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TOWARDS A BETTER WAY FORWARD

Atlantic Canada Indigenous Fishing Rights & Moderate Livelihood

Dear Chief Terry,

I was very pleased to receive your very compelling letter of September 16, 2020 written in your capacity as Lead Chief for the Fisheries Portfolio for the Assembly of Nova Scotia Mi'kmaq Chiefs in respect of the ten Nova Scotia First Nations that the Assembly represents on fisheries negotiations.

I was very humbled to learn that the Assembly seeks our assistance in advocacy for the Mi'kmaq fishery in respect of the current crisis around moderate livelihood despite the reality that it has been twenty-one years since the Supreme Court of Canada's rendering of its decision in *Marshall*.

Much as you and your fellow Chiefs in the Assembly do, I have a profound sense of responsibility for advocacy around the rights of the Mi'kmaq. As you may be aware, last year I was asked by the Government to be the Senate sponsor of amendments to the *Fisheries Act, Bill C-68*.

At 3rd Reading of the Bill in the Senate Chamber, Senator Peter Harder, the Government Representative in the Senate, read the following statement by the then-Minister of Fisheries and Oceans, Jonathan Wilkinson into the record of Senate proceedings:

*To Senator Christmas and all honourable senators in the chamber, I make my commitment to ensure that my department **moves forward on a path that respects aboriginal treaty rights and the right to a modern livelihood for Mi'kmaq and Maliseet First Nations as affirmed by the Marshall decision.***

Despite these encouraging words, and despite the recognition that, to the Mi'kmaq, protection and affirmation of such rights are indeed a matter of sacred and binding trust, we find ourselves at a perilous crossroads fraught with challenges. Two things are absolute: the promise by the Minister didn't manifest any change in DFO's approach to moderate livelihood – and that consequently the patience of the Mi'kmaq has been understandably and undeniably tried beyond all limits.

The DFO Jim Jones negotiating process in place for over three years now has not yielded a single, productive thing in Nova Scotia other than to bring entirely legitimate grievances to a boiling point. Chief Terry, you said it best in April 2019 while appearing as a witness with Bruce Wildsmith at the Senate Standing Committee on Fisheries and Oceans you declared that even the Fisheries Act:

"...doesn't address the Supreme Court decision that we have a treaty right to fish for our livelihood. That's not what is being discussed at the highest levels.

I'm sorry, but this is how I feel because of the experience I have had over the years. In 35 years as chief, the bureaucracy that is in existence has had a certain way of thinking, and we're not part of that thinking. It's brand new to the bureaucracy. The bureaucracy was not ready for this decision. I said that because I was told by those very bureaucrats."

And yet, it is the *Fisheries Act* itself that is intended to be the legal instrument that protects and enshrines Mi'kmaw fishing rights and should thus constitutionally enable the intent of the *Marshall* decision to be brought to life and ensuring that Section 2.3 of the *Fisheries Act* is realized, "*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.*"

It comes as no surprise that the Jim Jones process has been entirely unsuccessful in Nova Scotia, since as you point out in your letter that federal negotiators have been provided with a mandate to negotiate only one form of access, which is inconsistent with the needs and vision of our communities.

It seems to be abundantly clear to me that this one form of access has two bases: one, that communities must come under the DFO system of regulation, the Canadian commercial fishery regime – instead of adopting a Mi'kmaw form of governance. Secondly, the Jim Jones process entails working with each individual community and as such prevents the inherent benefits of working as a collective. When I first arrived to the Senate I had been seeking to have then-DFO Minister Leblanc deal with the Assembly of Nova Scotia Mi'kmaw Chiefs directly – yet, three years on Jim Jones is still trying to broker deals on a community-by-community basis.

The Jones process is flawed -- dealing with the lowest common denominator to try and get communities to sign on. One can't buy one's way into an agreement; it's no wonder that the Chiefs are entirely frustrated.

The bottom line is that it's not *about* money – and yet Jim Jones is offering Nova Scotia communities \$84 million over ten years. Let's be frank: these are merely interim agreements that do absolutely nothing to define moderate livelihood nor a governance framework acceptable to the Mi'kmaq around it. The Jones process and all it seeks to achieve in no way accommodates our requirement for Mi'kmaw governance around the critical issue of moderate livelihood.

A New and Better Way Forward

Now that the full nature of the problem and its impacts have been defined I'd like to turn to the notion of advocacy and the development of ways we can achieve our aims through working with the federal government.

