Treaty Rights as a Source for First Nation Social and Economic Development: The Marshall Decision in Atlantic Canada

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INTRODUCTION

In recent decades, First Nations across Canada have used a variety of instruments to rebuild their economies and societies, not without a struggle but also with measurable success. These instruments include levers like certain provisions of the Indian Act related to taxation on reserve, the pursuit of specific and comprehensive land claims, Treaty Land Entitlement settlements that have provided an avenue for the creation of urban-based reserves and business development, and Aboriginal and treaty rights recognized by the Supreme Court.[1] It is the latter that is the subject of this article, especially the two Marshall decisions issued by the Court in 1999, which recognized the treaty right of First Nations in the Maritime region to fish for a moderate livelihood.[2] In this article, we will describe the decision, the reaction to it from various parties, ongoing flashpoints that have the potential to generate tension and conflict, and some possible paths forward.

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[1] Wanda Wuttunee and Fred Wien, (eds.), *Engraved on Our Nations: Indigenous Economic Tenacity* (Winnipeg: University of Manitoba Press, forthcoming 2023). See also Carol Anne Hilton, *Indigenomics: Taking a Seat at the Economic Table* (Gabriola Island: New Society Publishers, 2021).

[2] Jeffery Calaghan, Lucia Westin, and Dan Vanclieaf, "The Indigenous Right to a Moderate Livelihood", in Wien and Williams, op. cit., pp. 75–79.

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THE MARSHALL DECISION

When he was charged in August 1993 with illegal fishing under Canada's Fisheries Act, Donald Marshall Junior was already well known in the Maritimes and nationally. Coming from Membertou in Cape Breton, and son of the Mi'kmaq Grand Chief at the time, "Junior" was the victim of a wrongful prosecution for murder which caused him to spend 11 years in prison, beginning in 1971, for a crime he did not commit. As recounted by his partner, Jane McMillan:

> Junior loved to fish. He was a grateful harvester and enjoyed cooking what he caught. He embraced the solitude of wandering down the river with his fly rod or jig and the excitement of setting nets in the Bras d'Or Lakes. Junior's passion for fishing led us to catch eels for a living. Eels are an important facet of Mi'kmaw culture, and eel fishing a time-honoured custom. After the catch, we would take out the choice eels, and Junior would spend hours cleaning them to pass to the Elders in the community. He also fished for feasts and important events like Treaty Day and Mawiomi (powwows).[3]

After being charged in 1991 with catching, selling and possessing eels without a licence and outside of the prescribed fishing season, the ensuing court case made its way to the Supreme Court. His defence was that the Peace and Friendship Treaties signed between representatives of the Mi'kmaq, Wolastoqey, and Peskotomuhkati peoples on the one hand and representatives of the British Crown on the other in the 1725–1780 time period enshrined his inherent right to sell the catch of his hunting and fishing without regard to more recent regulations. His lawyers further argued that the relevant treaties are recognized and affirmed by section 35 of the Canadian Constitution Act of 1982.

The Court agreed, holding that:

> ... the Peace and Friendship Treaties of 1760–1761 confirmed the right of the Mi'kmaw people to provide for their own sustenance by taking the products of their hunting, fishing, and other gathering activities, and trading for what in 1760 was termed "necessaries." The Court found that the concept of "necessaries" is equivalent in current times to the concept of a "moderate livelihood," and a moderate livelihood includes such basics as "food, clothing, and housing, supplemented by a few amenities." It does not, however, extend to the open-ended accumulation of wealth.[4]

The initial Court decision left considerable confusion in its wake, as well as escalating tensions at the waterfront and, in some cases, acts of racism and violence. It left unclear, for example, what moderate livelihood means, who would be responsible for managing the fishery, how the decision would impact the sustainability of the resource, and how it would fit into (or not) the existing regulatory regime lodged with the federal Department of Fisheries and Oceans (DFO). Because of widespread concern, the Court issued a second decision later in the fall of 1999 (called Marshall II). While it did not speak to all of the outstanding issues, the second decision did clarify that the Marshall First Nations would manage their own involvement in the moderate livelihood fishery and that DFO could only regulate if there was a compelling reason for doing so (such as protecting the sustainability of the

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[3] L. Jane McMillan, "Fishing with Donald Marshall Jr.", in Wien and Williams, op. cit, pp. 69–74.

