

# Mi'kmaq Fisheries in Atlantic Canada: Traditions, Legal Decisions and Community Management

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## Abstract

Historically, the Mi'kmaq, the indigenous people of Atlantic Canada, relied on and managed fisheries through a system based on clan groupings and natural cycles. However, their participation in harvesting and management has been eroded over time through treaty relationships and government policies. Today, recent court decisions upholding Mi'kmaq rights to the Atlantic Canadian fisheries are increasing Mi'kmaq involvement in fishery management. The Marshall decision, in particular, which was met by conflict between Mi'kmaq and non-native communities, offers potential for further development of local co-operation in fishery management. This paper explores the evolving state of Mi'kmaq nation-based and community-based management systems.

## Historical Mi'kmaq Fishing and Fishery Management

The Mi'kmaq people inhabited the coastal region's of Eastern Canada long before the arrival of Europeans to their shores in the seventeenth century. A nomadic people, who were organized into family-based clan groupings or Bands, the Mi'kmaq had developed a rich culture that built on the local environment and the resources. Similar to coastal peoples elsewhere in the world, the Mi'kmaq have depended on the sea for food, trade and travel. The fishery was a significant factor in the annual migration patterns of the communities. The fishery was an important part of a migratory life cycle that incorporated hunting, fishing, trade and the gathering of everything the land had to offer. It has been estimated that in the pre-contact period, ocean resources provided more than 90 percent of the food supply.<sup>1</sup> It has been such an important part of the lifestyle that it was, and still is, deeply entwined in the belief systems, cultural myths and legends, language and world-views of the Mi'kmaq, as well as the neighbouring First Nations, the Maliseet and Passamaquoddy<sup>2</sup>.

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<sup>1</sup>Atlantic Policy Congress of First Nations Chiefs Secretariat. 2001. Proceedings of the First Nations Conference on Fisheries Management. <http://www.apcfn.ca>, fisheries, law & policy.

<sup>2</sup> Atlantic Policy Congress of First Nations Chiefs Secretariat. 2001. <http://www.apcfn.ca>, fisheries, science.

This way of life led to the creation of a cyclical social and political culture that drew from these patterns set by nature. As one would expect, the high degree of dependence on wild resources for food resulted in the development of spiritual understanding of the world around them, mythologies to explain natural phenomena, as well as social systems and codes of conduct to define acceptable harvesting practices and strategies.

Regulations placed on harvesting practices - including times of harvest, areas of harvesting and who would harvest - were all tied to annual migrations between fishing and hunting grounds. Decision making was not vested in the hands of a hierarchical leadership, but rather made through a consensus of all members of the community within each of seven territorial districts or *sakamowiti*.<sup>3</sup> Each district comprised a geographical territory inhabited by a number of extended families. Within a district the political units consisted of the family. Each district would elect from their members a district chief, who with their families would participate in an annual gathering called a *Mawiomi* or Council. The *Mawiomi* was led by the *Kijsakamou* or Grand Chief and the spiritual leader *Kijkatin* or Grand Kaptin, whose functions were to facilitate, not to rule. Resource management decisions were made by the family clans and communities, through a bottom-up democratic political process, rather than being passed down by the *Sante Mawiomi* (Grand Council).

For the most part, annual migrations of the clans were determined by weather, resource availability and transportation routes. However, decisions made at the *Sante Mawiomi* could affect migrations based on principles of kindness, sharing and a spiritual relationship with the natural world. It has been said, "For the Mi'kmaq people, government, politics, economy and spirituality are all united."<sup>4</sup> This management regime is still referred to today as *Netukulimk*. *Netukulimk* can be loosely defined as, "the use of the natural bounty provided by the Creator for the self-support and well-being of the individual and the community at large."<sup>5</sup> In essence this philosophy dictates that one should not take any more than necessary for survival in order to ensure that there are some resources left for future use.

