



HOUSE OF COMMONS  
CHAMBRE DES COMMUNES  
CANADA

# **IMPLEMENTATION OF THE MI'KMAW AND MALISEET TREATY RIGHT TO FISH IN PURSUIT OF A MODERATE LIVELIHOOD**

**Report of the Standing Committee on Fisheries and Oceans**

**Ken McDonald, Chair**

**MAY 2021  
43<sup>rd</sup> PARLIAMENT, 2<sup>nd</sup> SESSION**

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**Ken McDonald  
Chair**

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### **Reports from committee presented to the House of Commons**

Presenting a report to the House is the way a committee makes public its findings and recommendations on a particular topic. Substantive reports on a subject-matter study usually contain a synopsis of the testimony heard, the recommendations made by the committee, as well as the reasons for those recommendations.

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# **THE STANDING COMMITTEE ON FISHERIES AND OCEANS**

has the honour to present its

## **FOURTH REPORT**

Pursuant to its mandate under Standing Order 108(2), the committee has studied the implementation of Mi'kmaq treaty fishing rights to support a moderate livelihood and has agreed to report the following:





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# LIST OF RECOMMENDATIONS

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*As a result of their deliberations committees may make recommendations which they include in their reports for the consideration of the House of Commons or the Government. Recommendations related to this study are listed below.*

## **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. .... 22**

## **Recommendation 2**

**That the Government of Canada work in partnership with Mi'kmaq and Maliseet communities to help define a moderate livelihood in a manner that is consistent with its cultural significance and distinct needs of the Mi'kmaq and Maliseet, and within the Constitution and laws of Canada. .... 22**

## **Recommendation 3**

**That the implementation of a moderate livelihood fishery consider the evolution of Mi'kmaw and Maliseet participation in various lobster fisheries in the years since the *Marshall* decisions. .... 22**

## **Recommendation 4**

**That the federal government undertake discussions with all appropriate Mi'kmaw and Maliseet representatives to help determine which persons are entitled to treaty rights affirmed by the *Marshall* decisions. .... 23**

## **Recommendation 5**

**That the Government of Canada work with the Mi'kmaq and Maliseet nations to help ensure that any agreement to implement a moderate livelihood fishery directly benefits the members of the community through job creation and other economic opportunity, and the proceeds of the catch is transparent for members of the community. .... 23**

**Recommendation 6**

**That the federal government provide their negotiators a clear and flexible mandate with which to engage in negotiations with Indigenous representatives. .... 23**

**Recommendation 7**

**That the federal government undertake a fulsome review of all investments, materials and actions delivered to Mi'kmaq and Maliseet communities by the government to accommodate fish harvesting treaty rights confirmed by the *Marshall* decisions in an effort to ascertain how effective the government's efforts have been in achieving their objectives. Further, the results of this review must be made public..... 23**

**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. .... 23**

**Recommendation 9**

**That Fisheries and Oceans Canada provide clear information on policy objectives, pathways and timetables related to the implementation process of the treaty right to fish to support a moderate livelihood..... 23**

**Recommendation 10**

**That commercial fisheries for Indigenous and non-Indigenous harvesters must be conducted under one set of conservation-based and safety rules and regulations for all participants in a particular fishery. .... 25**

**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 resources within their traditional ancestral homeland territories, and within the Constitution and laws of Canada. .... 25**

**Recommendation 12**

**That the Government of Canada recognize that the Mi'kmaq and Maliseet people have an interest not just in fishing, but also in the management of fisheries as nations and not just stakeholders. .... 26**

**Recommendation 13**

**That the Government of Canada consider alternate governance models that are consistent with treaty and Canadian law that share authority and decision-making with Mi'kmaq and Maliseet nations. .... 26**

**Recommendation 14**

**That, in its transferring of new communal commercial licences to First Nations communities, the federal government consider the principle of adjacency. .... 28**

**Recommendation 15**

**That Fisheries and Oceans Canada's science sector conduct a thorough evaluation of the Atlantic and Quebec lobster stocks and determine the environmental and ecological impacts of all fishing activities taking place outside of the currently established fishing seasons. .... 31**

**Recommendation 16**

**That, in Fisheries and Oceans Canada's implementation and regulation of fishing seasons, decisions be based on the best available science surrounding stock health and conservation, including water temperature, moulting and breeding timelines, hardness of shell, and other factors. .... 31**

**Recommendation 17**

**That fisheries must be managed by Fisheries and Oceans Canada under the leadership of the Minister of Fisheries and Oceans with the long-term preeminent objective of conservation of Canada’s shared fisheries resources. .... 31**

**Recommendation 18**

**That Fisheries and Oceans Canada recognize the historic science that supports lobster fishing at different times of the year in different locations due to the reproduction cycle of lobster from insemination through egg extrusion and ultimate egg release as a period of prohibited fishing for all fishers Indigenous and non-Indigenous..... 31**

**Recommendation 19**

**That the Government of Canada provide the necessary resources for the implementation of the right to a moderate livelihood fishery, including the funds necessary to develop, implement, and adopt best practices involving transparency and accountability within Mi’kmaq and Maliseet communities. .... 34**

**Recommendation 20**

**That Fisheries and Oceans Canada incorporate *Netukulimk*, and Mi’kmaw and Maliseet knowledge in setting limitations on an individual right to practice a moderate livelihood and enhance resource stewardship..... 35**

**Recommendation 21**

**That Fisheries and Oceans Canada foster greater collaboration between Mi’kmaq, Maliseet, and non-First Nation fishers on conservation issues. .... 35**

**Recommendation 22**

**That Fisheries and Oceans Canada implement joint data collection protocols, science assessments and consideration of fishery-wide conservation matters to ensure the future of coastal communities..... 35**

**Recommendation 23**

**That the Minister of Fisheries and Oceans follow the direction in the *Marshall* case from the Supreme Court that “[t]he paramount regulatory objective is the conservation of the resource. This responsibility is placed squarely on the Minister and not on the aboriginal or non-aboriginal users of the resource.” In any agreement with First Nations, only the Minister can be the regulator and the regulatory authority if we are to comply with the Court..... 37**

**Recommendation 24**

**That Fisheries and Oceans Canada acknowledge that moderate livelihood treaty rights can only be regulated for conservation purposes and compelling and substantial public objectives. .... 37**

**Recommendation 25**

**That Fisheries and Oceans Canada establish a meaningful consultation process to ensure that the conservation objective of a proposed restriction to treaty rights is understood by the Mi’kmaq and Maliseet communities it would affect and that it goes no further than necessary to meet that objective..... 37**

**Recommendation 26**

**That, in light of the alarming testimony given, Fisheries and Oceans Canada, in collaboration with provincial, Mi’kmaq and Maliseet governments develop a plan for investigating, enforcing, and eliminating the unrecorded illegal sale of lobster by all fisheries. .... 39**

**Recommendation 27**

**That, in light of the Minister of Fisheries and Oceans’ testimony highlighting systemic racism and, as effective enforcement is crucial to conservation, Fisheries and Oceans Canada must rigorously enforce fisheries regulations with impartiality and consistency. .... 39**

**Recommendation 28**

**That Fisheries and Oceans Canada be provided with the resources to fulfil its obligation to conserve the resource. This means that the Department must have sufficient numbers of enforcement officers and that those officers must be provided with the clear mandate and equipment to do their job safely and effectively. .... 39**

**Recommendation 29**

**That, in order to ensure safety and conservation, Fisheries and Oceans Canada work with the Mi'kmaq and Maliseet to build the capacity needed to enforce and manage the fishery with assistance from Mi'kmaw and Maliseet organizations. This increased capacity would include monitoring ability, training, science and research, operationalizing Mi'kmaw conservational values like *Netukulimk*, and the administrative capacity to provide transparency to the Mi'kmaq and Maliseet within their communities. .... 40**

**Recommendation 30**

**That Fisheries and Oceans Canada consider the viability of alternative enforcement models, such as partnerships with Indigenous-led enforcement regimes, like the Listuguj Mi'kmaq rangers or Indigenous Guardian program, and provide the Department the funding necessary to recruit qualified Indigenous personnel and engage directly with Indigenous communities and leadership in Nova Scotia and across Canada. .... 41**

**Recommendation 31**

**That, through collaboration with the Mi'kmaq and Maliseet people, the Government of Canada (Crown-Indigenous Relations and Northern Affairs Canada and Fisheries and Oceans Canada) establish regulatory mechanisms to enhance transparency surrounding the lobster fishery within community..... 41**



**Recommendation 32**

**That the Government of Canada look for opportunities to facilitate and bring the commercial fish harvesters and Indigenous moderate livelihood fishers together on a regular basis to participate in constructive dialogue, open communication, and mutual transparency. Further, the government should look to successful models where Indigenous fishers and other fish harvesting interests have been brought together, such as the Fraser River Peacemakers, as best practices in this endeavour. .... 43**

**Recommendation 33**

**That there be increased constructive communication between commercial fishers, Mi'kmaq and Maliseet to share information on what is being harvested and how many people are out participating in the moderate livelihood fishery..... 43**

**Recommendation 34**

**That Fisheries and Oceans Canada recognize that commercial fishers' knowledge and interests are a valued part of discussions that impact the future of the inshore fishery, and the proper resourcing of local management tables for communication and dialogue is crucial to having all voices heard. .... 43**

**Recommendation 35**

**That, when delivering actions or decisions to accommodate Indigenous fish harvesting treaty rights, the federal government must publicly communicate their actions and decisions and the basis for them to foster greater understanding and reconciliation between Indigenous and non-Indigenous harvesters and communities..... 44**

**Recommendation 36**

**That the Government of Canada implement more education for government representatives and Canadians at large on the nature and existence of treaty rights and the treaty relationship. .... 46**

**Recommendation 37**

**That Fisheries and Oceans Canada work with commercial fishers and the organizations that represent them on the meaning of treaties to foster understanding. .... 46**

**Recommendation 38**

**That Fisheries and Oceans Canada foster discussions about treaty rights implementation, anti-racism education, resource management and science concerns at the wharf level as well as at fishery advisory committees to build trust. .... 46**

**Recommendation 39**

**That the Minister of Fisheries, Oceans and the Canadian Coast Guard address systemic racism within the Department by conducting a national reform on Fisheries and Oceans Canada’s Conservation and Protection sector to address systemic racism within their regulations and operational policies to provide protection for treaty right to harvest and sell fish. .... 47**

**Recommendation 40**

**That Fisheries and Oceans Canada prioritize the development of joint protocols between First Nations and the Department to identify procedures in advance for dealing with possible crises concerning public safety and security of First Nations..... 47**



# IMPLEMENTATION OF THE MI'KMAW AND MALISEET TREATY RIGHT TO FISH IN PURSUIT OF A MODERATE LIVELIHOOD

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## INTRODUCTION

On 17 September 2020, on the 21<sup>st</sup> anniversary of the 1999 Supreme Court of Canada's *Marshall* decision,<sup>1</sup> the Sipekne'katik First Nation gathered in Saulnierville, Nova Scotia, to launch the first Mi'kmaw self-regulated moderate livelihood lobster fishery. The launch of this moderate livelihood fishery in the St. Mary's Bay area reopened discussions about treaty implementation and education, the role that commercial fishers in the Maritimes and Quebec have in the process, as well as conservation of the fishery resource and enforcement of fishery regulations by the federal government.

As of 23 November 2020, seven First Nations have begun self-regulated moderate livelihood fisheries, and seven others have started community consultations about starting a moderate livelihood fishery pursuant to their treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and upheld by the Supreme Court of Canada in its *Marshall* decisions. These communities, along with the remaining *Marshall* communities are shown in Figure 1.

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1 [\*R. v. Marshall\*](#), [1999] 3 S.C.R. 533.



Figure 1—Map of Marshall Communities



This map is not a legal document and the boundaries of the Traditional Indigenous Territories are for illustrative purposes only. The designations employed and the presentation of the material on this map do not imply the expression of any opinion whatsoever on the part of the Library of Parliament concerning the legal status and boundaries of the traditional territories.

Source: Map prepared by the Library of Parliament, Ottawa, 2020, using data from Natural Resources Canada (NRCan), "Administrative Features," [Administrative Boundaries in Canada – CanVec Series](#), 2019; NRCan, "Hydrographic Features," [Lakes, Rivers and Glaciers in Canada – CanVec Series](#), 2019; Native Land Digital, [Native Land](#), accessed 9 November 2020; Indigenous and

Northern Affairs Canada, [First Nations Location](#), 2016. Data on self-regulated fisheries compiled by the Library of Parliament, 23 November 2020. The following software was used: Esri, ArcGIS Pro, version 2.5.0. Contains information licensed under [Open Government Licence – Canada](#).

The planned launch of the self-regulated moderate livelihood fishery resulted in violence at the wharf in Saulnierville, which the House of Commons Standing Committee on Fisheries and Oceans (the Committee) strongly condemns. In response to the tensions, the Committee adopted a motion to:

[U]ndertake a study to examine the implementation of the Mi'kmaq constitutionally protected treaty right to fish in pursuit of a moderate livelihood, in order to evaluate the current Rights and Reconciliation Agreement process, identify better ways to engage interested parties in order to improve communication, reduce tensions and prioritize conservation, and identify issues that need to be addressed and a recommended path forward.<sup>2</sup>

The Committee held ten public meetings between 21 October 2020 and 2 December 2020, during which it heard testimony from First Nations organizations, commercial fishing associations in the Maritimes and Quebec, fishery scientists, academics, and retired fishery officers.

The Committee also received the Minister of Fisheries, Oceans and the Canadian Coast Guard, the Honourable Bernadette Jordan, accompanied by officials from Fisheries and Oceans Canada (DFO). The members of the Committee would like to extend their sincere thanks to all the witnesses who participated in this study. The Committee is pleased to present the results of its study in this report, along with recommendations based on the evidence it heard.

## BACKGROUND

### Peace and Friendship Treaties of 1760 and 1761

The Peace and Friendship Treaties of 1760 and 1761 were concluded between First Nations communities and the British Crown. These treaties were signed by a delegation representing the British Crown, on one side, and representatives of the following communities, on the other: the Mi'kmaq, the Wolastoqiyik (Maliseet) and the

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2 House of Commons, Standing Committee on Fisheries and Oceans, [Minutes](#), 19 October 2020.



Passamaquoddy.<sup>3</sup> These communities are located in New Brunswick, Prince Edward Island, Nova Scotia and Quebec.

The Peace and Friendship Treaties of 1760 and 1761 granted the First Nations communities that signed them the right to hunt and fish year-round within their territories.<sup>4</sup> These treaties also ensured the signatories could sell whatever they hunted, fished or gathered to obtain “necessaries.”<sup>5</sup>

It is important to note that Peace and Friendship Treaties differ from other historic treaties signed in Canada, in that they have a commercial aspect to them. The 1760 and 1761 Peace and Friendship Treaties included a trade clause, which sought to establish “truck houses” (or trading posts) to enable and encourage trade between the local First Nations and British settlers.<sup>6</sup>

Section 35 of the *Constitution Act, 1982* states that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” The right to fish outlined in the Peace and Friendship Treaties of 1760 and 1761 is considered both an Aboriginal right and a treaty right.<sup>7</sup>

## The Marshall Cases

On 24 August 1993, Donald John Marshall, Jr. – a member of the Membertou First Nation, part of the Mi’kmaq Nation in Nova Scotia – fished for eels near Pomquet Harbour in the County of Antigonish, Nova Scotia. He planned to sell his catch. As a result, he was arrested and charged by DFO fishery officers with committing offences under section 78(a) of the *Fisheries Act* regarding fishing out of season and without a

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3 Crown-Indigenous Relations and Northern Affairs Canada [CIRNAC], [Fact Sheet on Peace and Friendship Treaties in the Maritimes and Gaspé](#).

4 Crown-Indigenous Relations and Northern Affairs Canada [CIRNAC], [Fact Sheet on Peace and Friendship Treaties in the Maritimes and Gaspé](#).

5 *R. v. Marshall*, [1999] 3 S.C.R. 533, para. 4. Note: The Supreme Court of Canada defined “necessaries” as food, clothing, and housing.

6 Government of Canada, [Peace and Friendship Treaties \(1725-1779\)](#).

7 Nova Scotia Archives, [Copy of Authenticated Copy of “Treaty of Peace and Friendship concluded by the Governor of Nova Scotia with Paul Laurent, Chief of the La Heve tribe of Indians,” 1760](#); Nova Scotia Archives, [Copy of “Treaty of Peace and Friendship” between Jonathon Belcher and Francis Muis, 1761](#); Unlike Aboriginal rights, treaty rights derive from the negotiated agreements set out in treaties and land claims agreements between the Crown and Indigenous peoples, Jack Woodward, *Native Law*, Release 2, Carswell, Toronto, 2017, para. 5 §190.

licence while using illegal fishing gear. At issue was the right to sell his catch, and Donald John Marshall, Jr. did not dispute the reasons why he was charged.

Donald John Marshall, Jr. argued that, as a Mi'kmaq, he had "the right to fish and to sell the fish caught"<sup>8</sup> pursuant to the rights conferred within the Peace and Friendship Treaties of 1760 and 1761, as recognized and affirmed by section 35 of the *Constitution Act, 1982*.

