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TRUTH

and Conviction

Donald Marshall Jr.
and the Mi'kmaq Quest for Justice



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Najiwsgieig | We Go Fishing In Search of a Livelihood

ASIDE FROM JUSTICE work, Donald loved to fish. He enjoyed the privacy of wandering down the river with his fly rod or on the ice with a jig. It was where he found peace and joy. Taught to fish as a boy, he told fishing stories throughout his life. Down Skye River, Donald skillfully hand-jigged a salmon, dropping it at my feet with a sly smile. I was mesmerized. We feasted.

Having had success as an avid food harvester, Donald wanted to secure an income through an activity he enjoyed, one that allowed him to celebrate his Mi'kmaw identity through a respectful relationship with a culturally significant resource. He wanted to work. He sought the wilderness and the exhilaration that small-scale fishing offered him, far away from the spotlight under which he had lived since his wrongful conviction for murder.

We became eel fishers.

Mi'kmaw eeling is labour-intensive. During our first season, the Bernard brothers from We'koqmaq – Lunch, Chuckie, and Seven – and Uncle Ekkian (Donald's mother's brother) lent us fyke nets and taught us the ropes in Malagawatch.

By the next season, we had earned enough to buy our own. We hauled nets (cone-shaped netting bags mounted on rings with leaders to guide the



First pay day for eel fishers at Malagawatch. *L to R:* Winston Bernard, Seven (Peter) Bernard, Dickie Young, Lunch (Lawrence) Bernard, Donald Marshall Jr., Charles (Junior) Bernard, Jane McMillan, Chuckie Bernard, John Wayne Bernard, Grace Welch, and John John Bernard. *Photographed by Phil Welch, 1992*

fish towards the entrance) by hand, and they were heavy when wet and awkward to set, even in the calmest weather. We fixed the nets in the mud with poles that had been cut and trimmed from the local woods with the help of fishing buddies Albert Doucette and Gordon Julian. It was hard and dirty work, but we liked the adventure. Every time there was a thunderstorm, Donald rubbed his hands together and said, “Lots of eels tomorrow, baby!” He was right.

Initially, we liked the trials of catching eels. Fishing reinvigorated and helped reintegrate Donald. We were part of a communal occupation that gave meaning to our lives, an activity grounded in Mi’kmaq customary practices and the laws of harvesting, an activity in adherence to an ethos of sharing. Eels are a favoured food of Mi’kmaq elders. We distributed the biggest and best eels among the old people, and they always asked us for a feed wherever we were, no matter if it were at a funeral, a wedding, or grocery shopping. Many admired Donald’s eel-cleaning skills. When pow-wows or Treaty Day celebrations required eels for the traditional *katawapul* (eel stew), Donald went out of his way to ensure there was enough, spending hours bent over the sink, wrestling the eels into submission to prepare them for consumption. Eels still wiggle after they are gutted.

Eel fishing is not a prestigious or particularly lucrative fishery. Eels are slimy, and the muddy areas where they are fished typically have a pungent,



Donald Marshall fishing eels for the Membertou powwow with a fyke net near Malagawatch, August, 2008. Photographed by Keith Christmas

lingering odour. Like any resource extraction process, fishing is dangerous, and the risk of personal injury is high. Donald was not a strong swimmer, which compounded the danger. The financial risks were also high – the catch was determined by uncontrollable factors such as the weather, uncertain reproduction patterns, and gear malfunctions.

We fished in Cape Breton for another season then moved our nets and boat down to Paq'tnekek Mi'kmaw territory (Pomquet Harbour) on the mainland. We had heard that the eels were big there and running well. We spent several nights a week with Donald's cousin Billy Googoo and his family. They helped us navigate the new waters. Kinship matters.

On a bright August day in 1993 a boat approached us while we were checking our nets. It was unusual to see others fishing in the area. As the boat came closer, we could see it contained Department of Fisheries and Oceans officers, uniformed and armed. The officers pulled alongside our

boat and examined its contents. They asked us if there was anything else onboard besides eels. We told them that all bycatch had been released. An officer then asked to see our fishing licences. Donald said he was Mi'kmaw and did not need a licence to fish.

“Everyone needs a licence to fish,” the officer replied.

“I don't need a license. I have the 1752 treaty,” Donald responded.

