

## “IT’S TIME TO TRULY IMPLEMENT THE *MARSHALL* DECISION!” ANALYZING POLICE ENCOUNTERS WITH INDIGENOUS COMMUNITIES THROUGH FILM AND THE FIRST *MARSHALL* DECISION

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### Abstract

This article questions whether Marshall’s wrongful conviction in 1971 and the Supreme Court of Canada’s 1999 *Marshall* decisions could inform contemporary discussions on racialized surveillance and policing in relation to Indigenous bodies and the unceded territories they occupy. This article is one of the first to use the decisions as a springboard for analysis of the largely detrimental function of policing in Indigenous communities. It draws from film studies, critical policing studies, Indigenous and decolonial studies, and adopts a case study approach to probe policing in criminal justice and natural resource settings.

### Résumé

Cet article se demande si la condamnation injustifiée de Marshall en 1971 et les arrêts *Marshall* de 1999 de la Cour suprême du Canada pourraient alimenter les discussions contemporaines sur la surveillance raciale et le maintien de l’ordre en relation avec les corps indigènes et les territoires non cédés qu’ils occupent. Cet article est l’un des premiers à utiliser ces décisions comme tremplin pour analyser la fonction largement préjudiciable du maintien de l’ordre dans les communautés indigènes. Il s’inspire des études cinématographiques, des études critiques sur le maintien de l’ordre, des études autochtones et décoloniales, et adopte une approche d’étude de cas pour examiner le maintien de l’ordre dans le cadre de la justice pénale et des ressources naturelles.

*This is the sanctuary we need: the one that knows the times are urgent, we must slow down.*

—Báyò Akómóláfe<sup>1</sup>

*If you are trying to reconcile your relationship with Indigenous people,  
you cannot continue to uphold the law as a tool for exclusion,  
as a tool for marginalization, as a tool to support economic racism in the territories.*

—Fred Metallic, Director of Natural Resources, Listuguj Mi’gmaq Government<sup>2</sup>

<sup>1</sup> “Coming Down to Earth,” Báyò Akómóláfe, March 11, 2020, <https://www.bayoakomolafe.net/post/coming-down-to-earth>.

<sup>2</sup> Trina Roache, *Living Treaties: Part 2*—APTN Investigates, *APTN News*, December 16, 2019, 8:45–8:57, News video, 23:50 mins., [https://www.youtube.com/watch?v=SlqM\\_WEvsyM](https://www.youtube.com/watch?v=SlqM_WEvsyM).

## Introduction<sup>3</sup>

In 2019, the Aboriginal Peoples Television Network (APTN) posted the news story “The Irony in Canada’s New Deals to Reconcile Fishing Rights 20 Years After the Lobster Wars,” a reference to the heated environmental conflict in Esgenoôpetitj, or Burnt Church First Nation, between 1999 and 2002.<sup>4</sup> In the article and accompanying video, leaders and fishers highlight dissatisfaction with the federal government’s oversight regarding fisheries and resource access within Indigenous homelands and showcase their ongoing efforts to see meaningful implementation of the treaties. The APTN stories refer to the year 1999 when the Supreme Court of Canada issued the rulings reviewed in this special issue.<sup>5</sup> While some time has passed since the higher court judgment, the story this article communicates is not one of stagnation around Indigenous rights; it is a story of advocacy and action, as Fred Metallic conveys in his strong call for equity. The continued resistance to settler oversight regarding natural resources was also evident in September 2020 when the Sipekne’katik First Nation opened a self-regulated lobster fishery outside the commercial season regulated by the Canadian government. Non-Indigenous fishers and the Department of Fisheries and Oceans (DFO) reacted with violence. Leah Sarson points out that the First Nation was motivated by “self determination,” as stressed in an interview with Chief Michael (Mike) Sack.<sup>6</sup>

The higher court decision was set in motion when Donald Marshall Jr. a *Mi’kmaq* from the Membertou First Nation in Nova Scotia, was detained while eel fishing. He cited the 1752 *Treaty* as authorization to fish for eels in the waters near Antigonish, Nova Scotia.<sup>7</sup> Furthermore, the permission to fish for eels was granted by the chief of the Paq’tnkek Mi’kmaq, a small community approximately twenty-four kilometres east of Antigonish, in northeastern Nova Scotia. To the surprise of Donald Marshall Jr., he was arrested by a fisheries officer with a co-fisher and partner, L. Jane McMillan, on an August morning in 1993.<sup>8</sup> The Supreme Court challenge resulted from the three convictions of Donald Marshall Jr. on June 27, 1996, under the *Fisheries Act*.<sup>9</sup> The Supreme Court of Canada’s decision went beyond acquitting an individual; its recognition of a treaty right to sufficient resources for a sustainable lifestyle was groundbreaking.<sup>10</sup> The court “moved to uphold the honour and integrity of the Crown in its

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<sup>3</sup> The author thanks William Wardell, a clinical law professor at the University of Saskatchewan who encouraged her interest in wrongful convictions and Donald Marshall Jr. decades ago. She would also like to acknowledge Dr. Mario Levesque, Dr. Ken Coates and the Honourable Graydon Nicholas for the support, collegiality, and professional kindness, particularly following an unexpected loss.

<sup>4</sup> Trina Roache, “The Irony in Canada’s New Deals to Reconcile Fishing Rights 20 Years After the Lobster Wars,” *Aboriginal Peoples Television Network*, December 13, 2019, <https://www.aptnnews.ca/national-news/fishing-reconciliation-mikmaq/>.

<sup>5</sup> *R v Marshall*, [1999] 3 S.C.R. 456.

<sup>6</sup> Leah Sarson, “Shifting Authority: Indigenous Law-Making and State Governance,” *Millennium* 50, no. 3 (2022): 615.

<sup>7</sup> L. Jane McMillan, *Truth and Conviction: Donald Marshall Jr. and the Mi’kmaw Quest for Justice* (Vancouver: University of British Columbia Press, 2018), 113. This *Treaty* was originally a part of the evidence at trial and was later abandoned by the Supreme Court justices. In the majority decision, the *Treaty* of 1761 was Justice Binnie’s focus. In para. 4, he stated “In my view, the 1760 treaty does affirm the right of the Mi’kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed ‘necessaries’”.

<sup>8</sup> Michael Tutton, “Donald Marshall Jr.’s Eel Nets Returned,” *The Canadian Press*, October 6, 2019, <https://nationalpost.com/news/return-of-donald-marshall-jr-s-eel-nets-recall-days-of-historic-fishing-decision>.

<sup>9</sup> R.S.C., 1985, c. F-14. Ecojustice describes this law as “the principal federal statute that manages Canadian fisheries resources.” See Ecojustice Canada, “Legal Background: Fisheries Act,” February 2013, <https://ecojustice.ca/wp-content/uploads/2015/03/Ecojustice-Fisheries-Act-Feb-2013.pdf>.

<sup>10</sup> For a fuller discussion of the decision, see, for example, Ken Coates, *Marshall Decision and Native Rights: The Marshall Decision and Mi’kmaq Rights in the Maritimes* (Montreal: McGill-Queen’s University Press, 2000).

dealings with the Mi'kmaq people to secure their peace and friendship, as best the content of those treaty promises can now be ascertained.”<sup>11</sup> In keeping with the provincial focus of this journal, the impact of the *Marshall* decisions on fisheries in New Brunswick, particularly the original decision, is one topic this article addresses, although evidence is cited from other jurisdictions on the sweeping impact of the ruling.

The Supreme Court *Marshall* decisions, referred to throughout the *Living Treaties* films, are generally associated with treaty rights rather than what are traditionally seen as policing concerns. Even so, the higher court decisions are examined for developments that occurred in their aftermath to generate findings on whether and how the excessive regulation of Indigenous fisheries and natural resource management has impacted Indigenous communities in similar ways to the over-policing in criminal legal contexts that recent scholarship has analyzed.<sup>12</sup> As many readers will know, Donald Marshall Jr. is the same man who was wrongfully convicted for murder decades earlier.<sup>13</sup> The criminal legal system's mistreatment of Donald Marshall Jr. was examined in the 1989 Marshall Inquiry.<sup>14</sup> Since that time, considerable attention has been granted to the systemic discrimination toward Indigenous peoples in the criminal legal system.<sup>15</sup> Aiming to offer further insights, the two well-known prosecutions, one for murder, the other for fishing, of Donald Marshall Jr. are analyzed in this article through the lens of policing.<sup>16</sup> The Department of Fisheries is not a police agency according to more conventional definitions. However, it can, and does at times, exert the white settler state power under scrutiny in this article.

