and stealing of cattle." A

[22] Provincial Statues of Lower Canada (1807), Chapter 12, *An Act for the Better Regulation of the Fisheries of the Interior in the Interior of Gaspe*, 264–87.

[23] Geneviève Massicotte, "Rivalités autour de la pêche au saumon sur la rivière Risitigouche : étude de la résistance des Mi'gmaq (1763–1858)" (master's thesis in history, Université du Québec à Montréal, 2009), 140–42.

separate allegation made by Edward Mann and another petty local official in 1814 asserted that the Mi'kmaq had perpetrated the murder of four settlers along the river in the previous seven years.[24] Although the veracity of these claims must remain a matter of speculation, they do reflect an active resistance to settler rule—a resistance that included both petitions and other appeals as well as community-level physical defence of rights. The land grants on the river left the Mi'kmaq with 850 acres to support close to one hundred families, and made the events of dispossession on the Listuguj particularly difficult. It was a situation that would not be addressed by colonial officials until 1851.

II. Wildlife Management, 1850–1900

The exponential increase in population in New Brunswick in the first half of the nineteenth century created a mounting crisis with respect to fish and game populations. Settler harvesting, alongside land clearing, building mill dams, polluting the water, cutting forests along riverbanks, and other practices created environmental conditions incompatible with healthy wildlife populations. The colonial government experimented with such regulations as closed seasons, bag limits, and gear restrictions, as well as prohibitions on snaring game, netting waterfowl, hunting with the aid of dogs, and using "jack lights" at night.[25] Regulation began before 1800, and all fish and game laws underwent a major overhaul in the early 1850s.[26] However, given the fiscal position of the province and nineteenth-century sensibilities about the limited role of government, there was never a commitment to wildlife regulations sufficient to stem the decline.

In the late 1870s, the provincial and federal governments began leasing rivers, lakes, and shooting grounds to sporting clubs—some of them quite elite—that had begun proliferating.[27] The clubs were seen to bring two benefits. First, the money they expended promoted economic development, according to their supporters. Additionally, the lease agreements stipulated that sporting clubs employ private guardians, who were given the magisterial powers of search, seizure, and arrest.[28] Thus, they served the objectives of conservation in lieu of the ability of governments to implement effective surveillance systems. In the course of attempting to eliminate the traditional Mi'kmaq practices of spearing salmon by torchlight, prohibited under federal regulations, the Department of Marine and Fisheries tried minor forms of compensation and other acts of paternalism.[29] The department employed patrol boats, threats, incarceration, and armed raids on defiant Indigenous communities. Especially notable was the attack of armed sailors on the Listuguj who refused to follow government fishing regulations.[30]

[24] Library and Archives Canada, RG 10, A-6-g-kVol. 627, Memorial of Restigouche Residents to John Johnson, Superintendent of Indian Affairs, October 7, 1813; Petition of Edward Mann to John Prevost, November 15, 1813; Deposition of Thomas Busteed to Edward Mann, March 30, 1814.

[25] Bill Parenteau and Richard Judd, "More Buck for the Bang: Sporting and the Ideology of Fish and Game: Management, 1870–1900," in *New England and the Maritime Provinces: Connections and Comparisons,* eds. Stephen J. Hornsby and John G. Reid (Montreal and Kingston: McGill-Queens University Press, 2005).

[26] D. Wilson, "Report on the Salmon Fisheries in Certain Rivers of New Brunswick, 1962," *in Journals of the New Brunswick House of Assembly, 1863, Appendix*. Moses Perley*, Report on the Sea and River Fisheries of New Brunswick* (Fredericton: Provincial Legislature of New Brunswick, 1851).

[27] Dean Sage, *The Ristigouche and Its Salmon Fishing: With a Chapter on Angling Literature* (Edinburgh: D. Douglas, 1888).

[28] Parenteau, "'Care, Control and Supervision'."

[29] What is now the federal Department of Fisheries and Oceans has gone through several institutional name changes, as noted throughout the article.

[30] Parenteau, "'Care, Control and Supervision'."

As a result of persistent treaty claims in the decade after the passage of the first federal *Fisheries Act* (1868), the "Indian Branch" in the Department of the Secretary of State of Canada (that would become the Department of Indian Affairs in 1880) was prompted to review the issue. The review included the Departments of Fisheries and Justice.[31] In 1878, the deputy superintendent of Indian Affairs complained to the minister of Fisheries that the new regulations interfered with "the Indians of Ontario, the Lower St. Lawrence in the province of Quebec and the Maritime provinces in obtaining (as they formerly did) an important part of their subsistence in which from time immemorial they had been in the habit of fishing unrestricted by any regulation." Noting that, in some instances, the regulations contradicted "treaties" guaranteeing "unrestricted rights of fishing" and that the Department of Indian Affairs had insufficient funds to "compensate them for their deprivation," he asked the Fisheries minister to give "serious consideration to important modifications" of the regulations as they pertained to First Nations. Unmoved by the appeal, the Department of Fisheries' deputy minister contended that Indigenous peoples were "better off in every moral and material respect than ever before in their lives" and "any proposal therefore to restore the illegal abuses which Indians seem to claim some hereditary right to indulge in" would require stronger justification and parliamentary approval. In 1882 the Department of Justice confirmed the prevailing opinion within Fisheries that "Indians are entitled to use the public fisheries only on the same conditions as white men."[32] The differing views between the federal government branches of "Indian Affairs" and Fisheries reflected their respective mandates, the former carrying a fiduciary responsibility to the First Nations and the latter made responsible for the maintenance and enhancement of fish stocks.

