HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

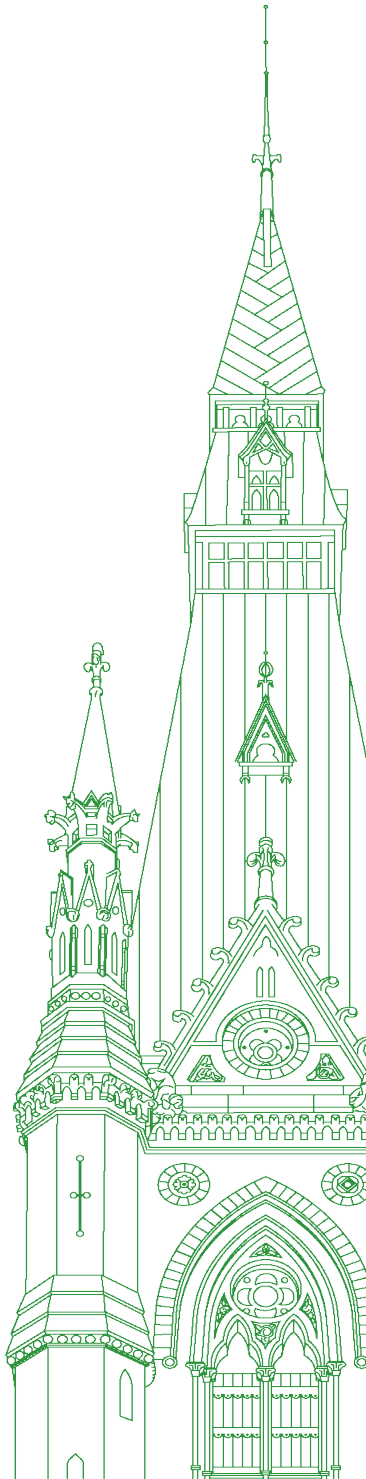
43rd PARLIAMENT, 2nd SESSION

Standing Committee on Fisheries and Oceans

EVIDENCE

NUMBER 011

Monday, November 30, 2020



Chair: Mr. Ken McDonald

Standing Committee on Fisheries and Oceans

Monday, November 30, 2020

● (1535)

[*English*]

The Chair (Mr. Ken McDonald (Avalon, Lib.)): I call this meeting to order.

Welcome to meeting number 11 of the House of Commons Standing Committee on Fisheries and Oceans. Pursuant to Standing Order 108(2) and the motion adopted by the committee on Monday, October 19, the committee is resuming its study of the implementation of Mi'kmaq treaty fishing rights to support a moderate livelihood.

Today's meeting is taking place in a hybrid format pursuant to the House order of September 23. The proceedings will be made available via the House of Commons website. So that you are aware, the webcast will always show the person speaking, rather than the entire committee. To ensure an orderly meeting, I would like to outline a few rules to follow.

Members and witnesses may speak in the official language of their choice. Interpretation services are available for this meeting. You have the choice, at the bottom of your screen of either the floor, or English or French.

For members participating in person, proceed as you usually would when the whole committee is meeting in person in a committee room. Keep in mind the directives from the Board of Internal Economy regarding masking and health protocols.

Before speaking, please wait until I recognize you by name. If you are on the video conference, please click on the microphone icon to unmute yourself. For those in the room, your microphone will be controlled as normal by the proceedings and verification officer. I will remind you that all comments by members and witnesses should be addressed through the chair. When you are not speaking, your mike should be on mute. With regard to a speaking list, the committee clerk and I will do the best we can to maintain a consolidated order of speaking for all members, whether they are participating virtually or in person.

I would now like to welcome our witnesses. Today, we have, as individuals, Michael Dadswell, professor of biology, retired, and Gary Hutchins, retired detachment supervisor for the Department of Fisheries and Oceans. Representing the Canadian Independent Fish Harvester's Federation, we have Melanie Sonnenberg, president, and Jim McIsaac, vice-president, Pacific.

We will now proceed with opening remarks for—

Mr. Richard Bragdon (Tobique—Mactaquac, CPC): I have a point of order, Mr. Chair.

The Chair: Yes, Mr. Bragdon.

Mr. Richard Bragdon: Thank you, Mr. Chair.

This should be fairly brief, as I'm looking forward to hearing the testimony tonight.

I wanted to make sure of the following as we get ready for the conclusion of the study coming up. There are a few documents that we wanted to have included as evidence for the current study. I have a motion that's in both languages and will send it to you and the clerk right away for translation. It's just to make sure of the inclusion of certain documents for the report of this study.

I'll read the motion if you're okay with that. It's being sent to you and the clerk to be circulated.

The Chair: Has it been translated, Mr. Bragdon?

Mr. Richard Bragdon: Yes, it has.

The Chair: Okay.

● (1540)

The Chair: Thank you, Mr. Bragdon.

Before we get into any discussion on the motion, of course, I'll have to make sure that all members have received it in both official languages.

The Clerk of the Committee (Ms. Nancy Vohl): I have not received it.

Can you send it to me so I can distribute it, please?

The Chair: The clerk hasn't received it, Mr. Bragdon, so I guess we'll have to wait until that's done, and then wait to make sure everybody has it, before we proceed.

The Clerk: I've got it, and am about to distribute it. Thank you.

The Chair: Okay.

Has everybody received it?

Okay.

Do I hear any discussion on the motion as proposed by Mr. Bragdon?

Hearing no discussion, Nancy, I'll ask you to do a recorded vote, please.

(Motion agreed to: yeas 11; nays 0)

The Chair: We'll now go to our witnesses for five minutes or less, please. We'll start with Mr. Dadswell.

● (1545)

Dr. Michael Dadswell (Professor of Biology (Retired), As an Individual): Good afternoon, committee members.

My name is Dr. Michael Dadswell.

I began my fisheries career in 1965 working on salmon in the Miramichi. I graduated with my Ph.D. in 1973. I went to the Huntsman Marine laboratory and worked as a fisheries biologist on the Saint John River. In 1977 I joined DFO and worked on lobsters, scallops and tidal power environmental impacts. Then in 1987 I moved to Acadia University, where I taught marine biology and fisheries biology for 33 years.

I see my role here today basically as that of a defence attorney for the lobsters.

Scientific fisheries research over the last hundred years has established what is known as the scientific concept of biological management for the conservation of fish stocks.

Fish stocks are extremely susceptible to the effects of exploitation and environmental change upon the recruitment of the young to the stock. Fisheries stocks are fragile and sensitive. To survive exploitation, recruitment must be good. The biology of the stock, then, is critical to survival.

Last Monday, the witnesses did not explain very well the importance of lobster seasons for the conservation of lobster stocks, so that is where I'll begin.

To provide a little history, the Canadian lobster fishery began in 1880. There were no regulations; it was the Wild West. But in 1920, the stock was collapsing. A number of regulations were introduced, with little effect.

Then during the 1930s Dr. Wilfred Templeman of the Canadian fisheries department undertook research on lobster life history around the Maritimes.

There are some lobster biology facts that you should all hear first. Mature females only moult and reproduce once every two years. This slows their growth, and when they are not berried—i.e. carrying eggs—they stay longer in the exploitation window. It is therefore extremely important to protect them.

Male lobsters can only pass sperm to females just after moult, when they are in the soft-shell condition. Females then store the sperm, but they do not release and fertilize the eggs until one to three months later, depending on the temperature and so forth.

At the right time as the female chooses, she fertilizes the eggs with sperm and releases the eggs, and then she glues them to the underside of her abdomen. The females then carry the eggs for 10 to 11 months.

Delayed release of eggs means that the take of a female before she releases her eggs and becomes berried is basically the same as the take of a berried female: her production then is lost to recruitment.

What Dr. Templeman found back in the 1930s was that the growth, maturity, moult and egg release periods of the lobster varied around the Maritimes, based on the local environment.

In the Gulf of St. Lawrence, because of warm summer temperatures females matured at a younger age, about five to six years. They were soft-shelled by late June—that meant they could be inseminated at that time—and they usually released the eggs by August.

In southwest Nova Scotia—lobster district 34, about which we're talking a lot—the females mature much later, at seven to eight years. They're soft-shelled in July and August, and egg release does not occur until October or November.

The seasons, then, were established based on these findings and the considerations of marketing and desirability of lobster. Soft-shell lobsters such as you talked about in the last meeting are not only susceptible to high mortality while they're being handled; they are also at a high risk of being attacked, killed and eaten by other lobsters when they're in the lobster trap.

Lobsters are cannibalistic. That's why they have those rubber bands on their claws when we buy them in the market. Essentially, the seasons are closed in most areas until after the soft-shell condition is over.

Also, soft-shell lobsters have poor meat quality, and consumer appreciation is lower. Because of seasons, Canada has established a superior quality of our product. Taking lobster outside the season leads to recruitment over-exploitation through the loss of females to the stock, the higher mortality of soft-shell animals and less consumer appreciation.

● (1550)

Now, the problem with all of this is that the effects of the lobster exploitation out of season will take anywhere from seven to 10 years to be evidenced. I will give you all an example that you probably know quite well.

