

DRAFT

Netukulimk Livelihood Fisheries Collaborative Enforcement Protocol

May 11, 2021

In 1999, the Supreme Court of Canada found in *R v. Marshall*, [1999] 3 SCR 456, that the beneficiaries of the 1760-61 Treaties have a right to a Moderate Livelihood Fishery (the “Right”). While the Right is exercised individually, it is authorized communally.

Mi’kmaw communities are currently working toward the implementation of this recognized Right through the development of community-based Netukulimk Livelihood Fishery Plans.

While we may have differing opinions of what a Moderate Livelihood Fishery entails, the Mi’kmaw are seeking to implement a legitimate livelihood fishery that ensures the safety of our people and the conservation of resources.

In requesting that DFO C&P voluntarily enter into this protocol, we wish to emphasize the following:

- Section 2.3 of the *Fisheries Act* requires that the *Act* be construed as upholding Mi’kmaw section 35 rights, and not as taking away or detracting from them;
- Enforcement guidelines must be developed to account for constitutionally sensitive rights and ensure that exercises of enforcement discretion do not violate these rights;
- Litigation against DFO in relation to breach of the Treaty Right will be commenced soon, which includes a claim that enforcement of the *Fisheries Act* and Regulations against authorized Mi’kmaw harvesters is unconstitutional and therefore without a lawful basis; and
- The Courts have confirmed that the Crown may have a duty to consult with Indigenous Peoples prior to the exercise of enforcement discretion in relation to constitutionally protected rights.

GUIDING POLICY STATEMENTS

1.1 This protocol is built on the basis of respect for the constitutionally protected Mi’kmaw Right to self-government, including the enforcement of a treaty-protected fishery.

1.2 DFO C&P, the Kwilmu’kw Maw-klusuaqn Negotiation Office (KMKNO), and community leadership are dedicated to collaboration on enforcement, capacity development, and co-management of treaty fisheries in and around Nova Scotia.

1.3 DFO C&P, KMKNO, and community leadership share a common concern for the rule of Mi’kmaw and Canadian law, the safety of harvesters and the conservation of species.

1.4 Mutual respect is central to this protocol. Respect for Rights, culture, protocol, mandate, and the individual must be maintained throughout all communications between the parties.

1.5 Decision making and responsibility for resources shall be reflective of the traditional Mi'kmaw practice of consensus building. The autonomy of individuals and leadership shall be respected throughout the decision-making, enforcement, and community justice processes.

PURPOSE STATEMENT

2.1 This policy will:

- 2.1.1 Provide direction to DFO C&P for engagement purposes with harvesters exercising their constitutionally protected treaty rights;
- 2.1.2 Provide direction to DFO C&P, KMKNO, and community leadership for engagement purposes regarding potential enforcement actions, on-water concerns, and harvester safety;
- 2.1.3 Ensure DFO C&P, harvesters, KMKNO, and community leadership have safe and respectful interactions regarding harvesting activities;
- 2.1.4 Ensure harvesters can exercise their constitutionally protected Right in accordance with their community management plans, without fear of unilateral enforcement action impacting their day-to-day livelihoods;
- 2.1.5 Ensure DFO C&P have access to community management information, practices, and scientific data as appropriate;
- 2.1.6 Ensure ongoing and open communication between DFO C&P and community leadership regarding authorized harvesting activities and authorized harvesters; and
- 2.1.7 Provide enforcement mechanisms for use as appropriate.

COMMUNICATIONS POLICY

General Provisions

3.2 All communications between DFO C&P will be respectful, prompt, and will, except in the situation of an emergency involving the safety of a person, take place prior to any enforcement action such as gear or harvest seizures, trap or net pulling, or the detention or arrest of harvesters.

Communication of Authorized Harvesting Activities

- 3.3 KMKNO and community leadership will share the following information with local DFO C&P detachments prior to the authorization of Moderate Livelihood Fishery activity:
- Community MLF management plan
 - Harvesting dates
 - Example of Authorization document
 - Authorized fishing gear identification information

- Names of authorized harvesters and their vessels, including vessel registration numbers
- Contact information for community leadership and KMKNO

3.4 Local DFO C&P supervisors will ensure they and their enforcement officers have read and understood the community MLF management plans once submitted. DFO C&P officers should have an understanding of the parameters of the community harvesting regulations outlined within the community MLF management plan.

3.5 Within ten (10) business days of receiving the community MLF management plan and supporting documentation, the local C&P supervisor shall meet with KMKNO and community leadership to discuss the community MLF management plan and clarify any questions regarding the plan, authorization, or documentation. At this time, C&P should identify any concerns with the harvesters or vessels named or the gear tags or tagging systems.

3.6 Any amendments made to the community MLF management plan, list of authorized harvesters or vessels, trap allotments, tagging systems, or other key documents or information will be shared with local DFO C&P detachments.

Communications Prior to Enforcement Action

3.7 Local DFO C&P detachments will contact designated community leadership prior to taking enforcement action against any harvester claiming to be authorized by the community under their community MLF management plan.

3.8 Local DFO C&P will identify potential enforcement action being contemplated, and which provisions of the community MLF management plan they believe were contravened during the harvesting activity.

3.9 Once contacted, community leadership will confirm whether the harvester in question is authorized for that activity, in that location. Community leadership will determine if the activities undertaken by the harvester are within the regulations outlined in the community MLF management plan and communicate this determination to DFO C&P.

COLLABORATIVE ENFORCEMENT ACTION

General Provisions

4.1 Any enforcement action contemplated shall take into consideration the perceived threat to conservation and safety posed by the harvesting activity and should be graduated in nature. Enforcement action should be appropriate to address the concern raised, while ensuring as minimal an impact to the harvester's moderate livelihood as possible.

4.2 When considering enforcement action, DFO C&P and community justice procedures shall balance the perceived threat or concern with the Rights of the individual, the needs of the

individual and their family, and the impact enforcement action may have on the safety of harvesters and officers, the conservation of the species, and the livelihood of the family.

Enforcement Action Against Authorized Harvesters

4.3 If the harvester is authorized but is determined to have conducted activities in contravention to the community MLF management plan, DFO C&P should:

- Observe;
- Document key concerns;
- Report key information; and
- Provide that information to community leadership.
 - If the harvester is authorized, and is acting within the regulations of the community MLF management plan, C&P may document the fishing activity but will not conduct other enforcement action including seizures unless directed to do so by community leadership.

4.4 If an authorized harvester is determined to have conducted activities in contravention to the community MLF management plan, community leadership shall review documentation provided by DFO C&P and implement graduated community sanctions and engage in culturally appropriate legal processes that ensure that any action taken minimally impacts the livelihood of the harvester.

4.5 DFO C&P may be requested to participate in community processes as determined by the community's established protocol.

Enforcement Action Against Unauthorized Harvesters

4.6 If the harvester is not authorized to harvest under the community MLF management plan, DFO C&P may proceed with enforcement action at their discretion.

4.7 If a harvester is determined to repeatedly conduct harvesting activities outside of the regulations of the community plan, graduated enforcement action, which may ultimately include fisheries charges, may be recommended as collectively decided by community leadership and DFO C&P.