They asked for our names and address and took a net as “evidence.” We thought it was a misunderstanding because we were new to the area. We felt safe because we were in Mi'kmaw territory, and Donald was protected by his treaty rights, affirmed and recognized by the Supreme Court of Canada in 1985 in *Simon v The Queen* and section 35 of the Constitution Act, 1982. James Matthew Simon had been convicted of possession of a rifle and ammunition but successfully argued that he had a right to hunt as set out in the 1752 Peace and Friendship Treaty. From the Mi'kmaw perspective, the *Simon* decision meant the 1752 treaty was in full force and effect.

We headed back to the reserve and told people what happened. We called the Department of Fisheries and Oceans and asked what was going on. We wanted the \$250 net back. They told us we needed permission from the chief to fish in that area. We asked Chief Kerry Prosper, and he said we could continue fishing. We let the department know we had his consent and continued to fish. A few days later, we sold the eels and reset the nets. When we went back to fish two days later, we were outraged to find our nets and boat gone. At no time did it occur to us that eel fishing was licensed or that we did not have a right to sell the eels we caught. At the trial that followed, the statement of facts read:

On August 24, 1993, at around 10 o'clock in the morning, Donald Marshall and Leslie Jane McMillan fished for eels by means of fyke nets, a type of fixed net, from a small outboard motor boat in Pomquet Harbour, County of Antigonish, Nova Scotia. For part of the morning Marshall pulled the nets and emptied the eels into the boat while McMillan operated the outboard motor, and for part of the morning McMillan pulled the nets and emptied the eels into the boat while Marshall ran the outboard motor. Marshall and McMillan transferred the eels from the boat to a holding pen ... Marshall helped weigh and load his eels onto a truck belonging to

South Shore Trading Company, New Brunswick. South Shore is engaged in the purchase and sale of fish. Marshall sold 463 pounds of his eels to South Shore at \$1.70 per pound. Marshall did not at any time hold a license within the meaning of S. 4(1)(a) of the Maritime Provinces Fishery Regulations and S. 35(2) of the Fishery Act with respect to fishing for or selling eels from Pomquet Harbour.¹



THE EEL FISHING CASE, which began in Nova Scotia Provincial Court on October 17, 1994, was public, expensive, and lengthy. The trial was set out as a test case for Mi'kmaw treaty rights, and the chiefs were happy it was Donald who had been charged. The case was sure to get lots of media exposure. The Union of Nova Scotia Indians and the Confederacy of Mainland Mi'kmaq agreed to support our defence and provided us with counsel, something we could never have afforded otherwise. Mi'kmaq resented the government's failure to respect their peoples' economic needs and treaty rights, particularly in the context of the cod-fishing crisis. Following the Supreme Court of Canada's *Sparrow* decision, in 1990, which confirmed that Indigenous peoples have the right to fish for subsistence and ceremonial purposes and that that right superseded all other fisheries, the federal government had implemented the Aboriginal Fisheries Strategy. The strategy was directed at regulating any existing Aboriginal or treaty commercial-fishing rights. Without sufficient consultation regarding Indigenous preferences for participation in commercial fisheries or justifying infringements, the Department of Fisheries and Oceans had instituted a communal fishing-licence program, but Membertou, Donald's home community, and Paq'tnkek, where we were caught fishing, had refused to take part because they did not want to accept any federal jurisdiction limiting the exercise of their treaty rights.

To resist these top-down and culturally unresponsive initiatives, the Union of Nova Scotia Indians and the Confederacy of Mainland Mi'kmaq joined forces in the Aboriginal Title Project. Together, they compiled historical documentation to aid in legal defence work for the protection and implementation of Mi'kmaw treaties and title. They were ready for the fight.

As a non-Indigenous person, I did not enjoy the protection of 35(1), and it was the Crown's position that any treaty rights that may be enjoyed by the other defendants were not transferable to me by virtue of my relationship with Donald.² I was not immune from prosecution, but early in the process, charges against me were dropped. Judge Embree, who heard the case in Antigonish Provincial Court, understood it to be an Aboriginal treaty rights test case. In court, the Crown vigorously pursued the charges against Donald, and he was defended with great acuity and perseverance by lead counsels Bruce Wildsmith and Eric Zscheile, with the help of the research team put together by the Mi'kmaw Nation. Many of the legal researchers were new Mi'kmaw lawyers and law students who had benefitted from the Indigenous Blacks and Mi'kmaq Initiative at Dalhousie University, a recommendation of the Marshall Inquiry to improve access to education and expand diversity in the law school, bar, and bench.

