

The Purdy Crawford Chair

In Aboriginal Business Studies

Impact of the Marshall Decision on the
Development of a Mi'kmaw Commercial Fishery

Nicole Johnson



Shannon School
of Business

**Purdy Crawford Chair in
Aboriginal Business Studies**

Shannon School of Business
Cape Breton University
1250 Grand Lake Rd, Box 5300
Sydney, NS B1P 6L2
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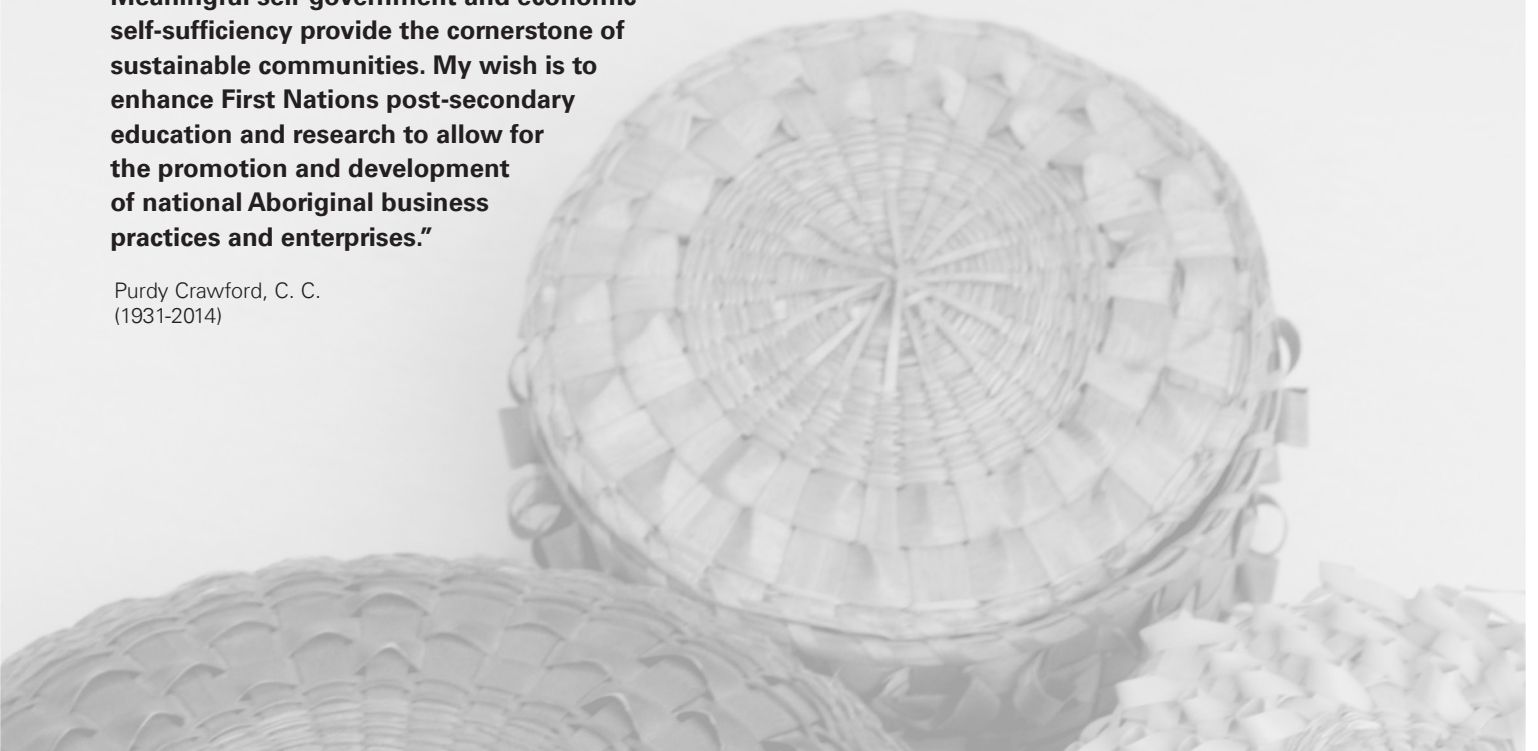
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"Meaningful self-government and economic self-sufficiency provide the cornerstone of sustainable communities. My wish is to enhance First Nations post-secondary education and research to allow for the promotion and development of national Aboriginal business practices and enterprises."

