

Mi'kmaq and the Recognition and Implementation of Rights Framework

by Dr. Sherry Pictou, Mi'kmaw
Assistant Professor, Women's Studies Department
Mount Saint Vincent University

THE GOVERNMENT ANNOUNCED in February 2018 that there will be a new legal “Recognition and Implementation of Indigenous Rights Framework,” as a way to breathe new life into Section 35 of the Constitution.

Section 35 is the Canadian constitutional protection of Aboriginal and Treaty Rights. The purpose of this brief is to highlight some of the issues and concerns about this new framework approach as it pertains to the northeastern part of Turtle Island, with a particular focus on the Mi'kmaq in negotiations with the federal and provincial governments in what is known as the *Made-In-Nova Scotia Process* (Mi'kmaq Rights Initiative (MRI) Negotiations).

It is well-documented that older policies of assimilation such as the White Paper of 1969 have been re-articulated as narratives of self-determination and reconciliation with an emphasis on nation-to-nation or “Crown” relations.¹ I contend that this is also the case with the recently announced new legislative framework.

The Peace and Friendship Treaties are being domesticated under Canadian law through the framework of Section 35. Section 35 is further domesticating the international law of UNDRIP and Indigenous rights to free, prior and informed consent.

DOMESTICATING MARSHALL

Current treaty and self-government negotiations with Mi'kmaq and Wolastoqiyik (Maliseet) (and more recently with Passamaquoddy) Chiefs in the maritime provinces and the Gaspésie region of Québec were triggered by the Supreme Court of Canada (SCC) decision known as the Marshall Decision in 1999.² The Marshall Decision is based on the case of the late Donald Marshall, Jr., a Mi'kmaw³ from Unamaki (Land of the Fog, now known as Cape Breton) who was charged for fishing and selling eels without a license. In Marshall, the SCC upheld the 1760 and 1761 Peace and Friendship Treaties as the basis for a treaty right to fish for a moderate livelihood.⁴

Though treaty fishing rights are the precursor for negotiations, since 1999 the Made-In-Nova Scotia process has culminated into negotiations over other resource sectors, as well, such as forestry and various energy development projects.

Canada lists the Made-In-Nova Scotia process as a Comprehensive Lands Claims process on its website, despite repeated confirmations from the federal government that the process is not a “modern treaty” process and “extinguishment” is not being contemplated for participating groups.⁵

Rather, as stated in a letter from Joe Wild, Senior Assistant Deputy Minister on Treaties and Aboriginal Government, the failure to properly categorize the Made-In-Nova-Scotia process indicates that Canada is looking to “change the terminology.”⁶

It is in this light that we must interpret the Liberal’s announcement that the Nova Scotia Process has transformed into a “Recognition of Indigenous Rights and Self-Determination Discussion Table” (or “rights and recognition” table, for short). This table has expanded now to include the Mi’kmaq of Nova Scotia along with the Mi’kmaq of New Brunswick and Prince Edward Island, the Maliseet of New Brunswick and now includes the Maliseet of Viger, Quebec and the Peskotomukati (Passamaquoddy), New Brunswick.

The “new” process is explicitly another attempt to interpret our Peace and Friendship Treaties. What is behind this process? What does it say about Canada’s understanding of our treaty rights and title?

DOMESTICATING UNDRIP

‘Uncertainty’ around Indigenous rights poses the greatest challenge for Canada and sovereign states around the world that seek to mobilize property law (as certainty) for neoliberal means, most robustly in the extractive industry sector.⁷

Therefore, it appears that the “certainty technique” – a policy initiated by the prior Conservative Government for negotiations with Indigenous Peoples – is being mobilized and extended under the new legislative framework. As Trudeau states, “[The Indigenous Rights Framework] will give greater confidence and certainty to everyone involved.”⁸ How will it do so? In part, through the mechanisms replacing the land claims policy, which was failing and falling apart.

