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Treaty Education Resource for Nova Scotia Teachers

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Section 1: Introduction and Purpose



Section 1: Introduction and Purpose

This *Resource* was created under a Treaty Education partnership between the provincial government, Mi'kmaw Kina'matnewey, and Millbrook First Nation. The partnership was established in 2015, and renewed in 2020, to create "opportunities for Nova Scotians to learn about Mi'kmaq, their inherent Aboriginal and Treaty Rights, and our shared history. It promotes an understanding of the Peace and Friendship Treaties as historical and living documents" (Treaty Education Nova Scotia 2017).

The work of Treaty Education is based on four questions:

- Who are the Mi'kmaq historically and today?
- What are the Treaties and why are they important?
- What happened to the Treaty Relationship?
- What are we doing to reconcile our shared history to ensure justice and equity? (Treaty Education Nova Scotia 2017)

Students and teachers in Nova Scotia's schools need—and deserve—a better understanding of Mi'kmaq, their history as a People, their inherent Treaty and Aboriginal Rights and Mi'kmaw Title, and their contributions to Nova Scotia and Canada. This *Treaty Education Resource for Nova Scotia Teachers* is a foundation document to give teachers reliable and contemporized information on these topics so they can introduce them confidently into their classes. The intent of the *Resource* is to inform and support teachers at all levels in Nova Scotia, no matter their discipline, so they can facilitate informed discussions in their classrooms. We hope this *Resource* will enrich the teaching and discussion of current issues and history of Mi'kmaq, their Treaty and Aboriginal Rights, and Mi'kmaw Title in Nova Scotia.

Marie Battiste, Mi'kmaw scholar and editor of the comprehensive collection of essays *Living Treaties: Narrating Mi'kmaw Treaty Relations*, wrote about the lack of reliable information about Mi'kmag in Nova Scotia schools.

For many generations, most of the children in Atlantic Canada have learned historical and ideological misinformation and have not learned much about the Mi'kmaq Nation and its Treaties. While they are taught the relations between the federal government and the provinces, they are not taught about the idea of Treaty Commonwealth or Federalism that continues, against all odds, to live as the supreme law of Atlantic Canada. They do not understand the ongoing constitutional

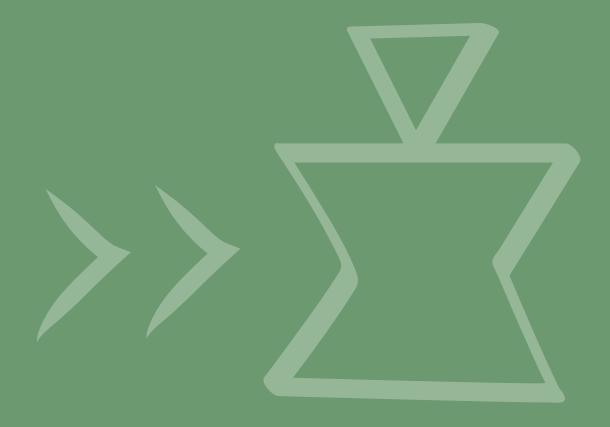
relationship that needs to be reconciled and implemented. One old saying comes to mind and is useful here: while the truth, at first, may make one uncomfortable, it will eventually set one free. The treaties are about sharing what the Mi'kmaq had in abundance and the idea of equal opportunity through trade and respecting human rights. They are not about military conquest, "might makes right," or other theories leading to injustice. Mi'kmaq and Atlantic educators need to rewrite the curriculum so that all our children understand the importance of the Treaty process and how it has created the baseline of democracy and respect for the land. (M. Battiste 2016, 8–9)

The Report of the Royal Commission on Aboriginal Peoples (RCAP) (1996) offers a helpful framework for understanding what is being reconciled in the 21st century. The authors divide the history of Indigenous Peoples in North America and European colonization into four stages:

STAGE 1	STAGE 2	STAGE 3	STAGE 4
SEPARATE WORLDS	CONTACT AND COOPERATION	DOMINATION AND ASSIMILATION	RENEWAL AND RENEGOTIATION
Before 1600 CE	1600 – mid 1800	Mid 1860 – mid 1950	Mid -1950 - PRESENT
Indigenous and non- Indigenous societies developed in isolation from each other. National groups with long traditions of governing themselves	Initial contact between Indigenous Peoples and Europeans characterized by cooperation, nation-to- nation negotiation of Peace and Friendship Treaties, trading and military alliances. Steep growth in European population numbers; sharp decline in Indigenous numbers	Attempts to destroy Indigenous distinctiveness: relocations, residential schools, outlawing of Indigenous cultural practices	Recovery and renewal for Indigenous Peoples and cultures, renegotiating relationships and Rights with colonial governments and settlers



Section 2: Mi'kmaq. Separate Worlds.



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Overview

The Royal Commission on Aboriginal Peoples characterizes the thousands of years before Europeans arrived as a time of separate worlds.

In the period before 1500, Aboriginal and non-Aboriginal societies developed in isolation from each other. Differences in physical and social environments inevitably meant differences in culture and forms of social organization. On both sides of the Atlantic, however, national groups with long traditions of governing themselves emerged, organizing themselves into different social and political forms according to their traditions and the needs imposed by their environments. (RCAP vol.1 1996, 41)

Mi'kmaw Territory and System of Districts

Mi'kmaq, Wolastoqey (Maliseet), and Peskotomuhkati (Passamaquoddy) inhabited what are now the Maritime Provinces for thousands of years. In their book *The Language of This Land, Mi'kma'ki, Mi'kmaw linguist Bernie Francis and settler researcher Trudy Sable wrote*

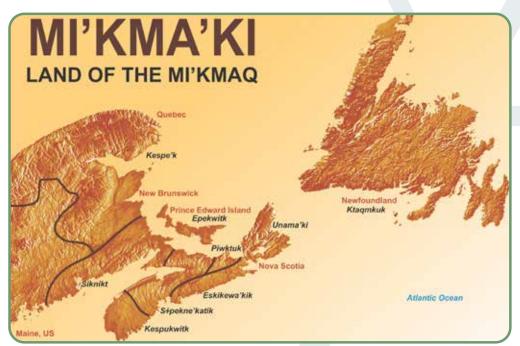
Mi'kmaw place names, along with legends and oral histories, attest to approximately 11,000 years of Mi'kmaw ancestral presence in Eastern North America, as evidenced in the ongoing excavation at Debert in central Nova Scotia, the earliest site of human habitation in Eastern North America. (Sable and Francis 2012, 19)

Mi'kmaq lived in the territory of Mi'kma'ki, which, in Canada, includes lands now known as:

- Nova Scotia
- Prince Edward Island
- Eastern New Brunswick
- Newfoundland, and
- · Gaspé, Quebec.

The word Mi'kmag comes from the Mi'kmaw term nikmaq, "my kinfriends." Mi'kmaq are one of the groups of First Nations of northeastern North America known as People of the Dawn (Nova Scotia Museum, n.d.). Mi'kmag was the name given to the Nation by Europeans. Mi'kmag call themselves L'nu, which means "People of the Same Tongue" or People Who Speak the Same Tongue" (Young 2020a)

There is also a Mi'kmaw Tribe in Maine (Aroostook Band of MicMacs 2021).



Map of Mi'kmaki. Courtesy of the Mi'kmawey Debert Cultural Centre.

Mi'kmaw territory was divided into seven districts or sakamowati that followed naturally existing drainage systems of the principal river systems (Sable and Francis 2012, 20). The districts were the following:

- Unama'kik and Ktaqmkuk ("across the waves/water")—Cape Breton Island and Newfoundland
- Epekwitk aq Piktuk—Prince Edward Island ("cradled above water") and Pictou ("explosion place"), PEI and the lowland area along the Northumberland Strait
- Eskikewa'kik—Atlantic coast east of Sheet Harbour to Canso
- Sipekne'katik ("area of wild potato/turnip")—Shubenacadie District and Minas Basin Coast
- Kespukwitk ("end of flow")—the area west of the La Have River to Yarmouth/Cape Sable, in south/southwestern NS
- Siknikt ("drainage area")—Miramichi River, Acadian Coast and Bay of Fundy
- Kespek ("end of land") —east of the Saint John River Valley where the watersheds flow into the Bay of Chaleur and the Northumberland Strait
- (Sable and Francis 2012, 21; Union of Nova Scotia Indians, The Confederacy of Mainland Mi'kmaq, and Native Council of Nova Scotia 2007).

Ecological Understanding and Worldview

Mi'kmaq have deep knowledge of the climate, plants, and animals in each of these districts. For example, in *The Language of This Land, Mi'kma'ki*, Sable and Francis highlight Mi'kmaw ethnographer Roger Lewis' research into Mi'kmaw eel weirs in Nova Scotia. The variety of weirs is one of many examples of Mi'kmaw understanding of the seasons and physiographic conditions.

Each weir construction was dependent on the migration patterns of different fish species, and the various physiographic and climatic conditions that affected their behaviour, including water levels, moon phases and temperatures. (Sable and Francis 2012, 22)

Mi'kmaq believe in a supreme being and that the sun and moon are manifestations of the Great Spirit. The Great Spirit Kluscap (which has several spelling variations including Gloos) was human in form with supernatural powers: Kluscap created the land inhabited by Mi'kmaq and instructed the people in making tools and weapons. Before departing earth, Kluscap foretold of the coming of the Europeans and promised to return (Miller 1995, 360, as cited in McMillan 1996, 25).



Kluscap Partridge Island. Artwork by Gerald R. Gloade (Millbrook First Nation), Program Development Officer for the Mi'kmawey Debert Cultural Centre.

Mi'kmaq believe that all matter, animate and inanimate, is imbued with life. Mi'kmaq were taught that the spark of life in living things has three parts: a form that decays and disappears after death; a mntu or spark that travels after death to the lands of the souls; and the guardian spark or spirits that aid people during their earth walk. While the form is different, all mntu and guardian spirits are alike but of different forces. No human being possessed all the forces, nor could human beings control the forces of the stars, sun or moon, wind, water, rocks, plants, and animals. Yet they belong to these forces, which are a source of awe, and to which entreaties for assistance are often addressed (RCAP vol.1 1996, 50).

To Mi'kmaq, all essences contain intelligence and should be respected; this special consciousness led to a carefulness with all things. For example, when plants are harvested, a small offering of tobacco is placed at their base, which feeds the mntu (RCAP vol.1 1996, 51). When animals die, the mntu goes into the ground with its blood and the animal reincarnates from the ground. Each human too--whether male or female, elder or youth--has a unique gift or spark and a complementary role in Mi'kmaw society. And each human needs the cumulative knowledge and wisdom of previous generations to survive successfully in a changing environment (RCAP vol.1 1996, 52).

Sable and Francis explain the Mi'kmaw worldview this way.

Personal and reciprocal relationships extended to animals and other objects considered inanimate in Western world view, such as rocks, mountains, certain stages of the production of wood products, winds, weather and so forth [...] This implies that one's relationship to the world, and its many energies and the forms that energy took, required a kind of respectful vigilance of the various forms of power, which in turn required proper conduct depending on the relationship one had with them. (Sable and Francis 2012, 24)

The Role of Women

You can listen to Mi'kmaw Elder Jane Meader describe women's role in the Creation Story, and in Mi'kmaw culture and society as a whole here:

Corwin Mintz, Tahila, and Jane Meader. 2016. *Mi'kmaq Creation Story – Woman of the Water*. 3 min. 14 sec. https://youtu.be/oCVIUYID3qs



Jane Meader and daughter Paulina Meader
Jane teaches at St. Francis Xavier University and Cape Breton University. Key
educator in her home community of Membertou. Mi'Kmaw Language Coordinator
for the Membertou Band Council, Mi'kmaw Language Advisory Committee for
Mi'kmaw Kina'matnewey, advisor to the Nova Scotia Department of Education
in Mi'kmaw Studies and Treaty Education. Paulina is an ER nurse at Dartmouth
General, and presents with frequently with her mother

Mi'kmaw Language

The Mi'kmaw language is part of the Algonquian linguistic family that includes Cree, Delaware, and Ojibway, among many others. It is an intricate, verb-based language compared in complexity to Latin. The Mi'kmaw language centres on the action rather that the object, which is the case for English (Sable and Francis 2012).

While most Indigenous North American languages were exclusively oral, some Nations like Mi'kmaq developed symbolic systems. The Mi'kmaw language used hieroglyphics, or characters that symbolize an idea or a thing rather than the sequence of sounds in its name. Each character represents a concept, which can be expressed orally with one or many words. The written language is called Komqwejwi'kasikl (suckerfish writings). In the 17th century, the ideograms were adapted by the priest Christien Leclercq, whose prayer books and catechisms were used for over a century (Mi'kmaw Spirit 2020).

In the latter half of the 1800s, Baptist the National missionary Silas Rand documented the Mi'kmaw language. He wrote admiringly of its complexity.

Soldie To The So

A Mi'kmaq hymnal written Komqwejwi'kasikl (suckerfinsh writing). Sipekne'katik First Nation. From the collections of the National Museum of the American Indian.

The language of the Indians is very remarkable. [. . .] it is copious, flexible and expressive. Its declensions of nouns and conjugation of verbs are as regular as the Greek, and twenty times as copious. The full conjugation of one Micmac verb will fill quite a large volume [. . .] Whole sentences, and long ones too, occur constantly, formed wholly of verbs. [. . .] any noun can assume the form and nature of a verb without difficulty. (Rand 1894 as cited in Sable and Francis 2012, 28–29)

Between 1974 and 1980, Mi'kmaw linguist Bernie Francis and settler linguist Doug Smith researched and developed a new orthography based on the phonemic principle. The orthography, known as the Francis/Smith system, is used throughout Nova Scotia, Newfoundland, Prince Edward Island, and parts of New Brunswick (Union of Nova Scotia Indians, The Confederacy of Mainland Mi'kmaq, and Native Council of Nova Scotia 2007). In 1998, the Grand Council declared it the official orthography of the Mi'kmaq Nation.

```
A a Sounds like A in Amen
                            Ó ó Sounds like O in Go
                                                                              S s Sounds like S in Sit, Was
E e Sounds like E in Met
                            Ú ú Sounds like U in Sue
                                                                              L I Sounds like L in Like, Fee!
I i Sounds like I in Bit
                            † † (schwa) Indistinct, like second O in Common
                                                                             M m Sounds like M in Me, Him
O o Sounds like O in Also
                            P p B as in Ball, P as in Put*
                                                                              N n Sounds like N in New, Can
U u Sounds like U in Put
                            T t D as in Dog, T as in Toy*
                                                                             W w Sounds like W in Will, How
Á á Sounds like A in Palm
                            K k G as in Go, K as in Cake*
                                                                              Y y Sounds like Y in Yes, Grey
É é Sounds like E in Where Q q A guttural sound as in the German word Bach
Í í Sounds like I in Ski
                            J j J as in Jim, Ch as in Church*
```

Official Francis/Smith orthography of the Mi'kmag Nation

Mi'kmaw Governance and Political Alliances

Mi'kmaw society at the time of contact was structured with a coherent system of government. Mi'kmaw leaders used diplomacy with other First Nations and traded along the east coast of North America. Chickasaw and Cheyenne lawyer and activist James Youngblood (Sa'ke'j) Henderson wrote:

They followed the rivers of the continent to create new forest village sites, as well as coastal villages. By the tenth century B.C., a large number of the Nikmaq [sic] chose to organise themselves into a spiritual and interactional community. Their fidelity to the community was labeled "Mikmaq"—the unpossessive core of "Nikmaq"—which referred to all allied peoples. The term distinguished the spiritual-political community from those of other Algonquian speakers in North America. (J. S. Y. Henderson 1995, par.36)

There is uncertainty about when Mi'kmaw governance systems were initiated, but they were in place when Treaty negotiations began with Europeans.

Neither European adventurers nor missionary priests of the seventeenth century who encountered the sacred order of the Mikmaq (Mikmaki) perceived an unorganised society. They did not find the anarchy that their state of nature theory presumed. Instead, they reported a natural order, with a well-defined system of consensual government and both an international and domestic law. While the Mikmaq order was built on different premises from European society, about sources of authority, upward from the family unit rather than the downward monarchic state, a coherence was achieved in their transnational goals. (J. S. Y. Henderson 1995, par. 33)

Family and Community Governance

Mi'kmaw society was focused on the family and the community. People lived in small family groupings and moved with the seasons in search of fish and game; they lived in the coastal areas during warmer months and inland in colder months.

Mi'kmaw scholar Marie Battiste writes about how communities formed.

The size of these divisions depended on the size of the families and on the abundance of game and fish. The Míkmaq were neither settled nor migratory. The environment of their birth has always been best suited to seasonal use, so that, compatible with the rhythm of the earth, a family was responsible for a hunting ground, a fishing river or waters and a planting home, and traveled to other resources through the year. These families formed several small gatherings or councils that came together in the form of the Mawiómi. (Battiste in J. S. Y. Henderson 1997, 17)

Mi'kmaw family units included members of the mother and father's lineages. Several family groups together formed a community, and each community had a Chief or Saqmaw who headed a Council of Elders (Hoffman 1955, 516, as cited in McMillan 1996, 28). Family alliances were significant in determining Chieftainship, which was usually hereditary (McMillan 1996, 34).

Settler legal anthropologist and professor Jane McMillan writes:

The eldest son of a Chief began training at an early age in order to meet the requirements expected of him if he was to receive the position of Chief. If the eldest son of a Chief did not demonstrate the expected qualities of leadership or there were no male children directly descended from the Chief, the Chief would go to his sister and ask her son. Thus, extended family networks were important. (McMillan 1996, 34)



1791. Possibly Tufts Cove, Family group by Binney. First known image of woodsplint basket. Nova Scotia Museum, Halifax

Historically, Mi'kmaq practiced polygamy, which allowed Chiefs to expand their networks of followers and alliances with other family groups. The greater the family size, the greater the contributions to the Chief, which improved his ability to redistribute goods to a larger number of people. Fulfilling such economic roles would enable the Chief to gain respect needed in matters of war and other chiefly duties (McMillan 1996, 35).

The Confederacy of Mainland Mi'kmaq (CMM) concurs that "[. . .] the position of Chief was normally passed on to the eldest son of the former Chief. The eldest son, however, had to be worthy. Otherwise, some other male in the same family group would get the job" (The Confederacy of Mainland Mi'kmaq 2007, 12).

District and Nation-Level Leadership and Governance

Together, a group of local Chiefs or Saqmaq chose a District Chief, or Keptin. The District Keptins, the Kji-saqmaw (Grand Chief), the Kji-keptin (Chief Keptin), and the Putus (Treaty Holder, Wampum Keeper, Storyteller, Counsellor) comprised the Santé Mawiomi or Grand Council of the Mi'kmaq. Up until 1918, the Grand Chief (Kji-saqmaw) was a hereditary position. The last *hereditary* Grand Chief was John Denny Jr., who died in 1918. The Grand Council met that year during St. Anne's Mission and selected Gabriel Sylliboy as the new Grand Chief (The Confederacy of Mainland Mi'kmaq 2007; McMillan 1996, 99–100).

Early writers did not provide evidence that there was ever a female Chief on the Grand Council. (McMillan 1996, 32–33) However, Sherry Pictou, Assistant Professor at Dalhousie University's Schulich School of Law, is, in 2021, an honorary Grand Council member. Pictou is former Chief of L'sitkuk (Bear River First Nation), former Co-Chair of the World Forum of Fisher Peoples, a member of the IPBES Task Force on Indigenous and Local Knowledge, and a Partnership Grant holder with KAIROS looking at gendered impacts of resource extraction in Indigenous communities in Canada.

At these Grand Council gatherings, Mi'kmaq organized their within-Nation affairs in social, ecological, economic, and ceremonial matters, as well as their interactions with other Indigenous Nations in matters of war and trade (McMillan 1996, 33). The Putus recorded events in Wampum Belts. Jane McMillan writes:

The wampum belt was generally applied to the different parts of a speech, or the different articles of a treaty; and on great occasions, when these belts were brought forth, individuals were found who, by memory or tradition, could explain each section of the precious girdle [. . .] (Gesner in Whitehead 1991, 231, as cited in McMillan 1996, 25).



Hereditary Chief Henri Membertou (1507–18 September 1611) was the Kji-saqmaw (Grand Chief) of the Mi'kmaq Nation and lived near Port Royal. Illustration by Gerald R. Gloade (Millbrook First Nation), Program Development Officer for the Mi'kmawey Debert Cultural Centre.



Sherry Pictou, Assistant Professor of Law and Management; Canada Research Chair in Indigenous Governance, Schulich School of Law, honorary honorary District Chief for the Confederacy of Mainland Mi'kmaq

Henderson comments on the 1616 writings of Father Biard, a Jesuit Priest, about the Mi'kmaw governance system he observed.

He noted the seven geographical hunting districts that comprised their national territory, roughly forty-seven thousand square miles in modern Atlantic Canada, from Newfoundland to Quebec and northern Maine. He commented on the Mikmag's continued use and regulation of their lands and territorial waters. Like other Europeans, he was amazed at how the commonwealth was bound together by councils, held at all levels of Mi'kmaq society, from the local family to the extended families at a regional level. (J. S. Y. Henderson 1995, par.35)

Henderson describes the multi-level governance system this way:

The Sakamow [chiefs] had collective responsibility along with the "saya" (leaders of many extended families) and "kaptins" (community spiritual leaders), to guide districts in all matters. On a daily basis these leaders, as heads of families, created order and continuity in governance. Each Mi'kmaw was represented by these leaders. In fact, the oral tradition insisted that everyone participated in all decisions of the "wikamou," the regional and local councils. (J. S. Y. Henderson 1995, par.37)



Gabriel Sylliboy, born ca 1864, photographed in 1930, son of Mary Barrington (widow of Benjamin Basque) and her second husband, a Sylliboy. First elected Grand Chief of the Mi'kmaq Nation. Well-known and respected. 1942 moved from Whycocomagh to Eskasoni, where he died in 1964. [Chronicle-Herald. Halifax, N.S., 6 March 1964:15. Information courtesy of Boyce Richardson.]