Purdy Crawford, C. C.
(1931-2014)



IMPACT OF THE MARSHALL DECISION ON THE DEVELOPMENT OF A MI'KMAW COMMERCIAL FISHERY

INTRODUCTION

Donald Marshall Jr was a Mi'kmaw man from the community of Membertou First Nation, Nova Scotia and the eldest son of the late Grand Chief Donald Marshall Sr. and Caroline Marshall. According to Harris (1986), "As the eldest son, Junior would be the next Grand Chief, a position that was conferred for life" (p. 20). However, in 1971, at the age of seventeen, Donald Marshall Jr's life changed forever when he was wrongfully convicted for the murder of Sandy Seale. He served eleven years in prison before he was acquitted in 1983. Of his wrongful conviction, it has been said, "The criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and wrongful conviction for murder in 1971 up to, and even beyond, his acquittal by the Court of Appeal in 1983" (Hickman, 1989, p. 1).

Following his acquittal, Donald Marshall Jr went on to spend his leisure time fishing. McMillan (2012) writes that, "In order to escape the unwanted and persistent attention he returned to the homeland of his childhood, Unama'ki, to become an eel harvester" (p. 124-125). McMillan continues, "Fishing was always Donald Marshall's first passion. He was taught to fish at a young age and told fishing stories throughout his life, with eel often taking a central role" (2012, p. 125).

Donald Marshall Jr's passion for eel fishing ultimately led to him being charged with several offences under the *Fisheries Act*. Marshall defended his actions by citing Mi'kmaw treaties and he appealed his conviction to higher courts. On 17 September 1999, the Marshall decision was issued by the Supreme Court of Canada. This decision, and the subsequent clarification, had a significant impact on the development of a Mi'kmaw commercial fishery.

THE MARSHALL DECISION

The incident leading to the Marshall case occurred in 1993, when Donald Marshall Jr went fishing for eels: "On August 24, 1993, Mr. Marshall went fishing for, and caught, eels in Pomquet Harbour in the County of Antigonish, Nova Scotia" (Issac, 2001, p. 104-105). His catch was seized by officers of the Department of Fisheries and Oceans, but, "Convinced that he had a right to fish, he contacted the chief of his reserve, who told him to keep fishing" (Coates, 2000, p. 3). Marshall went back and continued to fish. consequently, he was charged with three offences under the *Fisheries Act*: "Officials grabbed his 210 kilogram catch – worth close to \$790 – and charged him with fishing without a licence, selling eels without a licence, and fishing during a closed season" (Coates, 2000, p. 3-4). There was also a dispute about the use of illegal nets.

Jane McMillan and Peter Martin were with Marshall at the time and they were fishing for eels as well. McMillan and Martin were also charged under the *Fisheries Act*. Unlike Marshall, neither McMillan nor Martin proceeded to trial: "All charges were later dropped against McMillan, though not against Marshall and Martin. Martin, however, did not retain legal counsel. In the end, the federal government proceeded to trial only against Marshall" (Wicken, 2002, p. 4).

Donald Marshall Jr was well aware of historical treaties between First Nations and the Crown, and he strongly believed that he possessed a treaty right to commercially fish. Marshall decided to fight back with "the backing of more than a dozen Mi'kmaq chiefs and the official support of the Union of Nova Scotia Indians and the Confederacy of Mainland Mi'kmaq" (Coates, 2000, p. 4). Bruce Wildsmith was hired to represent him. According to Coates (2000), "The treaty argument, based on treaties signed with Britain in 1760 and 1761, held that these eighteenth-century agreements guaranteed Mi'kmaq the right to fish for commercial purposes and to benefit substantially from their resource activities" (p. 5).

