Sante' Mawio'mi

Mi'kmaq Grand Council

7 Districts of Mi'kma'ki ~ Land of the Mi'kmaq

SANTE MAWIO'MI BRIEF TO THE COMMITTEE ON FISHERIES AND OCEANS ON THE IMPLEMENTATION OF *R v. MARSHALL*

The Government of Canada recognizes in its declaration of principles respecting Canada relationship with Indigenous peoples that Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government. This principle recognizes the inherent jurisdiction and legal orders of the Sante Mawio'mi of the Mi'kmaq [Mawio'mi] is the starting point of nation-to-nation discussions. The Mawio'mi also known as the Mi'kmaq Grand Council which is the holder of the constitutional rights of the Mi'kmaq, the allied people of Atlantic Canada. The nation-to-nation transformation of the Mi'kmaw fishery is required. The transformation needs to be a return of the constitutional supremacy and rights affirmed in imperial treaties, instructions, proclamations, and acts. It represents a willingness to work with constitutional rights that control our destiny, while not giving the final word to the historical arrangements of the successive colonial government that Mi'kmaw families have been forced to conform our lives. The Grand Council or Sante' Mawio'mi encompasses seven districts in Atlantic Canada, all of Mi'kma'ki. We want to see a unified plan that would serve all of our districts. The Mawio'mi seeks to develop a clear and reliable constitutional reconciliation (*iljoga'tukwkemkey*) in the Mi'kmaw fishery through a Mawio'mi-Canada Accord that involves all the seven districts and their First Nations with Canada and the Maritime Provinces. The national Mi'kmaw fishery is based on inherent powers and our existing treaty reconciliations to guide the transition toward a strong, self-determining Mi'kmaw nation based on the best of its knowledge systems, language, heritage, and law. The design for nation rebuilding of the Mi'kmaw fishery seeks to weave the past together with the future. This weaving includes implementing the existing constitutional rights of the Mi'kmaw families.

In Atlantic Canada, the Mawio'mi have retained their inherent power to regulate the Mi'kmaw fishing rights.

In Atlantic Canada, the Mawio'mi is the governing council of the sui generis alliance of some of the L'nu people, called the Mi'kmaw nation or tribes in the Mi'kmaw Treaties with the British sovereign from 1726 to 1779. The Mi'kmaw Treaties establish a transatlantic, international compact between the Mawio'mi and the British sovereign, which the Mawio'mi calls the *Elikewake Compact*. Since 1610, the Mawio'mi had a trading relationship with France. Since 1629, the Mawio'mi had a trading relationship with the British sovereign, Charles. They established the inherent powers of the Mawio'mi and the delegated foundation of expressed British jurisdiction over British subjects in Mi'kmaw territory and Canada as a successor nation. Under Nikminen law and the European Law of Nations, the trading relationships and subsequent Mi'kmaw Treaties are consensual and solemn promises and agreements. These international laws must be mutually read together as they generate sacred and inviolable laws in Mawio'mi and British legal systems.

In its perspective, the Mi'kmaw Treaties with the various districts or tribes share the inherent powers of the Mawio'mi and the British sovereign's common or shared delegated rights. The Mawio'mi approved the various Mi'kmaw Treaties retaining and maintaining these ancestral

powers within its national territory for the Mi'kmaq. The Mawio'mi regulated the Mi'kmaw fisheries by its inherent powers and laws in the Mi'kmaw Treaties. The historical content, the common intent, and wording of the Mi'kmaw Treaties can be interpreted to include Mawio'mi jurisdiction over all fishers in its national waters. The Mi'kmaw Treaties do not provide any shared historical context, clear and plain common intent or English wording that is sufficient to extinguish the inherent right of the Mawio'mi. The Mi'kmaw Treaties do not provide any clear or plain intent or wording to expressly delegate the regulation of Mawio'mi fisheries to the British sovereign and law. By Mi'kmaw law and comity, the Mawio'mi has allowed the British sovereign to regulate its subjects' fisheries.

Fishing has been and is the lifeblood of the Mawio'mi relationship with the European and British sovereigns. Centuries before the first Europeans arrived in Nova Scotia, the Mi'kmaw had regulated and maintained the seasonal fishery through its districts and clans' governance. The autonomous fishery has existed in many forms in the inland and ocean fishery. It was integral to their worldview as the nephew (*netawansum*) in the Mi'kmaw Creation Story teaches about the ancient, restless, eternal, and valuable Water lodge. The Mi'kmaw language connects the Mawio'mi to the Water lodge and is of the utmost importance to Mi'kmaw law and economy. It establishes an inalienable relationship with the waters and its gifts or resources. Since the Mi'kmaq families inhabited heavily forested territory, their livelihood came from the waters. Water (*samqwan*) is considered inalienable and part of one's physical self, by extension, because of water's contact with the earth below it. The fish (*mime'j*) in the water has always been the foundation of Mi'kmaw laws allocating and regulating the economy among the families.