In Newfoundland the cod fishery collapsed in 1992. The onshore cod trap-fishers in Newfoundland were warning DFO that there were no juvenile cod evident in their traps for five years before the Newfoundland cod collapse. Essentially, their warnings were ignored.

So based on these lobster biology facts, and the present very healthy state of the lobster fishery, in my opinion, Mi'kmaq fishers can make a good, moderate livelihood by fishing in season, like all the other lobster fishermen.

Thank you.

The Chair: Thank you, Mr. Dadswell. That was a little bit over time.

We'll now go to Mr. Hutchins for five minutes or less, please.

You're on mute, Mr. Hutchins.

Mr. Gary Hutchins (Detachment Supervisor (Retired), Department of Fisheries and Oceans, As an Individual): Is that better? Can you hear me now?

The Clerk: Yes, we can. Go ahead.

Mr. Gary Hutchins: Great. Thank you.

My name is Gary Hutchins. I was a fishery officer and detachment supervisor with the federal Department of Fisheries and Oceans for almost 32 years. As a fishery officer, I took a sworn oath to enforce the Fisheries Act and regulations pursuant to the act.

My personal experiences are many. I have been involved in enforcement of all fish species on the east coast as well as the Fraser River salmon on the west coast of our great country in 1992, after the Sparrow decision ruling came down from the Supreme Court of Canada. I had the privilege of sitting with indigenous elders who were drying salmon on the banks of the river on endless wooden racks. They would tell stories about their rich, fascinating culture and spiritual beliefs, and I was fascinated.

However, the majority of my career was spent enforcing the many commercial fisheries as well as the indigenous fisheries on the east coast. I can tell you that commercial fishermen are a unique breed. They are the hardest-working, most driven, toughest, proudest and principled group of people I know, and further, they have earned every penny they have through hard work and determination. Yes, we butted heads, but they knew I had a job to do, and as one fisherman said to me, "Gary, I don't like you one little bit, but I respect you for what you are doing", and then I charged him.

We can all agree that the terrible and tragic events that have transpired since September 17 are unacceptable, and I don't condone them. These actions are fear-based, and not racist. Let me ask you all this question: How would you react if you felt powerless and abandoned by the Minister of Fisheries and your elected government? At this point, you'd feel backed into a corner, believing that your livelihood could be threatened. Whether or not this is fact-based, the simple truth is that one person's perception could also be their reality. Perhaps the reason for this behaviour is that fishermen were already aware that there were approximately 3,000 indigenous lobster traps in St. Marys Bay. They witnessed the destruction of a resource they had paid huge money to be a part of, all under the guise of a food, social and ceremonial fishery.

In the summer of 2017, my detachment, Digby C&P, learned that a large quantity of lobster was discovered in a ditch alongside a secondary road. We initiated an investigation, through which we located thousands of pounds of discarded lobster in the woods near the town of Weymouth, Nova Scotia. This is also adjacent to an area where several indigenous vessels landed their daily catch. Through our investigation, we could not conclude on reasonable and probable grounds that the lobsters were dumped by lobster buyers, or possibly indigenous fishers. Lobster buyers would have discarded them because, shortly after taking possession of the lobsters, the lobsters would have died. Similarly, indigenous fishers would have discarded them from their holding traps. Nonetheless, this showed a blatant and total disrespect for a valuable resource that provides income for thousands of people.

Mr. Dadswell has already talked about the lobsters and their survival rates, so I'll just move on.

This commercial fishery that Sipekne'katic wants to establish will cause a massive destruction of lobster. We have witnessed this type of destruction associated with the FSC fishery for years. Fishery officers have conducted thousands of patrols and regular checks in St. Marys Bay, and through these efforts, we have seen juvenile lobster used as bait, many with eggs attached. Fishery officers have witnessed untold numbers of dead lobsters in traps as well. This is a major conservation issue.

Allow me to speak to the facts for a moment. There is no indigenous treaty right associated with harvesting lobster. The FSC fishery was established by policy by the Department of Fisheries and Oceans to allow indigenous people to access the harvesting of lobster. Now we have a self-imposed attempt to create a commercial fishery by Chief Sack and others using licences and tags created by themselves. Access to the fishery is lawfully regulated in the following manner. A licence is created by the minister, tags are issued by the minister, and these tags are affixed to the traps in the manner for which they were designed.

I am perplexed as to why we are here discussing the creation of another indigenous commercial fishery when one already exists. Actually, there are two, if we include the FSC fishery. The federal government purchased and provided to all bands a variety of commercial licences, including licences for lobster fishing, as well as for vessels. The purpose of this undertaking was to provide a moderate livelihood for indigenous people, thereby fulfilling the obligations set down by the Supreme Court of Canada under the Marshall decision.

Perhaps a better question to ask is why are indigenous people not getting access to these licences to pursue a moderate livelihood? Perhaps the reason is that these licences have been leased back to white business owners, thereby taking opportunities away from the indigenous people. I have spoken with indigenous people who have expressed the desire to pursue a moderate livelihood from fishing, but have not been given the opportunities.

The Fisheries Act is the supreme law in Canada that governs our fishery resources, and no one—not the Minister of Fisheries nor the Prime Minister—can violate this law or any law. The fisheries minister should step down. Further, if anyone else had done that, they would have been charged by now. The Minister of Fisheries—

● (1555)

The Chair: Thank you, Mr. Hutchins. Your time has gone over. Hopefully anything else that's left in your testimony will come out in the line of questioning.

We'll now go to Ms. Sonnenberg for five minutes or less, please.

Ms. Melanie Sonnenberg (President, Canadian Independent Fish Harvester's Federation): Thank you, Mr. Chair, and good afternoon to the committee members.

The Canadian Independent Fish Harvester's Federation represents more than 14,000 independent owner-operators across Canada. Our primary species are lobster, crab, wild salmon, shrimp and groundfish. We produce over $3 billion in landed value, which translates into $10 billion at retail, and much more to over a thousand coastal communities in our country. Including crew members, we employ over 40,000 workers, and we are the largest private employer in coastal communities in Canada.

My name is Melanie Sonnenberg, and I'm the president of the fish harvester's federation. Today I'm joined by our federation's Pacific vice-president, Jim McIsaac. Our wheelhouse is the Canadian fishery. We are here today to discuss independent harvesters' role in the future of the fishery, and why it is important for us to be part of the consultation processes regarding the fishery.

We are not here to challenge treaty rights, but to discuss sustainable fisheries as we see them.

The three core components of sustainable fisheries are legal access, rights or privileges; harvesters with their knowledge; and our technologies with vessels and gear. Harvesters as an important component of sustainable fisheries have formed important relationships with the ecosystem, our communities, our economy and our governance systems. All these relationships are important if we are to protect the resource and ensure benefits to our communities for future generations of harvesters.

The work to protect independent harvesters dates back over 100 years. On governance, we work closely with the Department of Fisheries and Oceans in a symbiotic relationship that includes fisheries management, stock rebuilding, advisory committees, licensing issues, setting harvesting levels, and establishing harvesting as our controls. Our relationship is not perfect. Too often, the department is fixated on ecological objectives and has no resources to pay attention to socio-economic objectives. Over the last decade we have been working to drive this into the new Fisheries Act, and to ensure equitable distribution of benefits from our fisheries so that all harvesters in coastal communities are primary beneficiaries of our resource.

Without our driving socio-economic objectives, our fisheries would all be controlled by corporate and foreign entities. Our investment of putting knowledge into sustainable fisheries is significant. The net effect is tens of thousands of middle-class jobs that sustain over 1,000 coastal communities.

We are not part of any direct dialogue between the federal government and first nations around the term “moderate livelihood”. In the absence of that discussion, we would pose the following questions.

With multiple definitions and multiple parties, will limited entry be destroyed? If so, will fishing as a serious livelihood be destroyed? All legal fisheries are currently licensed, regulated, monitored by the federal government. Is this cornerstone to be replaced? How do we protect the resource when harvesters' plans are not consistent across all sectors of the industry.

Is it not important to monitor the catch to prevent overfishing in any fishery, including FSC, commercial or recreational fisheries? Won't the illegal sale of fish from any fishery undermine the sustainability of our legal fisheries?

Is it no longer important to protect our [*Technical difficulty—Editor*] our fisheries seasons and have conservation and protection rules that apply to all? As licence leasing reduces the net proceeds that go directly back to local communities, is this new objective in our Fisheries Act now irrelevant? Doesn't leasing to corporate entities undermine local ownership and erode net reach to all coastal communities?

We have been advised that we could see up to 35 separate management plans in Atlantic Canada alone. Is this workable? Will this make DFO's job of protecting our common resource more challenging and further complicate understaffing in many areas of the department?

We must find a way to manage the sector that doesn't cost more than the income from the sector. Can we afford both standards and enforcement? Should regulations apply to all harvesters equally in each fishery? If not, will we not have chaos?

Our members want positive working relationships with first nations in their geographic areas. Presently, we work with many in training, mentoring, marketing, species advisory committees, science and research; but by not being at fisheries consultation tables, we are left to speculate that we, the fishing industry, are on the menu.

