Fostering *Netukulimk*: The Mi'kmaw Right to Fisheries Conservation and Co-Management

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Abstract

More than 20 years after the landmark Supreme Court of Canada decision *R v Marshall* (1999), which recognized the Mi'kmaq people's right to fish across the Mi'kma'ki and sell their catch for a moderate livelihood, the Mi'kmaq are still facing many barriers to the exercise of their treaty rights. Moreover, fisheries management regulations, as well as the programs established by the Department of Fisheries and Oceans (DFO) to implement the *Marshall* decision, do not reflect Mi'kmaw laws and knowledge systems. In the face of these challenges, the Mi'kmaq are seeking greater control over their treaty activities and some have launched their own self-regulated fisheries. However, the legitimacy of Mi'kmaq-regulated fisheries has been strenuously contested by non-Indigenous fishers and the DFO, with the DFO enforcing federal conservation regulations in the face of Mi'kmaw laws and treaty rights. As a solution to this impasse, this thesis demonstrates the legal validity and potential workability of collaborative Mi'kmaw-Canadian fisheries co-management. Promoting reconciliation, co-management acknowledges the existence of Mi'kmaw inherent and treaty rights to the self-management of their fisheries, as well as, in practice, the DFO's concurrent jurisdiction. The Mi'kmaq people have sustainably managed their ancestral lands and waters since time immemorial and have developed effective conservation plans adapted to their own social, economic, and legal contexts. This thesis proves that, flowing from the right to self-management of their fisheries, the Mi'kmaq have the right to participate, along with DFO, in decision-making processes concerning conservation and management of fisheries and marine ecosystems. Creating collaborative Mi'kmaw-Canadian co-management processes using a dialogic "two-eyed seeing" approach would put Mi'kmaw and Western knowledge systems on an equal footing, preventing the ongoing infringement of Mi'kmaw treaty rights and enhancing the sustainability of fisheries management.

Résumé

Plus de vingt ans après la décision historique de la Cour suprême du Canada *R. c. Marshall,* qui a reconnu le droit du peuple Mi'kmaq de pêcher librement à travers le Mi'kma'ki et de vendre leurs prises pour une subsistance convenable, les Mi'kmaq sont toujours confrontés à de nombreux obstacles qui les empêchent d'exercer ces droits issus de traités. De plus, les règlements de gestion des pêches ainsi que les programmes établis par le ministère des Pêches et des Océans (MPO) pour mettre en œuvre la décision *Marshall* ne reflètent pas les lois et les systèmes de connaissances des Mi'kmaq. Par conséquent, les Mi'kmaq demandent un plus grand contrôle de leurs activités issues de traités et certains ont même lancé leur propre pêche auto réglementée. Cependant, ces pêches réglementées par les Mi'kmaq ont été fortement contestées par les pêcheurs non autochtones et le MPO, qui leur ont demandé de se conformer aux règles de conservation — des règles élaborées sans aucune considération pour leurs lois et leurs systèmes de connaissances. Comme solution à cette impasse, cette thèse démontre la validité juridique et la faisabilité potentielle de la cogestion des pêches entre les Mi'kmaq et le Canada. Favorisant la réconciliation, la cogestion reconnaît l'existence des droits inhérents et issus de traités des Mi'kmaq à l'autogestion de leurs pêches, ainsi que, en pratique, la compétence concurrente du MPO. Une cogestion collaborative entre les Mi'kmaq et DFO qui mettrait les systèmes de savoirs Mi'kmaw et occidentaux sur un pied d'égalité, par exemple en utilisant l'approche Mi'kmaw du Two Eyed Seeing, pourrait empêcher la violation continue des droits issus des traités des Mi'kmaq et créer un dialogue entre les deux traditions juridiques.

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Abbreviations

AFS	Aboriginal Fisheries Strategy
COSEWIC	Committee on the Status of Endangered Wildlife in Canada
DFO	Department of Fisheries and Oceans
IFA	Interim Fisheries Agreements
ISK	Indigenous Scientific Knowledge
ITQ	Individual Transferrable Quotas
NWMB	Nunavut Wildlife Management Board
RCMP	Royal Canadian Mounted Police
SARA	*Species at Risk Act*, SC 2002, c. 19
SCC	Supreme Court of Canada
SFMP	Sipekne'katik Fisheries Management Plan
TESA	"Two-Eyed Seeing" Approach
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

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Introduction

I. Broader Context

Since time immemorial, the Mi'kmaq people have inhabited the Mi'kma'ki, their ancestral territory, which extends "from present day Newfoundland and St.-Pierre de Miquelon [sic], westward to the mainlands of modern Nova Scotia, New Brunswick, northern Maine, Prince Edward Island, the Magdalene archipelago, and the Gaspé Peninsula of Québec".[1] The Mi'kmaq are a coastal people who historically "lived in villages along the coast, at harbours, and at the mouths of rivers for much of the year and fished extensively in coastal waters."[2] While the Bay of Fundy, the coast of the Gulf of St. Lawrence, and the peninsula of Nova Scotia were strategically important for colonial powers during the 18th century as "the entrance to the interior of the continent",[3] these areas were first and foremost the homes of the Mi'kmaq, the Wolastoqiyik — also known as Maliseet — and the Passamaquoddy. During the 1700s, the British Empire gradually established its colonial domination in these territories, replacing France as the primary colonial power.[4] As a consequence of increasing proximity between British settlers and Indigenous peoples, as well as Massachusetts' assertion of authority over the fisheries in the waters of the Mi'kma'ki, serious conflicts erupted between the Mi'kmaq and British colonists.[5] In the face of British violation of Mi'kmaw authority over their own waters, the Mi'kmaq people fought to protect their authority and autonomy over the fisheries they considered, and still consider today, as sacred.[6] To

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[1] James [Sákéj] Youngblood Henderson, "First Nations Legal Inheritances in Canada: The Mi'kmaq Model" (1995) 23 Man LJ 1 at 19 [Henderson, "Legal Inheritances"].

[2] *Ibid*.

[3] Jean-Pierre Morin, *Solemn Words and Foundational Documents : An Annotated Discussion of Indigenous-Crown Treaties in Canada, 1752-1923* (Toronto, ON: University of Toronto Press, 2018) at 21.

[4] French settlers in the Mi'kma'ki, or Acadians, lived peacefully with the Indigenous peoples of the region until the mid-18th century. The expulsion of the Acadians by the British, beginning in 1755, changed this dynamic. On Acadian law in the Mi'kma'ki before British conquest, see Robert Hamilton, *Legal Pluralism and Hybridity in Mi'kma'ki and Wulstukwik, 1604-1779: A Case Study in Legal Histories, Legal Geographies, and Common Law Aboriginal Rights* (PhD Thesis, University of Victoria, 2021) [unpublished] [Hamilton, *Legal Pluralism and Hybridity in Mi'kma'ki*] at 130:

> Until the 18th century they [Acadians] were a demographic minority receiving little organized support from France and dependent on the acquiescence of the Mi'kmaq for the survival of their communities. Even as they became a strong majority by the mid-18th century, the Acadians never established, or sought to establish, anything like political rule or territorial jurisdiction outside of their communities. Acadian law remained strictly internal, and Acadians navigated the legal pluralism of the era through strategic engagement with the overlapping regimes that impacted their lives.

[5] *Ibid* at 173.

[6] Indeed, Mi'kmaq were fearsome sailors and managed to seize "in the order of 100 European sailing vessels in the years prior to 1760." (*R v Marshall,* [1999] 3 SCR 456 [*Marshall*].)

deal with growing violence and confrontations, the Mi'kmaq, the Wolastoqiyik, the Passamaquoddy, and the British colonial government of Nova Scotia negotiated treaties on a nation-to-nation basis between 1725-1779, now known as the Peace and Friendship Treaties (PFT).

The PFT acknowledged the intertwinement of these nations' laws, jurisdictions, and territories[7] and established a relationship of peace, friendship, and protection between them.[8] When entering into a treaty relationship, parties are "equal, coexisting and self-governing nations [that] govern their relations with each other by negotiations, based on procedures of reciprocity and consent."[9] However, the Crown's understanding of this mutually agreed treaty relationship — as one of nation-to-nation — changed during the 19th century and one-sidedly "shift[ed] to an imposed model of unilateral and coercive authority".[10] While the Mi'kmaq-Crown relationship has evolved greatly since 1725, the Mi'kmaq people have always considered treaty promises as sacred and have continued to live in ways that are based in the spirit of the PFT relationship; they have always been willing to share their bountiful lands and waters.[11] Yet, the Crown's distorted understanding of the relationship drastically eroded Mi'kmaw fishing practices and the ecosystems of the Mi'kma'ki. This quote from current Natoaganeg (Eel Ground) First Nation Chief George Ginnish captures Mi'kmaq people's perception of their ancestral role in the fisheries and how it is at odds with the current state management system:

> To us the fishery has always been sacred. It has always been respected and conserved by us. We were always willing to share it with the newcomers and we remain willing to share it. However true conservation must play a central role in its

[7] See Hamilton, *Legal Pluralism and Hybridity in Mi'kma'ki*, *supra* note 4 at 229:

> The result was the development of the body of intersocietal law described in chapter four, which provided for clear areas of shared and exclusive jurisdiction and territory. Legal spaces were constituted and regulated through this plurality of orders. As mentioned above, for example, the non-molestation clause in the 1726 Treaty stated that "the Said Indians shall not be Molested in their Persons, Hunting Fishing & Shooting & planting on their planting Ground nor in any other their Lawfull occasions." Intersocietal law thereby structured these as Indigenous spaces, which were layered, in a sense, with intersocietal and Indigenous legalities.

[8] *Ibid* at 205-06.

[9] James Tully, *Public Philosophy in a New Key, Vol. I: Democracy and Civic Freedom* (Cambridge, UK: Cambridge University Press, 2008) at 265.

[10] Hamilton, *Legal Pluralism and Hybridity in Mi'kma'ki*, *supra* note 4 at 91.

[11] See e.g. Pamela Palmater, "My Tribe, My Heirs, Their Heirs" in Marie Battiste, ed, *Living Treaties: Narrating Mi'kmaw Treaty Relations* (Sydney, NS: Cape Breton University Press, 2016) 24 at 27.

> management. The *Fisheries Act*, its regulations and the policies of DFO do not meet this criteria [sic] and these laws and policies must change.[12]

With the patriation of the Canadian constitution in 1982, Aboriginal and treaty rights were finally recognized and protected by the highest law of the country. Despite this written constitutional protection, Indigenous peoples' rights in Canada have been repeatedly violated, as documented by numerous reports from national and international organizations.[13] As a result of these violations, Indigenous peoples are seeking greater control over the decisions and institutions affecting their lives and constitutionally protected rights, especially regarding the management of their ancestral territories.[14] The Mi'kmaq are one of these peoples who have decided to regain control over their territories by enacting their own laws to guide the exercise of their treaty rights. Indeed, since time immemorial, they have sustainably taken care of their ancestral lands and waters, as well as the life flourishing within them. This thesis sheds light on how and why the Mi'kmaq are still struggling to fully benefit from their constitutionally protected treaty rights.[15] If Canada is serious about reconciliation with Indigenous peoples, it must first recognize the contribution of First Nations' legal traditions in Canada and in Canadian constitutionalism.[16] For the Mi'kmaq, this means to "understand and respect the Mi'kmaw worldview, in relation to Mother Earth [...] so that Canada and the provinces can understand why it is so vital for [them] to protect Mother Earth and therefore be involved in the decision making."[17]

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[12] Canada, House of Commons Standing Committee on Fisheries and Oceans, *The Marshall Decision and Beyond: Implications for Management of the Atlantic Fisheries* (Ottawa, ON: Department of Fisheries and Oceans Canada, 1999) [Standing Committee on Fisheries and Oceans, *The Marshall Decision and Beyond*].

[13] Two notable domestic examples: Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa, ON: Canada Communication Group, 1996) and Truth and Reconciliation Commission of Canada, *Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg, MB: National Centre for Truth and Reconciliation, 2015) [TRC Final Report]; and an international example: United Nations, Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya,* 27th session, A/HRC/27/52/Add.2 (2014).

[14] Jane L McMillan & Kerry Prosper, "Remobilizing *Netukulimk*: Indigenous Cultural and Spiritual Connections with Resource Stewardship and Fisheries Management in Atlantic Canada" (2015) 26 Rev Fish Biol 629 at 630.

[15] Jane L McMillan, *et al,* "*Netukulimk* Narratives: Pathways to Rebuilding Sustainable Indigenous Nations" in Lars K Hallstrom *et al,* eds, *Sustainability Planning and Collaboration in Rural Canada: Taking the Next Steps* (Edmonton, AB: University of Alberta Press, 2016) 241 at 241.

[16] Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult" in John Borrows, *et al*, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON: Centre for International Governance Innovation, 2019) 65 at 78 [Morales, "Braiding the Incommensurable"].

[17] Cheryl Knockwood, "Rebuilding Relationships and Nations: A Mi'kmaw Perspective of the Path to Reconciliation" in Borrows, *et al, ibid,* 111 at 112.

II. The Mi'kmaq Fisheries Dispute

I was in the Maritimes when the lobster fishery dispute erupted in Nova Scotia between the Sipekne'katik First Nation and non-Indigenous fishers. At that time, the Mi'kmaq of Sipekne'katik had just launched their self-regulated lobster fishery, an initiative that generated violent reactions and reprisals from many non-Indigenous fishers, who were fiercely opposed to Mi'kmaq people's refusal to abide by the Department of Fisheries and Oceans (DFO) fishing regulations, including prescribed fishing seasons and other conservation regulations. As the tension grew, violence erupted and Mi'kmaw gear, vessels, and lobster traps were destroyed and vandalized, and a processing plant was burned to the ground. Despite these deliberate acts of violence against Mi'kmaq fishers, the Royal Canadian Mounted Police (RCMP) did little to protect Mi'kmaw property. They stood by and watched and were later particularly slow to prosecute those who vandalized, destroyed, and burned Mi'kmaq people's gear and other property.[18] Through conversations with local people about what I believed to be a clear violation of Mi'kmaw treaty rights, I began to grasp the complexity of the situation and the emotional charge it carried. Despite my knowledge of constitutional law and my deep interest in Indigenous-Crown relations, many questions remained unanswered: Why does the state seem so ambivalent about the approach to take in the face of the self-regulated Mi'kmaw fishery? Why are the Mi'kmaq still unable to exercise their treaty right to fish and sell their catch for a moderate livelihood without being at risk of prosecution?

This thesis will demonstrate that the Mi'kmaq are unable to fully exercise their treaty rights because the Crown refuses to recognise the self-government powers needed to fully benefit from these rights. Following the introductory chapters, I argue, in Chapter 3, that while the Mi'kmaq have had, since time immemorial, a fisheries management system based in the principle of *netukulimk,* a concept that embodies conservation and interdependence between humans and other life forms*,* the Crown refuses to recognise Indigenous knowledge as scientific knowledge, thus excluding Indigenous science and institutions from its decision-making processes. In Chapter 4, I

[18] Angel Moore, *APTN National News*, "RCMP Investigating after Sipekne'katik Lobster Fishing Boats Cut Loose from Wharf in N.S." (6 August 2021), online: <https://www.aptnnews.ca/national-news/rcmp-investigating-nova-scotia-sipeknekatik-fishing-boats-lines-cut/>.

demonstrate that the Supreme Court of Canada's (SCC) decisions on Aboriginal and treaty rights have been anchored in the racist "doctrine of discovery", which assumes Indigenous peoples were found, at contact, to be living without real government or law. I therefore contend that the SCC's articulations of Aboriginal and treaty rights have been incomplete, carefully ignoring the self-government aspects of these rights. I then proceed to articulate a right that would take into account the nation-to-nation relationship that characterized the PFT, which includes, but is not limited to, the Mi'kmaw right to the self-management of their fisheries. In Chapter 5, I argue that the Crown's current infringements of the Mi'kmaw right to self-management are unconstitutional because they do not meet the test for justifying infringement established in *R v Sparrow*[19] and *R v Badger*.[20] As a solution to jurisdictional conflicts arising from competing management powers, I suggest that co-management, flowing from the Mi'kmaw right to self-management, could be established to sustainably manage the fisheries and protect Mi'kmaw treaty rights. Below, I provide some historical and legal context for these claims.

a. Jurisprudence on the Peace and Friendship Treaties

One of the PFT, dating from 1752, states that the Mi'kmaq, the Wolastoqiyik, and the Passamaquoddy

> shall not be hindered from, but have free liberty of Hunting & Fishing as usual and that if they shall think a Truckhouse needful [...] they shall have the same built and proper Merchandize lodged therein, to be exchanged for what the Indians shall have to dispose of, and that in the meantime the said Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best Advantage.[21]

To grasp the implications of such a clause, it is necessary to review four key decisions: *R v Sylliboy*,[22] *Simon v The Queen*,[23] *R v Sparrow*,[24] and *R v Marshall.*[25] First, the 1929 *R v Sylliboy*[26] trial amassed testimonies on the importance of the PFT in Mi'kmaw oral history. Judge Patterson's

[19] *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].
[20] *R v Badger*, [1996] 1 SCR 771 [*Badger*].
[21] Treaty clause as transcribed in *Marshall, supra* note 6 at para 15.
[22] *R v Sylliboy* [1929] 1 DLR 307 (NSCC) [*Sylliboy*].
[23] *Simon v The Queen*, [1985] 2 SCR 387 [*Simon*].
[24] *Sparrow*, *supra* note 19.
[25] *Marshall*, *supra* note 6.
[26] *Sylliboy, supra* note 22.

transcriptions of the evidence of six Mi'kmaq witnesses are described by William C Wicken, one of the historians who provided expert witness testimony on Mi'kmaw history in *R v Marshall*, as "a unique Mi'kmaq perspective of treaty relationships during the early 20th century."[27] The witnesses in *Sylliboy* were almost all over 70 years old and their memory thus extended "before the residential school system, centralization and the post-war boom [that] precipitated significant alterations in Mi'kmaq society."[28] They testified that they had never been interfered with in their fishing and hunting practices and that they attributed this liberty to the PFT signed by their ancestors with the British Crown.[29] They believed in the treaties' continuing validity because they and their fathers annually received goods from colonial governments in exchange for respecting their treaty promises: "He [witness Gould's grandfather] told me he got these from the King. Under the Treaty. We promised to keep Treaty & got these things in return."[30]

In the 1985 case *Simon v The Queen,*[31] the SCC recognized for the first time the Mi'kmaw treaty right to fish and hunt outside governmental regulations. It confirmed that a treaty right could not be infringed by any provincial regulation or legislation. However, it was only in 1999, in *Marshall,* that the SCC ruled that the Mi'kmaw treaty rights to fish, hunt, and gather include the right to commercial exploitation for a "moderate livelihood".[32]

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[27] William C Wicken, "Heard It from Our Grandfathers: Mi'kmaq Treaty Tradition and the Syliboy Case of 1928" (1995) 44 UNBLJ 145 at 147 [Wicken, "Heard It from Our Grandfathers"]. Wicken transcribed Patterson J's testimonial transcriptions at the end of this article.

[28] *Ibid*.

[29] *Ibid* at 148.

[30] Francis Gould's testimony for the defense at the trial in *R v Sylliboy*, *supra* note 22, as transcribed by Patterson J and reproduced in Wicken, *ibid* at 148.

[31] *Simon*, *supra* note 23.

[32] The British Columbia Court of Appeal, in *R v Van der Peet,* [1993] 80 BCLR (2d) 75, at 126, first described "moderate livelihood" as "food, clothing and housing, supplemented by a few amenities". However, there are debates about the meaning of the expression "moderate livelihood" in terms of fish catch and financial value, because the SCC never defined it in these terms, except by mentioning that it "does not extend to the open-ended accumulation of wealth" (see *Marshall, supra* note 6 at para 7). While the trial judge in *Marshall* believed that the treaty strictly "gave the Mi'kmaq the right to bring the products of their hunting, fishing and gathering to a truckhouse to trade", the SCC rectified this interpretation at para 19:

> It was, after all, the aboriginal leaders who asked for truckhouses 'for the furnishing them with necessaries' [...] It cannot be supposed that the Mi'kmaq raised the subject of trade concessions merely for the purpose of subjecting themselves to a trade restriction. As the Crown acknowledges in its factum, 'The restrictive nature of the truckhouse clause was British in origin'. The trial judge's view that the treaty obligations are all found within the four corners of the March 10, 1760 document, albeit generously interpreted, erred in law by failing to give adequate weight to the concerns and perspective of the Mi'kmaq people, despite the recorded history of the negotiations, and by giving excessive weight to the concerns and perspective of the British, who held the pen.

Leading to the *Marshall* decision was the prosecution of Donald John Marshall Jr, a Mi'kmaw man[33] who had been accused of fishing and selling eels without a permit and outside regulations. The SCC acquitted Marshall on all charges after six years in court because

> the close season and the imposition of a discretionary licencing system would, if enforced, interfere with the accused's treaty right to fish for trading purposes, and the ban on sales would, if enforced, infringe his right to trade for sustenance. In the absence of any justification of the regulatory prohibitions, the accused is entitled to an acquittal.

The Mi'kmaq were thus free to exercise their treaty right to fish outside regulations, except in cases in which the Crown provides a viable justification for the regulation. In a rare clarification of one of its judgments, the SCC specified that Canada could still regulate Mi'kmaw fisheries if these regulations were "justified on conservation or other grounds of public importance,"[34] and if the infringement met the criteria of the infringement test established in *R v Sparrow*.

Indeed, in *R v Sparrow,* the SCC established the test for justifying an infringement of s. 35 rights, as followed in *Marshall*:[35] the Indigenous party must first prove the existence of a *prima facie* interference with a s. 35 right. If a *prima facie* interference is found, the burden of proof then switches to the Crown, who must prove that the regulation interfering with the treaty right has a "valid legislative objective".[36] This can include a regulation aimed at the conservation of natural resources, but a general "public interest" objective cannot be valid, as it is excessively vague.[37] If a valid objective is found, the Crown must finally demonstrate that the means employed are upholding the honour of the Crown.[38] The SCC adds that Indigenous peoples, "with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the

[33] Donald Marshall Jr. was also wrongly convicted of murder in 1971 at 17 years old, and spent 11 years in prison. His wrongful conviction led to the Government of Nova Scotia's *Royal Commission on the Donald Marshall, Jr. Prosecution: Digest of Findings and Recommendations* (Halifax, NS: 1989), which in turn led to many changes in the criminal justice system of Nova Scotia, especially in its dealings with the Indigenous and Black people.
[34] *R v Marshall*, [1999] 3 SCR 533 [*Marshall 2*] at para 6.
[35] *Sparrow*, *supra* note 19 at 1111-19; *Marshall, supra* note 6 at paras 64-66.
[36] *Sparrow, ibid* at 1113.
[37] *Ibid*; see also *R v Gladstone*, [1996] 2 SCR 723 [*Gladstone*] at para 75 for examples of other valid objectives.
[38] The honour of the Crown and the Crown's fiduciary duty will be discussed in detail in Chapter 5.

regulation of the fisheries."[39] In *R v Badger*,[40] the SCC states that the *Sparrow* test, which was originally articulated for Aboriginal rights, also applies when a treaty right is infringed.[41]

b. The Issue

After the release of the *Marshall* decision in 1999, a few Mi'kmaq communities decided to fish outside government regulations, as permitted by the *Marshall* decision, but were severely repressed by non-Indigenous fishers and DFO. Esgenoopetitj First Nation (Burnt Church First Nation) was the first to put out traps after the *Marshall* decision in 1999, setting off a violent conflict between Indigenous and non-Indigenous fishers in the weeks that followed. Following this crisis, Mikmaq First Nations found it all but impossible to keep their non-DFO-regulated fisheries alive, as they faced several structural barriers, such as the unjustified removal of their traps, the arrest of Mi'kmaq fishers, and the criminalization of those who bought Mi'kmaw catch. However, in 2020, Sipekne'katik (Shubenacadie) First Nation formally launched its own self-regulated fishery.[42] By having a conservation plan and by monitoring catches, all based on their own laws and knowledge systems, Sipekne'katik counters the main argument DFO uses to deny outside-regulation Indigenous fisheries, which is that governmental regulation is needed for conservation purposes.

One of the main problems arising from the Crown's interpretation of the *Marshall* decisions is that it does not attempt to justify violations of treaty rights unless an issue goes to court — only *a posteriori* — instead of justifying its actions before carrying them out — *a priori*. Yet, in *Marshall 2*, the SCC is clear that the Crown needs to establish "that the limitations on the treaty right are imposed for a pressing and substantial public purpose, after appropriate consultation with the

[39] *Gladstone, supra* note 37 at 1119.
[40] *Badger*, *supra* note 20.
[41] *Ibid* at para 82.
[42] Mi'kmaw traditional fisheries never really disappeared, but were carried out discreetly and were not officially recognized by Canadian authorities. The *Marshall* decision allowed the Mi'kmaq to stop hiding their fishing and trading activities. Esgenoopetitj (Burnt Church) First Nation (Burnt Church First Nation) was the first to launch its own self-regulated lobster fishery. However, in 2002, it signed an Agreement-in-Principle with DFO, which "turned over regulation of the fishery to the federal government"; see Sarah J King, "Conservation Controversy: Sparrow, Marshall, and the Mi'kmaq of Esgenoôpetitj" (2011) 2:4 Int'l Indigenous Policy J 1 at 10-11.

aboriginal community",[43] and must "go no further than is required"[44] for conservation**.** The Court also holds that "the concerns and proposals of the native communities must be taken into account, and this might lead to different techniques of conservation and management in respect of the exercise of the treaty right."[45] To promote fairness to the Mi'kmaq, an infringement of treaty rights based on conservation concerns should be supported *a priori* by scientific evidence proving the necessity of the infringement to protect an ecosystem or a species. Without such an *a priori* justification mechanism, the Mi'kmaq cannot assess whether DFO regulations are constitutionally justified until they are brought into court.

c. The Question

More than 20 years after the *Marshall* decision, one question remains unanswered: why are the Mi'kmaq still unable to exercise their treaty right to fish and sell their catch for a moderate livelihood without being at risk of prosecution? This thesis claims that this conflict is about more than conservation: it is about defining the social and physical boundaries between Canadian and Mi'kmaw sovereignties and legal orders. Despite Canada's persistent promises of political reconciliation, it continues to ignore the plurality of legal traditions present in Canada and the rights that flow from historical nation-to-nation treaties. I aim to find ways for Canadian law to be more respectful of treaty relations and promises because these sacred alliances are Canada's constitutional foundations and ought to be valued in our legal system.

III. The Thesis

I contend that the Mi'kmaq people have been unable to fully exercise their treaty right to fish unimpeded because state law has so far been incapable of accepting that it does not hold a monopoly on law, science, and conservation. My objective, in this thesis, is to defend both the Mi'kmaq nation's inherent right to self-government and their treaty right to the self-management of their fisheries as existing within the Canadian constitutional framework. I propose that an expression of the right to self-management that could take account of both Mi'kmaw and Canadian

[43] *Marshall 2*, *supra* note 34 at para 44.
[44] *Ibid*.
[45] *Ibid*.

legal orders is the Mi'kmaw co-management of marine ecosystems along with DFO. Without co-management, Mi'kmaw and Canadian laws are (and will be) constantly in conflict, as they have concurrent jurisdiction over fisheries on the same territory. There is thus a pressing need to create a space for dialogue between Canadian and Mi'kmaw jurisdictions, legal traditions and knowledge systems. Co-management as a solution would require, from the outset, taking Mi'kmaw law seriously and on its own terms. I argue that this could be achieved by using the "two-eyed seeing" approach, developed by the Mi'kmaw Elder Albert Marshall, and which puts Mi'kmaw and Western scientific knowledge on an equal footing.

a. A Map of the Sections

This thesis is divided into five chapters, in addition to the introductory and concluding sections.

In the first chapter, I focus on the theoretical and methodological frameworks for my research, describing how I studied and theorized about Mi'kmaw law without being myself of Mi'kmaq or other Indigenous origin. Indigenous critical legal theory helped me to shed light on the deep tensions between Indigenous and Western ways of knowing. On the other hand, critical legal pluralism made it possible to study the Mi'kmaq not as mere law-abiding subjects, but as people having agency within both state and Indigenous legal orders. On the methodological level, I undertook a close reading and historical analysis of law and legal cases to revisit the historical treaty relationship between the Mi'kmaq and the Crown. In addition, the rooted methodological approach has helped me decolonize my research by seeing Indigenous law and philosophy on their own terms.

The second chapter provides a review of the debates in the literature regarding the following themes: Indigenous scientific knowledge and Mi'kmaw law; treaty federalism and the right to self-government; the possibility of Indigenous-Crown co-management of the fisheries and the challenges faced by co-management initiatives in Canada.

In the third chapter, I explore ways Mi'kmaw law and Mi'kmaw knowledge systems can inform sustainable and respectful management of the fisheries. Central to Mi'kmaw ecology is

netukulimk, a principle guiding Mi'kmaq people's relationships with their land and all the life flourishing within it. I explore how, for centuries, the Mi'kmaq people harvested the Mi'kma'ki, took care of the land, and ensured the renewal of all species harvested to protect future generations. In contrast, I also review a century of DFO management of the fisheries, questioning its success in dealing with conservation and other environmental concerns.

In the fourth chapter, I undertake a close reading analysis of SCC's s. 35[46] rights cases and argue that the racist "doctrine of discovery" underlies SCC's interpretation of treaty and Aboriginal rights. By refusing to justify the acquisition of the Crown's overarching sovereignty in Canada, the Court negates that Indigenous peoples were sovereign and self-governing nations. Therefore, I contend that SCC's articulation of s. 35 rights is erroneous and proceed to articulate a Mi'kmaw treaty right that takes into account the inherent right to self-government and the pre-existing sovereignty of the Mi'kmaq people. As such, I find that the Mi'kmaw treaty right to fish includes, but is not limited to, the self-management of their fisheries. Finally, I demonstrate that while the Canadian government's official policy supports the inherent right to self-government of Indigenous peoples, actual federal measures merely incorporate Mi'kmaw treaty activities within Canada's top-down management structure.

Finally, in the fifth chapter, I respond to the following counterargument: the Mi'kmaq may have a right to the self-management of their fisheries, but this right is not absolute as it can be infringed upon because of conservation concerns. Contending that the government cannot infringe on Mi'kmaw treaty rights without meeting the justificatory test laid out in *Sparrow*, I apply this test to the Mi'kmaq-Crown context and find that the Crown has not met the justificatory standard for infringement in its management of the fisheries. This chapter demonstrates that an expression of the right to self-management is the existence of Mi'kmaw jurisdiction over fisheries management, and that from this jurisdiction flows the potential collaboration between the Mi'kmaq and the state regarding broader conservation matters. I contend that using a "two-eyed seeing" approach to the co-management of marine ecosystems, which puts both Mi'kmaw and Western knowledge on an equal footing, would respect both Crown and Mi'kmaw jurisdictions and could help find new collaborative ways to sustainably manage the fisheries.