Lobsters were an essential natural resource to the Mi'kmaw nation, tribes and families. They had fished lobsters (*jakej*) with spear (*nikoql*), hook or fishing weirs and traded them. The Denny clan has always been the caretakers of the lobster, which were viewed as relatives who were the progenitors of an extended family. The clan names (do'dems or totems) were integral to Mi'kmaw law; they were the foundation of the various roles and responsibilities of the allied families of the Mi'kmaw nation. They connect an extended family to a web of living relations in particular places during different seasons. The lobster do'dems appear in Mi'kmaw signatures on some Mi'kmaw Treaties. The American lobster (*Homarus americanus*) is unique to the northwest Atlantic Ocean. Settler journals noted that the lobster stock at contact with the Mawio'mi was vast;[1] the tide would wash the lobsters ashore after every storm.

Under Mi'kmaw law, the Mi'kmaq never needed a grant from the British sovereign to have a general or unrestricted right to fish in their territorial waters. For centuries, the Mi'kmaw had regulated these rights among the Mi'kmaq and the Europeans. The Mi'kmaq were accomplished ocean sailors and fishers sailing in the Bay of Fundy, the Atlantic Ocean o St. Pierre and Miquelon and Newfoundland, and the Gulf of St. Lawrence. Before 1760, the Binnie J. noted in *Marshall* at para. 23 that the Mi'kmaw had seized in the order of 100 European sailing vessels.

Mi'kmaw Treaties date back to 1726, when the British sovereign promised that his subjects shall not molest the Mi'kmaq in their fishing or any other lawful occasion. In 1726 at Annapolis Royal, the Mawio'mi *saqamaq*[2] ratified the 1725 Treaty at Boston, where His Most Excellent Majesty George recommended His Grace and Favour to the nations of the Wabanaki Confederacy and "Promising them Benefits". Part of these benefits was the "free Liberty and Privilege of Hunting, Fishing & Fowling as formerly". The free liberty and privilege of fishing were to be left undisturbed by the 1725 treaty of "firm and constant Friendship & Amity. In British prerogative law, the free liberty and privilege are considered a royal grant, in Mi'kmaw law, the free liberty was an inherent right.

Since the Treaty of 1726, the British sovereign affirmed the common purpose of each subsequent Mi'kmaw Treaty was the promise that settlers and their governments would not hinder or interfere with Mi'kmaw fishing rights established under Mi'kmaw law. The British sovereign renewed the Wabanaki Treaty of 1725 and the Mi'kmaw Treaty of 1726 in the Kjipuktuk Renewal Treaty, 1752 with the Mawio'mi saqamaq. The Mi'kmaq were affirmed the "free liberty of Hunting and Fishing as usual". The Mi'kmaw Treaties of 1760 extended the free liberties to the Mawio'mi saqamow and representatives. Still, they limited the sales of Mi'kmaw trade goods to the royal truck houses rather than to French or British traders. The Mi'kmaw Treaties of 1761 is silent as limiting Mi'kmaw trade to royal truck houses. Instead, the Mi'kmaw Treaties promised British law would protect the Mi'kmaw rights. The 1778 Treaties with the western districts or tribes of Mawio'mi renewed, ratified, and confirmed all the former Treaties' obligations. The 1778 Treaties promised:

> That the said Indians and their constituents shall remain in the Districts … Quite and Free from any Molestation of any of His Majesty's Troops or other good Subject in their Hunting and Fishing.

It is crucial that any plan must respect our inherent rights to fishing and trade as protected in the treaties. The big issue we see concerning the plan is to ensure that any plan does not put a price tag or limit on the Mi'kmaw fishing effort, as pricing in the fishing industry fluctuates. And the other concern is that we do not want to see a timeline around the development and implementation of the plan. Time frames have to withstand the test of time. Similar to the treaties we want our plan to be safe, inclusive and sustainable.

Mawio'mi inherent right to regulate Mi'kmaw fishing is a constitutional right protected by s. 35 and 52(1) of the Constitution Act, 1982.