In summation, we have proactive and productive options that could work in solving some of the current obvious concerns that our harvesters have. To achieve positive outcomes, we need a meaningful role for independent harvester organizations in fisheries' reconciliation negotiation. Existing consultation models that are used for international fisheries' negotiations like NAFTA and NAFO, where stakeholders provide advice and are sounding boards for the government, need to be adopted.

● (1600)

A common goal is that all harvesters participating in our fisheries be treated equally, so that enforcement applies to all. Alignment of seasons, regulations and fishing zones is [*Technical difficulty—Editor*] avoiding multiple management plans for one fishery.

In closing, on behalf of the Canadian Independent Fish Harvester's Federation, we would like to thank the standing committee for this opportunity to present. Mr. McIsaac and I would be pleased to answer any questions the committee members may have.

Thank you.

The Chair: Thank you, Ms. Sonnenberg. You were just a couple of seconds over time.

We'll now go to questions from committee members. I would remind people that, if you're not speaking, please put your microphone on mute. To the questioner, please identify who the question is for. That will make it a little easier to get the answer more quickly and make more productive use of your time.

For six minutes or less, Mr. Bragdon, go ahead.

Mr. Richard Bragdon: Thank you, Mr. Chair.

I know, Mr. Hutchins, that you were in the midst of your testimony when you ended. You may have about a minute or so to wrap up. I'll give you a bit of my time for you to wrap up, if you want to take a minute to finish your statement, and then I have some questions I'd like to ask.

Go ahead, Mr. Hutchins, and just finish off your statement.

Mr. Gary Hutchins: Thank you very much; I appreciate that.

I would like to finish off by saying that the term “white racist fisherman” has spread like wildfire, especially in the media and across Canada. This greatly upsets me because it is simply untrue, based on my 32 years of experience and knowledge.

Commercial fishermen have been vilified by our government leaders and our media. Our federal leaders have categorized fishermen as racists and terrorists. Because of these comments, Canadians believe what our elected leaders are saying. Now Canadians believe this to be so, thereby labelling commercial fishermen in southwest Nova Scotia as racists and terrorists.

If this is the case, we must assume that their wives, children, grandparents, parents, friends and perhaps the whole community is racist. After all, racism doesn't exist in a vacuum. Everyone wants to focus on the acts of the commercial fishers, so it seems everyone else involved in this incident gets a free pass.

The first thing you learn as an investigator is to investigate both sides of the story and collect all the facts and the evidence before making a decision. This opportunity was never afforded to the commercial fishers. They were instantly tarred and feathered by our elected leaders and media and, as a result, the citizens of Canada.

Remember, this incident was caused by an illegal fishery, an illegally fishery, and is the cause without which this incident would not have occurred. Guilt before innocence is what has happened, and without doubt our leaders in Ottawa are not entitled to a free pass. They must act with integrity and dignity and carry themselves in a manner that is above reproach and disrepute. They have fallen short. It's time for our leaders to apologize to the commercial fishers, their families and the community. Canadians look to our leaders to bring us together in pursuit of our Canadian dream, not to divide us with harmful, hurtful, divisive and destructive comments.

As a Canadian and a former DFO officer, I have always supported indigenous rights and always will, but this is simply an illegal fishery that should not have occurred, and I do not support it.

Thank you, sir, so much.

● (1605)

Mr. Richard Bragdon: Thank you, Mr. Hutchins.

Now I want to move into some questions. Obviously, we've heard testimony, and I want to thank each of the witnesses for taking the time to be here tonight to bring your perspective to the table.

I'd like to start with Ms. Sonnenberg. There has been a lot of discussion around the possibility of establishing a separate or second independent fishing authority. What would be the feeling of your association about that? Have you been consulted in regard to this talk of an independent, second, separate fishing authority, Ms. Sonnenberg?

Ms. Melanie Sonnenberg: The federation members, as the federation goes, have not been consulted on this matter. As I said in my presentation, having a separate table would be devastating to the fishery and the management of it. Our membership has been clear across the board to the Department of Fisheries and to anybody who will listen that it simply will not function. It sets us up for certain disaster.

Mr. Richard Bragdon: Thank you.

Ms. Sonnenberg—and I'll go to the others as well—do you feel that there has been adequate consultation with all stakeholders by the minister in regard to this as we were leading up to this point and the escalations that have happened? Do you feel there has been proper consultation, or is that improving at this point?

I'll start with you, Ms. Sonnenberg, and then head over to the other witnesses as well, Mr. Hutchins and Mr. Dadswell.

Ms. Melanie Sonnenberg: I would have to say, Mr. Bragdon, that the consultation has been very weak on our side. We are told repeatedly that we really don't have a place, that this is government to government. My members continue to ask where we will fit into this dialogue. I think that's what is most important for us to establish: With the department and with other government agencies that are in the reconciliation discussions, we have to know where we will fit.

I think Gary's comments were very appropriate in terms of the fear that's come from the fishing industry being driven by this lack of communication. We must find a way forward to inform the people who have such big investments in this industry.

Mr. Richard Bragdon: Thank you.

Mr. Hutchins and Mr. Dadswell, do you have a quick comment?

Mr. Gary Hutchins: Certainly. I guess the creation of another fishery seems to me to be somewhat redundant. The federal government has provided $600 million in licences to cover off the moderate livelihood. The fact sheet of the 1999 Supreme Court Donald Marshall decision clearly says that the first nations communities have been provided with “licences, vessels and gear in order to increase and diversify their participation in the commercial fisheries and to contribute to the pursuit of a moderate livelihood.”

That's already been established by the Marshall decision and the actions taken by the federal government to meet those obligations. Here we are today talking about the creation of another commercial fishery when already one exists.

Mr. Richard Bragdon: Mr. Dadswell.

Dr. Michael Dadswell: I agree completely with the statements just made, not so much from the side of the humans involved but from the side of the lobsters. Over-exploitation of female lobsters by one means or another in the long-term fishery whereby soft-shell lobsters are caught, females that have not extruded eggs are caught, is going to collapse the fishery sooner or later.

The Chair: Thank you, Mr. Dadswell.

Thank you, Mr. Bragdon.

We will now go to Mr. Morrissey, for six minutes or less.

Go ahead, please.

● (1610)

Mr. Robert Morrissey (Egmont, Lib.): Dr. Dadswell, I want to follow up on your comments. You would provide testimony to this committee that if we don't conserve the stocks accurately, if we don't protect the female soft-shell lobsters, there will be a negative impact on both the commercial fishery and any moderate livelihood fishery for first nations?

Dr. Michael Dadswell: That is correct. Everybody would suffer.

Mr. Robert Morrissey: Could you explain that to the committee, from your perspective, because you introduced yourself as a defence counsel for the lobster. I believe that was the terminology you used.

Dr. Michael Dadswell: That's right. I did.

Mr. Robert Morrissey: You stated that you were unbiased in your approach. I take that, and so your testimony is important.

One of the issues being studied by the committee is whether the Government of Canada through DFO can put limitations on a moderate fishery without infringing on treaty rights. So if you were to leave it wide open, then you could interpret that as having a negative impact on the long-term [*Technical difficulty—Editor*].

Dr. Michael Dadswell: Mr. Morrissey, you're—

The Chair: We're losing you, Bobbie. Your question didn't come through.

The Clerk: Mr. Morrissey, this is the clerk.

Mr. Robert Morrissey: I can hear you now. Can you hear me?

The Chair: Yes.

Mr. Robert Morrissey: Dr. Dadswell.

Dr. Michael Dadswell: Yes, I'm listening.

The Chair: I don't believe the witness heard your question.

Mr. Robert Morrissey: Can you hear me? Okay.

Dr. Dadswell, from your expertise as a biologist, if the Government of Canada does not impose restrictions on seasons and times when lobster is harvested, it could very well have a negative impact on not only the moderate livelihood fishery, but the commercial fishery as well. Would I be correct in that interpretation?

Dr. Michael Dadswell: I would say you are completely correct. Both fisheries would suffer, and the lobster stock would suffer.

Mr. Robert Morrissey: From that context, you very clearly explained the reasons why you should have seasons: because of the vulnerable state of lobster at certain times. You used a reference. Could you expand a bit more on the “exploitation window”?

Dr. Michael Dadswell: What I meant by the exploitation window is that.... Most lobster traps have a ring. The ring is set to be a certain size to get the largest number of lobsters of the right size for marketing. Most lobster fishermen don't particularly want to catch the biggest ones, because when they go in the trap, they can kill everybody. They try to keep it to a certain size.

With the lobster life history, the fact that the females only moult every second year means that they grow slower than the males. You have vulnerable females, which you absolutely need to keep the stock in good shape, staying longer in that exploitation window, which the trap can then catch. That means your actual catch rate of females would be higher than of males over a long-term period.

Mr. Robert Morrissey: Okay. Good regulations, good policy and good seasons are important to the moderate livelihood fishery as well as the commercial fishery.

