Court file number: 06191210

CANADA
PROVINCE OF NEW BRUNSWICK
PROVINCIAL COURT
JUDICIAL DISTRICT OF CAMPBELLTON

BETWEEN:

THE MINISTER OF FISHERIES AND OCEANS CANADA
Respondent on motion / Prosecution

-and-

KYLE EDWARD JOSEPH CAPLIN
Applicant on motion / Defendant

NOTICE OF MOTION SEEKING A DECLARATION OF UNCONSTITUTIONALITY BY KYLE EDWARD JOSEPH CAPLIN

FOR THE TRIAL SCHEDULED TO COMMENCE ON DECEMBER 14, 2021, IN CAMPBELLTON, NEW BRUNSWICK

TO:

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FROM:

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Date of Hearing : December 14, 2021, to December 16, 2021 (3-days)

Via registered mail with enclosed authorities and electronic copies by e-mail at agc_pgc_aro-bra@justice.gc.ca, johanne.theriault@gmail.com, pc-campbellton@gnb.ca.

Court file number: 06191210

FORM 3

NOTICE OF MOTION SEEKING A DECLARATION OF UNCONSTITUTIONALITY

CANADA
PROVINCE OF NEW BRUNSWICK
PROVINCIAL COURT
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KYLE EDWARD JOSEPH CAPLIN

Applicant on motion / Defendant

NOTICE OF MOTION SEEKING A DECLARATION OF UNCONSTITUTIONALITY

PLEASE TAKE NOTICE that a motion will be brought at 8:30a.m. on the 14th day of December 2021, in the Provincial Court of New Brunswick in the Campbellton Judicial District, New Brunswick, for an order to declare as unconstitutional and of no force or effect, in whole or in part, the following, enactment, principle or rule of law in so far as they may apply to the facts of this matter:

1. The condition in the 2018-2019 Eel River Bar First Nation Aboriginal Communal Fishing License (License No. 2018/19-FSC-0006-02) prohibiting designated fishers from catching and retaining lobsters of a size of less than 77 mm; and, if necessary, Section 7 of the *Aboriginal Communal Fishing Licenses Regulations*, SOR/93-332, subsection 78(a) of the *Fisheries Act*, RSC 1985, Ch. F-14 (the version in force from

2016-04-05 to 2019-06-20) (the "*Fisheries Act*"), and the 2018-2019 Eel River Bar First Nation Aboriginal Communal Fishing License.

2. The condition of the 2018-2019 Eel River Bar First Nation Aboriginal Communal Fishing License (License No. 2018/19-FSC-0006-02) requiring designated fishers to affix a tag, float, or buoy to each end of the fishing gear; and, if necessary, Section 7 of the *Aboriginal Communal Fishing Licenses Regulations*, SOR/93-332, subsection 78(a) of the *Fisheries Act*, and the 2018-2019 Eel River Bar First Nation Aboriginal Communal Fishing License.

3. The condition of the 2018-2019 Eel River Bar First Nation Aboriginal Communal Fishing License (License No. 2018/19-FSC-0006-02) requiring designated fishers to attach a valid tag to the lobster trap; and, if necessary, Section 7 of the *Aboriginal Communal Fishing Licenses Regulations*, SOR/93-332, subsection 78(a) of the *Fisheries Act*, and the 2018-2019 Eel River Bar First Nation Aboriginal Communal Fishing License.

4. The minimum length of lobster set out in item 23 of column III of Schedule XIV, of the *Atlantic Fishery Regulations*, 1985, SOR/93-61 (the version in force from 2018-05-30 to 2020-11-22) (the "*Atlantic Fishery Regulations*"); and, if necessary, subsection 57(2) of the Atlantic Fishery Regulations, as varied by Variation Order 2018-013, and subsection 78(a) of the *Fisheries Act*.

5. Subsection 27(1)b) of the *Fishery (General) Regulations*, SOR/95-242 (the version in force from 2018-05-30 to 2020-11-29) (the "*Fishery (General) Regulations*") which prohibits any person from setting, operating, or leaving lobster traps unattended in the water unless the traps are marked in the manner prescribed in subsections 27(2) to 27(6) of the same Regulations; and, if necessary, subsection 78(a) of the *Fisheries Act.*

6. The prohibition to fish for lobster in lobster fishing area 23(a) - the water adjacent to *Ugpi'ganjig* Eel River Bar First Nation - as set out in item 23 of column I of Schedule XIV of the *Atlantic Fishery Regulations*, during the prescribed close time that is set out in column II of that item; and, if necessary, subsection 57(1)a) of the *Atlantic Fishery Regulations*, and subsection 78(a) of the *Fisheries Act*.

7. The prohibition to possess lobster in lobster fishing area 23(a) - the water adjacent to *Ugpi'ganjig* Eel River Bar First Nation - as set out in item 23 of column I of Schedule XIV of the *Atlantic Fishery Regulations* during the prescribed close time that is set out in column II of that item; and, if necessary, subsection 78(a) of the *Fisheries Act*.

8. The prohibition to have a trap on board a vessel, in lobster fishing area 23(a) as set out in item 23 of column I of Schedule XIV of the *Atlantic Fishery Regulations* during the prescribed close time that is set out in column II of that item; and, if necessary, subsection 78(a) of the *Fisheries Act*.

