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Mi'kmaw fisherman Cody Caplin launches constitutional challenge

Former National Chief Del Riley is leading the legal battle to fight for the constitutionally protected Mi'kmaq right to fish.

SUPPORTERS OF MI'KMAW FISHERMAN CODY CAPLIN GATHER OUTSIDE THE CAMPBELLTON COURTHOUSE ON NOVEMBER 30TH.

CAMPBELLTON, NB – Cody Caplin, a Mi'kmaw fisherman from Eel River Bar returned to court on November 30th to make arguments for his constitutionally protected Aborignal and treaty right to fish for his sustenance. Cody is facing 10 charges of violating the Fishing Act for fishing to feed himself and his family.

The courtroom was packed, with over 50 people – most of them Mi'kmaq – in attendance. A law course on Aboriginal and treaty rights was also in attendance.

During the hearing, both Cody Caplin and his agent former National Cheif Del Riley delivered opening statements to the court which are printed below.

In the afternoon, Chief Riley examined Mi'kmaw elder Albert Marshall Sr. as a witness. Marshall said that he was testifying because "it is the whole Mi'kmaq nation which is on trial here, not just Cody Caplin" and gave evidence on Mi'kmaw rights and responsibilities to the natural world. The trial will resume on Thursday January 18th, 2024.

CODY RETURNS TO COURT JAN. 18-19. 2024

Opening statement by Cody Caplin

Cody Caplin made the following statement in court on Nov. 30th, 2023.

CODY CAPLIN IS A MI'KMAW FISHERMAN FROM EEL RIVER BAR WHO WAS CHARGED FOR EXERCISING HIS ABORIGINAL AND TREATY RIGHTS TO FISH.

My name is Cody Robert Ralph Brimsacle Caplin. I am a Mi'kmaw man, born and raised in the community of Ugpi'ganjig (Eel River Bar). My ancestors made nation-to-nation treaties with the British Crown, the French Crown, the United States of America, and with other Indigenous nations like the Mohawk Nation. We warred and we made peace. In 1725, my nation began what became our "Covenant Chain" treaty relationship with the British Crown, and this treaty was repeatedly renewed in different locations across Mi'kma'ki.

Jean Baptiste Cope, the Mi'kmaq Nation Grand Chief and some 90 other individuals made the Treaty of 1752 with the British Crown which outlined our rights to hunt, fish, and trade and renewed earlier agreements. Addressing a treaty gathering which renewed the 1752 treaty in 1761 in Halifax, Nova Scotia, Governor Jonathan Belcher promised my ancestors that the covenant of peace between the British Crown and the Mi'kmaq would place us "in the wide and fruitful field of English liberty." He added, "the laws will be like a great hedge about your rights and properties. If any break this hedge to hurt or injure you, the heavy weight of the laws will fall upon them and punish their disobedience."

Sadly, as is evident by the charges laid against me, the honour and the promises made by representatives of the British Crown are not been upheld.

The Covenant Chain of Mi'kmaq peace and friendship treaties with the British Crown (1725-1779) are very clear about recognizing the Mi'kmaq Aboriginal right to hunt and fish for personal subsistence. This was an obvious and basic right as hunting and fishing for our subsistence has been how our people have always survived, since long before any Europeans landed on our shores. Our right to feed ourselves is so obvious and basic that it was not always mentioned in the treaties, although we do see it specifically referred to in the treaty of 1752, where Clause 4 states that "It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting & Fishing as usual."

The last treaty in Covenant Chain of peace and friendship treaties was the "Treaty entered into with the Indians of Nova Scotia from Cape Tormentine to the Bay De Chaleurs, September 22nd, 1779" which was made with my ancestors from this region. This treaty, which was signed in the context of British fears that the American revolution would spread into Mi'kmaq territories, stated that "the said Indians and their Constituents, shall remain in the Districts before mentioned, quiet and free from any molestation of any of His Majesty's Troops, or other his good Subjects in their hunting and fishing."

It is important to remember that these treaties are peace and friendship treaties, and do not contain land sales or the surrender of Mi'kmaq sovereignty. They are what my elders describe as the extension of kinship relations by the Mi'kmaq to the British Crown, as a means of creating peace and friendship to resolve armed conflicts instigated by friction between rival colonial powers operating on Mi'kmaq lands and waters.

The Mi'kmaq people never surrendered our right to our lands and waters or the right to sustain ourselves from them. Our most obvious inherent Aboriginal right is to be able to feed ourselves upon the land our creator put us on. The recognition of this Aboriginal right to hunt and fish is not only found throughout the Mi'kmaq treaties with the Crown, but is a standard article of most other treaties made between the British Crown and Indigenous nations. Within our worldview this is in fact a spiritual question based in the mutual inter-relationship between Mi'kmaq peoples and the plant and animal beings that we share our territory with. In other words, "I am the lobster and the lobster is me."