Marshall lost the first round of his case in the Nova Scotia court. As explained by Coates (2000), "Judge John Embree ruled in June 1996 that the treaties were valid, but that the eighteenth-century instruments of commercial rights – truck houses and Indian trading agents – no longer existed, thereby eliminating the Mi'kmaq right to sell their catch" (p. 5). Historically, truck houses were places where Mi'kmaq people brought goods to trade. Marshall and Wildsmith appealed the decision in the Nova Scotia Court of Appeal in February 1997. In his argument, Bruce Wildsmith suggested that "the trading opportunities promised in the original treaties (truck houses and licensed Indian traders) represented an assurance that commercial resource harvests could continue" (Coates, 2000, p. 5). However, the Court of Appeal did not agree: "On March 26, 1997, a unanimous Nova Scotia Court of Appeal dismissed the appeal by Mr. Marshall to the lower court convictions" (Issac, 2001, p. 106).

Donald Marshall Jr's case eventually reached the Supreme Court of Canada for an appeal under the *Fisheries Act*. This was a step that Marshall and his attorney expected from the very beginning. According to Coates (2000), "The only way of ensuring that the eighteenth-century treaties were honoured in the present time was to have the Supreme Court rule on their relevance" (p. 6). Arguments in the Supreme Court of Canada began in November 1998: "Four hours of arguments before the Supreme Court were completed in early November and, as expected, the judges reserved their decision. A resolution of the Marshall case would await their judgment, which was not expected for at least eight months" (Coates, 2000, p. 6). The Supreme Court of Canada issued its decision on 17 September 1999: "Donald Marshall Jr was, by a vote of five to two, acquitted of the charges" (Coates, 2000, p. 7). Donald Marshall Jr finally won his case, and he did it in the highest court of Canada.

CLARIFICATION

The Marshall decision on 17 September 1999 affirmed the rights of Mi'kmaw people to commercially fish for resources. However, a clarification to the original Marshall decision was issued on 17 November 1999, due to "much reaction from both Aboriginal and non-Aboriginal people and, in particular, from representatives of non-Aboriginal fishers" (Issac, 2001, p. 110). West Nova Fishermen's Coalition, an intervener in the original Marshall decision, had applied for a rehearing of the decision "with respect to the federal government's regulatory authority regarding fisheries" (Issac, 2001, p. 110). The coalition also "sought a new trial to determine whether licensing and closed seasons could be justified by the Crown on the basis of conservation or some other ground" (Issac, 2001, p. 110). The request for a new hearing was in response to a "vocal reaction by non-Aboriginal fishers to the decision and in response to members of some First Nations who set lobster traps during the closed season" (Issac, 2001, p. 111). Many people opposed this request, including Donald Marshall Jr, other interveners, and even the Crown. In response, "In an unusual move, the court decided to give detailed reasoning regarding its rejection of the application for a rehearing" (Issac, 2001, p. 111). This provided a "useful clarification and reiteration of the law relating to treaty rights and their regulation and justifiable infringement by the Crown" (Issac, 2001, p. 111). The clarification may be seen as a limitation on the treaty right that had been affirmed through the Marshall decision.

IMPACT

The Marshall decision on 17 September 1999 was an important victory for the Mi'kmaw Nation. Following it, "Meetings were held in many communities to discuss how to best advance their participation in the commercial fishery and the 35 chiefs met in assembly to discuss a 'nation- based' approach to managing this fishery" (Wiber & Milley, 2007, p. 168). Donald Marshall Jr was proud of his accomplishment:

I give myself a pat on the shoulder that I'm a Mi'kmaq and I'm proud to be a Mi'kmaq ... When I went to the Supreme Court for fishing, I wasn't there for myself. I was there for my people. I had to represent my people, and it was really more touching than anything else when you represent your people and not yourself (Coates, 2000, p. 7).