Upon the arrival of Europeans to the shores of Mi'kmaq territory, the Mi'kmaq extended their principles of domestic law through a series of treaties, first with the French and later the English. The Treaty making period with the British ran between 1725 and 1794. The Treaties were primarily for peace and friendship, established to protect the Mi'kmaq way of life in the face of the superior political and military power of the British. They did not cede Mi'kmaq territory or resources. In 1763 a Royal Proclamation was issued that guaranteed the Mi'kmaq unmolested possession of hunting grounds and recognised the nation status of the Mi'kmaq people.

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<sup>3</sup>Young, T. and Metallic, F. 1999. *Apoqonmaluktimk, Working Together to Help Ourselves* Atlantic Policy Congress of First Nations Chiefs.

<sup>4</sup>Leavitt, R.M. 1995. *Maliseet & Micmac: First Nations of the Maritimes*. New Brunswick. New Ireland Press. p.272.

<sup>5</sup>Native Council of Nova Scotia. 1993. *Mi'kmaq Fisheries: "Netukulimk" Towards a Better Understanding*.

However, through the treaties of peace and friendship, European colonial expansion into the Atlantic provinces proceeded to the point that the descendants of Europeans greatly outnumbered those of the Mi'kmaq. During this period, Mi'kmaq access to natural resources was inhibited by government laws and policies dealing with aboriginal people, and the concurrent evolution of fishery laws and policies dealing with the management of non-native commercial fishing. Mi'kmaq people were placed on reserve lands, through a process referred to as centralization, and denied opportunity to use their language in formal education settings. Economic advancement of individuals in the modern North American economy was only possible if individuals or families left the reserve community to seek employment and education outside the context of their cultural upbringing. Today Mi'kmaq communities are characterised by their high dependence on social support due to the very high levels of unemployment. In many instances Mi'kmaq communities have unemployment levels of more than 80%.<sup>6</sup>

The result of these circumstances was that the connection between Mi'kmaq Bands became highly dependent on the present day governmental context, and not on the traditional Sante Mawiomi. Furthermore, Mi'kmaq management practices were overrun by the governmental management regimes of the federal and provincial governments.<sup>7</sup>

As a result of this history, an uneasy state of individual conflicts has existed for a considerable time between Mi'kmaq fishers, who believed that they should not be subjected to controls outside the Mi'kmaq traditional systems, and government fisheries officers who believed that Mi'kmaq fishers should be subject to the same management rules as non-native fishers.

### **The Sparrow Decision and the Mi'kmaq Response**

In 1990, the Supreme Court of Canada issued a landmark ruling on a case involving a native fisher from British Columbia, on Canada's pacific coast, that has a significant impact on Mi'kmaq access and involvement in the fishery. In the *Sparrow decision*, the Supreme Court of Canada upheld the Rights of aboriginal people to fish for food, social and ceremonial purposes. It stated that according to the rights accrued to aboriginal people under the Constitution Act (1982), Aboriginal people's rights to the food, social and ceremonial fishery have a priority over other uses of the fishery, including commercial fishing, but these rights are subject to overriding considerations such as conservation. It also stated that it was necessary for the Government of Canada to consult with aboriginal groups when their rights might be affected.

The Mi'kmaq responded to the Sparrow decision with a renewed interest in the fishery, and in establishing Mi'kmaq jurisdiction over their fishing activities. The Government of Canada responded with the Aboriginal Fisheries Strategy (AFS). Under the AFS the federal government made financial support for employment and economic development available to Mi'kmaq Bands

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<sup>6</sup>Atlantic Policy Congress of First Nations Chiefs. 2001 Moving Toward Implementation of Mi'kmaq, Maliseet and Passamaquoddy Treaty Rights with Respect to Fisheries. A Report on First Nations Initial Expectations for Participation in Atlantic Fisheries, APCFNC.

<sup>7</sup>The development of provincial governments and their associated powers and jurisdictions further compartmentalized the relationships between Mi'kmaq Bands, undermining the Sante Mawiomi and the role of the seven districts as management units.

through agreements that established a federal licensing regime as a control system for Mi'kmaq food fishing activity. This became a bone of contention within the individual Mi'kmaq communities. Band Councils were faced with an opportunity to gain financial support for their communities that would create much needed jobs, yet these same agreements diminished Mi'kmaq authority over their harvesting activities. Many communities signed agreements with the government over the course of the 1990s, thus further dividing Bands from one another and further moving the Mi'kmaq communities away from the community-based management system of the past. Bands became more dependent on the government for permission to fish, and as this dependence grew, the need to establish management decision making mechanisms diminished.