It is a great insult to the sacred nature of the treaty relationship between our peoples that the Crown is pursuing these charges against me, and a violation of the principle of the honour of the Crown.

INDIAN ACT RACISM

My great-grand parents were rounded up and put on reserves because of the racist *Indian Act* which violated our peace and friendship treaties. Our people were given numbers and controlled with race based legislation that didn't even consider us "persons" and that made it illegal for lawyers to represent our interests. The government's policy of "centralization" which saw the removal of Mi'kmaq people from our unceded lands and our concentration on reserves controlled by *Indian Act* federal government representatives was done in order to remove us from our lands and destroy our ability to sustain ourselves. Our children were taken away and sent to residential school so as to "kill the Indian and save the child."

This is a shameful chapter in Canadian history, and all the more so given the fact that in 2023 it is still not over, and our people continue to be persecuted for exercising our rights. As of today, nearly a quarter century on from the Marshall decision, Kukukwes News reports that over 54 Mi'kmaq fishermen in Nova Scotia alone are facing fishing related charges for exercising their Aboriginal and treaty rights.

CODY MEETING WITH ELDERS IN EEL RIVER BAR.

I come from a family lineage directly connected to our lands and to our treaty making relationship with the British Crown. The Peace and Friendship treaty of June 25th, 1761 was signed on the banks of the Miramichi river in my people's territory between the representatives of the Sovereign King George III and our own representative of Mi'kmaw sovereignty, our "Ikan-putu-wit" who signed the treaty using our totem/clan symbol. My Mi'kmaw grandmother Marion Simonson was born along this same river on April 23, 1913 to parents who were trappers, fishers, hunters and gatherers. They lived deep in the forest in the winter, and took to the rivers and the sea coast in the spring to fish for food and to trade.

My grandmother Marion lived to the age of 94. I recall that when I was about 12 years old, my grandmother told me about how on the railroad line going from Montreal to Halifax, she would enter the train and speak to the conductor about our "treaty" rights to travel, and that the train would take her where she wanted to go without charge on the basis of these rights. My grandmother was well aware of her Aboriginal and treaty rights and she was a rich source of oral history about our peoples' customs and conventions. She taught me that we have the right to hunt and fish on our lands to sustain ourselves, without needing any special permission from the Crown or anyone else.

FISHING FOR FOOD

My brother Kyle and I began to fish for lobster and salmon in our traditional waters about 10 years ago. We needed food to feed our family, and were trying to find a way to put some money in our pockets too. In 2015 we acquired a 20 foot salmon skiff. Sadly, as soon as we began exercising our Aboriginal and treaty rights – rights which have been clearly upheld by Canada's own Supreme Court in the 1999 Marshall decision and which are explicitly protected by Sections 25 and 35 of the Canadian Constitution – we began to be targeted by officers of the Department of Fisheries and Oceans (DFO) who seemed determined to stop us from exercising our rights.

My brother and I were doing nothing wrong. We were out on the water trying to provide for our families in accordance with our constitutionally protected rights. Long before we began fishing, the Supreme Court of Nova Scotia's Appeal Division in R. v. Denny (1990) and the Supreme Court of Canada in R. v. Marshall (1999) ruled in favour of the Mi'kmaq Aboriginal right to fish for food off reserve, and to gain a "moderate livelihood" from the sale of our catch. Despite these rulings in the

CODY HAULING UP LOBSTER TRAPS.

highest courts of the land, the DFO treated us like criminals and showed no respect for the treaties that the Crown made with our ancestors. Those treaties clearly recognize the Mi'kmaq right to hunt and fish and the DFO has not been upholding the honour of the Crown in its relationship with the people of our nation.

In the fall of 2018, I was fishing a number of licenses/tags issued in accordance with the *Aboriginal Fisheries Strategy Agreement* made between the DFO and the Eel River Bar Indian Act Chief and Council. At the same time, I was also fishing a small number of my own "treaty" traps in order to provide for my own sustenance needs in accordance with what I understood to be my Aboriginal and treaty rights.

On September 12th, 2018 I was out fishing for lobsters with my brother Kyle. We couldn't see them, but DFO officers were surveilling us, and as soon as we landed on shore, a SWAT team aggressively came running at us with their hands on their guns. They arrested us like we were dangerous criminals and the cops drove off with our lobsters, our boat, and our trailer. Over the course of the next year we weren't sure what to do. With our boat and trailer and traps taken we had no means to fish and exercise our rights, and a year later we still hadn't been charged with anything and hadn't had our equipment returned to us. We felt like we had been robbed.

