

UP THE CREEK: FISHING FOR A NEW CONSTITUTIONAL ORDER

Kiera L. Ladner
Assistant Professor
Department of Political Science
University of Western Ontario
London, Ontario
Email: kladner@uwo.ca

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INTRODUCTION¹

Everyone familiar with the study of Canadian politics knows the joke about how a French national, a Brit, and a Canadian were asked to write an essay about an elephant: the French national wrote about the culinary uses of the elephant, the Brit wrote about the elephant and imperialism, and the Canadian wrote a paper entitled, “Elephant: Federal or Provincial Responsibility?” Though simple, the joke conveys the essence of Canadian politics as Canadian politics have always been defined by debates over federalism. For example, who has responsibility for funding health care? Does the federal government have the authority to set and enforce national standards for health care? Who has the responsibility for funding local infrastructure? The subjects of these jurisdictional debates have changed over the years, as have the actors involved. While these debates were once the exclusive realm of the federal and provincial governments, increasingly, other actors have tried to engage these debates using the Charter. Most recently, queer rights activists and various religious groups have attempted to engage the federal government in a debate over who has the right to define marriage.

Scholars of Canadian constitutional politics such as Alan Cairns have argued that this expanded debate is the result of the introduction of the Charter and the creation of a rights bearing citizenry that now seeks to limit, expand and/or even exercise a government’s powers (Cairns 1995; 1991). With few exceptions, Cairns’ statement is true. For Indigenous peoples, however, the involvement of others in these intergovernmental disputes is nothing new. In fact, these expanded jurisdictional debates predate the creation of Canada as Indigenous peoples have, since the arrival of Europeans, continuously challenged the authority of colonial governments to claim jurisdiction over Indians and their lands, be it French, British or Canadian. Significantly, these jurisdictional debates are now finding their way into the spotlight as contemporary contestations of Canadian authority. This paper deals with one such contestation and the resulting debate between the Mikmaq and Canadian governments over who has jurisdiction for the Atlantic salmon fisheries.

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Indigenous people are now (as they always have been) engaging in jurisdictional debates (often perceived as 'rights' debates) in an attempt to challenge the Canadian constitutional order and the Crown's sovereignty and, most importantly, to re-affirm their own constitutional order and autonomy. Thus far, the courts have refused to engage in these jurisdictional and sovereignty debates by framing these debates strictly in terms of a rights discourse of Aboriginal and treaty rights. Still, it is important to understand that the issues that underlie Aboriginal and treaty rights disputes - such as the contention that the Mikmaw have a treaty right to engage their rights and responsibilities to the salmon fishery - are jurisdictional disputes and a matter of contested sovereignties.

In this paper, I want to suggest that the Mikmaw claim of rights and responsibilities for the salmon fishery is a jurisdictional dispute. While this dispute, in and of itself, could be a book length study, I have limited the scope of this paper to an examination of contested jurisdiction. Moreover, I want to return to my elephant anecdote and ask this quintessentially Canadian question, though transformed in such a manner as to question what is quintessentially colonial in Canada - the constitutional order. In an attempt to shed light on the contested sovereignties, and to decolonize our understanding of 'Canada's' constitutional history and the numerous jurisdictional debates involving Indigenous peoples, I ask: 'salmon: federal, provincial or Mikmaw responsibility?' The question of responsibility for the salmon is not so much a question as to which government has jurisdiction *over* the fish or who "owns" the fish. Instead, I argue, it is a multifaceted debate over who has the authority to regulate the fishery. More specifically, it is a debate that addresses these central questions: who has the right to fish? Who has the right to establish an exclusive fishery? Who has the right to profit from the fishery? And, who has the right to regulate and 'protect' the fishery? It is a debate that can be captured as I've noted above, as 'salmon: federal, provincial or Mikmaw fishery?'

Examining the Mikmaw claim to rights and responsibilities for the salmon as a jurisdictional debate helps to create an understanding of the salmon fishery disputes as they are understood and conceptualized within Mikmaw communities. That this is a trustworthy way to understand the fishery disputes between the Mikmaw and Canada became readily apparent when I spent last

summer fishing with and talking with Mikmaw fishers and community leaders (read: non *Indian Act* political leaders). For them, the Mikmaw have never fished ‘in Canada’ illegally, the Canadians have. Canadian governments, they argue, do not have the right to regulate Mikmaw fisheries. According to most Mikmaw (and most Mikmaw and Canadian historical sources), their nation retained this right when they negotiated a series of treaties with the British Crown in the mid-eighteenth century. Infact, they argue that the Mikmaw rights and responsibilities for the fisheries were recognized and affirmed by the treaties; and, the treaties provided subjects of the Crown with the right to trade for fish, but not necessarily the right to fish.

To summarize the Mikmaw position, fishing is a right and a responsibility that is both defined and regulated by the Mikmaw constitutional order. In as much as they are fishing for salmon, they are fishing for bricks and mortar; fishing to assert their rights and responsibilities under the Mikmaw constitutional order and fishing as a means to rebuild, re-establish and support that constitutional order. In short, they are fishing for a ‘new’ constitutional order. Only because no one seems to be willing to engage in the decolonization of Canadian constitutional politics or to deal with Mikmaw jurisdictional disputes, their struggle seems to be one of mammoth proportions, one comparable with the old adage of going up the creek without a paddle. Only, in this case the Mikmaw are constantly battling the rapids, as they attempt fishing for bricks up the creek without a paddle. Since the Mikmaw are sure to continue to navigate the rapids, to rebuild their constitutional order and engage Canada in jurisdictional debates, it is imperative to understand the fishing debate within and between these constitutional orders. As such, this paper proceeds in an exploratory manner to map both constitutional orders, and interrelation between these orders that results in the debate as to who has responsibility for the salmon

THE CANADIAN CONSTITUTIONAL ORDER

For my purposes, it is important to note that the constitutional debates that confront the Mikmaw today began not in Mikmaki but in England. An examination of ‘our’ Constitutional history begins in 1215 in the meadows of Runnymede and not on a salmon river in Mikmawki. This is because, the Crown is thought to be the source of Canada’s constitutional authority and the Magna Carta the source of our Constitution. It applies simply because the authority to govern all subjects (potential or actual) was vested in the Crown by god; the same god that granted the Pope

the right to rule the world (and thus gift all discoverable lands in 1493 to Spain and Portugal) as he was charged with the responsibility to govern all Christians (potential or realized).

The forty-seventh provision of the Magna Carta established a common fishery and a public right to fishing that could not be displaced by the Crown without the consent of Parliament. More specifically, it established,

The common right, which one individual of the whole community is entitled to enjoy as much as another, cannot be made by law the exclusive privilege of the people of a certain class or section upon terms and conditions that do not apply to the whole people alike. This right that one individual has in common with every other individual in the community to take and use fish and game, *ferae naturae*, is one that has existed from the remotest times, and, although at one time in England after the Norman Conquest the right to take fish and game was claimed as royal prerogative to the exclusion of the people, it was restored to them by the Barons at Runnymede in 1215, and was declared in the great charter which they wrestled from King John. (*Lewis v. State* 1913; cited in *R. v. Kapp et al* 2003)

Thus, while the specific right to fish in Mikmaki was not addressed in 1215, the issue was nevertheless resolved upon ‘discovery.’ As a matter of British and Canadian constitutional law, the Mikmaw fishery was incorporated and subsumed within this common or public fishery.

Discussing the relationship between Anglo-Canadian law and the displacement of Aboriginal peoples from their traditional fisheries, Douglas Harris claims:

Anglo-Canadian law and the doctrine of a public right to fish in particular, created the conditions under which a non-Native fishery could insert itself into the existing Native fishery ... Put simply, the public right to fish, as interpreted by Fisheries officials, established a principle of open access to a resource that had been a closely and locally regulated commons. Based on this principle of open access, the Canadian state built a legislative framework, principally through a system of licenses and leases, that confined and excluded the pre-existing native fishery ... (Harris 2001, 24)

In short, Harris explains how Anglo-Canadian law was used to dispossess Indigenous nations’ of their fisheries.

Federal or Provincial Responsibility?