The trial judge and the Nova Scotia Court of Appeal rejected his argument, and Donald John Marshall, Jr. ultimately appealed to the Supreme Court of Canada.

### *Marshall I*

In its decision, the majority of the Supreme Court of Canada, led by Justice Binnie, disagreed with the Nova Scotia Provincial Court's judgment as it pertained to its interpretation of the truck house provision of the Peace and Friendship Treaties of 1760 and 1761. The decision stated that:

The promise of access to "necessaries" through trade in wildlife was the key point, and where a right has been granted, there must be more than a mere disappearance of the mechanism created to facilitate the exercise of the right to warrant the conclusion that the right itself is spent or extinguished.<sup>9</sup>

Accordingly, the disappearance of truck houses, did not extinguish the right to trade wildlife to access "necessaries." In addition, the decision clarified:

The accused's treaty rights are limited to securing "necessaries" (which should be construed in the modern context as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth. Thus construed, however, they are treaty rights within the meaning of s. 35 of the *Constitution Act, 1982*. The surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessaries through hunting and fishing by trading the

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8 [\*R. v. Marshall\*](#), [1999] 3 S.C.R. 456.

9 [\*R. v. Marshall\*](#), [1999] 3 S.C.R. 456.



products of those traditional activities subject to restrictions that can be justified under the *Badger* test.<sup>10</sup>

The *Badger* test stems from *R. v. Badger*, a 1996 Supreme Court of Canada case. In summary, the *Badger* test asks three questions to help determine if the infringement of treaty rights is justified. The questions are:

- 1) Is there a valid legislative objective?
- 2) In the affirmative, does the legislation or action justify the infringement?
- 3) Is the proposed solution the one that infringes the least on treaty rights?<sup>11</sup>

The appeal was allowed on 17 September 1999, and an acquittal was entered on all three charges. This Supreme Court of Canada decision is commonly referred to as *Marshall I* and affects “Mi’kmaq and Maliseet First Nations in Nova Scotia, Prince Edward Island, New Brunswick, and the Gaspé region of Quebec, as well as with the Peskotomuhkati Nation at Skutik.”<sup>12</sup>

It should be noted that the treaty right to fish in pursuit of a moderate livelihood differs from the food, social and ceremonial (FSC) fisheries that exist for First Nations pursuant to the Supreme Court of Canada’s 1990 *Sparrow* decision. Additionally, communal commercial fishing licences are issued under the *Fisheries Act* through the *Aboriginal Communal Fishing Licences Regulations* and are often part of time-limited fisheries management agreements between DFO and First Nation organizations.<sup>13</sup> The issuance of communal licences is facilitated by DFO’s Allocation Transfer Program which manages the voluntary retirement of commercial licences and transfer to First Nations. Figure 2 demonstrates the various fisheries management regimes available to the communities affected by the *Marshall* decisions.

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10 [R. v. Marshall](#), [1999] 3 S.C.R. 456.

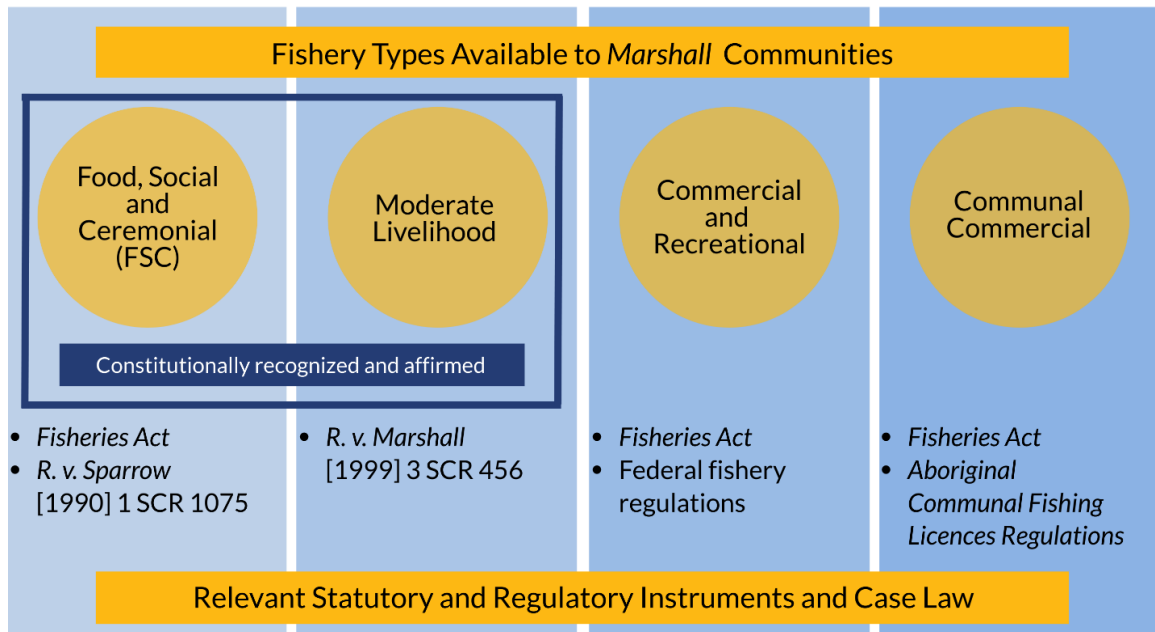
11 [R. v. Marshall](#), [1999] 3 S.C.R. 456.

12 Fisheries and Oceans Canada [DFO], [Our response to the Marshall decisions](#).

13 DFO, [An Integrated Aboriginal Policy Framework](#).



**Figure 2—Fishery Types Available to Marshall Communities**



Source: Figure prepared by the Library of Parliament using [PiktoChart](#).

### **Marshall II**

The West Nova Fishermen’s Coalition, as an intervener, filed for a re-hearing of the appeal and requested that the decision be stayed. In addition, the West Nova Fishermen’s Coalition “also sought a further trial limited to the issue [of] whether the application of the fisheries regulations to the exercise of a Mi’kmaq treaty right could be justified on conservation or other grounds.”<sup>14</sup> The Supreme Court explained that the appeal was requested to address the “presumed effects” of *Marshall I* on the local lobster fishery. Since this topic was not raised by the parties at any point during the hearings, it was deemed a new issue and therefore not a valid reason to grant a re-hearing of the appeal.

14 [R. v. Marshall](#), [1999] 3 S.C.R. 533.



On 17 November 1999, the application for re-hearing was dismissed.<sup>15</sup> However, with the dismissal, additional explanations were provided to help clarify certain aspects of the *Marshall I* decision. This decision is commonly referred to as *Marshall II*.

In *Marshall II*, the Supreme Court of Canada clarified that the federal and provincial governments could restrict treaty rights, such as fishing rights, for conservation reasons or other justified grounds.<sup>16</sup> It also indicated that, in the event of a future prosecution under federal regulations, Mi'kmaw fishers must demonstrate that they were “engaged in the exercise of the community’s collective right to hunt or fish in that community’s traditional hunting and fishing grounds.” The Supreme Court of Canada added that the responsibility for resource conservation falls to the minister responsible for those matters and not on the users of the resource.<sup>17</sup>

“[E]conomic and regional fairness, ... recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups” were also listed as examples of “other compelling and substantial public objectives” for which regulatory authority could be extended over Indigenous fisheries.<sup>18</sup> *Marshall II* noted that “Aboriginal people are entitled to be consulted about limitations on the exercise of treaty and aboriginal rights,”<sup>19</sup> but did not elaborate on the form this consultation should or could take.

## Previous Committee Report

In December 1999, this Committee tabled a report in response to the *Marshall* decisions. The report focused on the accommodation of treaty rights, conservation issues, fisheries management, localized fishing pressure, and DFO processes and procedures.<sup>20</sup>

The Committee report included 28 recommendations including that:

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15 Note: In paragraph 12 of *R. v. Marshall*, [1999] 3 S.C.R. 533, the extraordinary nature of a re-hearing is explained as follows: “An order suspending the effect of a judgment of this Court is infrequently granted, especially where (as here) the parties have not requested such an order.”

16 *R. v. Marshall*, [1999] 3 S.C.R. 533.

17 *R. v. Marshall*, [1999] 3 S.C.R. 533.

18 *R. v. Marshall*, [1999] 3 S.C.R. 533.

19 *R. v. Marshall*, [1999] 3 S.C.R. 533.

20 House of Commons, Standing Committee on Fisheries and Oceans, *The Marshall Decision and Beyond: Implications for Management of Atlantic Fisheries*, Second Report, December 1999.

- a co-operative, co-management and community-based approach to management of fisheries should be promoted;
- the federal government must be more proactive in facilitating the negotiations by providing stakeholders both aboriginals and non-aboriginals with funding and resources (including technical advice) to participate effectively in the process;
- the concept of "moderate livelihood" must be clarified or better defined;
- DFO must enforce one set of rules for everyone and that it must have the resources and personnel to do the job; and
- any transfer of access to fisheries resources to First Nations communities must be accomplished through a federal government-funded voluntary buyback of a portion of existing commercial licences as they become available.

## IMPLEMENTATION OF THE *MARSHALL* DECISIONS

### Historical Mi'kmaw Involvement in Fisheries

The *Marshall* decisions recognized a historical fishing right that was dispossessed from Mi'kmaq and Wolastoqiyik (Maliseet) communities since 1783.<sup>21</sup> With regard to lobster specifically, retired lawyer Andrew Roman argued that the "*Marshall* decision was about eels and on its face as worded cannot apply to lobsters or to any other species."<sup>22</sup> William Craig Wicken, however, indicated there is "extensive documentation from the late 18<sup>th</sup> century on into the 19<sup>th</sup> century about the involvement of the Mi'kmaq in the lobster fishery."<sup>23</sup> The historian added:

We also know that before the treaties were signed, which was in the 1760s, the Mi'kmaq were involved in the lobster fishery [...] They were a fishing people. They exercised that right communally, collectively. Lobster was one of the many species that

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21 William Craig Wicken, Professor, Department of History, York University, As an Individual, [Evidence](#), 2 November 2020.

22 Andrew Roman, Retired Lawyer, As an Individual, [Evidence](#), 30 November 2020.

23 William Craig Wicken, Professor, Department of History, York University, As an Individual, [Evidence](#), 16 November 2020.



they fished and sold to non-Indigenous people in Nova Scotia and throughout the Maritimes.<sup>24</sup>

Given the historical Mi'kmaw involvement in fisheries and the recognition of the Mi'kmaw treaty right to fish in pursuit of a moderate livelihood by the *Marshall* decisions, witnesses agreed on the necessity for an effective implementation of moderate livelihood fisheries. The question dividing witnesses was how to ensure that the *Marshall* decisions are implemented in a transparent and equitable way while ensuring predictability in the allocation of access and prioritizing the conservation of fishery resources.

## **Actions Taken by Fisheries and Oceans Canada Since the *Marshall* Decisions**

### ***Marshall* Response Initiative and Atlantic Integrated Commercial Fisheries Initiative**

Through the *Marshall* Response Initiative, from 2000 to 2007, and the Atlantic Integrated Commercial Fisheries Initiative (AICFI), launched in 2007 and renewed in 2019, DFO has provided some First Nations communities “with commercial fishing licences, fishing vessels and gear, and training, all in support of increasing Indigenous participation in commercial fishing.”<sup>25</sup> The Minister pointed out:

In 1999, the landing value for the First Nations fishery was about \$3 million. Last year, that landing value was \$120 million, so there has been progress made to making sure that First Nations have access to the fishery.<sup>26</sup>

In a 21 December 2020 written submission to the Committee, DFO provided data on First Nations communal commercial licences, issued under its Allocation Transfer Program, and landing values. Communal commercial fishing access, managed under DFO's *Aboriginal Communal Fishing Licences Regulations*, varies greatly between different communities. For the lobster fishery, *Marshall* communities possessed 347 communal commercial licences in 2020 with a total landing value of close to \$58 million in 2018.<sup>27</sup> In the view of Bernie Berry, President of the Coldwater Lobster

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24 William Craig Wicken, Professor, Department of History, York University, As an Individual, [Evidence](#), 16 November 2020.

25 DFO, [Our response to the Marshall decisions](#).

26 Hon. Bernadette Jordan, Minister of Fisheries, Oceans and the Canadian Coast Guard, [Evidence](#), 18 November 2020.

27 The written submission mentioned that the data were provided by DFO regional offices.

Association, therefore, the Government of Canada has fulfilled its fiduciary responsibility regarding the *Marshall* decisions. He stressed:

The *Marshall* initiative, along with other government programs and the ingenuity of First Nations, has created an economic success story within Atlantic Canada First Nations. This success was documented in a recent Macdonald-Laurier Institute report, which showed the total on-reserve fishing revenue for Mi'kmaq and Maliseet in Nova Scotia province grew from \$3 million in 1999 to \$152 million in 2016. This number is expected to be much higher today.<sup>28</sup>

First Nation witnesses challenged Bernie Berry's point of view. In the opinion of Regional Chief Paul Prosper, the increased communal commercial access and capacity for First Nations helped them gain an entrance into the fishery.<sup>29</sup> However, communal commercial access agreements were entered into on a "without prejudice" basis regarding treaty rights. Chief George Ginnish added:

Under the *Marshall* agreements, instead of implementing a treaty-based fishery, DFO offered funding to bands to purchase licences, vessels and gear from existing fishers so that we could participate in the existing commercial fishery under DFO's rules. This was designed to appease non-Indigenous fishers, not implement Mi'kmaq rights. While some Mi'kmaq communities refused to sign, many communities, impoverished and long denied any access to fisheries, felt compelled to sign these one-sided agreements.<sup>30</sup>

Questions were raised by some witnesses regarding the need to increase fishing access for Mi'kmaq communities through a moderate livelihood fishery when certain communal commercial licences have been leased to fishing corporations by First Nations. Melanie Sonnenberg, President of the Canadian Independent Fish Harvesters Federation, indicated that licence leasing to corporate entities could "undermine local ownership and erode net reach to all coastal communities."<sup>31</sup> In the opinion of Richard Williams, Research Director at the Canadian Council of Professional Fish Harvesters, after a two-decade struggle by independent fish harvesters to get the fleet separation and owner-operator policies enshrined in legislation and regulations, the challenge will be to ensure that the development of First Nation fisheries happen "within a framework

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28 Bernie Berry, President, Coldwater Lobster Association, [Evidence](#), 25 November 2020.

29 Chief Paul J. Prosper, Regional Chief, Nova Scotia and Newfoundland, Assembly of First Nations, [Evidence](#), 26 October 2020.

30 Chief George Ginnish, Chief Executive Officer, North Shore Mi'kmaq District Council, Eel Ground First Nation, [Evidence](#), 16 November 2020.

31 Melanie Sonnenberg, President, Canadian Independent Fish Harvesters Federation, [Evidence](#), 30 November 2020.



of a community-based, independent, owner-operated driven fishery.”<sup>32</sup> Gary Hutchins, a retired DFO supervisor, added:

Perhaps a better question to ask is why are Indigenous people not getting access to these licences to pursue a moderate livelihood? Perhaps the reason is that these licences have been leased back to white business owners, thereby taking opportunities away from the Indigenous people. I have spoken with Indigenous people who have expressed the desire to pursue a moderate livelihood from fishing but have not been given the opportunities.<sup>33</sup>

## Rights Reconciliation Agreements

In addition to the AICFI, in 2017 the federal government started negotiating fisheries-related Rights Reconciliation Agreements (RRAs) with Mi’kmaq and Wolastoqiyik (Maliseet) First Nations in Nova Scotia, Prince Edward Island, New Brunswick, and the Gaspé region of Quebec. RRAs are time-limited sectoral agreements and the negotiations are part of a broader reconciliation effort led by Crown-Indigenous Relations and Northern Affairs Canada. In the opinion of the Minister, the two 10-year RRAs, concluded in 2019 with Elsipogtog and Esgenôpetitj First Nations in New Brunswick and Maliseet of Viger First Nation in Quebec, resulted from efforts undertaken by the current federal government to “expand the mandate for moderate livelihood negotiations” and further implement the *Marshall* decisions.<sup>34</sup>

The Committee heard a contrasting perspective from Chief George Ginnish. In his view, DFO’s current negotiating mandate does not address moderate livelihood fishing. He stated that RRAs proposed by DFO ask, as part of the signing process, that “we agree to not assert our treaty rights for another 10 years if we sign onto those agreements.” Chief George Ginnish pointed out:

We have not treaty fished for 21 years, and to ask us not to do that for another 10 years while dangling some additional moneys in front of us is an insult. We have raised this issue with the minister and from our perspective we say lift that non-assertion clause in

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32 Richard Williams, Research Director, Canadian Council of Professional Fish Harvesters, [Evidence](#), 25 November 2020.

