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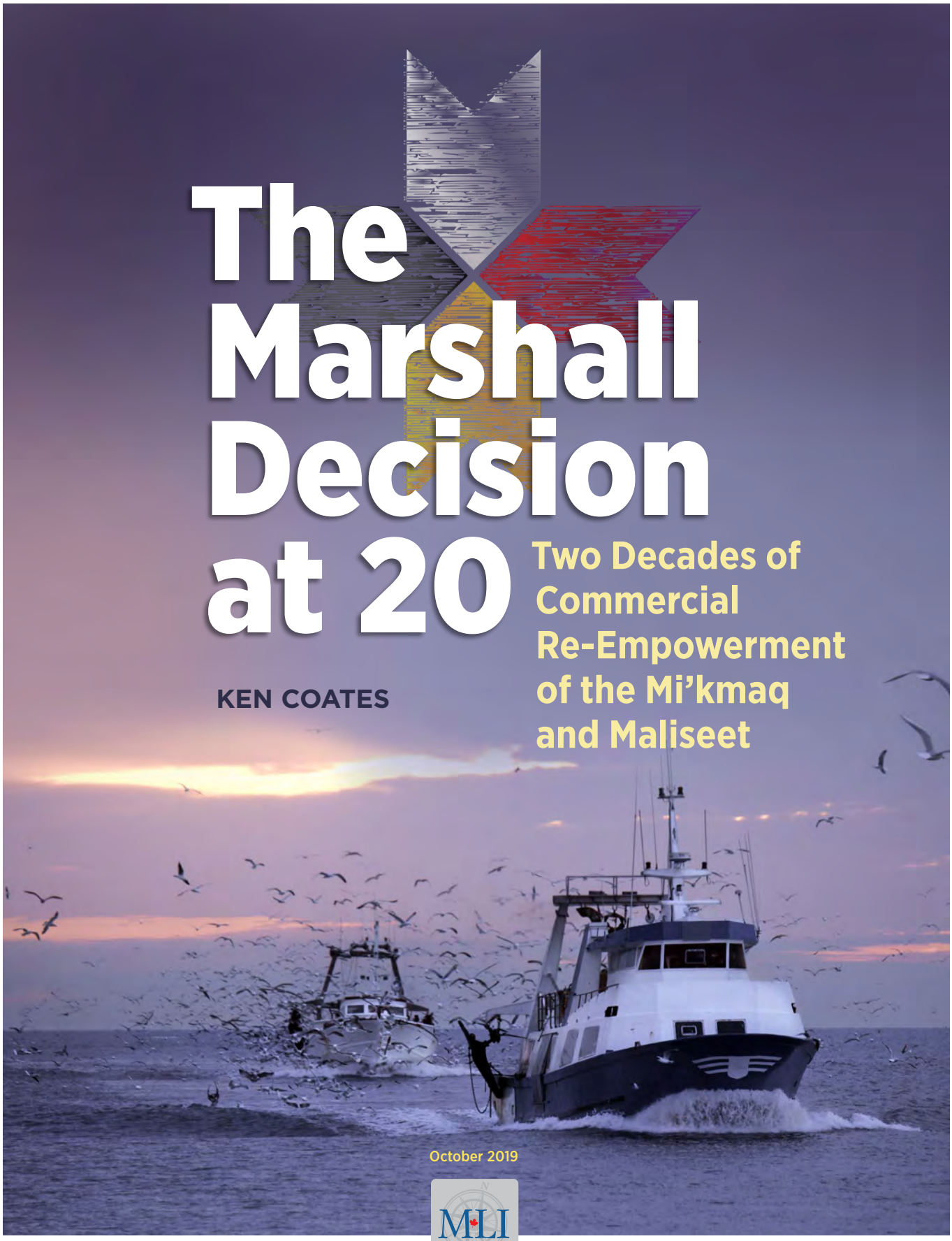

The Marshall Decision at 20

Two Decades of Commercial Re-Empowerment of the Mi'kmaq and Maliseet

KEN COATES

October 2019

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True North in Canadian public policy

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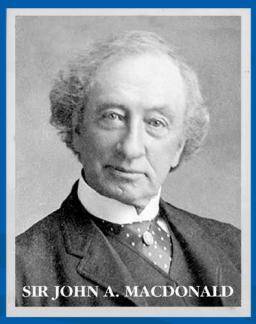
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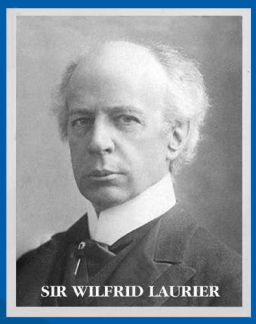
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Executive Summary

The 1999 Supreme Court of Canada (SSC) decision on the case of Donald Marshall Jr. transformed the national understanding of Mi'kmaq and Maliseet treaty and Indigenous rights. By recognizing the continued authority of the 18th century "peace and friendship" treaties between the British government and Mi'kmaq and Maliseet, the Supreme Court required the federal government to respect First Nations treaty rights within the East Coast commercial fishery. Over the next two years, the federal government and the First Nations negotiated financial and related arrangements that took the Mi'kmaq and Maliseet from having a small and marginal role in the fishing industry to being significant actors within an expanding and vibrant sector of the Maritimes economy.

In the 20 years that followed the Marshall decision, Mi'kmaq and Maliseet communities capitalized on the opportunities generated by the court ruling, quieting critics who believed that the empowerment of Indigenous peoples would disrupt a solid industry. It did not happen. The government provided substantial funding through the Marshall Response Initiative, a regional variation of the Aboriginal Fisheries Strategy and, a few years later, the Atlantic Integrated Commercial Fisheries Initiative (AICFI). The government's action bought peace in the fishery by purchasing licences and equipment for distribution to the Mi'kmaq and Maliseet while also supporting training, business development, and the expansion of the Indigenous fishery.

Mi'kmaq and Maliseet communities capitalized on the opportunities generated by the court ruling.

The subsequent transformation of the East Coast fishery proved more dramatic than expected. Communities secured licences, boats, and onshore facilities. Hundreds of Mi'kmaq and Maliseet individuals received training as boat captains and crew members. Many new businesses opened under First Nations or joint ownership. First Nations that previously secured little financial return from the fishing industry now received substantial annual payments, typically through community-owed fishing companies and Aboriginal economic development corporations. While the expansion of the Indigenous fishery did not produce uniform prosperity among First Nations in the region, the collective, wide-ranging economic benefit of the Marshall decision is perhaps unmatched in Canadian history.

Assessing the full importance of the Marshall decision uses business development, expanded employment, and the growth of "own source" revenues as a base, but also requires attention to key non-commercial elements. Over the past 20 years, the effect of the Marshall decision has been seen across the Maritimes:

- Opportunities for young people have improved.
- Communities have more money to spend on locally selected programs.
- Relations with non-Indigenous Canadians have improved. Mi'kmaq and Maliseet confidence has increased dramatically, in large measure because of the manner in which they have capitalized on Marshall-based opportunities.
- Strengthened 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.
- Governments have had to come to terms with First Nations' independence and legal authority, generating an acceptance of the need to restructure relations with Indigenous peoples.

The Marshall decision shows, in sum, that Indigenous treaty and legal rights matter and that the battle for justice through the Canadian courts can produce real and lasting benefits for First Nations peoples. The 1999 Supreme Court decision injected real authority into the 18th century peace and friendship treaties between the Mi'kmaq and Maliseet and provided a legal foundation for the construction of First Nations prosperity and opportunity. For the Mi'kmaq and Maliseet, the Marshall decision was one component of the struggles for Indigenous self-government, the effort to rebuild First Nations education, and the general Indigenous cultural revitalization.

Donald Marshall Jr.'s victory has not solved all of the problems and challenges facing Canada's First Nations. The judgment was specific to commercial fishing and did not apply to other aspects of the Maritime economy. But the Marshall decision reset the economic, legal and political structures in the Maritimes, allowing First Nations to assert and gain a major toehold in the regional economy. As related developments over the past 20 years have shown, the Supreme Court ruling changed the trajectory of Indigenous rights and well-being in the Maritimes.

Donald Marshall Jr. went fishing, as people in his community had done for generations. As his charges progressed, he came to believe that Mi'kmaq and Maliseet people had unrecognized treaty rights to fish for commercial purposes. The Supreme Court of Canada agreed with him. Life for First Nations people in the Maritimes has not been the same since that time.

The assessment of the impact of the Marshall decision on the Mi'kmaq and Maliseet has been completed on the occasion of the 20th anniversary of the SCC judgment. It is designed to remind readers of the background and context of the Marshall decision and to provide an overview of the economic, commercial, social and community-wide impact of the Court's actions. It provides a general assessment of the decision about how communities feel lives have changed over the past 20 years and how general business and employment activity have evolved rather than a detailed statistical analysis of a complex economic and financial process, which will be the subject of a separate report.

Perhaps more than anything, the report is designed to emphasize the region-wide importance of a major Indigenous court victory and to ensure that the political and economic legacy of the Marshall decision remains alive in the nation's consciousness.

Sommaire

Le jugement rendu en 1999 par la Cour suprême du Canada (CSC) dans la cause *Marshall* a modifié en profondeur la vision nationale commune des droits ancestraux et issus de traités des peuples Mi'kmaq et Maliseet. En reconnaissant aux Mi'kmaq et aux Maliseet un droit durable aux traités de « paix et d'amitié » signés par les Britanniques au 18e siècle, la Cour suprême laissait entendre que le gouvernement du Canada devait respecter les droits issus des traités liés aux activités de pêche commerciale conclus avec les Premières nations sur la côte Est. Au cours des deux années subséquentes, l'autorité fédérale a négocié avec ces parties des arrangements financiers et connexes qui ont permis aux Mi'kmaq et aux Maliseet de passer d'un rôle mineur à un rôle décisif dans ce secteur dynamique et croissant de l'économie des Maritimes.

Durant les 20 années qui ont suivi l'arrêt *Marshall*, les collectivités Mi'kmaq et Maliseet ont tiré profit des possibilités qui ont découlé de la décision de la Cour et ont fait taire leurs détracteurs, qui estimaient que l'autonomie des peuples autochtones perturberait une industrie florissante. Cela ne s'est pas produit. Le gouvernement a fourni des fonds substantiels par l'intermédiaire de l'Initiative de l'après-*Marshall* – variante régionale de la Stratégie des pêches autochtones – et, quelques années plus tard, de l'Initiative des pêches commerciales intégrées de l'Atlantique. Ces mesures lui ont permis de rétablir la paix dans le secteur de la pêche en distribuant des licences et du matériel aux Mi'kmaq et aux Maliseet, tout en appuyant la formation, le développement des entreprises et l'expansion des pêches autochtones.

Les transformations conséquentes du secteur de la pêche sur la côte Est se sont révélées beaucoup plus importantes que prévu. Les collectivités ont acquis des permis d'exploitation et se sont équipées en bateaux et en installations côtières. Des centaines de Mi'kmaq et de Maliseet ont suivi des formations pour devenir capitaines de bateau ou membres d'équipage. Bon nombre de nouvelles entreprises appartenant à des Premières nations ou détenues en propriété conjointe ont vu le jour. Les Premières nations qui exerçaient jusque-là des activités de pêche peu lucratives se sont mises à percevoir des revenus annuels substantiels, généralement par le biais de sociétés de pêche communautaires et d'entreprises de développement économique autochtones. Bien que le développement de la pêche autochtone n'ait pas bénéficié de manière égale à toutes les Premières nations de la région, le vaste avantage économique collectif procuré par l'arrêt *Marshall* est probablement inédit dans l'histoire du Canada.

L'importance que revêt l'arrêt *Marshall* est avant tout liée au développement commercial, à la création d'emploi et à la croissance des revenus de « sources propres ». Cependant, certains aspects non commerciaux clés y sont également pour quelque chose. Au cours des 20 dernières années, l'arrêt *Marshall* a eu des répercussions partout dans les Maritimes :

- les débouchés pour les jeunes se sont accrus;
- les collectivités ont eu plus d'argent à dépenser pour des programmes choisis localement;
- les relations avec les Canadiens non autochtones se sont améliorées et la confiance des Mi'kmaq et des Maliseet s'est considérablement renforcée, en grande partie grâce à la manière dont ces derniers ont pu tirer parti des possibilités qui ont découlé de l'arrêt Marshall;

- l'activité économique s'est intensifiée, les revenus sur les réserves autochtones réalisés par les Mi'kmaq et les Maliseet dans les pêches étant passés de 3 millions de dollars en 1999 à 152 millions de dollars en 2016; et
- les gouvernements ont dû composer avec l'indépendance et l'autorité juridique des Premières nations, ce qui a suscité l'adhésion à la nécessité de restructurer les relations avec les peuples autochtones.

L'arrêt *Marshall* montre, en somme, que les droits conventionnels et juridiques autochtones sont influents et que le recours aux tribunaux canadiens peut engendrer des avantages réels et durables pour les peuples des Premières nations. La décision de la Cour suprême en 1999 a conféré une autorité réelle aux traités de paix et d'amitié conclus avec les Mi'kmaq et les Maliseet au 18e siècle et constitue le fondement juridique sur lequel peuvent s'appuyer les Premières nations pour bâtir la prospérité et créer des débouchés. Pour les Mi'kmaq et les Maliseet, l'arrêt *Marshall* représente une étape dans la lutte vers l'autonomie gouvernementale autochtone, la reconstruction en matière d'éducation pour les Premières nations et la revitalisation de la culture autochtone en général.

