



## **Assembly of First Nations**

### **Submission to the Senate Standing Committee on Fisheries and Oceans**

**RE: Study the Implementation of Indigenous rights-based fisheries  
across Canada (22-02-10)**

SENT VIA EMAIL: [pof@sen.parl.gc.ca](mailto:pof@sen.parl.gc.ca)

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The Assembly of First Nations (“AFN”) is pleased to make this written submission on implementation of Indigenous Rights-based fisheries throughout the country. AFN acknowledges the scope of the study is to examine and report on the implementation of Indigenous rights-based fisheries across Canada, including the implementation of the rights of Mi’kmaq and Maliseet communities in Atlantic Canada to fish in pursuit of a moderate livelihood and that the Committee intends to identify the most appropriate and effective ways to ensure the recognition and implementation of Indigenous rights-based fisheries going forward.

## **Background**

The AFN is a national advocacy organization. The role of the AFN is to advocate on behalf of First Nations as directed by Chiefs-in-Assembly. This includes facilitation and coordination of national and regional discussions and dialogue, advocacy efforts and campaigns, legal and policy analysis, communicating with governments. The AFN also facilitates relationship building between First Nations and the Crown as well as public and private sectors and public.

The AFN’s ongoing work and advocacy in fisheries is mandated by the following Resolutions:

- 76/2017, *Establishment of a National Secretariat for the Negotiation and Implementation of Supreme Court Decisions regarding Fisheries;*
- 69/2019, *To Fully Implement the First Nations Priority Right to Food, Social, and Ceremonial Fisheries;*
- 96/2019, *Support for the Implementation of Ahousaht et al. (2009) Court Decision;*
- 115/2019, *Full Implementation of Supreme Court of Canada Marshall Decision;* and
- 8/2020, *Systemic Racism in all federal agencies including Fisheries and Oceans Canada's Response to Sipekne'katik First Nation's Inherent Rights-based Fishery.*

The recommendations outlined in this written submission reflect the mandates provided by Chiefs-in-Assembly and outlined in the above listed resolutions.

## **Context**

First Nations have occupied our territories for centuries and have a Right to continue to live on our lands as our forefathers have lived; this Right has never been lawfully extinguished.

First Nations have a unique and special relationship with the Crown and the people of Canada as set out in the Royal Proclamation of 1763 and manifested in Treaties, Peace and Friendship Treaties, military alliances, and modern self-government agreements.

This special relationship between First Nations and the Crown is grounded in First Nation Inherent and Aboriginal Rights and Title, Treaties and negotiated agreements with a view toward peaceful coexistence, mutual respect, recognition and the equitable sharing of lands and resources. Many Treaties, reflected in written documents, wampum and oral understanding, were entered into between First Nations and the British Crown (the Government of Canada after Confederation) between 1701 and 1923. Further, modern treaties and settlement agreements have been signed. Treaty

promises and agreements include non-interference, protection of hunting and fishing rights, sharing of lands and resources, health and education benefits, economic tools, and benefits for the duration of the Treaty relationship.

### **First Nations Fisheries**

For millennia and still today, First Nations have built economies based on harvesting, consuming, trading, using, and benefitting from the abundant fisheries in our territories. From the East Coast to the West Coast, fisheries are a source of traditional cultural values, sustenance, and economic income.

Since the Crown's assertion of legislative jurisdiction over "Sea Coast and Inland Fisheries" under Section 91(12) of the *British North American Act, 1867*, First Nations continue to experience dispossession and alienation from the fish, fish habitat and aquatic resources within our territories through the colonial administration of Crown laws and policies, particularly under the *Fisheries Act*. This is contrary to the principles of reconciliation and a direct violation of First Nations Rights and interests.

First Nations' efforts to secure proper redress for past and present dispossession and alienation are evident in the jurisprudence on fisheries-related Aboriginal and Treaty Rights (including *R v. Sparrow*;<sup>1</sup> *Guerin v. The Queen*;<sup>2</sup> *R v. Van der Peet*;<sup>3</sup> *R v. Gladstone*;<sup>4</sup> *R v. Adams*;<sup>5</sup> *R v. Marshall*;<sup>6</sup> *Lax Kw'alaams Indian Band v. Canada*<sup>7</sup>). These First Nations rights continue to be recognized and affirmed as existing Aboriginal and Treaty Rights under Section 35 of the Constitution Act, 1982.

