TREATIES, COURTS, AND GOVERNMENT PROGRAMS: A FULL LOOK AT THE *MARSHALL* DECISIONS

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Abstract

This study examines the *Marshall* decisions under a historical institutionalist lens. Specifically, it explores what gave rise to the initial decision, as well as the contemporary government implementation approach, to illuminate what has led to the current situation. It finds that endogenous institutional change through the rise of new judicial precedents set the stage for *Marshall* and that the government implementation approach has sought to integrate First Nations' fishing activities within the standing regulatory scheme while failing to engage substantively with their "moderate livelihood" right. The current impasse is a result of First Nations' discontent with this approach. Given this, the article concludes with some guidance on how to move forward.

Résumé

Cette étude examine les décisions *Marshall* sous l'angle de l'institutionnalisme historique. Plus précisément, elle explore ce qui a donné lieu à la décision initiale, ainsi que l'approche contemporaine du gouvernement en matière de mise en œuvre, afin d'éclairer ce qui a conduit à la situation actuelle. Il constate que l'évolution endogène des institutions par l'apparition de nouveaux précédents judiciaires a ouvert la voie à l'arrêt Marshall et que l'approche du gouvernement en matière de mise en œuvre a cherché à intégrer les activités de pêche des Premières nations dans le système de réglementation en vigueur tout en ne s'engageant pas de manière substantielle dans leur droit à un "moyen de subsistance modéré". L'impasse actuelle résulte du mécontentement des Premières nations à l'égard de cette approche. Dans ces conditions, l'article se termine par quelques conseils sur la manière d'aller de l'avant.

Introduction

In late 1999, the Supreme Court of Canada (SCC) issued a landmark ruling and subsequent judicial clarification in the case of *R v Marshall*.[1] In these, the Court affirmed that the Peace and Friendship Treaties of 1760–61 gave Mi'kmaq, Peskotomuhkati, and Wolastoqey peoples of the Atlantic region "the right to hunt, fish, gather, and to sell their products to make a 'moderate livelihood,'" while also acknowledging the authority of federal and provincial governments to limit this right "if justified by conservation needs or other pressing objectives."[2] In response to these rulings, the federal government has undertaken various initiatives. However, such efforts have not proved enough, as Ottawa has found itself repeatedly unprepared for the launch of moderate livelihood fisheries, such as that by Sipekne'katik First

[1] *R v Marshall* [1999] 3 S.C.R. 456 (hereinafter *R v Marshall 1*); *R v Marshall* [1999] 3 S.C.R. 533, (hereafter *R v Marshall 2*).

[2] David Bedford, "Emancipation as Oppression: The Marshall Decision and Self-Government," *Journal of Canadian Studies* 44, no. 1 (2010): 206, DOI: 10.3138/jcs.44.1.206; see also *R v Marshall 1* at Para. 7.

Nation in southwestern Nova Scotia on September 17, 2020.[3] With more Atlantic First Nations communities launching such fisheries, and the government lacking a cohesive implementation approach, the situation currently remains at an impasse. To understand what has led to this outcome, we examine the *Marshall* decisions using a historical institutionalist lens.

The article proceeds as follows. In the first section, the historical institutionalist framework is described. The historical background of the *Marshall* decisions is the focus of the next section. This reveals that endogenous and exogenous mechanisms of institutional change led to the historical treaties signed between the British and Atlantic First Nations peoples being forgotten or ignored by the twentieth century. It also unveils that these would not be suppressed forever because institutional change through the rise of new judicial precedents allowed for future Atlantic First Nations success in the Canadian courts and thereby laid the groundwork for the *Marshall* case. The third section examines the initial *Marshall* decision to show that it constituted a critical juncture, after which the federal response is discussed. Doing so illuminates that the long-standing government approach to implementing *Marshall* has been the integration of First Nations fishing activities within the standing regulatory scheme while simultaneously failing to engage substantively with their "moderate livelihood" right. The fact that First Nations discontent with this approach has never been resolved is the reason that we find ourselves at the current impasse. The last section concludes and provides guidance for moving forward.

The Historical Institutionalist Framework

In the 1970s, institutionalist scholarship began to re-emerge in political science after a prolonged absence.[4] This resurgence, primarily headed by American scholars, was interested in bringing the state back into political analysis.[5] This movement, called new institutionalism, asserts that institutions—"understood as the rules, norms, and practices that organize and constitute social relations"[6]—have a causal effect on political and social outcomes.[7] It further consists of three distinct traditions: rational choice institutionalism, sociological institutionalism, and historical institutionalism.[8] The latter, and the variant of new institutionalism used here, is a research tradition that, in the words of Theda Skocpol,

[3] Alex Cooke, "Mi'kmaw Fishermen Launch Self-Regulated Fishery in Saulnierville," *CBC News*, September 17, 2020, https://bit.ly/3hxVq9U.

[4] Elizabeth Sanders, "Historical Institutionalism," in *The Oxford Handbook of Political Institutions*, ed. R.A.W. Rhodes, Sarah A. Binder, and Bert A. Rockman (Oxford: Oxford University Press, 2009), 40.

[5] Peter A. Hall, "Politics as a Process Structured in Space and Time," in *The Oxford Handbook of Historical Institutionalism*, ed. Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate (Oxford: Oxford University Press, 2016), 31; André Lecours, "New Institutionalism: Issues and Questions," in *New Institutionalism*, ed, André Lecours (Toronto: University of Toronto Press, 2005), 3; Theda Skocpol, "Bringing the State Back In: Strategies of Analysis in Current Research," in *Bringing the State Back In*, ed. Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol (Cambridge: Cambridge University Press, 1985), 3–4.

[6] Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate, "Historical Institutionalism in Political Science," in *The Oxford Handbook of Historical Institutionalism*, ed. Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate (Oxford: Oxford University Press, 2016), 7.

[7] James Bickerton and Glenn Graham, "Electoral Parity or Protecting Minorities? Path Dependency and Consociational Districting in Nova Scotia," *Canadian Political Science Review* 14, no. 1 (2020): 34; Rebecca B. Morton, and Kenneth C. Williams, "The Advent of Experimental Political Science," in *Experimental Political Science and the Study of Causality: From Nature to the Lab* (Cambridge: Cambridge University Press, 2010), 15.

[8] Kathleen Thelen, "Historical Institutionalism in Comparative Politics." *Annual Review of Political Science* 2 (1999): 369–379.

"trace[s] sequences of outcomes over time, showing how earlier outcomes change the parameters for subsequent development."[9] Below, its key elements are discussed.

The concept of path dependence, something which originated in the economics literature,[10] is central to historical institutionalism.[11] This is the idea that once an entity takes a certain path, changing course is difficult because actors become accustomed to the established institutional rules and arrangements.[12] Consider, for example, the Canadian equalization regime. Despite its conflict-generating effect, the fact that the current system provides provinces with negotiating leverage over the federal government has led to its being locked in.[13] However, this is not to say that change is impossible in the historical institutionalist model. In fact, it recognizes that critical junctures, understood as significant events or exogenous shocks, can open the door for actors to initiate institutional change.[14] Such disruptions can be large and affect many institutions (e.g., a war or financial crisis) or smaller and sector specific (e.g., the initial *Marshall* decision).[15] Scholars in the tradition have also begun to emphasize that institutional change can occur gradually.[16] For example, terms have emerged such as "layering," where new rules or systems are introduced overtop old ones, and "displacement," when new rules emerge and call into question old ones.[17] This distinction between exogenous (outside path) and endogenous (within path) change is crucial to the historical institutionalist framework. Both elements were at play leading up to, and after, the initial ruling in *Marshall*.

