
EMPOWERING MARITIME FIRST NATIONS

Improving treaty rights
under the *Marshall* decision

Ken S. Coates

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Executive summary | *sommaire*

In 1999, the Supreme Court of Canada made a historic decision that transformed the country's commercial East Coast fishing industry. At the time, First Nations had been locked out of the regional economy for several centuries, despite traditionally engaging in fishing for subsistence and for trade.

In two rulings – the *Marshall* decision, and a clarification, *Marshall 2* – the Supreme Court ruled that First Nations in the Maritimes had the right to fish for commercial purposes under provisions in the Peace and Friendship Treaties signed between their ancestors and the British authorities in the 18th century.

The ruling sparked chaos on the water and at the wharves; First Nations fishers rushed to drop lobster pots and assert their share of the lucrative fishery, while non-Indigenous fishers pushed back at the perceived threat to their livelihoods.

To quell the storm, the federal government allocated millions of dollars to buy back fishing licences and quotas from non-Indigenous fishers, along with boats and gear, and transfer them to First Nations.

The interventions generally worked and secured relative peace on the waters of the East Coast. Hundreds of First Nations people joined the fishing industry and First Nations governments invested in associated businesses. In the intervening quarter-century, First Nations participation in the Maritime fisheries grew substantially.

However, tensions have risen in recent years thanks to several areas of contention:

- First Nations' frustrations with the slow pace and bureaucratic nature of the Government of Canada's licence acquisition process.
- The unresolved and controversial "moderate livelihood" provisions in the Supreme Court's decision.
- The growing frustration among non-Indigenous fishers over their marginalization as the Department of Fisheries and Oceans increasingly works directly – and often exclusively – with First Nations. These tensions are causing increasing difficulties for First Nations anxious to secure attention to their treaty rights.

The government's current approach – using a "willing seller, willing buyer" method that sees licences and quotas purchased from non-Indigenous fishers and transferred to First Nations – is making the situation worse.

The problem? It is too Ottawa-centric: a slow and bureaucratic top-down approach that leaves First Nations beholden to the federal government and unable to chart their own courses in the industry and beyond. It also fails to address the needs of First Nations that either are unable or do not want to fully participate in the Maritime fisheries and would prefer to expand their commercial opportunities under *Marshall* elsewhere in the wider economy.

It's clear that new approaches are urgently needed. These could include:

- Expanding First Nations access to the fisheries through more creative means, including by working with non-Indigenous fishers (through the purchase of partial licences and quotas).
- Granting First Nations more autonomy to manage access to the Maritime fishery. For instance, a first Nations-led, region-wide organization – or a series of sub-regional associations – could manage the purchase and allocation of commercial fishing licences much more nimbly and quickly than the current Ottawa-centric approach.
- Offering other financial ways to respect and honour First Nations' treaty rights under *Marshall* that go beyond the fisheries.

While the case at the heart of the *Marshall* decision dealt specifically with the fisheries, the court's rulings have much wider implications – that First Nations have a treaty right to greater space in regional and national economies, and that the Crown has an obligation to help them achieve this outcome.

The fact is not all First Nations people in the Maritimes are willing or able to work in such a gruelling industry. Many First Nations might prefer to be offered substantial settlement funds in lieu of fishing licences, etc., that could be invested more broadly in the regional economy. These funds could – and should – be directly controlled by First Nations, not the federal government.

Animosity and disrespect between First Nations and non-Indigenous fishers will only lead to further disharmony. First Nations and non-Indigenous communities must work together for the good of everyone living in the region. The only sensible solution is collaboration – building greater prosperity for all.

For this to happen, the Government of Canada must honour the treaties signed between First Nations and the Crown, and give Indigenous communities and their leaders the tools, support, and encouragement to succeed.

Marshall-based commercial fishing rights are part of the solution to Indigenous rights and aspirations. They are not the only way to create economic and commercial opportunity and in no way do the *Marshall* decision allocations address the potential full suite of treaty rights and obligations owed to First Nations in the Maritimes. For many reasons, the status quo will no longer hold; significant changes are urgently required.

Whatever solutions are found, First Nations rights under the Peace and Friendship Treaties must be respected, ideally in a manner that stabilizes Indigenous-non-Indigenous

relations in the region and that conserves the vital commercial resource that is the Maritime fishery. [MLI](#)

En 1999, un arrêt historique de la Cour suprême du Canada a profondément transformé l'industrie commerciale de la pêche sur la côte est. Plusieurs siècles auparavant, les Premières Nations avaient été écartées de l'économie régionale, et ce en dépit de leur pratique traditionnelle de la pêche à des fins de subsistance et d'échange.

Dans deux arrêts – Marshall et Marshall 2 (une clarification) – la Cour suprême a statué que les Premières Nations des Maritimes avaient le droit de pratiquer la pêche commerciale en vertu des traités de paix et d'amitié conclus au XVIII^e siècle avec les autorités britanniques.

L'arrêt a semé le chaos en mer et sur les quais, car les pêcheurs autochtones ont rapidement installé leurs casiers à homard et réclamé leur part de la pêche lucrative, tandis que les pêcheurs non autochtones ont manifesté contre la menace perçue pour leur gagne-pain.

Cherchant à calmer la tempête, le gouvernement fédéral a racheté pour des millions de dollars les permis, quotas, bateaux et matériels de pêche des Non-Autochtones et les a transférés ensuite aux Premières Nations.

Dans l'ensemble, ces actions ont réussi à établir une paix relative dans les eaux de la côte est. Des centaines de personnes issues des Premières Nations sont entrées sur ce marché, et les gouvernements autochtones ont investi dans leurs entreprises. Au cours du quart de siècle qui a suivi, la participation des Premières Nations aux pêches dans les Maritimes s'est considérablement accrue.

Cependant, les tensions ont augmenté ces dernières années en raison de plusieurs points litigieux :

- Les frustrations des Premières Nations face à la lenteur et la bureaucratiation du processus gouvernemental d'octroi des permis.*
- Les questions restées en suspens et les dispositions controversées dans l'arrêt de la Cour suprême concernant la notion de "subsistance convenable".*
- Le ressentiment grandissant des pêcheurs non autochtones du fait de leur marginalisation, le ministère des Pêches et des Océans travaillant de plus en plus directement – et souvent exclusivement – avec les Premières Nations. Ces tensions causent des difficultés croissantes aux Premières Nations soucieuses de mobiliser l'attention sur leurs droits issus des traités.*

La stratégie actuelle du gouvernement – qui repose sur le principe de vente de gré à gré (acheteur consentant, vendeur consentant) pour transférer aux Premières Nations les permis et quotas achetés aux pêcheurs non autochtones – envenime la situation.

Le problème ? La stratégie est trop centrée sur Ottawa : cette approche descendante hautement bureaucratique et lente laisse les Premières Nations redevables au gouvernement fédéral et constitue un obstacle à leur intégration dans l'industrie et au-delà. Elle néglige également les besoins des Premières Nations qui, soit par manque de moyens, soit par désintérêt pour les pêches, souhaiteraient, dans le cadre de l'arrêt Marshall, diversifier leurs débouchés commerciaux dans toute l'économie.

Il est urgent de mettre en œuvre de nouvelles stratégies. Elles pourraient comprendre les éléments que voici :

- Faciliter l'accès des Premières Nations aux pêches par des moyens innovants, y compris la collaboration avec les pêcheurs non autochtones (pour l'acquisition de segments de permis et de quotas).*
- Accorder plus d'autonomie aux Premières Nations en ce qui concerne la régulation de l'accès aux pêches dans les Maritimes. Par exemple, si l'achat et l'octroi des permis de pêche commerciale étaient administrés par une organisation régionale dirigée par les Autochtones – ou une série d'associations sous-régionales – plutôt que par la méthode centralisée d'Ottawa, le processus serait beaucoup plus fluide et plus rapide.*
- Offrir, dans le cadre de l'arrêt Marshall, de nouveaux moyens financiers permettant d'assurer le respect et la valorisation des droits des Premières Nations issus des traités qui vont au-delà de la pêche.*

L'affaire Marshall porte précisément sur la pêche, mais la décision rendue par la Cour a des conséquences beaucoup plus vastes : elle reconnaît que les Premières Nations ont le droit, en vertu des traités, de jouer un rôle plus important dans les économies des régions et du pays et que la Couronne a l'obligation de les aider pour y parvenir.

Or, il s'avère que ce ne sont pas toutes les Premières Nations des Maritimes qui nourrissent l'espoir ou sont en mesure de travailler dans une industrie aussi rigoureuse. De nombreuses Premières Nations aspirent à obtenir, au lieu de permis de pêche et autre, des fonds d'établissement substantiels à investir dans l'ensemble de l'économie régionale. Ces fonds pourraient – et devraient – être contrôlés par les Premières Nations, non pas par le gouvernement fédéral.

Le mépris et l'hostilité entre les pêcheurs autochtones et non autochtones ne feront qu'exacerber le conflit. Les communautés autochtones et non autochtones doivent travailler ensemble pour le bien de tous dans la région. La seule solution sensée est la collaboration pour la prospérité de tous.

Pour cela, le gouvernement canadien se doit d'honorer les traités entre les Premières Nations et la Couronne, tout en fournissant aux communautés autochtones et à leurs représentants les outils, le soutien et l'appui indispensables pour prospérer.

Les droits de pêche commerciale fondés sur l'arrêt Marshall constituent un aspect de la solution vers les droits et les aspirations des Autochtones. Ils ne sont pas le seul moyen de créer des débouchés économiques et commerciaux et, en aucun cas, les

fonds alloués par l'arrêt Marshall ne permettent d'optimiser pleinement tous les droits et obligations issus des traités à l'égard des Premières Nations des Maritimes. Pour diverses raisons, le statu quo ne tient plus; des changements importants s'imposent de toute urgence.