Through the ruling of the Supreme Court of Canada, the treaties of 1760-1761 were validated, which gave the Mi'kmaq the right to commercially use resources. However, these resources were not unlimited. Instead, the First Nations people could "earn a 'moderate income' (not defined) and were obliged to operate within the framework of federal government rules" (Coates, 2000, p. 7). The Marshall decision was important because the right to commercially fish for resources had the potential to extend beyond eels to other species of fish provided fishing was to produce a moderate income. In addition, the Marshall decision gave the Mi'kmaw people hope that their treaties would

be recognized, encouraged, and implemented by the Crown, following a long history of poor recognition. According to Issac (2001), "Prior to Marshall, the only decision of substance by the Supreme Court of Canada regarding treaty rights in the Maritimes was Simon (1985)" (p. 143).

More specifically, the Marshall decision had an impact on the development of a Mi'kmaq commercial fishery. "The government realized that this decision would lead to a significant increase for the Mi'kmaq First Nations in the region's commercial fishery, and also recognized that the Crown had a fiduciary obligation to assist the First Nations in realizing this opportunity" (Wiber & Milley, 2007, p. 169). The government, however, was not prepared for the Marshall ruling: "Troubles began in the immediate aftermath of the Marshall decision. Natives in Nova Scotia and New Brunswick rushed to put traps in the water, anxious to capitalize on the fall 1999 season" (Coates, 2000, p. 128). As a result, some conflict grew between the First Nations people and non-native fishermen.

Thus, "The Supreme Court issued its "clarification" in the midst of violent confrontations between First Nations fishers engaged in an unlicensed lobster fishery and non-Native fishers seeking to maintain their exclusive access to the resource" (McCallum, 2004, p. 206). Non-native fishers brought conflict to Burnt Church, a First Nation community in New Brunswick, "destroying roughly 3,000 lobster traps set by First Nations fishers, trashing equipment at three local fish plants, smashing the windows of the reserve school, vandalizing the principal's office, assaulting Mi'kmaw individuals, and burning a structure erected by the Mi'kmaw people for spiritual ceremonies" (McCallum, 2004, p. 206). The violence during this time was starting to reach its boiling point. According to Coates (2003), "Numerous outbursts added to the strain and brought the Maritimes to the edge of serious ethnic tensions, leading Donald Marshall Jr. to speak out against the hostility and to encourage First Nations communities to accept the federal government's offer of a 'cooling off' period" (p. 348).

The government reacted with the Marshall Response Initiative: "The government allocated \$159.6 million in the initial phase of the Marshall Response Initiative (MRI), and within a month of the decision had appointed a Chief Federal Representative to oversee the process of negotiating Interim Fisheries Agreements (IFA) to give MMFNs immediate access" (Scott, 2012, p. 3). The government offered the First Nations access to the fishery through a financial assistance program with the Department of Fisheries and Oceans called Interim Fisheries Agreements. According to Coates (2003), "The deals would include cash payments, training for would-be fishers, new fishing boats, community wharves, and other benefits associated with the need to build the foundation for a new industry and a new economic future for the First Nations of the Maritimes" (p. 350). However, there was a condition for First Nation communities that signed these interim fishing agreements: "A condition of the Agreements was that the First Nation would be issued DFO fishing licenses and that signatory First Nations would abide by the same terms and conditions as applied to non-native fishers,

including seasons, trap and gear limits, and vessel restrictions” (Wiber & Milley, 2007, p. 170). The interim fishing agreements were initially only for one year and “By February 2001, the department was negotiating longer-term agreements, providing for increased First Nations access to fishing licences, financial help to acquire boats and equipment, and a training program employing experienced First Nations and non-Native fishers” (McCallum, 2004, p. 209). McCallum notes that, “By 2004, the Department of Fisheries and Oceans had long-term agreements with 29 of the region’s 34 First Nations communities” (2004, p. 209).