[9] Theda Skocpol, "Why I Am an Historical Institutionalist." *Polity* 28, no. 1 (1995): 106.

[10] Giovanni Capoccia, "Critical Junctures," in *The Oxford Handbook of Historical Institutionalism*, ed. Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate (Oxford: Oxford University Press, 2016), 90; Margaret Levi, "Reconsiderations of Rational Choice in Comparative and Historical Analysis," in *Comparative Politics: Rationality, Culture, and Structure*, ed. Mark Lichbach and Alan Zuckerman (Cambridge: Cambridge University Press, 1997), 121.

[11] Jörg Broschek, "Federalism and Political Change: Canada and Germany in Historical-Institutionalist Perspective," *Canadian Journal of Political Science* 43, no. 1 (2010): 5, DOI: 10.10170S000842390999002; Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," *The American Political Science Review* 94, no. 2 (2000): 251.

[12] Lecours, "New Institutionalism," 9; Pierson, "Increasing Returns," 252.

[13] André Lecours and Daniel Béland, "Federalism and Fiscal Policy: The Politics of Equalization in Canada," *Publius* 40, no. 4 (2010): 590.

[14] Bickerton and Graham, "Electoral Parity or Protecting Minorities," 34; Capoccia, "Critical Junctures," 91.

[15] Giovanni Capoccia and R. Daniel Kelemen, "The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism," *World Politics* 59, no. 3 (2007): 349, DOI: 10.1017/S0043887100020852; James Conran and Kathleen Thelen, "Institutional Change," in *The Oxford Handbook of Historical Institutionalism*, ed. Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate (Oxford: Oxford University Press, 2016), 55.

[16] Fioretos, Falleti, and Sheingate, "Historical Institutionalism,"13.

[17] Wolfgang Streeck and Kathleen Thelen, "Introduction: Institutional Change in Advanced Political Economies," in *Beyond Continuity: Institutional Change in Advanced Political Economies*, ed. Wolfgang Streeck and Kathleen Thelen (Oxford: Oxford University Press, 2005), 19–23.

Historical Context: The Precursor to *Marshall*

First Nations and Europeans in the Atlantic Region

The Mi'kmaq, Peskotomuhkati, and Wolastoqey[18] peoples inhabited the lands of northeastern North America long before European contact.[19] Nonetheless, anthropological evidence suggests that these peoples began to evolve into a complex society nearly twelve thousand years ago.[20] Around this time, they established cultural practices, lived in communities a few months a year, and centred their economy around hunting, *fishing*, and gathering.[21] Societal development continued prior to and after European contact.

In 1497, John Cabot landed in modern-day Newfoundland and laid claim to the area on behalf of King Henry VII of England, thus commencing the European presence in the Atlantic region.[22] Drawn to the abundance of fish in the area, other European societies quickly followed suit, such as the Portuguese (1501), French (1504), and Spanish (1512).[23] Although an exact date for contact between these foreigners and Atlantic First Nations is unknown, scholars suspect that it occurred within this heavy influx of European fisheries during the sixteenth century.[24] That said, interactions with Europeans provided Atlantic First Nations with guns and iron tools that greatly facilitated their hunting and other day-to-day affairs.[25] However, contact also introduced a plethora of diseases (e.g., smallpox) to these peoples, thereby significantly reducing their populations and changing these societies for the worse.[26]

[18] The Wolastoqey peoples are sometimes referred to as the Maliseet and the Peskotomuhkati, Passamaquoddy. In this article, we use their current preferred terminology.

[19] Ken Coates, *The Marshall Decision and Native Rights* (Montreal: McGill-Queen's University Press, 2000), 25; Stephen A. Davis, "Early Societies: Sequences of Change," in *The Atlantic Region to Confederation: A History*, ed. Phillip A. Buckner and John G. Reid (Toronto: University of Toronto Press, 2017), 33; Daniel N. Paul, *First Nations History: We Were Not the Savages*, 3rd ed. (Halifax: Fernwood Publishing, 2008), 10. More specifically, these lands include modern-day Nova Scotia (including Cape Breton Island), New Brunswick, Prince Edward Island, parts of eastern Quebec, northern Maine, and potentially, southern Newfoundland.

[20] Andrea Bear Nicholas, ""Wəlastəkokewiyik Eyoltihtitpən Ekwpahak Təkkiw 1781/Maliseets in the Fredericton Area to 1781." *Journal of New Brunswick Studies* 14, no. 1 (2022): 6.

[21] Coates, *The Marshall Decision and Native Rights*, 22; Janet E. Chute, "Mi'kmaq Fishing Rights in the Maritimes: A Historical Overview," in *Earth, Water, Air and Fire: Studies in Canadian Ethnohistory*, ed. David T. McNab (Waterloo: Wilfrid Laurier University Press, 1998), 95–96; Stephen Patterson, "Eighteenth-Century Treaties: The Mi'kmaq, Maliseet, and Passamaquoddy Experience," *Native Studies Review* 18, no. 1 (2009): 29; William C. Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002), 26; see also Gespe'gewa'gi Mi'gmawei Mawiomi, *Nta'tugwaqanminen: Our Story: Evolution of the Gespe'gewa'gi Mi'gmaq* (Halifax: Fernwood Publishing, 2016).

[22] N.E.S Griffiths, "1600–1650: Fish, Fur, and Folk," in *The Atlantic Region to Confederation: A History*, ed. Phillip A. Buckner and John G. Reid (Toronto: University of Toronto Press, 2017), 55; Ralph Pastore, "The Sixteenth Century: Aboriginal Peoples and European Contact," in *The Atlantic Region to Confederation: A History*, ed. Phillip A. Buckner and John G. Reid (Toronto: University of Toronto Press, 2017), 42; Paul, *First Nations History*, 43.

[23] Pastore, "The Sixteenth Century," 42; Paul, *First Nations History*, 43.

[24] Patterson, "Eighteenth-Century Treaties," 28.

[25] Pastore, "The Sixteenth Century," 45; William Wicken and John Reid. *An Overview of the Eighteenth-Century Treaties Signed Between the Mi'kmaq and Wuastukwiuk Peoples and the English Crown* (Ottawa: Royal Commission on Aboriginal Peoples, 1996) 108, https://bit.ly/3yb5v4c.

[26] Coates, *The Marshall Decision and Native Rights*, 25; Griffiths, "1600–1650," 58; Wicken and Reid, *An Overview of the Eighteenth-Century Treaties*, 99–100.

The European presence only increased in the seventeenth century. In 1604, the French established two settlements in the Atlantic region, naming them Port-Royal (now Annapolis Royal, Nova Scotia) and Saint Croix (in modern-day Maine). Each failed by 1607, though the latter was re-established in 1610 but burned by the British three years later.[27] However, the settlers, whom we now refer to as the Acadians, established amicable relations with the First Nations of the region, most notably the Mi'kmaq.[28] This would prove vital to the French cause as Atlantic First Nations groups fought alongside them against the British between 1689–1697 and 1702–1713.[29]

Hostilities between the two European powers subsided with the signing of the Treaty of Utrecht, in which the French, without the consent of Atlantic First Nations, formally ceded Acadia (Nova Scotia) to the British but maintained control over Ile Royale (Cape Breton Island) and Ile Saint-Jean (PEI) on July 13, 1713.[30] Still, this did not bring about an end to conflicts. By 1722, another war commenced. Dummer's War, as it is referred to, was fought between the British and the Wabanaki Confederacy, a group composed of the Abenaki, Mi'kmaq, Peskotomuhkati, Penobscot, and Wolastoqey nations.[31] This would be brought to a close with the first of many treaties signed between the British and Atlantic First Nations.