Because Donald had admitted to catching and selling eels without a licence and with prohibited nets during a closed time, the only issue at trial was whether he possessed a treaty right to catch and sell fish that exempted him from compliance with the regulations. Conservation was not an issue. The trial lasted more than forty days over an eighteen-month period. Volumes of documents were presented and interpreted by anthropological and historical experts on both sides. The testimony of historians William Wicken and John Reid, for the defence, and Stephen Patterson, for the Crown, took thirty-four days and filled more than four thousand pages of transcripts. Media attention and the stress of the case weighed heavily on Donald, who felt an acute sense of personal responsibility for the trial's outcome.

Instead of arguing Donald's right to catch and sell fish under the 1752 treaty, the defence looked to the Peace and Friendship Treaties of 1760–61 for evidence that the Mi'kmaq had the right to catch and sell fish. The Mi'kmaq had signed five treaty agreements with the British Crown between 1725 and 1779. The British recognized that the Mi'kmaq had a sophisticated and comprehensive governance structure and processes for managing nation-to-nation agreements. The 1725 agreement was a peace and friendship treaty designed to end years of conflict between the British and the Mi'kmaq and their allies to conclude the Indian wars taking place in the northeast. The British planned to use the treaty to incorporate the

Mi'kmaq into the colonial network and assist in their battle against the French. As the Mi'kmaq understood it, the treaty protected their customary livelihoods, their resources, and their sovereign and sacred relationships within their territories. However, although the treaty-making process embodied both cultures, the embodiment was unequal because the writing of the treaty was in English and did not encompass Mi'kmaw understandings of the events or the agreements within the text.

The British promised that their settlements would be lawfully made and that they would not interfere in Mi'kmaw planting, hunting, and fishing grounds. When Edward Cornwallis, the newly appointed governor of Nova Scotia, arrived in 1749 with a flotilla of British ships and 2,547 passengers, however, the promise was not kept. Mi'kmaw families who had lived along Chebucto Bay for centuries were not consulted when the town of Halifax was built. When Mi'kmaq resisted and asserted their sovereignty, a proclamation offered rewards for Mi'kmaw scalps or prisoners. In an attempt to encourage the Mi'kmaq and other tribes in the Atlantic region to live peaceably with the British, the 1725 treaty was renewed in 1749 and 1752 and ratified again in Halifax in 1760 and 1761. The 1760 treaty protected the Mi'kmaq's right to trade the products of their hunting, fishing, and gathering for "necessaries."

Upon hearing the evidence regarding the treaties, the court convicted Donald Marshall on all charges in June 1996. He was given an absolute discharge, and the conviction went to appeal. The Nova Scotia Court of Appeal's decision was even more devastating to the Mi'kmaq because it denied the validity of the 1760–61 treaties. Defence counsel argued that if the Mi'kmaw treaties are read as a chain of treaties, then the trade clause constituted a treaty-protected right to commercial activity. The Crown countered that the treaties did not grant any commercial fishing rights to the Mi'kmaq. Conviction upheld, Donald was granted leave to appeal to the Supreme Court of Canada.

At no time in the court proceedings was Donald given an opportunity to express how it was that he came to be a harvester, how he understood his ability to fish as an inherent right and as an integral part of his Mi'kmaw identity. He did not get a chance to describe how he practised the Mi'kmaw legal principles of responsible harvesting and sharing, which had been passed

down for generations. Instead, the trial process narrowed the discourse to the written treaty and events in a selected period of time. The defence was precluded from offering the court a sense of Mi'kmaw history and legal traditions prior to the coming of Europeans. In short, the court authorized a particular, non-Mi'kmaw version of history. The treaty process – meant to protect and guarantee Mi'kmaw liberties and access to resources – has been reevaluated in terms that served the settler society while denying Mi'kmaw sovereignty. Treaty rights, from the Crown's perspective, were to be won or, preferably, lost. The case was not about honouring relationships; it was about adversaries duelling over legitimacy.



THE SUPREME COURT of Canada heard the case and on September 17, 1999, decided in favour of Donald Marshall (five judges in favour, two dissenting). Justice Binnie, writing for the majority, stated:

When interpreting the treaties the Court of Appeal erred in rejecting the use of extrinsic evidence in the absence of ambiguity. Firstly, even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement. Secondly, extrinsic evidence of the historical and cultural context of a treaty may be received even if the treaty document purports to contain all of the terms and even absent any ambiguity on the face of the treaty. Thirdly, where a treaty was concluded orally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written ones.

