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	<i>Klusuaqnn mu nuku' nuta'nukul</i>
<i>Words no long need</i>	<i>Tetpaqi-nsitasin.</i>
<i>Clear meanings.</i>	<i>Mimkwatasik koqoey wettaqne'wasik</i>
<i>Hidden things proceed from a lost legacy.</i>	<i>L'nueyey iktuk ta'n keska'q</i>
<i>No tale in words bares our desire, hunger,</i>	<i>Mu a'tukwaqn eytnukw klusuaqney</i>
<i>The freedom we have known.</i>	<i>panaknutk pewatmikewey</i>
	<i>Ta'n teli-kjijituekip seyeimik</i>
<i>A heritage of honour</i>	
<i>Sustains our hopes.</i>	<i>Espe'k L'nu'qamiksuti,</i>
<i>Help me search the meaning</i>	<i>Kelo'tmuinamitt ajipjitasuti.</i>
<i>Written in my life,</i>	<i>Apoqnmui kwilm nsituowey</i>
<i>Help me stand again</i>	<i>Ewikasik ntinink,</i>
<i>Tall and mighty.</i>	<i>Apoqnmui kaqma'si;</i>
	<i>Pitoqsi aq melkiknay.</i>
<i>Mi'kmaw I am;</i>	
<i>Expect nothing else from me.</i>	<i>Mi'kmaw na ni'n;</i>
	<i>Mukk skmatmu piluey koqoey wja'tuin.</i>

Rita Joe (1999). 'Poem 19', in *We Are the Dreamers: Recent and Early Poetry*. Sydney:

Breton Books. Translated by Sophie M. Lavoie.

Abstract

In September 2020, the Sipekne'katik Mi'kmaw First Nation launched an independent lobster fishery outside the control of the Canadian Department of Fisheries and Oceans (DFO). This sparked a series of protests, violent confrontations, and vandalism from non-Indigenous fishers. The roots of the lobster fishery dispute extend far beyond the immediate incidents, reflecting centuries of Mi'kmaw dispossession, cultural marginalization, and a broader struggle for self-determination and legal recognition. This dissertation investigates how the Mi'kmaw pursuit of legal revitalization and self-determination interacts with the established governance structures. It examines the key differences in understanding between Mi'kmaw and non-Indigenous perspectives on fisheries management, conservation, reconciliation, and the rule of law. Through interviews with key stakeholders and observations in affected communities, a comprehensive review of academic literature, and analysis of relevant legal and policy frameworks, this dissertation appraises the everyday interactions and negotiations that shape the creation of space for Mi'kmaw legal pluralism. The findings suggest that while significant challenges remain, there are opportunities for reconciliation and mutual cooperation between Mi'kmaw and non-Indigenous fishers. The concept of relational legal pluralism emerges as a crucial component for achieving sustainable coexistence and advancing the broader process of reconciliation. Though interconnected with formal processes of reform, practicing relational legal pluralism in everyday interactions will help further space for legal coexistence and more equal mutual recognition. This dissertation contributes to the ongoing discourse on Indigenous rights, legal pluralism, reconciliation, and the redefinition of Canada's relationship with the Indigenous peoples within its borders.

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Frontmatter

i. Abbreviations

C&P – (DFO) Conservation & Protection

DFO – Department of Fisheries and Oceans

FSC – Food, Social, and Ceremonial (Fisheries)

ITQ – Individual Transferable Quota

KMK(NO) – Kwilmu'kw Maw-Klusuaqn (Negotiation Office) (Translation: 'We Are Seeking Consensus'); Also known as the Mi'kmaq Rights Initiative

LFA – Lobster Fishing Area

MLSN – Mi'kmaw Legal Support Network

RRA – Rights Reconciliation Agreement

RCMP – Royal Canadian Mounted Police

UNDRIP – United Nations Directive on the Rights of Indigenous Peoples

ii. Glossary

First Nations – *Indigenous* and *Aboriginal* are often used to refer to the peoples who inhabited Canada pre-colonization. I utilize *Indigenous* to refer to this broader group. However, *Aboriginal* remains the phrase enshrined in the Constitution so it will be used in this legal context. The category *Indigenous* comprises the *Inuit* (those peoples who traditionally inhabited North America's Arctic and sub-Arctic regions), the *Métis* (a distinct group of mixed European and Indigenous heritage), and the *First Nations*. The latter indicates those Indigenous peoples who are neither *Inuit* nor *Métis*. The *Mi'kmaq* are one such Nation.

Fishers' Associations – The interests of fishers are represented by different associations. In this dissertation, I spoke with representatives from two inshore owner-operator associations. The association members are largely, but not exclusively, non-Indigenous.

Fishery Guardian – A form of compliance officer for Mi'kmaw fisheries.

Inshore and Offshore Fisheries – The offshore zone (LFA 41) starts around 60 miles from the coast. The inshore fishery consists of smaller boats fishing closer to the coast.

Lobster Fishery Dispute – There is no one settled name to refer to the conflict which has flared up numerous times in the last few decades. I have settled on *lobster fishery dispute* to remain as neutral and broad as possible.

Maritimes – The provinces Nova Scotia, New Brunswick, and Prince Edward Island.

Mi'kma'ki – The traditional and current home of the Mi'kmaq encompasses what is now known as Nova Scotia and Prince Edward Island as well as parts of New Brunswick, Québec, and Maine. The Mi'kmaq also settled in Newfoundland.

Mi'kmaq – *Mi'kmaq* is the plural non-possessive form of the word. *Mi'kmaw* is the singular and adjectival form. The Mi'kmaq alternatively refer to themselves as *L'nu/L'nuk*.

Mi'kmaw First Nation or Community – The wider Mi'kmaw First Nation in Canada consists of 30 First Nations. The Mi'kmaq I spoke with interchangeably identified their homes as a *First Nation* or a *Community*. I use on the terms in a similar fashion.

Non-Indigenous – Canadian is used to refer to a plurality of peoples. In the context of this dissertation, there is a need to differentiate them while still recognizing that everyone has a place within the wider label *Canadian*. For lack of a better phrase, I use the term *non-Indigenous* to refer to the primarily European people and their descendants who have settled and called Canada their home since the early 17th century. I am conscious

that this labeling is an unavoidably political move but I believe *non-Indigenous* is the least politicized and controversial of the options.

Officials, Representatives & Officers – I use *Officials* to refer to research participants from Mi'kmaw and non-Indigenous organizations of government. I use *Representatives* to refer to participants who occupy leadership positions in fishers' associations and civil society organizations. I use *Officers* to refer to participants from DFO C&P.

iii. Table of Laws

<u>Source</u>	<u>Page Numbers</u>
1752 <i>Peace and Friendship Treaty</i> . Available at: https://www.rcaanc-cirnac.gc.ca/eng/1100100029046/1581293947580 (Accessed: 6 May 2024).	pp. 24
1760-61 <i>Peace and Friendship Treaties</i> . Available at: https://www.rcaanc-cirnac.gc.ca/eng/1100100029046/1581293947580 (Accessed: 6 May 2024).	pp. 24, 27
<i>Aboriginal Communal Fishing Licences Regulations 2009</i> (SOR/93-332). Available at: https://laws-lois.justice.gc.ca/eng/regulations/SOR-93-332/ (Accessed: 28 May 2024).	p. 30
<i>Constitution Act, 1982</i> . Available at: https://laws-lois.justice.gc.ca/pdf/const_e.pdf (Accessed: 1 May 2024).	pp. 24, 26
<i>Fisheries Act 1985</i> . Available at: https://laws-lois.justice.gc.ca/eng/acts/f-14/ (Accessed: 6 May 2024).	pp. 25, 32, 37, 41
<i>Indian Act 1985</i> . Available at: https://laws-lois.justice.gc.ca/eng/acts/i-5/ (Accessed: 6 May 2024).	pp. 16, 25, 38
<i>Maritime Provinces Fishery Regulations 2022</i> (SOR/93-55). Available at: https://laws-lois.justice.gc.ca/eng/regulations/sor-93-55/page-2.html#h-1290115 (Accessed: 20 May 2024).	p. 29
<i>United Nations Declaration on the Rights of Indigenous Peoples Act 2021</i> . Available at: https://laws-lois.justice.gc.ca/eng/acts/u-2.2/page-1.html (Accessed: 31 May 2024).	p. 25

iv. *Table of Court Decisions*

<u>Case</u>	<u>Page Numbers</u>
<i>Grand Chief Michael Mitchell v. Minister of National Revenue</i> [2001] 1 SCR 911.	p. 26
<i>R v. Donald John Marshall Jr.</i> [1999a] 3 SCR 456.	pp. 27–28, 30–31, 33–37, 39, 44, 49–50, 57
<i>R v. Donald John Marshall Jr.</i> [1999b] 3 SCR 533.	pp. 27–31, 33–37, 39, 44, 49–50, 57
<i>R v. Dorothy Marie van der Peet</i> [1996] 2 SCR 507.	pp. 25, 28
<i>R v. Gabriel Sylliboy</i> [1928] 50 CCC 889.	p. 24
<i>R v. Howard Pamajewon and Roger Jones and R v. Arnold Gardner, Jack Pitchenese and Allan Gardner</i> [1996] 2 SCR 821.	p. 28
<i>R v. Ronald Edward Sparrow</i> [1990] 1 SCR 1075.	pp. 26–27, 30, 33
<i>R v. Wayne Clarence Badger</i> [1996] 1 SCR 771.	pp. 27–28

v. *Table of Interviews*

<u>Interview #</u>	<u>Date & Type</u>	<u>Participant</u>
1	6 May 2024; In-Person	Mi'kmaw Fishery Official
2 & 3	7 May 2024; In-Person; Joint ¹	Mi'kmaw Community Fishery Official and Lawyer & Mi'kmaw Community Fishery Guardian
4	8 May 2024; In-Person	DFO C&P Officer
5	9 May 2024; Online	Mi'kmaw Lawyer
6	10 May 2024; In-Person	Fishers' Association Representative
7	11 May 2024; In-Person	Fishers' Association Representative
8	13 May 2024a; Online	Mi'kmaw Academic, Former Chief
9	14 May 2024b; Online	DFO Policy Official
10	14 May 2024b (In-Person)	Civil Society Organizer & Facilitator

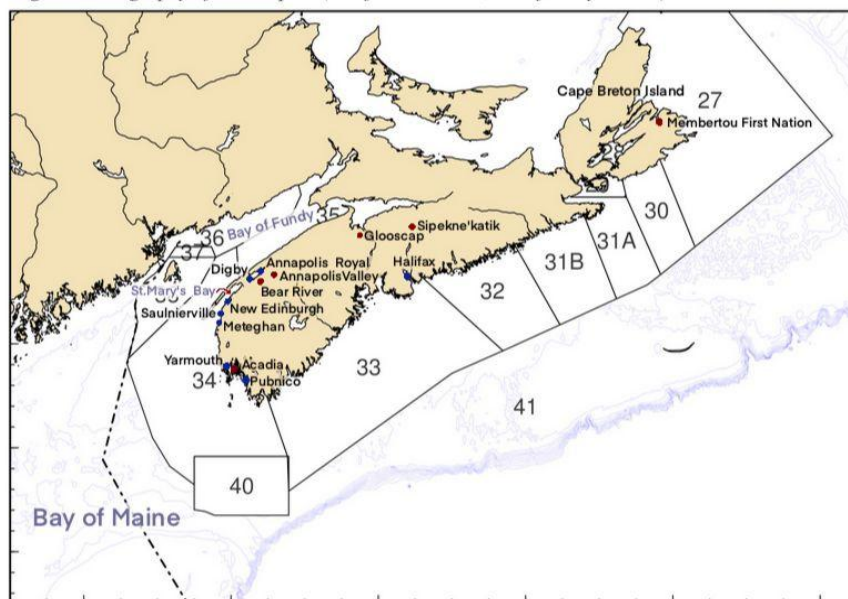
¹ Halfway through, a second participant joined and, ten minutes later, the first participant left. I count these as two interconnected interviews.

I. Introduction

i. The Lobster Fishery Dispute

It is September 2020. In *Figure1: Geography of the Dispute (Halifax Examiner; modified by author)*

Saulnierville, a small Nova Scotian fishing town on St. Mary's Bay, home to one of North America's most lucrative lobster fishing areas (LFA 34), tensions between



Indigenous and non-Indigenous fishers boil over when the Sipekne'katik Mi'kmaw First Nation launches a lobster fishery outside the control of the Canadian Department of Fisheries and Oceans (DFO). Two non-Indigenous fishers are arrested (BBC, 2020). Soon,

*Figure 2: The Aftermath in New Edinburgh
(Taken by author, 8 May 2024)*



other Mi'kmaw First Nations in Nova Scotia launch fisheries (Pannoizzo and Baxter, 2020a). Clashes in Middle West Pubnico by a lobster pound operated by Sipekne'katik result in 25 charges. Two days later, the pound is set on fire (Global News, 2022; Cooke and Chisholm, 2020). Clashes also take place at Yarmouth and outside a pound in New Edinburgh. This pound burns down in 2021 (CBC, 2021). The conflict spreads into other areas such as Cape Breton Island

(Shideler, 2022). Lobster catches are destroyed, boats and traps cut loose or vandalized, and cars vandalized (Levinson-King, 2020; Shideler, 2022; Streep, 2024). Occasional protests, small-scale clashes, and vandalism continue to this day (Ayers, 2024).

The non-Indigenous fishers' actions have frequently been decried as racist and bigoted (Bailey, 2020). This characterization misses other key drivers. Generally, from the

non-Indigenous fishers' perspective, a Mi'kmaw fishery outside the DFO's regulation undermines sustainable and effective management. Increased Mi'kmaw lobster fishing represents a threat to the non-Indigenous fishers' livelihoods and communities at a time when these are already under increasing pressure (Wiber and Barnett, 2023; Gaudet, 2022).