The ongoing dissatisfaction in Indigenous–state relations in Atlantic Canada is probed by setting out arguments that Indigenous women's well-being and security has been particularly undermined by policing shortcomings. The failure to fully implement the recommendations that addressed the systemic reasons why Donald Marshall Jr. was convicted for murder, known as the Marshall Inquiry, is a factor that places Indigenous woman at risk.<sup>17</sup> The efforts made to reform the police have been identified as particularly problematic. This point is illustrated through a 2022 prosecution for a murder in Nova Scotia caused by intimate partner violence, discussed in detail later in this article.<sup>18</sup> While clearly denouncing violence and without undermining the extreme harm of violence against women, mental health

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<sup>11</sup> *R v Marshall*, [1999] 3 S.C.R. 456, paragraph 4.

<sup>12</sup> Kent Roach, *Canadian Policing: Why and How It Should Change* (Toronto: Irwin Law Inc., 2022), 1.

<sup>13</sup> For further information see Michael Harris, *Justice Denied: The Law Versus Donald Marshall* (Toronto: Harper Collins, 1990) and, more recently L. Jane McMillan, *Truth and Conviction*, in particular Chapter 1: *Meki o'pla'lusnaq/A Great Wrong: The Wrongful Conviction*, 11–20, and Chapter 2: *Melgwisgat/Nightmare: Prison and Freedom*, 21–50.

<sup>14</sup> T.A. Hickman, L.A. Poitras, and G.T. Evans, *Royal Commission on the Donald Marshall Jr., Prosecution*, Province of Nova Scotia, 1989. [https://novascotia.ca/just/marshall\\_inquiry/docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution\\_findings.pdf](https://novascotia.ca/just/marshall_inquiry/docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution_findings.pdf).

<sup>15</sup> Kent Roach *Wrongfully Convicted: Guilty Pleas, Imagined Crimes, and What Canada Must Do to Safeguard Justice* (Toronto: Simon and Schuster Canada, 2023).

<sup>16</sup> Curt T. Griffiths defines policing, following Curtis Clarke and Chris Murphy, as activities by individuals or organizations acting to “maintain public order” while authorized by contracts, regulations, or policies. See Curt T. Griffiths, *Canadian Police Work*, 5th ed. (Toronto: Nelson College Indigenous, 2019), 3.

<sup>17</sup> L. Jane McMillan with Pam Glode-Desrochers and Paula Marshall, *Examining Police Practices in Mi'kmaki: Pathways to Positive Policing Relationships*. Public Safety Canada. 2020. <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rvw-plc-prctcs-stf/rvw-plc-prctcs-stf-en.pdf>. See also, J. Robert Larmer, “The Highway Runs East: Poverty, Policing, and the Missing and Murdered Indigenous Women of Nova Scotia,” *Dalhousie Journal of Legal Studies* 27 (2018): 89–136.

<sup>18</sup> *R v Isadore*, 2022 NSSC 209.

professionals contextualized the offender's wrongful actions by stating that he was impacted by his grandfather's death by an RCMP officer.

Based on fact situations like the one cited, Kent Roach asserted the sentiments of many when he stated, "policing needs to change."<sup>19</sup> Roach's conclusion was based on his involvement in various inquiries as well as his more recent investigations into policing in his recent book. Roach further asserted that "policing needs to become less violent and discriminatory, better governed, and more effective."<sup>20</sup> Debates about policing have been animated by Indigenous leaders in New Brunswick who have called for a public inquiry into the shooting deaths of two Indigenous persons in the spring of 2020, Chantel Moore and Rodney Levi.<sup>21</sup> Dalhousie University law professor Naiomi Metallic is among those who have criticized the New Brunswick government's refusal to appoint an inquiry into systemic racism. In making her claim, she cites the inquiry into the wrongful conviction of Donald Marshall Jr., discussed in this paper, as evidence of the need for dramatic transformations to policing institutions. Importantly, she cites the positive influence that the Marshall Inquiry and the resulting eighty-two recommendations had on "creating meaningful, positive change in Nova Scotia's justice system" in her call for justice in New Brunswick.<sup>22</sup>

Moreover, ongoing conflict around fisheries also differentially impacts women, such as an inherent rights lobster fisher, Marilyn Leigh Francis. Francis is featured in the 2019 Aboriginal Peoples Television Network *Living Stories* documentaries. Her story is scrutinized in this article to investigate ways that women's vulnerability is affected by the absence of what the Canadian Senate referred to in their 2022 report as "peace on the water."<sup>23</sup>

While this article outlines dissatisfaction, it should also be read as a positive exploration, as an effort to emphasize Indigenous resilience, voice, and strength, given the demands for forward movement on treaty implementation along with the calls for progress on policing and community safety. Fisheries advocacy is evident in *Peace on the Water*, the July 2022 report of the Standing Committee on Fisheries and Oceans, which lists many New Brunswick First Nations leaders including Chief Allan Polchies Jr. from St. Mary's First Nation and Chief Wilbert Marshall of Potlotek First Nation as witnesses.<sup>24</sup> The Fredericton-based agency, Indigenous Women of The Wabanaki Territories, is one organization that advocates on behalf of missing and murdered Indigenous women and gender-diverse persons.<sup>25</sup>

In 2019, Trina Roache, a journalist with the Aboriginal Peoples Television Network and a journalism professor, provided an update on Canada's violations of treaty rights in the two-part

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<sup>19</sup> Roach, *Canadian Policing*, 1.

<sup>20</sup> Roach, *Canadian Policing*, 1.

<sup>21</sup> Naiomi Metallic, "New Brunswick Needs a Public Inquiry into Systemic Racism in the Justice System: Nova Scotia Shows Why," *Journal of New Brunswick Studies/Revue d'études sur le Nouveau-Brunswick* 18 (2020): 7.

<sup>22</sup> Metallic, 7.

<sup>23</sup> Standing Senate Committee on Fisheries and Oceans, *Peace on the Water: Advancing the Full Implementation of Mi'kmaq, Wolastoqiyik and Peskotomuhkati Rights-Based Fisheries*, July 2022. Ottawa: Senate, Canada, [https://sencanada.ca/media/kikbt2do/2022-07-12\\_pofo\\_report\\_ss-2\\_peace-on-the-water\\_tabled-version\\_e.pdf](https://sencanada.ca/media/kikbt2do/2022-07-12_pofo_report_ss-2_peace-on-the-water_tabled-version_e.pdf) & [https://sencanada.ca/content/sen/committee/441/POFO/reports/PeaceontheWater\\_Mi'kmaq\\_b.pdf](https://sencanada.ca/content/sen/committee/441/POFO/reports/PeaceontheWater_Mi'kmaq_b.pdf).

<sup>24</sup> *Ibid.*, 51.

<sup>25</sup> Indigenous Women of the Wabanaki Territories, "About Us," <https://iwwt.ca/about-us>.

documentary *Living Treaties, Part 1 and 2*.<sup>26</sup> Along with the *Living Treaties* documentaries, films, including *Justice Denied* (1989) by Paul Cowan, based on the wrongful conviction and release of Donald Marshall Jr., and *Is the Crown at War with Us?* (2000), showing the violence that emerged in New Brunswick after the Supreme Court's *Marshall* decisions, both by the National Film Board, were also sources of qualitative data. Both films were groundbreaking in telling stories that revealed settler, particularly law enforcement, violence.

In addition to the films, recent scholarship informed this analysis. *Truth and Conviction*, written by L. Jane McMillan, a close friend and partner of Donald Marshall Jr., and an advocate for justice in Mi'kmaq communities informed the discussion.<sup>27</sup> A status report of the Marshall Inquiry recommendations that tracks how the absence of meaningful reform has influenced systemic problems such as the ongoing trauma of missing and murdered Indigenous women was a helpful resource.<sup>28</sup> Sociolegal resources were also key to this article's development.<sup>29</sup> While acknowledging demands to altering policing to the point of defunding, this article endorses varied approaches. It calls for critical evaluations of policing that engage multiple perspectives, that remain open to the creative possibilities reinforced by Roach and by McMillan and her colleagues who co-authored a recent study on policing.<sup>30</sup> Their report exemplifies the strengths of Indigenous women as changemakers.

The insights of Dr. *Báyò Akómoláfé*, a philosopher, writer, activist, professor of psychology, and executive director of the Emergence Network were helpful as a guide for future conversations and directions.<sup>31</sup> In addition to his speaking and educating, Dr. Akómoláfé is a frequent commentator on current affairs, particularly those related to the environment. He states a preference for process over outcome. He works both within and outside of the academy to promote spiritual transformation and what he labels "fugitivity," or the "site of hopelessness, of so-called defeat, of modest bearings and whispered songs."<sup>32</sup> Arguably, it is the uncertainty, fugitivity, and animated conversation, described by *Báyò Akómoláfé*, that may offer a template for forward movement on longstanding questions related to law enforcement.