9. The prohibition to fish for lobster without authorization set out in Schedule I of the *Atlantic Fishery Regulations*, 1985 SOR/86-21 (the version in force from 2018-08-30 to 2020-11-22); and, if necessary, subsection 14(1)b) of the *Atlantic Fishery Regulations*, and subsection 78(a) of the *Fisheries Act*.

THE GROUNDS FOR THIS APPLICATION ARE:

1. That Kyle Edward Joseph Caplin is a Mi'kmaq person, member of *Ugpi'ganjig* Eel River Bar First Nation, who is registered as a status Indian. His Indian status number is 0080117501.
2. That the main constitutional issues raised by this matter are *res judicata*, having already been decided by the Supreme Court of Canada in favor of Mi'kmaq, notably on September 17, 1999, in *R v Marshall*, [1999] 3 S.C.R. 456 ("*Marshall I*").
3. That Kyle Edward Joseph Caplin enjoys a limited immunity from prosecution under the impugned provisions of the *Fisheries Act* and *Regulations* in this matter, based upon his Mi'kmaw treaty rights to fish, notably the treaty rights to fish contained in the Mi'kmaq – Crown Treaty of 1760 – 61, his aboriginal rights to fish, and the protection afforded by s. 35 (1) of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("*Constitution Act*, *1982*").
4. That to the extent which the impugned provisions of the *Fisheries Act* and *Regulations* are inconsistent with Kyle Edward Joseph Caplin's constitutional rights, section 52 of the *Constitution Act*, *1982* renders them of no force and effect.
5. That the Crown cannot possibly justify the infringement of Kyle Edward Joseph Caplin's constitutional Mi'kmaw, treaty and aboriginal rights under the test for justification set out in *R v Badger*, [1996] 1 SCR 771 ("*Badger*") and *R v Sparrow*, [1990] 1 SCR 1075, ("*Sparrow*").
6. That the prosecution of Kyle Edward Joseph Caplin in the New Brunswick Provincial Court for violations of the *Fisheries Act* and *Regulations* is an inconvenient forum for judging the important constitutional issues raised by this matter.
7. That the *res judicata* constitutional issues in this matter involve the interests of many people who are not otherwise involved in the prosecution of Kyle Edward Joseph Caplin.
8. That it is possible the Mi'kmaw elders, leaders and knowledge keepers who provided the material evidence when these *res judicata* constitutional issues were initially adjudicated, such as, for example, Donald Marshall Jr., are now deceased or are otherwise unavailable.
9. That, as stated by Morrison J of Court of Queen's Bench of New Brunswick Summary Conviction Appeal Court in *R v Reynolds*, 2016 NBQB 018 at paragraph 25 affirmed by in *R v Reynolds* 2017 NBCA 36 ("*R v Reynolds*") by a unanimous New Brunswick Court of Appeal, "[t]he limitations of the Provincial Court processes with respect to broad fact-finding (i.e. no provision for examination for discovery, document discovery etc.) are an impediment to thorough consideration of the often complex social and legislative facts presented in constitutional cases".
10. That, as the Supreme Court of Canada states in *obiter dicta* in *R v Marshall/R v Bernard*, 2005 SCC 43 at paragraphs 142 – 143, constitutional issues involving treaty and aboriginal rights are perhaps better resolved by consultation, negotiation, and reconciliation rather than by the prosecution of a Mi'kmaq in the criminal justice system.

11. That the honour of the Crown has the status of a constitutional principle in Canadian Law, as Binnie J states in *Beckman v Little Salmon/Carmacks*, 2010 SCC 53 at paragraph 42, referring to *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 ("*Haida*") at paragraph 32.

12. That, as then Chief Justice Mclachlin states in *Haida* at paragraph 19, the honour of the Crown "infuses the process of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41)".

13. That, in *Marshall I* at paragraph 4, the majority of the Supreme Court of Canada supports its interpretation of the Mi'kmaw treaty right to fish contained in the Mi'kmaq – Crown 1760 – 61 Treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship . . .".

14. That when an Mi'kmaw person, such as Kyle Edward Joseph Caplin, is accused of violating the provisions the impugned *Fisheries Act* and *Regulations*, they have the right to raise treaty and aboriginal rights based arguments in their defense. However, the evidence required to satisfactorily prove the *res judicata* constitutional issues which are then evoked becomes less relevant and less material to the merit of the allegations against which the Mi'kmaw person is defending.

15. That a Mi'kmaw accused, such as Kyle Edward Joseph Caplin, who raises their constitutional Mi'kmaw treaty and aboriginal rights to fish in their defense, is faced with an unfair access to justice issue. They are required to bear the onerous physical, psychological, and financial burdens associated with complex litigation of *res judicata* constitutional issues against Canada who, from the Mi'kmaw accused's perspective, has practically unlimited financial resources to fund the litigation.

16. That, from the perspective of the Mi'kmaw accused, failure to correctly plead the important nuances of constitutional Mi'kmaw treaty and aboriginal rights to fish in the New Brunswick Provincial Court risks setting an unfavorable judicial precedent which may have the Crown's apparent desired effect of retrogressing Mi'kmaw progress in Canadian law and society.

17. That this access to justice issue requires the Mi'kmaw accused to employ legal counsel with a particular skill set applicable to Mi'kmaw issues ultimately amounting to additional onerous costs and disbursements the Mi'kmaw accused is required bear.