A few Mi'kmaq communities persisted in fishing outside the governmental management regime. These communities became strong proponents of a Mi'kmaq fishery management system. With this political desire, the Bands that had refused to sign an AFS agreement worked together with Bands that had AFS agreements to establish regional fishery management initiatives. The first of these to be established was the Mi'kmaki Aboriginal Fishery Service in Eskasoni, Cape Breton Island. With financial support from the AFS, MAFS worked with several Mi'kmaq communities in Cape Breton to coordinate fishery staff employed under AFS agreements. The valuable experience of the MAFS, subsequently renamed the Eskasoni Fish and Wildlife Commission, in implementation of federal fishery regulations and programs at the community level laid the foundation for new approaches in community-based management within the Mi'kmaq nation.

Indeed, in 1995, the work of the MAFS resulted in the creation of the broader-based Mi'kmaq Fish and Wildlife Commission, which was established by the Assembly of Nova Scotia Chiefs to manage natural resource activities on behalf of the Mi'kmaq and their institutions in Nova Scotia. In this regard, natural resources were defined to include (i) coastal, marine and freshwater fisheries; (ii) hunting, trapping and other wildlife related activities; and (iii) all activities related to the collection or harvesting of terrestrial resources including forests, and mineral resources.

A priority area for the Commission was to enhance natural resource management capacity for the Bands within the province. In particular the Commission worked to increase the role of the Mi'kmaq people in Nova Scotia in management of the region's fishery. This was necessary to improve management of the food fishery for the benefit of communities and for Mi'kmaq in generations to come. It was also considered important to improve capabilities to effectively participate in the commercial fishery to create employment and income necessary for community development.

To meet this mandate, the MFWC undertook activities and projects in the following areas:

- Promoting and coordinating Mi'kmaq access to natural resources.
- Promoting and developing employment opportunities in natural resource industries within Bands.
- Promoting and coordinating resource management planning in cooperation with Band organisations.
- Promoting and implementing public education activities in regard to natural resource

management and the principles of Netukulimk.

- Undertaking research activities on the current status and potential uses for natural resources.
- Assisting Bands in the preparation of resource management guidelines and regulations.
- Coordinating and implementing enforcement and monitoring activities.
- Undertaking activities to ensure and protect Mi'kmaq rights with respect to natural resource harvesting, development and management.
- Designing, developing and implementing projects in regard to resource development for Mi'kmaq Bands.
- Implementing a Mi'kmaq Natural Resource Harvesting Accord to define the role of the Commission with respect to the Governments of Canada and Nova Scotia.

The MFWC shared a common feature with other Mi'kmaq fishery management initiatives in other areas of Atlantic Canada, such as the Fishery Division of the Union of New Brunswick Indians in that it was solely dependent on governmental sources for financial support, particularly DFO and the AFS program. This created a dilemma for the Chiefs, and staff of the regional Mi'kmaq management organisation. On the one hand, efforts to establish an independent fishery management capacity within Mi'kmaq communities were perceived to be contrary to the management control structures established under the Fisheries Act, and would, therefore, compromise funding. On the other hand, if the organizations worked to ensure implementation of the federal management system, it would be perceived as contrary to the aspirations of Mi'kmaq communities and would compromise political support. It was very apparent that the AFS played a powerful role in controlling the development of Mi'kmaq management systems through the dependence of Mi'kmaq communities on external funding.

### **The Marshall Decision and its Aftermath**

The MFWC had been created by the Chiefs, in part, as a response to a court case - known today as the Marshall case - involving a Mi'kmaq harvester, Donald Marshall Jr., who had been charged with commercial fishing without a license. The Chiefs had provided support for the legal defence of Marshall, whose argument for defence was that the Mi'kmaq have a treaty right to fish for commercial purposes. In anticipation of a ruling by the Nova Scotia courts in favour of Marshall, the Chiefs felt that it was necessary to set up a Mi'kmaq (community) management system that would ensure smooth transition of the Mi'kmaq into the commercial fishery, and avoid confusion with regard to management priorities.