I want to go to Ms. Sonnenberg. Melanie, could you elaborate a bit more on where your very credible organization—which I've known for some time—would see a meaningful role in the negotiations for the commercial industry?

● (1615)

Ms. Melanie Sonnenberg: Thank you, Mr. Morrissey, for the question.

We need to find a place where we can understand what is being discussed about us, yet without us. We need to have an opportunity to have some input about what the impacts may be over the course of time and, as we've heard from Mr. Dadswell, what the impacts on stocks will be in different fisheries.

Presently, because we don't know any of this, we don't understand what the future holds for us. For us, a table needs to have some detail and some substance. It isn't about denying any rights. It isn't about not acknowledging what has been established by the Supreme Court. It is about making sure that we have a better understanding and that we have some protection. We have an industry that has heavily invested in fishing. We have thousands of fishermen across this country. They've established our coastal communities, as we know them, and we know that the prosperity in these communities has grown as of late.

We need to recognize that and figure out a way, collectively, to ensure that everybody is protected, and that we have some sense of community together. This isn't about dividing and conquering; this is about working together for the best of everybody.

The Chair: Thank you, Ms. Sonnenberg. Thank you, Mr. Morrissey.

We'll now go to Mr. Blanchette-Joncas, for six minutes or less please.

[*Translation*]

Mr. Maxime Blanchette-Joncas (Rimouski-Neigette—Témiscouata—Les Basques, BQ): Thank you, Mr. Chair.

First, I'd like to thank all of the witnesses who are here today.

My first question is for Mr. Dadswell.

I listened to your statement carefully, Mr. Dadswell. You shared some pretty damning facts. You said that it can take between seven and ten years before you see an imbalance, a problem situation.

Considering these facts, can you tell us about the importance of science in fisheries management?

[*English*]

Dr. Michael Dadswell: Okay, we have a problem. I'm not getting the interpretation. How can that be fixed?

The Clerk: Mr. Dadswell, this is the clerk of the committee. If you can, go down your Zoom screen—

Dr. Michael Dadswell: Yes.

The Clerk: Click “Interpretation”, then “Select”, then “English”.

Dr. Michael Dadswell: I don't have that on my Zoom screen anywhere.

The Clerk: Mr. Chair, could you suspend, please, and we'll come back?

The Chair: Yes.

We'll suspend for a moment.

● (1615)

_____(Pause)_____

● (1625)

● (1630)

The Chair: I just want to let the members know that IT is on the phone with both witnesses. They're on a different system, so they're not in our meeting on Zoom, or whatever. That's why they're not getting the translation. I do apologize to members who want to ask questions *en français* of these two members. I'm not sure if Ms. Sonnenberg is getting translation or not either.

What I would suggest, with the permission of the committee, is that any questions for Mr. Hutchins or Mr. Dadswell in French we can submit in writing and ask them to give a written response back.

If that's fine with everybody, we can go on to Mr. Blanchette-Joncas and his line of questioning if he has anything for Ms. Sonnenberg.

Mr. Johns.

Mr. Gord Johns: I'm only willing to proceed if that's okay with Mr. Blanchette-Joncas.

The Chair: I'm not hearing anything back from Mr. Blanchette-Joncas in response to your question, Gord.

[*Translation*]

Mr. Maxime Blanchette-Joncas: Mr. Chairman, if I may, I would like to tell you that the situation is completely unacceptable.

I do not understand that in the Parliament of Canada, where there are two official languages, interpretation in both official languages is not available. Please allow me to express my dissatisfaction very clearly to all members of the committee.

I find it vexing and completely disrespectful to my right to speak today. I understand that we're trying to find solutions, and I'm not trying to blame anyone, but I hope that we can learn from our mistakes for the future, and that we can even check with the witnesses who come to visit us at each meeting. We need to do practice runs with them beforehand. First of all, it would save us time, and secondly, it would save us the kind of problem we're facing today.

I will have to modify my questions, unfortunately, and I will still transmit my very precise complaints to whoever is entitled to them.

[*English*]

The Clerk: Mr. Chair, just to let you know, you can ask Mr. Blanchette.... If the members want to wait, they can wait. If not, they can proceed otherwise. If you have unanimous consent, then we can continue. If not, we can certainly wait.

The Chair: Mr. Blanchette, I will say thank you for that. I fully understand why you would be upset that this is not available in both official languages, but some things are outside of any of our control when it comes to a witness' signing on. We don't have any control over the system they're using or the method by which they are using it. They're not in the parliamentary precinct and, of course, they're not in either one of our offices per se.

I'm hearing the translation fine in my office, and I'm sure that other members on the committee are hearing it fine as well. However, unfortunately, we have a couple of witnesses who are not hearing it, so it's hard for them to answer a question. I do apologize on behalf of the clerk and the committee for not realizing this until it actually happens. I don't think anybody is at fault, but I will recommend, of course, in the future that we definitely have some way to test if the witnesses can't understand everything in both official languages and not just in the language of their choice.

[*Translation*]

Mr. Maxime Blanchette-Joncas: Mr. Chairman, I am pleased to hear your comments. However, as I mentioned earlier, I would like to point out, more incisively, that this also happened last week to my colleague, the member for Manicouagan, who sits on the Standing Committee on Fisheries and Oceans. It's the same thing, she was unable to get her words interpreted, and today, the same situation is repeating itself. I hope a decision will be made to test the interpretation with the witnesses before committee members are present.

Mr. Chair, I'd like to ask the clerk a question. Is it legal for a committee member to be unable to speak in one of the official languages? Isn't that part of his or her rights as a parliamentarian?

The Clerk: Thank you, Mr. Blanchette-Joncas.

Of course, I can answer your question. Indeed, this is completely unacceptable. Both official languages must be respected in parliamentary meetings. Having said that, when I did the sound tests with the witnesses, I talked about English and told them to choose that language. The witnesses did not mention to me that they did not see this option. So I couldn't know if they had access to it or not. Otherwise, at the time of the sound test, I certainly would have mentioned it.

Committees indeed have an absolute obligation to offer services in both official languages.

Mr. Maxime Blanchette-Joncas: Mr. Chair...

[*English*]

The Chair: Go ahead, Mr. Blanchette-Joncas.

[*Translation*]

Mr. Maxime Blanchette-Joncas: For my part, and this is nothing personal regarding committee members or witnesses, I will ask that my rights be respected, and they are to be able to express myself in the language of my choice, which is one of the two official languages of the Canadian Parliament.

I will also ask that today's meeting be adjourned until I can express myself in the language of my choice, one of Canada's two official languages, which we are not able to respect today, in 2020.

[*English*]

The Chair: Thank you, Mr. Blanchette-Joncas.

The first hour of our committee meeting today has expired, and I'd like to move on to the next group. Of course, we'll do their sound checks to make sure that they do hear it in French as well.

I would suggest that we could ask the witnesses to come back sometime this week when interpretation is available in both official languages because, Mr. Blanchette-Joncas, I do agree that you should be able to express a question or a statement in the official language of your choice, just as it is my right as an English-speaking Canadian to express myself freely. You should have that right, and we'll make sure that if that is not available, we won't allow the meeting to go ahead in the future.

The time for this hour is up. I'll suspend for a moment to switch out.

Nancy, I will ask if we can find some time somewhere to—

Mr. Blaine Calkins (Red Deer—Lacombe, CPC): I have a point of order, Mr. Chair.

I think you are going to get to what I was going to suggest, so I apologize for interrupting, Mr. Chair. Why don't I let you finish your thought, and then if there's something more I want to say, I'll interject then?

The Chair: Okay. I was going to make sure that the clerk understands that we have permission to invite these people back again at a time convenient to them and to the committee to reconvene and have a full round of questioning, where all members can ask questions and get to their points in both official languages.

Mr. Blaine Calkins: If that doesn't work, Mr. Chair, could we put those questions in writing through you to the clerk, and have the witnesses provide a response in writing? That way, in case they're not able to come back.... I think that, as MPs, we should have the opportunity to hear what these witnesses have to say.

I apologize to the witnesses for the technical difficulties, but we do need to maintain the rights of members of Parliament here.

I would love to have the witnesses back, Mr. Chair—that's just my opinion—but I would love to be able to ask the questions that I wanted to of the witnesses, but that I was not able do.

● (1635)

The Chair: Exactly. We'll make sure that that's available either in person or in writing, and even in both official languages, for that matter, so that everybody can see the full context of the conversation.

We will suspend now for a moment just to switch out the witnesses, and we'll leave it up to the clerk to line this up at the earliest possible convenience.

Thank you. We'll switch now to the second panel.

Thank you to our witnesses. I do apologize for the mix-up.

● (1635)

_____(Pause)_____

● (1640)

The Chair: We're back.

I would like to make a few comments for the benefit of the new witnesses.

Before speaking, please wait until I recognize you by name. When you're ready to speak, you can click on the microphone icon to activate your microphone. I will remind you that all comments should be addressed through the chair.

Interpretation, as we've been practising in this video conference, will work very much like in a regular committee meeting. You have the choice at the bottom of your screen of either the floor, English or French. When speaking, please speak slowly and clearly. When you are not speaking, your microphone should be on “mute”.

