



To: Standing Senate Committee on Fisheries and Oceans

From: MAWIW, on behalf of Elsipogtog and Esgeno6petitj First Nations

Subject: Written Brief regarding True Shared Decision-Making and the Limits of the RRAMandate

Date: April 20, 2022

Introduction

This written brief is submitted on behalf of Elsipogtog and Esgeno6petitj First Nations, communities of the Mi'kmaq Nation, regarding the need for true shared decision-making over our First Nations' fisheries with Canada.

On April 5, 2022, Tara Levi, the Executive Director of MAWIW, and legal counsel Dr. Bruce McIvor, made submissions on behalf of our First Nations. Mawiw Council Inc. is an Indigenous organization in New Brunswick, which works to advance the well-being of Elsipogtog, Neqotkuk, and Esgeno6petitj First Nations. We thank the Standing Senate Committee on Fisheries and Oceans for the opportunity to make submissions on this important issue before the Standing Senate Committee on Fisheries and Oceans.

Elsipogtog and Esgeno6petitj First Nations represent the largest Indigenous fishing fleet in Atlantic Canada and represent over 400 fishers with 110 vessels. The First Nations are also signatories to a 2019 Rights and Reconciliation Agreement (RRA) with Fisheries and Oceans Canada (DFO). To date, only three such RRAs have been signed.

We understand RRAs were intended to recognize our First Nations' treaty right to a commercial fishery and advance our rights to self-determination and economic self-sufficiency. However, to date, DFO has confined our First Nations' decision-making authority over our commercial

fisheries to a consultation based advisory framework with DFO representatives. This framework fails to provide for true-shared decision making between our First Nations and Canada and fails to respect our inherent and constitutionally protected right to the self-governance of our fisheries.

As you heard during our oral submissions on April 5, 2022, when DFO unilaterally regulates our Nations' fisheries, DFO not only fails to respect our inherent and constitutionally protected right to self-governance; it also puts our peoples' lives in jeopardy. To address these concerns, we wish to enter into exploratory discussions with Canada regarding a new mandate for shared decision-making arrangements over our fisheries in accordance with our Indigenous laws and governance structures. We believe s. 4.1 of the *Fisheries Act* provides a legislative mechanism to give effect to such arrangements. This matter, along with adequate capacity funding to meaningfully implement our fisheries governance rights, is of utmost importance to our communities.

Our 2019 RRA Agreement

In 2019, our First Nations entered into an RRA with Canada, known as the Interim Fisheries Agreement. Under this Agreement, Canada committed to co-develop an approach to the collaborative management of our fisheries (referred to as an Interim Collaborative Management Arrangement). Our Nations were hopeful that, consistent with Canada's commitments to the implementation of UNDRIP, and Canada's Principles Respecting the Government of Canada's Relationship with Indigenous Peoples, this commitment would result in a meaningful government-to-government relationship over the conduct of our fisheries.

However, at the negotiation table for the Interim Collaborative Management Arrangement our First Nations have been limited to a consultation-based framework under which our Nations may only co-develop 'recommendations' to provide to the Minister when they make decisions impacting our fisheries. If we do not agree to this arrangement, we cannot secure much needed

funding for the continued development of our fisheries governance programs. This is not a true shared decision-making arrangement which respects our inherent jurisdiction and decision-making authority. In accordance with Canada's own Principles, all relations with Indigenous peoples must be based on the recognition and implementation of the inherent right to self-determination, including the right of self-government.

While we are considering entering into an Interim Collaborative Management Arrangement with the DFO to secure much needed funding for our fisheries programs, we can only agree to this consultation-based framework as a preliminary measure. We cannot further delay our active participation in the governance of our fisheries.

True Shared Decision-Making and Existing Legislative Mechanisms

Our First Nations need a true shared decision-making framework that recognizes our right to regulate our fisheries in accordance with our Indigenous laws and governance structures. There is already a legislative tool in place that can be used to achieve this. What is missing is the political will to do so.