[46] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

In the concluding section, I reiterate the main arguments that led me to affirm the Mi'kmaq have treaty and Aboriginal rights to the self-management of their fishing activities and to propose a "two-eyed seeing" approach to the co-management of fisheries ecosystems along with DFO. Thereafter, I suggest that, going forward, research should include in-depth and in-person case studies of initiatives incorporating both *netukulimk* and co-management, such as the Mi'kmaq Moose Management Initiative established in Nova Scotia.

IV. Terms to Define

It is important to define some terms from the outset to provide awareness of the gaps between Indigenous and Canadian ways of doing law.

Netukulimk, a key principle explored in this thesis, underlies Mi'kmaw knowledge systems and is used in the literature as a theoretical framework for studying Mi'kmaw fisheries "management initiatives".[47] Among other things, *netukulimk* embodies sustainability in the Mi'kmaw language, and is defined by the Mi'kmaq Grand Council, the Union of Nova Scotia Indians, and the Native Council of Nova Scotia as the "Mi'kmaq way of harvesting resources without jeopardizing the integrity, diversity or productivity of our environment".[48] I will describe the implications of *netukulimk* for Mi'kmaw worldview and fishing practices in further detail in Chapters 2 and 3.[49]

In Canadian law, environmental stewardship is often referred to as "resource management". However, this expression does not fit with Indigenous worldviews, because "Aboriginal peoples do not manage resources; rather, they manage their space. This spatial consciousness shapes cultural and resource utilization and innovation."[50] Animals and plants are not envisioned as mere resources to be harvested, but rather as relatives, entailing human-animal/plant relationships, interconnections, and mutual responsibilities. For instance, Robert YELḰÁTŦE Clifford asserts

[47] McMillan & Prosper, *supra* note 14 at 629; King, *supra* note 42 at 9.
[48] The Mi'kmaq Grand Council, the Union of Nova Scotia Indians, the Native Council of Nova Scotia in cooperation with the Department of Fisheries and Oceans, "Mi'kmaq Fisheries *Netukulimk*: Towards a Better Understanding" (Truro, NS: Native Council of Nova Scotia, 1993) at 7.
[49] See sections 2.2(b) and 3.3, *infra,* for more on this topic.
[50] Henderson, "Legal Inheritances", *supra* note 1 at 222.

that the WSÁNEĆ people on the Pacific coast view "the land and non-human actors in WSÁNEĆ territory as [their] relatives."[51] For the Mi'kmaq, "[t]he relationship was expressed in various ceremonies and rituals that conveyed Mi'kmaq respect and gratitude for animals, fish, and all other earthly life forms, which today are called 'resources'."[52] While there exists no word in English to express such a relationship of mutual aid and interconnectedness between humans and the natural world, I will use "fisheries management", "marine ecosystems management" or simply "*netukulimk*" when referring to Mi'kmaw or Indigenous management.

Note that the term "Mi'kmaq" in the Mi'kmaw language means "my kin-friends" as well as the greeting "my brothers!"[53] The French were greeted as such when they encountered the Mi'kmaq people and thus the French identified them as "Notres nikmaqs". This expression was later anglicized and their tribal name became "Mi'kmaq" over time.[54] The Nova Scotia Museum explains that the Mi'kmaq originally called themselves *L'nu'k,* which means "the people",[55] and clarifies that "[t]he term Mi'kmaq, is the plural non-possessive form. The singular form of the word is Mi'kmaw. The word 'Mi'kmaq' is never used as an adjective."[56] On the other hand, the Nova Scotia government states that "[t]he word Mi'kmaq (ending in q) is a noun that means the people."[57] When referring to the people as a whole, the proper spelling is "Mi'kmaq", as well as when referring to the noun in the plural form. When used as an adjective or a noun in the singular form, it is spelled "Mi'kmaw".

Throughout this thesis, I will discuss the terms "sovereignty", "self-government", and "jurisdiction". I will briefly untangle these terms to clarify their interactions with each other. To

[51] Robert YELḰÁTŦE Clifford, "WSÁNEĆ ('The Emerging People'): Stories and the Re-emergence of WSÁNEĆ Law" in Brenda Gunn & Karen Drake, eds, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon, SK: Wiyasiwewin Mikiwahp Native Law Centre, University of Saskatchewan, 2019) 83 at 86.
[52] Kerry Prosper, *et al*, "Returning to *Netukulimk*: Mi'kmaq Cultural and Spiritual Connections with Resource Stewardship and Self-Governance" (2011) 2:4 TK Spirituality & Lands 1 at 5.
[53] Nova Scotia Museum, "Spelling of Mi'kmaq", online: <https://novascotia.ca/museum/mikmaq/?section=spelling>.
[54] *Ibid*.
[55] Nova Scotia Museum, "The Mi'kmaq", online (pdf): <https://museum.novascotia.ca/sites/default/files/inline/documents/mikmaq1.pdf>.
[56] *Ibid*.
[57] Nova Scotia Government, "The use of the terms Mi'kmaq and Mi'kmaw", online (pdf): <https://novascotia.ca/abor/docs/links/use-of-words.pdf>.

begin with, sovereignty, because "its meaning and effect are unstable and hotly contested",[58] is a contentious term that is greatly debated in, notably, Indigenous law, international law, and political theory. Kent McNeil differentiates factual from legal sovereignty: "[d]istinguishing between the two can assist, not only in understanding how the Crown got sovereignty over Canada, but also in conceptualizing the pre-existing sovereignty of the Indigenous peoples in North America."[59] Indigenous sovereignty, without having a fixed definition,[60] surely raises important questions about the legitimacy of modern states' sovereignty over Indigenous peoples and questions the very notion of sovereignty as understood by European nations ever since the Peace of Westphalia in 1648.[61] For Anishinaabeg scholar John Borrows, Indigenous sovereignty is the power of a nation to govern itself; it is a natural right that permits a nation to sustain itself and define its own identity.[62] For others, sovereignty is something "that ensnares indigenous peoples in structures of government inimical to indigenous ways of life and notions of power."[63] While it is not my intention to provide a sole definition of what sovereignty is, for the purpose of this thesis it is important to understand that self-government is only one of many possible ways to put Indigenous sovereignty into action; self-government is just a fraction of what full Indigenous sovereignty really means.[64] While self-government can be understood "as the state devolv[ing] its powers to more decentralized 'nodes' of power",[65] and has been criticized as being "one's image of oneself being defined in somebody else's context,"[66] I believe that self-government can be exercised

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[58] Trudy Jacobsen, Charles J G Sampford, & Ramesh Thakur, eds, *Re-envisioning Sovereignty: The End of Westphalia?* (Farnham, UK: Ashgate, 2008) at 1.
[59] Kent McNeil, "Indigenous and Crown Sovereignty in Canada" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto, ON: University of Toronto Press, 2018) 293 at 294.
[60] Paul Keal, "Indigenous Sovereignty" in Jacobsen, Sampford, & Thakur, *Re-envisioning Sovereignty, supra* note 58, 315 at 318.
[61] *Ibid* at 315. The Peace of Westphalia ended both the Eighty Years' War between Spain and the Hapsburg Netherlands, and the Thirty Years' War, mainly involving German principalities, which together killed over eight million people and redrew the boundaries of Europe. Some scholars have claimed that the Peace of Westphalia laid the groundwork for modern understandings of state sovereignty and international law; others disagree. See, e.g., the discussion in Andreas Osiander, "Sovereignty, International Relations, and the Westphalian Myth" (2001) 55:2 International Organization 251.
[62] John Borrows & Leonard I Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 5th ed (Toronto, ON: LexisNexis Canada, 2018) at 3.
[63] Keal, *supra* note 60 at 318.
[64] William Nikolakis, "The Evolution of Indigenous Self-Governance in Canada" in William Nikolakis, Stephen Cornell & Harry Nelson, eds, *Reclaiming Indigenous Governance: Reflections and Insights from Australia, Canada, New Zealand, and the United States* (Tucson, AZ: University of Arizona Press, 2019) 55 at 57.
[65] *Ibid*.
[66] Osennontion & Skonaganleh:rà, "Our World" (1989) 10:2-3 Canadian Woman Studies 7 at 16.

outside the restrictive boundaries of the state's delegated powers. Indeed, even if Indigenous governance systems did not operate on the same paradigms as Europeans', Indigenous peoples were "self-governing" nations before colonization. Thus, I see self-government in the sense of self-determination, that is, as a broader process "where Indigenous nations reclaim some of their sovereign powers [that] are not simply delegated powers."[67]

Jurisdiction can flow from both from delegated powers (delegated jurisdiction) and from sovereignty or self-determination (inherent jurisdiction).[68] While delegated jurisdiction is entangled with the power of the state, Kent McNeil describes the inherent jurisdiction of Indigenous peoples in Canada as "arising from the existence of the Aboriginal nations in North America prior to the arrival of the Europeans."[69] As treaty rights flow from nation-to-nation relationships between European colonial powers and sovereign Indigenous nations with their own laws, the exercise of treaty rights is connected to Indigenous sovereignty and inherent jurisdiction.

[67] *Ibid.*
[68] Kent McNeil, *The Jurisdiction of Inherent Right Aboriginal Governments* (Research Paper for the National Centre for First Nations Governance, 2007) at 3.
[69] *Ibid.*

Chapter 1: Theoretical Framework and Methodology

1.1 Overview

In this chapter, I describe the theoretical and methodological approaches I used to respectfully engage with Indigenous laws. The theory section describes how this thesis is grounded in Indigenous critical legal theory (ICLT) and critical legal pluralism (CLP). I begin by explaining how ICLT helped me critically analyze Mi'kmaw-Crown relations, as well as better understand how and why Mi'kmaw knowledge has been ignored throughout Canadian history. I then contend that critical legal pluralism is necessary for studying the place of Mi'kmaw law within the Canadian constitutional framework. Indeed, while Mi'kmaw law has its own unique philosophical foundations, it also has a life and history within and across Canadian law.

I begin the methodology section by disclosing my positionality as a non-Indigenous researcher undertaking doctrinal research in Mi'kmaw law. Afterwards, I review how critical and historical legal analysis and the rooted methodological approach helped me decolonize my work. Respectfully working with Mi'kmaw law requires one to understand that Indigenous laws have distinct philosophical foundations from those of Canadian law. That is, "different worldviews with unrelated historical, ontological, and epistemological origins create entirely different concepts of legality."[70] A profound understanding of these differences is needed to study Mi'kmaw law on its own terms without trying to assimilate it inside Canadian law's frameworks. Finally, through the method of braiding legal orders, I explain that my knowledge of Canadian law allowed me to see possibilities for the improvement of the relationship between Canadian and Mi'kmaw law. I also explain how I used the "two-eyed seeing" approach, a Mi'kmaq approach to co-management aligned with the braiding of legal orders, to suggest the possibilities for dialogue between Canadian and Mi'kmaw legalities.[71]

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[70] Alan Hanna, "Going Circular: Indigenous Legal Research Methodology as Legal Practice" (2020) 65:4 McGill LJ 671 at 684, citing Aaron Mills, *Miinigowiziwin: All That Has Been Given for Living Well Together: One Vision of Anishinaabe Constitutionalism* (PhD Dissertation, University of Victoria, 2019) [unpublished] at 28 [Mills, *Miinigowiziwin*].

[71] Cheryl Bartlett, Murdena Marshall & Albert Marshall, "Two-Eyed Seeing and Other Lessons Learned within a Co-Learning Journey of Bringing Together Indigenous and Mainstream Knowledges and Ways of Knowing" (2012) 2 J Environ Stud Sci 331 at 335.

1.2 Theoretical Framework

a. Indigenous Critical Legal Theory

Indigenous and Western ways of knowing (or epistemologies) have distinct "sources, grounding philosophies, breadth, applicability, enforceability, and, yes, language."[72] To be able to navigate across these distinct knowledge systems, one has to acknowledge their underlying differences through an appropriate theoretical framework. Critical theories are suited for this task as they interrogate "the law's historical silencing of the experiences of marginalized peoples"[73] and encourage one to ask questions about the nature of knowledge and law. The Nêhiyaw and Saulteaux scholar Margaret Kovach states that, "[f]rom a critical perspective, analysing how Western science approaches knowledge offers insight into the inherent tensions that exist between Western and Indigenous research."[74] ICLT was created to criticize the silencing of Indigenous philosophies, experiences, and laws.[75] However, instead of focusing only on racism, like other critical legal theories, ICLT "looks at colonial power structures and devises practical strategies for dismantling them."[76]

In this thesis, I will use ICLT to demonstrate how the state's structures for managing the fisheries are indifferent to and even try to silence Mi'kmaw claims, laws, and knowledge systems. In the spirit of the Maori principle *Kaupapa Maori*,[77] my goal is to address the imbalance between the power ascribed to Indigenous and Western sciences.[78] While *Kaupapa Maori* teaches Indigenous peoples that they can use research to their own benefit — which does not apply to me as a non-

[72] Tracey Lindberg, "Critical Indigenous Legal Theory Part 1: The Dialogue Within" (2015) 27:2 Can J Women & L 224 at 227.
[73] Karen ["Kerry"] L Sloan, *The Community Conundrum: Metis Critical Perspectives on the Application of* R v Powley *in British Columbia* (PhD Dissertation, University of Victoria, 2016) [unpublished] at 312. Sloan also provides an overview of the development of critical legal theories at 312-21.
[74] Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations and Contexts* (Toronto, ON: University of Toronto Press, 2009) at 79.
[75] T Lindberg, *supra* note 72 at 245.
[76] Sloan, *supra* note 73 at 317.
[77] This principle was first elaborated by Graham Hingangaroa Smith and then expanded by, notably, Linda Tuhiwai Smith. See Graham Hingangaroa Smith, "*Kaupapa Maori* Theory: Theorizing Indigenous Transformation of Education & Schooling", address to the *Kaupapa Maori Symposium*, at the University of Auckland and *Te Whare Wananga o Awanuiarangi* Tribal-university; Auckland, NZ (December 2003) [unpublished], online (pdf): <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.214.9139&rep=rep1&type=pdf>; Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, 3rd ed (London, UK: Zed, 2021) at 239-52.
[78] LT Smith, *ibid* at 67-90.

Indigenous researcher — it is also used to counter "the dehumanizing way they [Indigenous knowledge systems] have been depicted through academic research".[79] Following this idea, my research aims to counter the "positional superiority of Western knowledge"[80] that has been established through colonialism and Western research by considering Mi'kmaw knowledge systems to be on an equal footing with Western science. Community-based management practices, which have shaped the Mi'kma'ki since time immemorial, are anchored in millennia-old sciences and knowledge systems. Using these knowledge systems in research, acknowledging the spirituality contained in them,[81] and showing these systems' strength and authority in the fisheries management structure can help to slowly dismantle the power structure established by colonial governments in the Maritime fisheries context.

b. Critical Legal Pluralism

Indigenous-Crown treaties in Canada are sacred agreements that constitute the foundations of Canadian constitutional law.[82] As they were signed between sovereign nations, they emanated both from Indigenous peoples' and settlers' legal orders. Therefore, it is impossible to ignore the importance of legal pluralism when studying Canadian constitutional law and treaty relationships. Treaties are not the cause of legal pluralism in Canada, but a historical proof and reminder that this country was constituted from and by Indigenous legal orders. Legal pluralism is a response to the monist idea of law as solely emanating from the state. It is described by Patrick Glenn as expanding the sources we accept as law to be more inclusive of a diversity of peoples and ideas.[83]

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[79] Wendy Djinn Geniusz, *Our Knowledge Is Not Primitive: Decolonizing Botanical Anishinaabe Teachings* (Syracuse, NY: Syracuse University Press, 2009) at 8.
[80] LT Smith, *supra* note 77 at 68.
[81] *Ibid* at 84. Smith asserts at 84 that "[c]oncepts of spirituality which Christianity attempted to destroy, then to appropriate, and then to claim, are critical sites of resistance for Indigenous peoples. The values, attitudes, concepts and language embedded in beliefs about spirituality represent, in many cases, the clearest contrast and mark of difference between Indigenous peoples and the West. It is one of the few parts of ourselves which the West cannot decipher, cannot understand and cannot control … yet." [emphasis added]
[82] James [Sákéj] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:2 Sask L Rev 241; Aaron Mills, "What Is a Treaty? On Contract and Mutual Aid" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto, ON: University of Toronto Press, 2019) 208 [Mills, "What Is a Treaty?"]; Marie Battiste, "Narrating Mi'kmaw Treaties: Linking the Past to the Future" in Marie Battiste, ed, *Living Treaties: Narrating Mi'kmaw Treaty Relations* (Sydney, NS: Cape Breton University Press, 2017) 1 at 2-4 [Battiste, "Narrating Mi'kmaw Treaties"].
[83] H Patrick Glenn, "A Concept of Legal Tradition" (2008) 34:1 Queen's LJ 427 at 438.

This thesis is grounded in the theory of critical legal pluralism (CLP), developed by Roderick A MacDonald and Martha-Marie Kleinhans. While traditional legal pluralists view individuals as mere "law-abiding" subjects entirely constituted by law, and law as "an external object of knowledge",[84] CLP argues that it is "knowledge that maintains and creates realities",[85] and that individuals are law-creating subjects. CLP gives back subjectivity and agency to legal subjects and considers that they can affect, modify, and transform the legal orders of which they are subjects. CLP is more adapted to research in Indigenous law because, instead of solely asking which legal orders apply to Indigenous peoples, we ask: how do Indigenous peoples live through law? How can they act as legal subjects in a plurality of legal orders? How can these legal orders coexist through the actions of their subjects?

Kirsten Anker claims that state law only accepts "change over which it has firm control."[86] It never asks Indigenous peoples "what place is there for *me* in *your* universe?"[87] Instead, it automatically asks "what place is there for *you* in *mine*?"[88] I wish, like Anker, to imagine a state law able to accept that it does not have the legal monopoly in Canada, and that takes seriously promises of mutual aid between legalities. The SCC recognized, as far back as 1973 in the Aboriginal title case *Calder v BC (AG)*,[89] that Indigenous legal orders existed, but it has not yet meaningfully addressed the question of coexistence.[90] CLP allows Indigenous peoples to preserve their own legal orders by enforcing and living their laws, while also having an impact on the state's legal order, which is necessarily affected by its subjects' actions.

[84] Martha-Marie Kleinhans & Roderick A MacDonald, "What Is a Critical Legal Pluralism?" (1997) 12:2 Can JL & Soc 25 at 37.
[85] *Ibid* at 38.
[86] Kirsten Anker, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (Melbourne, AU: Taylor & Francis, 2014) at 3.
[87] *Ibid*.
[88] *Ibid*.
[89] *Calder v British Columbia (AG)*, [1973] SCR 313.
[90] The SCC has talked about reconciliation, but has mostly asked Indigenous law to reconcile with Canadian law, only accepting Indigenous law during the evidentiary process, in terms cognizable to Canadian law. See Christina Turner, "The Comedic Governance of Indigenous Land Rights in *Delgamuukw v. British Columbia* and Marie Clements' *Burning Vision*" (2020) 32 L & Literature 375; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*].

1.3 Methodology

a. Positioning Myself in My Research

While, for most of my life, I have been immersed in a Western worldview, I spent my years at McGill trying to grasp the epistemological and ontological divisions between Western and Indigenous ways of knowing. Because academic and scientific research on Indigenous peoples has historically been harmful to them,[91] it is important, especially as a researcher of settler origins, to position myself in relation to my research. Therefore, I have asked myself: how can I demonstrate that I am not just another settler doing research *on* Indigenous peoples rather than *for/with* them? Not being able to undertake field research within Mi'kmaw communities — the reasons for this will be stated in the next section — has made it even more complex to undertake this inquiry and has amplified my sense of being an impostor. Indeed, because Indigenous law is deeply relational,[92] the lack of an on-the-ground element to my research has made me feel uncomfortable.

Fortunately, both my supervisor and another Indigenous law professor, the Anishinaabeg scholar Aaron Mills, have helped me develop a respectful research methodology and, through their work, classes, and conversations, taught me that the essence of Indigenous law can sometimes be found in the relationships of mutual aid and respect developed with all our relations. I learned in the process that the relational aspect of Indigenous methodologies is more than being physically on the land — although that is an important component; it is also about the spiritual and intellectual commitment to accept Indigenous laws as laws and integrate them within our own lives and research.[93] It is about the devotion of the researcher to conduct research in order to improve the broader Indigenous-settler relationship.[94] The reconciliation project cannot rely solely on Indigenous peoples; settlers have to be involved in the process for it to be meaningful.[95] Therefore,

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[91] Kathy Snow, "What Does Being a Settler Ally in Research Mean? A Graduate Student's Experience Learning From and Working Within Indigenous Research Paradigms" (2018) 17 International Journal of Qualitative Methods 1 at 2; Elaine Coburn, "Indigenous Research as Resistance" (2013) 9 Socialist Studies 52; Alexandra Kilian, *et al*, "Exploring the Approaches of Non-Indigenous Researchers to Indigenous Research: A Qualitative Study" (2019) 7:3 CMAJ Open 504.
[92] Hanna, *supra* note 70 at 680.
[93] Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015) 1:1 Lakehead LJ 16 at 43 [Friedland & Napoleon, "Gathering the Threads"].
[94] Snow, *supra* note 91 at 2.
[95] *Ibid*.

for me, this research project was a personal journey to discovering my own privilege, questioning how to become a respectful ally, and fostering reconciliation.[96] Through this journey, and because I have previously worked in constitutional law, I felt that my role in the broader Indigenous-settler relationship was to encourage increasing the space for Indigenous legal orders within the Canadian constitutional structure.

When the Mi'kmaq-Crown fisheries conflict arose in 2020, I knew I would be studying it closely even though I lived about 1,000 kilometers away from the Mi'kma'ki. Indeed, it gathered all my deepest interests in law: Indigenous, environmental, social, and constitutional laws. This conflict is not just about Mi'kmaq people's access to self-government; it is about generally fostering sustainable practices through community-based management and about the health of our ecosystems. I was reminded of Robin Wall Kimmerer's reflection in *Braiding Sweetgrass*, "I need to remember that the grief is the settlers' as well. They too will never walk in a tallgrass prairie where sunflowers dance with goldfinches. Their children have also lost the chance to sing at the Maple Dance. They can't drink the water either."[97] Indigenous scientific knowledge, as contained in Mi'kmaw law, can play a significant role in preserving marine ecosystems. I hope that my thesis can raise awareness among non-Indigenous people, including government actors, about the potential solutions inherent in Mi'kmaw law for ending the "fishing wars" and solving conservation problems.

b. Doctrinal Research

Due to the global COVID-19 pandemic, I did not have the opportunity to undertake field research in Mi'kmaw communities. Nevertheless, the existence of an important body of literature by Mi'kmaw authors on Mi'kmaw law allowed me to grasp certain legal aspects of the Mi'kmaw culture without physically being in a Mi'kmaw community. Throughout two years of doctrinal research, I tried to capture the unique nature of the relationship between the Mi'kmaq, the land, and the animals, although I am aware that this will never be completely possible without living on

[96] Kilian, *et al*, *supra* note 91 at 506.
[97] Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge and the Teachings of Plants* (Minneapolis, MN: Milkweed, 2013) at 211-12.

the land surrounded by Mi'kmaw knowledge. I was able to explore the Mi'kmaw legal order and knowledge systems through the study of Mi'kmaw oral history as well as through the reading of secondary sources by Mi'kmaq scholars, other prominent Indigenous law scholars, and non-Indigenous authors who have worked closely with Indigenous communities. This permitted me to critically read primary sources, such as case law and treaties, as well as DFO's and Mi'kmaw communities' management plans. In considering all this doctrinal research, I was able to provide a legal analysis of the Mi'kmaq-Crown fisheries dispute in the Maritimes.

c. Methodologies

Having established my positionality as a settler researcher undertaking doctrinal research in Indigenous/Aboriginal law, I will explain the methodologies I used to decolonize my research: that is: 1) critical and historical analysis of law; 2) the rooted methodological approach; and 3) the braiding of legal orders.

Close Reading and Historical Analysis of Law

Legal research is often rooted in Western ways of knowing and scientific methods that are inappropriate to the study of Indigenous laws.[98] For Margaret Kovach, decolonizing one's research means "to recognize the historic Indigenous–settler relationship and by doing so reveal the relational dynamics between Indigenous and Western science that permeate Indigenous research discourse today."[99] To achieve such decolonization of my research, I undertake a close reading analysis of legal cases. Instead of simply accepting the SCC rulings in Aboriginal law, I question their internal logic to assess whether they are anchored in legitimate foundations.[100] I thus try to reveal the rationale that gives meaning to major SCC decisions on Aboriginal and treaty rights.

A historical anti-colonial analysis of law reveals how Canadian law has generally worked against Indigenous knowledge systems and it brings to the forefront Indigenous knowledge that has been

[98] Hanna, *supra* note 70 at 673; Darcy Lindberg, "Drawing upon the Wealth of Indigenous Laws in the Yukon" (2020) 50 Northern Rev 179 at 180; LT Smith, *supra* note 77 at 67-90.
[99] Kovach, *supra* note 74 at 76.
[100] David Greenham, *Close Reading: The Basics* (Abingdon, UK: Routledge, 2018) at 44.

suppressed through colonialism. It allows one to accept "Indigenous laws as law"[101] and recognize "the colonial influence in knowledge paradigms and [reveal] how Indigenous ways of knowing have been marginalized."[102] Historical analysis of law allows me to attend to the "consistency, comprehensiveness, and coherence"[103] of Canadian law regarding Mi'kmaw rights (internal critique), but also to question what Canadian institutions consider as law, "[r]ather than taking a conception of law as given"[104] (external critique).

This thesis is not a work of legal history in itself, but uses the work of Indigenous legal historians, such as Marie Battiste (Mi'kmaw),[105] her husband James [Sákéj] Youngblood Henderson (Chickasaw/Cheyenne),[106] and Daniel N Paul (Mi'kmaw)[107] to shed light on the biases that have marred our understanding of Canada's past for too long. As a person with settler origins, I am "driven not merely to better understand, but [also] to influence, and to change"[108] the colonial legal order of which I am a beneficiary. Part of my methodology thus consists in using sources of legal history to criticise and attempt to change Canada's constitutional assumptions, asking questions about the place of treaties and Mi'kmaw law within the Canadian constitutional framework.

The Rooted Methodological Approach

Understanding the historic Indigenous-settler relationship also requires one to acknowledge that Indigenous and Western laws' philosophical foundations are deeply distinct. The rooted methodological approach, developed by Anishinaabeg scholar Aaron Mills, was founded to specifically address the differences between what Mills calls Indigenous and Western

[101] Friedland & Napoleon, "Gathering the Threads" *supra* note 93 at 43. My use of anti-colonial historical analysis as a method parallels with my use of ICLT, including the *Kaupapa Maori* principle to empower Indigenous knowledge: see LT Smith, *supra* note 77 at 68; and Geniusz, *supra* note 79.
[102] Kovach, *supra* note 74 at 76.
[103] Markus D Dubber, "Legal History as Legal Scholarship: Doctrinalism, Interdisciplinarity, and Critical Analysis of Law" in Markus D Dubber & Christopher Tomlins, eds, *The Oxford Handbook of Legal History* (Oxford, UK: Oxford University Press, 2018) 99 at 113.
[104] *Ibid*.
[105] M Battiste, "Narrating Mi'kmaw Treaties", *supra* note 82.
[106] James [Sákéj] Youngblood Henderson, "Mi'kmaw Tenure in Atlantic Canada" (1995) 18:2 Dal LJ 196 [Henderson, "Mi'kmaw Tenure"]; Henderson, "Legal Inheritances", *supra* note 1.
[107] Daniel N Paul, *We Were Not the Savages*, 3rd ed (Halifax, NS: Fernwood, 2006).
[108] Dubber, *supra* note 103 at 7.

lifeworlds.[109] This approach requires researchers, when working with Indigenous legal orders, to ask: "How do [Indigenous] peoples do the work of learning, articulating, and implementing Indigenous laws?"[110] Indeed, to prevent imposing their own biases on their research or to avoid controlling or appropriating Indigenous laws,[111] researchers must understand how Indigenous law is learned and lived. For instance, Sarah Morales, a Coast Salish legal scholar from the Cowichan Tribes, "believe[s] that the starting point of any research pertaining to Indigenous law must be to gain a better understanding of the particular cultural context in which the laws and legal orders take place."[112] Similarly, Anishinaabeg scholar John Borrows believes that law is inseparable from culture, as it is grounded in it.[113]

Flowing from this idea that law is grounded in culture,[114] I consider that questions about *what* constitutes Indigenous law and *how* Indigenous law is practised and learned should always be studied together. In other words, Indigenous law's substance (*what*) should not be alienated from its form and its origins (*how*) because they are intrinsically linked.[115] Thus, the researcher must acknowledge that Indigenous and Canadian laws have distinct philosophical foundations that can be discovered in the creation stories of Western nations and Indigenous peoples.[116] For instance, Leona Makokis, a Nêhiyaw scholar and Elder, states that, diverging from Western knowledge systems, "[t]he systems of First Nations people, based on collectives, participatory democracy, cooperation, and kinship, are grounded in a philosophy shaped from the spirit of the land, and a belief that the environment, cosmos, plant, animal, and human realms are all equal and

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[109] Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 at note 5 [Mills, "The Lifeworlds of Law"]. See also Leona Makokis, who describes a "grounded theory" approach in Leona Makokis, *Teachings from Cree Elders: A Grounded Theory Study of Indigenous Leadership* (PhD Dissertation, University of San Diego, 2001), subsequently published as Leona Makokis, *Leadership Teachings from Cree Elders: A Grounded Theory Study* (Saarbrücken, DE: Lambert, 2010).
[110] Hanna, *supra* note 70 at 673.
[111] Desmond Manderson, *Proximity, Levinas, and the Soul of Law* (Montreal, QC: McGill-Queen's University Press, 2006) at 101.
[112] *Ibid*.
[113] John Borrows, *Canada's Indigenous Constitution* (Toronto, ON: University of Toronto Press, 2010) at 118.
[114] *Ibid*.
[115] Aaron Mills, "How Can Indigenous Law Interact Productively with and within the Canadian Common Law" (5 April 2020) at 00h10m:30s, online (podcast): Le Podcast du CRIDAQ [Mills, "How Can Indigenous Law Interact Productively"].
[116] Mills, "The Lifeworlds of Law", *supra* note 109 at note 5. These creation stories reveal "how we can know, they disclose what a person is, what a community is, and what freedom looks like" (at 864). They constitute the very core that gives direction to any legal order.

interconnected."[117] Similarly, the Mi'kmaw scholar Cheryl Knockwood believes that "[f]or reconciliation to succeed, the first step is for Canada and the provinces to understand and respect the Mi'kmaw worldview, in relation to Mother Earth."[118] Therefore, this thesis closely studies Mi'kmaw worldviews and ways of knowing in order to respectfully engage with Mi'kmaw laws. My approach is not rooted in the earth, as I did not have the opportunity to conduct research on Mi'kmaw territories, but it is grounded in the philosophical foundations of both Mi'kmaw and Canadian legalities. The differences between these legalities will be further illustrated through the different approaches and perspectives they have on fisheries management and treaty relationships.

