

AFTER *MARSHALL*: IMPLEMENTATION OF ABORIGINAL FISHING RIGHTS IN ATLANTIC CANADA¹

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Introduction

The Mi'kmaq people have occupied lands since time immemorial in the area now known as the Atlantic Provinces of Canada. As they did not sign any treaties with the British Crown surrendering rights to this territory, they have long contended that the Mi'kmaq have a right, as a nation, to the natural resources (and particularly the fishery) within Atlantic Canada. As signatories to 18th Century Peace and Friendship treaties with the Crown, the Mi'kmaq argue that their rights are not limited to harvesting traditional resource stocks, but include all of the access and management rights associated with nations (Schlager and Ostrom 1992). Thus, the Mi'kmaq leadership has argued that any harvesting activities of individual Mi'kmaq should be guided by the objectives, rules and protocols established by the Mi'kmaq nation, and not by those of the post-colonial Government of Canada. This assertion has been made repeatedly in community resource management plans for Mi'kmaq First Nations throughout the Atlantic region, including Listiguj, Burnt Church, Indian Brook and Acadia First Nations. However, for many years both the federal and provincial governments of Canada refused to recognize these rights, and Mi'kmaq individuals who cut trees, fished a commercial species or harvested wild animals were often prosecuted as poachers.

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In response, and following the success of litigation by other Canadian First Nations,² the Mi'kmaq have turned to the courts in their efforts to regain management control over resources.³ Several Supreme Court of Canada decisions have substantiated the Mi'kmaq view of their treaty and aboriginal rights to the fishery,⁴ particularly the 1986 *Simon* decision, the 1990 *Sparrow* decision, and the 1999 *Marshall* decision. In brief, the *Simon* decision resulted in Government recognition of peace and friendship treaties without surrender of land rights (Isaac 1999). The *Sparrow* decision led to government recognition of aboriginal rights to hunt and fish for food, social and ceremonial purposes (Isaac 1999: 405). The *Marshall* decision recognized the Treaty Right of the Mi'kmaq, Maliseet and Passamaquoddy peoples to rely on natural resources for a “moderate livelihood” and a “communal level of benefit” (Wiber and Kennedy 2001). While these decisions were met with uncertainty and some hostility by the non-native population, they did result in the government offering new program support to First Nations communities.

We argue in this paper that the response by the Government of Canada to these initiatives has been to limit as much as possible the Mi'kmaq First Nations' capacity to manage their fishery, and to create instead a greater dependence on mainstream Canadian management systems and the prevailing economic objectives defined for the fishery. Some go so far as to argue that there has been a steady assimilation of mainstream values on the part of Mi'kmaq communities who have become involved in the commercial fishery, and a concomitant abandonment of traditional community-oriented decision-making and approaches to resource management. This view can most often be found in First Nation communities that have chosen to remain *outside* the government programs that provide financial support for First Nation integration into the commercial fishery. We argue here

² In Canada, aboriginal peoples who are recognized as ‘status Indians’ under the Indian Act, are generally now referred to as ‘First Nations People’. This terminology relates to the political recognition of Canada’s three ‘founding nations’, French, English and aboriginal.

³ Civil disorder, face-to-face negotiations and government programs have also had some level of success in changing the relationship between the First Nations and the Crown.

⁴ Other resource sectors have court cases either pending or recently concluded, including forestry.

that the struggle between the government and First Nations over control of resource management has resulted in a mosaic of projects, negotiations and cooperative arrangements that have collectively both advanced Mi'kmaq community control *and* eroded Mi'kmaq priorities relating to their resource harvesting activities. In the following discussion we will explore the relative impact that these struggles have had on the relationship between the First Nations and the fishery in the Canadian Maritimes.

Traditional Mi'kmaq Community Objectives versus Governmental Economic Objectives

Non-native fishery priorities

Under the Canadian Fisheries Act, the federal Minister of Fisheries has ultimate responsibility and authority to manage Canada's fisheries. The Department of Fisheries and Oceans (DFO) undertakes the day-to-day business of management. The fishery in Atlantic Canada has been characterized by conflict between inshore small-boat fishers, industrial-scale fishing companies, and government managers (Finlayson et al. 1998; Kearney 1984; Wiber 2000, 2004). This conflict is the result of different economic and social objectives. The inshore fishers are primarily concerned with sustainable livelihoods while the corporate sector has been more concerned with sustainable profits. The government objectives, meanwhile, include resource conservation, optimizing employment, and economic efficiency of the industry. The conflict between resource users and the government has become more complex in recent years as the regions' once lucrative resources have been experiencing significant decline (Charles 2001; Finlayson et al. 1998). The fishing industry, both the inshore small boat fleet and the corporate sector, have used whatever political clout and negotiation skills they have in order to try to influence decisions in their favor in this top-down management system.

