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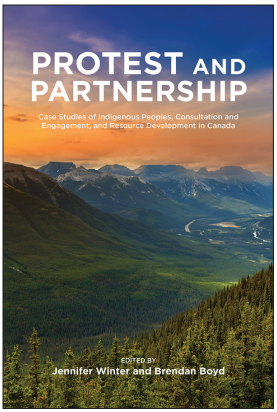

PROTEST AND PARTNERSHIP: CASE STUDIES OF INDIGENOUS PEOPLES, CONSULTATION AND ENGAGEMENT, AND RESOURCE DEVELOPMENT IN CANADA

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4

"It's Time to Make Things Right": Protests and Partnerships in the Implementation of Livelihood Rights in Mi'kma'ki

L. Jane McMillan, Janice Marie Maloney, and Twila Gaudet

This chapter shares a history of the Mi'kmaq Rights Initiative and the rise of the Kwilmu'kw Maw-klusuaqn Negotiation Office (KMKNO).[1] Our narrative examines the strategies employed by the Mi'kmaq of Nova Scotia to rebuild Indigenous nationhood, access their livelihood rights, and gain control over the management, distribution, and implementation of their treaty-protected resources. Generating and sustaining a nationhood collectivity against the capitalist imperative of economic individualism is a challenge for many First Nations. KMKNO works to counter colonially induced poverty, and to overcome settler ignorance of Treaty Rights, while fighting against divisive and contradictory policies imposed federally and provincially that undermine nation-to-nation relations. They seek remedies to complex problems of economic and political insecurity by fostering unity through effective communications, inclusivity, and the rigorous maintenance and protection of Indigenous and Treaty Rights. It is very difficult work managing the expectations, interests, and needs of the unique communities that comprise the Mi'kmaw nation in Nova Scotia. Through trial and error, grit, and determination, promising pathways to Indigenous prosperity, livelihood autonomy and freedom are emerging in Mi'kma'ki.

This chapter first grounds the consultation and negotiation processes in Mi'kma'ki, the territory of the Mi'kmaq Nation, within the pre-Confederation Peace and Friendship Treaties. The consequences of colonialism and the

failure of the signatories, and generations of settlers, to honour those treaties and Indigenous Rights, set the stage for Mi'kmaw resistance. Secondly, as presented here, the Mi'kmaq took a calculated risk and chose treaty litigation as a path to protect their rights. After successfully affirming their Treaty Rights through the courts in the *Simon, Marshall*, and other decisions, the Mi'kmaq of Nova Scotia took significant steps to unify as a nation and to build the scaffolding to construct mechanisms for protecting and managing their rights. Thirdly, we describe those steps in the story of the Made-in-Nova Scotia Process and detail the principles underpinning the governance activities of KMKNO. Highlighted are the general tensions the Mi'kmaq face internally and externally as they navigate the diverse needs of their membership and confront the challenges of the uneven, competitive, inadequate, and often unpredictable approaches to consultation and negotiation taken by federal, provincial, and corporate proponents in the context of implementing their livelihood rights in the context of the *Marshall* decision.

Peace and Friendship Treaties: The Precursors for Contemporary Consultation and Negotiation

The Mi'kmaq peoples known as L'nu have lived in Mi'kma'ki, the Atlantic region, since time immemorial. Their creation stories identify sacred connections to their territories, and when shared teach peoples their clan histories, value systems, modes of governance, and about their relationships with each other (Augustine 2016). Over time they developed highly sophisticated governance and legal principles that protected the environment, respected their ancestors, and fostered generations of prosperity. Honouring family relations (*msit no'kmaq*—all my relations) is vital to Mi'kmaq daily life and is captured in the concepts that guide their individual and collective interactions with each other and the universe. The Mi'kmaq believe that the spirits of their ancestors reside in the land, sea, and sky, and they take seriously the responsibility to honour and protect the legacies of their ancestors for future generations. Over the course of at least 14,000 years, well before the arrival of European explorers and settlers, the Mi'kmaq peoples developed vast trading networks, sophisticated national political and legal structures, and a rich social and cultural history (Hoffman 1955; Paul 2006).

Due to their geographic location, the Mi'kmaq Nation has endured one of the longest periods of colonial encounter. As such, they have a lot of experience

in engaging and negotiating with newcomers in their territories. The first sustained interactions between the Mi'kmaq and Europeans occurred following the arrival of French missionaries and settlers in the early 1600s (Henderson 1997). Early relations between the French and the Mi'kmaq were generally amicable, and the two groups co-operated and co-existed. The French attempted to assimilate the Mi'kmaq through a process that included the conversion of Mi'kmaq peoples to Catholicism to strengthen social and cultural ties between them and the original inhabitants. The French and Mi'kmaq formed partnerships based on reciprocity and mutual recognition, and the benefits each group could provide for the other (McMillan 2011). The French settlers were particularly dependent on the Mi'kmaq for survival in the harsh environment. The relationship began to shift with the arrival of more French settlers and the rise of the fur trade, which disrupted the existing balance of power between the nations. The relationship was altered further by the arrival of European conflicts to the shores of Mi'kma'ki.[2]

As the British moved into the territory of Mi'kma'ki, they did not follow the more amicable French example, instead developing hostile relations. The British colonialists largely ignored the Mi'kmaq peoples, except in instances where their activities interfered with commercial and settlement plans (McMillan 2011). British colonial authorities were concerned about the potential threat posed by the Mi'kmaq, who were experts in defending their territories on land and sea. Worried that they might continue to take up arms against the British, or that they would re-join forces with the French in their effort to regain control of Acadia, the British sought ways to ensure that the Mi'kmaq would remain peaceful and co-operative with the new British authorities. Treaties were one way of doing this; scalping proclamations, starvation, germ warfare, and terrorism were others (Upton 1979; Whitehead 1991; Prins 1996).

Recognizing the Mi'kmaq as a powerful military threat to their plans for occupation and settlement, the British entered into Peace and Friendship treaty negotiations. The first treaty was signed in 1725–26 (Wicken 2002). The intent of the treaty, from the British perspective, was to regulate the activities of the Mi'kmaq in order to enable the peaceful colonization and settlement of Mi'kma'ki. For the Mi'kmaq, the intent was to protect their sacred relations with their territories and resources in perpetuity (Wicken 2002; Wildsmith 1992; McMillan 2018). The Mi'kmaq practised treaty diplomacy, *kisa'muemkewy*,[3] amongst their citizens and allies, and had processes of community

engagement through *mawiomi* (formal gatherings) that included storytelling, ceremonies and rituals, by which they came to a collective understanding of their treaty obligations reflecting their world views (Young, T. 2018). The 1725–26 Treaty laid out protections for the inherent customary rights of the Mi'kmaq, including hunting, fishing, and planting. It was renewed several times between 1749 and 1778, including in 1749 and in 1752, when seven new articles were added. Following the British capture of Louisbourg and the loss of French "control" of Cape Breton, the British again signed several treaties with the Mi'kmaq in an attempt to quell resistance and ensure stability (McMillan 2011; Wicken 2012). The Treaties of 1760 and 1761 established agreements between the parties in regard to the harvest and sale of natural resources, among other things.[4]

At no time did the Mi'kmaq ever abandon their sovereignty or cede any of their lands to the French or the British.[5]

As an orally oriented culture, the Mi'kmaq relied on storytelling to translate knowledge generationally. The ability to recite genealogies and to demonstrate connectedness to places and to each other was central to social interactions and vital to the maintenance of treaty relations. Though the treaties of peace and friendship and the Royal Proclamation guaranteed protection of Mi'kmaq customary land use rights, and defined protocols that assured the exchange of gifts and annual renewal ceremonies, these promises were soon ignored by the British as a result of the influx of settlers and the unfettered colonial appetite for wealth accumulation. Waves of new colonists, hungry for the resources to fuel their capitalist aspirations, began to occupy Mi'kma'ki and soon forced the Mi'kmaq from their traditionally bountiful territories into the most marginal areas (Prins 1996; Paul 2006; Wicken 2012). The failure of the British to maintain their treaty relationships became apparent as the Mi'kmaq were forcefully excluded from the resource economy and treacherously dominated by discriminatory legislation, such as fishing and hunting regulations that protected settler interests over Indigenous Rights. They were violently pushed away from their traditional livelihoods, thus interrupting their long-held sacred connections to territory and jeopardizing prosperity.

Colonization is a process, not an event (Wolfe 1999). Mi'kmaq peoples were further marginalized by settler society with the passage of the British North America Act of 1867, which gave jurisdiction over Indigenous peoples to the newly created federal government. The official policy of the Canadian

state became dedicated to the elimination of Indigenous peoples. The Indian Act, 1876, the most discriminatory legislation in Canadian history, was one of many paternalistic tools used to pursue the goals of cultural genocide and to advance the agenda of assimilation through suffocating state control over every minute detail of Indigenous peoples' lives.[6]

It is worth remembering that the Mi'kmaq have not been passive victims in this history. Many people actively protested colonial aggressions through various tactics, such as guerrilla warfare, continuing with ceremonies through clandestine meetings, and embedding the traditional political body of the Grand Council within the Catholic Church. These efforts ensured that the culture, language, and indomitable spirits of the Mi'kmaq Nation are alive and well today. In 2022, legislation in Nova Scotia recognized Mi'kmaw as Nova Scotia's first language. There are numerous notable examples of ways in which the Mi'kmaq specifically, and Indigenous peoples more generally, have resisted colonization, and assert and protect their rights through the courts. These legal battles are instrumental in the establishment and institutionalization of Mi'kmaq consultation and negotiation processes.

Treaty Litigation: Forging the Pathway to Making Things Right

Even with settlers' denial of their treaty obligations that were set out in the covenant chain of Peace and Friendship Treaties made between 1725 and 1778, and despite the imposition of discriminatory laws and racist policies entrenched in British law that criminalized Mi'kmaq livelihoods, and systemically alienated them from their territories and resources, the Mi'kmaq persisted as a nation. They passed their treaty knowledge on from generation to generation around kitchen tables and in formal annual gatherings at St. Anne's Mission in Potlotek. For centuries, the Mi'kmaq made many petitions to the British Crown to negotiate better treatment and respect for their Treaty Rights. When this failed, they turned to the courts.