La victoire de Donald Marshall fils n'a pas résolu tous les problèmes et défis auxquels sont confrontées les Premières nations du Canada. L'arrêt était limité à la pêche commerciale et ne visait pas d'autres aspects de l'économie des Maritimes. Cependant, l'arrêt *Marshall* a renouvelé l'échiquier économique, juridique et politique des Maritimes en permettant aux Premières nations de s'affirmer et de s'imposer dans l'économie régionale. Comme l'ont montré les développements survenus au cours des 20 dernières années, la décision de la Cour suprême a influé sur l'évolution des droits et le bien-être des peuples autochtones dans les Maritimes.

Donald Marshall fils s'adonnait à la pêche, comme l'avaient fait les gens de sa collectivité génération après génération. L'affaire avait été instruite, mais Donald Marshall fils avait estimé que les Mi'kmaq et les Maliseet avaient des droits de pêche commerciale issus de traités qui n'étaient pas reconnus. La Cour suprême du Canada lui a donné raison. La vie des membres des Premières nations des Maritimes n'a plus été la même depuis ce jugement.

Le 20^{e} anniversaire du jugement de la CSC est l'occasion d'évaluer les répercussions de l'arrêt *Marshall* sur les Mi'kmaq et les Maliseet. Ce compte-rendu vise à rappeler aux lecteurs les circonstances qui ont entouré l'arrêt *Marshall* et à donner un aperçu des incidences économiques, commerciales, sociales et communautaires des poursuites en justice. Il fournit une évaluation générale du jugement, tant du point de vue des collectivités à l'égard des changements connus depuis 20 ans et de l'évolution des affaires et de l'emploi, sous la forme d'une analyse statistique détaillée, qu'à titre de processus économique et financier complexe, qui fera l'objet d'un rapport séparé.

Par-dessus tout, le compte-rendu est conçu pour souligner l'importance régionale de la victoire majeure des Autochtones devant les tribunaux et conserver bien vivante la conscience nationale de l'héritage politique et économique de l'arrêt *Marshall*.

Introduction

First Nations people in the Maritimes are heavily engaged in commercial fishing in the oceans around their traditional territories. The communities own hundreds of boats, operate numerous plants and service facilities, and employ hundreds of members in different aspects of the fishery (Charles, Bull, Kearney, and Milley 2007). At one level, this is what would be expected, for the Mi'kmaq and Maliseet people had long harvested the resources of the sea. But long-time observers of First Nations in the Maritimes marvel at the transformation that has occurred in recent decades. Only a few decades before the Marshall decision, the Mi'kmaq and Maliseet had been effectively excluded from one of the region's most important industries, despite their historic ties to the lands and waters in their home territory (Paul 2000).

Isolation from the fishing industry was not total. Numerous First Nations communities in the region had a few members who worked in the sector as captains or deckhands or seasonally in the onshore fish processing plans; a small number of First Nations people owned fishing boats and held or leased commercial licences. While the industry as a whole prospered over time, however, First Nations sat some distance aside, left out of a key resource-based industry in their backyard (Poliandri 2011). They agitated for a greater presence, but had difficulty convincing the government to adopt more than limited measures (Milley and Charles 2001). These realities angered and frustrated Mi'kmaq and Maliseet people who had a long-ignored treaty with the British, but who did not have a more contemporary land surrender treaty or land claims agreement that might have updated and clarified their resource rights. That their communities were among the poorest in Canada only heightened their anger and deepened regional frustrations.

First Nations people in the Maritimes are heavily engaged in commercial fishing.

The Marshall decision came at an important time, for the Indigenous population in the region was growing rapidly. The First Nations on-reserve population in New Brunswick grew by 28 percent from 1999 to 2016. Nova Scotia's on-reserve population jumped 34 percent in the same time period, while PEI saw a 24 percent increase, and Quebec had an increase of 6 percent, for a region-wide on-reserve population rise of 27 percent. Off-reserve populations grew even more dramatically between 1999 and 2016: New Brunswick's was up 77 percent, Nova Scotia's expanded by 60 percent, Quebec's jumped 45 percent, and Quebec's increased by 84 percent.) As a whole, the on- and off-reserve First Nations population grew by 43 percent across the region, ranging from a low of 34 percent in PEI to a high of 45 percent in Quebec. In numerical terms, the regional First Nations population had jumped from under 29,000 in 1999 to over 41,000 in 2016.

As the financial returns from the Maritime fishery improved, particularly due to the growing Indigenous lobster and crab harvests, Indigenous demands for greater engagement increased.

As happened with Indigenous peoples elsewhere in the country who felt excluded from the natural resource economy, legal challenges and political claims expanded. First Nations in British Columbia secured preferential access to the salmon fishery in the 1970s (Newell 1993, Harris 2001); northern Inuit and First Nations people gained harvesting and resource rights, including resource revenue sharing, through modern treaties signed in the 1980s and 1990s (Gallagher 2012, Coates and Crowley 2013). For First Nations, Inuit, and Métis people largely locked out of resource-based prosperity and searching for an equitable share in the nation's wealth and opportunity, using the courts was the only tool available to their communities short of political protests and blockades.

The Rise of Legal Activism (1985-1999)

In the Maritimes, this legal activism took numerous forms, from the Simon hunting rights case in New Brunswick on harvesting rights on Crown lands, to initial negotiations on a modern treaty and extensive preparatory work on the unrealized authority of what have been called "peace and friendship" treaties between the British and Maritime First Nations, signed in the latter half of the 18th century (Coates 2003).

There were promising signs that the law might provide real solutions. The case of James Matthew Simon, decided by the Supreme Court of Canada in 1985, provided an important test of the Mi'kmaq assertion of 18th century treaty rights (Wicken 1995; Slattery 2000; Rotman 1997). Simon argued that his right to hunt was protected under the Treaty of 1752, which stated, succinctly, that First Nations had "free liberty of Hunting & Fishing as usual" (Canada, Indigenous and Northern Affairs Canada 1752/2016, Article 4). Simon lost at trial and in his appeal to the Nova Scotia Court of Appeal. The Supreme Court of Canada reversed the original decision, asserting:

> Both Governor Hopson and the Micmac had the capacity to enter into the Treaty of 1752 and did so with the intention of creating mutually binding obligations. The Treaty constitutes a positive source of protection against infringements on hunting rights and the fact that these rights existed before the Treaty as part of the general aboriginal title did not negate or minimize the significance of the rights protected by the Treaty. Although the right to hunt was not absolute, to be effective, it had to include reasonably incidental activities, such as travelling with the necessary equipment to the hunting grounds and possessing a hunting rifle and ammunition in a safe manner. (*Simon v. The Queen*, [1985] 2 SCR 387)

Clearly, the 18th century treaties had substantial legal standing.

However, legal progress was slow, for judicial proceedings unfold over years, if not decades, particularly if there are appeals of court rulings involved. Using the courts is also extremely expensive, requiring extensive legal and historical research, the collection of oral testimony, and lengthy discussions with Indigenous leadership and community members about the proceedings.

An even more politically dramatic case emerged a decade later. In 1997, Thomas Peter Paul won a lower court ruling – subsequently overturned on appeal to the New Brunswick Court of Appeal – to the effect that First Nations had the right to cut timber on unalienated Crown lands. This decision set off a short-term frenzy in New Brunswick forests and raised the possibility of a much greater role for Indigenous people in the Maritime resource economy.

But the defeat on appeal put a damper on the First Nations' expectations. The slow progress had not yet yielded a major or transformative victory, leading some Indigenous leaders and community members to question the costly effort being made to secure Mi'kmaq and Maliseet rights through the legal system. This changed in 1999 when the Mi'kmaq and Maliseet people secured a major legal victory that altered the trajectory of Indigenous rights in the Maritimes and, in the process, the economic system in the region.

The Marshall Decision (1999) and Its Consequences

Observers of the Maritimes know that the Marshall decision has had a significant impact on the regional economy and the First Nations in the region. The Indigenous presence is decidedly greater than it was prior to Marshall and the flow-on benefits of the greater access to the fishery can be seen throughout the Maritimes. The Atlantic Policy Congress, which played an important role in the expansion of the Indigenous fishery, has been particularly keen to understand both the impact of the fishery on the First Nations' economic activity and the broader social and political consequences of the Marshall decision.

The Marshall decision has had a significant impact on the regional economy.

This study's evaluation of the consequences of the Marshall decision relied on in-person and telephone interviews with First Nations fisheries officials from several of the Maritime First Nations and the Atlantic Policy Congress, a review of available statistical information on the fishery and Maritime First Nations' socio-economic circumstances, documentation available on First Nations' and Indigenous organizations' websites, and an assessment of the commentary on the Marshall decision. The interviews with the fisheries officials at the various First Nations provided excellent insights into the broader local outcomes associated with the expansion of the fishery, including relations with chief and council and financial contributions to communities.

While the broad social, economic, and cultural trends are important, it is also valuable to recognize the community-specific responses to the decision. The specific First Nations' experiences, described in a series of short descriptions in sidebars throughout the report, demonstrate how communities have responded to their unique situation and needs.

> **Sidebar #1: Eskasoni First Nation:** *Before 1999, the Eskasoni First Nation had little connection to the East Coast fishery. The band held a licence or two at different times and allowed the licences to be fished by a band member. People from the community harvested eels but had little presence in the commercial fishery in the region. It took more than half a decade before the community started to move into the sector, gaining a couple of small licences and working on vessels. But the nation readied itself for a greater opportunity, establishing the Eskasoni Fish and Wildlife Commission with a view to capitalize on their treaty right to a food and commercial fishery. The community also created Crane Cove Seafoods to manage the First Nations' commer-*

cial operations. Eskasoni has been assertive and creative in responding to the Marshall decision. The First Nation was troubled by the court's ruling that people should earn "a moderate income," and sought instead to create real opportunities. Their harvesting company broadened their catch from lobster to include snow crab, shrimp, and haddock and were, by 2019, managing operations from Cape Breton Island to Yarmouth, Nova Scotia.

Crane Cove developed quickly and successfully. Eskasoni operations received ISO 9001 certification in 2015, a testament to their commitment to sound business practices and accountability. The company grew dramatically, with eight full-time staff and seven seasonal (April to July) support staff and over 90 seasonal fishers, almost all of whom were Eskasoni First Nation members. It has an annual payroll of some $5 million, with plans to increase this by 15 to 20 percent by 2021. At peak levels, about 90 people work in the Eskasoni fishery. The company encourages job sharing and hires between 100 and 200 different people in the course of a year. Crane Cove rigorously enforces regulations concerning drug use, producing fascinating evidence of changing conditions within the community. A decade ago, the drug testing failure rate stood at above 30 percent; in 2019, it had fallen to 2 percent. Importantly, the company does not use a failed drug test as a reason to exclude an individual from future work. A failed test results in a worker being suspended for at least a month, but a successful retest can lead to reinstatement. Most of the financial return is passed on to fishers and processing plant workers, thus circulating more money through the community.

The company has 11 of the 28 shrimp licences in Nova Scotia. The firm operates 7 band-owned vessels, staffed almost entirely by Eskasoni members. Crane Cove Seafoods operates out of five ports: Arichat, Petit De Grat, Louisbourg, Canso, and West Pubnico. The company also established a processing plant, using only Eskansoni workers; its mandate is to produce additional work for the community as a priority equal to making money. The plant operates for 12 to 16 weeks a year, depending on the availability of product and market demand. The operation focuses on speciality products, including crab meat produced for high-end markets. The company wants to do more, but their inland location means that opportunities to expand processing operations are minimal; the community has arranged for First Nations members to find work in Sydney-area processing plants. (They even pay for buses to deliver community-based plant workers to and from their places of work.). The company also operates a substantial trucking operation, which has improved Cape Breton access to external markets.

Crane Cove invested in additional licences over time, which has allowed them to purchase more boats, hire more crews, and has provided additional paid work. They have developed sales relationships with Wal-Mart and Costco in the United States. Working in the industry has not been without troubles, as the standard pressures of world prices, market demand, and conservation requirements are complicated by changes in quotas, the commercial sale of boats and licences, community training activities, and community needs. Payments from these fishing operations have enabled the Eskasoni First Nation to retire its debt. Once this was done, the funds have been returned to the community through a variety of projects that have included road paving, housing, and local services.

The direct relationship between community improvements and commercial success, a straight-line arrangement that rarely, if ever, shows up in non-Indigenous commu-

nities, means that First Nations see multiple benefits from business and fishing activities. The cumulative impact, in turn, makes fishing more attractive to residents, adding to economic revival and to growing confidence among the Eskasoni.

Crane Cove and the Eskasoni Fish and Wildlife Commission are not content with the current situation. They are pushing for more access to the fishery in the form of additional licences, more boats, and improved onshore processing. They want the government of Canada to make the expansion of First Nations licences a priority. Eskasoni business officials know that, improvements in community well-being notwithstanding, there is not currently enough money in the First Nation to deal with housing shortages, the need for improvements in the schools, and urgent health concerns. Commercial progress is welcome, but partial success has served to make some members more aware of the community's needs and the level of economic development required to truly empower and improve the Eskasoni First Nations.

