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Conservation Controversy: Sparrow, Marshall, and the Mi'kmaq of Esgenoôpetitj

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Conservation Controversy: Sparrow, Marshall, and the Mi'kmaq of Esgenoôpetitj

Abstract
This paper explores the interplay between the *Sparrow* and *Marshall* decisions of the Supreme Court of Canada, and the sovereigntist and traditionalist convictions of the Mi'kmaq of the Esgenoôpetitj/Burnt Church First Nation, as expressed in the conservationist language of the *Draft for the Esgenoopotitj First Nations (EFN) Fishery Act (Fisheries Policy)*. With the Supreme Court of Canada's decision in *Sparrow*, conservation became an important justification available to the Canadian government to support its regulatory infringement on aboriginal and treaty rights. Ten years later, in *Marshall*, the Court recognized the treaty rights of the Mi'kmaq to a limited commercial fishery. The *EFN Fishery Act*, written to govern the controversial post-*Marshall* fishery in Esgenoôpetitj (also known as the Burnt Church First Nation) demonstrates that for the Mi'kmaq, scientific management, traditional knowledge, sovereignty and spirituality are understood in a holistic philosophy. The focus placed on conservation by the courts, and the management-focused approach taken by the government at Esgenoôpetitj have led to government policy which treats conservation simply as a resource access and management problem. Conservation, which the Court deems "uncontroversial" in *Sparrow*, is a politically loaded ideal in post-*Marshall* Burnt Church.

Keywords
Esgenopetitj, Burnt Church, Mi'kmaq, conservation, Sparrow, Marshall, Van der Peet, indigenous, sovereignty, traditional kinowledge

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Conservation has become a critical issue in the recognition of aboriginal and treaty rights in Canada, and in the development of related policies. The *Sparrow* and *Marshall* decisions of the Supreme Court of Canada reinforced the political power of conservation as one of the only reasons the federal government can justify infringing upon the rights of indigenous peoples, according to the Court's interpretation of the Canadian Constitution. In the fishing dispute that erupted at Esgenoôpetitj NB (The Burnt Church First Nation) after *Marshall*, the conservation credentials of the government and the Mi'kmaq were hotly contested. This paper explores the role and meaning of conservation at Burnt Church in the context of *Sparrow* and *Marshall*. The Mi'kmaq at Esgenoôpetitj authored their own post-*Marshall* fisheries policy, *Draft for the Esgenoopotitj First Nations (EFN) Fishery Act (Fisheries Policy)* (Ward & Augustine, 2000), which provides important insight into the issues motivating the community during the dispute. Political sovereignty, traditional knowledge and spirituality, and conservation were all important concerns articulated in the *EFN Fishery Act* and within the community during the dispute. Post-*Sparrow* and post-*Marshall,* conservation has become the language in which many indigenous issues are expressed, since conservation is one of the primary justifications the federal government can use to limit Aboriginal and treaty rights. This paper explores the interplay between the *Sparrow* and *Marshall* decisions of the Supreme Court and the sovereigntist and traditionalist convictions of the Mi'kmaq, as expressed in the conservationist language of the *EFN Fishery Act*.

This discussion of conservation develops out of a larger project investigating the taken-for-granted values and assumptions at play in the fishing dispute at Burnt Church/Esgenoôpetitj, NB. This larger project is phenomenological and ethnographic, in that it seeks to understand people's motivations and lived experiences during the dispute and its aftermath.[1] For 12 months in 2004-2005 I lived in the communities of Burnt Church, carrying out ethnographic research in the Mi'kmaw[2] and English communities. I was a participant observer in both communities, attending community groups, events and meetings, and talking informally with people in all these contexts. I carried out interviews with activists, community members and fishers in both the English and Mi'kmaw communities. This type of research seeks to understand the nature of people's lives in their depth and quality, in the hopes of generating questions and insights which can open up new directions of exploration. In this paper I draw upon ethnographic research to inform my analysis of the published conservation debates that arose in the dispute, including policy documents written at Esgenoôpetitj, political and academic writings published by two Mi'kmaw activists who gave leadership in the dispute, and policy statements and documents of the Canadian government.

Conservation and *Sparrow*

In the Canadian context, the power of conservation as a legal and political tool in the negotiation of relationships with Aboriginal people emerged out of the Supreme Court's decision in *Sparrow* and was reinforced by the Supreme Court a decade later in *Marshall*. In the late spring of 1984 Ronald Sparrow, a member of the Musqueam Indian Band of British Columbia, was charged for fishing with a net longer than those allowed within the terms of his Band's fishing licence. Sparrow appealed his subsequent conviction to the Supreme Court, arguing that his aboriginal right to fish was protected

[1] For a more detailed discussion of these methods, JW Creswell's *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* 2nd Ed (2007, Thousand Oaks: Sage) provides an excellent overview. Margaret Kovach's *Indigenous Methodology: Characteristics, Conversations and Contexts* (2010, Toronto: University of Toronto Press) also provides important discussion on these methods, as well as on questions particular to research in indigenous communities, and research by indigenous and non-indigenous peoples.