Many inshore fishers live in the same communities (and often homes) that their ancestors occupied, and fish the same waters. Communities that have been dependent on the fishery for hundreds of years, now face a context where their political clout has been severely undercut by conditions of rapid urbanization and industrialization. Despite highly public protests, it has been difficult for inshore fishers to raise public awareness about the problems facing their industry, especially the fact that government policies are undermining their ability to

survive. They now fear their livelihood is destined to disappear as a direct result of decisions taken by the Minister under narrow policies of economic efficiency and privatization. They see the destruction of the various important commercial stocks that communities rely on as indication that the government has failed their conservation mandate.

On the other side, industrial fisheries have been feeling the negative impact of changing global markets, declining fishery resources, and increasing operating expenses (fuel and labor). Decreased performance of the industrial fishery threatens loss of investment and the associated closure of fish plants in larger coastal communities with resulting loss of jobs. Corporate leaders have contended that the government should use economic returns as a specific target in the management of the fishery. They argue that multi-year allocations would improve the ability of corporations to manage their investment and ensure decisions could be made to protect the businesses from variability in the fishery. As a result corporate fishers continue to lobby the federal government for greater control and access to the fishery through permanent private allocations.

In response to the economic arguments from the corporate sector, the DFO introduced Enterprise Allocations and Individual Transferable Quota systems over a twenty year period in the Atlantic Canadian fishery. These are mechanisms to award a volume of fish to enterprises to be landed on a per annum basis (Crowley 1996; Grafton 1996); in essence, they privatize the right to access a public resource. The government's view was that they needed to reduce excessive investment and capitalization of the 'open access' fisheries (Hardin 1968). Their policies were based on the assumption that market forces would determine economic return to the harvesting and processing sectors, and that the motivation for excessive investment in harvesting capacity could be greatly reduced. Privatizing fishing rights would, it was believed, enable companies and individual quota holders to plan their operations more efficiently and to ensure better fiscal management of their enterprise. A known supply of fish could be used to secure operating capital and to plan operations for the best return on investment.

Inshore fishers and their communities, however, actively lobbied the federal government for greater community control and access to the fishery. They were strongly opposed to privatization of the fishery from the outset, arguing that this would concentrate the right to fish into the hands of a few individuals or companies (see also (Copes 1986). The privatization strategy has also proven incapable of considering environmental variability in the fishery, or of adapting to

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global market fluctuations that provide a significant level of uncertainty for quota holders. The government policy also does not address many of the social factors that can have important economic implications to the fishery. These social factors, including family relationships and community ties, have a significant direct economic value, which is not fully considered in the economic analysis. Furthermore, such social factors have other indirect economic values related to social and health benefits in local communities (Wiber 2005). Native communities in particular have recognized the importance of considering these social benefits in making fishery allocations within their communities.

Such multi-sectoral conflicts over community-level management and corporate privatization of fish quotas characterized the commercial fishing industry when the Supreme Court of Canada recognized the Mi'kmaq right to be involved in the commercial fishery for 'moderate livelihood' purposes.

Mi'kmaq fishery priorities

Given that the Mi'kmaq leaders and harvesters had always argued that their resource rights extended beyond harvesting, they viewed the *Marshall* decision as an opportunity to advance their role in management of fishery resources, in accordance with their self-governance aspirations and building on their long tradition of community management. Unfortunately, this goal has been inhibited in part by a lack of clear understanding of the treaty relationship by the established commercial fishing industry, and in part by a lack of attention by governments to the potential for community management systems as effective means to promote conservation and sustainable fisheries (Milley and Charles 2001).

The Mi'kmaq, like any nation, has its own traditions regarding governance and resource management. For thousands of years prior to the occupation of their territory by European settlers, the Mi'kmaq managed local resources to meet community needs for food, shelter, and trade, supporting large settlements at rich resource sites and involving themselves in far-flung trade networks (Allen 1994). Archaeological evidence suggests that their production system relied heavily on both coastal and marine ecosystems and on adjacent inland forest resources (Allen 1994). Their oral history demonstrates that they relied on a system of spiritualism in their resource use called *Netukulimk* in the Mi'kmaq language. *Netukulimk* is a traditional worldview in which all things are part of a web of connected living and non-living things, and, when respectfully utilized, provides for the benefit of the

community as a whole. It is an understanding based on a ‘whole system’ and not a reduction of the ecosystem to discrete components. Furthermore, the *Netukulimk* world-view is based on the premise that man does not ‘own’ nature, but is part of it, which is considerably different from modern western concepts of Humankind being apart and hence proprietor of nature’s resources.

Prior to the *Marshall* decision the application of *Netukulimk* in Mi’kmaq society was evident through well-articulated concepts of the sacredness of the fishery as a source of food, and the need to prevent greed from undermining human responsibilities in this sacred relationship. Today, Mi’kmaq resource management efforts remain founded in the principles of *Netukulimk*, and Mi’kmaq leaders still recognize the management responsibilities associated with the right to harvest natural resources.

Another important distinction between *Netukulimk* and western economic resource management models is that traditional Mi’kmaq resource management priorities were for the community as a whole, and not just for the well being of the individual harvester (or corporation). The system is not based on the premise of ownership, but of relationship and responsibility. If nature does well, then the community does well. If the community does well, then the individuals do well. In the past, the community moved as a whole, worked as a whole and benefited as a whole. Much has changed.