Broken Promises: Historical Treaties

In February and June 1725, representatives of the Wabanaki Confederacy informed the British that they were willing to make peace. Negotiations commenced in November and the next month, delegates from both parties signed an agreement with the caveat that it would have to be ratified by each First Nations village.[32] Most did so by June 1726, though ratifications continued as late as 1728.[33] Importantly, the treaty signed by these communities contained reciprocal promises, one of which recognized their right to practice traditional activities. Specifically, the clause in question states "[that] the Indians shall not be molested in their persons, Hunting, *Fishing* and Planting Grounds nor in any other their Lawfull Occassions by His Majestys Subjects or their Dependants" [emphasis added].[34] Relations between the British and Atlantic First Nations remained functional after this treaty; that is, until 1744. At this time, First Nations groups took up arms alongside the French in their new war against the British, something which ended in 1748.[35] Roughly a year after, some Peskotomuhkati and Wolastoqey peoples signed a treaty with the British. Content-wise, this was largely a reassertion of the earlier agreement, except for the

[27] Coates, *The Marshall Decision and Native Rights*, 31; Griffiths, "1600–1650," 61; Paul, *First Nations History*, 53–54.

[28] Paul, *First Nations History*, 54.

[29] Wicken, *Mi'kmaq Treaties on Trial*, 57, 71, 101.

[30] Andrea Bear Nicolas, "Mascarene's Treaty of 1725," *UNB Law Journal* 43 (1994): 7, https://bit.ly/2T39vn; Stephen E. Patterson, "Indian-White Relations in Nova Scotia, 1749–61: A Study in Political Interaction," *Acadiensis* 23, no. 1 (1993): 26; Paul, *First Nations History*, 74–75; Wicken and Reid, *An Overview of the Eighteenth-Century Treaties*, 61–62.

[31] Patterson, "Indian-White Relations in Nova Scotia," 26; Wicken, *Mi'kmaq Treaties on Trial*, 100. Despite not being openly involved in the war, the French did provide aid to the fighting First Nations groups, thus demonstrating their willingness to undermine British efforts to colonize the region even after the Treaty of Utrecht.

[32] Wicken, *Mi'kmaq Treaties on Trial*, 71–86.

[33] Bear Nicolas, "Mascarene's Treaty of 1725," 10; Wicken, *Mi'kmaq Treaties on Trial*, 93, 158–159.

[34] Bear Nicolas, "Mascarene's Treaty of 1725," 17. The term "Indian" is outdated and not used except when quoting historical documents and in legal contexts.

[35] Coates, *The Marshall Decision and Native Rights*, 33; Patterson, "Indian-White Relations," 26; Paul, *First Nations History*, 105; Wicken, *Mi'kmaq Treaties on Trial*, 172; Wicken and Reid, *An Overview of the Eighteenth-Century Treaties*, 64.

fact that it did not contain reciprocal promises.[36] Still, not all Atlantic First Nations were united in their desire to make peace.

As Daniel Paul notes, "on September 23rd, 1749, the Mi'kmaq renewed their declaration of war against the British and began attacking military, shipping and trade targets."[37] In 1752, and during a downtime in this conflict, a Jean-Baptiste Cope representing the Shubenacadie Mi'kmaq signed a treaty with the British.[38] Akin to the agreement concluded between 1725–1728, it affirmed the right of these peoples to engage in traditional activities, stating "that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting & *Fishing* as usual" [emphasis added]. It also went further by agreeing to establish "truckhouses" in which the First Nations could bring "skins, feathers, fowl, *fish* or any other thing they shall have to sell" [emphasis added].[39] Despite the signing of this treaty, relations between the British and First Nations remained strained with on-and-off hostilities occurring over the next several years.[40]

By 1759, tensions between the British and First Nations started to dwindle as the French lost regional power with the fall of the fortress of Louisbourg.[41] In February of the next year, the British signed a peace treaty with Peskotomuhkati and Wolastoqey delegates, and in March, did so with Mi'kmaq representatives. These agreements were then ratified by individual villages over the next eighteen months.[42] Like the 1752 Treaty, these agreements affirmed that the British would provide truckhouses for the First Nations to exchange their goods, thus implying a right to obtain resources such as fish and game.[43] This compromise, combined with the issuance of the Royal Proclamation of 1763, ensured relative peace thereafter. The only exception was when the Miramichi and Shediac Mi'kmaq, as well as some Wolastoqey, breached some of the provisions outlined in the 1760–61 Treaties during the American War of Independence. Nonetheless, this was short-lived and agreements following the general stature of those made in 1760–61 were signed in 1778 and 1779.[44]

As seen, the historical treaties signed between 1725–1779 guaranteed the right of Atlantic First Nations to practice their traditional activities, an important one of which was to obtain and trade goods (e.g., fish and game). Over the years, these treaties and the rights conferred by them were either forgotten or ignored by settler authorities. This is evident in that in 1928, Mi'kmaq Grand Chief Gabriel Sylliboy

[36] Patterson, "Indian-White Relations," 29–30; Paul, *First Nations History*, 111; Wicken, *Mi'kmaq Treaties on Trial*, 176–178.

[37] Paul, *First Nations History*, 112.

[38] Patterson, "Indian-White Relations," 37–40; Paul, *First Nations History*, 125–126; Melanie G. Wiber, and Julia Kennedy, "Impossible Dreams: Reforming Fisheries Management in the Canadian Maritimes after the Marshall Decision," *Law and Anthropology* 11 (2001): 283; Wicken, *Mi'kmaq Treaties on Trial*, 183–185.

[39] W.E. Daugherty, "Mi'kmaq Holdings Resource Guide: 1749 Ratification at St. John of the Chebucto Renewal of the Treaty of 1725," Nova Scotia Archives.

[40] Coates, *The Marshall Decision and Native Rights*, 38; Patterson, "Indian-White Relations," 31, 52–53; Paul, *First Nations History*, 151.

[41] Wiber and Kennedy, "Impossible Dreams," 283.

[42] Coates, *The Marshall Decision and Native Rights*, 38–39; Patterson, "Indian-White Relations," 54–55; Wicken, *Mi'kmaq Treaties on Trial*, 197–201; Bruce H. Wildsmith, "Vindicating Mi'kmaq Rights: The Struggle Before, During and After *Marshall*," *Windsor Yearbook of Access to Justice* 19 (2001): 206.

[43] *R v Marshall 1* at Para. 44; Nova Scotia Archives, "Mi'kmaq Holdings Resource Guide: Copy of Authenticated Copy of 'Treaty of Peace and Friendship Concluded by the Governor...of Nova Scotia with Paul Laurent, Chief of the La Heve tribe of Indians,' 1760," last modified in January 2023, https://bit.ly/35buRSe.

[44] Patterson, "Eighteenth-Century Treaties," 49–50; Patterson, "Indian-White Relations," 57.

from Cape Breton, Nova Scotia, was convicted of possessing pelts in violation of the 1926 provincial *Lands and Forestry Act* despite claiming a right to do so under the 1752 Treaty.[45] The reasons for this abandoning of treaty principles are numerous. For instance, the passing of laws such as the 1794 Nova Scotia *Game Act*, which "provided that no person within a certain period each year should kill partridge or black duck but Indians and poor settlers,"[46] displaced First Nations rights conferred by earlier treaties. Even more, critical junctures like the passing of the *Constitution Act, 1867,* which provided Parliament with jurisdiction over "Indians, and lands reserved for the Indians," gave rise to new institutional arrangements for the Canadian state in its dealings with Indigenous peoples,[47] such as the paternalistic 1876 *Indian Act*.[48] In short, the era of treaty neglect was a result of endogenous and exogenous institutional change with settler colonialism trumping nation-to-nation treaty relations. Nevertheless, matters began to change in the second half of the twentieth century.