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* ... What is contemplated is not a right to trade generally for economic gain, but rather a right to trade for necessaries. The treaty right is a regulated right and can be contained by regulation within its proper limits. Catch limits that could reasonably be expected to produce

a moderate livelihood for individual Mi'kmaw families at present-day standards can be established by regulation and enforced without violating the treaty right. The accused caught and sold the eels to support himself and his wife. His treaty right to fish and trade for sustenance was exercisable only at the discretion of the Minister. Accordingly, the closed season and the imposition of the discretionary licensing system would, if enforced, interfere with the accused's treaty right to fish for trading purposes, and the ban on sales would, if enforced, infringe his right to trade for sustenance. In the absence of any justification of the regulatory prohibitions, the accused is entitled to an acquittal.³

The decision reverberated across the country, inspiring Indigenous communities to unite in collective action to secure their rights to resources. The federal government, the Department of Fisheries and Oceans, and non-Aboriginal fishers were not prepared for the decision.

The judgment led to immediate conflict and controversy in the Maritimes, grabbing international headlines and marring the Mi'kmaq's legal victory. Non-Indigenous fishers resisted the Supreme Court's findings on the grounds that they believed they held traditional rights to the waters and were unwilling to share the strained – but lucrative – resources with anyone, especially “Indians.” Although Donald was an eel fisher, the Mi'kmaq interpreted the decision to mean that they had access to all ocean resources. The case marked an unprecedented turn in colonial relations: it opened a window to remedy patterns of dependency and subjugation in favour of sustainable community advancement, a return to the principles of *netukulimk* (responsible harvesting) through the affirmation of traditional knowledge and treaty and Indigenous rights. It marked a resurgence of practices that respect the sacred interconnectedness with the spirits in all life forms. The values of *netukulimk* are the centrepiece of the Unama'ki Institute of Natural Resources, which opened in 1999, and frame the harvesting guidelines of the Mi'kmaw Nation.

The eel disappeared from the headlines as the controversy shifted to lobster and who had access to this profitable fishery. Fears that Indigenous people would take to the waters and harvest everything at once were heightened when the Department of Fisheries and Oceans, following its

own interpretation of the Supreme Court decision, showed excessive force in restricting Mi'kmaw access to the waters. Video footage of hulking government vessels battering small Mi'kmaw dories to force the occupants overboard into the open ocean and other violent confrontations played out on the nightly news.

The Marshall decision sparked increased surveillance and monitoring for all fishers. Heightened fear and competition strained Indigenous and settler relations, preempting any potential for cooperation and collaboration in fishery access and co-management. Given the fragile state of the fishery, acrimony had increased not only between settler and Indigenous peoples but also within these groups as well. Despite the opinion of the Supreme Court, Mi'kmaw claims to territories, resource management, and equitable access were in practice denied. Media accounts propelled animosity towards Indigenous harvesters by perpetuating negative stereotypes and exaggerating instances of overfishing and the use of illegal gear. When Donald went out in public, he was often accosted and blamed by settlers for disrupting generations of family businesses and taking food out of their children's mouths.

The West Nova Fishermen's Coalition, a powerful lobby group representing non-Indigenous fishers angered at the lack of consultation and the outcome of the case, applied for a rehearing with respect to the federal government's regulatory authority. If granted, the coalition wanted a stay in the judgment until the rehearing was complete. The Supreme Court rejected the application but reiterated the law relating to treaty rights, their regulation, and justifiable infringement by the Crown. This reconsideration was extraordinarily rare. The court stated that Mi'kmaw and Maliseet treaty rights were not unlimited and that the Aboriginal fishery could be regulated for conservation purposes or to serve other important public objectives: "The paramount regulatory objective is conservation and responsibility for it is placed squarely on the minister responsible and not on the aboriginal or non-aboriginal users of the resource. The regulatory 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."⁴

In negotiating interim agreements, the federal government tried to stem conflicts and license all Indigenous access. But the policies and strategies – aimed at maintaining order and the future of the fisheries – sparked more controversy. Mi'kmaw bands were concerned whether signing agreements would infringe the newly affirmed treaty rights. These were serious and challenging considerations for communities struggling to climb out of poverty and supply adequate housing, education, health services, and employment to their members. Band by band, the terms of the agreements were set out, fuelling tensions that suggested the arrangements would divide and conquer the Mi'kmaq and eliminate the necessity to recognize the Mi'kmaq as a nation. In the immediate post-*Marshall* era, the Mi'kmaw leadership was fractured as coercive individual contribution agreements were put in place for twenty-seven of the thirty-four Indigenous communities that fell under the *Marshall* jurisdiction. Eventually, all but two communities signed agreements.