The right to fish in Mikmaki was decided as a matter of law in 1215. Or was it? The Magna Carta established a public fishery. Meaning that fish were not the property of, nor the exclusive

right of, those that owned lands adjacent to public waters. The Crown could not establish exclusive rights to fishing, unless explicitly sanctioned by Parliament. Meanwhile, in 1867, the Fathers of Confederation charged the federal government with the responsibility of maintaining the public fishery, secured in 1215. Section 91 (13) of the Constitution Act, 1867 provided the federal government with an exclusive jurisdiction over ‘Sea Coast and Inland Fisheries’. In summary, the nature of and responsibility for the public fishery have been matters of great debate and contested jurisdiction since Confederation.

This federal-provincial debate has taken numerous forms and has involved a number of distinct debates, three of which will be discussed in this paper. The first debate involves the provinces contesting fisheries as an exclusive federal jurisdiction on the basis of the pre-existing proprietary rights (not legislative rights) of provinces and individuals. This contesting of the federal jurisdiction based on pre-existing rights predates Confederation, as there were pre-existing exclusive fishing rights that had been established prior to Conquest, rights that had been recognized prior to 1865 Fisheries Act but, nonetheless, were still the subject of debate.

According to Roland Wright,

[m]uch of the discussion [during the second reading of the 1865 bill] focused on the new *fisheries* leasing provision which authorized the commissioner of crown lands to issue the same ‘where the exclusive right of fishing does not already exist by law in favor of private persons.’ It was explained that this latter phrase was intended to cover those instances in French Canada where exclusive rights had been conveyed prior to Conquest. Such grants were valid since they had not been subject to the public right of fishing derived from Magna Carta.” (Wright 1994,352)

Following Confederation the contestation of the federal government’s exclusive jurisdiction and the provinces pre-existing proprietary rights was taken up on numerous occasions by several provinces, individually and collectively. For instance, in 1898 the federal government took Ontario, Quebec, and Nova Scotia to court. At issue was whether, at the time of Confederation, the Dominion of Canada obtained proprietary rights to waters located within provincial boundaries which had not been previously granted to the Dominion, or whether such proprietary rights remained within the scope of provincial power. Acknowledging that there is a difference between proprietary rights and legislative rights, the courts found that,

... the 91st section of the British North American Act did not convey to the Dominion of Canada any proprietary rights in relation to the fisheries. ... Whatever proprietary rights in relation to the fisheries were previously vested in private individuals or the provinces respectively remained untouched by that enactment. (*A.G. (Canada) v. A.G. (Ontario) et al* 1898, 712)

With the exception of New France, prior to Confederation the governments of the colonies were unable to establish exclusive fisheries. While this decision did not extend protection to pre-existing exclusive fisheries outside of those granted by the French Crown, the decision protected the from legislative encroachment by the federal government.

A second important jurisdictional dispute regarding the salmon fishery involves the provincial contestation of the federal control of the fishery on the grounds that section 92(13) ('property and civil rights') provides the provinces with jurisdiction. The provinces argued that while the federal government had legislative rights over the fishery, provincial governments have jurisdiction over the product of the fishery under section 92 (13). Several provinces have argued that while the federal government has jurisdiction over the regulation and management of the fishery (and thus the act of fishing), the provinces could claim ownership of the caught fish. Caught fish, they argued, were no longer held in common (public property) but had become the private property of the fisher. As private property, caught fish were now the subject of provincial jurisdiction (property and civil rights). This dispute was settled in a series of cases beginning with *A.G. (Canada) v. A.G. (Ontario) et al* and culminating with *A.G. (Canada) v. A.G. (British Columbia), 1930* which established the parameters of the federal legislative jurisdiction over the regulation and management of the fishery, and the provinces' proprietary rights. These decisions, while protecting the proprietary rights of the provinces from legislative incursion, limited the jurisdiction of provinces over fish as property in matters such as the issuing of leases (Crown land), regulating shore-based buying, processing and sport-fishing, and regulating aquaculture.² In so doing, this series of decisions culminating in 1914, (created a jurisdictional quagmire: the federal government is responsible for live wild salmon, licensing, Aboriginal fisheries, commercial fishing, off-shore sports fishing, off-shore buying and

² It should be noted that jurisdictional disputes over the meaning of s. 91(12) and 92(13) have arisen since 1929, but that these disputes have been of a more specific nature – i.e. disputes concerning the legislative jurisdiction over fish farms and their product.

processing, off-shore inspections. Meanwhile, provincial governments are responsible for leasing crown-land for the purpose of fishing, caught fish or fish that are considered as property (once they arrive on shore), shore-based buying and processing, and all aspects of aquaculture or farmed salmon (alive or dead).

My third and debate comes from the early 1920s when Quebec challenged the federal government's jurisdiction over the fishery on the basis that the province had the right to license fishers. At the time most licensed fishing in the province was done using "engines that are attached to the soil" thus requiring a provincial license (permission) to attach appliances to the soil for the purpose of fishing (Orders in Council, PC 360 February 13, 1922). This dual jurisdiction resulted in a 'dual expenditure' in the governments' administration costs and in the fishers' licensing costs. (The federal government delegated its responsibilities for the administration (not regulation) of the salmon fisheries to Quebec. It did so because it acknowledged that Quebec would continue provincial license requirements and would willingly administer federal fishery regulations (thus saving the federal government money. Subsequently, the federal government delegated many of its administrative responsibilities to provincial authorities, subject to federal-provincial agreements and compliance with federal regulations. Still, the federal government maintains jurisdiction over the fisheries (and in most cases has not entered into administrative agreements with the provinces) and as such it continues to be a jurisdiction contested by provincial governments (such as Newfoundland) seeking to participate in the regulation (and enforcement) of the fisheries.

Mikmaw Responsibility?

One must throw the question about the rights of the Mikmaw into this quagmire of federal and provincial responsibilities. Mikmaw rights are sui generis (or 'unique') and have remained largely undefined and unresolved in terms of their meaning and realization within the Canadian constitutional order. More importantly, the Mikmaw perceive themselves, by and large as retaining the rights and responsibilities of nationhood within Mikmaki (Mikmaw territory) as they never ceded their territory nor ceded their rights and responsibilities as an autonomous nation. Whether conceptualized as an Aboriginal right, a treaty right or an unsundered right, the Mikmaw retain some semblance of rights vis-à-vis the salmon fishery. However, the

question as to what these rights mean today – constitutionally and practically - is a question of great debate and of great significance.

With the 1982 patriation of the Constitution Act, and its recognition and affirmation of Aboriginal and treaty rights, a great debate emerged concerning whether or not the ability of Aboriginal people to engage in fishing was a treaty right or an Aboriginal right. In part, this debate focused on the constitutionality of such a fishery, or whether it was indeed possible for there to be an Aboriginal right to or a claim of jurisdiction over the fishery, or any aspect thereof. The constitutionality of these assertions of jurisdiction is questionable for they would necessarily involve an exclusive fishery which is, in and of itself, thought to be unconstitutional. Whether such assertions are constitutional, is a matter of great debate in the academic literature, as is discussed below.

Scholars such as Roland Wright have argued that these assertions of rights, responsibilities and/or jurisdiction are unconstitutional. In his article, “The Public Right of Fishing, Government Fishing Policy, and Indian Fishing Rights in Upper Canada,” Wright argues that any examination of governmental fishing policy and ‘Indian’ fishing rights must begin with the Magna Carta of 1215 (Wright 1994,337). In Wright’s view, the forty-seventh provision of the Magna Carta expressly prohibits the establishment of any new exclusive fisheries in public waters. In so doing, the Magna Carta establishes fishing in navigable waters (or tidal and inland waters) as a public right that could only be abrogated by an Act of Parliament explicitly establishing (and limiting) an exclusive fishery (Wright 1994, 337). Thus, Wright concludes, that as a matter of *law*, Aboriginal peoples can neither be excluded (nor exclude others) from fishing in their traditional waters:

A common law public right of fishing present in the navigable waters of the province meant that, without the imprimatur of the legislature, Indians could not be excluded from fishing grounds which had seen the long and habitual use by them and their ancestors. Unfortunately, without similar legislative sanction, it also meant that neither they nor the crown could exclude others from those same grounds. Under the workings of the public right, the bald truth was that others would be allowed to fish in waters traditionally used only by Indians. (Wright 1994, 340)

Wright, however, ignores the numerous treaties which explicitly ‘recognize,’ ‘affirm’ and ‘guarantee’ the continuance of a nation’s rights and responsibilities vis-à-vis their fisheries and/or ‘grant’ a positive right to fish. Basing his conclusions on the Manitoulin or Bond Head Treaty of 1836 and the Robinson Huron and Superior Treaties of 1850, Wright argues that colonial officials were merely granting Aboriginal peoples a ‘share’ of the public right of fishing rather than an exclusive right (Wright 1994, 341-342). Wright’s contention is readily supported in the colonial historical record, which includes the following statement made by W.H. Draper, the superintendent general of Indian affairs, in 1845: “...the right to fish in public navigable waters in Her Majesty’s dominions is a common right – not a regal franchise – and I do not understand any claim the Indians can have to its exclusive enjoyment” (Wright 1994, 342).