Quelles que soient les solutions trouvées, les droits des Premières Nations en vertu des traités de paix et d'amitié doivent être respectés, idéalement d'une manière qui stabilise les relations entre Autochtones et Non-Autochtones dans la région et qui préserve cette ressource commerciale vitale qu'est la pêche dans les Maritimes. [MLI](#)

Introduction

The Maritime fishing industry faces profound challenges, ranging from navigating the complex and arcane procedures developed by the Department of Fisheries and Oceans, to environmental concerns, uncertain markets, looming tariffs imposed by the United States and China, succession issues within the sector, technological changes, and other factors. However, it remains a strong and vital industry, supporting numerous small coastal communities and making major contributions to the Maritime socio-economic order (Parsons 1993). One area – relations with First Nations people and, more accurately, the continuing difficulties facing First Nations seeking to exercise their legal, treaty, and constitutional rights to the fishery – stands out among the long list (Coates 2000).

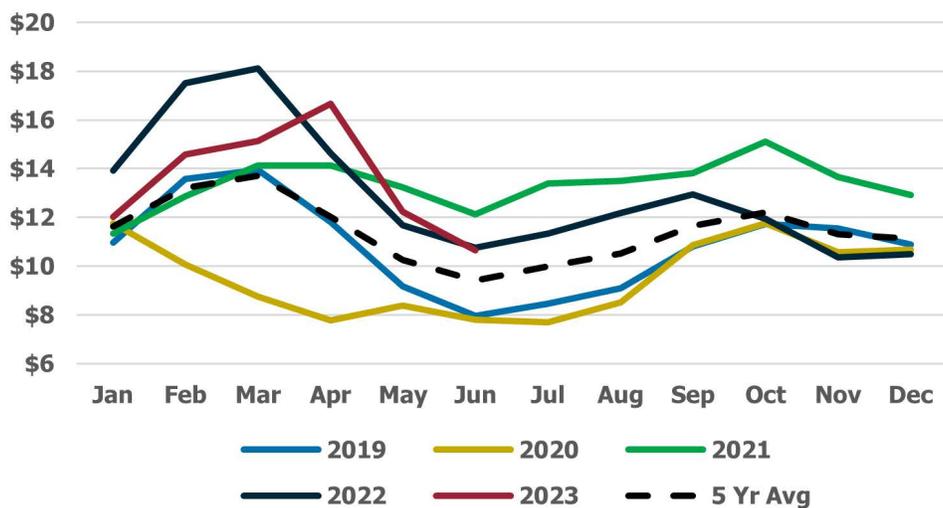
The potential for conflict over the Indigenous fishery is real. The problem is not the struggles between First Nations and non-Indigenous fishers that go back at least to 1999–2000 (but that in recent years have been quite good). The Maritimes faces a conflict that causes widespread anxiety and disruption on several fronts. First Nations are upset, with good reason, that the implementation of the *Marshall* decision, which affirmed the First Nations treaty right to fish, hunt, and gather in pursuit of a “moderate livelihood,” remains incomplete a quarter of a century after the Supreme Court ruling (Callaghan, Westin, and Vanclieaf 2022). Non-Indigenous fishers are upset, with good reason, as they feel squeezed out of the industry by licence and quota buybacks and believe they are being bypassed by the federal government in the management of the commercial fishery. The Department of Fisheries and Oceans (DFO) feels embattled (Mageau et al. 2015), rightly, as it tries to shoehorn an imprecise Supreme Court decision into a tightly regulated, conservation-focused industry impacted by climate

change and interventions by environmental groups (Coates 2023; Williams and Wien 2022).

Fishing is critical to the economic vitality of the Maritimes and, even more, to a network of culturally, socially, and economically important fishing communities. Strong demand and high global prices for seafood over the past 30 years have turned what most Canadians viewed as a quaint cottage industry into a vibrant and nationally important sector. Fishing licences spiked in value, turning many fishers in the region into millionaires on paper. The generally stable price for the key products, especially lobster and crab, has ushered in a period of sustained prosperity, one that, for the first time since the arrival of the Europeans, included significant economic opportunities for the Mi’kmaq, Maliseet, and Passamaquoddy (Wien and Williams 2023; Wuttunee and Wien 2024; Coates 2003).

The fishery presents Canada with a complex political and public policy dilemma. First Nations’ authority is far from fully developed in legal and political terms in the region, with the *Marshall* decision serving as the only

FIGURE 1: Canadian lobster shore price, 2019–2023



Note: The data represents the annual price for selected classes of lobster, focusing on ones that are key to the commercial markets (UB Lobster, AM Hard, FOB NE, 2 lbs. selects).

Source: Urner Barry/Seafood News 2023

substantial legal response by Canada to still largely unresolved Indigenous and treaty rights.

The federal government appears to expect the fishing industry to shoulder the nation's burden for ignoring the First Nations in the Maritimes, putting the Department of Fisheries and Oceans in a strong political vice. First Nations treaty rights are constitutionally protected, second only to conservation in the priority list. The *Marshall* decision must be implemented, but much broader treaty and Indigenous rights are being ignored (Bedford 2010). The non-Indigenous fishery is crucial to the future of the industry but has been effectively sidelined in discussions about that future. Industry representatives are actively discussing the future of the fishery; their work with government and scientists on conservation and protection of the fishing stock is particularly noteworthy. Increasingly, however, discussions about Maritime fishing have focused on negotiations between the federal government and First Nations, leaving industry out of the conversation. The Maritime fishing industry is vital to the country and requires innovative public policies that are commensurate with the importance of the sector to the region's people.

How the *Marshall* decision transformed the Maritime fishery

The 1999 *Marshall* decisions are one of the world's best examples of the commercialization of Indigenous and treaty rights (Coates 2000; 2019). The case will be discussed in greater depth later, but at its core, the legal issue under review was simple: Donald Marshall Jr., one of the foremost advocates for Indigenous rights in Canada, argued that he had a right, under the 18th-century Peace and Friendship Treaties with Great Britain, to catch fish (eels) for commercial purposes (Wildsmith 2001; Wicken 2002). The Government of Canada disagreed and fought the case to the Supreme Court; the court agreed with Marshall Jr. and instantly transformed the Maritime fishing industry (Williams 2022; Coates 2003).

In December 2024, the federal government faced a mounting budget deficit but remained committed to resolving Indigenous and treaty rights.

It promised to allocate an additional \$260 million to purchase additional fishing licences and quota in the Maritimes; Ottawa has already spent more than \$1 billion on resolving Indigenous rights under the *Marshall* decision. First Nations, however, are unhappy with federally imposed limits on the exercise of their treaty rights; the federal government's actions have only prompted First Nations to return to the courts for further rulings (Wiber and Kennedy 2001).

Some First Nations in the Maritimes (particularly in New Brunswick and Prince Edward Island) rejected the federal financial plan, arguing that it sought to replace their treaty right to earn a “moderate livelihood” from fishing with a transition to a restricted licence-based system that mirrored that available to non-Indigenous fishers.

“ *First Nations are unhappy with federally imposed limits on the exercise of their treaty rights.* ”

The Assembly of Nova Scotia Mi'kmaq Chiefs has been particularly outspoken in opposition. Chief Wilbert Marshall of the Potlotek First Nation argued that the 2024 proposal “failed to respect and uphold our inherent rights... Our treaty right to fish is not a commercial fishery.” Chief Gerald Toney, one of the key figures speaking for the Assembly of Nova Scotia Mi'kmaq Chiefs, said, “We have built a better way forward and the trust we have built with our communities and with our harvesters, through our community-based harvest plans, would be jeopardized if we even entertained these new agreements with DFO under this proposal” (Gorman 2025). The federal government attempted to lower tensions in the commercial fishery by expanding the number of licenses available to First Nations – but it appears to have had the opposite effect, generating considerable push-back. The Assembly of Nova Scotia Mi'kmaq Chiefs' response highlights the First Nations' commitment to treaty rights which, in their view, are fundamental to their relationships with Canada (Kwilmu'kw Maw-klusuaqn Undated).

Non-Indigenous commercial fishers, the group most directly affected by the government's purchase of licences and quota, have expressed their support for First Nations' involvement in the commercial fishery. They have demonstrated respect, flexibility, and restraint – despite occasional expressions of frustration and anger from some non-Indigenous fishers and communities – through a challenging and often aggravating quarter-century-long process. Like the First Nations, the non-Indigenous fishers were also not pleased with the details of the government's decisions to purchase licences and quota. Their reaction identifies important gaps in the process:

- the lack of consultation with commercial fishers about the future of the industry;
- strong industry concern about the lack of enforcement of regulations for out-of-season fisheries and illegal sales of catch by First Nations fishers, both politically sensitive topics;
- current federal approaches that do not stop First Nations from leasing their *Marshall* commercial fishing licences to non-Indigenous or corporate interests; and
- the lack of a practical or legal definition of the “moderate livelihood” provision in the *Marshall* decision.

The commercial fishers also worry about the vitality of the Maritime fishing stocks and, therefore, the industry (Maritime Fishermen's Union Undated). They point out that First Nations in the region, with around 5 per cent of the population, have already secured 10 per cent of the licences and quota. As the industry wrote in a letter to then Fisheries and Oceans Minister Diane Lebouthillier: “We must reinforce that fish stocks are a common resource that does not belong to the Crown, nor to First Nations, nor to non-Indigenous peoples, but to ALL Canadians and that it must be managed in a manner that benefits ALL Canadians” (Fisheries Associations 2025). The sentiment is fine, but the intensity of the issue is complicated by the fact that the federal government has, for all intents and purposes, placed the full weight of its treaty obligations to First Nations in the Maritimes onto a single industry (Coates 2023).

Canada's federal government and the Maritime First Nations have spent more than 25 years trying to implement the transformative *Marshall* agreement, making significant inroads in both the lucrative lobster fishery and other seafood markets (Isaac 2001).