18. That the existence of the impugned provisions of the *Fisheries Act* and *Regulations* which purport to regulate constitutional Mi'kmaw treaty and aboriginal rights to fish is evidence of the existence of constitutional Mi'kmaw treaty and aboriginal rights to fish.

19. That the Supreme Court of Canada affirms in *Simon v the Queen* [1985] 2 SCR 387 ("*Simon*") that the Mi'kmaq – Crown treaties, in the circumstances this case specifically the Mi'kmaq – Crown Treaty of 1752, continue to operate in force in Canadian law and affirmatively bind the Crown.

20. That Mi'kmaw aboriginal rights to fish under section 35(1) of the *Constitution Act*, *1982* have been affirmed by the Nova Scotia Court of Appeal since March 5, 1990, in *R v Denny* 94 NSR (2d) 253, [1990] 2 CNLR 115 ("*Denny*").

21. That the Mi'kmaw treaty rights to fish do not negate from Mi'kmaw aboriginal rights to fish. These constitutional laws function in symbiosis.

22. That the impugned provisions of the *Fisheries Act* and *Regulations* significantly restrict, and *prima facie* infringe upon, Kyle Edward Joseph Caplin's exercise of his constitutional Mi'kmaw treaty and aboriginal rights to fish.

23. That, as Lamer CJC states in *R v Adams*, [1996] 3 RCS 101, at page 132, "… [i]n light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative [licensing] regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance…", affirmed in *Marshall I* at page 504.

24. That, as the Supreme Court of Canada states in *Sparrow* at page 1112, in interpreting and analyzing aboriginal fishing rights, "…it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."

25. That, as Lamer CJC further emphasizes in *R v Van Der Peet*, [1996] 2 SCR 507 ("*Van Der Peet*") at paragraphs 49 and 50, "the only fair and just reconciliation is … one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each", affirmed in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at paragraphs 81 and 87.

26. That the condition in the 2018-2019 Eel River Bar First Nation Aboriginal Communal Fishing License, found on page 4, which purports to prohibit *Ugpi'ganjig* designated Mi'kmaw fishermen and fisherwomen from catching and retaining lobsters of a size of less than 77 mm does not give top priority to Mi'kmaw fishermen and fisherwomen in their food, social, and ceremonial fishery over other user groups in the allocation of any surplus fishery resources once the needs of conservation have been met.

27. That the minimum length of lobster set out in item 23 of column III of Schedule XIV, of the *Atlantic Fishery Regulations* is 75 mm. Therefore, a holder of a valid license to fish for lobster in the commercial lobster fishery is permitted to catch and retain lobsters that are 2 mm smaller than the minimum length lobster a designated fisher is permitted to catch and retain under the 2018-2019 Eel River Bar First Nation Aboriginal Communal Fishing License during the purported food, social and ceremonial fishery season.

28. That, from a Mi'kmaw perspective, the *Fisheries Act Regulations* which purport to establish the minimum length lobster a Mi'kmaw fisherman and fisherwoman is permitted to catch and retain represent an arbitrary exercise of Crown administrative discretion in that the regulations permit commercial fishermen and fisherwomen to catch and retain 75 mm minimum length lobsters in Lobster Fishing Area 23 whereas *Ugpi'ganjig* Eel River Bar First Nation Mi'kmaw fishermen and fisherwomen in are only permitted to catch and retain 77mm minimum length lobsters for food, social and ceremonial purposes in waters adjacent to their reserve.

29. That this distinction on minimum length of lobster is an arbitrary exercise of Crown administrative discretion and is unconstitutional. The distinction is based on national origin and race (although with reserve for race because, technically, Mi'kmaq is not a race, it is a nationality; Indian is a pejorative broad category that, from a European perspective,

encompasses many nationalities). These are grounds enumerated in subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act*, *1982* (UK), 1982, c 11 ("*Charter*").

30. That this arbitrary distinction on minimum length of lobster perpetuates a historical disadvantage and has an immediate prejudicial impact on Kyle Edward Joseph Caplin in this matter.

31. That this distinction cannot be saved by section 1 of the *Charter*.

32. That subsection 24(1) of the *Charter* is remedial in nature. Under subsection 24(1) of the *Charter*, the New Brunswick Provincial Court has a broad scope of powers to fashion just and appropriate remedies applicable to the *res judicata* constitutional issues raised in this matter.

33. That section 25 of the *Charter* limits *Charter* rights so they are not construed to abrogate or derogate from either the aboriginal or the treaty rights of the Mi'kmaq.

34. That the Mi'kmaw treaty rights are part of the prerogative constitutions of Nova Scotia, New Brunswick, and Prince Edward Island. These constitutionally protected Mi'kmaw treaty and aboriginal rights could not be extinguished by colonial laws, either provincial or federal. They are protected from provincial laws by federal laws. They were not extinguished at the time of the adoption of the *Constitution Act*, *1982*.

35. That the words of section 35 of the *Constitution Act*, 1982 did not give Parliament a power to regulate the Mi'kmaw treaty rights.

36. That, while the *Marshall I* majority judgment affirms Canada's general regulatory power, it does not resolve the issue of the nature of the specific regulation of the constitutional Mi'kmaw treaty rights.