The Marshall Decision

In September 1999, the Supreme Court of Canada issued its judgment on *R v. Marshall*, one of the most important Indigenous treaty rights and natural resource cases in Canadian history. Donald Marshall Jr. had been arrested for fishing for eels in Pomquet Harbour. He had sold his catch for less than $800 and was charged for both fishing and selling eels without a licence. Marshall, from the Membertou First Nation, had first come to the country's attention due to a controversial wrongful murder conviction and subsequent inquiry into Nova Scotia's policing and judicial decision. His arrest on fishing charges immediately garnered national headlines and brought Mi'kmaq and Maliseet rights to the fore.

Marshall and his supporters argued that the 1760-1761 treaties signed with the British government authorized such commercial activities. Further, Marshall argued that harvesting eels, like other traditional Indigenous fishing and harvesting activity, pre-dated by centuries the arrival of the Europeans in the area. The government disagreed, claiming that federal fishery regulations governed the use of fishery resources and that the treaties did not convey commercial fishing rights. Marshall was tried and convicted. He appealed, without success, in Nova Scotia and launched a subsequent appeal to the Supreme Court of Canada. The Supreme Court of Canada heard the appeal in 1999 and rendered its path-breaking decision in September of that year.[1]

The Supreme Court's decision spoke directly to the ongoing authority of the 18th century treaties and to the obligations of the federal government to address Indigenous commercial rights. As the court declared:

> This appeal should be allowed because nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship, as best the content of those treaty promises can now be ascertained. If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations. An interpretation of events that turns a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant is not

> consistent with the honour and integrity of the Crown. Nor is it consistent to conclude that the Governor, seeking in good faith to address the trade demands of the Mi'kmaq, accepted the Mi'kmaq suggestion of a trading facility while denying any treaty protection to Mi'kmaq access to the things that were to be traded, even though these things were identified and priced in the treaty negotiations. The trade arrangement must be interpreted in a manner which gives meaning and substance to the oral promises made by the Crown during the treaty negotiations. 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.

In the complex but compelling language of the law, the Supreme Court had overturned the original decision and vindicated Donald Marshall Jr. and Mi'kmaq and Maliseet harvesters in general. More broadly, the Supreme Court's ruling acknowledged the continuing importance of the 18th century treaties, particularly the British accord with the Maliseet signed in February 1760.

The Supreme Court's ruling acknowledged the continuing importance of the 18th century treaties.

The judgment touched off celebrations among the Mi'kmaq and Maliseet, who heralded the decision as a reinstatement of their commercial treaty rights and the first opportunity to share in regional economic prospects. Government and fishing industry officials were shocked, for the decision ran counter to most legal expectations and long-standing government policy. There was an immediate and critical reaction by First Nations to the element in the ruling that Indigenous peoples were restricted to earning an unspecified "moderate income," but that was the one shadow on an otherwise transformative judgment. Further, the decision recognized Indigenous fishing as a collective rather than an individual right, an element that empowered First Nations governments in the implementation of the ruling. Legal experts immediately weighed in on the judgment, with several finding interpretive fault with the Court's decision. Others acknowledged the manner in which the Court continued to strengthen Indigenous and treaty rights in the resource sector and saw the ruling as a bold step forward.

The federal government was ill-prepared for the Supreme Court's decision. In the months that followed, the Supreme Court revisited aspects of its initial ruling, a most unusual legal step, responding to the prospect of enduring conflict in the region. The Court appeared to be siding with the many non-Indigenous fishers who described the Marshall decision as an over-empowerment of the Mi'kmaq and Maliseet.

Indigenous peoples viewed the second ruling, which emphasized that Indigenous treaty-based fishing was still subordinate to Canadian law and conservation requirements, as a retreat from the initial judgment. Throughout the Maritimes, Indigenous people took to the water in the fall and winter of 1999–2000, exercising their long-claimed but previously unrecognized rights. They experienced strong and angry resistance from many non-Indigenous fishers and community members, who claimed that the Supreme Court ruling would upend the regional economy

and cause widespread disruptions in the carefully managed fishery. The government of Canada now faced the formidable challenge of negotiating with 34 Mi'kmaq and Maliseet First Nations located throughout the Maritimes, including the Gaspé region of Quebec, Nova Scotia, New Brunswick, and Prince Edward Island.[2]

In the months that followed the Marshall decision, under great pressure from non-Indigenous interests to define a path forward and through extended negotiations with Mi'kmaq and Maliseet communities and organizations, the federal government worked slowly toward an appropriate resolution. First Nations, blocked from the sector for generations, took to the water with enthusiasm. They had to fight through age-old barriers, such as *Indian Act* provisions that made it impossible to use reserve land as collateral for a fishing loan, and provincial fisheries loans boards that imposed comparable restrictions. Non-Indigenous people, particularly in the fishing industry, pushed back hard. Tentative steps brought some peace to the fishery; over time, the government and Indigenous communities negotiated a mutually acceptable resolution.[3]

> **Sidebar #2: Donald Marshall Jr.:** *For much of the late 20th century, Donald Marshall Jr. was one of the most well-known Indigenous people in Canada. The focus of an intensive investigation into institutional racism in Nova Scotia, Donald Marshall Jr. helped expose major failures in the policing and judicial systems in Canada. The son of the Grand Chief of the Mi'kmaq and a member of the Membertou First Nations, Donald Marshall Jr. was a high-profile symbol of Indigenous resilience and determination. As the spokesperson for the most important Indigenous rights and treaty case in Maritime history, he continued to fight for Mi'kmaq and Maliseet rights through to his death in 2009, at the age of 55. He lived long enough to see the rapid unfolding of the early results of the Supreme Court decision on his case, not long enough to appreciate the transformations that swept across the region in the 20 years between 1999 and 2019.*
>
> *The name of Donald Marshall Jr. has pride of place in Mi'kmaq and Maliseet history. He is remembered for his long and painful experience in the Nova Scotia legal system and for representing Indigenous peoples of the Maritimes in their battle for treaty and fishing rights. The Membertou First Nation erected a statue in his honour in front of the Membertou Trade and Convention Centre in 2010. In October 2019, his eel-fishing nets seized by the Department of Fisheries as evidence for the court case were returned by the government to Membertou First Nation where they will be on public display at Membertou Heritage Park.*
>
> *Somewhat surprisingly, the passage of time has eroded the community's memories of Marshall. Young people in the region have only limited understanding of his role, often restricted to the association between his name and the landmark Supreme Court of Canada ruling. Older Mi'kmaq and Maliseet people, in contrast, understand how the deep racism of the policing and legal system destroyed much of his life and applaud him for leading the commercial fisheries case. Donald Marshall Jr. was not a fame-seeker and declared repeatedly that he sought recognition and results for the Membertou, the Mi'kmaq and the Maliseet, and not for himself.*
>
> *Donald Marshall Jr. died from the complications of a lung transplant in August 2019. He did not share much in the benefits of the Marshall decision but was recognized across Canada and internationally for his role in identifying fundamental flaws in the Canadian legal system and for the contributions he made to the recognition of Indigenous rights.*

The Investment: First Nations in the Maritimes and the Aboriginal Fisheries Strategy

The federal government, driven to act urgently by tensions between Indigenous and non-Indigenous peoples and the need to respond to the Supreme Court of Canada's Marshall decision, sought a solution that would create commercial space for Indigenous fishers without threatening the ocean stocks or displacing unduly the non-Indigenous interests. The government moved in February 2000, using a $160 million allocation from what became known as the Marshall Response Initiative (which ran from 2000 to 2007[4]) to deal with the Marshall decision. The government used part of the money both to buy back commercial fishing licences from non-Indigenous fishers, which were then used to support First Nations engagement in the fishery, and to equip those First Nations with initial equipment.

Negotiations continued, with more than a dozen First Nations signing interim agreements with the federal government in the first four months of 2000. The Fisheries Access Program (FAP) provided funds to purchase vessels, gear and licences.[5] This expanded into a regional Aboriginal Fisheries Strategy (AFS), based on an AFS developed in the wake of the 1990 Sparrow decision in British Columbia on Indigenous salmon fishing rights.[6] The AFS provided a coordinated approach to Mi'kmaq and Maliseet engagement in the fishery. Using AFS funds and support provided through the original agreements, First Nations purchased boats and fishing supplies, provided limited training for captains and crew, and developed onshore facilities.

Government support expanded, as did First Nations engagement. Non-Indigenous anger dissipated.

Tensions continued, particularly at Burnt Church and Indian Brook, both of which asserted broader rights than the government was prepared to accept. Conflict declined over time; government support expanded, as did First Nations engagement. Non-Indigenous anger dissipated as people came to understand that anyone leaving the industry would be properly compensated.

Ottawa's offer to purchase licences – still a source of comment by First Nations who feel the government dramatically overpaid – resulted in more than 1400 fishers offering to relinquish their licences to the government for distribution to First Nations. The federal government's total financial commitment, coming through a variety of programs, was significant, amounting to some $545 million, most of which was allocated between 1999 and 2007. (The Marshall Response Initiative, which provided the majority of the total federal funding, came in two stages: an initial $160 million as an interim measure and a second phase, incorporating the funds from the first stage, to expand access.)

In return for participating in the federal government's processes, First Nations had to accept the Department of Fisheries regulations and conservation practices, an important concession that brought peace to the fishery but that was extracted at substantial cost to the federal government.

The federal government expanded its engagement in 2007 when it created the Atlantic Integrated Commercial Fisheries Initiative (AICFI).[7] While this program built off the Marshall Response Initiative, it had a larger scope. The AICFI sought to improve on management of communal commercial fishing enterprises and to diversify the economic basis of the First Nations communities. Through this funding, the government of Canada sought to improve the commercial fishery, capitalize on aquaculture possibilities, and enhance training opportunities across the sector.

The AICFI was not without its flaws. The AICFI came up for renewal in 2012, providing an important test of the federal government's commitment to the principles of the Marshall decision and the effort to create a permanent place for the Mi'kmaq and Maliseet in the East Coast fishery. At this juncture, the general economic benefits of the AICFI and related initiatives were clear at the macro level. It was obvious that Indigenous employment had increased and First Nations business opportunities had grown dramatically.

Indigenous employment had increased and First Nations business opportunities had grown dramatically.

Jacquelyn Thayer Scott, a faculty member of Cape Breton University, examined the effectiveness of the program. In Scott's analysis, the program had been a significant success and warranted extension. First Nations continued to have trouble securing funding for business development and did not get a great deal of support from business professionals in the region.

Despite the high-profile political effort behind the AICFI, many Indigenous people in the Maritimes did not know much about the program elements. Further, Mi'kmaq and Maliseet engagement was far from uniform across the region. To Scott, however, the benefits of the initiative greatly outweighed the remaining challenges. She concluded: "The Atlantic Integrated Commercial Fishery Initiative has been a completely new and different policy approach unlike anything seen before in Canada. Its lessons have high potential applicability in First Nations issues at a range of social and economic levels. Its lessons also reach farther afield and offer promise for improved policy and practice in a large country with widely differing inter- and intra-provincial differences and characteristics"(Scott 2012).

The Atlantic Integrated Commercial Fisheries Initiative was enhanced and improved over time. A major innovation for Fisheries and Oceans was the inclusion of specialists on Indigenous affairs in the program planning and the entrenchment of the concept of joint decision-making in the AICFI Management Committee, which was co-chaired by DFO and the Atlantic Policy Congress. The initiative remains a cornerstone of Mi'kmaq and Maliseet engagement in the East Coast fishery and the foundation of the continued improvement in First Nations economic

prospects in the Maritimes. The AICFI demonstrates the continued authority and relevance of the Marshall decision, even though the specific measures in the initiative were not spelled out in the original Supreme Court judgments.

As the Mi'kmaq and Maliseet moved to exercise their now-confirmed treaty rights, they discovered that there were substantial financial, experiential, training, and commercial barriers to effective participation in the industry. First Nations entrepreneurs and communities needed money to build their capacity to enter the industry.

The support provided through the AICFI addressed, to a significant degree, these underlying challenges and permitted Mi'kmaq and Maliseet people and communities to work their way into the industry. The Mi'kmaq and Maliseet communities placed particular effort on harvesting skills, business planning and skills development related to entrepreneurship, and collaborative fisheries management. Through the program, communities invested in evaluating existing fishing equipment and boats, purchasing new vessels, upgrading existing vessels, expanding access to the fishery through the purchase of quotas and licences, improving onshore facilities, and purchasing fishing gear and traps.

First Nations entrepreneurs and communities needed money to build their capacity to enter the industry.

As the AICFI unfolded, the government extended its support to aquaculture and various land-based enterprises. The broader objectives remained much the same: developing Indigenous skill and experience, targeted training in boat operations, improving management capabilities, and supporting the continued improvement of economic opportunities for First Nations in fisheries and aquaculture. AICFI programs included Capacity Building and Business Development, Harvester Training, Expansion and Diversification, and Aquaculture Development. The programs recognize, implicitly, that the transition from the pre-1999 Indigenous fishery to substantial and sustainable engagement could never be a one-time or short-term effort. Instead, as the Mi'kmaq and Maliseet argued from the outset, generations of marginalization could not be set right overnight. Instead, the preparation of Indigenous people and communities for long-term involvement in the East Coast fishery emerged as the centrepiece of First Nations' agendas and, as a direct result, government investment and planning, a process that is actively monitored by DFO through a Business Capacity Rating System.