When employing the laws of the dominant society, Wright argues quite convincingly that Aboriginal people have no claim to an exclusive fishery and that the granting and/or recognition of such a fishery would be unconstitutional. Though he disagrees with Wright’s argument, Douglas Harris admits that while an exclusive fishery is a matter of great debate, and while Wright’s position is extremely problematic for reasons of historical accuracy, by and large it has been accepted as the ‘government standard’ (Harris, 2001:27-33). Despite the government’s acceptance of Wright-like conclusions, other scholars have agreed with Harris’ labeling Wright a historical revisionist and have found significant archival and constitutional evidence to back their arguments pertaining to Aboriginal fishing rights (Harris, 2001:29). For instance, in his article, “Aboriginal Rights, *Magna Carta* and Exclusive Rights to Fisheries in the Waters of Upper Canada,” Mark D. Walters directly engages Wright’s understanding of Aboriginal and constitutional history, and his conclusions (Walters, 1998). In so doing, Walters presents a markedly different understanding of the right to fish guaranteed under the Manitoulin treaty: he argues that the treaty recognized and affirmed an exclusive fishery and protected it from the encroachment of non-native fishers (Walters, 1998:310). Walters further challenges Wright’s understanding of English constitutional and common law (particularly the *Magna Carta*) arguing that an exclusive fishery is constitutional because Aboriginal rights and customary laws would have survived and remained in force as distinct systems upon the assertion of Crown sovereignty (Walters, 1998:334). Fishing rights are constitutional for two reasons: first, land covered by water was not extinguished (in the Manitoulin treaty) and therefore Aboriginal title

remained intact; and second, exclusive Aboriginal rights to fisheries remained untouched by the Magna Carta's 'public right' of fishing unless (and until) Aboriginal rights were expressly ceded or extinguished (Walters 1998,312-344).

As such, Walters postulates that:

...as long as aboriginal title remained unceded and unextinguished – and upon the assumption that aboriginal title extended to lands covered by waters – any public rights of access to waters in which exclusive aboriginal fisheries were located ... were at best inchoate (Walters, 1998:344).

Unlike the conclusions of Wright, Walters' findings are widely accepted and supported in contemporary legal and historical scholarship (see Clark 1990; Coates 2000). For instance, Peggy Blair accepts the arguments put forward by Walters. In particular, Blair argues that Aboriginal peoples retained an 'exclusive' right to use and occupy their fisheries, despite the British Crown's assertion of sovereignty (Blair 2000, 31). She contends that this right can be justified using the Royal Proclamation of 1763 as:

The proclamation set out a protocol by which the 'hunting grounds,' which included fisheries, were to be acquired by the crown through land cessions ... The provisions of the proclamation, then, formed the policy which governed surrenders of land by Aboriginal peoples to the crown at the time. Until lands were surrendered, they continued to be subject to Aboriginal title (Blair 2000, 31).

As such, Blair argues that scholars (such as Wright) who proclaim that the common law prevents the existence of exclusive fishing rights have failed to consider the existence of Aboriginal title to land prior to the assertion of Crown sovereignty.

While the arguments presented by Harris, Walters and Blair are still the subject of much debate, the governments of Canada and the courts have, nonetheless, recognized some semblance of an Aboriginal and/or treaty right of nations such as the Mikmaw to engage their rights and responsibilities for the fishery. They have done so in multiple cases and through the negotiation of numerous agreements specifically pertaining to the salmon fisheries. For example, in 1980, following years of 'illegal fishing' and confrontations between the Mikmaw and Canadian governments, and the invasion (and subsequent standoff) aimed at halting the fishery, a fishing agreement was negotiated between the government of Quebec and the Listiguj *Indian Act* band

council. Subsequently, similar agreements have been negotiated with other Mikmaw *Indian Act* band councils.

Despite such agreements and a growing body of common law, Mikmaw fishery-related rights continue to exist on a precarious foundation over a murky pool of academic and governmental debates and legal jurisprudence, even though guaranteed under treaty (See for example *R. v. Sparrow* 1990; *R. v. Van der Peet* 1996; *R. v. Marshall* 1999. See also Kyle 1997). To this end, the rights and responsibilities of the Mikmaw vis-à-vis the salmon fishery remain susceptible to governmental interference (or non-action in so far as Canada's interference is necessary to enforce these rights and responsibilities) and to unilateral infringement or alteration by the courts. For example, the majority decision in *Marshall I* (1999) determined that the truckhouse clause in the 1760 treaty provided the Mi'kmaq with a right to obtain goods to trade through their pursuit of traditional hunting and fishing activities. It 'recognized' and/or 'provided' Mikmaw fishing rights because, as Supreme Court Justice Ian Binnie argued, the right to bring goods to trade at truckhouses would be inconsequential without a corresponding right to obtain goods to trade (*Marshall I* 1999, para. 32).

The court's decision to protect fishing practices incidental to treaty rights under section 35(1) stands in sharp contrast to the court's decision in *Van der Peet* where the same court determined that practices, customs, or traditions incidental to Aboriginal fishing rights were not protected under section 35(1). Leonard Rotman has argued that the categorization of Aboriginal practices into 'integral' or 'incidental' rights

demonstrates a profound inability or reluctance to recognize that Aboriginal rights ought to be understood as broad, theoretical constructs ... [which] deflects attention away from what ought to be the true issue at hand, namely the ability of Aboriginal peoples to determine the precise methods by which they will make use of or implement their larger, abstract rights (Rotman 1997,4-44).

In other cases, such as *Sparrow*, *Marshall II*, and *Badger* (1996), the courts have established that, regardless of the existence of rights (incidental or otherwise) Aboriginal and treaty rights pertaining to fisheries can justifiably be limited, infringed upon and regulated by the Canadian state (by courts, executive and/or parliamentary action and even, administrative or bureaucratic (in)action). Such infringement must be justified in

accordance with or by invoking the ‘infringement tests’ established in cases such as *Badger and Sparrow*. But, following *Marshall II*, a government may not be required to justify infringement for reasons of regulating a resource or an industry. As a unanimous court ruled in *Marshall II*,

...regulations that do no more than reasonably define the Mi’kmaq treaty right in terms that can be administered by the regulator and understood by the Mi’kmaq community... do not have to meet the *Badger* standard of justification. (*Marshall II*, para. 37)

In other words, the Court opens the possibility for the federal government to unilaterally impose regulations or restrictions on constitutionally protected Mikmaw treaty rights which may not have to meet any standard or justification at all. Further, the court creates the opportunity for the governments of Canada to unilaterally alter or (re)define treaties and other agreements with Aboriginal peoples. In their review of the Marshall decisions, Barsh and Henderson assert:

Marshall II revives and legitimizes the process by which the Mikmaq originally lost the enjoyment of their treaty rights ... *Marshall II* vindicates a kind of *administrative* supremacy over Aboriginal peoples, in which ministerial discretion can unilaterally override fundamental constitutional rights without the need for justification or compensation. As such, it is a cynical colonial wink to the Crown’s attorneys and to the mandarins in Ottawa (Barsh & Henderson 1999, 17).

Ottawa’s ability to engage in practices which unilaterally alter and redefine treaties is a matter of great debate among scholars. More to the point, it is of grave concern for Aboriginal peoples as it provides Ottawa with the unchallenged ability to redefine treaties and to regulate Aboriginal fisheries despite the fact that such fisheries are, in the case of the Mikmaw, protected by the treaties and remain the prerogative of the Mikmaw nation. This court-sanctioned ability is extremely problematic considering its potential. In their study of the Pacific salmon management system, Emily Walter, R. Michael M’Gonigle and Celeste McKay demonstrate that federal fishery regulations (such as determining the total allowable catch among user groups) have infringed upon traditional Aboriginal laws and rights to stewardship over their fisheries:

...the Department of Fisheries and Ocean’s (‘DFO’) management system constitutes, *as a whole*, a ‘structural infringement’ of Aboriginal fishing rights. By defining the right to fish uniquely as a right to harvest, excluding fisheries

management from the current conception, stocks have been depleted and Aboriginal self-regulation initiatives precluded (Walter, et. al., 2000, 266).