37. That the *trial* judge in the *Marshall* proceeding, Nova Scotia Provincial Court judge John Embree, heard 41 days of testimony in 1995-96. Neither counsel for Donald Marshall Jr. nor the Crown prosecutors presented evidence on the scope of the regulatory power possessed by Canada over Mi'kmaw treaty rights to fish.

38. That the West Nova Fishermen's Coalition was added as an intervener to the *Marshall* proceeding by order dated April 7, 1998. After the Supreme Court of Canada released *Marshall I* on September 17, 1999, the West Nova Fishermen's Coalition applied for a rehearing of *Marshall I* and a stray of the judgment. The West Nova Fishermen's Coalition also sought a further trial on the issue whether the application of the fisheries regulations to the exercise of a Mi'kmaw treaty right could be justified on conservation or other grounds. It was only at this stage in the *Marshall* proceedings that West Nova Fishermen's Coalition raised issues relating to the scope of the Government of Canada's regulatory authority over constitutional Mi'kmaw treaty rights. The Supreme Court denied the exceptional motion for rehearing but used the opportunity to issue an unusual clarifying decision, *R v Marshall*, [1999] 3 RCS 533 ("*Marshall II*"), justifying its earlier ruling and providing a more explicit statement of the limits of the treaty right.

39. That, in *Marshall II*, the Supreme Court of Canada states at paragraph 6, "…[t]hese cases [*Sparrow* and *Badger*] were referred to in the September 17, 1999, majority judgment

[*Marshall I*], but the applicable principles were not elaborated because justification was not an issue which the Crown chose to make part of this particular prosecution, and therefore neither the Crown nor the defence had made submissions respecting the government's continuing powers of regulation".

40. That, relative to Treaty 8, in *Badger* at paragraph 75, Cory J states for the majority of the Supreme Court of Canada that although the justificatory test formulated in *Sparrow* applied to aboriginal rights and made no mention on its potential bearing upon treaty rights, the test applied to a treaty right "in most cases." This conclusion is based on the wording of Treaty 8 which expressly provides that treaty rights contained therein are "…subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty…".

41. That Mi'kmaw treaty rights to fish are distinct from the situation of aboriginal rights to fish not affirmed by treaties which was the case in the *Sparrow* factual matrix.

42. That, as the Supreme Court of Canada establishes in *R v Guerin*, 2002 SCC 79, [2002] 4 SCR 245 ("*Guerin*") and *Sparrow*, the Crown has a fiduciary relationship with the Mi'kmaq. The duty arises from the aboriginal and treaty rights of the Mi'kmaq, the Crown commitments in the *Royal Proclamation of 1763* and the *Constitution Act*, *1982*, as well the Crown's assumption of control over those Mi'kmaw rights.

43. That, as Justice Beverely McLachlin (as she then was) writes in *Van der Peet* at paragraph 263, "[t]he history of the interface of Europeans and the common law with aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet running through this history, from its earliest beginnings to the present time is a golden thread—the recognition by the common law of the ancestral laws and customs the aboriginal peoples who occupied the land prior to European settlement".

44. That, as then Chief Justice Beverely McLachlin writes in *T'silhotqin Nation v British Columbia*, 2014 SCC 44 at paragraph 69*,* "[a]t the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation of 1763*. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown."

45. That, as then Chief Justice of Nova Scotia MacKeigan states in *R v Isaac*, (1975) 13 NSR (2d) 460 (*"Isaac*") at paragraphs 57 and 58 for a unanimous Nova Scotia Court of Appeal Justices "… [n]o [Mi'kmaw] Nova Scotia treaty has been found whereby [the Mi'kmaw] 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. […] Agreements with [the Mi'kmaq] the Indians in the Maritimes were primarily treaties of peace and, informal sometimes oral. They were pledges of peace…".

46. That the Mi'kmaq – Crown treaties are a conduit between distinctive normative legal orders.

47. That the Mi'kmaq have rights to self-determination and to self-governance with respect to regulating the Mi'kmaw traditional lands, waters, and resources, including with respect to regulating the Mi'kmaq in their fishery.

48. That Mi'kmaw rights to self-determination and self-governance are affirmed in the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) A/61/L.67 ("*UNDRIP*"), notably at articles 3, 4, and 5.

49. That subsection 4(a) of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 4 affirms *UNDRIP* "as a universal international human rights instrument with application in Canadian law".

50. That the Federal *Act Respecting First Nations, Inuit and Métis children youth and families*, SC 2019, c 24 states at section 8 (a) "[t]he purpose of this act is to (a) affirm the inherent right of self-government…". In the preamble of this Federal *Act*, Parliament also "affirms the right to self-determination of Indigenous peoples, including the right to self government […] [and] …the need to respect diversity of all Indigenous peoples, including the diversity of their laws, rights, treaties, histories, cultures, languages, customs and traditions…".

51. That, in the Mi'kmaq – Crown treaties, the Crown assured Mi'kmaq that British law (now provincial and federal laws) would not molest, hinder, or interfere with Mi'kmaw fishing under Mi'kmaw law.

52. That subsection 35(1) of the *Constitution Act*, *1982*, constitutionally ensures the Mi'kmaq, among other rights, the ancestral right to fish according to Mi'kmaw law.

53. That the implementation of the affirmative constitutional Mi'kmaw treaty and aboriginal rights to fish, as well as the protection of the Mi'kmaq in carrying out their rights is urgent.