Setting the Stage: Legal Successes

Throughout the 1960s, Indigenous peoples in Canada began to mobilize against the state, something which was due in large part to the legalization of Indigenous organizing off-reserve in 1951 and influenced by the American social movements of the same period.[49] A significant portion of this activism involved using the courts to test Indigenous claims. As a result, new legal precedents emerged that greatly disrupted the status quo on matters of Indigenous rights. Below, we discuss this institutional layering—with specific emphasis placed on important cases involving Atlantic First Nations—to show how it paved the way for *Marshall*.

During the 1960s and 1970s, Indigenous peoples in Canada had some legal successes. For example, in *White and Bob* (1965), two First Nations men from Vancouver Island, British Columbia, were charged with hunting without a permit and out of season in contravention of the *Game Act* and acquitted on the basis that historical treaties provided them the right to do so.[50] Even more, in *Calder* (1973), the Nisga'a peoples of British Columbia argued that they maintained ownership of their traditional lands. Despite losing their case, gains were also made. In the split decision ultimately decided on technicalities, six Supreme Court judges ruled that Aboriginal title existed after European contact, three of whom said

[45] Coates, *The Marshall Decision and Native* Rights, 82–83; *R v Syliboy* [1929] 1 D.L.R. 307 (hereinafter "*R v Syliboy*"); William C. Wicken, "'Heard it from our Grandfathers' Mi'kmaq Treaty Tradition and the *Syliboy* Case of 1928." *UNB Law Journal* 44 (1995): 145; Wildsmith, "Vindicating Mi'kmaq Rights," 209.

[46] *R v Syliboy*, 312.

[47] See s. 91 (24) of the *Constitution Act*, being Schedule B to the *Canada Act 1982* (UK), c.11, https://bit.ly/3ZtA02Q. Moreover, by the term "Indigenous," I refer to the First Nations, Inuit, and Métis peoples of Canada. I also mean the same in using the term "Aboriginal," which is legal jargon for "Indigenous."

[48] Naiomi Walgwan Metallic, "The Relationship between Canada and Indigenous Peoples: Where Are We?," in *Canadian Politics* 7th ed, ed. James Bickerton and Alain-G. Gagnon (Toronto: University of Toronto Press, 2020), 425–426.

[49] Michael Morden, "Right and Resistance: Norms, Interests and Indigenous Direct Action in Canada," *Ethnopolitics* 14, no. 3 (2015): 256, DOI: 10.1080/17449057.2014.949444; Rima Wilkes, "The Protest Actions of Indigenous Peoples: A Canadian-U.S. Comparison of Social Movement Emergence," *American Behavioral Scientist* 50, no. 4 (2006): 512, DOI: 10.1177/0002764206294059. Importantly, the federal government banned Indigenous organizing in 1927 by adding Section 141 to the *Indian Act*, a provision stipulating that Indigenous peoples could not solicit funds to pursue legal claims. For more information, see Joe Mathias and Gary R. Yabsley, "Conspiracy of Legislation: The Suppression of Indian Rights in Canada," *BC Studies* 89 (1991): 35–36.

[50] Coates, *The Marshall Decision and Native* Rights, 83–84; see also *R v White and Bob* [1964] 50 D.L.R. (2d) 613; *R v White and Bob* [1965] 52 D.L.R. (2d) 481.

that it had never been extinguished.[51] Cases such as these provided fertile grounds for Atlantic First Nations to test their own claims.

In 1974, Stephen Isaac, a Mi'kmaw man from Potlotek First Nation in Cape Breton, Nova Scotia, was charged and convicted for carrying a rifle on a road with intent to hunt in violation of the provincial *Lands and Forestry Act*. This was later overruled by the Nova Scotia Court of Appeal. In its decision, the Court held that the historical treaties signed by Atlantic First Nations, as well as the Royal Proclamation of 1763, guaranteed the right of these peoples to hunt on-reserve and that any provincial law seeking to regulate such was constitutionally ineffective.[52] This precedent was expanded upon in a later case. On September 21, 1980, James Matthew Simon, a Mi'kmaw man from Shubenacadie, Nova Scotia, was charged with illegally possessing a rifle off-reserve during closed season in violation of the Nova Scotia *Lands and Forests Act*, but argued that the 1752 Treaty, signed by his ancestors, provided him with the ability to do so. Lower courts convicted Simon on the basis that the treaty in question had no effect. The SCC overturned these rulings, affirming that the 1752 Treaty remained operational and that it conferred beneficiaries a right to hunt, either on or off reserve.[53]

The inclusion of Section 35 (1) in the *Constitution Act, 1982*, which states that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed," aided Atlantic First Nations as well as Indigenous peoples more broadly in court cases following *Simon*. This is because the clause, itself a product of Indigenous activism,[54] recognized that Aboriginal rights—understood as "a range of rights held by native peoples, not by virtue of Crown grant, agreement or legislation, but by reason of the fact that aboriginal peoples were once independent, self-governing entities, in possession of most of the lands now making up Canada"[55]—existed and constitutionalized them along with treaty rights.[56] *Denny et al.* (1990), a consolidated case involving three Mi'kmaq men from Nova Scotia who were convicted of committing offences in violation of *Fisheries Act* regulations, was the first significant case involving Atlantic First Nations peoples tried under the Section 35 framework. In its decision, the Nova Scotia Court of Appeal overturned the convictions of the three men, ruling that Mi'kmaq in the province had an Aboriginal right to fish or hunt for food both on and off reserve in priority to other users so long as conservation needs were met.[57] The same year this judgment was

[51] Coates, *The Marshall Decision and Native* Rights, 84–86; Metallic, "The Relationship between Canada and Indigenous Peoples," 429–430; Erich Steinman, "Indigenous Nationhood Claims and Contemporary Federalism in Canada and the United States," *Policy and Society* 25 (1): 102, https://doi.org/10.1016/S1449-4035(05)70051-5; see also *Calder et al. v. Attorney-General of British Columbia* [1973] 313 S.C.R.

[52] Prosper et al., "Returning to Netukulimk: Mi'kmaq Cultural and Spiritual Connections with Resource Stewardship and Self-Governance," *International Indigenous Policy Journal* 2, no. 4 (2011): 11–12, DOI: 10.18584/iipj.2011.2.4.7; Wildsmith, "Vindicating Mi'kmaq Rights," 210–211; see also *R v Isaac* [1975] 13 N.S.R. (2d) 460.

[53] Coates, *The Marshall Decision and Native* Rights, 87; Wildsmith, "Vindicating Mi'kmaq Rights," 211–213; see also *Simon v The Queen* [1985] 2 S.C.R. 387.

[54] Metallic, "The Relationship between Canada and Indigenous Peoples," 431.

[55] Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights." *Queens Law Journal* 8, no. 1/2 (1982): 243.

[56] Jaime Battiste, "Understanding the Progression of Mi'kmaw Law," *Dalhousie Law Journal* 31, no. 2 (2008): 339; Ghislain Otis, "Constitutional Recognition of Aboriginal and Treaty Rights: A New Framework for Managing Legal Pluralism in Canada?," *The Journal of Legal Pluralism and Unofficial Law* 43, no.3 (2014): 328, DOI: 10.1080/07329113.2014.986951. Importantly, the definition of Aboriginal rights provided here was used by the Nova Scotia Court of Appeal in *R v Denny et al.* [1990] 94 N.S.R. (2d) 253.