After a complicated and contentious first year, 1999–2000, that included significant confrontations on the water and docks in the region, the parties settled on a simple way forward based on “willing seller, willing buyer.” The federal government bought dozens of fishing licences and transferred them to First Nations, provided funding to purchase boats, equipment, and training for Indigenous crew members, and helped with business preparation. The transition has been an impressive success with more than 1,000 First Nations people entering the industry and with their communities receiving millions of dollars per year in “own source revenue” (money that comes to the communities with no federal oversight or control over spending) (Levesque, Nicholas, and Coates 2024).

Two major issues remain unresolved. First, the Supreme Court asserted that First Nations had a right to earn a “moderate livelihood,” an undefined, “first in Canadian law” requirement that permanently limited the economic opportunities for First Nations in a single industry (Wiber and Milley 2007; Hamilton 2024; Guerrier 2001; McDonald 2021). Despite years of negotiations, the matter has not been settled. Second, the initial allocations of fishing rights did not make allowances for the rapid growth of the Indigenous population in the region.

Today, First Nations’ interest in the industry is high, for many reasons. Over the past two decades, their expertise in the fisheries has grown, as has their desire for greater autonomy and recognition of their treaty rights. At the same time, many First Nations (especially in more remote, non-coastal areas) still struggle to create economic opportunities for their members. Many First Nations in the Maritimes see securing a stronger foothold in the fisheries as key to their economic futures.

Under the “willing seller, willing buyer” approach, commercial fishing licences are purchased and transformed into communal licences held by First Nations. The licences do not carry regular fees, and the wider goal is to foster local economic development through the fishery. There are certain constraints. Specifically, selected inshore commercial licences can not be allocated to First Nations. First Nations can hold commercial as well as communal licences; the former are easier to sell than the latter and can also be used to borrow against other community interests. The First Nations manage the communal licences, which are typically used to create employment, support Indigenous-owned business, and produce financial surpluses that First Nations governments reinvest in their communities (Fisheries and Oceans Canada 2024a).

Growing demand and commercial engagement by First Nations are reshaping the Maritime fishing industry. First Nations want to increase their access and push their share of licences past 10 per cent, which is clearly their right under the 1999 *Marshall* decision. The Supreme Court judgment did not indicate a cap beyond the unspecific and still not explained “moderate livelihood” requirement.

Non-Indigenous fishers are under increasing pressure to sell their licences, which in turn impacts their communities as non-Indigenous fishers are gradually removed from the local economy. With surging Indigenous involvement and a rapidly growing population, the First Nations’ share of the Maritime fishery has grown steadily and could expand dramatically in the years to come (Paul and Coates 2019; Coates 2019; 2023).

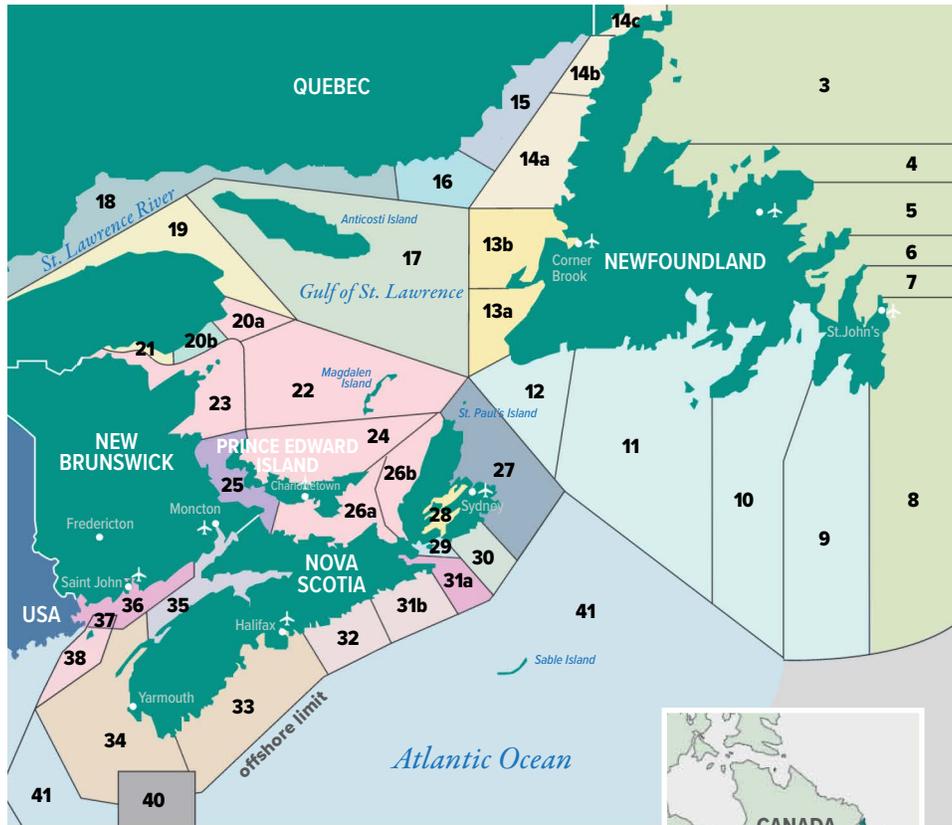
Several major areas of contention remain.

First Nations people have a constitutionally protected right to share in the prosperity of the Maritime fishing industry, limited only by the conservation needs of the regional fishery and the “moderate livelihood” restrictions. Indigenous people in the region face severe economic deficits, ones that extend far beyond the fishing industry and that are complicated by the inland location of most First Nations reserves. (Tobique, for example, has a series of licences on Grand Manan Island and the south shore of Nova Scotia; the latter is a five-hour drive and ferry ride away. This is equivalent to a First Nation near London, Ontario, trying to exercise a clear treaty right in North Bay, Ontario.) Addressing the First Nations’ broader economic needs and aspirations must be a priority.

Non-Indigenous people, meanwhile, are concerned about the ongoing uncertainty of the seafood industry, confusing debates over conservation efforts and requirements, entrenched frustrations with the Department of Fisheries and Oceans and federal politics, and, as an increasingly important element, the rising but still unpredictable evolution of First Nations engagement in the fishery.

The fundamental question – the one that brings all the forces and influences together – relates to the awarding of commercial fishing licences in the Maritimes. The East Coast fishery is tightly regulated with all commercial species closely monitored to ensure their continued viability. Licences are tied to species, quota (or traps in the case of lobster), and harvesting area. Individual licence holders have the right to harvest a fixed quota for fish or, for lobster, a fixed number of lobster traps, in a specific area and during a time-limited

Figure 2: Lobster fishing districts in Atlantic Canada



LOBSTER FISHING SEASONS

3-8 April 20 – July 15	19, 21 May 9 – July 9	31a April 29 – June 30
9-12 April 20 – July 30	20a, 22, 23, 24 26a, 26b April 20 – June 30	31b – 32 April 19 – June 20
13a-13b April 20 – July 5	20b May 8 – July 7	33-34 Last Monday in November – May 31
14a, 14b, 14c May 5 – July 10	25 August 9 – October 10	35 Last day Feb – July 31, and October 14 – January 14
15 June 1 – August 12	27 May 15 – July 15	36-37 March 31 – June 29, and 2nd Tuesday in Nov – January 14
16 May 20 – August 10	28 May 9 – July 10	38 April 20 – July 15
17 June 5 – August 5	29 May 10 – July 10	40 Closed to inshore – offshore lobster fishing
18 May 20 – July 31	30 May 19 – July 20	41 Area open all year

Note: Minimum size of lobster varies by district.

Source: A Canadian Foodie 2014.

opening. If they cannot reach their quota or if they fish with fewer traps than authorized, the right to fish lapses. Individual fishers or, increasingly, fishing companies typically hold multiple licences that cover various fishing zones and a variety of fish species. Several – lobster and crab – are high-demand, high-priced commodities. Others, particularly herring, are historically high volume but lower demand and now in uncertain supply.

Collectively, this approach means that the system works based on a fixed total number of licences with a total allowable catch. DFO scientists monitor the catch and assess the carrying capacity of the ocean waters. Licences are fixed and can be sold, made part of a bequest, or transferred. Quotas vary, occasionally dramatically, based on scientific evaluation and forecasts. Prices are often subject to price fluctuations. It is, to be sure, a volatile situation.

“ *All stakeholders find the “willing seller, willing buyer” process to be overly complicated, time-consuming, expensive, and unpredictable.* ”

From the outset, Ottawa’s “willing seller, willing buyer” approach to transferring licences and quotas removed the threat of confiscation or other draconian government action. Under the existing system, First Nations indicate their desire for additional licences. DFO officials adjudicate the requests. If the government agrees with the requests, it posts a notice to fishers in the region, asking for expressions of interest in selling their licence(s). Willing sellers submit bids to the government. If a meeting of a buyer (the federal government) and a seller (the fisher) ends in agreement, the government purchases the licence and then passes it to the First Nation. This process maintains preponderant control in the hands of the Department of Fisheries and leaves First Nations in the role of supplicant, dependent on the Government of Canada for access to the means of earning an income and securing a resolution of their court-approved treaty rights. Both Indigenous and non-Indigenous stakeholders find the process to be overly complicated, time-consuming, expensive, and unpredictable.

Background

Indigenous fishing rights have been in transition for close to 50 years. Until the 1970s, First Nations people had few if any recognized and assured rights to fish in remote regions, but lax fisheries enforcement and a “winking” by authorities at official regulations allowed Indigenous peoples to fish to provide for personal and community requirements. At this time, prices and demand for Maritime seafood products, particularly lobster and crab, combined with the high cost of entry into the industry – specifically the cost of buying equipment and securing training and experience – deterred most First Nations from participating.