## Reconsidering *Justice Denied*

In 1989, the National Film Board released the film *Justice Denied*.<sup>33</sup> The film traced parts of the story of Donald Marshall Jr. and the events that led up to his wrongful conviction in 1971. *Justice Denied* opens with a scene of young Donald Marshall Jr., played by a Canadian actor, Billy Merasty, in a fight

<sup>26</sup> Trina Roache, *Living Treaties: Part 1 and Part 2—APTN Investigates*, *APTN News*, December 16, 2019, News video, Part 1: [https://www.youtube.com/watch?v=y2h\\_orzCC1s](https://www.youtube.com/watch?v=y2h_orzCC1s): 23:50 and Part 2 [https://www.youtube.com/watch?v=SIqM\\_WEvsyM](https://www.youtube.com/watch?v=SIqM_WEvsyM) 23:50.

<sup>27</sup> McMillan, *Truth and Conviction*.

<sup>28</sup> L. Jane McMillan, "Still Seeking Justice: The Marshall Inquiry Narratives," *UBC Law Review* 47, no. 3 (October 2014): 927–990.

<sup>29</sup> Roach, *Canadian Policing*. The topic of over/under policing has also been addressed in books like Don Clairmont, *Native Justice Issues in Nova Scotia* (Halifax: Queen's Printer, 1992); A. Crosby and J. Monaghan, *Policing Indigenous Movements* (Halifax: Fernwood Publishing, 2018); and Miles Howe, *Debriefing Elsipogtog: The Anatomy of a Struggle* (Halifax: Fernwood Publishing, 2015).

<sup>30</sup> McMillan, Glode-Desrochers, and Marshall.

<sup>31</sup> "The Emergence Network," *Bayo Akómoláfé*, <https://www.emergencenetwork.org/bio/bayo-akomolafe/>.

<sup>32</sup> Akómoláfé, "Coming Down to Earth".

<sup>33</sup> Paul Cowan, *Justice Denied*, National Film Board of Canada, (Montreal: National Film Board of Canada, 1989), YouTube. 1989, 1 h 38 min, <https://www.youtube.com/watch?v=usSgx902Mq4>.

with other young men. The fight breaks up when police sirens are heard. As the group disperses, Donald Marshall Jr. is shown fuming at those who ran off, directing his friends to never leave during a fight. This scene showcasing the main character's determination foreshadows the rest of the film where Marshall steadfastly refuses to back down to policing and legal institutions who pressure him to confess to the murder of his teenage companion, Sandy Seale. Over the course of the film, viewers are reminded of Marshall's innocence.

Shortly after the opening scene, the encounter in the park between Donald Marshall Jr. and Roy Ebsary, the man ultimately determined to be responsible for the murder attributed to Marshall, is shown. In short order, Donald Marshall Jr. is arrested, tried, and imprisoned. One pivotal moment in the film happens during the prosecution when a medical professional referred to as Nurse Davis who examined the cuts on Donald Marshall Jr.'s arm after the incident was pressed during questioning to reveal that he had a tattoo on his arm that read "I hate cops."<sup>34</sup> The film hints that Marshall's antipathy toward law enforcement was a factor in the conviction, even though it was later revealed to be justified. The film traces the next eleven years of Donald Marshall's life, ending with his release from prison, a time when the evidence that he was wrongfully convicted and incarcerated become persuasive. The film is a vivid re-enactment of the law enforcement role in Marshall's conviction, found to be erroneous and based on evidence the police compelled from vulnerable witnesses.

*Justice Denied* is a searing indictment of the police and of their inequitable treatment of the Indigenous peoples who live in this homeland. The film, however, offers a nuanced view of law enforcement by showing the role of the RCMP in securing evidence that led to Donald Marshall Jr.'s exoneration, positioning him for the groundbreaking *Marshall* decisions on treaty rights that are also discussed in this text. In one scene, two actors playing the "hard-boiled" RCMP detectives, Staff Sergeant Harry Wheaton and Corporal James Carroll, interview Donald Marshall Jr. in a federal prison in New Brunswick about his claim to innocence. This scene is provocative in the context of this paper because it challenges the discourse that policing always serves discriminatory aims. The officers' work to remedy that wrong is captured in the film, thereby showing that law enforcement also played a role in overturning the conviction.

Anderson and Anderson, the authors of *Manufacturing Guilt*, first published in 1998, state that the actions of the RCMP officers were important to Marshall's eventual exoneration.<sup>35</sup> The credit for the outcome is largely due to Marshall, his family, and his community, who persevered for over a decade to see that the facts became known. Even so, Anderson and Anderson state that the "perseverance" of the officers was central to Marshall's release.<sup>36</sup> From the vantage point of history, the determination of Donald Marshall Jr., his family, and his community brought about the realization of some level of justice, as *Justice Denied* made clear and as L. Jane McMillan carefully documented in *Truth and Conviction*. Donald Marshall's tenacity, courage, and ability to withstand his term of imprisonment, as well as the Court of Appeal decision that held him accountable for the convictions along with all the associated traumas from confronting the colonial state is what eventually led to the establishment of the Marshall Inquiry that released its final report in 1989.

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<sup>34</sup> Cowan, *Justice Denied*, 26:46–26:49.

<sup>35</sup> Barrie Anderson and Dawn Anderson, *Manufacturing Guilt: Wrongful Convictions in Canada* (Halifax: Fernwood Publishing, 1998).

<sup>36</sup> *Ibid.*, 34.

At the end of *Justice Denied*, Billy Merasty, the actor playing Marshall, is encircled by his father and mother, represented by the real-life parents, Donald Marshall Sr., and his wife, Caroline Marshall-Hobbs. This uplifting ending seems to foreshadow positive outcomes, with Marshall triumphant, returned to the embrace of his family and community. While the message of the film was optimistic, the release from past injustices and true reconciliation, hinted at in the film's conclusion, were never truly realized.

## Examining Fisheries Law

Over-policing in the criminal legal system and over-regulation in relation to the regulation of fishing and natural resources are frequently showcased in news stories and academic texts. In her 2018 manuscript, *Truth and Conviction: Donald Marshall Jr. and the Mi'kmaw Quest for Justice*, L. Jane McMillan described community forums her research teams held as part of an evaluation of the Marshall Inquiry recommendations.<sup>37</sup> Notably, community participants wanted to converse beyond criminal legal related matters. They identified fishing and treaty rights as central to the achievement of justice.<sup>38</sup> This article builds on the finding that the participants viewed criminal law shortcomings and Aboriginal treaty law as companion elements, even though these areas are often siloed in Western legal systems.

In a 2019 article, "Reviewing *The Fisheries Act: An Indigenous Perspective*," Nicholas XEMFOLTW Claxton of the University of Victoria concludes that fishing and resource management laws are problematic.<sup>39</sup> He stated: "For Indigenous peoples who live on the vast coastline, Canada's *Fisheries Act* has been and continues to be one of the most oppressive and one of the most contentious of these acts."<sup>40</sup> Claxton's view was reinforced in 2022 by the Senate of Canada in their fifty-four-page report, referred to earlier, available in English, Wolastoqiyik, and Mikmaq, *Peace on the Water: Advancing the Full Implementation of Mi'kmaq, Wolastoqiyik and Peskotomuhkati Rights-Based Fisheries*.<sup>41</sup> From the Senate committee's perspective, it was unacceptable that First Nation fishers reported that they were "concerned for their safety and security while exercising their rights to fish."<sup>42</sup> According to the Senate Standing Committee, the rights-based fisheries that were legally required to satisfy the *Marshall* decisions have yet to be "fully implemented" by the Canadian government.<sup>43</sup> This has resulted in "rising tensions and even violence."<sup>44</sup> The committee made nine recommendations to realize "peace on the waters" through adherence to treaty rights.<sup>45</sup> For the senators, it was disconcerting that "systemic racism and safety" remained pressing problems.<sup>46</sup>

In Senate hearings, the Assembly of First Nations elaborated on this concern stating that the Department of Fisheries and Oceans approach was one that "criminalized the exercise of First Nations'

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<sup>37</sup> McMillan, *Truth and Conviction*, 154–155.

<sup>38</sup> *Ibid.*, 155.

<sup>39</sup> Nicholas XEMFOLTW Claxton, "Reviewing The Fisheries Act: An Indigenous Perspective," Yellowhead Institute, Policy Brief, Issue 26, March 25, 2019, <https://yellowheadinstitute.org/wp-content/uploads/2019/03/fisheries-act-brief.pdf>.

<sup>40</sup> Claxton, "Reviewing *The Fisheries Act*."

<sup>41</sup> Standing Senate Committee on Fisheries and Oceans, *Peace on the Water*.