33 Gary Hutchins, Detachment Supervisor (Retired), DFO, [Evidence](#), 30 Novembre 2020.

34 Hon. Bernadette Jordan, Minister of Fisheries, Oceans and the Canadian Coast Guard, [Evidence](#), 18 November 2020.

those agreements—it's been 20 years—and sit down to really begin to talk about treaty access and including our members.<sup>35</sup>

Chief Darlene Bernard also shared her frustrations with what she considered as DFO's limited negotiating mandate.<sup>36</sup> In her view, negotiations should be led by Crown-Indigenous Relations and Northern Affairs Canada instead of DFO, as moderate livelihood fishing is a rights-based issue not a commercial access one. However, Eric Zscheile, barrister and negotiator at the Kwilmu'kw Maw-klusuaqn Negotiation Office, mentioned that, in his experience at the negotiating table, DFO has made it clear that fisheries negotiations are in its purview.<sup>37</sup>

In First Nations witnesses' perspectives, the constitutionally recognized and affirmed treaty right to fish in pursuit of a moderate livelihood remains to be implemented. There is still no recognized framework governing how First Nations can lawfully exercise their treaty right to fish in pursuit of a moderate livelihood as a fishery distinct from FSC fisheries, which do not have a commercial aspect, and communal commercial fisheries, which do not have a constitutional status.

## Challenges in Defining the Concept of Moderate Livelihood

Although the Supreme Court of Canada used the terms “necessaries” and “moderate livelihood” in its *Marshall* decisions, no explicit definitions of the terms were provided. The term “necessaries” was taken from the Peace and Friendship Treaties of 1760 and 1761, which provided context for the term. However, the term “moderate livelihood” was introduced in the *Marshall* decisions as a modern synonym for “necessaries,” but was not defined. No widely accepted definition of “moderate livelihood” appears to exist to date.

Justin Martin, Fishery Coordinator of the Potlotek First Nation, indicated that defining and quantifying the concept of moderate livelihood is the responsibility of each Mi'kmaq community. In his view, it is “beyond the scope of this Committee” to provide any legal definition for the concepts of moderate livelihood and moderate livelihood fishery.<sup>38</sup>

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35 Chief George Ginnish, Chief Executive Officer, North Shore Mi'kmaq District Council, Eel Ground First Nation, [Evidence](#), 16 November 2020.

36 Chief Darlene Bernard, Lennox Island First Nation, [Evidence](#), 16 November 2020.

37 Eric Zscheile, Barrister and Negotiator, Kwilmu'kw Maw-klusuaqn Negotiation Office, [Evidence](#), 30 November 2020.

38 Justin Martin, Fishery Coordinator, Mi'kmaq Rights Initiative, Potlotek First Nation, [Evidence](#), 29 October 2020.



DFO must first understand Mi'kmaq communities needs and empower them to envision what a moderate livelihood represents for them. The Minister appeared to agree:

With regard to the definition of a moderate livelihood, I think the big thing here to remember is that we've built systems as governments throughout history that did not include the Mi'kmaq or First Nations in those systems. We need to make sure that what we're doing now is allowing the First nations to define the moderate livelihood for themselves. This can't be a top-down approach from government. This has to be something that comes directly from the Mi'kmaq. Although everyone seems to think it would be a much easier solution if the government just had a definition and then put everybody in place, I don't believe that's the best way forward.<sup>39</sup>

It is beyond the scope of the Committee to define what would constitute a moderate livelihood. Members also recognize that the Committee is not participating in the nation-to-nation negotiations.

#### **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 2**

**That the Government of Canada work in partnership with Mi'kmaq and Maliseet communities to help define a moderate livelihood in a manner that is consistent with its cultural significance and distinct needs of the Mi'kmaq and Maliseet, and within the Constitution and laws of Canada.**

#### **Recommendation 3**

**That the implementation of a moderate livelihood fishery consider the evolution of Mi'kmaw and Maliseet participation in various lobster fisheries in the years since the *Marshall* decisions.**

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39 Hon. Bernadette Jordan, Minister of Fisheries, Oceans and the Canadian Coast Guard, [Evidence](#), 18 November 2020.



**Recommendation 4**

**That the federal government undertake discussions with all appropriate Mi'kmaq and Maliseet representatives to help determine which persons are entitled to treaty rights affirmed by the *Marshall* decisions.**

**Recommendation 5**

**That the Government of Canada work with the Mi'kmaq and Maliseet nations to help ensure that any agreement to implement a moderate livelihood fishery directly benefits the members of the community through job creation and other economic opportunity, and the proceeds of the catch is transparent for members of the community.**

**Recommendation 6**

**That the federal government provide their negotiators a clear and flexible mandate with which to engage in negotiations with Indigenous representatives.**

**Recommendation 7**

**That the federal government undertake a fulsome review of all investments, materials and actions delivered to Mi'kmaq and Maliseet communities by the government to accommodate fish harvesting treaty rights confirmed by the *Marshall* decisions in an effort to ascertain how effective the government's efforts have been in achieving their objectives. Further, the results of this review must be made public.**

**Recommendation 8**

**That the federal government recognize the Mi'kmaq 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.**

**Recommendation 9**

**That Fisheries and Oceans Canada provide clear information on policy objectives, pathways and timetables related to the implementation process of the treaty right to fish to support a moderate livelihood.**



## Moderate Livelihood Treaty Right and Fishery Governance

### Authority for Fishery Management

Challenges in implementing the *Marshall* decisions involve fishery governance. According to Mi'kmaw witnesses, the implementation of the Supreme Court of Canada decision should not be considered as a regulatory issue but as a rights issue which would include recognizing a role for Mi'kmaq communities in the management and stewardship of fishery resources.<sup>40</sup> In the view of Chief Darcy Gray:

DFO insists on forcing Mi'kmaw treaty fisheries into the mould that was developed for non-Indigenous commercial fisheries. We do not fit that mould. That mould was not made for us. The restrictions that mould imposes are not justifiable. We are more than capable of designing an approach to fisheries governance that does reflect our rights, values and ambitions, but DFO has not been willing to work with us. By failing to offer any reasonable accommodation of our treaty, DFO provides no other alternative for us than to self-regulate. In a way, I'm thankful for it. It has made it obvious to our fishers and community members that we are capable of assuming this responsibility. Self-determination and self-government are the future of our fishery.<sup>41</sup>

Chief Wilbert Marshall indicated that DFO's approach in accommodating Mi'kmaw moderate livelihood treaty right through increasing communal commercial access managed under DFO regulations has failed Mi'kmaq communities. He stated:

DFO continues to look at a treaty right to a moderate livelihood through a colonial lens. They have continued to maintain their position that we should fish under their rules, using their licences and their reasons. We have the right to self-govern, and that includes the right to govern our fisheries and to develop our own sustainable livelihood fisheries, separate from the commercial fisheries.<sup>42</sup>

The Committee notes that under section 9.1 of the *Fisheries Act*, the Minister of Fisheries and Oceans retains the ultimate authority for fisheries management orders. Members also heard that many commercial fishing associations were opposed to Mi'kmaw self-regulated moderate livelihood fisheries. Bernie Berry, for example, indicated:

This [negotiation] process must recognize that there can only be one regulator and one set of rules for all. We cannot entertain any thought of having multiple regulatory

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40 Justin Martin, Fishery Coordinator, Mi'kmaq Rights Initiative, Potlotek First Nation, *Evidence*, 29 October 2020.

41 Chief Darcy Gray, Listuguj Mi'gmaq Government, *Evidence*, 26 October 2020.

42 Chief Wilbert Marshall, Potlotek First Nation, *Evidence*, 29 October 2020.

regimes. If there are multiple regulators for one fishery it will only lead to confusion, non-compliance, lack of science, lack of enforcement, etc.<sup>43</sup>

According to Naomi Metallic, Chancellor's Chair in Aboriginal Law and Policy and Assistant Professor at Dalhousie University, in the legal pluralism context resulting from both DFO and Mi'kmaq communities having a role in the management and regulation of fishery resources, differences in law, regulations or policies could be resolved through negotiations similar to conflicts between the federal and provincial governments in the Canadian federalism context.<sup>44</sup>

In a written submission to the Committee, Chief Darcy Gray argued that, despite the ministerial discretion under the *Fisheries Act*, section 35 of the *Constitution Act, 1982*, protects treaty rights and “constrain[s] the Minister’s authority and discretion.”<sup>45</sup> He pointed out that case law has evolved since the *Marshall* decisions and the Supreme Court of Canada explained in 2014 that “[t]he guarantee of Aboriginal rights in s. 35 of the *Constitution Act, 1982*, like the *Canadian Charter of Rights and Freedoms*, operates as a limit on federal and provincial legislative powers.”<sup>46</sup>

#### **Recommendation 10**

**That commercial fisheries for Indigenous and non-Indigenous harvesters must be conducted under one set of conservation-based and safety rules and regulations for all participants in a particular fishery.**

#### **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 resources within their traditional ancestral homeland territories, and within the Constitution and laws of Canada.**

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43 Bernie Berry, President, Coldwater Lobster Association, *Evidence*, 25 November 2020.

44 Naomi Metallic, Chancellor's Chair in Aboriginal Law and Policy and Assistant Professor, Schulich School of Law, Dalhousie University, As an Individual, *Evidence*, 16 November 2020.

45 Chief Darcy Gray, Listuguj Mi'gmaq Government, *Brief*, 3 November 2020.

46 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 142.



### **Recommendation 12**

**That the Government of Canada recognize that the Mi'kmaq and Maliseet people have an interest not just in fishing, but also in the management of fisheries as nations and not just stakeholders.**

### **Recommendation 13**

**That the Government of Canada consider alternate governance models that are consistent with treaty and Canadian law that share authority and decision-making with Mi'kmaq and Maliseet nations.**

## **Co-Management as a Potential Way Forward**

In Thierry Rodon's opinion, the Government of Canada recognized the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*, through its *Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* policy launched in 1995.<sup>47</sup> Therefore, the Associate Professor and Canada Research Chair in Sustainable Northern Development at Université Laval suggested that co-management could represent a way forward:

The co-management of natural resources allows for the recognition of a dual authority: that of the federal government over the commercial fisheries and that of the Indigenous communities over the management of their resources.

Susanna Fuller, Oceans North Canada, also noted that co-management could play a key role in reconciliation.<sup>48</sup> She mentioned DFO's 2004 Atlantic Fisheries Policy Review (AFPR) stating:

An important objective of this policy framework is to provide for Aboriginal participation and involvement in fisheries management decision-making processes so as to promote collaboration between all resource users.

The AFPR defines co-management as the "sharing of responsibility and accountability for results between Fisheries and Oceans Canada and resource users, and in time and with the required legislative amendments, the sharing of authority for fisheries

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47 Thierry Rodon, Associate Professor and Canada Research Chair in Sustainable Northern Development, Université Laval, As an Individual, [Evidence](#), 2 November 2020.

48 Susanna Fuller, Oceans North Canada, [Evidence](#), 23 November 2020.

management.”<sup>49</sup> DFO’s 2007 Integrated Aboriginal Policy Framework also commits DFO to working with First Nations to increase their participation in “aspects of the management and protection of aquatic resources, including policy and program formulation, planning, resource management decision-making and program delivery.”<sup>50</sup>

Eric Zscheile provided the Committee with examples of successful co-management models and RRAs regarding wildlife management involving First Nations, Parks Canada and the Province of Nova Scotia.<sup>51</sup> He regretted the fact that DFO is “unique” in co-opting the “label of RRA and appl[ying] it to a process that is not consistent with the spirit or intent of the RRA concept.” He added:

It is [a] process that DFO has unilaterally developed based on their own regulatory models. It's a process that is founded on self-serving and purposely obstructive mandates. To date, I would not classify any engagements with DFO as true to the RRA.

### Adjacency as an Access Criterion

Referring to the case of the inland Sipekne’katik First Nation launching its self-regulated moderate livelihood lobster fishery in St. Mary’s Bay, about 300 km away from the nation’s territory, Sterling Belliveau, Former Minister of Fisheries and Aquaculture of Nova Scotia, indicated that adjacency to a nation’s territory must be a criterion determining its moderate livelihood fishery access.<sup>52</sup> The Committee heard Bernie Berry sharing that point of view:

Adjacency must be a major component of any discussions pertaining to a moderate livelihood also. First Nations have traditional territories that they have hunted and fished. First Nations cannot simply choose where they want to fish. Traditional grounds, areas and territories must be established and adhered to by First Nations.<sup>53</sup>

While DFO’s New Access Framework mentions that “priority of access should be granted to those who are closest to the fishery resource in question [...] on the implicit assumption that access based on adjacency will promote values of local stewardship and

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49 DFO, *Atlantic fisheries policy review - A policy framework for the management of fisheries on Canada's Atlantic Coast*.

50 DFO, *An Integrated Aboriginal Policy Framework*.

51 Eric Zscheile, Barrister and Negotiator, Kwilmu’kw Maw-klusuaqn Negotiation Office, *Evidence*, 30 November 2020.

52 Sterling Belliveau, Retired Fisherman, Former Minister of Fisheries and Aquaculture of Nova Scotia, As an Individual, *Evidence*, 2 December 2020.

53 Bernie Berry, President, Coldwater Lobster Association, *Evidence*, 25 November 2020.



local economic development,”<sup>54</sup> it should be noted that neither the Supreme Court of Canada, in its *Marshall* decisions, nor this Committee, in its 1999 report on the implications of *Marshall*, mentioned the concept of adjacency as an access criterion in the context of moderate livelihood fishing.

In addition, the Committee heard historian William Craig Wicken pointing out the fact that the Mi’kmaq were gradually displaced from coastal areas during settler colonization of Nova Scotia. He stated:

Most Mi’kmaq people actually live below the Shubenacadie River, in the areas of Queens, Shelburne and Yarmouth, as well as in Kings county. It was a gradual process. They were dispossessed from their coastal areas where they had historically lived. These are a coastal people and they’re a fishing people.

Reserves were created beginning in the 1840s, but most of them were inland and very, very small, and as in Bear River and Shubenacadie, which are on swampland, they are not very accessible to coastal areas.<sup>55</sup>

#### **Recommendation 14**

**That, in its transferring of new communal commercial licences to First Nations communities, the federal government consider the principle of adjacency.**

### **CONSERVATION OF FISHERY RESOURCES AND ENFORCEMENT OF FISHERY REGULATIONS**

Mi’kmaw self-regulated moderate livelihood lobster fisheries in Nova Scotia were launched in Fall 2020, outside of the DFO-regulated commercial fishing seasons. This has raised conservation of fishery resources concerns from some fishers and biologists. Questions related to DFO’s authority in enforcing fishery regulations and infringement on treaty rights based on conservation objectives were also raised.

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54 DFO, [New Access Framework](#).

55 William Craig Wicken, Professor, Department of History, York University, As an Individual, [Evidence](#), 16 November 2020.

## Lobster Conservation

### DFO-Regulated Conservation Measures

The lobster fishery management is based on effort control with a limited number of participants and allowable harvest gear. Michael Barron, Cape Breton Fish Harvesters Association, reminded the Committee of this fishery's particularities:

The lobster fishery was the first to introduce a limited entry in an effort to stabilize employment within the industry and address the historical trend of increased participation during the high production cycle, followed by disinvestment and withdrawal from the industry by those not solely dependent on it. Even with such limits, licence buyback programs in the 1970s, and as recently as the early 2000s, were necessary to try to match participant numbers with the available resources.<sup>56</sup>

According to Colin Sproul, President of the Bay of Fundy Inshore Fishermen's Association, the "centre of the current crisis in St. Mary's Bay is sustainability" of the lobster resource.<sup>57</sup> To ensure that sustainability, commercial fishing associations indicated that, over the years, their members have worked with DFO to reduce fishing efforts in the limited-entry inshore fishery by implementing conservation measures such as limits on the number of traps, limited and staggered fishing seasons, protection of egg-bearing females, and minimum and maximum lobster size limits.<sup>58</sup> Since 2006, for example, the Regroupement des pêcheurs professionnels de homard du Sud de la Gaspésie has implemented measures to reduce lobster fishing efforts by 30%.<sup>59</sup> As Kent Smedbol, manager at DFO, told the Committee, this precautionary approach has resulted in healthy lobster stocks throughout Atlantic Canada.<sup>60</sup>

Michael Dadswell, a former DFO biological scientist and retired professor of biology, raised the following concerns related to out-of-season fishing:

Mature females only moult and reproduce once every two years. This slows their growth, and when they are not berried—i.e. carrying eggs—they stay longer in the exploitation window. It is therefore extremely important to protect them.

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56 Michael Barron, Cape Breton Fish Harvesters Association, [Evidence](#), 26 October 2020.

57 Colin Sproul, President, Bay of Fundy Inshore Fishermen's Association, [Evidence](#), 21 October 2020.

58 DFO, [Lobster](#).

59 O'neil Cloutier, Director General, Regroupement des pêcheurs professionnels du Sud de la Gaspésie, [Evidence](#), 21 October 2020.

60 Kent Smedbol, Manager, Population Ecology Division, Maritimes Region, DFO, [Evidence](#), 23 November 2020.



[...]

In the Gulf of St. Lawrence, because of warm summer temperatures females matured at a younger age, about five to six years. They were soft-shelled by late June—that meant they could be inseminated at that time—and they usually released the eggs by August.

In southwest Nova Scotia—lobster district 34, about which we're talking a lot—the females mature much later, at seven to eight years. They're soft-shelled in July and August, and egg release does not occur until October or November.

[...]