Consistent with colonial attitudes and systemic discrimination, the courts did not at first recognize the Treaty Rights of the Mi'kmaq Nation. The Canadian justice system was particularly hostile to Indigenous Peoples; provisions in the Indian Act prohibited them from hiring lawyers for decades or from gathering in defence of their rights. Treaties signed before Confederation were thought to be extinguished. For example, Grand Chief Gabriel Sylliboy,

the head person of the Mi'kmaq Nation, argued in 1928 that he had a 1752 treaty that protected his right to hunt and sell furs in a case that went to the Nova Scotia Court of Appeal. The Court of Appeal unequivocally rejected Sylliboy's claim of a treaty right to hunt. The Grand Chief was convicted, and the court further stated that Sylliboy had no Treaty Rights (Wicken 2012; Young, J. 2015). Despite this loss, the Mi'kmaq continued to keep the treaties alive in their national consciousness and livelihood strategies (Battiste, M. 2016; McMillan 2018). As a result of Mi'kmaq advocacy, Grand Chief Gabriel Sylliboy was pardoned by the Nova Scotia department of justice in 2017, as a gesture of reconciliation (Nova Scotia 2017).

Tracing the complex history of Indigenous Rights litigation is beyond the scope of this chapter, but it must be noted that a series of cases across the country built the arguments to establish a clear duty of the Crown to consult with Indigenous Peoples and to prioritize Indigenous and Treaty Rights in decision-making processes involving resource development.[7] The germinal case *Calder v. Attorney-General of British Columbia* (1973) recognized Aboriginal Rights based on original occupancy. Afterward, the Nova Scotia Court of Appeal held that the Mi'kmaq had the right to hunt on reserve lands free of provincial game laws and that they held usufruct rights in reserve lands in *Isaac v. The Queen* (1975).

In 1982, partially as a result of the previous decade of political activism and tribal council mobilization, as Indigenous peoples adamantly rejected the 1969 White Paper policy of the Pierre Trudeau government, the rights of Indigenous peoples were formally recognized in the newly repatriated Canadian Constitution.[8] Section 35.1 of the Constitution Act, 1982 recognized and affirmed the existing Aboriginal and Treaty Rights of the Aboriginal Peoples of Canada. The exact meaning of section 35.1 was left ambiguous, particularly with regard to the questions of the meaning of "existing" rights and the exact definition of how these rights can be proven. In light of this uncertainty, many conflicts over resources turned to the courts for clarification, thus leading to a new era of Indigenous Rights litigation. Rather than acting honourably, the state has made every effort to limit Indigenous Rights.

Two important cases dealing with Mi'kmaq Rights came about in the period after 1982, most notably *Simon v. The Queen* (1985), in which the Supreme Court of Canada held that the treaty of 1752 was an existing treaty and it guaranteed certain hunting rights, and *R. v. Denny, Paul and Sylliboy* (1990), which found that the Mi'kmaq have an Aboriginal Right to fish for food.

Arguably the most significant case for Mi'kmaq Rights was *R. v. Marshall* in 1999 (Wildsmith 2001; McMillan 2018). Donald Marshall was a Mi'kmaw man from Nova Scotia who first gained notoriety for being wrongfully convicted of murder when he was seventeen years old. Marshall spent eleven years in prison until he could prove his innocence and was acquitted in 1983. Infamously one of the first wrongful convictions to come to the public's attention, it was a story so horrifying in its revelations of blatant and systemic racism, that it shook the foundations of the Canadian legal system and exposed the widespread discrimination against Indigenous peoples before the law (McMillan 2018). Donald Marshall's wrongful conviction resulted in a Royal Commission of Inquiry to find out what went wrong in his prosecution and presented eighty-two recommendations to address systemic faults in the administration of justice (Hickman 1989, 1).

In trying to recover from the trauma of his wrongful conviction, Donald Marshall turned to his culture and traditions for healing, and he went fishing for eels. Jane McMillan was his fishing partner and spouse at the time and she learned that the significance of Mi'kmaq relationships with marine life were incorporated in every facet of their life for thousands of years, from cosmological belief systems to political and family organization. The premises of Mi'kmaq traditional fisheries were both spiritual and practical, focusing mainly on the well-being and survival of families and community members. The early Mi'kmaq fished, hunted, and collected. Their subsistence activities were governed by the concept of *netukulimk*, which guided harvesting practices aimed at responsible harvesting and co-existence (Prosper et al. 2011). In fishing and selling eels, Marshall was carrying out livelihood activities as had his ancestors before him (McMillan 2012).

Subsistence customs reflected the holistic interconnectedness of Mi'kmaq laws embedded in their tribal consciousness governing their behaviour, particularly in relation to establishing means for survival and food security, such as sharing, providing, and honouring procurement skills. *Netukulimk* denoted the proper customary practice of seeking bounty provided by *Kisu'lk* (Creator) for the self-support and well-being of the individual, family, and the nation, and thus was intimately tied to Traditional Rights. One's place to hunt and fish, taken in its broadest sense, is the tract on which one practices *netukulimk* (McMillan and Prosper 2016). Oral histories, creation stories, myths, petroglyphs, and archival records reveal ritual practices, ceremonies and spiritual concepts relating to resource use, including extraction protocols,

taboos, and prohibitions, as indicators of customary stewardship and are primary sources of Mi'kmaw laws (Denys 1908; Hoffman 1955; Paul 2006; Borrows 2010; McMillan 2021). The Mi'kmaq prospered in their fisheries for thousands of years (McMillan and Prosper 2016). In fishing and selling eels, Donald Marshall was carrying out what he believed to be his Treaty Right to earn a livelihood unmolested. However, the joyous relief Donald Marshall experienced exercising his Treaty Rights as an eel fisher was short-lived when Donald, Jane, and Peter Martin were charged with illegal fishing (McMillan 2019).[9]

This incident became the focus of a treaty test case that considerably altered Indigenous and settler resource relations in the Atlantic provinces of Canada. In carrying out an inherent right and treaty-protected practice, Donald Marshall Jr., was charged with three counts under the Maritime Provinces Fishery Regulations: fishing eels without a licence, fishing eels in a closed zone with prohibited gear and selling eels without the authority of a licence (McMillan 2012).[10]

When the Supreme Court of Canada handed down the verdict in *R. v. Marshall* on September 17, 1999, the decision confirmed something the Mi'kmaq people had known for generations—that the rights enshrined in the Peace and Friendship Treaties of 1760–61 had not been extinguished by colonization, and that these rights should help to define the relationship between the Mi'kmaq people and the Canadian state (Coates 2000). The court did not elaborate on how the rights of the Mi'kmaq people should be implemented, instead leaving this open-ended and to be resolved outside of the judiciary through consultation and negotiation.

Fears that Indigenous people would take to the waters and harvest everything at once were heightened when the Department of Fisheries and Oceans (DFO), following its own interpretation of the Supreme Court decision, showed excessive force in restricting Mi'kmaq access to the waters. Video footage of hulking government vessels battering small Mi'kmaw dories to force the occupants overboard into the open ocean and other violent confrontations played out on the nightly news.

The *Marshall* decision sparked increased surveillance and monitoring for all fishers. Racism and competition strained Indigenous and settler relations, pre-empting any potential for co-operation and collaboration in fishery access and co-management. Given the fragile state of the fishery, acrimony had increased not only between settler and Indigenous peoples but also within these

groups as well. Despite the opinion of the Supreme Court, Mi'kmaw claims to self-governance in their territories, control over resource management, and equitable access were in practice denied. Media accounts propelled racist animosity towards Indigenous harvesters by perpetuating negative stereotypes and exaggerating instances of overfishing and the use of illegal gear.

In response to unreasonable limits to their livelihoods, the Mi'kmaq began to re-conceptualize and re-implement a holistic approach to the exercise of their Treaty Rights. In doing this, Mi'kmaq and their leadership returned to the concept of *netukulimk* as the values and moral principles reference base upon which to operate Mi'kmaq resource stewardship and governance.[11]

The court's ruling led to a great deal of confusion and conflict, as was seen in communities such as Burnt Church, where tensions erupted into violent clashes between Mi'kmaq and non-Indigenous fishers (Isaac 2001; King 2014). In part because of these hostilities and due to the strength of the outrage of commercial fisheries associations toward the *Marshall* decision, the court took the unprecedented step of issuing a clarification of their original ruling, known as *Marshall (No. 2)* (1999). This rare elucidation of the Court's ruling included the recommendation that further definition of the Treaty Rights of the Mi'kmaq people should be addressed through a process of "consultation and negotiation … rather than by litigation" (*R. v. Marshall (No. 2*), 1999, para. 22). Negotiation, when fair and honourable, is preferable to litigation, as it is more closely aligned with Mi'kmaq cultural approaches to justice, which emphasize dialogue, consensus building, compromise, and mutual respect rather than adversarial conflict (McMillan 2016). However, Mi'kmaq are well versed in fighting for their rights, every step of the way, even at the negotiation tables.

From Litigation to Consultation and Negotiation: The Made-in-Nova Scotia Process

In Canada, Indigenous Rights are in part defined and delimited through litigation and negotiation. The implementation and exercising of Indigenous Treaty Rights are highly contentious processes, often confounded by jurisdictional contests between federal and provincial governments over fiduciary responsibilities, and by pervasive systemic discrimination that devalues Indigenous knowledge and favours assimilation or elimination over

recognition (Borrows and Coyle 2017). The legitimacy of Canadian claims of sovereignty over Indigenous Peoples and their lands and resources are being challenged through Indigenous peoples' reinvigoration of identity politics, the successful pursuit of Treaty Rights and constitutional litigation, the unqualified adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* (United Nations 2007), and the national movement of reconciliation (Asch, Borrows, and Tully 2018; Borrows et al. 2019).

In response to the negative legacy of colonization, Indigenous communities across Canada are demanding not only participation in, but control over the decision-making and institution building processes that will positively influence the quality of their lives and reflect their constitutionally and treaty-protected rights. Key legal successes and constitutional recognition are linked with Indigenous Peoples' productive mobilization of the spirit and capacity for positive and empowering transformations. But litigation is risky; it is expensive, and slow, and dispositions are often narrowly interpreted by governments in application, even when the Supreme Court of Canada affirms broad application of Indigenous Rights. It is often the case that agents and institutions of the Crown view decisions affirming Treaty Rights as losses (McMillan 2018). This consciousness facilitates a persistently adversarial environment when it comes to consulting and negotiating Indigenous Rights with federal, provincial, and corporate entities.