Government funding for Indigenous engagement in the fishery proved substantial, totalling $545 million between 1992 and 2018, with a paltry $10 million from 1992 to 1999 and well over $500 million from 2000 to 2018. The funding consisted of $454 million through Marshall Response Initiative between 2001 and 2007. AICFI and the Atlantic Commercial Fisheries Diversification Initiative (ACFDI) provided $75 million between 2008 and 2018. Community allocations for 1992 to 2018 varied widely, from under $3 million to $41 million, based on population size, the scale of business activity and the stage of development. Allocations were provided on a per capita basis to provide a measure of equity between and among the First Nations.

TABLE 1: FEDERAL GOVERNMENT FUNDING FOR THE ABORIGINAL FISHERY IN THE MARITIMES, 1992 TO 2018

Jurisdiction	Total ATP	Total MRI*	AICFI/ACFDI	Total, 1992-2018
New Brunswick	$7,515,060	$106,488,929	$25,630,723	$139,634,710
Nova Scotia	$3,864,722	$112,027,827	$31,156,303	$147,048,853
PEI	$955,600	$11,872,384	$5,770,333	$18,598,316
Québec	$2,858,400	$54,682,440	$12,214,315	$69,755,155
TOTAL	**$15,193,782**	**$454,811,800**	**$74,771,674**	**$544,777,256**

Sources: The primary source of information is Canada, Fisheries and Oceans 2019b. For information on the Atlantic Integrated Commercial Fisheries Initiative, see Canada, Fisheries and Oceans 2019a.

* The value assigned to each jurisdiction is based on funding allocations for specific First Nations. But a portion of the total MRI value cannot be assigned to specific First Nations, therefore the jurisdictional sum does not equate to the total presented.

Much of the Marshall Response Initiative funding came through the Fisheries Access Program (FAP) and support for capacity development. The government provided over $131 million in capacity funding between 2001 and 2007, with allocations as high as $11 million in Listuguj and $43,715 in Paq'tnkek. FAP funding included allocations of over $27 million for Eskasoni, $22 million for Listuguj, and more than $19 million for Burnt Church and Elsipogtog. Some communities received much smaller allocations in FAP funding, such as Eel Ground ($192,475) and Bear River ($850,000).

AICFI and Atlantic Commercial Fisheries Diversification Initiative funding for on-reserve development projects was almost $75 million from 2008 to 2018. The development of the diversification initiative was a vital step. DFO and the AICFI Management Committee supported diversification but it could not be funded through the AICFI. A joint application secured funding for the ACFDI, which allowed First Nations to develop fisheries-related enterprises, including aquaculture. The program worked extremely well, unleashing a wave of First Nations entrepreneurship, creating jobs and adding to the economic impact of the Marshall decision. The ACFDI was subsequently folded into the AICFI.

This support covered substantial sums for capacity development and economic diversification, as shown in table 2. This funding allowed communities to capitalize on initial expansion activities and to move beyond harvesting and into other fishing and non-fishing related investments. Communities that had not participated extensively in the early stage developments received substantial allocations. The Madawaska Maliseet received around $1.3 million in diversification funding. Gesgapegiag secured $1.8 million, Gespeg got $1.3 million, and Bear River collected $560,000.

TABLE 2: AICFI AND ACFDI FUNDING, ON RESERVE, 2008 TO 2018

Jurisdiction	Capacity	Training	Diversification	ACFDI	TOTAL
New Brunswick	$7,924,012	$1,396,793	$14,003,767	$2,306,151	$25,630,723
Nova Scotia	$5,455,591	$833,067	$22,403,062	$2,464,583	$31,156,303
PEI	$1,466,539	$138,111	$3,011,958	$1,153,725	$5,770,333
Québec	$2,410,544	$564,855	$8,539,696	$699,221	$12,214,315
Region-wide	$17,256,686	$2,932,826	$47,958,482	$6,623,680	$74,771,674

Sources: Canada, Fisheries and Oceans 2019b, and Canada, Fisheries and Oceans 2019a.

The Return on Investment: Mi'kmaq and Maliseet Involvement in the Maritime Fishery

Through the Marshall decision, the Mi'kmaq and Maliseet secured recognition of their treaty right to engage in the commercial fishery. Subsequent negotiations with the federal government secured the licences, the funds necessary to buy equipment, and the opportunity to engage in the industry. Having the money and the right to fish did not, on its own, ensure successful Mi'kmaq and Maliseet participation in the commercial fishery. The First Nations fishers needed mentorship, training, and the opportunity to gain experience. There were opportunities off the water, particularly in the processing sector, that were available to communities and Indigenous entrepreneurs interested in entering this part of the industry.

Returns varied unevenly from $3 million in 1999 in communal commercial landings, to $66 million in 2004, to $43 million in 2006, to $60 million in 2008, to $53 million in 2010, before increasing steadily to $71 million in 2012, $91 million in 2014, and $122 million in 2016. Indigenous fishers were involved in harvesting a variety of species, with very different levels of market engagement.

The federal government continued to improve on its engagement in the First Nations fishing sector. It supported the Atlantic Integrated Commercial Fisheries Initiative (AICFI) and groups such as the Business Development Team of the Ulnooweg Development Group, which provides business advice to First Nations and Aboriginal development corporations.[8] Within a dozen years of the Marshall decision, 30 of 34 First Nations were actively involved with the

TABLE 3: COMMERCIAL LANDINGS, EASTERN CANADA, BY SPECIES, 2016

Species	Total Market Value	Mi'kmaq and Maliseet First Nations Landings	MMFM/Total % of MMFN	Value
Lobster	$1,260 million	$50 million	4%	41%
Snow Crab	$319 million	$48 million	15%	39%
Shrimp	$146 million	$14 million	9%	11%
Scallops	$156 million	$2 million	1%	2%
Groundfish	$111 million	$2 million	2%	2%
All species	$2,160 million	$122 million	6%	100%

Source: The primary source of information is Canada, Fisheries and Oceans 2019b.

AICFI. Professional advisors and support personnel were hired to assist with the transition to the commercial fishery. The Department of Fisheries and Oceans coordinated its operations, not without difficulties, establishing the Aboriginal Aquatic and Oceans Management program to ensure Indigenous participation in the scientific and technological aspects of fisheries management and to oversee collaboration, planning, and evaluation initiatives.[9]

The short-term advances were substantial, including:

- First Nations economic benefits from the fishery jumped from $4.4 million in 1999 to $35 million in 2009;
- The number of commercial fishing licences held by Maritime First Nations increased from 316 in 1999 to 1,238 in 2009 (Canada, Fisheries and Oceans 2019b).

Indigenous employment in the fishery spiked upwards, as did general economic returns to First Nations communities. Young people, in particular, entered the industry in large numbers, as did many Indigenous women. The number of seasonal jobs rose, Indigenous engagement in training improved, and First Nations ownership of fisheries-related businesses grew dramatically. The lobster fishery, the initial focus of the Indigenous engagement, expanded to include snow crab, shrimp, and ground fish, which extended the commercial seasons and improved personal and business income.

By 2019, 20 years after the Marshall decision, the economic impact was pronounced, far greater than commentators believed was likely in 1999 or even 2009. Consider some of the more recent statistics:

TABLE 4: CONTOURS OF THE MARITIME FISHERY, 2018

Total Number of Vessels	Native Harvesters	Native Captains	Participants in Training
320	1461	234	621

Annual catch numbers (selected communities) illustrate the continued growth of the Indigenous fishery.

TABLE 5: FISH HARVEST BY COMMERCIAL VALUE, 2007 TO 2016 (SELECTED COMMUNITIES)

Community	Annual $ value, 2007-2010	2016 ($ value)	Harvesters, 2016
Community One	$2.3 million	$50 million	20
Community Two	$2.9 million	$48 million	135
CommunityThree	$5.4 million	$14 million	50
Community Four	$3.3 million	$2 million	30
Community Five	$2.5 million	$2 million	32
Total (Selected communities - One to Five)	$16.4 million	$116 million	267
Total (34 First Nations)	**$52.4 million**	**$129.6 million**	**1310**

TABLE 6: TOTAL MI'KMAQ AND MALISEET FIRST NATIONS TOTAL FISHING REVENUES, ON-RESERVE, 1999-2016

Province	1999	2016
New Brunswick	$526,933	$63,277,109
Nova Scotia	$2,442,725	$51,999,138
PEI	$54,969	$10,974,837
Québec	$0	$25,747,846
Region-wide	$3,024,617	$151,998,930

TABLE 7: AICFI-GENERATED COMMERCIAL FISHERIES EMPLOYMENT, 2018 (BY PROVINCE AND SELECTED COMMUNITIES)

Province/Community	Land-based Employment	Total Harvesters	Total
New Brunswick	**154**	**691**	**845**
Burnt Church	53	135	188
Elsipogtog	17	300	317
Nova Scotia	**94**	**397**	**491**
Eskasoni	47	104	151
Pictou Landing	7	74	81
Prince Edward Island	**84**	**119**	**203**
Lennox Island	62	87	149
Québec	**26**	**103**	**129**
Listuguj	7	50	57
Regional Total	**358**	**1310**	**1668**

Sources for tables 4-7: The data for these tables was assembled from a variety of sources, including published reports of the Department of Fisheries and Oceans, information provided by Maritime First Nations and the Atlantic Policy Congress, and other statistical sources.

While the total number of jobs – 1668 on reserve in 2018 – is not enormous, it nonetheless represented a substantial percentage (4.1 percent) of the 41,000 on and off-reserve First Nations people in the Maritime region. The employment numbers were one of the most tangible examples of the impact of the Marshall decision on the everyday lives of Indigenous peoples and communities.

The Significance of the Marshall Decision for Mi'kmaq and Maliseet People

When Donald Marshall Jr. went eel fishing, he was doing something his ancestors had done for many generations. He was also engaging in a cultural activity of great importance to him personally (Martin 2018). As the First Nations ventured into the uncertain waters of the Canadian legal system, it was evident that the Marshall case was about more than treaty rights and access to the fisheries, important as they were.

Mi'kmaq and Maliseet people had long resented their isolation from one of the most important economic activities in their traditional territories and the poverty associated with their long-term marginalization. But they were searching for much more than fishing licences, boat ownership, and processing plant jobs. They sought, instead, a vindication of their generations-long understanding of the peace and friendship treaties, public recognition of their valid and substantial place in the regional economy, and the resources and opportunities needed to chart their own future.

The Marshall decision has had wide-ranging implications for Mi'kmaq and Maliseet people and for the Maritimes generally. Commentaries by First Nations leaders and community members, fishers, and businesspeople, make it clear that Indigenous life in the Maritimes has been profoundly changed by the Supreme Court decision and subsequent negotiated arrangements with the federal government.

The Marshall decision was not, of course, the only significant change in Indigenous empowerment over the past 20 years. Other Supreme Court decisions, particularly the "duty to consult and accommodate" decisions in Haida (2004) and Taku (2004) (Newman 2014, 2017), the adoption of the *United Nations Declaration of the Rights of Indigenous Peoples* (UNDRIP) in 2007 and Canada's acceptance of UNDRIP three years later, and the expansive and aggressive Indigenous agenda of Prime Minister Justin Trudeau and his government after 2015, each changed government policies and programs dramatically (Favel and Coates 2016).

More important than these legal measures, perhaps, were the increasing authority of Indigenous organizations, including the Mi'kmaq and Maliseet governments, the economic and business development work of the Atlantic Policy Congress of First Nations Chiefs' Secretariat,[10] and significant self-government initiatives, capped by the Mi'kmaq assuming control over their education system, and a surge in the number of Indigenous people attending colleges and universities. Collectively, these various developments reshaped First Nations governance and economic engagement, building on and interacting with the authority regained through the Marshall decision. But symbolically, emotionally, and practically, the 1999 Supreme Court judgment rewrote the foundations of First Nations life in the Maritimes in a number of important cultural, social, and economic ways.

Re-establishing treaties and commercial rights

Indigenous peoples in the Maritimes long knew that their 18th century treaties with the government of Britain had assured them of long-term economic standing in their traditional territories and waters. However, the British and settler governments, having signed the accords, put them aside. The colonial authorities and, after Confederation in 1867, the federal government, did not negotiate land surrender or other treaties with the Mi'kmaq and Maliseet, as they did with many First Nations in central Canada and the western prairies. On one hand, settler governments acted as though the peace and friendship treaties had resolved Indigenous land rights in the Maritimes; on the other, British and Canadian authorities did not ensure that the elements of the treaties were enacted nor did they take the necessary steps to systematically enact the agreements.

For more than 200 years, the treaty rights of the Mi'kmaq and Maliseet people stood in abeyance, remembered by the First Nations but ignored or forgotten by the public governments. In comparison to other First Nations, where 19th and 20th century treaties were signed, the Indigenous peoples in the Maritimes suffered through decades of intense marginalization, despite numer-

ous requests to governments for treaty-inspired support. This problem persisted through to the end of the 20th century. Discussions started several times around a "modern" treaty, intended to bring the Maritimes in line with Canadian norms, but the negotiations foundered.

