

Oct 2, 2023

TO: "J.M. Denis Lavoie Senior Counsel Public Prosecution Service of Canada"
<J.M.Denis.Lavoie@ppsc-sppc.gc.ca>

RE: His Majesty the King v. Cody Caplin Notice of Motion for a declaration of unconstitutionality

CC: "Honourable Judge % Judicial District of Campbellton" <PC-Campbellton-CP@gnb.ca>, "Hon. Hugh J.A. (Ted) Flemming, K.C. Attorney General, Government of New Brunswick" <Hugh.Flemming@gnb.ca>, "Premier Blaine Higgs" <Blaine.Higgs@gnb.ca>, "The NB Minister of Aboriginal Affairs Hon. Arlene Dunn" <Arlene.Dunn@gnb.ca>, The Governor General of Canada Her Excellency the Right Honourable Mary Simon <info@gg.ca>,

Dear Mr. Lavoie,

In response to the Crown's request for notice of the context of my s. 35 claim, I provide the following information in response to the ten areas of concern outlined in Mr. Lavoie's letter of May 4th, 2023.

1. The particular Aboriginal right being raised is my right as a Mi'kmaw person to fish in the unceded waters of my people for food for personal subsistence.
2. I am a Mi'kmaw national, a status Indian registered to Eel River Bar Indian Reserve, and 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, grandma and I walked out to the railroad line going from Montreal to Halifax, and that she entered the train and spoke to the conductor about our "treaty" rights to travel, and that the train took us where we 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.
3. The Indian Reserve of Eel River Bar was the one upon which my ancestors were rounded up and forced to live upon as the racist and genocidal *Indian Act* was imposed upon our people in violation of international law and our inherent Aboriginal and treaty rights. Previously free to roam across our vast unceded homelands, the *Indian Act* empowered police forces to repress our traditional governance systems, force our

children into residential schools, and concentrated our people onto small reserves which they were not allowed to leave without a pass from the local Indian Agent. According to the Canadian Encyclopedia, <https://www.thecanadianencyclopedia.ca/en/article/micmac-mikmaq> in the 1940s alone, the Department of Indian Affairs forced more than 2,000 Mi'kmaq people living in numerous small communities to relocate to government-designated reserves like Eel River Bar. "The moves, undertaken for the sole purpose of streamlining government administration were fraught with mismanagement and experimental tactics, and had disastrous effects on the communities. Homes, churches and industries were abandoned and replaced with poor conditions and economic dependency."

4. Fishing for food has been a practice of my people since time immemorial. 489 years ago, (on July 7th, 1534 to be exact,) the first documented trade exchange between Europeans and Indigenous people in Canadian history took place near Eel River Bar when French explorer Jacques Cartier was [mapping the coast](#) near Ugpig'anjig and was intercepted by a flotilla of some 50 Mi'kmaq canoes. Our people were fishing in our own waters for food when we met Cartier, and we have continued to do so, despite centuries of European interference and genocidal policies.
5. My family members have a long history of fishing for food and trade. Our family's last name is derived from the name of the Capelin fish which has long been an important source of food for our people.
6. My constitutionally protected Aboriginal and treaty right to fish for food is one that was a historic practice of my people and which has been continuously exercised by my family members and ancestors in the local geographical area of concern.
7. The charges I am facing are for allegedly violating the "Aboriginal Communal Fishing License Regulations" SOR/93-332 and the *Maritime Provinces Fishery Regulations* SOR/93-55. The Aboriginal Communal Fishing License Regulations were created by means of fraudulent interim Fishing Agreements made by the Jean Chretien's Liberal government with their own *Indian Act* Band Councils after the Marshall decision of September 19, 1999. Chief Everett Martin of Eel River Bar Indian Reserve allegedly signed an interim Fisheries agreement with James A. MacKenzie, an appointed representative of the Minister of Oceans and Fisheries (DFO) under Cabinet Minister Herb Dahliwal. The Interim Fisheries Agreement was drafted in Ottawa by DFO officials through a back-room process, and was then faxed to Eel River Bar, addressed to Chief Everett Martin. I have evidence that the signatures on this interim fishing agreement of both Chief Everett Martin and James A. MacKenzie are forgeries, and that the document itself is a fraud designed to undermine our aboriginal and treaty rights. The purpose of these Interim fishing agreements was to subvert the Supreme Court's ruling in the Marshall decision and to bribe *Indian Act* leaders into selling out our Aboriginal and treaty rights in exchange for millions of dollars in federal funding.