The Mi'kmaq have successfully litigated for recognition of their Treaty Rights. As a nation, they decided to not participate in the federal claims commission program, but instead established a unique course of action for consultation and negotiation. The Chiefs created an office to diligently manifest Treaty Rights in Nova Scotia to benefit the members of the Mi'kmaq Nation. The negotiation office maintains that they work for the Assembly of Chiefs, that the Chiefs provide them their mandate and the Chiefs make the decisions. They hold firm that they DO NOT negotiate Treaty Rights and they ARE NOT negotiating a modern treaty.

The *Marshall* decision instigated a redistribution of access to natural resources, allowing for increased opportunities for economic development and autonomy. The potential to remedy patterns of dependency and subjugation for Mi'kmaq communities and other Indigenous peoples across the country in favour of sustainable community advancement through the affirmation of Treaty and Aboriginal Rights, and through the substantiation of traditional

knowledge, marks an unprecedented turn in colonial relations (McMillan 2016).

The Mi'kmaq leveraged the *Marshall* decision and their livelihood Treaty Rights to demand reliable, productive, and respectful consultation and negotiation relationships with proponents. The Mi'kmaq are interested in self-governance and in developing co-management agreements to establish predictability in access to and sustainability of resources. A key priority is the incorporation of Mi'kmaq resource harvesting governance principles such as *netukulimk*. In 1999, the Supreme Court recognized the 1760–1761 Treaties in *R. v Marshall* as a right to livelihood. This case was significantly transformative for the Mi'kmaq Nation. It substantiated the Made-in-Nova Scotia Process, first organized in 1997 when the Mi'kmaq Chiefs of Nova Scotia, the Government of Nova Scotia, and the Government of Canada signed the Tripartite Memorandum of Understanding (MOU), which was an agreement between the three parties to begin discussions regarding issues and "matters of mutual concern." The Tripartite Forum approach was based on one of the eighty-two recommendations of the Royal Commission on the Donald Marshall Jr. Prosecution (Hickman 1989).

Negotiated by senior Mi'kmaq advisors Viola Robinson, former commissioner of the Royal Commission on Aboriginal Peoples, and law professor Joe B. Marshall, as well as the legal team Bruce Wildsmith and Eric Zscheile, who dedicated their professional lives to advocating for Mi'kmaq Rights, the MOU was signed as a result of pressures to address outstanding rights-related issues, particularly *with* regard to natural resource development. The Mi'kmaq position was, and firmly remains, that they would not be bound by the federal government's comprehensive land claims policy.[12] The MOU was not intended to act as a formal process by which the parties could negotiate specific rights or title claims—it simply represented a commitment by the parties to begin discussions. Following this political commitment to work together to address outstanding issues, representatives from the three parties met to explore options with a view to the creation of a formal negotiation and consultation process. The Mi'kmaq began to build capacity for negotiation within.

After the *Marshall* fishing case, the federal government, through the DFO, responded by entering into separate agreements with eleven of thirteen bands in Nova Scotia, each of the bands in New Brunswick and Prince Edward Island, and three in Quebec, to control their entrance to the fisheries

and regulate access to the resource. The Mi'kmaq of Nova Scotia found this tactic divisive and decided to reassert their nationhood in negotiations with federal and provincial governments to regain control over the decision-making processes and to protect the full implementation of their Treaty Rights.

During the great fishery hostilities of 2000–2001, the parties agreed to a joint statement asserting willingness to work together to resolve outstanding issues. Grand Council, Chiefs and tribal councils held exploratory talks to determine the substance of their Treaty Rights. In 2002, through band council resolutions, the Chiefs of the thirteen Mi'kmaw communities agreed to sign an umbrella agreement to confirm the willingness of the Mi'kmaq and the federal and provincial governments to work together to enter into discussions to define, recognize, and implement Mi'kmaw rights. The parties developed terms of reference for consultation, appointed negotiators, and held deliberations on the Made-in-Nova Scotia Process framework agreement. The agreement set out three distinct goals: the continuation of the Tripartite Forum; the commencement of negotiations with a view to the creation of a Framework Agreement on treaty and Aboriginal Rights negotiations; and the initiation of negotiations for the development of a Terms of Reference for a consultation process (Umbrella Agreement 2002).

In 2004, the Made-in-Nova Scotia Process was retitled Kwilmuk Maw-klusuaqn (Kwilmu'kw Maw-klusuaqn, "We Are Seeking Consensus"; KMKNO), or the Mi'kmaq Rights Initiative, formalized in a framework agreement in 2007. The agreement outlined negotiation procedures for Treaty Rights as applied to fish, wildlife, forestry, and land. It took a long time to reach a memorandum of understanding, but the process was based on respectful relations and has since led to significantly productive dialogues on governance and on social, cultural, and economic issues.

Kwilmu'kw Maw-klusuaqn Negotiation Office—the Pillars

With the establishment of the KMKNO, the Mi'kmaq were able to invest more time into research and community engagement for input on decision-making. Participatory decision-making was a power long denied by assimilative federal policies, systemic discrimination, and diluted by proponent ignorance of both the duty to consult and of Indigenous Rights generally. Throughout the negotiation process, it was made very clear to the public that

the new accord will not be used as an attempt to re-negotiate the Mi'kmaq treaties, nor would it constitute a process leading to their extinguishment, such as in the federal comprehensive claims policy. Throughout the history of KMKNO, maintaining this fact in the consciousness of the nation has been difficult and periodically there are public outcries that KMKNO is "selling out Mi'kmaq treaty rights."[13] Forging collective governance for exercising Indigenous Rights is controversial work that challenges colonial consciousness and pressures governments and private businesses to do things differently to come to agreements that honour the Peace and Friendship Treaties. Nation-to-nation consensus is complex, political, and often unobtainable in the current reconciliation framework where the federal rules and regulations appear as unbendable and sustain colonial structures that oppress and dispossess (Manuel 2017).

Despite the challenges, negotiations for the Framework Agreement continued after the pilot project. An Agreement was officially signed in 2007, and set out the process by which negotiations would take place, as well as the subject matter that could be discussed.[14] The envisioned goal of this process, as noted in the Framework Agreement, was the eventual creation of a "Mi'kmaq of Nova Scotia Accord" that sets out "the manner in which the Mi'kmaq will exercise constitutionally protected rights respecting land, resources and governance" (Made-in-Nova Scotia Framework Agreement 2007). The goal was to empower communities to take control of their own affairs and to create opportunities for equitable participation in Canadian economy.

Chiefs Terry Paul and the late Lawrence Paul, at the time co-chairs of the Assembly of Nova Scotia Chiefs, stated the significance of the agreement: "We will finally be able to achieve what our ancestors set out to do for our people, to protect a way of life that would allow us to provide for ourselves and our families. It is time to make things right. And this negotiation process will help us achieve that" (Kwilmu'kw Maw-klusuaqn n.d.). The province saw the agreement as a landmark in relations between the Nova Scotia government and the Mi'kmaq. It was a significant moment in a spirit of good will and co-operation to build on common learning and a shared interest in fostering a strong Nova Scotia, culturally and economically.

On Treaty Day 2008, the Assembly of Nova Scotia Mi'kmaq Chiefs signed the Mi'kmaq of Nova Scotia Nationhood Proclamation, signalling their commitment, through the Kwilmu'kw Maw-klusuaqn Mission Office (KMKNO), to develop a cohesive system of governance.[15] The chiefs recognized the need

to heighten transparency and accountability if they were going to be effectively and equitably responsive in decision-making regarding Treaty Rights implementation. This proclamation, in combination with the framework agreement, guides the Mi'kmaq Rights Initiative negotiations with the Crown and proponents.

In 2010, the Agreement on Consultation was signed to address the direction provided by the Supreme Court of Canada's *Haida* (2004), *Taku River* (2004) and *Mikisew Cree* (2005) decisions. The rulings framed the federal and provincial Crowns' legal duty to consult and where appropriate accommodate, particularly when Crown conduct may adversely impact established or potential Aboriginal and Treaty Rights.

The mission of the KMKNO is to address the historic and current imbalances in the relationship between Mi'kmaq and non-Mi'kmaq people in Nova Scotia and secure the basis for an improved quality of Mi'kmaq life. KMKNO undertakes the necessary research, develops consensus positions on identified issues, and creates public and community awareness in a manner that supports the ability of the Assembly to fully guide the negotiations, the implementation, and exercise of constitutionally protected Mi'kmaq Rights. It is committed to moving forward at a pace determined by the Mi'kmaq themselves, and to balancing individual First Nations autonomy with the collective Mi'kmaq identity, governance, and decision-making required to re-institute Mi'kmaq ways of operating. Five pillars directing the work of the KMKNO are:

1. To achieve recognitions, acceptance, implementation and protection of treaty, title, and other rights of the Mi'kmaq in Nova Scotia;
2. To develop systems of Mi'kmaq governance and resource management;
3. To revive, promote and protect a healthy Mi'kmaq identity;
4. To obtain the basis for a shared economy and social development; and
5. To negotiate toward these goals with community involvement and support.

KMKNO Consultation Processes

The Terms of Reference (ToR) for the Mi'kmaq-Nova Scotia-Canada consultation agreement were signed in 2010 to set the process for consultation between the Crown (represented by either Canada or Nova Scotia) and the Mi'kmaq of Nova Scotia. The Mi'kmaq can participate in the consultation process through committees that are established by the Assembly of Nova Scotia Mi'kmaq Chiefs. These committees are appointed by and report to the Assembly of Chiefs, and the Assembly has control over the composition and tenure of the committees. The ToR do not restrict consultation activity solely to the committees appointed by the Assembly; individual bands can conduct their own consultation if they so choose, and bands have the option to remove themselves from consultations if they see fit (KMKNO Terms of Reference, 2010). The options are clearly laid out in the ToR and are designed to protect a community's unique needs and importantly to provide opportunity for communities to decide how to proceed. As per the ToR, the parties jointly review the terms every three years. For communities who have opted out of a particular consultation, the review process enables them to return to the tables.