For the following two decades, the Department of Fisheries continued its policy of repudiation of Indigenous treaty rights, tempered by occasional acts of paternalism when the ministers could be convinced that the conditions of particular First Nations were sufficiently desperate to warrant "special privileges." Deputy Minister E.E. Prince spoke to the nature of the process in 1898, in response to criticism from the Department of Indian Affairs, when he remarked, "this Department [Fisheries] has devoted much attention and care to the special circumstances of the Indians, especially in remote districts, by relaxing closed seasons, by issuing special permits free or at reduced fees, and by other concessions, has met the requirements of urgent cases."[33]

In reaction to the question of treaty rights "constantly coming up" and "causing considerable trouble," the Department of Indian Affairs launched a nationwide survey of First Nations' fishing activities and attitudes in 1898, which led to another round of interdepartmental discussion. Not surprisingly, as William Carter, the Indian agent for the twelve Mi'kmaq First Nations in New Brunswick, noted, the Mi'kmaq "declare that by the treaty which their forefathers entered into with the whites of that time no restriction was ever to be placed on their right to hunt and fish at all seasons."[34]

[31] The current federal Department of Indigenous and Northern Affairs Canada went through several institutional name changes as noted throughout the article.

[32] Library and Archives Canada, Records of the Department of Indian Affairs, RG 10, vol. 2064, file 10,099 1/2, L. Vankoughnet, Deputy Minister of Indian Affairs to Minister of Marine and Fisheries, July 18, 1878; W.F. Whitcher, Deputy Minister of Marine and Fisheries, to L. Vankoughnet, September 13, 1878 (quoted): vol. 3909, file 107, 297, pt. 3, E.E. Prince, "Memo for the Minister, Re: Fishery Rights of the Indians," April 5, 1898.

[33] Library and Archives Canada, RG 10, vol. 3909, file 107, 297-3, E.E. Prince Deputy Minister of Marine and Fisheries, "Memo. For the Minister, re. Fishing Privileges of the Indians), May 31, 1897.

[34] Library and Archives Canada, RG 10, vol. 3908, file 107, 297, pt. 1, Copy of a circular letter to Indian Agents, December 31, 1897; William Carter, Indian Agent, New Brunswick, to J.D. Mclean, Secretary of Indian Affairs, January 21, 1898;

When presented with the findings of the survey, the Fisheries Department again repudiated the notion that First Nations had treaty rights. The deputy minister accused Indian agents of encouraging Indigenous peoples to assert their rights, insisted the matter had been settled, and remarked that further review of the issue "might encourage unjustifiable anticipation on the part of the Indians in various provinces." Finally, the Department of Justice issued an opinion in July 1898 that "whether so expressed or not, the treaties do not as a matter of law, limit the power of Parliament to impose regulations."[35] The Department of Indian Affairs would not raise the issue again until after the Second World War.

After 1880, the recreational hunting and fishing industry expanded dramatically in the Maritimes, and the provincial governments began to take a more active role in wildlife conservation, particularly with respect to hunting, which the colonial government considered under its jurisdiction. The *Game Acts* in New Brunswick underwent major consolidation and revision in the 1890s, and the provinces bolstered efforts at enforcement. Unfortunately, provincial records of game law administration for New Brunswick during this period are almost nonexistent. However, the small amount of correspondence between the federal Department of Indian Affairs and the provincial government departments suggests that the provincial government followed policies similar to the federal Department of Fisheries.[36] That is, they insisted that First Nations had no vested rights, but made special considerations and dealt leniently with Wabanaki peoples charged with violation of the *Game Acts.* Despite the paucity of information, it is clear that Indigenous peoples maintained the position that they had treaty rights to game, as the first formal legal challenges were mounted in the decade after the First World War.[37]

III. Squatting

The practice of squatting practised across the British North American colonies produced a diffuse and complex issue concerning the territories of Indigenous nations.[38] In all of the eastern British North American colonies, hundreds if not thousands of squatters encroached on Indigenous territories. Indeed, fears of being overrun by squatters was a major factor in the appeals and petitions of Indigenous people

Library and Archives Canada, "Memo. For the Minister, re. Fishing Privileges of the Indians"; vol. 11194, file 4A, A Power, Acting Deputy Minister of Justice to Secretary, Department of Indian Affairs.

[35] "Memo. For the Minister, re. Fishing Privileges of the Indians"; Library and Archives Canada, Acting Deputy Minister of Justice to Secretary, Department of Indian Affairs.

[36] As in other jurisdictions, starting in the early 1870s, Nova Scotia and New Brunswick passed piecemeal game regulations, such as closed seasons, bounties, bag limits, and restrictions on harvesting methods. However, little effort was made at enforcement. The consolidations and revisions of the acts were passed in anticipation of intensified enforcement efforts. See Parenteau and Judd, "More Buck for the Bang."