### **Full Implementation of Right to Fish for Food, Social, Ceremonial Purposes**

A persistent challenge First Nations continue to face is securing the fulsome application of established jurisprudence regarding the application of the constitutionally protected priority for Section 35 food, social, ceremonial (FSC) and economic Rights, especially during times of declining abundance.

The Supreme Court of Canada (SCC) *Sparrow Decision* (1990)<sup>8</sup> recognizes the Right of First Nations to fish for FSC purposes, which takes priority over all other uses of the resource, second to conservation. However, the Department of Fisheries and Oceans (DFO) has assumed the authority to manage FSC fisheries and continue to charge First Nations community members if they fish outside of their insufficient and federally imposed FSC allocations, while subsequently allowing commercial and recreational fisheries to take place. Actions taken by DFO to restrict FSC fisheries are not consistent with the legal priority access right as determined by the SCC.

In line with AFN Resolution 69/2019, the AFN recommends that Canada and DFO fully implement First Nations priority Right to FSC fisheries, immediately cease placing

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<sup>1</sup> *R v. Sparrow*, [1990] 1 SCR 1075.

<sup>2</sup> *Guerin v. The Queen*, [1984] 2 SCR 335.

<sup>3</sup> *R v. Van der Peet*, [1996] 2 SCR 507.

<sup>4</sup> *R v. Gladstone*, [1996] 2 SCR 723.

<sup>5</sup> *R v. Adams*, [1996] 3 SCR 101.

<sup>6</sup> *R v. Marshall*, [1999] 3 SCR 456.

<sup>7</sup> *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, [2011] 3 SCR 535.

<sup>8</sup> *R v. Sparrow*, [1990] 1 SCR 1075.

unlawful restrictions on FSC fisheries, and cease charging community members for exercising their Right to fish for FSC purposes.

### **Full Implementation of Supreme Court of Canada Marshall Decision**

In the 1999 *R v. Marshall* case,<sup>9</sup> the SCC recognized the Mi'kmaq Treaties of 1760-61 (guaranteed Mi'kmaq, Wolastoqiyik and Passamaquoddy peoples the right to hunt, fish, farmland and earn a reasonable living without British interference) to pursue a moderate livelihood from fishing. It also recognized government authority to regulate that fishery, but the scope of it has never been defined.

In the 20 years since the SCC *Marshall Decision*, Canada has not accommodated this commercial right to trade by making necessary changes and arrangements to allow for an Inherent and Treaty-based livelihood fishery. Consequently, Canada has failed to uphold the Honour of the Crown by not implementing the SCC *Marshall Decision* ruling that recognizes the Inherent and Treaty Rights of First Nations to fish for a moderate livelihood that is recognized and affirmed in Section 35 of the Canadian Constitution.

Instead, the Government of Canada's response to the *Marshall Decision* has been to offer Rights Reconciliation Agreements on fisheries. Twenty-two years after the *Marshall Decision*, there are four finalized time-limited Rights Reconciliation Agreements on fisheries.<sup>10</sup> There remains skepticism among some First Nations about the successful implementation of Rights Reconciliation Agreements based on their experience of DFO's repeated failure to honour SCC decisions (*R v. Sparrow*, *R v. Marshall*, *Ahousaht Indian Band and Nation v. Canada (Attorney General)*).<sup>11</sup> Rather than sign a Rights Reconciliation Agreement, some First Nations have launched their own self-regulated moderate livelihood Treaty fisheries under their management plans.<sup>12</sup>

On April 20, 2021, Regional Chief Paul Prosper, Nova Scotia and Newfoundland, Assembly of First Nations appeared before this committee and noted that in the original *Marshall Decision*, Marshall was charged with fishing out of season and without a licence. Marshall was acquitted, and certain provisions of the *Fisheries Act* were deemed to be invalid. Legislated changes to the *Fisheries Act* had to accommodate a moderate livelihood fishery; this has not taken place. It has been over 20 years since the *Marshall Decision*, and the federal government has neither established regulations

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<sup>9</sup> *R v. Marshall*, [1999] 3 S.C.R. 456.