After the 1760-1761 Mi'kmaw Treaties, the British sovereign's understanding was clearly and plainly expressed in the Royal Instructions to the Governor of Nova Scotia of December 9, 1761, which read with the Mi'kmaw Treaties remain the royal constitution of Nova Scotia. His Majesty's Royal Instructions publicly declared that the Crown 'was determined upon all occasions to support and protect the … Indians in their just rights and possessions and to keep inviolable the treaties and compacts which have been entered into with them....". The Treaties and Royal Instructions remain part of the prerogative constitution of Nova Scotia.

The Mi'kmaw Treaties have been affirmed as constitutional rights by the highest courts in Canada (*Simon*, *Marshall*). Constitutionalized aboriginal and treaty rights in s. 35 of the *Constitutional Act, 1982* belong collectively to the Mi'kmaw nation and tribes. Section 35 (1) of the *Constitution Act, 1982* declares:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés).

Under a purposive interpretation of the phrase "aboriginal people of Canada" in s. 35 the Court held that means the "modern-day successor" of Aboriginal nations that lived in and occupied territory that is now Canada. The Mawio'mi is both the ancestral and modern-day government under the Mi'kmaw Treaties. It has the inherent power to regulate the Mi'kmaw fishery and choose what means to implement the rights among its members according to their laws, customs and practices.

When the existing aboriginal and treaty rights of the Mi'kmaw were recognized and affirmed by enacting the s. 35, this gave rise to an obligation for the Mawio'mi, the Crown and the courts to "give effect to that national commitment" (*R. v. Marshall*, [1999] 3 S.C.R. 533 ("*Marshall No. 2*"), at para. 45). The Mi'kmaw Treaty rights protect the Mawio'mi inherent or aboriginal rights to fish that pre-existed before the treaties.

Mi'kmaw treaties and their inherent rights have been made part of the supreme law of patriated Canada under s. 52(1) of the *Constitution Act, 1982*. In 1990, the provincial court in Denny held that to the extent that the provision of the Fisheries Act and regulation applied to Mi'kmaq are inconsistent with their aboriginal and treaty rights in s. 35, s.52(1) renders them of no force or effect. The Mi'kmaq enjoys a limited immunity from prosecution of these act and regulations. However, under the constitutional rights, the Mawio'mi still have jurisdiction over the Mi'kmaw Fishery.

The spirit and intent of s. 25 of the *Canadian Charter of Rights and Freedoms* shields the inherent and treaty rights of the Mawio'mi from the rights and freedoms of other Canadians. Aboriginal and treaty rights. It provides that Charter rights "shall not be construed so as to abrogate or derogate from any Aboriginal, treaty, or other rights of freedoms that pertain to the Aboriginal peoples of Canada". It established that the constitutional rights of Mawio'mi are not affected by the guarantee of certain rights and freedoms in the Charter.

Mi'kmaw Treaties affirm the inherent right for the Mawio'mi to regulate Mi'kmaq fishing under Mi'kmaw law without British or Canadian interference

The Mi'kmaw Treaties with the British sovereign memorialized and affirmed the Mawio'mi pre-existing and inherent right to regulated Mi'kmaw fishing under Mi'kmaw law in their waters and trade in these fish with the British settlers. The British sovereign acknowledged these ancestorial prerogatives of the inherent sovereignty of Mawio'mi and its tribes in the sovereign Treaties. King George II and III affirmed the exclusive regulatory jurisdiction of the Mawio'mi over activities over its treaty-reserved territory and waters. The Supreme Court has affirmed these Treaties as constitutional rights. It affirmed what the text, structure, historical context, and the principles of interpreting the Treaties reveal: the constitutional rights of the Mawio'mi to regulate Mi'kmaw fishing under Mi'kmaw law without British interference.

The British sovereign and the colonists promised in the English to Indians Treaty of 1726 that the nation "shall not be molested in their Person's, Hunting, Fishing, and Shooting & Planting on their planting Grounds nor in any other their Lawful Occasions." This clause promised that the independence of their ancestral territory and economy of the Mawio'mi and tribes would not be interfered with by the Crown or colonists. This clause ensured the vitality of ancestral laws. Each following Treaties promised the colonists and their governments would not interfere with the ancestral laws. In *McCoy*, the court interpreted the 1726 Treaty and held that it did not surrender inherent or aboriginal rights of the Wolastoqey or Mi'kmaq in New Brunswick. The court found no intention expressed by Mawio'mi saqamaq to extinguish their inherent powers and laws. To the extent that the Treaty purports to limit aboriginal rights, the Court held the honour of the Crown was not upheld during treaty negotiations.