Taking lobster outside the season leads to recruitment over-exploitation through the loss of females to the stock, the higher mortality of soft-shell animals and less consumer appreciation.<sup>61</sup>

The potential for an excessive localized fishing pressure introduced by the launch of moderate livelihood fisheries was mentioned as an additional conservation concern by many commercial fishing associations. Michael Barron explained:

Commercial harvesters quite logically fear that unknown amounts of additional or changed effort, especially if these are concentrated in a few areas, could seriously reduce catches in targeted areas, while leaving others untouched.<sup>62</sup>

In the Executive Director of the Maritime Fishermen's Union Martin Mallet's view, tensions between First Nation and commercial fishers have also arisen in the past regarding out-of-season FSC fishing.<sup>63</sup> For Kevin Squires, President, Local 6, Maritime Fishermen's Union, transparency on the limits placed on moderate livelihood fishing activities in terms of number of participants and total catch is critical to ensure resource conservation.<sup>64</sup> Consequently, commercial fishing associations called for moderate livelihood lobster fisheries to be conducted under DFO regulations and in season. Peter Connors, President of the Eastern Shore Fisherman's Protective Association, summarized the industry's position as follows:

The potential for a massive competing non-compliant fishery is the real threat to our multi-billion-dollar industry and resources. Without the support of the existing compliant participants within industry, conservation and protection will be threatened. The operative terms here are “competing” rather than limited or regulated, and

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61 Michael Dadswell, Professor of Biology (Retired), As an Individual, [Evidence](#), 30 November 2020.

62 Michael Barron, Cape Breton Fish Harvesters Association, [Evidence](#), 26 October 2020.

63 Martin Mallet, Executive Director, Maritime Fishermen's Union, [Evidence](#), 29 October 2020.

64 Kevin Squires, President, Local 6, Maritime Fishermen's Union, [Evidence](#), 29 October 2020.



“compliant” rather than non-compliant. Moderate livelihood is best achieved through the existing framework for both Indigenous and non-Indigenous fishermen.<sup>65</sup>

The Committee also heard from Kent Smedbol that, in addition to biological considerations, there are “economics related to the seasons as well.”<sup>66</sup> For Shelley Denny, a member of the Potlotek First Nation, sea ice conditions can play a role in determining the timing of commercial fishing seasons.<sup>67</sup> She further explained that “there are reasons for the season, but most of them are around the market conditions. Canada prefers to sell all the hard-shell lobster.”

#### **Recommendation 15**

**That Fisheries and Oceans Canada’s science sector conduct a thorough evaluation of the Atlantic and Quebec lobster stocks and determine the environmental and ecological impacts of all fishing activities taking place outside of the currently established fishing seasons.**

#### **Recommendation 16**

**That, in Fisheries and Oceans Canada’s implementation and regulation of fishing seasons, decisions be based on the best available science surrounding stock health and conservation, including water temperature, moulting and breeding timelines, hardness of shell, and other factors.**

#### **Recommendation 17**

**That fisheries must be managed by Fisheries and Oceans Canada under the leadership of the Minister of Fisheries and Oceans with the long-term preeminent objective of conservation of Canada’s shared fisheries resources.**

#### **Recommendation 18**

**That Fisheries and Oceans Canada recognize the historic science that supports lobster fishing at different times of the year in different locations due to the reproduction cycle of lobster from insemination through egg extrusion and ultimate egg release as a period of prohibited fishing for all fishers Indigenous and non-Indigenous.**

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65 Peter Connors, President, Eastern Shore Fisherman's Protective Association, [Evidence](#), 29 October 2020.

66 Kent Smedbol, Manager, Population Ecology Division, Maritimes Region, DFO, [Evidence](#), 23 November 2020.

67 Shelley Denny, As an individual, [Evidence](#), 21 October 2020.



## **Netukulimk and Mi'kmaw Conservation-Based Practices**

Justin Martin pointed out that conservation of fishery resources is also a “primary management value” for First Nations.<sup>68</sup> Self-regulated moderate livelihood fisheries are conducted according to Mi'kmaw conservation-based practices following community consultation and consensus. *Netukulimk* principles are intended to provide a common set of minimum standards for Mi'kmaq fishing in pursuit of a moderate livelihood.

Justin Martin explained:

*Netukulimk* is the definition we use. It's the use of the natural bounty provided by the Creator for the self-support and well-being of the individual and the community by achieving adequate standards of community nutrition and economic and spiritual well-being without jeopardizing the integrity, diversity or productivity of the natural bounty. It was very clear early in our development of these [harvest management] plans, in meeting with the assembly and with chiefs and councils, with the grand council, that *netukulimk* was the core principle around all the development.

Our concept of conservation is *netukulimk*. We go as far as to speak to the spiritual well-being of the person and of the environment to ensure that not only is the species conserved but the people who are harvesting are also taken care of at all levels.<sup>69</sup>

Referring to out-of-season fishing by the Potlotek First Nation, Justin Martin indicated:

The community came to the conclusion that they would like to fish two separate seasons, one in the fall and one alongside the commercial industry in the spring. Through a number of community sessions, we have analysed conservation-based practices, including the commercial seasons, and the reasons why those seasons have been implemented by DFO with recommendations from the lobster associations.

We came to the conclusion, as a community, that they would like to follow conservation-based practices only. They would not like to follow marketability and market access-type reasoning, so they supported the common understanding that the summer or the highest water temperatures increased lobster trapability and vulnerability during the spawning cycle and the moulting cycle, and they chose to start fishing October 1, which is common in other areas of the province. There is an August-September season in the gulf, which is northern Nova Scotia. Southwest Nova Scotia season starts in the middle of October.<sup>70</sup>

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68 Justin Martin, Fishery Coordinator, Mi'kmaq Rights Initiative, Potlotek First Nation, [Evidence](#), 29 October 2020.

69 Justin Martin, Fishery Coordinator, Mi'kmaq Rights Initiative, Potlotek First Nation, [Evidence](#), 29 October 2020.

70 Justin Martin, Fishery Coordinator, Mi'kmaq Rights Initiative, Potlotek First Nation, [Evidence](#), 29 October 2020.

Chief Darlene Bernard reminded the Committee that the “Mi’kmaq have survived for thousands of years by embracing a sustainable approach to harvesting resources.”<sup>71</sup> She added:

Mi’kmaq people have lived in Epekwitk for 12,000 years, and our priority for the resources has always been and always will be inherently based on conservation. We are not looking to exploit the fisheries. For centuries, we have existed in accordance with the principle of *netukulimk*: taking what you need and leaving the rest for the next generation.

We have respect and gratitude for our resources. Any overfishing of a particular species in this country that has raised alarms over conservation has only happened as a result of post-colonial, non-Indigenous commercial fishing.

[...]

It must also be noted that if there were to be any issues regarding conservation, the privilege-based commercial fishery would be the first place where limitations would need to be explored, not the rights-based livelihood fishery.

According to Thierry Rodon, both First Nation and non-First Nation fishers share the same interest in conducting fisheries in a responsible way and implementing conservation measures. He referred to his experience of working with the Innu in Quebec as follows:

According to my experience of working with the Innu, they have as much, if not more, interest in managing the resource as responsibly as everyone else. Clearly, the Indigenous people are not going to move. The Mi’kmaq, who have been around for millennia, are not going to deplete the resource and then move away, as is often the case with other fishers.<sup>72</sup>

Enhancing conservation collaboration between Mi’kmaq and commercial fishers was seen by many witnesses as a way forward. Although differences in values and beliefs underpinning Indigenous knowledge systems and Western science may create barriers, exploring solutions through the lens of both knowledge systems, referred to by Shelley Denny as “two-eyed seeing,” may be critical to resolving conflicts.<sup>73</sup> O’neil Cloutier, Director General of the Regroupement des pêcheurs professionnels du Sud de la

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71 Chief Darlene Bernard, Lennox Island First Nation, *Evidence*, 16 November 2020.

72 Thierry Rodon, Associate Professor and Canada Research Chair in Sustainable Northern Development, Université Laval, As an Individual, *Evidence*, 16 November 2020.

73 Shelley Denny, As an individual, *Evidence*, 21 October 2020.



Gaspésie, provided an example of such collaboration between the Maliseet of Viger First Nation and commercial fishers in Gaspésie, Quebec. He explained:

As you know, there are three Mi'kmaq Indigenous bands in our region, as well as the Maliseet of Viger First Nation. We all participate in the advisory committee to develop proper rules and measures for the exploitation of this resource. We meet every year, and everyone comes to the table. In 2006, we decided that we needed to take many measures to preserve the resource, and the Indigenous communities agreed. Today, they're reaping the benefits.

In our view, collaboration is easy. I'll provide an example. In 2020, the advisory committee decided to entrust the co-management of the 2021 advisory committee to an indigenous group, the Maliseet of Viger. This group agreed to manage the advisory committee with Fisheries and Oceans Canada.<sup>74</sup>

Opportunities for conservation collaboration between DFO, Mi'kmaq and commercial fishers also include joint data collection. The Committee heard Susanna Fuller proposing:

As the moderate livelihood fisheries expand to other species and new areas, it's imperative that there be joint data collection protocols, science assessments and consideration of fishery-wide conservation matters to ensure that we are not jeopardizing the future of communities, human and ecological, First Nations and non-First Nations. Integrating the two-eyed seeing into how we manage fisheries will also be an important step.<sup>75</sup>

In Shelley Denny's opinion, if conservation is an issue, DFO should create opportunities to incorporate Mi'kmaq input, including potential changes in the seasons, into its Integrated Fisheries Management Plans used to guide the conservation and sustainable use of marine resources.<sup>76</sup> It should be noted that, on its website, DFO mentions the use of a combination of "science and Indigenous traditional knowledge on fish species with industry data to determine best practices for harvest."<sup>77</sup>

### **Recommendation 19**

**That the Government of Canada provide the necessary resources for the implementation of the right to a moderate livelihood fishery, including the funds necessary to develop,**

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74 O'neil Cloutier, Director General, Regroupement des pêcheurs professionnels du Sud de la Gaspésie, *Evidence*, 21 October 2020.

75 Susanna Fuller, Oceans North Canada, *Evidence*, 23 November 2020.

76 Shelley Denny, As an individual, *Evidence*, 21 October 2020.

77 DFO, *Integrated fisheries management plans*.

**implement, and adopt best practices involving transparency and accountability within Mi'kmaq and Maliseet communities.**

**Recommendation 20**

**That Fisheries and Oceans Canada incorporate *Netukulimk*, and Mi'kmaq and Maliseet knowledge in setting limitations on an individual right to practice a moderate livelihood and enhance resource stewardship.**

**Recommendation 21**

**That Fisheries and Oceans Canada foster greater collaboration between Mi'kmaq, Maliseet, and non-First Nation fishers on conservation issues.**

**Recommendation 22**

**That Fisheries and Oceans Canada implement joint data collection protocols, science assessments and consideration of fishery-wide conservation matters to ensure the future of coastal communities.**

## **Conservation as a Justified Ground for Treaty Right Restrictions**

The Supreme Court of Canada has clarified, in *Marshall II*, that the federal government could restrict the exercise of treaty rights for conservation reasons or other justified grounds. Most witnesses, including commercial fishers, agreed, however, that any potential infringement must pass the *Badger* test. The Committee notes that Claire Canet, Regroupement des pêcheurs professionnels du Sud de la Gaspésie, provided a different interpretation of the *Marshall* decisions and argued that conservation-related restrictions to treaty rights would not be subject to the *Badger* test.<sup>78</sup> To pass the *Badger* test, Colin Sproul called for a meaningful engagement process between the federal government and the Mi'kmaq people:

The first part of that test is a real consultation process with the Mi'kmaq. For the last 21 years, there has never been a consultation process. That is maybe partly because it wasn't set up right for the Mi'kmaq people, but also because Indigenous fishery leaders refused to engage in a consultative process—literally putting a sign on the table that said, “This is not a consultation; it's a negotiation.” I would venture to say that for the

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78 Claire Canet, JOBEL Project Officer, Regroupement des pêcheurs professionnels du Sud de la Gaspésie, [Evidence](#), 21 October 2020.



government to be able to pass the *Badger* test, the chiefs within Nova Scotia have to be willing to engage in it.<sup>79</sup>

In Naomi Metallic's view, conservation is a valid regulatory objective but the federal government must also bring evidence supporting that objective and ensure it meet its fiduciary duty and honour of the Crown by prioritizing Aboriginal and treaty rights in terms of access to the resource.<sup>80</sup> The Committee was provided with examples of Mi'kmaw harvest management plans designed to ensure the conservation of fishery resources. These plans include rules for conservation, safety and accountability. Chief Darcy Gray referred to the Listuguj Mi'kmaq Government's lobster fishing management plan as follows:

We understand the need for a well-regulated fishery. We understand that with rights comes responsibility. After several years of community consultation, we adopted our own law and fishing management plan to govern our lobster fishery. Our law and plan allow our people to sell their lobster but ensure that fishing efforts remain sustainable. For the last two falls, we have conducted our own self-regulated fishery. Lobster stocks in our fishing area remain healthy. We have not seen violence like that being witnessed in Nova Scotia. We see our lobster fishery as a self-determination success story. We tried to get here working with DFO. In the end, though, we got here in spite of DFO.<sup>81</sup>

Although Kent Smedbol evaluated the Eskasoni-Unama'ki's ecosystem-based management plan in the Bras d'Or Lake area in Nova Scotia as "comprehensive" and "high quality,"<sup>82</sup> the Committee did not receive information from DFO regarding the department's assessment and rejection of harvest management plans proposed by various Mi'kmaq communities. Chief Wilbert Marshall indicated that the Potlotek First Nation has demonstrated transparency and accountability in sharing its harvest management plan with DFO and local commercial fishing associations. He expressed his disappointment with DFO's response:

We have shared our work with the federal government and local fishing associations. In fact, we posted our plan publicly so everyone could see and access our rules on conservation, safety and harvesting. We have tried to work nation to nation, but we have been met with DFO slamming doors in our face. It has become clear that DFO seems to think the only way forward is their way. This isn't a meaningful dialogue. This

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79 Colin Sproul, President, Bay of Fundy Inshore Fishermen's Association, [Evidence](#), 21 October 2020.

80 Naomi Metallic, Chancellor's Chair in Aboriginal Law and Policy and Assistant Professor, Schulich School of Law, Dalhousie University, As an Individual, [Evidence](#), 16 November 2020.

81 Chief Darcy Gray, Listuguj Mi'gmaq Government, [Evidence](#), 26 October 2020.

82 Kent Smedbol, Manager, Population Ecology Division, Maritimes Region, DFO, [Evidence](#), 23 November 2020.

isn't reconciliation. This is the top-down approach, one that meets the needs of only one party.<sup>83</sup>

### **Recommendation 23**

**That the Minister of Fisheries and Oceans follow the direction in the *Marshall* case from the Supreme Court that “[t]he paramount regulatory objective is the conservation of the resource. This responsibility is placed squarely on the Minister and not on the aboriginal or non-aboriginal users of the resource.” In any agreement with First Nations, only the Minister can be the regulator and the regulatory authority if we are to comply with the Court.**

### **Recommendation 24**

**That Fisheries and Oceans Canada acknowledge that moderate livelihood treaty rights can only be regulated for conservation purposes and compelling and substantial public objectives.**

### **Recommendation 25**

**That Fisheries and Oceans Canada establish a meaningful consultation process to ensure that the conservation objective of a proposed restriction to treaty rights is understood by the Mi'kmaq and Maliseet communities it would affect and that it goes no further than necessary to meet that objective.**

## **Monitoring of Fishery Activities and Enforcement of Fishery Regulations**

Robust monitoring of fishery activities and catch reporting are essential to produce accurate, dependable, and timely data relied upon by fishery officers in charge of enforcing regulations. An effective enforcement of regulations is required to support the sustainable management of fisheries.<sup>84</sup>

## **Monitoring and Enforcement by Fisheries and Oceans Canada**

In the view of witnesses representing commercial fishing associations, DFO has not consistently enforced its fishery regulations. This has created uncertainties for the

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83 Chief Wilbert Marshall, Potlotek First Nation, *Evidence*, 29 October 2020.

84 DFO, *Fishery Monitoring Policy*.



industry, raising questions regarding the department's capacity to regulate, and contributing to "chaos and the animosity between fishermen."<sup>85</sup> Peter Connors indicated:

Insecurity and instability are created in the absence of a permanent settlement and clarification of the department's authority or capacity to regulate the resource. The ambiguity as to the level of necessity required by the *Badger* test creates the danger that the level of necessity required for the department to act may prevent the authorities from taking pre-emptive action and allow a situation to spiral out of control.<sup>86</sup>

Concerns were also raised by some witnesses regarding DFO's perceived inaction against the sales of catch from FSC fisheries. Although Richard Williams indicated that these illegal activities are often "sponsored by or at the initiative of non-Indigenous actors in the industry," Gary Hutchins mentioned that deficiencies in DFO monitoring and enforcement activities contributed to increase fears in the industry for the sustainability of the resource. The Committee notes that the responsibility to award licences to buyers and processors is provincial, and provinces should be enforcing and ensuring that the buyers are acting lawfully.

According to Alan Clarke, retired South West Nova Scotia Area chief of enforcement at DFO, a proper financial and human resources level to ensure robust monitoring and enforcement activities is lacking at DFO.<sup>87</sup> Gary Hutchins illustrated the situation:

Certainly, in order to do the job effectively, we need more manpower. When it comes to resources, we need more capital to put into officers. When it comes to training, I think we're pretty well trained. However, if we don't have the resources—the boots on the ground, as it were—to monitor compliance and make sure that it exists within a fishery, then we're doing a disservice to the people involved in that fishery, whether they are indigenous fishermen or commercial fishermen.