My brother Kyle and I went to the local DFO office in Charlo, New Brunswick to ask for our property back. As soon as we arrived we felt like we were being racially profiled as "dangers to society." The officers acted like we were going to hurt them when we went to the DFO to retrieve our boat. They had their hands on their guns, and they pressed the emergency button to summon backup. They suggested we were dangerous because we were "boxers." I remember thinking how ridiculous this was and how it felt like they were trying to make us look like violent criminals. My brother and I used to box when we were kids – at the age of 13 – I'm 36 years old now.

My brother Kyle pled guilty to these same charges after we spent thousands of dollars on legal costs to fight for our rights. Kyle's lawyer told him that the Crown was willing to make a plea deal to have some charges withdrawn but that he would also have to pay a fine of $13,500. Kyle was hesitant to take the deal, but his lawyer told him that it would be in his best interest to take the deal as this case could go on for years and that it would become very costly. The lawyer told my brother and I that fighting our case could cost us well over $100,000 – money that we didn't have. My brother was discouraged by this, and not having the funds to keep going, he felt that he had no choice but to plead guilty. However, he did say to the judge before accepting responsibility, "Even though I know that I am not in the wrong as I was exercising my treaty rights, I am pleading guilty to the charges here today."

MI'KMAW FISHING

Counts #1, #2, #3 that I am charged with, contend that I contravened or failed to comply with a condition of the Aboriginal Communal Fishing Licences Regulations, which in my understanding refer to a violation of the Aboriginal Fisheries Strategy Agreement made between the DFO and the Eel River Bar Indian Act Chief and Council beginning in 2001 and which continue to this day.

In reality, I provided my labour and equipment to fish several licenses and tags in accordance with all of the regulations of the Aboriginal Fisheries Strategy Agreement. In addition to fishing those licenses/tags, I fished about a dozen of my own lobster traps to provide food for my own sustenance in accordance with the customs and conventions of the Mi'kmaq people and my constitutionally protected inherent Aboriginal and treaty rights.

Since I began salmon fishing, I always give away a portion of my catch every year to help feed community members in need. I also provide food from my catches to my father, my mother, my grandparents, my brother Chris, and donate salmon to the Eel River Bar pow wow.

I do the same with the moose I hunt. I thank the animal and the creator, and speak to the animal and let them know they will be put to good use in feeding our people, and that none of them will be wasted. I hunt and fish in accordance with what I understand to be the Mi'kmaq way: for food to provide for our people, in such a way to not waste or harm the replenishment of the resource, and to give thanks for what has been provided by creation and my relation to it.

I will now pass matters over to former National Chief Del Riley to present the legal and constitutional arguments in my case.

Opening statement by Chief Riley

Chief Riley made the following statement in court on Nov. 30th, 2023.

CHIEF RILEY ABOARD THE CAPLIN'S VESSEL IN OCTOBER OF 2023. CHIEF RILEY WAS THE PRESIDENT OF THE NATIONAL INDIAN BROTHERHOOD.

The simple fact is that this trial should not be happening. The accused, Cody Caplin, a member of the Mi'kmaq Nation, is not a criminal. He simply exercised his constitutionally protected Aboriginal and treaty right as a member of his nation to fish in order to feed himself and his family on his people's unceded territory. As Indigenous people, the right to survive and feed ourselves from our own lands is the most basic Aboriginal right that we have.

The DFO and the Crown prosecutors are not upholding the Honour of the Crown by charging Mr. Caplin in this case. To the contrary, they are violating not only the Canadian Constitution, the most fundamental law of Canada, but also their fiduciary responsibility to Mr. Caplin as a status Indian. If there was any justice, the Crown would immediately withdraw these charges, apologize and compensate Mr. Caplin for the damages it has caused him and for the expenses he has incurred by having to justify his actions in court.

Instead, the Crown has charged Mr. Caplin with 10 counts of violations under paragraph 78(a) of the *Fisheries Act*. The first three counts are related to the *Aboriginal Communal Fishing Licences Regulations* made between Eel River Bar First Nation and the Department of Fisheries and Oceans, while the remaining seven counts refer simply to the *Fisheries Act* and not the agreement made between the DFO and the Band. I understand from a November 21, 2023 letter from Crown prosecutor Mark Stares, that while some ambiguity remains, counts 1 and 4 were withdrawn by the Crown and that counts 5,6,7,8,9 are being charged as alternatives to counts 2 and 3.