The honour of the Crown looks back to this historical impact, and it also looks forward to treaty reconciliation between the Crown and Aboriginal peoples in an ongoing, "mutually respectful long-term relationship".[3]

The Treaties of 1752 at Halifax renewed the obligations of the 1726 Treaty, affirming the *non-interference with Mi'kmaw fishing rights.* The 1778 Treaties with the western districts or

tribes of Mawio'mi renewed, ratified, and confirmed all the former Treaties' obligations. The 1778 Treaties promised:

> That the said Indians and their constituents shall remain in the Districts … Quite and Free from any Molestation of any of His Majesty's Troops or other good Subject in their Hunting and Fishing.

The Court in *Simon*, at para. 26, has since held these treaty obligations constitute a positive source of protection against infringements on these Treaty rights.[4] It declared in *Simon*, at para. 26, that "the fact that these rights existed before the Treaty as part of the general aboriginal title did not negate or minimize the significance of the rights protected by the Treaty."[5] It held in *Simon*, at para. 48, the fact that the Treaty did not create a new right but merely recognized pre-existing rights does not affect its status as imperial law. Moreover, it held at para. 48, the terms of any Treaty can be a confirmation, exception, or reservation are a grant. The Court in Simon, at para. 29, has interpreted the inclusion of the phrase "as usual" to ensure that the 1752 Treaty will be an effective source of protection for these pre-existing rights. Moreover, it interpreted the phrase "as usual" to reflect a concern that the Treaty rights be interpreted flexibly in a way sensitive to the evolution of changes in customary practices,[6] which includes activities reasonably incidental to the usual activities such as travel, *ibid*. at para. 31. The Court held, at para. 60, that provincial legislation could not restrict a Treaty right.[7]

The Mi'kmaw treaty obligation is unique—in that, no other treaty in Canada provides expressly for non-infringement of Mi'kmaw law regulating fishing. Under s. 52(1) of the Constitution Act, 1982, statutory law has to be consistent with the constitutionalized aboriginal and treaty rights of the Mawio'mi. Thus, these constitutionalized treaty obligations require Parliament and courts to consider Mi'kmaw law regulation of fishing from the perspective of the Mawio'mi. In *Marshall and Bernard*, at para. 48 and para. 127, the Court held the treaty rights do not have to be translated into common law rights.

These Treaty rights establish a residual jurisdictional rule: in the absence of any particular provision in a treaty, the Mi'kmaw nation retains jurisdiction over the subject matter. This interpretative rule prevents the British sovereign from claiming jurisdiction over a subject matter without justification. In the absence of treaty direction to the British sovereign, the judiciary must assume that the Mi'kmaw nation retains the subject matter.

In the Mi'kmaw Treaties, the British sovereign assured Mawio'mi that British law (now provincial and federal laws) would not molest, hinder, or interfere with their hunting, fishing, trade, or any other occasion under Mi'kmaw law of *Netukulimk*. This concept affirms the obligation of Mi'kmaq to fulfill the responsibilities to sustain our environment in a mutually enhancing livelihood. These words affirmed that the Mi'kmaw law would continue to regulate fishing, as the Mi'kmaw law had for generations. This clause protected the Mi'kmaw law, language and meaning of their way of life. The lack of learning of the Mi'kmaw language has limited comprehension of Mi'kmaw law. The British sovereign did not force the Mi'kmaq to adopt British law, language or way of life. This core of the Mi'kmaw Treaties guarantees the Mawio'mi independence against interference from the choice-limiting actions of others or negative liberty.

The non-interference of the British sovereign or settlers with Mi'kmaw law is based on the Mawio'mi inherent right to regulate Mi'kmaw fishery and trade distinct from other treaty rights.

The Mi'kmaw should lead the development and implementation of a plan, to avoid micromanagement by all other levels of government. The Mi'kmaq, been denied our way of life