Commercial fishers were appeased by requirements that demanded Mi'kmaw fishers follow settler industry regulations. Their interest lied in controlling Mi'kmaw participation in the commercial fishery and ultimately dispossessing the Mi'kmaq of their self-determining authority over land and sea. Millions of dollars emanated from the Department of Fisheries and Oceans along with a flood of policies and oversight groups: the Aboriginal Fisheries Strategy, the At-Sea Monitoring Initiative, the Marshall Response Initiative, the Fisheries Management Systems, the Atlantic Integrated Commercial Fisheries Initiative (AICFI), the Aboriginal Aquatic Resource and Oceans Management Program, and the AICFI technical advisory committee.

Under the new regime, all initiatives and programs were framed as voluntary. But access to the commercial fishery was guaranteed only through participation in government-run programs, which had complete control over training, licences, and equipment. For instance, the AICFI was portrayed publicly as a program “to support an integrated, orderly commercial fishery in the Maritimes and Quebec” and to provide the mentoring and training required to support First Nations in building capacity in commercial fisheries, but Indigenous fishers could not access its training or infrastructure dollars unless they operated within and complied with policy

regulations. If they wanted to exercise their treaty and Aboriginal rights independently, they still had to comply with federal regulations.

Non-Indigenous peoples also benefitted from these programs. In addition to being well paid for licence buyouts and gear transfers, they received most of the contracts for skippering and first-mate positions and healthy salaries for helping Indigenous communities meet the demands of the new programs. Mi'kmaw communities could not access AICFI funds unless they participated in monitoring programs that required infrastructure support and knowledge translation from outsiders. Eventually, the monitoring system shifted, and although the governance and management enhancement programs improved commercial operations, Mi'kmaq complained that the co-management components were slow to take Indigenous knowledge and traditional ecological knowledge into consideration. They argued that elders needed to be consulted consistently in resource management, design, and implementation, but this rarely happened.



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

To achieve their goals, Mi'kmaq across the Maritimes acknowledged the need to unite to collectively exercise their treaty and Aboriginal rights



Donald Marshall Jr., accompanied by Mi'kmaw Grand Chief Ben Sylliboy and Senator Dan Christmas (right) and his cousin, Chapel Island Chief Lindsay Marshall (left), walking through Sydney, NS, during a peaceful protest over Indigenous fishing rights, October 2000. *The Canadian Press/Andrew Vaughan*

affirmed in section 35 of the Constitution Act, 1982, and recognized by the Supreme Court of Canada. Donald looked to his father's legacy, particularly his leadership in the moose harvests after the *Simon* decision, for guidance. In meetings with chiefs and the Grand Council, he encouraged the nation to unite. He joined in marches and supported warriors in Esgenoopetitj when tensions erupted with fishers. His belief in Mi'kmaw rights and the responsibilities those rights enshrined remained resolute. During a particularly volatile CBC Radio call-in show addressing the question "Is the *Marshall* decision good for the Maritimes?" Donald phoned in pleading for peace and respect on the water. Indigenous peoples across the country were planning their fishing strategies and hosting meetings to share and mobilize their knowledge. Donald participated in many of these cultural exchanges. He fished when he could catch his breath, but the stress of being back in court, the lengthy trial and appeals, and fear of the consequences

if the Mi'kmaq lost their case all took their toll on his already fragile health. Frustrated by the negative reactions of Canadian society towards Mi'kmaq commercial fishing rights, he never ate another lobster.

Chiefs and tribal councils held exploratory talks to determine the substance of their treaty rights. In 2002, through band council resolutions, the chiefs in the thirteen Mi'kmaq communities agreed to sign an umbrella agreement to confirm the willingness of the Mi'kmaq and the federal and provincial governments to work together to enter into discussions to define, recognize, and implement Mi'kmaq rights. The parties developed terms of reference for consultation, appointed negotiators, and held deliberations on the Made-in-Nova Scotia Process framework agreement.