FISHING AGREEMENTS

The first three charges that Mr. Caplin is facing relate to the 2019 "Aboriginal Fisheries Strategy Agreement" that Eel River Bar First Nation signed with the DFO in order to gain funding to develop its own fishery in the wake of the 1999 R. v. Marshall decision. Mr. Caplin is alleged to have violated the terms of this agreement by fishing outside of its regulations. However, the Agreement is very clear that "it does not, and is not intended to, define or extinguish any Aboriginal or treaty rights," and that it is "without prejudice to the positions of the Parties with respect to Aboriginal or treaty rights." The document further states that it "is not a land claims agreement or treaty within the meaning of Section 35 of the *Constitution Act, 1982*, and that it "does not affect any Aboriginal or treaty rights of any other Aboriginal group."

This wording — which ensures that Mi'kmaq Aboriginal and treaty rights are not negatively affected by the agreement — was present in the first such agreement between the

Band and DFO, which was made in 2001 and which has been renewed ever since. The importance of this section stems from the fact that Aboriginal Communal Fishing Licences are granted unilaterally at the discretion of a Minister of the Crown, and are thus a privilege that can be taken away, and not an inherent Aboriginal or treaty right.

While the Parliament of Canada has the jurisdiction within its own governance system to create and issue licenses to "Aboriginal organizations" such as *Indian Act* Band Councils, Mi'kmaq people also have their own inherent Aboriginal and treaty right to fish without such a license from the Federal government. That is because the Mi'kmaq Aboriginal right to hunt and fish on their unceded territory remains intact and unextinguished, and because the Covenant Chain of peace and friendship treaties made between the Mi'kmaq nation and the British Crown explicitly confirms the Mi'kmaq treaty right to hunt and fish.

In the treaty of 1752, Article 4 reads, "the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting & Fishing as usual." It is further noted that "the said Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best Advantage." The treaty is to be permanent and applies to "for themselves and their said Tribe their Heirs, and the Heirs of their Heirs forever."

The treaty of 1779 similarly states that "the said Indians and their Constituents, shall remain in the Districts before mentioned, quiet and free from any molestation of any of His Majesty's Troops, or other his good Subjects in their hunting and fishing." These districts refer to those of "the several Tribes of Micmac Indians before mentioned" as well as to "all others residing between Cape Tormentine and the Bay De Chaleurs in the Gulf of St. Lawrence inclusive." This includes the traditional territory of the district of Gespe'gewa'gi where Eel River Bar First Nation is located.

CHIEF RILEY WITH A LOBSTER CAUGHT ON THE BAY OF CHALEUR.

The fact that the Mi'kmaq right to hunt and fish in their unceded lands was not explicitly brought up in the treaties of 1725-6 and 1760-1 is not only because these were primarily peace and friendship treaties in which the British sought to bring an end to the conflicts they had caused by entering and appropriating Mi'kmaq territory and resources, but because of the basic fact that the Mi'kmaq people sustained themselves in their daily lives by hunting and fishing in a manner completely free from British control. These rights were so obvious and self-evident that they did not have to be specifically mentioned as articles of a treaty. Most of the treaties with the Crown in what is now the province of Ontario do not list hunting and fishing rights in their terms, but hunting and fishing is a widely accepted and practiced Aboriginal right in Ontario today that is recognized by the province as a basic Section 35 right.

It is also worth mentioning that this case is not about a "moderate livelihood" right for Mr. Caplin to catch and sell lobster. In 2018, Mr. Caplin was not selling the lobster he was catching in his own "treaty traps" while simultaneously fishing licenses/tags for through the Band's "Aboriginal Fisheries Strategy Agreement" – he was eating the lobster and feeding his family with his catch, until the DFO seized his fishing equipment and violated their fiduciary responsibility to Mr. Caplin.

In keeping with Mi'kmaq customs and conventions, Mr. Caplin was providing food for his family and for community members in need of food by small scale fishing – using a dozen or so lobster traps. As the Band's *Aboriginal Fisheries Strategy Agreement* notes, there is no contradiction in exercising Aboriginal and treaty rights by "treaty fishing" while simultaneously participating in the licensing system set up by the Band with the Federal government and following those rules for the lobsters caught with those traps.

There are as far as we know, no conservation issues with the lobster population in the Bay of Chaleur, and there is no evidence that the Department of Fisheries and Oceans consulted with Eel River Bar First Nation or any traditional Mi'kmaq governance structures about conservation issues and their concerns with the potential overfishing of lobster in the time period around 2018. If there were to be any infringement of the treaty right to fish on the basis of conversation, there should first be a limitation on those non-native commercial fishermen and corpora-

tions whose fishing stems from privileges granted by the Crown, not from any inherent rights. We understand that no such limitations were enforced by the Crown during the time that Mr. Caplin was charged with these offenses.