54. That the Canadian legal system must reconcile itself to the coexistence with pre-existing Indigenous legal orders. Perhaps, as then Chief Justice of British Columbia Lance Finch (2012) suggests on pages 15-16 at 2.1.1 of his article entitled "The Duty to Learn", "a crucial part of this process must be to find space for ourselves, as strangers and newcomers, within the Indigenous legal orders themselves." : Hon. Lance S. G. Finch, "*The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice*" (paper-delivered at "Indigenous Legal Orders and the Common Law," Vancouver, BC.

55. That the report of the Royal Commission set up to examine the prosecution Donald Marshall Jr., who spent eleven years in prison for a murder he did not commit, contains numerous recommendations that the Crown determine the extent to which Indigenous legal orders should be incorporated into the criminal and civil law as it applies to Indigenous People : *The Royal Commission on the Donald Marshall Jr., Prosecution: commissioners' report: findings and recommendations, vol 1 (Halifax: The Commission, 1989)*.

56. That the principles of cooperative federalism are evidence that multiple normative legal orders can coexist symbiotically in Canada's legal system.

57. That Canada is and always was a multijuridical nation with a constitution analogous to a living tree, planted upon the Mi'kmaq – Crown treaties, that can and must grow and evolve in function with the norms of Canada's free and democratic society.

58. That the constitutional Mi'kmaw treaty and aboriginal rights to fish can be regulated, but

it is the Mi'kmaq themselves who have priority jurisdiction with respect to regulating the Mi'kmaq in their fishery.

59. That the meaningful exercise of the constitutional Mi'kmaw treaty and aboriginal rights to fish, as well as the corollary Mi'kmaw responsibilities to sustainably regulate halieutic resources for seven generations, is integrally linked to the Mi'kmaw culture, identity, language, and well-being.

60. That the *Indigenous languages Act*, SC 2019 c 23 at section 6 states "the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act*, *1982* include rights related to Indigenous languages."

61. That, as then Chief Justice McLachlin states in *Mahe v Alberta*, [1990] 1 SCR 342 at page 362, "the fact that any broad guarantee of language rights […] cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity of the people speaking it. It is the means by which individuals understand themselves and the world around them".

62. That in the Mi'kmaw language, Mi'kmaw law is called *L'nuey Tplutaqan* : Tuma Young, "L'nuwita'simk: A Foundational Worldview for a L'nuwey Justice System" (2016) 15 Indigenous LJ 75.

63. That *L'nuey Tplutaqan* has always regulated the Mi'kmaq in their fishery.

64. That the normative legal principles of *L'nuey Tplutaqan* are culturally entrenched and embodied in the Mi'kmaw language and in Mi'kmaw *ta'n wetapeksulti'kw* the stories specific to certain Mi'kmaw families and where they come from in the Mi'kmaw traditional territory *Mi'kma'ki*. The Mi'kmaw language provides a focal point for the Mi'kmaq to understand both the Mi'kmaw culture and the intimate Mi'kmaw relationship with *Mi'kma'ki*.

65. That the Mi'kmaw legal principle *Netukulimk* has to do with fulfilling the responsibilities and obligations for sustainability of the Mi'kmaq people and the environment in a mutually enhancing livelihood for seven generations.

66. That the *Listuguj Mi'kmaq First Nation Law on the Lobster Fishery and Lobster Fishing*, 2019-01, published in the First Nations Gazette at Part II, in force since June 17, 2019, is a relevant and material example of the Mi'kmaw law regulating the Mi'kmaq in their fishery in accordance with *Netukulimk* Mi'kmaw legal obligations for sustainability.

67. That the honour of the Crown is related to the Crown's fiduciary relationship to the Mi'kmaq, but it is fundamentally different and has different legal implications for the Crown.

68. That the honour of the Crown is always at stake in all the Crown's dealings with the Mi'kmaw people, as the Supreme Court of Canada confirms in *Badger* at paragraph 41.

69. That not all aspects of the Crown's relationship with the Mi'kmaq are fiduciary, as the Supreme Court of Canada confirms in *Manitoba Métis Federation Inc v Canada*, 2013 SCC 14, at paragraphs 48 - 50.

70. That the content of the Crown's fiduciary relationship to the Mi'kmaq varies on a case-by-

case basis because it "varies with the nature and importance of the interest sought to be protected", as Binnie J states in *Wewaykum Indian Band v Canada*, 2002 SCC 79, at paragraph 86.

71. That fiduciary obligations arise from the Crown's affirmative constitutional obligation to create space for and to protect constitutional Mi'kmaw treaty and aboriginal rights to fish, especially since the Crown assumes these obligations and must discharge these obligations as a fiduciary.

72. That, generally, the duty of the Crown when acting as a fiduciary is "that of a [person] man of ordinary prudence in managing [their] his own affairs" as the Supreme Court of Canada states in *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at paragraph 104.

73. That, in addition to the said affirmative Crown fiduciary obligations, the Crown has urgent affirmative constitutional obligations to create space for and to protect Mi'kmaw treaty and aboriginal rights to fish arising from the honour of the Crown and the Mi'kmaq – Crown treaties.

74. That the Crown in right Canada, through the Department of Fisheries and Oceans, has not demonstrated over the more than 21 years since *Marshall I* how they could implement the urgent affirmative constitutional Mi'kmaw treaty rights to fish, nor how they would protect Mi'kmaq in carrying out their constitutional treaty rights and responsibilities.