Nation-to-Nation Governance

Mi'kmaw legal scholar Naiomi Metallic writes:

[...] the Mi'gmaq have a unique and distinct political relationship with other nations, within their confederacy, and within the broader indigenous political community. These traditions continue today. (Metallic 2016, 48)

Beginning in the late 17th century, the Mi'kmaw Nation was a member of the Wabanaki Confederacy. The Confederacy was a coalition of the Mi'kmaw, Wolastoqey, Peskotomuhkati, Penawahpskewi, and Abenaki Nations (McMillan 1996, 27–33).

Settler anthropologist Harald Prins writes about the purpose of the Wabanaki Confederacy.

The Wabanaki Confederacy was more than a political alliance. It was also a cultural agency, ritually bonding different and even formerly hostile groups. At special gatherings chieftans and ambassadors discussed common issues and forged agreements. (Prins 2002, 212)

A potent force for some two hundred years, the Wabanaki Confederacy played a crucial role in the long struggle for aboriginal rights in Northeast America. But, this confederacy was more than a political alliance—it represented a sacred bond of Algonquian brotherhood. Remarkable in its achievements, this institution has a legacy, which is of relevance for contemporary Wabanaki politics and must therefore not slip from memory. (Prins 1999, 1)



Map of Wabanaki Confederacy.

Do these Centuries-Old Governance Systems Still Exist?

The *Indian Act* of 1876 gave the Canadian government the right to impose an Anglo-Canadian municipal style of government on First Nations governments. In 1899, the band council system was implemented in Mi'kma'ki and Wolastoqiyik. Settler scholar Martha Walls studied this attempt, and the resistance it met.

In 1899 the federal government aimed to bolster its control over the political affairs of Mi'kmaw and Wolastoqiyik communities with the application of the triennial system of band elections, a federally orchestrated system of elected chiefs and councillors that was intended to undermine traditionally named leaders. The triennial system was received variously, and by no means universally, by First Nations – and it certainly did not undermine their existing political systems. (Walls 2017, 165)

In her book *No need of a Chief for this Band: the Maritime Mi'kmaq and federal electoral legislation*, 1899–1951, Walls documents how many Mi'kmaw communities resisted the imposed structures; even communities that accepted triennial elections did so to meet specific community needs and goals.

Every three years, male community members aged twenty-one and older were obliged to assemble under the supervision of the local Indian agent – the official tasked with implementing federal policy at the local level – to nominate and elect a community chief and a set number of councillors. For more than half a century, until the 1951 Indian Act ushered in new band election rules, Ottawa attempted to supplant local Mi'kmaw political practices by foisting the triennial system on the Mi'kmaq of the Maritime provinces. For more than half a century, these efforts failed [. . .]

Between 1899 and 1951, Ottawa was unable to impose its political framework on the Mi'kmaq because Mi'kmaw communities variously accepted, rejected, ignored, and/or amended the legislation aimed at dictating their political behaviour. [. . .] Nor did the new rules displace old Mi'kmaw political forms or prevent the creation of new ones; the Mi'kmaq continued to rely on definitively Mi'kmaw political practices, both old and new, that distinguished them from their Euro-Canadian neighbours. (Walls 2011a, 1–2)

[. . .] reactions to the prospect of a new federally directed political system were multi-faceted and complex. Resistance coexisted with accommodation. (Walls 2011a, 7)

In the 21st century, First Nations have been building their Nations and Alliances using models of organization that make sense for them now. Today the spirit of the Confederacy can be found in the Atlantic Policy Congress (APC) (McMillan 1996, 33). The APC, incorporated in 1995, is a policy research and advocacy organization representing Mi'kmaq, Wolastoqey, Peskotomuhkati, and Innu Chiefs, Nations, and Communities (Atlantic Policy Congress 2021).



Additional Resources

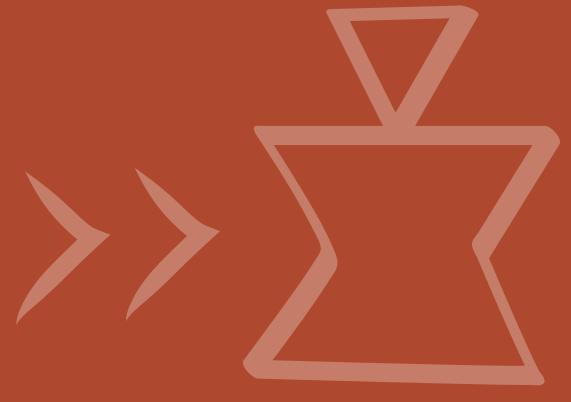
Cape Breton University. 2007. "Mi'kmaw Timeline." Mi'kmaq Resource Centre. https://www.cbu.ca/indigenous-affairs/mikmaq-resource-centre/mikmaq-resource-guide/mikmaw-timeline/

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Section 3: Contact and Cooperation Period (1600s to mid-1800s)



Section 3: Contact and Cooperation Period (1600s to mid-1800s)

STAGE 1	STAGE 2	STAGE 3	STAGE 4
SEPARATE WORLDS	CONTACT AND COOPERATION	DOMINATION AND ASSIMILATION	RENEWAL AND RENEGOTIATION
Before 1600 CE	1600 – mid 1800	Mid 1860 – mid 1950	Mid-1950 - PRESENT
Indigenous and non-Indigenous societies developed in isolation from each other. National groups with long traditions of governing themselves	Initial contact between Indigenous Peoples and Europeans characterized by cooperation, nation-tonation negotiation of Peace and Friendship Treaties, trading and military alliances. Steep growth in European population numbers; sharp decline in Indigenous numbers	Attempts to destroy Indigenous distinctiveness: relocations, residential schools, outlawing of Indigenous cultural practices	Recovery and renewal for Indigenous Peoples and cultures, reneogiating relationships and Rights with colonial governments and settlers

Overview

The Royal Commission on Aboriginal Peoples (1991–1996) labelled the 1600s–1800s the period of contact and cooperation, noting that initial contact between Indigenous Peoples and Europeans was characterized by cooperation.

It was a period when Aboriginal people provided assistance to the newcomers to help them survive in the unfamiliar environment; this stage also saw the establishment of trading and military alliances, as well as intermarriage and mutual cultural adaptation. This stage was also marked by incidents of conflict, by growth in the number of non-Aboriginal immigrants, and by the steep decline in Aboriginal populations following the ravages of diseases to which they had no natural immunity.

Although there were exceptions, there were many instances of mutual tolerance and respect during this long period. In these cases, social distance was maintained — that is, the social, cultural and political differences between the two societies were respected by and large. Each was regarded as distinct and autonomous, left to govern its own internal affairs but co-operating in areas of mutual interest and, occasionally and increasingly, linked in various trading relationships and other forms of nation-to-nation alliances. (RCAP vol.1 1996, 42)

Mi'kmaw legal scholar Naiomi Metallic writes of this period:

Following contact, RCAP characterizes the next two hundred years as the era of "Nation-to-Nation" relations (from 1600 to mid-1800s). This can come as a surprise to some people, who may have believed that, upon arrival, Europeans immediately set upon a course of attempting to "conquer" the Indigenous peoples of these lands.

On the contrary, the themes animating this period include friendship, intermarriage, barter, and trade and military alliances. Further, the dealings between representatives of the British Crown and the Indigenous peoples they encountered, including the issuance of the Royal Proclamation of 1763 and the signing of various treaties, evidencing clear recognition of Indigenous peoples' status as nations, their right to self-determination and their claims to the territory. (Metallic 2018, 425)



Indian Dance at Government House, Fredericton, N.B., Jan. 1st, 1835, by Captain Campbell, McCord Museum of Canadian History, Montréal

Impact of Europeans on Mi'kmaq

Even though the first 200 years of contact between Europeans and Mi'kmaq are characterized as cooperative and separate, gradual changes in dynamics—including a shift in European objectives from exploration to settlement, and a massive increase in European immigration to the continent—would have drastic impacts on Mi'kmaq. In her 1999 master's thesis, settler Anita Tobin summarized these impacts.

With the coming of European powers came economic, political and social influences that served to fracture traditional Mi'kmaq value systems, modes of production and political and social structures. Indeed, European law replaced natural law. The entire Mi'kmaq way of life was violated, leading to the conversion of the Mi'kmaq to Catholicism, depopulation from disease and war, disempowerment of Mi'kmaw leaders, the dispossession of traditional territory that was so greatly relied on for sustenance, the introduction of alcohol, and the eventual disintegration of the traditional family unit. All of this lent itself to the perpetuation of a cycle of poverty that led to reliance on welfare programs, family violence, and the destruction of Mi'kmaq identity so necessary to the health and well-being of future generations. (Tobin 1999, 12)

Precise numbers are elusive, but during the 19th century, Mi'kmaw and Wolastoqiyik populations declined rapidly while settler populations boomed (Walls 2017, 157). By a Nova Scotia and New Brunswick federal count of 1868, Mi'kmaq and Wolastoqiyik numbered 3,513. Today, Mi'kmaq from or in Nova Scotia number more than 18,000 (CIRNAC 2021a).

Resistance and Resilience

Throughout the centuries of colonization, Mi'kmaq have resisted the imposition of European worldviews. Mi'kmaw Isabelle Knockwood, in her book *Out of the Depths*, writes about students' acts of defiance to maintain some autonomy. It is said that Mi'kmaq hid their culture in plain sight from Indian agents. For example, people would throw the jigmaqan (a musical instrument made from ash tree wood) into the fire that they were singing and dancing around, to warn of an approaching Indian agent. Singing and dancing were illegal. Many families found ways to hide their children from the Indian agents who came to take them to residential schools. Settler academic Martha Walls writes about the resistance of Mi'kmaw sisters hired to teach in a New Brunswick residential school. Individuals and communities fought back in creative ways (Walls 2011b).

Despite oppression and deceit, Indigenous Peoples throughout Canada are reclaiming their power and place. Especially since the 1960s, Mi'kmaq have fought successfully for their Treaty Rights and rebuilt their cultural foundation.

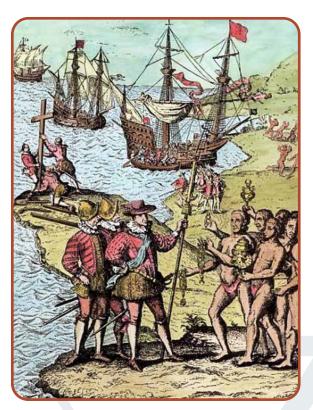
Doctrine of Discovery: 1500s to the Present

European Worldview

The doctrine of discovery is a legal principle that took shape when Europeans began their exploration of North America. In the 15th century, during the European "age of discovery," the church made a proclamation, the Papal Bull *terra nullius* (or empty land proclamation), which gave European Christian rulers and explorers the authority to "discover" and then "claim" land in non-Christian areas.

At their height, the European empires laid claim to most of the earth's surface and controlled the seas. Numerous arguments were advanced to justify such extravagant interventions into the lands and lives of other peoples. These were largely elaborations on two basic concepts: 1) the Christian god had given the Christian nations the right to colonize the lands they 'discovered' as long as they converted the Indigenous populations; and 2) the Europeans were bringing the benefits of civilization (a concept that was intertwined with Christianity) to the 'heathen.' In short, it was contended that people were being colonized for their own benefit, either in this world or the next.

(TRC Honouring the Truth 2015, 46)



"Discovery of America, 12 May, 1492, Christopher Columbus erects the cross and baptizes the Isle of Guanahani by the Christian Name of St. Salvador." From a stamp engraved on copper by Th. de Bry, 1590. Credit: www.bridgemanart.com

[. . .] In 1493, Pope Alexander VI issued the first of four orders, referred to as "papal bulls" (a term that takes its name from the Latin word for the mould used to seal the document), that granted most of North and South America to Spain, the kingdom that had sponsored Columbus's voyage of the preceding year. These orders helped shape the political and legal arguments that have come to be referred to as the "Doctrine of Discovery," which was used to justify the colonization of the Americas in the sixteenth century. (TRC Honouring the Truth 2015, 46)

The doctrine of discovery was linked to a second idea: the lands being claimed were *terra nullius* or "land belonging to no one." Imperialists argued that Indigenous People occupied but did not own the land. True ownership came only with European-style agriculture (TRC Honouring the Truth 2015, 46).

Condemnation of the Doctrine of Discovery

In their ground-breaking 1996 report, the Royal Commission on Aboriginal Peoples (RCAP) called the doctrine of discovery and *terra nullius* factually, legally, and morally wrong, and impediments to Indigenous Peoples assuming their rightful place in Canada (RCAP vol.1 1996, 7).

Recommendations 46 and 47 in the Truth and Reconciliation Commission's (TRC) Calls to Action (2015) called for the elimination of the doctrine of discovery and the signing of a Covenant of Reconciliation that would include repudiation of concepts used to justify European sovereignty over Indigenous lands and peoples, such as the Doctrine of Discovery and *terra nullius*, and the

UNDRIP is a comprehensive international instrument on the Rights of Indigenous Peoples. Signed by the majority of 144 United Nations (UN) members in 2007, the Declaration recognizes that laws based on racist doctrines, like the doctrine of discovery, can no longer stand.

reformation of laws, governance structures, and policies within their respective institutions that continue to rely on such concepts. (TRC Calls to Action 2015, 5)

In 2021, parliament passed Bill C-15, the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14. "The purpose of this Act is to affirm the Declaration as an international human rights instrument that can help interpret and apply Canadian law. It also provides a framework to advance implementation of the Declaration at the federal level" (Government of Canada 2021a).

Mi'kmaw legal scholar Naiomi Metallic argues that given Canada's endorsement of UNDRIP, and its effective "ratification" of the declaration by passing a Canadian Act supporting it, the federal government will no longer be able to use doctrine of discovery arguments in court (Metallic 2020). The preambles of both UN and Canadian instruments contain clear renunciations of the legitimacy of the doctrine of discovery.

Whereas all doctrines, policies and practices based on or advocating the superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences, including the doctrines of discovery and *terra nullius*, are racist, scientifically false, legally invalid, morally condemnable and socially unjust (Government of Canada 2021a)

In a recent case, a court in British Columbia actually talked about how the doctrine of discovery is an illegal and immoral justification for Crown sovereignty and ownership. That is a remarkable development. The judge cited the TRC and UNDRIP as part of this discussion (*Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.* 2022 BCSC 15 (CanLII)).



Naiomi Metallic, Associate Professor of Law; Chancellor's Chair in Aboriginal Law and Policy

Continuing Legacy of the Doctrine of Discovery

While international human rights law condemns doctrines of superiority as colonial and racist, former National Chief of the Assembly of First Nations Perry Bellegarde notes that the doctrine of discovery lives on in Canadian society.

Advancing reconciliation requires bringing Canadian law and policy into line with international human rights laws, which has condemned doctrines of superiority, including discovery and terra nullius, as colonial and racist. Yet the racist assumptions and impacts of these doctrines live on in aspects of Canadian law and policy. They are evident in underlying assumptions that assume First Nations are "claimants" in our own lands and that treat First Nations as somehow lacking sovereignty. The assumptions and impacts of these racist doctrines must be uprooted. The path forward will require Canada to acknowledge the truth of our pre-existing and continuing sovereignty as self-determining peoples. (former National Chief Perry Bellegarde as cited in Assembly of First Nations 2018, 1)

Despite the growing awareness of the factual and moral emptiness of the doctrine of discovery, it still underlies contemporary social, political, and legal relationships between settlers and Indigenous Peoples. Mi'kmaw legal scholar Naiomi Metallic documents the ways in which the doctrines of discovery and *terra nullius* are still alive in contemporary Canadian legal decisions.

Metallic describes how Canadian case law recognizes that Indigenous Peoples have Inherent Rights to land and self-government, while holding that this Inherent Right is legally diminished by the British Crown's claim of sovereignty over lands now called Canada (Metallic 2018, 435).

Doctrine of Discovery in Section 35, Constitution Act, 1982

Metallic explains that Section 35 of the *Constitution Act,* 1982, fails to acknowledge Indigenous Peoples' Rights to self-determination and self-government. This has affected how the Treaties are viewed and treated by governments and the courts.

Crown sovereignty as the starting premise of section 35 has influenced the development of the legal tests for Aboriginal rights, treaty rights, and title [...] the TRC has said that section 35 has been used more "as a means to subjugate Aboriginal peoples to an absolutely sovereign Crown" than "as a means to establish the kind of relationship that should have flourished since Confederation, as was envisioned in the Royal Proclamation of 1763 and the post-Confederation Treaties." (Metallic 2018, 439)

As noted earlier, Canada's ratification of UNDRIP with Bill C-15, there are now tools in Canadian law to challenge the tenure of the doctrine of discovery.

Royal Proclamation of 1763

From 1754 to 1763, France and Britain fought over territory in North America (the Seven Years' War). Britain won, acquiring France's North American possessions east of the Mississippi River, except for Saint Pierre and Miquelon. The terms of the victory were written in the 1763 Treaty of Paris. A few months later, the British Crown issued the Royal Proclamation, which established the foundation for Britain to govern North American territories (Hall, Albers, and McIntosh 2020). The document is divided into four sections; the final section pertains to Indigenous Peoples (McGilligan 2004, 37).

The Royal Proclamation's objective,

[. . .] so far as the Indians were concerned, was to provide a solution to the problems created by the greed which



Governor Murray with his Council in 1764 (Artist Charles W. Simpson)

hitherto some of the English had all too often demonstrated in buying up Indian land at low prices. The situation was causing dangerous trouble among the Indians and the Royal Proclamation was meant to remedy this [. . .] (*R. v. Sioui*, 1990 CanLII 103 (SCC), (1990) 1 SCR 1025, p. 1064)

Under the Royal Proclamation, Indigenous Peoples could only sell title to their lands to the Crown. British colonists were

- forbidden to settle on Indigenous lands,
- forbidden to buy or grant lands without Royal approval,
- required to remove themselves from Indigenous lands if they were unlawfully settled on said land. (McGilligan 2004, 39)

Anishinabe/Ojibway Professor John Borrows argues that the Royal Proclamation is part of a Treaty between First Nations and the Crown and stands as a positive guarantee of First Nation self-government. He argues that the Proclamation must be read in conjunction with the subsequent 1764 Treaty at Niagara, which was signed by at least 24 Indigenous Nations. In this Treaty, the British emphasized the Nation-to-Nation relationship with Indigenous Nations, mutual respect for each Nation's sovereignty over their own affairs, and respectful co-existence (Borrows 1997, 169–170).

The Proclamation's most important legacy is that it implicitly recognizes Indigenous sovereignty, as did subsequent Treaties (*R. v. Marshall; R. v. Bernard*, 2005 SCC 43 (CanLII), [2005] 2 SCR 220). This Supreme Court decision referred to the Proclamation as the "Indian Bill of Rights." The Court decided that the Royal Proclamation did apply to Nova Scotia, but it did not reserve Nova Scotia for Mi'kmaq, or grant it to its Indigenous Peoples.

Additional Resources

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Section 4: Covenant Chain of Treaties 1725–1779



Section 4: Covenant Chain of Treaties 1725–1779

Overview

During the period of contact and cooperation, Mi'kmaq and the British Crown signed a series of written Peace and Friendship Treaties called the Covenant Chain of Treaties (1725 and 1779). These Treaties are about mutual peace, respect, and prosperity. They were based on a shared understanding of interdependence, trade, and sovereignty between two Nations.

Importantly, Mi'kmaq never ceded land in any of these Treaties. Mi'kmaw lawyer, activist, and scholar Pam Palmater emphasizes that

the treaties we signed are often referred to as the peace and friendship treaties, but they are much more than that. They are some of the most significant nation-to-nation treaties ever signed on this continent because the Mi'kmaq never surrendered anything in return for the treaty promises. We simply committed to refrain from war with the Crown and to live in peace with settlers. (Palmater 2016, 32)

There was no surrender of Mi'kmaq territory. There was no surrender of our traditional occupations or economic endeavours. There was certainly no agreement to surrender our sovereignty and independence to the Crown. We agreed to be allied nations and all that entails. These agreements applied to both His Majesty's heirs and Mi'kmaw heirs, forever. (Palmater 2016, 34)

Tuma Young, scholar and first Mi'kmaw president of the Nova Scotia Barristers' Society, writes extensively about the Treaty Relationship in Mi'kma'ki, and emphasizes that the Treaties spell out how Indigenous Peoples and European settlers are to relate to one another.

The initial relationship between Canada and Indigenous peoples has its roots here in Atlantic Canada. You do not have to look further than the Covenant Chain of Peace and Friendship Treaties that were signed here in the 1700s. These Treaties lay out the foundation as to how both parties are to conduct their relationship with each other. The relationship was to be based on a mutually respectful and beneficial manner. The Mi'kmaq agreed to share the land and its resources, not cede, and both parties were to benefit from this relationship. (Young 2020b)

Why Did the Crown and Mi'kmaq Enter into Treaties?