<sup>10</sup> August 15, 2019 – Elsipogtog and Esgenoôpetitj First Nations (New Brunswick); August 30, 2019 - Maliseet of Viger First Nation – Wolastoqiyik Wahsipekuk (Quebec); April 16, 2021 – Listuguj Mi'gmaq First Nation (Quebec).

<sup>11</sup> *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494.

<sup>12</sup> Sipekne'katik First Nation launched a self-regulated treaty protected lobster fishery in September 2020. Potlotek First Nation launched a self-regulated treaty protected fishery in September 2020. Pictou Landing First Nation launched a self-regulated treaty protected lobster fishery in November 2020. St. Mary's First Nation launched a self-regulated treaty protected lobster fishery in July 2021. The Kespukwitk District worked with community members to develop a Netukulimk Livelihood Fisheries Plan to provide an interim approach to collective administration of communal livelihood fisheries access and management for the Constitutionally protected Right to fish for a moderate livelihood. Acadia, Annapolis Valley, Bear River and Glooscap First Nations adopted a Kespukwitk District Netukulimk Livelihood Fisheries Plan for lobster fishing in November 2021; this has been approved by DFO. Abegwit First Nation and Lennox Island First Nation have said they are considering self-regulated treaty protected fisheries.

for a moderate livelihood fishery nor have they engaged the Mi'kmaq in formal consultations on developing regulations.

In line with Resolution 115/2019, the AFN recommends Canada immediately recognize and implement the SCC *Marshall Decision* that honours and upholds the spirit and intent of the original signatories of the Treaties by upholding the Honour of the Crown and the principles of reconciliation. Specifically, AFN recommends that the Prime Minister acknowledge and recognize that First Nations signatories to the 1760-61 Treaty are entitled to exercise their Constitutional Right recognized by the SCC. Further, the AFN urges Canada to direct all departments and Ministers to revise or develop all necessary laws, regulations, and steps to accommodate and implement the 19760-61 Inherent and Treaty Right to a moderate livelihood fishery that is affirmed and protected in Section 35 of the Constitution.

### **Support for the Implementation of *Ahousaht et al. v. Canada (2009) Court Decision***

In a 2009 court decision,<sup>13</sup> the Supreme Court of British Columbia recognised and affirmed the fishing rights of the Five Nuu-chah-nulth First Nations of Ahousaht, Ehattesaht, Hesquiaht, Tla-o-qui-aht and Mowachaht/Muchalaht (the Five Nations). This case recognized their Right to fish for any species in their traditional territories and to sell that fish into the commercial marketplace.

The Five Nations won another court victory in April 2021 when the British Columbia Court of Appeal reaffirmed the Five Nations' commercial Right to fish in their territorial waters. The BCCA reaffirmed the commercial fishing Rights of the Five Nations to ensure they can exercise their commercial fishing Rights to a non-exclusive, multi-species, limited commercial fishery aimed at wide community participation. Notwithstanding conservation concerns, First Nations must have high priority to access fisheries above recreational and commercial fishers. This decision provides further clarity for Canada and the Five Nations involved with respect to the Rights that will need to be accommodated in the regulatory regime.

The Five Nations have negotiated with the Government of Canada for the past 10 years to develop multi-species fisheries in line with their proven Rights and to increase opportunities for their membership to participate in the fishing economy. After years of negotiations, the Five Nations found the accommodations by the Government of Canada to be insufficient with no meaningful effort made to implement Rights-based multi-species fisheries. As such, Canada has not honourably implemented the *Ahousaht et al. v. Canada* decision in good faith.

In line with Resolution 96/2019, the AFN recommends that the Prime Minister direct the Ministers of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) and DFO, and their staff to:

- meet with representatives of the Five Nations so they can brief the Ministers directly on the steps remaining to conclude a reconciliation agreement.
- conclude a reconciliation agreement with the Five Nations so that the Five Nations can begin to implement their expanded community fisheries in the upcoming fishing season; and

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<sup>13</sup> *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494.

- direct the Minister of DFO to revise specific policies and regulations to foster rather than impede the community-based fisheries of the Five Nations.

Further, the Prime Minister must recognize that regardless of whether an agreement is reached, the Five Nations require and are entitled to meaningful and economically viable fishing opportunities.