Thus, when this case study of administrative and ‘structural infringements’ is applied to Mikmaki, it can be argued that despite any gains that have been made in recognizing Mikmaw rights and responsibilities for the salmon, Canadian governments have retained jurisdiction and as such, have retained the ability (though limited) to interfere with the Mikmaw fishery wherever and whenever it likes. Because they have refused to recognize that Mikmaw rights and responsibilities are vested in and limited by a separate constitutional order, Canadian governments claim exclusive jurisdiction over the fishery and claim the Mikmaw as but a mere burden on the Crown’s sovereignty.

THE MIKMAW CONSTITUTIONAL ORDER

One cannot simply look towards Runnymede, London or Ottawa to discover our constitutional history as our constitutional histories predate the ‘discovery’ of Europeans off the shores of the Americas, as each nation had their own constitutional order. Thus, to fully understand jurisdictional issues pertaining to salmon and the competing claims of responsibility for fisheries, it is necessary to examine both the Canadian and Mikmaw constitutional orders; as both orders provide both nations and their governments with the rights and responsibilities which they seek to exercise. To understand but one is to misunderstand constitutional politics in Mikmaki and the relations (disputed or otherwise) between the Mikmaw and Canada. In short, according to many Indigenous people, perpetuating this misunderstanding is to actively perpetuate colonialism and the colonization of the Mikmaw. Overcoming colonialism, requires understanding and coming to terms with the ‘other’ constitutional order and political history that defines Mikmaki; an understanding of history and politics that the Union of Nova Scotia Indians tried to convey in the 1970s.

According to a 1970s declaration by the Mikmaw of Nova Scotia,

From time in memory, our forefathers have lived in this land. This is our land.
This is our home. Our history and our allegiance is to this land and to no other.

...

Before the English and French came, we were here. We are a pre-confederation
nation of peoples. ...

Prior to the coming of European immigrants, our ancestors exercised all the prerogatives of nationhood. We had our land and our own system of land holding. We made and enforced our own laws and ways. The various tribal nations dealt with one another according to accepted codes. ... We, in fact, had our own social, political, economic, educational and property systems. We exercise the rights and prerogatives of a nation and the existence of a nation.

It was as nations our forefathers dealt with the European immigrants. It is as nations we exist today. It is our desire and our intent to continue to exist and a nation of Micmacs. ... (Union of Nova Scotia Indians 1977, 1-2)

As is suggested in this declaration, the Mikmaw have their own constitutional order that comprises and defines distinct political, economic, educational, property and legal systems. Similar to the British constitution, the Mikmaw constitutional order is unwritten and comprised of customs and conventions and a multiplicity of documents. Unlike the British constitution, the Mikmaw constitutional order is comprised of oral 'documents' such as stories, songs and ceremonies. Thus the manner in which this Mikmaw constitutional order is conceptualized and documented, though consistent with most of the intellectual and political traditions of Indigenous nations, is distinct from the manner in which western-eurocentric constitutions are conceptualized and documented in the intellectual and political traditions of European nations and their colonial offspring. Western-eurocentric constitutional orders are expressions of worldviews that have constructed the earth as 'man's' dominion and established as the norm, hierarchical structures of government through power and domination. Indigenous constitutional orders, however, emerge from Indigenous worldviews that explicitly deny the dominion of humans over earth and of one human over another. Thus, it is necessary to keep in mind that the Mikmaw constitutional order emerged from a radically different world and a completely different understanding of that world. The Mikmaw worldview, grounded in an ecological relationship with their territory and a relationship between all beings within that territory, stands in marked contrast with the western-Eurocentric worldview based upon relationships of domination and oppression not only of all human but of all beings.³

Understanding the Constitutional Order

³ For a discussion of contextuality see Ladner (2003a)

In their stellar work, *Aboriginal Tenure in the Constitution of Canada*, Henderson, Benson and Findlay explain the Mikmaw worldview and the intellectual, economic, political, spiritual and social relationship with Mikmaki that informs their constitutional order. Though lengthy, the following excerpt *begins* to explain the Mikmaw world, and the connections I see between the Mikmaw worldview and their constitutional order:

“*Mikmaki*” became the concept that the allied people (Mikmaq) called their national territory. Not the usual land description, it is translated as the “space or land of friendship.” It stressed the voluntary political confederation of the various Algonquian families into the Holy Assembly or the *Sante Mawiomi* and their shared view. Wherever their language was spoken was *sitgamuk*, their ancient space, every part of which was sacred to the allied people.

Although it is possible to view Mikmaki as a territorial concept, in the Mikmaw context or landscape it expresses their sacred order. Their sacred order is not a cosmological order; it is the result of a millennia of field observations and direct experience by their ancestors. ...

The sacred order in which the Mikmaq live is expressed as a sustaining relationship. Consistent with their verb-oriented reality, a process of being with the universe, the order was and is a widely shared, coherent, and interrelated world-view connecting all things. For example, the Mikmaq conceptualize animals with a certain *mntu* (or force) and consider them a “separate nation.” An important feature of this order is the use of human kinship as a general analogy for ecological relations. The most obvious and widespread manifestation of this reciprocal relationship is the totemic clan system that categorizes social obligations, such as sharing and deference, as well as proper moral and ethical considerations within the ecological relationship. Plants, animals, and humans are related, and each is in an endless cycle as both producer and consumer with respect to the other.

Like other Aboriginal people, the Mikmaq do not regard their environment as “natural.” Instead, they view it as created by interactions between their ancestors and the ancestors of other life forms or species. ... All physiographic features within Mikmaki have ancient names in Mikmaq language (transcribed by explorers and missionaries) that witness their knowledge of its resources and continuous use of the ecosystem.

The Mikmaq are not inclined to make vast philosophical judgements to create such an elaborate system of thought about the Living Lodge; they do not believe that the world places some spirits in a superior position to others. Of course they are not perfect, but they have devised a code of behaviours to which they are equal – instead of a morality impossible to realize. This sacred order was never viewed as a commodity that could be sold, only shared.

Organized through extended family structures, the allied people identified with a hunting district (*sakamowti*) certain hunting and fishing stations under the responsibility of certain families, and the settlements (*wigamow*) that belonged to each of them. From each district or *wigamow* or settlement of kinsmen and their dependents, the *Sante Mawiomi* or Grand Council was created. The *mawiomior* Council recognizes one or more *kep'ten* ("captains") to show the people the good path, to help them with gifts of knowledge and goods, and to sit with the whole *Mawiomi* as the government of all Mikmaq. From among themselves the *kep'ten* recognize a *jasagamow* ("grand chief") and a *jikep'ten* ("grand captain"), both to guide them and one to speak for them, and from others of good spirit they choose advisers and speakers, or *putuis*, as well as the leader of the warriors or *smankus*.

Government always has been and remains spiritual, persuasive and non-coercive. The cruelties of repressive laws and majoritarian oppression were unknown until the recent intervention of European habits and laws. ...

The relationship between the Mikmaq and the land embodies the essence of the intimate sacred order. As humans, they have and retain an obligation to protect the order and a right to share its uses, but only the future unborn children in the invisible sacred realm of the next seven generations have any ultimate ownership of the land. In the custom of the Mikmaq, the *Sante Mawiomi* was and is the trustee of the sacred order and the territory for future generations. Part of this duty was to regulate the natural resources of Mikmaki among the allied people and through the Nikmanen trading customs to increase the bio-diversity. This is more of a management right to ensure discipline in consumption of the resources rather than a system of ownership. (Henderson, et. al., 2000, 412-416; see also Henderson 1995, 196-300)

This passage from Henderson et. al. *begins* to demonstrate the complexity of the Mikmaw worldview and the intellectual, economic, political, spiritual and social relationship with Mikmaki which informs their constitutional order. The passage urges the reader to 'think outside the box' and to validate alternative constitutional orders. Although radically different from the constitutional orders, systems of government and legal frameworks that we are familiar with, the Mikmaw nevertheless had their own constitutional order, legal and political systems which were products of a distinct worldview and intellectual tradition. This distinct constitutional order is not based on a declaration of the sovereignty of a Crown, claims of absolute ownership, or the existence of a hierarchical regime which exercises and enforces through coercion what remains of the Crown's sovereignty. Instead, the Mikmaw constitutional order was intentionally constructed over generations by the Mikmaw people as an expression of their relationship with the world around them and as a means of maintaining peace and friendship among all beings

(human and non-human) of Mikmaki. The Mikmaw constitutional order is an expression of a relationship with Mikmaki and as such it does not conceive of the Mikmaw having a right to assert claims of sovereignty, ownership or jurisdiction over any of the people (human and non-human) which share the sacred space (Mikmaki).