[57] Coates, *The Marshall Decision and Native* Rights, 89–90; Wildsmith, "Vindicating Mi'kmaq Rights," 213–214; see also *R v Denny et al*.

issued, the SCC made a similar ruling in *Sparrow*, a case involving a Musqueam man from British Columbia, but broadened the right to include fishing or hunting for social and ceremonial purposes.[58]

Despite the success of *Sparrow*, *Denny et al.*, and earlier cases, they did not deal with whether historical treaties provided Atlantic First Nations with the right to engage in commercial activities. In 1996, this issue was heard in a case involving a Mi'kmaw man from Papineau First Nation, New Brunswick, who was accused of harvesting timber with an intent to sell it. Judge Arsenault of the New Brunswick Provincial Court acquitted Paul on the basis that the 1725–1728 and 1752 Treaties provided him with a commercial right to harvest trees. Roughly a year later, Judge Turnbull of the New Brunswick Court of Queen's Bench upheld the result but for different reasons, asserting that the 1752 Treaty did not apply to those without some connection to its signatories, and that the 1725–1728 Treaties did not provide a right to harvest trees commercially. Instead, he claimed that a 1693 treaty not signed by Atlantic First Nations peoples conferred upon them ownership of the land and that this had not been surrendered, thus meaning that they could access resources for commercial purposes. Nevertheless, in 1998, the New Brunswick Court of Appeal disagreed with both Arsenault and Turnbull and overturned the acquittal, which was affirmed when the SCC denied leave to appeal that same year.[59]

As demonstrated, prior to the *Marshall* decisions, institutional layering occurred through the rise of new legal precedents that held that Mi'kmaq, Peskotomuhkati, and Wolastoqey peoples could fish or hunt for food, social, and ceremonial purposes. The *Paul* case, despite the loss, also raised the possibility that they may be able to do so for commercial reasons. In short, these precedents paved the way for future Atlantic First Nations success in the Canadian courts. In this sense, they opened the door for the *Marshall* case and thus, the critical juncture that was to come.

A Critical Juncture: The Initial *Marshall* Decision

On August 24, 1993, Donald Marshall Jr., a Mi'kmaw man, and his partner, Jane McMillan, a settler woman, sold 463 pounds of eels that they had retrieved from the waters of Pomquet Harbour, Nova Scotia, for $787.10. Two months later, they were charged with offences under the *Fisheries Act* for fishing and selling catch without a licence during closed season. On October 24, 1994, the case against Marshall and his companion made its way to the Nova Scotia Provincial Court with Judge Embree presiding.[60] Early on, the charges against McMillan were dropped because, in her words, "Judge Embree…understood it to be an Aboriginal treaty rights test case."[61] Initially, Marshall's defence team founded their case on the basis that the 1752 Treaty guaranteed him commercial fishing rights. However, this was dropped in favour of the 1760–61 Treaties after the Crown argued that the 1752 one had been abrogated and its expert

[58] Coates, *The Marshall Decision and Native* Rights, 88–89; but also see *Sparrow* [1990] 1 S.C.R. 1075.

[59] Coates, *The Marshall Decision and Native* Rights, 94–104; see also *R v Paul* [1996] 182 N.B.R. (2d) 270; *R v Paul* [1997] 193 N.B.R. (2d) 321; *R v Paul* [1998] 196 N.B.R. (2d) 292.

[60] L. Jane McMillan, "'Mu Kisi Maqumawkik Pasik Kataq—We Can't Only Eat Eels': Mi'kmaq Contested Histories and Uncontested Silences," *Canadian Journal of Native Studies* 32, no. 1 (2012): 129; L. Jane McMillan, *Truth and Conviction: Donald Marshall Jr. and the Mi'kmaw Quest for Justice* (Vancouver, University of British Columbia Press, 2018), 113–114; Wildsmith, "Vindicating Mi'kmaq Rights," 215–216.

[61] McMillan, *Truth and Conviction*, 115.

historian, Stephen Patterson, opined that the British would have understood the later treaties as conferring upon Atlantic First Nations a right to trade their products.[62]

Embree issued his decision on June 27, 1996, ruling that the 1760–61 Treaties provided the Mi'kmaq with a right to obtain and trade goods, but that this had perished with the disappearance of the truckhouse system. The Nova Scotia Court of Appeal later upheld the trial decision, though differed from Embree in stating that the treaties did not confer upon the Mi'kmaq a special right to trade. Rather, they affirmed that the promise of truckhouses contained in the treaties was merely a device used by the British to ensure peaceful relations with Atlantic First Nations.[63] Despite these losses, the case was appealed to the SCC and on September 17, 1999, Canada's top court ruled 5-2 to overturn Marshall's conviction. In the decision, the Court held that the 1760–61 Treaties guaranteed him and other Mi'kmaq, Peskotomuhkati, and Wolastoqey peoples of the region "the right to hunt, fish, gather, and to sell their products to make a 'moderate livelihood,'" while also acknowledging the authority of federal and provincial governments to limit this right "if justified by conservation needs or other pressing objectives."[64]

By giving rise to rights-based fishing access, the ruling in *Marshall* issued a shock to the institutions governing the Atlantic fishery, which, prior to the decision, were stable and based on the idea that the stock could only be fished by those persons with government-afforded fishing access. Ultimately, the legacy of this critical juncture has been an approach that seeks to accommodate First Nations fishing activities within the standing regulatory scheme while failing to engage substantively with their "moderate livelihood" right. However, questions remain: What gave rise to this path? What sustained it? How has it changed over time?

The Government Response

The Immediate Aftermath

The decision in *Marshall* surprised the federal government, something which is evident in the fact that then Minister of Fisheries, Herb Dhaliwal, issued a statement shortly thereafter asserting that he wanted interim agreements with Atlantic First Nations until a long-term solution could be put in place. As later reports would show, they lacked any sort of contingency plan for handling the ruling.[65] Therefore, what could have otherwise been a less conflictual critical juncture was not. For example, the months of September and October 1999 were plagued by conflict in places such as Miramichi Bay and St. Mary's Bay as First Nations harvesters immediately took to the waters to exercise their rights, primarily in the lucrative lobster fishery.[66] On November 17, 1999, the SCC even clarified their earlier ruling by issuing

[62] Wildsmith, "Vindicating Mi'kmaq Rights," 217–219.

[63] Phillip M. Saunders, "Getting Their Feet Wet: The Supreme Court and the Practical Implementation of Treaty Rights in the Marshall Case," *Dalhousie Law Journal* 23, no. 1 (2000): 62–63; Wildsmith, "Vindicating Mi'kmaq Rights," 219–222; see also *R v Marshall* [1997] 159 N.S.R. (2d) 186.

[64] Bedford, "Emancipation as Oppression," 206; see also *R v Marshall 1* at Para. 7.

[65] Coates, *The Marshall Decision and Native* Rights, 131–134; Anthony Davis and Svein Jentoft, "The Challenge and the Promise of Indigenous Peoples' Fishing Rights from Dependency to Agency," *Marine Policy* 25 (2001): 227; Chantal A. March, *The Impact of the Marshall Decision on Fisheries Policy in Atlantic Canada* (Major Report, Memorial University, 2002), 22; Richard McGaw, "Aboriginal Fisheries Policy in Atlantic Canada," *Marine Policy* 27 (2003): 420, DOI: 10.1016/S0308-597X(03)00023-X.