### **Protecting First Nations Fishers**

There is systemic racism and structural violence that influence not just the legislative process but also responses to the exercise of First Nations' fishing Rights. By its nature, systemic racism is a system that has increased biases against a particular group. Structural violence represents the systematic ways in which some groups are hindered from equal access to opportunities, goods, and services that enable the fulfillment of basic human needs.<sup>14</sup>

In many ways, the Constitutional division of powers between the federal and provincial governments does not create space for Indigenous governments, Indigenous laws, and Indigenous ways of knowing and being. The *Fisheries Act* was recently amended to enable collaborative development and management. However, there is much work to be done in recognition of the equivalency of Indigenous laws, and consideration of Indigenous Knowledge in decision making.

Chiefs, Elders, and First Nations community members have experienced cultural violence through threats and harassment for exerting their Right to fish. Cultural violence represents the existence of prevailing or prominent social norms that make direct and structural violence seem “natural” or “right” or at least acceptable.<sup>15</sup>

On September 17, 2020, exactly 21 years after the SCC's *Marshall Decision*, Sipekne'katik First Nation launched its Treaty-protected Inherent Rights-based fishery. Non-Indigenous fishers violently retaliated over the following weeks against Mi'kmaq fishers and individuals, which included physical assault, arson, theft, and destruction of fishing gear, lobster catches, vehicles, and property.

Despite public statements by the Minister of DFO about affirming Sipekne'katik's Treaty-protected Inherent Rights to fish, RCMP and DFO's Conservation and Protection Officers stood idle while non-Indigenous fishers continued to seize, damage and tamper with lobster traps belonging to Sipekne'katik fishers, assaulting Sipekne'katik members and harassing fishers, perpetuating the systemic infringement of the Mi'kmaq peoples' Rights to access the lobster resource under their Treaty-protected Inherent Rights-based fishing plan.

Law enforcement was heavily criticized for inaction in the dispute. On October 23, 2020, AFN National Chief Perry Bellegarde called on the RCMP Commissioner Brenda Lucki to resign after she defended the RCMP's response to the ongoing violence.

The AFN supports the comments made by Chief Ross Perley of Tobique First Nation, provided to this Committee on April 20, 2021. When there was violence and racism towards Mi'kmaq, Minister Jordan made misleading comments on the right to fish for the necessities of life and this led to non-Natives feeling justified in exhibiting violence, threats, arson, death, and damage to property of the Mi'kmaq. The response by DFO

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<sup>14</sup> Johan Galtung, “Cultural Violence” in *Journal of Peace Research*, Vol. 27, 1990, pp. 291-305.

<sup>15</sup> Johan Galtung, “Cultural Violence” in *Journal of Peace Research*, Vol. 27, 1990, pp. 291-305.

Conservation and Protection, as well as the RCMP, was completely and wilfully inadequate, which emboldened these racist actions. Instead of protecting Mi'kmaq fishers who were simply exercising their Treaty-protected Rights to provide for their families, DFO Conservation and Protection seized their traps and gear and effectively eliminated their Right to fish.

DFO's approach to enforcement has criminalized the exercise of First Nations' Rights, leading to mistrust and violence. A new approach to enforcement is needed. The RCMP and DFO's Conservation and Protection Program must protect First Nations fishers who exercise their Rights, rather than allow violence and intimidation from non-Indigenous fishers.

The AFN supports comments made by Chief Darlene Bernard of Lennox Island First Nation to this Committee on April 20, 2021. It is imperative that the Government of Canada understands that it does not have the answers. It cannot meet the challenges presented by the *Marshall* and other Rights-related court decisions unilaterally. To avoid further unrest and litigation, the Government of Canada must accept that the process has to be truly cooperative. Canada must work as a good faith partner in a Nation-to-Nation basis.

The AFN also supports the comments of Chief Darcy Gray of Listuguj Mi'kmaq Government, provided to this Committee on April 20, 2021, that DFO must work with First Nations to develop community-centered approaches to enforcement and dispute resolution that acknowledge communities' values and help strengthen relationships.

In line with Resolution 8, 2020, AFN recommends that the Minister of DFO address systemic racism within the department by undertaking the following measures:

- i. conduct a national reform on DFO's Conservation and Protection sector to ensure that their operational policies duly recognize and respect First Nations' Treaty-protected Inherent Right to harvest and sell fish.
- ii. support and prioritize the development of joint protocols between First Nations and DFO, or provinces and territories as appropriate to identify procedures in advance for dealing with possible emergencies concerning public safety and security of the First Nation; and
- iii. develop appropriate responses to infractions under the *Fisheries Act*, including relevant provincial or territorial legislation or through the authority of the First Nation.