It was not easy for Indigenous peoples – marginalized and disempowered within the regional economy through generations of neglect for their legal and treaty rights – to join the commercial fishery. Those who wanted to fish for commercial purposes had to secure the same kind of freshwater or ocean licences required of other Canadians. Few Indigenous people worked in the Maritime fishery. On the West Coast, in contrast, First Nations were far more active, as fishers and even boat captains but even more extensively in the large and lucrative cannery operations that opened along the coast and on Vancouver Island. Over time, Japanese and Chinese labourers pushed most Indigenous workers out of the canneries. But a significant number still worked on boat crews. First Nations and Métis also participated heavily in the freshwater commercial fishery, particularly in the Prairie provinces, but they did so based on standard commercial fishing regulations and not exclusively because of their legal status as Indigenous peoples (Lutz 2009). Gradually, along with broader efforts to regain control over resource and harvesting rights, Indigenous peoples fought for – and won – rapidly expanding roles in resource and infrastructure project approvals, regional resource management, and commercial engagement participation through employment, business arrangements, and more recently, equity holding in infrastructure and/or productive capacity. This includes, in a stepwise fashion, the improvement of Indigenous fishing rights in the Maritimes.

The *Canada Act* (1982) guarantees the right of Canada’s Indigenous peoples to fish for food, social, and ceremonial purposes, the latter of which is ill-defined in law and practice. The Supreme Court further affirmed Indigenous rights in its *Sparrow* decision (*R. v. Sparrow* 1990), which ruled that Indigenous

rights are not extinguished by regulations imposed under the *Fisheries Act*. This expansion of rights, secured in a battle over fishing in BC's Fraser River system, applied across the country and represented a major step in the re-empowerment of First Nations. (The ruling expanded upon the pivotal 1965 case *R. v. White and Bob*, which recognized the right of status First Nations people to hunt for personal and food purposes (Binnie 1990; Elliott 1991).)

These arrangements allowed First Nations and Inuit (later expanded to include the Métis) to harvest for food and ceremonial purposes. This represented a partial re-empowerment but stopped well short of meeting the demands of Indigenous peoples for access to commercial harvesting opportunities. These expectations had to be addressed in some parts of Canada in the face of declining fish stocks, particularly on the West Coast and during the collapse of the East Coast cod fishery. Other harvests, particularly the lobster and crab fisheries in the Maritimes, experienced a spike in prices and demand, ushering in an era of unprecedented prosperity in the fishing communities in the Maritimes. First Nations sought a toehold in the commercial fishing industry as they watched the industry grow in importance and profitability around them.

The *Marshall* decision sparked the expansion of First Nations' rights. Donald Marshall Jr. originally came to national prominence in 1982 when he was released from prison after being wrongly accused and found guilty of murder. The subsequent investigation into the Nova Scotia police and court system exposed deep seams of racism and intolerance and turned Marshall into a figure of national renown and a symbol of the personal cost and consequence of injustice and oppression (McMillan 2019). Marshall's previous notoriety immediately propelled his case into the national spotlight after his arrest for fishing eels in the waters around Cape Breton. Losses in the lower court system took the wind out of the sails of the Aboriginal rights movement, but Marshall, his legal team, and the First Nations in the Maritimes forged on, appealing their case to the Supreme Court of Canada (McMillan 2019).

Marshall's legal claim was unique and simple: the Peace and Friendship Treaties, signed with First Nations from Massachusetts to Nova Scotia, guaranteed First Nations the right to sell the products of their fishing and hunting activities. The treaties, in the tradition of the accords of that era, made no explicit mention to this right. The agreements did indicate that First Nations people had access to the "truck houses" or trading posts where residents exchanged products and engaged in the colonial economy. Marshall's lawyer,

Bruce Wildsmith, drew on historical evidence and Indigenous oral testimony to buttress his arguments. The federal government entered the Supreme Court appeal with confidence; the Department of Fisheries and Oceans does not appear to have had a contingency plan in place if the judgment went against them. Even strong supporters of the extension of Indigenous rights were not convinced that the Mi'kmaq and Maliseet challenge would succeed.

Marshall's legal claim was unique: the Peace and Friendship Treaties ... guaranteed First Nations the right to sell the products of their fishing and hunting activities.

The rest of the story is well-known. The Supreme Court ruled in Marshall's favour, recognizing that First Nations had a right to fish for commercial purposes, but they did include the odd "moderate livelihood" provision. Ottawa scrambled to develop a response, with several months of political uncertainty causing great stress and considerable conflict in the region. The contours of an agreement came together under the umbrella of the Maritime Response Initiative, which featured the "willing seller, willing buyer" principle. In addition to buying licences for First Nations, the federal government also agreed to provide Indigenous communities the money needed to purchase boats, fishing gear, dockside equipment, and offered funding and the support required so boat operators and crew members could be trained.

Today, First Nations own boats, dock facilities, gear, traps, repair yards, and the equipment needed for a modern fishery. They have processing plants, some with dozens of employees, and dozens of companies involved in the service and supply sectors. Individual communities are receiving millions of dollars a year in own-source revenues from the profits from fishing; they are using the funds to provide services, build homes, support cultural revitalization, and improve local infrastructure. As an exercise in the commercialization of Indigenous and treaty rights, the First Nations have taken a Supreme Court decision and converted it into the foundations of regional Indigenous prosperity.

Major gaps remain, however. The availability of licences has not kept pace with the growth in the First Nations population in the region or the Indigenous demand/need for licences, employment, and business opportunities. Commercial fishing is the only significant and open opportunity for First Nations people in most Maritime communities, a challenge reinforced by the generally limited economic prospects of the non-metropolitan parts of the Maritimes.

However, only so many Indigenous people are interested in or are capable of working in the fishing industry. There is no cap (nor should there be) on the percentage of the fishery that will be controlled by Indigenous communities. However, this leaves non-Indigenous fishers to worry whether they and their families will have a place in the industry in the future. Overriding these considerations is a region-wide antipathy to the Department of Fisheries and Oceans – and to intervention by Ottawa generally – which shows up as a strong desire for a new combination of First Nations autonomy and regional relevance in decision-making.

One large issue hangs over the entire discussion. First Nations people, communities, and governments want – and deserve – respect for their Indigenous and treaty rights. There have been several attempts to develop a modern treaty for the region, one that recognizes that First Nations in the Maritimes never surrendered their land, waters, and resources to the governments of Great Britain or Canada. Donald Marshall Jr. fought a key battle and won a rights-based entrée for the First Nations of the Maritimes into the Canadian economy. Joshua Bernard, a Mi'kmaq from Pabineau First Nation in New Brunswick, tried to extend the principle of modernizing treaty rights to the forestry industry, but the Supreme Court of Canada rejected his claim in 2005. First Nations have unresolved and non-negotiated rights to the land, resources, and governance authority. In the fisheries, they have one major entrance point to the Canadian economy as well as a smattering of smaller and less reliable options. The *Marshall* decision resolved one small element in the treaty rights of the First Nations of the Maritimes, but there are many more unrecognized and untested rights and major needs in Indigenous communities.

In short, the government of Canada and the fishing industry need to develop a better and more regionally focused approach to First Nations' commercial fishing rights under the *Marshall* decision. Equally, it is simply impossible and unrealistic to believe that the majority of the treaty and

Indigenous economic rights in the Maritimes can be addressed through the two Supreme Court *Marshall* decisions from 1999 or that the substantial weight of Canadian obligations to Indigenous peoples should be placed on the back of a single, albeit profitable industry. *Marshall*-based commercial fishing rights are part of the solution to Indigenous rights and aspirations. They are not the only way to create economic and commercial opportunity and in no way do the *Marshall* decision allocations address the potential full suite of treaty rights and obligations owed to First Nations in the Maritimes. For many reasons, the status quo will no longer hold; significant changes are urgently required.

Making room for First Nations in the regional fishery

As discussed earlier, the Mi'kmaq and Wolastoqey (Maliseet) First Nations, and the Peskotomuhkati Nation at Skutik, possess the treaty right to fish in pursuit of a “moderate livelihood” through the terms of the Peace and Friendship Treaties. Thirty-four First Nations in the Maritimes and in Quebec’s Gaspé region, plus the Peskotomuhkati (whose traditional territory spans the New Brunswick-Maine border), have the right to participate in the local commercial fishery subject to the availability of licences and the conservation requirements established by the Department of Fisheries and Oceans.

The Supreme Court affirmed the contemporary relevance of the economic system in place during the late 1700s, which allowed First Nations to use the “truck house” system. The treaties enabled Indigenous people to participate in the so-called truck system, where they and European settlers could bring their catch to truck houses where they could trade them for other needed commodities. The *Marshall* decision asserted that the right to participate in the commercial fishery had not expired simply because the economic system had evolved from the truck system to its current form. The Supreme Court ruled that the federal government is obligated to ensure that fishery regulations allow for these specified rights of Indigenous peoples in accordance with the Constitution of Canada, which was bolstered by both the *Sparrow* and *Marshall* decisions.

Following the *Sparrow* decision, in 1990 and with extensive negotiations with the First Nations, the Department of Fisheries and Oceans developed and implemented an Aboriginal Fisheries Strategy (AFS), investing some \$35 million a year through 135 AFS agreements across the country. Two-thirds of the agreements are in British Columbia. According to DFO (Fisheries and Oceans Canada 2012), fisheries agreements negotiated under the AFS could contain:

- provisions with respect to amounts that may be fished for food, social, and ceremonial purposes;
- terms and conditions that will be included in the communal fishing licence (e.g., species, amount that may be fished, area, gear, times, reporting requirements);
- arrangements for co-operative management by the Aboriginal group and DFO of fishing by the group for food, social, and ceremonial purposes;
- co-operative management projects for the improvement of the management of fisheries in general, such as stock assessment, fish enhancement, and habitat management; and
- provisions related to communal licences under the Allocation Transfer Program (ATP) for obtaining access to commercial fisheries and/or other economic development opportunities.

The AFS provided a framework for the management of Indigenous fishing for food, social, and ceremonial purposes. It creates opportunities for Indigenous groups to participate in the management of fisheries with the goal of improving the economic self-sufficiency of Indigenous communities, providing a foundation for the development of self-government agreements and treaties, and enhancing the fisheries management skills and capacity of Indigenous groups (Fisheries and Oceans Canada 2012).

