Court File Number: 06191310

IN THE PROVINCIAL COURT OF NEW BRUNSWICK

JUDICIAL DISTRICT OF CAMPBELLTON

BETWEEN:

HIS MAJESTY THE KING, as represented by the Director of Public Prosecution of Canada

REQUÉRANTE

- and -

CODY ROBERT RALPH BRIMSCALE CAPLIN

RESPONDENT

Numéro de la cause :

COUR PROVINCIALE DU NOUVEAU-BRUNSWICK

CIRCONSCRIPTION JUDICIAIRE DE CAMBELLTON

ENTRE:

- et -

INTIMÉ

FORM 1
NOTICE OF APPLICATION

TO: **Cody Caplin**
2 Cedar Drive
Eel River Bar First Nation, N.B.
E8C 2Y9

TAKE NOTICE that an Application will be, brought at 9:30 p.m. on the 15th day of June, 2023 at 157 Water Street, Campbellton, Province of New Brunswick or at another time and date fixed by the Court, for an Order granting the following:

1. The summary dismissal of the Respondant's application seeking a

FORMULE 1
AVIS DE REQUÊTE

DESTINATAIRE:

SACHEZ qu'une requête sera présentée le _____ 2017 à ____h____ au 145, Boul. Assomption, en vue d'obtenir l'ordonnance suivante :

declaration of unconstitutionality pursuant to the *Constitution Act, 1982* dated December 21, 2021.

THE GROUNDS FOR THIS APPLICATION ARE:

1. The Respondent's application is manifestly frivolous as it does not show any foundation for a violation of the *Constitutional* or the *Charter*;

2. Even in assuming that the facts as alleged in the Respondent's application to be true, they do not show any violation of s. 35 of the *Constitution Act, 1982.*

IN SUPPORT OF THIS APPLICATION, THE APPLICANT RELIES UPON THE FOLLOWING:

1. See Schedule "A" hereto attached.

THE RELIEF SOUGHT IS:

1. To dismiss summarily the Respondent's Constitutional application without hearing any evidence;

2. To declare the Respondent guilty of the offence pursuant to s. the *Maritime Provinces Fishery Regulations* SOR/93-55; and

3. Sentence the Respondent accordingly pursuant to s. 78(a) of the *Fisheries Act*.

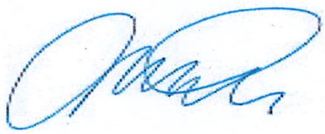
THE APPLICANT MAY BE SERVED WITH DOCUMENTS PERTINENT TO

THIS APPLICATION:

1. By service in accordance with Rule 4, at 777 Main Street, Suite 400, Moncton, N.B., E1C 1E9.

2. Fax: (506) 851-2409

Dated at Moncton, New Brunswick, this 11th day of May 2023.



J.M. DENIS LAVOIE
Counsel for the Applicant

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SCHEDULE « A »

I. Context:

1. The Respondent is being charged for having committed a series of offences on September 12, 2018, at or near Charlo, New Brunswick as follows:

    a. for failing to comply with a condition of a licence issued pursuant to the *Aboriginal Communal Fishing Licence Regulations* by catching and retaining lobsters of a size less than 77 mm, in violation of s. 7 of the said regulation, and thereby committing an offence contrary to s. 78 of the said *Fisheries Act*, RSC, 1985, c. F-14; for failing to comply with a condition of a licence issued pursuant to the *Aboriginal Communal Fishing Licence Regulations* by not affixing a tag, float or buoy to each end of the fishing gear, in violation of s. 7 of the said regulation, and thereby committing an offence contrary to s. 78 of the said *Fisheries Act*, RSC, 1985, c. F-14.

    b. for failing to comply with a condition of a licence issued pursuant to the *Aboriginal Communal Fishing Licence Regulations* by not attaching a valid tag to the lobster trap, in violation of s. 7 of the said regulation, and thereby committing an offence contrary to s. 78 of the *Fisheries Act*, RSC, 1985, c. F-14.

    c. by having in his possession in Lobster Fishing Area 23 lobster under the size limit of 77 mm, in violation of s. 57(2) of the Atlantic Fishery Regulations, 1985, and thereby committing an offence contrary to s. 78 of the said *Fisheries Act*, RSC, 1985, c. F-14.

    d. by setting and leaving unmarked lobster traps without buoys in violation of s, 27(1)(b) of the Fishery (General) Regulations, and thereby committing an offence contrary to s. 78 of the *Fisheries Act*, RSC, 1985, c. F-14.

    e. by fishing for lobster in Lobster Fishing Area 23 during a closed time in violation of s. 57(1)(a) of the Atlantic Fishery Regulations, 1985, and thereby committing an offence contrary to s. 78 of the *Fisheries Act*, RSC, 1985, c. F-14.