It is important to remember, as Henderson et. al. suggest, that the Mikmaw conceive of their territory and their relationship with this territory as a sacred relationship, whereby people “have and retain an obligation to protect the order and a right to share its uses ... [and] the *Sante Mawiomi* [or the Grand Council] was and is the trustee of the sacred order and the territory for future generations” (Henderson, et. al. 2000, 416). As such, their relationship with the territory was (and is) defined by responsibility and management, rather than jurisdiction and ownership. While this can be said of the geographic territory as a whole, the same applies to all beings such as the trees, rocks, winged, four legged, and water dwelling with whom the Mikmaw shared Mikmaki. Still, it must be noted that while the Mikmaw make no absolutist assertions of sovereignty over the land and its ‘resources,’ their relationship entails responsibilities for governing and/or managing the relationship among themselves within the territory, between themselves and other beings, and in order to protect Mikmaki (Henderson 1995, 196-300).

As has been suggested by Henderson et.al.the responsibility for governing and/or managing Mikmaki and the resulting usage rights was divided territorially among seven districts (*sakamowti*). Each district was further divided or allocated among communities (*wigamow*), which were then further divided into family zones or territories (*netukulowomi*). Within each community, relations among the Mikmaw and between themselves and Mikmaki were managed by a council of family leaders (*sayas*), headed by a *sakamow*. When relationships could not be managed or the conflict involved Mikmaw from other communities or outsiders, the matter was brought to the district council, comprised of *sakamow* and managed by a *keptin*. The Grand Council, or the Sante Mawiomi, dealt with inter-district and inter-national disputes, as well as matters of a national importance. This council *sakamow*, *keptin*, *kji-keptin* (grand captain) and *kji-sakamow* (grand chief).⁴

⁴ It should be noted that these were not gendered roles, but that they have become increasingly gendered (and now de-gendered) as Christian ideology and western norms became influential

Relations were governed by a code of behaviours and a system of principles and laws that had been constructed by their ancestors and by themselves and were thus based upon a millennia of observations in Mikmaki. According to Russel Barsh, one of the most important laws or principles governing the Mikmaw relationship with the fishery was *netukulimk*. In his article about Mikmaw fishing ethics, Barsh explains the idea of *netukulimk*. He writes,

Etymologically, the root *ntuk-* refers to “provisions” in the broadest sense of food, fuel, clothing, shelter. *Netukulit* is “to get provisions”, *ntuksuwinu* is “hunter or provider” and *netukulowomi* is “a hunting territory” (literally, “gathering provisions place”). *Netukulimk* is the process of supplying oneself or making a livelihood from the land, and *netukulimkewel* refers to the applicable rules or standards. Interestingly, the closest homophone is *nutqw-* (“insufficiency”) rather than *pukw-* (“abundance”); thus *netukulimk* sounds more like “avoiding not having enough” than like “obtaining plenty.” It implies a normative commitment to meeting modest needs instead of accumulating wealth: “Take only what you need” is the way many Mikmaw elders translate *netukulimk*. (Barsh 2002, 16-17)

Responsibilities for managing ‘resources’, including the fishery were further manifested in the intersection between Mikmaw territoriality and the legal regime or code of behaviours. If families did not abide by *netukulimk* or were ineffective managers of their allocated territory, the leaders would step in to deal with the families through teachings and goodness rather than authoritative action and punishment (Barsh, 2002).⁵ *Netukulimk* was an effective means of managing the Mikmaw, Mikmaki and the relationship between the two, both internally and externally.

within Mikmaw society and as Mikmaw found it necessary to replace women leaders because of their dealings with seventeenth and eighteenth century western-eurocentric fishers, traders, missionaries and administrators. (miigam'agan & gkisedtanamoogk, 2003-2004).

⁵ A similar understanding of *netukulimk* and its territorial implications was conveyed by Isaac Metallic, a fisher from Listiguj: “at the beginning of the salmon fishing [many years ago], there was only six or seven fisherman, but everybody had their own territory.” For the fishery to function, respect was (and is) vital: “we all don’t go to the same place, tripping over each other! That’s why you have to respect each other’s territory, respect my territory and I’ll respect your territory.” In this way territorial management is guided by the idea of respect, sharing, and reciprocity. (Metallic, February 17th, 2004).

Externally, the Mikmaw were surrounded by *Nikmaq* (allies or friends) with whom the borders of Mikmaki had been established ‘centuries’ prior to colonization (Henderson 1997, 32). International territories (shared and mutually exclusive) were subject to the same regulatory practices (codes of conduct) as the family territories of which they were comprised; in other words, there were static boundaries and each nation (each *Nikmaq*) had a responsibility to manage its own territory and resources. Failure to manage these resources, incursions in another’s territory and/or misuse or failure to manage shared territories in accordance with Mikmaw law resulted in international disagreements and confrontations. For instance, ‘in ancient times’ the Kwedeches (Mohawks of the St. Lawrence) and the Mikmaw had established a peaceful political alliance which enabled them to live as friends and to use in an agreed to manner a shared territory or border zone that both accepted responsibility for managing. In the 1500s, this peaceful co-existence was terminated after a series of events which culminated in an armed confrontation during what was to have been an exclusive Mikmaw salmon fishery. In the end, the interference of the Kwedeches in the Mikmaw salmon fishery and the confrontation that ensued, resulted in the forced expulsion of the Kwedeches from Mikmaki, and the re-assertion of the Mikmaw’s exclusive control (responsibility for use and management) over an expanded Mikmaki (Union of Nova Scotia Indians, 1977).

***Wenuj*: Strangers in Mikmaki**

Eurocentric thinkers may dismiss the Mikmaw constitutional order and question the Mikmaw claims of rights and responsibility (modern jurisdictions) for managing and using Mikmaki and its ‘resources.’ Still, this complex system of territorially defined relations and responsibility, multilevel governance, ethics and law was and remains an effective means of managing a people, a territory and the relationship with other beings. As Barsh explains, the combination of family territories and *netukulimk* was an effective means of governing the fishery and ensuring conservation, “as long as there was no significant competition from Europeans ... because Europeans did not respect Mikmaw law and took fish and wildlife from the *netukulowomi* of Mikmaw families without their consent.” (Barsh 2002, 26)

Barsh’s quotation alludes to the arrival of the *wenuj* (strangers), an event in the 1520s that changed Mikmaki and the ability of the Mikmaw to govern (manage) within their territory

forever. The European invasion or the Mikmaw welcoming of *wenuj* as *nikmaq* (allies), meant that the Mikmaw had to deal with numerous new conflicts: territorial intrusions; the unauthorized use, theft and pillaging of their resources; the arrival of people who the Mikmaw viewed as physically inferior, weak, deformed and less intelligent beings; and, the arrival of ‘people’ that had no ability to speak a ‘proper’ language or understand rationality or abide by the ‘good life’ (a lawful and ethical life) (Jaenen 1974). More importantly, the European invasion meant that the Mikmaw were forced to deal with the resultant ‘American holocaust’⁶; though often denied, this was a holocaust of epic proportions. With a conservatively estimated population of thirty-five to fifty thousand people living in Mikmaki at the time of contact, the Mikmaw had been ‘reduced’ (literally eradicated by means of ‘disease and violence’ and practices such as ‘hunting’) (Miller 1976)⁷ to a population of about 2,000 individuals by the end of the 1600s. Viewed another way, approximately nine out of every ten Mikmaw died between 1550 and 1612 (Henderson 1997, 33). By the late 1600s they were considerably outnumbered by the French. Despite these tragedies, the Mikmaw had to find ways to cope with their ever-changing reality and the influx of ‘alien nationals’ into their territory. The Mikmaw refused to become “passive victims of [an] imposed new world order” (Prins 1996, 56). They struck alliances with the Vatican (Henderson 1997) and the French Crown in areas such as military alliances, trade and religious affiliation (Prins 1996, 56). From the outset, they welcomed the French *wenuj* as *nikmaq* and, as Prins notes, they “seized useful foreign technologies and, to a degree accommodated the newcomers, but they *never surrendered their freedom or autonomy*. Certainly they rejected all efforts to settle them permanently ...” (Prins 1996, 56; emphasis added). By the 1600s, despite all efforts, permanent settlements had been established throughout ‘Acadia’ and the French Crown claimed their territory by ‘right of discovery’: a right that protected their discovery from other European nations, but conveyed no right of ownership or jurisdiction other than those secured through either waging of war against the Indigenous peoples, or negotiating of treaties with them (Williams 1997; Williams Jr. 1989).