We have seen over the years in all aspects of the fishery that at times we have no resources for anything. Sometimes we've even been told to park our vehicles because we can't put gas in them.<sup>88</sup>

To help establish a more comprehensive fishery monitoring program, Richard Williams proposed the use of electronic monitoring on vessels as well as enhanced dockside

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85 Colin Sproul, President, Bay of Fundy Inshore Fishermen's Association, [Evidence](#), 21 October 2020.

86 Peter Connors, President, Eastern Shore Fisherman's Protective Association, [Evidence](#), 29 October 2020.

87 Alan Clarke, South West Nova Scotia Area Chief of Enforcement (Retired), DFO, [Evidence](#), 25 November 2020.

88 Gary Hutchins, Detachment Supervisor (Retired), DFO, [Evidence](#), 2 December 2020.



monitoring.<sup>89</sup> In his view, it is critical to put in place an integrated monitoring infrastructure into which data can be fed.

#### **Recommendation 26**

**That, in light of the alarming testimony given, Fisheries and Oceans Canada, in collaboration with provincial, Mi'kmaq and Maliseet governments develop a plan for investigating, enforcing, and eliminating the unrecorded illegal sale of lobster by all fisheries.**

#### **Recommendation 27**

**That, in light of the Minister of Fisheries and Oceans' testimony highlighting systemic racism and, as effective enforcement is crucial to conservation, Fisheries and Oceans Canada must rigorously enforce fisheries regulations with impartiality and consistency.**

#### **Recommendation 28**

**That Fisheries and Oceans Canada be provided with the resources to fulfil its obligation to conserve the resource. This means that the Department must have sufficient numbers of enforcement officers and that those officers must be provided with the clear mandate and equipment to do their job safely and effectively.**

### **First Nation-Led Monitoring and Enforcement**

The Committee heard from Mi'kmaq witnesses about community-led monitoring and enforcement activities. Chief Darcy Gray provided the example of the Listuguj Mi'gmaq Government training conservation officers in charge of enforcing the Listuguj harvest management plan.<sup>90</sup> The community also has dockside monitors counting lobster as the catch comes off the boat.

### **Opportunities for Monitoring and Enforcement Collaboration**

Monitoring of fishery activities and enforcement of fishery regulations were seen by witnesses as areas of concern but also of collaboration opportunities between DFO, First Nation and commercial fishers. Chief Darlene Bernard expressed the wish for DFO to work with Mi'kmaq communities to help them develop their enforcement and science

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89 Richard Williams, Research Director, Canadian Council of Professional Fish Harvesters, [Evidence](#), 25 November 2020.

90 Chief Darcy Gray, Listuguj Mi'gmaq Government, [Evidence](#), 26 October 2020.



capacity.<sup>91</sup> Shelley Denny pointed out that First Nations are aware of possible governance gaps and abuse of rights, but need alternative enforcement models that would be culturally appropriate. She indicated:

While all Mi'kmaq have rights, not all Mi'kmaq are interested in pursuing livelihood fishing. Identifying those who want to fish is part of the process. Governance gaps exist at the community level as well and are of concern to DFO.

[...]

Governing based on cultural teachings passed down through families doesn't fit DFO's top-down, highly regulated approach to fisheries. However, there is a shared perspective that an alternative to current fisheries governance is lacking. The Mi'kmaq are aware that there are challenges regarding the exercise of rights, including the abuse of rights, and there is a need for ways to address them that are culturally appropriate, since they involve ethical issues that cannot be addressed by DFO or the Canadian legal system. It is a necessity for the Mi'kmaq to develop fishery and fishing rules.<sup>92</sup>

From Richard Williams's perspective, collaboration between all parties is key to ensure the sustainable management of fishery resources in the long term. He stated:

I guess my approach to this focused on the fact that in the medium to long term, we are not going to be able to use fisheries officers and have rules enforced by officials on the water as a way to solve these problems. The key in the medium to long term is going to be to get agreements among people who are working together on the water and to have dialogue and collaboration take place at the community level. That's where I think the minister needs to lead this overall exercise in the immediate future.<sup>93</sup>

## Recommendation 29

**That, in order to ensure safety and conservation, Fisheries and Oceans Canada work with the Mi'kmaq and Maliseet to build the capacity needed to enforce and manage the fishery with assistance from Mi'kmaw and Maliseet organizations. This increased capacity would include monitoring ability, training, science and research, operationalizing Mi'kmaw conservational values like *Netukulimk*, and the administrative capacity to provide transparency to the Mi'kmaq and Maliseet within their communities.**

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91 Chief Darlene Bernard, Lennox Island First Nation, [Evidence](#), 16 November 2020.

92 Shelley Denny, As an individual, [Evidence](#), 21 October 2020.

93 Richard Williams, Research Director, Canadian Council of Professional Fish Harvesters, [Evidence](#), 25 November 2020.

### Recommendation 30

**That Fisheries and Oceans Canada consider the viability of alternative enforcement models, such as partnerships with Indigenous-led enforcement regimes, like the Listuguj Mi'gmaq rangers or Indigenous Guardian program, and provide the Department the funding necessary to recruit qualified Indigenous personnel and engage directly with Indigenous communities and leadership in Nova Scotia and across Canada.**

### Recommendation 31

**That, through collaboration with the Mi'kmaq and Maliseet people, the Government of Canada (Crown-Indigenous Relations and Northern Affairs Canada and Fisheries and Oceans Canada) establish regulatory mechanisms to enhance transparency surrounding the lobster fishery within community.**

## FOSTERING COMMUNICATION AND TREATY EDUCATION

### Communication Needs

While recognizing and affirming the nation-to-nation nature of negotiations between First Nations and the federal government, the Committee heard testimony, both from First Nation witnesses as well as commercial fishers, calling for greater communication and trust between First Nations, commercial fishers and the federal government.

Chief Darcy Gray recommended including industry representatives in discussions, but without a veto and with a view towards developing understanding and education around the exercise of treaty rights.<sup>94</sup> Shelley Denny noted “constructive communication is needed between the two groups, some sharing of information, and definitely some education on what's going on, what's being harvested and how many people are out there.”<sup>95</sup>

The Northumberland Fishermen's Association also called for the recognition that commercial fishers' knowledge and interests are a valued part of any discussion that impacts the future of the inshore fishery.<sup>96</sup> Kevin Squires noted that he understands “the

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94 Chief Darcy Gray, Listuguj Mi'gmaq Government, *Evidence*, 26 October 2020.

95 Shelley Denny, as an Individual, *Evidence*, 21 October 2020.

96 Northumberland Fishermen's Association, *Brief*, 9 November 2020.



nature of nation-to-nation negotiations, but there has to be a place for commercial harvesters.”<sup>97</sup>

There was a strong view expressed by commercial fishing associations that they are being cut out of the conversation by DFO. This is leading to uncertainties and fears among all stakeholders concerning the future of the fishery. For example, O’neil Cloutier explained that:

Since October 30, 2019, the Regroupement has been calling on the Department of Fisheries and Oceans to put in place a process of discussion, dialogue and communication involving the first nations of the Gaspé Peninsula, the Regroupement and the department. To date, the department has still not responded to this call.<sup>98</sup>

Bernie Berry emphasized:

The implementation process of a moderate livelihood fishery must be determined through open dialogue with all affected parties. The most critical reason for this matter of a moderate livelihood fishery not moving forward has been a lack of transparency in the negotiating process.<sup>99</sup>

This statement was echoed by Alan Clarke, who stated with respect to the Minister’s communications during the unrest surrounding the launch of Sipekne’katik First Nation’s moderate livelihood lobster fishery: “I wouldn’t call it bad communication; I would have to call it no communication.”<sup>100</sup>

Melanie Sonnenberg noted “[w]e need a table. We need to come to that table collectively and work through this instead of doing it through the press, where we have a light shining.”<sup>101</sup> Martin Mallet also suggested “creat[ing] a dialogue table where everybody could speak together and talk about fisheries management.”<sup>102</sup>

Colin Sproul raised the precedent of the Northwest Atlantic Fisheries Organization (NAFO) “whereby the minister sits with other nations and directly negotiates and, in a

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97 Kevin Squires, President, Local 6, Maritime Fishermen’s Union, [Evidence](#), 29 October 2020.

98 O’neil Cloutier, Director General, Regroupement des pêcheurs professionnels du Sud de la Gaspésie, [Evidence](#), 21 October 2020.

99 Bernie Berry, President, Coldwater Lobster Association, [Evidence](#), 25 November 2020.

100 Alan Clarke, as an individual, [Evidence](#), 25 November 2020.

101 Melanie Sonnenberg, President, Canadian Professional Fish Harvesters Federation, [Evidence](#), 2 December 2020.

102 Martin Mallet, Executive Director, Maritime Fishermen’s Union, [Evidence](#), 29 October 2020.

side room, she takes advice from people from all parts of the fishing industry, Indigenous and non-Indigenous alike.”<sup>103</sup>

During the Minister’s appearance before the Committee, she reiterated that she “will continue to make every effort with industry to increase transparency, formalize the lines of communication and ensure that industry has meaningful opportunities to share their concerns and express their views.”<sup>104</sup> The Minister also highlighted the appointment of Allister Surette as a federal Special Representative with a mandate “to gather different perspectives and address real questions and concerns, with the goal of building a greater understanding. He will provide recommendations to the government on ways to move forward.”<sup>105</sup> It is the Committee’s hope that, in the future, DFO will act proactively in communicating with all stakeholders in the fishery.

### **Recommendation 32**

**That the Government of Canada look for opportunities to facilitate and bring the commercial fish harvesters and Indigenous moderate livelihood fishers together on a regular basis to participate in constructive dialogue, open communication, and mutual transparency. Further, the government should look to successful models where Indigenous fishers and other fish harvesting interests have been brought together, such as the Fraser River Peacemakers, as best practices in this endeavour.**

### **Recommendation 33**

**That there be increased constructive communication between commercial fishers, Mi’kmaq and Maliseet to share information on what is being harvested and how many people are out participating in the moderate livelihood fishery.**

### **Recommendation 34**

**That Fisheries and Oceans Canada recognize that commercial fishers’ knowledge and interests are a valued part of discussions that impact the future of the inshore fishery, and the proper resourcing of local management tables for communication and dialogue is crucial to having all voices heard.**

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103 Colin Sproul, President, Bay of Fundy Inshore Fishermen’s Association, [Evidence](#), 21 October 2020.

104 Hon. Bernadette Jordan, Minister of Fisheries, Oceans and the Canadian Coast Guard, [Evidence](#), 18 November 2020.

105 Hon. Bernadette Jordan, Minister of Fisheries, Oceans and the Canadian Coast Guard, [Evidence](#), 18 November 2020.



### Recommendation 35

**That, when delivering actions or decisions to accommodate Indigenous fish harvesting treaty rights, the federal government must publicly communicate their actions and decisions and the basis for them to foster greater understanding and reconciliation between Indigenous and non-Indigenous harvesters and communities.**

### Treaty Education and Addressing Systemic Racism

In addition to fostering communication between First Nation communities and commercial fishers, as well as between all parties and DFO, the Committee heard compelling testimony about the need for DFO to work towards developing material and capacity to educate fishing communities, as well as its own personnel, about treaty rights and address systemic racism.

To that end, Regional Chief Paul J. Prosper recommended implementing more education for government representatives and Canadians at large on the nature and existence of treaty rights and the treaty relationship.<sup>106</sup> Ian MacPherson, Executive Director of the Prince Edward Island Fishermen's Association, concurred, recognizing the need to educate commercial harvesters on the meaning and understanding of the treaties.<sup>107</sup>

Susanna Fuller called on DFO to invest in treaty and *Marshall* decisions education. She argued that there should have been real proactive work from DFO with independent fishers to figure out the way forward.<sup>108</sup> She also reiterated that this work should have started in 1999, in the immediate aftermath of the *Marshall* decisions, along with the reallocation of licences.

The Minister explained to the Committee that:

We're working right now with one of the fishing associations, the Canadian Independent Fish Harvesters' Federation, to offer some training or courses to harvesters who are

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106 Chief Paul J. Prosper, Regional Chief, Nova Scotia and Newfoundland, Assembly of First Nations, [Evidence](#), 26 October 2020.

107 Ian MacPherson, Executive Director, Prince Edward Island Fishermen's Association, [Evidence](#), 26 October 2020.

108 Susanna Fuller, Oceans North Canada, [Evidence](#), 23 November 2020.

interested in what it means to have a treaty right. Those are extremely important conversations. This is a first step.<sup>109</sup>

According to Richard Williams, independent fish harvesters increasingly recognize the existence of systemic racism and this emerging consensus would provide a “constructive basis for dialogue and future collaboration” between First Nation fisheries leaders, harvester leaders and DFO on moving forward with the development of First Nation fisheries.<sup>110</sup> He emphasized:

These [harvester] leaders understand and acknowledge that 300 years of systemic racism unjustly separated Indigenous peoples from their traditional territories and fisheries, and that racism is evident today in recent violent action. They recognize the constitutional rights and the simple human rights of Indigenous peoples to have full and fair access to fisheries for food, social and ceremonial purposes; to earn rewarding livelihoods; and to build self-reliant communities.

The Committee believes in expanding treaty education to address systemic racism. As Chief Darlene Bernard emphasized:

To me, all you have to do is look at the last three months and see what happened in Nova Scotia to see that there is systemic racism in our system. You can't deny that. I think the people who don't want to come out and say there's systemic racism are denying it to themselves. It's there. We need to deal with it.<sup>111</sup>

Witnesses also called on DFO to educate its own officials on the importance of treaties and treaty rights. Chief Darlene Bernard noted that “Clearly there needs to be some education within the ranks of the government.”<sup>112</sup> The Minister appeared to agree, indicating: “I believe [...] as the Prime Minister himself has stated, that there's systemic racism throughout every department in Canada.”<sup>113</sup> Kent Smedbol explained that DFO:

rolled out a number of training programs for our science staff to make them aware of moderate livelihood, the *Marshall* decision and Indigenous reconciliation programs.

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109 Hon. Bernadette Jordan, Minister of Fisheries, Oceans and the Canadian Coast Guard, [Evidence](#), 18 November 2020.

110 Richard Williams, Research Director, Canadian Council of Professional Fish Harvesters, [Evidence](#), 25 November 2020.

111 Chief Darlene Bernard, Lennox Island First Nation, [Evidence](#), 16 November 2020.

112 Chief Darlene Bernard, Lennox Island First Nation, [Evidence](#), 16 November 2020.

113 Hon. Bernadette Jordan, Minister of Fisheries, Oceans and the Canadian Coast Guard, [Evidence](#), 18 November 2020.



Through the regions, we have set up in a couple of areas additional activities for working with Indigenous groups and First Nations.<sup>114</sup>

The Committee also heard from retired DFO enforcement official Gary Hutchins who noted that while conservation and protection officers receive cross-cultural training:

there's not enough of that. There's not a great understanding by the average fishery officer when it comes to Indigenous rights and the treaty rights and the rich culture that the indigenous people bring to this country. I can assure you that nobody that I know of has ever complained about supporting treaty rights. We all support them. We just want to know how to manage them.<sup>115</sup>

Susanna Fuller called for further action to educate the public service about the implications of reconciliation, with the implementation of a departmental treaty rights education strategy.<sup>116</sup> This strategy should foster discussions about treaty rights implementation, anti-racism education, resource management and science concerns at the wharf level as well as at fishery advisory committees to build trust.<sup>117</sup>

### **Recommendation 36**

**That the Government of Canada implement more education for government representatives and Canadians at large on the nature and existence of treaty rights and the treaty relationship.**

### **Recommendation 37**

**That Fisheries and Oceans Canada work with commercial fishers and the organizations that represent them on the meaning of treaties to foster understanding.**

### **Recommendation 38**

**That Fisheries and Oceans Canada foster discussions about treaty rights implementation, anti-racism education, resource management and science concerns at the wharf level as well as at fishery advisory committees to build trust.**

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114 Kent Smedbol, Manager, Population Ecology Division, Maritimes Region, DFO, [Evidence](#), 23 November 2020.

115 Gary Hutchins, as an Individual, [Evidence](#), 2 December 2020.

116 Susanna Fuller, Oceans North Canada, [Evidence](#), 23 November 2020.

117 Susanna Fuller, Oceans North Canada, [Evidence](#), 23 November 2020.



### Recommendation 39

**That the Minister of Fisheries, Oceans and the Canadian Coast Guard address systemic racism within the Department by conducting a national reform on Fisheries and Oceans Canada's Conservation and Protection sector to address systemic racism within their regulations and operational policies to provide protection for treaty right to harvest and sell fish.**

### Recommendation 40

**That Fisheries and Oceans Canada prioritize the development of joint protocols between First Nations and the Department to identify procedures in advance for dealing with possible crises concerning public safety and security of First Nations.**

## CONCLUSION

Fishers in the Maritimes and Quebec fish in the context of concerns related to biodiversity conservation, changing ocean conditions and the decline of many fish stocks. For commercial fishers, these challenges are combined with uncertainties regarding DFO's implementation of First Nation treaty rights. Throughout this study, fears and frustrations were expressed by both First Nation and non-First Nation witnesses. The Committee hopes that the hearings conducted as part of the study have contributed to an easing of tensions in the Maritimes and Quebec's coastal communities.