[4] Callaghan, op. cit., p. 76.

resource), if they formally consulted with the affected First Nations about this planned infringement of their treaty right, and if they made the case for doing so.[5]

THE INSHORE FISHING INDUSTRY IN THE MARITIMES AND FIRST NATION PARTICIPATION

In 2018, the Canadian fish harvesting industry generated some $3.7 billion in landed value. Of this amount, an estimated $2.4 billion was landed by fleets in the Maritime provinces and Quebec. Almost all of the landed value in Eastern Canada came from independent owner-operated inshore and midshore vessels. The value of lobster harvests amounted to $1.7 billion in the region in 2019, making it the most valuable of the various species that were caught.[6]

Commercial fishing is controlled through the issuance of licences by DFO, and more than 6,000 licences were issued for lobster in 2020 in the three Maritime provinces and Quebec. Of course, the employment impact goes well beyond the licence holders to encompass the crews on the boats and those engaged in related occupations such as processing and transportation. Bearing in mind that most fishing takes place within seasons of six months or less, Atlantic coast fish harvesters averaged over $33,000 in fishing income in 2019 and have seen an 84% growth in after-inflation earnings since 2010. The major challenges facing the commercial fishery include the aging of the harvester workforce and the closure of fishing on certain endangered stocks, including mackerel and herring. As well, the surge in market demand for seafood generally has driven up the value of fishing licences and quotas, making it much more difficult for new entrants to become enterprise owners and for First Nations to purchase licences to create jobs and incomes for their communities.[7]

Fishing was, of course, central to the economic base of Indigenous communities not only pre-contact but also in later times. Yet, they were gradually pushed aside as American and European settlers flooded into the region during the 17th and 18th centuries, claiming land near the ocean shore, along rivers, and in the most fertile agricultural areas. Federal policies and other events furthered this dislocation and the undermining of traditional ways of making a living. Indigenous communities were progressively displaced and marginalized by the creation of reserves throughout the region in the early 1800's, the controls imposed by the 1876 Indian Act, the requirement for children to attend residential schools, the effects of the Great Depression, and the attempts in the 1940s in Nova Scotia to centralize the Mi'kmaq population in two locations that both lacked ocean fishing access. When limited entry licensing was introduced in the 1970s, there were no programs to enable First Nations to purchase licences, boats, and gear for their communities, and without property as collateral Indigenous individuals could not access provincial fisheries loan board services.[8] The exclusion from fishing was so complete that, by the time of the Marshall decisions in 1999, Coates reports that there were only one or two fishing licences in the whole community of Eskasoni, the largest First Nation in Nova Scotia.

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5 Naiomi Metallic and Constance MacIntosh, "Canada's Actions on Mi'kmaw Fisheries", in Wien and Williams, op. cit., pp. 33–35.

6 Rick Williams, "An Overview of Commercial Fisheries", in Wien and Williams, op. cit., pp. 3–7.

7 Rick Williams, ibid, pp. 3–7.

8 Fred Wien, "A History of Exclusion", in Wien and Williams, op. cit., pp. 24–34.

> Before 1999, the Eskasoni First Nation had little connection to the East Coast fishery. The band held a licence or two at different times and allowed the licences to be fished by a band member. People from the community harvested eels but had little presence in the commercial fishery in the region.[9]

In the last two decades, however, First Nations in the region have gradually started to reclaim their place in the fishery, aided in no small measure by court decisions recognizing Aboriginal and treaty rights. This resurgence has taken three forms:

(a) Having **the right to fish for food, social and ceremonial purposes** recognized in the Supreme Court's *Sparrow* decision of 1990. While this right as recognized by the Court does not permit commercial fishing (i.e., selling fish for income), it does permit each community to designate certain fishers who will catch lobster and other species, making them available in the community for food, for social occasions such as weddings, and when ceremonial events are being undertaken.[10]

(b) Having **the right to fish to obtain a moderate** livelihood as recognized by the Supreme Court's Marshall decisions handed down in the fall of 1999. This right as interpreted by the Court does allow the catch to be sold to a limited degree, but being able to exercise the right has generated controversy. This situation is described more fully below.