The remaining charges #4-10 under the *Fisheries Act* should similarly be dismissed as Mr. Caplin's Aboriginal and treaty right to hunt and fish for his subsistence also trump these regulations. Section 52 of *Canada's Constitution Act* clearly states that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." As a result, counts #4-10 should also be dismissed by this court as they violate Sections 25 and 35 of the *Canadian Constitution Act*.

As the Supreme Court in *R. v. Marshall* put it, "The accused caught and sold the eels to support himself and his wife. His treaty right to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Accordingly, the close season and the imposition of a discretionary licencing system would, if enforced, interfere with the accused's treaty right to fish for trading purposes, and the ban on sales would, if enforced, infringe his right to trade for sustenance. In the absence of any justification of the regulatory prohibitions, the accused is entitled to an acquittal."

SECTION 25 AND 35

Aboriginal and treaty rights are "recognized and affirmed" by Section 35 of the Canadian Constitution Act, and according to Section 25, the Charter of rights and freedoms "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada." As a result, Mr. Caplin's inherent Aboriginal and treaty right to fish trump the regulations and conditions of the *Aboriginal Communal Fishing Licences Regulations* and the *Fisheries Act*. I know this because I played a key role in negotiating for and coming up with the wording for Sections 25 and 35.

I am now approaching 80 years of age, and I have a lifetime of knowledge and struggle as a traditional Indigenous man belonging to the Crane Clan of the Chippewa of the Thames Nation who has been politically active at the local, regional, national, and international level. At the age of 6, I was forcibly removed from my family by the RCMP and taken to the Mohawk Indian Residential School in Brantford, Ontario where I faced 5 years of the most horrific abuse imaginable. I then suffered through several more years of oppression in an Indian Day school as well as spending four years in a TB clinic that followed the same rules as residential school. In 1970 after a sojourn in the United States to escape Canadian racism, I began working for the Union of Ontario Indians (now the Anishinabek Nation) as a Land Claims researcher and solved upwards of 70 land claims. A few years later, I was promoted to the position of Land Claims Research Director, and led the efforts of the Union's Land Claims department from 1972 to 1976.

In 1976 I was elected President of the Union of Ontario Indians and held that office until 1980. As President, I took part in numerous regional and national meetings and was closely involved in supporting the land rights issues of various First Nations in Ontario. At the urging of the Ontario Chiefs and particularly at the direction of traditional hereditary chiefs, I sought the presidency of the National Indian Brotherhood on the platform of securing constitutional protections for Indigenous people. I was elected to national leadership on the platform of constitutionalizing the protection of Indigenous rights in 1980. I spent the next two years deeply involved in negotiating for the inclusion of Sections 25 and 35 in the Canadian constitution.

As President of the National Indian Brotherhood, I met with Cabinet Ministers, the Indian Affairs Minister John Munroe, and Members of Parliament. Jean Chretien was the Minister of Justice and Attorney General of Canada and was also the Minister responsible for overseeing Constitutional Negotiations. Chretien's office communicated with me on a regular basis as part of the constitutional discussions.

I have recently published my autobiography, *The Last President: How Aboriginal and Treaty Rights were Entrenched in the Canadian Constitution* which contains my account of the context and negotiations for Sections 25 and 35 and my understanding of the Indigenous intent and interpretation of these sections. Rather than going into more detail here, I would like to enter my book as an exhibit in this court case, and particularly refer the Court to pages 185-220 which relate to the constitutional protection of Aboriginal and treaty rights.

R. V. ISAAC, 1975

Turning now to the legal context regarding Mr. Caplin's case, I want to stress that the Mi'kmaq people never gave up their rights to sustain themselves from their lands. The Nova Scotia Court of Appeal made this point very clearly in R. v. Isaac, 1975 when it stated that "No Nova Scotia treaty has been found whereby Indians ceded land to the Crown, whereby their rights on any land were specifically extinguished, or whereby they agreed to accept and retire to specified reserves." [Note that the reference to Nova Scotia includes New Brunswick which was established as a separate province in 1784.]

In R. v. Isaac, Justice MacKeigan noted that "I have been unable to find any record of any treaty, agreement or arrangement after 1780 extinguishing, modifying or confirming the Indian right to hunt and fish, or any other record of any cession or release of rights or lands by the Indians."

Referring to the inherent Aboriginal right to hunt and fish for food, Justice MacKeigan stated that "The original Indian rights as defined by

CHIEF RILEY ENTRENCHED ABORIGINAL AND TREATRY RIGHTS IN SECTIONS 25 AND 35 OF THE CANADIAN CONSTITUTION.