[66] Coates, *The Marshall Decision and Native* Rights, 139–141, 148; Frank Gale, *Marshalling Resources: Crisis Citizen Engagement and the Marshall Decisions*, (MA thesis, Carleton University, 2012), 31, 35; Amer Obeidi, Keith W. Hipel, and

an unusual thirty-five-page decision dismissing a rehearing and stay motion previously filed by the West Nova Fishermen's Coalition (a commercial fishers' group).[67]

However, among this instability, actors began to propose solutions. In October, First Nations and settler stakeholders gathered to determine how the former could be incorporated into the Atlantic fishery. As Ken Coates highlights, "The most popular idea was for the federal government to purchase existing licences and allocate them to bands."[68] With a report on the implications of the *Marshall* decisions issued in December by the House of Commons Standing Committee on Fisheries and Oceans recommending such a buy-back and redistribution scheme,[69] the idea of incorporating First Nations fishing activities within the standing regulatory regime started to become favoured. However, it would later be solidified as the outcome of the critical juncture through a series of federal programs that locked it in by embedding First Nations communities within the commercial fishery. This started with the Initial *Marshall* Response Initiative (I-MRI).

Programs for Everyone! The Federal Approach

In January 2000, the federal government announced the I-MRI, a $159.6 million program that provided government negotiators with the funds to buy back and redistribute commercial licences to all First Nations communities, and to equip those who were signatories with the necessary fishing equipment to kickstart their operations.[70] In other words, it was designed to ingrain First Nations communities within the commercial fishery by way of providing them access. This program was reinforced for two reasons. First, First Nations collectives fortified the systemic logic by buying into the program, something which thirty of the thirty-four Atlantic communities had done by its end date, March 31, 2001.[71] Second, settler fishers legitimized the program because it largely maintained the status quo. In simple terms, they were willing to adapt by selling licences and gear back to the government in order to sustain the standing regulatory scheme;[72] this being something which greatly benefits them in comparison to a system where First Nations fishers have unregulated access.

However, the program also experienced negative feedback. For example, the fact that four First Nations communities never signed I-MRI agreements demonstrates underlying discontent with their rights being integrated into the existing structure. Support for this claim is seen in that Esgenoôpetit First Nation refused to sign an agreement with the federal government until 2002 out of concern for how doing so

D. March Kilgour, "Turbulence in Miramichi Bay: The Burnt Church Conflict Over Native Rights," *Journal of the American Water Resources Association* 42, no. 6 (2006): 1631–1633, DOI: 10.1111/j.1752-1688.2006.tb06025.x.

[67] Wildsmith, "Vindicating Mi'kmaq Rights," 228; see also *Marshall* 2. For a discussion of differences between the initial decision and that issued in response to the rehearing and stay motion, see Saunders, "Getting Their Feet Wet," 67–85.

[68] Coates, *The Marshall Decision and Native* Rights, 147–148.

[69] House of Commons Standing Committee on Fisheries and Oceans, *The Marshall Decision and Beyond: Implications for Management of the Atlantic Fisheries* (2d sess., 36th Parliament, December 1999, Committee Report 2).

[70] Ken Coates, *The Marshall Decision at 20: Two Decades of Commercial Re-Empowerment of the Mi'kmaq and Maliseet* (Ottawa: MacDonald-Laurier Institute, 2019), 15, https://bit.ly/3k9cuYV; Department of Fisheries and Oceans, *Archived—Audit of the Longer-Term Marshall Response Initiative (Capacity Building)* (Ottawa: Government of Canada, 2009), https://bit.ly/3x45C0r; Jacquelyn Thayer Scott, *An Atlantic Fishing Tale 1999–2011* (Ottawa: MacDonald-Laurier Institute, 2012), 3, https://bit.ly/2T3o0Ia.

[71] March, *The Impact of the Marshall Decision*, 37, 42; McGaw, "Aboriginal Fisheries Policy in Atlantic Canada," 418.

[72] March, *The Impact of the Marshall Decision*, 29.

would affect their treaty right to fish.[73] Still, the positive reinforcement of the I-MRI outweighed such negative side effects. Seeing this, the government continued in the same direction with their next program, thereby further locking in the outcome of the critical juncture.

The Longer-Term *Marshall* Response Initiative (LT-MRI), announced in February 2001, was a $430.2 million program that had the same goal as its predecessor; that is, to buy back and redistribute licences and gear as well as support First Nations fishing activities, thus further embedding communities within the commercial fishery.[74] However, the program differed slightly from the I-MRI in the sense that it placed some emphasis on capacity building such as training First Nations fishers and building community fishing enterprises.[75] That said, reinforcement mechanisms for this program built upon those seen in its predecessor. On one hand, the systemic logic of the LT-MRI was bolstered by community buy-in. By its end date, March 31, 2007, thirty-two of the thirty-four Atlantic First Nations communities had signed agreements.[76] On the other hand, settler fishers supported the program for the continued reason that it maintained the status quo. The fact that a small minority of them accrued benefits from selling back their licences and gear at inflated prices may have also influenced program acceptance.[77] Yet, the LT-MRI also experienced negative feedback, though to a lesser extent than the I-MRI. As Jacquelyn Scott highlights, the two non-signatory communities expressed discomfort with how an agreement might affect their treaty rights.[78] This shows that underlying discontent with *Marshall* rights being incorporated into the standing structure carried over from the I-MRI. Still, after the LT-MRI ended, the government moved in a somewhat different direction while still locking in the outcome of the critical juncture.

Five months after the LT-MRI concluded, a new program, entitled the Atlantic Integrated Commercial Fisheries Initiative (AICFI), began with an investment of $55.1 million over five years and was later renewed at a cost of $11.02 million per year until being made permanent in 2017. The goal of the AICFI is to build capacity within the commercial fishing enterprises of Atlantic First Nations and thereby sustain the investment made under previous programs.[79] In this respect, it goes beyond the MRI programs whose primary goal was to provide fishing access and gear, yet like them, still seeks to ensure First Nations' participation in the commercial fishery. It also displayed similar feedback effects as its predecessors. The program experiences positive reinforcement given that thirty-three of the thirty-five Atlantic First Nations communities currently participate.[80] As well, the fact that the AICFI does little to

[73] Sarah J. King, Conservation Controversy: Sparrow, Marshall, and the Mi'kmaq of Esgenoôpetitj," *The International Indigenous Policy Journal* 2, no. 4 (2011): 11.

[74] Gale, *Marshalling Resources*, 177; March, *The Impact of the Marshall Decision*, 37; Scott, *An Atlantic Fishing Tale*, 3.

[75] Department of Fisheries and Oceans, *Archived—Audit of the Longer-Term Marshall Response Initiative*.

[76] Scott, *An Atlantic Fishing Tale*, 4.

[77] March, *The Impact of the Marshall Decision*, 29.

[78] Scott, *An Atlantic Fishing Tale*, 4.

[79] Department of Fisheries and Oceans, *Evaluation of the Atlantic Integrated Commercial Fisheries Initiative (AICFI)* (Ottawa: Government of Canada, 2015), https://bit.ly/3dxO9pt; National Indigenous Fisheries Institute, *Atlantic Integrated Commercial Fisheries Initiative: Discussion Paper* (Membertou: National Indigenous Fisheries Institute, 2018), 2, https://bit.ly/3gXyAcM.