The Crown: Peace and Trade

European colonization brought with it a relentless expropriation and reduction of Mi'kmaq's traditional occupancy and use of land and resources. In response to their lands and sources of sustenance being taken away, Mi'kmaq attacked the colonizers. The British were motivated to stop these attacks and to gain Mi'kmaw support in their wars with the French—motivated enough to recognize Mi'kmaw sovereignty. (Dorey 1994, 10)

Tuma Young describes the motivations of the British this way:

The primary motivation [of Europeans] was the desire to seek out peace with the L'nuk. After waging long and protracted wars with the French and the other Algonquian tribes, including the L'nuk, the British wanted



Tuma Young, first indigenous President of Nova Scotia Barristers Society

peace. In addition, the British wanted to establish trading relationships with the L'nuk. Thus, the treaties could be seen, not just as Peace and Friendship but trade and commerce treaties. Entering into the kisaknutmaqan (treaty relationship) ensured the British gained a permanent foothold with settlements and a trading relationship with the L'nuk who would become their treaty partners. (Young 2020a)

Mi'kmag: Sacred Pacts and Legal Covenants

Mi'kmaw writer and politician Jaime Battiste (first Mi'kmaw elected to the House of Commons) writes:

To the Mi'kmag, treaties are covenants that protect their ancestral livelihoods and have been passed down through each generation since. Joe B [Marshall] recalls that many Mi'kmaq of his generation would have heard from their fathers, grandfathers and relatives about the importance of treaties as a method of ensuring the survival of the people. The interlinked treaties constituted imperial and Mi'kmaw law, each treaty becoming enveloped within the Mi'kmaw family dynamic and values and responsibilities associated with them. (J. Battiste 2016a, 144)

In Living Treaties: Narrating Mi'kmaw Treaty Relations, Mi'kmaw scholar Marie Battiste writes:

To the Mi'kmag nation, treaties are sacred pacts and legal covenants that are held as a fundamental source of their relationships with successive waves of colonists and colonial governments. (M. Battiste 2016, 2)

The treaties make sense of the idea, in the Mi'kmaw language, of elikewake (the king in our house), just what was aspired and committed to in living with the king as a friend and ally, not as oppressed subjects. (M. Battiste 2016, 4)

The Treaties were written in English when few Mi'kmag were fluent in English. So Mi'kmag co-creation of the Treaties was based on spoken agreements and ceremonies with the British (The Confederacy of Mainland Mi'kmag 2007, 83). Tuma Young writes:

There are many stories about the treaties, some are recent while others go back hundreds of years. All of these stories illustrate the L'nu treaty interpretation principles that need to be applied when looking at the treaties and how are they to be interpreted. Many of the stories are about upholding the honour and the intent of the treaties. Some are about the expectations regarding the clauses in the treaties while others are about the resistance and insistence of L'nuk in upholding the peace and friendship relationship. It can be a bit disheartening to hear or listen to these stories, especially when the stories tell about past difficulties in the treaty relationships between the colonists and the L'nuk. Not all stories end in happy ever after. (Young 2020a) The Treaties were accompanied by ceremonies, feasts, and gifting. The understanding was that the agreement could not be changed without the parties coming together again (Augustine 2016, 20). Tuma Young writes:

The parties have to hold a feast or a ceremony to acknowledge the dispute, to formally and legally (under Mi'kmaq law) recognize the *Apiksiktatimkewey* and to help restore the relationship that has been impacted by the dispute. A feast is held, speeches are made, gently teasing humour is used and sometimes, a game is played (more often a game of Waltes which is a bone dice game) and the exchange of presents. Soon, there is laughter and the parties are deemed to have restored the balance in their relationship. They can now live and participate in the same community once again. (Young 2020b)

Chronological Listingof Peace and Friendship Treaties

The Peace and Friendship Treaties form a Covenant Chain of Treaties; the Treaties are interconnected and intended to be viewed together, as part of a whole (The Confederacy of Mainland Mi'kmaq and The Mi'kmawey Debert Cultural Centre 2015, 106). The Treaties listed below have been recognized by the Supreme Court of Canada (SCC) as legal and binding and have been referenced in many recent court decisions.

Treaty of 1725

This Treaty was intended to encompass the Abenaki, Wolastoqey and Mi'kmaq (Palmater 2016, 32). It brought to an end three years of war between these Nations and the colonial governments of Nova Scotia and New England (Wicken and Reid 1996, 64). Sa'ke'j Henderson writes:

[...] the earliest Peace and Friendship treaty is the 1725 kisaknutmaqan or the Treaty of 1725. The partners in this treaty promised to keep the peace, cease hostilities, return any captives, engage in trade with each other, not disturb the L'nuk in their hunting or fishing, and a dispute resolution clause. (Young 2020a)

This Treaty was signed in Boston, whereas subsequent Treaties were made directly with English colonial officials at Kjipuktuk (Halifax) (Wicken and Reid 1996, 64).

Treaty of 1726

The Treaty of 1726 ratified the 1725 Treaty with only Mi'kmag and the colonial government. There is circumstantial evidence that leaders gathered at Annapolis Royale for the Treaty signing ceremony, but formal ratification did not occur until all the villages provided their consent (Wicken and Reid 1996, 63). The agreement stated that

- Mi'kmaq would maintain peace between our nation and Britain's settlers;
- Mi'kmaq would permit the settlers to live where their current villages were constructed at the time of treaty signing;
- Britain would recognize and protect all Mi'kmaw lands, liberties and properties, including beaches and fisheries (not previously sold);
- Mi'kmag would continue to hunt, fish and fowl as formerly; and
- the nations of Mi'kmag and Britain would continue to trade as usual. (Palmater 2016, 33)

The Treaty contained a provision that if there was a quarrel, revenge would not be taken (Palmater 2016, 33).

Treaty of 1749

For eighteen years after 1726, peace was maintained throughout the Atlantic region. In 1744, this peace was disrupted by conflicts between the French and English. At the end of the war, the Treaty of 1749 was signed between the Wolastogey, Siknikt Mi'kmag (Chignecto), and the British to re-establish peace under British rule (The Confederacy of Mainland Mi'kmag and The Mi'kmawey Debert Cultural Centre 2015, 106).

Treaty of 1752

The Treaty of 1752 dealt extensively with processes of justice. It acknowledged Mi'kmaq's separate national identity within the United Kingdom.

In the Mi'kmaq view, the Mi'kmaq Compact, 1752, affirmed Mikmakik and Britain as two states sharing one Crown – the Crown pledging to preserve and defend Mi'kmaq rights against settlers as much as against foreign nations. (Marshall Sr., Denny, and Marshall 1989)

Grand Chief Donald Marshall Senior writes that Mik'maq were aware that relations between themselves and settlers had to be regulated in some way, and he called for a "two-legged" justice system that used British and Mik'maw legal traditions.



Printed Proclamation for the Treaty of 1752 Commissioner of Public Records - Mi'kmaq and Government Relations series Nova Scotia Archives RG 1 volume 430 number 2

For incidents involving Mi'kmaq citizens on Mi'kmaq territory, the traditional Mi'kmaq justice system would apply. For situations involving settlers, the English justice system would be used. And finally, for matters that involve both Mi'kmaq citizens and settlers, the English civil-justice system, with input from the Mi'kmaq, would come into play [. . .] the Civil Law of England – the fundamental principles of contract, property, and torts – was understood to be the appropriate basis on which to measure the conduct between the Mi'kmaq and the British people in Nova Scotia. (Marshall Sr., Denny, and Marshall 1989)

This Treaty reconfirmed commitments made in 1725 and added new agreements:

- Mi'kmaq would always have the 'favour, friendship and protection' of His Majesty;
- His Majesty would provide 'aid and assistance' to Mi'kmaq in defence of their treaties;
- Mi'kmag would have complete freedom to trade their resources;
- Mi'kmaw families would be given provisions needed for their sustenance;
- Annually, on October 1, His Majesty would provide Mi'kmaq with blankets, tobacco and ammunition as part of the treaty renewal process; and
- Mi'kmaq would save any ship-wrecked settlers. (Palmater 2016, 33)

Importantly, the Treaty also confirmed the construction and use of truckhouses or trading posts where Mi'kmaq could trade furs and other products for European goods such as copper kettles or metal axes at a fair rate of exchange

Treaties of 1760 and 1761

These Treaties between the Governor of Nova Scotia and Mi'kmaq, Wolastoqey, and Peskotomuhkati communities reconfirmed the commitments made in the earlier Treaties and continued to include promises like

- Mi'kmaq would not disturb any of the 'lawful' British settlements,
- No revenge would be taken by Mi'kmag for wrongdoing by settlers. (Palmater 2016, 34)

Hereditary Chief and Keptin Stephen J. Augustine writes of the 1761 Treaty signing ceremony.

[...]the treaty [was] celebrated at Nova Scotia Lieutenant Governor Jonathan Belcher's farm near Halifax. Belcher invited all of the official representatives of the Crown as well as the members of the Nova Scotia House of Assembly. After the terms of this peace and friendship treaty were agreed, Belcher led the Mi'kmaw chiefs to two pillars of stone he had erected at his farm, where the party gathered for the feast, burying the hatchet and smoking the pipe. This was a great day of celebration for the town of Halifax. The Mi'kmaw chiefs were feasted, honoured with gifts, and most importantly, symbolically made a teplutakan with representatives of the Crown. (S. Augustine 2016, 22)

Belcher's Proclamation of 1762

Belcher's Proclamation was not a treaty, but rather a unilateral document issued by Nova Scotia Lieutenant Governor, Jonathan Belcher. Belcher's Proclamation was in response to

complaints by the Indians that settlements were being made on their lands in violation of the treaties, the desire to recognize the "just Rights and Possessions" of the Indians in accordance with the treaties, and the "fatal Effects which would attend a Discontent among the Indians in the present Situation of Affairs." (Adams 2004, 339)

The Supreme Court of Canada stated in the 2005 case of R. v. Marshall; R. v. Bernard that in

1762 the then governor of Nova Scotia, Jonathan Belcher, issued a Proclamation directing settlers to remove themselves from lands "reserved to or claimed by" the Indians. It further directed that "for the more special purpose of hunting, fowling and fishing, I do hereby strictly injoin and caution all persons to avoid all molestation of the said Indians in their said Claims, till His Majesty's pleasure in this behalf shall be signified." (R. v. Marshall; R. v. Bernard 2005)

The Lords of Trade were not happy with the proclamation, claiming that it was "inconsistent with his Majesty's Right, and so injurious to the Commercial Interest of His Subjects" (*R. v. Marshall; R. v. Bernard*). They also argued that the grant of coastal lands to Mik'maq was contrary to the true spirit and meaning of the Royal Instructions upon which Belcher's Proclamation was based (*R. v. Marshall; R. v. Bernard*).

Belcher's Proclamation was never implemented (Adams 2004, 341–42).

Treaties of 1778 and 1779

Both the 1778 Treaty signed with the Wolastoqey and the 1779 Treaty signed with the Mi'kmaq of the Miramachi were in response to disturbances between Mi'kmaq and the colonists. These conflicts raised fears that some Mi'kmaw communities were siding with the Americans in the War of Independence against Great Britain. Neither Treaty altered the existing Treaty Relationships; each of the Mi'kmaw communities reaffirmed their Treaty Relationship with the British.

Treaty Interpretation and Celebration Today

The Peace and Friendship Treaties are living documents: their meaning is not limited to the English-language words recorded on parchment. Mi'kmaw understanding of the Treaties is embedded in Oral Histories of ceremonies and spoken words. The Mi'kmaw signatories intended the Treaties to evolve so that future generations would benefit from their Nation-to-Nation promises.

Palmater writes:

One cannot read a treaty and claim to "know" what it means without understanding the history and context or having lived it. This is why there are so many misunderstandings about the treaties in some segments of Canadian society. A true understanding is a process that takes time because treaties between nations are relationships that are unique, organic, evolving, adapting and enduring. Any relationship changes over time. [. . .] Although represented in the parchment versions, the meaning of the treaties is first and foremost found in the spirit and intent of the treaties. This is what guides the nation-to-nation relationship—not the limited scope of the English-language text. Though some lawyers are quick to cite court cases, some forget that Mi'kmaw laws were and are still applicable and relevant to the negotiation, signing and interpretation of these treaties as any imported British law. [...] The spirit and intent of treaties are found outside their written form—yet they are as valid today as when they were first signed, not because a court said so, but because Mi'kmaw people and settlers both have lived those treaties and have never stopped exercising these treaty rights since they were signed. (Palmater 2016, 36-37)

Mi'kmaw scholar Marie Battiste notes that the Supreme Court of Canada affirmed that the Treaties must be read as the Mik'mag understood them (M. Battiste 2016, 4).

As a result of the stormy disputes in the courts between settler interests and Mi'kmaw interests, it is significant that the Supreme Court of Canada has recognized the intended fundamental rule of construction of treaties and how they are revealed. They have dismissed colonial interpretation of the Mi'kmaw treaties as dishonorable and lacking persuasion. The Court has been guided by the constitutional reforms of 1982 that affirm Aboriginal and treaty rights. It has been persuaded by the arguments for reading the Mi'kmaw treaties as they should be read as the Mi'kmaq would have understood them. This method reflects the most faithful application of the original meaning of the treaty negotiations and text. (M. Battiste 2016, 6–7)

On October 1, 1986, Nova Scotia's Mi'kmaq celebrated Mi'kmaw Treaty Day for the first time. Every year since, Mi'kmaq celebrate in Halifax, as stipulated in the 1752 Treaty. The Treaty called for an annual reaffirmation and exchange of gift (J. Battiste 2016b, 69). On this day, the Province of Nova Scotia acknowledges its obligation to honour the Treaties.



Mi'kmaq march with a Treaty Day banner during festivities in Halifax. 2010. Courtesy of Province of Nova Scotia.

Additional Resources

Nova Scotia Archives. 2022. "Peace and Friendship Treaties." Mi'kmaq Holdings Resource Guide. https://archives.novascotia.ca/mikmaq/



Section 5:
Domination and Assimilation:
The First 100 years of
Confederation

Section 5: Domination and Assimilation: The First 100 years of Confederation

STAGE 1	STAGE 2	STAGE 3	STAGE 4
SEPARATE WORLDS	CONTACT AND COOPERATION	DOMINATION AND ASSIMILATION	RENEWAL AND RENEGOTIATION
Before 1600 CE	1600 – mid 1800	Mid 1860 – mid 1950	Mid-1950 - PRESENT
Indigenous and non-Indigenous societies developed in isolation from each other. National groups with long traditions of governing themselves	Initial contact between Indigenous Peoples and Europeans characterized by cooperation, nation-tonation negotiation of Peace and Friendship Treaties, trading and military alliances. Steep growth in European population numbers; sharp decline in Indigenous numbers	Attempts to destroy Indigenous distinctiveness: relocations, residential schools, outlawing of Indigenous cultural practices	Recovery and renewal for Indigenous Peoples and cultures, reneogiating relationships and Rights with colonial governments and settlers

Overview

The Royal Commission on Aboriginal Peoples (RCAP) referred to the first 100 years of Confederation (1867-1967) as Stage 3, the era of domination and assimilation.

In Stage 3, non-Aboriginal society was for the most part no longer willing to respect the distinctiveness of Aboriginal societies. Non-Aboriginal society made repeated attempts to recast Aboriginal people and their distinct forms of social organization so they would conform to the expectations of what had become the mainstream. In this period, interventions in Aboriginal societies reached their peak, taking the form of relocations, residential schools, the outlawing of Aboriginal cultural practices, and various other interventionist measures of the type found in the *Indian Acts* of the late 1800s and early 1900s.

[. . .] Non-Aboriginal society began to recognize the failure of these policies toward the end of this period, particularly after the federal government's ill-fated 1969 white paper, which would have ended the special constitutional, legal and political status of Aboriginal peoples within Confederation. (RCAP vol.1 1996, 42–43)

RCAP noted that during this period most aspects of the "rough equality" of Nation-to-Nation relationships ended. The negotiation of Treaties continued, along with Indigenous dispossession through the *Indian Act* (RCAP vol.1 1996, 32).

Mi'kmaw legal scholar Naiomi Metallic writes:

Colonial governments, and later the federal government, segregated First Nations on small and less-than-desirable parcels of land (reserves). The aim was that they might eventually become extinct from disease and starvation or be absorbed into mainstream culture.

During this period, the federal government ignored the plight of the Inuit and Métis leaving them to fend for themselves despite significant displacement from their traditional lands and resources.

On reserves, First Nations were barred from exercising their traditional subsistence livelihoods and federal rations to alleviate starvation were provided sparingly. Further, the federal government pursued a policy of cultural genocide through sending thousands of Indigenous children — First Nation, Métis, and Inuit alike — to residential and day schools. In addition, the *Indian Act* and related policies were employed to revoke the "Indian status" of thousands of First Nations men, women, and children through several arbitrary identity laws, among other assimilatory policies. (Metallic 2018, 425)

Gradual Civilization Act of 1857

The *Gradual Civilization Act* was an Act of the Province of Canada (what is now Ontario and Quebec), before Confederation. The Act was intended to **enfranchise** Indigenous Peoples, or remove their legal identity as "Indians," which was a key feature of pre- and post-confederation assimilation policies. The Act introduced **voluntary enfranchisement**: Indigenous people could surrender their legal and ancestral identities (e.g., their legal identity as "Indians") in return for full Canadian citizenship, including the right to vote (Government of Canada 1857). Its provisions were incorporated with the *Gradual Enfranchisement Act* (1869) to create the Federal *Indian Act* of 1876. Both Acts applied in Nova Scotia.

British North America Act (now called the Constitution Act, 1867)

Note: See Section 6 for information on the Constitution Act, 1982

Overview

The 1763 Treaty of Paris, which ended the Seven Years' War between Britain and France, gave Britain control of all North America north of Mexico, except for the islands of Saint Pierre and Miquelon. That control of all North America only lasted 20 years, until *another* Treaty of Paris (1783) was signed, which ended the American War of Independence.

By the 1783 Treaty of Paris, Britain agreed that the United States of North America would comprise the 13 colonies that had declared independence, and British North America—which would become the first Canada—would comprise what is now Ontario, Quebec, New Brunswick, and Nova Scotia, as well as Newfoundland and Prince Edward Island.

From the end of the American War of Independence (1783) until 1867, each colony of British North America functioned independently. However, by the middle of the



John Williams, Mi'kmaw guide, and wife, 1886. Nova Scotia Archives

19th century, both Britain and the British North American colonies were considering another form of governance for British North America. Four of the British colonies came together and decided to form their own country. On July 1, 1867, Upper and Lower Canada (Ontario and Quebec), New Brunswick and Nova Scotia, and the British Parliament signed the *British North America Act (BNA Act)* to become the new country of Canada under the sovereignty of the British Monarch. Other British colonies, over time, joined this new confederation until Canada we know today was complete.

The British North America Act (BNA Act) served as Canada's constitution until 1982.

How Were Indigenous People Involved in the Writing of the BNA Act of 1867?

"Infamously, the *British North America Act* only mentions, 'Indians and lands reserved for the Indians' in a single sub-clause, assigning responsibility for both to the federal government," writes settler historian Brian Gettler (Gettler 2017). Gettler speaks to the silence concerning First Nations in the documentary record on Confederation.

The new federal state's remarkable nonchalance with respect to Indigenous affairs underscores just how obvious and unproblematic the issue appeared to Euro-Canadians in the run-up to 1 July 1867 and in the months and years immediately thereafter. The absence of Indigenous affairs from the Confederation debates and the inaction that



Mi'kmaq camp, 1870 ca, Point Lévis, Québec. McCord Museum of Canadian History, Montréal

followed the *BNA Act* requires us to revise modern Canada's origin story. We should understand the silence of 1867 as the colonial project at its most imperial, as actors simply assumed it to be natural, necessary, and, indeed, noble. It points to colonial politicians' unquestioned and unquestioning belief that the state already had "solved" relations with Indigenous peoples, that the new Constitution only needed to recognize the validity of existing practices of territorial dispossession and "improvement." This silence, underlined and problematized, ought to be at the heart of our thinking about Canada on 1 July, whether in 1867 or 150 years later. (Gettler 2017)

In addition to giving Parliament exclusive legislative authority over "Indians, and lands reserved for the Indians," Section 91(24) of the *BNA Act* gave Parliament the exclusive right to negotiate Treaties and purchase Indigenous land for the Crown (Joseph 2018, 84). Constitutional settler scholar Brian Bird argues that Section 91(24) represents the continuation of the Nation-to-Nation Crown-Aboriginal relationship that existed prior to Confederation, and that courts have acknowledged the broad federal responsibility embedded in s. 91(24) (Bird 2011).

It should be noted that Section 91(24) gave the Canadian government the authority to pass the *Indian Act* in 1876.

Indian Act

Note: The *Indian Act* was passed in 1876 and had been amended several times. This section summarizes the history of its evolution.

The *Indian Act of 1876* was a further step in Canada's attempt to assimilate First Nations into the non-Indigenous Canadian society as quickly as possible. It grew out of the *Gradual Civilization Act of 1857* and the *Constitution Act, 1867*, which allowed the federal government extensive control over Indigenous Peoples. It is one of many assimilation policies intended to end the cultural, social, economic, and political distinctiveness of Indigenous Peoples (RCAP vol.1 1996, 137). The *Act* is administered by Indigenous Services Canada (ISC), formerly Indian and Northern Affairs Canada (The University of British Columbia. 2009a).

How Does the Indian Act Affect First Nations?

The *Indian Act* affects First Nations, non-Status Indians, Inuit, and Métis in two ways.

- It defines who is and who is not recognized as a Status Indian.
- It defines how reserves and bands can operate (note: Bands do not have to have reserve lands to operate under the Act.) It sets out rules for governing reserves, defines how bands can be created, and what powers they have. (Wilson 2018, 72)



Mic-Mac Indians presented to Marquis of Lorne at Halifax, Library and Archives Canada/C-002295

NS Museum identification. "1879. Third Mi'kmaq from left, with

goatee, is Chief Jacques-Pierre Peminuit Paul. Second from left is probably his adopted son, John Noel, who succeeded him as chief. Judge Christopher Peminuit Paul may be the second Mi'kmaq from right, also with goatee.

The *Indian Act* of 1876 affected only First Nations (Inuit did not come under the *Indian Act* until 1939 and Métis and non-Status Indians were not covered by the Act until 2016). Among other things it

- displaced traditional Indigenous governance structures and imposed a colonial governance system. (RCAP vol.1 1996, 237)
- banned traditional Indigenous ceremonies; up until 1951 individuals caught practicing any form of traditional ceremony could be arrested and charged.
- forbade residents from leaving the reserve without a pass. This provision was never enforced in Mi'kma'ki.
- forbade Status Indians from possessing, selling, or making intoxicants.
- from 1927 to 1951 the Act forbade Status Indians and Indian organizations from hiring legal counsel to sue the government to protect Indigenous Rights and Title.
- Forbade Status Indians (and non-Indians) from owning property on reserve (off a reserve, Indigenous people could, did, and do own land).

How Was the Indian Act Enforced?

For much of the 19th and 20th centuries, Indigenous Peoples were considered wards of the state, children who have been made the legal responsibility of the government. Indian agents enforced the *Act* and managed the day-to-day affairs of people living on reserves (Wilson 2018, 43). Within reserve lands, Indian agents managed band finances and infrastructure projects, distributed rations, paid annuities, inspected schools, negotiated land surrenders, conducted band council elections, presided over band council meetings, and determined residents' access to housing and welfare (Wilson 2018, 43).

How Has the Indian Act Evolved?

Removal of blatant discrimination

Over time, a number of the more repressive measures of the *Indian Act* were repealed or amended, in part due to Indigenous activism and lobbying, and in part to a growing societal awareness of inequities and inequalities in Canada, and the racism, sexism, and paternalism inherent in the *Indian Act* (Giokas 1995, 354; Dyck and Sadik 2021).