Braiding Legal Orders

Finally, I believe that Canadian constitutionalism can and should be utilized to empower Indigenous laws in Canada. This is why I use the method of 'braiding legal orders', employed by the contributors to *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples,*[119] to meaningfully implement Mi'kmaw rights and empower their laws within and across the Canadian constitutional order. The braiding metaphor was introduced by Oonagh Fitzgerald and Risa Schwartz as follows:

> The braiding of sweetgrass indicates strength and drawing together power and healing. A braid is a single object consisting of many fibres and separate strands; it does not gain its strength from any single fibre that runs its entire length, but from the many fibres woven together. Imagining a process of braiding together strands of constitutional, international and Indigenous law allows one to see the possibilities of reconciliation from different angles and perspectives, and thereby to begin to reimagine what a nation-to-nation relationship justly encompassing these different legal traditions might mean.[120]

Inspired by this metaphor, I suggest that the meaningful implementation of Indigenous treaty rights has to be undertaken in collaboration with the Indigenous legal order at stake. Indeed, through the

[117] Makokis, *supra* note 109 at 6.
[118] Knockwood, *supra* note 17 at 112.
[119] John Borrows, *et al*, eds, *Braiding Legal Orders : Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON: Centre for International Governance Innovation, 2019).
[120] Oonagh Fitzgerald & Risa Schwartz, "Introduction", in Oonagh Fitzgerald & Risa Schwartz, eds, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (CIGI, Special Report, 31 May 2017) at 3. The braiding or weaving of legal sources has also been discussed in the Metis context by Kerry Sloan in "Weaving Strands of Metis Law" in Catherine Richardson & Jeannine Carrière, eds, *Speaking the Wisdom of Our Time* (Vernon, BC: J Charlton, 2020).

founding treaties, Indigenous and settlers' laws have become intertwined. While interpreting these treaties, one must weave together Indigenous and Canadian laws to come back to the essence of treaty relationships. I undertake such an approach by reinstating the importance of the nation-to-nation relationship and Indigenous perspectives while interpreting treaty rights. I question the articulation of treaty rights by Canadian courts and demonstrate that, if Indigenous laws and perspectives had truly been considered, treaty and Aboriginal rights would include self-government powers. I also show that braiding Canadian and Mi'kmaq approaches to conservation, which are different but not incommensurable, could resolve current conflicts in fisheries management.

However, there are limits to the productive collaboration between Canadian and Indigenous legal orders because of the differences between their philosophical foundations. The "two-eyed seeing" approach (TESA) is a type of legal braiding that acknowledges these different philosophical foundations and keeps each knowledge system within its own processes and institutions, drawing the boundaries of effective and respectful collaboration. TESA has been developed by the Mi'kmaw scholar and Elder Albert Marshall to use Mi'kmaw knowledge respectfully in co-management initiatives. It requires the researcher "to see from one eye with the strengths of Indigenous knowledges and ways of knowing, and learn to see from the other eye with the strengths of Western knowledges and ways of knowing [...] and [...] learn to use both these eyes together, for the benefit of all."[121] While braiding legal orders — in this thesis by trying to demonstrate that Canadian law is an intertwinement of colonial and Indigenous laws — TESA acknowledges the fundamental differences between Western and Indigenous laws, but does not see them as incommensurable or as dichotomous: "indigenous knowledge is more than just the binary opposite of western knowledge".[122] In my thesis, TESA unfolds as follows: while I provide a legal analysis regarding a situation in which Mi'kmaw treaty rights are at stake, I undertake both a Canadian case law analysis and an analysis of the articulation of treaty rights by the Mi'kmaq people. This helps me find solutions that respect both legal traditions and do not merely incorporate Mi'kmaw law within Canadian law. As the main proposal of this thesis is also grounded in TESA

[121] Bartlett, Marshall & Marshall, *supra* note 71 at 335. I will come back to the two-eyed seeing approach in Chapter 5, section 5.3.
[122] Amber Giles, *et al,* "Improving the American Eel Fishery through the Incorporation of Indigenous Knowledge into Policy Level Decision Making in Canada" (2016) 44:2 Hum Ecol 167 at 169.

— suggesting the Crown and the Mi'kmaq should implement co-management guided by a two-eyed seeing approach — my methodology is intended to illustrate my theory and argument. In other words, my methodology reflects what I am proposing as an alternative to the Crown's behaviour.

1.4 Limitations

This thesis contains limitations that are important to address. First, in Chapter 3, I portray Mi'kmaw lifeways, knowledge systems, and legal tradition. However, these aspects of Mi'kmaq people's lives are deeply linked to the land and to the people holding that knowledge. Therefore, not having had the chance to undertake field research in Mi'kmaw communities has limited the knowledge that informs this thesis. As John Borrows observes, "[t]he transmission of oral traditions [...] is bound up with the configuration of language, political structures, economic systems, social relations, intellectual methodologies, morality, ideology, and the physical world."[123] These are almost all aspects that are difficult if not impossible to grasp through doctrinal research alone. Similarly, Robert YELḰÁTŦE Clifford asserts that Indigenous peoples' stories and the laws contained in them must be told in context, because they are often located in a "place-based ontology."[124] As a consequence of not receiving contextualized knowledge, my arguments are more grounded in Canadian constitutional law than in Mi'kmaw law.

The second limitation relates to the language barrier between me, as a researcher, and the Mi'kmaq. Language is deeply linked to a people's worldview and, as Sákéj Henderson claims, "the Mi'kmaq defined themselves linguistically. Language, rather than territorial boundaries, was, and remains, at the core of the Mi'kmaq consciousness and normative order."[125] Many defining concepts of Mi'kmaw law were thus simply incommensurable for me, as a French and English speaker. Fortunately, many scholars have worked to translate a key concept in Mi'kmaw law: *netukulimk*. As a result, I was able to comprehend a part of the Mi'kmaw legal order, but several other ideas

[123] John Borrows, "Listening for a Change: The Courts and Oral Traditions" (2001) 39:1 Osgoode Hall LJ 1 at 8.
[124] Clifford, *supra* note 51 at 86.
[125] Henderson, "Legal Inheritances", *supra* note 1 at 14.

present in Indigenous languages are simply impossible to express in English, because English is not verb-oriented like Mi'kmaq and other Algonquian languages.[126]

[126] Henderson, "Mi'kmaw Tenure", *supra* note 106 at 225; Graham White, *Indigenous Empowerment Through Co-Management: Land Claims Boards, Wildlife Management, and Environment Regulation* (Vancouver, BC: UBC Press, 2020) at 277 [G White, *Indigenous Empowerment*]; Jaime Battiste, "Understanding the Progression of Mi'kmaw Law" (2008) 31:2 Dalhousie LJ 311 at 327, citing Marie Battiste & James [Sákéj] Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage* (Saskatoon, SK: Purich, 2000) at 50; Stephanie H Inglis, *Speakers Experience: A Study of Mi'kmaq Modality* (2002) [unpublished, archived at Memorial University Library]; Helga Lomosits, "Future is not a tense", online: <http://www.inst.at/trans/15Nr/01_2/lomositsl5.htm>.

Chapter 2: Literature Review

2.1 Overview

This chapter reviews the ongoing debates in the literature in three subject areas relevant to this thesis. The first section surveys the literature available on Indigenous Scientific Knowledge (ISK) and Mi'kmaw law. The academic discussion about ISK and Western science sheds light on the profound gaps between Mi'kmaw way of living with and from the territory and the Canadian way of managing the territory.[127] It also elucidates how these dissimilarities — different knowledge systems, distinct relationships with sacredness and spirituality, and dissimilar relationships with the environment — render incoherent the application of DFO regulations to Mi'kmaw fisheries. The second section of this chapter is a survey of the secondary literature on treaty rights jurisprudence, which identifies the major flaws of the case law and the inconsistencies between different SCC decisions. As well, in this section, I summarize the debates about Indigenous peoples' right to self-government and the particular Mi'kmaq-Crown political context in the Maritimes. Finally, as the third argument of this thesis demonstrates that co-management could balance Mi'kmaw treaty rights with conservation concerns, the last section of this literature review explores the perspectives of Indigenous law scholars on co-management. This review identifies some major pitfalls of co-management according to several Canadian case studies. For instance, many scholars point out that, by leaving too little space for Indigenous science, leadership, and decision-making processes, non-Indigenous proponents of co-management too often use it as an assimilation tool to exert more control over Indigenous governance. These perspectives will be reviewed below.

This review of the literature shows that the Mi'kmaq are scientifically, legally, and culturally disposed to partake in the restoration of ecosystems through their meaningful participation in the development of conservation measures.[128] While some scholars have studied the Crown-Mi'kmaq

[127] Metis Elder Elmer Ghostkeeper makes a similar comparison in his book *Spirit Gifting: The Concept of Spiritual Exchange* (Raymond, AB: Writing On Stone Press, 2007) by referring to the way the Metis people live *with* the land *versus* the way oil and gas companies are living *off* the land for financial success.
[128] Ed Goodman, "Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-Management as a Reserved Right" (2000) 30:2 Envtl L 279 at 282.

fishery dispute from different perspectives,[129] this thesis is unique as it proves the existence of a constitutionally protected right to the self-management of the fisheries — both as a treaty right and as a part of the Aboriginal right to self-government — and suggests that co-management can not only be an expression of that right, but also a solution to the current fishery dispute. Instead of simply asserting that co-management is necessary, I prove that the Crown has an obligation to implement meaningful co-management of the fisheries in order to meet its constitutional and treaty responsibilities towards the Mi'kmaq.

2.2 Indigenous Scientific Knowledge and Mi'kmaw Law

a. Indigenous Scientific Knowledge

Traditional Knowledge has been defined as a "cumulative body of knowledge, practice, and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment."[130] It "derives from multiple sources, including traditional teachings, empirical observation, and revelation,"[131] and is not identical across Indigenous cultures. For Fikret Berkes, Johan Colding, and Carl Folke, TK is an attribute of societies with a long historical continuity of resource use practice.[132] In this definition, traditional knowledge is not only about ecological knowledge, but also about the relationships that all living beings share together.[133] Frances Abele asserts that TK has three interrelated components: 1) it is rooted in a specific historical, social, and

[129] See e.g. Melanie Wiber & Chris Milley, "After *Marshall*: Implementation of Aboriginal Fishing Rights in Atlantic Canada" (2007) 55 J Leg Pluralism & Unofficial L 163; Melanie Wiber & Julia Kennedy, "Impossible Dream: Reforming Fisheries Management in the Canadian Maritimes after the *Marshall* Decision" in René Kuppe & Richard Potz, eds, *Law & Anthropology: International Yearbook for Legal Anthropology* (London, UK: Martinus Nijhoff, 2001) 282; Shelley K Denny & Lucia M Fanning, "A Mi'kmaw Perspective on Advancing Salmon Governance in Nova Scotia, Canada: Setting the Stage for Collaborative Co-Existence" (2016) 7:3 Int'l Indigenous Policy J 4.

[130] Fikret Berkes, Johan Colding & Carl Folke, "Rediscovery of Traditional Ecological Knowledge as Adaptive Management" (2000) 10:5 Ecol Appl 1251 at 1252; Andrea J Reid, *et al*, "'Two-Eyed Seeing': An Indigenous Framework to Transform Fisheries Research and Management" (2020) 22 Fish & Fisheries 243 at 245.

[131] Marlene Brant Castellano, "Updating Aboriginal Traditions of Knowledge" in George J Sefa Dei, Budd L Hall & Dorothy Goldin Rosenberg, eds, *Indigenous Knowledges in Global Contexts* (Toronto, ON: University of Toronto Press, 2000) 38 at 23.

[132] Berkes, Colding & Folke, *supra* note 130.

[133] Giles, *et al*, *supra* note 122 at 169.

political perspective; 2) it is a deeply local knowledge; 3) it has strong ethical and cosmological components.[134]

While some scholars claim that the use of the word "traditional" to describe Indigenous knowledge is pejorative because the term denotes a certain static state,[135] others disagree as, for them, it simply indicates how it was acquired and used over centuries of knowledge accumulation.[136] As Sarah J King notes, Indigenous philosophies and traditions are dynamic, and since Indigenous knowledge is intrinsically holistic and contextual in nature, it can only exist through the lives and experiences of Indigenous peoples.[137] Thus, the fact that Indigenous knowledge is qualified as "traditional" does not necessarily imply that it is static; it is enshrined in Indigenous experience, and, therefore, utterly sensitive and responsive to change.[138] However, in this thesis, I will use the expression "Indigenous scientific knowledge" as I will uniquely focus on knowledge accumulated by Indigenous communities. I add the word "scientific", because if science is "knowledge about or study of the natural world based on facts learned through experiments and observation",[139] Indigenous knowledge is a science in itself as it includes models, theories, and methods that study the behavioural and phenomenological processes of ecosystems.[140] Indeed, Russel Lawrence Barsh, an ecologist specializing in Indigenous ecological knowledge, refers to Indigenous knowledge as "Indigenous science".[141]

Scholars have long tried to grasp what accounts for the differences between Western and Indigenous ways of knowing. For instance, Barsh describes the purpose of Indigenous science as "likely to be forecasting, rather than modifying the system. What is sought is precise and highly

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[134] Frances Abele, "Between Respect and Control: Traditional Indigenous Knowledge in Canadian Public Policy" in Michael Orsini & Miriam Smith, eds, *Critical Policies Studies: Contemporary Canadian Approaches* (Vancouver, BC: UBC Press, 2007) 236 at 237.
[135] Reid, *et al, supra* note 130 at 245.
[136] Battiste & Henderson, *supra* note 126 at 46.
[137] King, *supra* note 42 at 9.
[138] Kekuhi Kealiikanakaoleohaililani & Christian P Giardina, "Embracing the Sacred: An Indigenous Framework for Tomorrow's Sustainability Science" (2016) 11:1 Sustainability Science 57 at 65.
[139] Merriam Webster Dictionary, *sub verbo* "science", online: <https://www.merriam-webster.com/dictionary/science>.
[140] Russel Lawrence Barsh, "Taking Indigenous Science Seriously" in Stephen Bocking, ed, *Biodiversity in Canada: Ecology, Ideas and Action* (Toronto, ON: University of Toronto Press, 2000) 153 at 170.
[141] *Ibid.* This term is also used by Tewa scholar Gregory Cajete in *Native Science: Natural Laws of Interdependence* (Santa Fe, MN: Clear Light, 2000).

reliable information about how things behave, and how their behaviour may change in response to a variety of existing forces."[142] Others explain this difference by the fact that Indigenous knowledge "is not a definable object, but instead a way of being and living in the world".[143] This is difficult to grasp for a non-Indigenous scholar since Indigenous knowledge "is a diverse knowledge that is spread throughout different peoples in many layers."[144] In that vein, the book *Protecting Indigenous Knowledge and Heritage: A Global Challenge* by Mi'kmaw scholar Marie Battiste and her husband Sákéj Henderson (Chickasaw/Cheyenne) explains that imposing a definition encompassing all Indigenous knowledge is an act of colonization, as it imposes a universalization process onto Indigenous cosmology. Indigenous knowledge is deeply attached to specific ecologies, lands, mountains, and peoples.[145] For Blackfoot scholar Alan Hanna, this difference exists simply because "Indigenous research methodologies have their own origins based in community and family teachings, which exist independently of research standards and categories set by Western academic institutions."[146]

On the other hand, Kehuki Kealiikanakaoleohaililani (Indigenous Hawai'ian) and Christian P Giardina believe that Indigenous and Western ways of knowing can be differentiated by their relationships to spirituality: Indigenous knowledge cannot be separated from its sacred and spiritual aspects, while Western science is based on rejecting these aspects.[147] The idea of sacred ecology conflicts with the Western commodity-based approach to environmental stewardship because Western science is characterized by the separation of knowledge and religion.[148] For instance, some see the use of ISK within environmental impact assessments as violating the principle of the separation of Church and State protected by the *Canadian Charter of Rights and*

[142] Barsh, "Taking Indigenous Science Seriously", *supra* note 119 at 158.
[143] Reid, *et al, supra* note 130 at 245.
[144] Battiste & Henderson, *supra* note 126 at 35.
[145] *Ibid* at 36.
[146] Alan Hanna, *supra* note 70 at 674.
[147] Kealiikanakaoleohaililani & Giardina, *supra* note 138; Henderson, "Legal Inheritances", *supra* note 1 at 19; Henderson, "Empowering Treaty Federalism", *supra* note 82; Mills, *Miinigowiziwin, supra* note 70; McMillan & Prosper, *supra* note 14 at 630.
[148] See Barsh, "Taking Indigenous Science Seriously", *supra* note 140; Kealiikanakaoleohaililani & Giardina, *supra* note 138 at 59; Roderick F Nash, *Wilderness and the American Mind* (London, UK: Yale University Press, 2014). However, there exist some exceptions to this separation. For instance, in the Christian religion, a branch of evangelical environmentalism has developed, emphasizing biblical teachings on human responsibilities as stewards of nature. See e.g. Roger S Gottlieb, *A Greener Faith: Religious Environmentalism and Our Planet's Future* (New York, NY: Oxford University Press, 2006).

Freedoms.[149] However, sacredness is not lived identically within Indigenous and Western societies. For Stevenson, Westerners' skepticism about ISK's sacred and spiritual aspects is anchored in a misunderstanding of Indigenous spirituality, which is erroneously associated with religion.[150]

Barsh explains that while Europeans have a long experience of religious wars and domination, they should not project their fears onto Indigenous peoples' relationships with spirituality and sacredness. European fear of religious control is "the product of a particular historical experience: the domination of European society for a thousand years by a bureaucratic system of religion (the Church) and inherited social relationships (feudalism)."[151] Westerners must not forget that "Indigenous knowledge systems have developed within different social and political contexts."[152] We cannot expect Indigenous science to be separated from sacredness and spirituality, which play significant roles in knowledge accumulation and in the way Indigenous peoples interact with the natural world.

b. Mi'kmaw Law: Netukulimk

Netukulimk is a principle underlying Mi'kmaw law and knowledge systems, frequently used by Mi'kmaw communities for structuring their "management initiatives".[153] Henderson refers to *netukulimk* as a way of life based on "the conviction that the resources [have] to be renewed as well as shared."[154] While resource management exercised under a commodity-based approach implies the existence of human domination over nature, a *netukulimk* approach to management rather implies that there are relationships and mutual responsibilities between humans and all living beings, including the lands and waters, relationships that "laid the foundation for how the Mi'kmaq interacted with and respected all life within their circle" and were "expressed in various

[149] See e.g. Albert Howard & Frances Widdowson, "Traditional Knowledge Threatens Environmental Assessment" (1996) 17:9 Policy Options 34.
[150] Marc G Stevenson, "Ignorance and Prejudice Threaten Environmental Assessment" (1997) 20:3 Policy Options 26.
[151] Barsh, "Taking Indigenous Science Seriously", *supra* note 140 at 166.
[152] *Ibid*.
[153] McMillan & Prosper, *supra* note 14 at 629.
[154] Henderson, "Mi'kmaw Tenure", *supra* note 106.

ceremonies and rituals that conveyed Mi'kmaq respect and gratitude for animals, fish, and all other earthly life forms."[155]

Among the literature that helped me grasp the nature of *netukulimk*, Barsh's article "*Netukulimk* Past and Present: Mi'kmaw Ethics and the Atlantic Fishery" paints an enlightening anthropological and historical portrait of *netukulimk* and Mi'kmaw lifeways:

> There is evidence that family planning was practiced. Biard reported that Mi'kmaw women bore children only every second or third year, which he attributed to their hard lives, as well as their practice of nursing their children for three years. Birth spacing and contraception were widely practiced elsewhere in Aboriginal North America. In addition, there is Le Clercq's reference to meetings of the chiefs (*saqamow*) to assign each family a distinct hunting territory (*netukulowomi*). A ceiling on each family's subsistence resources would create incentives to conserve and to limit family size.[156]

Barsh put together several anthropological sources on Mi'kmaw practices to paint a general portrait of *netukulimk* among Mi'kmaw communities. From family planning to land allocation and food conservation methods, he links these practices together to prove that there existed an established management system in the Mi'kma'ki long before colonization. On another level, the Mi'kmaw author Jaime Battiste describes the creation stories of the Mi'kmaq, as well as how their laws evolved and were disrupted by colonial law.[157] He also refers to the website "Mi'kmaw Spirit" as a reliable reference for written and translated versions of the Mi'kmaw creation story:[158]

> Kluskap's mother came into the world from the leaf of a tree, so in honor of her arrival tobacco or *tomawey* (doo-mah-way) would be made from bark and leaves and would be smoked. The *tomawey* would be smoked in a pipe made from stone, with a stem made from the branch of a tree. The pipe will be lit from the sweetgrass which was lit from the Great Fire. The *tomawey* represents Kluskap's grandmother, nephew and mother, and the smoke will be blown in seven directions.
>
> After honoring Nukumi's arrival the Mi'kmaq shall have a feast or meal. In honor of Netawansom they will eat fish. The fruits and roots of the trees and plants will be eaten to honor Ni'kanaptekewi'skw.[159]

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[155] Prosper, *et al*, *supra* note 52 at 5.
[156] Russel Lawrence Barsh, "*Netukulimk* Past and Present: Mi'kmaw Ethics and the Atlantic Fishery" (2002) 37:1 J Can Stud 15; [Barsh, "*Netukulimk*"] at 23.
[157] J Battiste, *supra* note 126.
[158] "Mi'kmaw Creation Story", online: <http://www.muiniskw.org/pgCulture3a.htm>.
[159] *Ibid.*

This creation story illustrates the interconnectedness of the Mi'kmaq people with the natural world and the cyclical patterns of Mi'kmaw lifeways. Similarly, Kerry Prosper *et al* explain that the "Mi'kmaq believe that their ancestors are situated within the circle of life. In the Mi'kmaq worldview, consumption of all life forms, such as plants, trees or mammals, is considered as a celebration of their ancestors, as all deceased are integrated into and with the land, water and air."[160]

To better understand how Mi'kmaw law is experienced and articulated today, as well as its role in Mi'kmaw fisheries, Kerry Prosper, a Mi'kmaw Elder and scholar, and the legal anthropologist Jane L McMillan mapped out the recent embodiments of *netukulimk* within the harvesting, fishing, and hunting practices of Mi'kmaw communities.[161] The Native Council of Nova Scotia published a detailed booklet on the importance of *netukulimk* in Mi'kmaw fisheries, as well as on their position on self-government.[162] These authors believe that the use of *netukulimk* for organizing fishing practices in the Maritimes would increase sustainability as well as Indigenous and non-Indigenous communal well-being. They assert that DFO management disrupted the Mi'kmaq people's spiritual connections with the lands and the fish, and is generally in conflict with Mi'kmaw consciousness and knowledge systems. *Netukulimk,* its evolution through colonialism, as well as its ability to guide sustainable management of the fisheries, will be further discussed in Chapter 3, sections 3.3 and 3.4.

2.3 Treaty Federalism and Canadian Constitutional Law

a. Literature on Treaty Rights Jurisprudence

The test for Aboriginal rights established in *Sparrow*, which has since been held to apply to treaty rights,[163] has caused much dissatisfaction amongst Indigenous law scholars. On the one hand, the SCC has held in *Badger* that the wording "recognized and affirmed" in s. 35(1) of the *Constitution Act, 1982* does not render Aboriginal and treaty rights "absolute".[164] On the other, some Indigenous law scholars believe that s. 35 rights are absolute because they were carefully placed beyond the

[160] Prosper *et al*, *supra* note 52 at 6.
[161] McMillan & Prosper, *supra* note 14.
[162] The Mi'kmaq Grand Council, *et al, supra* note 48.
[163] *Badger, supra* note 20 at para 41-52.
[164] *Ibid* at para 79.

reach of s. 1, in Part II of the *Constitution Act, 1982*.[165] According to Henderson, s. 35 is protected by constitutional supremacy under s. 52(1) of the *Constitution Act, 1867*, and judicial power is not allowed to establish such a justificatory test.[166] He claims that

> the Court's justified infringement test [...] reinforces a colonial legal consciousness: it fuels the colonial practice of developing a justificatory legal and political regime to disguise the self-aggrandizing, self-originating authority of the colonialists, and it extends their tyranny over Aboriginal peoples.[167]

For Henderson, the Court in *Sparrow* unjustifiably used its powers to undermine treaty federalism. According to the doctrine of treaty federalism first articulated by Henderson and Barsh in their book entitled *The Road*,[168] treaties constitute the foundation of American and Canadian constitutional law. Therefore, these constitutional agreements should not be unilaterally infringed upon. In her book *Declarations of Interdependence,* Kirsten Anker provides a unique legal pluralist perspective on treaty interpretation, criticizing courts and governments as they try to fit Indigenous law within Western law.[169] She reminds the reader that relying on tools of the Western legal universe to explain Indigenous law alters Indigenous law considerably, as it takes it out of its broader cultural and social context.[170] Analogously, Metis scholar Joshua Ben David Nichols contends that the SCC gradually eroded the "quasi-federal" structure enshrined in Indigenous-Crown treaties, whereby Indigenous peoples were sovereign in their own territories, and replaced it "with a handful of 'simple municipal institutions' that are subject to a confusing system of overlapping federal and provincial jurisdiction."[171] Indigenous peoples have suffered a great deal

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[165] James [Sákéj] Youngblood Henderson, "Constitutional Powers and Treaty Rights" (2000) 63:2 Sask L Rev 719 at 739; see also Warren J Sheffer, "*R. v. Marshall*: Aboriginal Treaty Rights and Wrongs" (2000) 10 Windsor Rev Legal & Soc Issues 77.
[166] Henderson, *ibid* at 739.
[167] *Ibid*.
[168] Russel Lawrence Barsh & James [Sákéj] Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley, CA: University of California Press, 1982).
[169] Anker, *supra* note 86.
[170] See also Turner, *supra* note 90. There is an ongoing debate about analytical tools in Indigenous legal critique. On the one hand, Val Napoleon and Hadley Friedland believe that common law tools should be used to analyse Indigenous law. On the other hand, Aaron Mills is strongly opposed to this method, as he claims it negates the uniqueness of Indigenous law, which cannot be understood by using common law tools. See e.g. Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions Through Stories" (2016) 61:4 McGill LJ 725 [Napoleon & Friedland, "An Inside Job"]; Mills, "The Lifeworlds of Law" *supra* note 109; Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 Indigenous LJ 1; Mills, "How Can Indigenous Law Interact Productively", *supra* note 115; Clifford, *supra* note 51.
[171] Joshua Ben David Nichols, "A Narrowing Field of View: An Investigation into the Relationship between the Principles of Treaty Interpretation and the Conceptual Framework of Canadian Federalism" (2019) 56:2 Osgoode Hall L J 350 at 357.

as a result of these jurisdictional overlaps, as federal and provincial governments throw the ball to each other regarding who will pay for services to Indigenous peoples.[172]

Another perspective on the SCC's rights infringement test in *Sparrow* is that while the Court believes that the "wording of s. 35(1) of the *Constitution Act, 1982* supports a common approach to infringements of aboriginal and treaty rights",[173] scholars believe that treaty rights should be held to a higher standard of justification[174] since, as the SCC has recognized, treaties are "solemn agreements" of a "sacred nature".[175] To that effect, Catherine Bell states that

> treaty promises give rise to a stricter duty of adherence by the Crown because of a dual fiduciary obligation: the general obligation of the Crown to act in the interests of Aboriginal peoples over whom they exercise significant control and the specific obligation of the Crown to fulfill express promises in the treaty.[176]

According to Bell, the infringement test should require negotiations with the Indigenous community whose treaty rights are endangered. She believes that infringement of 'solemn' and 'sacred' agreements should not be made unilaterally. However, the SCC has since held in *Haida* that in the case of a possible infringement of a proven s. 35 right, "deep consultation, aimed at finding a satisfactory interim solution, may be required."[177] Theoretically, the Crown is thus already held to a high standard of consultation that should not allow the unilateral infringement of proven treaty rights. Whether, in practice, this obligation is upheld is another matter.

b. Mi'kmaq Right to Self-Government

Before 1985, Mi'kmaq treaty rights were blatantly disregarded by provincial and federal authorities. For instance, Melanie Wiber and Chris Milley describe how "Mi'kmaq access to their traditional resources was drastically reduced over the years of colonization and more dramatically

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[172] For example, Jordan River Anderson, a Cree child, died after waiting three years for home-based care that never arrived, due to a jurisdictional and financial dispute between the federal and provincial governments over who would pay for his care. This tragedy led to the creation of Jordan's Principle, guaranteeing Indigenous children access to the same services as any other child despite jurisdictional disputes.
[173] *Badger*, *supra* note 20 at para 79.
[174] See e.g. Sheffer, *supra* note 165 at 99; Catherine Bell, "*R v Badger*: One Step Forward and Two Steps Back?" (1997) 8:2 Const F 21 at 25.
[175] *R v Sioui*, [1990] 1 SCR 1025; *Badger*, *supra* note 20.
[176] Bell, *supra* note 174 at 25.
[177] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 43-44 [*Haida*].

under the Federal Indian Act."[178] They also emphasize that "[t]he 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."[179]

After the recognition of Mi'kmaw treaty rights in the *Marshall* decision, DFO developed financial assistance programs to increase the Mi'kmaq people's presence in the fisheries. What seemed like a reasonable initiative for implementing Mi'kmaw treaty rights, is, on the contrary, viewed by McMillan, Prosper, Milley, and Wiber as a tactic of cooptation to maintain control over Mi'kmaw fisheries and to assimilate them within state regulations.[180] Through these programs, DFO insists on fitting Mi'kmaw treaty fisheries into a mold created for non-Indigenous commercial fishing. Indeed, a condition of these financial agreements is that First Nations must "abide by the same terms and conditions as applied to non-native fishers, including seasons, trap and gear limits, and vessel restrictions."[181] They also include a clause that prohibits signatory nations from asserting their treaty rights for 10 years.[182] This puts Mi'kmaw communities in a difficult quandary, whereby they must choose between receiving financial aid permitting them to access fisheries, and exercising their s. 35 right to manage their fisheries and treaty activities. This will be discussed in further detail in Chapter 4, section 4.3(b).