75. That Aboriginal Fisheries Strategy ("AFS") Agreements between the Crown and the individual Mi'kmaw *Indian Act* Band and Counsels are interim measures while the Crown and the Mi'kmaq negotiate implementing the affirmative constitutional Mi'kmaw treaty and aboriginal rights and responsibilities to fish.

76. That the Crown has been refusing, delaying and procrastinating [*atermoyement*] in fulfilling its affirmative obligations to the Mi'kmaq to implement and protect the urgent affirmative constitutional Mi'kmaw treaty and aboriginal rights and responsibilities to fish.

77. That the Crown's refusal, delay and procrastination [*atermoyement*] in fulfilling its affirmative constitutional and fiduciary obligations to the Mi'kmaq, with respect notably to the Mi'kmaw rights to fish, brings the honour of the Crown into disrepute and constitutes a breach of the Mi'kmaq – Crown treaties, as well as a breach of the fiduciary relationship between the Crown and the Mi'kmaq.

78. That the Crown's pattern of attempting to relitigate the *res judicata* constitutional issues raised by this matter constitutes an abuse of process because it equates to prosecutorial conduct that contravenes fundamental notions of justice and thus undermines the integrity of the judicial process, as defined by Charron J for a unanimous Supreme Court of Canada *in R v Nixon*, 2011 SCC 34 at paragraph 36 and as applied by the New Brunswick Court of Appeal in *Reynolds* at paragraphs 93 - 98.

79. That the Crown's pattern of attempting to relitigate the *res judicata* constitutional issues raised by this matter is ostensibly behavior that is inconsistent with the honour of the Crown, the fiduciary relationship between the Crown and the Mi'kmaq, the Mi'kmaq – Crown Treaties, and Mi'kmaw law.

80. That the Crown dishonourably evading its urgent affirmative constitutional obligations to the Mi'kmaq is creating an environment in Canadian society that is conducive for sowing confusion, tension, and violence such as occurred notably after the *Marshall I* decision 21 years ago, in *Esgenoôpetitj* Burnt Church, New Brunswick, and again on October 1, 2020, Treaty Day, in Saulnierville, Nova Scotia, when Sipekne'katik First Nation launched their Moderate Livelihood Fishery.

81. That, when the Crown in right of Canada or in right of a province mandates its agents not to use words like unceded or surrendered with respect to Mi'kmaw aboriginal title recognitions, it is ostensibly behavior that is inconsistent with the honour of the Crown, the fiduciary relationship between the Crown and the Mi'kmaq, the Mi'kmaq – Crown Treaties, and Mi'kmaw law.

82. That the Crown does not sufficiently train and educate agents of the Crown, namely the Department of Fisheries and Oceans officers in the present matter, on the affirmative constitutional obligations the Crown owes to the Mi'kmaq, nor on how to exercise their discretion in the performance of their daily duties as agents of the Crown so that their conduct upholds the affirmative constitutional obligations the Crown owes the Mi'kmaq.

83. That the Crown's unilateral failure to train its agents on how to properly exercise the scope of their discretion and power over the legal and practical interests of the Mi'kmaq, considering the Mi'kmaw perspective, the intergenerational trauma in Mi'kmaw societies and the particular vulnerability of the Mi'kmaq relative to the Crown, demonstrates all the "hallmarks" of a fiduciary duty and of a breach thereof as the Supreme Court of Canada defines these "hallmarks" in *Lac Minerals v International Corona Resources Ltd*, [1989] 2 SCR 574, at pages 664 - 666.

84. That, as Ontario Court Justice Wolf states in *Kina Gbezhgomi Child and Family Services* v *M.A.*, 2020 ONCJ 414 at paragraph 42, a judge may take judicial notice of the fatal legacy of colonialism on Indigenous people including the well-known fact that Indigenous languages are in decline across Canada and that this decline is notably due to Canadian laws and policies – including the 1885-1951 potlatch ban (i.e. the repealed s. 149 of the *Indian Act*, RSC 1985, c I-5), the residential school system, the Indian day school system, the sixties scoop, and the disproportionate removal of Indigenous children from their families and communities through the child-welfare system – intentionally disrupting the intergenerational transmission of the Indigenous languages and knowledge systems – and the disproportionate levels of overincarceration of Indigenous people in Canada.

85. That there are currently no practical avenues of recourse in Canadian law for Kyle Edward Joseph Caplin to seek remedy for the Crown's breach of his affirmative constitutional Mi'kmaw treaty and aboriginal rights to fish.

86. That since Mi'kmaq people have affirmative constitutional Mi'kmaw treaty and aboriginal rights to fish, the Mi'kmaq must of necessity have a means to vindicate and maintain them, and a remedy if they are injured in the exercise or enjoyment of them.

87. That, as the Supreme Court of Canada states in *Guerin* at page 383, the "concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery".

88. That remedies for a breach of fiduciary duty are equitable remedies subject to the court's discretion.

89. That Equity will not suffer a wrong without a remedy.

90. That, as the Supreme Court of Canada states in *Guerin* at page 357, generally, the Mi'kmaw beneficiary, in this matter Kyle Edward Joseph Caplin, who suffered the breach of the Crown's fiduciary duty is entitled to be placed in the same position so far as possible as if there had been no breach.