During the five years that the Marshall case moved from one court to another, and eventually to the Supreme Court of Canada, the MFWC worked with individual communities to establish local fish and wildlife management committees, and to establish local management plans that reflected traditional values, and present day aspirations.

In September 1999, the Supreme Court of Canada ruled on the Marshall case in favour of the defendant. Mi'kmaq treaty rights to the commercial fishery had been recognised. There was a strong sense of vindication and hope within Mi'kmaq communities, and a strong sense of fear and apprehension throughout the non-native fishery.

The Mi'kmaq Chiefs responded to the news quickly. Several meetings of all Mi'kmaq, Maliseet and Passamaquoddy Chiefs throughout Atlantic Canada were organized by a policy advisory group that had been established by the Chiefs in 1992, the Atlantic Policy Congress of First Nations Chiefs. These meetings also included the fishery and legal technicians from the Bands and various regional organisations. It was clear from the deliberations and ensuing resolutions of the Chiefs that they wanted unity in their response to the Marshall decision, rather than a Band by Band approach similar to the AFS. To assist the Chiefs, they established a technical committee comprising fishery staff from the various organizations. This group was to work to support nation to nation negotiations (between the First Nations and the federal government of Canada) for the smooth transition of the "Marshall fishery". The Chiefs also appointed a principal negotiator to oversee and facilitate discussions with the federal government.

After the Marshall decision, one of the first steps taken by the Mi'kmaq chiefs in Nova Scotia was to set up formal dialogue with non-native fishermen's organizations, to bely fears and to promote their common interest in a sustainable fishery. In some instances, this initiative has led to continued interaction, with the goal to undertake joint local management with the non-native partners. Such interactions were particularly effective with inshore fishermen's organizations that had been, at that time, involved with efforts to establish community-based management on a local level. On the other hand, discussions were not as effective with many groups, which did not demonstrate their desire to establish joint local community-based management systems. These groups apparently remained afraid that the Marshall decision would result in over-exploitation, with an associated loss of profit and employment, and were pushing for a rehearing of the Marshall decision by the Supreme Court of Canada.

Meanwhile, the Government of Canada appointed in 1999 a single negotiator, James MacKenzie, whose task was to enter into access agreements with individual Bands. The government was experiencing significant pressure from many non-native groups, and as a result made it a condition of negotiated agreements that access must be tied to voluntary buy-backs from non-native fishermen, and acceptance of federal licensing policies related to each specific fishery.

This approach to increasing Mi'kmaq involvement in the commercial fishery has been highly controversial. On the one hand, it certainly serves to appease non-native concerns in the aftermath of the Marshall decision. It also addresses the real financial needs of poor Mi'kmaq communities; without significant funds to invest in commercial fishing boats and gear, these communities were, for the most part, powerless to engage in the modern commercial fishery.

On the other hand, the MacKenzie negotiation process lacks flexibility, in that the government was not willing to negotiate alternative means of access for the Mi'kmaq - such as quota sharing, or trap reductions in the lobster and crab fisheries - that might have been preferred in some cases by both native and non-native communities. This approach is based on a one-size-fits-all strategy that allows Mi'kmaq harvesting only through the licensing and regulatory regime employed by DFO for the non-native commercial fishery. Such a strategy ignores the Mi'kmaq rights upheld in the Sparrow and Marshall decisions; both decisions were clear that federal regulations cannot and should not interfere with the right of First Nations to harvest, unless the government can justify infringement of the right based on conservation.

Mi'kmaq bands faced a dilemma in responding to the Canadian government's approach. There was a great desire to immediately and fully exercise the fishing rights recognised in the Marshall decision, and to do so through self-managed fisheries. Some bands, such as Indian Brook (Nova Scotia) and Burnt Church (New Brunswick) have refused to compromise their positions on this, leading to physical conflicts with federal government officials, that have become the focus of much media attention. However, the need for financial support and the threats of hostility by non-native fishers (notably in South Western Nova Scotia and Northern New Brunswick) made it necessary for many Mi'kmaq communities to enter into access agreements with DFO that would not prejudice the long-term Treaty Right and would promote immediate access with the potential for minimizing conflict. Accordingly, many individual Bands entered into AFS-like "Mackenzie Agreements" with the government of Canada.