The 2021 report of the *Standing Committee on Fisheries and Oceans* on Mi'kmaw and Maliseet (Wolastoqiyik) treaty rights provided important testimonies of Mi'kmaw and Canadian leaders on the efforts deployed by DFO to implement the *Marshall* decisions.[183] The report illustrates the worldview clashes between Indigenous peoples, commercial fishing associations, and Canadian leadership. Indigenous leaders insist on their right to participate in the definition of their treaty rights, as opposed to the unilateral imposition of Western norms by most Canadian experts and leaders, such as those imposed under DFO assistance programs. The report also provides 40 recommendations for DFO to follow in order to respect and meaningfully implement treaty fishing

[178] Wiber & Milley, *supra* note 129 at 168.
[179] *Ibid* at 168.
[180] McMillan & Prosper, *supra* note 14 at 638; Wiber & Milley, *supra* note 129 at 175.
[181] Wiber & Milley, *ibid* at 170.
[182] Canada, House of Commons, "Rapport du Comité permanent des pêches et des océans", *Implementation of the Mi'kmaw and Maliseet Treaty Right to Fish in Pursuit of a Moderate Livelihood*, (10 May 2021) (Chair: Ken McDonald) at 23.
[183] *Ibid.*

rights in the Maritimes. Notably, Recommendation No. 8 asks the federal government to "recognize the Mi'kmaw and Maliseet treaty right to harvest, sell fish, and co-manage moderate livelihood fisheries as the foundation of the Government of Canada's nation-to-nation relationship with Mi'kmaq and Maliseet nations."[184] Unfortunately, the committee mostly relies on DFO to conduct environmental assessments and enact conservation regulations, overlooking Mi'kmaw knowledge systems.

c. Conservation

The literature also asserts that conservation problems observed today in the Atlantic are not caused by Mi'kmaw "moderate livelihood" activities, but by Canada's mismanagement of the fisheries over the past century. As Mi'kmaw fisheries represent such a small percentage of the overall catch compared to non-Mi'kmaw commercial and sport fisheries, it is incoherent to let the Mi'kmaq share the burden of conservation restrictions.[185] Barsh observes that "[o]n the eve of the *Marshall* decision in 1999, Mi'kmaw people owned less than half of one per cent of the fleet, mainly small boats fitted for inshore lobster traps or jigging for cod in estuaries and bays."[186] Warren J Sheffer states that, in 2000, the Mi'kmaw fishery accounted for only 1.5 per cent of the commercial lobster catch in New Brunswick, while "unemployment on reserves, such as Burnt Church, [was] as high as 90 per cent."[187] In 2021, Mi'kmaw and Maliseet fisheries accounted for six percent of the landed value in the Maritimes.[188] Justin Martin, the fishery coordinator of the Mi'kmaw Potlotek First Nation, testified during the hearings of the *Standing Committee on Fisheries and Oceans* that

> Our level of harvesting is being managed in accordance with *netukulimk*, taking only what we need to sustain our families and communities. We do not harvest to create wealth for individuals. If there is a conservation issue, it is not one that rests on the shoulders of the livelihood harvesters but one that rests on the shoulders of the commercial fishing industry.[189]

[184] *Ibid* at 23 [emphasis added].
[185] Barsh, "*Netukulimk*", *supra* note 156 at 34.
[186] *Ibid* at 28.
[187] Sheffer, *supra* note 165.
[188] Canada, House of Commons, Standing Committee on Fisheries and Oceans, *Study on the Implementation of Mi'kmaq Treaty Fishing Rights to Support a Moderate Livelihood* (2020) online: <https://www.dfo-mpo.gc.ca/transparency-transparence/briefing-breffage/2021/livelihood-subsistance-eng.htm>.
[189] Canada, House of Commons, Standing Committee on Fisheries and Oceans, 43-2, No 5 (29 October 2020) online: <https://www.ourcommons.ca/DocumentViewer/en/43-2/FOPO/meeting-5/evidence>.

These nations have had tremendous difficulty accessing the fishery — be it for food or moderate livelihood purposes — because of their historical, legal, and political exclusions from it, that putting restrictions upon their participation compromises the implementation of their treaty rights to fish for a moderate livelihood.

Additionally, Mi'kmaw communities are deploying serious efforts to address sustainability concerns, which are simply not taken into consideration by DFO. Indeed, McMillan and Prosper note that "[t]he Unama'ki Institute of Natural Resources (UINR) was formed in 1999, to address the concerns of the five Mi'kmaw communities of Cape Breton regarding natural resources and their sustainability."[190] However, "the Department of Fisheries and Oceans' policies failure to include Indigenous rights and Indigenous ecological knowledge in their initial responses to the decision, incited racial tensions and suppressed Indigenous knowledge and resource management systems."[191] Barsh also extensively documents how DFO regulations are not ecologically sustainable, and that "Canada's current regime for managing lobsters relies heavily on economic rather than biological factors."[192] According to the ecologist, DFO must switch from a species-by-species approach to an ecosystem conservation strategy.[193] For him, the only effective way to achieve this shift is to "learn from the indigenous people who have long inhabited, sustainably utilized, and extensively modified local ecosystems."[194] Similarly, John Borrows believes that Indigenous peoples' "legal systems and life ways can more fully facilitate reconciliation with the earth."[195]

This literature has shown that, thus far, DFO has been unable to meet its obligations under Canadian constitutional law to implement the Mi'kmaq nation's treaty fishing rights; it has unsustainably managed halieutic resources in the Maritimes for decades; and it has ignored Mi'kmaw conservation efforts in the process.

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[190] McMillan & Prosper, *supra* note 14 at 639.
[191] *Ibid* at 638.
[192] Barsh, "*Netukulimk*", *supra* note 156 at 32.
[193] Barsh, "Taking Indigenous Science Seriously", *supra* note 140 at 153.
[194] *Ibid*.
[195] John Borrows, "Earth-Bound: Indigenous Resurgence and Environmental Reconciliation" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto, ON: University of Toronto Press, 2018) 49 at 50.

2.4 Co-Management

While many scholars suggest that the Mi'kmaq have a right to the self-management of their fisheries and that they should be consulted when their treaty rights are infringed upon in the name of conservation, few suggest that they might participate in the decision-making process concerning broader environmental policies. I contend that the co-management of marine ecosystems could resolve the tensions between treaty fishing rights and conservation concerns. The American lawyer and scholar Ed Goodman claims that "decisions of critical importance to [Indigenous peoples] should not be made unilaterally by the [government], but rather through a process of mutual consideration, analysis, and respect."[196] Similarly, in a paper written for Environment Canada, Suzanne Berneshawi states that "[t]he Mi'kmaq Nation, to date, has not been actively involved in government initiated resource management and conservation programs."[197] She then adds that the Mi'kmaq "[i]nvolvement must go beyond consultation or tokenism."[198] As decisions regarding the environment greatly affect Mi'kmaw self-management capacity, the Mi'kmaq should be able to significantly participate in these decision-making processes. While the possibility of special environmental rights for Indigenous peoples is not novel, I go further by suggesting that co-management, as an expression of the right to self-management, could bridge Mi'kmaw treaty rights and conservation concerns.

a. Definition of Co-Management

Co-management is described by Fikret Berkes, a leading scholar in the field, as "the sharing of power and responsibility between the government and local resource users."[199] Evelyn Pinkerton views co-management as "the power-sharing in the exercise of resource management between a government agency and a community organization of stakeholders."[200] Derek Armitage, Fikret Berkes, and Nancy Doubleday define the role of co-management as "responding to demands for a

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[196] Goodman, *supra* note 128 at 323.
[197] Suzanne Berneshawi, "Resource Management and the Mi'kmaq Nation" (1997) 17:1 Can J Native Stud 115 at 116.
[198] *Ibid*.
[199] Fikret Berkes, Peter George, & Richard Preston, "Co-management" (1991) 18:2 Alternatives 12 at 12.
[200] Evelyn Pinkerton, "Translating Legal Rights into Management Practice: Overcoming Barriers to the Exercise of Co-Management" (1992) 51 Human Organization 330 at 331.

greater role for resource users and communities in environmental management";[201] they add that co-management can "democratize decision making, foster conflict resolution, and encourage stakeholder participation."[202] Indeed, Lars Carlsson and Fikret Berkes believe that co-management is more than a power-sharing arrangement, but is an "approach to governance"[203] and a "continuous problem-solving process."[204] An approach to co-management anchored in mutual aid would be consistent with an Indigenous understanding of treaties.[205] Indeed, for the Mi'kmaq, treaties were about forging relationships; they "make sense of the idea, in the Mi'kmaw language, of *elikewake* (the King in our house), just what was aspired and committed to in living with the king as a friend and ally, not as oppressed subjects."[206]

While some scholars study co-management as the incorporation of ISK within the state decision-making process,[207] there exists a strong opposition to the notion of 'incorporation'. According to Marc G Stevenson, 'integrating' Indigenous knowledge "without considering the broader socio-cultural contexts, understandings, functions, values, needs, rights, and interests of Aboriginal peoples [is] ethically and scientifically bankrupt, irresponsible, and politically, culturally, and ecologically unsustainable."[208] Mere integration becomes another tool the state can use to control ISK and Indigenous wildlife management. For instance, Stevenson reports that scientists often 'cherry-pick' elements of ISK, removing them from their broader social and cultural contexts, to merge these elements of ISK with Western scientific models and theories: "[t]he end result has not allowed Aboriginal peoples nor their knowledge to make a significant contribution to the way resources are managed, frustrating both those who possess this knowledge and those wishing or mandated to use it in co-management."[209] When co-management is carried out in the form of knowledge integration, Stevenson observes that Indigenous parties sometimes simply refuse to

[201] Derek Armitage, Fikret Berkes & Nancy Doubleday, *Adaptive Co-Management: Collaboration, Learning, and Multi-Level Governance* (Vancouver, BC: UBC Press, 2008).
[202] *Ibid* at 3.
[203] Lars Carlsson & Fikret Berkes, "Co-management: Concepts and Methodological Implications" (2005) 75:1 J Environ Management 65 at 66.
[204] *Ibid* at 65.
[205] See e.g. Mills, "What Is a Treaty?", *supra* note 82.
[206] M Battiste, "Narrating Mi'kmaw Treaties" *supra* note 82 at 4.
[207] Giles, *et al*, *supra* note 122.
[208] Marc G Stevenson, "Decolonizing Co-Management in Northern Canada" (2004) 28 Cultural Survival Q 68 [Stevenson, "Decolonizing Co-Management"].
[209] *Ibid* at 71.

participate in the co-management process or resist using the language of the state in which they are asked to communicate. For instance, in the Southeast Baffin Beluga Co-Management Committee, "Inuit hunters [...] refused to use or consider the term 'stock'; they had no word in Inuktitut for such a concept."[210]

Also opposed to the integration approach is Albert Marshall, a Mi'kmaq Elder who developed a model for a co-management that encompasses both Indigenous and Western ways of knowing.[211] This "two-eyed seeing" approach (TESA) allows co-management participants to go beyond the "all-too-common dialogue integrating, combining or incorporating (commonly used as euphemisms for assimilating) other knowledges and ways of knowing into Western science."[212] Andrea Reid *et al* have studied co-management initiatives that use TESA, such as the Slave River and Delta Partnership (SRDP). With this partnership, Western and Indigenous investigators were able to find common ground in the results of their research by having their own unique, but complementary lines of investigation:

> Where water quality and fish health could be described, respectively, in terms of "turbidity" (in Nephelometric Turbidity Units) or "fish external anomalies" (number of cysts, tumours, lesions and malformations) through a Western scientific lens, they could likewise be understood in terms of "the physical appearance of water" (changes in water visibility or movement over time) or "fish aesthetics" (changes in frequency of lesions or deformities over time) through an Indigenous lens.[213]

The SRDP provided "a power-neutral approach to answering a co-developed set of questions and produce a co-authored report."[214] While it was carried out on a small-scale fishery, the SRDP nevertheless showed that research can be carried out jointly without merely incorporating ISK within Western science models and theories.

b. Co-Management as an Expression of the Right to Self-Management

[210] *Ibid.*
[211] Reid, *et al, supra* note 130
[212] *Ibid* at 245.
[213] *Ibid* at 250.
[214] *Ibid* at 251; Chrystal S Mantyka-Pringle, *et al,* "Bridging Science and Traditional Knowledge to Assess Cumulative Impacts of Stressors on Ecosystem Health" (2017) 102 Environment International 125.

In Canada, co-management has never been officially recognized as emanating from a treaty right. However, some attention has been given in the Canadian literature to the possibility of recognizing special environmental rights for Indigenous peoples.[215] Notably, Lynda M Collins and Meghan Murtha "argue that Aboriginal peoples in Canada enjoy a right to conservation under s. 35 of the *Constitution* as an incident to constitutionally guaranteed treaty and Aboriginal rights to hunt, fish, and trap."[216] Sarah Morales views the right to participate in the decision-making process as deriving from Indigenous peoples' right to self-determination. Morales claims that the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)[217] requires governments to "make space for Indigenous laws and practices" within decision-making processes affecting their ancestral territories.[218] This thesis further argues that Indigenous peoples holding these conservation rights should also be able to participate in the elaboration of environmental policies ensuring conservation.

Co-management initiatives have been employed in recent land claims agreements and other modern treaty-making processes in northern Canada, resulting in the creation of, among others, the Nunavut Wildlife Management Board, the Yukon Fish and Wildlife Management Board, and the Mackenzie Valley Land and Water Board. Thierry Rodon's book *En partenariat avec l'État: Les expériences de cogestion des Autochtones du Canada*[219] is one the few major works[220] about the various co-management initiatives between Indigenous communities and governments in Canada. Rodon summarizes the four major interpretive models of Indigenous co-management and

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[215] See e.g. Robert K Hitchcock, "International Human Rights, the Environment, and Indigenous Peoples" (1994) 5 Colo J Int'l Envtl L & Pol'y 1; Benjamin J Richardson, "The Ties That Bind: Indigenous Peoples and Environmental Governance" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford, UK: Hart, 2009) 337; William Andrew Shutkin, "International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment" (1991) 31 Va J Int'l L 479; Laura Westra, *Environmental Justice and the Rights of Indigenous Peoples* (London, UK: Earthscan, 2008).

[216] Lynda M Collins & Meghan Murtha, "Indigenous Environmental Rights in Canada: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish and Trap" (2010) 47:4 Alta L Rev 959 at 971.

[217] United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples,* 2 October 2007, A/RES/61/295 [UNDRIP].

[218] Morales, "Braiding the Incommensurable", *supra* note 16 at 78.

[219] Thierry Rodon, *En partenariat avec l'État: Les expériences de cogestion des Autochtones du Canada* (Québec, QC: Presses de l'Université Laval, 2003).

[220] There exist two books on the subject: Rodon, *ibid*, and G White, *supra* note 126; see, in addition, the following articles: Donna Craig, "Recognising Indigenous Rights through Co-Management Regimes: Canadian and Australian Experiences" (2002) 6 NZ J Envtl L 199; Paul Nadasdy, "The Anti-Politics of TEK: The Institutionalization of Co-Management Discourse and Practice" (2005) 47:2 Anthropologica 215.

identifies those that serve to exercise greater control over Indigenous peoples and those that give Indigenous communities more power over their lands and waters. In the first category, Rodon includes "confiscation du pouvoir" (cooptation) — when Indigenous knowledge is incorporated into the current resource management structure [221]— and "le malentendu" (misunderstanding) — when misunderstandings between Indigenous peoples and the Crown are reproduced in the co-management institution.[222] In the second category, he includes power-sharing — co-management is understood an intercultural transaction in which both groups are allowed to participate [223]— and "autonomisation" (empowerment) — where co-management is seen as a way for Indigenous peoples to take back the power over their lands and waters.[224] Similarly, Graham White studies how co-management can be meaningfully implemented to empower Indigenous peoples.[225] According to White, co-management initiatives in northern Canada should be viewed as a sign of significant progress in the Indigenous-Crown relationship and as an embodiment of treaty federalism, but also as containing important lessons on how to meaningfully share management decision-making with Indigenous peoples.

c. Challenges to Co-Management

Many scholars identify the challenges of working in "cross-cultural collaboration".[226] According to White, "the central challenge in making co-management work [is] getting the adherents of the two systems to accept that the other's perspectives and techniques can be merged into an effective system utilizing the best of both systems."[227] White asserts that co-management should not be understood as a tool to achieve self-government, because "the very essence of co-management is integration into governance institutions for the purpose of exerting influence."[228] However, in this argument, White does not take into consideration that for Indigenous peoples, environmental co-management is utterly connected to governance.

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[221] Rodon, *supra* note 219 at 145.
[222] *Ibid* at 146.
[223] *Ibid* at 145.
[224] *Ibid* at 146.
[225] G White, *Indigenous Empowerment, supra* note 126; Graham White, "Treaty Federalism in Northern Canada: Aboriginal-Government Land Claims Boards" (2002) 32:3 Publius 89.
[226] Giles, *et al*, *supra* note 122 at 179.
[227] G White, *Indigenous Empowerment, supra* note 126 at 12.
[228] *Ibid* at 19.

Giles *et al* believe that the underlying cause of many of the problems faced by co-management initiatives in Canada is that they ignore "the cultural, spiritual, or management facets of the [Indigenous] knowledge system".[229] The literature agrees that co-management must go beyond mere consultation and should also include Indigenous ways of knowing.[230] Without this commitment to accept Indigenous science, culture, contexts, and political authorities, there is a great danger of falling into an "insidious form of cultural assimilation".[231] Given this, Stevenson found that "there are fatal and systemic flaws to the usual process by which [Indigenous] knowledge is collected and applied in the northern Canadian co-management experience."[232] This thesis will address the steps needed to redress these inequities, "thereby creating space for the 'real' inclusion of Aboriginal peoples and their knowledge and management systems into co-management practice."[233]

d. The Unique Contribution of This Thesis

While many scholars have covered the Mi'kmaq-Crown fisheries dispute from different perspectives, this thesis is unique as it is the only one that addresses the jurisdictional conflict at the heart of these fishing disputes. Shelley K Denny and Lucia M Fanning offer an analysis of the Mi'kmaq-Crown conservation dispute on Atlantic salmon,[234] but while they assume that it is in the interest of both parties to find collaborative solutions to conservation, my thesis provides a detailed constitutional analysis that proves that the Crown has a constitutional obligation to develop a nation-to-nation solution to this conflict. In other words, their work focuses on the *need, challenges,* and *advantages* of working in cross-cultural collaboration, while mine also focuses on the Crown's *obligation,* within the Canadian constitutional order, of working in cross-cultural collaboration.

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[229] Giles, *et al*, *supra* note 122 at 179.
[230] Stevenson, "Decolonizing Co-Management" *supra* note 208; G White, *Indigenous Empowerment, supra* note 105 at 266; Fikret Berkes & Thomas Henley, "Co-Management and Indigenous Knowledge: Threat or Opportunity?" (1997) 18 Policy Options 3 at 30.
[231] Stevenson, *ibid*.
[232] *Ibid*.
[233] *Ibid*.
[234] Denny & Fanning, *supra* note 129.

Other scholars have advocated for the recognition of a Mi'kmaw right to the independent stewardship of their treaty activities,[235] but have never addressed, as in this thesis, the DFO-Mi'kmaw jurisdictional conflict that arises with the recognition of a Mi'kmaw right to self-management. This thesis directly addresses this conflict and demonstrates how government-to-government co-management is a tool available in Canadian law to address these jurisdictional issues. Finally, scholars like Donna Craig and Graham White have studied how co-management promotes the development of Indigenous rights in Canada, but have not considered it as a possible expression of treaty rights.[236] In contrast, in the United States, the 1974 *Boldt* decision recognized co-management as attached to the western Washington tribes' treaty right to fish, which generated a body of literature on the treaty right to co-management.[237] Inspired by the *Boldt* decision, I argue that co-management is a possible expression of the treaty and Aboriginal right to self-management, and that it could ensure the sustainability of the fisheries as well as resolve Crown-Mi'kmaq jurisdictional conflicts.

2.5 Conclusion

This literature review reveals the debates in the literature about Indigenous and Mi'kmaw knowledge systems, as well as their place in fisheries management. It also shows that Indigenous law scholars believe that treaty relations are at the core of the Canadian constitutional order and that treaty rights infringement should be held to a high justification standard and include robust consultation and accommodation processes. Yet, this literature review also demonstrates that DFO does not meet this high standard, as it does not properly consult or accommodate and rarely takes into account the conservation efforts put in place by Mi'kmaw communities. Finally, it illustrates that co-management is perceived in the literature as a useful tool for empowering Indigenous peoples, but only when ISK is respectfully implemented in the process. This thesis will build on and go beyond these findings by establishing that, in light of the PFT and the inherent right to self-

[235] See e.g. Wiber & Milley, *supra* note 129; Wiber & Kennedy, *supra* note 129; Martin Nie, "The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands" (2008) 48:3 Nat Resources J 585.
[236] Craig, *supra* note 220; G White, *Indigenous Empowerment, supra* note 126.
[237] *United States v State of Washington*, [1974] 384 F Supp 312 [*Boldt* decision]. This decision will be discussed in further detail in Chapter 5, section 5.2 (d). See e.g. Goodman, *supra* note 128; Shelly D Stokes, "Ecosystem Co-Management Plans: A Sound Approach or a Threat to Tribal Rights" (2003) 27:2 Vt L Rev 421.

government, the Mi'kmaq hold a constitutionally protected right to the self-management of their fisheries. Flowing from this right, I also prove that co-management of marine ecosystems and species is a possible expression of the Mi'kmaw treaty right to fish and self-manage their fisheries and could resolve the jurisdictional conflicts arising from the right to self-management.

Chapter 3: Indigenous Scientific Knowledge and Mi'kmaw Law

3.1 Overview

Indigenous knowledge systems include spiritual and sacred relationships with their territories and waters that cannot be set aside when dealing with Indigenous scientific knowledge (ISK). Indeed, article 25 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) asks Member States to support Indigenous peoples' "[rights] to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."[238] Recently, there has been a growing recognition of the significant benefits of Indigenous environmental practices. The *United Nations Conference on Environment and Development* (Rio Conference) in 1992 set the stage for the recognition of ISK across the world. For the first time, an international forum for environmental protection recognized the importance of factors such as "social, economic, scientific, educational, cultural, and spiritual values"[239] for the development of environmental protection policies.

Several events have shown the importance of ISK in increasing environmental sustainability and the health of ecosystems. For instance, during the 2021 British Columbia forest fires, 75 members of the Secwépemc First Nation refused to evacuate their town, thereby saving their community's infrastructures from wildfires. Despite their efforts, the fire grew, but because of the ancestral knowledge of Darrell Peters, a fire warden, the community's school was spared.[240] With the help of the BC Wildfire Services, he led a backfire down a slope to push the fire back where it could be fought more easily. Peters and other members of the Secwépemc First Nation wish to promote the use of traditional burning, a very effective way to prevent forest fires and regenerate saturated soils. Regrettably, the practice has been prohibited by the British Columbia Forest Service since the 1930s.[241]

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[238] UNDRIP, *supra* note 217, article 25.
[239] Monica E Mulrennan, "Indigenous Knowledge in Marine and Coastal Policy and Management" (2013) 27 Ocean YB 89 at 89.
[240] Camille Vernet, "Une communauté autochtone sauvée d'un incendie grâce aux savoirs ancestraux", *ICI Radio-Canada* (23 July 2021), online: <https://ici.radio-canada.ca/nouvelle/1811174/autochtone-brulage-traditionnel-feu-kamloops-skeetchestn-incendie>.
[241] Other ISK practices were banned across Canada during the 20th century, such as regular burning to help maintain berry patches: see Nancy J Turner & Pamela Spalding, "Learning from the Earth, Learning from Each Other:

There is a growing awareness of the intrinsic link between prohibited ancestral practices and the well-being of the territory and, by the same token, the well-being of the communities inhabiting the territory. Indeed, "traditional management approaches have maintained and enhanced ecological and biological diversity in First Nations' territories."[242] Indigenous ecological knowledge has the potential to not only enhance Indigenous communities' and territories' well-being, but also to restore lands and management systems in non-Indigenous societies.[243] In this chapter, I will demonstrate that ISK and *netukulimk* provide important teachings that can help restore aquatic habitats and fish stocks, and could be used to resolve the fisheries conservation crisis. I will first explore the sacred and spiritual connections that Indigenous peoples have with the environment. Afterwards, I will discuss the Mi'kmaq concept of *netukulimk* to then explain how and why it is incompatible with the Department of Fisheries and Oceans' (DFO) way of managing the fisheries. I also contend that ISK's differences from Western science are not insurmountable if they are acknowledged and if a commitment to collaboration and mutual aid is made by both sides.

3.2 Sacredness and Spirituality in Mi'kmaw Scientific Knowledge

Mi'kmaw knowledge systems are closely related to the land and culture of the Mi'kmaq people; they produce local knowledge that cannot be separated from the communities and ecosystems that hold them.[244] However, since Indigenous peoples traditionally have not isolated reason from spirit, and "because they did not espouse an evolutionist theoretical perspective, their beliefs have been viewed as superstitions."[245] Yet, ISK is not a collection of superstitions or a mere database; it is a science in itself, with its own models and theories.[246] Unfortunately, ISK is often misunderstood or misused, as its access is highly local and requires long-term commitment.

Ethnoecology, Responsibility, and Reciprocity" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto, ON: University of Toronto Press, 2018) 265 at 273. Straits Salish salmon reef netting on the Pacific coast, which helps to conserve salmon populations, was also banned: see, e.g., Nicholas XEMŦOLTW Claxton, *To Fish as Formerly: A Resurgent Journey Back to the Saanich Reef Net Fishery* (PhD Dissertation, University of Victoria, 2015 [unpublished].

[242] Turner & Spalding, *ibid* at 269.

[243] *Ibid* at 266.

[244] Prosper, *et al*, *supra* note 52 at 2.

[245] Kovach, *supra* note 74 at 78.

[246] Barsh, "Taking Indigenous Science Seriously", *supra* note 140 at 157.

The Mi'kmaq people have a special relationship with their environment that can be described as sacred and spiritual. Because in Mi'kmaw consciousness everything is always interconnected together and with the spiritual world,[247] an ethic of sacredness has developed in Mi'kmaq environmental stewardship. Sákéj Henderson notes that "[h]ow Aboriginal languages appropriate a space and attach responsibilities to it also reveals their ecological consciousness. Their notion of self does not end with their flesh, but continues with the reach of their senses into the land. Thus, they can speak of the land as their flesh."[248] For the Mi'kmaq, because all living things are considered as kin — "the soil, lichens, trees, water, sky, stars, etc."[249] — they have the responsibility to care for the Earth which is their own flesh and kin. An example of this special relationship is given by Prosper *et al*, who illustrate the importance of the sacred link between a Mi'kmaw hunter and animals:

> This sacred connection [...] was integral to the belief systems and law ways governing the relations between humans and animal spirits. The success of the hunt and the availability of the moose depended on the maintenance of this connection by respecting the moose during life and death. Rituals were carefully constructed to ensure the cycle of regeneration was not interrupted.[250]

When humans see themselves as being part of a web of interconnected relations with the land and animals, a cycle of mutual respect is ensured. They develop a strong sense of responsibility towards the animals and plants they are harvesting, and the practice of harvesting thus naturally becomes intertwined with the responsibility of sustainably managing the environment. Therefore, the sacred and spiritual relationships with the environment result in a kind of self-regulation of the Mi'kmaq people's behaviour, rendering them more sensitive to the needs of their local ecosystems. For the Mi'kmaq, this is expressed 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."[251] Mi'kmaw spiritualties are rooted in the earth, "[f]or if nature itself is

[247] St. George's Indian Band, "Mide-Wiigwas: Traditional Mi'kmaq Teachings", online: <http://www.sgibnl.ca/mide-wiigwas-traditional-mikmaq-teachings/>.
[248] Henderson, "Mi'kmaw Tenure", *supra* note 106 at 221.
[249] Nova Scotia Curriculum, "*Netukulimk*", online: <https://curriculum.novascotia.ca/sites/default/files/documents/resource-files/Netukulimk_ENG.pdf> at 2.
[250] Prosper, *et al, supra* note 52 at 5.
[251] Wiber & Milley, *supra* note 129 at 167.

conceived of as sacred then humanity need not look beyond the Earth for salvation or for hope",[252] and can thus be understood as a special relationship of mutual exchange with the land and its ecosystems.[253] This sacred relationship with the earth is an integral part of a broader Mi'kmaw law that will be explored in the next section.

3.3 Mi'kmaw Law and *Netukulimk:* Avoiding Not Having Enough

a. A Mi'kmaw Creation Story

Mi'kmaw law cannot be encapsulated within a set of regulations or a legal code because "Mikmaw knowledge is not a description of reality; rather it is some perceptions about the nature of change, insights about patterns or styles of the flux. Life is not static. To see things as permanent is to be confused about everything."[254] Rather, Mi'kmaw law is embodied in Mi'kmaw spiritualities (as described in the preceding section), territories, consciousness, and creation stories:

> The old woman introduced herself as Nukumi (noo-goo-mee). She said to Kluskap, "I am your grandmother." Kluskap asked the old woman how she arrived in the Mi'kmaq world. Nukumi said that she owed her existence to the rock, the dew and Naku'set, the Sun. She went on to explain that on one chilly morning a rock became covered with dew because it was sitting in a low valley. By midday, when the sun was most powerful, the rock got warm and then hot. With the power of Naku'set, the rock was given a body of an old woman. This old woman was Nukumi, who came into being already very wise and knowledgeable. She told Kluskap that he would gain spiritual strength by listening to and having great respect for his grandmother.
>
> Kluskap was so glad for his grandmother's arrival to the Mi'kmaq world he called upon Apistne'wj (ah-bis-ti-nay-ooj), a marten swimming in the river, to come ashore. Apistne'wj came to the shore where Kluskap and Nukumi were standing, and Kluskap asked him to give up his life so that he and his grandmother could live. Apistne'wj agreed. Nukumi then took Apistne'wj and quickly snapped his neck, then placed him on the ground. Kluskap for the first time asked Creator to use his power to give life back to Apistne'wj, because he did not want to be in disfavor with the animals. Apistne'wj went back to the river and in his place lay another marten. Kluskap and Apistne'wj became friends and brothers forever. Because of marten's sacrifice, Kluskap referred to all the animals as his brothers and sisters from that point on.

[252] William Closson James, "Canada" in Bron Taylor, ed, *The Encyclopedia of Religion and Nature* (London, UK: Bloomsbury, 2010).
[253] Henderson, "Mi'kmaw Tenure", *supra* note 106 at 223; Ghostkeeper, *supra* note 127.
[254] Henderson, *ibid* at 228.