In the Committee's view, recommendations put forward in this report should be implemented by the federal government as part of a framework implementing the treaty right of the Mi'kmaq and the Wolastoqiyik (Maliseet) to fish in pursuit of a moderate livelihood. Such a framework should also ensure the sustainable management of aquatic resources and predictability related to access for all commercial fish harvesters. The Committee notes that DFO, in its Integrated Aboriginal Policy Framework, has acknowledged there are "increasing demands from the fishing industry, other industries, governments and non-government interests for the Government of Canada to provide more stability, certainty and predictability with respect to aquatic resource access and co-management."<sup>118</sup>

Although DFO has initiated programs to bolster First Nation participation in commercial fisheries since the *Marshall* decisions, there is so far no consensus regarding whether

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118 DFO, [\*An Integrated Aboriginal Policy Framework\*](#).



the Mi'kmaw and the Wolastoqiyik (Maliseet) treaty right to fish in pursuit of a moderate livelihood has been effectively and meaningfully implemented. This has caused confusion and created barriers and uncertainty for the *Marshall* communities and commercial fishers, more than 250 years after the Peace and Friendship Treaties and over 20 years since the *Marshall* decisions.

The Committee notes that the Prime Minister's mandate letter to the Minister of Fisheries, Oceans and the Canadian Coast Guard includes the development of a comprehensive blue economy strategy.<sup>119</sup> The Supplementary Letter released in January 2021 mentioned that a blue economy should create “jobs and opportunities for ocean sectors and coastal communities, while advancing reconciliation and conservation objectives.”<sup>120</sup> In the Committee’s view, stimulating blue growth would also require achieving a more just and inclusive ocean economy. Therefore, the Committee calls on DFO to devote greater attention to socio-economic and cultural impacts of its allocation of aquatic resources access decisions as well as to the issue of coastal communities’ participation to fishery governance.

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119 Prime Minister of Canada, [\*Minister of Fisheries, Oceans and the Canadian Coast Guard Mandate Letter\*](#), 13 December 2019.

120 Prime Minister of Canada, [\*Minister of Fisheries, Oceans and the Canadian Coast Guard Supplementary Mandate Letter\*](#), 15 January 2021.

## APPENDIX A LIST OF WITNESSES

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The following table lists the witnesses who appeared before the committee at its meetings related to this report. Transcripts of all public meetings related to this report are available on the committee's [webpage for this study](#).

| Organizations and Individuals   | Date       | Meeting |
|---|------------|---------|
| <b>As an individual</b><br>Shelley Denny  | 2020/10/21 | 3       |
| <b>Bay of Fundy Inshore Fishermen's Association</b><br>Colin Sproul, President  | 2020/10/21 | 3       |
| <b>Mi'kmaq Rights Initiative</b><br>Allison Bernard, Wildlife Lead<br>Kwilmu'kw Maw-klusuaqn Negotiation Office                                   | 2020/10/21 | 3       |
| <b>Regroupement des pêcheurs professionnels du Sud de la Gaspésie</b><br>Claire Canet, JOBEL Project Officer<br>O'neil Cloutier, Director General | 2020/10/21 | 3       |
| <b>Assembly of First Nations</b><br>Paul J. Prosper, Regional Chief<br>Nova Scotia and Newfoundland   | 2020/10/26 | 4       |
| <b>Cape Breton Fish Harvesters Association</b><br>Michael Barron  | 2020/10/26 | 4       |
| <b>Listuguj Mi'gmaq Government</b><br>Darcy Gray  | 2020/10/26 | 4       |
| <b>Prince Edward Island Fishermen's Association</b><br>Bobby Jenkins, President<br>Ian MacPherson, Executive Director                             | 2020/10/26 | 4       |
| <b>Eastern Shore Fisherman's Protective Association</b><br>Peter Connors, President   | 2020/10/29 | 5       |

| <b>Organizations and Individuals</b>  | <b>Date</b> | <b>Meeting</b> |
|---|-------------|----------------|
| <p><b>Maritime Fishermen's Union</b></p> <p>Martin Mallet, Executive Director</p> <p>Kevin Squires, President</p> <p>Local 6</p>  | 2020/10/29  | 5              |
| <p><b>Potlotek First Nation</b></p> <p>Wilbert Marshall</p> <p>Justin Martin, Fishery Coordinator</p> <p>Mi'kmaq Rights Initiative</p>  | 2020/10/29  | 5              |
| <p><b>As an individual</b></p> <p>Naiomi Metallic, Assistant Professor</p> <p>Chancellor's Chair in Aboriginal Law and Policy, Schulich School of Law, Dalhousie University</p> <p>Thierry Rodon, Associate Professor</p> <p>Department of Political Science, Université Laval</p> <p>William Craig Wicken, Professor</p> <p>Department of History, York University</p> | 2020/11/02  | 6              |
| <p><b>As an individual</b></p> <p>Naiomi Metallic, Assistant Professor</p> <p>Chancellor's Chair in Aboriginal Law and Policy, Schulich School of Law, Dalhousie University</p> <p>Thierry Rodon, Associate Professor</p> <p>Department of Political Science, Université Laval</p> <p>William Craig Wicken, Professor</p> <p>Department of History, York University</p> | 2020/11/16  | 7              |
| <p><b>Eel Ground First Nation</b></p> <p>George Ginnish, Chief Executive Officer</p> <p>North Shore Mi'gmaq District Council</p>  | 2020/11/16  | 7              |
| <p><b>Lennox Island First Nation</b></p> <p>Darlene Bernard</p>   | 2020/11/16  | 7              |

| <b>Organizations and Individuals</b>   | <b>Date</b> | <b>Meeting</b> |
|--|-------------|----------------|
| <p><b>Department of Fisheries and Oceans</b></p> <p>Hon. Bernadette Jordan, P.C., M.P., Minister of Fisheries, Oceans and the Canadian Coast Guard</p> <p>Robert Lamirande, Senior Advisor</p> <p>Sylvie Lapointe, Assistant Deputy Minister Fisheries and Harbour Management</p> <p>Timothy Sargent, Deputy Minister</p> <p>Doug Wentzell, Associate Regional Director General Maritimes Region</p> | 2020/11/18  | 8              |
| <p><b>Department of Fisheries and Oceans</b></p> <p>Matthew Hardy, Manager Fisheries and Ecosystem Sciences Division, Gulf Region</p> <p>Kent Smedbol, Manager Population Ecology Division, Maritimes Region</p>   | 2020/11/23  | 9              |
| <p><b>Oceans North Canada</b></p> <p>Susanna Fuller</p>  | 2020/11/23  | 9              |
| <p><b>As an individual</b></p> <p>Alan Clarke, South West Nova Scotia Area Chief of Enforcement (Retired) Department of Fisheries and Oceans</p>   | 2020/11/25  | 10             |
| <p><b>Canadian Council of Professional Fish Harvesters</b></p> <p>Richard Williams, Research Director</p>  | 2020/11/25  | 10             |
| <p><b>Coldwater Lobster Association</b></p> <p>Bernie Berry, President</p>   | 2020/11/25  | 10             |
| <p><b>As an individual</b></p> <p>Sterling Belliveau, Retired Fisherman, Former Minister of Fisheries and Aquaculture of Nova Scotia</p> <p>Michael Dadswell, Professor of Biology (Retired)</p> <p>Gary Hutchins, Detachment Supervisor (Retired) Department of Fisheries and Oceans</p> <p>Andrew Roman, Retired Lawyer</p>  | 2020/11/30  | 11             |
| <p><b>Canadian Independent Fish Harvester's Federation</b></p> <p>Jim McIsaac, Vice-President Pacific</p> <p>Melanie Sonnenberg, President</p>   | 2020/11/30  | 11             |

| <b>Organizations and Individuals</b>  | <b>Date</b> | <b>Meeting</b> |
|---|-------------|----------------|
| <b>Kwilmu'kw Maw-klusuaqn Negotiation Office</b><br>Eric Zscheile, Barrister and Negotiator   | 2020/11/30  | 11             |
| <b>As an individual</b><br>Sterling Belliveau, Retired Fisherman, Former Minister of Fisheries and Aquaculture of Nova Scotia<br>Michael Dadswell, Professor of Biology (Retired)<br>Gary Hutchins, Detachment Supervisor (Retired)<br>Department of Fisheries and Oceans | 2020/12/02  | 12             |
| <b>Canadian Independent Fish Harvester's Federation</b><br>Melanie Sonnenberg, President  | 2020/12/02  | 12             |

## **APPENDIX B LIST OF BRIEFS**

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The following is an alphabetical list of organizations and individuals who submitted briefs to the committee related to this report. For more information, please consult the committee's [webpage for this study](#).

**Beaton, Stuart**

**Collins, John R.**

**Native Council of Nova Scotia**

**Northumberland Fishermen's Association**

**Regroupement des pêcheurs professionnels du Sud de la Gaspésie**

**Steneck, Robert**





## REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* ([Meetings Nos. 3 to 13, 17 to 21, 23 and 25](#)) is tabled.

Respectfully submitted,

Ken McDonald  
Chair



## ***Introduction***

On October 19, 2020, the Standing Committee on Fisheries and Oceans (FOPO) unanimously passed a motion to undertake a study to: examine the implementation of the Mi'kmaq constitutionally protected treaty right to fish in pursuit of a moderate livelihood; in order to: evaluate the current Rights and Reconciliation Agreement process; identify better ways to engage interested parties to improve communication; reduce tensions and prioritize conservation; identify issues that need to be addressed; and recommend a path forward.

In the fall of 2020, Canadians witnessed Indigenous treaty rights and aspirations collide with neglect by the Minister of Fisheries and Oceans. The Minister's mismanagement of negotiations with Indigenous communities and exclusion of non-Indigenous commercial lobster fishing associations from the negotiations were primary factors in the crisis. The tension, anger and frustration precipitated by this collision led to breaches of public safety, violent clashes, and divisions of communities and Canadians with the start of an unauthorized lobster fishery. These events were both unacceptable and preventable. The Minister must recognize her role in failing to prevent the escalating crisis. The Minister's failure to communicate with Canadians before, during and after the dispute also aggravated the situation.

First Nations have already given notice that the continued failure of the federal government to balance treaty rights with resource conservation is resulting in the launch of a First Nations managed lobster fishery outside of the DFO commercial seasons in the summer of 2021. This will impact commercial fishers and coastal communities in Atlantic Canada.

## ***The Marshall Decisions***

The Supreme Court of Canada's (SCC) Marshall I & II decisions reaffirmed the Mi'kmaq 1760 treaty right to fish and sell catch in pursuit of a "moderate livelihood." While the high court's description of a moderate livelihood was lacking in clarity, it did provide answers on other points of the treaty right, including:

- conservation of the resource is the paramount regulatory objective and responsibility is placed squarely on the Minister, not on the aboriginal or non-aboriginal resource users (paragraph 40),
- the existence of a treaty right does not mean that the right cannot be regulated nor that the Mi'kmaq are guaranteed an open season in the fisheries (paragraph 2),
- the treaty right has always been subject to regulation and that the government's power to regulate the treaty right has been repeatedly affirmed (paragraph 24),
- catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present day standards can be established by regulation and enforced without violating the treaty right – such regulations would accommodate the treaty right and would not constitute an infringement that would have to be justified under the Badger standard. (paragraph 61).

Conservative members saw this study as an opportunity to gain answers for the many questions left unanswered by the Trudeau government and Minister Bernadette Jordan. We had hoped this study would render a unanimous report in which all committee members could provide the government specific recommendations with which to rebuild dialogue, balance, peace, and economic opportunity for all in Atlantic Canada's fisheries.

The study and its purpose of examining "the implementation of the Mi'kmaq constitutionally protected treaty right to fish in pursuit of a moderate livelihood" quickly expanded in scope as the committee slipped into an examination of aspirations for co-managing and co-governing the fisheries resources. Indigenous co-management and co-governance of fisheries are topics important for the future of Canada's fisheries with many questions to be answered, yet the mandate of the committee's study are the motion's five points.

As such, Conservative MPs felt obliged to issue a dissenting report to answer the committee's original mandate and express our understandings of witness testimony and answers gaps and questions raised by the Committee report. True reconciliation cannot happen if any group is marginalized and excluded from processes directly affecting their livelihoods, interests and futures. Our intent in writing this report is to support reconciliation based on consensus and cooperation between the Government of Canada, Indigenous and non-Indigenous peoples.

### ***Examination of the Implementation of the Mi'kmaq Constitutionally Protected Treaty Right to Fish in Pursuit of a Moderate Livelihood***

After the Supreme Court's 1999 Marshall rulings, consecutive federal governments actively implemented the Mi'kmaq treaty right to fish and sell catch in pursuit of a moderate livelihood by providing access and resources to expand Indigenous participation in Atlantic fisheries.

The Marshall Response Initiative (MRI), announced by the Chrétien government was designed to address the federal government's responsibilities after the Supreme Court ruling and operated from 2000 to 2007. Through the MRI, the federal government began providing Indigenous communities access to and the means with which to participate in the commercial fishery by buying back commercial fishing licenses from non-Indigenous harvesters and providing these licenses, fishing equipment and training to Indigenous communities.

The MRI delivered significant federal investments that provided Mi'kmaq communities resources and training to grow and manage commercial fishery activities.

In a 2019 Macdonald-Laurier Institute (MLI) report that examined 20 years of the federal government's efforts to implement Mi'kmaq treaty rights to harvest and sell fish, author Ken Coates described how efforts of the federal government supporting Mi'kmaq treaty rights have delivered a dramatic transformation of the East Coast fishery.<sup>1</sup> The committee adopted the MLI report as evidence for this study on November 30, 2020.

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<sup>1</sup> Ken Coates, *The Marshall Decision at 20: Two Decades of Commercial Re-Empowerment of the Mi'kmaq and Maliseet* (Macdonald-Laurier Institute, 2019), 4.

Between 2000 and 2018, federal governments invested some \$535 million to expand moderate livelihood fisheries and related activities in the Maritimes.<sup>2</sup> The MLI report found these federal investments in Indigenous fishing activities in response to Marshall “[s]trengthened economic activity in the industry, with total on-reserve fishing revenues for the Mi’kmaq and Maliseet growing from \$3 million in 1999 to \$152 million in 2016.”<sup>3</sup>

Striking a strong contrast with these findings is testimony from Indigenous witnesses that suggested no meaningful progress in implementing Indigenous access or participation in commercial fisheries has been achieved since the Marshall decisions.

Allison Bernard representing the Kwilmu’kw Maw-klusuaqn Negotiation Office and Mi’kmaq Rights Initiative told the committee, “Mi’kmaq never really get a chance to move ahead, even though we’ve had this treaty right or this Marshall decision since 1999, which is 21 years.”<sup>4</sup> Similarly, Shelley Denny said, “there is no federal policy to address livelihood fisheries.”<sup>5</sup>

Considering the 20 years of investments and significant returns on those investments documented in the MLI report, testimony stating Mi’kmaq never really get a chance to move ahead and that there is no federal policy to address livelihood fisheries indicates a disconnect between federal government actions and the experiences of Indigenous communities.

Since treaty rights affirmed in the Marshall decisions are communal rights, resources like licenses, funds, and equipment were delivered to Indigenous governments to create economic opportunities for these communities in the Atlantic fishery.

In his testimony, Colin Sproul of the Bay of Fundy Inshore Fishermen's Association responded to a question by stating “[w]hat you’re asking begs the question why Indigenous people still do not have access to the fishery, given that the federal government spent more than \$600 million buying fishery access from non-Indigenous communities and delivering it to first nations. It’s at the heart of this issue, and it’s not being discussed.”

Mr. Sproul provided a partial answer to this when he noted, “[t]he issue is that the majority of that access is then leased back and rented to non-Indigenous fishing corporations, effectively dispossessing first nations people of their legitimate right to fish.”<sup>6</sup>

Federal governments have consistently made significant investments to implement Mi’kmaq treaty rights, but the access provided for moderate livelihood fishing has not always been fully provided to community members by their Indigenous governments. Also, it is unclear what license leasing revenues are distributed to community members and whether community members are aware that the revenues represent the federal government’s attempts to implement their treaty rights to fish for a moderate livelihood.

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<sup>2</sup> Ken Coates, *The Marshall Decision at 20: Two Decades of Commercial Re-Empowerment of the Mi’kmaq and Maliseet* (Macdonald-Laurier Institute, 2019), 17.

<sup>3</sup> Ken Coates, *The Marshall Decision at 20: Two Decades of Commercial Re-Empowerment of the Mi’kmaq and Maliseet* (Macdonald-Laurier Institute, 2019), 5.

<sup>4</sup> House of Commons, Standing Committee on Fisheries and Oceans, Minutes, 21 October 2020.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

This is not to say that the money accruing from these licenses is not being spent on important community priorities, but this practice likely contributes to the sense among First Nations that their access to the fishery has not increased in line with their expectations. It also poses a barrier to First Nations people who wish to engage directly in the moderate livelihood fishery.