The government invested a substantial amount of money into the Marshall Response Initiative: “Between 1999 and 2007, a total of \$589.8 million was invested through the MRI (phases I and II); part of this money was used to purchase 295 new and used vessels” (Johnstone, 2016, p. 226). In addition, the Marshall Response Initiative “provided approximately 1,400 licences and 300 vessels to groups, through fisheries agreements negotiated with thirty-two of the thirty-four eligible First Nation groups” (Johnstone, 2016, p. 226).

The process of engaging the Mi’kmaq in the commercial fishery was not a simple one: “At the time of the Marshall decision, all available fishing licences were already in use” (Johnstone, 2016, p. 226). As a result, the government introduced a buy-back program to give the Mi’kmaq immediate access to the fishery, which was the quickest way to get over this entrance barrier. Due to the limited amount of licenses, the government started to buy back existing licenses from non-native fishermen who were looking to retire: “These buy-back arrangements most often involved the government also purchasing the fishers’ boats and gear” (Wiber & Milley, 2007, p. 173). However, this was a fairly expensive approach, as “The government was offering prices of between \$300,000 to \$350,000 for a licence and fully equipped boat” (March, 2002, p. 29). The buy-back program technique limited the number of Mi’kmaq able to enter into the commercial fishery to the number of fishermen willing to retire, so “In addition to being unable to provide the level of employment First Nations needed, the system often left natives to fish in areas of low productivity with inefficient gear” (Wiber & Milley, 2007, p. 174).

Although the Mi’kmaq had a treaty right to enter into the commercial fishery, they were generally inexperienced in this type of work. According to Wiber & Milley (2007):

However ... many of the Mi’kmaq communities lacked either the knowledge or the experience necessary to envision their involvement in the commercial fishery, and as a result most were unprepared to effectively deal either with the negotiations to arrive at viable agreements, or with the day-to-day management of commercial fishing operations (p. 171).

As a result, some financial resources were made available to the First Nations for the purpose of developing management capacity and activities. This financial help was only made to First Nations that agreed to follow the rules and regulations of the Department of Fisheries and Oceans through the Marshall Interim Fisheries Agreement. These

financial resources were key: "First Nation financial assistance has enabled many of the participating native communities to establish community administrative structures that specifically manage the First Nation's fishery" (Wiber & Milley, 2007, p. 172). A mentorship program was also introduced for inexperienced First Nation fishers, which involved receiving training support from experienced non-native fishers. This emerged from the buy-back process employed: "During the negotiation of buy-backs and Interim Fishery Agreements, several of the non-native fishermen who sold their licenses back to the government included the condition that they were hired as mentors" (Wiber & Milley, 2007, p. 175). This meant that the non-native fishermen were still actively employed in the fishery even after they sold their licenses and gear back to the government.

The Marshall decision also resulted in other services or programs to ensure Mi'kmaq are successful in the Atlantic commercial fishery. One example is the service of the Business Development Team (BDT) of Ulnuweg Development Group, Inc. The BDT was established under the Atlantic Integrated Commercial Fisheries Initiative (AICFI) and "Its clients are First Nation communities (FNCs) who are attempting to establish sustainable enterprises in the Atlantic commercial fishery" (Johnstone, 2016, p. 220). The BDT has been critical in helping First Nations overcome the barriers of entry into the commercial fishery, such as restrictive government policies, capital costs, and incumbency advantages. The BDT would find people to act as advisers to the Mi'kmaw people in order to be successful in the commercial fishery: "The first three hired included an accountant, a former Fishery Coordinator for a community in Québec, and a former fish plant manager who had also managed a deep-sea trawler fleet for another large seafood company" (Scott, 2012, p. 14). Scott goes on to note that, "In 2010, two additional advisers were added to the BDT, with specialist experience in fish processing, marketing, and aquaculture. Their role was to advise those MMFNs now starting to branch into vertical supply chain businesses (such as ice making, fish processing, and retail sales), or to diversify horizontally (into aquaculture, for instance)" (2012, p. 14). The BDT has a great deal of expertise and experience, and it has built trust through Ulnuweg such that, "By 2013, thirty of thirty-four MMFNs had joined the AICFI" (Johnstone, 2016, p. 231).