I would now like to welcome our witnesses.

Here as an individual, we have Andrew Roman, retired lawyer. As well, we have Eric Zscheile, barrister and negotiator for the Kwilmu'kw Maw-klusuaqn negotiation office.

We will now go to opening remarks from Mr. Roman for five minutes or less, please.

Mr. Andrew Roman (Retired Lawyer, As an Individual): Thank you. Can you hear me fine, Mr. Chair?

The Chair: Yes.

Mr. Andrew Roman: All right.

Thank you, Mr. McDonald, and committee members, and your hard-working staff, for inviting me.

As a non-partisan witness with no economic interests at stake, I feel free to explain the law as I see it, while recognizing that others may see it differently.

My relevant experience is in analyzing laws and judicial decisions, and I've also drafted federal and provincial legislation. However, I don't claim any special expertise in aboriginal treaty law or in fisheries law.

While I was preparing for today, I watched some of your earlier meetings. Meeting number eight was of particular interest—[*Technical Difficulties*]

● (1645)

Mr. Blaine Calkins: Mr. Chair, I cannot hear the witness.

The Chair: Yes, sorry, Mr. Roman, you're cutting out.

Mr. Andrew Roman: The parts of the presentation I saw—

Yes?

The Chair: We're not hearing everything you're saying. Your connection is in and out. It was good there the last time you spoke, so if it continues to cut in and out, I'll let you know, and we'll have to see if we can rectify it maybe by going to the other witnesses first.

Mr. Andrew Roman: All right.

I was saying that the minister's speech did not mention any limits on the case that was imposed by the Supreme Court of Canada. No one expected the minister to provide a long legal analysis, but the case law is complex and often misunderstood.

Litigation is better than violence, but it never provides long-term solutions. That's why I was happy to hear your minister say that the nation-to-nation negotiations are taking place. To negotiate fairly, however, the minister must understand the law as it is and not as someone might like it to be.

Floating around in the media for several years has been what I call the “Marshall myth”, that the indigenous fishers have the right to catch whatever they want, whenever they want, provided it is only for a modest livelihood. That's not what the Supreme Court of Canada held as I read its decision.

There were two sets of reasons released three months apart. In the second set of reasons, the court backtracked and narrowed the first set of reasons. It explained that it acquitted Mr. Marshall for fishing for eels, but the court refused to recognize a treaty right covering any species other than eels, because each aquatic species raised different evolving legal issues under different conservation requirements, both for present and future fisheries regulations.

The Supreme Court has never recognized two classes of lobster fishers, indigenous and non-indigenous, with different rights. Lobsters are not eels. The Marshall decision was about eels and on its face as worded cannot apply to lobsters or to any other species.

Our Constitution's section 35 protects existing rights, but it doesn't create new ones. Because there is no treaty right to fish for lobsters, out of compliance with the generally applicable regulations, there can be no constitutional right to earn an illegal income from lobsters whether that is modest or not.

Then in 2005 came the court's decision in the Stephen Marshall case, which was decided about five years after the Sparrow case. The Stephen Marshall case narrowed the resource rights even more closely to what was the actual practice way back in 1760 at which time lobster fishing didn't even exist.

So where are we today? Today, 21 years after the Donald Marshall decision, Canada has no judicial answer and no support for non-compliant lobster fishing.

If this committee wants to recommend authorizing the Mi'kmaq to fish for lobsters out of season or some other way, my advice is to recommend a new law that does that. But be honest, and don't hide behind the Marshall myth to pretend that the law is what it is not. That would be fake law that is inconsistent with a policy of transparency and accountability.

That's why those are my remarks, Mr. Chair.

● (1650)

The Chair: Thank you, Mr. Roman.

We'll now go to Mr. Zscheile, for five minutes or less, please.

Mr. Eric Zscheile (Barrister and Negotiator, Kwilmu'kw Maw-klusuaqn Negotiation Office): Thank you, Mr. Chair. I would like to thank the Standing Committee on Fisheries and Oceans for inviting me today to address the issues of Mi'kmaq treaty rights implementation.

I was privileged to be involved as co-counsel in assisting Mr. Bruce Wildsmith on the original Donald Marshall Jr. case.

For my opening remarks I would like to touch on three points: first, the reliance that people have been placing upon the two companion cases, Marshall and Marshall II; second, a definition of what I would prefer to call “parameters” around the concept of moderate livelihood; and third, the rights reconciliation approach and community fishing plans.

First I'll touch on the companion cases of Marshall and Marshall II.

In reviewing the record of past witnesses before this committee, I have seen far too much emphasis placed on Marshall II as somehow being a negation of the first Marshall decision or as being a legal authority for the proposition that the DFO can unilaterally impose existing regulatory authorities already found in the Fisheries Act and regulations.

Marshall II must be read within the context of both cases and the facts that gave rise to the acquittal of Donald Marshall Jr. The Marshall II decision was, in fact, a rejection by the Supreme Court of an application by the West Nova Fishermen's Coalition to rehear Marshall.

In fact, Marshall II confirms that Crown obligations toward the implementation of the moderate livelihood right must be guided by the honour of the Crown, and Crown actions will require justification as that test has been developed by the Supreme Court through such cases as Badger.

Marshall II does add the concept of "compelling and substantial public objectives" to the usual justification requirement of conservation, but goes on to state that this does not include "disruption or inconvenience" to non-Mi'kmaq fishermen.

The same arguments being made to this committee by fisheries associations were, therefore, rejected by the Supreme Court in 1999 and are even further from the mark after two decades of subsequent case law respecting Crown obligations in their dealings with first nations respecting rights implementation.

Second let me touch on parameters around moderate livelihood.

When reading Marshall and Marshall II, it is clear that the Supreme Court did not have a specific monetary amount in mind as a definition of “moderate livelihood”. They were placing the concept on a spectrum. At one end of the spectrum was FSC, or food fishing; at the other end was full-scale commercial fishing.

The court clearly felt that the parties, through negotiations, were best placed to find where on that spectrum the answer lay. Marshall II is clear that any answer or definition for what a “moderate livelihood” fishery is must be justified per acceptable legal obligations and must be in terms that can be administered by the regulator, DFO, and understood by the Mi'kmaq community.

Therefore, the socio-economic concept of moderate livelihood, which drifts us into concepts such as living wage and median income, is not the expertise of DFO. What is the purview of DFO is developing, with the Mi'kmaq, rules around the fishery, such as trap numbers, that fall on the proper point in the spectrum.

Third come the rights reconciliation approach and community fishing plans.

In 2016, the Assembly of Nova Scotia Mi'kmaq Chiefs proposed a rights reconciliation approach, or RRA, to Canada and Nova Scotia as an alternative to the comprehensive claims policy. This approach was predicated on the fact that the Mi'kmaq of Nova Scotia had existing, recognized and valid treaties with the Crown and were interested in developing a series of separate arrangements to implement those treaties based on subject matter. I am myself in the process and advanced stages of developing an RRA with Parks Canada and beginning RRA discussions on wildlife management with the Province of Nova Scotia to build on co-management initiatives that we have had success with.

A key component of the RRA approach is the development of interim or incremental arrangements that let both parties test-drive potential solutions. This has led to great successes with Parks Canada and the Province of Nova Scotia.

I am most familiar with the community fishing plans that have been developed by the Potlotek, Pictou Landing and Annapolis Valley first nations. These plans have been submitted to DFO in order to develop interim or incremental arrangements to support a livelihood fishery. These communities, through negotiation and consultation processes, have attempted to engage DFO with respect to the operations and substance of these plans. This is perfectly in line with the proposed RRA that we developed in 2016.

● (1655)

DFO, unique to all other federal or provincial authorities, has unfortunately co-opted the label of RRA and applied it to a process that is not consistent with the spirit or intent of the RRA concept. It is process that DFO has unilaterally developed based on their own regulatory models. It's a process that is founded on self-serving and purposely obstructive mandates. To date, I would not classify any engagements with DFO as true to the RRA.

Thank you. I invite any questions from the committee.

The Chair: Thank you, Mr. Zscheile.

I don't believe the other witness has signed on yet, so we'll go to our questioning.

First up is Mr. Williamson for six minutes or less, please.

Mr. John Williamson (New Brunswick Southwest, CPC): Thank you very much, Mr. Chairman.

Thank you to our two witnesses.

Mr. Zscheile, I remember 21 years ago, when the Supreme Court brought forward the Marshall decision and two months later, the subsequent Marshall II decision appeared. It did seem that Marshall II put parameters around the initial decision. Is it your contention that it didn't do that?

Marshall is quite broad, and the clarification, which is certainly how it was reported in the media, put parameters on it to signal that there had to be collaboration, co-operation and negotiation between the federal government and first nations. At the end of the day, on conservation grounds, the federal government would be supreme. I know that's a word that a lot of people don't like to use, but that seems to be a fair reading of the Marshall decision. It was certainly one that was reported in the popular press 21 years ago.