Mi’kmaq access to their traditional resources was drastically reduced over the years of colonization and more dramatically under the Federal Indian Act, established after the formal founding of the Canadian nation. The Indian Act, in essence, governs all aspects of Mi’kmaq life. Over the years, through a series of specific government policies, such as centralization, and passive exclusion from mainstream economic activity, Canada’s aboriginal people became almost completely dependent on government social support systems. The Mi’kmaq had very limited access to the fishery for food and derived no direct economic benefit from the region’s fishery and forest resources. This is in stark contrast to the past when the Mi’kmaq diet derived up to 80 percent of its protein from the fishery.

First Nation response to the *Marshall* decision was, therefore, euphoric. Meetings were held in many communities to discuss how to best advance their participation in the commercial fishery and the 35 chiefs met in assembly to discuss a ‘nation-based’ approach to managing this fishery. The leadership felt that the *Marshall* decision was a vindication of Mi’kmaq rights after years of Mi’kmaq exclusion,

and they felt that they would once again be able to manage their resources for the benefit of their communities. This was well articulated in the months that followed the *Marshall* decision in several resolutions passed at All Chiefs Meetings held by the Atlantic Policy Congress of First Nations Chiefs, a regional Mi'kmaq and Maliseet First Nations organization that facilitates nation-level policy analysis and development.

Federal response to the *Marshall* Decision

After the Supreme Court *Sparrow* decision, which recognized an aboriginal right to fish resources for food and ceremonial purposes, the government introduced the Aboriginal Fisheries Strategy (AFS) program. This program relied on community-specific agreements that specified access for the purposes of the food fishery. Seven years later, the Supreme Court recognized the Mi'kmaq right to a 'moderate livelihood' fishery in the *Marshall* decision. The government realized that this decision would lead to a significant increase for the Mi'kmaq First Nations in the region's commercial fishery, and also recognized that the Crown had a fiduciary obligation to assist the First Nations in realizing this opportunity. But there were many questions about how this could be done. Two months after the release of the *Marshall* decision, the Supreme Court of Canada took the rare step of issuing a clarification of the *Marshall* decision (November 17, 1999), in response to an unprecedented appeal of the Court's decision by a coalition of non-native fishing concerns. This clarification is often referred to as *Marshall 2*, and it clearly stated that the Federal Minister of Fisheries has overall management authority and that the right to a livelihood fishery had limitations (namely conservation and good governance). The clarification did not state how this authority should be exercised.

Perhaps modeling their response on the AFS, the government offered a financial assistance program through the DFO, to facilitate First Nations transition into the fishery. This program was implemented through bilateral 'Interim Fisheries Agreements' between the DFO and individual Mi'kmaq and Maliseet First Nations. These Interim Agreements were to deal with the immediate needs of the First Nations while the government through the Department of Indian and Northern Affairs (INAC) was conducting negotiations for a long-term treaty relationship between Canada and the Mi'kmaq. The focus of the Interim Fisheries Agreements was primarily related to harvesting activities, with First Nations

receiving vessels and gear and training support for native fishers.⁵ A condition of the Agreements was that the First Nation would be issued DFO fishing licenses and that signatory First Nations would abide by the same terms and conditions as applied to non-native fishers, including seasons, trap and gear limits, and vessel restrictions. Little attention was paid in the Agreements to other aspects of the fishery, in particular, management activities (Wiber and Kennedy 2001). An overall Government objective underlying the DFO program was the maintenance of DFO authority over the fishery and the application of federal rules and regulations to the Mi'kmaq livelihood activity. This was despite the fact that the *Marshall* case dealt with a situation where Donald Marshall Jr. had been fishing *outside* these rules and regulations and had been found by the Court to be within his treaty right in so doing.

In ignoring Mi'kmaq communal resource management concepts in the post-*Marshall* process, the government undermined the traditional community decision-making processes that have been actively employed for hundreds, if not thousands, of years. Mi'kmaq concepts of resource ownership and access are quite different from the concepts being promoted through federal fisheries policy. While there was considerable debate within Mi'kmaq communities regarding the communal versus individual nature of the access rights, there had been little deviation from the traditional concepts of *Netukulimk*. This was evident in many of the community meetings held after the *Marshall* decision by regional Mi'kmaq organizations such as the Mi'kmaq Fish and Wildlife Commission (MFWC), and the Atlantic Policy Congress.

Impact of *Marshall* on Community Governance Systems

While the apparent aim of the Interim Fishing Agreements (post-*Marshall*) was to increase Mi'kmaq involvement in the commercial fishery in Atlantic Canada under DFO rules and regulations, the court had also stipulated that there be a communal benefit to this involvement. Unlike individual non-native fishers who receive access to the fishery as a privilege granted by the government through a license, individual Mi'kmaq fishers gain access through the right of the Mi'kmaq nation.