for over 500 years, and now our oppressors want to continue to regulate and control the way we should exercise our right to fish. It is the Grand Council's position that we do it our way, develop our plans, implement them as self-determining sovereignty. Because of years of divide and conquer, another challenge we have is the jurisdictional divide of province, whereas Mi'kma'qki where the Grand Council presides includes all seven districts of families of the Mi'kmaw Nation. The jurisdictional issue of the government creates a larger issue because they are not structured like the Grand Council. We were the Mi'kmaq Grand Council before the arrival of Europeans; we still have the same territory. Another issue I want to address is that during the COVID pandemic, the Federal Government was attempting to sign agreements with individual "bands" which we feel is an underhanded attempt to continue the divide and conquer approach. A lot of communities and families were suffering; the leadership were focuses were elsewhere and the government was trying to fragment our constitutional right to fish and focus on regulating or buying into the moderate livelihood issue by offering money when the communities were struggling. It is going to be challenging to come to a unified position as, right now, the Government of Canada is not unified or attempting to reconcile with our constitutional right to fish. The provincial laws regulating the fisheries are not unified or consistent with our constitutional rights or the rule of law. The Mi'kmaw Chiefs are not unified across all the districts. The Chiefs and their administration on reserves do not have jurisdictions over the off-reserve natural resources. They have jurisdiction over the reserves, but not Mi'kmaq on the rivers and ocean. The Mi'kmaw jurisdiction over the treaty fishery is vested in Grand Council, but Canada and the provinces keep denying and avoiding these jurisdictional issues. Our goal is for our Nation to be strong and unified.

The Mi'kmaw Treaties do not provide British or Canadian court's jurisdiction to resolve disputes where Mi'kmaw has been perceived as the wrongdoers.

No explicit language in s. 52 or s. 35 or in constitutional conventions authorizes any court to assess the legitimacy of these constitutional rights of the Mi'kmaw nation or any government legislation that has the effect of restricting constitutional rights. However, the terms of the Mi'kmaw Treaties expressly provided that any misunderstanding would be resolved by His Majesty's law, where the Mi'kmaq would be treated equal to His Majesty's subjects. Under the authority of the Treaty of 1752, the Grand Chief Sylliboy of the Mawio'mi unsuccessfully changed provincial law (R. *v Sylliboy* [1929] 1 D.L.R. 307) overturned in 1985 by the Court when a Mi'kmaw hunter successfully challenged provincial law in conjunction with the treaty rights protected by the s. 88 federal *Indian Act*. (*Simon v. R*., [1986] 1 C.N.L.R. 153 [*Simon*]). Mi'kmaw fishers successfully challenged federal law and provincial regulation of the fishery that infringed on their aboriginal rights to fish (*R. v. Denny* (1990), 55 C.C.C. (3d) 322 [*Denny*]) and trading rights in Treaty of 1760 (*R. v. Marshall* [1999] 3 S.C.R. 456 [*Marshall*]). Mi'kmaw harvesters of timber successfully challenged provincial law and regulations for their own uses (*R. v Marshall; R. v. Bernard* 2005; *R. v. Sappier-R. v. Grey* 2006). The Supreme Court affirmed that the Mi'kmaw treaties of the 18th century are still valid and had not been extinguished by the King through clear and plain intent or wording.

In the process of protecting the treaty rights, the court is limited to the issues raised before it. Each Mi'kmaw Treaty must be considered and interpretive by courts, politicians, and administrators in its unique historical and cultural context. The Mi'kmaw treaty's interpretation involves determining the words' facial meaning and noting any silences and ambiguities. If one or more possible interpretation arises from the wording, the court considers the treaty's historical and cultural backdrop. The Mi'kmaw Treaties affirm the Mi'kmaq's free liberty to fish under Mawio'mi law. They are silent about the British sovereign's jurisdiction over the Mi'kmaw or British fisheries. The words of the 1760 Treaties do not delegate any regulatory jurisdiction to the British sovereign over the Mi'kmaw fishery. To comprehend the inherent and treaty right of the Mawio'mi to regulate the Mi'kmaw fishery, one must consider the prior Mi'kmaw Treaties and the affirmation of their inherent free liberties to fish.

Any statute or regulation that constitutes a prima facie infringement of an aboriginal or treaty right must be justified. Any infringement must have a valid legislative or regulatory objective, compelling and substantial, for a court to override the constitutional protection of these rights. The justified infringement of regulations was not at issue in the *Marshall* decision. The existence of a treaty right to fish and trade was the only issue before the Court.

The constitutional rights of the Mawio'mi and its tribe precede the introduction of the criminal law in its territory and have modified the criminal law procedures and rules. Canadian criminal courts have proven they are broken and unfair processes when dealing with Aboriginal peoples and their constitutional rights. In *Bridging the Cultural Divide*, the Royal Commission on Aboriginal Peoples devoted a special report to the subject of Aboriginal people and criminal justice in Canada. It recommended that federal, provincial, and territorial governments recognize the right of Aboriginal nations to establish and administer their own systems of justice pursuant to their inherent right of self-government, including the power to make laws, within the Aboriginal nation's territory. This recommendation is consistent with the wording of the Mi'kmaw Treaties (at 224).