[37] There are hints that this was the case. For example, when members of the Metepenagiag and Natoaganeg First Nations were charged by provincial authorities with hunting during closed season in 1898, they appealed to the Department of Indians Affairs. Although treaty rights were not specifically mentioned, the Indian agent did remark, "I cannot bring them to believe that the game laws of the province were intended to apply to the Indians." See Library and Archives Canada, RG 10, vol. 8862, file 1/18-5, pt. 1 John Dominic, Red Bank, to Deputy Superintendent of Indian Affairs, March 3, 1898; W.D. Carter, Indian Agent to J.D. McLean, Deputy Minister of Indian Affairs, March 7, 1898. In a classic bit of paternalism, J.D. McLean, the deputy minister, responded to the complaint by Metepenagiag resident John Dominic that "You must always remember that the protection of game is quite as much if not more in the interests of the Indians as of any other members of the community, and you could not expect others to care about the preservation of game in order to have it exterminated by the privileged few." See Library and Archives Canada, RG 10, vol. 8862, file 1/18-5, pt. 1 McLean to Dominic, March 12, 1898.

[38] For the widespread practice of squatting, see Andrew Parnaby, "The Cultural Economy of Survival: The Mi'kmaq of Cape Breton in the Mid-19th Century," *Labour/Le Travail* 61 (2008): 69–98; and John Clarke, *Land, Power and Economics on the Frontier of Upper Canada* (Montreal: McGill-Queen's University Press, 2001).

for reserves.[39] Between 1800 and 1850 the population of New Brunswick exploded from 25,000 to almost 250,000, the bulk of it after 1820 when the reserve system was mostly set in place.[40] The province did not have sufficient land to accommodate the large number of new settlers, and many of them were too poor to even pay the nominal fees to obtain a standard 100-acre grant.

Squatting had begun by 1788 at which time Lieutenant Governor Thomas Carleton issued an order for a group that had encroached on the as yet unsurveyed Mi'kmaq village at Richibucto to desist.[41] In April 1809, Provincial Secretary Jonathan O'Dell issued a standing order that any land transaction between settlers and Wabanaki peoples could transpire only if all the men of the community consented and it received official sanction from the colony's government.[42]

The New Brunswick government did not have the capacity to follow through on this directive. This deficiency created a hodgepodge of technically illegal practices and arrangements. Squatters were able to move on to reserve land and set up operations with only occasional intervention by colonial officials. Until the 1840s, Moses Perley was the sole Indian agent for the province. He sometimes lent the people of the reserves a sympathetic ear, but was nevertheless fixated on the "civilizing" of Indigenous peoples through the promotion of agriculture, the practice of Christianity and, to a lesser extent, the British version of education.[43] Despite its limited utility, the "Bible and plow" focus of the New Brunswick colonial administration—and, after Confederation, the Canadian government—endured for more than a century. In practice, it was simply not compatible with the primary goal of attracting and supporting settlers.

It would not be an exaggeration to suggest that many within the settler community considered settling on reserve lands an entitlement. Aggression and intimidation directed toward Indigenous peoples regularly featured when settlers' practised land grabs through squatting.[44] Moses Perley's experience with a group of settlers who had taken up land on the Tobique Reserve was emblematic of a pattern of hostility among squatters. This particular group, Perley suggested, "make themselves quite at ease. They pay no rent, acknowledge no title and from long impunity have become very insolent and overbearing." He added "'they openly plunder the forest in the vicinity of the most valuable timber" and "hunt off like wild beasts" any Indigenous peoples "if they attempt to look after or prevent the trespasses which are constantly committed."

Moreso than the agricultural opportunities, cash-poor settlers were interested in any reserve forest lands with standing timber. Trespass cutting of timber became so common as the lumber trade expanded in the early decades of the nineteenth century that the colony's government set up a system for lease agreements between settlers and Indigenous communities. It did not replace the practice of simply moving onto reserve lands seasonally to cut wood, and was subject to a variety of abuses—reneging on written agreements and forcing Indigenous peoples to accept overpriced and/or substandard supplies in lieu of

[39] L.S.F. Upton, "Indian Affairs in New Brunswick," *Acadiensis* 3, no. 2 (1974): 3–26; L.S.F. Upton, "Indian Policy in Colonial Nova Scotia," *Acadiensis* 5, no. 1 (1975): 3–31.

[40] Graeme Wynn, *Timber Colony: A Historical Geography of Early Nineteenth Century New Brunswic*k (Toronto: University of Toronto Press, 1981), 3.

[41] New Brunswick Indian Affairs Documents [online] MG#54, item #1a, Order issued by Lieutenant Governor Thomas Carleton, June 28, 1888. See also New Brunswick Indian Affairs Documents [online] MG#54, item 4. Order issued by Provincial Secretary Jonathan O'Dell, May 9, 1793.

[42] Indian Affairs Documents, #39, Order issued by Provincial Secretary Jonathan O'Dell, June 6, 1809.

[43] L.F.S. Upton, "Indian Affairs in New Brunswick," *Acadiensis* Spring 1974, Vol. 3 Issue 2, pp.3–26.