[2] Mi'kmaq is a noun; Mi'kmaw an adjective.

under Section 35(1) of the *Constitution Act*, which recognizes and affirms the existing aboriginal and treaty rights of aboriginal peoples in Canada, and that the regulations imposed in the licence granted to his Band were therefore inconsistent with the *Constitution*. In their 1990 decision, the Supreme Court recognized Sparrow's aboriginal right to participate in a food fishery; the Court declined to consider the question of aboriginal rights to a commercial fishery. The Court held that the *Constitution Act* protects existing aboriginal rights, and that "Section 35(1) does not promise immunity from government regulation in contemporary society, but it does hold the Crown to a substantive promise" (1990, 4). That is, the Crown bears the burden of justifying any regulations it imposes that limit rights protected under 35(1). In this case, the justification framework laid out by the court relies primarily upon conservation.

In *Sparrow*, the Supreme Court provides guidelines by which the Crown can assess the legitimacy of its regulation of aboriginal rights. The Crown cannot justify infringement on aboriginal rights simply by appealing to the public good. The Court clearly states that the primary acceptable justification for regulatory infringement on aboriginal rights is conservation: "The justification of conservation and resource management, [however,] is uncontroversial" (1990, 5). Further, the next management priority after conservation must be the Indian food fishery, that is fishing for consumption by the community, not for commercial sale. Only after these two priorities have been adequately addressed can the remaining resources be allocated among other interested parties, including (native and non-native) commercial fishers. The Court's decision in *Sparrow* sets out a management framework in which the only priority more important than the subsistence of Aboriginal communities is the continued existence of the stocks themselves. Conservation has become the government's best justification for infringement on aboriginal rights, both in fisheries management and in natural resource management more generally.

Academic discussions of *Sparrow* tend to highlight and critique the Court's affirmation of aboriginal rights. Isaac (1993) explores the significance of the Court's reliance on Section 35(1) of the Constitution Act in their decision, calling *Sparrow* "the single most important judicial decision on Aboriginal rights in Canada to date" (213). Asch and Macklem (1991) argue that the Court in fact relies on two different understandings of Aboriginal rights, as contingent on state action and as inherent in the nature of aboriginality, and suggest that this undermines aboriginal sovereignty and the constitutional right to aboriginal self-government. Sharma (1998) suggests that although the Court's recognition of aboriginal rights seems positive, in practice it offers little practical leverage for aboriginal communities wanting to build a sustainable livelihood from the fishery. Binnie (1990) suggests that the great weight the Court has given to 35(1) will now necessarily limit the breadth of rights that can be recognized under it. Binnie also criticizes the Court's unwillingness to address the thorny question of Musqueam commercial fishing rights. In Binnie's view, the Court's purpose in *Sparrow* is to encourage the government and Native people back into political negotiation: "Having shown that section 35 has a real if limited bite, the Court sets out to force a better accommodation by governments of Aboriginal peoples in modern Canada, and a political settlement of ancient grievances" (241). For Binnie, the most pressing question arising out of *Sparrow* is whether government can be so motivated, and whether Aboriginal groups will be willing to recognize "the economic and political constraints imposed on the federal and provincial governments" (242).

Within two years of *Sparrow*, the federal department responsible for fisheries management, the Department of Fisheries and Oceans (DFO), began to implement the Aboriginal Fisheries Strategy (AFS) as its primary response to *Sparrow*. The AFS engaged individual indigenous communities in negotiation with the DFO over their participation in fisheries management and enforcement, and access to fisheries for food, ceremonial and social purposes (DFO, 2008a; 2008b; 2010). In practice, this means that indigenous people can eat and preserve the fish they catch, share it in the context of traditional celebrations, such as pow-wows and in ceremonies, and share their catch with other members of their

communities, such as elders and family members. The Aboriginal Fisheries Strategy focused on negotiating aboriginal agreement to catch limits, terms and conditions of licences and arrangements for fisheries management and research. In Esgenoôpetitj/Burnt Church, the Aboriginal Fisheries Strategy resulted in a fall lobster fishery for food, ceremonial and social purposes. Mi'kmaq fishers were allowed to fish on a small scale, without selling their catch.

The Meanings of Conservation

After *Sparrow,* as conservation became a more powerful factor in indigenous fisheries policy, differences about what, exactly, conservation entails became critical to the developing conflicts and relationships between the Canadian government and the Mi'kmaq at Esgenoôpetitj/Burnt Church. For the government, the Court's decisions reinforce their obligation to involve indigenous people within the existing management framework, working towards the conservation of fish stocks as a common goal.[3] With the Aboriginal Fisheries Strategy (AFS), the government includes aboriginal communities among the communities it must consider as it manages fish. Fisheries conservation is a question of scientific resource management, and the AFS was developed in order to "contribute substantially to enhancing …[fish] stocks" (2008b, 1) and "to improve the economies and social structure of aboriginal communities" (2010, 1). The ends of conservation, in this view, are the management of fish in order to improve the material lives of people. The government's approach echoes Pinchot's classic utilitarian view of conservation as "the art of producing from the forest [or ocean] whatever it can yield for the service of man" (1914, 13).

