



October 21, 2020

The Right Honourable Justin Trudeau, P.C., M.P.
Office of the Prime Minister
80 Wellington Street
Ottawa, ON K1A 0A2
By Email: justin.trudeau@parl.gc.ca

Re: Mi'kmaq Fishers

Dear Prime Minister,

We are writing about Mi'kmaq fishing rights and the Crown-indigenous conflict taking place over lobster fishing off the coast of traditional Mi'kmaq territory. We have divergent concerns about the federal Crown's actions and statements to date. We write this in the wake of your sympathetic remarks in the House of Commons this week, with respect to this very subject. More than careful parliamentary language is needed, to be sure, although not careful enough, as we mention at the end of this letter.

In brief, the Canadian Civil Liberties Association asserts that the Crown has breached its fiduciary obligations to the Mi'kmaq (again). Crown mismanagement of its treaty obligations to Mi'kmaq people is well established. A pattern of bias and sometimes racism against Mi'kmaq people continues with any suggestion that this conflict is inexorable; that culpability arising from this conflict is shared by Mi'kmaq people; and that Crown-aboriginal reconciliation, when it comes to Atlantic fisheries, is about competing interests. In our view, it is just about racism and Crown fiduciary failures.

Twenty years ago, mainstream media repeatedly referenced Mi'kmaq constitutional fishing rights as a "native belief." Back then, at least, the federal Department of Fisheries relied upon "inflated numbers and partial truths, raising the unsettling possibility that the government is manufacturing a conservation problem to justify the infringement of Mi'kmaq treaty rights."¹ Accordingly, it is incumbent on your Government to check for biases embedded in itself.

For centuries, Indigenous people have been accused of complicity in Crown atrocities against them; the authors of their own misfortune. In respect of the Mi'kmaq, the Supreme Court of Canada has twice upheld their treaty right to fish and trade for sustenance. In both cases, intervenors representing non-indigenous fisherman, West Nova Fishermen's Coalition, argued that the Mi'kmaq defendant was fishing illegally, wrongly, contrary to principles of conservation. After the Court dismissed their objections, and acquitted the Mi'kmaq fisherman, there were protests and civil unrest. So the Court held a second hearing to address the West Nova Fishermen's Coalition's application for a stay and re-hearing of their grievances against Mi'kmaq fishers.

¹ William Hipwell, PhD., "Ottawa's lobster war against the Mi'kmaq," *National Post*, September 30, 2000.

The defendant in those two cases was none other than Donald Marshall Jr., a Mi'kmaq man who was wrongly convicted of murder, who served 11 years in prison for a crime he did not commit, and who was nevertheless presumed the author of his own misfortune, by the presiding judge vacating his conviction.² In the Mi'kmaq fishing rights cases years later, he was accused of the same by his non-indigenous neighbours.

This history bears repeating, because it keeps repeating itself. The 17-year-old Marshall had been apprehended and charged by police for the mortal stabbing of an acquaintance, it turns out, by a 59 year old former ship's cook with a record of knifing convictions. Marshall was charged and convicted, a Royal Commission later held, because he was the lying, miscreant Mi'kmaq near the scene of the crime. Marshall must have done something wrong, the Nova Scotia Court of Appeal concluded over a decade later, for being a Mi'kmaq.³

Not for the first time, meanwhile, the depletion of the lobster population is now being alleged by non-indigenous commercial fishermen. Not once, but twice, the Supreme Court of Canada has set forth the applicable law on this issue. It is being applied by the Crown. Non-indigenous fishermen continue to object, but this time have done so with digital cameras rolling. Indigenous people should not have to engage in self-help when civilians confront indigenous fishers and their property with apparent violence and property damage.

The Ipperwash Commission Report, called after the Ontario Provincial Police were convicted of homicide against Chippewas protestor Dudley George, sets forth the history of unlawful and harmful police escalation that has led to tragedy. Its lessons are as valuable today, as ever. Its recommendations are not being followed by the RCMP, in our view, during the recent conflict on traditional Mi'kmaq territory.

Your Solicitor General is accountable to Parliament for the RCMP. We were particularly concerned to hear reports of Mi'kmaq fishers pleading, unsuccessfully, for police assistance while their lobster pound burned. Leaving aside the importance of police de-escalation amid conflict, the Mi'kmaq are as worthy of protection by the RCMP as non-indigenous people. Historically, the opposite has been the case.

Today, the Crown and the RCMP must recognize and affirm that indigenous people ought never be discriminated against by RCMP or civilians. Indigenous fishing rights permit self-

² In fact, that paraphrase from the Royal Commission (*infra*) is a polite version of the injudicious rant against Marshall by the Nova Scotia Court of Appeal, which made contemptuous findings of fact devoid of evidentiary support, and were as racist as the police, prosecutors and judiciary had been a dozen years previous: *R. v. Marshall*, (1983), 57 N.S.R. (2d) 286, at pp. 321-22.

³ *Royal Commission on the Donald Marshall, Jr., Prosecution (N.S.)* (1989): "We find *that the criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and conviction in 1971 up to - and even beyond - his acquittal by the Supreme Court of Nova Scotia (Appeal Division) in 1983. *that this miscarriage of justice could have and should have been prevented if persons involved in the criminal justice system had carried out their duties in a professional and/or competent manner. *that Marshall was not the author of his own misfortune. *that the miscarriage of justice was real and not simply apparent. *that the fact that Marshall was a Native was a factor in his wrongful conviction and imprisonment."

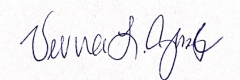
determination over a traditional activity, but the RCMP remains duty bound to prevent violence against Mi'kmaq fishers.

As fiduciary to indigenous peoples, the Crown is responsible and accountable for this violence against Mi'kmaq fishers; for setting the stage for this to happen; and for a solution to the conflict. The current situation is intolerable. Indigenous rights ought not be trampled on and then blamed for their trampling. We recognize that the presenting issues are complex and that historical animosities are heightening tensions. But the solution is for the Crown to obtain.

Furthermore, we would be remiss if we did not add that we think it inappropriate (and arguably unparliamentary) for a Prime Minister to say in the House that any conduct is “criminal,” at least until due process is completed, and an independent investigation, prosecution, and trial has transpired. For a First Minister to pre-judge conduct to be criminal, pre-trial, is contrary to the presumption of innocence and risks the integrity of a fair trial. Over our history, these principles have too often been observed in the breach, to the detriment of indigenous peoples.

Finally, we wish to underscore that the principles and recommendations to be found in the Ipperwash Commission Report serve as a model for preventing, resolving and reconciling conflicts such as this one.

Sincerely,



Verna George
Special Advisor, Indigenous Affairs
Canadian Civil Liberties Association