[44] Moses H. Perley, *Reports on Indian Settlements* (Fredericton: J. Simpson, 1842).

cash payment, to single out a few. It was also common to pay for timber fees only when Crown land officers made an inspection. "It had so long been the custom," one settler testified, "to cut as they pleased on Indian land, that they considered it right and lawful to do so….Detected in the act or before the removal of the timber the payment of stumpage made it alright."[45]

By 1840 the realization that leasing timber on Indigenous territories was not worth the effort had set in with the colony's government, which was desirous of reducing the cost of relief of destitute Indigenous peoples (on average about three hundred pounds per year). The New Brunswick House of Assembly formed a Select Committee on Indian Reserves in February 1843 to address squatting and other issues regarding reserve lands.[46] In the Preamble of the Final Report, the committee noted that squatters played an important role in the development of the colony. It recommended that land not needed or utilized on reserves be offered for sale in 50- and 100-acre lots just as on Crown lands. The recommendation was built on a gross misunderstanding of Indigenous land use patterns, particularly the seasonal nature of Indigenous economies. By making improvements, the lot holder could gain full title to the land; only marsh lands were to be leased for hay. For the "benefit" of Indigenous peoples the remaining land was to be laid out in town, pasture, and wood lots. Over the objections of the Wolastoqiyik, who petitioned the government for a reconsideration and abandonment of the scheme, the colonial government passed an *Act for the Management of Indian Lands and Settlement of the Indians* in April 1844.[47] In essence, the legislature had converted a problem with piecemeal chipping away of reserves into a state program of dispossession. Thereafter, the government retreated to the neglect of Indigenous affairs characteristic of the practice of the previous two generations. Little or no action was expended toward fulfilling its mandate.

IV. *Bernard, Jacobs,* and *Syliboy*

In 1925, the arrest of Alex Bernard and Peter Jacobs, both Mi'kmaq, for unlawfully trapping beaver led to the first known use of the eighteenth-century treaties in an Atlantic Canadian court. At the trial, W. Emmett McGonagle, the counsel for the accused, produced copies of the *Treaty* of 1725, *Treaty* of 1752, Belcher's *Proclamation* of 1762, and the *Royal Proclamation* of 1763, which he had obtained from the Nova Scotia provincial archives. According to the local newspaper, Bernard and Jacobs presented as evidence "a medal supposed to have been given to the tribe during the reign of George third and kept by them since that time." Ultimately, the two men were judged not guilty by virtue of insufficient evidence, making a judgment on the treaty claims unnecessary. In the years after the case, copies of the treaties were circulated in Indigenous communities, and, on more than one occasion, were produced as evidence of exemption from the New Brunswick game laws when Wabanaki hunters were confronted by wardens.[48]

Perhaps the most important court case in Canada prior to the Second World War involving Indigenous treaty rights to natural resources began in 1928, when Gabriel Sylliboy, the Grand Chief of the Nova Scotia Mi'kmaq, was arrested for illegal possession of fifteen muskrat and fox pelts on Cape Breton Island. Not surprisingly, it has received considerable attention from historians and legal scholars.

[45] Ibid., 4; Moses Perley, Report of the Select Committee on Indian Lands 21, 29 March 1843, pp. 203–208, 235–236.

[46] Perley, *Reports on Indian Settlements,* 2.

[47] Upton, "Indian Affairs in New Brunswick," 16.

[48] "Constitutional Aspect Undecided," *Moncton Transcrip*t, May 30, 1925; Library and Archives Canada, RG 10 vol. 8862, file 1/18-5, pt. 1 B.A. Vanderbeck to H.H. Ritchie, October 21, 1927; Mrs. Peter Narvie, Eel River, Secretary, Department of Indian Affairs, April 4, 1929; Charles Hudson to J.D. McLean, Secretary, Department of Indian Affairs, April 26, 1929.

The *Treaty* of 1752 provided the basis of the defence, a treaty created within the context of the final defeat of the French in North America.

The case was adjudicated at the county court level. Sylliboy lost his case. It was ruled that the treaty defence was immaterial on the grounds that the Mi'kmaq, by virtue of their relationship with the French, did not constitute a sovereign nation. The presiding judge also ruled that the governor of Nova Scotia at the time did not have the authority to make treaties; that the Peace and Friendship agreement did not apply to the French controlled territory of Cape Breton; and that even if it was a legitimate treaty, by international law it was negated by the renewed hostilities of the mid-1750s in which the Mi'kmaq fought on the side of the French.[49] Just a year prior, in 1927, the federal government amended the 1876 *Indian Act* that required anyone soliciting funds for Indigenous legal defences to obtain a licence from the Superintendent General of Indian Affairs, which made the raising of treaty issues difficult for a generation.

For the most part, the *Syliboy* decision eliminated formal legal appeals to treaty rights until after the Second World War. Copies of the substance of the decision were distributed to game wardens and police magistrates in Nova Scotia and New Brunswick to demonstrate to First Nations that they did not hold any special rights to fish and game. Additionally, First Nations in New Brunswick began to insist that the treaties allowed them unrestricted rights to hunt and fish on their own reserves. Both the provincial government and the federal arm of "Indian Affairs" resisted this notion until the early 1950s.[50] After *Syliboy* and the step toward the criminalization of treaty rights, Wabanaki peoples' general pattern of "illegal" harvesting (mostly clandestine) persisted, as did the repudiation of treaty rights, tempered by occasional, ad hoc acts of paternalism on the part of the state.