Mr. Eric Zscheile: I think my contention truly is that if you put everything into context—remember, Marshall II was, as you're saying, a companion decision to Marshall I—you have to remember that the facts of Marshall II are the facts of Marshall I. It involves the activities of Donald Marshall, Jr. and all of the facts surrounding what he was doing. When you read Marshall II and what it is saying, in a lot of ways it is simply expounding on what the Supreme Court very directly says are fundamental tenets of the way that all treaty and aboriginal rights litigation are looked at.

When we talk about whether the federal government ultimately has the authority to look out for things like conservation and public safety, it absolutely says that. What they're saying in Marshall II is that this was part and parcel of what Marshall I is all about as well. Marshall I cannot stand for the proposition that the federal government does not have ultimately the ability to regulate for things like conservation and public safety.

What Marshall II then also says, though, is that we're not minimizing the task of the federal government when it looks at regulations. It has to justify its regulations. Are its regulations truly directing themselves towards consultation and public safety? Are the regulations the minimum of infringement on rights to reach the federal government's goals in what it wants to do with its regulations? When it talks about the Badger case in Marshall II, all of those are still the existing and normal ways that we would look at federal government action when it comes to the way they would look at justification.

I'm just making the ultimate argument that this idea that a new case—a companion case—a few months later, based on the exact same facts as the first case, could somehow come up with a different conclusion than the first case did doesn't have merit.

● (1700)

Mr. John Williamson: Sure. I could appreciate that.

Would you agree that Marshall II talked about, perhaps, rights and responsibilities on the part of both the federal government and first nations?

Please be very brief, because I want to ask Mr. Roman a question.

Mr. Eric Zscheile: Yes. It reiterated the fact that it's up to governments and first nations to negotiate these things out.

Mr. John Williamson: Perfect. Thank you.

Mr. Roman, would you have any comment on that?

I call them the “Marshall decisions,” because I think they both have to be read, but do you have any comments on how those two court cases need to be read together to ensure that we arrive at the right outcome?

Mr. Andrew Roman: I see the two Donald Marshall sets of reasons as being one decision explained twice. There was only one decision, and the decision was that Donald Marshall was not to be convicted. However, in the first reasons for the decision, there was a strong dissent from Justice Beverley McLachlin, who was not known as a right-wing zealot but as a middle-of-the-road judge. What she dissented was quite strong, so to create a unanimous decision they came back three months later and watered down what they said the first time.

Then, along comes the second decision, six or seven years later, and I want to mention there that Justice Beverley McLachlin, who was writing for the majority in the Stephen Marshall case, held that there was no right to commercial logging under the same treaties as Donald Marshall, because commercial logging was not the basis of their traditional culture.

Well, commercial lobster fishing was also not the basis of traditional culture and identity in 1760, because it didn't exist at the time. They didn't have the vessels to do it at the time. Therefore, I think this does narrow the scope of the Marshall decision.

That said, I agree with Mr. Zscheile in much of what he said about what the test is for justification and the honour of the Crown, that the justification must be, as he described it, the question is not what the test is but how it works today, and if—

Mr. John Williamson: Right.

I'm just going to stop you, because—

The Chair: Thank you, Mr. Williamson.

Mr. John Williamson: I figure my time is up, but I see we have another witness here as well.

The Chair: Okay.

We'll go to Mr. Battiste, for six minutes or less, please.

Mr. John Williamson: Mr. Chair, as a quick point of order, I see that Mr. Belliveau, the other witness, is here.

The Chair: I believe the clerk has let me know that we're rescheduling him.

Mr. John Williamson: Okay. Pardon me.

The Chair: Thank you.

Mr. Battiste, please.

Mr. Jaime Battiste (Sydney—Victoria, Lib.): Mr. Zscheile, during the Marshall litigation, did the Crown raise the argument that the minister could regulate the Mi'kmaq treaties? Was there an argument brought forth in terms of regulating Mi'kmaq treaty rights?

Mr. Eric Zscheile: When you read the text of Marshall II, I think they're spelling out what happened with the potential justification arguments that were put forth in Marshall I. In essence, what happened in Marshall I was that the Crown was arguing that there was no treaty right to the activities that Donald Marshall Jr. was involved with, and therefore, they didn't feel that they needed to put forward justification arguments on whether or not he did have a treaty right, but there were conservation concerns, or whatever, at the time. At the time, the Crown chose not to provide justification arguments, and when you read Marshall II, you see that's one of the points that is brought up, that some people felt that it should have taken place.

Mr. Jaime Battiste: Okay. Basically, Marshall II ruled on something that was never provided as testimony.

In the historic Badger case, in which they talk about infringing a treaty right, within Treaty No. 8 there's a clause that states:

> the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty....

There is a clear regulation clause within Treaty No. 8. Is there any regulation clause in the Mi'kmaq treaties of 1752 or 1760-61 that say that the Crown can regulate Mi'kmaq fisheries?

● (1705)

Mr. Eric Zscheile: The difficulty of an assertion such as that would be just the language that was used in 1760-61. Is there any direct statement that says it can be regulated or should be regulated by the Crown, or what have you? No, there's not, but it was certainly accepted by all parties within the Donald Marshall Jr. litigation that, under section 35 in the constitutional constructs of Canada, as long as it follows the proper rules and does things according to the way they should be done, the federal government will always have the ability to regulate resources if that's what it needs to do.

Mr. Jaime Battiste: Yes.

There are certain ambiguities that I've heard from your testimony as well as...I'm sorry, the other witness we've called. Is there anything within indigenous case law that talks about how to solve ambiguities, if they're there?

Mr. Eric Zscheile: I think one of the keys to the Marshall case was that, clearly, what was taking place was that you had a document, the treaty of 1760, that was written by British authorities. It was written in a language that was common to British authorities. That's why, when you read Marshall I, you see significant use placed on the transcripts they had of discussions between Mi'kmaq leadership and British authorities in 1760 to talk about what the parties felt they were doing: What was their intention?

I think because the treaties come from a time period when language was not the same.... Plus, you're dealing with peoples who come from a totally different world view. So the way the court looks at things is that, as is normal for most aboriginal litigation, the classic tenet is that they will take the side of first nations in a broader understanding of what was intended when these things were entered into.

Mr. Jaime Battiste: Okay. Thank you for that.

We've heard assertions here from fisheries associations that there was $600 million provided to Mi'kmaq fishermen and Mi'kmaq communities for their moderate livelihood. Is that accurate?

Mr. Eric Zscheile: I wouldn't know the exact amounts when it comes to the Marshall response. I do know that the vast majority of the dollars were for purchases of licences and purchases of equipment. Those dollars didn't go directly to first nations communities. Those dollars would have been used to purchase licences and equipment that would have been from the non-native fishery at the time.

Mr. Jaime Battiste: Okay.

I have a last question for both of you, Mr. Roman—I'm sorry I forgot your name earlier—and Mr. Zscheile. Can you think of another case in the history of Canada where there was a need for a clarification by the Supreme Court of Canada?

Mr. Andrew Roman: I can think of hundreds of them. There are so many Supreme Court of Canada decisions—

Mr. Jaime Battiste: Two months later?

Mr. Andrew Roman: Well, not two months later, but eventually.

Mr. Jaime Battiste: Can you name one?

Mr. Andrew Roman: The only reason that came up was that someone raised it. When the Stephen Marshall case came up, the same treaty was interpreted, and the court felt an obligation to comment.

Mr. Jaime Battiste: Mr. Roman, I'm asking about—

Mr. Andrew Roman: Those things happen. There are lots of ambiguous decisions.

Mr. Jaime Battiste: Mr. Roman, I'm asking if there has ever been a Supreme Court of Canada case that needed to be clarified in the same year, with the same fact situation, in the history of Canada. If you can, can you name it?

Mr. Andrew Roman: I don't think it needed to be clarified. I think someone just tried to prevent it from happening, and the Supreme Court had to comment on that—

Mr. Jaime Battiste: Mr. Zscheile, can you name one? I'm just wondering.

Mr. Eric Zscheile: I should say that I was also co-counsel on the Stephen Marshall logging case as well. I think with the Marshall cases, the unique thing that I see in the way the Supreme Court handled the Marshall case is that ordinarily a new case will be brought to the court with a specific set of facts that are different from the initial case's set of facts. The court will look at the legal tenets they've applied according to those facts. I don't know that I've ever seen...and I think what is being suggested, the idea that the Supreme Court would come down with a decision and then a few months later narrow or change the tenor of that decision, not based on factual scenarios that are being brought forward, or new facts that are being brought forward, but simply bringing it based on the application of a fisheries association looking for a retrial.

You have to remember that the ratio of Marshall II is that they're denying the retrial. It's a unique.... Why the Supreme Court felt they needed to rediscuss two months later what they had discussed is still a bit of a mystery to me.

● (1710)

The Chair: Thank you, Mr. Zscheile and Mr. Battiste.

We'll now go to Mr. Blanchette-Joncas for six minutes or less, please.

[*Translation*]

Mr. Maxime Blanchette-Joncas: Thank you, Mr. Chair.

I find the witness group we have right now very interesting, because we seem to have two different perspectives on the issue.