1951 amendments

In 1951, the *Indian Act* underwent its first overhaul since it was first passed in 1876. Indigenous activists—who had long been arguing for changes to the legislation—led the charge that led to a growing awareness that the *Act* contravened basic human rights (Wilson 2018, 40).

The 1951 amendments removed some of the more blatant forms of discrimination in the *Act*, including the prohibition of hiring lawyers to vindicate land rights and other collective claims, the prohibition against Indigenous spiritual practices, and the provisions that automatically disentitled a First Nations person from recognition under the *Indian Act* (and consequently the right to live on reserve) upon becoming a doctor, lawyer, getting a university degree, joining the holy orders, and joining the military (often called the compulsory enfranchisement provisions). (Metallic 2018, 427)

In addition, the *Indian Act* of 1951 gave registered Indigenous women previously denied rights to vote and run in Chief and Council elections (Wilson 2018, 39).

1985 amendments

In 1985, two other highly problematic provisions in the *Indian Act* were removed: 1) the provisions on maintaining residential schools, and 2) the provision that stripped First Nations women (and their children) who married non-First Nations men of their Indian status. However, the Canadian government still has control over who is a Status Indian under the law. Metallic argues that the *Act* still effectively sets a 50 percent blood quantum rule, which disproportionately affects First Nations women and their descendants, a rule that has been the subject of numerous Charter and human rights challenges over the last 10 years (Metallic 2018, 427–28).

Why Some Indigenous People Have Resisted Eliminating the *Indian Act*

Indigenous Peoples are divided on the continuation of the *Indian Act* and Indigenous Services administration. Some people desire a complete dismantling of the *Act* and the Indigenous Services regime. Others resist initiatives to remove the *Act* until it can be replaced by self-determination and self-government for Indigenous Peoples, a just and equitable distribution of lands and resources, and implementation of the UN Declaration on the Rights of Indigenous People.

Pam Palmater, Mi'kmaw lawyer, scholar, and activist writes about some of the Act's protections.

> [. . .] the complexities of the *Indian Act* goes beyond racism. It also serves as a legislative tool by which to hold the federal government accountable for their legal responsibilities. There are various legal protections within the Act, like tax exemptions for property on reserves and the protection of reserve lands from seizure. First Nations have less than 0.2 per cent of all their traditional lands as reserve lands, and preserving the integrity of those collective lands has been identified as a priority by many First Nations. The Indian Act also serves to protect—at least



Pam Palmater: lawyer, author, speaker and activist

to some extent—from interference by the provinces. This is another, major concern of First Nations who know that Indian Act abolishment, without other legal protections in place, means that their lands would be under provincial jurisdiction and vulnerable to the provincial governments' voracious extraction and development appetites. (Palmater 2019)

Metallic explains that except for a few minor amendments, the *Indian Act* is substantively unchanged since 1951 (Metallic 2018, 431).

Indian Status as Defined by the Indian Act

What Is Indian Status?

The Indian Act sets out criteria by which First Nations are granted "Indian" status. Since 1951, a First Nations person had to have Status in order to vote for band Chief and Council, share band monies, and own and inherit property on reserve (though such ownership remains at the discretion of the federal government and does not entail full legal possession (Government of Canada 1985). The criteria for Indian status are complex and not necessarily linked to heritage. The 1951 version of the Act (Section 12) established a centralized record of Status Indians on an Indian Register, maintained by Indigenous Services (Wilson 2018, 40). Status Indians are issued an Indian status card with their name, band, and registration number. Indian status was linked to band membership (Parrott 2022).

The 1985 amendment to the *Indian Act* separated Indian status from band membership. Bands now determine band membership, and who can vote and access band resources. A Status Indian may not have band membership, and a band member may not have Indian status (Parrott 2022).

How Was Indian Status Conferred or Removed?

Indian agents had the power to determine who was registered as a Status Indian and who would be enfranchised and removed from the registry (Joseph 2012). The government used enfranchisement to terminate the status of status Indians and assimilate them into Canadian settler society. Over time, First Nations individuals have been enfranchised for

- voluntarily renouncing status in exchange for Canadian citizenship;
- serving in the Canadian armed forces;
- gaining a university education or joining a holy order;
- leaving reserves for long periods (e.g., to work);
- in the case of Status Indian women, for marrying non-Status men, or if their Status husbands died or abandoned them. (Wilson 2018, 50) (The University of British Columbia 2009d)

Status for Indigenous Women and Their Children

As a result of the enfranchisement rule for First Nations women, "between 1958 and 1968 alone, more than 100,000 women and children lost their Indian status [. . .]" (Joseph 2018, 21).

Before 1985, Indigenous women lost their Indian status, and the status of their children, if they married a non-Status man, while Status men gave their non-Status wives and their children status (Wilson 2018, 38). If an Indigenous woman's non-Indigenous husband died or abandoned her, she had no right to return to her reserve. Neither did an Indigenous woman who married a man from another reserve (Wilson 2018, 50).

In 1920, the Deputy Superintendent General wrote to the Superintendent General.

When an Indian woman marries outside the band, whether a non-treaty Indian or a white man, it is in the interest of the Department, and in her interest as well, to sever her connection wholly with the reserve and the Indian mode of life [. . .]. (Harry 2009, 18)

Kwakwaka'wakw writer and educator Bob Joseph explains:

The *Indian Act* subjected generations of Indigenous women and their children to a legacy of discrimination when it was first enacted in 1876, and it continues to do so today despite amendments. *Indian Act* policies made women unequal to Indian men [. . .] and to non-Indian women. Not all, but many, women have faced difficulty in being recognized as both Indians and women in Canada. (Joseph 2018, 21)

This blatant gender discrimination was somewhat rectified by amendments in 1985, 2010, and 2017.

Activism by Indigenous Women Has Changed Indian Status for Many

The definition of Status Indian has changed as the result of continuous Indigenous activism and resistance. Indigenous women have struggled against both the Crown and male Indigenous leaders to receive justice (Native Women's Association of Canada 2000, 8–11).

Bill C-31, 1985

Bill C-31 was the first attempt to address sex-based inequities in the *Indian Act*. In 1985, Bill C-31 ended the entitlement of Indigenous men to pass on status to their non-Indigenous wives. It ended the excommunication of Indigenous women upon marriage to non-Indians, and re-instated status to women and their children who had previously lost it (Native Women's Association of Canada 2000, 11).

In addition, Bill C-31 eliminated the government's ability to remove someone from the Indian Register and created conditions for Indigenous people who had been enfranchised in the past to regain their Indian status rights. It also created the problematic second-generation cut-off rule. This rule removes Indian status after two generations of mixed (Indian and non-Indian) parenting (Congress of Aboriginal Peoples, n.d., 8).

More than 114,000 people gained or regained their Indian status as a result of Bill C-31 (The Canadian Encyclopedia 2020). The Congress of Aboriginal Peoples (CAP) writes that Bands became concerned about the impact this would have on their lands and resources, which were often already insufficient. "Canada's response was not to provide additional lands or moneys [. . .], but to amend the *Indian Act* to allow Bands the ability to adopt membership codes" (Congress of Aboriginal Peoples, n.d., 11). The C-31 amendments allowed Bands to admit non-Status Indians and deny membership to status Indians, except for Indian women restored to status by the *Act* (although they could deny membership to their children) (Congress of Aboriginal Peoples, n.d., 11).

Bill C-3 of 2010, Gender Equity in Indian Registration Act

This Bill ensured that eligible grandchildren of women who lost Indian status as a result of marrying non-Status men were entitled to Indian status.

Bill S-3 of 2017

This Bill, which became law in 2017, addressed some of the remaining gender-based discriminatory articles within the *Indian Act* (CIRNAC 2018). Despite these changes, sexism and racism are still built into the Status provisions. For example, the 2nd generation cut-off rule still deprives children born after 1985 of status, effectively based on a blood quantum rule (Congress of Aboriginal Peoples, n.d., 12).

Land Theft

All of Nova Scotia is a part of Mi'kma'ki, the Mi'kmaw ancestral homeland. Mi'kmaw ethnographer Roger Lewis estimates that when the Europeans arrived, there were over 900 settlements in Nova Scotia (APTN News 2020). Beginning in the late 1700s, and despite never having ceded their territory, Mi'kmaq were confined to smaller and smaller areas of land that were "reserved" for them. As the settler population grew, settlers took over more and more land, including reserve lands. These trespasses, and the squatters on reserve lands, were largely ignored by the government. These constant land grabs had a detrimental effect on Mi'kmaw livelihoods and ways of living. Mi'kmaw scholar Marie Battiste writes:

As more and more land became settled, the Mi'kmaqs' accustomed freedom of movement, their seasonal migrations, became impossible to maintain. Without access to their different seasonal hunting and gathering territories, their traditional economy collapsed.

In Nova Scotia the collapse was sudden. Within a single generation the traditional Mi'kmaq lifestyle had become impossible. Recognizing the seriousness of this situation, the colonial government tried to provide annual grants of food and clothing to compensate for the treaty violations. However, the colonial government had no consistent policy, and by the early nineteenth century the help was normally only forthcoming in cases of extreme emergency – as during the war of 1812-1814 – when the government wanted to make sure the Mi'kmaqs remained loyal. (M. Battiste 1987, 138)

In this era of domination and assimilation, land made available to Mi'kmag diminished rapidly, and what remained was generally not favourable to farming. Mi'kmag turned to selling their products and resources to settlers.

Gradually some of the traditional Mi'kmag settlements became the basis for "reserved" lands, tracts of land set aside by the colonial government and acknowledged as exclusively for the use of the Indians. (M. Battiste 1987, 139)

As of the 21st century, 42 Mi'kmaw reserves total 117 squared kilometres—representing 0.2 percent of Nova Scotia's total land base. Many are uninhabited and uninhabitable (Tesar 2021).

The Reserve System

The first designated "Indian Reserves" in Nova Scotia were created in 1820. Throughout the 1800s, Mi'kmaw families moved on and off these reserves, as the land could not support them. Unable to sustain themselves on their increasingly limited hunting, fishing, and farming possibilities, residents had to find paid work, or market opportunities for the goods they made. Settler historian Martha Walls describes the devastating effects of the reserve system.

In the face of ongoing land pressures and reduced access to resources, and given that they, unlike First Nations in Ontario and Quebec, had no access to trust funds (monies for reserves that were accumulated via land sales), the Mi'kmaq and Wolastoqiyik experienced considerable poverty after Confederation. Annual reports of Indian agents are rife with attestations to the destitution of Maritime First Nations (Walls 2017, 161–162).

Many Mi'kmag left the reserves to find work or sell their products. In 1871, less than 50 percent of Mi'kmag enumerated in a census lived on reserve (Wicken 2012, 185). The federal government was determined to move Mi'kmag onto reserves, which they thought would encourage them to farm and assimilate into Canadian society (Wicken 2012, 121). Master's thesis research by settler Anita Marie Tobin (1999) shows in graph form the movement of families back to their original reserves (Tobin 1999, 89–90).

Federal Centralization Policy

Rationale and Phases

In the 20th century, the federal government set out to contain Mi'kmaq to a small number of reserves. The concept of "centralizing" all Nova Scotian Mi'kmaq was first explored during a Canadian financial crisis in 1918 (Patterson 1985, 21). This centralization policy was carried out in two phases: in the 1910s and again in the 1940s.



"Eskasoni Mi'maw families reflect on 1940's forced relocation" Global News, June 24, 2022

Tobin writes that in **phase one**, centralization was "a strategy to encourage those Mi'kmaq residing outside official reserves, some on privately owned property, to relocate, and in an effort to cut administrative costs and relief payments" (Tobin 1999, 25). It began in the aftermath of the 1917 Halifax Explosion, when Mi'kmaq residing in the off-reserve settlement at Kebec (Tufts Cove) who survived the blast were homeless. Indian Affairs wanted to resettle the dozen or so Explosion survivors, and other Halifax Mi'kmaq residing off reserve to the Indian Brook Reserve outside of Shubenacadie. Mi'kmaq refused, citing the reserve's remoteness, and stated their preference for the Millbrook reserve near Truro. Ultimately, Indian Affairs purchased additional lands for the Millbrook reserve (paid for by the surrender and sale of three unoccupied Halifax County reserves). With promises of better housing, stable employment, and farming lands—promises that were largely unkept—Mi'kmaq of Halifax moved to Millbrook (Tobin 1999, 25–26; Patterson 1985, 126, 21–23). As recounted by settler historian Jacob Remes, only one Mi'kmaw from Kebec/Tufts Cove moved to Millbrook. The remainder either stayed in Dartmouth or moved elsewhere in Nova Scotia (Remes 2014, 459).

Indian Affairs determined that the "success" of this experiment could be used as a rationale to promote **phase two** (Tobin 1999, 15). In 1941, federal officials launched phase two, hoping it "would somehow prompt an economic turnaround that would eventually lead the Mi'kmaq to self-sufficiency" (Tobin 1999, 40).

The second phase in 1941 was also in answer to the high unemployment rate of the Mi'kmaq, exacerbated by the Great Depression, and the desire of Indian Affairs to eliminate their financial responsibility to the Mi'kmaq. (Tobin 1999, 22)

Settler researcher Lisa L. Patterson writes that more to the point, centralization was an assimilation measure.

In keeping with the contradictory measure of the *Indian Act*, Indian Affairs maintained that removing the Micmacs to remote central reserves equipped as "rehabilitation" institutions would hasten their assimilation. (Patterson 1985, i)

In 1941, under threat of enfranchisement and loss of government financial support, Mi'kmaq were told to move to one of two reserves: Indian Brook (also known as Shubenacadie) on the mainland and Eskasoni in Cape Breton (Tobin 1999, 39). Between 1942 and 1949, half of the 2,200 Mi'kmaq in the province moved to Shubenacadie or Eskasoni (APTN News 2020). Patterson writes that by collecting Mi'kmaq in two reserves, "the government expected to reduce costs for Indian welfare, education and health care; ease local complaints; and give Indian Affairs, the clergy and the RCMP greater control over Indian life" (Patterson 1985, 1).

Many Mi'kmaq remember that after they moved to one of these reserves, their homes were burned behind them (APTN News 2020).

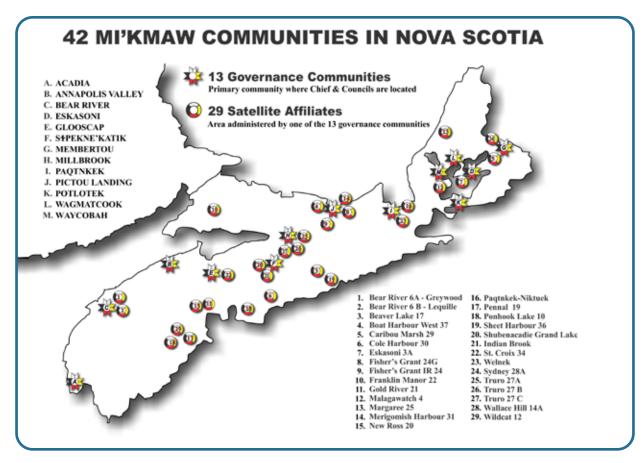
Failure of the Centralization Policy

Throughout the period of attempted centralization, Mi'kmaq continued to move throughout North America for work and kinship. While many Mi'kmaq refused to move from their reserve lands to Indian Brook (Sipekne'katik) or Eskasoni, hundreds of Mi'kmaq moved to these reserves where the resources and infrastructure could not support them.

At Indian Brook, the rapid population growth and lack of infrastructure disrupted the social and economic stability of the reserve (Paul, n.d.). Some Mi'kmaw leaders actively resisted centralization from its inception. Mi'kmaw leader Ben Christmas called centralization "a great instrument to beat Indians to submission" (APTN News 2020). As the program's inadequacies and problems intensified, leaders like Kji-saqmaw Sylliboy and Kji-keptin Simon Denny joined the protest movement.

Under increasing resistance, in 1949 Indian Affairs abandoned its centralization policy. Centralization damaged a number of former reserve communities, in some cases depriving them of all their residents. It also had a lasting effect on the distribution of Mi'kmaq in the province: Sipekne'katik and Eskasoni remain the most populous reserves on the mainland and Cape Breton, respectively.

Patterson argues that centralization had the unintended consequence of maintaining the Mi'kmaw language and traditions, as communities were more populous and people had more language and cultural supports (Patterson 1985, 119).



Map of First Nation reserves in Nova Scotia. Courtesy of the Mi'kmawey Debert Cultural Centre.

Mi'kmaw Reserves in Nova Scotia Today

Today, there are more than 18,000 registered or Status Mi'kmaq in Nova Scotia, most of whom, but not all, live on reserve (CIRNAC 2021a). There are 13 *Indian Act* Bands in the province, and their reserves are spread from Yarmouth in the southwest to Membertou in Cape Breton. Seven Bands have their reserves on the mainland: Acadia, Annapolis Valley, Bear River, Glooscap First Nation, Millbrook, Paqtnkek Mi'kmaw Nation, Pictou Landing, and Sipekne'katik. Five Bands have their reserves in Cape Breton: Eskasoni, Membertou, Potlotek First Nation, Wagmatcook, and We'koqma'q First Nation (CIRNAC 2021a).

Despite the hardships caused by the reserve system, reserves, as communities, are also places of cultural survival, where Mi'kmaw is spoken and taught in schools, and cultural practices are thriving.

Residential Schools (1831–1996)

Indian residential schools (IRS) were a system of schools for Indigenous children, established by the Canadian government and administered by churches. They operated from 1831 to 1996. An estimated 150,000 Indigenous children attended residential schools. In 2015, the Truth and Reconciliation Commission of Canada described residential schools as an instrument of cultural genocide against the Indigenous Peoples residing in Canada (TRC Honouring the Truth 2015, 1).

What Was the Purpose of Residential Schools?

The residential school system—whose creation was led by Canada's first Prime Minister Sir John A. Macdonald—was a policy deliberately enacted by the Canadian government to

- separate Indigenous children from their families,
- · minimize and weaken family ties and cultural linkages,
- disrupt and corrode social structures and economies of Indigenous Nations,
- and indoctrinate and assimilate children into a new culture—the culture of the legally dominant Euro-Christian Canadian society. (M. Battiste 2016, 263)

In justifying residential school policy, the Prime Minister told the House of Commons in 1883 that

when the school is on the reserve the child lives with its parents, who are savages; he is surrounded by savages, and though he may learn to read and write his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men. (TRC Honouring the Truth 2015, 2)

In 1894, amendments to the *Indian Act* and new regulations made school attendance at an on-reserve day school mandatory. Indian agents were authorized to place children between the ages of 7 and 15 in boarding or industrial schools (TRC vol. 1 2015, 254–255). Parents who did not comply could receive a jail sentence. From 1894 to 1996, over 150,000 Indigenous children—estimated at 20 percent of Status Indian children—were forcibly removed from their families and communities and placed in residential schools. By 1931, Canada had 80 residential schools (TRC Honouring the Truth 2015, 64).

The Schubenacadie Residential School

The Maritimes' only Indian Residential School was built in Shubenacadie in 1929 and was open to students from 1930 to 1967. Over 1,000 Mi'kmaw and Wolastoqey children from Nova Scotia, Prince Edward Island, New Brunswick, and Quebec attended the school.

The school was first managed by the Roman Catholic Archdiocese of Halifax and later the Missionary Oblates of Mary Immaculate. It was staffed by the Sisters of Charity of St. Vincent de Paul of Halifax. The childrens' families and community leaders

voiced objections, and protested everything from forced attendance to poor conditions, mistreatment, and the inadequate quality of schooling. Many children fought against the system by refusing to let go of their languages and identities. Some children ran away from the school in an effort to return home. (Parks Canada 2021)

The abandoned school building was demolished in 1986, and a factory now stands in its place. The site of the former school is a place of remembrance and healing for some survivors and their descendants, but not for all.

The Tragedy of the Residential School Experience

Note: Be aware for the potential for emotional triggering in discussing these events with students.

Residential schools disrupted the traditional Mi'kmaw system of learning. Mi'kmaw scholar Marie Battiste writes of the Indigenous process of education that was disrupted by residential schools.

Mi'kmaw control of socializing children through education was a covenant learned from our Creation story and its teachings. The Mi'kmaw educational traditions were focused on enabling the potential and gifts of the Creator in each person and nourishing the learning spirit throughout the many cycles of life. Mi'kmaq deep love for their children, for learning and for sharing knowledge, including an on-going curiosity and capacity for the deep learning of diverse ecologies and societies, was part of Mi'kmaw socialization, hospitality and protocols of place—all shared with the newcomers as reported in the travel logs of explorers and missionaries and priests for centuries. (M. Battiste 2016, 264)

Instead of these educational practices, Mi'kmaw children in residential school had little or no contact with their families and were forbidden to speak their language; if students broke the rules, they were severely punished. During their schooling, students experienced confinement, humiliation, lack of privacy, and physical, sexual, and psychological abuse (Knockwood 2001). Mi'kmaw writer Isabelle Knockwood details her experiences at the Shubenacadie residential school.

I remember a nun shaking a girl by the shoulders and yelling, "Look at me, look at me," because she did not realize that direct eye contact between a child and adult was considered arrogance in the Native culture. We were forcibly disconnected from everything our parents and elders had taught us, and everything new was learned in an atmosphere of fear. Shame too was associated with learning, particularly in history and catechism where Indians were depicted in a derogatory way as savages and heathens. [. . .] One indication I had that I was different racially from the priest, nuns, farmers and maintenance workers and their families was that we were called derogatory names [. . .] Another indication came when light-skinned girls were treated differently than dark-skinned girls. Margaret [. . .] who was part Mi'kmaw and part-Black seemed to be singled out for display when white visitors from the church or from the Department of Indian Affairs came. She was also the most abused child in the school. The message was loud and clear that the darker your skin was, the lower in your teachers' estimation you were. (Knockwood 2001, 52)



Through the residential school system, every Indigenous community in Canada suffered losses to their language, culture, religion, and economy. The consequences of this cultural genocide were tragic for Indigenous People who experienced

- dislocation;
- loss of pride, self-respect and identity within Indigenous families, communities, and nations;
- · loss of culture, language, and traditions.

This trauma led to epidemic rates of suicide, alcoholism, and family disfunction and violence. These consequences are described as intergenerational trauma because they have moved through generations until the present day (TRC Honouring the Truth 2015, 135–136,139). The present generation are now working to recover knowledge and dignity lost through the residential school system.