91. Such further and other reasonable grounds as counsel may advise and this Honourable Court may permit.

THE CONSTITUTIONAL ISSUES TO BE RAISED ARE:

1. Is Kyle Edward Joseph Caplin a Mi'kmaw person who is a beneficiary of the Mi'kmaq – Crown treaties recognized by section 35(1) of the *Constitution Act*, *1982*?

2. Should the Honourable Court order a stay of proceedings because this is an inconvenient forum for judging the important constitutional issues raised by this matter?

3. Are the main constitutional issues raised by this matter *res judicata*?

4. Should the Honourable Court order a stay of proceedings because the important constitutional issues raised by this matter are *res judicata*?

5. Does the doctrine of *issue estoppel* preclude the Crown from prosecuting Kyle Edward Joseph Caplin for allegedly violating the impugned provisions of the *Fisheries Act* and *Regulations*?

6. Is the Crown's attempt to relitigate the *res judicata* constitutional issues raised by this matter an abuse of process because it equates to prosecutorial conduct that contravenes fundamental notions of justice and thus undermines the integrity of the judicial process?

7. Are the impugned provisions of the *Fisheries Act* and *Regulations* inconsistent with Kyle Edward Joseph Caplin's treaty rights, notably with the treaty rights to fish contained in the Mi'kmaq - Crown Treaties of 1760 – 61, and therefore of no force or effect or application to him, by virtue of sections 35 (1) and 52 of the *Constitution Act*, *1982*?

8. Is the condition in the 2018-2019 Eel River Bar First Nation Aboriginal Communal Fishing License prohibiting *Ugpi'ganjig* Eel River Bar First Nation fishermen and fisherwomen from catching and retaining lobsters of a size of less than 77 mm unconstitutional based on grounds enumerated in subsection 15(1) of the *Charter* because it constitutes an arbitrary administrative distinction which perpetuates a historical disadvantage and has prejudicial impact on Kyle Edward Joseph Caplin and is not saved by section 1 of the *Charter*?

9. Does the Crown's delay and procrastination [*atermoyement*] in fulfilling its affirmative constitutional and fiduciary obligations to the Mi'kmaq with respect to their rights to fish bring the honour of the Crown into disrepute?

10. Does the Crown's delay and procrastination [*atermoyement*] in fulfilling its affirmative constitutional and fiduciary obligations to the Mi'kmaq with respect to their rights to fish

constitute a Crown breach of the fiduciary relationship between the Crown and the Mi'kmaq?

11. Does the Crown's delay and procrastination [*atermoyement*] in fulfilling its affirmative constitutional and fiduciary obligations to the Mi'kmaq with respect to their rights to fish constitute a Crown breach of the Mi'kmaq – Crown treaties?

12. What just and appropriate remedies are available to Kyle Edward Joseph Caplin in light of the Crown breaching his constitutional and fiduciary rights?

THE CONSTITUTIONAL PRINCIPLES TO BE ARGUED ARE:

1. The honour of the Crown, a constitutional principle, is always at stake in the Crown's dealings with the Mi'kmaq.

2. Mi'kmaw treaty and aboriginal rights and responsibilities are contained in the Mi'kmaq – Crown treaties, as affirmed in *Marshall* regarding specifically the Treaties of 1760 – 61.

3. Subsection 35(1) of the *Constitution Act*, 1982 recognizes and affirms Mi'kmaw aboriginal and treaty rights.

4. To the extent which the impugned *Fisheries Act* and *Regulations* are inconsistent with constitutional rights, section 52 of the *Constitution Act*, *1982* renders them of no force and effect.

5. Mi'kmaw treaty rights and aboriginal rights to fish are due top priority over other user groups in the allocation of any surplus fishery resources once the needs of conservation have been met.

6. In light of the Crown's unique fiduciary obligations towards the Mi'kmaq, the Crown may not simply adopt an unstructured discretionary licensing regime which risks infringing Mi'kmaw treaty and aboriginal rights.

7. The purpose of section 15(1) of the *Charter* is to guarantee substantive equality.

8. Subsection 24(1) of the *Charter* is remedial in nature and grants this Honourable Court a broad scope of powers to fashion just and appropriate remedies.

9. Section 25 of the *Charter* limits *Charter* rights so they are not construed to abrogate or derogate from either the aboriginal or the treaty rights of the Mi'kmaq.

10. The Mi'kmaw constitutional rights to self-determination and to self-governance are expressly recognized and affirmed in the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, C4, and the *Act Respecting First Nations, Inuit and Métis children youth and families*, SC 2019, c 24.

11. Mi'kmaw aboriginal rights recognized and affirmed by section 35 of the *Constitution Act*, *1982* include rights related to Indigenous languages, as Parliament states in the *Indigenous languages Act*, SC 2019 c 23.

12. The common law recognizes the ancestral laws and customs of the Mi'kmaq who occupied the land prior to European settlement. The title the Crown acquired at its assertion of

sovereignty was burdened by the pre-existing legal rights of the Mi'kmaq. The Mi'kmaw interest in land gives rise to a fiduciary duty on the part of the Crown.