I further note that Section 3(4) of the Interim Fisheries Agreement states that, "Except for

the purpose of enforcing the terms of this Agreement, the Parties undertake not to bring the existence of this Agreement to the attention of any court, board, or other tribunal, and agree not to seek the introduction into evidence before any court, board or tribunal of any matter relating to discussions, meetings, consultations, or documents regarding the negotiation of this Agreement or generated as a result of it.” Created by the Federal government and negotiated in secret, and signed with fake signatures, the Interim Fisheries Agreement is in every way a violation of my Constitutionally protected Aboriginal and treaty rights and does not represent a legitimate infringement upon my rights.

8. The historic Mi'kmaq community to which my present-day aboriginal community is descended from was a signatory to the Peace and Friendship treaty made on June 25th, 1761 on the banks of the Miramichi river which was renewed at LeHeve, in Nova Scotia on the 9th of November 1761. As noted by the Nova Scotia Supreme Court ruling of [R. v. Isaac, 1975 CanLII 2416 \(NS CA\)](#) “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.” Justice MacKeigan stated 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.” At the time of the 1763 Royal Proclamation, what is now known as the Province of New Brunswick was considered to be part of the Province of Nova Scotia.
9. My people's right to fish for food was historically exercised by my ancestors in the local geographic area of concern and continues to be exercised today.
10. My treaty and Aboriginal rights are infringed by the failure of the DFO to uphold the Marshall decision of 1999 and to seek a way around this decision through the creation of "Aboriginal Communal Fishing License Regulations" through fraudulent "Interim Fishing Agreements" signed with federally controlled *Indian Act* bodies that are responsible to the Minister of Indian Affairs and not to Mi'kmaq people. The fundamental problem stems from the unconstitutional nature of Section 91(24) of the *British North America Act* which violates my constitutionally protected Section 25 and 35 Aboriginal and Treaty rights. No consultation or agreement with Mi'kmaq people was ever made by the Imperial Crown to change or transfer our treaty relationship to the Federal Government of the Dominion of Canada. We never ceded or surrendered our lands and waters, and those lands and waters were never paid for by the Crown. Openly racist Canadians seeking profit from our lands and natural resources then proceeded to unilaterally impose the genocidal *Indian Act* in 1876 based on the “exclusive Legislative Authority” jurisdiction given to the Federal government for “Indians and Lands Reserved for Indians” under Section 91(24) of the *BNA Act*.

In regards to the suggestion that my right to feed myself by fishing on the unceded territory of my people is “communal and not individual,” the Mr. Lavoie is displaying his ignorance of Mi'kmaq customs and conventions which never prevented us from eating. As a Mi'kmaw man, I

am the one responsible for feeding myself and supporting my family. I have a personal relationship with all the creatures of creation, and the choice of what food I put in my belly and is individual in the deepest sense of the word. We Mi'kmaq are a free and sovereign people with the right to sustain ourselves from the lands our creator placed us on, as long as we are not harming others or violating Mi'kmaq custom and convention.

To the extent that there is a "communal" or "collective" entity with a say upon where and how I feed myself, it is one based upon my extended family or clan and our traditional system of governance. The *Indian Act* Band Council which was created by Canada and imposed on our people for the purposes of destroying our culture, economy, and hereditary system of clan based leadership is not a legitimate communal organization for Mi'kmaq people. The Band Council is not an "Indian," and it does not hold any Aboriginal and treaty rights of its own – either individually or collectively.

The fact that the Canadian government negotiated "Interim Fishing Agreements" with itself as a way to get around constitutionally protected Aboriginal and treaty rights recognized by the Supreme Court of Canada is outrageous, all the more so as the Interim Fishing Agreement in Eel River Bar is fraudulent and was created in secrecy, and richly rewarded those who sold out our rights.

The attempt by the Crown to avoid addressing the important issue of my Constitutionally protected Aboriginal and treaty rights, and to summarily dismiss my constitutional claim would bring dishonour to the Crown and continue a long legacy of racism and discrimination against Mi'kmaq people.

Finally, I request that my court case be transferred from the Provincial court of New Brunswick to the jurisdiction of the Federal Court based in Fredericton, NB, effective immediately.

Sincerely,



Cody Caplin