Among the Mi'kmaq, conservation is understood to be connected not only to the wellbeing of the fish stocks, but also to the economic, political and spiritual wellbeing of the larger community. Netukulimk, the traditional Mi'kmaq idea of conservation, is described by the Unama'ki Institute of Natural Resources as:

> 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. (2009)

Elsewhere in this issue of the *International Indigenous Policy Journal*, Prosper, McMillan & Davis provide a valuable discussion of Netukulimk and its relevance to contemporary Mi'mkaw life (2011; see also Doyle-Bedwell & Cohen 2001, and Berneshawi 1997). In Esgenoôpetitj, Miigama'gan is a former band councilor and one of those who provided leadership during the dispute. For her, "cultural, spiritual and economic wellness" are central to the "vision of a healthy native community." These holistic views of conservation, which emphasize relationship with human and non-human beings across many generations, are common to the traditional philosophies of indigenous peoples (see for example Belanger, 2010; Sefa Dei, Hall & Goldin Rosenberg, eds. 2000; Subramanian & Pisupati, eds. 2010).

[3] While the Canadian government has worked with some indigenous communities in an attempt to integrate traditional ecological knowledge into its management processes, such efforts were not made at Burnt Church.

Van der Peet and stereotypes

Throughout the 1990s, the nature of an aboriginal right to fish for commercial purposes continued to be litigated. In 1996, in *R. v. Van der Peet*, the Supreme Court of Canada ruled that "(t)o be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right". To decide whether an indigenous people (in this case, the *Stó:lō*) hold an aboriginal right to fish for commercial purposes under Section 35(1) of the *Canadian Constitution*, the court devised a series of ten tests aimed "at identifying the practices, traditions and customs central to the Aboriginal societies that existed in North America prior to contact with Europeans" (1996, 47).[4] In effect, as Justice L'Heureux-Dubé points out in her dissent to this ruling, this has the effect of freezing aboriginal rights at a particular moment in time. Constitutional scholar John Borrows suggests that this test

> has the potential to reinforce stereotypes about Indians. In order to claim an Aboriginal right, these determinations of Aboriginal will become more important that what it means to be Aboriginal today. The notion of what was integral to Aboriginal societies is steeped in questionable North American cultural images (1997, 43-4).

The Court's decision to define Aboriginality in pre-contact terms engages and reinforces stereotypes of the "imaginary Indian", which Daniel Francis had described four years earlier in his book of the same name. The romantic appeal of the mythic Indian, and the myriad related stereotypes, shape much engagement with indigenous people across North America (Parkhill 1997, King 2003). Krech's controversial work *The Ecological Indian* takes up the particular ways that indigenous environmental attitudes have been made both mythic and trivial as they are reinvented in Western discourse (1999; see also Harkin & Lewis, ed., 2007). As McGregor points out, while aboriginal environmental knowledge can offer much to contemporary management and decision making, this cannot happen until the perpetual stereotyping of indigenous people (as noble conservationists, and as dissolute and greedy) is overcome (1997, 325). In this context, the charge that the Court reinforces these stereotypes and perhaps even relies upon them seems especially potent. In Esgenoôpetitj/Burnt Church, the conflict that erupted after *Marshall* illustrates the challenges that arise when holistic concerns for conservation are read simply as fisheries management problems.

Marshall and the Burnt Church controversy

In 1993, three years after Ronald Sparrow was acquitted by the Supreme Court for his actions on the Pacific coast, Donald Marshall Jr, a Mi'kmaq man, was arrested for fishing and selling eels without a licence on the Atlantic coast. Marshall was convicted, appealed and eventually argued before the Supreme Court that he had a treaty right to catch and sell fish, under the Treaties of 1760-61.[5] In September of 1999, the Supreme Court acquitted Marshall and held that all Mi'kmaw had the right to earn a moderate livelihood by fishing, according to the terms of the Peace & Friendship treaties their ancestors had signed with the Crown. As in *Sparrow*, the Court recognized the Canadian government's responsibility to regulate the fisheries, and held that the government can regulate the Mi'kmaw fishery

[4] In *R. v. Gladstone*, and *R. v. N.T.C. Smokehouse*, issued simultaneously with Van der Peet, the Court applied the Van der Peet tests in its decisions.