Beyond the technical and fishing-related provisions of the Marshall decision, the Supreme Court ruling revived the 18th century treaties, recognized the contemporary authority of the peace and friendship agreements, and adopted a broad interpretation of the accords. The full implications of the re-empowerment of the treaties remain to be seen, although the government's continuing interest in negotiating a modern agreement with Maritime First Nations suggests that the Marshall decision gave the matter greater urgency. For the Mi'kmaq and Maliseet, the court's recognition of the peace and friendship treaties reset the legal authority of treaty rights for the First Nations in the region. There are few political and legal elements more foundational to Indigenous peoples than an historical treaty; there are few steps that are more empowering or more dramatic than having the leading court in the land re-establish the authority of those historic treaties.[11]

Growing confidence in Canadian legal and political systems

On a broader scale, the Marshall decision by the Supreme Court of Canada demonstrated to First Nations people in the Maritimes that the Canadian legal and political system could protect and serve their interests. Indigenous peoples in Canada had long since lost faith in the colonial and paternalistic governance systems, which had marginalized them for generations and, after the 1960s, built a culture of welfare dependency that had wide-ranging and negative effects on Mi'kmaq and Maliseet communities. First Nations people, in the Maritimes and elsewhere in the country, had limited engagement in the provincial and federal electoral processes. Because of their poverty and political powerlessness, they remained for generations under the control of federal civil servants. There had been some minor court victories and core services such as education and health care were provided, albeit at a lesser quality than for the general public. To put it succinctly, Canada did not work for First Nations in the Maritimes.

The Supreme Court decision was a significant part of the process of re-establishing Indigenous confidence in the Canadian legal and political system. Although the legal route was lengthy and expensive, it ended well for First Nations. First Nations had been recognized and their treaty rights effectively reinstated. But the process did not stop there. The federal government responded to the court decision, albeit chaotically at first, and followed up with continued support, revised programs, and extensive engagement. If the decision demonstrated, along with hundreds of other Indigenous cases across the country, that the legal system could protect First Nations and treaty rights, the subsequent negotiations and agreements with the federal government showed that the bureaucracy and political system could support the initial judgments. A subsequent Supreme Court trial, this time involving the logging rights case of Joshua Bernard, did not end well for the First Nations (R. v. Marshall; R. v. Bernard, [2005] 2 SCR 220, 2005 SCC 43).[12]

First Nations are far from satisfied with the responsiveness of the Canadian courts and government agencies. There are many unresolved and contested Indigenous issues, not the least of which are First Nations treaty, land, and resource rights in the Maritimes. While the government response to the Marshall decision was initially slow and convoluted, and if the implementation left much to be desired, the reality is that the investments, policies, and programs did eventually adapt to both the court judgment and the realities of the East Coast fishery.

Mi'kmaq and Maliseet find themselves deeply entwined with the federal government as they continue the process of capitalizing on the opportunities created by the Marshall decision. Major areas of debate remain, including the definition of the unusual requirement for a "modest income," and a great deal of training, education, and business development remains underway. Several generations will pass before the First Nations are able to secure in full their long-term place in the East Coast fishery. But engagement with government has demonstrated, although still with caution and uncertainty, that the political and civil service processes can respect Indigenous rights and that the government of Canada can work with First Nations to create lasting opportunities (McMillan 2011).

> **Sidebar #3: Atlantic Policy Congress:** *The Marshall decision empowered Mi'kmaq and Maliseet people, building on the authority of the First Nations. The First Nations remained the rights holders and had the authority to establish economic development corporations and fishing operations and to hold the licences and grants provided by the government of Canada. Given the small size of the two First Nations and their economic challenges, it remained difficult for the communities to capitalize on opportunities, even given the considerable power established through the Marshall decision.*
>
> *In the Maritimes, the First Nations had a formidable ally in the Atlantic Policy Congress (APC), established in 1995 to advocate on behalf of Indigenous peoples in Atlantic Canada, Eastern Quebec, and Maine. As the APC describes its mandate, the organization "follows a relationship vision that concentrates on partnership and cooperation, government to government relationships, dialogue and education, quality of life, and self-determination in First Nations Communities. In order to accomplish this, APC works closely with community members and leadership to get direction by providing all information in order that communities can make informed decisions."*[13]
>
> *The APC has played a vital role in transforming the legal authority granted in the Marshall decision into effective and sustainable local economic development. The Atlantic Policy Congress assisted with negotiations with the government of Canada, advised First Nations of their commercial options, and provided a great deal of assistance with business plans, investment strategies, and core business operations. The congress has monitored the policy and administrative efforts of the Department of Fisheries and Oceans, and promoted the retention and expansion of government support programs. It has lobbied for the expansion of the Marshall Response Initiative and the creation and evolution of the Atlantic Integrated Commercial Fisheries Initiative (AICFI).*
>
> *The congress has focused considerable attention on one of the most controversial elements of the Marshall decision, the unexplained rider to the effect that Maritime First Nations were limited to a "moderate livelihood." The APC has argued that the First Nations in the region have experienced severe limitations imposed by this requirement and are owed substantial compensation (or the elimination of the constraint). The legal and political effort to keep up pressure on the government of Canada and the department of Fisheries and Oceans in particular remains a substantial component of the outreach work of the APC.*
>
> *More fundamental, perhaps, has been the APC's business development work. The First Nations remain the rights holders under the Marshall decision and the economic development initiatives will remain focused at the community level. But few of the First*

Nations are large enough and experienced enough to tackle the development of full-scale commercial ventures. The APC's business development office plays a critical role in providing assistance and strategic planning, developing business plans and helping the First Nations secure the required funding. The APC supports community-level project management teams and assists them in establishing successful commercial operations. The APC helped both the government of Canada and the First Nations in the Maritimes develop and implement support programs and, most critically, it has provided the third-party support needed to build the transition between being rights holders and achieving commercial success.

The accomplishments of Mi'kmaq and Maliseet First Nations are real and substantial. Obviously they emphasize the Maritime fishery, but they also include cultural tourism, aquaculture, onshore processing, and general business diversification. The Atlantic Policy Congress shares the First Nations' goal of building own source revenues, which will liberate the Indigenous communities from over-reliance on the federal government.

The APC's vision is of economic independence, based on the recognition and exercise of Mi'kmaq and Maliseet treaty and Indigenous rights, of a diverse First Nations economic base that uses the fishery as the floor and not the ceiling for regional development, and that empowers Indigenous youth, male and female alike, to take more prominent roles in the regional order. They envisage a time, in the not so distant future, when First Nations build beyond their local economic base and establish industry-wide dominance, based on both First Nations rights and sustained commercial success. The APC, operating under the direction of regional chiefs, remains a valuable support agency for business and governance development, sharing the belief that the Mi'kmaq and Maliseet deserve to take part in the prosperity of Canada as a whole.

Community rebuilding and improvements

Developments at the community level matter, often as much or more than major legal decisions or sweeping political and policy realignments. More basic elements, from the quality of roads and the availability of decent housing to facilities for seniors and funding for cultural programs, contribute substantially to quality of life and peoples' confidence about their future.

The Mi'kmaq and Maliseet First Nations produced significant improvements, ranging from the remarkable transition to Indigenous-managed education in Nova Scotia to the development of an active presence in New Brunswick gaming and impressive local-level economic development activities in many communities. Separating developments related to the Marshall decision from broader First Nations and government efforts is difficult and, ultimately, unimportant, for they are all part of Indigenous efforts to secure appropriate support and of governments to respond to First Nations' demands and needs.

The Marshall decision did result in substantial improvements at the community level. Some of this was indirect, in the form of flow-on spending from First Nations people newly employed in the fishery, and included increased emphasis on training and education that prepared people for work outside ocean-based industries. Expenditures from the fishing companies circulated through the local economy, created entrepreneurial opportunities and adding to the number and variety of jobs, with both producing additional wealth within the Mi'kmaq and Maliseet communities.

Additionally, First Nations communities secured direct benefits from Marshall-based commercial activity. While the business-First Nations relationships varied across the Maritimes, community-owned enterprises typically returned a portion of their annual profits to their First Nations. (The remaining profit was re-invested in company activities, equipment, and new business opportunities.) In the first years after 1999, annual payments were small as the companies paid for training costs, purchased additional equipment, built locally controlled facilities, and otherwise secured the long-term future of their operations. Within a decade, and in some instances sooner, most of the community-owned enterprises returned significant contributions to their First Nations governments.

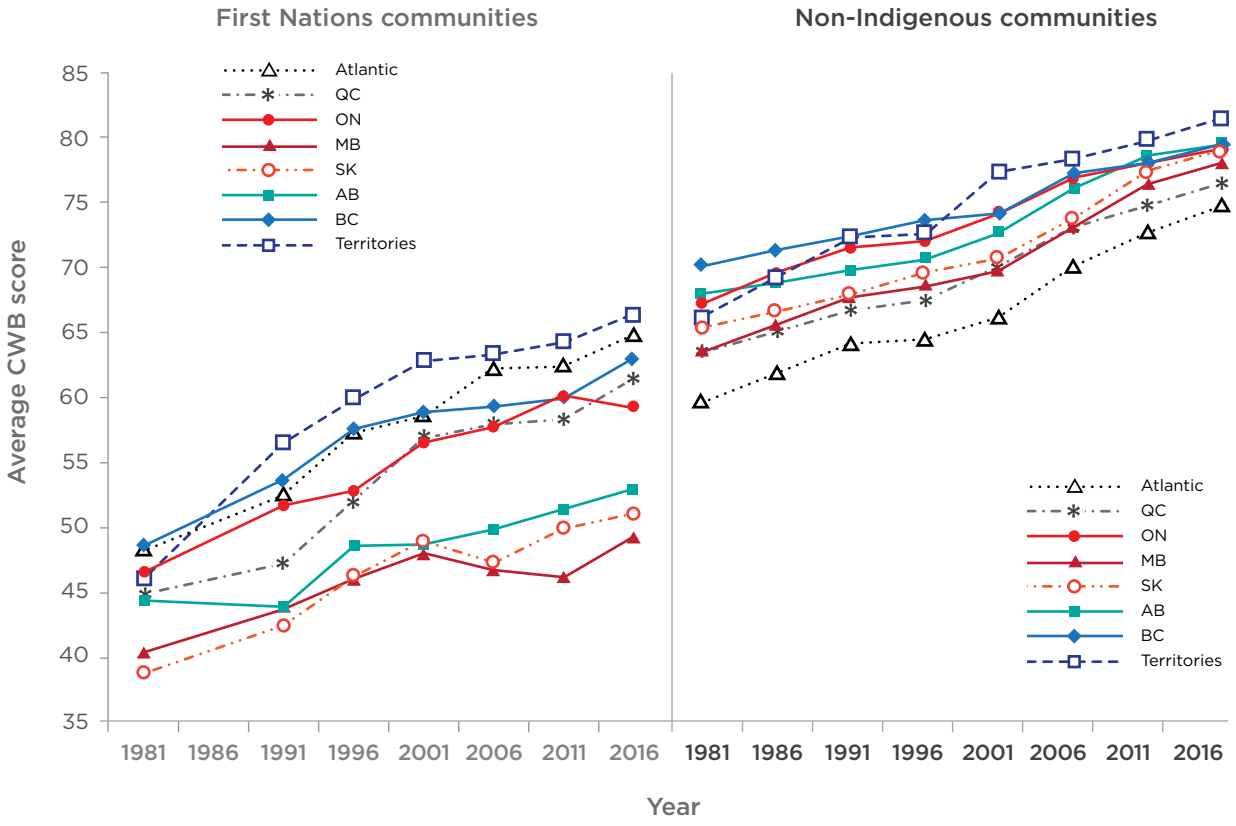
First Nations communities secured direct benefits from Marshall-based commercial activity.

It is impossible to be precise about this element of First Nations commerce. Most community-owned businesses and First Nations governments do not divulge the size and specific use of these contributions. Furthermore, the value of the contributions varies substantially between companies and over time, in keeping with the realities of a market-sensitive sector and uneven returns from the harvests. But annual distributions in some communities often amounted to more than a million dollars a year, sometimes many multiples of that, according to community leaders interviewed by the author. These funds came to the First Nations as own source revenues, not controlled by the federal government and therefore not subject to the standard application and accountability to the federal government processes that had long characterized federal transfers and locally available resources. Own-source revenue has emerged as a major part of the First Nations' drive for autonomy, allowing local Indigenous governments to target key priorities without recourse to additional applications for federal funding.

Those First Nations communities that receive substantial contributions from their fisheries companies have a strong sense of how Marshall-related economic activity is changing local conditions. One economic development official provided a brief overview of the direct investments tied to company contributions to his First Nations. He described, among other elements, a recently paved road, a newly opened seniors' housing project, several new houses, support for locally owned new businesses, an improved playground at the local elementary school, an expanded processing plant, cultural programming for teenagers, and a language initiative. Because of the nature of the financial relationships between the fishery operations and Councils, it is impossible to track the connection between income from the fisheries and specific Council expenditures. Nonetheless, it is clear that the payments, multiplied across 34 communities and added up over 20 years, had a substantial impact on community services and infrastructure.