Additional Resources

CXOCXOCXOCXO

Land back, A Yellowhead Institute Red Paper. https://redpaper.yellowheadinstitute.org/

Cash back, A Yellowhead Institute Red Paper. https://cashback.yellowheadinstitute.org/

Indian Residential School Legacy Project. https://www.mikmaweydebert.ca/sharing-our-stories/indian-residential-schools-legacy-project/

Government of Canada. The former Shubenacadie Residential School in Nova Scotia. https://www.pc.gc.ca/en/culture/clmhc-hsmbc/res/information-backgrounder/pensionnat-shubenacadie-residential-school



Section 6: Renewal and Renegotiation



Section 6: Renewal and Renegotiation

STAGE 1	STAGE 2	STAGE 3	STAGE 4
SEPARATE WORLDS	CONTACT AND COOPERATION	DOMINATION AND ASSIMILATION	RENEWAL AND RENEGOTIATION
Before 1600 CE	1600 – mid 1800	Mid 1860 – mid 1950	Mid-1950 - PRESENT
Indigenous and non-Indigenous societies developed in isolation from each other. National groups with long traditions of governing themselves	Initial contact between Indigenous Peoples and Europeans characterized by cooperation, nation-tonation negotiation of Peace and Friendship Treaties, trading and military alliances. Steep growth in European population numbers; sharp decline in Indigenous numbers	Attempts to destroy Indigenous distinctiveness: relocations, residential schools, outlawing of Indigenous cultural practices	Recovery and renewal for Indigenous Peoples and cultures, reneogiating relationships and Rights with colonial governments and settlers

Overview

The Royal Commission on Aboriginal People (RCAP) writes that in terms of settler-Indigenous relations, Canada started to turn the page on the dark era of domination and assimilation in the 1950s. At this point, they write, Canada moved into the era of renewal and renegotiation. RCAP describes this stage as a "time of recovery for Aboriginal people and cultures, a time for critical review of our relationship, and a time for its renegotiation and renewal" (RCAP Highlights 1996). Mi'kmaw legal scholar Naiomi Metallic argues that these events were improvements over the previous era of domination and assimilation, and significant problems remain to be addressed (Metallic 2018, 426).

This Section examines the following:

- the Hawthorn Report of 1963
- the White Paper of 1969
- the Red and Brown Papers of 1970
- the Constitution Act, 1982 and Section 35
- the Penner Report of 1982: Recommendations for Indigenous Self-Government
- Elijah Harper and the Meech Lake Accord of 1987
- the Charlottetown Accord of 1992
- the Royal Commission on Aboriginal Peoples of 1996
- The Truth and Reconciliation Commission of 2008–2015

The Hawthorn Report of 1966

In 1963, the federal government commissioned Harry Hawthorn, a University of British Columbia settler anthropologist, to investigate the social conditions of Indigenous Peoples in Canada. The Hawthorn Report concluded that Indigenous Peoples were Canada's most disadvantaged and marginalized population. They were "citizens minus" as a result of years of failed government policy that "left students unprepared for participation in the contemporary economy" (Government of Canada (Editor: H.B Hawthorn) 1966). The report recommended that Aboriginal Peoples be considered "citizens plus," with sufficient resources to choose their own lifestyles, on or off reserve. The authors advocated ending all forced assimilation programs, especially the residential school system (Lagace and Sinclair 2021; Government of Canada (Editor: H.B Hawthorn) 1966) (University of British Columbia 2009 i).

The White Paper of 1969

Background and Consultation Process

In the 1960s, increasing Indigenous activism and media attention heightened general awareness of the social injustice and socio-economic inequities experienced by Indigenous People in Canada. Given the Hawthorn Report, the federal government could no longer deny that Indigenous Peoples faced greater poverty, higher infant mortality rates, and lower levels of education and life expectancy than non-Indigenous Canadians.

Canada implemented a consultation process to hear Indigenous voices. That process was viewed with suspicion by some First Nations. For example, the Indian Chiefs of Alberta refused to participate in the consultations "[. . .] because we have been stung and hurt by his concept of consultation" (Indian Chiefs of Alberta 1970, 190). While many Indigenous organizations and individuals participated in the consultations, First Nations leaders continued to be sceptical about the government's intent, and repeatedly "expressed concern about Aboriginal and treaty rights, title to the land, self-determination, and access to education and health care" (University of British Columbia 2009).

The White Paper Proposals

In 1969, Pierre Trudeau's government tabled its Statement of the Government of Canada on Indian Policy, known as the White Paper. The White Paper asserted that it rested upon "the rights of Indian people to full and equal participation in the cultural, social, economic and political life of Canada" (Government of Canada 1969b, 6). This notion of 'formal equality' leading to assimilation is now viewed by many as colonial thinking and contrary to reconciliation.

The White Paper claimed that its intent was to make all Indigenous Peoples "equal" to other Canadians. Trudeau famously told reporters that First Nations must choose between jumping into Canadian society with both feet or be content with partial citizenship (Government of Canada 1969b).

Indigenous Nations saw this policy as a road map to cultural genocide and fought back. For the first time in history, federal ministers and Indigenous leaders met face-to-face. The proposed policy was withdrawn in 1970.

The document proposed

- abolishing the *Indian Act*, which it thought lead to "discrimination, isolation and separation." The authors stated that "discrimination breeds discrimination by example, and the separateness of Indian people has affected the attitudes of other Canadians towards them." (Government of Canada 1969a, 11)
- eliminating Indian Status: "To be an Indian must be to be free free to develop Indian cultures in an environment of legal, social and economic equality with other Canadians." (Government of Canada 1969a, 2)

The White Paper did not address concerns raised by First Nations in the consultation process. It did not

- recognize or honour the First Nations' Rights.
- acknowledge and provide mechanisms to deal with historical grievances, particularly land title and Aboriginal and Treaty Rights.
- propose any means for meaningful Indigenous participation in Canadian policy making.
 (University of British Columbia 2009)

Mi'kmaw legal scholar Naiomi Metallic argues that the White Paper

recommended fundamental changes to the status of Indian people in Canada, notably the end of the distinct status for Indians, the dissolution of Indian Affairs, the repeal of the *Indian Act* and its replacement with an *Indian Lands Act*, with the objective of facilitating First Nations' absorption into mainstream society. [. . .] the government justified this proposal as a progressive move in tune with social reform and civil rights. (Metallic 2018, 431)

Indigenous Response to the White Paper

The White Paper—and the process that informed it— "led to a wave of activism, academic work and court decisions over the next five decades" (Lagace and Sinclair 2021).



Prime Minister Pierre Trudeau speaks during a dramatic meeting with the entire federal cabinet and a delegation of about 200 First Nations leaders on Parliament Hill in Ottawa in 1970. THE CANADIAN PRESS/R. Mac

The backlash from First Nations was immediate and universally negative and "sparked a new era of Indigenous identity and political organizing in Canada" (University of British Columbia 2009). Indigenous leaders strongly denounced the document and the consultation process (CBC Radio 2009). They argued that "instead of dealing with First Nations fairly and appropriately, the federal government was absolving itself of historical promises and responsibilities. Instead, provinces—with whom First Nations had no relationship—would be forced to deal with longstanding issues" (Lagace and Sinclair 2021).

Kwakwaka'wakw writer and educator Bob Joseph argues that the Canadian government proposed to achieve "equality" by removing Indigenous Peoples' "distinctiveness as a People and their relationship to the land, and forcing them to assimilate into mainstream society with no Aboriginal or treaty rights whatsoever" (Joseph 2018, 90).

Metallic argues:

At the time ... equality was conceived of as "formal equality," the notion that everyone should be treated identically. Pursuant to this understanding, First Nations ought to be treated the same as other citizens and their legal status as "Indians," as well as their different legal entitlements arising therefrom (treaties, reserves, the *Indian Act*, etc.), was often blamed for their plight (as opposed to a century of colonial and assimilatory policies). Viewed in another light, the objective was still assimilation, but based less on denigrating Indigenous cultures than on viewing mainstream Euro-Canadian culture as the pinnacle of social ordering. (Metallic 2018, 427)

In 1970, the Union of Nova Scotia Indians (UNSI, now the Union of Nova Scotia Mi'kmaq) responded to the Special Joint Committee on the Constitution of Canada. Their response affirmed that Mi'kmaq of Nova Scotia were

- united on the real feelings of social and economic injustices of the past and present situation in which they find themselves.
- considered themselves "the owners of Nova Scotia and point to the absence of agreements or [treaties] in which land was [ceded]." (Union of Nova Scotia Indians 1971, 7–8)

Their brief ended with a statement from UNSI President Noel Doucette:

We are a people with special rights guaranteed us by promises and Treaties. We do not beg for these rights, nor do we thank you. We do not thank you for them because we paid for them, and God help us, the price we paid was exorbitant. We paid for them with our culture, our dignity, our pride and self-respect. We paid, we paid and we paid until we became a beaten and poverty stricken race. (Union of Nova Scotia Indians 1971, 7–8)

Metallic describes the rejection of the White Paper by Indigenous Peoples.

The significance of this milestone is not the proposal itself, but the reaction to it. Contrary to the federal government who viewed it as progressive, First Nations viewed the proposal as the ultimate attempt at assimilation. Anger towards the White Paper fuelled a national First Nations resistance movement and the creation of regional and national advocacy bodies, including the National Indian Brotherhood (which would eventually become the Assembly of First Nations). First Nation opposition was so strong that the federal government withdrew the proposal and declared a formal end to its assimilation policy in 1971. (Metallic 2018, 431–432)

Impact of the Failure of the White Paper

In his research for the National Centre for First Nations Governance, settler scholar and politician John Milloy writes of the enormous impact of the failure of the White Paper.

Not until the failure of the Trudeau/Chrétien White Paper proposal in the early 1970s was the determination to "assimilate the Indian peoples" abandoned and a search begun in constitutional conferences and court rooms to a find a place in Confederation for First Nations that would fully respect their "existing rights." (Milloy 2008, 1)

The Red and Brown Papers of 1970

In 1970, the Indian Chiefs of Alberta presented a document entitled Citizens Plus to Prime Minister Pierre Trudeau and the Government of Canada. It became known as the Red Paper: a counter proposal to the White Paper addressing issues raised in the consultation process but ignored in the White Paper (Indian Chiefs of Alberta 1970).

The Union of British Columbia Indian Chiefs was formed in response to the White Paper. It published the Brown Paper (titled A Declaration of Indian Rights: The B.C. Indian Position Paper), which rejected the White Paper's proposals and asserted that Indigenous Peoples continue to hold Indigenous title to the land (University of British Columbia 2009).

Donald Marshall Jr. 1971 Trial and the Royal Commission of 1989: Miscarriage of Justice

These two cases speak not to Treaty Rights but directly to systemic anti-Indigenous racism within Nova Scotia's police and justice systems, and society in general.

Donald Marshall Jr. was the son of Donald Marshall Senior, Kji-saqmaw. In 1971, at the age of 17, he was wrongly convicted of murder. He spent more than 11 years in jail. In 1989, a provincially appointed Royal Commission on the Donald Marshall Jr. Prosecution exposed the systemic racism underlying the miscarriage of justice. Justice Anne Derrick, who defended Donald Marshall in Nova Scotia's Court of Appeals, writes:



Donald Marshall provides testimony in 1988 about the 1971 slaying of Sandy Seale, for which he was wrongfully convicted. (File Photo). Doug Ives/CP printed Globe and Mail Oct.6, 2019

On May 28, 1971 Donald Marshall Jr., walking through Sydney's Wentworth park, met up with Sandy Seale, a Black youth from Whitney Pier. Marshall and Seale were casually acquainted. Proceeding through the Park together they encountered two men who struck up a conversation. One of these men, Roy Ebsary, described by the Commissioners' Report as "an eccentric and volatile old man with a fetish for knives" with no provocation or warning, fatally stabbed Sandy Seale in the stomach. He died on May 29, 1971. On June 4, 1971, Donald Marshall, only 16 and still living at home on the Membertou reserve was arrested and charged with non-capital murder. The Royal Commission of Inquiry found that the fact that "Marshall was a Native is one reasons why John McIntyre [the Sydney Police Chief heading the Seale murder investigation] singled him out so quickly as the prime suspect without any evidence to support his conclusion." (Derrick 2003)

While in prison, Marshall continued to denounce his wrongful conviction. In 1982, the RCMP reopened the investigation into Seale's murder. On March 12, after 11 years and one month in prison, Marshall was released, and his conviction was overturned. In May 1983, the Nova Scotia Court of Appeal ruled that Marshall had been wrongly convicted and entered his acquittal (Butts 2020).

Ebsary was convicted of manslaughter and sentenced to three years in prison, reduced to one year on appeal. The province of Nova Scotia awarded Marshall \$270,000 for his wrongful imprisonment; half of this amount went to pay his legal fees (McMillan 2018, 28–32).

Royal Commission on the Donald Marshall Jr. Prosecution

The Nova Scotia government established the Royal Commission (1986–1989)—also known as the Marshall Inquiry—to investigate the charging, prosecution, conviction, and sentencing of Donald Marshall Jr., and to make recommendations to prevent such tragedies from happening in the future (Butts 2020).

Settler legal anthropologist and scholar Jane McMillan writes:

The impetus for a public review came primarily from the media, Mi'kmaw and black organizations, private citizens, and the federal and provincial Opposition parties. By the time the government consented to a public airing of the case, the scope of the concerns went well beyond the specifics of Donald's wrongful conviction. The provincial government and the Department of the Attorney General were being accused of meddling in the affairs of the criminal justice system to cover up political wrongdoing. [. . .] The justice system, often taken for granted as being fair, was being portrayed as overtly racist and possibly corrupt. The announcement of a royal commission in October 1986 was an exercise in damage control and public relations. (McMillan 2018, 35)

The Royal Commission heard from 113 witnesses (only six of whom were Mi'kmaq), reviewed 176 evidence exhibits, and, in its 1989 Marshall Report, castigated the Nova Scotia justice system—and society in general—for the injustices carried out against an innocent Mi'kmaw teen (McMillan 2018, 38).

The final report concludes that

the criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and wrongful conviction for murder in 1971 up to, and even beyond, his acquittal by the Court of Appeal in 1983. The tragedy of the failure is compounded by evidence that this miscarriage of justice could – and should – have been prevented, or at least corrected quickly, if those involved in the system had carried out their duties in a professional and/or competent manner. That they did not is due, in part at least, to the fact that Donald Marshall, Jr. is a Native. (Royal Commission on the Donald Marshall, Jr., Prosecution 1989)

In her book Truth and Conviction: Donald Marshall Jr. and the Mi'kmaw Quest for Justice, McMillan concludes:

The highly publicized commission exposed discrimination and socioeconomic inequalities in the criminal justice system and in Nova Scotia society. Nova Scotians became aware of the resilience of Mi'kmaw tribal culture in the face of a predominantly white criminal justice system and a settler society that had failed to honour the Peace and Friendship Treaties. (McMillan 2018, 48)

The Royal Commission on the Donald Marshall Jr. Prosecution made many recommendations, including to

- establish a Native Criminal Court.
- establish a Native Justice Institute to support the Native Criminal Court, hear concerns and needs, monitor the treatment of Mi'kmaq in the criminal justice system, conduct research, and train people working in and outside the Native Criminal Court.
- establish a Native court worker program.
- recruit and hire Indigenous people for the RCMP.(Royal Commission on the Donald Marshall, Jr., Prosecution 1989)

Constitution Act, 1982 and Section 35

In the 1970s, Prime Minister Pierre Trudeau initiated a political process that led to the repatriation of the Canadian Constitution, with the *BNA Act* of 1867 becoming the *Constitution Act, 1982*. The BNA Act and 30 appended documents became the full responsibility of the government of Canada. The Canadian Charter of Rights and Freedoms was added to the Constitution at this time.

Early drafts of a repatriated Canadian Constitution did not recognize existing Aboriginal Rights or relationships. In the introduction to *Drumbeat: Anger and Renewal in Indian Country*, George Erasmus (National Chief of the National Indian Brotherhood in the 1980s) writes about Indigenous organizing and campaigning to entrench Aboriginal and Treaty Rights in the Constitution.

Native people in Canada will not soon forget the contempt with which we were treated in the long negotiations leading up to the repatriation of the Canadian Constitution in 1982; [. . .]

We watched with mixed feelings as the national debate on the Constitution proceeded in the first years of this decade. On the one hand, we were very much aware that any constitutional change might adversely affect the treaties that our forebears had signed with Great Britain before Canadian confederation; on the other hand, we were hoping that the inclusion of aboriginal and treaty rights in the Constitution would, for the first time, signal our place in Confederation.

We held many meetings to discuss what might happen, and the consensus, in an effort to ensure that our rights would be protected when the Constitution was "brought home." In particular, our nervousness arose, in part, from the fact that the meaning of our rights written in these pre-Confederation treaties had not been tested in Canadian courts, but, more perhaps, because of our memory of the callous way in which we have been treated by Canadian legislatures and courts in the past.

We embarked on a significant plan to generate publicity, organized considerable lobbying in Canada and (surprising, I think, to many Canadians) in Britain, aimed directly at the Crown, and at the British Parliament, which still held custody, as it were, over the Constitution. At one point, we gathered together more than 500 chiefs for a major assembly in London. We held tours throughout the country, and even sent teams and information packages to Europe to educate the public there about what was at stake. (Erasmus 1989, 21–25)

Through campaigns and demonstrations, Indigenous organizations succeeded in having their Rights enshrined and protected under **Section 35(1)**. Some examples of Rights protected by Section 35 are the following:

- Existing Rights of First Nations, Inuit, and Métis Peoples, including existing Treaty Rights and current and future land claims agreements.
- Rights to subsistence resources and activities (hunting, fishing, gathering).
- Right to self-determination and self-government.
- Right to practice one's own culture and customs including language and religion. (Government of Canada 2021b) (Indigenous Services Canada (ISC) 2021) (Government of Canada 2021b)

Note: It is important to understand that Section 35 *recognizes* Aboriginal Rights, but it did not create them. Aboriginal Rights existed in proclamations, Treaties, and common law before Section 35, but were vulnerable to being altered or extinguished by the federal government through "ordinary" legislation (Government of Canada 1996, 195).

Effects of Section 35

The constitutional protection of Aboriginal and Treaty Rights gave Indigenous Peoples great hope, but many issues remained unresolved. On the strength of constitutional protection, many Indigenous groups turned to the Courts. However, "the burden fell upon Indigenous Peoples to define, through litigation, the nature and quality of those rights" (The University of British Columbia 2009c).

Metallic writes that governments in Canada abdicated to the courts their responsibility for implementing Indigenous Rights.

The recognition of Aboriginal and Treaty rights in the *Constitution Act, 1982* was a result of hard-fought lobbying efforts by Indigenous groups. It was originally intended that future constitutional amendments would further specify the content of Aboriginal rights, but this did not occur and it has fallen to the courts to interpret the provision and tell us what is in the "section 35 box."

Since 1990, the Supreme Court has decided over thirty decisions interpreting section 35 and this jurisprudence recognizes rights to hunt, fish, and gather for food, social, and ceremonial purposes, and some rights to engaging in commercial trade of fish and some other harvested items for the purpose of obtaining a moderate livelihood. The Court has also further fleshed out the nature and content of Aboriginal title and even declared it to exist with respect to land of the Tsilhqot'in Nation in the interior of British Columbia. The Court has also found that governments have an obligation to consult and accommodate when authorizing or engaging in activities that will impact on these rights, even if they have not been proven but are credibly asserted. [...]

While the Court's section 35 jurisprudence has led to positive developments for some Indigenous communities, the test for proving the Aboriginal rights has been criticized as being unduly narrow and freezing Indigenous rights by casting them as practices "integral and distinctive" to pre-contact cultures. The tests for Aboriginal rights, treaty rights, and Aboriginal title have also been charged with placing a heavy onus of proof on Indigenous claimants, who must prove each right on a case-by-case basis. Likely because of this, what have been defined as section 35 rights have not extended far beyond hunting, fishing, and gathering rights. The Supreme Court has even been reluctant to recognize self-government as a right protected by section 35 and has said that, if it is, the right must be linked to a precontact practice that is integral and distinctive to the culture. Such an approach to self-government has been criticized as far too restrictive. (Metallic 2018, 438–440)

Metallic and many others question how effective a vehicle Section 35 is for transforming the relationship between Indigenous Peoples and Canada. Metallic argues that Section 35(1) is still imbued with the doctrine of discovery worldview and therefore cannot support "meaningful reconciliation." Caselaw related to Section 35 is still anchored in the doctrine of discovery: courts continue to reason that the Inherent Rights of Indigenous Peoples were diminished by "discovery" and claiming of sovereignty by the British. This overarching claim of Crown sovereignty has placed a heavy burden of proof on Indigenous claimants and defined the limits of legal tests for Aboriginal Rights, Treaty Rights, and Title.

Metallic argues, however, that Section 35(1) itself might not be the problem, but rather the approaches and attitudes of those applying it (Metallic 2018, 439). She argues that the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and *Canada's UN Declaration Act* [see Section 6] are important tools for changing approaches and attitudes because it supplies the missing details.

These details are: (1) a comprehensive elaboration of the specific rights to which Indigenous peoples are entitled, (2) the framing of the nature of these rights as fundamental human rights, and (3) a comprehensive elaboration of government obligations in relation to Indigenous rights, including that the Canadian government, through its laws, policies and other actions, plays a key role in implementation. (Metallic 2020, 3)

Note: Only recently have Canadian governments started creating policies and legislation to promote, protect, and give space for Indigenous Rights, partly due to Canada signing on to UNDRIP (Metallic 2020).

Note: See Section 9 for examples of legal cases through which Indigenous Peoples have defined their Rights through litigation.

Penner Report of 1982: Recommendations for Indigenous Self-Government

In 1982, at the same time the Canadian Constitution was being repatriated and Indigenous and Treaty Rights enshrined, the House of Commons established the Special Committee on Indian Self-Government. Led by Keith Penner, a Liberal MP from Northern Ontario, the Committee was charged with making recommendations "regarding possible provisions of new legislation and improved administrative arrangements to apply to some or all band governments on reserves, taking into account the various social, economic, administrative, political and demographic situations of Indian bands, and the views of Indian bands in regard to administrative or legal change." (Cumming and Ginn 1986, 97–98). Three Indigenous representatives sat on the Committee: Roberta Jamieson (Assembly of First Nations), Susan Isaac (Native Women's Association of Canada), and Bill Wilson (Native Council of Canada) (Government of Canada, Parliament (Chair: Keith Penner) 1983, iii).