[5] See Wicken (2002) and Wildsmith (2001) for accounts of the case by those involved in Marshall's defense, and Coates (2000) for a chronicle of the early years of the dispute in Burnt Church.

without infringing upon treaty rights. Binnie, now appointed to the Supreme Court, writes for the majority:

> The accused caught and sold the eels to support himself and his wife. His treaty right to fish and trade was exercisable only at the absolute discretion of the Minister. Accordingly, the close season and the imposition of a discretionary licencing system would, if enforced, interfere with the accused's treaty right to fish for trading purposes, and the ban on sales would, if enforced, infringe his right to trade for sustenance. *In the absence of any justification of the regulatory prohibitions*, the accused is entitled to an acquittal (1999, 5-6; emphasis added).

The ruling recognized the right of the Mi'kmaq to earn a "moderate livelihood" from the fishery, to fish and sell the catch. The Court found that the imposition of the Department of Fisheries and Ocean (DFO)'s system of seasons and licences on the Mi'kmaq was an unreasonable interference on the rights of Mi'kmaw fishers, given that the government provided no justification for these infringements on their treaty rights.

Sparrow allowed the community to harvest (and preserve) lobster for a few weeks in the fall, but did not allow people sell their catch and, therefore, to earn a livelihood from the aboriginal fishery. In a community with 85% unemployment (Dharamsi, 2000), where only one person among the 1500 residents held a commercial fishing license[6], the creation of opportunities to earn a livelihood was tremendously important. Across Mi'kma'ki, people greeted *Marshall's* affirmation of their treaty rights to earn a livelihood from the fishery with joy. In Esgenoôpetitj, after the court's decision, people celebrated: "It was like time slowed down. That's how intense and wonderful it was" (Miigam'agan). Some Mi'kmaq people began to fish lobster out of season from small dories with refurbished traps, and to sell their catch without federal licences to local dealers. The dealers would, in turn, sell the lobster to regional canning plants, and the fish became a part of the commercial market.

Marshall provoked anger among non-native commercial fishers and their families. The non-native neighbours of Esgenoôpetitj were convinced that the Mi'kmaw fishery would decimate commercial lobster stocks. They were frustrated that federal fishing regulations were not being enforced in the Mi'kmaw fishery. As the Mi'kmaw fishery grew, so did the anger of these neighbouring fishers. By early October, violence erupted on the wharf at Burnt Church. Some of those involved in a non-native protest against the fishery destroyed native fishing gear. Natives occupied the wharf, making a stand in support of their fishery. Native youth raided the gear shed of a nearby non-native fisher, in an attempt to replace their gear, and were rebuffed with baseball bats. The truck of a non-native fisher was burnt, as was a cottage, and the sacred arbour on the reserve.[7] Across the region, members of the (commercial, non-native) Maritime Fisherman's Union worked to find ways to shut down the Mi'kmaw fishery. While local groups of non-native fishers engaged in protests on the waters and at nearby canning plants, regional fisheries organizations[8] went back to court.

The West Nova Fisherman's Coalition, an intervener in the *Marshall* appeal, applied to the Supreme Court for a rehearing and stay of *Marshall*. The Court did not grant the rehearing, but, in an unprecedented move, gave reasons for their refusal in what amounted to a clarification of their earlier

[6] This is compared to at least 4 licences in the neighbouring English village of approximately 85 residents, and tens more in surrounding non-native communities.

[7] While charges were laid in relation to the altercation over "replacement" traps, no one has been charged with any of the fires mentioned here.

[8] These organizations are largely non-native in membership, reflecting the fact that Atlantic commercial fishers were largely non-native before Marshall.

decision.[9] In this document, which has come to be known as *Marshall II*, the Court revisits the question of the justification of government regulation, essentially reminding all parties of the reasons upon which the government *can* justify its infringement on treaty rights (though the government did not elect to provide such a justification at trial). The Court affirmed that for aboriginal and commercial fisheries, the "paramount regulatory objective is conservation" (1999b, 3). Responsibility for conservation "is placed squarely on the Minister responsible, and not on the aboriginal or non-aboriginal users of the resource," though aboriginal communities must be consulted on such matters (3-4). "The Minister has available for regulatory purposes the full range of resource management tools and techniques, provided their use to limit the exercise of a treaty right can be justified on conservation or other grounds" (4).

With this ruling, the Court has reinforced the legal position of conservation, and the social and political power of the conservation discourse. For the federal government, conservation continues to be the most powerful reason that the government can give for limiting treaty and aboriginal rights. In Esgenoôpetitj, where community concerns about rights and sovereignty found little purchase in the public debate, the discourse of conservation became the framework within which political positions were articulated and contested, allies were sought and opponents were challenged. While the Mi'kmaw community recognized the importance of conservation as stated by the court, they argued that they were in a far better position than the government to enact conservationist policies.