V. Modernization and The *Simon* Case

The Second World War marked a watershed moment in the governance of Canada, as both the provincial and federal governments came out of the wartime planning experience with a new model for the economic and social development of the nation, ushering in the advent of the positive state. A national Royal Commission (1946) that fully documented the generally woeful conditions on First Nations reserves in Canada made the improvement of life for Indigenous peoples and reform of the archaic 1876 *Indian Act* public issues.

A major revision of the *Indian Act* came in 1951. Most significantly, in terms of the many historical grievances of Canadian First Nations, it removed the part of the 1927 amendment that required anyone soliciting funds for Indigenous legal claims to obtain a licence from the Superintendent General of Indian Affairs. Although poverty and other social problems were by no means eliminated, significant improvements were made in First Nations communities in the decades after the war, and a new generation of leadership

[49] *Rex v Syliboy* [1929] 1D.L.R. 307 (also reported: (1928), 50 C.C.C. 389); William C. Wicken, "'Heard It from our Grandfathers': Mi'kmaq Treaty Tradition and the Syliboy Case of 1928," *University of New Brunswick Law Journal* 44 (1995): 145–62.

[50] PANB, Records of the New Brunswick Fish and Wildlife Service, Row 5 H.H. Ritchie to S. Leonard Jones, Game Warden, November 16, 1937; Jones to Ritchie, November 13, 1937; Alfred Hudson, Tobique Narrows, to H.H. Ritchie, October 13, 1928; Ritchie to Hudson, October 20, 1938; A.T. Pelletier, Chief, Fish and Wildlife Branch, Memorandum, March 25, 1959; Library and Archives Canada, RG 10, vol. 8862, file 1/18-5, pt. 1, G.H. Prince, New Brunswick Deputy Minister of Lands and Mines to Department of Indian Affairs, August 16, 1945; H.M. Jones, Superintendent, Welfare Service, to E.J. Blakely, Superintendent, Indian Agency, December 10, 1952; L. Couture, Department Legal Adviser, to J.P.B. Ostrander, Superintendent, Welfare Service, November 10, 1953.

with more formal education and confidence emerged.[51] However, the new era of modernization also presented challenges for First Nations.[52]

Soon after the revision of the *Indian Act*, Willie John Simon, a constable for the Big Hole Tract of Natoaganeg (Eel Ground First Nation), made the first treaty claim. As was often the case, it grew out of a confrontation between Indigenous peoples and wildlife enforcement officers. In this incident the issue began as a brawl between three Mi'kmaq fishers who used nets on the Molus River (a small tributary of the Richibucto) and federal fisheries officers.[53]

The incident embittered the officers and prompted the Fisheries Department to assertively apply its authority when the salmon run began the next spring. In an action that may have had a measure of premeditation, Willie John Simon was arrested on June 20, 1957, for setting salmon nets on the Richibucto River without a licence. Back in 1951, Simon's nets had been seized by federal officers, at which point he complained to the federal Department of Citizenship and Immigration responsible at that time for Indian Affairs. Simon argued that Elsipogtog (Big Cove First Nation) had treaty rights.

This time around, he decided to test his beliefs in court. He was, ultimately, unsuccessful. In 1958, the New Brunswick Supreme Court ruled, on appeal, that Simon could establish no direct lineage to the people covered under the *Peace and Friendship Treaties* of 1725 and 1752, and therefore had no right to fish in contravention of federal regulations.[54]

The decision in the *Simon* case, which flatly rejected Wabanaki treaty law, did little to discourage harvesting practices, and by the early 1960s confrontations between fisheries officers and Wabanaki fishers became more common. In the vicinity of the Mi'kmaq Metepenagiag (Red Bank Reserve) on the Miramichi watershed, for example, throwing stones at fisheries officers had become routine. The federal deputy minister of Fisheries informed Indian Affairs in September 1965 that "the number of attacks on our officers by rock throwing in this area in the last few years, recorded on the weekly reports of these officers, is not less than shocking." Earlier in the year an officer suffered a fractured skull in a rock throwing incident, and in 1963 officers were allegedly warned by a group of men from the reserve that they "should be careful or someone might get shot." In the minds of the local wardens, the culprits were a "hard core of determined Indians who are not only prepared to go to some length to show their disregard for the law, but also have no hesitation in causing bodily harm to enforcement officials to achieve their

[51] On the organization of Indigenous people in the region in the 1960s and 1970s, see John Reid, "The 1970s: Sharpening the Sceptical Edge," in *The Atlantic Provinces in Confederatio*n, eds. Ernest R. Forbes and Delphin A. Muise (Toronto: University of Toronto Press, 1993), 485–87; For general discussion of the Native Rights movement in Canada, see, J.R. Miller*, Skyscapers Hide the Heavens: A History of Indian-White Relations in Canada,* 3rd ed. (Toronto: University of Toronto Press, 2000); Olive P. Dickison, *Canada's First Nations: A History of the Founding Peoples form Earliest Times* (Toronto: MacMillan and Stewart, 1992).