With the support of First Nations from across the country, the Penner Committee recommended constitutional entrenchment of self-government and its recognition in legislation, an idea that had been actively contested by federal and provincial governments in the past. The Committee called for a return to the Nation-to-Nation Relationship recognized in the Royal Proclamation of 1763, one in which the provinces and federal government would withdraw from Indian affairs, and First Nations would govern their own affairs on reserves (RCAP Highlights 1996). Federal support of programs, services, and operations would occur through grants that were previously given to the provinces.

These recommendations were never enacted, partly due to an election that put the Conservatives in power. In 1984, the Department of Indian Affairs tabled Bill C-52, titled An Act Relating to Self-Government for Indian Nations (Bill C-52 1984). This Bill fell far short of the Penner recommendations and did not go beyond a first reading.



Elijah Harper, Red Sucker Lake First Nation, by John Barker Editor@Thompsoncitizen.Net May 17, 2013

Elijah Harper and the Meech Lake Accord of 1987

The Meech Lake Accord

Quebec did not sign on to the Constitution Act, 1982. In 1982, Indigenous leaders were promised more constitutional talks, but Prime Minister Brian Mulroney ignored this promise and chose to focus on Quebec. There is a great National Film Board of Canada (NFB) series on this, called Dancing Around the Table (see Additional Resources for links to watch this film)

The Meech Lake Accord (1987–1990) was a constitutional amendment package negotiated to gain Quebec's acceptance of the Constitution Act by recognizing Quebec as a "distinct society." To be ratified, the Accord needed support from the federal and all provincial legislatures within a three-year period. There was much opposition to the Meech Lake Accord by individuals who thought it would weaken federal power and also by Indigenous groups who were not included in the Accord process and were outraged by their concerns being treated as secondary to those of Quebec (Reynolds 2018, 44).

Elijah Harper Brought Meech Lake Negotiations to a Close

Elijah Harper, Cree-Ojibway of Red Sucker Lake First Nation, served as a community development worker and researcher for the Manitoba Indian Brotherhood and a program analyst for the Manitoba Department of Northern Affairs. He was elected Chief of the Red Sucker Lake Indian Band in 1978. In 1981 he became the first Indigenous MLA in the Manitoba legislature and served as Minister Without Portfolio Responsible for Native Affairs, and Minister of Northern Affairs. He was elected to the House of Commons in 1993 (Marshall 2018).

During his time in the Manitoba Legislature, Harper protested the Meech Lake Accord because of "insufficient participation, inclusiveness and recognition of Aboriginal people . . ." (University of Winnipeg 2011). In 1990, Harper received national recognition for his refusal to accept the Meech Lake Accord. Holding an Eagle Feather, Harper repeatedly voted "no," which effectively ended the Meech Lake Accord, and the constitution was not amended (Coyle 2017). Harper told the CBC:

I was opposed to the Meech Lake Accord because we weren't included in the Constitution. We were to recognize Quebec as a distinct society, whereas we as Aboriginal people were completely left out. We were the First Peoples here – First Nations of Canada – we were the ones that made treaties with the settlers that came from Europe. These settler people and their governments didn't recognize us as a Nation, as a government and that is why we opposed the Meech Lake Accord. (CBC TV 1990 b)

Charlottetown Accord of 1992

The Charlottetown Accord of 1992 was an unsuccessful follow-up to the Meech Lake Accord. The aim of the Charlottetown Accord was to

- · recognize Quebec as a distinct society;
- · decentralize certain federal powers to the provinces;
- recognize Aboriginal governments as one of the three orders of government (federal, provincial, Indigenous);
- recognize the Inherent Right of self-government of Aboriginal People; and
- reform the Senate and the House of Commons. (Centre for Constitutional Studies 2019)

Settler lawyer and writer Jim Reynolds specifies.

Aboriginal people went from being shut out of the Meech Lake Accord to having their wish list of constitutional amendments included in the Charlottetown Accord two years later. This shift almost certainly reflected the federal government's desperation to resolve the Quebec issue rather than any genuine desire to improve the situation of Aboriginal peoples. (Reynolds 2018, 45)

The Accord was approved by the federal government and all ten provincial governments, but Canadian voters rejected it in a referendum in 1992 (Centre for Constitutional Studies 2019).

Royal Commission on Aboriginal Peoples (1991–1996)

Why Was the Royal Commission Established?

In 1990, Canada was gripped by a 78-day standoff between Mohawk protesters and Canadian authorities in Oka, Quebec, over a proposed development on a Mohawk burial ground. The Oka crisis exposed serious problems with the handling of conflicts with Indigenous communities and led to the establishment of the Royal Commission on Aboriginal Peoples (RCAP) in the summer of 1991.



Logo of the RCAP.

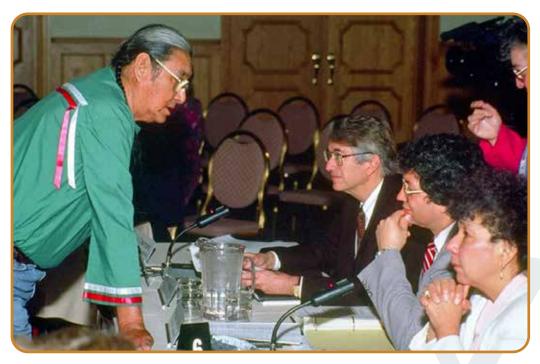
The Royal Commission began its work at a difficult time.

It was a time of anger and upheaval. The country's leaders were arguing about the place of Aboriginal people in the constitution. First Nations were blockading roads and rail lines in Ontario and British Columbia. Innu families were encamped in protest of military installations in Labrador. A year earlier, armed conflict between Aboriginal and non-Aboriginal forces at Kanesatake (Oka) had tarnished Canada's reputation abroad – and in the minds of many citizens. (RCAP Highlights 1996)

The Commission directed itself to a central question: What are the foundations of a fair and honourable relationship between the Aboriginal and non-Aboriginal people of Canada?

Four of the six commissioners were Indigenous. one of those Commissioners was Viola Robinson, a Mi'kmaw leader from Nova Scotia. The RCAP conducted research, held public hearings and round tables (involving 178 days of public hearings and 96 community visits), received submissions from individuals and groups, and published reports. In 1996, after five years of consultation, testimony, and research, the Commission released a five-volume, 4,000-page report dealing with self-governance, Treaties, residential schools, health, housing, the north, economic development, education, and more (Doerr 2021).

Cherokee writer Thomas King describes the RCAP as "the most comprehensive and complete study of Aboriginal people, Aboriginal history, and Aboriginal policy that has ever been done in North America" (King 2012, 171).



RCAP photograph depicts hearing scene and RCAP Commissioners and staff (Library and Archives Canada R 2847-87-1, RG33-157, Vol #8, 10)

What Did the RCAP Recommend?

The RCAP's final report set out a 20-year agenda for implementing change; some of its 440 recommendations are

- a complete restructuring of the relationship between Indigenous and non-Indigenous peoples in Canada (a return to a Nation-to-Nation Relationship in which Indigenous Peoples are regarded as a third order of government, possessing rights of selfdetermination and self-government)
- a new Royal Proclamation acknowledging Indigenous cultures and values, the origins of Indigenous Nationhood, and the Inherent Right to Indigenous self-determination.

- a suite of legislation to facilitate the exercise of Inherent Aboriginal Rights, and recognition of the ability of Indigenous Nations to exercise their Inherent Right to self-government immediately, as well as to manage the ongoing Treaty Relationship, including the equitable sharing of Canada's lands and resources. (Metallic 2018, 442)
- the establishment of an Indigenous parliament to advise the Canadian Parliament on matters affecting Indigenous Peoples.
- a significant increase in land holdings for First Nations in southern Canada. (RCAP vol.1 1996, 685–691)

What were the Impacts of the RCAP?

The RCAP report is an important document in the historical and contemporary relations between Indigenous and non-Indigenous peoples in Canada. (Doerr 2021)

Scott Serson, a senior settler government leader during the RCAP process, writes:

The 1996 Report of the *Royal Commission on Aboriginal Peoples* [. . .] was by far the broadest and most comprehensive effort to define a plan of reconciliation between the Aboriginal peoples of this land and the rest of Canadian society. (Serson 2009, 165)

While many of the report's 440 recommendations have not been implemented, the RCAP Report had some important impacts.

- raising awareness of the impacts of residential schools, which led to the Indian Residential School Settlement and creation of the Truth and Reconciliation Commission.
- influence on several SCC decisions on Aboriginal issues in the areas of sentencing and equality rights and continues to be a vital resource to inform social-context judging in the Indigenous context. (Serson 2009, 165)

The Federal government responded to RCAP with an action road map called Gathering Strength—Canada's Aboriginal Action Plan. Serson argues that even though the government's action plan led to some steps toward reconciliation, the RCAP promise to Indigenous Peoples has not been fulfilled (Serson 2009, 168). Serson argues that several factors contributed to this inaction:

- A change in senior administrators within Indian Affairs.
- Inflation coupled with a focus on reducing the deficit, and the introduction of a 2% cap on the annual budget for on reserve programs and services. This cap stayed in place for decades, long after other federal austerity measures were eliminated.
- The growth in the number of Indigenous People entitled to Indian Status rights following the passage of Bill C-31. (Serson 2009, 168–169)

Between 1997 and 2015, federal funding for programs and services for Status Indians on reserve was subject to a 2 percent cap on annual increases. As the Indian status population grew, due in part to the reinstatement of Indian status to thousands of people (The University of British Columbia 2009b), the funds to support their wellbeing and create the conditions for self-determination diminished. Serson points out that while this cap was in place, health investments for non-Status Canadians and transfer payments to provinces increased many times more (Serson 2009, 169–170). Serson argues that this inequity in federal spending points to the continuing, underlying assumptions about the capabilities of Indigenous Peoples. These assumptions, he writes, still influence the federal government's willingness to engage in meaningful reconciliation (Serson 2009, 173).

The Truth and Reconciliation Commission (2008–2015)

The Royal Commission on Aboriginal Peoples (1996) recommended a public inquiry to investigate and document the residential school policies, practices, and impacts, and to recommend actions. In 2008, the Truth and Reconciliation Commission of Canada (TRC) began a seven-year process to listen to individuals affected by the residential school system (TRC Honouring the Truth 2015, 23).

The TRC concluded that residential schools were an instrument of cultural genocide. "Honouring the Truth, Reconciling the Future," the summary volume of the final report states that

cultural genocide is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. [...] families are disrupted to prevent the transmission of cultural values and identity from one generation to the next. (TRC Honouring the Truth 2015, 1)

Goals and Conclusions of the TRC

Key goals of the TRC were to

- acknowledge residential school experiences, impacts and consequences.
- provide a holistic, culturally appropriate, and safe setting for former students, their families, and communities to come forward.
- facilitate truth and reconciliation events at both the national and community levels.
- promote awareness and public education of Canadians about the Indian Residential School (IRS) system and its impacts.
- create as complete a historical record as possible of the IRS system and legacy, and make it accessible to the public.
- support commemoration of former IRS students and their families.
- submit recommendations to the Government of Canada to ensure that nothing like this ever happens again. (TRC Honouring the Truth 2015, 340)



Impact of the TRC

The TRC produced 94 Calls to Action to address the cultural genocide of Indigenous Peoples, as enacted by the residential school policy, and achieve true reconciliation. The Actions are directed at federal, provincial, and municipal governments, business and corporate sector, education sector, academia, and other bodies.

As of June 2021, 13 of these 94 Calls to Action had been completely enacted, 60 had received some response, and 21 had not been addressed (Nardi 2021). Federal government maintains a website providing data on its responses to the Calls to Action.

National Inquiry into Missing and Murdered Indigenous Women and Girls

Indigenous women and girls face an alarmingly disproportionate risk of all forms of violence and homicide. Over the past decades there has been a growing push for the government to investigate this issue. Initially the calls for an inquiry were rejected by the federal government, which stated that a 2014 RCMP investigation was sufficient to understand the underlying issues and provide a basis for action. Continuing activism culminated in the 2016 launch of a National Inquiry by the newly elected Prime Minister Justin Trudeau.

The Inquiry was public, independent, and mandated to

- examine and report on the systemic causes of all forms of violence that Indigenous women and girls experience, and
- to recommend concrete action to end this violence.

The Inquiry invited the participation of survivors, family members, and loved ones and conducted community visits, and community and expert panel hearings.

The National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) released its Final Report in 2019. This report provides conceptual and legal frameworks for understanding the history of violence between Canada and Indigenous Peoples—particularly First Nations, Métis, and Inuit women and girls and Two-Spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex and asexual (2SLGBTQQIA) peoples. As did the TRC, the National Inquiry concluded that the treatment of Indigenous Peoples



Kjipuktuk 2021 March for MMIR – Missing and Murdered Indigenous Relations. Photo Elizabeth Goodridge. NS Advocate June 4, 2021

constitutes genocide as defined under International law. It issued 231 calls to justice directed at governments, institutions, social services providers, industries, and all Canadians.

Canada's commitment to issue a national action plan in response to the report was delayed for two years. On June 3, 2021, Canada released MMIWG National Action Plan (NAP). Canada has committed to issuing a more in-depth implementation plan within a year (Nardi 2021).

Additional Resources

National Centre for Truth and Reconciliation website: https://nctr.ca/

National Inquiry into Missing and Murdered Indigenous Women and Girls website: https://www.mmiwg-ffada.ca/

Constitution Act, 1982 Section 3: https://laws-lois.justice.gc.ca/eng/const/page-13.html

House of Commons Committee. 1983. "Indian Self-government in Canada. Report of the Special Committee." Chairperson: Keith Penner. https://parl.canadiana.ca/view/oop.com_HOC_3201_22_6/1?r=0&s=1

CBC Radio. 2009. *Red Paper/White Paper Part 1*. CBC Ideas. https://www.cbc.ca/player/play/1473005172

Nardi, Christopher. 2021. "Much work remains on the Truth and Reconciliation Commission's 94 Calls to Action." National Post. https://nationalpost.com/news/much-work-remains-on-the-truth-and-reconciliation-commissions-94-calls-to-action

Crown-Indigenous Relations and Northern Affairs Canada. "Delivering on Truth and Reconciliation Commission Calls to Action." Government of Canada.

https://www.rcaanc-cirnac.gc.ca/eng/1524494530110/1557511412801

Indigenous Rights Speaker Series: The Gap Between Law and Practice | Video Collection. https://www.lrwc.org/library/audio-video/indigenous-rights-the-gap-between-law-and-practice/

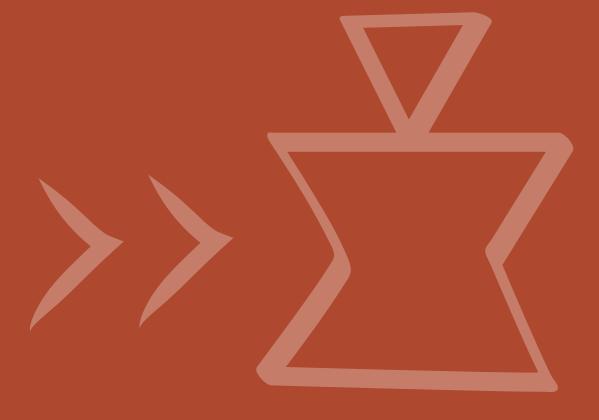
Knockwood, Isabelle. 2001. Out of the Depths. The Experiences of Mi'kmaw Children at the Indian Residential School at Shubenacadie, Nova Scotia. Lockeport, Nova Scotia: Roseway Publishing.

Benjamin, Chris. 2014. Indian School Road. Legacies of the Shubenacadie Residential School. Nova Scotia: Nimbus Publishing.

Bulbulian, Maurice. *Dancing Around the Table*. National Film Board of Canada. 57 min. 1987. https://www.nfb.ca/film/dancing_around_the_table_1/ https://www.nfb.ca/film/dancing_around_the_table_part_two/



Section 7: Aboriginal Rights and Land Claims



Section 7: Aboriginal Rights and Land Claims



Mi'kmaq Group, ca 1910. Silas Rand photographer From the McCord Museum

What Are Aboriginal Rights?

Aboriginal Rights are collective rights which flow from Indigenous Peoples' continued use and occupation of certain areas, and their prior existence as organized societies with legal frameworks. (Metallic 2022). They are *Inherent* Rights which Indigenous Peoples practiced and enjoyed prior to European contact. Stated another way, Aboriginal Rights have not been granted from external sources, but result from Aboriginal Peoples' occupation of their territories, and their ongoing social structures and political and legal systems (McNeil and NCFNG research staff 2007). The National Centre for First Nations Governance expands on the idea of *inherent*.

The inherent right of self-government that Aboriginal peoples have today in Canadian law comes from the sovereignty they exercised prior to contact with Europeans. It is inherent because it existed before European colonization and the imposition of Euro-Canadian law. Aboriginal rights to lands and natural resources are also inherent because they pre-date European colonization. They are communal rights that come from occupation and use of the land by Aboriginal peoples as sovereign nations (McNeil and NCFNG research staff 2007, 6).

Mi'kmaw-specific Aboriginal Rights were acknowledged in 1990 by the Nova Scotia Court of Appeal. The Court affirmed that the Mi'kmaq of Nova Scotia have an Aboriginal Right, protected by s.35 of the *Constitution Act*, 1982, to fish for food (R. v. Denny 1990).

Aboriginal Rights should never be referred to as "special rights" (Joseph 2019, 123).

What Is Aboriginal Title?

A great deal of case law involving Indigenous Nations deals with the difference between what Indigenous Peoples see as their Aboriginal Title to land and its resources, and what the Canadian legal system defines as Aboriginal Title.

Aboriginal Title refers to the Inherent Aboriginal Right to land or a territory. The Canadian legal system recognizes Aboriginal Title as a unique collective right to the use of, and jurisdiction over, a group's ancestral territories (The University of British Columbia 2009a). The 1997 Delgamuukw and Gisday'way (Delgamuukw v. British Columbia 1997) SCC decision acknowledged that Aboriginal Title is an "encumbrance" on the Crown's ultimate title in cases where land was never ceded or surrendered in a treaty (Joseph 2019, 119). It follows that Aboriginal Title and Rights are separate and distinct from any rights that non-Indigenous Canadian citizens may have (The University of British Columbia 2009a).

Comprehensive and Specific Claims

Note: In reading this section it is important to understand that Aboriginal Title (as described above) encompasses far more than comprehensive or specific land claims.

Federal land claims policies are attempts by the government to address wrongs made against Indigenous Peoples—their Rights and lands—by the federal, provincial, or territorial governments.

In the 1920s, Indigenous political organizations emerged with the purpose of reclaiming their lands. Organizing on the part of Indigenous Peoples was threatening for government officials. Kwakwaka'wakw writer and educator Bob Joseph explains that "the federal government was trying desperately to plug the holes on the dyke, knowing that if the dam burst and all the pent up resentment and anger was given a voice, their control over Indians would be severely weakened" (Joseph 2018, 74). The federal governments initial response to these early land claims was to amend the Indian Act in 1927, making it illegal for Status Indians to form political organizations, hire lawyers, or raise money to hire legal counsel (Joseph 2018, 72). These amendments made it almost impossible for Indigenous Peoples to pursue land claims and human rights cases.

There are two types of government land claims: 1) comprehensive claims and 2) specific claims.

Comprehensive Claims

Until recently, the federal government recognized only two ways of addressing wrongs against

Indigenous Peoples and their lands: comprehensive claims and specific claims. They deal with the unfinished business of Treaty-making in Canada. "They are based on the traditional use and occupancy of land by Indigenous Peoples who did not sign treaties, were not conquered, or did not surrender their lands by any means" (Joseph 2019, 171).

Comprehensive claims agreements and modern Treaties are implemented through legislation, and they set legal parameters for the use and management of land and resources, and more and more frequently for Aboriginal self-government. In Canada today—with the federal government having exclusive jurisdiction over Indians, and the provinces having jurisdiction over lands—a comprehensive claim can't be settled without the federal government signing on (Allen 2022).

The Assembly of First Nations writes that comprehensive land claims arise when First Nation rights and title have not been dealt with by treaty or through other legal means. In areas where this has occurred, comprehensive land claim and self-government agreements can be jointly negotiated between a First Nation and Canada and, where applicable, provincial and territorial governments. (Assembly of First Nations n.d.)

Federal Comprehensive Claims Policy of 1973

The federal government's Comprehensive Claims Policy (CCP) lays out the process for negotiating comprehensive claims. It was drafted in response to the Supreme Court of Canada's 1973 decision in *R. v. Calder*, which made it clear that First Nations are the Title Holders to their Traditional Territories and that this Title is a burden on Crown sovereignty (Assembly of First Nations 2015).

The Assembly of First Nations notes that

despite significant advances in Canadian jurisprudence
(in particular, the Supreme Court of Canada's decisions
in Delgamuukw, Haida and Tsilhqot'in) and in international law (the United
Nations Declaration on the Rights of Indigenous Peoples), Canada has
been unwilling to issue an updated policy that meaningfully reflects these
substantive and significant changes that have taken place since the early
1990s. (Assembly of First Nations 2015)

The Policy was last updated in 2014 as an interim policy.

Indigenous Peoples' Concerns with the CCP

According to settler lawyer Bruce McIvor, the CCP is concerning for Indigenous Peoples with Aboriginal Title as it "perpetuates and reinforces the understanding of land claims agreements as mechanisms for removing Indigenous Peoples from their lands so that the lands can be exploited by non-Indigenous people" (McIvor 2018).

Nova Scotia Mi'kmag opt out of the CCP

While the federal government attempted to address all Aboriginal Title assertions across Canada through the CCP, Mi'kmaq refused to take part, objecting to any process that might lead to surrender of their Title or Rights. In 1998, after years of negotiations, the federal and provincial governments committed to the **Made-in-Nova Scotia process**, a first in Canada. Through this process, the parties "seek to clarify rights to lands and resources, ensure that the interests of Aboriginal groups in resource management and environmental protection were recognized, and that claimants share in the benefits of development" (Kwilmu'kw Maw-klusuagn (KMK) n.d.).