Conversely, over the last four centuries or so, the Mi'kmaq, under growing settler Canadian presence and a series of colonial policies, were dispossessed of their fisheries throughout their historic lands of Mi'kma'ki (Coates, 2000). Mi'kma'ki encompasses what is nowadays Nova Scotia and Prince Edward Island as well as parts of New Brunswick, Québec, Maine, and settlements in Newfoundland (Denny, 2022). The Mi'kmaw right to a commercial fishery has increasingly been recognized. However, constant negotiations with the Government over the last 20 years have been largely unproductive from the Mi'kmaw perspective (Francis, 2023; Coates, 2019). Consequently, fueled by a sentiment of 'until



you move Canada, they don't move', unilateral action to reclaim access to the fishery became an increasingly realistic—and perhaps necessary—prospect for the Mi'kmaq (Interview 5).²

However, the lobster fishery dispute concerns more than fishing. Fishing and Mi'kmaw identity and livelihoods are deeply intertwined (McMillan and Prosper, 2016). Fishing by Mi'kmaq in a Mi'kmaw way is seen as crucial to Mi'kmaw resurgence and self-determination (Simpson, 2017). Many Mi'kmaw leaders see DFO authority as contrary to those two notions. Instead, they want space to develop in their own way. In this way, the lobster fishery dispute reflects the wider debate on the Canadian-Indigenous relationship. This is the framing this dissertation takes.

ii. This Dissertation

Much has been written about the lobster fishery dispute (e.g., Francis, 2023; Andrews *et al.*, 2022; Shideler, 2022; Montambeault *et al.*, 2020) and many frameworks have been proposed frameworks upon which to build reconciliation and fruitful coexistence (e.g., Denny, 2022; Francis, 2020). One angle that is under-explored is how fishery governance can be an engine for Mi'kmaw legal revitalization and self-determination – and through this, hopefully, contribute to a more just Nova Scotia.

I treat the dispute as a case to study contested legal and moral authority in the face of hegemonic state power and the structural erasure of Indigenous legal systems. In this context, I assess how much space there is for Mi'kmaw legal self-determination and legal pluralism and how such space is created through the everyday (inter)actions of the individuals involved in the lobster fishery.

² Table of Interviews (Frontmatter) lists key interview details.

The Argument proceeds as follows. In Chapter Two, I describe the methodology. In Chapter Three, I explain the background and theoretical framework of the dissertation. First, I outline the colonial backdrop of the lobster fishery dispute. Second, I provide a overview of Indigenous political resistance to Canadian colonialism and efforts to revitalize Indigenous legal and governance systems. Here, I introduce the concept of legal pluralism to describe both the current situation and a potential way forward. Finally, I trace the core aspects of Mi'kmaw law and fisheries governance. In Chapter Four, I provide the legal and policy framework which simultaneously structures and fuels the lobster fishery dispute.

Moving to the empirically-grounded part of the dissertation, in Chapter Five, I lay out the conceptual differences at the heart of the lobster fishery dispute. I divide these in three: the different understandings of the types of fisheries; the disagreements on where space for reconciliation should come from; and the range of views regarding Mi'kmaw self-governance and self-enforcement. On the latter, I distill two points of contention: whether Mi'kmaw self-management and enforcement in the lobster fishery are contradictory to conservation; and whether DFO regulation is contradictory to Mi'kmaw self-determination.

In Chapter Six, I investigate how these differences are contested and mediated. Generally, there are opposing understandings of process. The DFO feels bound by its interpretation of the law, many non-Indigenous fishers argue for adherence to the rule of law and a common arbiter to avoid anarchy in the fishery, and the Mi'kmaq aim for self-determination and treaty right implementation. Where the law and structures for reform accommodate these goals, the Mi'kmaq work within them. However, where the Mi'kmaq

encounter obstacles, many look beyond the law. In this, they respond to perceived injustice similarly as some non-Indigenous fishers.

In Chapter Seven, I build on this similitude to suggest that differences may not be insurmountable. In particular, I underline how the Mi'kmaq and non-Indigenous fishers might be allies in opposition to corporatization of the lobster fishery. I go on to demonstrate that commercial co-optation and the increasing challenge of racism stand in the way of such reconciliation, but that reconciliation is not out of sight.

Finally, in Chapter Eight, I argue that to achieve reconciliation, relationship-building and dialogue are crucial. In these engagements, it is crucial to practice relational legal pluralism if Mi'kmaw self-determination and legal pluralism are to be accomplished.

II. Methodology

To do justice to the range of people's social and cultural constructions in the lobster fishery dispute, I utilize a qualitative methodology built on constructivist grounded theory (Charmaz, 2017; Bryant, 2020). This allows to surface insights into processes, actions, and interactions as they are shaped by the views of the research participants, while also allowing critical reflection on how the researcher's positionality has shaped the research process (Charmaz, 2017; Denny, 2022).

Data was primarily gathered during ten days of fieldwork in southwest Nova Scotia. In that period, I conducted ethnographic observations at some of the key sites of the lobster fishery dispute—harbors, offices, towns, and reserves. Furthermore, I interviewed people variously involved in fishery management. These ten semi-structured interviews, ranged between 45 minutes and 2.5 hours. Participants can generally be divided into (1) Mi'kmaw (from three First Nations) and (2) DFO officials; (3) DFO Conservation & Protection (C&P) officers; and (4) fishers' association and (5) civil society representatives. I also consulted with an even wider range of representatives. I treat participants as representatives of their institutions—as the ones who sit at the table to build relationships and spaces for coexistence, and share those understandings with their respective institutions. However, I view their statements as truth claims based on their worldviews, understandings, and agendas, which may or may not represent their respective institutions (Lomborg and Kirkevald, 2003). The insights from this fieldwork are discussed in Chapters Five, Six, Seven, and Eight, and also inform Chapter Four.

Additionally, I conducted a systematic literature review, supplemented by references recommended by interview participants. These insights are integrated throughout the

dissertation, but form the heart of Chapter Three. Lastly, I undertook a doctrinal analysis of relevant treaties, legislation, jurisprudence, and policy, the findings of which inform Chapter Four.

Due to limited time, I was unable to speak with representatives from every relevant institution. Furthermore, as the parties involved are very internally fractured, not every facet of their relationships or internal contestation could be captured. When and where possible, I have mitigated this by triangulating the different data sources.

III. Background & Theory

The lobster fishery dispute sits in a web of past and present colonialism, Indigenous resistance, politics, and differing understandings of law, justice, governance, sustainability, economics, and livelihood. In this Chapter, I disentangle this web, and describe how it informs present-day Mi'kmaw Legal revitalization.

i. Colonization

Nova Scotia is ground zero for Canadian colonization. In the early 16th Century, Europeans and Mi'kmaq made contact and traded (Coates, 2000; McMillan and Prosper, 2016). In 1605, the first French settlement in Canada was established at present-day Annapolis Royal. 16 years later, the British unsuccessfully tried to settle.

However, this was not barren land. Had it been, the Europeans probably would not have survived. The Mi'kmaq hold a deep connection to their land and it is estimated that as much as 90% of their diet came from the water (McMillan and Prosper, 2016; Denny, 2022). With the help of the Mi'kmaq, Europeans were able to successfully settle in Nova Scotia and learned how to exploit its natural resources (McMillan and Prosper, 2016). Contact with European settlers drove a major commodification of resources (Coates, 2000). The importance of this trading relationship waned, yet the Mi'kmaq still held land that the colonizers wanted control over (McMillan, 2015).

Many Mi'kmaq died in the early stages of colonization due to European pathogens (McMillan, 2015; Coates, 2000). Furthermore, the Mi'kmaq made handy allies to (mainly) the French. As a result of colonial wars fought with the Mi'kmaq directly, or with the Mi'kmaq fighting for one or both sides, the population declined even further (McMillan, 2015). Still, there were many aspects of Mi'kmaw life that obstructed colonial rule.

The colonizers employed a range of strategies to overcome this. The Mi'kmaq would not cede their land so the British and later the Canadians built settlements on unceded territory (McDonald, 2017). The conversion to Christianity started by the French was continued by generations of missionaries (Coates, 2000). The semi-nomadic Mi'kmaq were sedentarized and centralized into reserves, away from the non-Indigenous population (Truth and Reconciliation Commission of Canada, 2015b; Coates, 2000). The Mi'kmaq relied on the land's bounty and had a broad subsistence-based livelihood, so their access to their fisheries and forests was largely cut off (McMillan and Prosper, 2016; McMillan, 2015). Mi'kmaw children were sent to residential schools where they were robbed of their language and community connection through which Mi'kmaw knowledge and identity were passed (Truth and Reconciliation Commission of Canada, 2015b; Fieldnotes, 7 May 2024). The Mi'kmaq had strong governance and legal systems which were deeply tied to their ways of living so a Western-style system of government was imposed on them through a series of colonial Acts. Additionally, their laws were relegated to the realm of the traditional, erased from the Canadian legal system (Hamilton, 2021; Borrows, 2002). These colonial policies were largely compiled in the *Indian Act 1985* (henceforth *Indian Act*), first enacted in 1876, but still in force with amendments. These policies amounted to more than the sum of their parts. They constituted an effort to rob the Mi'kmaq of their very essence (Truth and Reconciliation Commission of Canada, 2015a).

The Mi'kmaq were not passive in the face of this attack on their way of life. They resisted, continued to assert their own laws and governance, and on numerous occasions, petitioned the British and Canadian Governments to respect Mi'kmaw rights (McMillan, 2015; Coates, 2000). These efforts largely fell on deaf ears.

Around 18,000 Government-recognized Mi'kmaq organized into 13 communities remain in Nova Scotia, (Statistics Canada, 2021). The pains and losses of colonization run deep. Nevertheless, the Mi'kmaq persist as a testimony to the failure of total colonization. They continue to fight to regain what they lost. But, what does regaining mean now that they coexist with a far larger non-Indigenous population?

ii. Legal Pluralism

The law is constituted through its contestation and negotiation in everyday life (Ewick and Silbey, 1998). Legal pluralism describes the coexistence of multiple legal systems in a given social space (Merry, 1988). Generally, there is a plurality of legal, moral, cultural, social, and political authorities which constrain individual and collective action. Past academic work in Nova Scotia has attested to the existence of strong customary practices in non-Indigenous fishing communities which contest state authority (Barnett, 2013; McMullan *et al.*, 1993; Parlee and Wiber, 2011). Despite the centralization of governance, Non-Indigenous fishers' conceptions of governance continue to clash with DFO authority. In this critical descriptive sense, legal pluralism refers to how more than one legal system may be relevant to understanding social reality (Napoleon, 2019).

Legal pluralism is also critical praxis. States have an interest in maintaining the 'myth of a singular law', as their authority depends on their status as the supreme law of the land. This is especially the case in colonial contexts where the state is a newcomer and must assert its authority over the plurality of local legal systems which predated it (Hamilton, 2021; Haring, 1998). As Eisenberg (2022, p. 41) argues, legal colonization involves rendering 'pre-existing governing practices and legal orders unrecognizable as features of legitimate law and governance'. However, Indigenous legal orders persist

(Coyle, 2022). Canadian law continues to operate alongside Indigenous systems to communicate normative values, structure behavior, maintain social order, and resolve conflicts. As McMillan (2011, p. 191) recounts, in the Eskasoni Community Court in Cape Breton Island, many defendants turned up having already resolved their conflicts in their own ways, attesting to the continued foreignness of Western legal traditions in many Mi'kmaw communities. Indigenous peoples all over Canada are pushing for greater recognition of their legal orders (McKerracher, 2023). Legal pluralism as praxis provides both a normative and an applied resource for rethinking the state's relationship with Indigenous legal systems.

Generally, conventional theories of law—most prominently Hart's (1961)—emphasize that law consists of primary rules, which determine obligations or duties, and secondary rules, through which primary rules receive their authority and which set out legitimate avenues to change primary rules (McKerracher, 2023, p. 137). In addition to these two, in analyzing legal pluralism within a wider matrix of power relations, I rely on Michaels' (2017) relational conception of laws. Michaels argues that in contexts of legal pluralism, decentralized yet common tertiary rules of external recognition mutually determine legal status. In other words, for legal systems to be externally valid, they must be recognized and treated as such by other legal systems.

These relationships are multi-sided, but recognition need not be reciprocated. In the absence of external recognition, there are other forms of relations between legal systems. However, especially in colonial contexts, such relations are often more oppressive and can range from indifference to competition (Jentoft and Bavinck, 2014; Napoleon, 2019). The value of a relational conception of legal pluralism to this dissertation is twofold. Firstly, it

offers deepens understanding of the importance of external recognition for a legal system to function as ‘law’. Secondly, relational legal pluralism offers a roadmap to a more respectful relationship between Indigenous and Canadian law—ones without constant negation, subjugation, or competition (Eisenberg, 2022; Hanna, 2018). In this way, relational legal pluralism helps escape the colonial fundaments of state legal sovereignty and, in its place, creates space for Indigenous self-determination on a more equal Nation-to-Nation footing.

In legal pluralism, state legal authority is one among many. The Government and the law are hegemonic authorities in Canada (McMillan, 2011; McKerracher, 2023; Lazarus-Black and Hirsch, 1994). However, to remain in this position, they must push back against that contestation and resistance which undermines them. Furthermore, as Lazarus-Black and Hirsch (1994) argue, legal hegemony is constituted through the existence of spaces for contestability and resistance (see also: Webber, 2006). Resistance here is taken ‘not as confrontation, but as deflection, ruse, or improvised evasion’ (Mezey, 2001, p. 147). In the case at hand, many important struggles for recognition of Indigenous rights are fought in the Canadian courts. Yet, by resisting on the terms of the law, that system is further entrenched. The law is also held in place by the expectations that people have of it. In this, control of discourse and the official and unofficial institutions that perpetuate it are key factors. If enough people see the state’s legal system as the ultimate and legitimate arbiter of disputes, then, cumulatively and over time, that is the position it will occupy. This is a relatively simplistic and reductionist view of legal authority and hegemony and there are many more social forces at play here. Nevertheless, it is a crucial insight that the lived law is formed through the multitude of actions of and interactions between individual agents. The Mi’kmaw struggle in the lobster fishery seeks to break

through the hegemony of the Government and the law, and to build a new relationship on a Nation-to-Nation basis (Simpson, 2017; Davis and Jentoft, 2001).