In 2004, the Made-in-Nova Scotia Process was retitled Kwilmuk Maw-klusuaqn (We Are Seeking Consensus), or the Mi'kmaq Rights Initiative, and the parties signed a framework agreement in 2007. The agreement outlined negotiation procedures for treaty rights as applied to fish, wildlife, forestry, and land. It took a long time to reach a memorandum of understanding, but the process was based on respectful relations and has since led to productive dialogues on governance and on social, cultural, and economic issues. On Treaty Day 2008, the Assembly of Nova Scotia Mi'kmaq Chiefs signed the Mi'kmaq of Nova Scotia Nationhood Proclamation, signalling their commitment, through the Kwilmuk Maw-klusuaqn Mission Office (KMKNO), to develop a cohesive system of governance. The chiefs recognized the need to heighten transparency and accountability if they were going to be effectively and equitably responsive in treaty rights implementation. This new mechanism for participation was to put decision-making control back into the hands of the Mi'kmaq. The life of the Mi'kmaq Nation depended on it.

Within the assembly, individual chiefs were made responsible for carrying particular portfolios: fisheries, mining, and finance; gaming; governance, Mi'kmaq women and urban Mi'kmaq; education, social, and parks; energy and justice; health; culture, heritage, and archaeology; sport and recreation; and lands, wildlife, and forestry. The portfolio system helped coordinate and organize the diverse matters that came to their attention through the KMKNO's Consultation Department. Along with a technical team, the lead chief would gather and present relevant information to the assembly, who

in turn would provide them with instructions. Any major decisions would be ratified by a vote of the Mi'kmaw population.

Today, the KMKNO's board of directors is composed of the chiefs of the assembly, the national Assembly of First Nations' regional vice-chief, the Mi'kmaw grand chief, the *kji keptin*, and two district chiefs with *ex officio* status. For now, the Grand Council members have a symbolic role but one that may take on greater political significance as the nation awaits the appointment of the next grand chief following the passing of Benjamin Sylliboy in December 2017. The KMKNO lists its five pillars on its website:

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

By consulting and negotiating with the federal and provincial governments, the KMKNO is not giving up any rights claims, nor is it negotiating new treaties. Its representatives position themselves as protecting time immemorial rights, and they understand that it is their collective duty to ensure that Mi'kmaw lands and resources will be enjoyed for generations to come. KMKNO is tackling the thorny questions of membership. By cleaning up the mess made by the Indian Act, they are creating a system in which the Mi'kmaq determine who are the beneficiaries of their rights. Belonging can be determined at the community's discretion following the traditional concepts of *wejikesin* and *ekinawatiken*, meaning "We must go back to our communities and seek their feedback and approval at the outset."

The primary goal is to ensure that all Mi'kmaq enjoy their treaty rights and that federal, provincial, and corporate entities engage with Mi'kmaq in ways that ensure that their rights are foregrounded, respected, and foundational to any development in Mi'kma'ki. KMKNO's slogan is "It Is Time

to Make Things Right.” They disseminate information about consultations through newsletters, press releases, community notices, and articles in the *Mi’kmaw Maliseet Nations News* and through their website, Facebook, YouTube, and Twitter.

The KMKNO set up working groups to manage natural resources such as moose and fish. In 2009, it conducted extensive community negotiations to establish moose-hunting guidelines for the nation, and it continues to examine how the Mi’kmaq can create a fair and open process for exercising their authority to harvest. Working with Natural Resources Canada and Environment Canada, the Mi’kmaq are developing rights-based, adaptive, collaborative moose-management plans. Holistic rights implementation occurs through Mi’kmaw-controlled harvester identification, a Mi’kmaw-directed reporting mechanism to monitor harvest levels and locations, and a community-controlled Mi’kmaw customary law program to dispense with breaches to Mi’kmaw harvesting guidelines. One of the most successful examples of self-determination, the Moose Management Initiative is operated by the Unama’ki Institute of Natural Resources, with support from KMKNO. It operates on the ethos of sacred resource use, sharing, and responsible harvesting. Their education program is revitalizing Indigenous environmental knowledge and ethical resource management for the next seven generations.