In addition to determining regulations related to fishing for food, social, and ceremonial purposes, the AFS creates agreements related to commercial licences under the Allocation Transfer Program (ATP), which enables Indigenous communities to gain access to commercial fisheries and other economic development opportunities. To ensure that ATP fishing does not limit increases to the existing commercial fishing effort, the ATP facilitates the voluntary retirement of commercial licences, which can then be issued to

Indigenous groups (Fisheries and Oceans Canada 2012; National Indigenous Fisheries Institute Undated).

Since Ottawa launched the ATP in 1994, approximately 900 commercial licences have been issued to Indigenous groups and 1,300 seasonal jobs created per year across the fishing industry, though the economic impact has been curtailed by the sharp reductions in West Coast fishing in recent years (Fisheries and Oceans Canada 2012). The cumulative impact of the AFS is considerably smaller than the employment and business outcomes from the *Marshall*-based fishery in the Maritimes, despite the latter having a much smaller geographic footprint and operating for 10 years less. Implementation of the AFS program, according to the DFO, resulted in improved monitoring of Indigenous fishing and better co-operation on enforcement (Fisheries and Oceans Canada 2012).

“*In the days and weeks following the Marshall Decision, there was much unrest in the fishery.*”

Fishing licences are specific to the purpose of fishing, the species, the method of harvesting, and the region where the fishing takes place. Across Canada, the Department of Fisheries and Oceans is responsible for issuing licences to Indigenous communities for the purpose of food, social, and ceremonial use (FSC). A condition of these kinds of licences is that this type of catch cannot be sold, bartered, or traded. The only limitation, and it is an important one, is conservation (Fisheries and Oceans Canada 2022). The regulations pertaining to Indigenous participation in commercial fisheries are outlined in the *Fisheries Act* of 1993 (Canada 2025a). According to this legislation, communal licences may be issued to Indigenous organizations so that they can carry on fishing and related activities. These licences cover both the specific vessels and the persons designated to fish on behalf of the Indigenous organization. The licences are subject to the same fisheries regulations as licences held by non-Indigenous commercial fishers (Canada 2025b).

Fishing licences allocated under the *Marshall* decision (1999) are separate from and in addition to the Indigenous rights to fish for food, social, and ceremonial purposes, which are granted through a combination of Section 35 of the *Canada Act* (1982), the country's Constitution, and subsequent court decisions that built upon this foundational commitment. *Marshall* recognized the First Nations' treaty rights (also protected under the Constitution).

Government efforts since the *Marshall* decisions included, as a start, the *Marshall* Response Initiative, the Atlantic Integrated Commercial Fisheries Initiative, and the Rights Reconciliation Agreements (Fisheries and Oceans Canada 2025b). As of 2024, government spending on these efforts amounted to over \$630 million. The First Nations, in turn, have expanded their returns to their communities from about \$3 million pre-*Marshall* to over \$170 million in 2019. First Nations' assets in the industry, which were small in 1999, now stand at over \$3 billion. Direct Indigenous employment leapt from a few dozen people in 1999 to over 2,400 at present, with ongoing training and investment programs designed to increase this number.

The Marshall Response Initiative

Canada's first foray into the process of resolving the rights and claims stemming from the *Marshall* decision, the *Marshall* Response Initiative (MRI), involved negotiating agreements with eligible First Nations, providing the licence, physical assets, and personnel training needed to capitalize on a community's *Marshall* rights. The intervention came at a critical time in the region:

“In the days and weeks following the *Marshall* Decision, there was much unrest in the fishery. First Nations had taken to the water and were fishing out of season. There was also unrest among the non-native fishers who were uncertain about their future in the commercial fishery” (Fisheries and Oceans Canada 2020).

The initial program had a budget of almost \$160 million. The longer-term MRI had an expanded budget of \$430 million. The system was not always well coordinated. For instance, the government spent \$21 million on training across the various agreements, but no one was prepared or could deliver that training in a systematic manner.

Under the program, 32 of the eligible communities reached agreements between 2000 and 2007 on the initial or the longer-term MRI actions, at

which point the MRI was wrapped up. A final evaluation of the MRI indicated that two-thirds of First Nations assessed the program as “predominately satisfactory” to “very good.” Commercial fishers “were not entirely satisfied with the consultation process,” claiming inadequate consultation and a lack of attention to their concerns.

The allocation of licences under the MRI was impressive, from 411 in 1999 to a high of 1,500 in 2003, which dropped slightly to 1,142 in 2006. Lobster licences (1,751 in total) made up the largest share; Ottawa also allocated licences for alewives, clam, four types of crab, eel, groundfish, herring, mackerel, oysters, scallops, sea urchins, smelts, tuna, and other species (Fisheries and Oceans Canada 2007). The final report on the MRI indicated that more generally most of the First Nations reported better relations with the DFO after the MRI was in place and that relations with non-Indigenous commercial fishers had also improved. Interestingly, relations between the various First Nations themselves also improved considerably.

The MRI wrought substantial and unpredictable transitions. Some harbours lacked the capacity to absorb the growth in the First Nations fishery, so Ottawa diverted funds from other federal programs to cover the unanticipated costs. The expense of purchasing retired licences increased over time, as few fishers wanted to leave the lucrative and more dependable industry. More First Nations wanted into the fishery, and they needed more licences. The resulting inflation in the value of licences had no direct effect on First Nations because the taxpayers of Canada absorbed the cost. But the final MRI report also observed that “representatives of commercial fishers expressed concerns about the impact that this will have on the next generation of fishers, including concerns that the increase in the licence retirement costs would prevent younger fishers from ‘acquiring’ a licence and starting their own commercial fishing enterprise” (Fisheries and Oceans Canada 2020). As the government has indicated:

“Fishing remains one of the main industries in rural coastal Eastern Canada, generating about \$1.7 billion in landed value (inshore fleets only) in 2017 and supporting many fisheries-dependent communities. Most fishing-related jobs are part of the middle class in Atlantic Canada and Quebec, where the fishing industry employs more than 59,000 fish harvesters and processing workers. The Government of Canada wants this wealth to be kept in the hands of those individuals that actively fish and for the wealth accumulated to be reinvested

and spent in coastal communities, rather than have it concentrated in the hands of a few wealthy corporations in larger urban centres” (Fisheries and Oceans Canada 2019).

Furthermore, First Nations fishing patterns did not follow the patterns of the previous non-Indigenous licence holders as they used different wharves and fished closer to their communities. There was a problem with “royalty charters,” wherein First Nations licence holders hired other, usually non-Indigenous, fishers to “fish the quota.” Given the early stage of the First Nations fishery, it was not surprising that non-Indigenous people held almost 30 per cent of the employment in the *Marshall*-related fishery. Skills and capacity development in the First Nations fishery did not emerge as rapidly as the Ottawa and First Nations desired. Despite the improvements, a great deal remained to be done.

Atlantic Integrated Commercial Fisheries Initiative

In 2007 the government created the more expansive Atlantic Integrated Commercial Fisheries Initiative (AICFI) to build upon the *Marshall* Response Initiative; it had similar priorities and mechanisms to the MRI. The key element in the process, which eventually involved all but one of the 35 eligible First Nations, was the purchase of existing commercial licences, all on a voluntary basis, which were then allocated to First Nations. There was often a mismatch between First Nations’ needs and the availability of licences, as well as process delays because of the direct involvement of the Department of Fisheries and Oceans in the purchases.

These problems notwithstanding, substantial investments occurred in the sector. Between 2009 and 2022, First Nations secured almost \$57 million in “communal commercial access.” Less well-known is that First Nations contributed almost \$40 million of that total, fully 70 per cent. Eskasoni First Nation, for example, purchased \$7.3 million worth of snow crab licences, covering 68 per cent (\$4.8 million) of the total cost themselves. Pictou Landing First Nation purchased almost \$4.7 million in snow crab, lobster, and tuna licences, paying close to 70 per cent of the total cost itself. Not all the licence purchases were large. Buctouche’s only licence purchase under the program was a \$3,000 clam licence, with 87 per cent of this small payment coming from the AICFI program (AICFI 2025).

Rights Reconciliation Agreements

The Supreme Court, in revisiting the *Marshall* decision in a second ruling (commonly known as *Marshall II*), attempted to deal with the intense and largely critical response to the initial judgment. In the *Marshall II* decision, the Supreme Court of Canada noted that implementing forward-looking approaches for the treaty right might be best achieved through consultation and negotiation of modern agreements with First Nations. This led to the negotiation of rights reconciliation agreements with the First Nations, a process that started in 2017 and continued to 2023, resulting in seven agreements that included 15 First Nations. This more focused and First Nations-specific approach allowed for the development of unique and localized arrangements for the fishery. In 2024, the federal government created the Community Based Acquisition Fund, which provided \$260 million to treaty First Nations to be used to obtain access to commercial fishing. This included the purchase of licences, equipment, management support at the First Nations level, and capacity building to help the First Nations participate on an equal footing in negotiations with the Department of Fisheries and Oceans (Fisheries and Oceans Canada 2025).

Moderate Livelihood Agreements

Seeking a balance between recognizing Indigenous and treaty rights, the conservation requirements of the fishery, and the stability of the non-Indigenous commercial industry, the government of Canada launched yet another initiative to address the moderate livelihood requirements, turning again to the “willing seller, willing buyer” approach (Fisheries and Oceans Canada 2024b). The current process is straightforward, at least conceptually:

1. The licence holder, learning of federal government interest through public Requests for Proposals, completes and registers an “Application for Relinquishment of Commercial Fishing Licence or Quota.”
2. DFO officials adjudicate the request for market value payment.
3. A third-party assessment determines the market value.
4. If an application for relinquishment is received, the applicant must return official documents relating to the licence or the quota and clear up any outstanding legal or financial obligations to the government.

5. The Government of Canada continues the process until it has secured the required number and variety of licences (Fisheries and Oceans Canada 2024c).