Legal pluralism in the fishery has the potential to drive ‘incoherence, power struggles over access, competition, and social conflict’ (Denny, 2022, p. 10; Jentoft and Bavinck, 2014). Concurrently, given the unavoidability of legal pluralism, it is not a question of if, but to what extent legal pluralism is given space in the fishery (Borrows, 2002). In this, it is important to ask what Indigenous law is exactly.

iii. Indigenous Legal Revitalization

That Indigenous laws and governance persist does not mean that they have not become severely impoverished through centuries of colonization (Shideler, 2022; McMillan, 2011). As Indigenous peoples all over Canada and beyond claim rights to self-determination and self-government, a movement of cultural revitalization has looked to (re)define what it means to be Indigenous in this ‘modern era’ (Von der Porten, Corntassel and Mucina, 2019; Borrows, 2002).

The movement of revitalization stems from frustration at slow processes of change and the ‘politics of recognition’. As Coulthard (2014, p. 152) defines it, the politics of recognition looks to reconcile Indigenous assertions of nationhood with state sovereignty by accommodating Indigenous claims. This framework only further entrenches the power of the state and is unable to accommodate Indigenous self-determination and a true Nation-to-Nation Crown-Indigenous relationship (Napoleon, 2018; Mills, 2016; Michaels, 2017). Consequently, Indigenous peoples are focusing on ‘rebuilding and recovering first’ in their own ways, in the hope that this may give life to an ‘Indigenous future’ and change the power dynamics between Indigenous peoples, the Canadian state, and natural resources

(Simpson, 2017, p. 245; see: Von der Porten, Cornthassel and Mucina, 2019). This ‘radical resurgent organizing’ involves reframing Indigenous issues in a manner that does not re-entrench state power (Simpson, 2017, p. 178).

Governance over resources such as fisheries is central to Indigenous legal revitalization and, through this, to Indigenous physical, spiritual, cultural, social, and political survival (Davis and Jentoft, 2001; Borrows, 2002; Lowitt *et al.*, 2019). Indigenous identity and the land are often inextricably connected (Todd, 2018; Denny, 2022). For the Mi’kmaq, aquatic resources hold a key place in their epistemology, ontology, livelihoods, governance, and education (McMillan and Prosper, 2016; Prosper *et al.*, 2011). As such, living on the land is central to Indigenous efforts to pass on Indigenous identity to the next generation (Simpson, 2017, p. 145).

iv. Mi’kmaw Law

Long into colonization, the Mi’kmaq had a strong governance and legal structure (Coates, 2000). Mi’kmaw law was lived and unwritten, continually constituted through everyday practice (McMillan, 2011). Law was interconnected with all aspects of Mi’kmaw life—from dispute resolution to resource usage or marriage (Hamilton, 2021, p. 105-108; Prosper *et al.*, 2011). The law stemmed from custom rooted in social and ecological knowledge, language, and spirituality (Hamilton, 2021; Coates, 2000). As such, it is hard to separate Mi’kmaw law from Mi’kmaw culture, values, knowledge, and livelihoods. Hence, any policy which separates fishing by Mi’kmaq from Mi’kmaw ways of fishing requires careful study. Revitalization is not a project that can be accomplished with quick fixes—it is slow and gradual with much learning through doing.

Generally, Mi'kmaw law and governance are dialogical, consensual, and restorative, founded on distinct understandings of justice and fairness (McMillan, 2011; McMillan, 2016). At the core of these structures of social control lies the idea of *Msit no'kmaq* (all my relations), which sees existence as being constituted through relations of 'mutual existence and reciprocity' with humans and non-humans alike (Prosper, 2009, p. 86). From this flows, firstly, the idea that justice must restore the peace, balance, and interdependent individual and community bonds that a harm has altered (McMillan, 2011). Dispute resolution processes are governed by values like 'love, honesty, humility, respect, truth, patience, and wisdom' and rely on the instruction of elders and spiritual and social sanctions (Hamilton, 2021, p. 106; Truth and Reconciliation Commission of Canada, 2015a, pp. 17-18; Mi'kmaw Legal Support Network, 2024).

In this, *apiqsigtoagen* (mutual forgiveness) plays a key role (McMillan, 2011). This is a collective and largely avoidant process involving periods of reflection and mutual assistance in healing and reintegration. The Mi'kmaq only engage in confrontation when strictly necessary or when all sides are ready. Adversarial justice often runs contrary to Mi'kmaw conceptions of justice. These major differences make even more complicated to build a structure capable of accommodating both systems of justice.

Netukulimk, another core concept, conveys sustainability, conservation, ecological balance, and attachment to place (Denny, 2022; Hamilton, 2021). As Prosper *et al* (2011, p. 1) define:

Netukulimk is a complex cultural concept that encompasses Mi'kmaq sovereign law ways and guides individual and collective beliefs and behaviours in resource protection, procurement, and management to ensure and honour sustainability and prosperity for the ancestor, present and future generations.

This can be summed up as ‘taking only what you need’ as opposed to maximal exploitation of the resource (Interview 1; Denny and Fanning, 2016b).

In diminished form, many of these practices still inform Mi’kmaw life (McMillan, 2011; Denny, 2022). However, it remains uncertain what they mean nowadays, where they exist alongside other understandings of justice and connections to the environment. This is a question that the Mi’kmaq are answering, for example, through the Mi’kmaw Legal Support Network (MLSN) (McMillan, 2016). MLSN operates a customary law program aimed at revitalizing Mi’kmaw law and according it a greater place in both Mi’kmaw life and the Canadian legal system (MLSN, no date). Efforts are also taking place within Kwilmu’kw Maw-Klusuaqn (KMK; the main Mi’kmaq rights organization) to revitalize customary law in the fishery (Fieldnotes, 6 May 2024; McMillan, 2016). Concurrently, many Mi’kmaq are increasingly interested in their traditional practices and knowledge (Shideler, 2022; Pictou, 2017). These grassroots and institutional efforts are crucial to Mi’kmaw legal revitalization. But, they do not determine what space there is for legal revitalization in the fishery. This matter of space for Mi’kmaw law is the focus of this dissertation.

IV. Legal Framework

In this Chapter, I outline how Government law and policy governs the Crown-Mi'kmaq relationship with regard to Mi'kmaw fishing. Many Mi'kmaw efforts attempt to fundamentally reform or escape this structure. Despite this, much of the present dispute is waged within the framework of the Canadian legal system. In the first section of this chapter, I describe this structure as it is found 'on the books', before turning to how this has been given effect by the DFO in practice.

i. Treaties and Acts

Canadian law has an awkward relation with matters of Indigenous self-determination which have their source in Indigenous peoples' inherent sovereignty.

Between 1725 and 1779, the British colonial Government in Nova Scotia and various Mi'kmaw, Wolastoqiyik, Abenaki, Penobscot, and Peskotomuhkati Nations concluded a series of Peace and Friendship Treaties. The essence of these treaties as it pertains to the case at hand is contained in the 1752 and 1760–61 Treaties. Alongside a slew of other provisions regulating Mi'kmaq-British coexistence, the Mi'kmaq were to have 'free liberty of Hunting and Fishing as usual' and would trade their wares with the British at a 'Truckhouse'—a type of trading post (1752 Peace and Friendship Treaty, para. 4). These treaties fell into gradual unilateral disuse (see: *R v. Sylliboy*, 1928).

The *Constitution Act, 1982* 'recognized and affirmed' Aboriginal and treaty rights (s. 35(1)). This short clause provided the rights constitutional protection. Treaty rights are those which flow from historic and contemporary agreements between the Crown and Indigenous peoples. Meanwhile, Aboriginal rights protect practices which Indigenous peoples hold virtue of their historic occupation and use of their land pre-colonization,

which were ‘integral to the[ir] distinctive cultures’ (*R v. Van der Peet*, 1996, para. 13). These rights are listed nowhere and have instead been mainly interpreted by the Supreme Court (Slattery, 2016).

Self-government is, debatably, one such right (Beaton, Hamilton and Nichols, 2022). Self-government has been further enshrined in Canadian law through the domestication of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP; *UNDRIP Act 2021*). This adoption into Canadian law means that the Government must ensure that its laws are consistent with the UNDRIP (*UNDRIP Act 2021*, art. 5). Together, this has the potential to create space for legal pluralism in the fishery and fundamentally reshape the Crown-Indigenous relationship.

Within this right-based framework, two Acts are of importance to this case: the *Indian Act* and the *Fisheries Act 1985* (henceforth *Fisheries Act*). First, the *Indian Act* remains the principal law structuring the Crown-Indigenous relationship. Through the *Indian Act*, the Canadian Government imposed, among others, a Western-style system of government on the First Nations subordinate to the Canadian Government and created reserves. In this way, the *Indian Act* displaced ‘traditional’ Indigenous governance which remains a hurdle in contemporary legal revitalization and self-determination efforts (Hanna, 2018; Beaton, Hamilton and Nichols, 2022; see also: Metallic, 2016).

Second, under the *Fisheries Act*, the Minister in charge of the DFO holds supreme regulatory authority and wide discretion for the ‘proper management and control’ and ‘conservation and protection’ of the fisheries (art. 2(1)). The Act purports to uphold Aboriginal and treaty rights and, when making a decision, the Minister must consider the adverse effects this may have on these rights. Regardless, the *Fisheries Act* places control

over the lobster fishery squarely with the Minister and, under the Act, any Mi'kmaw self-government will stem from delegated authority, not an inherent right to self-determination (Denny, 2022; Interview 5).

A general tension remains between the spirit of Indigenous sovereignty, which at times rears its head throughout the Canadian legal structure that has been built up since colonization. The courts operate wholly within this colonial legal structure and have consequently struggled to reconcile this tension. Nevertheless, in the next section, I turn to what space for Mi'kmaw fishing and self-governance the courts have found.

ii. Jurisprudence

For a long time, courts denied the continued effect of Indigenous treaty rights. However, the *Constitution Act, 1982* signaled a shift in thinking and invigorated Indigenous litigation efforts (Wiber and Milley, 2007). This resulted in a series of key decisions.

In 1990, in *R v. Sparrow* (1990; henceforth *Sparrow*), the Supreme Court recognized the Aboriginal right to fish for Food, Social and Ceremonial (FSC) purposes, only to be infringed subject to a two-part test. First, there is the question of whether an interference follows a well-evidenced 'valid legislative objective' that may justify the infringement (p. 1079). Second, where such an objective is found, the question arises whether the infringement violates the 'honour of the Crown'. This is the unwritten constitutional principle that the Crown has a fiduciary duty and 'obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation' (*Mitchell v. M.N.R.*, 2001, para. 9; Hoehn, 2020). The Court held this to require the Government to ensure that rights-holders have priority access—at least in the case of FSC fishing—that any justified infringement is maximally minimal, and to engage in meaningful consultation with

rights-holders regarding the infringement and how to mitigate it. The Court in *R v. Badger* (1996) confirmed the wider applicability of the *Sparrow* test to treaty rights. The *Badger* test largely constitutes an application of the *Sparrow* test to treaty rights. At this time, the matter of commercial fishing—as opposed to FSC catch which may not be sold—was left open-ended.

More clarity came in 1993 when Donald Marshall Jr. was arrested for asserting his right to fish and sell eels under the 1760-61 Treaties (McMillan, 2012). In *R v. Marshall* (1999a; henceforth *Marshall I*), the Supreme Court ruled that Marshall had a collective treaty right held by his community ‘to continue to obtain necessities through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the *Badger* test’ (p. 459). The Court interpreted this as a right to gain ‘a moderate livelihood’ in a modern context (para. 7). It found that this right could be subject to ‘regulation within its proper limits’ (para. 58). Nevertheless, the Court left unanswered what limits and regulation may be appropriate.

Following *Marshall I*, many Mi’kmaq exercised their right to a moderate livelihood by fishing outside DFO regulation. This was seen by non-Indigenous fishers as a threat to conservation and their livelihoods. Tensions between Mi’kmaq and non-Indigenous fishers escalated (Coates, 2000; Wien and Williams, 2023). A coalition of non-Indigenous fishers filed a motion for rehearing and stay.

In *R v. Marshall* (1999b), or *Marshall II* as it is commonly known, the Supreme Court dismissed the motion. However, in unusual fashion, it did clarify key aspects of its original ruling, which can be construed as a ‘tempering’ (Pothier, 2010, p. 195). First, it held that conservation is the overarching objective of regulation of the fishery and

constitutes grounds upon which the exercise of treaty rights may be limited. Other valid objectives for regulation include ‘economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups’ (p. 535). Second, the Court reaffirmed the Minister’s ultimate responsibility for these objectives, for which she has available ‘the full range of resource management tools and techniques, provided their use to limit the exercise of a treaty right can be justified’ (p. 535). Third, confusingly, the Court also held that regulations which translate the moderate livelihood into regulatable terms, such as catch limits, do not constitute a limitation necessitating the *Badger* test. The *Badger* test is only triggered when regulatory limits restrict ‘catch *below* the quantities reasonably expected to produce a moderate livelihood or other limitations that are not inherent in the limited nature of the treaty right itself’ (para. 39). Despite these clarifications, the Court still left unclear how the DFO should exercise its regulatory authority.

Since, under *Marshall*, the right to a moderate livelihood is collective, this implies communal control over its exercise.³ At present, under the reasoning in *R v. Van der Peet* (1996), the Court determines the validity of Aboriginal rights based, in part, on whether they were practiced prior to ‘first contact’. This reasoning is greatly problematic and may, hopefully, at some point be dispensed with (Eisenberg, 2007). At first contact, despite the added commercial dimension, the Mi’kmaq did not suddenly cease fishing in their traditional ways. Given that Mi’kmaw fishing for commercial purposes outside of Mi’kmaw governance structures does not make historical sense, I would question whether the Mi’kmaq enjoy an Aboriginal right to self-government of their treaty fisheries (Slattery, 2016; Francis, 2023; see: *R v. Pamajewon*, 1996). Care must therefore be taken that, as the

³ Henceforth, I refer to *Marshall I* and *II* collectively as just *Marshall*.

DFO exercises its regulatory authority, the Mi'kmaq are not effectively absorbed into this regulatory ecosystem or become mere proxies for the implementation of DFO regulations. There must be space for Mi'kmaw self-government. To my mind then, legally, the default of the moderate livelihood fishery is Mi'kmaw self-governance, to the extent that the DFO has not justifiably limited it.