13. That the Mi'kmaq – Crown treaties are a conduit between the distinctive normative legal orders of the common law and Mi'kmaw law [*L'nuey Tplutaqan*].
14. The principles of cooperative federalism are evidence that multiple normative legal orders can coexist symbiotically in Canada's legal system.
15. The *Constitution of Canada* is analogous to a living tree that must grow and evolve in function with the norms of Canada's free and democratic society.
16. The Mi'kmaw legal principle *Netukulimk* has to do with fulfilling the responsibilities and obligations for sustainability of the Mi'kmaw people and the environment in a mutually enhancing livelihood for seven generations. This is, generally, the Mi'kmaw legal principle analogous to conservation.
17. The Crown has urgent affirmative constitutional obligations to the Mi'kmaq to implement and protect the constitutional Mi'kmaw treaty and aboriginal rights and responsibilities.

STATUTORY PROVISIONS OR RULES UPON WHICH THE APPLICANT PLACES RELIANCE ARE:

1. The impugned *Fisheries Act and Regulations*;
2. Subsection 35(1) of the *Constitution Act*, 1982;
3. Section 52 of the *Constitution Act*, 1982;
4. Subsection 15(1) of the *Canadian Charter of Rights and Freedoms*;
5. Section 25 of the *Canadian Charter of Rights and Freedoms*;
6. *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 4;
7. *Indigenous languages Act*, SC 2019 c 23;
8. *L'nuey Tplutaqan*, specifically, the Mi'kmaw legal principle *Netukulimk*.
9. Listuguj Mi'kmaq First Nation Law on the Lobster Fishery and Lobster Fishing, 2019-01, published in Part II of the First Nations Gazette;
10. *Act Respecting First Nations, Inuit and Métis children youth and families*, SC 2019;
11. *Indian Act*, RSC 1985, c I-5;
12. The rules of Equity invoked by the unique fiduciary relationship between the Crown in right of Canada and the Mi'kmaq.

THE RELIEF SOUGHT IS:

1. A stay of proceedings against Kyle Edward Joseph Caplin in the present matter.
2. A declaration that the *prima facie* infringement of Kyle Edward Joseph 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 all or some of the following legislative and regulatory provisions are contrary to or inconsistent with subsection 35(1) of the *Constitution Act*, 1982, and specifically with Kyle Edward Joseph Caplin's Mi'kmaw treaty and aboriginal rights to fish protected by section 35(1), and are therefore inapplicable to Kyle Edward Joseph Caplin:
    a. In the 2018-2019 Eel River Bar First Nation Aboriginal Communal Fishing License, the conditions:
        i. prohibiting designated fishers from catching and retaining lobsters of a size of less than 77 mm;
        ii. requiring designated fishers to affix a tag, float, or buoy to each end of the fishing gear; and
        iii. requiring designated fishers to attach a valid tag to the lobster trap;
    b. In the *Atlantic Fisheries Regulations*:
        i. the prohibition to fish for lobster without authorization set out in Schedule I;
        ii. the minimum length of lobster set out in item 23 of column III of Schedule XIV;
        iii. the prohibition to fish for lobster in lobster fishing area 23(a) as set out in item 23 of column I of Schedule XIV during the prescribed close time that is set out in column II of that item; and
        iv. the prohibition to have a trap on board a vessel, in lobster fishing area 23(a) as set out in item 23 of column I of Schedule XIV during the prescribed "close time" that is set out in column II of that item.
    c. In the *Fishery (General) Regulations*, Subsection 27(1)b) of the which prohibits any person from setting, operating, or leaving lobster traps unattended in the water unless the traps are marked in the manner prescribed in subsections 27(2) to 27(6);
4. A declaration that the Crown is attempting to relitigate *res judicata* constitutional issues.
5. A declaration that the Crown's pattern of attempting to relitigate the *res judicata* constitutional issues raised by this matter constitutes abuse of process because it equates to prosecutorial conduct that contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.
6. A declaration that the Crown's pattern of attempting to relitigate the *res judicata* constitutional issues raised by this matter brings the honour of the Crown into disrepute.
7. A declaration that the Crown has urgent affirmative constitutional obligations to the Mi'kmaq to implement and protect the constitutional Mi'kmaw treaty and aboriginal rights

to fish.

8. A declaration that the Crown has affirmative fiduciary obligations to the Mi'kmaq to implement and protect the constitutional Mi'kmaw treaty and aboriginal rights to fish.
9. A declaration that the Crown's refusal, delay and procrastination [*atermoyement*] 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.
10. A declaration that the Crown's refusal, delay and procrastination [*atermoyement*] in fulfilling its affirmative constitutional obligations and fiduciary obligations to the Mi'kmaq with regard to their treaty rights to fish constitutes a Crown breach of the fiduciary relationship between the Crown and the Mi'kmaq.
11. A declaration that the Crown's refusal, delay and procrastination *[atermoyement*] in fulfilling its affirmative constitutional and fiduciary obligations to the Mi'kmaq with respect to their rights to fish amounts to a Crown breach of the Mi'kmaq – Crown treaties.
12. Kyle Edward Joseph Caplin to be placed in the same position so far as possible as if there had been no breach of his constitutional and equitable rights.
13. Costs and disbursements, including Kyle Edward Joseph Caplin's legal fees.
14. Such further relief that this Honourable Court and counsel may consider to be appropriate and just in the circumstances.

THE APPLICANT MAY BE SERVED WITH DOCUMENTS PERTINENT TO THIS APPLICATION

1. By service in accordance with Rule 4, at

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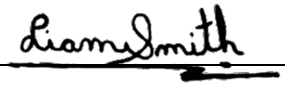
Dated this 1st day of December 2021.



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