⁵ It is worth noting here that the very high financial expenditure on the vessel and license buybacks and associated training programs actually accomplished little with respect to capacity building within native communities.

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The government has reconciled this difference with their top-down management system through a communal commercial license that is issued to the First Nation as part of the agreement. The Band Council⁶ of the First Nation in turn allocates access to individual fishers, either as independent vessel owners or as Band-employed fishers on Band-owned vessels, depending upon the system and structure of the community's fishery. A similar system had been previously employed by the government of Canada to allocate access to the food fishery, as a means to control overall food fishing effort.

Such provisions proved inconsistent with some of the provisions of the Fisheries Act, however, and as a result, the Federal Fisheries Act was amended in 2003 to ensure that the allocation of licenses to First Nations communities was legal. Bill C43 now defines "aboriginal organization" as well as providing express regulation-making authority for designated persons as to who can fish and vessels to be used under a license issued to an aboriginal organization, and for authorizing designations to be made through license conditions. The enactment also provides that the terms and conditions of some licenses issued to aboriginal organizations prevail over certain regulations, to the extent of any inconsistency (Bill C43 Summary).

All these arrangements appeared to herald a positive change for Mi'kmaq communities. However, due to years of exclusion from the fishing industry, many of the Mi'kmaq communities lacked either the knowledge or the experience necessary to envision their involvement in the commercial fishery, and as a result most were unprepared to effectively deal either with the negotiations to arrive at viable agreements, or with the day-to-day management of commercial fishing operations.⁷ In order to ensure constructive participation in the fishery in a second round of Interim Fisheries Agreements, some financial resources were made available to First Nations for the enhancement of management capacity and

⁶ Under the Canadian system, governance within First Nation communities is indirect and effected through a 'band chief and council', although the federal government programs actually control much of the financial and operational aspects of internal band politics.

⁷ Long time exclusion from the fishing industry also meant that First Nations parties had unrealistic expectations of the potential for financial benefit from the fishery, and did not fully understand the skill levels needed to be effective fishers in a technologically intensive industry.

management activities. This included administrative management, planning, monitoring and enforcement. However, the support was available only to those First Nations that had agreed to ‘assimilate’ the DFO rules and regulations as their own, through a *Marshall* Interim Fishing Agreement. Communities that opted to develop their own independent processes outside the scope of an Agreement were ineligible for funding programs and were unable to gain support for development of indigenous management systems and structures.

This government financial support for the development of fishery management capacity in First Nations is in direct contrast to the situation in the non-native fishing communities, where the government has not assisted in developing local management capacity. First Nation financial assistance has enabled many of the participating native communities to establish community administrative structures that specifically manage the First Nation’s fishery. Some communities have adopted a corporate structure, such as the Membertou First Nation, while others have adopted a community governance model (community based resource management), such as the Abegweit First Nation. In rare cases, the First Nation has adopted a combined approach involving a Band-owned fishing company under a community governance model, such as the Lennox Island First Nation. All such First Nation management systems have their advantages and disadvantages for the communities, but in general, they have greatly contributed to the development of overall community governance capacity. While it is still early in the evolution of the community-level systems, many First Nations are now regularly interacting with industry, environmental NGOs (ENGOs) and the government on resource and environmental management issues – something that was not the case in the past. An important example is the seat at the table that they now have in developing integrated management plans for bodies of water in which they have fishing rights.

On the one hand, the government strategy to encourage First Nations to enter into interim fisheries agreements has been effective in assimilating communities into the top-down administrative system employed in the non-native commercial fishery. On the other hand, this same process has enabled native communities to effectively enhance their governance capacity, which in turn has strengthened their hand when dealing with the federal government at the negotiation table. This in effect, gives the First Nations an opportunity to deal with DFO (and INAC) on a higher technical and administrative level than is experienced by non-native fishers’ organizations and communities. Non-native fishers are left to deal primarily through DFO-organized advisory committees, or are politically excluded from the management process.

First Nations Fisheries Economic Objectives and post-*Marshall* Agreements

In the months immediately after the *Marshall* decision, the Mi'kmaq and Maliseet chiefs met in Assembly to discuss priority issues for the fishery. Many of these discussions focused on the need to achieve full employment in the communities, not only through the fisheries, but through other resource sectors as well. While the *Marshall* Decision focused on charges laid on the Mi'kmaq harvester, Donald Marshall Jr., for his involvement in the eel fishery, the court found that the aboriginal right extended to other natural resources that had been traditionally harvested and traded prior to the Treaties of 1760 and 1761. However, the federal government response to *Marshall* was entirely directed towards controlling the impact by working through the DFO regulations, and as a result, First Nation expectations about employment shifted primarily toward the fishery. Meanwhile, the priority for the Government was to ensure that the overall level of fishing effort (number of fishers, boats and gear) would remain constant. This could be accomplished by reducing effort levels in the non-native fishery but only at severe political cost. Shortly after the decision was handed down by the Court, there were a number of protests by non-native fishers who opposed Mi'kmaq involvement in the commercial fishery⁸ and the government was concerned that Mi'kmaq participation must increase only through processes that would ensure a peaceful and politically acceptable transition.