The expanded fishery, among other factors such as improved Indigenous education in the Maritimes and more general First Nations activism and economic development, produced significant collective results in the region. The federal government's Community Well-Being Index provides a rough guide to living conditions at the community level. While the data shows that the living

CHART 1: COMMUNITY WELL-BEING INDEX, FIRST NATIONS AND NON-INDIGENOUS COMMUNITIES, 1981-2016



Source: Canada, Indigenous Services Canada, 2016.

conditions in Indigenous communities lags well behind those in the general Canadian population – the highest ranked Indigenous communities in 2016 on the Community Well-Being Index were close to the lowest ranked general regional populations in 1999 – it also provides evidence of considerable improvement in circumstances.

For Atlantic Canada as a whole, the living standards of First Nations communities jumped significantly between 1999 and 2016, from close to a score of 57 on the CWBI at the time of the Marshall decision to close to 64 in 2016. By this time, Atlantic Canada was behind only the Territories in the well-being of its First Nations communities. The top-ranked regions in the country were rated at more than 10 points higher that the Atlantic Canadian First Nations communities. First Nations in a few other parts of the country improved their CWBI scores as much or more than the Maritimes between 1999 and 2016; a Marshall-type jolt was not the only avenue to improved economic and social outcomes. But clearly the Marshall decision was a significant component of the general improvement of Indigenous well-being in the Maritimes.

As the scale of the Mi'kmaq and Maliseet fishery grows, the community benefits will expand accordingly. The result will not, in the short to medium term, be overly dramatic, for the sim-

ple reason that the backlog of needs for personal and community facilities is so substantial. Realistically, communities will become better off rather than wealthy, closer to the Canadian standard more than handsomely supported. But given the starting point for Mi'kmaq and Maliseet people, what are to this point modest gains represent a vital change in trajectory and collective well-being.

Sidebar #4: Pictou Landing First Nation: *In the year of the Marshall decision, Pictou Landing had one community-owned lobster boat, operated by a captain and two deckhands on behalf of the community. It was auctioned off and a community member purchased it. The Supreme Court judgment caught the First Nation by surprise. But the community responded quickly, signing one of the first Marshall agreements in Canada. Twenty years later, the community has 13 lobster and eight snow crab licences, with engagement in the rock cod, herring ground fish, and other fisheries. There was some dissatisfaction with the fact that non-Indigenous fishers received such high payouts from the government of Canada and that money flowed more slowly to First Nations. Within the next two decades, the First Nations owned close to 20 boats. Five or six community members secured commercial licences, although current prices of up to $2 million per licence have made entry into the fishery prohibitively expensive.*

Pictou Landing got heavily involved in the commercial prospects of the industry. Direct engagement through boat ownership and fishing was obviously a large part of that involvement. So was the development of boat servicing capacity, including an application to the AICFI for funds for a boat storage facility. Pictou Landing First Nations celebrated the fact that they had their own mechanic and were training their own skilled workers, drawing heavily on AICFI and other government programs to finance the workforce preparation. The shortage of space controlled by the First Nations has slowed possible commercial operations, including a plan to build traps. Because of the distributed nature of the Pictou Landing licences and harvesting, the community also invested in a Bed and Breakfast in Shubenacadie that can host up to 30 people and that has been used seasonally to house fishery workers. There was some oyster harvesting in the Pictou Landing harbour, no fish farming, not enough product for a processing plant, and some preliminary explorations of aquaculture. The First Nations' fishing operations supports 78 fishers, with six management and administrative staff.

Efforts to expand the fishery have run up against the rather welcome difficulty of not having enough local First Nations people looking for work. Local fishermen have hired away First Nations workers. Considerable area construction, particularly a new school, absorbed a good portion of the local workforce. Conversely Pictou Landing is justly proud of their continuing effort to hire women for their fishing crews. As of summer 2019, the community had three female captains and another five female deckhands. The First Nation strongly supports the training of community members, male and female, and wishes to have more engaged in the fishery.

The Pictou Landing fishing operations have attracted strong support from the First Nation and its members, including resounding enthusiasm for the financial returns that have been allocated for the expansion of the commercial operations and for other local purposes. The First Nation deserves applause for creating jobs, keeping jobs and money in the community, and donating funds for local needs. The commercial vision for the coming decades – more licences, more boats, more First Nations crew

members, expanded marine services, boat repair, and construction, and improved quality of life in the community – is widely shared among the Pictou Landing First Nations. The fishery operators work closely with the chief and council, with cheques from fisheries profits going directly to the chief and council for allocation to council projects.

The community contemplated a model in which the political and economic activities were separated, but opted for the integrated model. The extra level of political engagement can slow operational decisions at times, but in return, the coordination of fishery and council activities ensures broad community support for plans to improve the fishing enterprise. In addition, the inclusion of the council's human resources committee in the hiring process has provided great accountability and a clear and open means of avoiding conflicts of interest.

Given Pictou Landing's location, the limited pre-Marshall engagement in the commercial fishery was a strong indication of the marginalization of the Mi'kmaq people in the Maritimes. The community's quick and successful participation demonstrates the impact and authority of the Marshall decision. Local pride, the entrepreneurial spark, and the energy that now suffuses the local economy provide a sharp reminder of how much the Supreme Court judgment altered First Nations' realities and expanded opportunities.

Empowerment of First Nations women

In the initial discussions about the 1999 Marshall decision, issues of gender rarely surfaced. Questions focused on the empowerment of Indigenous people and communities and the recognition of treaty rights. Quietly, but quite rapidly, Indigenous women made it clear that they expected to find a place for themselves in the Marshall-based fishery. Since very few women were previously involved in the industry, this involved considerable educational and training effort and support from the Indigenous-controlled fishing companies and First Nations.

Twenty years after the Marshall decision, women had taken substantial roles in the industry. There are significant numbers of female Indigenous boat captains and crew members. In one Nova Scotia community, women staff three of the 10 boats managed by the local fishing company. Fishing companies have hired hundreds of women to work in onshore processing plants, even arranging busing to deliver the workers to jobs in other communities, according to community officials interviewed by the author. Women also find opportunities in company offices.

This transition in female engagement in the fishing industry in the Maritimes mirrors developments across the country. Indigenous women are more likely than Indigenous men to complete high school, college, and university. They are, as a group, experiencing better employment rates and higher salaries than Indigenous men.[15] The substantial presence of women in the Maritime fishery cannot, therefore, be connected entirely to the Marshall decision and the resulting opportunities. But it is true that the growth of Indigenous involvement in the East Coast fishery created new opportunities for women within the sector, including substantial numbers of leadership and commercial positions, in an industry that historically provided few openings for Indigenous peoples and many fewer still for women.

The possibility now exists for a substantial and sustained expansion in opportunities for Mi'kmaq and Maliseet women, both directly and indirectly in the fishery and through the

growing prosperity of First Nations communities. That this is part of a more general transition in the lives of First Nations women across the country does not diminish the importance of the unique and regional conditions associated with the Marshall decision.

Business development opportunity

First Nations businesses encounter serious barriers in their efforts to expand on their economic base, facing particular challenges raising capital. The government funding that accompanied the resolution of the Marshall decision enabled Mi'kmaq and Maliseet individuals with fishing rights, personal motivation, and a commercial bent to enter the sector. In the first instance, various government programs helped Indigenous people to start commercial operations and unleashed considerable entrepreneurial energy across the Maritimes. The opportunities expanded rapidly as individuals and communities contemplated investments in related fishing businesses, from processing plants to boat repair. The community and business profits from the fishery allowed individuals and Aboriginal economic development corporations to expand into other industries.[16]

It is important to understand both the pre-Marshall decision barriers to Indigenous business developments in the Maritimes and the manner in which supports from the post-Marshall government sparked a renaissance in Indigenous economic development. The expansion in Mi'kmaq and Maliseet business that occurred after 1999 reflected the combination of access to investment capital, opportunities for reinvestment that occurred after the first wave of successful Indigenous business expansion, and the burst in confidence that accompanied the revitalization of the regional Indigenous economy.

Mi'kmaq and Maliseet businesspeople and communities discovered opportunities to own and operate businesses.

In a classic example of success building on success – with the inevitable commercial challenges and failures that are part of the business world – Mi'kmaq and Maliseet businesspeople and communities discovered opportunities to own and operate businesses. In New Brunswick between 2012 and 2016, for example, Indigenous businesses experienced a 14 percent growth in revenue, 36 percent growth in wages, 20 percent rise in employment, and 106 percent increase in profits (Joint Economic Development Initiative 2019).

Indigenous commercial operations proceed with deep commitments to Mi'kmaq and Maliseet communities. This is particularly the case with community-owned enterprises, which combine the pursuit of profit with local employment and local spin-off benefits. This approach, which is imbedded in the tight relationships between community-oriented firms and local governments, has enhanced the collective benefits of post-Marshall decision development. The community impact of reinvestments, especially those made as a result of the financial transfers from the economic development corporations to First Nations governments, have boosted the profile of business activity and increased the prestige of the community-owned enterprises.

Young Mi'kmaq and Maliseet men and women drawn to business employment and entrepreneurship have been able to draw on local role models and practical, in-community examples of successful Indigenous businesses.

The expansion has not all been tied to the Marshall decision. The general empowerment of Indigenous peoples, government investments in Aboriginal business, the success of Indigenous organizations, and the improvement in Mi'kmaq and Maliseet educational outcomes have all contributed as well. A quarter century ago, Indigenous business activity in the Maritimes beyond the reserves was minimal and low-profile. With investments in the fishing industry leading the way, First Nations emerged after 1999 as a small but significant and growing part of the regional economy.

> **Sidebar #5: We'koqma'q First Nation:** *Like all Maritime First Nations, the people of We'koqma'q had long been locked out of the fishery. In 1999, the year of the Marshall decision, the community had a single snow crab licence, one lobster licence, and a dormant sea urchin licence that had not been used for five years. Several local people worked an oyster lease as well. The licences were band-owned, but the community did not own the boat although the captain was required to hire at least one community member. The return to the community, some $50,000 a year, had little impact on the local economy. Some members wanted to get involved with the industry post-Marshall, but there were few local lobster opportunities, the most lucrative part of the East Coast fishery.*
>
> *The reaction to the Marshall decision was somewhat limited. Many local residents did not believe they needed the Supreme Court of Canada to tell them what their treaty and Indigenous rights were. They realized that they needed government help to buy boats and pay for training. Like most communities, residents resented the "moderate living" regulations, opinions they did not hold back from expressing to visiting department of Fisheries and Oceans staff. They were also unhappy with proposed Maritime Protected Areas plans, which would have closed off up to 10 percent of the Atlantic waters. The We'koqma'q have been unhappy with the allocation of licences and support for boat purchases and training, recognizing that the small number of licences fell far short of meeting community requirements. Many members expressed unease with the amount of federal money going to non-Indigenous fishers; they joined many Indigenous people in wondering if the non-Indigenous people were the prime beneficiaries of the Marshall decision.*
>
> *There have been productive changes. More community members worked on the boats using community-owned licences available through the Marshall Response Initiative and subsequent programs. Ships capable of working in deep waters were added to the local fleet, staffed by We'koqma'q members. The community also invested in a fish farm, a processing plant connected to steelhead trout, and a hatchery that produces fingerlings for the market. In 2018, 40 people worked seasonally in the processing plant. One quarter of the staff at the fish farm worked full-time; the rest were hired seasonally. Another 15 to 20 worked at the band-owned fish farm. Most of the workers were in their 20s and 30s, providing many First Nations with their first paid jobs. As in other communities, the fishery provided employment and commercial opportunities.*
>
> *We'koqma'q made substantial commitments to developing a commercial eel operation. Glass eels carry substantial commercial value, commanding high returns from*

the large Chinese market. An exploratory licence to harvest eels (called elvers) granted in 1997 allowed 11 non-Natives and 12 First Nations members to use Fyke nets and eel pots, including at night. The government allocated between six and seven licences across Atlantic Canada, with We'koqma'q dominating the First Nations side of the fishery and other First Nations being blocked from entering the field. There was, as well, a substantial black-market fishery that complicated an already volatile situation. The First Nation hired four security personnel at the plant to guard the valuable commodity. The community got involved in the Red fish harvest as well, using Marshall-related funds to enter the sector.

We'koqma'q First Nation took advantage of its local assets – particularly eels – and its growing expertise in the sub-sector to expand its presence throughout the region. The community-owned enterprise had operations in such communities as Shediac, North Sydney, and Grace Bay and employed between 100 and 125 people per year. The work in these operations, which produced about four-and-a-half months of employment a year (supplemented by Employment Insurance), enabled many people to move off welfare and into the paid workforce.

There are significant local concerns that young people are not actively engaging in the industry; as with youth across the country, they are distracted by social media and less engaged in the practicalities of employment and work. Further, the costs of entry into the field continue to escalate, with licences reaching over $2 million with a further $160,000 required for a decently equipped boat. The legal complications continue, with negotiations expanding in 2017 into Rights Reconciliation Agreements to bring Marshall obligations into the fisheries regulations.

For the We'koqma'q, the full impact of the Marshall decision likely lies in the future, as engagement by community members, the growth of business operations, and debates with the department of Fisheries and Oceans remain ongoing. Legal judgments, the We'koqma'q discovered, respond to gaps and difficulties in the law. They are not comprehensive and well-designed responses to real social and economic conditions. As such, court decisions are often imperfect and incomplete resolutions to complex and long-standing difficulties.