According to the consultation Terms of Reference, which are unique to Nova Scotia and the first of its kind for Indigenous nations in Canada, a proponent—as per the Supreme Court of Canada in *Haida* (2004), *Taku* (2004) and *Mikisew Cree* (2005), has no legal duty to consult with the Mi'kmaq except where resource-based projects have potential impacts to the environment. If there are potential impacts, the province must engage in consultation, particularly when regulatory permits and licences are issued, and they may delegate certain procedural aspects of consultation to proponents. Proponents may include private industry, consulting firms, government departments and municipalities. When the federal or provincial government is going to make a decision that could potentially impact Mi'kmaq Rights and title, they are required to formally notify the Assembly by writing a letter to the Chiefs and councils and to the KMKNO.

Once the letters are received by the Assembly, individual communities can decide whether to take the lead on a particular file on the behalf of the Assembly, or they can proceed with consultation on their own, or they can have consultations run through the KMKNO office with the Lead Chiefs of the relevant portfolio overseeing the discussions. First Nation communities frequently defer to the KMKNO for their technical support expertise. Once

KMKNO receives the letter, they co-ordinate the consultation on behalf of the Assembly, unless a community indicates otherwise. Consultation can occur at any stage of a project, from the planning stages to on-site monitoring. Discussions can focus on the protection of resources, cultural and archaeological concerns, Mi'kmaq use and occupancy, historical connections to territory, and the impacts of project construction and operations. While improvements in uptake are occurring, there are still situations where the governments have not adequately triggered a consultation process due to "failure to consistently follow the terms of reference, consultation funding, communications, time gaps, and legislated timeframes" (Indigenous and Northern Affairs Canada 2015).

The duty to consult exists to protect the collective rights of Indigenous peoples. At consultation, the concerns of the Mi'kmaq are brought forward to the Crown. It is not a veto process, nor is it a way to get approval from the Mi'kmaq. It is a forum for addressing Mi'kmaq concerns before the Crown makes a final decision on a project. Without a formal process, the concerns of the Mi'kmaq would not necessarily be heard or addressed. The KMKNO has framed participation in consultation as a responsibility of Mi'kmaq to respond to protect their rights. Advisory groups are created to decide what should be examined, issues to be addressed, and to identify next steps. Advisory groups consist of Elders, researchers, scientists, resource users, conservationists, and people who represent the best interests of the Mi'kmaq. The information they review and collect is brought to the Assembly throughout the consultation process for the input and guidance of the leadership. The Assembly provides instruction by passing resolutions. The dialogue continues between the Assembly, the advisory groups, and the government. Not all consultations result in agreement, but without the dialogue the Mi'kmaq Nation would not have the ability to drive change. The dialogue relies largely on the honour of the Crown. If the Assembly is not satisfied with the accommodations made by the Crown, then the Mi'kmaq can go to court for infringements of Aboriginal and Treaty Rights and title. With the passing of the United Nations Declaration on the Rights of Indigenous Peoples Act in 2021, the duty to respect and recognize the human rights of Indigenous peoples raises the standards and imperative of implementing Treaty Rights, self-governance, and federal and provincial accountability in consultations and negotiations.

By participating in consultation, KMKNO is not giving up any rights claims. They position themselves as protecting time immemorial rights and it is a collective duty to ensure that Mi'kmaq lands and resources will be enjoyed for many years to come. Their slogan is "It is time to make things right." Information about consultations is disseminated through newsletters, press releases, community notices, and articles in the *Mi'kmaq Maliseet Nations News* and through their website, Facebook, YouTube, and X accounts.

The KMKNO consultation team provides feedback on legislation, regulations, and policy. They advocate for and recommend specific items. Potential changes to any government legislation or policy must consider the following:

- Recognize that the Mi'kmaq of Nova Scotia have rights;
- Support and promote responsible resource management, consistent with recognition and affirmation of existing Treaty and Aboriginal Rights;
- Recognize the Mi'kmaq assert co-ownership of natural resources;
- Recognize the Terms of Reference for a Mi'kmaq-Nova Scotia-Canada Consultation Process and that the Province needs to take its duty to consult seriously;
- Recognize there is a unique relationship with the Mi'kmaq of Nova Scotia;
- Be socially responsible;
- Be reflective of the needs of the Mi'kmaq;
- Recognize there is an exception that benefits agreements are developed with the Mi'kmaq prior to project approvals; and
- Identify MEKS as tools used in consultation.

Legislation and regulations currently or recently under review by the consultation team include the following: Children and Family Services Act, Mineral Resources Act, Marine Renewable Energy Act, Environmental Goals and Sustainable Prosperity Act, and Aquaculture regulations and the Fisheries Act. These are transformative areas of inquiry, with outcomes that directly affect the livelihoods of Mi'kmaq families and communities.

The Office of L'nu Affairs in Nova Scotia produced proponent engagement guidelines which emphasize communications, decision-making, and lasting outcomes that should benefit the Mi'kmaq Nation. It is a work in progress with the principles of engagement centred around:

1. Mutual respect—taking into account different interests, perspectives, cultures, understandings and concerns;
2. Early engagement—before final decisions are made—clear and reasonable timelines should be established and communicated, appropriate and proportionate in respect of the decision being made;
3. Openness and Transparency—open lines of communication, provision of timely, accurate, clear and objective information. The Mi'kmaq need to be informed of how their concerns have been considered, and where appropriate, addressed in the planning and decision-making process;
4. Adequate time to review / respond—appropriate and proportionate in respect of the decision being made for the Mi'kmaq to review the information, hold internal discussions, and respond. (Office of Aboriginal Affairs 2012)

KMKNO has a variety of departments mandated to conduct research related to negotiations and consultations to protect Treaty Rights. The Chiefs of the Assembly are responsible for particular portfolios to help co-ordinate and organize the vastly diverse and complex matters that come through the KMKNO's Consultation Department. The evolving portfolios are currently: Archaeology, Benefits, Child Family, Energy, Fisheries, Governance, Social, Cultural Tourism, Nova Scotia Power, Forestry, Wildlife, and Lands. The Lead Chiefs receive all authorities and instructions from the Assembly. Their role is to meet and gather information relevant to their portfolios and present it to the Assembly. In addition to the Chiefs, the Grand Chief and the Grand Captain of the Mi'kmaq Grand Council—the traditional governing body of the Mi'kmaq Nation—are ex officio members of the Assembly.

The Governance portfolio, for example, has the challenging job of determining membership and citizenship. The central discussions are focused on the contentious issues of eligibility to practice Indigenous Rights and who is

entitled to receive benefits. The Assembly of Mi'kmaq Chiefs have relied on federally issued Indian Status cards. Since the 1980s, the Native Council of Nova Scotia, representing non-status and off-reserve Indigenous peoples, has issued to their members Aboriginal and Treaty Rights Access cards (ATRA) to access harvesting rights. Enforcement officers once recognized both cards. The Assembly of Mi'kmaq Chiefs asked the province to enter into formal consultation to ensure that the Mi'kmaq maintain control over identifying their membership and verifying who has access to Mi'kmaq harvesting rights (Googoo, R. 2017). In 2022, the Supreme Court of Nova Scotia certified a class-action lawsuit filed by the Native Council of Nova Scotia because the ATRA passport holders lost access to hunting moose in the Cape Breton Highlands. The Newfoundland agreement of recognition of the Qalipu members who now reside in Nova Scotia and the emergence of "Eastern Métis" groups add layers of complexity and increase contestation over the questions of membership and benefits. KMKNO is in the process of creating a system whereby Mi'kmaq determine their own membership using the traditional concepts of *wejikesin* and *ekinawatiken*—translated as "we must go back to our communities and seek their feedback and approval at the outset" (Battiste, J. 2014).

A key priority for the Mi'kmaq Rights Initiative is access to and management of resources. In 2009, KMKNO conducted extensive community negotiations to establish moose hunting guidelines for the nation and are continuing to examine how Mi'kmaq can create a fair and open process for exercising their authority to hunt. The Mi'kmaq continue to work with the federal and provincial Departments of Natural Resources and Environment and Climate Change to institutionalize their Adaptive Moose Management Plan, which includes collaborating to address harvest levels, instituting Mi'kmaq-controlled Harvester Identification and a Mi'kmaq-directed reporting mechanism to monitor harvest levels and locations. This community engagement process is the hallmark of effective, meaningful, and generative Indigenous Rights consultation and implementation in the Atlantic. The cultural significance of the moose hunt cannot be underestimated in its knowledge translation capacities and for its food security redistribution activities when tonnes of meat are shared with community members and organizations who help those struggling on social income assistance (CBC News 2016). Non-Indigenous hunters, however, continue to protest any priority rights of the Mi'kmaq to hunt moose.

KMKNO's Perspective—Protests and Partnership in Nation Rebuilding

The KMKNO works for the Assembly of Chiefs, and the Chiefs are elected by their constituents. The concerns of the constituents drive the mandates of the Chiefs, which in turn influence the priorities of the negotiation and consultation processes. It is ideally a community-driven process. The Assembly generated the five pillars, and these remain the guideposts for implementing Mi'kmaq treaties and Indigenous Rights and title. Harvesting rights (moose and fisheries) were selected as priority areas because despite the constitutional and Supreme Court of Canada affirmations of these rights, there are still conflicts on the ground that need to be resolved to ensure Mi'kmaq are able to access resources and exercise their rights to their full potential without getting charged with violations of hunting and fishing regulations, or trespassing. As the Mi'kmaq work through regulatory control issues, livelihood rights become prioritized.

In order to maintain the community-driven nature of the KMKNO processes, the organization is challenged to sustain engagement on both the mundane and controversial issues it deals with on a day-to-day basis. There are hundreds of ongoing consultations that require meaningful ratification by the membership. The staff of KMKNO understand and take to heart their responsibilities in what is a nation rebuilding process. It is an all-consuming responsibility according to the executive director:

> We always talk with our staff and ourselves, you never leave the work, for us you never leave it at your desk. For us you go home and most of us live in community or our families, we are community members, you always hear about Treaty Rights. You open your window and you look out and you see the traps in the water. You know everything is just right there, you are always in it. You never leave work per se and you never leave your community.[16]

For the director of consultation, the role of Treaty and Indigenous Rights protection is embedded in her lineage, and it is her familial duty to carry out her commitment to the nation.