These inherent and treaty rights of the Mawio'mi and its tribes are separate from the Crown's jurisdiction over non-Mi'kmaw fishing in the constitution, either federal, provincially, or by *Indian Act* bands. This separation requires the judicial reading of all the constitutional powers together and ensuring that federal and provincial laws are consistent with the inherent and treaty rights of the Mawio'mi. Any inconsistency in the criminal law with the Mi'kmaw Treaties may judicially be held null and void.

In *Simon* and *Marshall*, the Court has affirmed the Mi'kmaw Treaties as part of the supreme law of Canada. And the Mi'kmaw Treaties should be given the constitutional force of law and respect. These decisions created the Crown prosecutors' duty to consult with the Mawio'mi about any alleged harms by individual Mi'kmaw. The *Simon* and *Marshall* decisions generate actual or constructive knowledge of those charges that potentially impact the treaty rights. Once the Crown is put on notice, however, it must determine whether a duty to consult arises and, if so, what the scope of the duty is as part of a "process of fair dealing and reconciliation".

In the situation of the Mi'kmaw Treaties, under the honour of the Crown, the Crown has the duty of consultation, negotiation, and reconciliation with the Mawio'mi. The trans-jurisdictional clauses of the Treaties of the Indians to English in the Elikewake Compact acknowledged the separate jurisdictions between His Majesty's settlements and treaty-reserved territory of the Mawio'mi and its tribes or districts. His Majesty promised to police this trans-jurisdictional boundary between the English and Indians.

In the Mi'kmaw Treaties, Mawio'mi saqamaq maintained ancestral jurisdiction over the activities of their members. They promised not to molest any colonists in the existing or lawfully made settlements or in commerce and if there happens any Robbery or outrage Committed by any of our Indians, the Tribe or Tribes they belong to shall cause satisfaction to be made to the Parties Injured. The saqamaq's obligation of the remedies of "satisfaction," which is more a part of the concept of treaty restitution or therapeutic justice than criminal law jurisdiction. They choose to remedy Mi'kmaw wrongs by consultation and negotiations rather than adjudication.

His Majesty's representative promised in the Mi'kmaw Treaties reciprocal "satisfaction and reparations" under royal law for the behaviour of the British colonists that injured Indians of the nations where the Mawio'mi or saqamaq "shall have the Benefit equal with His Majesty's other Subjects.

Justice Binnie noted in *Marshall* that in the treaty conference of 1761, about the Treaties, Lieutenant Governor (and Chief Justice) Belcher promised the Mi'kmaq, "The [British] Laws will be like a great Hedge about your Rights and properties, if any break this Hedge to hurt and injure you, the heavy weight of the Laws will fall upon them and punish their Disobedience." Belcher's promise affirmed the non-interference of British law and the protection of the British law to the Mi'kmaw rights and property from other interests of British subjects. This recorded oral promise is a treaty limitation on British sovereign and subjects.

Canadian Fisheries and Oceans have not respected the Mawio'mi fishery.

For the last century and a half, Canadian law, policy, institutions, and attitude toward Mi'kmaq remain centred around the federal *Indian Act*, a powerful status quo to overcome. Until that relationship is transformed to a nation-to-nation relationship, progress will be limited, no matter the competence or conviction of any ministers or the fragmented Mi'kmaw First Nations. One of the significant challenges to transformation is that although strengthening the nation-to-nation relationship is the goal, practically speaking the administration of Indigenous affairs and the Fisheries and Oceans in Canada is not organized around Treaty nations. For the most part, it is organized around an imposed system of band administration of the federal *Indian Act*, which intentionally was directed at destroying traditional federations of the allied families that negotiated the treaties. Existing Mi'kmaw First Nations are creatures of federal *Indian Act*, isolated from the constitutional rights of Mawio'mi and their Aboriginal and treaty rights. Most of the national and provincial Indigenous organizations and treaty organizations in Canada are likewise structured around the *Indian Act*. The Canadian transformation to a nation-to-nation relation in fisheries in the Mawio'mi context must go beyond reorganizing specific Mi'kmaw First Nations and their provincial Indigenous organization that constrain the constitutional rights of the Mawio'mi. While the Mawio'mi deeply respects the Mi'kmaw First Nations and have attempted to work with them to implement the inherent and treaty rights, we comprehend that a national Mi'kmaw fisher is required under our understanding of the existing aboriginal and treaty rights.