Conservation Policy and Politics at Esgenoôpetitj

After the Supreme Court's clarification in the late fall of 1999, as Miramichi Bay froze over for the winter, the people of Esgenoôpetitj began to consider together how to move forward. The community asked two men, Sakej (James Ward) and Kwegsi (Lloyd Augustine), to undertake a community consultation process. Ward was the head of a key faction of the Warrior Society in Burnt Church. Augustine was the traditional chief, or Keptin, the community's representative at the Sante Mawi'omi (Mi'kmaw Grand Council). Many of those involved in the leadership of the community fishery understood the Court's decision as upholding not only their treaty rights, but also the treaties themselves, treaties which affirm the status of the Mi'kmaq as a sovereign people. The disputed Mi'kmaw fishery represented the exercise of Aboriginal rights and sovereignty in their own lands and waters, as affirmed in the treaties and by Canadian courts. It also represented an attempt to enact the traditional Mi'kmaw philosophies and governance practices, which are the foundation of this sovereignty. For example, Miigam'agan emphasized the importance of community decision making processes, and in particular the roles of women and elders within these processes:

> The community organizers facilitated, and worked around the clock to support the community demonstrations and the development of the fishery management plan. We were always at the forefront, organizing groups and meetings, because we felt that if the women and the elders were present at the forefront that the people would be more respectful.
>
> Because in the big picture it's all about a collective – you know, the women and elders' responses are being observed by their community. So their presence was important, and it wasn't a trick. It was to offer the support of the medicine, because we're such a social culture. …Community Relationships are very important (capitalization by Miigam'agan).

[9] Wildsmith argues that this was an elaboration of the earlier decision which went beyond the original, and in which "the two dissenting judges in Marshall (No.1) were in fact purporting to explain what the majority meant in the September 17th majority decision" (2001, 229).

The consultation process led to the release of two new policy documents in the spring of 2000, the *Draft for the Esgenoopotitj First Nations (EFN) Fishery Act (Fisheries Policy)* and the *Draft for EFN Management Plan*, both prepared by Ward and Augustine. Conservation, so prized by the courts, became the way in which traditional knowledge and sovereigntist politics were articulated in the community's self-representations through these documents. They employ conservation to challenge the competence of the Canadian government, to highlight the importance of Mi'kmaw sovereignty and to reaffirm the importance of traditional Mi'kmaw knowledge and philosophies. Since, according to the Court rulings, conservation trumps all other rights, it has become the way in which the Mi'kmaw bid for attention to their central concerns.

In the *Fishery Act* and the *Management Plan* the Mi'kmaq frame the fishery in Burnt Church as a conservationist response to colonialism and to the incompetence of the Canadian government's management of fish stocks through the Department of Fisheries and Oceans (DFO). In the *Fishery Act*, the people of Esgenoôpetitj claim a fishery as their traditional right, within their traditional territories, based on the authority of the treaties and their inherent rights as indigenous people. The authors of the *Act* position the Mi'kmaq as a sovereign Nation, entitled to a Nation-to-Nation relationship with Canada. In the context of ongoing crises in the Atlantic fisheries, including the collapse of the Atlantic salmon fishery (which had been central to local and traditional life all along the Miramichi) and of the cod fishery, and given the systematic exclusion of indigenous people from commercial fisheries on the Atlantic coast, the *Act* is highly critical of the practices and policies of the Canadian government.

> The focus of the fishery management by the DFO was not to protect and preserve the fisheries and it's supporting ecosystem. DFOs focus was to satisfy the non native fishing industry and ravish the fisheries for the sake of profit. This policy has been at the expense of the Mi'kmaq, Maliseet and Passamaquoddy fishery. The DFO have historically forced the Mi'kmaq, Maliseet and Passamaquoddy people out of their own waters and denied them their inherent rights so the DFO could selfishly take over the fishery and make non native fishermen wealthy (Ward & Augustine 2000, VII; punctuation as in original).

The *Act* suggests that even though the government purports to prioritize conservation, the DFO itself has not historically honoured conservation as its priority. The *Act* states that the overall intent of the Mi'kmaq fishery policy is to restore habitat degraded by DFO mismanagement.

Conservation is a political framework here, one which members of the First Nation use to contest the government's position on their fishery. It is also recognized as a tool that may be used by the government to drive a wedge between local communities with interests in the fishery. The political nature of the conservation question is acknowledged within the *Management Plan* itself.

> We are very concerned that the DFO will attempt to politicize the current conflict between EFN and DFO. Instead of immediately complying with the SCC Marshall decision and providing "access" for members of EFN, we believe the DFO will try to use our management plan as a means of creating a "conservation scare" amongst non-native fishermen (Ward & Augustine 2000, XXV).

The authors are suggesting that the DFO and the government are likely to use conservation to create conflict between native and non-native fishers, in order to reinforce their own legitimacy and undermine the Mi'kmaq. However, "conservation" is also the realm within which the Mi'kmaq have sought alliances with non-natives against the Canadian government. The policy extends an explicit invitation to create alliances with those who "share the same conservationist principles" (XXIV). The members of the Burnt Church/Esgenoôpetitj First Nation, through their management plan, are engaged

in a political contest over who is the most able to implement sustainable management of the fisheries. Like any policy document, the EFN management policy as laid out in the *Fishery Act* is a *political* document. The Act articulates issues of rights and conservation, in an attempt to discredit the Canadian government's management of fisheries, and position the Mi'kmaq fishery as conservationist in principle and in practice.