In 2007, the Chiefs of Nova Scotia, and the Nova Scotia and Canadian governments signed the Mi'kmaq-Nova Scotia-Canada Framework Agreement for the Made-in-Nova Scotia Process. This important agreement confirms that all parties will work to resolve outstanding Mi'kmaw Title and Rights issues through negotiations in a spirit of reconciliation. The Agreement specifically provides that, among other things, "the negotiations pursuant to this Framework Agreement are not intended as a re-negotiation of the Mi'kmaq Treaties, nor as a process leading to their extinguishment" and that "the Parties acknowledge that the Mi'kmaq do not intend to agree to a Mi'kmaq of Nova Scotia Accord that does not implement to their satisfaction their view of Mi'kmaq rights and title" (the Mi'kmaq of Nova Scotia, Nova Scotia, and Canada 2022).

Specific Claims

Specific claims concern the government's outstanding obligations under historic Treaties or the Indian Act (Albers 2020).

Jaclyn McNamara, a lawyer with the firm OKT, which advocates for advancing the self-determination of Indigenous Peoples, writes on OKT's blog:

A 'specific claim' is a claim made by a First Nation against Canada for a historic wrong. They typically relate to claims where Canada has either breached its obligations under a historical treaty, or breached its obligations managing a First Nation's assets, including reserve lands, natural resources and band money. (McNamara 2019)

Specific claims are about

- the size and location of reserves.
- the improper use of reserve lands by others, particularly government,
- reserve land taken in the past without permission, and
- financial compensation for the use of reserve land. (Albers 2020)

Slow Resolution of Claims Through Comprehensive and Specific Claims Processes

The voluntary specific claims process was created in the 1970s. Within this process, First Nations and

writes that
specific claims deal with First
Nation grievances against the
Crown and arise where Canada
is deemed to have failed to meet
its obligations under Treaties or
other agreements, or in how it
has managed First Nation funds
or assets. (Assembly of First
Nations n.d.)

The Assembly of First Nations

the Government of Canada can try to resolve specific claims through negotiated settlements, outside of the court system (Government of Canada 2020b). In 2007, in an attempt to reform the specific claims system, the Harper government introduced Justice at Last: A Specific Claims Action Plan.

Mi'kmaw legal scholar Naiomi Metallic states that

there are still hundreds of outstanding claims that have yet to be resolved through the specific claims process and the process has been discredited as being biased, since Indian Affairs is at once the defendant and the judge and jury over these claims [. . .].

The comprehensive claim process has also been charged with being exceedingly slow (in some cases taking two or three decades) and expensive, resulting in only a small minority of groups with completed claims. As a policy of the federal government—again, without legislative backing—the process is often contingent on the political will of the government in power, and some governments have been very slow to proceed on land claims. (Metallic 2018, 436–37)

Specific Claims in Nova Scotia

These specific claims by Mi'kmaw Bands in Nova Scotia have been settled with the Crown in Nova Scotia.

- Acadia's Ponhook Reserve claim for loss of reserve land.
- Bear River's claim for illegal surrender of lands (resolved by administrative remedy).
- Millbrook and Sipekne'katik's claim for unlawful surrender and sale of Sambro, Ingram River, and Ship Harbour Lake Indian Reserves in 1919.
- Paqtnkek Mi'kmaw Nation's claim for loss of land at Summerside (Welnek).
- Potlotek First Nation's claim re a 200-acre lot resolved through administrative remedy.
- Potlotek First Nation's claim regarding a right-of-way resolved through administrative remedy.
- Potlotek First Nation's claim regarding a subpower station on the Chapel Island reserve resolved through administrative remedy.
- Wagmatcook's claim for the loss of 3,800 acres of reserve land.

These specific claims are currently in negotiations in Nova Scotia.

- Annapolis Valley's claim re alienation of land and timber removal from the St. Croix Reserve.
- Bear River's claim re the Gulch Hydro Pipeline Project and the sale of reserve land.
- Millbrook's claim regarding loss of lands and resources from the Sheet Harbour Reserve.
- Millbrook's claim regarding the taking of lands for a highway and fiber optic cable.
- All 13 Bands in Nova Scotia's claim regarding the mismanagement of Kejimkujik Reserves.
- Patgnkek Mi'kmaw Nation's re loss of lands for a highway in 1965.
- Patgnkek Mi'kmaw Nation's claim for the loss of reserve lands/Peter McChesney Grant.
- We'koqma'q First Nation's claim for the 1862 alienation of reserve lands.(CIRNAC 2021b)

United Nations Declaration on the Rights of Indigenous Peoples of 2007

What Is UNDRIP?

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is the most comprehensive international instrument on the Rights of Indigenous Peoples, and the product of almost 25 years of deliberations by UN General Assembly members and Indigenous groups. It was adopted by the UN in 2007 by a majority of 144 states with 11 abstentions and 4 votes against (Australia, Canada, New Zealand, and the United States, all of which have since endorsed the Declaration). UNDRIP

- establishes a universal framework of minimum standards for the survival, dignity, and well-being of the Indigenous Peoples of the world.
- speaks to existing human rights and fundamental freedoms as they apply to the specific situation of Indigenous Peoples.
- protects collective rights that may not be addressed in human rights charters that emphasize individual rights.
- safeguards the individual rights of Indigenous Peoples. (United Nations 2007, 7)

UNDRIP's 46 articles declare that Indigenous Peoples have the right to

- full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.
- enjoy and practice their cultures and customs, their religions, and their languages.
- develop and strengthen their economies and their social and political institutions.
- be free from discrimination.
- self-determination, which includes the right "to freely determine their political Status and freely pursue their economic, social and cultural development."
- autonomy or self-government in matters relating to their internal and local affairs.
- maintain and strengthen their distinct political, legal, economic, social, and cultural institutions.
- lands, territories, and resources which they have traditionally owned, occupied, or otherwise used or acquired, and it directs states to give legal recognition to these territories. (United Nations 2007, 7–27)

The Declaration does not override the Rights established in Treaties and Agreements between Indigenous Peoples and individual states; it commands these states to observe and enforce the Agreements they have made (United Nations 2007, 25).

Canada and UNDRIP

After its initial opposition, Canada issued, in 2010, a qualified endorsement of UNDRIP, describing it as "an aspirational document," but still remained an objector (Wilt 2017). Six years later, Canada became an unqualified supporter of the Declaration, confirming "Canada's commitment to a renewed, nation-to-nation relationship with Indigenous peoples – a relationship based on recognition of rights, respect, co-operation and partnership" (Government of Canada 2016).



Senator Dan Christmas of Membertou voting yes to Bill C-15 in the Senate. https://www.declarationcoalition.com/latest/

In 2015, the Truth and Reconciliation Commission (TRC) called for UNDRIP to the be framework for reconciliation in Canada. In 2021, the federal government passed into law, **An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples** (UN Declaration Act) (Metallic 2020, 2). The Act affirms the Declaration as a universal international human rights instrument with application in Canadian law and provides a framework for the government's implementation of the Declaration. Section 5 of the Act states "The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration" (Government of Canada 2021a).

In 2021 the United Nations Declaration on the Rights of Indigenous Peoples Act received Royal Assent. The purpose of the Act (Bill C-15) is to

- affirm the Declaration as a universal international human rights instrument with application in Canadian law, and
- provide a framework for the Government of Canada's implementation of the Declaration. Section 5 of the Act states "The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration." (Government of Canada 2021a)

The Canadian Act is too new at the date of writing this guide to determine how its provisions will affect relations between proponents, Indigenous groups, and governments when dealing with development projects. Metallic writes:

The fact that the right to self-determination is the cornerstone of the UN Declaration also means that the jurisdiction, laws and institutions of Indigenous groups will have to be taken seriously, and this will serve to strengthen the constitutional roots of our country, which lay not only in British and French legal orders, but also Indigenous legal orders which have long been overlooked. (Metallic 2020, 2)

Additional Resources

Vowel, Chelsea, 2011. "The More Things Change, the More They Stay the Same." https://apihtawikosisan.wordpress. com/2011/07/05/the-more-things-change-the-more-they-stay-the-same/

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Section 8: Indigenous Self-Determination and Self-Government



Section 8: Indigenous Self-Determination and Self-Government

What are Indigenous Self-Determination and Self-Government?

The Inherent Right of self-government that Indigenous Peoples have today comes from the sovereignty they exercised prior to contact with Europeans. As with Aboriginal Rights discussed above, the Right to self-government is *Inherent* because it existed before European colonization and the imposition of Euro-Canadian law (McNeil and NCFNG research staff 2007, 6).

Indigenous self-government includes to the Right of Indigenous People to govern themselves, within Canada, with laws they have passed that either exclude or have priority over laws passed by other governments (United Nations 2007).

Indigenous self-determination is the Right of Indigenous Peoples to choose their destinies. In Canada, it means that First Nations, Inuit, and Métis have the Right to negotiate the terms of their relationship with Canada, and choose governmental structures that meet their needs (RCAP vol.2 1996, 158). Article 3 of the UNDRIP recognizes the Right to self-determination and states that "[b]y virtue of that right [Indigenous peoples may] freely determine their political status and freely pursue their economic, social and cultural development" (United Nations 2007). The Right to self-determination is explicitly stated at article 3 of the UN Declaration, but its basic premise—that Indigenous Peoples should control their destinies and participate in any decisions that affect them—is reflected in several articles. This includes

- the guarantees of the right to self-government and means and ways for its financing (art 4);
- the right to distinct political, legal, economic, social and cultural institutions (art 5);
- the right to control education (art 14(2);
- the right to participate in all decisions that impact Indigenous rights with states seeking to obtain their free, prior and Informed Consent (arts 18–19);
- the right to determine and develop priorities for development (art 23);
- the right to control lands and resources (art 26(2)); and
- the right control identity and citizenship (art 33(1)). (United Nations 2007)

Indigenous Self-Government is the ability of Indigenous Peoples to enforce their own rules, resolve disputes, and problem-solve; and to establish their own governing institutions to carry out these tasks. Self-government does not mean absolute sovereignty across the board. RCAP rejected the idea that Aboriginal self-government equalled an absolute/secessionist form of sovereignty.

Although jurisdiction over core areas would accrue to Aboriginal nations upon their recognition, no sovereignty is absolute or exclusive in any federation; nor are the lawmaking powers associated with that sovereignty. [. . .] the lawmaking powers of Aboriginal nations will need to be harmonized with those of the federal and provincial governments if the federation is to move forward in a renewed relationship on the basis of consensus and mutual respect. (RCAP vol.2 1996, 310)

Inter-Relationship Between Self-Determination and Self-Government

According to RCAP, the Right of self-government does not supersede the Right of self-determination or take precedence over it. Rather, the Right of self-government is available to Indigenous Peoples who wish to take advantage of it; it is one of a range of voluntary options available to Indigenous Peoples.

Indigenous self-government harkens back to the contact and co-operation stage in the history of Crown-Aboriginal relations (see Section 3), when Aboriginal groups were independent, and the Crown entered into Treaties with them as equals. Indigenous self-government is sometimes described as shared sovereignty or treaty federalism, and variations of it were recommended

Article 4 of UNDRIP states

in exercising their right to self-determination, [Indigenous peoples] have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. (United Nations 2007, 8)

by the 1983 Report of the Special Committee on Indian Self-Government (the Penner Report) and the 1996 Royal Commission on Aboriginal Peoples (RCAP) (Reynolds 2018, 57).

Settler legal scholar Kent McNeil argues that

in my opinion, the inherent right of self-government, understood as residual governmental authority over all aspects of Aboriginal life, has both territorial and personal dimensions. The territorial dimension would provide the Aboriginal government in question with authority over the territory of the Aboriginal nation in which the right of self-government is vested. This would allow it, for example, to make and enforce laws in relation to such matters as land use and environmental protection. In addition, where an Aboriginal nation has Aboriginal or treaty rights (such as hunting and fishing rights, or entitlement to other resources) that extend beyond its territory, jurisdiction in relation to those rights should be part of its right of self-government. The personal dimension would involve authority over the citizens of that nation, even when physically outside the territory of the nation. Instances of this could include jurisdiction over family law matters, such as marriage and adoption, and possibly over matters like education and cultural heritage. (McNeil 2004, 20)

The RCAP argues for self-government on a Nation level.

[. . .] the inherent right of self-government is vested in the entire people making up the Aboriginal nation and so is shared in an organic fashion by the various overlapping groups that make up the nation, from the local level upward. The inherent right does not rest in local communities as such, considered apart from the nations of which they are part. In effect, for an Aboriginal people to exercise the inherent governmental power at their disposal, they will have to draw up a national constitution that establishes an overall structure of government. In many cases this structure will include not only national but also local institutions. Within such multi-level structures, each level of government can be viewed as exercising its own powers, powers that are appropriate to its particular sphere of authority and that spring in each case from the people concerned. (RCAP vol.2 1996, 234)

McNeil argues for research that would lead to new self-government frameworks, frameworks that acknowledge the re-existing sovereignty of First Nations and reject colonial explanations for Crown sovereignty. The path of negotiations leading to a framework for self-government, he argues

involve territorial rights of First Nations as cultural, social, economic, and political entities. Separating lands and resources from issues of governance and jurisdiction, as sometimes happens in negotiations, distorts the true nature of the rights, which include both entitlement to and political jurisdiction over the lands and resources in a First Nation's territory. (McNeil 2004, 9)

A Brief History of the Inherent Right to Self-Government

What follows is a brief history of selfgovernance promises by a succession of governments, and the work of Mi'kmaq to have those promises honoured today.

Pre-Contact Governance

In "A Brief History of Our Inherent Right to Self-Governance: Pre-Contact to Present," McNeil writes:

For thousands of years, the aboriginal people of what is now Canada organized themselves as sovereign nations, with what was essentially governmental jurisdiction over their lands, including property rights.

Those rights—of governance and property—were trampled in the stampede of European settlement, colonization and commercial interests. But they



1860's Mi'kmaq leaders, Shubenacadie. Back Row: from left to right, unknown man, Judge Christopher Peminuit Paul, Saqmaw Jacques-Pierre Peminuit Paul, John Noel. Front row: all unidentified.

were never lost or extinguished. (McNeil and NCFNG research staff 2007, 4)

Prior to the arrival of Europeans in North America, Indigenous peoples were organized as sovereign nations. We had our own cultures, economies, governments and laws. We were generally in ORjohnexclusive occupation of defined territories, over which we exercised governmental authority (jurisdiction). We also owned the lands and resources within our territories, and so had property rights, subject to responsibilities placed on us by the Creator to care for the land and share it with the plants and animals who also lived there. (Centre for First Nations Governance 2021)

For more information see Section 1.

Early Contact Nation-to-Nation Agreements

Early partnerships between Indigenous Nations and foreign governments were forged through Treaty, trade, and military alliances, in which Mi'kmaq saw themselves as a self-determining, sovereign People (Dorey 1994, 9). Over five centuries, the sovereignty of Mi'kmaq, and other First Nations, was eroded by laws, policies, and decisions based on colonialism and paternalism. This section gives a high-level scan of landmarks in the struggle for self-governance.

An Act for the Gradual Enfranchisement of Indians of 1869

In Section 2 you read about Mi'kmaw forms of governance, pre-contact. Those governance structures began to change in 1869, through An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs. Section 10 of the Act allowed the Crown to order "any tribe, band or body of Indians" to elect their Chief, by the men of the band, for a term of three years. It also affirmed that "all life Chiefs now living shall continue as such until death or resignation, or until their removal by the Governor for dishonesty, intemperance or immorality" (Government of Canada 1869).

This Act paved the way for British-style elections for Chief and Council on reserve.

Indian Act of 1876

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Through all of its changes since 1876, the *Indian Act* has laid out how most First Nations communities—reserves and bands, with or without land—are governed. Through the Indian Act election system, the federal government attempted to displace traditional leaders and governance ways.

Even today, the Act dictates how bands can be created and what powers they have. Ultimate authority rests with the federal Minister of Indigenous Services, and massive amounts of reporting are required to federal agencies (Wilson 2018, 58).

The local band office in each community oversees programs such as Social Assistance, Economic Development, Housing and Health. However, all these programs are subject to the policies and rules of the federal government. Mi'kmaq continue to have little say in the policies that affect them directly. (The Confederacy of Mainland Mi'kmaq 2007, 77)

In her book *Price Paid: The Fight for First Nations Survival*, Xat'sull writer Bev Sellars describes how this reporting structure could weaken local accountability.

When I was chief there was absolutely no requirement for me to report to the individuals in the community. I could have gone through my twelve years as chief without consulting with them. But the amount of reporting we did to the Department of Indian Affairs and other funding agencies was unreal. (Sellars 2016, 146)

Kwakwaka'wakw writer and educator Bob Joseph argues that the *Indian Act* changed the nature of what it was to be in leadership.

A chief was more likely to be elected based on his ability to communicate and negotiate with government agencies as well as maintain his commitment to community, values and traditions.

[. . .] Imposing European-style elections was designed for assimilation—to remake traditional cultures in the



Bob Joseph, Kwakwaka'wakw writer and educatoractivist

Other Acts and Reports Speaking to Indigenous Self-Government

image of the colonizers. (Joseph 2018, 16)

The following acts and reports have spoken to the Inherent Right to self-government. For more detail go to Section 3 which describes the federal government's policies and responses to demands for Indigenous self-government—the Constitution Act, 1982, the Penner Report, RCAP. The following is a list of other federal policies and programmes that speak to Indigenous self-government.

Charlottetown Accord of 1992: The Charlottetown Accord was a further attempt to amend the Canadian Constitution. The Accord provided terms for the implementation of the Inherent Right of Indigenous self-government (McNeil and NCFNG research staff 2007, 19).

Mi'kmaw legal scholar Naiomi Metallic writes that while the Accord failed—it was rejected by a majority of Canadian voters in a referendum—it did foster a national discussion about Indigenous self-government.

This amendment would have specified Indigenous peoples' jurisdiction "to safeguard and develop their languages, cultures, economies, identities, institutions and traditions," and "to develop, maintain and strengthen their relationship with their lands, waters and environment." [. . .] Although the accord [. . .] ultimately failed, the momentum around self-government led the Liberal government of Jean Chrétien to pass a policy recognizing the inherent right to self-government in 1995 (known as the "Inherent Rights Policy"). (Metallic 2018, 440)

Canada's Inherent Rights Policy of 1995: The federal policy Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government was designed to guide selfgovernment negotiations with Indigenous communities. In the policy, the federal government stated its intentions to renew Nation-to-Nation and government-to-government relationships with Indigenous Peoples, and recognized that negotiated arrangements would take many forms, based on the historical, cultural, political, and economic circumstances of the Indigenous governments, regions, and communities involved (Government of Canada 2020a). The policy addressed the right of international sovereignty in this way:

The inherent right of self-government does not include a right of sovereignty in the international law sense, and will not result in sovereign independent Aboriginal nation states. On the contrary, implementation of self-government should enhance the participation of Aboriginal peoples in the Canadian federation, and ensure that Aboriginal peoples and their governments do not exist in isolation, separate and apart from the rest of Canadian society. (CIRNAC 1995)

The Assembly of First Nations argues that the Self-Government Policy was limited and did little to further Indigenous self-government because it

- rejects Indigenous sovereignty;
- subordinates Indigenous Rights to individual rights and freedoms protected by the Canadian Charter of Freedoms;
- denies Inuit, Métis and First Nations inherent jurisdiction;
- requires individual negotiations over national agreements. For Mi'kmag in Nova Scotia this would mean negotiating 13 self-government agreements, rather than one agreement for all Mi'kmag of Nova Scotia. (Poitras and Adamek 2019, 5)

Metallic writes that the policy's requirement that self-government agreements be negotiated and agreed to by both the federal and provincial/territorial governments has

significantly hampered the growth of Indigenous self-government in Canada.
[. . .] To date, only twenty-two self-government agreements have been signed: eighteen as part of comprehensive land claims agreements; three as standalone self-government agreements; and one sectoral agreement. (Metallic 2018, 441)

The Royal Commission on Aboriginal Peoples of 1996: The Royal Commission on Aboriginal Peoples (RCAP) urged the Canadian government to recognize and affirm the "existing Aboriginal and Treaty Rights" set out in Section 35 of the Canadian Constitution (RCAP Highlights 1996), and the need for Indigenous Peoples to be regarded as a third order of government, possessing rights of self-determination and self-government. RCAP argued for return to a Nation-to-Nation relationship, and recognition that the inherent right to self-government did not need a constitutional amendment (Metallic 2018, 442).



2022 Joint Assembly of NS Government and Assembly of NS Mi'kmaq Chiefs Back Row L-R

Hon. Brad Johns, Chief Gerald Toney, Hon. Colton LeBlanc, Hon. Brain Wong, Hon. Tory Rushton, Hon. Greg Morrow, Chief Wilbert Marshall, Hon. Pat Dunn

Middle Row L-R

Hon. Allan MacMaster, Chief Robert Gloade, Hon. Brian Comer, Councillor Starr Paul, Chief Deborah Robinson, Councillor Kerry Prosper, Chief Andrea Paul, Hon. Steve Craig, Hon. Becky Druhan, Hon. John Lohr, Hon. Jill Balser Front Row L-R

Chief Sidney Peters, Chief Annie Bernard-Daisley, Premier Tim Houston, Hon. Karla MacFarlane, Kji-Saqmaw Norman Sylliboy

RCAP emphasized that Aboriginal groups needed significant support to become fully self-governing, and "called for the creation of a national Aboriginal Government Transition Centre to begin assisting Aboriginal nations immediately" (Metallic 2018, 442).

Principles Respecting the Government of Canada's Relationship with Indigenous Peoples, **2018:** In 2018, the Canadian government released a statement of principles to guide its dealings with Indigenous Peoples. The first principle of the ten is the following:

The Government of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government. (Government of Canada 2018, 5)

The commentary on Principle 1 states that Indigenous governments have the responsibility to "define and govern themselves as nations and governments and the parameters of their relationships with other orders of government." The federal government has the responsibility to make "changes in the operating practices and processes of the federal government" (Government of Canada 2018, 6).

Sherry Pictou, Mi'kmaw academic and Indigenous leader, comments on this statement of principles from a feminist and non-binary gender perspective.