The system that was introduced to provide access for Mi'kmaq communities without an overall increase in fish taken involved a buy-out program through which non-native fishers interested in retiring from the fishery could sell their licenses back to the government. These buy-back arrangements most often involved the government also purchasing the fishers' boats and gear. This program had two significant and negative effects. The sudden influx of government money dramatically increased the value of licenses and gear in the fishery overall, which in turn made it difficult for new non-native entrants into the fishery. It also tied the

⁸ It is ironic in some ways that at the same time as the government and non-native fishers were trying to limit the impact of native entry into the commercial fisheries, the corporate sector was already approaching Bands and the government to sell plants/fleets and to set up joint ventures with native communities.

level and type of access available to First Nations to the number of and the licenses held by individual non-native fishers who sought retirement. There was no direct relationship between the employment needs and desires of Mi'kmaq communities and the level, type and location of access available. The government did not have an unlimited budget to cover the buy-out program. As license costs increased, the government was unable to buy as many licenses as may have been initially intended. This sharply divided the level of access provided to the First Nations from that required to meet First Nation political aspirations (employment for all First Nation members) and economic needs (income for all First Nation members).

While the government explicitly stated that economic models of sustainability and efficiency underlay their management plan, in fact, the agreements arrived at with First Nations were not built on these principles at all. The available level of investment in vessels and gear simply would not sustain communal livelihoods. The motives for license retirement were a significant factor in determining the outcomes of this approach. Many fishers who had less than optimal gear and aging vessels could receive a higher than expected return if they sold to the government agents who were under pressure to meet the government's fiduciary obligations to the First Nations. The same was true for people who had licensed access in marginal fishing areas. The value of their license was suddenly higher than would have been possible without the buy-out program. As a result many licenses with lower than average returns, due either to poor location or to low quality vessels and gear, were sold back to the government and the First Nations entered the fishery with inefficient means of access.

In addition to being unable to provide the level of employment First Nations needed, the system often left natives to fish in areas of low productivity with inefficient gear. Furthermore, due to the lack of experienced fishers in the communities, and the use of older vessels and gear that had high maintenance and repair costs, many First Nations were left in a fiscal situation of net loss. The fishery quickly became a financial burden on the First Nations. Furthermore, Band Councils were forced to exclude some Band members from the fishery since access available to the community was lower than needed to provide full employment. This resulted in political problems being created at the community level that impacted on the social stability of the communities.

This internal instability was exacerbated by the inherent tension between individual 'moderate livelihoods' and a 'community level of benefit' to be expected from the

fishery. For example, the government response to the lack of experienced First Nation fishers was a Mentorship Program that relied on training support from fishers with demonstrated experience in the fishery, fishers that for the most part were non-native. During the negotiation of buy-backs and Interim Fishery Agreements, several of the non-native fishermen who sold their licenses back the government included the condition that they were hired as mentors. As a result, these fishers sold their licenses, vessels and gear and maintained their employment in the fishery. This put native boats under the command of non-native skippers, which increased economic returns to the communities, but at the cost of displacement of First Nation fishers from vessels. While this made band councils unpopular among job seekers in their community, the use of non-native mentors allowed them to gain a positive economic return from the fishery in order to benefit the wider community. In other words, meeting a level of community benefit depended on non-native fishermen. While the government did not sanction this practice, it was viewed as expedient in order to ensure a sufficient number of licenses be made available to the First Nations to ensure a peaceful transition into the fishery.

Food Fishery Management Issues

An interesting and unexpected side effect of the *Marshall* decision and the federal programs that ensued has been the changing relationship between the First Nations communities and the preexisting food fishery (as opposed to the post-*Marshall* commercial fishery). Prior to the *Marshall* decision, there were efforts to promote First Nation management values in the food fishery. These efforts included establishing harvester associations among the First Nations in Nova Scotia and the MFWC. The latter was established by the 13 Nova Scotia First Nations Chiefs to advance Mi'kmaq resource management capacity in the region, and operated with limited funding support from the government. The focus of the harvester associations was to promote integrated management practices among those involved in food fishing, and in gathering and logging activities in support of traditional practices. These activities led to a well-articulated desire to protect the fishery as a sacred source of food for the Mi'kmaq, a desire stated in the preamble of all community fishery plans developed with the support of the MFWC.

Under the food fishery, Mi'kmaq communities had adopted several strategies for the management of their fishing activities, primarily with respect to lobster, mackerel, gaspereau, and eels. Community management plans in some First Nations included the use of seasons (based on lobster molting cycles), lobster tags

(to distinguish Mi'kmaq food fishery traps and gear from those illegally set by poachers), and harvest distribution systems to ensure all community members had access to food, particularly the infirm and elderly who were unable to fish on their own. Most First Nations established food fishing seasons outside the commercial season, primarily to avoid direct conflict between food fishers and non-native commercial fishers, and to enable food fishers to fish when lobster populations had migrated closer to shore and were more accessible using small boats and fewer traps.