> I approach it as a personal responsibility. We are in a unique process and I think we have a personal responsibility, not only

> a professional responsibility to share the information, to ask the questions of our communities' members, and to take the information they give us back to the tables. It's at the gas station, it's at birthday parties, you don't get away from it, but it is part of our responsibility as a Mi'kmaw person and I think that comes with the dedication and responsibility and that is why you see our negotiators and our team being there for so long. It is that personal investment.[17]

The work is very challenging, with so much at stake on a day-to-day basis. The team takes the responsibility of representation seriously and are increasingly skilled at balancing diverse interests. During the most contentious scrimmages, they are tenacious in their willingness to fight for justice and have the very important role of translating those interests to non-Indigenous audiences, who are often poorly versed in Mi'kmaq knowledge systems, treaty relationships, and Indigenous Rights. Finding the right balance between economic development and protecting the environment are daily efforts for the consultation and negotiation teams:

> We are at the table and we have to find a good balance. We need be able to talk to people, even though I say we are tired of fighting, we need to be able to say to people here is what is going on in the areas, here is where we are at. Sometimes I feel that we are a shield for that warrior anger.[18]

A further challenge is keeping nationhood front and centre while respecting the decision of an individual band to pursue its own consultation process. The push and pull factors of collective consultation can get disrupted when federal and provincial policies divide a community, on cost/benefit measures of economic remunerations and the inherent connectedness to the land and its resources that require Mi'kmaw specific stewardship as embodied in the principles of *netukulimk*. Protest can be both productive and destructive for KMKNO. It is a factor beyond their direct control, but if read carefully it can provide valuable insights on the concerns of the community, which can then be translated for the Assembly to determine how best to act in the interests of their members.

Maintaining the collective while respecting community autonomy is a substantial challenge in the evolution of KMKNO. Nationhood gets put

to the test when individual bands decide that it is in their best interest to step out of the process. In 2013, the Sipekne'katik band removed itself from KMKNO activities and announced its intention to develop their own consultation process, in order to seek greater input from individual band members. This was a strategy to respond to specific community concerns. Sipekne'katik left the Assembly of Nova Scotia Mi'kmaq Chiefs following disagreements over the Alton Natural Gas Storage Project (Googoo, M. 2016). Sipekne'katik was followed by Millbrook First Nation in May 2016, when the band announced they would be leaving both KMKNO and the Assembly of Chiefs. Sipekne'katik had a changeover in Chief and council during the 2016 election and has since rejoined with the Assembly and the KMKNO on selected files. The Millbrook band withdrew, arguing that the KMKNO process was unclear and was shielded from the scrutiny of the majority of the Mi'kmaq people. The band also expressed their concerns that the negotiation office had expanded beyond its original mandate of treaty implementation. This concern was shared by Mi'kmaw scholar Dr. Sherry Pictou who worried that the KMKNO process is being co-opted by the comprehensive land claims process and will become a victim of the domestication of UNDRIP. This is a process which subsumes UNDRIP's authority into Canadian sovereignty under s. 35 of the Constitution and thus undermines the spirit and intent of Mi'kmaq Treaty Rights and the potential of the declaration to end dispossession and lead to full implementation of Indigenous Rights (Pictou 2018; Manuel 2017). However, the passage of Bill C-15 has potential to ameliorate these concerns and Dr. Pictou is now a District Chief, making significant contributions to the protection of Mi'kmaw livelihood rights and *netukulimk* fishery plans, thus ensuring KMKNO and the Assembly resist co-optation and reject assimilation.

Differing conceptions of how rights should be discussed and implemented has led to both protest and partnerships between the thirteen Mi'kmaq communities in Nova Scotia. A dramatic example of the challenges of effective communication was seen in 2013 in the context of Idle No More, when two Mi'kmaq activists undertook a hunger strike to protest the Made-in-Nova Scotia Process (Howe 2013). The opponents of the process argued that there had been insufficient consultation between government and Indigenous leaders, as well as a lack of consultation between Mi'kmaq leaders and their communities (McMillan, Young, and Peters 2013). After eleven days, the Assembly of Chiefs agreed to halt negotiations until their communities could

be better educated regarding the ongoing discussions, thus ending the hunger strike (Howe 2013). Days after the hunger strike ended, Mi'kmaq community members in Cape Breton raised concerns about the KMKNO process, specifically regarding the clarity and accountability of the negotiation process. Several people argued that the process was insufficient as the Mi'kmaq Chiefs dominated it and did not include satisfactory consultation with Mi'kmaq community members (Howe 2013):

> My husband, at one point when we were going through Idle No More, we were attacked a lot and we are so passionate about what we do and it is so important that we are there to do our best to protect (the rights) and we cannot do it alone. There is a role for everyone. When you look at the community groups and the warriors, on some of those consultation files I would love for them to get mad and go and do that (protest) because we need the teeth behind it and we need someone at the table. There is a role for everybody. But when we were being attacked every day, someone told me "you go tell them you are the desk warriors, you are the warriors that fight for this every single day, not just the flash items that come up, it is not for oh I don't like this project, it is for the consistency, that continual push. We fight every day."[19]

The issues of unambiguous accountability are at the root of successful nation rebuilding and productive conflicts have arisen in the recent years of the KMKNO. As expressed by the hunger-striking activists, community members, and individual First Nation communities, the process has been marked by a perceived lack of clarity and confusion regarding the exact goals and actions of the KMKNO. The protestors who undertook the hunger strike pointed out that many of the issues are due to the structure of the band and council system, which is drawn from colonial Indian Act policies and legislation reflecting Western concepts of representative democracy rather than traditional Mi'kmaq conceptions of consensus-based decision-making (Howe 2013). As with most other issues interfering with reclaiming nationhood, the tensions within the KMKNO may be traced back to the impacts of colonialism, treaty denial, and the disruption of Mi'kmaq systems of governance and dissolution of decision-making powers. As Janice Maloney and Twila Gaudet note in the interview, "They know they are stronger together."

Livelihood Fisheries—It's Time to Make Things Right

The Fisheries portfolio and working group is set up under the primary negotiation table known as the Main Table, and has membership from the federal Department of Fisheries and Oceans, Indigenous and Northern Affairs Canada, Nova Scotia's Department of Fisheries and Aquaculture, and the Office of L'nu Affairs.[20] The technicians supporting the KMKNO are currently working on a detailed mandate to negotiate fisheries matters with the goals of supporting moderate livelihood as per the *Marshall* decision and to establish Mi'kmaq laws and authorities, pursuant to Mi'kmaq harvest and management plans. The robust portfolio is focused on rights-based fisheries implementation; sustainable harvesting; fisheries economic development; food, social and ceremonial fisheries; communal commercial fisheries; and aquaculture. These discussions are complex and challenging, particularly as the Crown's position continues to be adversarial rather than conciliatory, and the DFO did not attend the tables to engage with Mi'kmaw led and determined livelihood rights management plans.

Although the *Marshall* decision recognized Mi'kmaw and Indigenous Rights, the plethora of policies, rules, and regulations imposed on Indigenous fishers in order to "include" them in the commercial fishery effectively marginalized their livelihood rights. For instance, officials with the DFO doggedly refused to recognize autonomous community-based management plans such as those put forward by the Listuguj, Esgenoopetitj, Sipekne'katik, Potlotek and Pictou Landing Mi'kmaw communities that resisted being constrained by what they saw as stop-gap measures and narrow interpretations of their rights. Instead, these communities wanted autonomy over resource management and harvesting decisions, and they wanted control over access, procurement, and the distributions of benefits. This autonomy included jurisdiction over livelihood, commercial, as well as food, social and ceremony fisheries. The solution to centuries of broken treaty promises, they argued, was an integrated, sustainable fisheries management program informed by Indigenous ecological knowledge and governed by Indigenous legal principles.

The Supreme Court of Canada said there was a major difference between the Mi'kmaq livelihood fishery and the normal commercial fishery. In the regular commercial fishery, commercial fishers must comply with whatever regulations and licence conditions Canada in its wisdom sees fit to impose. But, while a Mi'kmaq livelihood fishery is subject to regulation by Canada,

any such regulation of limitation on the exercise of the right *must be justified* by Canada, as the judge noted in their *R. v Marshall* decision: "In a series of important decisions commencing with *R. v. Sparrow*, [1990] 1 S.C.R. 1075, which arose in the context of the west coast fishery, this Court affirmed that s. 35 aboriginal and Treaty Rights *are* subject to regulation, provided such regulation is shown by the Crown to be justified on conservation or other grounds of public importance" (para. 6). In a livelihood fishery, limitations or restrictions on such matters as seasons and methods of harvest proposed by Canada, *have to be the subject of consultation* by the Mi'kmaw, and have to be justifiable.

The Supreme Court recognized Mi'kmaw and Wolastoqiyik (Maliseet) livelihood rights were to be exercised by authority of the local community. While catch limits can be identified to reflect moderate livelihood, the government cannot unilaterally impose seasonal limits. However, government practice, as noted above, has been one of exclusion. The regulatory framework of the DFO was not decolonized or meaningfully reorganized to honour and uphold Mi'kmaw livelihood rights, despite their mandate letters emphasizing reconciliation and nation-to-nation relationships.

This approach facilitates a persistently adversarial environment when it comes to consulting and negotiating how to secure the implementation of Indigenous Rights with federal, provincial, and corporate entities. As a result, the Crown, through the Ministry of Fisheries and Oceans, stubbornly do not come to the table to discuss restructuring the fishery to protect and prioritize livelihood. They employ a business-as-usual approach, only offering financial packages that pigeonhole livelihood rights into the confines of the commercial regulatory framework. A short-sighted, treaty-ignorant approach that is "unlawful because it failed to recognize or accommodate the treaty right to fish" (Metallic and MacIntosh 2020). This failure in proactive leadership impedes decolonization of the fishery and obstructs reconciliation. What should be a great moment in treaty relations has been muted by resentment, confusion, and reluctance to change. Adversarial spaces are not conducive to conciliatory actions. Instead, injustices are perpetuated, the balance of power remains askew, and livelihood rights get used as a pawn in a broader political strategy of divide and conquer. Mi'kmaw leadership is tired of this lack of respect and the injudicious treatment of their livelihood rights.

On September 17, 2009, the tenth anniversary of the fishing decision, Mi'kmaw leadership gathered in Halifax. It was the first anniversary without

Donald Marshall Junior, who had died on August 6 of that year. The Mi'kmaq nation were mourning, not only the loss of Junior, but also the failure of the Government of Canada to honour the Supreme Court decision and implement the rights set out in the 1760–61 Treaties. Chief Terry Paul's address admonished the governments' failure to recognize Mi'kmaw livelihood rights and demanded change.