<sup>42</sup> Standing Senate Committee on Fisheries and Oceans, *Peace on the Water*, 8.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*, 10–12.

<sup>46</sup> *Ibid.*, 32.

rights, leading to mistrust and violence.”<sup>47</sup> Janice Maloney, Executive Director, Kwilmu’kw Mawklusuaqn Negotiation Office, Assembly of Nova Scotia Mi’kmaw Chiefs, stated “that rights holders cannot seem to execute their rights-based fisheries without harassment” even though laws and legal decisions affirmed fishing rights.<sup>48</sup> Presenters informed the Senate that the federal government’s role should be guarding the “physical safety of fishers when they exercise their right to harvest and trade fish.”<sup>49</sup> Rather than an enforcement focus, the government should ensure that “this right can be meaningfully exercised.”<sup>50</sup> Dr. Pamela Palmater, Chair in Indigenous Governance, Ryerson University, stated that Fisheries and Oceans Canada and the RCMP should be relieved of responsibility for securitizing moderate livelihood fisheries.<sup>51</sup>

## The Absence of “Peace on the Water”

As the Senate’s Peace on the Water 2022 report clarifies, the gains that seemed likely from the first Marshall decision and even from the disappointing follow-up ruling have not been fully realized. According to the findings, Atlantic Canadian Indigenous communities have often been thwarted in their efforts to achieve an appropriate level of sustenance and to enjoy the natural world through pursuits such as going fishing, undisturbed by law enforcement. This is the case even though they have participated in processes of truth, reconciliation, and decolonization, and have had their assertions of sovereignty affirmed by the courts.<sup>52</sup>

Even so, leaders report that there was much jubilation when the higher court had proclaimed in 1999 that Donald Marshall Jr. had a treaty right to fish for eels, the practice he was engaging in when arrested and charged under fisheries laws. In the 2019 two-part documentary, *Living Treaties*, also by the Aboriginal Peoples Television Network (APTN), Chief Terry Paul of Membertou First Nation and a lifelong friend of Donald Marshall Jr. revisited his response to the original *Marshall* decision. Chief Paul stated with obvious emotion: “We won. And, you know, I mean, everybody cried for joy. I remember thinking that we won’t be hungry anymore. Finally, finally somebody listened to us. They listened to Junior.”<sup>53</sup>

Regardless of Chief Paul’s initial optimism regarding the court victory, both films in the *Living Treaties* series detail the immediate eruption of tensions following the *Marshall* decision. The reliving of the 1981 incident at Restigouche where police and fisheries agents swarmed the reserve is a reminder of the punitive role played by officers with the federal Department of Fisheries prior to and after the *Marshall* decision. The scenes replay the confrontations that Alanis Obomsawin captured in the 1984 film with the National Film Board *Incident at Restigouche*.<sup>54</sup> The *Living Treaties* documentaries also retell the story of

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<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, 33. These statements were made by Constance MacIntosh, Professor of Law, Dalhousie University.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, 33.

<sup>52</sup> The committee expressed its hope that the government of Canada would negotiate rights-based agreements “in the spirit of reconciliation and with a consensus-based approach in mind.” See Standing Senate Committee on Fisheries and Oceans, *Peace on the Water*, 42.

<sup>53</sup> Roache, *Living Treaties, Part 1*, 5:40–6:08.

<sup>54</sup> *Incident at Restigouche*, directed by Alanis Obomsawin (1984, National Film Board), 45 min. [https://www.nfb.ca/film/incident\\_at\\_restigouche/](https://www.nfb.ca/film/incident_at_restigouche/).



the violent encounters off the coast of the New Brunswick community of Esgenoôpetitj, formerly known as Burnt Church, at the time of the “lobster wars,” profiled in Alanis Obomsawin’s acclaimed documentary *Is the Crown at War with Us?* in 2000.<sup>55</sup> In *Living Treaties*, the more recent APTN documentaries, leader after leader, community member after community member, cites disappointment and ongoing frustration over the last decades of relative inaction with the piecemeal implementation of the first *Marshall* decision and the follow-up ruling. Leaders from the Atlantic Policy Congress stated that the second *Marshall* decision “gave the card back to the government.”<sup>56</sup> A 2020 investigation by the CBC also reported on the tensions regarding treaty rights and fishing that have not disappeared over the decades since the higher court’s original ruling and its follow-up decision.<sup>57</sup>

In this article, the punitive approach to resource management and enforcement in relation to fishing rights is argued to be counter to reconciliation and Indigenous sovereignty. The APTN story, “The Irony in Canada’s New Deals to Reconcile Fishing Rights,” previously mentioned, includes a photograph of George Ginnish, the chief of the Natoagenag First Nation in New Brunswick.<sup>58</sup> The frustration about federal government oversight over a treaty-guaranteed right was illustrated by the fact that Chief Ginnish was pictured standing in front of five placards created for the protest. The following powerful statements were written on the placards:

- *Five of the poorest Postal Codes in Canada are N.B. Mi’gmaq First Nations*
- *Our Ancestors Shared! We cannot rebuild our economies with 6 Lobster Licences*
- *It’s Time to Truly Implement the Marshall Decision!*
- *Continued Poverty and Food Insecurity Are NOT Options*
- *Mi’gmaq have a right to Hunt and Fish for a Moderate Livelihood*<sup>59</sup>

Chief Ginnish’s protest and his efforts to raise public awareness offer a poignant reference point to this article which attempts to track some of the ways policing and oversight have strained Indigenous communities in Atlantic Canada in the aftermath of the 1999 *Marshall* decisions.

## The Return of the Nets

Of symbolic note, the eel nets used on the day Donald Marshall Jr. was arrested for fishing violations were found in storage in a federal office in Antigonish, Nova Scotia, in 2019, a decade after he died in 2009.<sup>60</sup> The period the weathered eel nets were in storage was a time of resurgence of Indigenous rights demonstrated by the 1989 Marshall Inquiry and the 1999 *Marshall* decisions. The wrongful conviction and exoneration of Donald Marshall Jr. and the higher court’s affirmation of the treaties provided evidence of

<sup>55</sup> *Is the Crown at War with Us?*, directed by Alanis Obomsawin (2002, National Film Board), 96 min, [https://www.nfb.ca/film/is\\_the\\_crown\\_at\\_war\\_with\\_us/](https://www.nfb.ca/film/is_the_crown_at_war_with_us/).

<sup>56</sup> Roache, *Living Treaties, Part 1*, 10:41–10:43.

<sup>57</sup> Nic Meloney, “The History of the Mi’kmaq Lobster Fishery in the Atlantic Region,” Canadian Broadcasting Corporation, Nov 18, 2020, <https://www.cbc.ca/news/indigenous/mi-kmaq-lobster-fishery-history-video-1.5801366>.

<sup>58</sup> Roache, “The irony in Canada’s new deals.”

<sup>59</sup> *Ibid.*

<sup>60</sup> Tutton, “Eel Nets Returned.”

Canada's failures to abide by its own laws.<sup>61</sup> The eel nets are reminders of the successful claim of Donald Marshall Jr. to traditional rights, which, like the nets, continues to be inspirational. The nets are symbolic as markers for some of the returns—of safety, sovereignty, enjoyment, recognition of rightful ownership—Indigenous leaders seem to imagine and promote as counters to discriminatory policing and the systemic oppression reinforced in criminal and regulatory systems. The endurance of the eel nets, their seeming refusal to be forgotten, harkens to the continued viability of Indigenous peoples as well as their homelands, medicines, languages, and knowledges. Like the nets, the Indigenous communities and organizations vying for fishing rights remain vibrant and strong despite some tearing.

## Revisiting the Marshall Inquiry

The 1990 *Royal Commission on the Donald Marshall Jr.*, more commonly known as the Marshall Inquiry, has been described as an important benchmark regarding the administration of justice.<sup>62</sup> The report authors, Chief Justice T. Alexander Hickman of Newfoundland's Supreme Court, appointed as chair, Associate Chief Justice Lawrence A. Poitras of Quebec, and the Honourable Gregory T. Evans, QC, of Ontario, stressed the importance of dedicated action to prevent another ordeal like the one that Marshall faced. Among other important findings, they stated:

While it is impossible to guarantee that there will never be another miscarriage of justice such as befell Donald Marshall Jr., it is imperative that those in authority act responsibly to reduce or eliminate such a possibility.<sup>63</sup>

Criticisms of law enforcement were central to the inquiry report due to the powerful role that discriminatory policing played in the wrongful conviction of Donald Marshall Jr., then a teenager, in 1971. The consequences of policing failures were discussed in recent research, *Examining Police Policies and Practices in Mi'kma'ki—Pathways to Positive Policing Relationships*.<sup>64</sup> The study was funded by Public Safety Canada as a component of its response to the National Inquiry on Missing and Murdered Indigenous Women.<sup>65</sup> The study was aimed at generating knowledge that would “inform policy and transform policing practices to the benefit of Indigenous communities.”<sup>66</sup>

For McMillan and her colleagues, it was important to emphasize that legal investigations ranging from the 1989 Marshall Inquiry to the 2019 National Inquiry into Missing and Murdered Indigenous Women had pinpointed “serious systemic flaws and racial discrimination within the justice system overall and within policing services specifically.”<sup>67</sup> Notably, the researchers discovered that the participants

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<sup>61</sup> Kaitlyn Swan, “A Potent Symbol of First Nations Rights Sat for Years in DFO Storage, but Now It's Home,” *CBC News*, October 4, 2019, <https://www.cbc.ca/news/canada/nova-scotia/dfo-donald-marshall-nets-returned-20th-anniversary-1.5304578>.