The Supreme Court has provided the fundamentals for coexistence and reconciliation in the fishery by outlining key rights and duties. However, it has also held that these issues can only be settled through meaningful dialogue, consultation, and 'negotiation of a modern agreement for participation in specified resources by the Mi'kmaq' (*R v. Marshall*, 1999b, para. 22; Wien and Williams, 2023). In that vein, I next address how the core aspects of DFO lobster fishery regulation have been adapted to make space for the Mi'kmaq.

iii. DFO Policy

The preservation of the independence of the inshore commercial fishery is an overarching goal of DFO policy (*Maritime Provinces Fishery Regulations* 2022; DFO, 2022). The commercial fishery is managed as a 'limited entry, competitive fishery' (DFO, 2022). The core of this regulation is a licensing system—now enshrined in law—whereby licenses are only granted to eligible individuals who must fish the license themselves (DFO, 2021c). These so-called 'owner-operators' can fish in a LFA subject to the DFO's lobster fishing regulations, such as a set season and a trap limit (DFO, 2021b; DFO, 2022). Regulations are monitored and enforced by—some participants emphasized—armed C&P detachments (Interview 8). This owner-operator policy confines corporations to the differently regulated offshore fishery.

In many other fisheries, the DFO has introduced an individual transferable quota (ITQ). These quotas are granted to individual license holders and determine annual maximum catch. They may be transferred but only to other eligible license holders (DFO, 2021c). In many other fisheries, these restrictions were not strictly enforced, resulting in major corporations controlling most of the quota (Pictou, 2017; Pannozzo and Baxter, 2020a). Corporate creep into the Nova Scotian inshore fishery was met with major pushback from owner-operator fishers in the late 1990s. In response, the DFO granted fishers community management over a set quota (Wiber and Kearney, 2009). However, the Mi'kmaq are largely exempt from owner-operator and quota restrictions, which is a major point of contention in the lobster fishery dispute (Bull, 2020; *Aboriginal Communal Fishing Licences Regulations* 2009).

Since 1990, the DFO has had to accommodate increased Mi'kmaw rights-based fisheries participation. Post-*Sparrow*, The DFO launched the Aboriginal Fisheries Strategy under which it concluded, on a community-specific basis, agreements on FSC fisheries access largely outside DFO regulation (Wiber and Milley, 2007; Francis, 2023). *Marshall*, however, had potential to more fundamentally reshape the commercial fishery, rather than adding another small-scale non-commercial fishery (Coates, 2019).

Since *Marshall*, DFO policy has centered around providing the Mi'kmaq access to fish within its regulatory framework (McMillan and Prosper, 2016; Wiber and Milley, 2007). The DFO launched the Marshall Response Initiative in 2000 (Parliament. House of Commons, 2021; Francis, 2023). The Initiative was aimed at capacity-building and providing access to Mi'kmaw fishers wishing to exercise their rights, whose communities had entered into an agreement. At this point, the DFO and the Mi'kmaq did not enter into

any negotiations on treaty right implementation—all negotiations were ‘without prejudice’ to those rights (Francis, 2023; Metallic and Macintosh, 2020). After the Initiative ended in 2007, the DFO continued enhancing Mi’kmaw participation through the Atlantic Integrated Commercial Fisheries Initiative (Parliament. House of Commons, 2021; DFO, 2021a). In total, between 2000 and 2018, the DFO spent CA\$535 million on access schemes for Indigenous fishers in the Maritimes (Parliament. House of Commons, 2021; Coates, 2019). As part of these initiatives, the DFO bought communal commercial licenses for individual Mi’kmaw communities (Parliament. House of Commons, 2021; Coates, 2019). These are conventional commercial licenses managed communally by the First Nations Governments (Wiber and Miley, 2007). The Mi’kmaq argue that the access granted under these licenses is without prejudice to the treaty right to fish for a moderate livelihood, which, in their view, has not been implemented yet (Parliament. House of Commons, 2021; Francis, 2023).

In 2017, the DFO received a mandate to negotiate sectoral and time-limited Rights Reconciliation Agreements (RRA) with moderate livelihood rights-holders. These RRAs reflect the ‘needs and interests of a specific Nation and its members’ and look to outline a path toward collaborative fisheries management (DFO, 2024). The DFO’s mandate expired in April 2023 without any Nova Scotia Mi’kmaw First Nations having concluded an RRA. From their perspective, this too did not implement the moderate livelihood right (Parliament. House of Commons, 2021, p. 20–21).

Simultaneously, in the last three years or so, informally, the DFO has become more willing to accommodate Mi’kmaq-managed fisheries. Under interim authorization, the DFO has accepted self-management plans for moderate livelihood fisheries from the four Mi’kmaw communities in southwest Nova Scotia (DFO, 2023b). However, such fishing

does take place within DFO-set seasons. Sipekne'katik, who also fish in this region, have not accepted interim authorization.

25 years post-*Marshall*, the DFO remains largely reluctant to devolve control or to allow fishing outside their regulations. Though much of its resistance has been chipped away, the *sine qua non* for them remains their paramount authority, as set out in the *Fisheries Act* and recognized by the Supreme Court. Without changes to this attitude, it will be difficult for the Mi'kmaq to exercise legal self-determination in the fishery. In the next four Chapters, I first describe how space for legal pluralism is further limited, before moving to how it may nevertheless be created.

V. Competing Understandings

There are key conceptual differences in understanding of lobster fishery management between the DFO, the Mi'kmaq, and non-Indigenous fishers. I break these down into disagreements on (1) how the different types of Mi'kmaw lobster fisheries should be understood, (2) where 'space for reconciliation' should come from, and (3) what room there is for Mi'kmaw self-management and enforcement.

i. Different Fisheries

Supreme Court jurisprudence and DFO policy have created four types of Mi'kmaw lobster fisheries (Interview 1). First, the conventional commercial fishery involves Mi'kmaw fishers fishing in the same DFO-regulated system as non-Indigenous inshore owner-operators. Second, the food, social, and ceremonial fishery, an implementation of the *Sparrow* Aboriginal right, involves Mi'kmaw fishers holding community-issued FSC licenses fishing largely outside of DFO regulation. These first two types are largely uncontested. Third, the communal commercial fishery, created through post-*Marshall* DFO initiatives, involves community management of conventional commercial licenses, that are leased out to individual Mi'kmaw fishers. The proceeds from this are generally used for the benefit of the community. There is much debate regarding the space for self-management within this fishery. Finally, the moderate livelihood fishery, as Potlotek First Nation defines it:

is a small-scale, artisanal fishery with sale, trade and barter attributes, ... using traditional and modern methods and techniques, non-industrial vessels, practiced under the management and protection of First Nation Community Netukulimk livelihood fishery Plans ... and the Mi'kmaq concept of Netukulimk, with the goal of improving the well-being of many Mi'kmaq individuals and their families. (Potlotek, 2020)

However, there is no agreed-upon definition nor ubiquitous idea of governance. These are among the main issues in the lobster fishery dispute.

The DFO initially created the communal commercial fishery as a way of appeasing Mi'kmaq wanting to assert their *Marshall* rights. This was perceived differently by the Mi'kmaq. As one Mi'kmaw lawyer put it, the communal commercial fishery was created because the DFO was simply 'caught with their pants down' (Interview 5). They acknowledged some benefits:

I'm not going to say that it hasn't helped communities, because it has in the sense that it's allowed capacity building on fisheries ... It's allowed us to begin to develop various initiatives where people have training, they have experience, they have knowledge, and those are all essential to being a part of an industry that you were shut out from for 200 years, right?

However, as they continued, the fundamental issues driving the lobster fishery dispute, 'the recognition of the right and the management of the right', have never been addressed.

By contrast, the fishers' association representatives denied the difference between the communal commercial and moderate livelihood fisheries as, to them, a moderate livelihood can be gained through the communal commercial fishery. As one representative stated, 'the bottom line is First Nations, through that, has access into the fishery' (Interview 7). As another argued, the Government's obligations under *Marshall* were not to completely reshape the commercial fishery to accommodate the Mi'kmaq, but merely guarantee their 'right to *participate* in a largely modern commercial fishery' (Interview 6; emphasis mine). Following this logic, the FSC fishery offers space for self-management and 'traditional' fishing methods, but the moderate livelihood/communal commercial fishery is simply a conventional commercial fishery—albeit under a communal licensing system for the community's benefit.

There are clearly major disagreements regarding the implementation of *Marshall*. However, there is an even bigger sticking point: how much space there is for the different Mi'kmaw fisheries to coexist with the non-Indigenous inshore owner-operators and where such space should come from.

ii. *Space for Reconciliation*

For non-Indigenous fishers, this discussion comes at a time when they already face many other pressures that threaten the inshore owner-operator fishery. In view of these pressures, the commercial fishers conclude that they have 'given enough' since the Mi'kmaq have commercial access (Interview 7). Though the fishers' association representatives recognized the 'debt to the Mi'kmaq', they see it as not only their debt—'it's all Canadians' debt to pay equally'—and many more issues beyond the fishery must be addressed, such as 'economic reconciliation' (Interview 6). To the representatives, their communities have unevenly borne the burden of reconciliation while this more general reckoning remains unaddressed:

The Prime Minister's perverted version of reconciliation has leveled all the responsibilities and the debts of colonialism onto people who have just lifted themselves out of poverty in the last generation. (Interview 6)

They further underlined the fishery's socio-economic importance as not only the 'economic base' of almost every 'small coastal community in Atlantic Canada', but also as vital in passing on a particular way of life to the next generation (Interview 7). This is now threatened 'because [the younger generation] certainly can't compete against Government money' (Interview 7):

when access leaves one community and goes to another community, there's a winner and a loser ... So the positive return from that economic growth, from that access simply leaves the communities. Well, we're saying at some point, we have to draw a line here. (Interview 7)

The representatives believed these interests should be taken into account in the process of reconciliation.

This contrasts with the view of many Mi'kmaw officials who, taking a longer view, underlined that the socio-economic importance of Nova Scotian lobster fishing was created on the back of the dispossession and oppression of the Mi'kmaq:

They've never had to include us, even though when we signed the treaties, we agreed to share, and we shared with them, and we shared to the fault of our own people, the death of our own nations. And so I think now, when they have to share, that means dollars ... And so for them, it's: "I don't want to share". (Interview 5)

From this angle, non-Indigenous fishers' hesitance to 'share' the fishery discloses a deeper colonial disposition. Reconciliation in the fishery will require reckoning with these attitudes.

Disagreements on what the fishery is for and consequently, how space created for Mi'kmaw fishing should be used underlie the discussion on reconciliation. On one hand, there is some agreement that the moderate livelihood fishery should be small-scale and aimed at 'creating fishing families' (Interview 6), not the industrial '50-foot trawlers' of which others are fearful (Interview 5). On the other, Mi'kmaw communities are massively impoverished and underfunded. Age-adjusted, First Nations in Nova Scotia had an employment rate of 42.8% compared to the provincial average of 51.8% in 2021 (OneNS, 2024). Perhaps understandably, many Mi'kmaq see the communal commercial lobster fishery as an 'engine of economic development' (Interview 10).

The fishers' association representatives contended that there is insufficient space for such a 'quasi-corporate money generator for First Nations Governments' in the fishery and that 'this is not what *Marshall* is about' (Interview 6). As the representatives contended, in the face of uncertainty in the moderate livelihood debate, the Government has failed to act

decisively and not asserted the authority it has under the *Fisheries Act* which, in their eyes, *Marshall* wholeheartedly reaffirmed. The representatives alleged that some Mi'kmaw communities and 'unscrupulous' and 'criminal' individuals (Interview 6)—Indigenous and non-Indigenous alike—have exploited this regulatory 'grey space' (Interview 7). As a result, most communal commercial licenses have been leased to non-Indigenous fishers 'for a royalty check back to the band' (Interview 7). The representatives opined that this has deprived individual Mi'kmaw fishers of access. Given this, they argued that communal commercial access should be used to provide moderate livelihood access for Mi'kmaw wanting to fish just, as they saw it, like the treaties enshrined.

Generally, the Mi'kmaw officials disagreed with this reasoning. They agreed that because of lack of access, by the DFO's grace, Mi'kmaw fishers have been forced to catch and sell fish 'illegally' just to exercise their 'right to fish' (Interviews 2 and 3). However, to them, space to earn a moderate livelihood should be created alongside the access already provided for communal commercial fishing, not at the expense of painstakingly-won access.

In sum, both sides believe that for the Mi'kmaq to exercise the right to a moderate livelihood, the other should give up space. There is further disagreement on what usage should have priority, with each side referring to the fishery's importance to their community. This affects to what realm Mi'kmaw self-management and enforcement are relegated, as I explain in the next section.

iii. Self-Management & Enforcement

At their core, as numerous participants found, their disagreements can be reduced to two key questions:

1. Are Mi'kmaw self-management and self-enforcement detrimental to conservation and the effective management of the fishery?
2. Is DFO regulation contradictory to Mi'kmaw self-determination?

With regard to the first, the Nova Scotian lobster fishery was included in Ostrom's (1990) classic work on problems inherent in managing commons. That idea of a 'tragedy of the commons' dominates thinking of non-Indigenous fishers and DFO C&P officers alike (Hardin, 1968). Without proper enforcement, they warned of 'anarchy' (Interview 7), 'the destruction of [the] resource' (Interview 6), and 'fish[ing] it right out' (Interview 4). As such, they highlighted the importance of 'law and order' (Interview 6) and 'one set of rules' (Interview 7).

The association representatives were highly critical of the Mi'kmaw capacity to regulate and enforce rules. They were particularly critical of the governance structure imposed under the *Indian Act* which gives the Chief 'absolute authority' (Interview 6). Because of this power, they argued, First Nations governments are too self-interested for self-regulation and enforcement. The representatives referred to the plethora of cases where industry self-regulates and self-enforces, resulting in them doing 'a real bad job' (Interview 6). Furthermore, practically, the representatives were doubtful of the Mi'kmaw desire or ability to enforce regulations on their fishers, though they were uncertain on the precise reason why. According to one, it could be up to not accepting 'if there's a rule of law', 'even want[ing] to listen', or simply 'want[ing] the enforcing thing' (Interview 7). Regardless, the Mi'kmaw lack of 'proven capacity' to effectively manage the fishery, and an attitude of not wanting to take any risks with such a critical resource, led the representatives to a self-evident conclusion:

“with rights comes responsibilities”? And if you can't responsibly manage something, you're not going to manage it. (Interview 7)

Another representative was doubtful of the efficacy of Mi'kmaw approaches to fishery management in a 'commercial European fishery' (Interview 6). As they contended, while *netukulimk* may have worked before colonization, in the era of mass commercial demand, 'it moves from "take only what you need" to "take all you can sell"'. Nevertheless, they expressed a deep respect for *netukulimk* and recognized its importance to Mi'kmaw culture. Given this, they argued that Mi'kmaw approaches to fishery management should have a place at the 'governance roundtables' but completely rejected that the fishery could 'be managed with [only] Indigenous perspectives and not modern fisheries conservation biology'. They regretted that this might come at the cost of Mi'kmaw self-determination. But, in their view, conservation of the resource should trump all other considerations: 'the resource should win and then we all will'.