After *Marshall*, the focus shifted to the 'moderate livelihood' fishery and the negotiation of Interim Fishing Agreements with the government. Government funding for the MFWC ended, and less attention was placed on the management of the food fishery. Mi'kmaq leadership was more concerned with increasing revenue to the communities and harvesters appeared to be more concerned with maximizing incomes. The language of the fishery changed from 'sacredness' of food supply to how much money could be made. Many non-fishers in the communities, particularly elders, maintained the pre-*Marshall* perspective, but their view was less important during the government-First Nations negotiation processes for Interim Fishing Agreements.

This shift in focus is also noticeable in the seasonal activities of communities, as many native harvesters are involved now only in the 'moderate livelihood' fishery. In some instances, First Nations have opted to provide community members with food from their commercial catches and no longer allow harvesting during the food fishing seasons that were established practice prior to the *Marshall* decision. Some First Nation fishers have voiced their opposition to the food fishery, mirroring the sentiments of many non-native fishers that the food fishery reduces the take in the commercial fishery.

In the past, the DFO had imposed food fishery limits on most communities through AFS Agreements. These imposed quotas were not based on either stock abundance or on defined community need. In contrast, some communities rejected the funding packages attached to the AFS, preferring to demonstrate their capacity and commitment to manage their own food fishery without an AFS quota. One such community, the Acadia First Nation, ran its food fishery without a DFO imposed quota but has since had quotas unilaterally imposed on their food fishery by the government. The DFO took this action to stop reported sales of lobster from the food fishery to non-natives (a common problem due to the high value of the catch). The government opted for the quota system rather than working to

improve First Nation management capacity in the food fishery, an alternative approach that might have met the same objective. Before the commercial fishery, this action would have led to aggressive opposition, but with the Interim Fishing Agreements, more attention was being paid to the commercial fishery in Acadia First Nation and in other neighboring First Nations, and quotas in the food fishery no longer met with the same political resistance.

Government/First Nation Cooperation in Enforcement of First Nation and Government Regulations

As noted earlier, efforts have been made in some Mi'kmaq communities to establish community management systems to regulate First Nation commercial fishing activity.⁹ These activities were initiated during the negotiation of Interim Fishing Agreements and continued after the signing of the resulting agreements. While the terms of the Agreements involve the First Nations adopting the DFO management rules and regulations, some First Nations have established additional rules to govern the communal nature of their fishery, and to cover their food fishing activity, and these remain outside the scope of the Interim Fishing Agreements. A variety of rules/regulations have been adopted including: selection of landing sites; listing acceptable buyers for the catch from fishers; days on which food fishing is not allowed; reporting requirements; and entry requirements (age, training, certification). However, as discussed earlier, the First Nations have limited human and fiscal capacity to enforce their community rules and regulations. This has necessitated the development of new cooperative arrangements with the DFO for the enforcement of First Nation rules and regulations, and the development of enforcement capacity at the First Nation level.

In response to the need for support for enforcement of such fishery rules and regulations the DFO has developed protocol agreements for cooperation in fisheries justice. Cooperative arrangements between the government and First Nations include the use of community justice processes, training of First Nation justice workers, and sensitivity training on traditional values and justice processes for DFO staff. Diversion of cases involving fisheries infractions from the mainstream court system to community justice circles has been included in a draft

⁹ Community based management is also gaining popularity in non-native communities, albeit without much government support. See Wiber et al. 2004.

protocol agreement being developed between the DFO and the PEI (Prince Edward Island) First Nations, which seems to demonstrate the government's willingness to include First Nations in broader fisheries justice issues.

Broader First Nations Involvement in Marine and Coastal Management Issues

Broader involvement for First Nations in integrated coastal management has emerged as a result of an extensive review of the AFS. In response to a need to increase cooperation between the government of Canada and First Nations in the broader management of coastal and oceans issues, the DFO established the Aboriginal Aquatic Resources and Oceans Management Program (AAROM). This program was established separately from the *Marshall* initiatives and is thus accessible to First Nations and other aboriginal organizations across Canada. The program provides support for First Nations to effectively interact with the DFO in a broad range of oceans and coastal resources management issues. One interesting feature of the program is that it is specifically aimed to assist aboriginal organizations acquire the administrative capacity and scientific expertise to participate in aquatic resource and oceans management, and to establish the necessary collaborative management structures.

One effect of the resulting oceans management capacity in some communities has been the increased level of confidence the First Nations have in dealing with external environmental groups. ENGOs often ask First Nations communities to become involved in environmental debates. These organizations have used First Nations to advance their own objectives, without the complete or formal involvement of the First Nations communities. This in effect allows ENGOs to hijack the environmental agenda of the First Nations and to use them as political pawns in their ongoing struggle with government or industry. Through the development of community structures and capacity for broader oceans management, the First Nations have been more understanding of the issues involved and have been able to effectively represent their own position.