Another program to ensure success is the Aboriginal Aquatic Resources and Oceans Management (AAROM) program established by the Department of Fisheries and Oceans. Separate from the Marshall Response Initiative, "The [AAROM] program provides support for First Nations to effectively interact with the DFO in a broad range of oceans and coastal resources management issues" (Wiber & Milley, 2007, p. 178). This program is aimed to "assist aboriginal organizations acquire the administrative capacity and scientific expertise to participate in aquatic resource and oceans management, and to establish the necessary collaborative management structures" (Wiber & Milley, 2007, p. 178). Many Mi'kmaw communities have interacted with the Department of Fisheries and Oceans through this program.

ECONOMIC DEVELOPMENT IMPACT

The Marshall decision enabled many First Nation communities to increase economic development through their access to the commercial fishery: “Estimated economic returns to MMFNs from fishing in 1999 were \$4.4 million. The estimated economic return in 2009 from fishing was \$35 million” (Scott, 2012, p. 2). The number of fishing licences has also increased for First Nations: “The number of fishing licences held by MMFNs in 1999 was 316. In 2000 – a year after the Marshall Decision – they had risen to 594, and to 1238 by 2009” (Scott, 2012, p. 2). Employment in First Nation communities has also increased as a result of the Marshall decision. According to March (2002), more than 220 fishing enterprises have been transferred to Aboriginal communities, which translates into a 174% increase in the number of commercial lobster enterprises that are owned and operated by Aboriginal communities since the Marshall Decision (p. 36). March explains:

Increased access to the fishery also means increased access to more than 520 seasonal jobs in the industry. The government estimates that the landed value of the catches from the increased participation will equal \$21 million. This can be converted to almost \$14 million in earnings and profits for aboriginal communities. (2002, p. 36-37).

It is important to note that the Marshall decision opened up employment opportunities for younger community members. According to a study conducted on several First Nations by Cooper et al. (2010), “The majority of the fishers interviewed were relatively young, indicating that most of them entered the fishery post-*Marshall*” (p. 36). In terms of experience, Cooper et al. (2010) found that, “The average length of experience in the fishery was just over 11 years and the mode experience was 10 years, indicating that most of the fishers entered the industry at the time of the Marshall decision” (p. 37).

In April 2013, it was announced that the income of Mi’kmaw fishermen in the community of Eskasoni First Nation will now be tax exempt. This was the result of negotiations with the Canada Revenue Agency over a five year period. According to the Eskasoni community website, “This long-awaited decision is an important victory and signals a significant move forward in the recognition of Aboriginal rights, and specifically commercial fishing rights. Importantly, this decision was reached without lengthy and costly litigation with CRA” (Eskasoni, 2013). This was a significant win for the Mi’kmaw community.

ESKASONI

Eskasoni First Nation is largest of five Mi’kmaw communities in Cape Breton. Located along the shores of the Bras D’or Lake, “Prior to centralization Eskasoni’s population was less than 200, now Eskasoni is the highest populated reserve in Nova Scotia, with a population of 3,893 (registered population as of October 2008)” (Eskasoni, 2014).