[52] On efforts to consolidate Indigenous people on combined reserves, as part of the modernization program, see Martha Walls, "Countering the 'Kingsclear Blunder': Maliseet Resistance to the Kingsclear Relocation Plan, 1945–1949," *Acadiensis* 37 (2008): 3–30; and, Lisa Patterson, "Indian Affairs and the Nova Scotia Centralization Policy," (MA thesis, Dalhousie University, 1985); see also Daniel Paul, *We Were Not the Savages: A Micmac Perspective on the Collision of European and Aboriginal Civilization* (Halifax: Nimbus Press, 1993); James Kenny and Bill Parenteau, "Centralization in Nova Scotia," scoping document prepared for the Specific Claims Branch, Department of Indian Affairs and Northern Development, 1998.

[53] Library and Archives Canada, RG 23, Records of the Department of Fisheries and Oceans, vol. 729, file 715-311-1, pt. 1, A.A. Robichaud, District Protection Officer to Chief Supervisor of Fisheries, May 24, 1956.

[54] Ibid.; Library and Archives Canada, vol. 729, file 715-8-1, pt. 1, Province of New Brunswick, County of Kent, on appeal, *R v Martin Francis, Douglas Francis and Abraham Simon*, Decision of A.J. Cormier, December 8, 1957.

aims."[55] Looking back on this era, a fisher from the nearby Natoaganeg remarked, "The Native really had to fight for any right to the fishery without being hassled by the fisheries people."[56]

The fishing outside of colonial jurisdiction at Elsipogtog also continued unabated after the *Simon* case and eventually resulted in a second treaty challenge. In September 1966, Martin Francis and a number of other Elsipogtog residents were charged with netting salmon and bass in the Richibucto River out of season. Francis defended himself on the basis of the *Peace and Friendship Treaties* of 1725, 1752, and 1779. His treaty claims were rejected by a county court magistrate in January 1968 and by the New Brunswick Court of Appeals in November 1969, on essentially the same grounds as in the *Simon* case. However, the opinion of the county magistrate and editorials in some of the daily newspapers reflected changing attitudes among at least a segment of the non-Indigenous population. County Magistrate Eric T. Richard remarked in his decision that he was bound by the law, but also noted that over time that Elsipogtog had been reduced from 5,400 to 250 acres "under laws which not only deprive people of their lands but their privileges as well as their dignity."[57] The editor of the *Moncton Times* added, "It is high time that the position of the Canadian Indian was thoroughly reviewed…with the objective of guaranteeing to him beyond any shadow of a doubt his rights and privileges…safe from the legal chicanery that has hitherto so often been used against him."[58]

While there is no indication that these sympathies had penetrated state wildlife management agencies, the federal Department of the Environment (Department of Fisheries) was fully aware of changing public opinion and becoming alarmed at the frequency of protests and confrontations between First Nations and officers. Even as the *Francis* case was making its way through the New Brunswick court system, a review of policy toward First Nations on the east coast was underway. One result was that in the years 1972 to 1974 the department issued food fishery permits for salmon to the Elsipogtog, Bilijk (Kingsclear First Nation), and Listuguj. Food fishery licences had long been issued to First Nations in other parts of Canada, principally in British Columbia, and were in subsequent years also issued to the Metepenagiag, Natoaganeg, and Esgenoôpetitj (Burnt Church) Mi'kmaq reserves on the Miramichi watershed, and to the Wolstoqiyik Oromocto reserve on the Wolastoq.[59] The food fishery licences extended the parameters of legal salmon fishing by First Nations, but also carried strict guidelines in terms of timing, methods, and the quantity of the catch. They also prohibited any commercial sales. Overall, the policy added a new dimension to the relationship between the provincial and federal fisheries administration and was the first step in more comprehensive system of co-management between First Nations and the federal department. However, it had little immediate impact on curbing the inclination of Indigenous peoples to aggressively assert their treaty rights to the fishery. Indeed, controversy over alleged abuse of the food fishery licences would produce the salmon wars at Bilijk and Listuguj in the late 1970s and early 1980s.

[55] Correspondence from the records of the Department of Marine and Fisheries, located in the collection of the Claims and Historical Research Centre, Indian and Northern Affairs Canada, Ottawa, R.R. Logie, Assistant Deputy Minister, Department of Fisheries to R.F. Battle, Director, Indian Affairs Branch, Department of Citizenship and Immigration, September 24, 1965.

[56] Cited in Robert G. Adlam, "Fish Talk," *Anthropologica* 44, no. 1 (2002): 107.

[57] *R v Francis* (1969) 1 NBR (2d) 886.

[58] "New Deal for Indians is Essential," *Moncton Times*, January 10, 1968.

[59] On the British Columbia Indigenous fisheries, see Dianne Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993); Douglas C. Harris, *Fish, Law and Colonialism: The Legal Capture of Salmon in British Columbia* (Vancouver: UBC Press, 2001).

After receiving their food fishery licence, the Listuguj reserve soon began to set up a substantial commercial salmon operation that included the sale of salmon by individuals to nearby non-Indigenous communities and the trucking of fish to places as far away as Montreal. Trouble started in the late 1970s when fisheries agents in Quebec began cracking down on fishers, and conducting periodic searches of cars leaving Listuguj. The dispute exploded June 1981 when a force of four hundred Quebec provincial police and game wardens raided the reserve. They arrested approximately seventy-five people and confiscated salmon and nets.[60] The Restigouche incident was a dramatic symbol, played out before the national media, of the growing tension between federal and provincial authorities and eastern Canada's First Nations over the primacy of state fishing regulations.