> Nukumi cleaned the animal to get it ready for eating. She gathered the still-hot sparks from the lightning which had hit the ground to give Kluskap life. She placed dry wood over the coals to make a fire. This fire became the Great Spirit Fire, and later came to be known as the Great Council Fire. Thus, the first feast of meat was cooked over the Great Fire.
>
> Kluskap relied on his grandmother for her knowledge, and, since Nukumi was old and wise, Kluskap also came to respect her for her wisdom. They learned to respect each other for their continued interdependence and continued existence.[255]

This excerpt from the creation story of the Mi'kmaq reflects one of the core values embedded in Mi'kmaw law: that "spiritual laws that are connected to the animal world [...] should manage human behaviour spiritually."[256] It allows us to grasp the spiritual significance of connections between aspects of the natural world — rocks, dew, sun, animals, fire — for the Mi'kmaq people. First, Nukumi comes from the rocks, the dew, and the sun — from the earth. As her origin is the first thing she explains to Kluskap in the story, she shows just how important it is for the Mi'kmaq to acknowledge that they originate from Mother Earth. The story also reveals the spiritual importance of the Elders, seen as essential knowledge holders who are due utmost *respect*.

One of the most important aspects of this story in relation to this thesis is the *relationship* that is developed between Kluskap and Apistne'wj. Kluskap knows that he is dependent on Apistne'wj and asks for his permission to catch him and eat him to survive. Because Apistne'wj has a spirit, Kluskap considers his death a gift, but also an unbearable sacrifice. Therefore, he ultimately asks for his resurrection. Another marten is sacrificed and because of this life-saving sacrifice, Kluskap decides to consider the animals as his brothers and sisters (*responsibility*). Kluskap, Apistne'wj, and Nukumi deeply respect each other for their interdependence and interrelated existence (*reciprocity*). This story embodies the four core values of *netukulimk*: respect, relationship, responsibility, and reciprocity.

b. What Is Netukulimk*?*

[255] "The Coming of Nukumi" (part of the Mi'kmaw Creation Story), excerpted from "Mi'kmaq Knowledge in the Mi'kmaq Creation Story: Lasting Words and Deeds" by Stephen Augustine (8 April 1977) online: <http://www.muiniskw.org/pgCulture3a.htm>.
[256] Prosper, *et al*, *supra* note 52 at 11.

Chrestien LeClercq, a French missionary who spent almost a decade in Mi'kmaq communities in the late 1600s,[257] observed that Mi'kmaw Chiefs "distribute[d] hunting places to each individual; and it [was] forbidden for any Savage to exceed the metes and bounds of the area that has been assigned to him by the Council of Elders, which is convened in the Autumn and the Spring specifically for the purpose of making the division."[258] He also noted that they planted crosses to mark the most important fishing and hunting spots, and these crosses could be observed all over the Mi'kma'ki.[259] The Mi'kmaq had a carefully organized system enshrined in their everyday lives, ensuring that their harvesting practices were not endangering future generations. Today, we know that two key concepts constitute the foundation of Mi'kmaw knowledge systems:

> *Netukulimk*, which recognizes that sustenance is physical and spiritual, and that harvesting practices should not foreclose on options for the next seven generations to sustain themselves; while *M'sit No'kamaq* translates as 'all my relations' and acknowledges that Mi'kmaq people are related to all those with whom they share their territory. The concept acknowledges the spirit in all species and implies reciprocal responsibilities.[260]

This section will focus on *netukulimk*, a worldview described by the Mi'kmaq Grand Council as the "Mi'kmaq way of harvesting resources without jeopardizing the integrity, diversity or productivity of our native environment. "[261] Prosper *et al* define the etymology of *netukulimk* as follows:

> *Netukulimk* is the process of supplying one's self or making a living from the land, and *netukulimkewe'l* refers to the applicable rules or standards. Interestingly, the closest homophone is *nutqw*-(insufficiency) rather than *pukw*-(abundance); thus *Netukulimk* sounds more like "avoiding not having enough" than like obtaining plenty.[262]

For the Mi'kmaq, *netukulimk* is more than a management system: it is a complete way of being, where humans are interconnected with every living being and non-living thing,[263] as we saw in Kluskap's story:

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[257] See Barsh, "*Netukulimk*", *supra* note 156 at 19.
[258] Chrestien LeClerq, *Nouvelle relation de la Gaspesie* (Paris, FR: Amable Auroy, 1691); reprinted as William F Ganong, ed, *New Relation of Gaspesia: With the Customs and Religion of the Gaspesians* (Toronto, ON: Champlain Society, 1910) at 385 as cited in Barsh, "*Netukulimk*", *supra* note 156 at 19.
[259] Barsh, *ibid* at 19.
[260] Giles, *et al*, *supra* note 122 at 169.
[261] The Mi'kmaq Grand Council, *et al, supra* note 48 at 7.
[262] Prosper, *et al*, *supra* note 52 at 6.
[263] *Ibid* at 6; Wiber & Milley, *supra* note 129 at 167.

> *Netukulimk* begins when a person learns to weave respect, responsibility, relationship, and reciprocity into every aspect of his or her life … everything they do to *Wskitqamu* [Mother Earth] and on *Wskitqamu*. It is more than a mental concept because it is a profound way of "being and knowing" that guides one's understandings of how to live within *Wskitqamu* and how to live in harmony.[264]

Recently, *netukulimk* has been mobilized in environmental stewardship initiatives across the Mi'kma'ki, such as the "*Netukulimk* Geographical Information System (GIS) Management Project that monitors the biological and cultural resources of Cape Breton Island using a combination of field surveys, remote sensing and specialized software."[265] These initiatives show that *netukulimk* can guide unique "Mi'kmaq approaches to resource utilization and regulation that have the potential to frame sustainable natural-resource management and inform culturally aligned governance strategies against those imposed upon the Mi'kmaq by the state and its agents."[266]

c. Sustainability and Netukulimk

As discussed in the first section of this chapter, ISK and ancestral practices are tightly linked to the well-being of the territory and of the communities cultivating and practising them. *Netukulimk* is no exception. Both historically and currently it has been documented that wherever *netukulimk* was practiced, the Mi'kma'ki was thriving.[267] Traditionally, hunting and fishing territories were distributed by district Chiefs, thus "regulat[ing] the impact of resource extraction in Mi'kmaq lands and allow[ing] for the replenishment of resources in a sustainable manner."[268] However, Mi'kmaw stewardship and adherence to *netukulimk* are not strictly based on Chiefs' decisions: a harvester has a personal responsibility to make sure that what is taken from the land is renewed and shared.[269] There exist several control mechanisms ensuring the compliance of Mi'kmaw hunters with these responsibilities. For instance, Calvin Martin asserts that "[t]he single most important deterrent to excessive hunting, in the Eastern Algonquian's mind at any rate, was the fear of spiritual reprisal

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[264] Nova Scotia Curriculum, *supra* note 249 at 1.
[265] See Barsh, "*Netukulimk*", *supra* note 156 at 16; see also the Mi'kmaw Conservation Group, online: <https://mikmawconservation.ca/>; The Moose Management Initiative, online: <https://www.uinr.ca/programs/moose/>; or Sipekne'katik First Nation, Band Council, *Sipekne'katik Fisheries Management Plan* (draft), online: <https://sipeknekatik.ca/wp-content/uploads/2021/04/Sipeknekatik-Lobster-Fisheries-Management-Plan-Revised-and-Updated-April-20-2021-v2.pdf>.
[266] McMillan, *et al*, *supra* note 15 at 244.
[267] See e.g. LeClerq, *supra* note 258; Barsh, "*Netukulimk*", *supra* note 156 at 21.
[268] Prosper et al, *supra* note 52 at 6
[269] *Ibid* at 6.

for indiscreet slaughter."[270] Mi'kmaq hunters and fishers have a special spiritual connection to ecosystems,[271] and this connection is nurtured through rituals described by Henderson as follows:

> These renewal rituals and ceremonies brought the people and the land into balance thereby achieving basic subsistence and material well-being. These rituals and ceremonies created a harmony which emphasized stability and the minimization of risk for the harvesting of the resources rather than growth and the accumulation of wealth. The quest for harmony also created the need for diversification by trade and modification of habitats, thereby developing surplus capacities and sharing.[272]

In *netukulimk,* the 'right' to harvest is thus inseparable from the 'responsibility' to maintain sustainable relationships with the territory and the community. Indeed, the rights-based approach has been strenuously critiqued, as the language of rights is not grounded in Indigenous culture.[273] Rather, Mi'kmaw law is centered around relationships, responsibilities, and social cohesion and is derived from discussions, daily life, and observations: "[b]uilding upon the earth's teachings in this manner, the Mi'kmaq people seek to apply natural law to their relationships with others."[274] Therefore, according to a Mi'kmaw perspective, treaty relations require treaty partners to commit to relationships that are "[h]uman to human, human to plants, human to animals, to the water and especially to the earth."[275] Treaties are not instruments of distributive justice, but rather "frameworks for right relationships: the relational means by which we orient and reorient ourselves to each other through time"[276] and courts and governments cannot simply overlook this relational aspect of treaties.

d. Colonization and Netukulimk *Today*

Before European colonization, the Mi'kmaq were a nomadic people who travelled across the Mi'kma'ki to live from the land through hunting, fishing, and harvesting. Daniel N Paul claims that poverty was virtually non-existent in the Mi'kmaw society, as the Mi'kma'ki was abundant

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[270] Calvin Martin, *Keepers of the Game: Indian-Animal Relationships and the Fur Trade* (Los Angeles, CA: University of California Press, 1978) at 18; see also Prosper *et al*, *supra* note 52.
[271] Prosper, *et al*, *supra* note 52 at 14.
[272] Henderson, "Mi'kmaw Tenure", *supra* note 106 at 232.
[273] Maria Campbell, "We Need to Return to the Principles of Wahkotowin", *Eagle Feather News* (November 2007), online: <https://mgouldhawke.wordpress.com/2019/11/05/we-need-to-return-to-the-principles-of-wahkotowin-maria-campbell-2007/>; Mills, "What Is a Treaty?", *supra* note 82; Jean Leclair, "Penser le Canada dans un monde désenchanté: Réflexions sur le fédéralisme, le nationalisme et la différence autochtone" (2016) 25 Const F 1 at 2-5.
[274] John Borrows, *Canada's Indigenous Constitution*, *supra* note 113 at 62.
[275] Campbell, *supra* note 273.
[276] Mills, "What Is a Treaty?", *supra* note 82 at 225.

with food and everything was equally shared.[277] Paul describes pre-colonial First Nations' economies as "linked together by need":[278]

> Horticultural Nations traded farm produce for the pelts and meat of hunting countries. Salt and other minerals that were scarce in one territory could be acquired in exchange for products or produce in another. In many instances, the Nations [they] traded with were located halfway across the continent.[279]

This dynamic economy was affected by the arrival of Europeans: "The infusion of new wares and foodstuffs from Europe soon eroded the centuries-old, mutually beneficial relationships that the Mi'kmaq and other Amerindians had established."[280] As a result, their economy changed and adapted to European monetary and trading systems, which eventually led to "the destruction of traditional trading patterns".[281] With the later imposition of centralization, residential schools, and the colonial regulation of hunting and fishing in the 19th and 20th centuries, the Mi'kmaq's entire way of life was disturbed: "[t]he 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."[282] While the Mi'kmaq had lived from the land and had protected the Mi'kma'ki for thousands of years, the provinces took control of the territory, thus suppressing Mi'kmaw stewardship.

Many Mi'kmaq thereafter violated government regulations to ensure their basic sustenance, which brought them before the Canadian justice system and reintroduced the Peace and Friendship Treaties into the legal discourse.[283] Despite their requests for the recognition of their special rights under the Peace and Friendship Treaties, which promised privileged access and use of the territory for fishing and hunting purposes, Mi'kmaw hunters and fishers were constantly arrested, brought into court, their gear confiscated, and their catch prevented from being sold outside of their communities. As the Mi'kmaq people were banned from taking part in their traditional activities

[277] Paul, *supra* note 107 at 18.
[278] *Ibid* at 39.
[279] *Ibid*.
[280] *Ibid.*
[281] *Ibid* at 40.
[282] Wiber & Milley, *supra* note 129 at 168.
[283] Prosper, *et al*, *supra* note 52 at 10.

and from accessing most of their ancestral territories, it became difficult to transmit their knowledge and laws, including *netukulimk,* to future generations.[284] Jaime Battiste explains that

> Mi'kmaw knowledge is centred on the process of sustaining a shared worldview, a cognitive solidarity, and a tradition of responsible action that combines the teaching of rights with responsibilities. The aboriginal land tenure and rights derived from *netukulimk* cannot be separated from their sovereignty or governance or law of the Mi'kmaw territory.[285]

Because *netukulimk* is so closely linked to the land, the impact of land dispossession and centralization was devastating for the transmission of Mi'kmaw knowledge and greatly contributed to the assimilation of the Mi'kmaq people. These processes of assimilation prevented the Mi'kmaq from fully exercising the activities that kept them alive physically and spiritually. However, over the last few decades, many Mi'kmaw communities, associations, and organizations decided to reassert their rights and promote their spiritual relationship to the land and animals through the concept of *netukulimk*.

Because of this recent resurgence, *netukulimk* is today vibrant in many Mi'kmaw communities. Some have even decided to develop their own environmental stewardship plans around *netukulimk*. They have returned to the concept of *netukulimk* as a basis for the values and moral principles on which the management of their fisheries is founded.[286] To name only a few initiatives, the Mi'kmaq Grand Council published a document defining *netukulimk* and its implications for hunters, gatherers and fishers across the Mi'kma'ki.[287] The Native Council of Nova Scotia (NCNS) also established the permanent *Netukulimkewe'l Commission* to keep the implementation of treaty rights, and the practices and customs regarding the land and 'resources' focused on the principle of *netukulimk*. The Commission's goal is to "[administer] the orderly, sustainable and respectful access and use of all natural life resources throughout traditional Mi'kmaq territory".[288] The Mi'kma'ki Environments Resource Developments Secretariat (MERDS) was additionally created, and its goal is

[284] Prosper, *et al*, *supra* note 52 at 11.
[285] J Battiste, *supra* note 126 at 326.
[286] Prosper, *et al*, *supra* note 52.
[287] Mi'kmaq Grand Council, *et al, supra* note 48.
[288] "*Netukulimkewe'l* Commission", online: *Native Council of Nova Scotia,* <https://www.ncns.ca/program-services/netukulimkewel-commission/>.

> [t]o identify, promote, negotiate and establish participatory partnerships with resources development companies and government agencies to ensure that the socio-economic concerns, issues, needs and interests of our Community [...] are accommodated through meaningful project term consultation and arrangements to measurably realize benefits as primary stakeholders of the natural resources in and around Mi'kma'ki.[289]

The Sipekne'katik First Nation launched their own Fisheries Management Plan (SFMP) in 2021, which has conservation, treaty rights, economic security, and *netukulimk* as principal objectives:

> The objectives for the Sipekne'katik Fishery are as follows:
>
> > 1. To ensure conservation of the resource to protect and exercise Mi'kmaq Treaty and Aboriginal Rights to harvest natural resources for the benefit of the community and its members.
> > 2. To alleviate family poverty and advance the size and security of the middle class within the Sipekne'katik community.
> > 3. To ensure community adherence to the traditional Mi'kmaq principles of *Netukulimk*.[290]

The SFMP also asks the Sipekne'katik Band Council to engage in scientific activities to monitor species, establish fishing limits, and identify protection zones. The plan includes fishing seasons determined by the Fisheries Director and approved by the Band Council, who must take into consideration DFO-regulated seasons. It goes further by adding restoration and enhancement activities to the Band Council's responsibilities.[291] This fits with the *netukulimk* responsibility to actively care for the environment; the land is held for future generations, and rejuvenation and restoration are thus natural and essential. *Netukulimk* is more than a management system; it is a way of life, including a web of interconnected rights and responsibilities. It contains models, theories, and methods for maintaining sacred and sustainable relationships with the environment that cannot be set aside.

3.4 *Netukulimk* and the Department of Fisheries and Oceans

a. DFO Management

[289] The Mi'kma'ki Environments Resource Developments Secretariat, online: <https://www.ncns.ca/program-services/mikmaki-environments-resource-developments-secretariat-merds/>.
[290] *Sipekne'katik Fisheries Management Plan, supra* note 265.
[291] *Ibid* at s. 16 (d) and (e).

DFO has a history of poor resource management in the Maritimes, prioritizing economic benefits over sustainability. The abrupt decline of the Atlantic salmon stocks over the last century, as well as the decline of the eel population in recent decades, are the results of this long period of mismanagement.[292] The ecologist Russel Lawrence Barsh argues that DFO has, for a long time, ignored many vital biological characteristics of Atlantic salmon:

> A number of human interventions have adversely affected salmon production in Atlantic Canada streams. These interventions include acid rain, the construction of artificial dams and removal of beaver dams and toxic contaminants [...] used in the wood products industry. The use of hatcheries to rebuild salmon stocks reduces the adaptability of salmon to fluctuations in temperature and water chemistry. Hatchery fish also lose resistance to contagious disease, and lose crucial adaptive behaviours such as predator avoidance.[293]

These are just some examples of the contribution of governmental management to the decline of fish stocks. DFO lobster management is not spared by Barsh; he believes that the current lobster management regime relies too heavily on economic factors, rather than biological ones.[294] Instead of imposing catch ceilings, DFO makes it more complicated and costly to harvest: "[a]n example is limiting harvesting to the spring, when lobsters are still relatively widely dispersed before migrating inshore to warmer shallow waters, where they are much easier to catch."[295] This imposes a heavy burden on the shoulders of Mi'kmaw fishers who have smaller boats and less specialized gear that are often not adapted to go off-shore during the winter. Mi'kmaw fishers are thus disadvantaged by multinational companies that have no catch limit imposed upon them. As a consequence, fishing rights have become concentrated in the hands of fewer individuals and companies.[296] Decades of mismanagement, coupled with the historical exclusion of the Mi'kmaq from the fisheries, have greatly affected the "trust-like relationship"[297] between DFO and the Mi'kmaq.

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[292] See Reid, *et al*, *supra* note 130 at 252: "The American eel has been vital to the Mi'kmaq for thousands of years [...], but it has come under threat in recent decades due to the combined effects of habitat destruction and fragmentation from hydroelectric development, as well as targeted commercial fishery operations and other threats."
[293] Barsh, "*Netukulimk*", *supra* note 156 at 31.
[294] *Ibid* at 32.
[295] *Ibid*.
[296] Wiber & Milley, *supra* note 129 at 166.
[297] *Sparrow*, *supra* note 19. The SCC in *Sparrow* held that the fiduciary duty of the Crown obliges the government to maintain a "trust-like relationship" with Indigenous peoples, acting in their best interests and doing everything within their power to protect Aboriginal and treaty rights. See Chapter 5 for a more detailed discussion of the fiduciary duty in the Maritime fisheries context.

b. Conservation

Conservation has become the Crown's main argument for refusing to grant management powers to First Nations for the implementation of their Aboriginal and treaty rights in Canada.[298] In the fishing rights cases *Sparrow*[299] and *Marshall*,[300] the SCC made conservation one of the few reasons for justifying infringement of these constitutionally protected rights. In the fishing dispute that erupted in Saulnierville, where the Sipekne'katik First Nation launched its self-regulated lobster fishery in 2020, conservation was the main argument for DFO's and non-Indigenous fishers' contestation of the Mi'kmaw fishery. However, historically, DFO has forced Indigenous peoples in the Maritimes out of their waters to benefit non-Indigenous fishers.[301] Indigenous fishers' share in the Maritime fishery has thus been minimal and has not been the cause of today's conservation concerns. Indeed, in 2000, the Mi'kmaw fishery constituted only 1.5 percent of the commercial lobster catch in New Brunswick, while unemployment on reserves was excessively high.[302] The Indigenous share of the fisheries in the Maritimes has since increased to six percent in 2021 as a result of, among other things, Mi'kmaw treaty rights implementation and *netukulimk* revitalization.[303]

The *Convention on Biological Diversity*, of which Canada is a member state, prescribes in article 8(j) that each state party must,

> subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge [...].[304]

The *Code of Conduct for Sustainable Fisheries* also calls for traditional knowledge to be taken into account: "Conservation and management decisions for fisheries should be based on the best

[298] King, *supra* note 42 at 9.
[299] *Sparrow*, *supra* note 19.
[300] *Marshall 2*, *supra* note 34.
[301] King, *supra* note 42 at 7.
[302] Sheffer, *supra* note 165.
[303] *Study on the Implementation of Mi'kmaq Treaty Fishing Rights to Support a Moderate Livelihood*, *supra* note 188.
[304] United Nations General Assembly, *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 69.

scientific evidence available, also taking into account traditional knowledge of the resources and their habitat, as well as relevant environmental, economic and social factors."[305]

Despite these international instruments, ISK is still not taken into consideration within environmental decision-making bodies in the Maritimes. For instance, even though there exists a sub-committee within the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), an independent advisory panel to the Minister of Environment and Climate Change Canada that assesses the status of species at risk of extinction,[306] many Indigenous organizations voiced the concern "that meaningful and significant Aboriginal input had not been incorporated into the process."[307] Indeed, Giles *et al* studied the meaningful integration of ISK within governmental decision-making processes in Canada and found that, within COSEWIC, many actors were not even able to explain how and where ISK fits within their assessments.[308]

This fear of using and working with ISK can be explained by differences between Mi'kmaw and Canadian philosophical assumptions, which influence their respective approaches to fisheries management. Mi'kmaw philosophies are anchored in "values related to kinship, sustainability (*Netukulimk*, seven generations), respect for the [fish] and place, and generosity."[309] On the other hand, the government approach "values process, science-based knowledge, compartmentalization, economic benefits and conservation."[310] Thus, the Mi'kmaq people's approach to fisheries management is deeply communal and intertwined with practice, social norms, and oral histories, "while the governmental approach seeks legitimacy in mandates and processes stemming from legislation."[311]

Reluctance towards implementing ISK was especially felt when the place of Indigenous sacredness and spirituality was raised: "[t]he phrase 'there is no place for it' in reference to the cultural and

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[305] *Code of Conduct for Responsible Fisheries (Rome, IT: Food and Agriculture Organization, 1995)* at art 6.4.
[306] See e.g. Joshua E McNeely & Roger J Hunka, *Policy Critique of the Draft Species at Risk Act Overarching Policy Framework: Perspectives for the Improvement of the Government of Canada's Implementation of the Species at Risk Act* (Truro Heights, NS: Maritime Aboriginal Peoples Council, 2011).
[307] Giles, *et al*, *supra* note 122 at 171.
[308] *Ibid* at 178.
[309] *Ibid* at 177.
[310] *Ibid*.
[311] *Ibid*.

spiritual components of a Mi'kmaq knowledge system and COSEWIC, as well as within other parts of the process was used repeatedly during interviews."[312] However, as we studied earlier in this chapter, the sacred and spiritual aspects of Mi'kmaw knowledge cannot be separated from its other components. ISK is not a mere object of Western science; it is embedded in social and cultural contexts and possesses its own models, theories, and methods.[313] Therefore, a commitment to the processes, methods, and theories of ISK is essential to its meaningful use within government decision-making processes.

3.5 Conclusion

Throughout this chapter, I demonstrated that the Mi'kmaq have a deeply embedded conception of conservation which predates colonialism, and that their laws and knowledge systems could guide sustainable management of the fisheries in the Maritimes. Conservationism is enshrined in the concept of *netukulimk*, and has recently resurged in Mi'kmaw communities, guiding them through the exercise of their treaty rights. In contrast, I also showed that DFO, which uses conservation issues as a justification to infringe on treaty rights is, ironically, a key culprit in current conservation concerns. Bearing this in mind, DFO's rejection of Mi'kmaw law is not only paradoxical from a treaty point of view, but also from an environmental point of view.

[312] *Ibid* at 178.
[313] Mulrennan, *supra* note 239 at 106.

Chapter 4: Self-Government as an Approach to Treaty Rights

4.1 Overview

In this chapter, I demonstrate that the main hurdle to the exercise of Mi'kmaw treaty rights is the refusal by the Crown and the SCC to recognise the self-government powers of the Mi'kmaq. To support this argument, I begin by describing the implications of the doctrine of treaty federalism and then examine the historical Crown-Mi'kmaq treaty relationship. As the PFT were agreements between sovereign and self-governing nations, I argue that they must be defined in light of this nation-to-nation relationship, and treaty rights must be articulated under the perspective of self-government, not distributive justice. From there, I undertake a close reading of Aboriginal and treaty rights cases and contend that, from the outset, the doctrine of discovery was the vantage point from which the SCC articulated Aboriginal and treaty rights. This colonial bias led the SCC to carefully avoid recognizing the self-government aspects of Aboriginal and treaty rights. In light of this close reading, I propose that a Canadian law perspective on Mi'kmaw treaty rights must take into account treaty federalism as well as the pre-existing sovereignty of the Mi'kmaq people. This leads me to define Mi'kmaw treaty rights as including the right to the self-management of their fisheries. Finally, I contend that while the Canadian government's discourse and policies are seemingly in favour of Indigenous self-government, in reality, government actions have placed significant obstacles in the way of Mi'kmaw self-government efforts.

4.2 Treaty Federalism in Canadian Constitutional Law

a. Definition

The doctrine of treaty federalism, as articulated by Russel Lawrence Barsh and Sákéj Henderson, suggests that treaties are "political compacts irrevocably annexing tribes to the federal system in a status parallel to, but not identical with, that of the states."[314] In that sense, the Peace and Friendship Treaties (PFT) "illustrate the mutually embracing authority of both British and Mi'kmaw sovereignty and the ability of both nations to establish a new legal order that both affirmed the existing Mi'kmaw order and generated new legal rights and obligations."[315] These

[314] Barsh & Henderson, *supra* note 168 at 270.
[315] Henderson, "Constitutional Powers and Treaty Rights", *supra* note 165 at 720.

treaties affirmed the overlapping of Mi'kmaq and British nations' legal orders[316] and created "a common, mutually comprehensible world"[317] as well as "shared responsibilities rather than supreme powers."[318] Treaties constitute the core of Canada's constitution, in the sense that they are the founding agreements that gave settlers legitimacy to settle on Indigenous lands in what is now known as Canada. The Crown must thus abide by the promises it made to the First Nations of Canada if it wishes to retain/regain legitimacy on this territory.[319]

The existence of the doctrine of treaty federalism in Canada is the result of the British Crown's strategy to use treaty-making as a method to settle on Indigenous lands.[320] Through treaty-making, the Crown recognized the existence of Indigenous authorities and organized societies in the "new world". Consequently, because treaties emanate both from British (and, later, Canadian) and Indigenous legal orders, Indigenous and state laws must be given equal weight when interpreting treaties.[321] Mark Walters explains that the difficulty of defining Aboriginal rights "stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined."[322] As they are often interpreted by Canadian courts, the vantage point is, by default, Canadian law, but "a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives."[323] Therefore, the interpretation of Crown-Indigenous treaties should not rely uniquely on the texts of these agreements, but also on their historical contexts and on multiple layers of Indigenous oral and legal traditions.[324]

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[316] See Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815*, 2nd ed (Cambridge, UK: Cambridge University Press, 2011).
[317] *Ibid* at xxv.
[318] Henderson, "Empowering Treaty Federalism" *supra* note 82 at 253.
[319] *Ibid* at 241.
[320] Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17:2 Queen's LJ 350 at 351. Note that the French Crown also previously used such methods. See, for instance, Gilles Havard, *et al*, *The Great Peace of Montreal of 1701: French-Native Diplomacy in the Seventeenth Century* (Montreal, QC: McGill-Queen's University Press, 2001).
[321] *Delgamuukw, supra* note 90.
[322] Walters, *supra* note 320 at 412.
[323] *Ibid* at 413.
[324] M Battiste, "Narrating Mi'kmaw Treaties", *supra* note 82 at 5; see also Anker, *supra* note 86 at 3-4: "state law does not have a monopoly on legal meaning because language is indeterminate; that its stable, coherent foundation is a myth; and that the reification of law is a denial of the human element, of relation, interpretation, symbolism and embodied practice."

b. The Historical Treaty Relationship

The mid-1700s was a period of great conflict in North America, as colonies were rapidly expanding geographically, and the French and British Crowns were fighting for control over the "new world". The Mi'kmaq had been allied with the Acadians, descendants of French settlers in the Maritimes, for almost a century when the French power began to wane, and British ethnic cleansing of Acadians began. Until this point, Indigenous and Acadian communities had close "cultural, social, and commercial ties."[325] Intermarriage and relationships between them were frequent and, as William C Wicken claims, this had important implications for both communities:

> colonization changed Mi'kmaq and Acadian societies in ways that eased interaction and fostered a convergence of interests. On the one hand, it is assumed that growing dependence on European trade goods altered Mi'kmaq subsistence patterns and provided incentives for conversion to Catholicism and for learning French. On the other hand, it is also assumed that, left largely to their own devices by nearby colonies and Europe, the Acadians survived the harsh environment and the raids of New England privateers by relying not just on their own resources, but on those of the Mi'kmaq. Such mutual dependence made intermarriage both possible and desirable.[326]

As a result of these close links between Acadians and Mi'kmaq, the 1755 expulsion of the Acadians from the Mi'kma'ki by the British was not only an affront to Mi'kmaq military allies, but also to their friends and kin. The Acadian deportation added considerably to the existing tensions between the British and the Mi'kmaq.