In the 2015 mandate letters to his ministers, Prime Minister Trudeau stated that, "No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership" (Trudeau 2015). In his 2019 mandate letter to Minister Jordan, the third person in three years to hold the position of minister of Fisheries, Ocean, and the Canadian Coast Guard, he wrote:

> There remains no more important relationship to me and to Canada than the one with Indigenous Peoples. We made significant progress in our last mandate on supporting self-determination, improving service delivery and advancing reconciliation. I am directing every single Minister to determine what they can do in their specific portfolio to accelerate and build on the progress we have made with First Nations, Inuit and Métis Peoples. (Trudeau 2019)

In 2019, at the twentieth anniversary of the fishing decision hosted by KMKNO, the DFO, in a symbolic gesture, returned Donald Marshall Junior's eel nets they had confiscated in 1993. People were not in a celebratory mood at the gathering in Membertou, and the leadership and fishers expressed great frustration at having no protection in exercising their livelihood rights. Mi'kmaw harvesters reported that their gear was regularly vandalized, their boats burned, their traps cut; threats and intimidation were the order of the day and the DFO and RCMP could or would not do anything overtly to stop it. And in the weeks following September 17, 2020, the twenty-first anniversary of the Marshall decision, we witnessed with horror the attacks on Mi'kmaw livelihood harvesters escalate and reveal an astonishing level of racism when Sipekne'katik, Potlotek, and Pictou Landing exercised their legal livelihood fisheries. The extent of racialized violence was so dangerous that the Assembly of Nova Scotia Mi'kmaw Chiefs declared a State of Emergency on September

18, 2020 to protect Mi'kmaw harvesters, their families, and supporters. The Assembly co-ordinated assistance across organizations to protect the safety and security of Mi'kmaw affected by political unrest. But the violence continued to escalate as commercial fishing operations accused Mi'kmaw livelihood harvesters of threatening the conservation of the lobster stocks. During an emergency debate in the House of Commons during October 2020, Prime Minister Trudeau said "there is no place for racism in our country. The appalling violence in Nova Scotia must stop now. It's unacceptable, it is shameful, and it is criminal. Above all there is a right to live and fish in peace without being subject to threats and racism" (Zimonjic 2020).

Assimilation is not an option. Mi'kmaw leadership has consistently held firm that, as Indigenous peoples of Mi'kma'ki, they have treaty and constitutionally protected rights to exercise governance over all of their fisheries including food, social and ceremonial, communal commercial, and livelihood, and that they want self-government agreements to uphold, protect and honour those rights. The livelihood fishery is a legal fishery, it is not a symbolic fishery, it is a substantive fishery where the exercise of Mi'kmaw jurisdiction must be prioritized in order to meet the terms and obligations of the treaties. As stated in their submissions to the Royal Commission on Aboriginal Peoples, in terms of jurisdiction, "we have the freedom to manage and regulate our harvest, with levels based on need and on conservation. After we have taken what we need, other governments can manage what's left over on behalf of their citizens, but subject to our consent and our ability to establish that non-Indian use does not threaten the resources" (Royal Commission on Aboriginal Peoples 1992, 131).

After the racist attacks on Mi'kmaw fishers, the government made some efforts to calm the tensions between Indigenous and non-Indigenous communities. The DFO accelerated their efforts to compel First Nations, community by community, to enter into Rights Reconciliation Agreements, a version of the Marshall Response Initiative that was directed at engaging communities in the commercial fishery and participating in regulatory schemes that were at the complete discretion of DFO's minister. The agreements created divisions and orders that were counter to nationhood, to consensus seeking self-government, and are not an implementation of the treaty-protected right to livelihood. Lacking transparency, this method was not advancing the communal nature of Indigenous Rights; instead, it fostered uncertainty and generated disunity in the nation. Tensions over rights implementation

were further flared as outspoken fishers' organizations threatened legal action amid false and alarmist claims that purported Mi'kmaw control over their treaty fisheries would undoubtedly jeopardize conservation and ruin the livelihoods of all in Atlantic Canada. The DFO were not engaging in the KMKNO in an honourable manner, "they were stuck in the mindset of their ministerial authority and licensing regime."[21]

Mi'kmaw parliamentarians were compelled to work toward an outcome to advance the collective interests of their communities and were keen to engage all sides "in a true spirit of reconciliation and cooperation to find a fair and durable solution."[22] The parliamentarians, after collaboratively engaging with Mi'kmaq and non-Mi'kmaq stakeholders, sought counsel with the Grand Council and cabinet ministers, and then proposed "a fresh approach to implementing the Marshall decision" based on a partnership between First Nations and the Crown, to generate an Atlantic First Nations Fisheries Authority. Working on behalf of all Mi'kmaq and Wolastoqiyik (Maliseet) Chiefs, and the Regional Chiefs of the Assembly of First Nations Paul Prosper, Roger Augustine, and Ghislain Picard, Senators Daniel Christmas (Nova Scotia) and Brian Francis (PEI) and Member of Parliament Jaime Battiste presented the Atlantic First Nations Fisheries Authority Plan to Ministers Jordan, Bennett (Crown-Indigenous Relations) and Miller (Indigenous Services) on 30 September 2020.

Drawing on the strengths of the educational sectorial self-government agreement of Mi'kmaw Kina'matnewey, an Atlantic First Nations Fisheries Authority was envisioned as a joint approach focused on economic growth of the Indigenous fisheries and bringing transparency to harvesting for commercial, moderate livelihood and food, social and ceremonial purposes. This structure offered a respectful path, a true nation-to-nation partnership approach. The Atlantic First Nations Fishing Authority would be governed by Mi'kmaw laws and the principles of sustainability and responsible harvesting embraced within *netukulimk* livelihood plans and *kisa'muemkewey*, the treaty diplomacy, which requires the honour of the Crown to engage with the nation as a whole. Such an authority would bring certainty to the Atlantic fishery, create a space for constructive dialogue, transparent resource management, even allyship. Significantly, it would substantiate treaty implementation and decolonize the fishery to the benefit of all, Indigenous and non-Indigenous alike. Nothing changed. The Crown, through its DFO agents, lacked vision.

On October 23, 2020, the federal government appointed Allister Surette as the Federal Special Representative with the mandate of acting as a neutral third party in an attempt rebuild relationships between non-Indigenous and Indigenous fishers. Unfortunately, Mr. Surette's Interim Report dated 6 January 2021 indicated that 81% of the individuals interviewed were non-Indigenous. The exclusion of Indigenous voices continues. From a Mi'kmaw perspective, no Federal Representative could act as a neutral third party, and the ministers of Crown-Indigenous Relations, Indigenous Services, and Fisheries and Oceans were not inclined to engage Mi'kmaq and Wolastoqiyik leadership in the proposed Atlantic First Nations Fishing Authority. They chose to stay on their colonial course.

On March 3, 2021, Minister Jordan issued a statement on a "new path for First Nations to fish in pursuit of a moderate livelihood" (Fisheries and Oceans Canada 2021). In the statement, she said, "we have never stopped working with First Nations to reach agreements and implement their right to a moderate livelihood." The Mi'kmaw disagree. Minister Jordan did engage with industry and appointed a Federal Special Representative to "mend broken relationships" but she *did not consult* with the Mi'kmaq, and arbitrarily imposed another licensing regime contrary to the Supreme Court ruling and constitutional protections (Metallic and MacIntosh 2020). People across Mi'kma'ki were outraged.

In response, Senator Dan Christmas issued a statement on March 4, noting that the government's "new path" was headed completely in the wrong direction, and that it falsely asserted that moderate livelihood is a threat to conservation, thus creating an unjustified and provocative infringement of section 35 constitutionally protected Aboriginal and Treaty Rights. Senator Christmas's statement expressed the profound frustration of Mi'kmaw and Wolastoqiyik leadership at the continued top-down, colonial methods to disempower and dispossess Mi'kmaw of their rights (Christmas 2021). Minister Jordan's myopic approach completely ignored the learned advice of PEI Senator Brian Francis, Senator Dan Christmas, and Cape Breton MP Jaime Battiste, as well as of the traditional and elected leaders of the Mi'kmaq and Maliseet nations.

Instead, Minister Jordan pursued an agenda that "dismisses the pursuit of a nation-to-nation, treaty relationship; it abrogates and derogates the constitutionally protected right of self-governance; it completely disrespects the Mi'kmaw traditional law of *netukulimk*—and it totally abandons the duty to

consult, as there was absolutely no consultation with the Assembly of Nova Scotia Mi'kmaw Chiefs on this policy statement" (Christmas 2021).

Surette's final report was submitted to minister of Fisheries and Oceans and the Canadian Coast Guard, Bernadette Jordan, and minister of Crown-Indigenous Relations Carolyn Bennett on March 31, 2021. In the report, Surette states:

> I am grateful to the over 100 individuals that did meet with me, and some on multiple occasions.
>
> I had hoped to have more discussions with representatives from Indigenous communities. I have reached out to all Indigenous communities in the Maritimes and the Gaspé region and am very grateful to those that I had the opportunity to meet with and discuss the issue at hand.
>
> Regarding my numerous attempts to engage with certain Indigenous communities, for future reference, I would like to note barriers of why they declined to meet with me. In summary, the following were given as reasons to not meet with me: Fisheries is a matter of constitutionally affirmed Aboriginal and treaty rights, hence, Indigenous communities are engaged in formal agreements that govern their relationship with the Crown as well as in formal consultation processes. These First Nations that declined the invitation (which included the majority of Nova Scotia, amongst others) also indicated that they would want, at the least, a co-chair or a second person selected by them when agreeing to participate in a process that deals with issues of concern to them (Surette 2021).

By April 2021, the High Commissioner of the United Nations Human Rights Office was alerted by the Chair of the Committee on the Elimination of Racial Discrimination that the Committee had considered information it received under its early warning and urgent action procedure, related to allegations of acts of racist violence against Mi'kmaw peoples in Nova Scotia. The evidence of serious human rights violations experienced by Mi'kmaw livelihood fishers and their families was gathered and submitted by a team of Mi'kmaw lawyers on behalf of Sipekne'katik Mi'kmaw fishers with the support of the Chief Mike Sack and Council. The Committee on the Elimination of Racial

Discrimination (2021) called on Canada to investigate the racists acts of violence, investigate the alleged lack of response by Canada to protect Mi'kmaw from violence, prevent further acts of violence and to "respect, protect and guarantee the rights of Mi'kmaw peoples in relation to their fishing activities and territories, as well as their rights to be consulted, to food and cultural rights, including the measures taken to repeal federal and provincial laws, as well as policies and regulations that unduly limit such rights."