This process gives the government a “bank” of licences that it can use to honour reconciliation agreements or to respond to First Nations’ demands for additional access to the fishery. This, in turn, triggers a multi-stage approach for the allocation of licences and quota to specific First Nations, as follows:

1. The DFO determines the requirements of the First Nation applicant;
2. The Treaty First Nation and DFO determine if the funding will come from the existing Reconciliation Rights Agreement or, if an agreement is not in place and not anticipated, from DFO funds designed to support the completion of agreements.
3. The DFO and the individual First Nations then negotiate an access agreement that identifies the area to be fished, the species, and the quota to be covered by the licences.
4. If the DFO has sufficient licences banked covering the area and species, these licences can be allocated to the First Nation. If there are no such licences available, the DFO determines what is required and develops a plan to secure expressions of interest from willing licence holders.
5. The process of securing formal expressions of interest begins only when the DFO has determined if the affected Treaty Nations have the required amount of funding for licence purchases available to them and the government.
6. The DFO issues a request for expressions of interest covering the number and nature of licences required.
7. Drawing on arm’s length third-party and in-house evaluations of the market value of licences, the DFO assesses the expressions of interest and determines their suitability.
8. If sufficient licences are not offered at appropriate prices the DFO can redo the expression of interest process.
9. The DFO then reviews the licences tentatively approved for purchase and allocation.
10. The DFO then seeks formal internal approval of the proposal. This multi-stage process includes re-confirmation that funding is available

for special First Nations and concludes with Treasury Board approval for the final purchase.

11. When these stages are done – and this can obviously take several months, if not longer – the DFO secures a formal relinquishment from the licence holder and negotiates a binding agreement with the First Nation(s) involved. Lengthy formal procedures, almost all internal to government, then proceed, formalizing and confirming the arrangements. The financial arrangements, confirmation, and tracking are particularly detailed and formal.
12. Monitoring continues after the approvals are in place, including precise measures for paying the commercial licence holders, tracking the funds, and determining the balance between DFO funding and funds allocated to specific First Nations. The ultimate result of this intricate and heavily documented process is the allocation of the commercial licence to the First Nation.
13. If the First Nation has access to a boat, crew, and necessary equipment, it can start fishing.

In terms of information, the current DFO process is open to the public and, in particular, the commercial fishing industry. When a First Nation and the DFO agree that a fishing licence is desired and appropriate, the department posts its wish to purchase a licence or licences, sending notices directly to appropriate licence holders, fishing associations, and targeted publications. This process is designed to solicit interest from non-Indigenous licence holders. Those willing to consider a sale must contact DFO to get information on the requirements and application forms and processes.

Shortcomings of the current licensing system

There is a general agreement that the licensing system used to resolve First Nations' commercial fishing rights in the Maritimes is unsatisfactory and must change. But the various participants in the process have different concerns and perspectives. A national poll, conducted by Nanos in 2021, found that most Canadians (86 per cent) trusted scientists to have the final decision on fishing harvests, followed by Indigenous peoples (52 per cent) and commercial fishers (44 per cent). Politicians ranked much lower (27 per cent). Importantly, that same poll indicated that more than 80 per cent of respondents believe that it is highly important that the federal government be transparent in informing the public about the financial implications of reconciliation (Nanos 2021).

For First Nations

First Nations in the Maritimes say the current arrangements are too Ottawa-centric, slow-moving, and outside their control or even the direct influence. The current system keeps First Nations beholden to a federal government that has moved slowly to implement the 1999 *Marshall* decision. First Nations' tolerance and patience have been impressive, particularly over the still unresolved "moderate livelihood" fishery. A quarter of a century is too long. As one news report commented:

"Overall, the federal government's approach – making agreements and issuing fishing licenses community by community – has fostered inequality between First Nations. The divisive tactic has affected how strongly each community can negotiate and the financial investment that each has received, even though they all hold the same rights under the Peace and Friendship Treaties. 'They basically undermined the [First Nations'] collective efforts,' says [George] Ginnish [Chief of Natoaganeg First Nation]. 'If they really want peace on the water, there has to be equity.'

"The system must change to an approach that prioritizes Indigenous authority, gives real substance to the Supreme Court decisions and, more importantly, moves the 18th Century Peace and Friendship Treaties from the realm of administrative prerogative to a true illustration of First Nations-Government of Canada reconciliation and action. Too often, First Nations feel like

supplicants, having to ask mid-level federal officials for permission to secure access to commercial fishing – a right legally embedded in treaty and verified by the Supreme Court of Canada. First Nations in the Maritimes deserve an approach to the exercise of their rights that is commensurate with the status and importance of the treaties and the *Marshall* Decision. The current approach does not reach that standard” (Donovan 2023).

For the Government of Canada

The slow evolution of the allocation of commercial licences implies that the federal government finds the approach and system acceptable. The approach meets Ottawa’s technical and process requirements, which are clearly built around the country’s Treasury Board regulations – a complex and time-consuming standard that is far removed from First Nations’ realities. In whatever changes are made, the government will, appropriately, require full accountability for the expenditure of public funds. However, the system as it currently stands reflects the early stage and transitional circumstances under which it was created. The current approach to licence allocation meets, or at least approaches, the technical requirements of the Supreme Court decision but lacks the more recent recognition of Indigenous self-determination, respect for First Nations autonomy, and the need for greater attention to Indigenous priorities.

For commercial fishers

The current approach to managing the fishing licensing system is bureaucratic, time-consuming, and unpredictable. It is dramatically different than a buyer-seller negotiation, which allows for direct negotiation, personal connections, and old-fashioned horse-trading. There is a significant benefit to the current approach for existing commercial fishers – the involvement of the government has, since the 1999 *Marshall* decision, pushed prices for licences upwards by increasing demand for the fishery allocations and giving the accurate impression that the federal government’s deep pockets could meet their prices. The increase in the financial return from the sale of a licence began occurring at a time when a surge in demand and prices for selected species (particularly lobsters) made Maritime fishing licences commercially attractive. The asset

value of a Maritime fishing operation spiked sharply after 1999, leading some commercial fishers to take advantage of the opportunity to sell their licences at a premium. (The Government of Canada also purchased fishing boats and equipment as part of the *Marshall* settlements, again at a premium because of the rapid increase in demand.). It is exceptionally difficult to compare prices for commercial licences as they fluctuate substantially over time in line with global market prices. Furthermore, the value of the licences varies dramatically by species, size of the quota, location, and the richness of the particular fishing zone.

In 2025, the commercial fishing associations made their preferences on the licensing matter clear in a letter to the federal Fisheries and Oceans minister:

- that additional funding to purchase licenses and quotas be held until the effects of the potential tariff war with the newly installed Trump administration in the United States become clear;
- that there be a public audit of the previous expenditure of funds under the *Marshall* decision; and
- that there be industry-wide talks conducted that involve the commercial fishers, First Nations, and the Government of Canada.

The industry ends its letter strongly: “This funding, if allowed to continue, will have profound and irreversible negative implications for our commercial fishing communities and our members” (Fisheries Associations 2025).

For Canadian voters and taxpayers

Delays in responding to the full implementation of the *Marshall* decision have added to the complexities, tensions, frustrations, and distrust that currently surround the commercial fishery in the Maritimes. Canadians deserve a better process and a lessening of the legal uncertainty and public concerns in the area. The current approach costs more than it should. The involvement of the federal government under this system and the removal of competitive negotiations for fishing licences has forced up the price of licences and quotas and lessened the value-for-money implications of the *Marshall* decision.

Canadian taxpayers and voters deserve three things from the licensing process: greater efficiency and speed, lower overall prices for licences and

quotas, and a long-term, sustainable resolution to the ongoing debate over the 21st-century relevance and applicability of the Peace and Friendship Treaties. Everyone involved in the process – First Nations, commercial fishers, the Government of Canada, and non-Indigenous people in the Maritimes – desire a resolution that is widely acceptable and sustainable.

Today, the demand for licences has abated somewhat as there is a finite appetite among First Nations men and women willing to work on the boats and docks. But the First Nations’ need for “own source” revenue also remains strong, including among First Nations whose communities are far removed from the coastline, leading to increased pressure on the fishery. Tobique First Nation, which is located well inland in New Brunswick, reported earnings of \$12 million from its fishery in 2016. The Tobique First Nation, which leased out some of its licences, had quota for lobster at Grand Manan, NB, scallops at Digby, NS, sea urchins on Grand Manan Island, bluefish tuna in Scotia Fundy and groundfish off Yarmouth, NS, (Neqotkuk Maliseet Nation Undated). The regular posting of federal government requests for fishing licences and quotas is a constant reminder of the authority of the DFO/ Government of Canada and the priority assigned to First Nations people. A new approach is clearly required.

Options to consider

Under the current buy-back scheme, the DFO maintains control, with the final decisions requiring multiple approvals in Ottawa. These bureaucratic processes are the bane of the political and administrative existence of First Nations across the country. The current system inflates the prices for commercial fishing licences; the additional costs come out of the total funds allocated for Maritime First Nations (reducing the money available for other purposes and leading to the irony that a program intended to support First Nations is paying above-market rates to non-Indigenous fishers); the allocation of funds to add to the licence bank is inconsistent, and, in another irony, there is a lack of Indigenous autonomy in a process that is part of a general strategy to improve Indigenous independence.

Maintaining the current system

Continuity is the government's default operational method. Public administration systems tend to hold steady, to continue or only slightly modify existing policies and procedures. Governments and civil services do not generally welcome dramatic program shifts. The current approach to fisheries licences has tended to maintain current processes, and emphasizes the close monitoring of government funding since the money for licence purchases comes ultimately from taxpayers.

This process increases the purchase price of licences, adds unnecessary delays, and is not, to put it simply, user-friendly. It also fails to keep up with the speed of changes in the fishing industry.

Making the transition to a First Nations-controlled process

First Nations in the Maritimes are demanding greater control over the licensing process. There are many reasons why First Nations dislike the current process, but foremost among them is their lack of control and the expectation that they must continue to be obsequious to Ottawa.