<sup>62</sup> Archibald H. Kaiser, “The Aftermath of the Marshall Commission: A Preliminary Opinion,” *Dalhousie Law Journal* 13, no. 1 (May 1990): 374.

<sup>63</sup> Hickman, Poitras, and Evans, 18.

<sup>64</sup> McMillan, Glode-Desrochers, and Marshall, *Examining Police Policies and Practices in Mi'kma'ki*.

<sup>65</sup> The National Inquiry on Missing and Murdered Indigenous Women was called in December 2015 with its deadline for its final report extended to June 30, 2019.

<sup>66</sup> *Ibid.*, 2.

<sup>67</sup> *Ibid.*, 11.

shared “a profound mistrust of police services.”<sup>68</sup> Many people experienced the loss of close family members, with high numbers having had family members who were missing and/or murdered.<sup>69</sup> The participants reported that police services failed to offer protection to vulnerable family members.<sup>70</sup> In addition, law enforcement was deemed to have inadequately investigated and resolved crimes involving loved ones. The dissatisfaction was evident, irrespective of the participants’ “age, gender, spiritual orientation, language, economic and political orientations.”<sup>71</sup>

## Where the Path in the Call to Defeat Leads: A Theoretical Standpoint

This paper promotes an examination of the under-protection and over-policing recently described by scholar Kent Roach.<sup>72</sup> Fisheries are not the context Roach writes about, yet the revisioning he promotes is also necessary regarding the surveillance of natural resources. His vision of justice based on self governance seems to be embodied by the inherent rights fishers featured in the APTN in stories and documentaries. This is so because they work in accordance with traditional protocols, outside of current regulatory boxes. A lobster fisher from Nova Scotia, Marilynn-Leigh Francis, discussed later in this article, is fishing in accordance with traditional legal orders, feeding her family and community while risking prosecution due to fishing violations to affirm her community’s right to access natural resources. For Francis, the goal is to create a better life. She states that “the only way we can do that is to start asserting our rights, start taking our land back, start taking our resources back, start becoming who we were meant to be.”<sup>73</sup>

While working in different disciplines and spheres, Roach might be seen as promoting the fugitive mindset Akómoláfe writes about, using very different terminology. Akómoláfe states, for example, “We need trickster approaches, we need ways of dancing away, or dancing to, fugitive spaces, dancing to sanctuaries where we can shape-shift.”<sup>74</sup> Akómoláfe describes persons who operate around and between laws and systems. The sharing circles created for the research project Jane McMillan and her colleagues completed as a component of the federal government’s strategy on missing and murdered Indigenous women are another example of transformative processes.<sup>75</sup> In the circles, the participants asserted their right to safety, while grieving those lost to violence.

These stories seem to help us makes sense of Akómoláfe’s ambiguous and prophetic guidance. He writes:

The inquiry is how to get lost. The question of the fugitive is *how do I lose my way?* How do I lose this plantation? How do we get as far away as possible? So, these technologies I speak

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<sup>68</sup> *Ibid.*, 4.

<sup>69</sup> *Ibid.*, 4–5.

<sup>70</sup> *Ibid.*, 5.

<sup>71</sup> *Ibid.*

<sup>72</sup> Roach, *Canadian Policing*, 25.

<sup>73</sup> Roache, *Living Treaties, Part 1*, 22:50.

<sup>74</sup> Dr. Bayo Akomolafe, “Transcript: Dr. Bayo Akomolafe on Slowing Down in Urgent Times [ENCORE] /285,” *For The Wild*, May 4, 2022, <https://forthewild.world/podcast-transcripts/dr-bayo-akomolafe-on-slowing-down-in-urgent-times-encore-285>.

<sup>75</sup> McMillan, Glode-Desrochers, and Marshall, 12.

of are not fixed products one can scale up; they are cartographies of lostness, rehearsals in losing one's way in order to meet the world anew.<sup>76</sup>

Báyò Akómoláfé asserts that truth and justice are immeasurable and out of grasp. He urges us to manifest fugitivity, to leave aside certainty, to travel the indefinite path toward sanctuary creating newer truths, possibly through movement, song, even celebration, where appropriate.

## Defining the Way Forward

In recent years, demands for changes to policing have become particularly urgent and widespread. In Canada, many incidents have propelled concerns about police use of power. These include the legacy of the freezing death of Indigenous teenager Neil Stonechild, one of the best known of the “Starlight Tours”; an inadequate investigation into the death of Colten Boushie; and the many failures investigating cases of missing and murdered Indigenous women. This includes the death of Amber Tuccaro who went missing in Edmonton, Alberta, in 2010, and whose remains were found two years later in Leduc County, south of the city. These, among other high-profile and lesser-known cases, have intensified the calls for new forms of security and safety, particularly for the elimination or defunding of police through transfers to community supports. At the present time, police agencies are also under scrutiny for their role in what is alleged to be a wrongful conviction of two Indigenous sisters, Odelia and Nerissa Quewezance in 1993. The questionable nature of the confessions to police is one reason that a review of the convictions has been requested.<sup>77</sup>

Even more recently, a team of Halifax researchers published *Defunding the Police: Defining the Way Forward for HRM* which was presented to the Halifax Board of Police Commissioners in January 2022. The authors include Dr. El Jones, along with several Dalhousie PhD students studying either law or political science, Tari Ajadi, Harry Critchley, and Julia Rodgers. The report's three pillars are reforms to police practices, oversight, and accountability.<sup>78</sup> Jones and her colleagues specifically encourage that a review of policing powers to ensure this authority adheres to “the work of Indigenous communities and international human rights standards, including ‘the United Nations Declaration on the Rights of Indigenous Peoples’ and the ‘Calls for Justice from the National Inquiry into Missing and Murdered Indigenous Women and Girls.’”<sup>79</sup> While focused on policing, the Halifax report does not mention the prosecution of Donald Marshall Jr. The emphasis in the report by Dr. Jones and her colleagues on the racialized policing of Indigenous communities is, however, a reminder that concerns about policing have not disappeared in the years since 1989 when the Marshall Inquiry issued its calls for accountability and change.

In the next section, the article takes up an urgent issue, the disappearances and murders of Indigenous women, girls, and gender-diverse populations. This is accomplished by examining the

<sup>76</sup> Charlotte Du Cann and Bayo Akómoláfé, “When the Bones of Our Ancestors Speak to Us: A Fugitive Conversation with Bayo Akómoláfé,” *Resilience.Org*. October 28, 2021, <https://www.resilience.org/stories/2021-10-28/when-the-bones-of-our-ancestors-speak-to-us-a-fugitive-conversation-with-bayo-akomolafe/>.

<sup>77</sup> Emily Pasiuk and Dayne Patterson, “Saulteaux Sisters Jailed for Nearly 30 Years to Be Conditionally Released,” *CBC News*, March 27, 2023, <https://www.cbc.ca/news/canada/saskatchewan/quwezance-sisters-bail-decision-1.6790372>.

<sup>78</sup> El Jones et al., “Defunding the Police: Defining the Way Forward for HRM,” *Halifax Regional Municipality Board of the Police Commissioner’s Subcommittee to Define Defunding Police*, 2022. <https://www.halifax.ca/sites/default/files/documents/city-hall/boards-committees-commissions/220117bopc1021.pdf>.

<sup>79</sup> Jones et al., 16.

prosecution of Dwight Isadore in 2022 for intimate partner violence that resulted in the tragic loss of a vibrant and much-loved Indigenous woman, Cassidy Bernard. She was the mother of two twin daughters, fathered by Dwight Isadore.