Keeping groups in these new land claim and resource arrangements will domesticate the Peace and Friendship Treaties. This explains some of the perplexity of Mi’kmaq activists and their allies about how the Mi’kmaq leadership remains silent on the relentless clear-cutting in Nova Scotia. And though the Mi’kmaq Chiefs have expressed concern about experimental tidal energy turbines—placed in one of the most significant cultural and fishing areas of Mi’kmaki (our ancestral homelands) now known as the Minas Passage—and about the Alton Gas salt caverns project—in a river system that continues to be used by the community of Sipeknekatik⁹ to mention a few, the Mi’kmaq leadership continues to engage in this process and has entered into several Impact Benefit Agreements (IBAs) with energy companies. These include Kameron Coal Management Limited (Donkin Coal Mine) and Emera, The Maritimes Link Project to transport hydro electricity from Muskrat Falls, Newfoundland which is contentious for dissenting Indigenous grassroots and their allies there.¹⁰

Though the Made-In-Nova Scotia Process was established to negotiate how to implement treaty rights, in 2013 the Mi’kmaq leadership had to file a court application in order for the government to comply with Marshall. At the same time, these consultations on corporate access to resources and development projects indicate one of the main defining parameters for negotiating and implementing treaty rights that will now be formalized under the new ‘recognition and rights’ tables.

Further, the province recently announced that the Scotian Basin Exploration Drilling Project received a permit to drill despite local Mi’kmaq grassroots dissent. Indeed, as noted above, the Mi’kmaq of NS are listed in Trudeau’s “rights and recognition tables” and have produced a document to outline “Crown Consultation.”¹²

In 2016, the Liberal Minister of Natural Resources, Jim Carr announced that the “Liberal government is in the process of developing a ‘Canadian definition’ of the UN Declaration on the Rights of Indigenous Peoples.”¹³ Carr has been citing IBAs for some time as indicating Indigenous consent to the contentious Kinder Morgan Pipeline on the west coast.¹⁴ Most recently he cites 43 IBAs with First Nations as indicating consent for the contentious Kinder Morgan Pipeline despite the dissent of the Secwépemc People whose ancestral homelands are mostly impacted.¹⁵

Therefore, are we to conclude that Trudeaus’s new legislative framework indicates a different and improved process for Indigenous relations? Indigenous Activists, myself included, contend that this new framework is just another re-articulation or reformulation of older policies of dispossession.

As Russell Diabo argues, by invoking section 35 of the Constitution for implementing UNDRIP, it becomes a mechanism for domesticating and thereby subjugating UNDRIP under Canadian sovereignty.¹⁶

CONCLUSION

In closing, I would like to draw on a final observation. When the Marshall Decision upheld a treaty right to a moderate livelihood, the natural resource committee under the Mi’kmaq-NS-Canada Tripartite forum for discussing matters of mutual concern, was immediately removed and placed within formal consultation and treaty negotiations that became the Made-In-Nova Scotia process. Eighteen years later, the federal government split the Department of Indigenous Affairs into two departments, separating Crown relations from services.

In my view, these are neoliberal re-articulations that attempt to sever Indigenous Peoples from the land and water on which they depend in order to commodify natural resources under the guise of “closing the gap” or for the goal of economic development. This neoliberalization of Indigenous Treaty and Aboriginal Rights runs counter to most Indigenous worldviews where Land, Water and Humans are interdependent and require responsible stewardship.