(c) After the Marshall decisions, the Department of Fisheries and Oceans invested millions of dollars to build First Nation fishing capacity under the umbrella of what are called **communal-commercial fisheries**. This amounted to integrating Marshall First Nations into the existing commercial fishery through the use of short-term interim agreements that provided DFO-issued licences and quota allocations to fish during the regular commercial season, subject to DFO regulations and conservation requirements. Along with the licences, funding was provided for the acquisition of vessels and gear, as well as for building up fisheries governance, harvester training, and at-sea mentoring. The economic benefits in terms of outcomes such as employment, training, and business development have been substantial, according to a report prepared for the MacDonald-Laurier Institute. The report estimates that on reserve economic benefits from commercial fishing in the region grew from a paltry $3 million in 1999 to $152 million in 2016.[11]

There is considerable debate about the meaning of the federal government's investment in the communal-commercial fishery. The Supreme Court of Canada left it to future negotiations to define moderate livelihood fishing and self-government rights, but in response to the crisis that ensued after the 1999 decision, DFO pushed ahead with expanding First Nation access to the commercial fishery on the assumption that communal commercial fishing was in fact contributing to generating moderate livelihood outcomes. Most First Nations have

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[9] Ken Coates, *The Marshall Decision at 20: Two Decades of Re-Empowerment of the Mi'kmaq and Maliseet* (Ottawa: The MacDonald-Laurier Institute, 2019), p. 10.

[10] Rick Williams, "Development of First Nations Fisheries Since the Marshall Decision", in Wien and Williams, op. cit., pp. 8–23.

[11] Coates, op. cit. See also John Paul and Joseph Quesnel, "The Marshall Legacy", in Wien and Williams, op. cit., pp. 35–40.

never accepted that interpretation, but there has been no progress on negotiating a new treaty that would define and set the terms for the implementation of the right. Statements by First Nation leaders implying that nothing has been done since 1999 to meet the moderate livelihood right are heavily contested both within DFO and in the commercial industry.[12]

FIRST NATION PERSPECTIVES

Within the First Nation communities in the region, there are of course a range of views about the treaty right to fish for a moderate livelihood and how that right should be implemented. However, there seems to be substantial agreement on these core points:

- Despite the Court's decisions in Marshall I and II, the federal government is still a long way from supporting the implementation of the right in a satisfactory manner. First Nation representatives argue, for example, that DFO has until recently consistently declined to deal with the matter at the negotiating table on the grounds that it did not have a mandate to discuss the issue. And in practice, the Department and the federal government more generally have failed First Nations by failing to protect their fishers from racism and violence, by seizing their lobster traps if it was concluded that regulations were being violated, and by imposing regulations (such as the requirement to fish during officially mandated seasons) without consultation or making the case that an infringement of the treaty right was justified.[13]

- First Nation representatives maintain that their treaty right includes the right to manage the moderate livelihood fishery themselves, except for the exception noted in Marshall II. Furthermore, they are committed to doing so responsibly, with particular attention to maintaining the sustainability of the resource. As stated by the Fisheries Lead for the Assembly of Nova Scotia Mi'kmaq Chiefs, "We have the right to self-government, and that includes our right to govern our fisheries. We are developing our own sustainable livelihood fishery, separate from the commercial fishery, as we have a responsibility to protect our affirmed Treaty Right and the court ruling. By working together, we will develop sustainable community fishing plans as this is important to our people today and to the sustainability of the resource for future generations."[14]

- They also maintain that the issue is not only making room for moderate livelihood fishers on the water operating under community-approved fish management plans. The point of exercising governance rights is to enable First Nations to participate in the fishery on their own terms, allowing them to fish according to time-honoured principles deeply rooted in their cultures, such as *Netukumlink*.[15] They point to eel fishing, for example,

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[12] Rick Williams, "Development of First Nations Fisheries Since the Marshall Decision", in Wien and Williams, op. cit., pp. 8–23.

[13] Standing Senate Committee on Fisheries and Oceans, *Peace on the Water: Advancing the Full Implementation of Mi'kmaq, Wolastoqiyik and Peskotomahkati Rights-Based Fisheries* (Ottawa: Senate of Canada, 2022).

[14] The Assembly of Nova Scotia Mi'kmaw Chiefs, "Chiefs' Positions on Moderate Livelihood", in Wien and Williams, op. cit., pp. 105–113.