### **Linking *R v Isadore*, 2022 NSSC 209 and Policing**

The inclusion of this homicide case is important due to a tragic link between Dwight Isadore's criminal actions and the Marshall Inquiry. The story will begin here with a vigil held in 2019 to honour Cassidy Bernard, the woman who was viciously murdered. The vigil was for Cassidy Bernard and all missing and murdered Indigenous women. The vigil marked one year since the body of Cassidy Bernard was found on the We'koqma'q First Nation in her home. Her mother, Mona Bernard, stated that she missed her daughter "every day." She shared that Cassidy's "laughter would just ring through."<sup>80</sup> Her daughter was the type of person who brought "light into your days."<sup>81</sup>

The circumstances surrounding Cassidy's death as a crime of violence are disturbing. On October 24, 2018, Cassidy was found lifeless in her bed, bruised, and battered, encased in her sheets with her twin infant daughters nearby in their crib in a debilitated state. Cassidy Bernard co-parented the twin infants fathered with Dwight Isadore. Dwight was suspected in the homicide because Cassidy was the victim of prior violent attacks by him. Cassidy's mother was worried after her calls and texts were not answered. She discovered Cassidy's body lying in the bed covered in a blanket. Her face was caked in heavy makeup. Bernard's twin girls were found in a crib next to their mother. In a CBC news article, the infants were described as "cold, dehydrated, disoriented, and malnourished."<sup>82</sup> Fortunately, they survived and were taken into the family's care.<sup>83</sup>

At the time of the 2019 vigil, Cassidy Bernard's former partner, Dwight Austin Isadore, was banned by the We'koqma'q band council from the community. He admitted to threatening Cassidy on occasion yet maintained his innocence in her death. He was eventually pinpointed as the perpetrator through a "Mr. Big" operation, which involves undercover police obtaining confessions from suspects. Having confessed to undercover police, Dwight Isadore admitted in statements to police that he struck Bernard with his fists, hitting her in the neck, back, and stomach. He estimated he hit her around ten times with as much force as he could muster.<sup>84</sup> Dwight Isadore was nineteen at the time of the homicide.

Cassidy Bernard's death in 2019 and the arrest of Isadore over a year later were deeply felt in the community. Participants in sharing circles facilitated by McMillan and her colleagues for the study for Public Safety Canada stated that the police failure to effectively respond to the crisis of missing and murdered Indigenous women and girls and gender-diverse victims was a point of significant concern and

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<sup>80</sup> Angel Moore, "I Miss Her Every Day': Family, Community Still Waiting for Information on Who Killed Cassidy Bernard," Aboriginal Peoples Television Network, October 28, 2019, <https://www.aptnnews.ca/national-news/i-miss-her-everyday-family-community-still-waiting-for-information-o-who-killed-cassidy-bernard/>.

<sup>81</sup> *Ibid.*

<sup>82</sup> Andrea Jerrett, "Cassidy Bernard's Ex-Boyfriend Pleads Guilty to Manslaughter in Her Death," *CTV News Atlantic*, June 13, 2022, <https://atlantic.ctvnews.ca/cassidy-bernard-s-ex-boyfriend-pleads-guilty-to-manslaughter-in-her-death-1.5944974>.

<sup>83</sup> *Ibid.*

<sup>84</sup> Erin Pottie, "Ex-Boyfriend Will Serve 14 Years for Killing Cassidy Bernard, Abandoning Babies," *CBC News*, July 6, 2022, <https://www.cbc.ca/news/canada/nova-scotia/ex-boyfriend-will-serve-14-years-for-killing-cassidy-bernard-abandoning-babies-1.6512729>.

a source of outrage. One participant shared that Cassidy Bernard contacted the police shortly before she was murdered. At that time, she wanted “assistance” and sought to “file a complaint.”<sup>85</sup> Instead, the participant shared, Cassidy Bernard was killed five days later.

The prosecution for the murder of Cassidy Bernard happened after the sharing circles were held. Dwight Isadore pled guilty to unlawfully causing the death of Cassidy Bernard on July 6, 2022. On that date, Dwight Isadore was sentenced by the Supreme Court of Nova Scotia in Port Hawkesbury, Nova Scotia for manslaughter under s. 236(b) of the Canadian Criminal Code and for child abandonment under s. 218. The sentencing decision outlines background circumstances on the fatality. In addition, it summarizes a presentence report the judge reviewed to determine the sanction. The family history summarized in the report refers to pronounced instability in Mr. Isadore’s life including exposure to abuse in his home during his early years. Furthermore, it reports that his drug use began at a very early age.<sup>86</sup>

Of particular importance for this article, the presentence report describes Dwight Isadore’s experiences when his maternal grandfather, John Simon, was fatally shot by law enforcement in 2008, many years before Dwight Isadore murdered Cassidy Bernard. From the presentence report, John Simon was described as a central figure in Dwight Isadore’s life, who acted as “a father-like figure.”<sup>87</sup> According to both the psychologist report and the presentence report, this fatality caused “significant trauma” for Mr. Isadore.<sup>88</sup> Clearly, the death of John Simon does not alleviate Dwight Isadore from accountability for a vicious homicide. However, the violence against John Simon by police was cited as a systemic factor.

Few details on John Simon’s death are shared in the court decision. From other sources it is known that John Simon was shot three times and killed on December 2, 2008, over a decade before his grandson Dwight Isadore was convicted of manslaughter in 2022.<sup>89</sup> The shooter was a member of the nearby Baddeck, Nova Scotia, RCMP detachment who responded to a 911 call that reported on John Simon’s erratic behaviour. Further details about the incident and its aftermath are available in L. Jane McMillan’s 2014 article “Still Seeking Justice: The Marshall Inquiry Narratives.”<sup>90</sup> The family, community and leaders were outraged by the shooting. Then Assembly of First Nations National Chief Shawn A-in-chut Atleo and Wagmatcook First Nation Chief Lester Peck called for a public inquiry in 2010 to investigate John Simon’s death.<sup>91</sup> The officer who used lethal force was cleared of wrongdoing due to a decision that he was justified in the use of a firearm. The band, however, argued that the investigation was inadequate and deeply flawed. A report by the Commission for Public Complaints against the RCMP found that errors

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<sup>85</sup> McMillan, Glode-Desrochers, and Paula Marshall, 93.

<sup>86</sup> *R v Isadore*, para. 18.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*, para. 26.

<sup>89</sup> The Canadian Press, “RCMP Settle Civil Suit in 2008 Shooting of Man,” *CTV News*, January 6, 2012, <https://atlantic.ctvnews.ca/rcmp-settle-civil-suit-in-2008-shooting-of-man-1.749874>.

<sup>90</sup> McMillan, “Still Seeking Justice.”

<sup>91</sup> The Canadian Press, “Chief Calls for Inquiry into RCMP Shooting in Cape Breton,” *CTV News*, May 20, 2010, <https://www.ctvnews.ca/chief-calls-for-inquiry-into-rcmp-shooting-in-cape-breton-1.514311>.

in judgment and poor decision-making led to the fatality. It made eleven recommendations to avoid a future tragedy.<sup>92</sup>

Patsy MacKay, John Simon's common-law wife, commented in 2010 that the "one lesson" that was "being learned" was "not a good one."<sup>93</sup> It was that law enforcement "can obviously get away with murder."<sup>94</sup> MacKay expressed frustration that no one was taking responsibility for the officer's lack of judgment and wrongful actions. Her words are particularly troubling given that the sentencing judge found that the incident may have negatively influenced Dwight Isadore's choices later in life, including his lethal violence toward Cassidy Bernard.

## Studies on Police Violence and Mental Health

The strong links between police violence and mental health are documented in recent scholarship. Outland and colleagues trace the consequences of police killings in their 2022 article "Living with Trauma: Impact of Police Killings on the Lives of the Family and Community of Child and Teen Victims."<sup>95</sup> Outland's research team highlighted the complicated grief that results as well as the difficulties that survivors experience integrating the trauma. According to a 2017 study, "The Trauma Lens of Police Violence against Racial and Ethnic Minorities" by Thema Bryant-Davis and her colleagues, the psychological consequences for persons who are the direct and indirect targets of "racially and ethnically motivated police brutality" may potentially include "distrust, fear, anger, shame, PTSD, isolation, and self-destructive behaviors" and other maladaptive states.<sup>96</sup> Thinking in this vein, DeVlyder and colleagues query in their 2022 article "Police Violence and Public Health" if the present period may be the ideal time to reconsider whether the policing system can indeed be reformed, and to seriously consider alternatives that do not leave us searching for a path toward justice and peace in the context of a system that has never, in more than three hundred years, been just or peaceful across the entire population it is intended to serve.<sup>97</sup>

In more general terms, beyond the circumstances of Isadore Dwight, the death of John Simon was one of the incidents cited that caused Indigenous communities to lose faith in the justice system, particularly in policing. According to L. Jane McMillan, the shooting of John Simon brought to bear doubts on the value of the recommendations from the Marshall Inquiry. Simon's death renewed calls for their implementation and galvanized interest in a status report on the changes that resulted from the inquiry. In their report for Public Safety Canada, L. Jane McMillan and her team summarized their respondents' views on the future of policing. Those who favoured abolishing police were largely "those

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<sup>92</sup> Civilian Review and Complaints Commission for the RCMP (CRCC), *Chair's Final Report Following a Chair-initiated Complaint and Public Interest Investigation into the RCMP Member-Involved Shooting Death of John Simon*, March 16, 2011, <https://www.crcc-ccetp.gc.ca/en/chairs-final-report-following-chair-initiated-complaint-and-public-interest-investigation-rcmp>.