Freedom from the federal government

From the start of European colonization in the Maritimes, Mi'kmaq and Maliseet people wrestled with the challenges of external control and administrative domination. The situation worsened during the 19th century, as intense Indigenous poverty, the absence of land and resource rights, and increased newcomer immigration marginalized the First Nations in their homelands. With the advent of the Dominion of Canada in 1867, the creation of the Department of Indian Affairs, the passage of the *Indian Act* in 1876, and a steady stream of government legislation and regulations, Indigenous peoples across the country came increasingly under the control of the federal government. This effort, initially focused on ensuring that Indigenous peoples did not interfere with Canadian development, was transformed after World War II into a sweeping social welfare initiative that was designed, in the spirit of the age and with a healthy dose of paternalism, to address the underlying challenges facing First Nations in the Maritimes.

Between the 1950s and the present, government intervention produced a culture of dependency that ran throughout Indigenous communities across the country. With the demise of Indigenous harvesting and the availability of government welfare payments, housing, and various other programs, Mi'kmaq and Maliseet people found themselves and their communities under the effective control of administrators in Ottawa. First Nations resented the official domination and pushed back as best they could. Over time, this resulted in a variety of political actions, constitutional demands, and as Donald Marshall Jr. demonstrated, recourse to the courts.

The Mi'kmaq and Maliseet people, like other Indigenous groups across the country, asserted themselves and, as with the Marshall decision, discovered repeatedly that the federal government had acted inappropriately. Change came slowly, delaying opportunities and independence for Indigenous peoples. Funding was available through the government, but it came with uncertainty and with complex application procedures and reporting requirements. Gaining access to government resources was, therefore, a double-edged sword, providing essential services but further entangling Indigenous governments with the federal government.

The Mi'kmaq and Maliseet people, like other Indigenous groups across the country, asserted themselves.

One of the keys to a permanent transition from government control, along with Aboriginal self-government and resource rights, was having money separate from government. Revenue from community-owned businesses and royalties from resource developments provided some small measure of fiscal independence, but only rarely at the scale necessary to bring about substantial and sustained change. Few First Nations in Canada, and those mostly in the Western Canadian resource belt, had sufficient independent revenue to allocate their own money to projects of their choosing (Vining and Richards 2016, Richards 2015, Bains and Ishkanian 2016).

The Marshall decision and the economic opportunities that followed the judgment and the negotiated agreements with federal government changed the financial dynamics in the Maritimes. Aboriginal economic development corporations, capitalizing on Marshall decision-based opportunities, have been providing substantial sums to their First Nations governments.

The money now available to the local authorities did not replace the core services and finances that, appropriately, were still funded by the federal government. All Canadians receive essential services such as education, health care, fire protection, policing, roads, water supplies, and the like. In the case of First Nations reserves, these services are funded by the national government and often delivered by the First Nations. But for vital "extra" programs, like language retention, cultural revitalization, improved housing, and other specialized offerings, there was little reliable federal support and gaining access to it required complicated application and review processes.

While the individual projects and services are valuable, growing financial independence from the government of Canada was perhaps the most significant outcome from the availability of locally controlled funding. If the creation of welfare dependency and extreme reliance on complex government programs has been one of the most important legacies of the post-World War II era, the dismantling of state dominance and national government authority has become a key objective for First Nations across the country. The funds generated through Marshall decision-based economic development is far from comprehensive. The amount of money available to First Nations governments falls far short of meeting even the most urgent local needs. The expanding funding shows what is possible through community-owned and community-directed commercial development and has provided numerous examples of community benefits arising from such enterprises.[17]

> **Sidebar #6: Gesgapegiag First Nation:** *In the years leading up to the Marshall decision, some First Nations anticipated that the legal and political processes would ultimately recognize Mi'kmaq and Maliseet commercial fishing rights. They believed, as did Donald Marshall Jr. himself, that the courts would decide in the First Nations' favour and that the communities should prepare for the eventual victory. The Gesgapegiag First Nation had confidence in their success.*
>
> *Before the 1999 Supreme Court decision, the First Nation had already started to train its people for the lobster fishery. They found older, non-Native fishers who were willing and able to prepare First Nations members for the industry, training them in trap building, baiting, and boat operations. The First Nation paid for much of the training and cooperated with the Department of Fisheries and Oceans in the preparation of the workforce. After Marshall, they steadily expanded their fishery, adding mid-shore (snow crab and shrimp) and offshore boats (which allowed for extended trips to the fishery) to their fleet. They have an array of smaller, mid-size, and larger vessels that have enabled to them expand from their base in the lobster fishery, and even beyond snow crab and shrimp, to harvest halibut, turbot, and sea cucumber, among other species.*
>
> *With a head-start in the field, it is not surprising that the Gesgapegiag First Nation launched into post-Marshall engagement with enthusiasm. Twenty years later, the transformation has been impressive. The last of the older captains are retiring, opening more opportunities for the young First Nations members who have entered the industry. The community has 16 employees working offshore. They operate two communal lobster boats, employing more than a dozen band members.*
>
> *The Fisheries Department, drawing on federal funding and community support, provides regular upgrading and professional development opportunities, ensuring a steady stream of well-trained fishers for the community's commercial operations. They have replacement workers trained and ready to move into the positions coming open as older workers leave the sector. The Gesgapegiag First Nation is extremely pleased with the level of engagement by young people, with most of the fishers being under 45 and with training opportunities helping deckhands prepare themselves as mates and captains. The First Nation reaches out to high school students to encourage them to consider a future in the industry.*
>
> *The community is working on expanding its commercial presence in the field. The Gesgapegiag First Nation does not have onshore processing capacity at present – that is in the community's mid-range plans – but cooperates with local processors on the*

storage and wholesale marketing of their catch. The community owns and operates the Gesgapegiag Lobster Hut retail operation, employing another 10 people. They are currently adding other fish species to the lobster sales, broadening their produce line and, the community hopes, the economic return.

The Gesgapegiag First Nation is seeing benefits from the fishery that extend beyond employment, training, and the expansion of the First Nations' fisheries department. The community operates a reserve equity fund in order to be able to respond if there is a serious problem with one of the expensive boats in their fleet. When fishery operations produce a profit, the department makes money available to the chief and council for local needs. These have included school lunches for Gesgapegiag First Nation children, snow removal for elders' homes, and local employment and training programs. The First Nation draws on the fishery funds to "fill in the gaps" in areas where other resources are not available.

As a small community, the Gesgapegiag First Nation has long recognized the value of collective action, initially in the support they provided to the Donald Marshall Jr. legal case and now through involvement with the Mi'kmaq Maliseet Aboriginal Fisheries Management Association (MMAFMA). The MMAFMA (AGHAMM in French) works on behalf of the Mi'kmaq of Gespeg and Gesgapegiag and the Maliseet of Viger, identifying areas where collaborative engagement could bring better results for the region. The association is currently looking for opportunities with other fishery species and harvesting opportunities and is encouraging women to be more engaged in the fishery. Seaweed, for example, is being collected for conversion into marketable products, which are now being sold in the Lobster Hut.

For the Gesgapegiag First Nation, the 1999 Marshall decision has been transformative. The Supreme Court judgment has had a positive cumulative impact. The community has become more prosperous and more confident in the intervening years. Employment has increased dramatically. Prospects exist for further growth, through onshore processing and the harvesting and sale of other species. Government programs have improved capacity building, both in the fishery and more generally. Optimism is running high, sustained by the availability of "own source revenues" that enable the chief and council to "fill in the gaps" that had previously held people back. The Marshall decision did not solve all of the problems and issues among the Gesgapegiag First Nation. But it showed that real change was possible and that conditions could improve dramatically.

Improved relations with non-Indigenous peoples

The non-Indigenous protests that occurred in 1999–2000 in the aftermath of the Marshall decision exposed an unappealing aspect of Mi'kmaq and Maliseet life. First Nations have long spoken of the hostility they experienced at the hands of non-Indigenous peoples; the demonstrations and outbursts against the Supreme Court's judgment brought these elements into the public eye. As the voices grew louder and angrier, when a few people showed up at protests with firearms, and when acts of violence and vandalism occurred, the prospects for deep and continuing conflict escalated.

Several important developments tempered the anger and calmed Maritime tensions. First Nations resisted the temptation to push back aggressively for they saw no long-term benefit in

intense conflict. The government's slow but ultimately acceptable response to the Supreme Court decision produced outcomes that mollified the First Nations and most non-Indigenous people. Non-Indigenous fishers, for their part, overcame their initial hostility to the judgment, recoiled at the reality of intense anger, and secured a resolution from government that met their most pressing requirements. By 2001, calm had descended over the Maritimes as residents and political leaders alike realized that there was space for both Indigenous and non-Indigenous people in the region.

The development of peaceful and respectful collaboration is a difficult process to chart with accuracy. There are occasional anti-Indigenous outbursts, sometimes focusing on the "special status" accorded Mi'kmaq and Maliseet people. For their part, many Indigenous people resented the transfer of wealth to fishing licence holders by the government of Canada out of a court ruling that was supposed to empower First Nations and not enrich non-Indigenous peoples. Many of these comments, attitudes, and tensions are comparable to conditions in the rest of the country.

Over time, however, outcomes from the Marshall decision appear to have improved relationships with other residents in the region. The overall success of the Indigenous fishery, the many demonstrations of Mi'kmaq and Maliseet entrepreneurship, and the improvement of conditions in numerous communities counteracted long-standing stereotypes about Indigenous peoples. Equally, the increased level of commercial engagement brought Indigenous and non-Indigenous together more than in the past. There have been joint ventures, partnerships, cooperation between communities, and more positive interpersonal encounters than earlier.

It is wrong to assume that social relationships have been healed and that age-old prejudices have been eliminated, even with 20 years of constructive and sustained interaction. Major gaps in living standards and quality of life persist across the Maritimes, particularly in the smaller and more remote Indigenous communities. But respect for and awareness of Indigenous achievements over the past two decades have resonated across the region, creating a foundation for a stronger and more lasting presence for Mi'kmaq and Maliseet people within the Maritimes.

> **Sidebar #7: Elsipogtog First Nation:** *Like many Maritime First Nations, Elsipogtog had a small presence in the regional fishery in 1999. Twenty years later, on the heels of the Marshall decision, the First Nation had a strong and robust commercial fishery. Importantly, the community experienced an impressive surge in general employment, community income, and overall confidence. The Marshall decision had significantly transformed the Elsipogtog First Nation.*
>
> *The growth in commercial fishing operations has been impressive. From close to a standing start in 1999, the First Nation's fleet expanded to 77 boats by 2019. The snow crab fishery has 35 boats operating under the communal licence. The First Nation mobilizes more than 60 boats for the lobster fishery, each with a crew of four people. It currently operates 10 licences for tuna. Collectively the fisheries employ over 300 people per year. Elsipogtog has long wanted to expand its operations, in large measure because of the sizable number of members hoping to enter the industry and the desire of existing fishers to expand their catch. The First Nation is also at a point of renewal, as the fishery operations seek to replace older boats, many purchased 15 to 20 years ago shortly after the Marshall decision.*

The food fishery is managed differently and has contributed significantly to well-being among the First Nation. The lobster fishery has been contentious, in part because the food fishery begins before the commercial harvest, a matter of irritation to some non-Indigenous peoples and some members of the Maritimes Fishermen's Union. The department of Fisheries and Oceans is drawn in by complaints and the requirement that accusations be investigated. These inquiries, in turn, irritate First Nations people who are exercising their Indigenous, treaty, and legal rights and resent the oversight.

The commercial operations at Elsipogtog are managed as a department of the First Nation, and as not as a separate corporate entity. The operation has a director and assistant, fleet manager, aquaculture manager, and financial and administrative personnel. They operate a compound to fix the boats, operated by a manager, a lead mechanic, three other mechanics, and a boat hauler, and work off of all of the docks used by the fishing fleet. There is also a director of aquaculture who oversees an oyster-growing operation on a nearby river, employing four people annually from April to October. By itself, the commercial fishery is a significant employer of First Nations people, almost all from Elsipogtog. The foundations for a long-term, sustainable business operation have been well and firmly set.

The First Nation has been deterred from expanding by the high cost of additional licences, with an estimated local cost of $400,000 each. Several years ago, the Elsipogtog Department of Commercial Fisheries received funding to buy a single licence from the department of Fisheries and Oceans. The purchase helped, but fell far short of demand and need, which officials estimate would require the community to purchase another 20 licences. Indeed, the success of the commercial fishery to date has only heightened the First Nations' desire to take full advantage of the Marshall decision and assume its full and proper place in the East Coast fishery.

The First Nation has substantial onshore commercial operations as well. It owns and operates the McGraw Seafood processing plant, located several hours away in Tracadie-Sheila, close to the fishing grounds. The plant hires almost 150 workers each year, mostly Acadians, processing product harvested by Elsipogtog fishers. The McGraw facility has been upgraded in recent years while also returning substantial direct financial benefits to the First Nations. The plant is an important example of the manner in which the expanded Indigenous fishery has solidified relations with the non-Indigenous population.

The commercial fishing operation delivers substantial benefits to the First Nations. The commercial operation is owned and operated by the Elsipogtog First Nation and is able to draw on financial surpluses as needed and when available, after the financial needs of the fishery are addressed. The funds have been used for such diverse purposes as arena maintenance, elders' assistance, and road plows, among other contributions. Tangible personal returns from the Marshall decision to the members are demonstrated each year near Christmas when every member of the community receives an annual payment, usually in the range of $200 to $300. It is a large and celebratory event, with many volunteers assisting with the distribution of the cheques to the First Nations people of Elsipogtog.