⁶ For a discussion of the American holocaust and the use of this term see: Churchill (1998)

⁷ Another note on population is that in the northern territory of Mikmaki the settler population along the St. Lawrence was about 60,000 (Harring 1998)

New Alliances

Significantly, the Mikmaw never engaged the French in war nor were they ever conquered nor did they relinquish any of their rights as a nation or their responsibilities within Mikmaki in its entirety. A ‘somewhat-symbiotic’ (Prins 1996, 151)⁸ relationship of mutual co-existence emerged between the Mikmaw and the French and a relationship ensued that was defined by a continuation of Mikmaw autonomy, and a minimal interference with Mikmaw use of, and responsibility for, the fishery. As Chute explains,

... French missionaries and military personnel recognized the crucial nature of anadromous fish runs to Mi’kmaq subsistence everywhere, and tried not to interfere in this facet of the Aboriginal population’s economy. Missions were always set up at traditional fishing sites and, during the early eighteenth century campaigns against New England, which demanded Native assistance, were even timed so as not to clash with the fall fishing. (Chute 1998, 100)

The ethos of mutual-coexistence and co-autonomy, which typically defined the colonial relationship in French-occupied Mikmaki, was constantly challenged by the English and the wars that defined the relationship between the English, the Mikmaw and their allies (Wabinaki and French). In fact, the relationships between the Mikmaw, the English and the French were ones of stark contrast, for while the French relied on the Mikmaw and their allies for their continued survival, the English launched various genocidal offensives against the Mikmaw, ranging from attempting to poison a community in 1712 to Governor Cornwallis’ offering of bounties for Mikmaw scalps in 1756 (*Marshall I*, 1).

Throughout the history of English-Mikmaw hostilities, the Mikmaw are said to have followed “a flexible strategy that alternated between resistance and accommodation” (Prins 1996, 153). They were not passive victims in the French-English hostilities, nor were they passive victims of the British ‘hostile-take over.’ On several occasions, the Mikmaw attempted to reconcile hostilities with the British and to secure a relationship based on the same principles of mutual-coexistence

⁸ See Johnson (1992) whose section on governance outlines treaty principles intended to guide the relationship of co-existence between Mi’kmaq and the French as negotiated by the Sante Mawiomis and the Vatican, circa 1600 - in Mi’kmaq. See also Augustine (2000). Augustine also speaks of the Mikmaw French relationship and how treaties were and are intended to guide ecological relations.

and co-autonomy which governed their relationship with the French and which took advantage of the economic, technological and territorial arrangements offered by the English. Between 1725 and 1779, a series of treaties between the British Crown and the Mikmaw political leadership secured peaceful relations and established favourable terms for trade (Henderson 1991; Wildsmith 1992; Marshall Sr., Denny, and Marshall 1989).

It must be noted, however, that these treaties were not land cession treaties nor did they involve any abrogation or derogation from the rights and responsibilities of the Mikmaw nation within Mikmaki. Instead, the treaties dealt with matters such as peace and friendship, favourable trading relationships, and the terms or laws that would govern their relationship. The treaty established the terms by and the extent to which each nation would integrate the ‘other’ into their economic and political systems (Henderson 1991). The treaties also recognized and affirmed the rights of the English in Mikmaw territory, the continued sovereignty of the Mikmaw, and the continuation of Mikmaw ‘hunting, fishing, shooting, and planting’ in their territory (Coates 2000, 28-39).⁹ This interpretation of the spirit and intent of the Mikmaw treaties is commonly referred to as “treaty federalism” or “treaty constitutionalism.”¹⁰ Treaty constitutionalism suggests that treaties between Indigenous nations and colonial nations were not only negotiated on a nation-to-nation basis, but they entailed mutual recognition of nationhood and affirmations of commitment to a continuous nation-to-nation relationship. These nation-to-nation agreements allowed the newcomers (and their perpetual offspring) and Indians to peacefully co-exist as autonomous nations within the same territory. Treaties such as the Mikmaw’s not only recognized and affirmed the Indigenous peoples’ right to self-government and a continuation of

⁹ Along with the treaties, colonial policies also recognized and affirmed such rights and relationships. For instance, on December 9, 1761, Lt. Governor Belcher received instructions from the crown which: “issues proclamation enjoining people from interfering with the Indians’ claims from an area which includes the coastline from Mouscadaboet to Baie des Chaleurs which area is used by the Mi’kmaq living there for ‘hunting, fowling, and fishing...I do hereby strictly enjoin and caution all person to avoid all molestation of the said Indians in their said Claims, till His Majesty’s leisure in this behalf shall be signified...and if any persons is living on such land, they are to remove themselves.” Belchers Proclamation May 4th, 1762.

¹⁰ For a more thorough discussion of treaty federalism or treaty constitutionalism see: Henderson (1994); Ladner (2003b).

sovereignty, but they also recognized and affirmed a right to self-government and sovereignty for the settler society within Indigenous territories. Neither Indigenous sovereignty nor the sovereignty of colonial nations was limited by the treaties, except in areas which were explicitly delegated or dealt with in each specific treaty (Cornell 1988). In this way, the treaties established the terms of the relationship (trade, military, political) between nations and reflect the manner in which each nation attempted to integrate or deal with ‘the other’ into their legal, political and economic systems. The only limits to sovereignty were explicitly defined in a manner similar to modern practices whereby nations limit their sovereignty or their ability to realize self-determination by agreeing to limitations such as those established by trade agreements.¹¹

This understanding of the Mikmaw treaties is consistent with British colonial policies and common law both prior to and immediately following the signing of these treaties. Referring to the principles of colonialism which were affirmed in the 1763 Royal Proclamation, Bruce Clark argues that,

[t]he legislation had established that native bodies politic were recognized for legal purposes, and that colonial governments did not have jurisdiction legislatively to interfere with the right of self-government vested in these bodies politic in relation to territory that had not been surrendered by a treaty. (Clark, 37)

While the British Crown and its offices of colonial administration had affirmed some semblance of Mikmaw title and autonomy they proceeded in their colonization of the lands formerly claimed by France *as if international law and British colonial policies, practices and law, did not apply* (Upton 1979, 56-59; cited in Prins 1996)¹² They acted as if international law and previous colonial policies did not apply, because it was argued that France had already secured title prior to ceding it to the English. They acted in this manner, despite the fact that colonial

¹¹ Historians who have reviewed the treaty relationship based on new evidence about the political and economic context that shaped the Mikmaw/British treaty relationship include the works of Stephen Patterson (1993). See also William C. Wicken (1995; 2000). Wicken and Patterson along with John Reid from Saint Mary’s University all testified for the Marshall Case (1999) which recognized the validity of the 1760-61 Treaty.

¹² The 1760 official proclamation stated that the Crown was “determined to maintain the just rights of the Indians to all lands ‘reserved or claimed’ by them.” (Upton 56; cited in Prins 1996)

administrators knew that this was not the case. As Prins argues, “[t]he British were well aware of the fact that the French had based their colonial claims on the Principle of First Discovery. Not recognizing Aboriginal title, they had never signed treaties with the Mi’kmaq” (Prins 1996, 154). Significantly, it was well known to the British that the Mikmaw had neither ceded their territory nor surrendered any aspect of their autonomy or rights as a nation within Mikmaki.¹³ Despite this knowledge and a series of proclamations requiring the negotiation of treaties, no further treaties were negotiated between the Mikmaw and the British. The Mikmaw never relinquished their territory nor their rights and responsibilities as a nation; they merely agreed to establish relationships of peace, friendship, military, political and economic alliances with the British. Nevertheless, “when Mi’kmaq country was thus ‘magically’ transformed into Crown land, it was as if a terrible curse had been put on its Indigenous inhabitants” (Prins 1996, 154).