[15] As defined by the Unama'ki Institute of Natural Resources, "Netukulimk is the use of the natural bounty provided by the Creator for the self-support and well-being of the individual and the community. Netukulimk is

which is practised in this manner with different levels of effort and different fishing technologies depending on the time of year, with the proceeds shared within the communities, and with strict attention backed by both Indigenous and Western science on the sustainability question.[16]

- Not surprisingly given the events in the fall of 2020, First Nation representatives express great concern over the safety of their fishers and community members. They call on federal ministers to speak out against the racism and violence directed toward First Nation community members and to increase enforcement to ensure the safety of everyone, on and off the water.

NON-INDIGENOUS COMMERCIAL HARVESTING PERSPECTIVES

As with First Nations, commercial harvesting organizations also take varying positions on the subject of Indigenous participation in the fishery and achieving reconciliation. However, the following themes encompass the issues about which they are most concerned:

- When it comes to negotiations pertaining to their Aboriginal and treaty rights, First Nations in the region insist that these are matters to be discussed between their representatives and those of the Crown. Furthermore, the appropriate federal representative is Indigenous and Crown Relations Canada rather than DFO. Commercial harvester organizations, on the other hand, are accustomed to having a seat at the table when matters affecting their interests are discussed. While DFO has, separately, organized some briefing sessions to keep commercial harvesters informed, this is not seen to be adequate. "We don't feel that we've been heard. We have significant problems with the fact that DFO has failed to figure out a way to include us. We understand the nature of nation-to-nation negotiations, but there has to be a place for commercial harvesters."[17]

- Commercial harvesting organizations insist that there be a single regulatory system managed by DFO and enforcing one set of rules for the industry:

> Harvester leaders argue that if each First Nation, or a group of Nations, can exercise a right to unilaterally decide how much fish to catch, or how many lobster traps to set, and where and when to fish, there could be chaos. Either total fishing effort will keep ramping up, putting fish populations in danger, or there will be escalating conflicts between communities, fleets, and regions over who will see their shares reduced to maintain sustainable catch levels.

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achieving adequate standards of community nutrition and economic well-being without jeopardizing the integrity, diversity, or productivity of our environment." (Quoted from Senator Dan Christmas, "Exploring the Rights and Wrongs of the Moderate Livelihood and East Coast Indigenous Fishery", in Wien and Williams, op. cit., p. 122)

[16] Amber Giles, Lucia Fanning, Shelley Denny, and Tyson Paul, "A Mi'kmaw Approach to Managing Fisheries", in Wien and Williams, op. cit., pp. 114–119.

[17] Rick Williams, "Perspectives from Commercial Harvester Organizations", in Wien and Williams, o. cit., p. 146.

- There is great concern among commercial harvesting organizations that two of the bedrock principles for which they have long strived, not succeeding until 2019 in having them enshrined in legislation, will be undermined if First Nation participation takes certain forms. One principle is that fishing in most of the inshore fisheries will be undertaken only by owner-operators — that is, by the person possessing the licence, who needs to be physically present on the boat. Related to this is the principle of fleet separation, meaning that processing companies cannot own licences to harvest fish when it comes to the inshore fishery. With seven First Nations, led by Membertou, joining forces with a multinational corporation to purchase Clearwater Seafoods, which is the largest shellfish processing company in Canada and possibly the world, the worry is that Clearwater or other processing corporations will find ways to work around the fleet separation restriction by partnering with First Nations to gain control of harvesting licences.[18]

CURRENT ISSUES AND FLASHPOINTS

It becomes apparent, then, that there are significant issues to be addressed. This is not to say that progress has been negligible since the events in the fall of 2020. There have been no major breakthroughs, but one might describe what has developed as a kind of "muddling through". DFO has, for example, shown itself to be somewhat more amenable to sitting down with First Nation representatives to discuss their treaty right to fish for a moderate livelihood. Some First Nations in Nova Scotia, for their part, have taken the initiative to develop their own fish management plans either for one community or several. DFO approved these plans in 2022 and renewed them for 2023 with an understanding that moderate livelihood fishing will utilize DFO licences and take place during the DFO-approved fishing seasons. At Listuguj First Nation, the community has developed an agreement with DFO whereby fishers from the community will significantly reduce the number of lobster traps used during the "regular" spring season in exchange for being able to fish in the fall when non-First Nation fishing is closed down.