There is then a fundamental difference in interpretations of *Marshall*. The representatives argued that the needs of conservation and the proper management of the fishery required near complete DFO regulation of the fishery, while the Mi'kmaw officials interpretation of *Marshall* endows the DFO with a limited 'right to regulate' where strictly necessary (Interviews 2 and 3).

Furthermore, the Mi'kmaq argued that an essential component of the moderate livelihood right is self-management to the extent that this does not interfere with the objectives set out under *Marshall*. As one Mi'kmaw fishery guardian put it:

I wouldn't come into your house and tell you how to clean it or, you know, tell you how to do your stuff. Like this is stuff our people have been doing for thousands and thousands and thousands of years. This is stuff where we had treaties that specified that we have the right to do this unmolested and unhindered...Every time we try to practice our rights it is definitely hindered and it is definitely ... molested. (Interviews 2 and 3)

One Mi'kmaw community fishery official contended that, despite the creation of 'sound' management plans based on community input and conservation principles, Mi'kmaw self-management of the fishery has never been respected by the DFO (Interviews 2 and 3). 'It's just our way or the highway', as another stated (Interview 8).

On this view, it is not that the DFO's regulations are necessarily wrong but that they were reached without any 'recognition of a right or a recognition of an authority' (Interview 5). While the 'higher-ups' pay lip service to the Nation-to-Nation relationship (Interviews 2 and 3), in practice, the DFO maintains that they are the 'end all and be all authority for fishery issues in Canada' (Interview 5). Without an attitude change, one Mi'kmaw official was fearful of 'straightforward assimilation' through 'accommodation' (Interview 8). While they did think Mi'kmaw concepts and laws could endure within a system of co-governance, this would require a degree of 'creativity' from the DFO's (Interview 8).

Concurrent with this plea for space for self-management and enforcement, there appears to be a degree of uncertainty accompanying Mi'kmaw legal revitalization:

I used to ask the Chiefs years ago, what if the Government said, "okay, assert your treaty rights"? How would we do that? ... And I think that's, that's like before we say "oh DFO is against self-determination", let's determine what self-determination is. ... What would be the point of us self-determining, enacting a form of self-governance ... based on the DFO model? (Interview 8)

There are 'lots of [these] conversations going on' internally (Interview 5). As one Mi'kmaw lawyer found, even in the absence of a clear conceptualization self-enforcement, the 'essence' of *netukulimk* and a strong system of 'community pressure' have endured despite colonization (Interview 5). One Mi'kmaw fishery official pointed out that 'compliance and enforcement is a challenge because our culture doesn't have penalties' (Interview 1). However, the Mi'kmaw officials all argued they never got the chance to build up effective

Mi'kmaw fishery self-management and enforcement—already a complicated task ‘after you’ve been oppressed for so long’ (Interview 8):

I feel that expectation is placed on us unfairly. And when we don't have it all figured out at the snap of a hat, we're criticized for it. (Interview 5)

The difficulty, as they saw it, is to revitalize in a ‘modern’ context while maintaining a clearly differentiated idea of ‘what is Mi'kmaw about that’ (Interview 8). Given this, the officials pleaded for the space to organically revitalize Mi'kmaw law and governance through practical learning:

If DFO really truly wants to reconcile with us, then they need to start respecting our management plans, respecting our right, and allowing, giving us the opportunity. And if we fuck up, at least you gave us the opportunity, but they're not even giving us the chance to even try because they're fighting against us right off the get. (Interviews 2 and 3)

At a policy level, the DFO is simultaneously being pulled in multiple directions. It remains bound by the *Fisheries Act* and, as indicated by the Supreme Court, it therefore has an unavoidable ‘role to play in fisheries’—‘you can't really just decide, “oh, well, I'm not going to follow that today”’ (Interview 9). In this context, the DFO's tendency to accommodate and delegate authority rather than fundamentally rethink its position seems understandable. Even though the DFO has recognized that change is necessary, at the end of the day, ‘the machinery is tough to move, or change, or modify’ (Interview 9).

Ultimately, these conceptual disagreements appear relatively zero-sum. Progress towards one side's goals means another side must concede a core claim. Space for a moderate livelihood fishery distinct from the communal commercial one must be created from either the non-Indigenous fishers' or pre-existing Mi'kmaw access. Where a Nation-to-Nation co-management approach would allow for a far greater deal of self-management and enforcement, this would require the DFO and non-Indigenous fishers

to relinquish their position that the DFO has supreme regulatory authority (see: Francis, 2020). In the next chapter, I turn towards how non-Indigenous fishers and the Mi'kmaq both continue to push for change and how this may be damaging the prospects for coexistence.

VI. Differences in Process

Disagreements extend beyond the conceptual level to the ways to push for change the different parties consider appropriate. In this Chapter, I outline these differences and their implications for coexistence and legal pluralism.

i. Upholding the Rule of Law

A common conception I encountered among the fishers' association representatives was that the rule of law can be actively degraded and it is hard to restore. To uphold the rule of law as the representatives saw it, there must be a common arbiter that all sides respect and 'in Canada, that's the Supreme Court' (Interview 6). This understanding goes beyond 'all sides should adhere to the rules' and a need for 'somebody with a hammer' when rules are broken (Interview 7). To the representatives, the rule of law also requires 'respect for the Court' and its decisions—that issues be put to bed once settled:

If we don't agree with [the law], or Indigenous people don't agree with it, it's incumbent on us to change it. (Interview 6)

On this view, it is wrong for one side to push for change outside of the conventional channels of dispute resolution and reform. Such acts of resistance undermine the shared understanding upon which Canadian society is built.

The association representatives believed the Mi'kmaq will only adhere to the rule of law when it suits them. Citing examples from all over the Maritime provinces, the representatives pointed to a multitude of cases wherein First Nations went 'beyond the law' to achieve their goals. One felt that this has had tangible impacts with 'B-grade movie ... tough guys' acting with impunity in rural coastal communities (Interview 6).

The representatives also leveled blame at the Canadian Government for giving in to Mi'kmaw demands and further incentivizing such 'illegal' behavior:

the amount of participation has been based on the amount of agitation, not on the principles of adjacency and fisheries management or fairness or respect for the Marshall decision. (Interview 6)

While they recognized the DFO's 'absolute discretion', the representatives felt that the Government pays insufficient attention to the rule of law (Interview 6).

Both the Mi'kmaq and non-Indigenous fishers complained of uneven enforcement by C&P. The association representatives asserted that Government inaction at the policy level has significantly impacted on-the-water enforcement:

it appears to the vast majority of the industry that ... these folks have a cloaking device simply because they're Indigenous and the Federal Government, certain departments don't want the negative feedback. (Interview 7)

This was perceived completely differently by some Mi'kmaw officials. They alleged a significant degree of discrimination by C&P officers who only 'charge these guys because they're Native' because 'they want to be little racist pricks' (Interviews 2 and 3). At a higher level, the officials saw this as an intimidation tactic:

I think they do shit like that on purpose. Like "oh, if your community signed an agreement, let's look at the treaty and you'll get a free for all". (Interviews 2 and 3)

Mi'kmaw fishers cannot both be simultaneously under and over-policed. In this discourse, it is difficult to discern fact from fiction from misperception. However, clearly, both sides see enforcement as a political tool wielded in their disfavor.

One association representative (Interview 6) was similarly frustrated at the weaponization of the Supreme Court, making reference to Cameron's (2009) *Power Without Law*. This argues that *Marshall* was a case of undue judicial activism and overreach. Though the representative did not expand further on what they believed this

meant for the rule of law, apparently, among some fishers, the standing of the Supreme Court has been tarnished through the lobster fishery dispute.

Altogether, the representatives did understand the Mi'kmaq taking action 'to improve the situation at the negotiating table', yet they disagreed on the Mi'kmaw ways of doing so (Interview 6). For non-Indigenous fishers, law, order, and certainty are key. The Mi'kmaq have a slightly different understanding.

ii. *'We've Gotta Break the Law ... to Fight for Our Law'*⁴

Mi'kmaw self-determination is more than a legal concept. While it has been translated into a rights-based discourse, in the eyes of many Mi'kmaq, self-determination—and by extension the treaty rights—are undefinable because they encapsulate the Mi'kmaw 'inherent attachment to this place' which is 'about belonging to the land and the sea' (Interview 10; Borrows, 2002).

In some ways, the lobster fishery dispute has its roots in the awkward colonial semi-absorption of Indigenous sovereignty, which is now being recognized and remediated within a liberal constitutional framework. However, there are perceived limits to how much Mi'kmaw sovereignty can coexist alongside Canadian sovereignty. This was something that troubled one association representative:

how far do you take the self-determination is my worry. I mean, do you literally form another entity within Canada? (Interview 7)

The conventional mechanisms for dispute resolution and reform struggle to reconcile this 'butting of the two kind of structures' (Interview 9). In this context, non-Indigenous fishers' calls for law and order are seen by some Mi'kmaq as 're-colonization or further colonization' and a 'weapon in the repertoire' of discrimination (Interviews 2 and 3).

⁴ Stiegman and Prosper (2013, 8:34).

As some Mi'kmaw officials argued, the law protects a particular set of interests and status quo. The interviewed Mi'kmaw lawyers spend much of their everyday litigation fighting back against the 'criminaliz[ation] of the marginalized' (Interview 8). However, the law occupies an awkward position in Crown-Indigenous relations—simultaneously a tool of colonization and one of the most powerful constraints on state power. As the officials saw it, on paper at least, the law is on their side. If the 'DFO adhered to the law', they would recognize the Mi'kmaw 'self-government right to manage their rights' (Interview 5). Where the law is a useful tool to push for change, the Mi'kmaq are happy to work within the current legal structures:

we're using their laws against, that's the whole reason why I went to law school ... so that way I can understand their laws and use their laws against them for our own benefit. (Interviews 2 and 3)

However, when 'court pressure' proves insufficient, they look to create space otherwise (Interview 1).

The Mi'kmaw officials found that rights have not been 'implemented ... through that table between KMKNO and DFO' (Interview 5).⁵ Instead, implementation has occurred as a result of 'community members and bands saying "enough is enough"' (Interview 5) and playing a certain 'confrontational kind of role' which includes 'civil disobedience' (Interview 10). Some Mi'kmaw officials spoke of creating space in negotiations as a continuous process. In their view, government structures tend to resist accommodating Mi'kmaw self-determination which requires continual concerted action to break through:

Maybe in five years, we'll realize, "no, we're not there again". And then we will have to take the goalpost, and we will have to run with it again, and move it a little bit. (Interview 5)

⁵ KMKNO is the Mi'kmaw negotiator with the Canadian Government.

As one official argued, there is ‘enough flexibility in the current fishing regulations’ (Interview 1). The main issue is whether there is sufficient continuous ‘political pressure’ on the Government to change since the Mi’kmaq are ‘such a small population’ (Interview 1).

Yet, pushing for change requires the other side to give and creating pressure risks resistance. Citing opinion polls they conducted throughout Canada, the fishers’ association representatives were eager to point out the idea of the Mi’kmaq over-exerting political pressure, resulting in ‘pushback, not from the fishing industry, but ... in general’ (Interview 7). The unilateral assertion of a moderate livelihood fishery has also further damaged relationships at the community level. When things escalate, as one anonymous participant found, this undermines spaces for dialogue because it ‘impacts negatively the trust that—if we have any—that had been built’. In turn, this places a greater burden on the ‘few individuals who maintain good relationships’. These relationships are crucial to the everyday peaceful coexistence of Mi’kmaw and non-Indigenous communities. Some communities place more weight on this than others. As Bear River/L’sitkuk First Nation expressed during the height of the lobster fishery dispute in 2020:

Our communities worked tirelessly to build bridges and repair relationships with non-Mi’kmaq fishers and communities. Our children go to school with one another, we share communities with one another and often are families are connected to one another. All that work over the past few decades is quickly being eroded by others who will soon leave this area, leaving us to pick up the pieces.

There are, then, underlying tensions within Mi’kma’ki centered around key points of contention such as ‘when is enough enough’.

Though the association representatives were critical of the way some Mi’kmaw communities and officials’ actions had ‘caused this smite on the relationship’ between the Mi’kmaq and non-Indigenous communities, they did warn that, on both sides, ‘there’s a

tiny minority of vocal extremists speaking for the majority’ (Interview 6). While the representatives were careful not to endorse the vandalism, violence, and other uncivil acts of protest perpetrated by non-Indigenous fishers, they did understand from where the sentiments stemmed:

people were facing the destruction of their way of life that generations of their family had participated in. And a lot of our members were getting moved into the position of just not being sustainable or profitable anymore, because of the out-of-season fishing. And things got out of hand with ... largely the unaligned members. (Interview 6)

they shouldn't have burnt that property. The only problem is, nothing but illegal lobsters had been put in that property for X amount of years. (Interview 7)

When under enough pressure—as they did in response to the DFO’s plans to introduce quotas in 1995, as they did in 2020—some non-Indigenous fishers look beyond the ‘law and order’ discourse they would otherwise promote (Stiegman, 2007). Perhaps then, the differences between Mi’kmaq and non-Indigenous fishers are not as major as they seem at the surface.