Several Mi'kmaq First Nations have interacted with the DFO through the AAROM program, including the PEI First Nations through their Tribal Council, the Mi'kmaq Confederacy of PEI. Under this initiative the PEI communities are working to address aquaculture management, fisheries marketing, fisheries enforcement, and to strengthen their community fisheries management structures. The AAROM program

combined with the management capacity established through the Interim Fisheries Agreements has greatly enhanced the ability of the PEI First Nations to deal with regional environmental organizations, provincial and federal departments and industry on a wide range of marine and coastal environmental issues. Similar interest in AAROM has been expressed by the Mi'kmaq communities in Cape Breton through the Unimaki Institute, a First Nations resource management institute, established with industry assistance, by Mi'kmaq communities in the Gaspé region of Quebec.

Comparing and Contrasting First Nation Experiences with Secured Commercial Fishing Rights

All of the above patterns are the background for the post-*Marshall* summary presented in Table 1 (following pages). In this table, we provide specific examples to illustrate some similarities and differences in the approach taken by different First Nation communities to the opportunity to engage in commercial fishing. In all cases, First Nation communities have found the impact of *Marshall* on the constitutionally protected rights in the food and ceremonial fishery to be harmful. On the commercial side, different communities have tried several different approaches, ranging from wholesale adoption of the dominant non-native corporate model (Membertou First Nation), to total rejection of any agreement to facilitate commercial fishing (Bear River First Nation). In the center are several bands that are experimenting with alternative fishing structures (band quota and boats awarded to individual band members or band-owned boats and quota crewed by community members). The level of involvement of non-native fishermen on native boats remains a contentious issue in many communities.

Table 1: Emerging Patterns: Specific Examples

Government Program/ Initiative	Example First Nation	Action Taken	Effect
Aboriginal Fisheries Strategy (AFS) Agreement	Acadia First Nation	The Acadia First Nation has not signed an AFS Agreement, arguing that the AFS program is an infringement on the Rights of the First Nation to run and manage their own food, social and ceremonial fishery. Despite this, the government has repeatedly imposed an AFS license on the Band, arguing that the license is necessary for the effective management of the lobster fishery. However, the Acadia First Nation was able to operate its food fishery in the absence of a lobster quota until 2006. Five years after the <i>Marshall</i> decision and the signing of an Interim Fisheries Agreement, the DFO imposed a lobster quota on the Band's food fishery. While staff and some harvesters opposed this action, the Band was unable to prevent it. There was no support from other First Nations for a resistance action.	The imposed quota had an impact on the morale of the Band fisheries staff, which had been effectively managing their commercial fisheries operations (Kespuwick Resources) <i>and</i> operating a community-run food fishery. It sent a message to the Band that all fishing activities were to be under the authority of DFO.

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Interim Fisheries Agreement (IFA) (post- <i>Marshall</i>)	Indian Brook First Nation	The Indian Brook First Nation has repeatedly refused to sign AFS Agreements, and for 5 years had also refused to sign an IFA. Over the past few years, Indian Brook has had a political rift within the Chief and Council. A majority of the Councilors are in favor of signing an IFA while the Chief and a smaller number of Council oppose it. In 2005, the DFO negotiated an IFA with the pro faction in the absence of the opposing Chief and Council members.	The IFA signing further exacerbated political animosity and created social unrest in the community. Subjects of concern included insufficient access for community needs and exclusion of a number of experienced food fishers from the livelihood fishery. Furthermore, allocations within the band made outside the community governance structure (Chief and Council) have led to violent confrontations between Band members.
IFA (cont.)	PEI First Nations	The PEI First Nations signed a one year Interim Fisheries Agreement in 2000, with the intention of establishing community fishery management capacity. Prior to the negotiation of a subsequent multi-year Agreement the PEI communities undertook internal consultations to identify community fisheries objectives, design a community management structure, and establish	The PEI First Nations priority for employment over profit has led to a strong community governance system in which the fishers are actively involved. However, by adopting the DFO rules and regulations through the IFA the allocations to the individual fishers mirrors the non-native

		community management capacity. On the basis of these consultations the Bands negotiated, through the newly formed Mi'kmaq Confederacy of PEI, multi-year agreements that included support for the development of management capacity at the community level.	system used by DFO. As a result, alternative low cost strategies for allocating fishing effort have not been considered within the community. As a result, the Band and many individual fishers are now experiencing debt.
IFA (cont.)	Member-tou First Nation	The Membertou First Nation has a reputation for corporate governance of its administration and community programs (ISO 9000 certification). The Membertou First Nation actively pursued an IFA with a strong emphasis on corporate fisheries development. The access provided to the Band through their initial and subsequent multi-year agreements has led to joint ventures with some of the larger fishing companies in Atlantic Canada.	The communities' fishery seems to be profit (not employment) driven, aiming to gain revenue from the fishery to cover communities' social and infrastructure needs. There is a preference for corporate structure and less attention to traditional community governance systems. The community has incorporated DFO rules and regulations with little or no effort to define alternative management approaches to meet their own objectives.
IFA (cont.)	Bear River First	Bear River First Nation has been steady in its refusal to sign an IFA. There is little	Small-scale fishing activity has proceeded with the DFO turning