### **National Secretariat for the Negotiation and Implementation of Supreme Court of Canada decisions related to fisheries**

There is opportunity for Canada and DFO to invest in the implementation of court decisions that recognize the Inherent, Aboriginal and Treaty Rights of First Nations rather than a continued litigious relationship between First Nations and the Crown.

In December 2017 the Chiefs-in-Assembly at the AFN Special Chiefs Assembly passed a resolution by consensus calling for the AFN to support the establishment of a National Secretariat to promote the implementation of SCC decisions related to fisheries, and to support Rights holders in advancing due recognition and respect for their Aboriginal and Treaty Rights in Nation-to-Nation discussions with the Crown. A National Secretariat empowered by First Nations to share information and develop national expertise, develop tools and policy frameworks, and pursue the recognition of Inherent, Aboriginal

and Treaty jurisdictions, authorities, Rights, Title and responsibilities could be an important tool in furthering reconciliation and redress in the governance and management of fish, fish habitat and fisheries resources.

In line with Resolution 76/2017, AFN recommends that Canada and DFO support the development of a National Secretariat to assist its work in integrating strategies for the benefit of First Nations at negotiation tables on fisheries management, including increased economic access and a national strategy to assess, facilitate, and promote the development and enactment of federal legislation to implement Aboriginal Title, Rights and Treaty Rights confirmed by successful SCC decisions. Engagement with First Nations will be necessary to explore how a National Secretariat could support Nation-to-Nation collaborative governance and management of fish, fish habitat, and fisheries.

### **Summary of Recommendations**

1. Canada and DFO must fully implement First Nations priority right to FSC fisheries, immediately cease placing unlawful restrictions on FSC fisheries, and cease charging community members for exercising their Right to fish for FSC purposes.
2. Canada must immediately recognize and implement the SCC *Marshall Decision*, 1999 that honours and upholds the spirit and intent of the original signatories of the Treaties by upholding the Honour of the Crown and the principles of reconciliation. Specifically, the Prime Minister must:
  - a. acknowledge and recognize that First Nation signatories to the 1760-61 Treaty are entitled to exercise their Constitutional Right recognized by the SCC; and
  - b. direct all departments and Ministers to revise or develop all necessary laws, regulations, and steps to accommodate and implement the 19760-61 Inherent and Treaty Right to a moderate livelihood fishery that is affirmed and protected in Section 35 of the Constitution.
3. Canada must immediately recognize and implement the Ahousaht 2009 Decision. Specifically, the Prime Minister must recognize that the Five Nations require and are entitled to meaningful and economically viable fishing opportunities. The Prime Minister shall direct the Ministers of CIRNAC and DFO and their staff to:
  - a. meet with representatives of the Five Nations so they can brief the Ministers directly and from their perspective on the steps remaining to conclude a reconciliation agreement.
  - b. conclude a reconciliation agreement with the Five Nations so that the Five Nations can begin to implement their expanded community fisheries in the upcoming fishing season; and
  - c. direct the Minister of DFO to revise specific policies and regulations to foster rather than impede the community-based fisheries of the Five Nations.
4. The Minister of DFO must address systemic racism within the department by taking the following actions:



- a. Undertake a national reform on DFO's Conservation and Protection sector to ensure that their operational policies duly recognize and respect First Nations' Treaty-protected Inherent Right to harvest and sell fish.
  - b. Support and prioritize the development of joint protocols between First Nations and DFO, or provinces and territories as appropriate to identify:
    - i. procedures in advance for dealing with possible emergencies concerning public safety and security of the First Nation; and
    - ii. appropriate responses to infractions under the *Fisheries Act*, relevant provincial or territorial legislation or through the authority of the First Nation.
5. Canada and DFO support the development of:
- a. A National Secretariat to assist its work in integrating strategies for the benefit of First Nations at negotiation tables on fisheries management, including increased economic access; and
  - b. A national strategy to assess, facilitate, and promote the development and enactment of federal legislation to implement Aboriginal Title, Rights and Treaty Rights confirmed by SCC decisions.

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