The salmon fishing controversy involving the Wolstoqiyik Bilijk followed a similar trajectory and merits close examination as it provides an excellent example of the importance of government modernization policies and environmental factors in shaping the relationship between Indigenous peoples and the state over access to natural resources in the postwar period. As part of its industrial development plan the New Brunswick government erected three hydro dams on the Wolastoq, the largest by far being the Mactaquac Dam located approximately fifteen kilometres north of Fredericton. Located in close proximity to the dam, the Wolstoqiyik residents took advantage of the enhanced opportunity for salmon fishing.[61]

The increased fishing of the Wolstoqiyik raised strenuous objections by the commercial net fishers in Saint John, the Atlantic Salmon Federation, the New Brunswick Fish and Game Association, and environmental groups. There are no indications that the Bilijk Wolstoqiyik were ever consulted about the building of the dam, despite its very close proximity, or that they played a part in the campaign against its construction.

By creating a situation in front of the reserve where considerable quantities of salmon could be captured in plain view, the Mactaquac Dam became a flashpoint of controversy—a site for testing the collective will and conviction of the Bilijk Wolstoqiyik against state fishery agencies and their allies.[62] Complaints about the fishing practices of Bilijk began in the years after the dam became operational. The issuing of a food fishery licence by the federal Department of the Environment (Fisheries) in 1974 did little to ameliorate the brewing controversy. Despite scientific acknowledgment of the negative impact of the hydroelectric dams and expanded deep-sea trawling, the main focus of state and private "conservation" efforts became the 900–1,300 fish quota for Bilijk.[63]

[60] On the events of 1980, see PANB RS110 Container 41611 File 780-25-0001 Enforcement General—Indian Food Fishery, "Observations of the Restigouche Indian Reserve Salmon Fishery June 23–27, 1980." The best source on the overall dispute and the 1981 raid is Alanis Obomsawin's 1984 NFB documentary titled "Incident at Restigouche."

[61] James L. Kenny and Andrew Secord, "Public Power for Industry: A Re-examination of the New Brunswick Case, 1940–1960," *Acadiensis* 30, no. 2 (2001): 84–108; James L. Kenny and Andrew Secord, "The Environmental Politics of Hydro Development: The Case of the Saint John River (New Brunswick), 1950–70," paper presented to the 2005 meeting of the American Society of Environmental History, Houston, Texas.

[62] James Kenny and Bill Parenteau, "'Each Year the Indians Flexed Their Muscles a Little more': The Maliseet Defence of Aboriginal Rights on the St. John River, 1945–1990," *Canadian Historical Review* 95, no. 2 (June 2014): 187–216.

[63] Western Consultants, "Review of the Atlantic Salmon Fishery August 15, 1973. Prepared for Fisheries and Training Branch, Department of Fisheries and Environment," pp. 11–15. Commercial fishermen who depended on the salmon fishery for their livelihood were designated as bona fide and could choose one of two compensation options. If they wanted to retain their licence for fishing when the fishery reopened, they could opt for compensation for their loss of income. However, if they chose to permanently relinquish their licence, they could apply for compensation for their fishing assets. Non–bona fide

The Indigenous position on the simmering Bilijk dispute was articulated in 1977 by Anthony Francis, president of the Union of New Brunswick Indians, in a letter to a New Brunswick minister. He insisted that "Indian people have always fished for their own use" and it "never constituted a threat to man or conservation of any particular species of fish." While Francis acknowledged that the fishery was usually "for their own use," he intimated that the Wolstoqiyik did not want to limit the fishery for this purpose only. "Our organization feels," he noted, "that this imposition prejudices the position of Indian people on future negotiations in the area of Aboriginal rights."[64] Essentially, here the Wolstoqiyik showed a willingness to accept food fishery licences, because the licenses at least indemnified them, in some instances, from the nuisance of prosecution—but they did not consider them a privilege, nor did they believe that they defined the extent of their rights.

The persistent tension at Mactaquac exploded in June 1978. It did nothing to relieve tensions, as larger state enforcement action took place on July 5, 1978. The tensions that had characterized the previous years continued.[65] On this date a force of one hundred officers from the RCMP, Department of Fisheries and the Environment, and New Brunswick Department of Natural Resources, supported by a SWAT team, descended on Bilijk in search of salmon and nets. Rocks were thrown at the officers and fist fights continued for an hour. There were minor injuries on both sides and enforcement vehicles were damaged. The enforcement team arrested two men and confiscated nine salmon nets.[66] It was touched off when fisheries officers and the RCMP arrested four Bilijk residents who had been fishing "in violation" of the law. In bringing the Wolstoqiyik into custody, a larger group from the reserve met the officers and a brawl ensued; the prisoners went free, but the officers confiscated the nets and salmon.[67]