Analysis

It is early days yet to assess the outcome of recent legal decisions that have secured First Nation access to fisheries resources in Canada such as the *Marshall* Decision of the Supreme Court of Canada. In terms of First Nation community capacity to govern resource use according to their own values and priorities, however, the recent unfolding of Canadian aboriginal fisheries programs has led to both costs and benefits. The impact of this process has varied within communities and across initiatives, from the AFS, to the post-*Marshall* Interim Fisheries Agreements (both corporate and communal), and to AAROM (see Table 1). Some communities have gained in resource management experience, but only within the ground rules established by the DFO. Other communities have found the cost too high in that the government has maintained the upper hand through enhanced DFO control. The DFO has specifically designed and driven the programming to be consistent with non-native fishing. Native communities have not been able to maintain aboriginal values in the harvesting of fish, nor in the distribution of benefits. In fact, many signatory communities are experiencing sharp debt as a result of the ‘right’ to fish commercially. Some argue that there has been an assimilation of First Nations into the federal fishery top-down management structure, with little aboriginal voice in policy planning. We would argue, however, that this is not the total picture.

Entry into the commercial fishery has propelled First Nations into wide-ranging political and economic contact with the non-native communities around them. In some areas of the region, non-native fishers and their communities have benefited from partnerships with native communities on issues of concern to both – partnerships triggered by fisheries agreements and the subsequent seat for First Nations at the stakeholders’ table. This is not to say that there are no tensions between these communities. Winners and losers have emerged as a result of the shifting of political power and this has led in some cases to open conflict. However, it is also true that lateral negotiations are becoming more common in the regional management planning process, and many other players in the fishing industry view the strengthened position of native managers at the negotiation table as a positive influence. Thus, while the DFO has retained most decision-making power, native communities are shifting the DFO position on numerous issues, which rebounds to the benefit of other fishing communities in the Maritimes. In the long term much depends on the subsequent fishing rights negotiations.

References

- ALLEN, Patricia
1994 *Metepenagiag. New Brunswick's Oldest Village*. Fredericton and Red Bank, New Brunswick: Goose Lane Editions and Red Bank First Nation.
- CHARLES, A.
2001 *Sustainable Fishery Systems*. Oxford: Blackwell Science.
- COPEL, P.
1986 'A critical review of the individual quota as a device in fisheries management.' *Land Economics* 62: 278-91.
- CROWLEY, B. L., ed.
1996 *Taking Ownership: Property Rights and Fishery Management on the Atlantic Coast*. Halifax: Atlantic Institute for Market Studies.
- FINLAYSON, A., Christopher, and Bonnie J. McCAY
1998 'Crossing the Threshold of Ecosystem Resilience: The Commercial Extinction of Northern Cod.' Pp. 311-337 in Fikret Birkes, Carl Folke and Johan Colding (eds.), *Linking Social and Ecological Systems: Management Practices and Social Mechanisms for Building Resilience*. Cambridge: Cambridge University Press.
- GRAFTON, R. Quentin
1996 'Individual transferable quotas: theory and practice.' *Reviews in Fish Biology and Fisheries* 6: 5-20.
- HARDIN, G.
1968 'The tragedy of the commons.' *Science* 162: 1243-47.
- ISAAC, Thomas
1999 *Aboriginal Law. Cases, Materials and Commentaries*. Saskatoon, Saskatchewan: Purich Publishing.
- KEARNEY, John
1984 'The Transformation of the Bay of Fundy Herring Fisheries, 1976-1978: An Experiment in Fishermen-Government Co-Management.' Pp. 165-203 in C. Lamson and A.J. Hanson (eds.), *Atlantic Fisheries and Coastal Communities: Fisheries Decision-Making Case Studies*. Halifax: Dalhousie Ocean Studies Programme.
- SCHLAGER, E., and E. OSTROM
1992 'Property Rights Regimes and Natural Resources.' *Land Economics* 68: 249-262.

WIBER, Melanie G.

2000 'Fishing Rights as an Example of the Economic Rhetoric of Privatization: Calling for an Implicated Economics.' *Canadian Review of Sociology and Anthropology* 37: 267-288.

2004 'Finding Common Ground in the Fisheries Field: Agency in the Ethnographic Encounter.' *Zeitschrift für Ethnologie* 129: 49-70.

2005 'Mobile Law and Globalism: Epistemic Communities versus Community-Based Innovation in the Fisheries Sector.' Pp. 131-152 in Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Anne. Griffiths (eds.), *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World*. Burlington, VT: Ashgate Press.

WIBER, Melanie G., Fikret BERKES, Anthony CHARLES and John KEARNEY

2004 'Participatory Research Supporting Community-Based Fishery Management.' *Marine Policy* 28: 459-468.

WIBER, Melanie G., and Julia KENNEDY

2001 'Impossible Dreams: Reforming Fisheries Management in the Canadian Maritimes after the Marshall Decision.' *Law and Anthropology* 11: 282-297.