The report of the Standing Committee on Fisheries and Oceans, *Implementation of the Mi'kmaw and Maliseet Treaty Right to Fish in Pursuit of a Moderate Livelihood*, presented to the House of Commons May 13, 2021, made forty recommendations that largely aligned with the proposed Atlantic First Nations Fishing Authority. For example,

> Recommendation 1, that the Government of Canada recognize the Mi'kmaw and Maliseet right to a moderate livelihood fishery as a foundation of the Government of Canada's nation-to-nation relationship with the Mi'kmaq and Maliseet nations;
>
> Recommendation 8, that the federal government recognize the Mi'kmaw and Maliseet treaty right to harvest, sell fish, and co-manage moderate livelihood fisheries as the foundation of the Government of Canada's nation-to-nation relationship with Mi'kmaq and Maliseet nations;
>
> and
>
> Recommendation 11, that the Government of Canada acknowledge that Mi'kmaq and Maliseet have the rights to manage and develop resources for their economies with the guidance of their traditional governance institutions, Elders, and leaders, determining manner of ownership, access, manner and pace of economic development derived from the access and use of the resources within their traditional ancestral homeland territories, and within the Constitution and laws of Canada. (McDonald 2021).

These recommendations reflect what Mi'kmaw leaders have been insisting upon since the signing of the Peace and Friendship Treaties in the 1700s.

Mi'kmaw and Wolastoqiyik leaders continue to develop the proposed Atlantic First Nations Fisheries Authority. Seeking additional tools to protect Indigenous Treaty and Constitutional Rights, two Mi'kmaw Senators, the Honourable Dan Christmas (Nova Scotia) and the Honourable Brian Francis (PEI), with the support of Mi'kmaw member of Parliament Jaime Battiste, led the difficult, but successful, final debate to pass Bill C-15. The bill received Royal Assent and became law on national Indigenous Peoples' Day, June 21, 2021. The enactment provides that the Government of Canada must take all measures necessary to ensure that the laws of Canada are consistent with the *United Nations Declaration on the Rights of Indigenous Peoples* (United Nations 2007) and that the Canadian government must prepare and implement an action plan to achieve the objectives of the Declaration.

In September 2021, Minister Jordan lost her seat in the South Shore-St. Margarets riding under heated criticism of her handling of the dispute involving Indigenous fishing rights and her inability to appease the interests of non-Indigenous commercial fishers who vote in that riding.[23]

In December 2021, the prime minister's mandate letters directed that "every Minister [is] to implement the United Nations Declaration on the Rights of Indigenous Peoples) and to work in partnership with Indigenous Peoples to advance their rights" (Trudeau 2021). DFO Minister Murray, who resides in British Columbia, was directed to "work with Indigenous partners to better integrate traditional knowledge into planning and policy decisions" and to "advance consistent, sustainable and collaborative fisheries arrangements with Indigenous and non-Indigenous fish harvesters" (Trudeau 2021). The legal, social, technical capacities of the Mi'kmaw nations and KMKNO to take on the governance of an Atlantic First Nations Fishing Authority continue to expand.

Mobilizing Mi'kmaq Authority

The priorities of Mi'kmaw leadership remain the well-being, security, and sustainability of the rights of the nation, as they have for centuries. Honouring the Peace and Friendship Treaties are at the heart of Indigenous and settler relations. Their position is a steady, enduring patience that is gathering strength as Mi'kmaw resist the government's efforts to assimilate livelihood rights into a bureaucratic regulatory framework. With unwavering courage

and steadfast belief in their rights to livelihood, Mi'kmaq leadership through KMKNO resist attempts to buy out, minimize or bury the Mi'kmaw Peace and Friendship Treaties.

At the forefront to cultural resurgence are the L'nu Saqmaw or Grand Chief of the Grand Council, Norman Sylliboy, Kji Keptin Antle Denny, and the Putus, along with their Council of Keptins, are the leaders and diplomats governing the seven districts that comprise Mi'kma'ki. The Grand Council is instrumental in *kisa'muemkewey*, treaty diplomacy, and in keeping the spirit and intent of treaties alive and in action. L'nu Saqmaw rejects any government interference with the exercise of Mi'kmaw livelihood rights; any plans issued by the DFO that attempt to regulate the fishery, such as the Rights Reconciliation Agreements, are directly in contravention of Mi'kmaw rights to self-determination and self-governance. Tired of the "divide and conquer" approach of the federal government, Grand Chief Sylliboy is working with the Grand Council and KMKNO to unify the nation, encouraging each community to build strong livelihood plans that are self-determined, community-led, and reflect the principles of *netukulimk* to collectively benefit all Mi'kmaw citizens. L'nu Saqmaw (Grand Chief) Norman Sylliboy expressed his view that the starting point for discussions should be seeking an understanding from where we come from by "honouring our ancestors"—*ta'n wetapeksi'k* in Mi'kmaq. To seek such an understanding, one must first carefully listen to the background and experiences of others (McMillan and Wien 2022).

A central responsibility of L'nu Saqamaw is to sustain treaty relations and the integrity of the Peace and Friendship Treaties through education. He encourages people to not sell their Treaty Rights and to refuse to sign any agreements that undermine Mi'kmaw rights to livelihood. L'nu Saqamaw Sylliboy is working with Keptins from across Mi'kma'ki to reignite customary protocols in the seven districts. Above all else, L'nu Saqmaw is clear that the government cannot put a price tag on Mi'kmaw treaty and constitutionally protected livelihood rights and is demanding transparency and inclusion in all discussions pertaining to the management of the resources. In a meeting with Mi'kmaw fishers L'nu Saqmaw Sylliboy stated:

> When the chiefs were discussing the agreements—it was a problem, you cannot put a price tag on our treaties. I told them don't use money, don't put a dollar on our rights. You cannot quantify, when you use dollar signs you cannot guarantee the future.[24]

At the direction of Mi'kmaw Chiefs and with the blessings of the Grand Council, KMKNO is working with the Unamaki Institute of Natural Resources, the Mi'kmaw Conservation Group, the Atlantic Policy Congress of First Nations Chiefs Secretariat, and other community-based experts to assist in the development of consensus-based standards for resource governance and management through the implementation of *netukulimk* livelihood fishery plans. At the heart of *netukulimk* plans are the principles of sustainability, the protection of Treaty Rights, and the safety and security of responsible harvesters. These are fisheries for the future, *Elmkinek'eway*—an organizing principle for the Atlantic First Nations Fisheries Authority.

In the absence of nation-to-nation recognition of self-government for fisheries, or the establishment of an Atlantic First Nations Fisheries Authority, individual communities such as Potlotek and Pictou Landing have advanced *netukulimk* livelihood plans with KMKNO to secure their economic well-being, protect and honour the resources, and hold harvesters accountable. Other communities have decided to co-ordinate their efforts by forming regional collectives. For example, the Kespukwitk Netukulimk Livelihood Fisheries Management Plan, a collaborative fishery management plan for Acadia, Bear River, and Annapolis Valley First Nations to exercise their Treaty Rights, was established in November 2021 with the support of District Chief Dr. Sherry Pictou and other Chiefs of the Assembly. Harvesters designated under the plan are currently authorized to fish up to 3,500 *jakej* (lobster) traps, up to 70 per harvester during established seasons in the waters of the traditional Kespukwitk District, which is one of the seven districts of Mi'kma'ki traditionally governed by the Grand Council.

The resurgence of *netukulimk* as the sacred foundation for treaty implementation is characteristic of Mi'kmaw ingenuity and emblematic of Mi'kmaw leadership. *Netukulimk* livelihood plans exemplify the Mi'kmaw philosophy to use the natural bounty provided by Creator for the self-support and physical, social, cultural, spiritual well-being. Mi'kmaq leadership are actively advocating for and building the legitimacy of *netukulimk* livelihood plans, both within their communities, that have long been suffocated by oppressive colonial policies of assimilation, and within the communities that have failed to recognize and honour Mi'kmaw inherent and Treaty Rights. It is an empowering and holistic approach to living well within the world and with each other, while simultaneously bringing forward enforceable harvesting practices and standards of sustainability.

Conclusion

The 2008 Nationhood Proclamation stated that the Mi'kmaq would seek to create new governance structures that better represent their interests and enhance the quality of life for Mi'kmaq people in Nova Scotia. There is presently a gap between the current, colonial-dominated governance structures that perpetuate conflicts within and between communities, and the future governance systems envisioned to improve the lives of Mi'kmaq people collectively through positive treaty relations, state fulfillment of its fiduciary obligations, and more responsible and reconciliatory recognition of Mi'kmaq Rights by federal and provincial ministries and corporations wishing to utilize Indigenous lands and resources. As negotiations continue regarding the reform and re-creation of governance structures, negotiators and community representatives will have to do what they can to counteract the negative pressures of the current system. In practical terms, this means putting more effort into community engagement and consultation. In order for meaningful alternative governance structures to be established, the people sitting at the negotiating table must do all they can to ensure the diverse opinions and values of the Mi'kmaq people are evenly represented in their decisions. By openly addressing issues of accountability and transparency, expanding opportunities for community feedback, the results of negotiations and consultation will continue to gain legitimacy and efficacy in rights implementation.

In July 2022, after hearing from Executive Director of KMKNO Janice Maloney and others, the Standing Senate Committee on Fisheries and Oceans released its report *Peace on the Water: Advancing the Full Implementation of Mi'kmaq, Wolastoqiyik and Peskotomuhkati Rights-Based Fisheries* (Manning 2022). It puts forward ten recommendations including a three-step plan to move forward with the full implementation of the rights-based fisheries:

1. To immediately review, amend, modify as necessary all relevant laws, regulations, policies and practices regarding rights-based fisheries to ensure they are in line with the UNDRIP;
2. Interim Nation-to-nation agreements using section 4.1 of the Fisheries Act—true shared decision making;
3. Permanent step—introduce new legislation in cooperation with Mi'kmaw Wolastoqiyik and Peskotomuhkati, to create

> a new legislative framework that will allow for the full implementation of rights-based fisheries.