Canada and the Atlantic provinces have systemically avoided implementing our constitutional rights to the fishery. They have made politics and vested interests supreme over constitutional rights. Parliament has attempted to resolved some of the confusion surrounding the *Fisheries Act* and Mawio'mi constitutional rights in the modernized *Fisheries Act* (2019). Parliament made it clear that it will uphold the constitutional rights of the Mi'kmaw peoples. The Fisheries Act requires reconciliation among constitutional rights. Section 2.3 provides that the *Fishery Act* "is to 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." This affirms that licences under the Fishery Act cannot abrogate or derogate from the Mi'kmaw Treaties. Moreover, as suggested in *Marshall* decision, s. 2.4 provides that "[w]hen making a decision under this Act, the Minister shall consider any adverse effects that the decision may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act*, 1982." Furthermore, s. 2.5 (f) provided that the Minister may cooperate with any Indigenous governing body when making decisions. This mandate should be directed at the Mawio'mi that hold constitutional rights of the Mi'kmaw nation.

These amendments to the Fisheries Act require a constitutional reconciliation through a Mawio'mi-Canada Accord to establish a national framework. The federal and provincial governments have relied on the division of constitutional powers to avoid implementing the *Marshall* decision. They have not acknowledged the constitutional division of power between aboriginal and treaty rights. Mi'kmaw Treaties with the British sovereign created a foundational division of power. This treaty division of power is like the subsequent constitutional division of power between federal and provincial power in the *Constitution Act, 1982*. The constitutional honour of the Crown polices the division of power regarding constitutionalized treaty rights.

The federal or provincial government cannot demonstrate that the *Fishery* regulations are consistent with Mawio'mi inherent right to regulate the constitutional rights of Mi'kmaq. Both governments have not recognized that the treaty rights are part of the Atlantic provinces' constitution and limit their constitutional powers to enact valid laws. Neither Canada nor the Atlantic provinces have passed legislation to regulate these Mi'kmaw treaty rights as distinct from federal fishery laws.

These constitutional rights of the Mi'kmaw nation limit the authority of the Parliament in multiple ways. The Court has not found that the Minister's discretionary regime is reasonable; it found the legislative regime denies the Mi'kmaw holders of the constitutional rights their preferred means of exercising that right. The Court has not found the legislative regime, including a special priority of the fishery allocation, based on consultation with the Mawio'mi. It did not find that the regime has contained any evidence that there has been as "little impairment as possible" of their constitutional right to achieve a substantial and compelling objective. The Court did not find that Canada has provided compensation or amelioration for limiting the Mi'kmaw Treaty right by its past discrimination of their Treaty rights.

Considering the specific non-interference provision in the Mi'kmaw Treaties, Canada may not be able to identify a valid legislative objective. To identify a valid legislative objective, Canada must establish an evidentiary foundation in the Mi'kmaw Treaties for such objectives. Any valid legislative objective must be consistent with the constitutional doctrine of the honour of the Crown and its special trust relationship of protecting the Treaty's rights. The courts will require the Crown to stand by its Treaty promises. The honour of the Crown requires that its negotiators act in good faith, and there can be no sharp dealing.

Neither Canada or the Atlantic provinces regulations have never actually attempted to implement any of the aboriginal and treaty rights of the Mawio'mi or its tribes. The current commercial licensing regime treats Mi'kmaq like all other individual stakeholders, who do not have constitutional rights. It does not accommodate the constitutional and collective rights of the Mawio'mi in managing the fisheries. Canada's refusal to consult with the Mawio'mi and establish a consensual reconciliation for a national regulation for the Mi'kmaw fishers will argue against any valid legislative objective.

While the Canadian Parliament is required to work out a fair and balanced reconciliation with the inherent and treaty right of the Mawio'mi to the fisheries, its focus for the past twenty-

two years has been on the questioning the Supreme Court of Canada [Court]'s judicial reasoning and decision in *R. v. Marshall*. In those twenty-two years, the Fisheries and Oceans have studied the Marshall decision but have not implemented its right. It focuses ignores the spirit and intent of the Mawio'mi in exercising its inherent and treaty rights whose nature is "sacred", *Royal Instruction* 1761, *R. v. Sioui*, [1990] 1 S.C.R. 1025 [*Sioui*], *Simon*, *R. v. Taylor* (1981), 34 O.R. (2d) 360, and affirmed as constitutional rights by the Court in *Simon* and *Marshall*. Instead of reading the Mi'kmaw treaties together to implement a national scheme for the Mawio'mi, the Fisheries and Oceans have only focused on the specific case-by-case judicial interpretation of aboriginal rights, *R. v. Sparrow*, [1990] 1 S.C.R. 1075, and the Mi'kmaw rights to fish in the Treaty of 1760. This approach has created the appearance of the sustained and prohibited sharp dealing of the Fisheries and Oceans with an affirmed constitutional right to fish under the Treaties.