Due to the close ties between both nations, conflicts between Acadians and the Mi'kmaq are reported to have been relatively low.[327] Wicken claims that they could occupy the same territory and avoid conflict because "they followed different economic cycles and because, initially, population densities were low. As farmers, Acadians did not at first interfere with Mi'kmaq fishing

[325] William C Wicken, "Re-Examining Mi'kmaq-Acadian Relations, 1635-1755" in Sylvie Dépatie, *et al,* eds, *Vingt Ans Après, Habitants et Marchands: Lectures de l'histoire des XVIIe et XVIIIe siècles canadiens* (Montreal, QC: McGill-Queen's University Press, 1998) 93 at 93 [Wicken, "Re-Examining Mi'kmaq-Acadian Relations"].
[326] *Ibid* at 94.
[327] *Ibid* at 98.

and hunting. Co-occupation was thus possible so long as fish and animal populations remained stable and harvests did not fail."[328] Robert Hamilton explains this from another point of view:

> Even as they became a strong majority by the mid-18th century, the Acadians never established, or sought to establish, anything like political rule or territorial jurisdiction outside of their communities. Acadian law remained strictly internal, and Acadians navigated the legal pluralism of the era through strategic engagement with the overlapping regimes that impacted their lives.[329]

Therefore, the Mi'kmaq traditional way of life was preserved and their territorial control and jurisdiction remained relatively stable despite the growing number of Acadians. However, some complaints by the Mi'kmaq were recorded and demonstrate their desire to keep control over their traditional lands that were adjacent to Acadian settlements. This shows that the Mi'kmaq "believed in the need to maintain jurisdiction over their lands and to enforce proprietary rights."[330]

The relationship between the Mi'kmaq and the British was less harmonious. Encounters began in 1660 with the arrival of British fishing boats from New England in the waters of the Mi'kma'ki.[331] Eventually, Massachusetts asserted its jurisdiction over this fishery, which sparked violent conflicts between the British and the Mi'kmaq:

> The Mi'kmaq were a coastal people: they lived in villages along the coast, at harbours, and at the mouths of rivers for much of the year and fished extensively in coastal waters. Thus, Massachusetts attempting to bring marine areas under their jurisdiction brought them into conflict with the Mi'kmaq.[332]

The hostilities that began in the 1660s lasted until the negotiations of the first Peace and Friendship Treaty in 1726, the Treaty of Boston, by the Wabanaki Confederacy: the Mi'kmaq, Wolastoqiyik, Passamaquoddy, Penobscot, and Abenaki.[333] This first Mi'kmaq treaty relationship with the British was thus closely connected to the British colonies' attempts to assert jurisdiction over Mi'kmaw waters. However, while Massachusetts was spreading its legal authority over the

[328] *Ibid* at 99.
[329] Hamilton, *Legal Pluralism and Hybridity in Mi'kma'ki, supra* note 4 at 130.
[330] Wicken, "Re-Examining Mi'kmaq-Acadian Relations", *supra* note 325 at 98.
[331] Hamilton, *Legal Pluralism and Hybridity in Mi'kma'ki*, *supra* note 4 at 173.
[332] *Ibid*.
[333] *Ibid.*

Mi'kma'ki and was shaping colonial practices there, "[t]here were never attempts to regulate the access or use of marine spaces or resources of the Wabanaki themselves".[334]

After the signing of the 1726 Treaty of Boston, violence continued to erupt as British colonial authority refused to release Mi'kmaw prisoners: "[t]he Mi'kmaq men had believed that when peace was made their brothers, who were being held in Boston for their attacking New England fishing boats, would be released."[335] In addition, the English governor of Nova Scotia at that time, Edward Cornwallis, went so far as to give a reward for each Mi'kmaw scalp settlers brought to the colony's authority.[336] Cornwallis also refused to consult Mi'kmaw Chiefs when using their lands and establishing new settlements. As a result, settlers faced violent retaliation from the Mi'kmaq who were trying to keep control over their ancestral territory. They were ready "to give up their lives to protect the lands in [their] territory [...] because it was essential to [their] culture and identity as a people, [their] strength as a nation".[337]

The treaties negotiated during this chaotic period aimed to benefit the Mi'kmaq people as much as settlers; while the Mi'kmaq could continue to sustain themselves from the territory by keeping hunting, fishing, and gathering as usual on the entirety of the Mi'kma'ki without being molested or interfered with by settlers, settlers could stay on their settlements and use Mi'kmaw waters without retaliation. The Mi'kmaq were fearsome sea warriors and seized about 100 British ships before the making of the last PFT. In *Marshall,* Binnie J spoke about Mi'kmaq sailing abilities and the aspiration by both parties to put an end to violent conflicts and return to peace:

> The Mi'kmaq, according to the evidence, had seized in the order of 100 European sailing vessels in the years prior to 1760. There are recorded Mi'kmaq sailings in the 18th century between Nova Scotia, St. Pierre and Miquelon and Newfoundland. They were not people to be trifled with. However, by 1760, the British and Mi'kmaq had a mutual self-interest in terminating hostilities and establishing the basis for a stable peace.[338]

[334] *Ibid* at 175.
[335] *Ibid* at 174.
[336] Morin, *supra* note 3 at 23.
[337] Palmater, *supra* note 11 at 24.
[338] *Marshall, supra* note 6 at para 17.

The PFT were not about military conquest or land cession, nor were they about asserting authority over Mi'kmaq affairs. The Mi'kmaq were, to the contrary, very wary of the constant British presence in Mi'kmaw waters and refused British authority over them. As the *Royal Proclamation, 1763*[339] of King George III confirmed: Indigenous lands could only be purchased with the full consent of the nations concerned.[340] The Mi'kmaq never gave their consent. Sákéj Henderson stresses that "[t]he Treaty Commissioners repeatedly assured the Indians that the government had no intention of interfering with their way of life or their livelihood."[341] This idea of non-interference was reflected in the testimonies of all the Mi'kmaw witnesses at the *R v Sylliboy* trial: "From my earliest recollections no one ever interfered with our rights to hunt and fish at any time";[342] "[s]ince I was boy heard that Indians got from King free hunting and fishing at all times."[343] The PFT aimed to fulfil both parties' desires through promises of peace, friendship, and mutual aid.

c. Treaties as Relationships

Treaty-making has always been a part of the Mi'kmaw legal tradition as a way of extending the interconnectedness of beings on the Mi'kma'ki.[344] As Mi'kmaw author Fred Metallic illustrates, "every time a treaty is made, [..] we are adding to our extended family."[345] For the Mi'kmaq, the real importance of treaties is thus "the relationship to which both sides had agreed",[346] and the reciprocity of this relationship.[347] As part of the 2021's Mi'kmaq History Month, the Confederacy of Mainland Mi'kmaq, representatives of the Mi'kmaq Grand Council, Nova Scotia Mi'kmaw communities and organizations, as well as provincial and federal governments created a poster to educate the public on treaty relationships, and the text reads as follows:

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[339] *Royal Proclamation of 1763* (King George III, 7 October 1763) reprinted as RSC 1985, App. II, No. l.
[340] M Battiste, "Narrating Mi'kmaw Treaties", *supra* note 82 at 2.
[341] Henderson, "Empowering Treaty Federalism", *supra* note 82 at 251.
[342] Joe Christmas' testimony at the *R v Sylliboy* trial, *supra* note 22, as recorded by Patterson J and transcribed by Wicken in "Heard It from Our Grandfathers", *supra* note 27 at 157.
[343] Grand Chief Sylliboy's testimony at his trial, *supra* note 22, as recorded by Patterson J and transcribed by Wicken, *ibid* at 158.
[344] Fred Metallic, "Treaty and Mi'gmewey", in Marie Battiste, ed, *Living Treaties: Narrating Mi'kmaw Treaty Relations* (Sydney, NS: Cape Breton University Press, 2016) 42 at 46.
[345] *Ibid*.
[346] Michael Coyle & John Borrows, "Introduction" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto, ON: University of Toronto Press, 2017) 3 at 3.
[347] M Battiste, "Narrating Mi'kmaw Treaties" *supra* note 82 at 4.

> Many parts of the Mi'kma'ki are alive — not just the people, plants and animals. The moon, the sun, the stars and even many everyday items are alive to us. When we say *msit no'kmaq* we are honouring all of these relations. Our worldviews and practices, particularly *netukulimk,* protect and sustain all life.
>
> When the Mi'kmaw *Saqmaq* agreed to the Peace and Friendship Treaties with the British in the 1700s, they were extending an offer to live in Mi'kma'ki as part of *msit no'kmaq*. Through this invitation to a treaty relationship, they sought to live in peace and friendship.[348]

The PFT were agreements to live together peacefully as friends on the Mi'kma'ki, with all the life and relationships the land encompassed.[349] The treaties were also understood as a commitment towards future generations and towards Mother Earth: they "need to honour the understanding about balancing 'give and take' within [their] continuous and diverse interactions with the land, with other groups of living beings and non-living things, and with ecological resources."[350] The treaty promise of being able to fish and hunt on the entirety of the Mi'kma'ki meant for the Mi'kmaq that they would retain their relationship of mutual aid and kinship with the animal world and honour the principle of *netukulimk*.[351]

When the Mi'kmaq enter into relations with another nation, they "engage in ceremonies as a way of giving thanks to all of Creation and to show appreciation for the gifts that [they] receive from Mother Earth."[352] The negotiations with Europeans that led to the conclusion of the PFT also contained these spiritual protocols, including gift exchanges, dancing, ceremonies, sweat lodges, and tobacco offerings.[353] Indeed, Mi'kmaw Elders never accepted treaty terms without smoking the sacred pipe with their treaty allies. Fred Metallic explains that the smoking of the pipe represents, for the Mi'kmaq, the unification of "the physical and spiritual realm of [the] territory."[354] He continues: "When Mi'gmaq smoked the pipe and thereby gave life to the treaty agreement, it was understood and agreed by the parties that we were creating a new vision for the

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[348] Confederacy of Mainland Mi'kmaq, *et al,* "Mi'kmaq History Month" (October 2021), online: <https://mikmaqhistorymonth.ca/posters/>.
[349] J Battiste, *supra* note 126 at 2.
[350] Nova Scotia Curriculum, *supra* note 249 at 2.
[351] Patrick J Augustine, "Mi'kmaw Relations", in Marie Battiste, ed, *Living Treaties: Narrating Mi'kmaw Treaty Relations* (Sydney, NS: Cape Breton University Press, 2016) 52 at 55.
[352] Stephen J Augustine, "Negotiating for Life and Survival" in Marie Battiste, ed, *Living Treaties: Narrating Mi'kmaw Treaty Relations* (Sydney, NS: Cape Breton University Press, 2016) 16 at 18.
[353] *Ibid* at 18.
[354] Metallic, *supra* note 344 at 47.

territory based on a shared legal meaning."[355] Europeans agreed to these protocols and therefore entered into an old tradition for maintaining peaceful and respectful relationships with neighbours.[356] The PFT thus established the basis of a relationship between the Mi'kmaq and the British Crown, but also with the land and the animals.

The change in colonial regime brought uncertainty to the Mi´kmaq as to whether British settlers would let them fish, hunt, trap and gather throughout their territories. Given that the Mi'kmaq had been the allies of the French — who did not interfere with Mi'kmaw traditional activities and territories to any great extent — the Mi'kmaq needed reassurance that they could continue to enjoy their ancestral territories and activities without being molested by British settlers. For the Mi'kmaq, the PFT were thus about protecting and sharing their lands and waters. They also included promises of mutual political and military protection, as well as promises "about sharing what the Mi'kmaq had in abundance and the idea of equal opportunity through trade."[357]

The British as much as the Mi'kmaq benefitted and believed in this mutual relationship of friendship. Indeed, the continuity of the Crown's commitment to this relationship of mutual aid and exchange over the centuries was illustrated by the testimonies of six Mi'kmaw men at the *R v Sylliboy* trial, at which they claimed that they and their fathers and grandfathers received gifts in exchange for keeping their treaty promises.[358] Francis Gould, one of these witnesses, explained that his grandfather would sometimes go to Sydney and would always come back with gifts from the Crown for keeping their treaty promises: "He [his grandfather] told me he got these from the King. Under the Treaty. We Promised to keep Treaty and get these things in return."[359] This direct relationship with the King/Crown was enshrined in Mi'kmaw consciousness and became an integral part of their oral tradition.[360]

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[355] *Ibid*.
[356] *Ibid* at 19.
[357] M Battiste, "Narrating Mi'kmaw Treaties" *supra* note 82 at 9.
[358] Wicken, "Heard It from Our Grandfathers", *supra* note 27 at 148.
[359] Gould's testimony at the *R v Sylliboy* trial, *supra* note 22, as recorded by Patterson J and transcribed by Wicken in "Heard It from Our Grandfathers", *supra* note 27 at 148.
[360] Hamilton, *Legal Pluralism and Hybridity in Mi'kma'ki*, *supra* note 4 at 205.

Over the course of the second half of the 19th century and onwards came major changes in the Canadian policy on Indigenous peoples. Instead of treating Indigenous peoples as peoples as when the PFT were negotiated, the Crown started to treat them like law-abiding *subjects* and enacted many laws to assimilate them into Canadian society, such as the *Gradual Civilization Act*, 1857[361] and the *Indian Act*.[362] The ancient nation-to-nation treaty relationship with Indigenous peoples no longer seemed to fit within the legal framework developed by the Crown. With increasing settlement and changing policy, the treaty relationship gradually eroded as treaty promises were progressively broken.[363] As Indigenous peoples began to assert their treaty rights before Canadian courts, they were told that their treaties were of no force because they never had the "authority" to negotiate them in the first place.[364] The constitutional status of treaties was eventually recognized in 1982 with the patriation of the constitution, but the discourse of the Crown's overarching sovereignty over "Indigenous subjects" remained prominent in judicial decisions.[365]

4.3 The Supreme Court (Mis)Interpretation of s. 35 Rights

Unlike New Zealand, Canada never created an independent forum for the interpretation of historical Indigenous-Crown treaties, putting the weight and power of treaty interpretation exclusively on Canadian courts and thus excluding Indigenous institutions. As the first SCC case to analyse the meaning of s. 35, *Sparrow* provides an insight into the underlying assumptions of SCC's interpretation of s. 35 rights.[366] By asserting that s. 35 is not part of the *Canadian Charter*, but that s. 35 rights can nonetheless be unilaterally infringed, "the court is changing section 35(1) from being a jurisdictional provision that relates to the division of powers and Canadian federalism to being a set of Charter-like provision rights."[367] The Court has thus moved treaty interpretation from a nation-to-nation model to a "sovereign-to-subject model of rights".[368]

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[361] Canada, No. 58, 3rd Session, 5th Parliament, 1857.
[362] RSC 1985, c I-5.
[363] For instance, Mi'kmaq were massively displaced and confined to overpopulated reserves through the *Indian Act* and the Centralization Policy of 1942. Their hunting and fishing rights were limited to the boundaries of reserved lands. See e.g. Prosper, *et al, supra* note 52 at 11; Wiber & Milley, *supra* note 129 at 68.
[364] See e.g. *Sylliboy, supra* note 22.
[365] See e.g. *Sparrow*, *supra* note 19 at 1103.
[366] Joshua Ben David Nichols, "UNDRIP and the Move to the Nation-to-Nation Relationship", in John Borrows, *et al*, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON: Centre for International Governance Innovation, 2019) 145 at 146.
[367] *Ibid* at 147.
[368] *Ibid.*

In *Badger,* the SCC developed a set of principles of Crown-Indigenous treaty interpretation, and summarized them as follows:

> First, it must be remembered that a treaty represents an exchange of solemn promises [...] Second, the honour of the Crown is always at stake in its dealing with Indian people.... It is always assumed that the Crown intends to fulfil its promises. [...] Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. [...] Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention.
>
> Treaties and statutes relating to Indians should be liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians. In addition, when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement [...] As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing.[369]

Additionally, the SCC opines in the *R v Van der Peet*[370] and *Sparrow*[371] that Indigenous perspectives must be considered when interpreting s. 35 rights. Despite the existence of these interpretive principles, courts usually analyse Indigenous perspectives only at the evidentiary level, ignoring them when determining the very content of a treaty.[372] Coupled with the minimal training in Indigenous law provided to the judiciary, this ignorance of Indigenous perspectives and of the historical nation-to-nation treaty relationship has led to erroneous interpretations of the role of treaty partners.

a. The Doctrine of Discovery as the Supreme Court's Approach to Aboriginal and Treaty Rights

[369] *Badger, supra* note 20 at para 41-52 [emphasis added].
[370] *R v Van der Peet*, [1996] 2 SCR 507 at para 49 [*Van der Peet*].
[371] *Sparrow*, *supra* note 19 at 1112.
[372] See Fraser Harland, "Taking the Aboriginal Perspective Seriously" (2018) 16 Indigenous LJ 21.

The approach the SCC adopts for defining treaty rights is similar to the one adopted by the same court for articulating Aboriginal rights in the *Van der Peet* trilogy,[373] as both approaches are based on the same assumptions about the origins and extent of the Crown's sovereignty. Therefore, I will analyse Aboriginal and treaty rights cases together to better understand the rationale behind the landmark decisions that shaped Aboriginal law and policies in Canada.

The Doctrine of Discovery

In the *Van der Peet* decision, Chief Justice Lamer (as he then was) developed a test for Indigenous peoples to meet whenever they claim the protection of a s. 35 Aboriginal right: the practice claimed must have been an integral part of the specific distinctive culture of the Indigenous people in question prior to contact with Europeans.[374] I argue that the *Van der Peet* test, like SCC's interpretation of Mi'kmaw treaty rights in *Marshall*, is erroneous in Canadian law: both endorse the racist doctrine of discovery.[375] This doctrine is founded on the false premise that America was legally empty when Europeans "discovered" the continent, "allowing European law to control Indigenous peoples."[376] This premise is based on assumptions about the inferior legal status of Indigenous peoples and on the idea that "Indigenous peoples had imperfect claims to sovereignty and title when Europeans arrived."[377] I believe, as Borrows asserts, that this doctrine is "a legal fiction that does not take account of the complexities of Canada's formation."[378]

By qualifying Aboriginal rights as a practice "aris[ing] out of the *distinctness* of Aboriginal peoples"[379] rather than arising from the fact that Indigenous peoples were organized societies and *peoples* with an "inherent right of self-determination"[380] before and after contact, Lamer CJ

[373] *Van der Peet, supra* note 370; *R v NTC Smokehouse Ltd*, [1996] 2 SCR 672; and *R v Gladstone*, *supra* note 37. It is also similar because in *Badger*, *supra* note 20 at para 73, the Court says that the Aboriginal rights analysis from *Sparrow* applies to treaties.
[374] *Van der Peet, supra* note 370 at para 80.
[375] *Ibid*.
[376] John Borrows, "The Durability of Terra Nullius: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701 at 702 [Borrows, "The Durability of Terra Nullius"].
[377] John Borrows, "Canada's Colonial Constitution", *supra* note 113 at 18.
[378] *Ibid*.
[379] Joshua Ben David Nichols, "Of Spectrums and Foundations: An Investigation into the Limitations of Aboriginal Rights" in Robert Hamilton, *et al,* eds, *Wise Practices: Exploring Indigenous Economic Justice and Self-Determination* (Toronto, ON: University of Toronto Press, 2021) 115 at 134 [Nichols, "Of Spectrums and Foundations"].
[380] *Ibid*.

ignores the rationale behind the existence of Aboriginal rights: pre-existing Indigenous sovereignty. Indeed, he argues that the purpose of s. 35 is "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[381] Through this formulation, he carefully ignores the pre-existence of Aboriginal societies as self-governing and sovereign nations and simply assumes the unilateral imposition of the Crown's sovereignty over Indigenous peoples, which can only be justified through the doctrine of discovery. More explicitly in *Sparrow*, the Court confirms its adherence to the doctrine of discovery by stating

> that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.[382]

From the outset, the SCC refuses to provide any proof of equitable and honest purchase of lands from Indigenous peoples, and simply assumes that the Crown's title appeared through the "force of law alone"[383] — or was it via "legal magic"?[384]

Reconciliation ... With Colonialism

While the *Van der Peet* test considerably limited the possibility of successfully proving the existence of an Aboriginal right by putting a heavy burden of historical proof on the shoulders of Indigenous parties, the majority of the SCC in *Gladstone* expanded the standard for Crown infringement of s. 35 rights when commercial rights are concerned. Instead of providing a form of priority for the Indigenous commercial fishery — which would have led to a necessary collaboration between DFO and Indigenous commercial rights holders — the SCC mixes the requirement of priority with the requirement to consult and accommodate, rendering the notion of priority redundant in cases in which commercial rights are at stake:

> [In cases where commercial rights are at stake,] the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful

[381] *Van der Peet*, *supra* note 370 at para 31.
[382] *Sparrow, supra* note 19 at 1103 [emphasis added].
[383] Borrows, "Canada's Colonial Constitution", *supra* note 113 at 18.
[384] See McNeil, *supra* note 59 at 294.

> of the fact that those rights have priority over the exploitation of the fishery by other users.
> [...]
> Questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are those enumerated in *Sparrow* relating to consultation and compensation, as well as questions such as whether the government has accommodated the exercise of the aboriginal right to participate in the fishery.[385]

The *Gladstone* decision was the first to recognize an Aboriginal right with a commercial dimension, and what could have been the beginning of jurisdictional co-existence and constitutional partnership was cut short by the Court's creation of yet another burden on Indigenous peoples' autonomy in the name of reconciliation:

> Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.[386]

In the name of reconciliation, the majority of the Court in *Gladstone* makes sure that the responsibility of the "allocation of the resources" remains in the hands of the Crown.[387] In *Lax Kw'alaams*, the Court goes further by enshrining consideration of broader community interests within the steps for defining commercial Aboriginal rights:

> 4. Fourth, and finally, in the event that an Aboriginal right to trade commercially is found to exist, the court, when delineating such a right should have regard to what was said by Chief Justice Lamer in *Gladstone* (albeit in the context of a *Sparrow* justification), as follows:
>
> > Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies

[385] *Gladstone, supra* note 37 at paras 62-64.
[386] *Ibid* at para 73.
[387] *Ibid* at para 62.

> with the rest of Canadian society may well depend on their successful attainment. [*Gladstone*]; para. 75.[388]

The Court thus considers reconciliation as the reason behind the enactment of s. 35, and repeatedly uses it to limit the recognition of Aboriginal rights and to fit s. 35 rights within the Crown's existing regulatory framework. However, I contend that such an interpretation of reconciliation that serves to limit self-government opportunities and that "requires that Indigenous peoples reconcile themselves to colonialism"[389] is erroneous. Although s. 35 is very broad and its concrete implications unclear, the parliamentary debates of the House of Commons Special Committee on Indian Self-government, which led to the publication of the *Penner Report* in 1983,[390] as well as the final text of the demised Charlottetown Accord of 1992[391] and the Inherent Right of Self-Government Policy of 1995[392] clearly demonstrate that both government actors and Indigenous peoples believe that s. 35 comprises an inherent right of self-government. In the same stream of ideas, Barsh and Henderson remind us that

> more than a year before *Van der Peet*, the Royal Commission on Aboriginal Peoples issued two reports on the nature of the Crown-Aboriginal relationship which spoke in terms of "co-existence" and "partnership", which is to say a sharing of powers and a division of constitutional authority in furtherance of First Nations' unextinguished right to self-government." The Chief Justice, however, did not refer

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[388] *Lax Kw'alaams Indian Band v Canada (Attorney Genera*l), 2011 SCC 56 at para 46 [emphasis in original]. In *Ahousaht Indian Band and Nation v Canada (Attorney General),* 2021 BCCA 155 at para 69, the BCCA interprets the addition of the fourth criterion in *Lax Kw'alaams* as follows:

> Aboriginal rights should not be characterized as being artificially narrow, but equally, courts should avoid extravagant articulations of them that are inconsistent with the need for them to exist within a broader social context. Courts must recognize that traditional practices will not, typically, serve as a basis for unbounded Aboriginal rights.

[389] Borrows, "Canada's Colonial Constitution", *supra* note 113 at 33.

[390] Canada, House of Commons, Special Committee on Indian Self-Government & Keith Penner, *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa, ON: Queen's Printer for Canada, 1983) [*Penner Report*].

[391] *Charlottetown Accord Draft Legal Text,* 28 August 1994, s. 27 [Charlottetown Accord]. If the Charlottetown Accord had been approved by referendum by the Canadian population, a third order of Indigenous governments, autonomous from federal and provincial powers, would have been enshrined in and protected by the constitution. The negotiations which led to the Accord brought several Indigenous leaders and associations together to debate in great depth the provisions with representatives from the federal and provincial governments. Thus, I believe that they ought to be given considerable weight in the interpretation of s. 35.

[392] Canada, Department of Indian and Northern Affairs, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa, ON: Canada Communication Group, 1995):

> The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown's relationship with treaty First Nations.

> to the Royal Commission's views. "Reconciliation", then, was pulled from thin air, in defiance of the main trends in contemporary Canadian constitutional thought.[393]

An interpretation of reconciliation that helps the Court to justify its rejection of any self-government powers to Indigenous peoples is thus not anchored in the political understanding of s. 35. It forces Indigenous peoples to reconcile with the Crown's sovereignty, but leaves the Crown free from major efforts at reconciliation. However, a "one-sided exchange can only go for so long."[394]

Treaty Rights and Discovery

When it comes to defining treaty rights, SCC's approach is very similar to the one adopted to assess the existence of Aboriginal rights. In the *Marshall* decision, the SCC articulated Mi'kmaw treaty rights as a permission to practice certain activities (here, fishing), ignoring the self-government aspect of the right. This approach to treaty rights ignores the very nature of the nation-to-nation treaty relationship and the context in which the PFT were negotiated. The Court instead takes a distributive justice approach, which is neither historically nor legally accurate:

> the Supreme Court of Canada consistently chooses to account for the unique political status of Indigenous peoples *within* the contract-confederation story. Instead of situating treaties as the very things which empower settler legitimacy, settler legitimacy requires no justification and is simply presumed, and treaties are imagined as contracts executed under the logic of distributive justice.[395]

By interpreting the PFT as merely granting permission to fish, the SCC forgets that the PFT were not instruments of distributive justice, but were rather agreements between sovereign nations that served to avoid conflicts and to build a relationship of friendship and mutual aid. The relational aspect of the PFT is even enshrined in the text of the treaties through the repetitive use of the language of kinship: "the King as 'father' and the colonialists as 'brothers'."[396] By ignoring this relationship and by anchoring its decisions within a contractual or distributive justice logic, the

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[393] Russel Lawrence Barsh & James [Sákéj] Youngblood Henderson, "The Supreme Court's *Van Der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993 at 999.
[394] David Howes, "From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929" (1987) 32:3 McGill LJ 523 at 557.
[395] Mills, "What Is a Treaty?", *supra* note 82 at 224. Mills' chapter explores in depth why a contractarian interpretation of treaties is uniquely violent to Indigenous peoples.
[396] Henderson, "Empowering Treaty Federalism", *supra* note 82 at 248; see also Coyle & Borrows, *supra* note 346 at 3.

Court can avoid granting self-government powers to the Mi'kmaq and escapes tackling the thorny question of the Crown's sovereignty.[397] Instead, it frames treaty rights so that they "can be accommodated within the existing Crown regulatory apparatus."[398]

b. From Discovery to Treaty Federalism: Defining Treaty Rights in Light of the Treaty Relationship

I believe that it is possible to counter this flawed approach to treaties by putting emphasis on the doctrine of treaty federalism when articulating treaty rights. Indeed, Sákéj Henderson states that "[s]elf-determination has always been the context of all treaties"[399] and the PFT are no exception. These treaties kept land authority in the hands of Indigenous governments, "but allowed the British coastal settlements to exist under English law within the reserved tenure."[400] While the SCC in treaty and Aboriginal rights cases interpreted treaties from the vantage point of (unquestioned) Crown sovereignty — as if treaties were documents granting mere permission to practice specific activities — we must instead articulate treaty rights in light of the historical treaty relationship. In other words, instead of interpreting treaties as merely protecting a set of practices such as fishing or hunting, courts must uncover the true meaning of these practices for the Indigenous nation as a self-determining nation, and in doing so, analyze the Indigenous law of the people on its own terms. This approach was adopted by Justice L'Heureux-Dubé in her dissent in *Van der Peet,* and taken up by Nichols to reimagine Aboriginal rights through the prism of self-determination:

> Her definition of Aboriginal rights places the emphasis on the fact that the various land use practices that are in question can only acquire their meaning and purpose when they are seen in relation to the "organized societies" they are grounded in. The rights that are "recognized and affirmed" in s. 35 are not merely a set of *sui generis* Aboriginal relics that can be fit into existing unilateral regulatory systems and curated by judicial review, but rather they are the rights of Aboriginal peoples.[401]

Bearing this in mind, the question I ask to define the nature and scope of Mi'kmaw treaty rights is: what did fishing and hunting "as usual" entail for the Mi'kmaq as a self-governing people when

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[397] For more details on the legitimacy of the Crown's sovereignty, see McNeil, "Indigenous and Crown Sovereignty in Canada" *supra* note 59.
[398] Nichols, "Of Spectrums and Foundations", *supra* note 379 at 135.
[399] Henderson, "Empowering Treaty Federalism", *supra* note 82 at 303.
[400] *Ibid* at 261.
[401] Nichols, "Of Spectrums and Foundations", *supra* note 379 at 137.

they entered into the treaty relationship? After having analyzed the Mi'kmaq-Crown historical relationship, I believe that for the Mi'kmaq, this treaty promise meant that they could fish freely without interference from settler society, as confirmed by the testimonies of the *Sylliboy* trial witnesses.[402] Indeed, one of the core reasons the Mi'kmaq fought with British colonists is that the British tried to assert authority over the waters of the Mi'kma'ki. The Mi'kmaq would not have negotiated a treaty whereby they gave up their authority over their own waters, and nothing in the treaty can be interpreted as such. The treaty relationship was, on the contrary, about sharing what they had in abundance.[403] In this relationship, they were under the protection of the King, but retained their autonomy and self-determining powers.[404] I explained earlier in this thesis that Mi'kmaw fishing activities were part of a broader framework for living from/with the land that included responsibilities towards the fish, the territory (land and water), and the communities as a whole.[405] Fishing was about sustaining themselves and their community and entertaining a relationship of mutual aid with the animals, the land, and community members. Thus, in light of the historical treaty relationship, the treaty right should be characterized as protecting of the ability of the Mi'kmaq to sustain themselves through the fisheries without interference from governments, and to assume their inherent responsibilities towards the fish (self-management).

If I can agree that there exists an internal limitation — "moderate livelihood" — to the exercise of this treaty right, it is not for the same reason as the one given by the SCC in *Marshall*. The Court held that the PFT included a right for the Mi'kmaq to trade their catch for "necessaries", and that the modern application of this right would be a right to sell their catch for a "moderate livelihood", but ignored the very reasons why the Mi'kmaq only fished and traded for "necessaries". By analysing the "necessaries" component of the PFT under a Mi'kmaw perspective, we realize that the Mi'kmaq never accumulated wealth from their fisheries because they managed their behaviours in accordance with the principle of *netukulimk* — take only what you need —[406] in which the gift of fishing comes with the direct responsibility of renewing, protecting, and respecting the fish as well as all living things.[407] Illustrating this way of interacting with the animal

[402] See section 4.2(c).
[403] M Battiste, "Narrating Mi'kmaw Treaties" *supra* note 82 at 9.
[404] *Ibid* at 4.
[405] See Chapter 3, section 3.3; see also Henderson, "Legal Inheritances", *supra* note 1 at 20.
[406] The translation of *netukulimk* by Mi'kmaw Elders, in Barsh, "*Netukulimk*", *supra* note 156 at 17.
[407] Henderson, "Legal Inheritances", *supra* note 1 at 20.

world, Wilson D Wallis and Ruth Sawtell Wallis claim that "[y]ou should not bother animals that you cannot use. Leave them alone. It is wrong to kill them unless you have need of them. Let them go where they want to go."[408]

By reaffirming the "government's general regulatory power",[409] the Court simply assumed that the management and regulatory authorities were vested in the Crown and did not consider that, within the Mi'kmaw legal tradition, the act of harvesting was deeply linked to the *responsibility* of taking care of the fish and marine ecosystems. Therefore, by concluding that the Mi'kmaw right is limited to a moderate livelihood,[410] the Court should also have concluded that the treaty right includes, but is not be limited to, a management component.

