

April 24, 2023

The Honourable Joyce Murray, P.C., M.P.
Minister of Fisheries and Oceans
Minister's Office
200 Kent Street
Station 15N100
Ottawa, ON K1A 0A6

Dear Minister Murray:

Re: Senate Report "Peace on the Water" ("Report"); Minister's Response ("Response")

We have provided letters to the Senate Committee based on their Report and also a letter to the Minister based upon the Response, the latter of which is dated April 13, 2023.

Subsequent to our letter to the Minister, matters have substantially escalated. One need simply review the press releases from the past week of extreme violence including assaults, and possibly one death. The violence and widespread poaching has led to the early closure of the elver fishery. And this is just one fishery – the elvers. This very serious situation requires a government intervention leading to resolution.

This is crucial because this is a multi-billion dollar industry that is vital to the economic well-being of Atlantic Canada and now the subject of intense conflict.

What we are suggesting here is that the government show some leadership to guide everyone out of this quagmire. Only the government can do this. Call it reconciliation or consultation (neither of which technically apply to this situation) or whatever is necessary to establish the appropriate intervention.

What is the intervention which is required? Our previous writings in this matter clearly outline a way forward. We have summarized and clarified this solution below.

The *Marshall* decision requires substantial clarification and direction from the Courts in order for all players to proceed forward in a properly defined legal framework. Fundamentally that is what is missing and was prior to *Marshall*. That decision verified that the Mi'kmaw (and other Indigenous groups in Atlantic Canada) have a right to fish and sell those fish as promised in the Treaty.

Since that decision, the Mi'kmaw (well those who can trace their ancestry back to the Treaties) have tried to exercise this right. The Crown has stopped them at every turn in spite of the *Marshall* decision. The Crown has chosen to "sprinkle" some fishing quota on

the Bands hoping that this somehow addresses *Marshall*. Well, it doesn't, for a number of reasons more clearly spelled out in the previous submissions.

More and more force is being used by the Crown and those wishing to participate in the fishery. Policing doesn't work and the Crown's resources are stretched well beyond their capacity.

In response to all of this, the Senate in its Report made a number of recommendations. These won't work and are just another way to show that the "Crown" says it is trying to do something when in fact nothing is being done. Nothing in the Report even comes close to addressing the fundamental issue viz: those who have the right to fish and sell believe wholeheartedly that this is their fundamental and legal right.

On the other hand, those that hold the licenses from the government have the view (supported by the Crown) that only license holders have the right to fish and sell. That group resist any of the "sprinkling" which occurs as this is an infringement of their right.

Who has the right? We don't know. What we do know is that the Senate has recommended that one of the solutions is to have a different department (other than fisheries) address this. At the same time, the Minister of Fisheries states that that department should be dealing with it. Meanwhile amidst substantial public unrest and concern the government seems to be focussed on which department is implementing the policies!

When public safety and security are at issue, the expenses of policing the fishery are astronomical and the honour of the Crown is at stake. Arguments about which department should be dealing with the matter are trivial to say the least but are emblematic of the problem – the Crown is defending its position similar to that which was held prior to the *Marshall* decisions and wonder why anyone – let alone the First Nations – would have anything to say about it!

Meanwhile ask anyone what the law is that governs this and you will get a myriad of answers. To some extent all are correct and at the same time all are wrong. That simply leads to tension which in turn leads to violence and the reality is that this is all being done in the backdrop of a dwindling resource. Buffalo Springfield summed it up in the '60's – "Nobody's right if everybody is wrong".

There is a possible road forward which should be started now before this already terrible situation worsens.

As an aside, lets just look at one small quote from the *Marshall* decision in order to show how confusion and lack of trust can start. The Court in *Marshall* stated: "In the circumstances, the purported regulatory prohibitions against fishing without a licence ... do *prima facie* infringe the appellants' treaty rights under the Treaties of 1760-61 and are inoperative against the appellant (Donald Marshall) unless justified under the *Badger* test".

Anyone reading this would conclude that any regulations and any charges under the regulations (as with *Marshall*) need to be justified by the Crown. Well charges have continued and the regulatory regime enforced against Mi'kmaw and the Crown has never justified. But they say they done everything that is necessary to justify and expect that the Mi'kmaw should simply believe them.

This is just one of the many outstanding issues as a result of the *Marshall* decision. Clarification is required.

What is being suggested here is that both parties, the Crown and those who claim the right to fish through ancestral lineage to those who signed the Treaty, can agree to have the Courts look at it again and further define what was said in *Marshall*. Now when we say "parties" everyone should be very careful. The Bands are not a Party. Reference is made to our correspondence related to the Report and the Response.

Parties are – the class who can claim the right – ie. trace back to the Treaties and of course, on the other side is the Crown. So, a class action.

One of the problems that the First Nations have had particularly where (as with the groups in Atlantic Canada), there is no overall governing body, is lack of funding necessary to proceed with an all-encompassing **civil** legal suit which could deal with the fundamental issues including:

1. Who has the right? (The Bands, some other governing body which apparently doesn't exist, or the individuals who can trace ancestry back to the Treaties?) The Court could determine this and such a determination is needed very soon.
2. How far does the right extend? i.e. Geographical, and to which species?
3. How are the rights of those exercising Treaty rights exercised with the "competing" interests of the license holders? i.e. How are overall quotas allocated? In these circumstances, First Nations say they come first (after conservation) because of the Constitution. Is that correct?
4. Can the Crown charge before they are able to justify the regulations under which the charges are laid? (Based on the above note that the *Marshall* decision said at that time, the regulations were not justified. This has never happened since *Marshall* but charges continue.)
5. In the civil suit arena (not summary conviction as was the case with *Marshall*), the Crown is forced to justify. We can all then see if the Crown has undertaken sufficient steps to justify the regulations. Again, the Courts would determine this.
6. What does a "moderate living" mean and does it apply in these circumstances. There is a related question. Does all of the cumulative quota necessary for the

Mi'kmaw to earn a moderate living come before and in priority to all other licensed fishers?

7. What happens in the interim until these issues are addressed? and
8. If the "class" is certified, there will be a body who can negotiate on behalf of the Treaty rights holders. No such governing body exists now.

All of this would be as determined by the Courts after fulsome hearings with all interested parties. Finally, a way forward can be achieved without everyone speculating on what the law is. This is happening now and everyone has their own opinion and to some extent those opinions are true.

Bottom line – such an action cannot proceed without funding from the Crown to the affected group for the action. We are suggesting that this starts as a class action to bring everyone in and cannot be underfunded. Without that, the whole process may fail and all would be worse off than now.

Let's all stand aside and let the Courts map the solution for everyone. Then we will all be confident as to what the law is and can proceed accordingly.

Short of that, in our view, the violence will continue and no one can explain the law to any of the sides with any credibility based upon the state of the current caselaw and the actions of the Crown.

It is time that the *Marshall* decision is revisited and advanced.

Again, we would be pleased to discuss this further with the Minister or the Senate Committee or any that are appointed by either of them.

Yours truly,

Michael Kennedy
Hubert Francis
Natalie Clifford

c: Standing Senate Committee on Fisheries and Oceans