The fisheries working group includes members from the Department of Fisheries and Oceans, Indigenous and Northern Affairs Canada (now Crown-Indigenous Relations and Northern Affairs Canada, and Indigenous Services Canada), the Nova Scotia Department of Fisheries and Aquaculture, and the Office of Aboriginal Affairs. It is currently working on a detailed mandate to negotiate fisheries matters with the goals of supporting the ability to make a moderate livelihood (as per the *Marshall* decision) and establishing Mi’kmaw laws and authorities (pursuant to Mi’kmaw harvest and management plans). These discussions are complex and challenging, particularly as the Crown’s position continues to be adversarial rather than conciliatory. Things are changing, though, as government agencies embark on implementing the Truth and Reconciliation Commission’s ninety-four calls to action and nation-to-nation mandates as issued by Prime Minister Trudeau.

The Mi'kmaq Rights Initiative is central to the nation-rebuilding process underway in Mi'kma'ki. The Mi'kmaq have successfully litigated for recognition of their treaty rights. As a nation, they decided to not participate in the federal claims commission program but instead established a unique course of action for consultation and negotiation. The KMKNO works diligently to manifest treaty rights in Nova Scotia to the benefit of the members of the Mi'kmaq Nation. It is controversial work that challenges colonial consciousness and pressures governments and private businesses to do things differently and to come to agreements that substantively honour the Peace and Friendship Treaties.

One of the greatest obstacles to reconciliation is the widespread position, held by agents of the Crown such as those in Fisheries and Oceans Canada, that Supreme Court decisions affirming Indigenous treaty rights are losses rather than wins. In litigation, the relationship between the Crown and Indigenous peoples remains adversarial. In response to perceived losses, Crown agents aggressively assert their regulatory power and control. In 2017, an official with Fisheries and Oceans Canada stated: "We've been tested by the courts many, many times on issues relating to fisheries by Indigenous peoples in Canada and I'll put it bluntly to you, in most cases we come out on the losing side of those issues. And we need to be careful moving forward that we don't create another situation that results in another precedent, and that is a possibility. We didn't think we were going to lose the Marshall case, but we did."⁶

Reconciliation requires full recognition of Mi'kmaq rights and title, meaningful consultation, and fulfillment of the fiduciary obligations of the Crown. To facilitate this, the Assembly of Nova Scotia Mi'kmaq Chiefs entered into a memorandum of understanding on treaty education with the province of Nova Scotia on Treaty Day 2018: "Treaty Education is a vehicle for us to begin the long-term, generational journey toward reconciliation." Together, the Mi'kmaq and the province are building programs and services for the education system, the civil service, and the broader public. Four questions guide the work: Who are the Mi'kmaq historically and today? What are the treaties, and why are they important? What happened to the treaty relationship? What are we doing to reconcile our shared

history to ensure justice and equity? Treaty education will be integrated in all grade levels, and an awareness campaign based on the phrase “We are all treaty peoples” will generate greater understanding of rights and responsibilities as a way to build better relationships between Nova Scotians and the Mi’kmaq Nation.



ALTHOUGH THE MI’KMAQ Justice Institute closed its doors in 1999, Donald’s run-in with the Department of Fisheries and Oceans and the court cases that followed guaranteed that the spirit and intent of the Marshall Inquiry recommendations lived on in Mi’kmaq consciousness and were looked to as a way to facilitate community control over resource disputes. When we went fishing on that fateful day in August 1993, it never crossed our minds that harvesting and selling the innocuous eel would lead to the transformative Supreme Court of Canada decision *R v Marshall*. We were simply trying to keep food on the table and gas in the boat and, hopefully, we’d have a bit left over for beers at the 123 Legion in Whycocomagh. Fortunately, the outcome was a true victory for the Mi’kmaq Nation. Donald’s treaty rights legacy is written into the province’s treaty education curriculum, which every school student and civil servant will receive.

After decades of exclusion from and marginalization within settler economies, the Mi’kmaq finally had incredible opportunities for nation rebuilding and economic growth. Membertou was transformed. The band leveraged its Marshall agreement seed monies to develop businesses and expand its land base. Its infrastructure now includes a shopping mall, a casino, a convention centre–hotel complex, a world-class hockey arena, a bowling alley and boxing gym, a communications network, a state of the art high school, running trails, health facilities, sidewalks, and street lamps. It is no longer recognizable as the community of Donald’s youth. Today, Membertou exemplifies the extraordinary capacity, tenacity, ingenuity, and strength of Mi’kmaq communities.

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