Yet, a fundamental divide between the Marshall First Nations and the commercial harvesters persists, and tensions remain high. First Nations have a vision of a rights-based fishery (contrasting with what is termed a privilege-based fishery for non-Indigenous harvesters) that includes their own systems of governance over matters such as developing their own fish management plans, setting the rules for their fishers, having their own guardians enforce the rules, and integrating traditional knowledge with Western scientific evidence on matters such as sustainability. Commercial harvester groups are saying, on the other hand, "You are welcome to participate in the fishery as long as you fish in our seasons, follow our rules and are policed by our officials."[19]

Both sides have leverage over the situation: First Nations have treaty rights backed by the Marshall decision and other Supreme Court rulings, while commercial harvester groups are powerful partners in the existing co-management system and have considerable local political influence, as evidenced in the 2020 federal election. The federal government, for its

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[18] Ryan Stack, "The Clearwater Purchase", in Wien and Williams, op. cit., pp. 178–181.

[19] Fred Wien and Rick Williams, "Flashpoints and Possible Pathways", in Wien and Williams, op. cit., pp. 184–186.

part, seems to favour one side and then the other on an issue-by-issue basis in its policy and related decisions.

In addition to this fundamental divide, several other flashpoints have emerged and need to be resolved, including:

- Interpreting the meaning of the moderate livelihood right. What does it mean to earn a moderate livelihood, how many First Nation community members can exercise this right, and does the right include authority to self-regulate? The Supreme Court recognized the self-government right for moderate livelihood fishing, but with the critical caveat that DFO can step in to protect the resource for conservation or for other "*compelling and substantial public objectives which may include economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups"*.[20] Any override by DFO must be preceded by in-depth consultations with First Nations and by making the case to justify its actions. DFO has, in several important instances, not abided by these conditions.

- Addressing the tension arising from First Nations exercising their right to engage in direct nation-to-nation negotiations with the federal government, a process that often excludes commercial harvesting groups from participating in decisions that affect their livelihoods and runs counter to the co-management principles governing most fisheries management processes.

- A key issue is creating trust and fairness in the enforcement of regulations. Commercial harvesting interests adhere strongly to the idea that there should only be one regulator, while First Nations hold out for the right to manage their own fishery, for which they require capacity development. First Nation communities see moderate livelihood fishing as a means for a larger number of their community members to access commercial fishing, but in a modest and occasional way, using less costly boats and gear and operating in safer near-shore fishing grounds. This type of small-scale, artisanal fishing activity could also provide an access point for young community members to gain the knowledge, experience, and skills necessary to become professional fish harvesters and be able to compete in the regular commercial fishery.

- An important issue is making it possible for First Nation fishers to enter the lobster fishery, where the total numbers of licences and traps are rigidly restricted by DFO to protect the stocks. In each region, there are hundreds of non-Indigenous competitors who have, over decades, protected their local fishing grounds and devised many unwritten rules and traditions to manage competition among neighbours fishing from the same ports.[21] It's a zero-sum situation, meaning that more licences and trap allocations for First Nation entrants must mean less for existing commercial harvesters and therefore fewer jobs and incomes in their communities. Progress in developing First Nations fisheries to date has involved a "willing seller, willing buyer" approach, with DFO buying up licences from retiring fishers and making them available, often in creative ways, to First Nations. With

[20] Supreme Court of Canada Judgment in *R. v. Marshall*, November 17, 1999, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1740/index.do

[21] Rick Williams, "Unique Challenges in the Lobster Fishery", in Wien and Williams, op. cit., p. 45.

a booming lobster market, high prices for licences are now a major barrier to expanding Indigenous access. As an alternative approach, First Nations leaders have proposed that commercial harvesters, in a spirit of reconciliation, might give up fishing a small number of traps (5 to 10 has been suggested out of some 300 or so utilized on a typical boat) to make room for First Nations.