Shortly after the 1761 treaty was negotiated, the Mikmaw began to see the ramifications of the curse that had swept over their lands. Following the expulsion of the Acadians, “a concerted plan was laid to overwhelm the Mi’kmaq numerically.” (Chute 1998, 101) This plan was easily realized by the ‘floods’ of British loyalists who invaded Mikmaki, seeking refuge from the American Revolution. With the exploding population, the Mikmaw were ‘easily’ dispossessed of much of their territory — including several fisheries. While the Mikmaw continuously sought governmental protection of their lands and resources, by and large this did not happen. For while many Mikmaw finally received some semblance of protection through the establishment of reserves alongside their fishing territories, reserves did not protect the Mikmaw from further dispossession of both land and resources.¹⁴ As settlers continued to occupy reserve lands, the

¹³ In 1763 Governor Murray was instructed to “induce [Mikmaw] by Degrees, not only to be good neighbors to Our Subjects, but likewise themselves to become good Subjects to Us...promising and assuring them of Protection and Friendship on Our part, and delivering them such Presents” and further “to inform yourself with great Exactness of the Number, Nature and Disposition of the several Bodies or Tribes of Indians of the manners of their Lives, and the Rules and Constitutions, by which they are governed or regulated” in Shortt and Doughty (1918, 181,199- 200).

¹⁴ Provincial Archives of New Brunswick, PANB RG10, RS 10 105 F-8875. includes docs from Restigouche mission asking for protection of lands/resources & continued incursions

Mikmaw were consistently excluded from the fisheries.¹⁵ Efforts to exclude Mikmaw from the fishery only intensified as salmon populations plummeted in the first half of the nineteenth century.¹⁶

During the second half of the nineteenth century, the efforts of commercial and sports fisheries to exclude the Mikmaw were realized as colonial administrators, followed by the new federal Department of Fisheries, stepped up the systematic exclusion of Mikmaw from the salmon fishery by banning their harvesting methods and creating a licensing regime which excluded Mikmaw. Licences were provided to ‘responsible’ (i.e. ‘civilized’ or non-Mikmaw) individuals. (Parenteau 1998, 2) Despite the fact that some limited concessions were made at various times and various locales for a Mikmaw fishery to provide fish for their own use, the Mikmaw continued to be excluded from the fishery. Most often, these food fisheries were operated by settlers, department employees or missionaries for the benefit of the reserve because the “feeling of the department was that Native people could not efficiently operate a fishing station or be trusted to maintain the nets from season to season” (Parenteau 1998, 15). Moreover, it was thought that such activities might interfere with efforts to ‘civilize’ the Indians.¹⁷ These ‘Mikmaw fisheries’ were disbanded by the late 1880s because of financial and personnel difficulties associated with running these fisheries and the common misperception that the fisheries were not needed because they interfered with the ‘civilization’ project and interfered with the commercial and sports fisheries.

¹⁵ Mowat and Perley report the status of salmon fishing in the northern territory of Mikmaki and how legislation both supported the development of a non-native fishing industry and prevented Mikmaw from fishing. John Mowat (1888); see also M.H. Perley (1850), iii-99.

¹⁶ The salmon population declined – to the point of extinction in several areas - for countless reasons which included technological advancements in canning which enabled salmon to be more readily exported, the development of a sports fishery, and most importantly, imported (alien) industrial practices which resulted in the damming and polluting of salmon territories. See Parenteau (1998, 8).

¹⁷ In his personal records, Father Pacifique de Valigny of the missionary at Listiguj, records that he sent a September 23, 1882 letter to the Department of Indian Affairs, requesting a salary increase of fifty dollars because he was not only distributing rations, but had taken the additional responsibilities of managing education and the fishery. (Pacifique File 9-4-2).

Despite such exclusion, the Mikmaw, by and large, never gave up fishing. Those who did give up fishing did so because, for the most part there were no fish. Since the salmon fishery was regulated and Aboriginal peoples were legislated out of the fishery, Mikmaw have been claiming their rights and responsibilities pertaining to the salmon within Mikmaki ‘illegally’— insofar as colonial governments (including Canada) have been concerned. Since the fishery was first regulated in the 1840s people in Listiguj have been charged and/or arrested (Mowat 1888; Perley 1850), and the reserve has been ‘invaded’ by Canadian authorities on several occasions as part of an effort to halt this ‘illegal’ fishery.¹⁸ The Mikmaw continue to fish at Listiguj and elsewhere, despite constant harassment, violence and legal problems because as the Mikmaw believe they have the right and the responsibility to do so.

Their rights and responsibilities to fish and to manage their relationship with the fishery have never been ceded. Rather, it has been recognized, affirmed and protected by the various treaties between themselves and the Crown since 1725; treaties whereby neither the Mikmaw nor the Crown ever relinquished autonomy. Furthermore, it is a right and responsibility that exists within and is governed by the Mikmaw constitutional order. Thus it is easily concluded that this constitutional order has been recognized as such by colonial governments, their policies and practices, and in the resulting treaty relationships.

CONCLUSION

Thus, to summarize, the salmon fishery is contested jurisdiction as it is a responsibility claimed by two separate, yet parallel constitutional orders. The result of these overlapping constitutional orders is a jurisdictional quagmire whereby there are competing claims of jurisdiction over the salmon fishery, continual contestation of these constitutional orders and their resulting claims of rights and responsibilities and/or jurisdiction. On the one hand, the Crown has established the salmon fishery as a public fishery which, though the subject of jurisdictional debate, is governed

¹⁸ According to Isaac Metallic, a fisherman from Listiguj, there have been numerous attempts to control Mikmaw fishers. For instance, in 1981, in an effort to close the salmon fishery, Listiguj was invaded and a violent confrontation erupted between Mikmaw fishers and the Quebec police. (Metallic, 2004, also see, Obansawin 1982)

by both the provincial and federal governments. In accordance with the Canadian constitutional order, there has been much debate historically as to whether the Mikmaw had any right to fish whatsoever and whether 'establishing' such an exclusive fishery was even allowable under Canadian law. Nevertheless, the Courts have established that the Mikmaw have rights to engage in fishing for a 'modest living', however, this right is subject to legislative and regulatory limitations as it falls within the purview or jurisdiction of the Canadian government (and the provinces). Thus, while the courts have recognized and affirmed a right to fish, they have not dealt with the Mikmaw as having a separate constitutional order. As such, they have not recognized the Mikmaw as having a right and responsibility (jurisdiction) to the fishery and have instead presented the Mikmaw as having a right to fish which is subject to the Canadian constitutional order, a right that is but a mere burden on the Crown's sovereignty.

On the other hand, in accordance with their constitutional order, the Mikmaw see themselves as having the rights and responsibilities for the fishery. Further to this, the Mikmaw understand these rights and responsibilities to have been recognized and affirmed by the treaties and subsequently, Canadian constitutional law as section 35 of the Constitution Act, 1982 recognizes and affirms Aboriginal and treaty rights. As a separate constitutional order, Mikmaw have the ability to engage their rights and responsibilities to the fishery (proprietary and regulatory) and are not subject to federal and/or provincial jurisdiction as these jurisdictional claims are dependent upon and exist within a separate constitutional order. According to the Mikmaw constitutional order, this jurisdiction is not a matter of contestation as the Mikmaw never relinquished their autonomy and never ceded any of their rights and responsibilities to the fishery in the treaties. In fact, when viewed from the perspective of the Mikmaw constitutional order (and not the constitutional order of the alien nation), the Crown may not be able to establish a claim to jurisdiction over the fishery or even a right to have an exclusive fishery, as these rights and responsibilities were never negotiated and/or provided to the Crown by the Mikmaw, they were simply accommodated and their rights simply exist by convention or as a 'burden' to Mikmaw autonomy.