Before the Marshall decision, Eskasoni had relatively little economic development and privately-owned stores were very popular. As a result of the Marshall decision in 1999, Eskasoni First Nation has developed a Mi'kmaw commercial fishery: "In 2006, during the late MRI period, Eskasoni established Crane Cove Seafoods as the sole division of their commercial fishery" and it "is a fully integrated fishery that harvests wild-caught snow crab, shrimp, lobster, groundfish, scallop, and tuna" (2012, p. 7). Crane Cove Seafoods "employs between 120 and 130 full-time and part-time employees. These employees comprise shore-based and sea-going personnel" (Crane Cove Seafoods, 2014). The head office of Crane Cove Seafoods is in the fisheries building in Eskasoni, which "overlooks the spectacular Bras d'Or Lakes and is the perfect location for conferences, meetings and workshops" (Crane Cove Seafoods, 2014). Eskasoni Corporate Division was established in May 2012. Since the development of the fishery, the community has also established Foodland supermarket, a gaming centre, a fitness centre, a community rink, a cultural centre, and Eskasoni Cultural Journeys.

MEMBERTOU

Membertou First Nation is a Mi'kmaw community located adjacent to Sydney, Nova Scotia in the Cape Breton Regional Municipality. It is one of five Mi'kmaw communities located within Unama'ki. According to Membertou's community website, "Membertou is an urban First Nation community consisting of over 1260 people, and one of five communities that make up the Cape Breton Regional Municipality, with a total population of over 115 thousand people" (Membertou, 2014). Economic development in Membertou before the Marshall Decision was limited. Since the Marshall decision in 1999, Membertou has developed a Mi'kmaw commercial fishery called First Fishermen Seafood: "Utilizing the fleet of six vessels Membertou's First Fishermen Seafood's Division harvests a variety of ground fish, shell fish and large Pelagic including tuna and swordfish" (Membertou, 2014). Since the Marshall decision, Membertou has also established the Membertou Market, Membertou Trade and Convention Centre, Membertou Entertainment Centre, and several gaming establishments. The profit that is generated from these businesses is distributed back to the community.

MILLBROOK

Millbrook First Nation, located within Truro, Nova Scotia, is one of thirteen Mi'kmaw communities in the province. According to their community website, "The Millbrook First Nation is a Mi'kmaq community of 1,729 Band members, 847 band members live on reserve. The Millbrook First Nation also has reserve land in Beaver Dam, Sheet Harbour, and Cole Harbour" (Millbrook, 2014). Like Membertou and Eskasoni, this community has also developed a commercial fishery, called Millbrook Fisheries. It is an important employer and source of income for the community: "The Band operates Millbrook Fisheries and has a \$25 million, interim fishing agreement with the federal

Department of Fisheries and Oceans. Employing 40 people, Millbrook Fisheries owns 50 fishing licenses for various species and has 14 boats (12 inshore and 2 offshore)" (Orr et al., 2011, p. 31). Orr et al. (2011) notes, "Although revenues from Millbrook Fisheries increased 54% to \$1.2 million between 2001 and 2010, this figure actually represents a slight decline (from 9% to 8%) in its contribution to business enterprise revenue" p. 32). Millbrook has developed other businesses, such as Millbrook Tobacco Store, Millbrook Treaty Gas, and Millbrook Gaming Commission.

CONCLUSION

The Marshall decision has been a significant economic driver for Mi'kmaw communities, as demonstrated in the three brief case studies above. But there is still room to grow. As noted by Hubert Nicholas, the commercial fisheries liaison coordinator for Unama'ki Institute of Natural Resources, "The Unama'ki bands, they commercially fish for lobster, shrimp, snow crab, and ground fish. But, most of their revenue is generated from the snow crab industry" (2011). Nicholas believes that First Nations can do much more when it comes to the fishery: "We could be taking resources right from the ocean to the plate. I think in the future, that's the way that we'll have to go. I'd like to see Unama'ki bands actually catch it, take it to their own processing facilities, have First Nation communities like this establishment here market it, and ship it to the [consumer]" (Unama'ki Institute of Natural Resources, 2011). While there are challenges ahead, the future is bright.

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