Chief Justice Marshall were not modified by any treaty or ordinance during the French regime which lasted until 1713 in Acadia, and until 1758 in Cape Breton, and must be deemed to have been accepted by the British on their entry. Such acceptance is shown by the British Royal Proclamation of October 7, 1763 (R.S.C. 1970, Appendices, pp. 123-129), which has been perhaps a little extravagantly termed the "Indian Bill of Rights."

Justice MacKeigan continued: "The Proclamation was clearly not the exclusive source of Indian rights ... but rather was "declaratory of the aboriginal rights." I am of the opinion that the Proclamation in its broad declaration as to Indian rights applied to Nova Scotia including Cape Breton. Its recital acknowledged that in all colonies, including Nova Scotia, all land which had not been "ceded to or purchased by" the Crown was reserved to the Indians as "their Hunting Grounds". Any trespass upon any lands thus reserved to the Indians was forbidden."

Justice MacKeigan explained that a usufructuary right is a right to the use of land and includes "the right to catch and use the fish and game and other products of the streams and forests of that land." Indeed, the Chief Justice wrote at page 485: "This Part (of the decision) has established that Indians in Nova Scotia had a usufructuary right to the use of land as their hunting grounds. That right was not extinguished for reserve land before Confederation by any treaty, or by Crown grant to others or by occupation by the white man. It has not been extinguished or modified since 1867 by or under any federal Act."

In the *Royal Proclamation of 1763*, King George III stated: "And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds."

The Indigenous nations "with who We are connected" is a reference to the Covenant Chain relationship that the British Crown first forged with the Schoharie Mohawks of the Five Nations or Haudenosaunee Confederacy, and which was subsequently extended to the Mi'kmaq Nation in 1752, the "praying Indians" of the Seven Nations of Canada in 1760, and the Anishinaabe nations at the 1764 Treaty of Niagara.

The "hunting grounds" referred to in Royal Proclamation include the unceded lands of the Mi'kmaq Nation, to which there is no record of any purchase or surrender having been made. This means that in a very real sense, the "lands reserved for Indians" by the Royal Proclamation of 1763 continue to encompass the great majority of the land mass of Canada's Maritime provinces, and

not just the postage stamp sized "reservations" unilaterally created by the racist *Indian Act* in 1876 in order to concentrate Indigenous nations and remove them from their traditional territory.

TRADITIONAL MI'KMAQ LEADERSHIP

I note that it is the longstanding position of the Mi'kmaq traditional leadership, in the form of its Grand Council, the Mi'kmaq Nationimouw, that it continues to claim:

"*...de jure*, by 'ancient title and dominion, all that territory which it possessed, governed, used and defended at the time it entered into the protection of Great Britain. Sitqamuk, our national territory, includes the lands today known as Nova Scotia, Prince Edward Island, and parts of Newfoundland, New Brunswick, and the Gaspé peninsula of Quebéc, an extent of twenty thousand square miles, more or less. Although our Treaty of protection guaranteed us permanent enjoyment of this territory, save only for settlements of British subjects then existing (to the extent of one thousand square miles or less), we recently have been confined to small parcels of land in total less than fifty square miles. Title and right even to these parcels, denominated "Indian Reserves," is contested now by the government of Canada, yet we never have sold or ceded by deed or by Treaty a single acre of our original domain." (*Santé Mawiómi complaint to the United Nations Human Rights Committee*, 1980)

The Santé Mawiómi document continues by stating:

"In its Treaty of 1752, the Mi'kmaq Nationimouw sold no land, and ceded no sovereignty over its domestic affairs. It became a protected state or dependency, as that term would come to be used and understood more generally a century later in the evolution of the British Empire into a commonwealth of nations.

"In 1761, shortly after the fall of French forces in Canada, Great Britain and the Mi'kmaq Nationimouw ceremonially renewed the Treaty of 1752 at Halifax. Standing by a monument erected for that purpose, Nova Scotia Governor Jonathan Belcher described our relationship with the Crown in these words:

"Protection and allegiance are fastened together by links, if a link is broken the chain will be loose.

You must preserve this chain entire on your part by fidelity and obedience to the great King George the Third, and then you will have the security of his Royal Arm to defend you.

I meet you now as his Majesty's graciously honored servant in government and in his Royal name to receive at this pillar, your public vows of obedience – to build a covenant of Peace with you, as upon the immovable rock of Sincerity and Truth, – to free you from the chains of bondage, – and to place you in the wide and fruitful field of English liberty.

The 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 furnish their disobedience."

CHIEF RILEY CHECKING HIS PHONE WHILE FISHING FOR LOBSTER ON THE BAY OF CHALEUR.