To return to my original question, Salmon: federal, provincial or Mikmaw responsibility? Are we fishing for one clear cut or absolute answer, or is it a jurisdictional quagmire of overlapping

and contested sovereignties? The answer really depends on what constitutional order you are 'standing in' when the question is posed. Regardless of how each constitutional order defines this debate over the salmon fisheries, one thing is certain: both of these competing constitutional orders are well-rooted in the territory and are not likely to be toppled. While both continue to refute the claims and authority of the other, and Canada refuses to deal with the competing constitutional order, it seems as though these contested sovereignties and the resulting impasse could continue 'for as long as the sun shines and the waters run.' No matter what happens, it is clear that Mikmaw will continue fishing for bricks and mortar to rebuild and strengthen their constitutional order and they will continue engaging their rights and responsibilities for the salmon that this constitutional order provides them. Hopefully, at some time in the near future, Canadians and their governments will begin to come to terms with this other constitutional order and these contested sovereignties can be resolved peacefully.

Works Cited

- Augustine, Stephen. 2000. "Creation Story." [video recording] Listiguj, Quebec: Mikmaw Mawiomí Secretariat.
- Barsh, Russel Lawrence. 2002. "Netukulimk past and Present: Mikmaw Ethics and the Atlantic Fishery." *Printemps* 37(1).
- Barsh, Russel Lawrence and James (sakej) Youngblood Henderson. 1999. "Marshalling the Rule of Law in Canada: Of Eels and Honour." *Constitutional Forum* 11(1): 1-18.
- Belchers Proclamation May 4th, 1762, PRO, CO 217/19: 27r-28r.
- Blair, Peggy. 2000. "Taken for 'Granted': Aboriginal Title and Public Fishing Rights in Upper Canada." *Ontario History* 92(2):31-55.
- Cairns, Alan. 1995. "Constitutional Minoritarianism in Canada." In *Reconfigurations: Canadian Citizenship and Constitutional Change*, ed. Douglas E. Williams, 119-141. Toronto, Ontario: McClelland & Stewart Inc.
- Cairns, Alan. 1991. "Political Science, Ethnicity, and the Canadian Constitution." In *Disruptions: Constitutional Struggles, from the Charter to Meech Lake*, ed. Douglas E. Williams, 161-180. Toronto, Ontario: McClelland & Stewart Inc.
- Churchill, Ward A. 1993. *Little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the Present*. Winnipeg: Arbeiter Ring Publishing.
- Chute, Janet E. 1998. "Mi'kmaq Fishing in the Maritimes: A Historical Overview." In *Eearth, Water, Air and Fire: Studies in Canadian Ethnohistory*, ed. David T. McNab, Waterloo: Wilfred-Laurier Press.
- Clark, Bruce. 1990. *Native Liberty, Crown Sovereignty* Montreal: McGill-Queen's University Press.
- Coates, Ken S. 2000. *The Marshall Decision and Native Rights* Montreal: McGill-Queen's University Press.
- Cornell, Stephen. 1988. *The Return of the Native: American Indian Political Resurgence*. New York: Oxford University Press.
- Harring, Sidney L. 1998. *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*. The Osgoode Society for Canadian Legal History. Toronto: University of Toronto Press.
- Harris, Douglas C. 2001. *Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia*. Toronto: University of Toronto Press.

- Henderson, James (sakej) Youngblood. 1997. *The Mikmaw Concordat*. Halifax: Fernwood Press.
- Henderson, James (sakej) Youngblood. 1995. "Mi'kmaq Tenure in Atlantic Canada." *Dalhousie Law Journal* 18: 196-300.
- Henderson, James (sakej) Youngblood. 1996. "First Nations' Legal Inheritances in Canada: The Mi'kmaq Model." *Manitoba Law Journal* 23, (January).
- Henderson, James (sakej) Youngblood. 1994. "Empowering Treaty Federalism." *Saskatchewan Law Review* 58: 243-329.
- Jaenen, Cornelius J. 1974. "Amerindian Views of French Culture in the Seventeenth Century." *Canadian Historical Review* 55: 261-291.
- Johnson, Eleanor V. 1992. *Mi'kmaq Consciousness*. MA Thesis. Halifax: Saint Mary's University.
- Kyle, Rosanne. 1997. "Aboriginal Fishing Rights: The Supreme Court of Canada in the Post-Sparrow Era." *UBC Law Review* 31(2): 293-316.
- Ladner, Kiera L. 2003a. "Governing Within an Ecological Context: Creating an AlterNative Understanding of Blackfoot Governance." *Studies in Political Economy* 70: 125-152.
- Ladner, Kiera L. 2003b. "Treaty Federalism: An Indigenous Vision of Canadian Federalisms." In *New Trends in Canadian Federalism*, eds. M. Smith and F. Rocher, 167-194. Peterborough: Broadview Press.
- Marshall Sr., Grand Chief Donald, Grand Captain Alexander Denny, and Putus Simon Marshall. 1989. "The Covenant Chain." In *Drumbeat: Anger and Renewal in Indian Country*, ed. Boyce Richardson, 71-104. Toronto: Summerhill Press Ltd.
- miigam'agan and gkisedtanamoogk. 2003-2004. Interviews & personal correspondence: Eskanoopetij (Burnt Church), Mikmaki.
- Miller, Virginia. 1976. "Aboriginal Micmac Population: A Review of the Evidence." *Ethnohistory* 23: 117-127.
- Metallic, Isaac. 2004. Interview. Listiguj, Mikmaki. February 17th.
- Mowat, John. 1888. *Chaleur Bay and its Products for 1887-8*. New Brunswick: Mirimachi Advance Office.
- Obansawin, Alanis. 1982. *Incident at Restigouche*. National Film Board.

Orders in Council. 1922. PC 360 February 13, 1922 in *Sessional Papers*, vol. 9 First Session of the 14th parliament of the Dominion of Canada vol. LVII. Ottawa: F. A. Acland, Printer to the Kings' Most Excellent Majesty.

Pacifique, Father de Valigny. Fonds Pacifique de Valigny. University of Moncton Archives. File 9-4-2.

Formatted: French (France)

Patterson, Stephen E. 1993. "Indian White Relations in Nova Scotia, 1749-161: A Study in Political Interaction." *Acadeiensis* XXIII(1): 23-59.

Perley, M.H. 1850. *Report on the Sea and River Fisheries of New Brunswick within the Gulf of Saint Lawrence and Bay of Chaleur*. Fredericton: J.Simpson.

Prins, Harald. 1996. *The Mi'Kmaq: resistance, Accomodation and Cultural Survival*. Toronto: Harcourt Brace.

Rotman, Leonard. 1997. "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" *University of New Brunswick Law Journal* 46(11):11-50.

Shortt, Adam and Arthur G. Doughty (eds). *Documents relating to the Constitutional History of Canada, 1759-1791*. Ottawa: J. de L. Tache. Vol.1. 1918.

Union of Nova Scotia Indians. 1977. *Nova Scotia Micmac Aboriginal Rights Position Paper*. Presented to the Government of Canada, 25 April

Walter, Emily, R. Michael M'Gonigle and Celeste McKay. 2000. "Fishing Around the Law: The Pacific Salmon Management System as a 'Structural Infringement' of Aboriginal Rights." *McGill Law Journal* 45(1): 263-314.

Walters, Mark D. 1998. "Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada" *Queens Law Journal* 23: 301-368.

Wicken, William C. 2000. *Mi'kmaq Treaties on Trial*. Toronto: University of Toronto Press.

Wicken, William C. 1995. "Heard it from our Grandfathers." *Univeristy of New Brunswick Law Journal* 44: 145-161.

Wildsmith, Bruce. 1992. "Treaty Responsibilities: A Co-Relational Model." *University of British Columbia Law Review* 26: 324-336.

Williams, Robert. 1997. *Linking Arms Together*. New York: Oxford University Press.

Williams, Robert. 1989. *The American Indian in Western Legal Thought: The Discourse of Conquest*. New York: Oxford University Press.

Wright, Roland. 1994. "The Public Right of Fishing, Government Fishing Policy, and Indian Fishing Rights in Upper Canada" *Ontario History* 86(4):337-62.

Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia [1898] A.C. 700 (P.C.)

Attorney-General of Canada v. Attorney-General of BC [1930] A.C. 111 (P.C.)

R. v. Badger [1996] 1 S.C.R. 771

R. v. Kapp et al [2003] BCPC 0279

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R. v. Marshall [1999] 3 S.C.R. 456

R. v. Marshall [1999] 3 S.C.R. 533

R. v. Sparrow [1990] 1 S.C.R. 1075

R. v. Van der Peet [1996] 2 S.C.R. 507