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Mr. Wentzell and Mr. d'Entremont,

As you are aware, the Supreme Court of Canada decided in *Marshall (R. v. Marshall)*, [1999] 3 SCR 456) that the Mi'kmaq have a constitutionally-protected Treaty Right to harvest and trade products of their hunting, fishing and other gathering activities to acquire “necessities” (para. 4). The Court also held that the licencing regime in the *Fisheries Act* and Regulations was an infringement, and that infringement by DFO could not be justified under the Badger test (*R v. Badger*, [1996] 1 SCR 771) if imposed through an unstructured discretionary administrative regime.

In *Marshall v. Canada*, [1999] 3 SCR 533, the SCC reconfirmed this legal point concerning licencing and seasons in paragraph 34 in saying: “specific criteria must be established for the exercise by the Minister of his or her discretion to grant or refuse licences in a manner that recognizes and accommodates the existence of an aboriginal or treaty right” (para. 33) and that “the Governor in Council has the power to amend the Aboriginal Communal Fishing Licences Regulations to accommodate the limited commercial fishery as described in the September 17, 1999 majority judgment in addition to the food fishery” (para. 34). Any such controls must be proposed by the Crown, be subject to true and meaningful consultation and accommodation with the Mi'kmaq and be justified (paras. 41-44).

Since *Marshall* was decided no substantive amendments have been made to the *Fisheries Act* or Regulations to accommodate the Treaty Right within the regulatory framework. Further, no agreement has been reached between Canada and the Mi'kmaq of Nova Scotia concerning conduct of the Treaty Right.

In 2019, the *Fisheries Act* was amended to require that it be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act*, 1982, and not as abrogating or derogating from them (section 2.3) and to direct that the Minister consider any adverse effects that a decision may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act*, 1982 when making a decision under that Act (section 2.4).

DFO continues to unilaterally impose a discretionary licencing and seasons regime on the Mi'kmaq Right. This is patently illegal. A result of that illegality is that the *Fisheries Act*, and the Regulations, including provisions related to enforcement, are constitutionally inapplicable to the Mi'kmaq, and of no force or effect, pursuant to section 35(1) and section 52(1) of the *Constitution Act*, 1982 to the extent they prohibit, or unduly restrict, the exercise of the Treaty Right.

We enclose a copy of executed court documents which are in the process of being filed with the Supreme Court of Nova Scotia seeking a declaration that the Act and Regulations are constitutionally inapplicable to the Right. We have every expectation that the Court will rule in our favor and uphold what the Supreme Court said in *Marshall*.

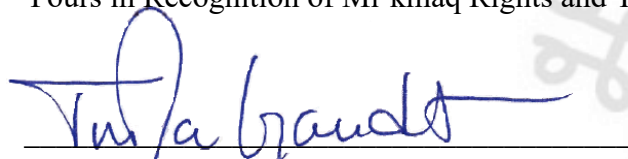
As the Act and Regulations are constitutionally inapplicable, enforcement actions taken by DFO Conservation and Protection Branch (C&P), or other departments of the federal government, are illegal.

DFO C&P has its own duty to consult and accommodate our proven Treaty Right. We invite C&P to do so through the attached draft Consultation protocol. We are ready to discuss this with you at your earliest convenience.

Your officers should be aware that any enforcement of the Act and Regulations against Mi'kmaq fishers who are acting under community-approved MLF Plans are illegal activities. Those enforcement actions can therefore be torts or crimes, including for assault, theft, interference with economic relations or conspiracy. You can expect that our harvesters will be documenting any interactions with your officers by taking photographs and videos, identifying your officers and their actions. We ask that your Department keep very careful records of what each staff member does to interfere with authorized MLF activities, as we are going to be looking for production of those records periodically so that we can determine what individual actions need to be taken to protect the personal and property rights of Mi'kmaw harvesters.

We look forward to hearing from you in response.

Yours in Recognition of Mi'kmaq Rights and Title,



Twila Gaudet, B.A., LL.B.
Director of Consultation
Kwilmu'kw Maw-klusuaqn Negotiation Office

c.c.:

Minister Bernadette Jordan, Minister of Fisheries, Oceans and Canadian Coast Guard,
Government of Canada.

Minister Carolyn Bennett, Minister of Crown-Indigenous Relations, Government of Canada.

Jacinta Berthier, Regional Director – Fisheries Management, Department of Fisheries and
Oceans Canada.