The priorities of Mi'kmaw leadership remain the well-being, security, and sustainability of the rights of the nation, as they have for centuries. Honouring the Peace and Friendship Treaties are at the heart of Indigenous and settler relations. The remedy, for many, requires full recognition of Mi'kmaw rights and title, meaningful consultation, and fulfillment of the fiduciary obligations of the Crown. The authority of Indigenous legal principles and practices must be recognized by DFO and supported for all of us to live in our shared futures as a just society.

To conclude, the KMKNO negotiation and consultation processes make significant and meaningful impacts on the relationship between the Mi'kmaq and settler society. By entering into negotiations as equal partners with the governments of Canada and Nova Scotia, the Mi'kmaq are able to work towards the recognition and implementation of their Indigenous and Treaty Rights. The process has been laborious, long, slow, and at times wrought with tension, but it has generated foundations for self-governance. In order to ensure the success of the process, those representing the Mi'kmaq, namely the Assembly and the technical support teams of KMKNO recognize they must address the issues of openness and accountability or risk losing the support of the Mi'kmaq they represent. Only a legitimate negotiation process, built upon meaningful recognition of the rights of the Mi'kmaq, can lead to positive, sustainable change in Nova Scotia. There is much to do in order to address the centuries of colonialism, which the Mi'kmaq have endured, and the work of KMKNO is germinal in rebuilding the nation. It is the foothold for establishing jurisdiction for self-determination in the formation and enforcement of Mi'kmaq laws, self-identification of beneficiaries and infrastructure for self-government.

The province retains accountability for consultation and is responsible for ensuring the proponent engagement with the Mi'kmaq is adequate—the standards for provincial and federal fulfillment of their treaty obligations and responsibilities must be much higher, faster, and stronger. Part of the process involves decolonizing policies and processes through Treaty Rights education, which is currently being undertaken by the province in a wholesale curricular change and in the provision of treaty education courses for civil servants. It is a positive direction, which may shift the discourse from rights recognition

as something the Crown and settlers have to give up, to substantive and just treatment of Mi'kmaw nationhood. The federal government has work to do.

Situated within Mi'kmaq legal principles, the Marshall Inquiry recommendations, the KMKNO pillars, the Truth and Reconciliation Commission Calls to Action (Sinclair 2015), and in the UN Declaration on the Rights of Indigenous Peoples, are the tools necessary for refreshing, restructuring, and achieving the treaty implementation and nation-to-nation relationships between Indigenous peoples and the province of Nova Scotia and the Government of Canada. From these principles, a comprehensive action plan that establishes Indigenous laws and governing institutions that enshrine and operationalize Treaty Rights as a regular course of business can be developed and sustained. This will require, from all parties, the careful and transparent maintenance of consultation and consent processes as well as the replacement or elimination of legislation, policies, and practices that perpetuate systemic discrimination, produce inequality, and deny Indigenous Rights, in order to foster an environment of reconciliation that facilitates self-determination. Prime Minister Trudeau in the mandate letters to his ministers stated that, "No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership" (Trudeau 2017). It is time to make things right.

NOTES

1 McMillan is grateful to the many Mi'kmaw people who shared their insights that informed this chapter, particularly co-authors Janice Maloney and Twila Gaudet and the members of the KMKNO team. Many thanks to Dr. Sherry Pictou, Dr. Albert Marshall, and the wonderful people exploring understandings of *netukulimk*, including Kerry Prosper, Naiomi Metallic, Tuma Young, Justin Martin, Clifford Paul, the Mi'kmaw Conservation Group, Unama'ki Institute of Natural Resources, Atlantic Policy Congress, Dr. Shelley Denny, Melissa Nevin, and StFX and Dalhousie students. Special thanks to Senator Dan Christmas and MP Jaime Battiste. Preliminary historical research on KMKNO was supported the University of Calgary School of Public Policy and Alex Miller. Many thanks for the inspiration and extraordinary patience of editors Jennifer Winter and Brendan Boyd. As ever, I hope this work honours the legacy of Donald Marshall Jr.

2 Positioned between the French colonies along the St. Lawrence River and the American colonies to the south, Mi'kma'ki (or Acadia, as it was known to Europeans at the time) became a battleground between French and British colonial powers. Beginning in the early 1600s and lasting for roughly 150 years, the territory of Acadia was the site

of many violent clashes between the French and English (Paul 2006). Many Mi'kmaq fought alongside the French in conflicts throughout this period. After Port Royal fell to British control in 1710, the French ceded control of mainland Nova Scotia to the British through the Treaty of Utrecht in 1713. The French maintained control of Unama'ki, what is now Cape Breton Island, where they built the Fortress of Louisbourg, which became the stronghold of French military presence on the Atlantic coast (Upton 1979).

3 Tuma Young (2018) notes that this word refers to the treaty diplomacy processes of the Mi'kmaq. *Mawiomi* is a formal gathering for establishing and renewing relationships.

4 For excellent scholarship on Mi'kmaw Peace and Friendship Treaties see William C. Wicken's *The Colonization of Mi'kmaw Memory and History, 1794–1928: The King v. Gabriel Sylliboy* (Toronto: UTP, 2012) and *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto: UTP, 2002).

5 In 1763, King George III of England issued a Royal Proclamation, which became the basis for the creation of new colonial governments in North America. The Royal Proclamation also decreed that the lands of Indigenous peoples, which had not been purchased or ceded to the Crown, be reserved for use by Indigenous nations.

6 See Arthur Manuel's *The Reconciliation Manifesto: Recovering the Land Rebuilding the Economy* (Toronto: Lorimer, 2017).

7 *R. v. Sparrow* (1990) established that the Crown is legally accountable to Indigenous peoples, which became the foundation of the principle upon which the duty to consult arises. Subsequent cases including *Delgamuukw* (1997), *Haida Nation* (2004), *Taku River* (2004), and *Mikisew Cree* (2005) helped to develop the doctrine further, embedding in case law principles such as the priority of Aboriginal and Treaty Rights in decision-making processes and the inclusion of First Nations in resource development projects (Morellato 2008).

8 The White Paper policy drafted by Minister of Justice Jean Chrétien for the Trudeau government proposed to convert reserves to private property and to eliminate Indian status, thus removing the legal identities of Indigenous peoples and their rights to their lands.

9 The statement of facts presented to the Provincial court in Antigonish read:

> On August 24, 1993, and at or near Pomquet Harbour, Donald Marshall (an aboriginal person, being a status Mi'kmaq Indian registered under provisions of the *Indian Act* and a member of the Membertou Band, an Indian Band under the *Indian Act*) and Leslie Jane McMillan brought their eels from the holding pens ashore at the location where they kept their boats. This location is situated on lands that are part of the Afton Indian Reserve, at Antigonish County. Marshall helped weigh and load his eels onto a truck belonging to South Shore Trading Company, New Brunswick. South Shore is engaged in the purchase and sale of fish. Marshall sold 463 pounds of his eels to South Shore at $1.70 per pound. Marshall did not at any time hold a licence within the meaning of S. 4(1)(a) of the Maritime Provinces Fishery Regulations and S. 35(2) of the Fishery Act with respect to fishing for or selling eels from Pomquet Harbour (*R. v. Marshall* [1999] 3 S.C.R 26014).

10 The charges against Jane McMillan were dismissed early on in the trial as the late Judge Embree understood the case to be a matter of Indigenous Treaty Rights and she is not an Indigenous person.

11 See McMillan (2018), 87–88. The concept of *netukulimk* (responsible harvesting) guided Mi'kmaw resource use and management and lay at the heart of Mi'kmaw legal consciousness and *tplutaquan* (law). To practice *netukulimk* required Mi'kmaq to individually and collectively seek the bounty that *Niskam* (the Creator) had provided to the ancestors but to do so in a way that respected and honoured the places where one hunts, gathers, and fishes, along with the spirits that reside there. Prior to harvesting, Mi'kmaq made offerings and prayers, "enacting a reverence for all things of creation imbued with spirit." *Netukulimk* is about respect, reverence, responsibility, and reciprocity. Its practice and philosophy embrace co-existence, interdependence, and community spirit. Failure to practice *netukulimk* could lead to a failed hunt; a poor harvest; spiritual sanctions; or communal sanctions, shunning, or shaming.

12 The federal government has had a policy to negotiate comprehensive land claims or modern treaties with Indigenous groups and provincial or territorial governments since 1973. There is a great deal of criticism of this policy, and it has undergone revisions (Monchalin 2016). See for example Eyford (2015).

13 Some members of the Mi'kmaw Nation worry that the office acts on its own volition and is selling out sacred Mi'kmaw Treaty Rights by entering into agreements with corporate entities and federal and provincial governments that do not respect Mi'kmaw sacred interconnectedness with the environment. Some people reject the authority of Indian Act Chiefs. Some think negotiation takes too long, dilutes Treaty Rights, and prefer immediate action in order to meet the urgent housing, employment, education, health and justice needs of their families and communities.

14 The process was crafted by the Mi'kmaq legal team lead by Bruce Wildsmith and Eric Zscheile with the late Honourable Jim Prentice for the federal government and the late Michael Baker for the province.

15 Today, the KMKNO's board of directors is composed of the chiefs of the assembly, the national Assembly of First Nations' regional vice-chief, the Mi'kmaw grand chief, the kji keptin, and two district chiefs with ex officio status.

16 Interview October 12, 2017. On file with author.

17 Interview October 12, 2017. On file with author.

18 Interview October 12, 2017. On file with author.

19 Interview October 12, 2017. On file with author.

20 The Main Table is where negotiations between federal, provincial and Mi'kmaw governments take place. A first priority of the Main Table was to negotiate a process to address the Crown's duty to consult on any proposed activities that may impact Aboriginal, title and Treaty Rights. The province of Nova Scotia changed the name of its Office of Aboriginal Affairs to the Office of L'nu Affairs on February 23, 2021 (Office of L'nu Affairs 2021).

21 Interview October 12, 2017. On file with author.

22 Letter dated September 30, 2020, authored by The Hon. Daniel Christmas, The Hon. Brian Francis, Mr. Jaime Battiste.

23 According to the 2006 census, 97.1% identified as White, 1.5% as First Nations and 0.6% as Black. In the 2016 census 5% self-identified as Indigenous.

24 Interview January 27, 2021. On file with author.

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