4.4 The Crown's Quandary: The Political Recognition of Indigenous Self-Government and the Sharing of Its Sovereign Powers

In this section, I assert that, in addition to the general intent and context of the PFT, government policies on Indigenous self-government support a Mi'kmaw right to the self-management of their fisheries as flowing from s. 35 right to self-government. Despite this political recognition of the inherent right to self-government, concrete government actions suggest, to the contrary, that the Canadian government refuses, in practice, to implement the Mi'kmaw inherent right to self-government by sharing its sovereign powers. Indeed, the DFO continues to block Mi'kmaq people's attempts to manage their fisheries, thus leading to the ongoing infringement of the Mi'kmaw treaty right to self-management.

a. Government Policies on Self-Government

The official discourse of the Government of Canada supports Indigenous peoples' inherent right to self-government. In 1995, the *Inherent Right of Self-Government Policy*, "recognize[d] the inherent right of self-government as an existing Aboriginal right under section 35 of the

[408] Wilson D Wallis & Ruth Sawtell Wallis, *The Micmac Indians of Eastern Canada* (Minneapolis, MN: University of Minnesota Press, 1955) at 107.
[409] *Marshall 2*, *supra* note 34 at para 25.
[410] Philip P Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law" (1993) 107 Harvard L Rev 381 at 428-29.

Constitution Act, 1982."[411] In another policy paper published in 2018,[412] the Government of Canada "recognize[d] that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government."[413] This policy further specifies that "Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government."[414] In the preamble of the *United Nations Declaration on the Rights of Indigenous Peoples Act,* Parliament reiterates "that all relations with Indigenous peoples must be based on the recognition and implementation of the inherent right to self-determination, including the right of self-government".[415]

While these official statements should be encouraging for Indigenous peoples, more than 20 years after the *Marshall* decision the Mi'kmaq are still awaiting concrete governmental actions to support their right to self-government. Regarding the fisheries, the measures adopted since *Marshall* have favoured the incorporation of the Mi'kmaq within the top-down Canadian government structure rather than implementing a true Mi'kmaw self-regulated fishery. Melanie Wiber and Chris Milley assert that the Canadian government's answer to the *Marshall* decision, which recognized Mi'kmaw treaty rights to fish, hunt, and gather, "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."[416] While the communal and spiritual aspects of Mi'kmaw fisheries, as well, as their self-government aspirations, render the commercial system incompatible with Mi'kmaw treaty-based fisheries, the government has ignored this incompatibility and tried to integrate the Mi'kmaq within the commercial fishing industry.

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[411] Canada, Department of Indian and Northern Affairs, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, *supra* note 392.
[412] Canada, Department of Justice, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* (2018) online (pdf): <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.
[413] *Ibid* at 5.
[414] *Ibid* at 9.
[415] *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, SC 2021, c C-14 at preamble.
[416] Wiber & Milley, *supra* note 129 at 163.

b. *Post*-Sparrow *and Post*-Marshall *Context*

After the *Sparrow* decision, which recognized the priority of Indigenous food, social, and ceremonial fisheries over non-Indigenous commercial and recreational fisheries, the DFO established the Aboriginal Fisheries Strategy (AFS) program to control Indigenous access through community-based agreements. This program imposed quotas on First Nations' food fisheries that were neither grounded in stock abundance nor communities' needs.[417] As a result, some communities refused to adhere to these agreements and the funding packages that came with them and asserted their self-government right to manage their own food fisheries.[418] However, while some Mi'kmaw communities, such as the Acadia First Nation, ran their own food fishery management programs, they eventually saw quotas unilaterally imposed upon them by DFO to prevent the sales of food-fishery catch to non-natives.[419] Despite the government's official discourse on self-government, DFO chose the unilateral imposition of quotas instead of improving Indigenous management and enforcement capacities.

After the issuance of the *Marshall* decision in 1999, recognizing the Mi'kmaq right to sell their catch for a moderate livelihood, the DFO switched from AFS to the negotiation of Interim Fisheries Agreements (IFAs). These agreements aimed at integrating Mi'kmaw fishers within the commercial fisheries through non-Indigenous fishers' licence buyouts, financial incentives, and mentorship programs. However, IFAs required First Nations to abide by DFO regulations to be illegible to receive financial aid and other incentives. According to the Atlantic Policy Congress of First Nations Chiefs, who advised bands not to sign IFAs, they also had potential implications for future court decisions about treaty rights.[420] Indeed, in Canadian law, signing agreements covering the same issues as the ones covered in the PFT could have the effect of extinguishing these older arrangements.[421] The decision *Shubenacadie Band v Canada (AG)* addresses this

[417] *Ibid* at 176.
[418] *Ibid*.
[419] *Ibid*.
[420] Esgenoopetitj First Nation, Band Council, *Backgrounder on the Situation in the Mi'kmaq Community of Esgenoopetitj* (12 May 2000) at 2.
[421] However, since the Mi'kmaq were forced to sign these agreements in order to enjoy their treaty rights, IFAs should not extinguish previous treaties. Without signing IFAs, Mi'kmaq faced DFO charges and non-Indigenous fishers' reprisals.

problem and describes the worries of the Shubenacadie/Sipekne'katik First Nation's then Chief concerning IFAs as follows:

> [Chief Maloney] clarified that what the Band refused to do was negotiate limited conditional access to a resource to which it asserted a constitutionally protected treaty right of access. [...] He expressed the expectation that "you will consult with us, with rather than without prejudice, about our access and what limits you feel can be properly justified". Chief Maloney commented:
>
> > I wish to also state that I am quite offended that you as the Crown's representative see your treaty obligations to us as being fulfilled by a mere "without prejudice" agreement negotiated with your bureaucrats. I believe this action trivializes our nation-to-nation treaty and is totally unacceptable.[422]

According to Chief Maloney, the IFAs were not real Mi'kmaq-Crown agreements because the possibility of negotiation was limited to very narrow aspects of an already established regulation. The goal behind IFAs was to integrate the Mi'kmaq within the DFO's regulatory scheme. The Minister responded to Chief Maloney that IFAs were only a temporary solution to accommodate the immediate needs of Aboriginal fisheries after the release of the *Marshall* decision.[423] Yet, more than 20 years later, these IFAs are still in effect and no other kind of agreement has been proposed in the Maritimes.[424]

The IFA program fragmented the Mi'kmaq into groups who were in favour of signing IFAs to access financial incentives and the commercial market, and other groups who wanted to keep the full exercise of their treaty rights to fish and manage their fisheries according to their own values and laws. Indeed, the Mi'kmaw treaty right to fish is communal in nature,[425] and the individual transferrable quotas (ITQs) used by DFO to regulate commercial fisheries do not fit with this communal nature, nor with Mi'kmaw law. The SCC emphasized the importance of the difference between common law property rights and collective Indigenous rights:

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[422] *Shubenacadie Band v Canada (AG),* (2000) 193 FTR 267 at para 9 (emphasis added).
[423] *Ibid* at para 11.
[424] In British Columbia, some First Nations were able to negotiate agreements with DFO outside IFAs and AFS programs, but only after multiple, long, and expensive legal battles and because of BC's particular context: most BC First Nations have no treaties and thus clearly have unceded title to their lands and waters. However, in BC, like in Nova Scotia, there is no recognition of Indigenous peoples' rights to self-management and self-government. See section 5.3(c).
[425] *Marshall, supra* note 6.

> Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin*, *supra*, at p. 382, referred to as the "*sui generis*" nature of aboriginal rights. [426]

This excerpt talks about the importance of not managing Indigenous collective rights and Canadian property rights in the same way. However, despite the development of community-based management initiatives by fisher organizations, strong divisions between small-scale fishers and Indigenous fishers who were both against ITQs, and large-scale commercial fishers who benefitted from this ownership system, allowed DFO to remain inflexible regarding the individual ownership of quotas and licences.[427] To remedy the inconsistencies between Mi'kmaw law and DFO rules, many Mi'kmaw communities who had signed IFAs decided to complement DFO rules with their own additional regulations, notably on the "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)."[428]

Some communities never signed IFAs with DFO, and one of them, the Sipekne'katik First Nation, recently launched its own self-regulated lobster fishery. Tensions arose between non-Indigenous fishers who claimed that the Sipekne'katik fishery was illegal and Indigenous fishers who stood up for their treaty rights. Non-Indigenous fishers "cut the lines and seized traps almost as fast as they were dropped",[429] and a Mi'kmaw lobster processing plant was set on fire and burned to the ground. Despite the federal government's official policy supporting Indigenous self-government, the Nova Scotian and federal governments threatened to prosecute those who bought lobster from Sipekne'katik fishers, sending the message that the Sipekne'katik moderate livelihood fishery was, in fact, illegal. However, the *Marshall* decision has been clear that the Crown cannot infringe on the Mi'kmaw treaty right to a moderate livelihood fishery without justifying it on conservation or another "valid" legislative grounds.

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[426] *Sparrow, supra* note 19 at 1112.
[427] Wiber & Kennedy, *supra* note 129 at 292.
[428] Wiber & Milley, *supra* note 129 at 177.
[429] Brett Forester, "'Lack of Awareness' About Treaties at Heart of Lobster Protests, Mi'kmaw MP Says", *APTN National News* (22 September 2020), online: < https://www.aptnnews.ca/national-news/lack-of-awareness-about-treaties-at-heart-of-lobster-protests-mikmaw-mp-says/>.

While those opposed to the Sipekne'katik fishery focus on lobster conservation, the concerns about the Sipekne'katik fishery's impact on lobster stock are not founded in scientific evidence. With the conservation plan put in place by Sipekne'katik First Nation (analyzed in section 3.3 of this thesis) and the presence of Mi'kmaw enforcement officers, experts voiced that the Sipekne'katik fishery was not a serious threat to lobster stocks.[430] In fact, given the size of the Sipekne'katik fishery, which issued seven licences with 50 traps each in 2020 — compared to 390,000 commercial fishery traps during the regulated season[431] — the impact of this fishery on lobster stocks is minimal; it accounts for less than one percent of the catch. Indeed, the Department of Biology at Dalhousie University released a statement in support of Mi'kmaw-regulated fisheries that refuted conservation concern claims:

> We denounce, in the strongest possible terms, the acts of violence perpetrated by anyone against Mi'kmaw harvesters pursuing their rights, and likewise denounce any claim that such actions are justified in the name of conservation. There is no credibility on biological grounds to the conservation concerns, given the terms of the fishery initiated by the Mi'kmaw community.[432]

Conservation concerns are raised because conservation is one of the only grounds that can justify an infringement of Mi'kmaw treaty rights to fish and sell their catch, according to the SCC.[433] The same argument was raised against Burnt Church/Esgenoopetitj First Nation's self-regulated fishery in the 2000s. This community had initially decided not to sign IFAs in order to ensure the continuity of their treaty rights, but after years of conflicts with non-Indigenous fishers and government fisheries officers, community fishers became exhausted from continually being arrested, intimidated, and having their gear destroyed. As a consequence of this collective exhaustion, a new Chief was elected to the Band Council with the mandate of negotiating an IFA with the government, setting aside their self-regulated fishery. In April 2002, an Agreement-in-Principle was signed, in which the "Band Council agreed to abide by the rules and regulations of federal government, in return for fishing boats, licences, quota in all regional fisheries (including

[430] Dalhousie Department of Biology, "Dalhousie Department of Biology Stands with Mi'kmaw Fishers" (24 September 2020), online: <https://www.dal.ca/faculty/science/biology/dalhousie-department-of-biology-stands-with-mi-kmaw-fishers.html>.
[431] Brett Forester, *supra* note 429.
[432] Dalhousie Department of Biology, *supra* note 430.
[433] However, in *Gladstone*, *supra* note 37, the court cited other possible grounds, for instance, at paragraph 75: "with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard."

lucrative snow crab quota) and research money."[434] The Agreement was initially signed for a period of two years, but the Band has continued to renew it with DFO.[435]

Conservation became the major ground upon which treaty rights and self-government could be set aside. However, the true reason for setting aside self-government powers is the refusal to share its sovereign powers: "although the [SCC]'s recognition of aboriginal rights seems positive, in practice it offers little practical leverage for aboriginal communities wanting to build a sustainable livelihood from the fishery."[436] The Court opined in *Sparrow* that "Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats to the existence of aboriginal rights and interests."[437] Conservation has been shown to be one of these objectives.

4.5 Conclusion

Throughout this chapter, I revealed the existence of a Mi'kmaw constitutionally protected right to the self-management of their fisheries. Because a nation-to-nation relationship is at the core of the creation of the PFT, the vantage point from which we must interpret rights flowing from the PFT should be self-governance, not the doctrine of discovery. By re-articulating the PFT rights under the perspective of self-government and Mi'kmaw law, I found that the Mi'kmaq have the right to sustain themselves through their fisheries and to take upon themselves the responsibilities that come with the gift of fishing: ensuring the renewal and well-being of the species harvested. Therefore, the Mi'kmaw treaty right to fish includes, but is not limited to, the right to the self-management of their fisheries.

The *Marshall* case asserts that treaty rights are not absolute and can be infringed upon in the event of conservation concerns. Since there exist many concerns regarding the conservation of fish stocks in Atlantic Canada, and those will intensify due to climate change, DFO will have increasing opportunities to infringe on Mi'kmaw treaty rights. In the following chapter, I demonstrate that

[434] King, *supra* note 42 at 10.
[435] *Ibid.*
[436] *Ibid* at 2.
[437] *Sparrow*, *supra* note 19.

because "the relationship between the Government and aboriginals is trust-like, rather than adversarial,"[438] the Crown must work in collaboration with Indigenous peoples to limit as much as possible the infringement of such rights. I argue that from the Mi'kmaq treaty right to fish flows the possibility for the Mi'kmaq to participate in the decision-making process of environmental and conservation regulations.

[438] *Ibid* at 1108.

Chapter 5: Infringement of Mi'kmaw Rights and Co-Management

5.1 Overview

It is important to understand that Indigenous peoples not only want their fair share of the fisheries, but they also "strive for participation in the management of these resources, and that they want to share in the power to make decisions about the fate of the land and the resources it supports."[439] In this chapter, I aim to counter the argument that could be used to limit Mi'kmaw self-management of their fisheries: according to the SCC in *Marshall 2*, even if the Mi'kmaq have a proven treaty right to self-management, the Crown can limit this right for conservation purposes. I will demonstrate that DFO's infringements on Mi'kmaw treaty rights in the name of conservation are unconstitutional because they do not meet the standard for justification established by the SCC in *Sparrow*. Furthermore, as a result of the recognition of a Mi'kmaw right to self-management, an Indigenous jurisdiction regulating the same activities and species as DFO in contiguous geographical/marine areas should be recognized.[440] As a solution to the Maritimes fisheries dispute and to acknowledge potential jurisdictional overlaps in Maritimes waters, I contend that a Mi'kmaq-DFO co-management system could be put in place to coordinate Mi'kmaw and DFO jurisdictions, prevent the unilateral infringement of Mi'kmaw rights, and ensure the sustainable management of the fisheries and marine ecosystems.

This chapter unfolds as follows: I begin by describing the main principle binding the Crown in its interactions with Indigenous peoples: the honour of the Crown. Then, through the application of the infringement test established in *Sparrow* to the case at hand, I demonstrate that DFO conservation measures infringing on Mi'kmaw treaty rights are unconstitutional according to Canadian law's own standards because they have failed to uphold the duties arising from the honour of the Crown: the duty to consult and accommodate. To prevent further infringements, and more generally to ease ongoing fisheries conflicts in the Maritimes, I suggest that co-management of marine ecosystems, as an expression of the right to self-management of the fisheries, could help

[439] Claudia Notzke, "A New Perspective in Aboriginal Natural Resource Management: Co-Management" (1995) 26:2 Geoforum 187.
[440] For instance, with the recognition of the Mi'kmaw treaty right to fish and hunt for a moderate livelihood, the federal and Nova Scotian governments proceeded "with the expansion of Mi'kmaq jurisdiction over the moose harvest [... and] the moose-management." In McMillan, *et al, supra* note 15 at 254.

to ensure the development of sustainable fishing practices and to increase respect for Mi'kmaw treaty rights. To avoid the establishment of a co-management system that would relegate Indigenous scientific knowledge (ISK) to a lower rank than Western scientific knowledge, I designate a co-management model that puts ISK and Western science on an equal footing through knowledge coexistence: Elder Marshall's "two-eyed seeing" approach.

5.2 Limitations of Conservation

While the conservation of species is essential to ensure the very existence of Indigenous treaty rights, Canada has historically failed to protect the productive capacity of Indigenous territories.[441] As a result, Indigenous peoples in Canada have seen their treaty right to fish infringed upon for conservation concerns, without having any control over the policies that have led to unsustainable fishing practices. As conservation is one of the only reasons the Mi'kmaw treaty right to fish can be limited, it is used ostensibly to deem Mi'kmaw fisheries as illegal and limit Mi'kmaq people's access to the fisheries, even when conservation concerns are not supported by scientific evidence. Does the Crown hold a higher duty to collaborate with the Mi'kmaq and accommodate their approach to fisheries management when designing conservation regulations? To answer this question, we must first grasp the general principle binding Canada in its interactions with Indigenous peoples: the honour of the Crown.

a. The Honour of the Crown and the Duties That Flow from It

The honour of the Crown is at stake whenever the Crown interacts with Indigenous peoples. It "derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation."[442] It thus serves the SCC in justifying its colonial practice of "superimposition of European laws and customs"[443] over pre-existing Indigenous peoples. The honour of the Crown "is not a cause of action itself; rather, it speaks to *how* obligations that attract it must be fulfilled."[444] While the

[441] See above at Chapter 3, section 3.4(a); See also Collins & Murtha, *supra* note 216 at 961: "Aboriginal peoples in Canada are particularly affected by unsustainable forestry practices, climate change (resulting in serious disruption to arctic ecosystems), large-scale hydroelectric projects, low-level flight testing, destructive extractive projects, contaminated drinking water, indoor air pollution, and in some cases, industrial contamination."
[442] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director),* 2004 SCC 74 at para 66.
[443] *Van der Peet, supra* note 370 at para 248.
[444] *Manitoba Metis Federation Inc v Canada (Attorney General),* 2013 SCC 14 at para 73 [*Manitoba Metis*].

honour of the Crown is a general principle that is not a cause of action, it gives rise to different duties — such as the fiduciary duty — that are judicially enforceable.[445] In *Manitoba Metis Federation v Canada,* the SCC outlined at least four distinct obligations arising from the honour of the Crown:

> (1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest (*Wewaykum*, at paras. 79 and 81; *Haida Nation*, at para. 18);
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> (2) The honour of the Crown informs the purposive interpretation of s. 35 of the *Constitution Act, 1982* and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest (*Haida Nation*, at para. 25);
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> (3) The honour of the Crown governs treaty-making and implementation (*Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at p. 512, *per* Gwynne J., dissenting; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 51), leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing (*Badger*, at para. 41); and
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> (4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 43, referring to *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555; *Mikisew Cree First Nation*, at para. 51; *Badger*, at para. 47).[446]

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[445] The SCC's jurisprudence regarding the relationship between the honour of the Crown and the fiduciary duty is confusing. While in *Manitoba Metis*, the Court asserts that the honour of the Crown gives rise to the fiduciary duty, it states the opposite in *Van der Peet,* at para 24: "The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake." [emphasis added] I believe that the *Manitoba Metis* version is the correct one because the honour of the Crown is a more general principle that derives from the unilateral assertion of Crown sovereignty over Indigenous peoples; being more general, it can thus encompass the more specific fiduciary duty, which arises when the Crown has discretionary powers over Indigenous interests (giving rise to a fiduciary or trust-like relationship). According to the SCC in *Guerin v The Queen*, [1982] 2 SCR 335 at 341:

> […] where by statute, agreement or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary strict standard of conduct.

This strict standard of conduct will require the Crown to make decisions in the best interest of the Indigenous community whose interests are at stake. See *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),* [1995] 4 SCR 344 at para 12.

[446] *Manitoba Metis, supra* note 444 at para 73 [emphasis added].

The honour of the Crown is thus extremely important here because it constitutes "the very basis of Parliament's legal authority to legislate over First Nations."[447] It is used by the SCC to legitimize the Crown's assertion of sovereignty over Indigenous people.[448] Through the duties that arise from it, the honour of the Crown sets boundaries on the powers the Crown can exercise over Indigenous peoples, supplying "to Crown-Native relations a measure of legitimacy that would be lacking were the Crown able to set the terms of those relations at its sole discretion."[449] Therefore, if the Crown fails to uphold the duties listed above, it can no longer justify the legitimacy of its actions in light of its own legal order. To make sure that the Crown upholds its honour when dealing with s. 35 rights, the SCC has required the Crown to justify upon strict criteria any legislative or administrative action infringing on Indigenous rights.[450]

Infringement/Justification Test

It is in *R v Sparrow* that the SCC established the test to assess whether infringements of s. 35 Aboriginal rights are justified. In *Badger,* the same court ruled that the test established in *Sparrow* would also apply to justify infringements of treaty rights.[451] The test goes as follows: first, a *prima facie* proof of infringement of a s. 35 right must be established by an Indigenous party:

> To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1) certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?[452]

Then, the onus switches to the Crown to demonstrate that the legislative objective behind the infringing regulation is "valid", that is, "compelling and substantial".[453] If the Crown demonstrates that its objective is valid, the assessing court must then evaluate if the Crown has upheld its honour

[447] Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford, UK: Oxford University Press, 2011) at 73.
[448] Thomas McMorrow, "Upholding the Honour of the Crown" (2018) 35:1 Windsor YB Access Just 311 at 315-316.
[449] Fox-Decent, *supra* note 447 at 69.
[450] *Sparrow*, *supra* note 19 at 1110-14. An infringement lacking proper justification would be deemed unconstitutional (see Fox-Decent, *supra* note 447 at 59).
[451] *Badger, supra* note 20.
[452] *Sparrow, supra* note 19 at 1112.
[453] The terms "compelling and substantial" were subsequently used in *Delgamuukw*, *supra* note 90 at 1108.

in trying to attain its legislative objective.[454] This includes asking "whether there has been as little infringement as possible in order to effect the desired result; [...] and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented."[455] In fishing rights cases, the Crown must also give priority to Indigenous food, social, and ceremonial fisheries when elaborating fisheries regulations.[456]

The duty to consult of the *Sparrow* test parallels the duty to consult elaborated in *Haida Nation v British Columbia*, triggered in cases in which "the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal [or treaty] right or title and contemplates conduct that might adversely affect it."[457] In *Haida*, the SCC clarified the different levels of this duty, stating that in "cases where the claim to [Aboriginal] title is weak, the Aboriginal right limited, or the potential for infringement minor, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice."[458] On the other hand, if a "strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high [...] deep consultation, aimed at finding a satisfactory interim solution, may be required."[459] The Crown must thus consult Indigenous parties whose interests are threatened, but the degree of this consultation varies greatly according to the strength of the asserted claim and the level to which the infringement will likely affect the asserted right. Treaty rights and proven Aboriginal rights will be at the high end of the consultation and accommodation spectrum.[460] In all circumstances, consultations must be performed in good faith "through a meaningful process of consultation",[461] with "the intention of substantially addressing [Aboriginal] concerns".[462]

b. Application of the Infringement Test to the Mi'kmaq-Crown Context

[454] *Sparrow, supra* note 19 at 1110.
[455] *Ibid* at 1119.
[456] The SCC in *Sparrow* and *Jack v The Queen*, [1980] 1 SCR 294 gave priority to Indigenous food, social, and ceremonial fisheries.
[457] *Haida, supra* note 177 at para 35.
[458] *Ibid* at para 43.
[459] *Ibid* at paras 43-44.
[460] *Ibid.*
[461] *Ibid* at para 42.
[462] *Ibid*, citing *Delgamuukw, supra* note 90 at para 168.

Now that we have established the test assessing the constitutionality of an infringement of treaty rights, we need to assess whether DFO measures towards the Mi'kmaq have met this test. First, it is important to determine the nature of the right being infringed. In the situation at hand, we must acknowledge that the Mi'kmaq proved, in *Marshall*, that they hold a s. 35 right to fish for a moderate livelihood outside government regulations. I have also demonstrated that the Mi'kmaq hold a s. 35 right to the self-management of their fisheries. In addition, most Mi'kmaw communities, like Sipekne'katik First Nation, have a "factually credible claim to Aboriginal title."[463]

After establishing the credibility of s. 35 rights, one must establish a *prima facie* case of the violation of these rights. I claim that by imposing on the Mi'kmaq the same conservation regulations as the ones imposed on non-Indigenous fishers, such as the *Maritime Provinces Fishery Regulations*[464] or the *Atlantic Fishery Regulations,*[465] DFO infringes on the Mi'kmaw right to sustain themselves from the fisheries and to take care of the fish and their ecosystems. Indeed, in *Gladstone*, the *Sparrow* test for *prima facie* interference is summarized as follows:

> (1) asking whether the legislation has the effect of interfering with an existing aboriginal right and (2) determining whether the limitation (i) was unreasonable, (ii) imposed undue hardship, (iii) denied the right holders their preferred means of exercising that right.[466]

However, the SCC in *Gladstone* specifies that "[t]he questions asked by the Court in *Sparrow* [...] only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place."[467] In the case at hand, I believe that there has been such a *prima facie* infringement on Mi'kmaw treaty rights. First, the imposition, through the *Atlantic Fishery Regulations,* of regulated seasons and catch limits that are not defined by the moderate livelihood right interferes with the exercise of Mi'kmaw treaty rights. Second, these limitations

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[463] *Sipekne'katik v Alton Natural Gas Storage LP*, 2020 NSSC 111 at para 86; see also Robert Hamilton, "After Tsilhqot'in Nation: The Aboriginal Title Question in Canada's Maritime Provinces" (2016) 67 UNBLJ 58. While title arguments could potentially be used to help persuade the Crown to negotiate fishing agreements with the Mi'kmaq, this is not the focus of this thesis.
[464] *Maritime Provinces Fishery Regulations,* SOR/93-55.
[465] *Atlantic Fishery Regulations,* 1985 (SOR/86-21) at Appendix XIV.
[466] *Gladstone, supra* note 37 in the official summary published by the Court, see also at para 39, citing *Sparrow* at p. 1111-12.
[467] *Ibid* at para 43.

impose undue hardship on the Mi'kmaq and deny their preferred means of exercising their rights. Indeed, the imposition of regulatory seasons that prohibits, in certain regions, the fishing of lobsters during summer months creates undue hardship for Mi'kmaw fishers as they often have smaller boats and less sophisticated gear than non-Indigenous fishers.[468] Thus, being obliged to fish offshore and during winter is a hurdle to the exercise of their treaty rights. Moreover, this imposition denies the Mi'kmaq "their preferred means of exercising that right",[469] as they have fished, since time immemorial, "[d]uring the warm-weather months running from mid-March to the autumn."[470]

After establishing a *prima facie* infringement, the third step consists in asking whether the regulations imposed on the Mi'kmaq have a valid and compelling legislative objective. The Crown claims that conservation is the purpose of the infringing regulations, as stated in s. 2.1 of the *Fisheries Act*, which is a valid objective according to the SCC in *Sparrow*.[471] Finally, the fourth step consists of assessing whether DFO, while developing its conservation plan, has upheld the duties flowing from the honour of the Crown, such as ensuring minimal impairment of rights, giving priority to Mi'kmaw fishers in the allocation of the resources, and providing opportunities to consult. It is, I contend, at this last stage that the Crown is most at fault.

DFO, the Honour of the Crown, and Its Duties

It is important to first mention that DFO's agents are liable to uphold the honour of the Crown, because they are direct agents of the Crown.[472] To assess whether the Crown acted honourably when developing its conservation plans in the Maritimes, we must determine if the duties deriving from the honour of the Crown have been upheld. I will focus on the duty to consult and accommodate as well as on the duty to undertake good faith negotiations, as this thesis deals with proven treaty rights: the Mi'kmaw treaty right to fish for a moderate livelihood, and its corollary,

[468] Wiber & Milley, *supra* note 129 at 166.
[469] *Ibid.*
[470] William C Wicken, "Re-Examining Mi'kmaq-Acadian Relations", *supra* note 325 at 96.
[471] *Sparrow*, *supra* note 19; *Marshall 2*, *supra* note 34 at para 6; Hamilton, *supra* note 463. In the previous chapter, in section 4.4(b) I argued that the Crown's conservation concerns are not scientifically founded. However, with climate change, real conservation concerns will arise sooner or later. Thus, for rhetorical purposes, I imagine in this section that the conservation concerns raised by the Crown are valid.
[472] See e.g. *Gladstone v. Canada (Attorney General)*, *supra* note 37.

the right to self-management of the fisheries. Proven treaty rights give rise to the duty to consult and potentially accommodate, the duty to give priority to Indigenous fisheries, and the duty to undertake good faith negotiations.[473] However, I will not cover the duty to give priority within this analysis because this thesis focuses on the right to self-management.[474]

DFO's Duty to Consult and to Undertake Good Faith Negotiations

While in *Mikisew First Nation v Canada*, the SCC ruled that the duty to consult did not apply to the legislative process,[475] it is clear that the problem at the heart of this thesis arises from executive powers rather than from legislative ones. Indeed, DFO's infringing actions do not derive directly from the *Fisheries Act* — adopted under the parliament's legislative power — but rather from DFO Minister's implementation powers under the *Fisheries Act*.[476] Therefore, when enforcing and implementing the *Fisheries Act*, DFO acts under the directives of the Minister, who holds (and can delegate) many executive powers, such as issuing fishing licenses, determining fishing seasons, and enacting and enforcing regulations.[477] Since DFO's enforcement and implementation actions emanate from an executive power, it is bound by the duty to consult.

In *Sparrow*, the SCC stated that "[t]he aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries."[478] In *Haida*, it held that meaningful consultations in the case of an infringement of a proven treaty right may require the Crown to "make changes to its proposed action based on information obtained through consultation."[479] In other words, when concerns are voiced by Indigenous communities, the Crown should "ensure they are integrated into the proposed plan of

[473] *Manitoba Metis*, *supra* note 444 at para 73.
[474] That is, it is impossible to assess whether DFO respected the priority doctrine in respect of Sipekne'katik First Nation, who refused to sign IFAs and participate in the AFS program, because the community fishery was operating outside DFO regulations. Moreover, knowing whether DFO respected the priority right of other Mi'kmaw communities would not affect the conclusions of this thesis.
[475] *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40.
[476] *Fisheries Act,* RSC 1985, c F-14.
[477] *Maritime Provinces Fishery Regulations, supra* note 464; *Aboriginal Communal Fishing Licences Regulations* SOR/93-332.
[478] *Ibid.*
[479] *Haida, supra* note 177 at para 46.

action."[480] In 1999, the Standing Committee on Fisheries and Oceans clearly stated that "[a]s a result of *Marshall*, the [DFO] will be required to consult with First Nations before developing and implementing regulations."[481] Moreover, the measures adopted to consult and accommodate must show that s. 35 rights are taken seriously, not just considered "as an afterthought to the assessment of environmental concerns."[482]

Because the PFT were not land cession treaties, and since "the Mi'kmaq have established treaty rights and continue to assert Aboriginal rights and title [...] the [Crown's] duty to consult and accommodate is on the high end of the spectrum."[483] Unfortunately, I found that DFO's conduct with respect to Mi'kmaw fisheries has hardly met the high standards of honourable consultation and accommodation required by the honour of the Crown. Indeed, despite their constitutional duty to consult and accommodate the Mi'kmaq, DFO completely overlooked Mi'kmaw claims to self-management and the efforts and measures put in place by Mi'kmaw communities to ensure the sustainability of their moderate livelihood fishery.[484] For instance, despite Sipekne'katik First Nation's efforts to put in place a conservation plan that aligns with DFO's conservation regulations (as examined in this thesis in section 3.3(d)) DFO refuses to recognize their treaty-based fisheries as legal. Sipekne'katik First Nation acted six years after 12 Mi'kmaw communities filed a lawsuit to require the Crown to negotiate with them the implementation of their treaty right to fish for a moderate livelihood.[485] This case was put on hold as Canada agreed to start negotiations, but almost a decade later, fruitful negotiations have yet to take place. Sipekne'katik thus chose to act without the Crown's approval, asserting their treaty right to self-management and their inherent right to self-government.