ENDNOTES

- ¹ See: G.S. Coulthard. *Red skin, white masks: Rejecting the colonial politics of recognition*. Minneapolis, MN: University of Minnesota Press, 2014; Russell Diabo. Harper Launches Major First Nations Termination Plan: As Negotiating Tables Legitimize Canada's Colonialism. *First Nations Strategic Bulletin*, Vol. 10, issues 7-10 June-October 2012; Russell Diabo. "Our Right of Indigenous Self-Determination is Being Hijacked by Trudeau: Recognition & Implementation of Rights Framework." *First Nations Strategic Bulletin*. Vol. 16, Issues 1-3, Jan. to Mar. 2018; Jeremy J. Schmidt. "Bureaucratic Territory: First Nations, Private Property, and 'Turn-Key' Colonialism in Canada," *Annals of the American Association of Geographers*, 2018, DOI: 10.1080/24694452.2017.1403878.
- ² R. v. *Marshall*, [1999] 3 S.C.R. 456, 533.
- ³ Mi'kmaq is plural and Mi'kmaw is singular.
- ⁴ It is important to point out, though the signatories to the treaties included the Mi'kmaq, Wolastoqiyik and Passamaquoddy Peoples, the negotiations have translated separately for each group according to each province. This brief will focus on the parameters for treaty negotiations in the Made-In-Nova Scotia process.
- ⁵ In March 2017, the NS Chiefs were able to secure a letter from Mr. Joe Wild, Senior Assistant Deputy Minister on Treaties and Aboriginal Government stating that "Canada is not contemplating the negotiations of a 'modern treaty' in the Made-in-Nova Scotia Process" or have a policy that "contemplates extinguishment of Aboriginal and Treaty rights including title" or is the funding regarded as a loan (MRI 2017)— all of which are features of the older land claims and modern treaty processes. While this letter at first appears to be reassuring, the Made-In-Nova Scotia process was formerly listed on the Department of Indigenous Affairs (then Aboriginal Affairs) website as a comprehensive land claim (Sherry M. Pictou, *Decolonizing Mi'kmaq Memory of Treaty: Lsitkuk's learning With Allies in Struggle for Food and Lifeways*. Halifax. Doctoral Dissertation. Halifax, Dalhousie University, 2017). Further, the Made-In-Nova Scotia process has been referred to by the Aboriginal Affairs of Nova Scotia as a "modern treaty" (AANS, *Office of aboriginal affairs statement of mandate 2014 – 2015*, 2014:13) and by Justice A. Peter Ross in a recent provincial court case involving fishing salmon outside of an Aboriginal Food Fishery Strategy agreement as "modern day agreements" and a "modern day treaty" (R. v. Martin 2016 NSPC 14).
- ⁶ Mi'kmaq Rights Initiative (2017). Documents: Letter from INAC on the Nova Scotia Process March 7, 2017: <http://mikmaqrights.com/negotiations/made-in-nova-scotia-process/documents/>
- ⁷ See, for example, Isabel Altamirano-Jimenez. *Indigenous Encounters with Neoliberalism: Place, Women, and the Environment in Canada and Mexico*. Vancouver: University of British Columbia Press, 2013; Fiona MacDonald. "Indigenous Peoples and Neoliberal "Privatization" in Canada: Opportunities, Cautions and Constraints." *Canadian Journal of Political Science*, 44:2 (June 2011) p. 257-273; and, Eva Mackey. *Unsettled Expectations: Uncertainty, Land and Settler Decolonization*. Halifax and Winnipeg: Fernwood Publishing, 2016.
- ⁸ Joanna Smith, "Trudeau Liberals announce new legislative framework on Indigenous rights," Canadian Press, February 14, 2018: <https://globalnews.ca/news/4025875/justin-trudeau-indigenous-rights-legislation/>
- ⁹ Mi'kmaq Rights Initiative, Press Releases: <http://mikmaqrights.com/about-us/press-releases>; Mi'kmaq Rights Initiative, Consultation: <http://mikmaqrights.com/consultation/>; Mi'kmaq Rights Initiative, Made-In-Nova Scotia Process: <http://mikmaqrights.com/negotiations/made-in-nova-scotia-process/>
- ¹⁰ Ibid; Trina Roache. "Tension high at #MuskratFalls construction site." *Aboriginal Peoples Television Network*. Oct. 25, 2016: <http://aptnnews.ca/2016/10/25/tension-high-at-muskratfalls-construction-site/>
- ¹¹ Alex Cook. "BP granted approval to start drilling off Nova Scotia's coast, Canadian Press," *CBC News*. April 21, 2018: <http://www.cbc.ca/news/canada/nova-scotia/bp-oil-drilling-off-shore-mi-kmaw-fishing-grounds-1.4630026>
- ¹² Mi'kmaq Rights Initiative, Consultation: <http://mikmaqrights.com/consultation/>.
- ¹³ Aboriginal Peoples Television Network, National News. Ottawa developing "Canadian definition" of UNDRIP, says liberal minister. April 21, 2016: <http://aptnnews.ca/2016/04/21/ottawa-developing-canadian-definition-of-undrip-says-liberal-minister/>
- ¹⁴ Jim Carr. Open Parliament Canada. April 17, 2018: <https://openparliament.ca/debates/2018/4/17/jim-carr-6/>
- ¹⁵ Martin Lukacs. "Indigenous rights 'serious obstacle' to Kinder Morgan pipeline, report says." *The Guardian*. October 17, 2017: <https://www.theguardian.com/environment/true-north/2017/oct/16/indigenous-rights-serious-obstacle-to-kinder-morgan-pipeline-report-says>
- ¹⁶ Russell Diabo. "Harper Launches Major First Nations Termination Plan: As Negotiating Tables Legitimize Canada's Colonialism." *First Nations Strategic Bulletin*, Vol. 10, issues 7-10 June-October 2012; Russell Diabo. "Our Right of Indigenous Self-Determination is Being Hijacked by Trudeau: Recognition & Implementation of Rights Framework." *First Nations Strategic Bulletin*. Vol. 16, Issues 1-3, Jan. to Mar. 2018.