My questions will be addressed to both Mr. Roman and Mr. Zscheile, who will be able to answer them one after the other. I will start with Mr. Roman.

Mr. Roman, does the case law on indigenous fishing rights suggest, or could potentially suggest, that the exercise of fishing rights by indigenous communities takes precedence over the exercise of fishing rights by non-indigenous communities? Are these two activities legally on an equal footing?

[*English*]

Mr. Andrew Roman: That's a difficult question to answer when you talk about an equal footing, because they aren't on equal footing, never have been, and never will be. That's because one group has treaty rights, and the other group doesn't.

My position isn't all that different from Mr. Zscheile's on most of the issues we have been discussing. The position of indigenous fishers, loggers, or whatever else, is always complicated, because it's a mix of statute and case law.

I don't really have a mandate to say who should fish how much, and I'm not a fisheries officer. If you're going to make new law, do it cleanly, which means pass a law, and don't misunderstand or misstate what the Supreme Court of Canada did and did not decide in the Donald Marshall case and the Stephen Marshall case.

[*Translation*]

Mr. Maxime Blanchette-Joncas: Mr. Zscheile, can you give us your opinion on this matter, please?

[*English*]

Mr. Eric Zscheile: We have to recognize as well there are various aspects of the fisheries wherein first nations have rights. As I said in my opening comments, there's a direct difference between food, social and ceremonial rights versus moderate livelihood rights.

When we brought the case to the Supreme Court, none of us argued the idea of a moderate livelihood. At the time, both sides argued there were two types of fishing: there's food fishing, and there's commercial fishing. It was the Supreme Court that developed this third form of fisheries called a moderate livelihood.

It did that, because in a food fishery, first nations have certain priorities when it comes to access to the fisheries. That comes from the Sparrow case and others. The Supreme Court was concerned about the fact that if we started talking about rights in the commercial sphere, there were inherent limitations or inherent "parameters", as I call them, that would be around. That's why it came up with the concept of a moderate livelihood.

What's clear, however, is that the Mi'Kmaq, in this instance, are the only ones that have a section 35 right to a moderate livelihood. That doesn't exist for fishers.

[*Translation*]

Mr. Maxime Blanchette-Joncas: Thank you, Mr. Zscheile.

Should the achievement of this standard of living, or adequate livelihood, normally be measured by subsistence fishing income, or should it be measured by the total income of individuals?

[*English*]

Mr. Andrew Roman: There's a problem with this whole modest income thing. It has never been defined, so it's like a Rorschach test: you read into it what you want to get out of it.

As I said in my opening remarks, if there's no right to do something, you can't earn a modest income doing it. The key part of the Stephen Marshall decision was paragraph 26, where Chief Justice McLachlin said that the treaties grant the right to practice a traditional 1760 trading activity.

The question of fact becomes, what was that? If that's what it was about, what does that translate to, if anything, today?

They were not trading lobsters with the British then, which suggests that if they want to sell lobsters now, you should pass a law authorizing that instead of relying on the Marshall case, which certainly wasn't clear on that point. It could be interpreted, when you look at the Stephen and Donald Marshall cases together, as narrowing the treaty right to something that has to do with what existed in 1760.

It's not a satisfactory situation to say what existed in 1760 was wonderful, but I think what you should do is to pass a law to say we don't want that law anymore, but we this law. If you do that, you then have the honesty of being transparent and accountable as a government, or as a committee, making that recommendation.

● (1715)

[*Translation*]

Mr. Maxime Blanchette-Joncas: Mr. Zscheile, can you give us your opinion on this matter?

[*English*]

Mr. Eric Zscheile: As I said, I think you have to look at the moderate livelihood more as a spectrum of the way in which resources are allocated. If we start getting into an idea of moderate livelihood as a monetary unit or moderate livelihood as family income, and we start having to look at what does everybody have to bring into it and everything else, it starts expanding it way beyond DFO's purview, and where do we go?

That's why I think the important part is using community dialogue and working with communities to develop moderate livelihood fishing plans. I think the first key thing is making sure that the number of lobster that are coming out are within the conservation mandates on both parties' sides and, really, let the communities decide what is the best way for community people to start accessing lobster as they go.

If a community decides within its own plan that they are going to provide the access that they have to livelihood lobster to people within their community who may be unemployed or don't have access to other types of income, then that's something that the community can decide going forward, but if you try to make an omnibus rule that comes from DFO, I just don't know how that's developed, and I don't know how it's implemented.

The Chair: Thank you, Mr. Blanchette-Joncas.

We will now go on to Mr. Johns for six minutes or less, please.

Mr. Gord Johns (Courtenay—Alberni, NDP): Thank you, Mr. Chair.

Thank you to the witnesses for your testimony.

Mr. Zscheile, I really was interested in what you had to say about DFO—that they're self-serving and taking a unilateral approach to this—and you talked about rights and reconciliation.

We've had several witnesses come to this committee who have said that DFO doesn't actually have a mandate to determine what moderate livelihoods are or how treaty rights are practised. That mandate actually belongs with Crown-Indigenous Relations on a nation-to-nation basis. Is this something you agree with? Maybe you can expand a little bit on that.

Mr. Eric Zscheile: Well, to my mind, and certainly as being somebody who is at the main table negotiating with both CIRNAC and DFO, as well as the Province of Nova Scotia, it's always been our understanding that when it comes to fisheries negotiations, that is in the purview of DFO. Certainly, DFO has made it clear that CIRNAC is not there to discuss any of the ways in which fisheries discussions go forward.

When we developed the RRA concept, it was built around the idea that we would start with doable action items that could work going forward, and we could develop those in a way that preserves the health and vitality of the treaties and get both parties working together as co-managers in the attempt.

The dilemma, as you've been saying, is that DFO has come with a very limited mandate on what they can discuss and how they wish to discuss it, and their ability to go out of those mandates seems to be very difficult. My understanding is that they get their mandates from cabinet through the Minister of Fisheries and Oceans, and I don't know how much CIRNAC has to say in the whole affair.

Mr. Gord Johns: That's perfect, because I was just going to talk about my riding, and I'm sure you're very aware of the Nuu-chah-nulth right to catch and sell fish. They won their court case in the Supreme Court. The government fought them, appealed and appealed and spent over $19 million just on legal fees.

In one of the comments from Judge Garson, who was overseeing one of the court cases, she scolded the government for knowingly going to the table with an empty mandate. This is something that we're seeing frequently. I think you were alluding to how there might be an order in council on some of these issues and that they are at cabinet.

Do you believe that DFO actually has a mandate to resolve these outstanding issue and to honour these court cases?

● (1720)

Mr. Eric Zscheile: Do they have a mandate? I'll tell you what I've been told, and then we can decide whether or not they have the mandate.

When we developed the community fishing plans that I talked about—Potlotek, Pictou Landing and Annapolis Valley—we wanted to work with DFO to try to ensure that they were plans that both of us could live with. We put forward those plans to DFO for comment and asked them to sit down with us to discuss whether or not these were workable. When we didn't get any response, we went through the levels of consultation to say, okay, well let's consult as we normally would consult when it comes to these things, and we didn't get any response.

Based on the things that have been happening now, we once again.... I was at a meeting with some chiefs and DFO officials where the chiefs said, “All we're looking for is to just tell us what parts of our plan you disagree with, and tell us what parts of our plan that we can modify or work with so that you feel they are acceptable.” What we were told was, “We have no mandate to discuss anything within these plans with you, or any approach other than looking for a general type of licence that we can use to cover this over.”

It really frustrated the chiefs, in the sense that, really, what was the point of the conversation? They couldn't even get a “yes” or a “no” or “here are our problems” from the DFO officials.

Mr. Gord Johns: Speaking of the chiefs, there seems to be an underlying effort at this committee to condemn Chief Sack and other indigenous fishers for practising their rights. This committee isn't a courtroom. We're here to provide recommendations to the government on how to uphold rights beyond upholding the existing law.

What does DFO need to change to respect the Mi'kmaq rights to fish and for a moderate livelihood?

Mr. Eric Zscheile: Well, to my mind—and I think this is what the chiefs have put forward—they need to sit down as negotiating partners with the Mi'kmaq at the table, and they need to look at the proposals being put forward by the Mi'kmaq to consider whether these are workable proposals that can be put into place to start addressing moderate livelihood.

That's all the chiefs are asking for. The chiefs are fully willing to say that if there are parts of their plans that they need to modify or adjust or look at again, then they would be glad to do that. Just tell them what they need to do.

So I think what they're looking for is what any of us would look for in negotiations. We bring forward our values, our principles, our wants, things that we want to see, and we're just hoping that the other side of the table can listen to us and we can listen to their hopes and values and what they want to see and we can come up with something that works for both of us. But it's very difficult to negotiate with somebody who just sits on the other side of the table and says, “This is what I want and I really don't have a mandate to talk about anything you want, so I guess we'll just sit here and just speak to each other without any thought that we're going to get to a logical solution.”