Access to fisheries must be managed to control fishing effort to levels supporting sustainability of fisheries. This means that conservation limits are necessary and affirmed by the courts. Since access provided to Indigenous communities for moderate livelihood fisheries is meant to benefit members of the community, the government must undertake to ensure its provision of access to fisheries for moderate livelihood fishing achieves its intended purpose, which is opportunities for Indigenous communities to fish for a moderate livelihood.

**Recommendation: We welcome more indigenous participation in the fishery and believe this can only be achieved if the federal government and DFO recognize and ensure the intended purposes of licenses, to provide for moderate livelihood fishing, are respected by prohibiting the leasing of such licenses to non-Indigenous harvesters.**

All commercial fishing associations that appeared as witnesses before committee expressed support for increased Indigenous participation in Atlantic fisheries. Having witnessed the benefits and tangible results of the MRI supporting moderate livelihood fisheries, most of these associations believe that the MRI was essential to the government's response to Marshall and to support for Indigenous fishing activities in pursuit of moderate livelihoods.

Contrary to Figure 2 of the Committee report, multiple witnesses expressed views holding that food, social ceremonial fisheries (FSC) are based on the Sparrow decision, not the Marshall decision. Eric Zscheile, co-counsel in the Marshall case, confirmed this by stating that, "...in a food fishery, First Nations have certain priorities when it comes to access to the fisheries. That comes from the Sparrow case and others." Multiple witnesses also related that moderate livelihood and communal fisheries are part of the commercial fisheries and should be subject to the same DFO regulatory, conservation and enforcement regulations as the commercial fishery.

### ***Evaluation of the Current Rights and Reconciliation Agreement Process***

As of April 19, 2021, the Trudeau government finalized Rights and Reconciliation Agreements (RRA) with four Mi'kmaq communities representing less than 12% of the 34 communities holding moderate livelihood fishing rights reaffirmed by the Marshall decisions. The RRA process was first proposed by the Assembly of Nova Scotia Mi'kmaq Chiefs to Ottawa in 2016.

This exceptionally low rate of buy-in by Mi'kmaq communities into the RRA process is best explained by testimony from Chief Darlene Bernard of the Lennox Island First Nation who told the Committee "this whole thing about the RRAs, rights and reconciliation agreements, those are nothing but a slap in the face to First Nations."<sup>7</sup>

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<sup>7</sup> House of Commons, Standing Committee on Fisheries and Oceans, Minutes, 16 November 2020.

Based on testimony there is a divergence between the views of First Nations and commercial fishing associations as to what should be negotiated with RRAs. On the one hand, First Nations are seeking a self-regulated and self-governed fishery with the only co-management element being the approval by DFO of Fishery Management Plans. This approach would represent a new class of license outside of FSC and commercial licenses called a moderate livelihood license.

Mr. Bernie Barry, President of the Coldwater Lobster Association, testified in speaking of the MRI, “[i]ndustry believes the Crown has fulfilled its fiduciary responsibility concerning the Marshall decision.” Mr. Barry went on to state, “[i]ndustry has been excluded from the most crucial conversations when they concern the transfer of access from the commercial fishery and how that is going to be achieved without harming the industry.”<sup>8</sup>

As such, our understanding is that the Assembly of Nova Scotia Mi’kmaq Chiefs proposed a RRA process in 2016, the Trudeau government through DFO subsequently established a RRA process in which Mi’kmaq communities participated only to find out that the process was not what they understood it to be.

While we conclude that the government either made a commitment or created a false expectation of what the RRA process would entail, the low rate of buy-in by Indigenous communities is a clear reflection that the Trudeau government and Minister Jordan failed to make the RRA process an effective or efficient means of implementing moderate livelihood fishing treaty rights. At the same time their lack of involvement in face-to-face discussions with commercial fishing groups has caused suspicion and hostility to a government process that excluded other Canadians who make a living from the sea.

It must be noted that the Committee’s evaluation of the RRA process was limited by the fact that these agreements have been negotiated behind closed doors and government will not inform Canadians what it is they have negotiated.

The Trudeau government’s approach through their RRA process is indeed a departure from how successive governments negotiated and implemented access and resources for moderate livelihood fisheries that produced results better than those of the RRA process.

In his testimony, Colin Sproul related how “[t]here are precedents for the government to have nation-to-nation conversations and still take advice from the industry, the Northwest Atlantic Fisheries Organization being the best example, whereby the minister sits with other nations and directly negotiates, and, in a side room, she takes advice from people from all parts of the fishing industry, Indigenous and non-Indigenous alike.”<sup>9</sup>

Thierry Rodon of Université Laval told the Committee that for trust to be built between Indigenous and non-Indigenous interests, “[p]eople need to have places where they can talk to each other and show that there is responsible management on both sides.”<sup>10</sup>

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<sup>8</sup> House of Commons, Standing Committee on Fisheries and Oceans, Minutes, 25 November 2020.

<sup>9</sup> House of Commons, Standing Committee on Fisheries and Oceans, Minutes, 21 October 2020.

<sup>10</sup> House of Commons, Standing Committee on Fisheries and Oceans, Minutes, 16 November 2020.

The Trudeau government's RRA process has failed to mitigate or prevent the frustrations of Indigenous communities, and this failure has precipitated tensions and conflicts between Indigenous communities, non-Indigenous fishers, and the government last fall. The RRA process has also failed to get agreement with First Nations.

**Recommendation: The Minister of Fisheries engage personally in face-to-face, parallel negotiations with commercial lobster fishery organizations and Mi'kmaq representatives to attain a mutual agreement on an acceptable new approach to developing a negotiating process for the moderate livelihood fishery that balances the requirement to accommodate Indigenous moderate livelihood fisheries as determined in Marshall I and Marshall II and to assess historic needs and economic impact of commercial fishers and rural communities.**

***Better Ways to Engage Interested Parties in Order to Improve Communication, Reduce Tensions and Prioritize Conservation***

Aspiring to achieve solutions that satisfy every interest may result in actions that satisfy none. There is an imperative for the Government of Canada, through DFO, to include Indigenous communities and non-Indigenous parties in the cooperative development of solutions required to continue the important work of implementing Mi'kmaq treaty rights to moderate livelihood fishing while also ensuring the conservation of the resource that Canadians depend on.

Conservative members agree with the summary of testimony in the Committee Report section titled *Lobster Conservation: DFO-Regulated Conservation Measures*. It is disappointing the Committee report willfully ignores testimony received on November 23, 2020, from DFO's Science Branch detailing scientific reasons why lobsters are not fished at certain times of the year as prescribed by the seasonal commercial fishing restrictions under DFO's Lobster Fishing Area (LFA) system.

Dr. Kent Smedbol from DFO testified that “[h]andling of lobsters during a soft-shell period or during their spawning might have individual level effects on that lobster, so they're more susceptible to handling. It could lead to increased mortality or sublethal effects.” Dr. Smedbol, when asked by MP Morrissey if “[t]hat's why you have seasons that have been in place for some time,” responded, “yes.” Mr. Morrissey then said, “I could conclude reasonably that fishing in those areas at times of the year would have a long-term negative impact on lobster stock.” Matthew Hardy, DFO Manager, Fisheries and Ecosystem Sciences Division replied, “yes.”<sup>11</sup>

In her November 18, 2020, committee appearance, the Minister of Fisheries and Oceans was asked about the Potlotek First Nation's moderate livelihood fishery launched in St. Peter's Bay. The Minister stated: “[t]he fisheries officers are very concerned about the excessive fishing there and about how it could negatively impact the long-term sustainability. We are concerned about that. We want to make sure, as I have said every time I've talked about this issue, that

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<sup>11</sup> House of Commons, Standing Committee on Fisheries and Oceans, Minutes, 23 November 2020.



conservation is the priority. As I've said, right now what's going on in St. Peters Bay is more than what even the First Nations moderate livelihood plans have indicated they would be fishing."<sup>12</sup>

Conservative members are concerned that the Minister's response acknowledged that excessive fishing was occurring and that there was uncertainty as to whether conservation was being upheld as a priority. The Minister issued no commitment to fulfill her responsibility to ensure sound management and conservation of the fishery.

**Recommendation: To protect the sustainable harvesting of the resource, the issuance of Moderate Livelihood lobster licenses by the Minister of Fisheries cannot add new effort to the fishery nor additional active licenses in any LFA above the 2020 numbers without scientific evidence that supports increased catches coming from increased license effort.**

### **Issues That Need to be Addressed by the Federal Government**

#### ***Greater Cooperation, Transparency and Communication from the Minister***

The launch of the moderate livelihood fisheries on September 17, 2020, occurred outside of DFO's regulated season dates. A statement from the Minister was released in which she stated that "[u]ntil an agreement is reached with DFO, there cannot be a commercial fishery outside the commercial season. A sound management framework is necessary for the management and conservation of fish stocks."<sup>13</sup>

"I want to be clear that DFO continues to address unauthorized fishing," the Minister continued. "Fishing without a license is a violation under the Fisheries Act and anyone fishing outside the activities authorized under a license may be subject to enforcement action."<sup>14</sup>

Whatever clarity this statement provided Canadians and Indigenous communities was nullified the next day when it was removed from the DFO website and replaced by a news release stating the Minister's willingness to meet with Indigenous and industry leadership.

In the weeks that followed, additional moderate livelihood fisheries were launched, and the Minister failed to provide Canadians timely or comprehensive communications explaining the legality of the increasing harvesting efforts that were occurring outside of DFO's regulated season. The absence of proactive communications added to the widespread confusion, frustration, and anger that, in some cases, led to conflict and violence.

This conflict and violence could have been reduced or even prevented had the Minister provided timely and robust communications explaining the legality of the moderate livelihood fisheries. The crisis that occurred in 2020 was the result of the failed RRA process, contradictory statements from the Minister at the onset of the crisis, and her ignoring warnings from Conservative MPs for nine months prior to this crisis.

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<sup>12</sup> House of Commons, Standing Committee on Fisheries and Oceans, Minutes, 18 November 2020.

<sup>13</sup> <https://www.cbc.ca/news/canada/nova-scotia/mikmaw-fishermen-self-regulated-fishery-lower-saulnierville-1.5727920>

<sup>14</sup> Ibid.

The committee also heard testimony from Mr. Sproul stating that the minister had also been warned of a potential conflict by commercial fishing associations. “For three years, we've lobbied extensively Minister Jordan and Minister Blair and have raised the public safety concerns,” he said.<sup>15</sup> “Over the last three years, Justin Trudeau's cabinet, as a tactic at the negotiating table, has stopped enforcing existing Canadian fishery policy and law because they don't want to sour the mood at the table. That lack of law enforcement is precisely what led to the chaos and the animosity between fishermen who have peacefully coexisted.”<sup>16</sup>

Mr. Sproul concluded, “Really, at the core of the problem is that the government has good intentions to reach rights reconciliation agreements with the nations, but the problem is that as a tactic during the negotiations they stopped enforcing the law. That only empowered people to keep fishing outside of regulations. It has obviously been a failed tactic. What we've seen come of that is 12 nations get up from the table and not one sit down.”<sup>17</sup>

This testimony cannot be ignored because it reflects the high level of distrust the crisis created between non-Indigenous harvesters and the Trudeau government, the Minister and DFO. All Canadians must have confidence in their government's commitment to the rule of law and the commitment of the Minister to fulfilling her responsibilities as are bestowed by the Constitution, the Fisheries Act and other relevant regulations and statutes.

As Minister Jordan clearly stated in her November 18, 2020, appearance before the Committee, “DFO is responsible for the overall management of Canada's fisheries and the stocks that they depend on.”<sup>18</sup> A majority of Canadians agree with this statement from the minister, yet the crisis last year demonstrated her willingness, as the head of DFO, to suspend or abandon overall management of Canada's fisheries for reasons she has not provided to Canadians. This sort of inconsistency of words and actions is not conducive to conservation, sound fisheries management, reconciliation, or the implementation of moderate livelihood fisheries.

### ***Recognition That the Treaty Right May Be Subjected to Regulation***

The Supreme Court declared in paragraph 61 of the Marshall I decision that “[c]atch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present day standards can be established by regulation and enforced without violating the treaty right. Such regulations would accommodate the treaty right and would not constitute an infringement that would have to be justified under the *Badger* standard.”

In paragraph 38, the court also clarified that “[t]he Mi'kmaq treaty right to participate in the largely unregulated commercial fishery of 1760 has evolved into a treaty right to participate in the largely regulated commercial fishery of the 1990s.”

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<sup>15</sup> House of Commons, Standing Committee on Fisheries and Oceans, Minutes, 21 October 2020.

<sup>16</sup> House of Commons, Standing Committee on Fisheries and Oceans, Minutes, 21 October 2020.

<sup>17</sup> Ibid.

<sup>18</sup> House of Commons, Standing Committee on Fisheries and Oceans, Minutes, 18 November 2020.

### ***Definition of “Moderate Livelihood”***

In addition, the ruling did provide some definition of moderate livelihood when, in paragraph 59 of Marshall I, it states “[a] moderate livelihood includes such basics as ‘food, clothing and housing, supplemented by a few amenities’ but not the accumulation of wealth (*Gladstone*, supra, at para. 165). It addresses day-to-day needs.”

During the Minister’s appearance, she was unable to provide the committee a definition of the term “moderate livelihood” nor any details reflecting what definition of the term DFO negotiators were utilizing in their ongoing negotiations with First Nations.

### ***One Regulator, One Authority***

Non-Indigenous harvesters who appeared before the committee did not oppose a co-management approach but did say such co-management must occur within the framework of a DFO-regulated fishery under the authority of the Fisheries Minister where all Indigenous and non-Indigenous harvesters operate under the same seasons and rules. Witnesses also stated that any co-management framework must adhere to the clear delineations of the authority, roles and responsibilities of the fisheries minister outlined in Marshall.

Mr. Alan Joseph Clarke, a retired DFO Area Chief of Enforcement, testified that “DFO must enforce one set of rules for everyone...commercial fisheries for Indigenous and non-Indigenous fishers must be conducted under one set of rules and regulations including seasons.”<sup>19</sup>

Paragraph 41 of Marshall II states, “[t]he Minister’s authority extends to other compelling and substantial public objectives which may include economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups.”<sup>20</sup>

Factors identified by the Supreme Court to guide the Minister’s regulatory authority are not limited to conservation. In paragraph 41 of Marshall II, the court points out that Marshall himself submitted that “it is clear that limits may be imposed to conserve the species/stock being exploited and to protect public safety”. Marshall’s counsel also submitted that “Aboriginal harvesting preferences, together with non-Aboriginal regional/community dependencies, may be taken into account in devising regulatory schemes.”

In testimony, Eric Zscheile stated, “What they're saying in Marshall II is that this was part and parcel of what Marshall I is all about as well. Marshall I cannot stand for the proposition that the federal government does not have ultimately the ability to regulate for things like conservation and public safety.”<sup>21</sup>

While all members of the Committee recognize the necessity of Indigenous participation in aspects of fisheries resource management, protection, decision-making and program delivery, it is unclear how the Minister of Fisheries and Oceans can uphold her ultimate responsibility for

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<sup>19</sup> House of Commons, Standing Committee on Fisheries and Oceans, Minutes, 25 November 2020.

<sup>20</sup> <https://scc-csc.lexum.com/scc-csc/scc-csc/en/1740/1/document.do>

<sup>21</sup> House of Commons, Standing Committee on Fisheries and Oceans, Minutes, 23 November 2020.

the overall management or governance of Canada's fisheries if the associated authorities for fisheries regulation and governance are disbursed.

### ***Adjacency***

The Committee Report incorrectly dismisses the existence of the principle of adjacency to fisheries access provided to Indigenous communities for moderate livelihood fisheries, affirmed by the Supreme Court. The Committee ignored paragraph 17 in Marshall I, which states, "the treaties were local, and the reciprocal benefits were local. In the absence of a fresh agreement with the Crown, the exercise of the treaty rights will be limited to the area traditionally used by the local community with which the 'separate but similar' treaty was made."<sup>22</sup>

Further, the House of Commons Standing Committee on Fisheries and Oceans said in its 1999 report on the Marshall decisions that, "[t]he Court confirmed that the treaty right is a communal right to be exercised by the authority of the local community and that it is limited to the area traditionally used by the local community."<sup>23</sup>

The Supreme Court also affirmed that this treaty right under section 35 of the Constitution only applies to First Nations which signed the Peace and Friendship treaties.<sup>24</sup>

First Nations other than the Acadia and Bear River engaging in moderate livelihood lobster harvest in St. Mary's Bay and South West Nova Scotia are in violation of the stipulations of the Marshall decisions without a commercial license that allows them access. Many fishers in these areas are from Indigenous communities 300 kilometres or more from the St. Mary's Bay.