After the "78" war, as it became known on the reserve, the band manager of Bilijk travelled to British Columbia to learn that the Squamish had passed Bylaw 2A that mandated its right to manage and regulate the fishery on the waters bordering the reserve. In April 1979, the Kingsclear Band Council passed an identical bylaw asserting its right over the fishery, which made the Kingsclear Reserve responsible for rights on the portion of the Wolastoq bordering the reserve. According to Chief Sacobie, the DIA's approval of Bylaw 2A was important both politically and symbolically: "It recognizes the right of the Indian governments to pass laws on Indian lands, and is an important recognition of the need to preserve the physical and well-being of the people who have lived off of those resources as long as man can remember."[68]

In the years immediately before the *Marshall* case, the Wabanaki peoples once again challenged New Brunswick's natural resource regulations. In the early months of 1995, Natural Resources officers

fishers, on the other hand, were required to relinquish their commercial licence and receive compensation for their fishing assets. On the decidedly negative reaction of the commercial net fishers to the moratorium and the process, see PANB RS1056 K11 #38095, Leonard Wilson, President, St. John Commercial Fishermen's Association, to Editor, *Toronto Globe and Mail*, February 5, 1973.

[64] PANB RS1056 C7 Indians, Anthony Francis to Hon. Romeo Leblanc, February 28, 1977. The letter also complained of "over-zealous" fisheries officer who harassed and threatened Indigenous people. It is unclear if Francis was referring to the salmon fishery.

[65] Kenny and Parenteau, "'Each Year the Indians Flexed Their Muscles a Little More.'"

[66] Ibid.

[67] Ibid.

[68] PANB, RS 110, 1977–86 C 41611, M.A. Redmond to B.C. Carter, June 15, 1978, File 780-25-0002, Enforcement General Enforcement Indian Food Fishery, Kingsclear; Memo, William C. Hooper to John Connely, February 16, 1979, Kingsclear Indian Band Bylaw 2A; Todd MacInnis, "Law and Salmon Fishing on the Kingsclear Maliseet Reserve" (MA thesis, University of New Brunswick, 1991), 77.

arrested Thomas Peter Paul with Daryll Gray from the Pabineau Reserve, along with Nicholas and Timothy Paul from St. Mary's. The group had been cutting bird's-eye maple, a valuable wood, on the Crown lease of the Stone Consolidated (Canada) corporation and selling the proceeds to outside parties. Provincial enforcement officials had previously dealt leniently with Indigenous peoples harvesting wood, fish, and game for personal use, but strictly prohibited commercial sales.

Thomas Peter Paul decided to assert his treaty rights in court. Adjudicated by judge Frederick Arsenault in Bathurst, the verdict, delivered on August 28, 1996, came as something of a surprise. Judge Arsenault ruled that the treaties made by the Mi'kmaq with the British clearly permitted commercial harvesting and, in fact, took precedence over provincial regulations. The provincial government quickly filed an appeal which was heard by Justice John Turnbull of the Court of Queen's Bench. Turnbull upheld the ruling of Arsenault. He cited a passage from the *Abenaki Treaty* of 1693, "saving to the Indians their own grounds and free liberty for hunting, fishing, fowling and all their other lawful liberties and privileges."[69]

The Crown had better results when it appealed the case to the Court of Appeals. The appeals court judges ruled that the oral testimony of the Indigenous defendants was not valid and that "the evidence here does not establish that the commercial harvesting of timber was a practice, a tradition or custom that was an integral part of respondent's culture." The Supreme Court of Canada declined to hear the case. A decision that had brought great optimism and hope to Indigenous communities for a year was overturned, to be replaced by a "frozen-in-time" decision more in line with policies that had traditionally been the default position customarily made by the Crown in defending dispossession.[70]

Conclusion

A great deal has been written about dispossession concerning the British colonial project, which was global in reach. However, a longer, sweeping episodic view of the more than two centuries leading up to the 1999 Supreme Court of Canada *Marshall* decisions is useful for understanding what might be called the anatomy of dispossession—of how settlers, supported by the colonial state, used legal and extra-legal means to gain control and exclude Indigenous people from natural resources in a process that began in the 1770s and continues today. More importantly, such glimpses of the documentary record demonstrate that treaty and other claims of Wabanaki peoples were both persistent and consistent over the course of late-eighteenth, nineteenth, and twentieth centuries. Indigenous history in New Brunswick can be written as a heart-wrenching tragedy of poverty and deprivation, but also as resistance to colonial rule. Throughout the period of British colonial occupation, Indigenous peoples exerted agency through both physical and legal defences and challenges. Changes in tactics were at least as much a result of evolving state policy, which could either open or close avenues of redress, than of any change in the insistence of Indigenous people that they held treaty rights. Thus, when Donald Marshall challenged the federal fisheries laws based on treaty claims, he drew upon a long tradition of physical and legal resistance to resource policy.

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[69] *R v Paul,* 1996 CAN LIII 12436 (NBPC).

[70] Ken Coates*, The Marshall Decision and Native Rights* (Montreal: McGill-Queen's University Press, 2000).

Bill Parenteau was a history professor at the University of New Brunswick (Fredericton). His teaching and research focus was on the environmental and social history of the Atlantic provinces with an emphasis on rural working people and First Nations. He was the long-time editor of *Acadiensis,* the journal of the history of the Atlantic region.

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