R. V. DENNY, 1990

In the constitutional argument that was drawn up for Cody and Kyle Caplin by lawyer Liam Smith, he repeatedly makes the argument that the matters at hand are *res judicata* constitutional issues that the Crown is attempting to relitigate. I concur with Mr. Smith as this is quite obvious what is happening in addition to being a clear example of Canadian officials failing to uphold the honour of the Crown and their fiduciary responsibility to Mr. Caplin given their "trust-like" relationship to Indians.

Specifically, I would like to draw the Court's attention to the ruling of the Nova Scotia Supreme Court in R. v. Denny, 1990 which bears a very close resemblance to Mr. Caplin's case. The Court considered the Section 35 rights of David B. Denny, Lawrence John Paul and Thomas Frank Sylliboy – three Mi'kmaq fishermen who were fishing for food for themselves and their family without a license from Canada. Like Mr. Caplin, these Mi'kmaq men caught fish for their personal consumption off-reserve, with no intent to sell the catch or to profit in the commercial sense.

R. v. Denny, references the analysis of R. v. Issacs as follows: "The decision of Chief Justice MacKeigan is also relevant for his particularly thorough historical analysis of the basis upon which the Micmac aboriginal rights exist. The court found that the "original Indian rights" of Nova Scotian Indians to hunt and fish had not been diminished by treaty, other agreement or competent legislation."

R. v. Denny reaches the following conclusion after relying extensively on the perspective of R. v. Issacs:

1.The appellants have an existing aboriginal right to fish for food in the subject waters in these appeals. Given this finding, it is not necessary to determine whether the appellants have a right to fish protected by treaty.

2. Section 35 of the *Constitution Act, 1982*, provides the appellants with the right to an allocation of any surplus of the fisheries resource which may exist after the needs of conservation have been taken into account. This right is subject to reasonable regulation of the resource in a manner that recognizes and is consistent with the appellants' guaranteed constitutional rights.

3. Based upon the appellants' aboriginal right to fish for food and the protection afforded by s. 35 (1) of the *Constitution Act, 1982*, the three appellants enjoy a limited immunity from prosecution under the provisions of the *Fisheries Act and Regulations*. To the extent that the provisions under which they have been charged are inconsistent with the constitutional rights of the appellants, s. 52 of the *Constitution Act* renders them of no force and effect.

The same logic applies in Mr. Caplin's case. When he was lobster fishing in the fall of 2018, Mr. Caplin was fishing a number of licenses for other people offered Communal Fishing Licences by the Minister of Fisheries and Oceans, as well as fishing for lobsters for his own personal consumption and sustenance. In so doing he was exercising his inherent, constitutionally protected Aboriginal and treaty rights under the Covenant Chain of Mi'kmaq peace and friendship treaties with the British Crown.

In R. v. Paul, 1980, a case where a Mi'kmaq man from Red Bank Indian Reserve was charged with the possession of undressed beaver skins off-reserve, the court outlined that the Treaty of 1725, the Treaty of 1752, the Treaty of 1779, Belcher's Proclamation of 1762, and the Royal Proclamation of 1763 are the relevant treaties and proclamations that protect Mi'kmaq Aboriginal and treaty rights regarding hunting and fishing. Mr. Caplin's defense will involve reference to all of these treaties and a number of legal decisions concerning Aboriginal and treaty rights.

The Treaty of 1779 was made by Mr. Caplin's ancestors from the Mi'kmaq district of Gespegeoag – and included Mi'kmaq people from Cape Tormentine to The Bay of Chaleur – Within the treaty, the Crown promised "That, the said Indians and their Constituents, shall remain in the Districts before mentioned, quiet and free from any molestation of any of His Majesty's Troops, or other his good Subjects in their hunting and fishing." As Judge Hughes of the New Brunswick Court of Appeal put it in R. v. Paul (1980) in reference to this clause in the treaty, "It could and probably should, in the circumstances, be interpreted as a recognition of a pre-existing right which the Indians had exercised from time immemorial and consequently may be treated as a confirmation of that right free from molestation by British troops and subjects." As a result, the court allowed the appeal and set aside Mr. Paul's conviction.

The Aboriginal and treaty rights described above supersede the jurisdiction and authority of any other Canadian laws and regulations, as they are protected by Sections 25 and 35 of the Canadian Constitution, the highest law of the land. In accordance with Section 52 of the *Constitution Act*, the punishments provided for under paragraph 78 of the *Fisheries Act*, R.S.C. 1985 should not apply to Mr. Caplin, and the charges against him should be dismissed.