These judicial cases involve a question of an individual treaty right. The Court in *Sioui*, at 1066-67, has held that an Indigenous person seeking to rely on a treaty right to defeat a charge of violating Canadian law must first establish a treaty right that protects, expressly or by inference the activities in question. However, the treaty rights are collective rights recognized and affirmed in British imperial constitutional law and the constitution of Canada. In *Marshall*, a Mi'kmaw Indian asserted a right to catch and sell fish under the Treaties of 1760 that exempted him from compliance with the offences set out in the federal fishery regulation and maritime provinces' fishery regulations— the selling of eels without a licence, fishing without a licence and fishing during the closed season with illegal nets. While the trial court and Court of Appeal convicted the Mi'kmaw fisher, the Court held the lower courts erred, and the Mi'kmaw fisher was entitled to an acquittal based on the treaty right that exempted him from federal and maritime province regulations.

In the *Marshall* decision, the Mi'kmaq fisher was successful in the Court in protecting their inherent and treaty rights against inappropriate criminal and regulatory interference by the Crown. No provisions exist in these regulations that give direction to the Minister to explain how she or he should exercise this discretionary authority to issue or authorize licence for fisheries or fishing in a manner that would respect the Mawio'mi treaty rights. The Court in *Marshall* affirmed Lamer C.J.'s test to licensing schemes in *Adams*. Lamer stated at para. 54:

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the Sparrow test.

The Court suggested that the Mi'kmaq treaty rights were not accommodated in the regulations because, presumably, the Crown's position was, and continues to be, that no such treaty rights existed. The Court concluded that the purported regulatory prohibitions against fishing without a licence, selling eels without a licence, and fishing during the close season with improper nets were *prima facie* infringements of the constitutional right of a Mi'kmaq to fish for trading purposes under the Treaties of 1760. It held these regulatory prohibitions were inoperative against the Mi'kmaq and entitled him to an acquittal of the charges unless, in subsequent cases,

could justify the regulatory prohibition under the *Sparrow* and *Badger* test. Neither the federal nor maritime provinces have modified their regulations to respect the Mawio'mi treaty right to regulate the fisheries or individual Mi'kmaw rights held under Mawio'mi law.

The Court affirmed the core treaty right was based on the inherent or aboriginal power of the Mawio'mi. Both sources of the right are established as constitutional rights. However, in the *Marshall* case, the appeal to the Court did not require it to give an opinion on the issue of justifying the federal or maritime fishery regulations that interfered with the Mawio'mi right to regulate the treaty right of Mi'kmaq to fish. Based on the wording of the treaties and an extensive review of the historical evidence, the trial judge concluded that the only trade right conferred by the 1760 Treaties was a "right to bring" goods to truck houses that terminated with the demise of the exclusive trading and royal truck house regime. This evidence led to the trial judge's conclusion that under the federal and maritime regulatory prohibition of the fisheries, the Crown did not breach its constitutional obligation to the Mawio'mi or the Mi'kmaw fisher and, therefore, neither required any accommodation or justification by the Crown. The Court determined that the 1760 Treaties contained the core right of the Mi'kmaq to bring fish to be traded and did not terminate with the demise of the royal truck house regime. Moreover, the Court did not address the issue of the validity of the Crown's criminal and regulatory proceedings against the Mi'kmaw fisher in the absence of any delegated authority arising from the Mi'kmaw Treaties to the British sovereign over fisheries (*Marshall No 2* at para. 13). This inherent jurisdiction in the Mi'kmaw Treaties resides in the Mawio'mi since the Mi'kmaw Treaties do not provide any jurisdiction for British or Canadian courts to resolve disputes where Mi'kmaw has been perceived as the wrongdoers.

Based on the spirit and intent of the Mi'kmaw Treaties, Mi'kmaw rights to fish are best reviewed and balanced by the duty of consultation and negotiations with the Mawio'mi or through a royal commission of inquiry or constitutional reconciliation by Parliament and the Mawio'mi rather than by the courts. The constitutional reconciliation should generate a Mawio'mi-Canada Accord on Mi'kmaw Fishery.

Wela'lioq,

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