VII. Allies Driven Apart

Despite major differences and in the face of mounting ecological, physical, economic, social, and historical pressures, a frequently-expressed sentiment was that there remains space for peaceful and fruitful coexistence. As one civil society representative put it, ‘my sense is that the barriers have more to do with the human structures rather than limitations in the biological biomass’ (Interview 10). In this Chapter, I assess the shared interests that might unite both sides, and to what extent these prospects have been damaged by recent events.

i. Shared Interests

In another universe, the Mi’kmaq and non-Indigenous fishers could have been allies. After all, they share many similarities in their experiences and interests.

First, the fishery holds a common socio-economic importance, and both communities have an interest in sustainably and ‘equitably shar[ing] the resource’ (Interview 6). Whether it be large fishing corporations or ‘the emergence of tidal energy generation’, there was a sense among the association representatives that their enemies were not the Mi’kmaq but were instead ‘in boardrooms in Houston and Ottawa and Toronto and wherever’ (Interview 6). Fishers’ associations and certain Mi’kmaw communities have, at times, been ‘powerful allies’ in resistance to major commercial interests (Interview 6). Some expressed that, in this sense, the lobster fishery dispute appears a case of ‘false consciousness’ straight out of Marxist theory:

One thing [the offshore fishery] arranged with the Federal Government from the very beginning of Marshall was that this was not going to hurt them. They said, “this is all on the inshore, this won’t touch us. In fact, we will benefit.” (Bull, 2020)

From this perspective, in the shadow of the dispute between the Mi'kmaq and non-Indigenous fishers, the corporate fishery is silently able to maintain a profit.

Second, both sides indicated that the Mi'kmaq might be able to learn from the fishers' associations. The LFA 34 lobster fishery has been communally managed since 1995. As such, the associations in the area have '35 years [experience] taking a fishery allocation that belongs to the community, not to any individuals, and like fairly and equitably sharing that out to our members without them fighting with each other about it or being mad at us' (Interview 6). In this respect, when *Marshall* came out, there was a sentiment of 'they want to manage it themselves? ... That's what we were trying to do' (Bull, 2020). As the association representatives indicated, they had hoped that they could share their expertise with the Mi'kmaq so that the Mi'kmaq might avoid the 'problems that we know they're gonna get into' (Interview 6). When the moderate livelihood fishery is envisioned as small-scale, owner-operator, and communally managed, there is a surprising amount of space for allyship and shared learning.

The association representatives and some Mi'kmaw officials spoke of a time when, based on solidarity and shared hope for a better future, their sides came together to support Mi'kmaw fishing. In the Spring of 2003, when the DFO was highly resistant to the idea of a moderate livelihood fishery and negotiations were at a standstill, Bear River could launch a pilot fishery (Stiegman 2007):

there was a brief instance ... where, in cooperation with the non-Native fishermen, Bear River went out, just to prove a point. And ... it wasn't us calling DFO, it was them [non-Indigenous fishers] calling. (Interview 8)

Though damaged, the relationship between Bear River and the non-Indigenous communities in their vicinity continues to this day and played a tempering role in 2020:

in the height of all of that [the events of 2020], on a quiet Sunday morning that no one really knows about, [Bear River] was presented with lobster traps because they knew [Bear River] were getting caught in the crossfire. (Interview 8)

In creating space for legal coexistence, it will be important to build upon what remains of these relationships. However, the space constrained by 25 years of conflict is currently under even greater pressure. In the next two sections, I outline two key pressures: co-optation and racism.

ii. Co-Optation

In November 2020, Clearwater Seafoods—one of North America’s largest seafood producers which controls most Nova Scotian offshore lobster licenses—announced its acquisition for 50% by a coalition of seven Mi’kmaw First Nations, among whom Sipekne’katik (Withers, 2020; Streep, 2024; Baxter, 2020). Clearwater has been kept out of the inshore fishery, though it does operate much infrastructure that the commercial fishery relies on to process and sell its catch. For many non-Indigenous fishers, ‘the Clearwater deal’ represented exactly what they were fearful of: the Mi’kmaq operating as a ‘new screen for a corporate takeover of our fishery’ (Interview 6).

On one hand, the takeover has constrained space for coexistence. The major commercialization of Mi’kmaw fishing has complicated Mi’kmaq-non-Indigenous fisher allyship in the struggle for a sustainable, resilient, and prosperous inshore owner-operator fishery, since the Mi’kmaq now also actively put pressure on that relationship through the offshore fishery:

“We had no problem slamming John Risley [former Clearwater owner],” ... “Do we do the same type of approach, where we’re calling out what is now an Indigenous-owned company ...?” Risley told a reporter, “No one is going to be talking about taking things away from the First Nations, and that is very good for the company.” (Streep, 2024)

On the other, from the point of view of many Mi'kmaq, the deal represents an important step towards economic reconciliation and financial independence for their communities. As Terrance Paul, Chief of Membertou First Nation put it, “this acquisition helps our children to think better about the future, and that they do have a future” (Julian, 2021). However, the takeover is also contentious at a deeper level.

The DFO's attempts to integrate moderate livelihood fishing into the conventional commercial fishery are one of the main drivers of the lobster fishery dispute. In two officials' eyes—one Mi'kmaw, one non-Indigenous—the DFO has attempted to impose a property-based approach, instead of a treaty-based one, because of its ideological preference for a ‘vertically-integrated, privatized corporate fishery’ (Interview 10). And, since it ‘would probably prefer to manage a few companies as opposed to hundreds of fishermen’ (Interview 8):

DFO says, “this is how this works”. “There is no other way to do it except to treat this as property.” And so the struggle to get in the fishery is about how much property you can get. (Interview 10)

As both officials agreed, colonialism and capitalism are ‘two sides of one coin’ (Interview 10). To them, it seemed that the Mi'kmaq were buying into that system with the Clearwater takeover—part of a longer process wherein ‘communal became code for company’ (Interview 8). In this capitalist system, the bands might become ‘treated ... as just another company’, stripping away the special status afforded under the treaties (Interview 8).

Kirsch (2007, p. 304) remarks that the speed is remarkable ‘with which capital now appropriates the terms of its critique’. Building on this, Coulthard (2014) demonstrates how, in the Canadian context, the ‘politics of recognition’ deflects and assimilates fundamental challenges to the colonial-capitalist system:

strategies that have sought independence via capitalist economic development have already facilitated the creation of an emergent Aboriginal bourgeoisie whose thirst for profit has come to outweigh their ancestral obligations to the land and to others. (p. 42)

Given this, despite the economic importance of the commercial fishery, some Mi'kmaw officials had doubts about the commercialization of the fishery:

other than having a share in the fishery that they've been denied for 200 and some odd years, ... my question has always been: why do we want equality in a system that has caused the inequality to begin with? (Interview 8)

The officials warned of 'co-optation' and 'participating into something that's not of your own' (Interview 8), though one civil society representative wondered whether this might be 'a corporate model in a good way' (Interview 10).

The commodification of the Mi'kmaw fishery is 'so entrenched now that it's going to be difficult to ever unpack that' (Interview 8). Though the Clearwater fishery is distinct from the moderate livelihood fishery, the market logics driving this 'conglomerate system' are more pervasive (Interview 8). As one Mi'kmaw official described with regards to the elver (baby eel) fishery:

you have the elder and even some young ... knowledge keepers really against ... disrupting and taking the babies. And us, of all people with the legacy of residential school, what has been happening in Canada with our children and so forth. ... it's just inherently wrong. (Interview 8)

Nevertheless, there was a hope among many of the Mi'kmaw officials that the 'resurgence of Mi'kmaw principles' (Interview 8) might be strong enough to counter 'the maximum exploitation that's been instituted for a millennium' (Interview 1; see also: Young, 2023). The extent to which this is possible and whether capitalism has fundamentally 'affect[ed] the substance of the law' is a matter of much debate in Mi'kma'ki (Interview 5).

At the end of the day, as one civil society representative found, 'that's something that has to come from within the communities themselves' (Interview 10). Perhaps, there is

a fine balance that can be found between, on one hand, maintaining a Mi'kmaw identity, and, on the other, harnessing the power of the capitalist-colonial system, in a Mi'kmaw way, to be a motor of economic development and reconciliation.

Regardless, for a long time, the picture was clearer concerning Mi'kmaq-non-Indigenous relations: major commercial interests and neoliberal policies were enemies of reconciliation and Indigenous legal self-determination. That has now become more complex.

iii. Racism

The role of racism in the lobster fishery dispute was another point of disagreement. The fishers' association representatives emphasized the pressures non-Indigenous owner-operator fishers face and argued that racism only was ancillary to the conflict:

some of the fishermen ... never had any criminal records in their entire life. Some of them were millionaires, owners of big businesses, employers, sports coaches, upstanding members of society in every other way. Why did they resort to criminal acts? ... I think that it shows that it wasn't simply a racist mob and that it was people who were defending their way of life, their community, their children's future. (Interview 6).

Concurrently, there was some disagreement among the Mi'kmaw officials. For some, the lobster fishery dispute was just 'the most racist people com[ing] out of the woodwork' (Interviews 2 and 3). For others, the role of racism was more nuanced:

I think it was racism but complicated by capitalism, because a lot of that was companies sending their workers ... there to protest the fisheries. It wasn't like independent fishermen saying "oh you're taking our livelihood". (Interview 8).

Irrespective of the centrality of racism in the events of 2020, the association representatives and Mi'kmaw officials agreed there was space for dialogue:

When people say, "it's impossible because there's so much racism", well, there's a parallel truth in that, but I know it's possible because I was there. And my friends

from the Mi'kmaq community were there, they'll say the same thing, and they know that that was totally within reach. (Interview 10)

However, in the representatives' eyes, the lobster fishery dispute has furthered racism and complicated dialogue. The dispute's livelihood and racist dimensions have 'overlapped now' and amplified one another (Interview 10). Among older generations of fishers, the 'inflammatory' media and political rhetoric accusing them of racism have forged 'a hardened battle mentality' (Interview 7). The representatives also found that increasingly bad stereotypes of the Mi'kmaq have had a marked effect on younger generations:

there are so many kids growing up in these communities, fishing communities, who're growing up with negative stereotypes about Indigenous fishermen. (Interview 6)

Nowadays, as one representative found, teenagers in their community were 'saying stuff I wouldn't dare think of' (Fieldnotes, 10 May 2024).

The dispute has had other long-term effects too. Some Mi'kmaw officials argued that, due to the dispute, their communities have been further racialized. They spoke of an increase in negative stereotypes, for example, of Mi'kmaw fishers as 'poachers' for 'practicing their treaty rights' (Interviews 2 and 3). The Mi'kmaw officials charged that these enhanced 'racist and discriminatory' stereotypes have resulted in an even more unequal system of enforcement (Interviews 2 and 3). This inequality has strongly colored Mi'kmaw fishers' opinion of the DFO and has begun to affect their relationship with other Government departments:

our fishermen will not call the Coast Guard... because that's who they see taking their gear, because it's Coast Guard boats that DFO uses when they do the enforcement. Or they're afraid that ... they're going to come and DFO's going to board the boat. (Interviews 2 and 3)

While racism may not have been the main issue in 1999, it has become a major problem which must be addressed if the two sides are to ever come together. Some Mi'kmaw

officials were pessimistic about these prospects since, perhaps, ‘that’s the nature of the beast’ (Interview 5). Nonetheless, in the final Chapter, I outline a good place to center attempts to bring the two sides together.

VIII. A Way Forward?

i. Deliberative Spaces

As a concluding question, I asked the interview participants whether they were hopeful for the future. Their answers were similar:

it's not going to happen in four years. It's going to take a long time. And it's going to take building those structures. ... often spaces that are not created, not governed and developed by the state, they're actually civil society spaces.
(Interview 10)

Mi'kmaw officials, association representatives, the DFO and civil society all agree on the importance of dialogue.

Post-Marshall, in southwest Nova Scotia, through the valuable contribution of boundary-workers, non-Indigenous and Mi'kmaw fishers were able to come together in a dialogue group. The group was well-attended with police, DFO, and KMK representatives also present. Though 'it wasn't designed to be a conflict resolution or ... mediation group', many of those involved credited it with the relative calm in southwest Nova Scotia in 1999 (Interview 6):

In the height of the protests with the fishermen in 1999, they asked ... former Chief Frank Meuse [of Bear River] to chair a meeting. And I don't know who called that meeting but there was no DFO there. So there was just I think it was Chief Debbie [of Acadia], some of our colleagues, and all these fishermen. And ... they had it kind of set up ... like you would expect, ... your Roberts rules meeting. He says "no", and he put everyone in a circle. He had an eagle feather with him and he conducted a talking circle. And the only qualification that he made before that was to, you know, "when you speak, you speak for your grandparents." And ... the dynamics changed. It wasn't about fish as property or commodity, it was the relationship to the fish. (Interview 8)

This story has now become a 'teaching story' (Bull, 2020). Many people on all sides were convinced that the lessons of the 'eagle feather story' could help guide towards a better future:

where I think it should start again is like a giant conference in Truro with like 300 fishermen, Indigenous and non-Indigenous alike, ... where we all get in a room and sit down and talk about things in a safe space. (Interview 6)

Such spaces for dialogue and interaction, distinct from the formal processes of negotiation and reform, are crucial to shaping the foundations for reconciliation (Montambeault *et al.*, 2020; Sokolić, 2020; Lee, 2022). Unfortunately, the dialogue group no longer exists. As some participants argued, one of the main issues was that it ‘became more of a higher level thing’ where ‘a lot of the actual fishery involved people weren’t there anymore’ (Interview 6). As such, ‘there’s no real dialogue taking place’ anymore (Interview 6).

Deliberative spaces may be dedicated structures for dialogue but may also simply be everyday interactions (Montambeault *et al.*, 2020; Sokolić, 2020). Through these interactions, otherwise major differences seem to fade. As one association representative put it, ‘you carry the same lunch down the same wharf, drag your butt back up the ladder at the same time, it builds mutual respect and trust’ (Interview 6).

A key problem is that many relationships have been damaged as a result of the dispute. Both sides disagree fundamentally on certain issues and space is more constrained than it was in 1999. There is need for community-level spaces to express frustrations at processes of change so that emotions can be handled productively. A good place to restart dialogue might be to again bring together ‘progressive thinking fishery leaders’ (Interview 6). Through deliberation, the Mi’kmaq and non-Indigenous fishers may find a balance and reduce the mistrust and sense of ontological conflict aggravated by the pursuit of economic reconciliation and development. Consequently, the two sides may become more familiarized with each another, share common experiences and goals, cooperate, or even become allies (Lederach, 1997).