- Additional flashpoints have to do with multiple centres of leadership within both sides and, in some cases, weak influence over members; communication challenges arising from misinformation through social media; and both institutional and inter-group racism. When several First Nations in Nova Scotia and Newfoundland purchased a controlling interest in Clearwater, fears arose that this would lead to vertical integration in the industry, where the previously established lines between a processing company on the one hand and independent owner-operated fishers on the other would be eroded.[22]

A VISION FOR THE FUTURE

Since the Marshall decision, the federal government has made significant investments in building fishing capacity within the Marshall First Nations, and they have responded impressively to the opportunities that were opened up under what came to be known as the communal commercial fishery. In the view of First Nations, disputed by some non-Indigenous commercial fishing groups, the federal government's actions did not represent the recognition and implementation of their right to fish for a moderate livelihood. In their view, for the more than two decades that followed the Supreme Court's decision, negotiations concerning moderate livelihood were off the table. Sipekne'katik First Nation then forced the issue in the fall of 2020, putting boats in the water outside of the approved fishing season and issuing their own moderate livelihood fishing licences. At a later date, several Mi'kmaw First Nations in Nova Scotia set out moderate livelihood fishing plans, which DFO approved; but as noted above, they are using DFO licences and fishing in season. The significant innovation that occurred is being able to divide one DFO lobster licence and its trap allocations among multiple crew and boats on the water, which non-First Nation harvesters can't do. For them, one licence means one boat and crew.

The current pattern is one where First Nations are pressing their right to fish, and in some areas they encounter resistance on the wharves and on the water and are blocked from being able to purchase bait or find buyers for their catch. Over the last several decades, this pattern of pursuing a right in the face of resistance has not been without precedent, such as in the case of moose hunting in Nova Scotia. One saw it as well in the 1990s when Membertou First Nation in Cape Breton was starting to rebuild its economic base. At that time, some merchants in the Sydney area reacted in a hostile manner, claiming that Membertou had unfair advantages, such as with taxation of on-reserve businesses or access to federal grants. Yet, Membertou persisted, and it is now abundantly clear not only that the members of Membertou are considerably better off than they were previously but also that Membertou is making a huge economic and social contribution to the wider Cape Breton region. This is evident in many indicators, ranging from employment being provided for

[22] Fred Wien and Rick Williams, "Flashpoints and Possible Pathways", in Wien and Williams, op. cit., pp. 197–205.

Sydney residents, contracts being awarded to tradespersons, valuable services such as a hockey arena and a trade/convention centre being made available to the public, and donations being provided for charitable purposes.[23]

It is conceivable that a similar scenario could play out in the inshore fishery, if the conflict can be contained in the short term and wise decisions are made by all the parties involved. That is, First Nations could find room to participate in fishing for a moderate livelihood, while at the same time the industry is strengthened for all concerned. First Nations have a lot to bring to the table — their youth, for example, to an industry where 40 per cent of working fish harvesters are at or beyond the usual retirement age; their traditional knowledge of how to fish sustainably; and the advantages they might have in areas such as attracting investments, product branding, and marketing. There are also negative consequences that need to be avoided by the industry, especially the harm that would ensue to markets in Canada and abroad, including Europe, if incidents of violence and racism were to continue.

The challenge in a complicated situation such as we have described is where and how to intervene to pursue a longer-term vision. It is worth noting that not all the flashpoints are equally deserving of priority attention, and some are connected to others so that making progress on one leads to another issue receding in importance. Strengthening enforcement, for example, might represent a strategic catalyst for wider changes in that both commercial harvesters and First Nations believe strongly that the protection of resources for future generations is a high priority. This would require much more rigorous enforcement mechanisms in all fisheries for all participants. If DFO were to significantly strengthen its enforcement programs and practices while helping build First Nation capacities to enforce their fisheries management plans while cracking down on harassment by non-Indigenous actors, it is reasonable to expect that opposition by commercial harvesters to First Nations "running their own show" — an opposition rooted in fears of out-of-control Indigenous fishing — would significantly recede. In a situation where First Nation harvesters could feel safe and well supported in conducting their fishing operations on land and at sea, and where non-Indigenous harvesters were confident that agreements and management plans were being fully implemented in all fisheries, new foundations of trust and co-operation could rapidly take shape to energize reconciliation in other fields of activity and community relations.

[23] Mary Beth Doucette and Fred Wien, "How Does First Nation Social and Economic Development Contribute to the Surrounding Area? A Case Study of Membertou", in Wuttunee and Wien, op. cit.