To this end, I am pleased to share the fact that the three Mi'kmaw parliamentarians have formed an advocacy team. Sydney-Victoria MP, Jaime Battiste, PEI Senator Brian Francis and I have been working

both individually and as a team, meeting with Ministers Bennett and Jordan and others, laying the groundwork for a viable, Indigenous-led alternative to the Jim Jones process.

I'd like to offer the proposed terms of our proposal:

1. Re-align government assignment of the responsibility for the Moderate Livelihood Fishery

As you may know, it is my best advice that responsibility for this file and negotiations around moderate livelihood be shifted to Crown-Indigenous Relations (CIRNA) given the reality that we are dealing a matter of *governance* around Section 35 Constitutional rights, and no longer a *regulatory* matter under the purview of DFO.

The proposed new path would still see a relationship with DFO but in a more peer-to-peer, collaboration-based model free of any hierarchical reporting requirements to the department – besides which, the establishment and ramping up of such a governance body is strongly aligned to the business of CIRNA. It is therefore logical, practical and indeed critical that responsibility for the file move from DFO to CIRNA.

2. Creation of an Atlantic First Nations Fisheries Authority

As an expression of the right to governance under Section 35 Aboriginal and Treaty rights – we need the government to invest in a governance infrastructure in Atlantic Canada and create an organization and a body that deals with governance of the Atlantic Indigenous fishery – for and by the Mi'kmaq and Maliseet – communities who would be permitted to opt in at their own choice.

The authority would require planners that would assist First Nations in the development of fisheries management plans. Dedicated leadership would also be required to work with CIRNA on discussions around those fisheries management plans.

An Indigenous management system would be required to hire and employ Indigenous fishery conservation officials and also Indigenous fishery monitors to go on vessels; the former would ensure conservation laws are followed, and the latter would measure degrees of compliance with the respective fisheries management plans. Lastly, a reporting system would of course be required and absolutely necessary to report on all activities, the number of catches, and so forth.

3. *Netukulimk*: The traditional legal order of the Mi'kmaq

We recommend this governance authority function under the traditional legal order of the Mi'kmaq known as *Netukulimk* – the centuries-old approach to governing harvesting of all kinds. Each community would develop its own *Netukulimk Fisheries Management Plan* – essentially management plans based on Mi'kmaw law.

Government investment would be in the way of funding infrastructure, providing the means for communities to manage their own plans. The by-product would be expressions of what constitutes "*moderate livelihood*" for each of the communities opting into the *Netukulimk*

model, negotiated by and for Atlantic Canada's Indigenous peoples as an expression of self-government around fish harvesting – operating under traditional Indigenous values.

In conclusion, Chief Terry, I wish to assure the Chiefs to the greatest extent possible, of our clear desire to see progress on this most critical of initiatives. We have heard your wishes for advocacy towards a way forward. I hope and trust we have adequately defined our concept for a new and better path to governance of the Mi'kmaw fishery.

With the support of yourself and the Assembly Chiefs, we are prepared to vigorously advocate to the federal government -- and in particular, to the Ministers of CIRNA and DFO -- this new way forward, a second and better path, mandated to operate under a Mi'kmaw governance model, with departmental responsibility under CIRNA and no longer DFO.

Our pursuit in this regard has already begun – and the Assembly's support of this proposal will give us greater fuel to see government accept this plan, fund its creation, operations and establishment, to the benefit of Mi'kmaq and Maliseet communities and our livelihood fishers.

A recent editorial by DFO Minister Jordan gives us cause for encouragement, as suggested by these comments:

'The recent events surrounding Nova Scotia's fisheries have brought the treaty relationship to the forefront. This is exactly where it needs to be. Many non-Indigenous Canadians now understand that the Mi'kmaq have a constitutionally protected treaty right to fish in pursuit of a moderate livelihood.

When we understand our history and responsibility as treaty people, it changes how we understand these moments. This is not about creating a brand new fishery outside the law. This is about actualizing a fishery that always had a right to exist. This can be a turning point in our treaty relationship.

We need to do things differently. In this instance, that means working in partnership with First Nations to launch a fishery that members of their community can earn a moderate livelihood from. It means working together to ensure the fishery is viable, sustainable, has the tools it needs to succeed, and where conservation of the resource for generations to come is key.

Reconciliation is an uncomfortable and difficult process, as we unlearn and relearn our history — and it will certainly mean changing the way things have always been done. But as I relearn our shared history, I see this as something we need to be committed to as Canadians.

This is a promise we have made as treaty people."

On the strength of such commentary, progress may indeed be closer in reach than we suspect.

In respect, and in Recognition of Mi'kmaw Rights and Title,



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