<sup>93</sup> CBC News, "No Inquiry into RCMP Shooting," *CBC News*, March 9, 2010, <https://www.cbc.ca/news/canada/nova-scotia/no-inquiry-into-rcmp-shooting-n-s-justice-minister-1.924222>.

<sup>94</sup> *CBC News*, "No Inquiry."

<sup>95</sup> Rafael L. Outland et al., "Living with Trauma: Impact of Police Killings on the Lives of the Family and Community of Child and Teen Victims," *Current Psychology* 41, no. 4 (2020): 1–15.

<sup>96</sup> Thema Bryant-Davis et al., "The Trauma Lens of Police Violence Against Racial and Ethnic Minorities," *Journal of Social Issues* 73, no.4 (2017): 866.

<sup>97</sup> Jordan E. DeVlyder et al., "Police Violence and Public Health," *Annual Review of Clinical Psychology* 18 (2022): 545.

most traumatized by excessive force during raids and child apprehensions.”<sup>98</sup> This finding verifies that persons affected by police violence experience long-term impacts.

## The Criminalization of Fisheries and Trauma

In the context of fisheries, trauma has also been reported from police invasions regarding disagreements due to fishing and the excessive use of force to restrain persons exercising their treaty rights. Two examples are cited to bring home the possible impacts experienced by Dwight Isadore. One example comes from the violent encounters in 1981, when police invaded what is now known as Listuguj First Nations. In relation to these and other incidents, Fred Metallic, who manages fisheries for Listuguj, formerly known as Restigouche First Nation, referred to the consequences of the heavy police presence for mental health. He stated: “The stories are long, the stories are deep, the trauma is deep.”<sup>99</sup>

Community members who experienced what is sometimes referred to as the “lobster wars” at Esgenoôpetitj First Nation also report continued ill-effects. Curtis Bartibogue, a Mi’kmaq lobster fisherman from that community, recalled the “sense of empowerment” he gained by exerting his treaty rights following the *Marshall* decision.<sup>100</sup> He was almost nineteen years old at the time. Although he was arrested by the Department of Fisheries and Oceans officers, he recalled the positive consequences for the young people. At the same time, he shared that the well-being of community members was impaired by the violent encounters. He recalled that “it almost looked like an invasion from the military” when government boats confronted the Mi’kmaq fishers.<sup>101</sup> On this topic, Curtis Bartibogue stated: “A lot of things that aren’t talked about is the trauma. The trauma that our children seen. Helicopters flying over our houses everyday, bullets flying past our houses, people getting rammed, people being arrested and thrown in jail.”<sup>102</sup> Bartibogue continued, “To this day, I still feel that trauma. Even just speaking about it right now, my voice wants to crack. And it’s, it’s...we’re talking twenty years ago.”<sup>103</sup>

The next sections of the article set out details on the Marshall Inquiry with an update on some of the policing topics that are relevant in the contemporary context, such as violence toward Indigenous women. The paper then turns to the 1999 *Marshall* decisions and discusses some of the topics regulated to fishing regulation that remain in play some years after the higher court ruled.

## The Marshall Inquiry and its Aftermath

A central message of the Marshall Inquiry is taking justice seriously and thinking hard about ways to realize justice in systems created to confront and address harm. An oft-quoted statement from the Marshall Inquiry is the fact that the criminal justice system failed Donald Marshall Jr. at virtually every turn from his arrest and wrongful conviction for murder in 1971 up to, and even beyond, his acquittal by the Court of Appeal in 1983. It is well known by this time that the justice system’s failures went beyond Donald Marshall

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<sup>98</sup> McMillan, Glode-Desrochers, and Paula Marshall, 93.

<sup>99</sup> Roache, *Living Treaties, Part 2*, 1:58–2:02.

<sup>100</sup> Roache, *Living Treaties, Part 1*, 9:37–9:40.

<sup>101</sup> *Ibid.*, 7:48–7:53.

<sup>102</sup> *Ibid.*, 9:47–10:04.

<sup>103</sup> *Ibid.*, 10:04–10:11.



Jr. and were experienced by Indigenous communities. Prior scholars and community-based researchers have evaluated the Marshall Inquiry and have documented its influence on criminal legal systems.

More recently, McMillan, whether in sole or co-authored writing, has traced the effects in several studies cited in this paper. McMillan's awarding-winning book, *Truth and Conviction*, also dedicates chapters to the urgent need for follow-up on the spirit and intent of the recommendations from the Marshall Inquiry. The call for changes to policing that scholars pinpoint as central to justice reform are affirmed by this article.

Rather than repeat previous calls, there are important messages around the embeddedness of colonialism that filter through the inquiry report that deserve consideration. These include the need to challenge the view of Indigenous peoples as problems and for acknowledgment of Indigenous life worlds as rich and resourced. The fact that Donald Marshall held promise as the son of a grand chief and as a future leader appears to have been lost on the legal actors that readily assessed him as criminal. The years he might have spent throwing eel nets in the waters to feed his family and community were not guarded by a careful investigation into the death of Sandy Seale. Decades later, implementing the Marshall Inquiry recommendations still remains urgent. The need for deep and fundamental shifts to realize human rights and greater safety, particularly for Indigenous youth, is equally urgent.

A particularly pressing concern is the absence of an effective approach to preventing and responding to violence against women, as the murder of Cassidy Bernard makes plain. The prosecution of Dwight Isadore for the death of Cassidy Bernard in October 2018 can be directly connected to the failure to follow up on recommendations from the Marshall Inquiry regarding policing in Indigenous communities. Also in 2018, J. Robert Larmer, a graduate from Schulich School of Law, Dalhousie University, analyzed policing in relationship to missing and murdered Indigenous woman in Nova Scotia based on justice case studies.<sup>104</sup> As Larmer points out, the Marshall Inquiry laid the foundation for the province of Nova Scotia to demonstrate leadership by granting Indigenous communities "greater autonomy" in relation to the delivery of criminal legal justice.<sup>105</sup> He argues that following through on the recommended changes might have created a more secure environment for Indigenous women.

This scholarship endorses the calls for urgent action regarding the security of Indigenous women, girls, and other vulnerable Indigenous peoples, those who are gender diverse and/or particularly marginalized. In April 2019, Cassidy Bernard's family and community met with lawmakers in Nova Scotia and reinforced the need for concentrated action to promote Indigenous women's safety.<sup>106</sup> At that time, the MLA from Inverness, Allan MacMaster, introduced a resolution in the Nova Scotia House of Assembly to honour Cassidy Bernard and to recognize all missing and murdered Indigenous women. Bernard-Daisley shared six recommendations that the community asked all levels of government to implement. Recommendations 4 and 5 asked governments to "advocate for the end of violence to Indigenous women" and to develop "an Indigenous women's declaration" for all First Nations communities. One recommendation opposed healing lodges for persons convicted of murder of Indigenous women. The three remaining recommendations addressed policing—including demands for immediate action when a woman goes missing and calls for the re-opening of cold cases. Finally,

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<sup>104</sup> Larmer, "The Highway Runs East."

<sup>105</sup> Larmer, 135.

<sup>106</sup> Bill Dunphy, "Cassidy Bernard's Death Focus of MacMaster Resolution," *Inverness Oran*, No date, <https://www.invernessoran.ca/top-story/1300-cassidy-death-macmaster>.