Indigenous communities and governments desire autonomy from the Government of Canada – especially since greater Indigenous control tends to lead to more positive outcomes.

For the Maritime fisheries, the approach could be quite straightforward: Maritime First Nations would set up a region-wide organization or a series of sub-regional associations to manage the purchase and allocation of commercial fishing licences. The federal government would, through negotiations with the affected First Nations' organization or organizations, establish a global budget for the purchase of fishing licences in the Maritimes. Working through the Indigenous organization(s), the First Nations, would collectively determine a process and establish criteria for the allocation of licences and quotas to individual First Nations. First Nations would negotiate directly with willing sellers, having posted an open invitation for commercial licence holders to make their holdings available for sale. There would be an incentive for individual First Nations and the regional Indigenous authority to secure the best price possible.

Properly done, such an approach would eliminate the most objectionable elements of the current approach: long timelines, the upward creep in prices for

licences and quotas (which also increases the cost of entry for younger and new fishers), reliance on Ottawa-based civil servants, and the limited First Nations control of the process. The emergence of a regional or a set of sub-regional First Nations organizations would make the system responsive and transparent to both government, which has a fiduciary responsibility to monitor the use of public funds, and to the First Nations). This approach would do so because it would provide incentives to pursue real market prices for the licences and quotas, an outcome that is not always realized when the Government of Canada is the primary bidder for private property. This approach would be the latest step in the recognition of Indigenous political and economic autonomy.

Creating additional space through partial quotas

The Supreme Court’s “moderate livelihood” provisions continue to present a major challenge to the Maritime fishery. The ambiguity surrounding the word “moderate” adds to the frustration felt by both Indigenous and non-Indigenous stakeholders.

Exacerbating the matter, some First Nations have exercised this treaty right by fishing outside the regular open season – heightening the anger and conflict. Ignoring federal conservation requirements in favour of First Nations-defined regulations, they are catching and selling fish when non-Indigenous fishers are not allowed to do so. This harvest is a relatively small part of the overall Maritime commercial catch and does not, according to conservation scientists, represent a great threat to fish stocks. However, it is a significant political irritant. And, if “moderate livelihood” harvests outside the regular licence and quota system expanded significantly, then it would increase the pressure on fishing stocks. These factors make for a particularly volatile situation.

However, a possible solution lies in the purchase of partial quotas. In general, the current approach to the sale of licences and quotas has an all-or-nothing element to it. Commercial licence holders either sell their licences or quotas, or don’t. Meanwhile, not all First Nations communities are seeking full licences; some smaller communities might prefer to only partially engage in commercial fishing.

The federal government could address this situation by asking licence holders to sell a portion or percentage of their harvesting authority. First Nations looking for limited commercial access to the fishery would likely

find a fractional licence acceptable. For First Nations that want a substantial allocation or even the equivalent of a full licence, a call could be put out for fractional contributions from several individual licence holders. In this manner, First Nations could secure the licences and quotas they require, while the commercial licence holders, in turn, could obtain full market value for the fractional allocations.

Allowing the sale of portions of licences could alleviate the pressure for commercial fishers to sell their full licences and quotas. They could remain part of the industry while also meeting Indigenous demands for their fair share of the industry. This process would unfold along the same “willing seller, willing buyer” approach, with the price paid for the partial allocation set by open competition. The Department of Fisheries and Oceans could manage this process by following the current system, or a First Nations’ authority could manage it, as proposed above.

Ensuring comprehensive engagement

Canada has excellent models for the expansion of Indigenous treaties and legal and constitutional rights, and encouraging greater Indigenous engagement in the wider economy. The mining sector has more than 400 impact and benefit agreements with Indigenous groups across the country. Over time, in forestry, mining, hydroelectric development, power transmission, and others, Indigenous peoples and their governments have collaborated with businesses, provincial and territorial governments, the Government of Canada, and other stakeholders. Resource development has emerged as the front line of reconciliation with Indigenous peoples.

These collaborative changes have not yet occurred comprehensively with the Maritime fishery. In the wake of the *Marshall* decisions, the federal government moved quickly to find a resolution. It did not immediately reach out to hold comprehensive discussions with either the commercial fishing industry or non-Indigenous communities. This frustrating pattern has continued since then. For their part, First Nations have both insisted upon and expanded direct First Nations–government negotiations (specifically with the DFO) on matters related to the fisheries.

This pattern needs to change. There are many times when First Nations must be able to speak directly and confidentially to the federal government. At other times, it is essential that First Nations, industry, and government

collaborate over the industry's long-term planning and to ensure that proper attention is paid to Indigenous rights. In the mining sector, First Nations typically deal with single, well-funded project proponents. It is the same with hydro development, pipelines, and large industrial plants. The management of the fishery is, by design, much more complex.

“ *The long-term stability of the commercial fishery requires greater engagement between Indigenous and non-Indigenous peoples.* ”

The long-term stability of the commercial fishery, whatever the outcome of the expansion of First Nations fishing rights under the *Marshall* decision, requires greater engagement between Indigenous and non-Indigenous peoples. Relations on the docks and in the communities are better than most people believe,¹ largely because of the outsized attention the media has given to isolated conflicts related to the fisheries. Commercial fishers have sold licences and equipment, trained First Nations crews, leased licences from First Nations, and collaborated on and off the water. The commercial industry accepts (reluctantly in some quarters) the *Marshall* decision – even as its members are frustrated because they feel marginalized in the management processes related to the fishery.

First Nations and industry representatives need to more deeply engage in discussions about local, regional, species-based, or other aspects of the fishery. The DFO must include industry more extensively in discussions about changes in licensing, conservation, and general resource management in the fishery. The First Nations and the federal government could clarify the conditions under which negotiations must, for reasons of the law and treaty, be conducted exclusively with the First Nations. At present, the DFO's approach is exacerbating rather than moderating tensions in the sector. The country needs to do better in this area.

A dramatically different approach

There is a strong agreement in the Maritimes about several key elements in the Indigenous rights effort:

- Indigenous people signed and honoured the Peace and Friendship Treaties with the British authorities, which were not land surrender agreements. However, the British government failed to implement the treaties in a systematic way, and did not honour either the treaties or the letter or spirit of the Royal Proclamation of 1763 when it took Indigenous lands for the use of and occupation by non-Indigenous peoples. To this day, there are still no land surrender treaties in the Maritimes.
- As a direct consequence of these political decisions and the entrenched antipathy of the non-Indigenous population, First Nations were marginalized and impoverished. Locked out of the evolving commercial economy, they suffered the serious multi-generational consequences of extreme poverty and state paternalism as highlighted by the impositions of reserves, the *Indian Act*, and residential schools.
- More recently there has been widespread recognition that Indigenous political and legal successes have re-empowered First Nations by strengthening their political autonomy and involvement in the natural resource sector. This expansion of authority peaked in the Maritimes with the 1999 *Marshall* decision.

In the Maritimes there are strong differences of opinion about the extent and nature of Indigenous and treaty rights, but there is nonetheless a clear understanding that such rights exist and that the current recognition of those rights is incomplete. First Nations have, since at least the 19th century, demanded that attention be paid to their treaty rights and to their urgent needs for food, shelter, and opportunity. Until the 1999 *Marshall* decision, however, the 18th-century treaties had been moribund, hiding in Canada's legal background while remaining prominent in the historical memories of First Nations. To this point, and in the absence of an agreement on a modern treaty, other legal decisions, or a major negotiated settlement, the commercial fisheries judgment is by far and away the most prominent economic opportunity available to First Nations in the Maritimes.

This has meant, in simple terms, that most of the effort to produce economic fairness for First Nations in the Maritimes has fallen on the commercial fishery. Further, it means that the entire weight of honouring the Peace and Friendship Treaties stands on the Government of Canada's response to the Supreme Court's *Marshall* decision.

This could soon change. Additional court challenges could extend the *Marshall* decision to include other sectors (The Wolastoqey Nation's assertion that it did not give up its traditional territories in New Brunswick through the Peace and Friendship Treaties is working its way through the courts, a process that includes a November 2024 provincial court ruling that it could claim privately held lands (Wolastoqey Nation 2024)). A long overdue land surrender or modern treaty could result in the transfer of large sums of money, substantial amounts of land, and additional government powers to the First Nations, a process largely complete in the territorial North and in Labrador, and partially done in British Columbia. This expensive, time-consuming process, one all but certain to result in major achievements by the First Nations, could hamstring economic development in the Maritimes for two decades if the pattern of negotiations and legal challenges in the rest of the country hold for the region.

First Nations have choices (and the option is truly theirs): they can focus their legal and commercial efforts on the Maritime fishing industry and the implementation of the *Marshall* decision (an effort that has produced impressive results for them), they can go to the courts to attempt to extend the commercial reach of the Peace and Friendship Treaties to other economic sectors, or they could re-start negotiations with the Government of Canada to develop a modern treaty, which would include land and financial elements.

Ottawa also has options. It can continue to lay the burden for addressing national obligations for addressing the Peace and Friendship Treaties solely on the commercial fishing industry, an approach that will only hold until the First Nations win a court decision broadening the reach of the treaties. It could take part in the negotiation of a modern treaty, an outcome that could bring about a region-wide resolution of outstanding claims and provide an invaluable foundation for economic and governance renewal. Alternatively, the federal government could continue the expensive and emotionally draining process of fighting major First Nations court cases.

There is another option, one that has not been explored extensively. The Government of Canada could recognize that the "truck house" commitments

of the Peace and Friendship Treaties represent more than an Indigenous opportunity to participate in the commercial fishing industry but rather a promise by the British authorities that First Nations would have an opportunity to participate, with a reasonable degree of equality, in the broader economy. Rather than focusing on expanding their access to the scope of the commercial fishery, the government could, with full First Nations agreement and participation, broaden the scope of their collective effort. Funds currently allocated to purchase commercial licences, augmented substantially to meet the First Nations' rights and aspirations, could be used to create opportunities across the economy. A First Nation could, under this approach, secure funds to buy a resort, gas station, transportation company, restaurant, farm, airline, residential development, urban retail operation, or any other commercial or investment opportunity.