[80] Department of Fisheries and Oceans "Our Response to the *Marshall* Decisions," Government of Canada, last modified April 19, 2021, https://bit.ly/3Zzkp1Z; "The *Marshall* Decisions," Government of Canada, last modified September 22, 2022, https://bit.ly/3Xsfnm0; *R v Desautel* [2021] S.C.C. 17, https://bit.ly/3QHbjMn. Thirty-five communities are noted here instead of the previously stated thirty-four because "in 2017, the Peskotomuhkati Nation at Skutik was also identified as a Nation implicated by the Marshall decisions." Despite this recognition occurring in 2017, the Peskotomuhkati peoples have always been implicated by the *Marshall* decisions. Canada's highest court recognized this in *R v Desautel*, affirming that the

disrupt the status quo leads to maintained acceptance among settler fishers. Despite such positive reinforcement, increasing negative feedback has also been seen throughout the program's tenure. For example, in 2013, twelve Nova Scotia Mi'kmaq communities filed a lawsuit requesting that the government consult with them to develop a new regulatory regime that accommodates the right to fish for a moderate livelihood.[81] Moreover, and as a result of federal inaction, in 2017 members of Sipekne'katik First Nation fished during closed season and sold some of their catch, something which angered settler fishers.[82] Therefore, despite locking in the outcome of the critical juncture by further embedding First Nations communities within the commercial fishery, displeasure with the moderate livelihood fishing right's being incorporated into the standing regulatory scheme has not only persisted, but has heightened, during the AICFI's tenure.

In an attempt to deal with such dissatisfaction, the federal government began to work with the Nova Scotia Mi'kmaq to develop solutions. In 2015, they decided on moving forward with Rights Reconciliation Agreements (RRAs) and commenced negotiations after the 2017 fisheries dispute.[83] In the federal government's words, "[RRAs are] intended to be a reflection of the moderate livelihood fishing needs and interests of a specific Nation and its members."[84] However, given that they essentially restrict signatories to operating under the standing structure, RRAs have seen limited reinforcement with only four communities signing on.[85] For example, the Assembly of Nova Scotia Mi'kmaq Chiefs (ANSMC) and other First Nations communities stepped away from RRA negotiations in 2019 due to dissatisfaction with the process;[86] specifically, the fact that agreements may compromise their treaty right to fish.[87] The lack of uptake is seen as significant negative feedback.

With RRAs and earlier federal actions failing to adequately address First Nations concerns, Mi'kmaq, Peskotomuhkati, and Wolastoqey peoples took matters into their own hands. On September 10, 2020, the ANSMC announced that it was working with communities to implement their right to fish for a moderate livelihood.[88] Seven days later, the first out-of-season moderate livelihood fishery (MLF) was

Aboriginal and treaty rights of Indigenous peoples who inhabited Canadian territory at the time of European contact are protected under Section 35 of the *Constitution Act, 1982*, even if they now reside outside of Canada.

[81] *Acadia First Nation v Canada (Attorney General)* [2013] NSSC 284.

[82] Ross Lord, "'This Needs to Stop': Indigenous Fisherman Speaks out After Boat Torched in N.S.," *Global News*, October 11, 2017, https://bit.ly/37joCgk; Natasha Pace, "N.S. Lobster Fishermen Protesting Outside DFO Offices Against Illegal Poaching," *Global News*, September 14, 2017, https://bit.ly/36eGEzB.

[83] House of Commons Standing Committee on Fisheries and Oceans, *Study on the Implementation of Mi'kmaq Treaty Fishing Rights to Support a Moderate Livelihood: Briefing for the Minister of Fisheries and Oceans for her November 18, 2020 Appearance* (Ottawa: Government of Canada, 2020), https://bit.ly/2UXbZEw/.

[84] Department of Fisheries and Oceans, "Our Response to the *Marshall* Decisions."

[85] Senate Standing Committee on Fisheries and Oceans, *Peace on the Water: Advancing the Full Implementation of the Mi'kmaq, Wolastoqiyik, and Peskotomuhkati Rights-Based Fisheries* (1st sess., 44th Parliament, 2022, Committee Report 4), 24, https://bit.ly/3w4E4cp; Trina Roache, "The Irony in Canada's New Deals to Reconcile Fishing Rights 20 Years After the Lobster Wars," *APTN News*, December 13, 2019, https://bit.ly/3xerkPj.

[86] House of Commons Standing Committee on Fisheries and Oceans, *Briefing for the Minister*.

[87] House of Commons Standing Committee on Fisheries and Oceans, *Implementation of the Mi'kmaw and Maliseet Treaty Right to Fish in Pursuit of a Moderate Livelihood* (2d sess., 43rd Parliament, May 2021. Committee Report 4), 20–21, https://bit.ly/36aBuEI; Senate Standing Committee on Fisheries and Oceans, *Peace on the Water*, 24–25.

[88] Assembly of Nova Scotia Mi'kmaw Chiefs, "Chiefs Working with Communities on Moderate Livelihood," News Release, September 10, 2020, https://bit.ly/3ZxAZPT, accessed January 15, 2023.

launched in St. Mary's Bay, Nova Scotia, by Sipekne'katik First Nation.[89] Despite Chief Michael Sack of Sipekne'katik making the federal and provincial governments aware of this launch on September 11, both parties did little to prepare.[90] As a result, conflict ensued between First Nations and settler fishers, which continued well into late October.[91] Additional complexity was added to the situation given that by November, several other communities had launched, or had plans to launch, MLFs.[92]

Initially, the federal government's response was slow. In late October, they appointed a federal special representative to mediate the situation and report back on policy options.[93] At the same time, the House of Commons Standing Committee on Fisheries and Oceans began to study the implementation of the moderate livelihood right.[94] Such actions did little to resolve the short-term issues at hand. Therefore, on March 3, 2021, the Minister of Fisheries and Oceans, Bernadette Jordan, issued a statement detailing the government's "new path" for implementing the right to fish for a moderate livelihood. This plan involves the federal government working with First Nations communities to develop Moderate Livelihood Fishing Plans (MLFPs) that recognize their right to run treaty fisheries but restrict their operation to established seasons.[95] In other words, like prior government actions, it seeks to incorporate First Nations fishing activities into the standing regulatory scheme while ignoring their management rights. To this end, it has experienced an extensive amount of negative feedback. For example, the ANSMC immediately rejected the plan, and as of April 2022, only three communities had worked with the government to develop MLFPs.[96] Moreover, MLFs continue to operate and the ANSMC is also pursuing a legal challenge against the federal government.[97] Perhaps the only positive reinforcement of the program has been commercial fishers calling it a "good first step."[98] Given this, a path forward remains uncertain.

[89] Alex Cooke, "Mi'kmaw Fishermen Launch Self-Regulated Fishery in Saulnierville," *CBC News*, September 17, 2020, https://bit.ly/3hxVq9U.

[90] Brett Forester, "DFO, RCMP Knew Violence Was Coming but Did Nothing to Protect Mi'kmaw Lobster Harvesters: Documents," *APTN News*, February 10, 2021, https://bit.ly/3yk5QAS.

[91] Stefan Sinclair-Fortin, "How Did It Get to This? A Recent Timeline of Indigenous Lobster Fishing Rights," *The Coast*, November 15, 2020, https://bit.ly/369AaCl.

[92] House of Commons Standing Committee on Fisheries and Oceans, *Mi'kmaw and Maliseet Treaty Right*, 9.

[93] Department of Fisheries and Oceans, "Government of Canada Appoints Federal Special Representative to Facilitate Discussions Between Commercial Lobster Industry and First Nations in Atlantic Canada," News Release, October 23, 2020, https://bit.ly/3jvPHnS, last modified October 23, 2020.

[94] House of Commons Standing Committee on Fisheries and Oceans, *Mi'kmaw and Maliseet Treaty Right*, 11.