Under Section 4.1 of the *Fisheries Act*, R.S.C., 1985, c. F-14, Canada can enter into agreements with Indigenous Nations to identify the Nations' and Canada's respective powers and roles over Indigenous and non-Indigenous fisheries matters, and set out procedures for joint action:

4.1 (1) The Minister may enter into an agreement with any government of a province, any Indigenous governing body and any body - including a co-management body - established under a land claims agreement, to further the purpose of this Act, including an agreement with respect to one or more of the following:

(a) facilitating cooperation between the parties to the agreement, including facilitating joint action in areas of common interest, reducing overlap between their respective programs and otherwise harmonizing those programs;

(2) An agreement may establish

(a) the roles, powers and functions of the parties;

(b) programs and projects;

(c) principles and objectives of the parties' respective programs and projects;

(d) standards, guidelines and codes of practice to be followed by the parties in the administration of their respective programs and projects;

(e) processes for policy development, operational planning and communication between the parties, including the exchange of scientific and other information;

(f) the administrative structures that will be used to carry out the agreement's objectives;

(g) the power of the parties to create committees and public panels and to conduct public consultations; and

(h) the circumstances and manner in which the government of the province or the Indigenous governing body is to provide information on the administration and enforcement of a provision of the laws of the province or the Indigenous governing body that the agreement provides is equivalent in effect to a provision of the regulations.

Therefore, section 4.1 agreements may be used to set out our First Nations' and Canada's respective "roles, powers and functions" regarding Mi'kmaq and non-Indigenous fisheries matters, and identify overlapping matters for collaboration. Respectively, these roles and powers

are grounded in our First Nations' inherent and constitutionally protected governance rights, and Canada's constitutional powers. Our First Nations' governance rights and decision-making authorities are also recognized and protected by UNDRIP. We remind Canada that Bill C-15 affirms UNDRIP's application in Canadian law and recognizes UNDRIP as a source for the interpretation of the Fisheries Act provisions.

UNDRIP recognizes our right to: provide free, prior and informed consent before Canada takes legislative or administrative actions that affect our First Nations, including the conduct of our fisheries (Article 19); and participate in decision-making which would affect our rights (Article 18).

While section 4.1 sets out Parliament's intent for Canada to negotiate shared-decision making arrangements with Indigenous Nations over fisheries, to date, the DFO has informed us that the negotiation of a s. 4.1 *Fisheries Act* agreement, is outside the scope of its current RRA mandate.

DFO requires a new RRA mandate that respects our governance rights, and Canada's statutory obligations to implement UNDRIP under Canadian law, as contained in Bill C-15. We request Canada (through DFO and CIRNAC) enter into exploratory talks with our First Nations to inform a new mandate regarding shared decision-making arrangements over our fisheries, as guided by s. 4.1 of the *Fisheries Act*.

The Need for True Shared Decision-Making

As you heard during our submissions on April 5, 2022, the need for true shared decision-making is personal. Days before DFO decided to open the snow crab season last year, our First Nations implored DFO to delay the opening. We knew there was still ice on the water making it a hazard

for fishers. We have included photos at Appendix A showing this ice on our wharfs. These photos were attached to the delay request our First Nations sent to DFO.

On the first day of the snow crab season, the Tyhawk fishing vessel departed to fish snow crab and capsized. Two lives were senselessly lost, including Elsipogtog community leader and captain Craig (Jumbo) Sock. These deaths occurred just over a year ago today and are still heavily felt throughout our community and by the families of the two deceased.

This was a senseless and preventable loss of life and a stark demonstration of the costs at stake when our First Nations are limited to making 'recommendations' only over the conduct of our fisheries on our waters. If our First Nations were respected and approached as decision makers over our fisheries, the snow crab fishery would not have been opened in such conditions.

It is of the utmost importance to our community, to our fishers, and their families, that Canada (through DFO and CIRNAC) begin exploratory discussions with our First Nations towards developing true shared decision-making over our fisheries, and make use of the tool Parliament has given DFO to do so under s. 4.1 of the *Fisheries Act*.

These discussions must be supported by adequate funding for the development of our governance programs, including the training of our Guardians and fishers. It is our Guardians who went out on the water to bring the Tyhawk and its crew home. When this training and our equipment is underfunded, it puts our peoples' lives at risk.

We know our territories and we know our waters. Shared decision making recognizes that together we can do better, and together we can make better decisions. We are hopeful we can begin this work to address the long history of conflict and rights denial that has tainted

Indigenous commercial fisheries in the Maritimes, and establish a new government-to-government relationship grounded in rights recognition.

Sincerely,



Tara Levi

Mawiw Executive Director
Mawiw Tribal Council Inc