Recommendation 6 asked that governments “ensure that all First Nation communities have adequate policing services.”<sup>107</sup>

The argument of this paper is that a more fulsome uptake of the spirit and intention of the Marshall Inquiry recommendations would help create the structures needed to keep Indigenous woman safer. The Marshall Inquiry’s affirmation of Indigenous law and knowledge systems reinforced the need to place value on Indigenous lives, particularly women.<sup>108</sup> An outspoken advocate, Chief Bernard-Daisley, reinforced the urgent need for action. She called upon all the thirteen Mi’kmaq communities in Nova Scotia to serve as warriors, to take violence against women seriously and to ban men, including Mi’kmaq men, who are charged and convicted of violence from entering the communities.<sup>109</sup> Through her action plan, Bernard-Daisley sought to emphasize to Indigenous women that “our lives are precious and our lives matter.”<sup>110</sup>

## The *Marshall* Decisions and the Aftermath

The Supreme Court’s affirmation of treaty rights in 1999 was heralded in Indigenous communities, which promptly began to exercise those rights. As a result, the decision remains a touchstone for clashes between Indigenous fishers and the Department of Fisheries and Oceans. Roache’s 2019 documentaries, *Living Treaties*, includes interviews with various Indigenous dignitaries, elected chiefs, and band members. One story aligns with the concerns about the safety of women voiced in the calls regarding the Marshall Inquiry recommendations. One fisher who is profiled, Marilyn Lee Francis, describes herself as an inherent rights fisher. She struggles with the constant threat of Department of Fisheries apprehensions of her equipment. Marilyn Lee Francis has been threatened and subject to harassment. Even so, she continues to fish. Regarding her advocacy on behalf of the natural world and her lobster fishing, she stated,

We use laughter as medicine, as healing. Sometimes I sit back and I laugh, I can’t comprehend Western society or their thought process into anything, as a Native person. My Elder always told me to laugh, so that’s what I do. Mother Earth and us have been attacked for the same amount of time. So what do you do? You just keep it moving, that’s all you can do.<sup>111</sup>

In Part 2 of the *Living Treaties* documentary, Francis shared her view that “when people say you’re a woman and you can’t do it, that’s their way of trying to instill fear in you in hopes that you sit down, and we’ve got to stop sitting down for these people.”<sup>112</sup>

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<sup>107</sup> Ibid. This point is interesting because some First Nations are asking that the RCMP stay off communities and, if they have to go to the community, that it be an Indigenous RCMP that does so. Given there are often few available Indigenous RCMP, or only one, this can cause issues. At one time, some First Nations communities had tribal police, although there were, at times, issues of relations, etc.

<sup>108</sup> Questions are raised of how this intersects with Aboriginal law.

<sup>109</sup> Dunphy.

<sup>110</sup> Dunphy.

<sup>111</sup> Robin Tress, “This is Our Home, Not a Cash Cow—Marilynn-Leigh Francis,” *Council of Canadians*, December 13, 2018, <https://canadians.org/analysis/our-home-not-cash-cow-marilynn-leigh-francis/>.

<sup>112</sup> Roache, *Living Treaties*, Part 2, 19:03–20:56.

## Travelling the Fugitive's Path

Dr. Akómoláfe's interventions were identified as particularly appropriate for these times as he resists too readily drawing conclusions or arriving at solutions. It is recognized that the failure to outline recommendations on policing may disappoint some readers. In contrast, Akómoláfe encourages us to meet "the incomprehensibility of the moment," to travel the fugitive's path that "glows in the dark." At this point, "where the path in the call to defeat leads," it is possible, asserts Dr. Akómoláfe, that we might encounter "something deeper than solutions. Something too sacred for words to embrace."<sup>113</sup> The self-described unorthodox politics of Dr. Báýò Akómoláfe, a scholar working in ecology and environmental justice, seem to have value when set alongside the "politics of embarrassment" or accountability that were solidified by the 1989 Marshall Inquiry, which reinforced state wrongdoing and failure.<sup>114</sup> This paper takes up his encouragement to promulgate a "weird politics" that "enshrines the promise that in losing our way, straying away from the marked tarmacs of the conventional, we might find ourselves in different, surprising places"<sup>115</sup>

Passages like the one below seem to offer a lens to the problems this article seeks to probe. Ironically, the resolutions Alomokafe put forward are questions rather than answers. He writes:

Instead of merely asking how we can unilaterally bring about a new story, we can listen to the invitation of the wilds to open up to the fragility of map-making projects. We can gather round a set of inquiries that bring us to investigate the contours of our seeing and the textures of our knowings—and, as such, the world we are co-performing with many, *many* others.<sup>116</sup>

While Akómoláfe is an unusual scholar to look to for guidance on policing, this article presents his theory as relevant. His work is deliberately unsettling because it fails to provide conclusions, thereby inviting us to keep probing, investigating, and reimagining beyond what might be readily apparent. From the vantage point of Báýò Akómoláfe's visioning, it is of interest that the descendants of Mi'kmaq leaders who fought for treaty and Indigenous rights were generally supportive of police services, if they were "fully decolonized and anti-racist."<sup>117</sup> While these findings do not determine the future of policing, they may confound and trouble solutions.

## Where We Might Begin

To begin, we will want to affirm the calls to earnestly implement the Marshall Inquiry.<sup>118</sup> We will want to advocate for Chief Bernard-Daisley's plan of action. We will be motivated to take notice of the

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<sup>113</sup> Akómoláfe, "Coming Down to Earth."

<sup>114</sup> L. Jane McMillan, "Colonial Traditions, Co-optations, and Mi'kmaq Legal Consciousness," *Law & Social Inquiry* 36, no. 1 (2011): 176.

<sup>115</sup> Báýò Akómoláfe, "Astray, Awkwardly: An Autistic Politics," *Báýò Akómoláfe*, August 16, 2022, <https://www.bayoakomolafe.net/post/astay-awkwardly-an-autistic-politics>.

<sup>116</sup> Báýò Akómoláfe, "The Burden of the New Story," *Báýò Akómoláfe*, October 23, 2016, <https://www.bayoakomolafe.net/post/coming-down-to-earth>.

<sup>117</sup> McMillan, Glode-Desrochers, and Paula Marshall, 93.

<sup>118</sup> See the discussion in McMillan, *Truth and Conviction*.

Senate recommendations on fisheries that will have impact on community safety, fostering conditions for women to thrive.

Here, we might take notice of the words of Janice Maloney, Executive Director, Kwilmu'kw Maw-klusuaqn Negotiation Office, Assembly of Nova Scotia Mi'kmaw Chiefs, who explained that fishing to achieve a moderate livelihood goes beyond an exercise of treaty rights. It enhances well-being and security by ensuring community members can afford "housing" and "food," fostering "a better quality of life."<sup>119</sup> Having these foundations intact can bring about "better mental and physical health" as well as "a sense of pride in their work," which contributes to the "community's overall wellbeing."<sup>120</sup> When Janice Maloney maintained that support for rights-based fisheries is "a way for community members to feel empowered and to better their lives and the lives of others within their community," she expressed an alternative to over-policing and over-surveillance by encouraging decolonial and conciliatory actions supporting human rights.<sup>121</sup>

## Conclusion

In this article, the wrongful conviction and exoneration of Donald Marshall Jr. was scrutinized, alongside a consideration of the highly problematic fisheries-related prosecution featured in the *Marshall* decisions. More specifically, this article extended the doubts about policing expressed in the Marshall Inquiry, aimed at criminal legal system reform, to the over-surveillance of resource management, an area where treaties and fishing regulations overlap. Drawing from film studies, critical policing studies, sources on spirituality, Indigenous and decolonial studies, this article adopted a case study approach to probe policing and surveillance in criminal justice and natural resource settings. This exploration of ways that policing and enforcement impacted Donald Marshall Jr. sought to bring nuance to the revisioning and re-thinking of policing occurring in jurisdictions across North America, including Atlantic Canada.

In the article, reference was made to the scholarship of Dr. Báýò Akómoláfe. The benefit of Dr. Akómoláfe's work is it serves as a reminder to remain open to possible, albeit fraught, futures where defunding the police is available, as advocates demand, and where reforming the police in accordance with the Marshall Inquiry and the Indigenous informants interviewed by McMillan and her colleagues, might co-exist in dynamic tension. Holding both as possible options might create messy, vibrant pathways toward an uncertain yet urgently needed decolonization informed by truth. The overall goal is releasing the stronghold that colonial-inspired policing and surveillance systems exert over Indigenous peoples and communities in New Brunswick specifically and Atlantic Canada more generally. The fact that Indigenous women remain especially vulnerable to violence in the aftermath of many inquiries, including the Marshall Inquiry and the national inquiry into murdered Indigenous women and girls, is evidence that security systems are failing.

As noted here, both convictions of Donald Marshall Jr. resulted from actions that took place in natural environments. The first conviction of Donald Marshall Jr. resulted from a walk in the park with a friend. The second happened on the water. Thinking with Akómoláfe, the realization of less criminalization and greater liberation might offer time and space to truly enjoy these spaces in co-

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<sup>119</sup> Standing Senate Committee on Fisheries and Oceans, *Peace on the Water*, 25.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

relationship and to “wonder about the contributions of stones to world-making, and embark upon quests to eavesdrop on the gossip of trees.”<sup>122</sup>

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<sup>122</sup> Akómoláfe, “The Burden of the New Story.”

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