Each MacKenzie agreement deals with access to specific fisheries as well as support for capacity building, such as financial support for training, fishing vessels and gear, and in some cases construction of fisheries-related facilities. For the most part, access in the initial round of MacKenzie agreements focused on the high valued commercial species such as lobster and snow crab. All access in these agreements was in accordance with communal commercial licenses issued by the government to the Band. While MacKenzie agreements include statements that access is without prejudice to Treaty rights and aboriginal title, Bands were obligated to 'shelve' their right to manage their fisheries for the duration of the agreement, and to fish in accordance with the DFO licensing and regulatory system. Subsequent negotiations between the Bands and MacKenzie have broadened the scope of species involved, and in some cases also includes the development of local management capacity.

## **Discussion**

The 1999 Marshall decision, recognizing the right of Mi'kmaq, Maliseet and Passamaquoddy peoples to fish commercially as well as for food, social and ceremonial purposes, is dramatically changing the nature of fisheries in Atlantic Canada. The court decision has sparked conflict in the Maritimes, between Mi'kmaq and non-natives in the fishery and in coastal communities. The conflict has been intense, physically and emotionally. At the same time, however, there is a real sense of opportunity, from two perspectives.

First, there is a sense of opportunity among Mi'kmaq to finally recover a reasonable livelihood, through the use of natural resources that they have traditionally harvested, but which for many years were taken from them. First Nations are working to develop the capacity not only to fish, but also to engage in fishery self-management, by combining a community-based approach with their traditional philosophical connection with the natural world, *Netukilmk*. This effort involves building expertise in fishery management and policy development, as well as expanding the understanding of conservation matters among harvesters.

There is also a sense of opportunity in a less obvious quarter. Within a large segment of the inshore small-boat fishery in the Canadian Maritimes, there exists an understanding of the close connection between fishers and their communities. Increasingly, we are seeing new initiatives

moving to recognise this connection, through community-based fishery management that is rooted in geographical proximity to the fish stocks. This move is bolstered by growing social science evidence that fishery conservation can be improved through such management, which makes use of local knowledge of the ecosystem, and can improve compliance by empowering fisher associations and communities. Those pursuing community-based management in the non-native fishery have been undertaking impressive efforts to develop such management approaches, but with little official support. Now, these forward-thinking fishers have found common ground with Mi'kmaq First Nations, to pursue their mutual desires for acceptance of community-based fishery management, and for more emphasis on ecosystem-based management. This has helped to overcome the perception of the Marshall decision as a threat to the livelihood of inshore non-native fishers, and has led to new linkages between First Nations, community-based non-native fisher organizations, and environmental groups.

Unfortunately, these positive developments are faced with major challenges. Just as non-native community based fishery management has met with little support from the federal government, for the most part the cycle of dependence on external support and top down management that has been characteristic of the post colonial period of Mi'kmaq history has been repeated. Mi'kmaq efforts to establish a management system that respects and builds upon the long tradition of community management have been inhibited by the present dependence on federal assistance.

The Sparrow and Marshall decisions were clear in their recognition of (a) the Mi'kmaq right to access the fishery, and (b) the fact that any regulations infringing on this right must be justified on the basis of conservation needs and good management of the resource. The Mi'kmaq viewed the Marshall decision, in particular, as an opportunity to advance their role in the management of their local fishery resources, in accordance with the self-governance aspirations of First Nations. However, little ground was conceded by the government. Agreements showed little evidence of a recognition by the federal government that community management systems can be effective in promoting conservation and sustainable fisheries.

Conflicts, such as that experienced in Burnt Church, will likely continue if the government continues to alienate Mi'kmaq communities from the management process. These situations can be avoided if both native and non-native fishers establish effective dialogue, and undertake activities that promote local management cooperatively. Demonstrations of cooperation taking place at the local level can reduce the need for federal intervention and lay the foundation for advancement of local management systems.