“*The Peace and Friendship Treaties promised First Nations a broader engagement with the regional economy.*”

The recent settlement in the Robinson (Huron) annuities agreement addressing the government's failure to honour the terms of an 1850 treaty in what's now Ontario provides an indication of what is legally and financially at stake (Income Security Advocacy Centre 2024; Crown-Indigenous Relations and Northern Affairs 2023). The 1850 Robinson treaties provided a \$3 per person annuity payment, which the Crown raised to \$4 per person per year in 1875. The treaty also stated that the annuity could be increased if the development of the land and resources in the treaty area warranted it. The federal government honoured the \$3/\$4 annuities, but ignored the First Nations' repeated requests for an increase. (The parallel Robinson (Superior) court decision is before the courts.) The governments of Ontario and Canada reached an agreement with the Huron First Nation in 2024, settling on a \$10 billion payout, with the cost divided equally between the province and the federal government. Arriving at the \$10 billion award took years of tense and expensive legal hearings, but the court's decision demonstrated

the contemporary value and relevance of, in this case, a 19th-century treaty (Income Security Advocacy Centre 2024). It is an easy step to see that the Peace and Friendship Treaties promised First Nations a broader engagement with the regional economy, though making the same statement about the legal status of this claim is more problematic.

There are other Canadian examples of potential relevance to the Maritimes, including parallels between the Treaty Land Entitlement process on the Prairies (Major 2010) and the treaty rights-based commercial fishery in the Maritimes. Ottawa compensated First Nations on the Prairies because they did not receive the land promised to them under the numbered treaties. The First Nations in the West have also received large settlements and can use the funds however they wish. Some First Nations have used the money to buy farmland and/or to add to their existing reserves. Others have reached further afield, using the settlement funds to purchase urban land of greater commercial or business value. Other aspects of the treaties that were similarly ignored, called the “cows and ploughs” clauses, have led to dozens more court cases and, in recent years, major financial settlements and awards. The Lac La Ronge Indian Band in north-central Saskatchewan, for example, one of the largest and most commercially active in the nation, received a \$600 million payment (Dudha 2025; Crown-Indigenous Relations and Northern Affairs 2024; Lac La Ronge Indian Band 2024).

This potential solution, which the government of Canada and the First Nations would negotiate to address outstanding commitments under the Peace and Friendship Treaties (Daugherty 1983), would involve the transfer of substantial amounts of money to the newly created Indigenous-controlled organizations through a start-up fund and ongoing payments. These agencies, in turn, would exist solely to distribute the money to the partner First Nations, who could then spend the funding on economic development and infrastructure projects. These investments could include additional purchases of licences, fish quota, boats, and industry-related equipment. Some First Nations, however, might decide to disengage from the fishery entirely and move their investments to hotels or farming.

For the commercial fishery, the approach would ideally involve the establishment of a First Nations’ controlled investment fund (or funds), which would avoid the extensive bureaucracy of the current commercial licensing purchase approach and would enable each First Nation to

pursue appropriate economic opportunities in or near their communities. Alternatively, and here the model of the Treaty Land Entitlement Process is of direct relevance (Indigenous Services Canada 2017), each First Nation could negotiate an agreement with the Government of Canada and control the money themselves. Instead of relying on the government to purchase and allocate licences, each First Nation would receive a cash settlement that they can use as they see fit. They could buy licences and quota, if they wished, or they could buy commercial land, a hotel, a resort, a regional airline, or they could use the funds to build a cultural camp, fund language revitalization programs, or build a retreat centre, etc.

“*Instead of relying on the government to purchase and allocate licences, each First Nation would receive a cash settlement.*”

This approach has several attractive elements, including:

Financial certainty and clarity. After what will invariably be lengthy negotiations, the Government of Canada and the First Nations in the Maritimes could establish a sum for the financial resources the First Nations deserve, under the terms of the Peace and Friendship Treaties, to enter the regional and national economy. They would establish an investment corporation (or corporations), controlled by First Nations from the Maritimes, that would manage the funds on behalf of the participating First Nations.

Improved value for money. Properly done (and the Alberta Indigenous Opportunities Corporation has had considerable success in this regard), an approach of this nature could be faster, less bureaucratic, and more flexible than the current Ottawa-centric decision-making process. Under First Nations control, a regional authority or sub-regional organizations could operate more effectively and competitively than management through the DFO. They could produce greater value for money by removing the heavy hand (and complex decision-making processes) of the Government of Canada from the commercial equation.

New business and employment opportunities, across a broader range of commercial sectors. The system would accommodate those First Nations that seek opportunities other than fishing. The fishing industry requires advanced skills, a high level of comfort on the ocean, and a tolerance for extremely hard, uncomfortable, and seasonal work. Only a small percentage of Maritimers, including those in the First Nations, are willing and able to work on an ocean-going fishing boat or are interested in working in a fish processing facility or marine repair shop.

A continued expansion of the First Nations commercial fishery. First Nations could use some of the funds to purchase commercial fishing licences on the long-standing “willing seller, willing buyer” basis. These purchases would be made between the First Nation and the licensee, with no government involvement after the establishment of the financial allocation to the Indigenous agencies.

Geographic flexibility. Almost all Maritime commercial fishing operations, by definition, are ocean-based. Some First Nations located on lands a considerable distance from fishing ports are involved with the fishery largely because it is the only highly remunerative economic opportunity available. This is inconvenient and expensive for those involved and often does not capitalize on local Indigenous knowledge and experience.

Expanding the range of commercial opportunities. If First Nations had available a pool of capital, they could use it at their discretion to broaden their commercial reach and provide their communities with greater financial stability. In other parts of Canada, Indigenous governments and economic development corporations have invested in transmission lines, telecommunication systems, renewable energy facilities, pipelines, energy storage, Indigenous financial institutions, as well as hotels, casinos, retail stores, farms, and businesses in the new economy. This approach would allow each First Nation in the Maritimes to chart its own economic course, including commercial fishing when desired.

Broadening regional engagement with First Nations treaty rights. At present, the socioeconomic and political impact of addressing First Nations treaty rights under the *Marshall* decision rests almost entirely with the commercial fishing industry and the host communities. The capital approach suggested herein would take advantage of the proven treaty right to participate in the regional economy and broaden the reach of Indigenous

employment, business activity, and investment from one industry – albeit a major one – to give the First Nations in the Maritimes an economic foothold across the region. Expanding treaty-based economic rights beyond the narrow confines of the *Marshall* decision honours the original agreement, reflects the spirit of the Supreme Court judgment, potentially involves all economic sectors and all regions, and brings the whole Maritimes into treaty relationships with the First Nations.

Conclusion

As upheld by the Supreme Court’s *Marshall* decision, First Nations in the Maritimes have a treaty right to fish commercially. However, this could be interpreted as a treaty right to participate equitably in the national economy more broadly.

The Government of Canada has struggled to keep up with the surging demand by First Nations for access to the commercial fishery in the Maritimes. Ottawa also hasn’t devised a plan to properly address the Supreme Court requirement to provide First Nations with the right to earn a (properly defined) “moderate livelihood” from the fishery.

Solutions exist, but they must also consider the impacts on non-Indigenous fishers and their communities, who fear being pushed out of the industry. A failure to address these concerns could bring about jarring transitions in Maritime society.

The current system for securing licences for First Nations fishers can be improved. At present, it is too Ottawa-centric, inefficient, and needlessly expensive. Money allocated for licence purchases is not being used particularly well, largely because of the lengthy processes and the direct involvement of the federal government. It does not work particularly well for commercial fishers either, few of whom are eager to sell their allocations (this forces Ottawa to go to market repeatedly to build a “bank” of available licences and quota for distribution to First Nations).

More importantly, it is increasingly clear that the fishing industry should not bear the entire weight of addressing the contemporary economic relevance of the Peace and Friendship Treaties. A sustainable, legally just,

and economically sound solution requires a more creative and expansive approach.

The Government of Canada has a firm obligation to honour the Peace and Friendship Treaties – a duty that has not been honoured completely or efficiently. At present and in practical terms, legal judgments and political attention to First Nations’ treaty rights apply only to the commercial fishery in the Maritimes. The Government of Canada has a large and complex set of programs in place to encourage Indigenous business development, but these are available across the country without reference to existing treaties or court decisions.

Canada has only a few options available: it can keep its current focus on the Maritime commercial fishery, negotiating a comprehensive modern treaty (which could easily take a decade or longer), or it could take a courageous step toward honouring the spirit of the Peace and Friendship Treaties by establishing a First Nations economic development fund (with appropriate Indigenous organizations to manage the money) for the Maritimes. This substantial allocation, established under First Nations’ control, could be used to buy additional fishing licences on the open commercial market. But First Nations could also use the money to invest in any other business sector, producing a more expansive footprint in the Maritime economy.

A decisive step of this nature would address centuries of Indigenous economic marginalization and transform, in a positive and effective manner, the foundations of First Nations life in the Maritimes, honour the long-neglected series of eighteenth-century treaties, respect the Supreme Court of Canada’s *Marshall* decisions, and alleviate much of the current pressure on the commercial fishery in the region. The *Marshall* decisions are among the most important commercializations of Indigenous treaty rights in modern history. It has served, for a quarter century, as a ceiling on Indigenous legal and economic aspirations when, in terms of treaty and First Nations constitutional rights, it should be seen as a floor. Bold and constructive steps, taken together by First Nations and the Government of Canada – founded on a shared commitment to Indigenous and treaty rights and with appropriate engagement with the broader economy in the Maritimes – could be one of the most positive and effective contributions to economic reconciliation in Canadian history. [MLI](#)

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Endnotes

- 1 This observation is based on extended conversations over the past five years with Indigenous fishery managers, fisheries associations, and Maritime fishers about the state of relations on the East Coast.

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