Here, the wider and ongoing negotiation and reform processes come into view. On one hand, these will be crucial in creating a system of ‘participatory self-governance’ (Interview 10) or ‘collaborative process of co-management’ (Interview 5), as well as building a structure around the existing community-level spaces for dialogue and learning (Wiber and Kearney, 2009). On the other, there is a risk that this form of reconciliation will not involve a deeper structural reform. Coulthard (2014, p. 17), building on Fanon’s work, argues that in decolonial processes of mutual recognition and accommodation, the relationship will ‘usually end up being determined by and in the interests of the hegemonic partner’. Moreover, some Mi’kmaq officials and civil society representatives argued that in negotiations, the DFO operates in a ‘divide-and-conquer’ fashion, preferring negotiations with individual parties (Interview 10). The officials and representatives hoped that power differentials with the Government could be overcome through everyday allyship and deliberation:

one of the things that I don't think any Government wants to see is when you can transcend the boundaries that are put on you and come together as a people, as humanity, and stand up against the Government. (Interview 8)

Maybe, through everyday coexistence, a more egalitarian space can be created that moves beyond the hegemonic power of the state.

The creation of such space does not itself further the revitalization and autonomy of Mi’kmaq law. The association representatives expressed a vision that the Mi’kmaq ‘should be at the table to discuss science and how they are involved in the fishery’, but that these should be weighed against other—perhaps more ‘scientific’—forms of knowledge (Interview 7). Without addressing these attitudes, co-management might reimpose the straightjacket of ‘federal colonized type of processes’, again undermining the Mi’kmaq operating on their terms (Interview 1). As an alternative, in the next section, I outline what

it might take for all parties to develop trust and faith in a more equal coexistence and put legal pluralism into practice.

ii. Practicing Relational Legal Pluralism

To the Mi'kmaq, 'the treaties are sacred and ... go much beyond fishing' (Interview 8). Their fundamental promise is 'peaceful coexistence; being able to practice our rights, being able to fish, and ... also making sure there's enough resources for everybody' (Interviews 2 and 3). From the Mi'kmaw perspective, the treaties provide the bedrock upon which the continuing relationship between themselves and non-Indigenous Canadians is built; 'we are all treaty people' (see: Truth and Reconciliation Commission of Canada, 2015a; Mills, 2017). Part of reconciliation involves renewed mutual respect. In the spirit of this respect, perhaps it is time to also learn how to 'do things ... the Mi'kmaq way' (Interview 9).

Treaty is not just a noun, it is also a verb (Denny, 2022). Similarly to Mi'kmaw law, it is something that is lived and actively done—the mutual responsibilities and obligations all 'treaty people' have are continually reconstituted and reconsecrated through the everyday (inter)actions between individuals. This offers an entry into thinking about legal pluralism in the Nova Scotian lobster fishery.

Mi'kmaw law is not frozen in the past. It is actively adapting and being adapted to the 'ways of knowing and learning that we do now' (Interview 5). Self-determination, *netukulimk*, enforcement, sentencing, and sanctioning are all being actively (re)imagined and further institutionalized in Mi'kmaw life:

We're just not there yet. We're trying to identify compliance-based opportunities and then build processes and governance to allow community-based justice ... to be considered. (Interview 1).

In one way, Mi'kmaw law is dependent on the space granted to it to revitalize. In another way, that space is granted based on Mi'kmaw law's demonstrated capacity and effectiveness in ensuring social order and sustainable management of the fishery. Therein lies the paradox of the situation.

The opportunity to develop into a stand-alone system is a core component of legal self-determination (Coulthard, 2014; Simpson, 2017; McKerracher, 2023). Relational legal pluralism provides a roadmap to this self-determination in a plural context. As a reminder, relational legal pluralism refers to how plural legal orders 'are not completely separate from each other but instead are mutually constitutive' (Michaels, 2017, p. 115). In part, the relationship between Canadian and Mi'kmaw law is given form in the everyday. Practicing relational legal pluralism is not constitutive of Mi'kmaw law's factual status as law, but it will contribute to its external recognition (McKerracher, 2023). 'Radical resurgent organizing' (Simpson, 2017, p. 178) need not be contrary to everyday practices of coexistence if these are approached in a mutually respectful manner with an interest in shared learning and growing. In this way, Mi'kmaw law may gain external validity and further space for revitalization on its own terms and without prejudice to the state's colonial assertion of legal sovereignty.

A foundational step must be to recognize the existence of legal pluralism. By developing everyday deliberative spaces, non-Indigenous fishers may better understand, respect, and appreciate Mi'kmaw law as distinct from their own legal traditions (Anker, 2016; Borrows, 2002). Everyday practices of relational legal pluralism may be based on formal learning or more organic understanding of Mi'kmaw law, by seeing it work in practice. Small-scale acts of collaboration and community-based pilot initiatives may also

prove fruitful avenues to pursue, as they proved in the spring of 2003 (Stiegman, 2007). Over time, Mi'kmaw law may re-enter 'Canada's legal imagination', thereby slowly contributing to a change in political culture (Borrows, 2002, p. xii; Pictou, 2017). This has occurred to some degree within the DFO. Many DFO officials who 'would like to see changes happen for the betterment of people, including people who have rights in Canada' have become allies in the Mi'kmaw assertion of legal self-determination (Interview 9). All those involved in the fishery may together help forge the preconditions for a future wherein Mi'kmaw and non-Indigenous Canadian laws may peacefully coexist.

Decolonization is lived and continually reaffirmed and practicing relational legal pluralism must be similarly continuous. The relationship between the Mi'kmaq and non-Indigenous Canadians will not be easily re-founded. However, by continued everyday practice of relational legal pluralism, the relationship between Mi'kmaw and non-Indigenous Canadian law can become one of mutual recognition, not only hegemonic accommodation. The structures to achieve this need to be built, but the foundations already exist. As one civil society representative found, 'it's not like flicking a switch, it's more like gardening' (Fieldnotes, 14 May 2024). Taking this view, the lobster fishery may offer a way to 'garden' relational legal pluralism on a Nation-to-Nation basis.

IX. Conclusion

I came into this dissertation aiming to outline how, at a technical level, Mi'kmaw laws, ways of enforcement, and systems of justice might coexist with their non-Indigenous counterparts in the lobster fishery dispute. My fieldwork pulled me in a different direction. What I have attempted to demonstrate throughout the last eight Chapters is how this discussion cannot be separated from the wider context of colonization, resistance, politics, law, justice, governance, sustainability, economics and livelihood in which it is embedded. With changes in this context, legal pluralism might come more or less into view.

The matter of space is central to the struggle for legal pluralism. The revitalization of Mi'kmaw law is dependent on the space granted to it, yet simultaneously creates space by demonstrating its effectiveness. Given how important fishing is to Mi'kmaw culture and livelihoods, if appropriate space is granted, the fishery offers a great opportunity for legal revitalization and relational legal pluralism, on Mi'kmaw terms. However, this space has been hard to come by due to rigid legal structures and great conceptual and processual disagreements. In the face of these, at times, the lobster fishery dispute can appear zero-sum. Moreover, the present structures for dispute resolution and reform cannot reconcile the multiple directions they are being pulled in. Mi'kmaw attempts to go beyond conventional structures to further open up space have been largely successful, yet have had concomitant effects which require addressing.

The possibilities for relational legal pluralism exist in a somewhat bifurcated state. On one hand, while all these differences may at first seem insurmountable, they can be recast toward shared purpose and allyship in everyday deliberative spaces. I suggest that these build on pre-existing boundary-work, and what solidarity and shared interests remain.

In this way, differences begin to seem less stark and space for reconciliation is further opened up. On the other, what economic reconciliation has already been achieved has served to constrain space. This will be far harder to overcome since it has placed the Mi'kmaq and non-Indigenous fishers more directly in opposition, greatly damaged relationships, and aggravated racism.

In the face of this, space for legal pluralism will be created from multiple pressures, two of which I addressed in this dissertation. Wider processes of reform must determine the exact institutional arrangements and official tertiary rules of external recognition (Michaels, 2017). Just as important, however, should be an effort to refound the relationship between Mi'kmaw and Canadian law in the everyday, built on a renewed form of mutual respect and recognition of plurality. The space created through these continual practices of everyday relational legal pluralism and treaty will be crucial to the reconstitution of the relationship between the Mi'kmaw and Canadian legal systems on a Nation-to-Nation footing. This form of legal pluralism is a stepping stone along the longer process of reconciliation. In this way, the Nova Scotian lobster fishery may offer lessons to the many other contexts undergoing similar transitions throughout Canada.

I am confident that, at some point, these efforts will be successful. After all, everybody just wants to fish.

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Annex 1: CUREC Approval⁶

SOCIAL SCIENCES & HUMANITIES INTERDIVISIONAL RESEARCH ETHICS COMMITTEE

Research Governance, Ethics & Assurance Team, Research Services, University of Oxford,
Boundary Brook House, Churchill Drive, Headington, Oxford OX3 7GB, UK
Tel: +44(0)1865 289881 Email: ethics@socsci.ox.ac.uk



Student Name

Faculty of Law, Centre for Criminology
University of Oxford

21 March 2024

Dear **Student Name**

Research ethics approval

Research title: Regulating in (Post-)Colonial Transitions: Fisheries Disputes and Legal Pluralism in the Everyday in Nova Scotia

Research ethics reference: R92214/RE001

The above application has been considered on behalf of the Social Sciences and Humanities Interdivisional Research Ethics Committee (SSH IDREC) in accordance with the University's procedures for ethical approval of all research involving human participants.

I am pleased to confirm that, on the basis of the information provided to the IDREC, ethics approval has now been granted for this study for the period 4th March 2024 to 3rd September 2025.

Please note the following:

Personal data: It is the responsibility of the Principal Investigator to ensure that all personal data collected during the project is managed in accordance with the University's [guidance and legal requirements](#).

Fieldwork: The University's [Safety in Fieldwork Policy](#) must be followed.

Amendments: Please notify the committee if you intend to make any amendments to the information in your ethics application as submitted at date of this approval, as all changes must receive ethical approval prior to implementation. The **amendment form** is available on the [SSH IDREC webpage](#).

We welcome feedback on your experience of the ethical review process and suggestions for improvement. Please email any comments to ethics@socsci.ox.ac.uk.

Yours sincerely

DocuSigned by:

Yolande Monger

55238586303436...

Mrs Yolande Monger

Research Ethics Administrator

for

Jennifer Blaikie

Research Ethics Manager (SSH IDREC)

⁶ 'Regulating in (Post-)Colonial Transitions: Fisheries Disputes and Legal Pluralism in the Everyday in Nova Scotia' was the working title

Annex 2: MEW Approval



Date: April 15, 2024

Name: **Student Name**

University/Organization: Oxford

Dear **Student Name**

I wish to inform you that the Mi'kmaq Ethics Watch Committee has reviewed and approved your proposal for the study, "**Regulating in (Post-)Colonial Transitions: Fisheries Disputes and Legal Pluralism in the Everyday in Nova Scotia**".

As your project moves forward with the approval of Mi'kmaq Ethics Watch, I must note that the individual communities have their own perspectives on research projects, and it is your responsibility to consult them to ensure that you meet any further ethical requirements. Governments, universities, granting agencies, and the like also have ethical processes to which you may be expected to conform.

When your project is completed, the Sister Dorothy Moore L'nu Resource Centre at Cape Breton University would be pleased to accept the results in a form that could be made available to students and other researchers (if it is appropriate to disseminate them). Our common goal is to foster a better understanding of Indigenous knowledge.

If you have any questions concerning the Mi'kmaq Ethics Watch review of your project, please do not hesitate to contact me and I will forward them to the committee members.

Wela'liq,

A handwritten signature in black ink, appearing to read 'Laurianne Sylvester', is written over a light blue horizontal line.

Laurianne Sylvester
Dean of Unama'ki College
Cape Breton University

LS/zd



1250 Grand Lake Road, Sydney, NS, Canada B1M 1A2

CBU.ca

Annex 3: Consent Form⁷

PARTICIPANT CONSENT FORM (Interviews)

Central University Research Ethics Committee Approval Reference: R92214/RE001

Regulating in (Post-)Colonial Transitions: Fisheries Disputes and Legal Pluralism in the Everyday in Nova Scotia

Study Summary:

In Nova Scotia, questions of fisheries governance have been a polarizing topic, with efforts to build a more sustainable and ethical future having been ongoing for the last few decades. This dissertation aims to explore how all types of actors on the ground understand and integrate this reality into their work to regulate fisheries in Digby County. In other words, it is interested in how wider dynamics of change are taking place in the everyday life of officials, and how this has impacted their regulatory practices. This study is independent of any government or First Nations affiliation.

Please initial each box

1	I confirm that I have read and understand the information sheet for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily.	
2	I understand that participation is voluntary and that I am free to withdraw in whole or in part at any time before the data has been pseudonymized (within 10 working days of the interview date), without giving any reason, and without penalty.	
3	I agree to being audio-recorded during an in-person interview, or video-recorded during an online interview for the transcription of data. I understand that the interview cannot continue if I do not consent to this.	
4	I give permission for the use of direct quotations from the interview in the dissertation, and potential academic and policy publications, briefs and blogs, without being identifiable in the research output. If I do not consent to this, my data will still be used for analysis but will not be quoted or referred to directly in the final dissertation or any subsequent publications.	

⁷ Not the original formatting.