[95] Department of Fisheries and Oceans, "Minister Jordan Issues Statement on a New Path for First Nations to Fish in Pursuit of a Moderate Livelihood," News Release, March 3, 2021. https://bit.ly/3x4zGJo, last modified March 3, 2021.

[96] Assembly of Nova Scotia Mi'kmaw Chiefs, "Assembly of Nova Scotia Mi'kmaw Chiefs Respond to DFO Announcement," News Release, March 3, 2021, https://bit.ly/3dvnLwF, accessed January 15, 2023; Senate Standing Committee on Fisheries and Oceans, *Peace on the Water*, 27.

[97] Aaron Beswick, "Mi'kmaw Chiefs Drop Moderate Livelihood Lawsuit," *The Chronicle Herald*, December 19, 2022, https://bit.ly/3XwqAlp.

[98] Elizabeth McSheffrey, "'We Absolutely Listened': Minister Backs Livelihood Fisheries Plan as Some First Nations Oppose It," *Global News*, March 4, 2021, https://bit.ly/3jHaipp.

Discussion and Conclusion

This article set out to examine the *Marshall* decisions using a historical institutionalist lens. Several interesting elements were illuminated, as summarized in Table 1. We first discuss these as they relate to the precursor of *Marshall* and then the decisions and their implementation.

By situating the *Marshall* decisions within a historical context, two aspects were uncovered. First, it was revealed that because of endogenous and exogenous mechanisms of institutional change, the historical treaties signed between the British and Atlantic First Nations were forgotten or ignored by the turn of the twentieth century. The second intriguing element is that these treaties would not be neglected forever. As the investigation unveiled, endogenous institutional change through the rise of new judicial precedents in Indigenous rights cases set the stage for future Atlantic First Nations' success in the Canadian courts and, therefore paved the way for the *Marshall* case.

Table 1. Case Developments Typologized to the Historical Institutionalist Framework.

Framework Element	Case Development
Critical Juncture/Gradual Change	Over time, exogenous (e.g., the Constitution Act, 1867) and endogenous change (e.g., new laws) led to treaty rights being neglected by settler authorities.
Gradual Change	Starting in the 1960s, Indigenous claims began to succeed in the Canadian courts. Resulting judicial precedents held that Atlantic First Nations could fish or hunt for food, social, and ceremonial purposes. This set the stage for future legal successes.
Critical Juncture	The Marshall ruling gave rise to rights-based fishing access and disrupted the institutions governing the Atlantic fishery; specifically, the idea that only those with government-afforded access could fish the stock.
Path Dependence	The federal government has reacted to Marshall by seeking to integrate First Nations fishing activities into the standing regulatory scheme while ignoring their "moderate livelihood" right. While buy-in to various government programs has affirmed this path, it is becoming increasing fragile as First Nations have begun to challenge it.

In looking at the decisions and their aftermath, two additional elements were exposed. First, it was shown that the initial ruling in *Marshall* was a critical juncture as it disrupted the institutions governing the Atlantic fishery by giving rise to rights-based fishing access. Second, we demonstrated that the outcome of this critical juncture has been a federal approach that seeks to integrate First Nations fishing activities into the standing regulatory scheme while simultaneously failing to engage substantively with their "moderate livelihood" right. Between 2000 and 2017, this outcome was reinforced through a series of government programs, the I-MRI, LT-MRI, and AICFI. However, as negative feedback in the form of First Nations' discontent with this approach was left unresolved, it led to a fisheries dispute in 2017. The solution proposed to resolve this was the RRA process. Since this program resembles its predecessors and does not address First Nations concerns, it set the stage for another outburst in 2020. Much like the solution to the first conflict, the current proposal, MLFPs, does not deal with First Nations concerns over their rights being incorporated into the standing regulatory regime. Currently, the situation remains at an impasse as the federal government continues to stick with its same old approach while Atlantic First Nations carry on asserting their right to fish for a moderate livelihood. Without change, future conflict appears likely.

It also raises the question of how to proceed. Moving forward, the federal government's piecemeal approach to addressing Indigenous rights claims through litigation is not sufficient.[99] Rather, to truly implement the *Marshall* decisions and avoid future issues, it must commit to substantively engaging with First Nations and settler stakeholders. The most important step in this process will be to work with these two groups to define the concept of a "moderate livelihood." Although this appears difficult, we believe that guidance already exists. In revisiting the initial *Marshall* decision, one will find that Justice Binnie described a moderate livelihood as "such basics as 'food, clothing and housing, supplemented by a few amenities,' but not the open accumulation of wealth."[100] This is similar to the government's Market Basket Measure, which, by calculating the cost of a basket of goods including "food, clothing, footwear, transportation, shelter and other expenses for a reference family of two adults and two children," determines the cost of a "modest, basic standard of living" in different regions of Canada.[101] Looking at these values for the regions including the thirty-five Atlantic First Nations communities will provide parties with a reference point that could serve as the basis for further discussions.

While characterizing a "moderate livelihood" will be significant in resolving some of the current issues, it does not answer the question of how to deal with MLFs. As it stands, it seems as though First Nations fishers want these to operate outside the requirements placed on commercial fisheries, while settler fishers appear to want them functioning under such regulations.[102] Given this, the most tangible option looks to be a two-system approach where MLFs co-exist with commercial fisheries following the same seasons and with some sort of government licensing scheme. While this recommendation appears similar to the federal government's MLFPs, we add three caveats which we believe distinguish our suggestion from its approach.

First, as the rise of MLFs demonstrates First Nations' interest in being part of the resource management process, they must be involved in it and their traditional knowledge—e.g., the Mi'kmaq principle of *Netukulimk*—must be taken seriously.[103] Next, as accommodating MLFs will require a drop in the commercial quota, licences must be bought back from commercial fishers and/or Indigenous communities. This needs to occur as they become available to minimize price inflation effects, such as those seen throughout the MRI programs.[104] Finally, to avoid job losses and thus, potential community

[99] In the absence of a willing federal partner, John Borrows notes that Indigenous peoples are limited to litigation and protests to address their claims. For more information, see John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002), 43.

[100] *R v Marshall 1* at Para. 59.

[101] Statistics Canada, "Dictionary, Census of Population, 2016: Market Basket Measure (MBM)," last modified January 3, 2019, https://bit.ly/3gKgOtb.

[102] Paul Withers, "'Moderate Livelihood' Fishermen Must Operate During Commercial Season, DFO Says," *CBC News*, March 3, 2021, https://bit.ly/43wPuVN.

[103] According to the Unama'ki Institute of Natural Resources, "Netukulimk is the use of the natural bounty provided by the Creator for the self-support and well-being of the individual and the community. Netukulimk is achieving adequate standards of community nutrition and economic well-being without jeopardizing the integrity, diversity, or productivity of our environment." For more information, consult UINR, "Netukulimk," accessed April 13, 2023, https://bit.ly/3UzU5CI.

[104] Chantal March states that "[during the I-MRI], the [federal] government was offering prices of between $300,000 to $350,000 for a licence and fully equipped boat. The same licence and boat would have been sold for $80,000 to $100,000 [prior to *Marshall*]." See March, *The Impact of the Marshall Decision*, 29.

out-migration,[105] settler fishers and rural fishing communities must be supported through retraining and economic development as licences are bought back to accommodate MLFs.

Altogether, we believe that our recommendations provide a basis for moving forward. However, only the willingness of stakeholders to work together will determine the result: more conflict or progress.

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[105] We state this because when licenses were bought back under the MRI, settler fishers working on vessels who did not own a license lost jobs, thus leading to possible community out-migration. See McGaw, "Aboriginal Fisheries Policy in Atlantic Canada," 421.

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