THE COVENANT CHAIN

Since our last meeting on the 12th of October there has been a groundbreaking new ruling in Aboriginal and treaty law in the case of *R. v. Montour and White* which departs from the Van der Peet test and offers a new test for Aboriginal and treaty rights. It also recognizes the Covenant Chain agreement the British Crown entered into with the Mohawks of Kahnawake as a binding and un-extinguished treaty relationship which must be upheld in accordance with the principle of the honour of the Crown.

The new test proposed by Justice Bourque takes into account Canada's repeated claims of reconcil-

iation with Indigenous peoples and consists of the following three steps:

(1)It will require first to identify the collective right that the Applicant invokes;
(2) Then, the Applicant will have to prove that such a right is protected by his or her traditional legal system; and
(3) Finally, the Applicant will have to show that the litigious practice or activity in question is an exercise of that right.

By way of context, "the Court comes to the conclusion that the endorsement of the UNDRIP without qualification and the adoption of the UNDRIP Act are more than additional instruments in the Aboriginal law landscape. They are also expressions of more profound changes. Since Van der Peet, knowledge about Indigenous peoples' life in Canada has tremendously evolved, notably through the contribution of several public inquiries. The raising of a collective awareness on the past and present situations of Indigenous peoples in Canada is palpable. Canadian society is starting to grasp the pressing need for a renewed relationship in which reconciliation is central. As well, the executive and legislative branches have made significant steps towards reconciliation. The Court thus concludes that the parameters of the debate have fundamentally changed. The notion of reconciliation, as referring to a work-in-progress to arrive at a mutually respectful long-term relationship between sovereign peoples, did not have the same importance at the time Van der Peet was delivered as it has nowadays. The question before the Court when elaborating a s. 35(1) framework is no longer, or at least not only, how to "conciliate" Aboriginal rights claims with Crown's sovereignty, but also how to reconciliate sovereign peoples through the recognition of Indigenous peoples' rights."

There is much more to be said about the implications of this decision which recognizes the Covenant Chain relationship between the Mohawks of Kahnawake and the Crown as an existing treaty that the Crown is honour bound to uphold, and which sets a strong precedent in regards to the Covenant Chain relationship which the Mi'kmaq Nation also holds with the British Crown.

We have printed a copy of the ruling for the Court to examine, and we intend to call witnesses from this case in Mr. Caplin's defence, and to make the argument that the legal principles and test for Aboriginal and treaty rights within it should apply in Mr. Caplin's matter as well.

"TREATY LOBTER" FROM THE BAY OF CHALEUR.

STAY THE PROCEEDINGS

In conclusion, I would like to note that Aboriginal and treaty rights cases like the one that we are dealing with today are extremely expensive for First Nations people to fight. They are almost impossible to fight alone, and were it not for the generous support of the members of the Micmac Rights Association that Mr. Caplin is a member of, it is doubtful that this hearing would even be taking place at all.

Having to fight these cases is yet another example of the continued systemic racism directed against Indigenous people as no other people in our society have to repeatedly go through these kinds of trials and tribulations to continually prove the existence of their constitutionally protected rights.

In order to re-litigate previously settled matters of Aboriginal and constitutional law, Mr. Caplin will be required to expend considerable resources in paying witnesses for their time and expenses, convening political support, undertaking legal and historical research, and covering the costs of bringing me and my assistant to court in what is an over 3000 km round trip drive for us that takes several days of travel to complete.

This is an unfair and unnecessary burden to impose on Mr. Caplin for using a dozen lobster traps to provide food for him and his family in accordance with his Aboriginal and treaty rights, and is a monumental waste of Court and government resources, not to mention a dishonour to the Crown's relationship with the Mi'kmaq nation.

I thus conclude our opening statement with the hope that there is now enough evidence and argument before the Court provided in the opening statements of Mr. Cody Caplin and myself – for the court to now issue:

1. A stay of proceedings against Cody Robert Ralph Brimsacle Caplin (Cody Caplin) in the present matter.
2. A declaration that the *prima facie* infringement of Cody Caplin's Mi'kmaw treaty rights to fish is not justified and is contrary to subsection 35(1) of the *Constitution Act*, 1982.
3. A declaration that the Crown is attempting to relitigate *res judicata* constitutional issues in this matter.
4. A declaration that the Crown's refusal, delay and procrastination in fulfilling its urgent affirmative fiduciary obligations to implement and protect the Mi'kmaw constitutional rights to fish brings the honour of the Crown into disrepute.
5. Costs and disbursements, including Mr. Caplin's legal defense fees.
6. Such further relief that this Honourable Court and counsel may consider to be appropriate and just in the circumstances.

That concludes my opening statement.

CODY CAPLIN (LEFT) THANKS CHIEF RILEY FOR HIS SUPPORT WHILE KYLE CAPLIN LOOKS ON.

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