The First Nation has benefitted substantially from the Marshall decision. More businesses are being created, spreading outward from the fisheries. Relations with

the department of Fisheries and Oceans remain somewhat problematic, particularly because the notional allocation under federal funding comes with many strings attached. From 1999, when the fishery was a hot point between First Nations and other peoples in the area, to the present, relations between Indigenous and non-Indigenous people have improved significantly. There are quite a few non-Indigenous peoples working with Elsipogtog, including on the fishing boats. For good reasons, Indigenous confidence is described by local residents as being much higher than before.

In August 2019, the Elsipogtog First Nation and Esgenoôpetitj First Nation signed a long-term agreement with the government of Canada to continue to improve relations in the East Coast fishery. The important accord recognized the importance of the Marshall decision and committed signatories to work on expanding the First Nations presence in the fishery through the acquisition of additional quotas, licences, and boats. The participants agreed on the need to create new negotiating processes to ensure that the East Coast fishery became even more collaborative and that the participating First Nations benefit more equitably from the prosperity of the industry (Canada, Fisheries and Oceans 2019c). Twenty years after the original Marshall decision, the case continues to shape and define opportunities for the Elsipogtog First Nation.

Partnerships with non-Indigenous companies

For some of the First Nations in the region, partnerships with non-Indigenous companies have provided expanded commercial opportunities. Premium Seafoods Group, for example, works with Chapel Island First Nation, Eskasoni First Nation, Waycobah First Nation and Membertou First Nation. Crane Cove Fisheries has taken a lead role in providing affiliated trucking services to the Cape Breton fishing industry, delivering regionally produced products to markets in Montreal and northeastern United States.

Partnership arrangements are not without complications. In 2018, Premium formed a partnership with the Five Nations Clam Company and secured from the federal government a surf clam licence that had been held by Clearwater Seafoods. Clearwater, also working in cooperation with First Nations operating under Marshall decision rules, challenged the decision, which resulted in the cancellation of the licence with Premium and its partners. In March 2019, Clearwater and 14 First Nations signed a 50-year agreement that, as stated in the press release, would "provide millions of dollars in benefits to First Nations through annual revenue sharing, training, leadership development, employment, as well as procurement of goods and services from Indigenous suppliers." It also committed Clearwater and its partners to collaborate in joint submissions to anticipated Department of Fisheries and Oceans licensing processes (The Canadian Press 2019).

Collaborations between First Nations and non-Indigenous businesses, rare before the Marshall decision, are emerging as a core element in the future of the Atlantic fishery, providing tangible benefits to First Nations, capitalizing on the investments, experience and expertise of non-Indigenous firms, and offering a foundation for cooperation and co-existence that will, over time, extend far beyond the fishery.

The Marshall Decision after 20 Years

While Mi'kmaq and Maliseet people were hopeful in September 1999 when the Supreme Court of Canada assembled to announce its decision on the Donald Marshall Jr. case, only a few people were truly optimistic. First Nations, much like the federal government, did not fully anticipate the resoundingly favourable decision. Life for Mi'kmaq and Maliseet people changed profoundly that day, both for the access they gained to the East Coast fishery and for the clear recognition of the continuing authority of the 18th century treaties with Britain. Mi'kmaq and Maliseet had always believed they deserved fishing rights in their territorial waters, just as they had never surrendered their lands and rights and had outstanding authority tied to the peace and friendship treaties from the second half of the 1700s.

Between 1999 and 2019, Mi'kmaq and Maliseet communities capitalized on the Marshall decision to convert their marginal and tenuous place in the Maritime fishery into a substantial and sustainable share of the economic, employment, and community development potential of the East Coast fishery. If in September 1999 few people appreciated the full significance of the Supreme Court ruling, fewer still guessed that the transition would be as comprehensive and constructive as it proved to be.

The Marshall decision generated a substantial amount of "own source revenue" for Indigenous communities.

It is impossible to define with precision the full impact of the Marshall decision on the Mi'kmaq and Maliseet people. The general statistics – community-controlled catch, employment, boat ownership, licence fees, transfers to First Nations, and improved local incomes – tell only part of the story, albeit an important one. More Mi'kmaq and Maliseet people are working. Community incomes are up, in some instances dramatically. Many fishing boats are owned by the communities or community members. Onshore investments are expanding, as is general business development. Fishing operations transfer millions of dollars a year to First Nations governments, paying for numerous community upgrades, services, and Indigenous programs. The commercial potential of the Marshall decision was immediately evident in September 1999, but few observers anticipated the changes of the magnitude and speed that have been achieved.

The broader significance of the Marshall decision lies with the politics of recognition, the cumulative effects of community empowerment, and the renewal of Mi'kmaq and Maliseet confidence. The Marshall judgment brought First Nations to the forefront throughout the Maritimes, making it clear that the federal government and provincial authorities had to reckon with Indigenous legal, political, and economic power. It was, in many important ways, an assertion of relevance and importance to the non-Indigenous population that, unlike earlier Mi'kmaq and Maliseet efforts, could not be ignored by government.

But the economic and employment opportunities that arose from the Supreme Court decision gave the Mi'kmaq and Maliseet a significantly greater degree of autonomy and independence than they had had earlier. The Marshall decision generated a substantial amount of "own source revenue" for Indigenous communities, money that does not come from the government of Canada, is not controlled by federal authorities, and that can be used entirely at each First Nations' discretion. This independence, a sharp break from the paternalism and dependency created among Mi'kmaq and Maliseet over the preceding generations, spread from the fishing industry into other aspects of Indigenous life, aided in substantial measure by collaborative business activities, the assistance of the Atlantic Policy Congress, and the rise of Aboriginal economic development corporations as major employers and business operators. These activities, in turn, have already resulted in expanded employment, many local improvements, and notable improvements in prosperity.

The influence of the Marshall decision on First Nations life in the Maritimes is readily recognized by community and business leaders throughout the region. While it is only one of several factors, including growing Indigenous legal authority and First Nations political mobilization, the Marshall decision judgment fostered improved educational outcomes among Indigenous youth, greater Mi'kmaq and Maliseet engagement in the regional economy, and enhanced Indigenous relationships with provincial and federal governments. The Supreme Court of Canada decision in the Marshall case put the Mi'kmaq and Maliseet on a new trajectory, one marked by greater Indigenous economic activity and much more autonomy from government.

About the Author

Kenneth S. Coates is MLI's Munk Senior Fellow in Aboriginal and Northern Canadian Issues. He is the Canada Research Chair in Regional Innovation in the Johnson-Shoyama Graduate School of Public Policy at the University of Saskatchewan. He has served at universities across Canada and at the University of Waikato (New Zealand), an institution known internationally for its work on Indigenous affairs.

He has also worked as a consultant for Indigenous groups and governments in Canada, New Zealand, and Australia as well as for the United Nations, companies, and think tanks. He has previously published on such topics as Arctic sovereignty, Aboriginal rights in the Maritimes, northern treaty and land claims processes, regional economic development, and government strategies for working with Indigenous peoples in Canada. His book, *A Global History of Indigenous Peoples: Struggle and Survival*, offered a world history perspective on the issues facing Indigenous communities and governments. He was co-author of the Donner Prize winner for the best book on public policy in Canada, *Arctic Front: Defending Canada in the Far North*, and was short-listed for the same award for his earlier work, *The Marshall Decision and Aboriginal Rights in the Maritimes*.

Ken contributes regularly, through newspaper pieces and radio and television interviews, to contemporary discussions on northern, Indigenous, and technology related issues.

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Endnotes

1 For background on the decision and subsequent public response, see Coates 2000. Cameron 2009 offers a more critical view. For as broader historical overview, see Wicken 2002. On the legal and historical implications of the decision in the context of Marshall, see Walters 2001, and Ray 2000. See also Isaac 2001, McCallum 2004, McGaw 2003, Wiber and Milley 2007, and Wiber and Kennedy 2001.

2 The story is explored, at length, in Coates 2000.

3 There have been several studies of the impact of the Marshall decision. See, for example, March 2002, and Johnson 2015.

4 See, for example, Canada, Fisheries and Oceans 2009. See also Canada, Fisheries and Oceans 2012a.

5 See https://www.tbs-sct.gc.ca/dpr-rmr/2006-2007/inst/dfo/dfo11-eng.asp.

6 For further details, see Canada, Fisheries and Oceans 2012b, and Wiber and Milley 2007.

7 Program details can be found at Canada, Fisheries and Oceans 2019a. For a program evaluation, see National Indigenous Fisheries Institute 2018.

8 For details, see https://www.ulnooweg.ca/.

9 For details, see Canada, Fisheries and Oceans 2018.

10 Details on the work of the APC can be found at https://www.apcfnc.ca/.

11 Treaty negotiations are underway. See Mi'kmaq Rights Initiative (Undated). For further updates, see Canada, Crown-Indigenous Relations and Northern Affairs Canada 2019. See also Pictou 2018.

12 See also McCullum 2006, and Chartrand, 2006.

13 See https://www.apcfnc.ca/about-apc.

14 For an overview of developments in one region, see Poliandri 2011.

15 The Aboriginal Peoples Survey 2017, produced by Statistics Canada, and associated statistical updates provide substantial detail on these complex developments. See Anderson 2019.

16 As this relates to Indigenous business in the Maritimes, see Joint Economic Development Initiative 2019.

17 For further background, see Canada, Crown-Indigenous Relations and Northern Affairs Canada 2016.

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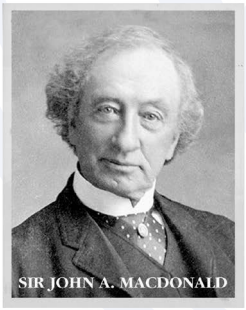
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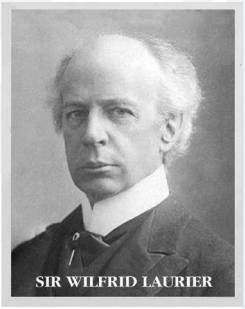
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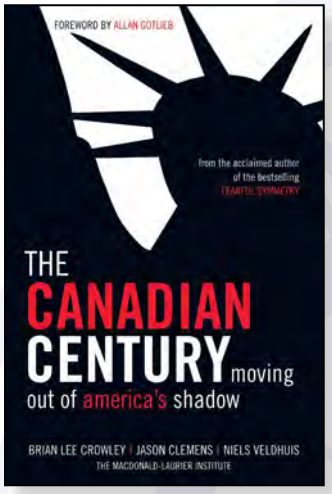

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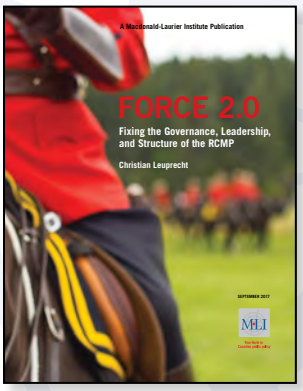

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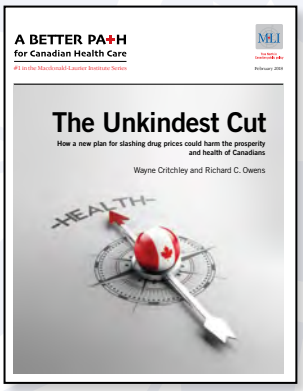

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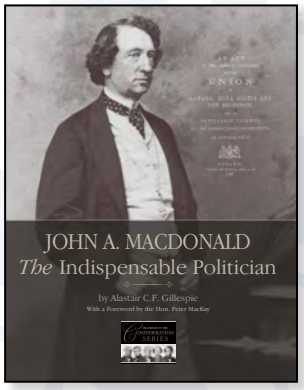

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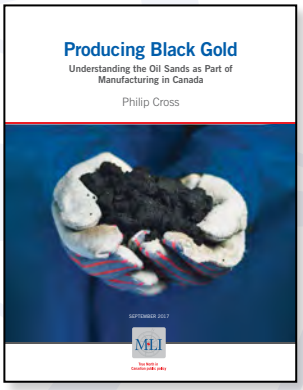

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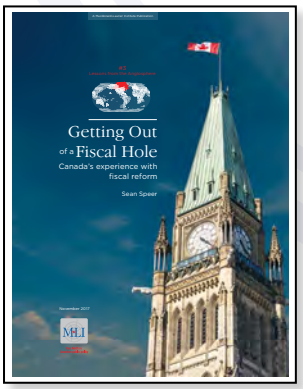

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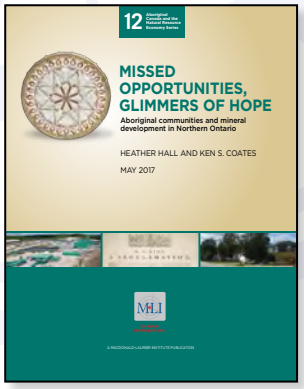

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Intelligent and informed debate contributes to a stronger, healthier and more competitive Canadian society. In five short years the Macdonald-Laurier Institute has emerged as a significant and respected voice in the shaping of public policy. On a wide range of issues important to our country's future, Brian Lee Crowley and his team are making a difference.

JOHN MANLEY, CEO COUNCIL