I highlight the tensions between patriarchy, neoliberalism, and contradictory concepts of decolonization to demonstrate how the Rights Framework manifests a contemporary form of patriarchal colonialism in state-Indigenous politics, especially self-government negotiations, that will continue to negatively impact Indigenous women and gender diverse persons. (Pictou 2020)

Collaborative Federal Fiscal Policy for Self-Government, 2019: Under Canada's Inherent Rights Policy (1995), representatives of self-governing Indigenous governments worked with federal officials to rewrite federal policy on how self-government is financed. In 2019, they produced the Collaborative Federal Fiscal Policy for Self-Government. The policy states that

Canada recognizes that implementing this new fiscal relationship requires systemic change within the federal government and the way it works with Indigenous governments. This renewed fiscal relationship represents an important step in that direction. (CIRNAC 2019, par 17)

In this policy, the federal government committed to the following:

- achieving reconciliation with Indigenous peoples through a renewed, nation-to-nation, government-to-government, and Inuit-Crown relationship based on recognition of rights, respect, co-operation, and partnership as the foundation for transformative change that moves away from colonial systems of administration and governance.
- that modern treaties with self-government and self-government agreements are intended to be acts of reconciliation based on mutual recognition of the right of self-determination and Indigenous self-government.
- that Indigenous governments are autonomous orders of government as set out in modern treaties and self-government agreements, and are partners in the evolving system of fiscal federalism.
- that reconciliation and self-government, described in modern treaties and self-government agreements, require a renewed fiscal relationship, developed in collaboration with Indigenous self-governments, that supports the political, social, economic and cultural development of the Indigenous community.
- that self-government can lead to improved quality of life for Indigenous peoples and help close socio-economic gaps between the Indigenous community and other Canadians.
- that the preservation, practice, development and revitalization of Indigenous culture, language and heritage in all its diversity and uniqueness, is vital for the well-being of Indigenous peoples and thus a critical component of effective self-government. (CIRNAC 2019, par 1–6)

Canada's UNDRIP Act, 2021: UNDRIP (2007) articles 3 and 4 stipulate that Indigenous Peoples have the Right to self-determination, including the Right to determine their political status, the Right to self-government in their internal and local affairs, and the Right to financing for their autonomous functions (United Nations 2007). Canada's UN Declaration Act (2021) obligates the federal government to implement self-determination and self-government. Section 5 of the Act requires the government to consult and cooperate with Indigenous Peoples and with federal ministers to "prepare and implement an action plan to achieve the objectives of the Declaration" (Government of Canada 2021a).

Indigenous Self-Government Today

Through Indigenous Rights and Title court cases, Indigenous Peoples have gained recognition of their constitutionally protected right of self-government. Many Indigenous Nations are claiming greater self-governance through civil and criminal court proceedings (United Nations 2007). An important development is the legislative recognition of self-government in An Act respecting First Nations, Inuit and Métis children, youth and families (Government of Canada 2019).

Anishinaabe/Ojibway legal scholar and Officer of the Order of Canada John Borrows writes:

One in three Indian bands in Canada has chosen to organize their political affairs in accordance with their own customs. The fact that Indian bands continue to function under a degree of their own inherent authority demonstrates that, rather than extinguishing Indian governance, the Indian Act could be interpreted as explicitly recognizing and affirming pre-existing law-making powers. (Burrows 2010, 43)



Additional Resources

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Section 9: Indigenous People's Legal Orders



Section 9: Indigenous People's Legal Orders

Introduction

Over the past couple of decades, Indigenous legal scholars and others have been working to contest the global application of Eurocentric definitions of the law and legal systems, and to re-establish Indigenous legal orders. This has been referred to by some as the Indigenous law renaissance. Legal scholar Hadley Louise Friedland writes:

Indigenous law can be hard to see when we are used to seeing law as something the Canadian government or police make or do. Some people may even have been taught that Indigenous people did not have law before white people came here. This is a lie. Law can be found in how groups deal with safety, how they make decisions and solve problems together, and what we expect people "should" do in certain situations (their obligations) [. . .] They are often practiced and passed down through individuals, families, and ceremonies. This is why many still survive, after all the government's efforts to stop them and sneer at them. Because of the presence of Canadian law, and the lies and efforts to stop Indigenous law, some Indigenous laws are sleeping. It is time to awaken them. (Friedland 2009, 15–16)

Indigenous legal scholar Val Napoleon explains the difference between legal systems and legal orders.

As Indigenous peoples, we have gained much of our current understanding of law from our experiences with the western legal system in Canada. We know the western legal system through its courts, legislation, and enforcement, and by its treatment of our peoples, lands, and resources. Given this, many Indigenous peoples have come to associate "law" with power, punishment, hierarchy, and bureaucracy [. . .]

I use the term "legal system" to describe state-centred legal systems in which law is managed by legal professionals in legal institutions that are separate from other social and political institutions. For example, Canada and other nation states have such central legal systems. In contrast, I use the term "legal order" to describe law that is embedded in social, political, economic, and spiritual institutions. (Napoleon 2013, 230–231)

Aboriginal and Indigenous Law intersects with almost every other area of law in Canada. Many Indigenous Nations are reviving their governance and legal orders, including the Mi'kmaq of Nova Scotia. In Nova Scotia, two award-winning initiatives focus on Mi'kmaw governance and legal processes: the Schulich School of Law at Dalhousie University and Kwilmu'kw Mawklusuaqn (KMK).

Schulich School of Law, Dalhousie University

The Indigenous Blacks & Mi'kmaq (IB&M) Initiative was established at the Schulich School of Law in 1989. The initiative aims "to increase representation of Indigenous Blacks and Mi'kmaq in the legal profession in order to reduce discrimination."

Naiomi Metallic, a Schulich Law Professor, Chancellor's Chair in Aboriginal Law and Policy, and member of the Listuguj First Nation in Quebec, researches, teaches and builds interdisciplinary partnerships. She argues that "[. . .] future lawyers must understand as well as know their roles and responsibilities in addressing these challenges" (Schulich School of Law at Dalhousie University 2021).

The Assembly of Nova Scotia Mi'kmaw Chiefs and Kwilmu'kw Maw-klusuaqn (KMK)

The Assembly of Nova Scotia Mi'kmaw Chiefs is currently comprised of 12 of the 13 Mi'kmaw Chiefs in Nova Scotia and ex-officio members: Grand Council's Kji-Saqmaw and Kji-Keptin; two District Chiefs, representing the Confederacy of Mainland Mi'kmaq and the Union of Nova Scotia Mi'kmaq; and the Assembly of First Nations' Regional Chief. The Assembly meets monthly to deliberate on issues common to all Mi'kmaw communities, and is the aggregate governance institution for the Mi'kmaq in the province.

The Assembly provides direction in the "Made-in-Nova Scotia" Process and in the formal consultation process with Canada and Nova Scotia. The Assembly's successes include: developing Moose Management Guidelines; the Mi'kmaq Forestry Initiative and a Mi'kmaq Lands Trust; developing an enrollment process for those who identify as Mi'kmaq but do not hold a federally-issued Status Card; developing a Plamu (Salmon) Management Plan in partnership with Mi'kmaw environmental organizations; securing a Mi'kmaw License Plate for Nova Scotia vehicles; and creating standards to support communities in establishing their own Netukulimk Livelihood Fishery Plans.

Kwilmu'kw Maw-klusuaqn (KMK) takes direction from the Assembly of Nova Scotia Mi'kmaw Chiefs. It seeks consensus on the best ways to implement Mi'kmaw Aboriginal and Treaty Rights, "for now, and for seven generations to come."

KMK was developed by the Mi'kmaq, for the Mi'kmaq. Through these discussions, we hope that the Mi'kmaq of Nova Scotia can finally implement our Rights from the Treaties signed by our ancestors in the 1700's. (Kwilmu'kw Maw-klusuaqn (KMK) n.d.)

The five pillars of KMK's work are the following:

- 1. To achieve recognition, acceptance, implementation and protection of Treaty, Title, and other Rights of the Mi'kmaq in Nova Scotia;
- 2. To develop systems of Mi'kmaw governance and resource management;
- 3. To revive, promote and protect a healthy Mi'kmaw identity;
- 4. To obtain the basis for a shared economy and social development; and
- 5. To negotiate toward these goals with community involvement and support. (Kwilmu'kw Maw-klusuaqn (KMK) n.d.)

KMK has over 600 active consultations. Staff work with Chiefs, community experts, Mi'kmaw organizations, provincial and federal governments, and resource development proponents to "look at concerns of the Mi'kmaq of Nova Scotia, before work happens on our lands and waters" (Kwilmu'kw Maw-klusuaqn (KMK) n.d.).

Case Law

In 1982, Section 35 of the *Constitution Act, 1982* recognized Aboriginal and Treaty Rights, but stipulated that specific rights must be defined by the courts on a case-by-case basis. (W. B. Henderson and Bell 2020) This section describes some of the key legal decisions that are shaping the determination of Treaty Rights in Nova Scotia.

R. v. Sylliboy (1928)

Gabriel Sylliboy is believed to be the first Indigenous person to use the 1752 Peace and Friendship Treaty to fight for Canada's recognition of Treaty Rights. In 1927, Sylliboy, the first elected Grand Chief of the Santé Mawiómi (Grand Council), was arrested for hunting and possessing pelts out of season while off his We'koqma'q reserve. Sylliboy argued he had a Treaty Right to hunt and fish on the land, but was convicted of the charges in **Magistrate's Court** under Nova Scotia's Lands and Forests Act (Wicken 2012).

Chief Sylliboy appealed the ruling in **County Court**. In *R. v. Sylliboy*, he argued again that the 1752 Peace and Friendship Treaty "agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting & Fishing as usual," and again lost the case (CIRNAC 2016). Judge Patterson ruled that 1) Mi'kmaq "were never regarded as an independent power," and therefore could not have entered into a Treaty with the Crown, and 2) that Governor Hopson did not have the authority to enter into the 1752 Treaty (Conn 2019).

Grand Chief (Kji-saqmaw) Sylliboy was later vindicated. In 1985, in *R. v. Simon*, the Chief Justice of Canada, wrote:

It should be noted that the language used by Patterson J., reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. (Simon v. The Queen 1985)

In 2017, Nova Scotia issued a posthumous pardon and apology (Sylliboy died in 1964) in a ceremony at Province House, attended by Mi'kmaw leaders, Elders and the Kji-saqmaw's descendants.

"The wrongs of the past can never be undone, but we can work together to do better for the children of this generation and of those that follow," said Lt.-Gov. J.J. Grant, who granted the free pardon. "This pardon addresses a conviction against the late grand chief in the pursuit of his aboriginal and treaty rights, and it helps us acknowledge and learn from the struggles of the past and memorialize those who sought to exercise their rights." A free pardon is based on innocence and recognizes that a conviction was in error. A free pardon is an extraordinary remedy and is considered only in the rarest of circumstances. (Nova Scotia. Office of the Premier 2017)

The Premier formally apologized to the Kji-saqmaw.

Grand Chief Sylliboy was a Mi'kmaw leader who acted with courage and integrity in this hunt at a time when aboriginal and treaty rights were not recognized with the full weight we accord them now as part of the Canadian Constitution and recent case law. (Nova Scotia. Office of the Premier 2017)

R. v. Isaac (1975)

In 1975, Stephen Isaac of Potlotek First Nation was charged under the Nova Scotia Lands and Forest Act and found guilty in Magistrates Court for hunting off reserve lands. In an appeal to the Nova Scotia Supreme Court level, his conviction was quashed, with Chief Justice MacKeigan affirming the continuing authority of the Royal Proclamation of 1763 in honouring hunting and fishing Rights for Mi'kmaq in Cape Breton (J. S. Y. Henderson 2016, 107).

Chickasaw and Cheyenne lawyer and activist James Youngblood (Sa'ke'j) Henderson writes that in reaching this decision, MacKeigan conducted the first judicial review of what Mikmaw Aboriginal and treaty rights are protected by the Indian Act. He affirmed that Mi'kmaw treaties existed, and reasoned that Mikmaw customary rights to the use of their traditional lands were confirmed by the 1763 Royal Proclamation, and reconfirmed by the Indian Act, which precludes the application of provincial game laws on reserve. He expressly overruled the contrary 1929 opinion of Judge Patterson in the Syliboy case, and ruled that the rights of the Mikmaq to reserved lands had never been extinguished by treaty or surrender (J. S. Y. Henderson 2016, 107).

R. v. Simon (1985)

In 1981, James Matthew Simon of the Sipekne'katik band was in illegal possession of shotgun cartridges loaded with shot larger than AAA and in illegal possession of a rifle during closed season contrary to the Lands and Forests Act. The judge ruled that the Treaty of 1752 did not exempt Simon from provisions of the Lands and Forests Act, and the Court of Appeal upheld that decision.

Because Simon had admitted to the elements of the charges, the main question for the Supreme Court of Canada was whether "James Matthew Simon, enjoys hunting rights which preclude his prosecution for offences under the Lands and Forests Act [. . .]" (Simon v. The Queen 1985).

The Simon case was one of the first to affirm that the Mi'kmaw Treaties of Peace and Friendship remain in force and effect, and that beneficiaries of the Treaties have Rights. Although s.35 was not part of the case—as it arose before the Constitution Act, 1982 came into effect—the Court "unanimously decided that treaties and statutes relating to Aboriginal people should be given a 'fair, large and liberal construction' in deciding in favour of Aboriginal people and settling on the sense naturally understood by them each time an expression was equivocal" (DIALOG, n.d.).

R. v. Sparrow (1990)

Ronald Edward Sparrow was a member of the Musqueam Nation. His case is important to Aboriginal Rights because *R v. Sparrow* was the first SCC case to test section 35 of the *Constitution Act, 1982* (Beaudoin 2020).

In 1990, the Supreme Court of Canada found that the Musqueam, including Ronald Edward Sparrow, had an Aboriginal Right to fish in their traditional territory along the Fraser River. As in *R. v. Simon*, the Court found that an existing Aboriginal Right did not have to be practiced exactly as it had been practiced at a particular point in time. Instead, practices that have evolved over time could and should still be protected.

This interpretation of Aboriginal rights signified a shift toward a more dynamic and forward-thinking approach to Aboriginal rights. Applying this approach to the facts, the Court found that the Musqueam had lived in the area in question as an organized society long before European settlement, and that fishing for food had been "an integral part of their distinctive culture" (para 40). Thus, the Court found that the Musqueam had an Aboriginal right to fish in the territory in question. (Hellinga 2020)

The Supreme Court also held that for a Right to be extinguished, the Crown must demonstrate a clear and plain intention to extinguish that Right (R v. Sparrow 1990). Simply enacting legislation which limits or is inconsistent with an Aboriginal Right is insufficient to demonstrate a plain and clear intention to extinguish a Right (Hellinga 2020).

The Court ruled that Rights are not absolute. The Crown may "infringe" or limit the exercise of a Right if it can show a justifiable reason for so doing (R v. Sparrow 1990). The Court said the government can impair Aboriginal Rights no more than necessary, must consult with the Aboriginal People whose Rights are at stake, and must pay compensation. This test for justifiable infringement is known as the **Sparrow test** (McNeil and NCFNG research staff 2007).

R. v. Denny, Paul, Sylliboy (1990)

Three Mi'kmaq were charged with various fishing offences: fishing salmon with a net without a license, fishing cod without a license, and fishing salmon with a snare on a river outside a reserve. They were convicted at the County Court level and appealed to the Nova Scotia Supreme Court. The judge acquitted all three men due to

- their existing Aboriginal Right to fish for food in the waters in these appeals;
- their right under Section 35 of the Constitution Act to an allocation of any surplus of the fisheries resource, after the needs of conservation have been taken into account; and
- their limited immunity from prosecution under the provisions of the Fisheries Act and Regulations. (R. v. Denny 1990)

Mi'kmaw aquatic scholar Shelley Denny and settler marine affairs academic Lucia Fanning summarise:

In the Nova Scotia Supreme Court, Denny, Paul, and Sylliboy were acquitted of illegal fishing and possession of salmon, since the regulatory regime for fisheries management was inconsistent with their Aboriginal right to fish. The outcome of the case prioritized Aboriginal fishing after needs related to conservation had been met over other interest groups. (Denny and Fanning 2016, 3)

The Marshall Decision: *R. v. Marshall* and Right to Fish for a Moderate Livelihood (1999)

In 1999, Marshall was charged with fishing eels without a licence. With the support of Mi'kmaw Chiefs, the Union of Nova Scotia Mi'kmaq (formerly the Union of Nova Scotia Indians), and the Confederacy of Mainland Mi'kmaq, Marshall took the case to the Supreme Court. Canada's highest court recognized that Marshall's Right to fish for trade was an established Treaty Right under 1760–61 Treaty.

Marshall was charged with catching and selling 210 kg of eel 1) with an illegal net, 2) without a licence, and 3) during closed season. He was charged under the federal Fisheries Act and the Maritime Provinces Fishery Regulations. In the Provincial Court and the Nova Scotia Court of Appeal, Marshall was found guilty on all three charges.

He took the case to the SCC which recognized, in a landmark 1999 decision known as The Marshall Decision, Marshall's Right to harvest. A majority of the Supreme Court held that the 1760 Peace and Friendship Treaty affirmed the Right of the Mi'kmaq to provide for their own sustenance by trading the products of their hunting, fishing, and other gathering activities, in exchange for "necessaries", which the Court found was equivalent to a "moderate livelihood" (Decembrini 2020).

Settler legal anthropologist and scholar Jane McMillan writes:

The decision reverberated across the country, inspiring Indigenous communities to unite in collective action to secure their rights to resources. The federal government, the Department of Fisheries and Oceans, and non-Aboriginal fishers were not prepared for the decision. The judgement led to immediate conflict and controversy in the Maritimes, grabbing international headlines and marring the Mi'kmaq's legal victory. Non-Indigenous fishers resisted the Supreme Court's findings on the grounds that they believed they held traditional rights to the waters and were unwilling to share the strained – but lucrative – resources with anyone, especially "Indians" [. . .] When Donald went out in public, he was often accosted and blamed by settlers for disrupting generations of family business and taking food out of their children's mouths. (McMillan 2018, 218)

In response to conflicts around implementing the *Marshall I* decision, *Marshall II* re-confirmed that Treaty Rights are still subject to justifiable infringement under the Sparrow test (see *R v. Sparrow* above). The federal government could still infringe on that Treaty Right for a range of social policy objectives (Beaudoin 2020).

Since the *Marshall II* Decision, Mi'kmaq have been acting on their Right to fish for a moderate livelihood both within and outside of the commercial lobstering season set by the Department of Fisheries and Oceans. There have been many conflicts with non-Indigenous commercial fishers and the police. Under a program known as the Marshall Response Initiative, Fisheries Canada spent (between 2000 and 2007) close to \$600 million to provide eligible Mi'kmaq with fishing vessels, training, and communal commercial licenses—acquired from commercial fishers under a voluntary retirement program (Warry 2007, 129).

It must be noted that these communal commercial licences do not pertain to the Mi'kmaw Treaty Right to a moderate livelihood.

Since Marshall, the Crown has not amended the Fisheries Act and Regulations which still prohibits the Mi'kmaq from exercising the Right to fish for a moderate livelihood without a license. Important unresolved legal issues have remained. (Kwilmu'kw Maw-klusuaqn (KMK) n.d.)

Mi'kmaq of Nova Scotia have developed **Netukulimk Livelihood Fisheries Plans**. These community developed and implemented plans regulate community fisheries in accordance with the concept of Netukulimk, or "the use of the natural bounty provided by the Creator for the self-support and well-being of the individual and the community. Netukulimk is achieving adequate standards of community nutrition and economic well-being without jeopardizing the integrity, diversity, or productivity of our environment" (Unama'ki Institute of Natural Resources 2022).

In May, 2020, Mi'kmaq of Nova Scotia rejected an offer of "banked licences" and an \$86.6 million Rights Reconciliation Agreement because the Department of Fisheries (DFO) confirmed that it had "no mandate in which they can provide the fisheries access required by our [Mi'kmaw] communities and livelihood fishers for the implementation of Netukulimk Livelihood Fisheries Plans" (Kwilmu'kw Maw-klusuaqn (KMK) 2020).

R. v. Marshall; R. v. Bernard (2005): The Marshall Logging Case

In the wake of the 1999 *Marshall* case (described above), First Nations people throughout Atlantic Canada began to explore the boundaries of what goods could be harvested and sold or bartered to allow the harvester to earn a moderate livelihood. Joshua Bernard from New Brunswick and a number of Mi'kmaw harvesters from Nova Scotia were charged with cutting and taking timber from Crown lands. In their defence, the loggers argued they had Aboriginal Rights and Title and a Treaty Right to earn a moderate livelihood from logging as a "logical evolution of a traditional Mi'kmaq trade activity" (R. v. Marshall; R. v. Bernard 2005).

The cases wended their way through the Nova Scotian and New Brunswick courts to the Supreme Court of Canada. The main issues before the SCC were whether 1) the Treaty of 1760–61 gave the Indigenous loggers a Treaty Right to harvest timber for commercial purposes, and 2) they had Aboriginal Title giving them the Right to harvest timber on Crown lands.

The Court concluded that the Treaties of 1760–61 did not give Mi'kmaq a Right to harvest timber for commercial purposes, as commercial logging was not a trading activity Mi'kmaq practiced at the time the Treaties were made. The Court also found that the loggers failed to prove they held Aboriginal Title to lands on which the logging occurred; they had not shown that Mi'kmaq used the lands regularly and exclusively enough to prove title.

R. v. Sappier; R. v. Gray (2006)

In this case, the SCC ruled that the Mi'kmaw and Wolastoqey Nations have an Aboriginal Right to harvest wood for building houses and furniture for personal use. The question of whether the defendants had a Treaty Right to harvest timber was not considered because the Court had already decided the respondents should be acquitted based on their Aboriginal Rights (R. v. Sappier; R. v. Gray 2006).

The Right, categorized as a Right to harvest wood for domestic purposes was limited

The word "domestic" qualifies the uses to which the harvested timber can be put. The right so characterized has no commercial dimension. The harvested wood cannot be sold, traded or bartered to produce assets or raise money. This is so even if the object of such trade or barter is to finance the building of a dwelling. In other words, although the right would permit the harvesting of timber to be used in the construction of a dwelling, it is not the case that a right holder can sell the wood in order to raise money to finance the purchase or construction of a dwelling, or any of its components. (R. v. Sappier; R. v. Gray 2006)

Additional Resources

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