**Recommendation: Only DFO has both the regulatory and enforcement responsibility under the rulings by the Supreme Court of Canada. Any moderate livelihood fishery for First Nations must fall under DFO regulation and enforcement as outlined by the Supreme Court of Canada. Any co-management of the moderate livelihood fishery must fall under this structure and must balance mutually agreeable and mutually beneficial outcomes for non-Indigenous attachment to the fishery.**

**Recommendation: Moderate Livelihood licenses are commercial fishing licenses, and as such must be subject to the same regulations including seasons as all commercial fishing licenses.**

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<sup>22</sup> <https://scc-csc.lexum.com/scc-csc/scc-csc/en/1739/1/document.do>

<sup>23</sup> <https://www.ourcommons.ca/DocumentViewer/en/36-2/FOPO/report-2/>

<sup>24</sup> <https://scc-csc.lexum.com/scc-csc/scc-csc/en/1739/1/document.do>

# **BLOC QUÉBÉCOIS DISSENTING REPORT**

## **NATION-TO-NATION CONSULTATION FOR MODERATE LIVELIHOOD FISHING**

### **INTRODUCTION**

The Bloc Québécois commends the committee members and Library of Parliament employees for their hard work and dedication over the course of this study and thanks all witnesses who contributed to the public debate by submitting briefs and appearing before the committee. Their testimony will go down in parliamentary history and without a doubt be tremendously useful to those who will one day undertake the difficult task of understanding the intricacies of moderate livelihood fishing. We can only hope that their contribution will help resolve this issue for good and in a manner that satisfies everyone involved.

However, we are bound to acknowledge that the report that was submitted today is a failure. Given that the findings barely scratch the surface of the issues raised in the motion, we believe that the whole study itself was a waste of time. The report's deluge of words, complemented by a torrent of recommendations that were expressly designed to leave readers simultaneously content and confused, make it essentially cosmetic. Parts of it are riddled with truisms, others are inconsistent, and some have absolutely nothing to do with the topic of the study. The fact that the committee produced a report with thousands of empty words is appalling for First Nations and non-Indigenous fishers who live off the sea, for coastal communities seeking to build up their economies and for the overall situation vis-à-vis land use and development. Suffice to say that the report is not in the public interest.

In the next few pages, we will voice our criticism in three sections that discuss four main themes: first, the failure to address the topic of the study; second, the lack of consistency of the report's recommendations; third, the over-politicization of the study; and fourth, the failure, whether intentional or not, to propose any kind of concrete solution.

### **FAILURE TO ADDRESS THE TOPIC**

The motion of October 19, 2020, set out the committee's mandate for this study:

That the Standing Committee on Fisheries and Oceans undertake a study to examine the implementation of the Mi'kmaq constitutionally protected treaty right to fish in pursuit of a moderate livelihood, in order to evaluate the current Rights and Reconciliation Agreement process, identify better ways to engage interested parties in order to improve

communication, reduce tensions, prioritize conservation and identify issues that need to be addressed and a recommended path forward;

Did the committee examine the implementation of the Mi'kmaq right to fish for a moderate livelihood? No. Did it evaluate the current rights and reconciliation agreement process? No. Did it identify better ways to reduce tensions and prioritize conservation? No. Did it recommend a path forward at the end of the study? No. The final report provides no response to the four points raised by the motion. Below we will talk about the failure of the report and its recommendations point by point.

For the first point, the report correctly notes that there is no definition to date of what constitutes a “moderate livelihood” fishery. However, while giving itself the mandate to examine the application of the right to fish for this purpose, it has refrained from even attempting to set the limits of this right, even for operational purposes. As a result, the very premise of the study is contradictory. How can the committee study a topic that remains undefined? This question deserves to be asked.

Voltaire often said, “If you wish to converse with me, define your terms.” Without a definition, the notion of a moderate livelihood remains a non-identified concept, which complicates its observation in reality. However, the committee recommended clarifying this notion more than 20 years ago.<sup>1</sup> This has yet to be done, and it has clearly hindered the committee’s ability to conduct an intelligible study of the application of the rights confirmed by the *Marshall* decisions. Yet, in 1999, parliamentarians proposed ideas for a working definition. The former MP for Saint-Jean, Claude Bachand, said that the “definition of the suitable subsistence level must be negotiated.”<sup>2</sup> His colleague, Yvan Bernier, MP for Bonaventure-Gaspé-Îles-de-la-Madeleine-Pabok, suggested that a moderate livelihood should be interpreted as including a certain threshold of profitability and a concern for viability and sustainability, in keeping with the UN fishing agreement that Canada had just signed.<sup>3</sup> Even today, the lack of leadership that caused this inaction prevents the committee from producing a study and recommendations that clearly, credibly and relevantly assess the application of the rights that were confirmed by the *Marshall* decisions.

For the second point, we must ask ourselves how the committee could have evaluated the process for reaching agreements if those agreements were never made public and the process is still ongoing? If a lack of transparency significantly impeded the committee’s study, this poses an even greater problem in our opinion for the population at large, to whom the government is ultimately accountable, as transparency is

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<sup>1</sup> House of Commons, Standing Committee on Fisheries and Oceans, 36<sup>th</sup> Parliament, 2<sup>nd</sup> Session, *The Marshall Decision and Beyond: Implications for Management of the Atlantic Fisheries*, Thursday, 16 December 1999.

<sup>2</sup> House of Commons, Debates of the House of Commons, 36<sup>th</sup> Parliament, 2<sup>nd</sup> Session, vol. 136, no. 2, Wednesday, 13 October 1999, p. 75.

<sup>3</sup> *Ibid.*, pp. 79 and 98.

intrinsically linked to ethics. And while the committee did not have the audacity to compel the government to make the documents relevant to these agreements available to the committee, the government did not have the decency or initiative to provide them.

For the third point, with all due respect, the committee's recommendations to reduce tensions and prioritize conservation seem to be nothing more than wishful thinking, two perfect examples of which are recommendations 32 and 33, which lack the measures needed to ensure that they are implemented. The only approach that came up over the course of the study that could lead to tangible, beneficial results was completely left out of the committee's recommendations. We are referring to co-management; more on that later.

Lastly, for the fourth point, it is clear to us that the report contains no path forward. While clarity, soundness and pragmatism should be the hallmarks of any report's recommendations, these recommendations speak volumes but say little. The committee could have taken this opportunity to not follow in the footsteps of every federal government since 1999. However, it chose the very same approach: wait and see.

#### **WHEN IDEOLOGY PREVAILS OVER PUBLIC INTEREST**

At several points in their interventions, the committee members gave us the impression of acting, *mutatis mutandis*, like two of the three wise monkeys: Mizaru, who sees nothing, and Kikazaru, who hears nothing. The manner in which they asked their questions and gave their comments seemed to us to stem more from a desire to justify their parties' positions on the issue after the fact and win or maintain seats in the Atlantic provinces than from a real intention to find solutions to the problems that Gaspésie and Maritimes residents are experiencing because of the inaction of one government after the next. Overall, it really felt like the committee members were talking past each other over the course of the study, which is reflected in the redundant, inconsistent and banal recommendations that we are criticizing.

Recommendations 1 to 12 (excluding recommendation 10), which make up more than one quarter of the recommendations, are good examples of redundancy, since they could have been summarized into one recommendation: "That the federal government implement the *Marshall* decisions and that the Minister of Fisheries and Oceans fulfill her mandate." Recommendation 17, which calls for the conservation of fisheries resources, (an objective that is already outlined in the Act) is equally verbose and rife with self-evident truths.<sup>4</sup>

Next, recommendations 16 and 18 are contradictory. On the one hand, the committee recommends that DFO take scientific data into account when making its decisions, while,

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<sup>4</sup> *Fisheries Act*, R.S.C., 1985, c. F-14, paragraph 2.1 (b).

on the other, it is telling DFO which findings to take into account from the data. This infringes on basic logic and scientific ethics alike.

Lastly, we turn our attention to recommendation 27, “That ... Fisheries and Oceans Canada must rigorously enforce fisheries regulations with impartiality and consistency.” Does anyone think it should be any different?

We could continue with a comprehensive analysis of the various recommendations, but the result would invariably be the same: we would have an Iwazaru-like report—one that speaks nothing .

In essence, the ruling parties preferred to defend the status quo and exploit the socio-political context to their advantage, rather than work to help Indigenous and non-Indigenous people.

### **POSSIBLE SOLUTIONS: REVISIT THE PAST AND RECONSIDER CO-MANAGEMENT**

In 1999, the Bloc Québécois issued a supplementary opinion to the Fisheries and Oceans Committee report *The Marshall Decision and Beyond: Implications for Management of the Atlantic Fisheries*. It is worth quoting part of it:

The concept of “moderate livelihood” is the key element in the Marshall decision with respect to the future scope of the Aboriginal role in the fishing industry. It must be borne in mind that until this point has been clarified all solutions will necessarily be of a tentative nature. To better define the concept, the Government should:

- name an official at Indian and Northern Affairs Canada to coordinate efforts to clarify the concept of “moderate livelihood”;
- determine the working method and the parameters to be considered;
- set a timetable for the process.

We must now admit that had the government drawn more from the Bloc Québécois proposals of 1999, many of the later troubles could have been avoided.

Throughout this study, both commercial and Indigenous fishers condemned the government’s approach as fuelling tensions. “The current violence is a symptom of a flawed negotiation process followed by the government and the constant exclusion of commercial fishers from fisheries management discussions,”<sup>5</sup> said O’Neil Cloutier, while at the same time regretting that commercial fishers have been denigrated by “right-thinking” attitudes within the *de facto* coalition government, while Chief George Ginnish was critical of the fact that “DFO has again sought to undermine and divide [his nation]

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<sup>5</sup> House of Commons, Standing Committee on Fisheries and Oceans, 43<sup>rd</sup> Parliament, 2<sup>nd</sup> Session, *Evidence*, Number 003, Wednesday, 21 October 2020, p. 11.



as a collective and to negotiate agreements with individual bands.”<sup>6</sup> As well, Chief Darlene Bernard had sharp but frank words for the federal government: “This whole thing about the ... rights and reconciliation agreements, those are nothing but a slap in the face to first nations.”<sup>7</sup>

Seen from this perspective, the Minister of Fisheries and Oceans’ approach does not seem to be that much different from the one under British colonialism, whose motto was “divide and conquer.” We believe that such an approach, when combined with secret negotiations and agreements, only serves to inflame tensions. There needs to be transparency, not only in the interests of the non-Indigenous population—since it is on their behalf that the government negotiates nation-to-nation and since accountability is a matter of democracy—but also in the interests of the First Nations. The government has a duty to ensure fairness and foster peace between the different communities. Unfortunately, the secrecy surrounding the negotiation process and the exclusion of certain groups simply serves to sow mistrust and, as a result, envy, inequity and even racism. Let’s just say that these are not the basic conditions for successful reconciliation.

Commercial fisheries are vitally important to Indigenous communities, given how much of a tremendous economic development tool these fisheries are to them. There has been outstanding progress in this area in Quebec since 2001.<sup>8</sup> The Maliseet of Viger provide a glowing example of this.<sup>9</sup> However, the reappropriation of resources has not come without tension in the Atlantic provinces. How can these tensions be overcome? As mentioned earlier, we believe that co-management, the only way that could have helped quickly ease tensions, has been totally ignored by the committee.

The outright refusal of governments to consider this solution is nothing new. The current *Fisheries Act*, despite recent amendments, does not allow for true co-management,<sup>10</sup> and yet the Royal Commission on Aboriginal Peoples, in Volume 2 of its report, dealt extensively with co-management of resources, including fisheries, and recommended that the federal government create joint co-management arrangements with Indigenous and provincial governments in anticipation of treaty-making.<sup>11</sup>

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<sup>6</sup> House of Commons, Standing Committee on Fisheries and Oceans, 43<sup>rd</sup> Parliament, 2<sup>nd</sup> Session, *Evidence*, Number 007, Monday, 16 November 2020, p. 9.

<sup>7</sup> *Op. cit.*, p. 15.

<sup>8</sup> Paul Charest, “L’accès des autochtones à la pêche commerciale et leur participation à sa gestion,” Paul Charest, Camil Girard and Thierry Rodon (eds.), *Les Pêches des Premières Nations. Innus, Malécites et Micmacs*, coll. “Mondes Autochtones,” Quebec City: Presses de l’Université Laval, 2012, p. 239.

<sup>9</sup> See Emmanuel Machaud, “Les pêches commerciales des Malécites de Viger: l’exploitation et la gestion du crabe des neiges et de la crevette nordique,” Paul Charest, Camil Girard and Thierry Rodon (eds.), *Les Pêches des Premières Nations. Innus, Malécites et Micmacs*, coll. “Mondes Autochtones,” Quebec City: Presses de l’Université Laval, 2012, pp. 305-332.

<sup>10</sup> *Ibid.*, p. 237.

<sup>11</sup> Recommendation 2.4.78.

During this study, the committee had the opportunity to hear from a number of witnesses who demonstrated the value of this co-management approach. Since the testimony on co-management was left out of the committee's report recommendations, we believe that for everyone's benefit, it is worth quoting Professor Thierry Rodon:

The Mi'kmaq from the Sipekne'katik community decided to create their own fishing season and to issue their own permits, which is clearly recognized by Canada's 1995 inherent right policy. This policy clearly states that self-government is an aboriginal right and that natural resources management is a right that they can negotiate as a priority or exclusively. One of the most important rights is access to the resource, and that is what is at stake in the case we are studying. This type of situation is going to occur more and more often in Canada. One must have experienced the salmon fishing crisis on the Moisie River to know how to arrive at a solution. In the end, this type of crisis, where access to a resource and competition between sport fishers and commercial fishers are at issue, can be resolved through co-management. The co-management of natural resources allows for the recognition of a dual authority: that of the federal government over the commercial fisheries and that of the indigenous communities over the management of their resources. This makes it possible to collaborate and to harmonize fishing practices, and also to alleviate the concerns of some fishers who are protesting against this fishery, which they consider to be illegal. It is actually not illegal because it stems from the aboriginal rights of indigenous peoples.<sup>12</sup>(Emphasis ours)

Professor Rodon later expanded on his thoughts about this solution by pointing out to the committee that co-management arrangements often emerge during periods of tension. He said that "[p]eople need to have places where they can talk to each other and show that there is responsible management on both sides. In fact, it's not just the Mi'kmaq who need to demonstrate this, it's the commercial fishers as well. Together, they need to define what can and cannot be fished."<sup>13</sup> This is something that the Bloc Québécois fully supports, and we believe that it is now up to the Minister of Fisheries and Oceans to adopt such an approach.

## CONCLUSION

Basically, at the end of this study, we have ended up with a report that has completely missed the mark and will likely not contribute in any way to solving a problem that has been arising over and over again for twenty years now. In 2001, *Le Devoir* described the tensions surrounding the implementation of the *Marshall* decisions as a "lobster war," writing that we were still awaiting a long-term solution.<sup>14</sup> In "Penser la politique spectrale," a series of two articles published in *L'Action Nationale*, philosopher Dominic

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<sup>12</sup> House of Commons, Standing Committee on Fisheries and Oceans, 43<sup>rd</sup> Parliament, 2<sup>nd</sup> session, *Evidence*, Number 006, Monday, 2 November 2020, p. 2.

<sup>13</sup> House of Commons, Standing Committee on Fisheries and Oceans, 43<sup>rd</sup> Parliament, 2<sup>nd</sup> session, *Evidence*, Number 007, Monday, 16 November 2020, p. 4.

<sup>14</sup> H  l  ne Buzzetti, "Le mandat des autochtones," *Le Devoir*, Friday, 5 January 2001, p. A2.

Desroches encourages the reader to view political problems from the perspective of “spectropolitics.” He writes that the embodiment of the “political ghost” is the return of unresolved problems that come back to haunt us. This perfectly describes the situation surrounding the implementation of the *Marshall* decision and could be applied to any number of unresolved political problems constantly haunting the news. As long as there is no real political will to implement the decision, no clear definition of moderate livelihood or no attention paid to co-management, it is quite likely that new conflicts between Indigenous and non-Indigenous fishers will arise in the not too distant future. This means that the government is responsible for feeding mistrust, misunderstanding and racism, and for jeopardizing reconciliation. How many crises will Indigenous and non-Indigenous populations have to go through—and how serious will they have to be?—before politics is forced to come up with lasting solutions to a dramatic situation?

Beyond the measures we propose in our recommendations, we believe that in order to overcome inertia and have a lasting impact on our relationship with Indigenous peoples, we first need to reform the constitutional system we are under. The constant paralysis to which Canada has condemned itself by refusing change of any kind simply reinforces our conviction that only Quebec independence could accomplish such an evolution.

## **RECOMMENDATIONS OF THE BLOC QUÉBÉCOIS**

The Bloc Québécois does not claim to have infallible or definitive proposals for resolving the complex problem raised. However, it would be presumptuous to harshly criticize the committee’s report without making recommendations of our own. Here, then, are four cornerstones, four necessary, essential steps that the government should carry out if it really wishes to bring about a lasting, respectful and satisfactory settlement for all parties.

### **Recommendation 1**

**That the government clarify the concept of moderate livelihood through negotiations with the First Nations concerned by the *Marshall* decisions.**

### **Recommendation 2**

**That, out of a sense of duty to be transparent with the population at large and for the sake of equity among the First Nations involved, the Department of Fisheries and Oceans make public the rights and reconciliation agreements, and that the agreements reached be released once they are signed.**

### **Recommendation 3**

**That the Department of Fisheries and Oceans shift toward co-management of fisheries resources when implementing the First Nations rights confirmed by the *Marshall* decisions.**

**Recommendation 4**

**That as a first step in this shift to co-management, the Department of Fisheries and Oceans implement co-management pilot projects for communities affected by the *Marshall* decisions.**