5	I understand that I am not required to disclose any potential criminal behaviour and that should I choose to share previously undisclosed criminal behaviour, the research team may be compelled to testify.	
6	I understand that I am not required to disclose sensitive issues, that my choice to disclose sensitive issues such as political beliefs is voluntary, can be retracted, and that, if necessary, the research team might provide me with resources for further help.	
7	I understand that research data collected during the study may be looked at by designated individuals from the University of Oxford where it is relevant to my taking part in this study. I give permission for these individuals to have access to this data.	
8	I understand who will have access to the personal data provided, how the data will be stored, and what will happen to the data at the end of the project.	
9	I understand that this project has been reviewed by, and received ethics clearance through, the University of Oxford Central University Research Ethics Committee, as well as the Mi'kmaw Ethics Watch.	
10	I understand how to raise a concern or make a complaint.	
11	I give permission for you to contact me again to clarify information provided during the interview, or for a follow-up interview at my discretion.	
12	I give permission for you to contact me again for potential future research (in the next five years).	
13	I give permission for you to contact me once the transcript of my interview has been completed, and for you to share the transcript with me for my approval.	
14	I agree to take part in the above study	

Name of Participant

Date (dd/mm/yy)

Signature

Name of person taking consent

Student Name

Date (dd/mm/yy)

Signature

Annex 4: Information Sheet

PARTICIPANT INFORMATION SHEET

Central University Research Ethics Committee Approval Reference: R92214/RE001

Regulating in (Post-)Colonial Transitions: Fisheries Disputes and Legal Pluralism in the Everyday in Nova Scotia

1. Introductory paragraph

You are being invited to take part in a research project. Before you decide it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully and discuss it with others if you wish. Ask me if there is anything that is not clear or if you would like more information on. Take time to decide whether you wish to take part.

2. Why is this research being conducted?

In Nova Scotia, questions of fisheries governance have been a polarizing topic, with efforts to build a more sustainable and ethical future having been ongoing for the last few decades. This dissertation aims to explore how all types of actors on the ground understand and integrate this reality into their work to regulate fisheries in Digby County. In other words, it is interested in how wider dynamics of change are taking place in the everyday life of officials, and how this has impacted fisheries regulation. In particular, it is interested in enforcement practices.

The dissertation will look to offer a greater understanding of the workings of a major and widely-known First Nations rights and Canadian fisheries governance issue. This is particularly relevant given that many other coastal communities in Canada are faced with similarly complex dynamics. While recognizing the importance of finding equitable, just and sustainable long-term solutions, this research can thus perhaps provide lessons for how the in-between space can be managed.

3. Why is this topic relevant to criminology?

Criminology is more than just the popular understanding as the ‘study of crime’. In a broader understanding, criminology is the study of why we make laws, why people break those laws, how we respond to people breaking those laws, and how we ought to respond to people breaking those laws. This dissertation is particularly interested in that first part. In simple terms, it wants to see what the ‘law(s) of the land’ is/are. What may be wrong or illegal to one may seem correct to another. In contexts of change where governance has become more uncertain, determining what rules people follow is particularly important. This dissertation hopes to do just that.

4. Is this study affiliated with a specific government or First Nations body?

This study is independent of any government or First Nations affiliation.

5. Why have I been invited to take part?

The researcher is looking to interview officials in Nova Scotia that hold a relevant office and are in any way involved in the regulation of fisheries in Digby County, Nova Scotia.

Such participants will be asked to talk about their understandings of changes taking place and how this has (not) impacted their work. More broadly, they will be able to offer insights into how regulating fisheries has changed in light of broader transitory processes.

6. Do I have to take part?

No. It is up to you to decide whether or not to take part. You can withdraw yourself from the study through a written communication at any stage, without giving a reason, and without any negative consequences. Upon withdrawal, the data collected will be deleted from the transcript and will not be analysed in the final dissertation. Moreover, a copy of the transcript of your interview will be shared with you once it has been completed. You will have the opportunity to retract any statements, or clarify any information. Where any paragraphs in the transcript have been deleted, the phrase ‘participant has withdrawn consent from the study’ will be inserted instead.

Once the data has been pseudonymized, it will no longer be possible to withdraw from the research. However, you will still be request changes to the pseudonymization at this stage, for example, if you feel that you could still be identified through the data.

7. What will happen to me if I take part in the research?

If you decide to take part in the study, you will be asked to sign a consent form. Participation will involve an interview lasting for a maximum of an hour-and-a-half, with the possibility for follow-up to clarify any potential questions. Interviews will preferably take place in-person, with an option to conduct an online interview on Microsoft Teams. Consent forms with a range of opt-ins and outs will be provided before the start of the

interview and can be offered in French or Mi'kmaw, though this has to be indicated in advance. The interview cannot continue without your written consent.

During the interview, you will be asked to answer roughly 10 questions on your work on fisheries regulation in Digby. The questions will mainly cover changes to fisheries regulation and how the Canadian government way of doing things has overlapped, interacted, and contested with Indigenous practices. These 10 set questions may be accompanied by no more than a maximum of 5 additional questions that aim to clarify information given in the interview.

With your consent, I would like to record the discussion (audio for in-person interviews, video for online interviews) so that I have an accurate record of the conversation for transcription purposes. Unfortunately, the interview will not be possible without recording.

You will be able to ask for a break or to stop the interview altogether at any time. After the initial rounds of interviews and observational research, you may be contacted once again for a separate follow-up interview that will be concerned with discussing patterns and questions emerging from the initial data analysis. You are welcome to decline participation in this interview, of course. Alternatively, you may also choose to only answer a few written questions. This second interview will be conducted online, should last no more than an hour and interview questions will be available in advance for you to read.

8. What are the possible disadvantages and risks in taking part?

The data collected will be pseudonymized, but there is a chance that you could still be identifiable, depending on what specific details you choose to mention during the interview

and whether you consent to be quoted. However, you will not be quoted directly in the final dissertation or any potential future publications without your explicit consent to this.

There will be no questions that require the participant to disclose any sensitive personal information, such as political views. Participants will only be interviewed about their personal experiences acting in their official capacities. However, participants are welcome to share any information they deem relevant to the interview, and are able to retract statements at a later date. Should such information be provided during the interview, the research team might suggest relevant resources or welfare options to participants if deemed necessary.

Furthermore, there will be no questions that require participants to disclose information on criminal behaviour. However, if you reveal previously undisclosed criminal behaviour, the research team reserves the right to report this to relevant authorities and may be compelled to testify.

As outlined in the list of interview questions, the researcher will ask questions that do not aim to compel participants to reveal information on sensitive issues.

9. Are there any benefits in taking part?

We anticipate no direct benefits to participants taking part in the study. However, participation in the research will help inform a better general understanding of fisheries regulation, and how transitions are experienced by officials on the ground, and will thus be of general societal, academic and potentially political benefit.

10. What information will be collected and why is the collection of this information relevant for achieving the research objectives?

During the research, identifiable data such as consent forms, contact details, interview recordings, transcripts, and any notes will be stored in a password-protected folder in the University of Oxford's secure cloud storage. After completion of the transcripts, all recordings will be deleted. Furthermore, all data will be pseudonymized through the assignment of a unique participant number to each transcript and recording. Pseudonymized transcripts and any other relevant data will be stored on an encrypted device on a password protected NVivo account, a platform used for the analysis of qualitative research. The researcher and academic supervisor will have access to the research data.

After completion of the dissertation, identifiable consent forms, transcripts and analyses will be securely stored for five years. Contact details will be stored insofar as you consent to this. If you consent, contact details may be retained for follow-up studies or potential collaborations in a password-protected drive, benefiting from two-factor authentication, accessible on an encrypted device for up to five years.

11. Will the research be published? Could I be identified from any publications or other research outputs?

The dissertation will be publicly available on the University of Oxford's Research Archive (ORA) and the Mi'kmaw Resource Centre at Cape Breton University.

Findings from this research may be written up based on the MSc dissertation and published in an academic article. Findings may also be used in policy and academic briefs, blogs, and presentations.

Similar for the dissertation, the data in this potential publication will be pseudonymized. This means that while names and organisation affiliation will not be mentioned in the dissertation, you might still be identifiable depending on what you disclose during the interview and whether you give consent to the researcher to use direct quotations.

12. Data Protection

The University of Oxford is the data controller with respect to your personal data, and as such will determine how your personal data is used in the study. The University will process your personal data for the purpose of the research outlined above. Research is a task that is performed in the public interest. Further information about your rights with respect to your personal data is available at: <https://compliance.admin.ox.ac.uk/individual-rights>.

13. Who has reviewed this study?

This study has received ethics approval from a subcommittee of the University of Oxford Central University Research Ethics Committee (Ethics reference: **R92214/RE001**), as well as the Mi'kmaw Ethics Watch at Cape Breton University.

14. Who do I contact if I have a question, concern about the research, or if I wish to make a complaint?

If you have a concern about any aspect of this study, please contact Jesse Loevinsohn at **Student.Name@crim.ox.ac.uk** or Prof. **Supervisor Name**, at **Supervisor.Name@crim.ox.ac.uk** and we will do our best to answer your query. We will

acknowledge your concern within 10 working days and give you an indication of how it will be dealt with. If you remain unhappy or wish to make a formal complaint, please contact the Chair of the Research Ethics Committee at the University of Oxford who will seek to resolve the matter as soon as possible:

The Chair, Social Sciences & Humanities Interdivisional Research Ethics Committee;

Email: ethics@socsci.ox.ac.uk; Address: Research Services, University of Oxford, Boundary Brook House, Churchill Drive, Headington, Oxford OX3 7GB.

15. Further Information and Contact Details

If you would like to discuss the research with someone beforehand (or if you have questions afterwards), please contact:

Student Name

Centre for Criminology, Faculty of Law

University of Oxford

Email: **Student.Name**@ethics@socsci.ox.ac.uk

Annex 5: Interview Protocols

Department of Fisheries and Oceans

1. Briefly, in what way you are involved in fisheries governance in Digby/Yarmouth County, and when did you first start working in fisheries governance?
2. What was fisheries governance like you first started working? Could you characterize what it was like before *Marshall*?
3. In your own words, what is the DFO's role in fisheries governance? How authoritative is it? How authoritative is it in relation to non-Indigenous fishers?
4. How does the DFO ensure compliance?
5. How have you personally/how has your office experienced the lobster fisheries dispute?
6. Has your work changed as a result of wider changes in the relationship between First Nations and the Canadian government? In what ways? Did this happen in real time or in a more diffuse manner?
7. How would you characterize fisheries governance in Digby/Yarmouth County now? What is the 'law of the land'?
8. How do you/does your office view First Nations fisheries governance, in particular its enforcement and processes of dealing with breaches? Do you have any worries?
9. How, if at all, does the DFO's regulatory ecosystem (for lack of a better word) interact with First Nations fisheries governance?
10. How have you negotiated and resolved any potential overlaps or disputes between these ecosystems? How did you reach that decision?

11. To what extent do you see ‘your’ way of regulating fisheries learning from indigenous practices and vice versa?
12. Would you say that these different regulatory ecosystems can be reconciled at a structural level into one system?

First Nations Government & Civil Society Officials

1. Briefly, in what way you are involved in fisheries governance in your community, and when did you first started working on fisheries governance?
2. What was fisheries governance like when you first started working? Could you characterize what it was like before *Marshall*?
3. In your own words, what is your First Nation’s/the Mi’kmaq approach to fisheries governance and enforcement and what sets it apart?
4. Why are governance over fisheries and fisheries enforcement so important to the Mi’kmaq?
5. How have you personally/how has your First Nation/have the Mi’kmaq Nations you work with experienced the lobster fisheries dispute?
6. In what ways has your work changed as a result of wider changes in the relationship between First Nations and the Canadian government?
7. In what ways are you/is your Nation/organization reviving/revitalizing Mi’kmaq legal practices and knowledge systems?
8. What is the ‘law of the land’ in the fisheries in your community’s fishery now and how would you characterize the DFO’s authority? What expectations do you have of the DFO?

9. What is your Nation's/the individual Mi'kmaq Nations' role in regulating fisheries or how does it envision this?
10. How does your regulatory ecosystem (for lack of a better word) interact with the DFO's? Does the DFO interfere with your regulatory ecosystem? Is there any dialogue or cooperation?
11. How have you interacted with non-Indigenous fishers in this pluralism?
12. How have you negotiated and resolved any potential overlaps or disputes between these ecosystems? How did you reach that decision?
13. Would you say that these different regulatory ecosystems can be reconciled at a structural level into one system?

RCMP Officials⁸

1. Briefly, in what way are you involved in fisheries governance in Digby/Yarmouth County, and when did you first started working on fisheries governance?
2. What was fisheries governance like when you first started working for the RCMP? Could you characterize what it was like before *Marshall*?
3. How would you characterize fisheries governance in Digby/Yarmouth County now? What is the 'law of the land' and what is the RCMP's role in enforcing it?
4. What expectations do different actors and communities have of the RCMP in the fisheries?
5. How is your relationship with other actors involved in fisheries governance? How is the RCMP's authority in the fisheries?

⁸ Though originally included in the research design, no RCMP Representatives agreed to an interview.

6. To what extent do you feel that your work has changed or is changing as a result of wider changes in the relationship between First Nations and the Canadian government?
7. How have you personally/how has the RCMP experienced the lobster fisheries dispute?
8. Have there been more situations for you to respond to since 2020? How have you responded to these?
9. How do you view the First Nations fisheries governance ecosystem (for lack of a better word)?
10. Have you seen any on-the-ground interactions between the First Nations and Canadian government's ways of regulating fisheries and, if so, how do you experience these?
11. How have you negotiated and resolved manifestations of overlaps or disputes between these ecosystems? How did you reach that decision?

Fisheries Associations

1. Briefly, in what way you are involved in fisheries governance in Digby/Yarmouth County, and when did you first started working on fisheries governance?
2. What was fisheries governance like when you first started working? Could you characterize what it was like before *Marshall*?
3. In your own words, what is your approach to fisheries governance and enforcement? What sets it apart from First Nations ways of doing things?

4. How does your approach align with DFO's? What is your relationship with them?
What expectations do you have of them?
5. Why are governance over fisheries and fisheries enforcement so important to your association?
6. How has your association/have your members experienced the lobster fisheries dispute?
7. In what ways has your work changed as a result of wider changes in the relationship between First Nations and the Canadian government?
8. How would you characterize the DFO's authority with regards to First Nations?
9. How do you view Mi'kmaq revitalizing their legal practices and knowledge systems? Do you think there's space for that?
10. How do you view it in particular with regards to Mi'kmaq enforcement and processes of dealing with breaches? Do you have any worries?
11. How does your 'way of doing things' (for lack of a better word) interact with the First Nations'? Is there any dialogue or cooperation?
12. How have you negotiated and resolved any potential overlaps or disputes between these ecosystems (in the everyday)? How did you reach that decision?
13. Would you say that these different regulatory ecosystems can be reconciled at a structural level into one system? How do you envision these systems coexisting?