Instead of consulting and undertaking good faith negotiations, DFO confronted the Mi'kmaq with a dilemma: to choose between 1) signing Interim Fisheries Agreements (IFAs), allowing them to enter the commercial market and thus forcing them to comply with DFO rules (and potentially

[480] Morales, "Braiding the Incommensurable", *supra* note 16 at 69.
[481] Standing Committee on Fisheries and Oceans, *The Marshall Decision and Beyond: Implications for Management of the Atlantic Fisheries*, *supra* note 12.
[482] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at para 504.
[483] *Sipekne'katik Self-Governance Initiative Protocol: Navigating a New Path Forward*, online (pdf): <https://sipeknekatik.ca/wp-content/uploads/2020/08/SGI_Protocol_Jul31_2020.pdf> at 10.
[484] Wiber & Milley, *supra* note 129 at 170.
[485] *Acadia First Nation v Canada (Attorney General),* 2013 NSSC 284.

compromising their treaty rights); or 2) being fined and arrested for 'illegal' fishing and having their traps and gear confiscated.[486] Through imposing these dilemmas, DFO have tried to incorporate the Mi'kmaq within its top-down fisheries management structure with little to no compromise. However, it is in part because of this very top-down structure that treated ISK so poorly in the past[487] that some communities are reluctant to agree to IFAs. Those who refused to sign IFAs were not granted access to funding programs and as their fishers were deemed 'illegal', and they were unable to find political and financial support to build alternative management structures.[488] The imposition of IFAs on the Mi'kmaq without any possibility of Crown compromise regarding fishing seasons and other conservation rules does not satisfy the requirements of the duty to consult and accommodate. DFO's conduct also violates the "requirements [of] honourable negotiation and the avoidance of the appearance of sharp dealing."[489] By acting this way, DFO clearly refuses to accept that another entity can have management powers over the fisheries. Therefore, it does everything to incorporate the Mi'kmaq within its top-down structure, because "national law admits only change over which it has firm control."[490]

5.3 Co-management as a Solution

The SCC has made it clear that the duties deriving from the honour of the Crown are more than political obligations; they are legally enforceable.[491] If a DFO regulation or measure does not meet the infringement test laid out in *Sparrow*, it will be deemed unconstitutional. By using sharp dealing, the Crown fails to uphold the honour of the Crown and the legal obligations that its own courts have developed to justify the purported legal foundations of its sovereignty over the Mi'kmaq.[492] The Crown has compromised the privileges that come with the special trust-like Crown-Indigenous relationship and the very narrative that is constitutive of its legal authority over

[486] See *Shubenacadie Band v Canada (AG), supra* note 422.
[487] See McNeely & Hunka, *supra* note 306.
[488] Wiber & Milley, *supra* note 129 at 171.
[489] *Manitoba Metis, supra* note 444 at para 73.
[490] Anker, *supra* note 86 at 3.
[491] *Sparrow, supra* note 19.
[492] See an exhaustive explanation in Chapter 2 of Fox-Decent, *supra* note 447 at 67: "judicial recognition of the fiduciary relationship as a response to Crown assertions of sovereignty brings into focus the nature of the deficit in legitimacy that the Court attempts to mend through the imposition of fiduciary obligations."

the Mi'kmaq.[493] In the previous section, we saw that DFO conservation policies unjustifiably infringe on Mi'kmaw rights to fish and to self-manage their fisheries. To remedy this situation, from the right to self-management should flow the possibility for the Mi'kmaq to participate in the decision-making of conservation regulations along with DFO.

While both UNDRIP[494] and DFO's Integrated Aboriginal Policy Framework proclaim the benefits and necessity of Indigenous participation in the management of the fisheries, I believe that co-management is an ideal way to generate a political space that would bridge legal communities and foster meaningful negotiations that go beyond what is required by the fiduciary relationship.[495] In its fourth strategy, DFO aims to increase "Aboriginal participation in co-management of aquatic resources",[496] demonstrating the legitimacy and viability of a Crown-Mi'kmaq shared decision-making process. Instead of the domination and power entailed in the honour of the Crown, co-management embraces the legal pluralism that characterizes the Canadian legal system, enabling parties to share and transfer knowledge and practices. Co-management is not only required under a Canadian case law perspective but also by the treaty relationship that has linked the Crown to the Mi'kmaq since the 1700s.

In addition to benefiting the Mi'kmaq people's aspiration for self-government and control over their traditional lands and waters, co-management would also benefit DFO through the sharing of local knowledge, potentially improving the management quality of increasingly fragile and changing ecosystems. Indeed, fisheries practices are deeply rooted in local ecological systems that are neither linear nor static. Relying on local resource users for managing and monitoring ecosystems has become increasingly common.[497] Since "[c]entralized, top-down resource management is ill-suited to user participation",[498] there is a growing need for sharing management initiatives with resource users, especially Indigenous communities who hold constitutionally

[493] *Ibid* at 69.
[494] Morales, "Braiding the Incommensurable", *supra* note 16 at 71: "The right to participate in decision making is viewed as deriving from the right to self-determination, which is considered the founding principle of Indigenous peoples' right and the central guiding principle of UNDRIP."
[495] Fikret Berkes, "Adaptive Co-Management and Complexity: Exploring the Many Faces of Co-Management" in Derek Armitage, Fikret Berkes & Nancy Doubleday, *supra* note 201 at 29.
[496] Canada, Department of Fisheries and Oceans, *An Integrated Aboriginal Policy Framework* (2007), online (pdf): <https://waves-vagues.dfo-mpo.gc.ca/Library/40582255.pdf>.
[497] Reid, *et al*, *supra* note 130 at 244.
[498] Armitage, Berkes & Doubleday, *supra* note 201 at 1.

protected rights on vulnerable lands and waters. Indeed, centralized bureaucracies are often incapable of noticing subtle environmental changes and are "limited in their ability to respond to changing conditions, an anachronism in a world increasingly characterized by rapid transformations."[499] Therefore, collaborative initiatives have become essential to stimulating "innovation and adaptive capacities."[500] Practices such as Indigenous-Crown co-management have emerged to balance the advantages and disadvantages of the top-down state structure and community-based systems.[501]

a. The Boldt *Decision*

While there is no Canadian precedent recognizing an Indigenous right to co-management, the United States Court of Appeals for the Ninth Circuit recognized in *US v Washington* (1974) that such a right is held by western Washington tribes.[502] In that case, commonly referred to as the *Boldt* decision, Justice Boldt attached the right to environmental co-management to the tribes' treaty right to fish. The facts of the case are as follows: while these tribes had seen their treaty right to secure up to 50% of the fishing harvest recognized years earlier, they were still not able to exercise this right properly because a limited number of fish "remained by the time this migratory species reached the marine and riverine territories in which the tribes could legally fish."[503] In other words, the state managed the non-Indigenous commercial and sport fisheries "so that all but some five percent of the fish was harvested elsewhere."[504] Consequently, Justice Boldt declared that the right to equally participate in the fisheries was unrealizable without granting a higher-level right to participate in the management of the fisheries along with the state. This decision influenced over 100 subsequent cases on Indigenous self-government as well as major Indian law statutes in the US, such as the *Indian Gaming Regulatory Act*,[505] which has "dramatically increased tribal

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[499] *Ibid* at 1.
[500] *Ibid* at 4.
[501] *Ibid* at 2.
[502] *Boldt* decision, *supra* note 237.
[503] Evelyn Pinkerton, "Toward Specificity in Complexity: Understanding Comanagement from a Social Science Perspective" in Douglas Clyde Wilson, Jesper Raakjaer Nielsen & Poul Degnbol, eds, *The Fisheries Co-management Experience: Accomplishment, Challenges, and Prospects* (Amsterdam, NL: Kluwer, 2003) 61 at 62.
[504] *Ibid* at 62.
[505] *Indian Gaming Regulatory Act*, US 1994, c 29; in Christi Turner, "*Boldt* ruling to let Natives manage fisheries is still vastly influential, 40 years later", *High Country News* (14 February 2014), online: <https://www.hcn.org/blogs/goat/40-years-later-the-boldt-decision-legacy-still-being-laid>.

sovereignty across the US, and may not have been possible without the state-to-Indian government cooperation established in the *Boldt* Decision."[506]

The facts of the *Boldt* decision are very similar to the facts of the Crown-Mi'kmaq dispute. The Mi'kmaq hold a constitutionally protected treaty right to access the fisheries and to do so outside of government regulations, but, like western Washington tribes, they cannot effectively exercise this right due to conservation regulations. In addition, both nations saw the fish populations on which they relied for food drop considerably due to decades of state mismanagement.[507]

b. Northern Land Claims Agreements

Over the past few decades, Nunavut, the Northwest Territories, and the Yukon have been flourishing areas for co-management initiatives.[508] Although no Canadian court has yet recognized the existence of a 'right to co-management', the inclusion of co-management boards within northern Canada's land claims agreements demonstrates the necessity of implementing shared decision-making processes in giving effect to Indigenous claims to ancestral lands and waters.[509] As an example, the primary goal of the Nunavut Final Agreement is to expand Inuit participation in decision-making processes and governance. Therefore, the Nunavut Wildlife Management Board (NWMB) is in charge of marine life in Nunavut and "is mandated to use the best Western science and Inuit Qaujimajatuqangit (IQ, the traditional knowledge of the Inuit) knowledge systems, in making management decisions."[510] To achieve such increased participation, in the majority of the northern co-management boards, half of the members are nominated by Indigenous organizations, and the other half by government.[511] These boards "represent a compromise between Indigenous peoples' desire for complete control over matters of crucial importance to them and the insistence of the federal government on established patterns of state control."[512]

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[506] C Turner, *ibid*.
[507] See for example the case of the Maritimes eel fisheries in Reid, *et al*, *supra* note 130 at 252.
[508] G White, *Indigenous Empowerment, supra* note 126 at 33.
[509] However, the Yukon Fish and Wildlife Management Board only makes recommendations, in contrast to the NWMB, which is a decision-making body; see G White, *ibid* at 99.
[510] Stephanie A Boudreau, "Nunavut Fisheries Co-Management and the Role of the Nunavut Land Claims Agreement in Fisheries Management and Decision Making" (2016) 30 Ocean YB 207 at 210.
[511] G White, *Indigenous Empowerment, supra* note 126 at 42.
[512] *Ibid* at 4. This compromise is not what I am proposing with the two-eyed seeing approach.

While co-management boards like NWMB seemingly represent a victory for northern Indigenous peoples regarding the control they have over their lands and waters, concerns have been raised about their success in meaningfully using ISK and in empowering Indigenous self-determination.[513] Nevertheless, the existence of these boards demonstrates that co-management can be both functional and beneficial.

c. British Columbia Fisheries Agreements

Some First Nations in British Columbia have been able to negotiate agreements with DFO that are not IFAs or under the AFS program, but only after multiple, long, and expensive legal battles. For instance, the recent Coastal First Nations Fisheries Resource Reconciliation Agreement (CFNFRRA), a community-based commercial fishing model involving eight First Nations, was launched after the British Columbia Court of Appeal released a decision acknowledging the authority of some Nuu-chah-nulth communities to sell their catch outside governmental restrictions.[514] However, DFO is not "softer" on BC First Nations than on the Mi'kmaq. Indeed, the agreement comes after an 80% decline in Pacific salmon stocks due to overfishing and oceans' rising temperatures, requiring DFO to reduce commercial quotas. It is also situated in BC's particular context: most BC First Nations, including those in the CFNFRRA, have no treaties and thus clearly have unceded title to their lands and waters. However, the lack of recognition of BC First Nations' self-management and self-government powers in relation to their fishing rights is similar in both BC and Nova Scotia. For example, while the CFNFRRA established a unique community-based Indigenous commercial fishery model, the "overarching management and associated decisions remain with the Department of Fisheries and Oceans."[515] It will be particularly interesting to monitor what will happen after Kitasoo Xai'xais Stewardship Authority

[513] Giles, *et al*, *supra* note 122 at 179; Stevenson, "Decolonizing Co-Management" *supra* note 208.
[514] *Ahousaht Indian Band and Nation v Canada (Attorney General), supra* note 388.
[515] See Bessie Brown, "Government of Canada signs historic reconciliation agreement with B.C. Coastal First Nations", *Coastal First Nations, Great Bear Initiative* (July 26, 2019), online: <https://coastalfirstnations.ca/government-of-canada-signs-historic-reconciliation-agreement-with-b-c-coastal-first-nations/>.

launches its own conservation guidelines and management plan and officially declares the Kitasu Bay (near Klemtu, BC) a protected marine area without DFO's consent.[516]

5.4 Viable Model of Co-Management: The "Two-Eyed Seeing" Approach

A common criticism directed towards co-management initiatives is that they too often subsume Indigenous scientific knowledge (ISK) and make decisions about Indigenous lands through Western-based processes.[517] Indeed, co-management initiatives often relegate ISK to a lower rank and ignore the Indigenous institutions, laws, and decision-making processes producing that knowledge.[518] In this section, I argue that there exists a way to empower Indigenous legal traditions through co-management. To achieve this, the Crown must make space, both intellectually and structurally, for Indigenous legal traditions and must submit itself, as Kirsten Anker stresses, "to the potentially disruptive process of asking, 'What place is there for *me* in *your* universe?'"[519] Of course, reconciling two vastly divergent knowledge systems entails many logistical, conceptual, and communication-based issues. The Mi'kmaw Elder Albert Marshall and colleagues describe these challenges as follows:

> From the perspective of government respondents, the barriers are logistical (no formal process for "integration"; concerns around data ownership), conceptual (no space in the process for cultural or spiritual components; the two systems operating on incompatible time scales—immediate vs. seven generations) and communication-based (using different languages and interpretations; unresolved historical traumas and issues of mistrust between the Mi'kmaq and the Canadian Government).

In this section, I will review the two-eyed seeing approach (TESA), a method that places ISK and Western science on an equal footing. TESA, developed by Elder Marshall, is described as: "learning to see from one eye with the strengths of Indigenous knowledges and ways of knowing, and from the other eye with the strengths of Western knowledges and ways of knowing [...] and

[516] See Kitasoo Xai'xais Stewardship Authority, *Gitdisdzu Lugyeks (Kitasu Bay) Marine Protected Area Management Plan (Draft)*, (June 2022), online: <https://drive.google.com/file/d/1AbqAWafqdQkeUbWwpQ17A6AZIvT3RxIZ/view>.
[517] Mulrennan, *supra* note 239 at 102.
[518] *Ibid* at 102.
[519] Anker, *supra* note 86 at 3.

learning to use both these eyes together, for the benefit of all."[520] It prevents the centralization of decision-making and uses ISK in a collaborative way through knowledge coexistence.

a. Addressing Co-management Challenges: TESA

Fikret Berkes and Thomas Henley state that "[o]ne of the major mechanisms for creating an equitable [co-management] relationship [between Indigenous peoples and the state] lies with the recognition of indigenous knowledge as a legitimate source of information and values."[521] In line with such recognition, TESA has been specially developed to enhance "the coexistence of disparate paradigms across a variety of fields".[522] In developing this approach, the goal was to

> move beyond the all-too-common dialogue of integrating, combining or incorporating (commonly used as euphemisms for assimilating) other knowledges and ways of knowing into Western science, and instead build an ethic of knowledge coexistence and complementarity in knowledge generation using Two-Eyed Seeing as a guiding framework.[523]

Rather than trying to reconcile or integrate incommensurable knowledge systems, TESA promotes knowledge coexistence. Instead of seeing differences between knowledge systems as an issue, TESA fosters these differences as a richness to be used to the benefit of all, and creates a "two-way flow of perspectives and knowledge exchange."[524] Indeed, it focuses on the common goals of these systems: to enhance our understanding of the world, "an end that surely becomes more achievable through a plural coexistence."[525] This enhanced cooperative process, in turn, helps build social and ecological resilience. To achieve an effective and respectful TESA, both a hybrid process and a hybrid structure are required. What follows are broad recommendations, because TESA initiatives can adopt a variety of forms depending on the context and the openness of the parties involved.[526]

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[520] Albert Marshall, "Two-Eyed Seeing", Institute for Integrative Science and Health (2004), online: <http://www.integrativescience.ca/Principles/TwoEyedSeeing/>.
[521] Berkes & Henley, *supra* note 230 at 30.
[522] Reid, *et al*, *supra* note 130 at 245.
[523] *Ibid* at 245.
[524] Mulrennan, *supra* note 239 at 102.
[525] Reid, *et al*, *supra* note 130 at 245.
[526] *Ibid* at 249.

b. Hybrid Process

As we studied in Chapter 3, ISK does not exist in a void; it is utterly intertwined with local ecosystems, populations, and experiences. Therefore, ISK comes with its own systems, models, and institutions. The issue with current co-management initiatives in Canada is that they do not transform the very structures and rationales for decision-making so that they are both Indigenous and Western-based.[527] What results is a process of knowledge incorporation rather than knowledge coexistence, as well as the use of ISK to consolidate Western science[528] and "concentrate power in administrative centers, rather than in [Indigenous] communities".[529]

To respect the nature and integrity of ISK, knowledge coexistence leaves ISK and Western science within their respective knowledge systems, and then brings them into dialogue and consensus-based decision-making "to improve collective understanding of ecosystem change."[530] Through mutual research interests, research co-development, co-evaluation, community validation, and the research of shared benefits, TESA helps develop long-term partnerships between stakeholders to foster a holistic and dynamic decision-making process. It is also fundamental for stakeholders to develop "a common vision of the desired future."[531] Only after this common vision is found can Indigenous and Western knowledge systems generate solutions and "contribute in parallel to produce an enriched picture and mutual understanding."[532] From there, Indigenous and Western decision-makers can compare and contrast their results and make decisions according to the best of both systems through knowledge braiding.

Such hybrid processes have been implemented in some cases, but all in connection with small-scale fisheries.[533] For instance, a collaboration between academic researchers, scientists, government agents, and local communities was created to assess the quality of water within the Slave River Delta in the Northwest Territories. Their efforts were aimed at building "capacity for

[527] Prosper, *et al, supra* note 52 at 2.
[528] For instance by "cherry-picking" Indigenous knowledge to confirm Western science hypothesis. See Stevenson, "Decolonizing Co-Management" *supra* note 208.
[529] Nadasdy, *supra* note 220 at 15.
[530] Reid, *et al*, *supra* note 130 at 251.
[531] Berkes, *supra* note 495 at 27.
[532] Reid, *et al*, *supra* note 130 at 246.
[533] See, for example, the discussion of the Saskatchewan and Slave River deltas in Reid, *et al*, *supra* note 130 at 256.

measuring environmental change, and contributed to developing a potential legacy monitoring tool for adaptation and use by local people to support decision making at various scales."[534] Such small-scale case studies can expand data and experience on knowledge coexistence and possibly lead to a broader application of TESA to commercial and industrial fisheries.[535]

c. Hybrid Structure

The structure of co-management boards adopting TESA must permit the coexistence of a plurality of knowledge systems and enable the development of trust and long-lasting relationships. Indeed, Fikret Berkes claims that meaningful co-management must entail "a form of communication that enables participants to reconsider their worldviews and adjust the ways that they categorize experience, thus building new, shared metaphors."[536] According to a long-term study on Canadian and South African co-management initiatives,[537] co-management functions better if the structure is not fixed, but evolves over time and circumstances.[538] The success of these initiatives was found to be proportionally correlated to the number of years the arrangements had been put in place.[539]

However, certain structural elements remain indispensable to achieving TESA. First, there must be a nomination process whereby half the members are appointed by the Indigenous nation and the other half by the government agency.[540] Second, communities should be able to participate in the appointment of board members so that they can have confidence in their board's legitimacy. Third, at least one seat at the board's table should be saved for a knowledge holder, such as an Elder or a medicine person. In fact, in boards to which only Western-trained scientists were appointed, Graham White found that the application of ISK often entailed misconceptions, simplifications, and misunderstandings.[541] Mi'kmaw knowledge holders are the most experienced

[534] Mantyka-Pringle, *et al, supra* note 214 at 132.
[535] Reid, *et al*, *supra* note 130 at 256.
[536] Berkes, *supra* note 495 at 27.
[537] There exists a similar approach to co-management in South Africa called the "Two-Way Knowing Approach". See McMillan & Prosper, *supra* note 14 at 640.
[538] Berkes, *supra* note 495 at 27.
[539] *Ibid* at 27.
[540] G White, *Indigenous Empowerment, supra* note 126 at 42.
[541] *Ibid* at 276.

and trusted by their communities to share traditional knowledge;[542] in fact, they often hold the responsibility to share this knowledge. For example, the Moose Management Initiative in Nova Scotia, a partnership between Indigenous organisations — Unama'ki Institute of Natural Resources and the Assembly of Nova Scotia Chiefs — and federal and provincial governments to develop a moose management plan in the province,[543] created an advisory committee composed of Elders, hunters, and other knowledge holders. This committee provides counsel on ethical hunting — how the moose hunt management can be guided by *netukulimk* — and other spiritual and environmental considerations.[544]

To achieve knowledge coexistence, it is important to accept that for the Mi'kmaq, "knowledge itself depends on relationships and connections between living beings (including humans) and non-living entities."[545] It is critical to reshape the top-down Western decision-making process and try to reach consensus rather than rule by majority. This could increase the development of trust, reciprocity, and respect among board members, and ensure that every point of view is taken into account in the final decision.[546]

5.5 Conclusion

In this final argumentative chapter, I have shown that, for decades, DFO has repeatedly infringed on Mi'kmaw treaty rights and, in doing so, has violated the Crown's duties of honourable dealing, consultation, and accommodation. To counteract these failures and to simultaneously protect fish stocks and Mi'kmaw treaty rights, there is a need for the development of a shared decision-making process regarding conservation of the fisheries and of marine ecosystems. I argue that from the Mi'kmaw right to the self-management of their fisheries flows the right to the co-management of marine ecosystems. If such treaty-based co-management were established, the Crown could no longer unilaterally infringe on Mi'kmaw self-regulated fisheries and the Mi'kmaq would be able

[542] See Gillian Austin & John Sylliboy, *Elders Project: Honouring Traditional Knowledge* (Dartmouth, NS: Atlantic Policy Congress of First Nations Chiefs Secretariat, 2011).
[543] Unama'ki Institute of Natural Resources, *Moose Management Initiative*, online at <https://www.uinr.ca/programs/moose/>.
[544] McMillan, *et al*, *supra* note 15 at 259.
[545] Reid, *et al*, *supra* note 130.
[546] Thomas E Shea, "Coordination and Consensus in Water Resource Management" (1982) 13:3 Pac L J 975 at 1001.

to gain control over the conservation regulations that are currently a serious impediment to the exercise of their treaty and inherent rights. Finally, to deal with criticisms of co-management initiatives in Canada, I have suggested the use of an approach to co-management that would put Indigenous and Western knowledge on an equal footing: the two-eyed seeing approach. This approach permits respectful engagement with Indigenous laws and knowledge by working with the institutions, people, and processes that constitute and hold them.

Conclusion

I. Answering the Question

In coming back to the question that gave rise to this thesis — why are the Mi'kmaq still unable to exercise their treaty right to fish outside government regulations and sell their catch for a moderate livelihood? — I have found that it is, in fact, a question of power. Sákéj Henderson asserts that "[i]n the legal process, power is the ability to annex, determine, and verify partial truths as total truths."[547] The Mi'kmaq nation's inability to fully exercise its treaty rights is caused by the state's refusal to share its monopoly on law, science, and truth. It is also linked to the difficulties of translation that come with cross-cultural collaboration. This thesis has proved that, although there exist many cultural and legal disparities between Canadian and Mi'kmaw laws, Canadian law can build bridges with Indigenous legal traditions by going back to the treaty superstructure that enabled Europeans and others to legitimately settle on Indigenous lands. However, to collaborate effectively, Canada's institutions must accept a certain degree of power-sharing.

As Justice Murray Sinclair has claimed, "[r]econciliation is about forging and maintaining respectful relationships. There are no shortcuts."[548] In order to move forward with reconciliation, Canada must accept that our peaceful presence on this land was made possible by the relationships colonial governments forged with Indigenous peoples through historic treaties and must somehow recreate the links lost over the centuries. In that vein, this thesis demonstrates that there exists a space in Canadian constitutional law for Mi'kmaw fisheries self-management, from which flows the possibility of Crown-Mi'kmaq co-management of marine ecosystems.

II. Summary of Arguments

I have supported my conclusions through three argumentative chapters (Chapters 3-5), in addition to a chapter on the methodology and theoretical framework of this work (Chapter 1), and another displaying the academic dialogue upon which this thesis is built (Chapter 2).

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[547] Henderson, "Mi'kmaw Tenure", *supra* note 106 at 207.
[548] Murray Sinclair, "If you thought the Truth was hard, Reconciliation will be harder", *UM Today News* (29 October 2014), online: <https://news.umanitoba.ca/if-you-thought-the-truth-was-hard-reconciliation-will-be-harder/>.

In Chapter 3, with the study of *netukulimk,* I demonstrated how Mi'kmaw law and scientific knowledge can be used to sustainably take care of Mi'kmaw lands and waters. In contrast, I demonstrated that DFO's way of managing the fisheries in the Maritimes prioritizes commerciality over sustainability and has led to the decline in the Atlantic salmon and American eel populations. I asserted that this mismanagement is a symptom of the centralized state's incapacity to respond to the ever-changing needs of local ecosystems.

In Chapter 4, through a close reading of treaty and Aboriginal rights decisions, I illustrated that the racist "doctrine of discovery" underlies SCC's interpretation of Aboriginal and treaty rights. There is thus a need to shift from the paternalistic and erroneous doctrine of discovery to the rationale of the nation-to-nation treaty relationship in the interpretation of s. 35 rights. By rearticulating Mi'kmaw treaty rights under the perspective of the treaty relationship and of the Mi'kmaq people's articulation of their laws and treaty rights, I found that their treaty fishing right encompasses, but is not limited to, the right to the self-management of their fisheries. In the final section of Chapter 4, I shed light on the contradiction between the government's policies seemingly supporting self-government and the concrete actions it takes against Mi'kmaw treaty rights. While it officially supports the inherent right to self-government, DFO refuses to share its jurisdiction on fisheries management with Mi'kmaq nations. Rather, it undermines their self-management efforts by forcing them to integrate into the commercial market and abide by DFO regulations. By embracing and committing to treaty federalism through the acceptance and recognition of Mi'kmaw laws, institutions, and worldviews, Canada could achieve true partnership with the Mi'kmaq and come back to the treaty supra-structure that enabled Europeans and others to settle in the Mi'kma'ki.[549]

Finally, in Chapter 5, I provided an answer to the counterargument asserting that the Mi'kmaw right to self-management can be infringed upon for conservation concerns. I proved that, flowing from the *Sparrow* and *Haida* tests, the Mi'kmaq also have a right to be consulted and accommodated, and to participate in good faith negotiations when conservation regulations are elaborated. The Crown has continuously breached Mi'kmaw treaty rights and has failed to meet

[549] Henderson, "Empowering Treaty Federalism" *supra* note 82 at 241.

the infringement test laid out in *Sparrow* — more precisely, the honour of the Crown and its duty to consult, negotiate, and accommodate. I suggest that DFO's breach, which compromises the honour of the Crown, should not only result in a declaration of unconstitutionality, but should consequently lead to the development of a nation-to-nation decision-making process addressing conservation problems. A space for dialogue between Mi'kmaw and Canadian institutions is necessary to ensure development of sustainable fishing practices and respect for Mi'kmaw treaty rights. A co-management process could provide this space.

III. Moving Forward

Ideally, future research on this topic should be conducted in person in Mi'kmaw communities, and should include case studies of co-management initiatives that have been established in the Maritimes. This would permit researchers to study more in depth the challenges and benefits of such initiatives and document at the community level the communication taking place between the parties. The American Eel fishery management within the Committee on the Status of Endangered Wildlife in Canada and the Moose Management Initiative (MMI) could be interesting case studies. The MMI is especially important, as it is the first of its kind in the region; it uses *netukulimk* as a guiding principle and could be used as a framework for the future co-management of aquatic species.[550]

The MMI demonstrates that effective self-determination efforts can take place both inside and outside state institutions. Indeed, before partnering with federal and provincial governments, the Mi'kmaq established guidelines within their own communities, which later became laws, emphasizing "hunting safety, community authority and hunting-advisory groups, the no-hunting time, identification and non-Mi'kmaq helpers, and hunter reporting for herd management."[551] Only after these guidelines were established and enforced among several Mi'kmaq communities did the federal and provincial governments start to discuss and later negotiate the possibility of a Mi'kmaq management jurisdiction. As Michael Murphy asserts, "[a] relational strategy [to access self-government] recommends gaining multiple access points to political power, working both inside

[550] McMillan, *et al*, *supra* note 15 at 259; Unama'ki Institute of Natural Resources, *Moose Management Initiative*, *supra* note 536.
[551] McMillan, *et al*, *supra* note 15 at 262.

and outside state institutions at various geopolitical scales, as well as in cooperation and in direct confrontation with state institutions."[552] For instance, in British Columbia, the Kitasoo Xai'xais First Nation recently asserted their inherent authority over fisheries management without seeking the state's approval by launching its own management and conservation plan:

> We invite other people and governments to work with us to implement this plan, but we seek no permission. Our right to implement this plan comes from our inherent and Aboriginal rights and title and from our connection to this land for thousands of years.[553]

Until Canada and the Maritime provinces can reach an agreement with the Mi'kmaq regarding the jurisdictional aspect of fisheries management, an effective strategy to foster their self-government rights is to continue to live by and enforce their laws and ancestral practices, even without DFO's approval.

[552] Michael Murphy, "Indigenous Peoples and the Struggle for Self-Determination: A Relational Strategy" (2019) 8 Can J of Human Rights 67 at 67.
[553] Kitasoo Xai'xais Stewardship Authority, *Gitdisdzu Lugyeks (Kitasu Bay) Marine Protected Area Management Plan (Draft)*, *supra* note 516.

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