In 2000, as the EFN prepared to implement its own fishery policy, the Canadian government continued to express concerns about the integrity of the stocks and also of the Mi'kmaw system of fisheries management. While in 1999 the RCMP and the Department of Fisheries and Oceans had been involved in policing the fishery and the related violence between fishers, in 2000 they began to intervene more directly. The DFO attempted to halt the Mi'kmaw fishery altogether, relying on the RCMP and the Coast Guard for enforcement support. The behaviour of all three of these agencies toward the Mi'kmaq subsequently became violent. Video images of government boats ramming and capsizing Mi'kmaw fishing dories drew attention from around the world, as did images of the Mi'kmaw occupation of the Burnt Church wharf. During much of its dealings with communities involved in the dispute, in its public positions and in the parameters it set for mediators, the Canadian government persisted in defining the dispute as "about fish." The government positioned access to and management of the lobster fishery as the key issue to be negotiated and discussed, and disallowed other topics from the conversation. This is illustrated by the challenges that arose in attempts to resolve the dispute. In August 2000, the government made a settlement offer to the First Nation (reportedly valued at $2.5 million) which was rejected in a community referendum. Many in the community wanted to be able to continue to fish on their own terms, according to their own policy and philosophy. In September of that same year, Bob Rae arrived in the community as a mediator, jointly agreed-upon by the government and the Band Council. People within the community of Esgenoôpetitj report that he seemed uninterested in their concerns; a DFO press release (2000) suggested that Rae was unable to move forward, given the unreasonable demands of the First Nation. The sets of issues upon which the First Nation wanted to mediate included rights, sovereignty and governance, while the Canadian government wanted to talk about resource management and fisheries access. Throughout the years 2000 and 2001, all attempts at mediation came to similarly unsuccessful ends.

For the authors of the *Act* in Esgenoôpetitj, the political nature of the government's conservation claims in the Burnt Church dispute was very clear. This understanding was echoed by others in the community in 2005, as my conversation with Mi'kmaw activists Dalton and Cindy[10] indicates:

That's the biggest word that they [the federal government] can use is conservation. "We have to look at the conservation of this stock, and we have to control them, and we have to turn around and regulate it," and stuff like that. Where we already had our own conservation [plan] and we were following it.

The *EFN Fishery Act* represents the position of the community as conservationist, sovereigntist, and anti-colonial:

> Due to the consistent mismanagement by DFO, it's biased and racist policy making, it's overpolicing of Mi'kmaq fishermen, it's adversarial nature and relationship with the Mi'kmaq, it's paternalistic and condescending attitude towards First Nations people, the Mi'kmaq of EFN [Esgenoôpetitj First Nation] will be reasserting it's control over the fisheries in it's traditional territories. …The EFN will exercise its Inherent right to self determine it's own political, social and economic future and it's inherent right to self government which will include the ability as a self governing people to legislate policy (Ward & Augustine, 2000, VII; punctuation as in original).

[10] These are pseudonyms.

Through this document, the community argues that the federal government and its agencies pursued policies intended to separate them from their lands and resources and that the Mi'kmaw protest (through the native fishery) is a reasonable response, an attempt to reclaim what is rightfully theirs under the treaties. Meeting the concerns of livelihood and conservation in the government's terms is not enough; the *Act* calls for Mi'kmaw conservation on Mi'kmaw territories.

Mi'kmaw Conservation Philosophy

Within the *EFN Fisheries Act*, Mi'kmaq management of the fishery is understood as a necessary condition of effective conservation: Effective conservation arises through Mi'kmaw sovereignty, the governance of Mi'kmaw philosophy over Mi'kmaw territory. It's not simply that the Mi'kmaq should make decisions about Mik'maw territory; Mi'kmaw sovereigntists understand decisions made within a Mi'kmaw framework to be politically, spiritually and environmentally unique. The *Act* suggests that the fishery will be guided by a developing "Mi'kmaq conservation philosophy", based on scientific data, traditional environmental knowledge from Mi'kmaq fishers, and traditional philosophy from elders and community members (Ward & Augustine 2000, XXIII). Mi'kmaw conservation philosophy is understood, in this case, to be inextricable from the quest for sovereignty.