Mr. Gord Johns: The Marshall decision said the Mi'kmaq had a right to a moderate livelihood, not a modest income. Can you explain what it said in the Marshall decision, and set the record straight, that what we're talking about are two different things?

Mr. Eric Zscheile: Yes, that's what I mean about concepts like median income or whatever. You know, the court wasn't saying that a person has the right to have a middle class income or whatever. What the court was trying to do was to find a way to put some parameters around where this fishery would fall. To put it in blunt terms, if a food fishery means you use 10 traps, and if a commercial fishery means you use 500 traps, well, somewhere between 10 traps and 500 traps is going to be where a moderate livelihood fishery falls, and there are a lot of questions that you need to figure out within that. What is the health of the resource? How many Mi'kmaq want to get involved? How many things are we talking about?

But that's what regulators do. That's what resource managers do. They sit down and they look at the total resource and how they are going to apportion it in a way that meets all of those needs. So when the Supreme Court said moderate livelihood, that's what they were trying to get at. They were trying to get at the sense that if somebody does that, they can't be doing it to accumulate wealth, and they identified what necessities are. They said there's housing, and food, and the necessities of life that all of us have, and if you're doing that, then that's good.

Sorry about that. Thanks.

● (1725)

The Chair: It's not a problem. I was just trying to get the answer in.

Mr. Johns, you've gone over time.

We'll now go to Mr. Calkins for five minutes or less.

Go ahead, please.

Mr. Blaine Calkins: Thank you, Chair.

This is a question for both of the witnesses who are here. As the committee has explored the concept of a moderate livelihood, we've had numerous witnesses give us their opinion on this. I'm just wondering what your opinion would be, and whether there is anything in the decisions that would give us any guidance as to whether or not a moderate livelihood would be an individual right or a communal right.

Mr. Andrew Roman: I don't see anything in the decision that gives you that level of clarity, Mr. Calkins.

I think the problem with moderate livelihood or income is that the Supreme Court of Canada didn't quite know what to do, so it kicked the can down the road and Mr. Zscheile is now left with a battered can and has to try to deal with that. That's not helpful, but, you know, when the Supreme Court of Canada or any other court has half a solution and the case is in front of them, they can't take forever to decide. They decide what they can and they kind of fudge the rest. That's what they did with this empty vessel called moderate livelihood, and now what you have to do is fill it with content.

Mr. Blaine Calkins: Mr. Zscheile.

Mr. Eric Zscheile: I think I lost the tenor of the question. Could you repeat it for me?

Mr. Blaine Calkins: My question was, is there any clarity anywhere, or any opinion anywhere that could help us discern whether or not a moderate livelihood would be an individual right or a community right for first nations?

Mr. Eric Zscheile: We put it in the same context as just about all of the aboriginal treaty or aboriginal rights litigation that the Supreme Court puts out. These are classified communal rights, meaning that they accrue to a community of first nations. In this case, the community would be the Mi'kmaq, but they're practised, of course, by individuals.

I'll equate it to the moose hunt, which I do a lot of work with. When an individual Mi'kmaq person goes and hunts moose, they're not an employee of a band, and they're not doing so based on that communal idea. They're hunting for themselves and their family. However, the community, being the Mi'kmaq, have the ability to instruct or pass their own rules or laws that say which way the hunt will take place.

With moose in Nova Scotia, the Mi'kmaq have decided that no one should be hunting moose between January 1 and August 15. That's not written in provincial regulations. It's not stipulated anywhere, but the community has said this is the way that we think we should do it. The harvesters, when they go out to hunt as individuals or as family members, follow the communal instructions on the way it should be.

I see fishing being handled the same way, which is communities develop rules, guidelines and understandings on the way it's going to happen and work with individuals who go out to do the actual harvesting, the way that they always would have done.

Mr. Blaine Calkins: Mr. Roman, in your testimony, you were very clear that a new law should be established to provide certainty and clarity. I'm looking at this from the perspective, and my own understanding, that access to the fishery for the purpose of a moderate livelihood is simply that, access to the fishery. Yet, we seem to be consumed with talking about access to management. When we hear things like co-management of the fishery, which is different than access to the fishery itself, the DFO is typically consultative with people who are involved in the fishery, but they don't give access to management of the fishery to commercial fisherman any more than they give access to management to anyone else.

Is there anything in the Marshall decisions that would give us any clarity as to whether the department or the Crown needs to give up access to management of the fishery in order to provide access to the fishery itself?

● (1730)

Mr. Andrew Roman: I don't read the decision that way. I think it's silent on that issue.

Mr. Blaine Calkins: Mr. Zscheile, do you have an opinion on that?

Mr. Eric Zscheile: I'd agree with Mr. Roman. I don't think there's anything within.... It was never a question being asked of the court in Marshall whether or not Donald Marshall Jr., either individually or as part of a collective, should have management rights. It was strictly towards access.

I would say, I think that there are section 35 rights on things like self-governance and so forth that do start getting into the idea of co-management or partnership rights, as we like to call them in Nova Scotia, but does that come from the Marshall decisions? No, I wouldn't say it does.

The Chair: Thank you, Mr. Calkins. You've gone well over, I'm afraid.

I'll leave the last couple of minutes of the committee to Mr. Cormier, please.

Mr. Serge Cormier (Acadie—Bathurst, Lib.): Oh, well thank you very much, Mr. Chair. I thought we were over our time limit, but thank you very much.

Mr. Zscheile, you were talking about first nations wanting different things. What is your idea on how to reach consensus among all Mi'kmaq first nations? It seems like they all want different things. If you talk to some of the first nations in my area, we have had great collaboration throughout the years. For the last couple of years now they have owned a couple of fish plants. It's going well. They seem okay with what is going on right now in the fishing industry. They're part of it. They own fish plants.

Again, with your idea of coming to an agreement and some kind of consensus, they all want different things. How do you see that happening?

Mr. Eric Zscheile: The way I always describe it is, in governance, what's happening in the Mi'kmaq community, certainly, is what I call the fundamentals of federalism. We are starting to really understand, from the communities' perspectives, what are certain areas of concern that may be of a global nature. Everybody wants to come up with single ways of looking at them, the areas where they want to have more of a local aspect, and look at it in that way.

As I said, I'm working with Parks Canada on an RRA discussion. We're looking at it as a whole, so all 13 communities and a governance whole. I think what you're hearing on fishing is the communities are saying, at least for the time being, that they feel more comfortable in talking about access to the fisheries for community members as being something of a local nature.

Mr. Serge Cormier: I just have a couple more minutes left.

Mr. Roman, you are a lawyer or a retired lawyer, and were talking about the first Marshall case's being a split decision of 5-2 or 7-2, and then the second Marshall case was all agreed by all judges. What do you think changed between the first and second decisions? What do you think happened there?

Mr. Andrew Roman: What usually happens in these cases is that if there's a split decision coming down and they want unanimity, everybody has to put a little bit of water in their wine and make a compromise.

There was a compromise when you look at the second set of reasons because the tone of it was somewhat different. To get Justice McLachlin on side, you had to give her something. I think what the second decision did was to repeat large parts of the first decision, but then it kind of watered it down a little bit, too. Then, at that time, Beverley McLachlin was just a judge. When the Stephen Marshall case came around, she was the chief justice and had much more influence and, I think, expressed her views much more strongly at that time.

The Chair: Thank you, Mr. Roman.

Thank you, Mr. Cormier.

Mr. Serge Cormier: Thank you very much.

The Chair: We're completely out of time. We've gone a minute or so overboard—maybe two minutes.

I will close by reassuring the committee members that the witnesses who appeared earlier in the first panel are going to be rescheduled, and Mr. Belliveau, as well, has agreed to be rescheduled, so we will get to hear the full testimony of those witnesses.

Mr. Blanchette-Joncas, we will make sure that everybody is aware of the need for interpretation and that it has to be available for the meeting to continue on any grounds whatsoever.

Just on a point, I want to say to all committee members.... First, I want to apologize for a mistake I made earlier by allowing Mr. Bragdon to bring forward a motion on a point of order. It is my understanding that a motion cannot be made on a point of order. We've allowed it now and done it, but I ask all members to please refrain from doing that in the future. I don't want to have to call you out for making a mistake, as I'm admitting to doing myself tonight. As somebody once said, it's never nice to eat crow.

● (1735)

Mr. Richard Bragdon: My apologies, Mr. Chair.

The Chair: Again, thank you to everybody.

Thank you to the staff.

Thank you, everybody, for your patience.

Mr. John Williamson: I have a point of order, Mr. Chair.

I'm sorry. I know you want to wrap up.

This is just for planning purposes. Do you expect that Wednesday's meeting will be with these witnesses? Is that your intention? I know that you need to do some planning, but is that what you are thinking?

The Chair: I leave that up to the clerk. If she hasn't already lined up the witnesses, yes, we'll try to line them up for Wednesday, but if we already have others lined up, the others have agreed to be rescheduled, so we can fit them in along the way.

Mr. John Williamson: Okay, I'll have my office reach out tomorrow.

Thank you.

The Chair: Okay.

Thank you, one and all. Have a good evening.

The meeting is adjourned.