Traditional indigenous knowledge "derives from multiple sources, including traditional teachings, empirical observation, and revelation" (Brant Castellano 2000, 23). It is a holistic and integrated way of thinking and doing, where divisions traditional in the West (such as those between science and religion) have little import. Brant Castellano quotes Couture's anonymous mentor, who said, "There are only two things you have to remember about being Indian. One is that everything is alive, and the second is that we are all related" (29). In his discussion of indigenous philosophies, Yale Belanger (2010) suggests that they begin with the land and that their meaning is therefore contextual. In indigenous communities, traditional knowledge is an integral part of the social and cultural lives of the community; it cannot be separated from it (Berkes 2005). Traditional practices, including the ceremonies, are ways in which people can honour and maintain their connections to their (human and non-human) relations. Indigenous philosophies are dynamic and changing; as Berkes points out, they are also politically volatile. Both within indigenous communities and in indigenous relationships to others, these ideas shape political positions and motivate community practice. This is precisely because of their holistic and contextual nature – these philosophies are not removed from the social and cultural lives of the people, but exist only within and among them. In this context, for many of the people of Esgenoôpetitj, conservation of lobster stocks is inseparable from the larger context of community life, from livelihood, sovereignty and spirituality. While the *EFN Fisheries Act* might seem to be a document of natural resources policy, it is also a political and religious statement of conviction, since such policy emerges within the context of Mi'kmaq relationships with human and non-human beings over many generations.

In *Ćelán̲en: A Journal of Indigenous Governance*, *EFN Fishery Act* co-author Sakej (James Ward) argues for the Mi'kmaw right to self-determination (2004). In his view, the status of the Mi'kmaq as a people with the right to self-determination can be demonstrated by their interwoven and unifying language, sacred history, religion and homeland. Ward begins his article with a teaching that his Elders shared with him, which illustrates the spiritual nature of his political struggle:

> At the Dawn of man, the Creator (Kisulk) granted the Mi'kmaq life and the right to freewill (right to self-determination). The Mi'kmaq were to live on Mother Earth and enjoy the gifts of her lands and waters. In exchange the Mi'kmaq were to protect and preserve Mother Earth. It was a

> divine obligation delegated to the Mi'kmaq, Kisulk gave us these rights and responsibilities and no government can take them away. (2004, 1)

In Ward's view, sovereignty comes to the people from the Creator. Mi'kmaq responsibility for the lands and waters of their traditional homeland, Mi'kma'ki, is a divine charge. This understanding of traditional teachings is echoed by Augustine, who articulates that Mi'kma'ki "belongs to the Creator and cannot be sold or given up." In this context, the conservation philosophy suggested by the *EFN Fisheries Act* is an attempt to (re)unite the traditional, political, scientific and spiritual within the practices of the community.

The conservation philosophy that the Mi'kmaq at Esgenoôpetitj articulated in their community consultation process, and which was reflected in the *EFN Fisheries Act*, embodies traditional knowledge as it is described in academic discussions engaging indigenous people. Yet, as Borrows has pointed out in his criticism of *Van der Peet*, "like others, Aboriginal people are traditional, modern and postmodern" (1997, 63). What's interesting about this Mi'kmaq policy is not that it is brand new, but that it is in fact an old way of thinking and doing rearticulated and re-understood in a modern context. In her discussion of traditional knowledge in the contemporary Canadian context, Marlene Brant Castellano (2000) points out that "culture is dynamic, and adjusts to changing conditions, and that a particular practice that embodies a timeless truth may need to be adapted if it is to remain effective" (24). The "conservation policy" of the Mi'kmaq is precisely such an adaptation, an attempt to make the dynamic historic philosophies of the Mi'kmaq relevant in the contemporary context, where prominent political rhetoric of and public concerns for conservation rule the day.

Conservation is designated by the Court as the major justification available for infringing upon treaty and aboriginal rights. Thus conservation becomes a site of political contest, which both the Mi'kmaq and the government attempt to turn to their own advantage. [11] In *Sparrow*, the Court suggests that "The justification of conservation and resource management, however, is uncontroversial" (1990, 5). In practice, conservation justifications operate as highly controversial and politicized claims which governments and First Nations use to invoke a variety of needs and concerns. Conservation is a politically loaded ideal. The Canadian government insisted on a narrow definition of conservation, focusing on licences and catch. This is a conservation framework that they already define and control, having set the terms of the Act themselves. In arguing for an alternative approach to conservation, the Mi'kmaq saw an opportunity to set new terms, based not only on modern science, but also on traditional Mi'kmaw forms of knowledge. In a 2002 opinion piece, Kwegsi (Lloyd Augustine) suggests that for the federal government "conservation became a just cause to stop Indians from exercising our right to fish" (2). Like Cindy, he argues that the community's *Fisheries Act* presented a stronger alternative to the federal government's plan. For Kwegsi, the *Act* is, "a plan based on conservation to protect the species for the seventh generation of yet unborn" (2002, 2).

The End(s) of the Dispute

The dispute in Esgenoôpetitj came to a close in 2002 with the signing of an Agreement-In-Principle. This agreement resolved questions of fisheries management and access, as the Band Council agreed to abide by the rules and regulations of federal government, in return for fishing boats, licences, quota in all regional fisheries (including lucrative snow crab quota) and research money. This agreement didn't address other issues at play in the dispute, such as indigenous rights and sovereignty or the role

[11] Non-native commercial fishers and their families, residents of the English village of Burnt Church, also employ conservation as a key political category in their stories of the dispute. See my (forthcoming) for discussion of this.

of traditional knowledge and philosophy in Mi'kmaq communities. What had changed in the community of Esgenoôpetitj? The community was exhausted, after years of violence and confrontation. In the band council election of August 2001, the balance of power had shifted in the elected (Indian Act) Band Council, with long-standing chief Wilbur Dedam regaining his majority. While the Band Council did reject the next government settlement offer later that fall, Dedam was more willing to work with the federal government than the sovereigntist activists at the forefront of the dispute. After the bombing of the World Trade Centre on Sept 11, 2001, Mi'kmaq activists found themselves increasingly vulnerable to the security powers of the federal government. On August 1, 2002, Dedam and Fisheries Minister Robert Nault announced that they had signed the Agreement-In-Principle, and the band temporarily turned over regulation of the fishery to the federal government. The Agreement, signed for an initial period of two years, continues to be renewed by Dedam and the DFO today.

The signing of the Agreement-in-Principle returned oversight of the fishery to the government, alleviating the government's concerns about conservation. It put boats, licences, quota and money into the community of Esgenoôpetitj, allowing them to establish themselves within the existing commercial fishery. It reestablished fishing as a livelihood for some families. Some Mi'kmaq, whose goal was participation in the commercial fishery, feel that the Agreement is an adequate recognition of their treaty right to fish, and sell their catch. However, the Agreement did not recognize the traditional values of the people of Esgenoôpetitj, their sovereignty and spirituality, or the principles that motivated some to risk their lives in the lobster fishery. The leaders who had been at the forefront of the dispute, most of them supporters of Mi'kmaq sovereignty and traditional culture, were frustrated by Dedam's decision to sign an agreement, and deeply disappointed that they had not achieved a Mi'kmaq-governed fishery. After the signing of the Agreement, Kwegsi wrote:

> The government's approach, as before, had been to "negotiate" agreements with poverty stricken Indian communities, and by carefully wording the agreements and offering monies, they devised a way to deceitfully take away the rights of the Mi'kmaq people. The latest agreement was signed by a small number of Band Council people, its Indian Agents, in a room without even a lawyer present to advise them. …
>
> The United Nations Human Rights Committee has ruled that the extinguishment of our aboriginal and treaty rights is a violation of fundamental human rights. History will show this present injustice and it will be said that the Mi'kmaq people signed under great duress (2002, 2).

In the Burnt Church First Nation, most people believe that the federal government and its agencies (the DFO, RCMP and Coast Guard) were not motivated to do what was best for their communities. Some argue that the government's concern for conservation is a convenient excuse for maintaining control over the community and its resources. Local concerns about Mi'kmaq culture and identity, traditional knowledge, sovereignty and rights are not privileged – sometimes not even allowed[12] – in public conversations about the dispute. The government insists that its primary concerns are conservation and law and order. Conservation then becomes a key issue and framework in the dispute, as locals both use and critique the government's conservation discourse in an attempt to articulate conservation in terms that reflect Mi'kmaq values and concerns.

[12] In 2002, after many months of consultation, the report of the Miramichi Bay Community Relations Panel's investigation of the conflict in Burnt Church was released. This report documented many of the concerns that local natives and settlers had had about the dispute. It was this report that prompted the chief official of the Department of Fisheries and Oceans in the region to comment, "Perhaps it never really was about fish" (CBC 2002). And yet the terms of appointment of the Community Relations Panel, "specifically excluded any dealings with aboriginal rights" (Augustine & Richard 2002, 7).

In Burnt Church, the *Sparrow* and *Marshall* decisions have played a part in focusing the debate on the question of conservation, the result of which is that other community concerns (political, spiritual, economic and relational concerns) are expressed and framed in ecological terms. But all conservations are not the same. The holistic concerns of the Mi'kmaq entail distinctive goals much broader than access to fish, money, and fisheries management. As so many have pointed out, the stereotype of the ecological Indian is a potent one in the contemporary world, as is its related opposite, the Indian as greedy and pathetic misfit (Francis, 1992; King, 2003; McGregor, 1997). The experiences of the dispute in Esgenoôpetitj bear out Borrows' suggestion that recent Supreme Court decisions reinforce the role of ecological stereotypes in contemporary aboriginal politics and policy. After *Sparrow*, Binnie suggested that the Court hoped to encourage "a political settlement of ancient grievances" (1990, 241). The events in Esgenoôpetitj suggest that political settlements will remain fraught, so long as the decisions of the Court are used to exclude the political concerns of indigenous people. Conservation is certainly one of the key issues of our century, as the collapse of fisheries, deforestation and climate change all demonstrate. In this context, conservation is a critical concern in the development of natural resource policy, for indigenous people and the Canadian government. But how effective can such policy development be, if people are talking about resource management and access when they really need to be talking about such issues as human rights and self-determination?

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