f. by having lobster in his possession in Lobster Fishing Area 23 during a closed time in violation of s. 57(1)(b) of the Atlantic Fishery Regulations, 1985, and thereby committing an offence contrary to s. 78 of the *Fisheries Act*, RSC, 1985, c. F-14.

g. by having a lobster trap on board a vessel in Lobster Fishing Area 23 during a closed time in violation of s. 57(1)(c) of the Atlantic Fishery Regulations, 1985, and thereby committing an offence contrary to s. 78 of the *Fisheries Act*, RSC, 1985, c. F-14.

h. by fishing lobster without authorization in violation of s. 14(1)(b) of the Atlantic Fishery Regulations, 1985, and thereby committing an offence contrary to s. 78 of the *Fisheries Act*, RSC, 1985, c. F-14.

i. by obstructing or hindering a fishery officer carrying out his duties under the *Fisheries Act*, RSC, 1985, c. F-14, in violation of s. 62 of the said act, and thereby committing an offence contrary to s. 78 of the said act.

2. On May 17, 2022, the Court heard the crown's case on the circumstances of the said offences. The Respondent informed the Court that the only defence that he would rise would be the one related to an aboriginal or treaty right defence pursuant to s. 35 of the *Constitution Act, 1982*. On that same date, the Court ruled that the Crown had proven its case beyond a reasonable doubt save and except the aboriginal or treaty right defence to be raised.

3. On December 17, 2021, the Respondent filed a Notice of Motion seeking a declaration of unconstitutionality in the above matter. The Attorney General of Canada was served with the said notice on October 28, 2022.

4. In the said Notice, the Respondent is arguing that all Mi'kmaq persons as he is, are beneficiaries of the Peace & Friendship Treaties of 1760-1761 concluded with the English Crown and that the sections of the Fisheries Act and regulation either unconstitutional or constitutionally non-applicable pursuant to s. 35 and / or s. 52 of the *Constitution Act, 1982* (herein after being referred to as the "*Constitution*").

5. He also raises that the condition of the licence issued to the Eel River Bar First Nation relating to the minimum length of lobster being caught is breaching s. 15 of the *Canadian Charter of Rights* (herein after being referred to as the "*Charter*"). This is a non-issue. The evidence already in Court is to the effect that the minimum length requirement at the time was the same for all lobster fishers.[1]

6. In his notice, the Respondent states that he identifies himself as a Mi'kmaq person, a member of the Eel River Bar First Nation, and that he is a registered Indian pursuant to the Indian Act, R.S.C. 1985, I-5.

II. Grounds for this application:

7. It is the Applicant's position that the Respondent's application is manifestly frivolous as it does not show any foundation for a violation of the *Constitutional* or the *Charter*. Therefore, the Court should not hear any evidence on the issues raised in the Notice of Motion for a declaration of unconstitutionality of the Respondent and should not address any relief pursuant to s. 35 or 52 of the *Constitution*.

8. Even in assuming that the facts as alleged in the Respondent's application to be true, they do not show any violation of the s. 15 *Charter* and of s. 35 of the *Constitution Act, 1982.* Therefore, the said application is bound to fail.

III. Duty of the Court to properly manage its judicial resources:

9. The Court should decline to hold a hearing when the application / motion presented a party to the case is manifestly frivolous.[2]

10. In R v. Jordan[3] and R v. Cody[4], the Supreme Court of Canada has instructed trial courts to properly manage the trial process by refusing to hear futile applications in view of minimizing delay. This allows the use of time court more efficiently.[5]

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[1] Variation Order GVO 2018-013
[2] *R.* v. *Haevischer*, 2023 SCC 11
[3] R v. Jordan, [2016] 1 S.C.R. 631, para. 63
[4] R v. Cody, [2017] 1 S.C.R. 659, para 38
[5] Op cite, note 3, para. 41 & 139.

11. The Crown's position is to the effect that the Respondent's Application does not meet the threshold fixed by the Supreme Court of Canada and that the Court should not hold a hearing of the issues being raised on violation of the *Charter* and of the *Constitution Act, 1982*.[6]

IV. Laws of Canada do apply to the location in question / Canadian sovereignty applies to its entire territory:

12. There has been no doubt expressed by the courts that Canadian sovereignty extends to the entire territory of Canada. Canadian sovereignty is a legal reality recognized by the "law of nations."[7] In R. v. *Sparrow*, the Supreme Court of Canada rejected the theory that Canada's Aboriginal peoples might retain any measure of international sovereignty:

> It is worth recalling that while British policy toward the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown. [8]

13. When applied to the question of the jurisdiction of courts, the law has also been clear that the criminal courts themselves do not have the jurisdiction to rule on a question of Canadian sovereignty:

> ...it is beyond the competence of a municipal court to question the validity of the acquisition of sovereignty over new territory which is an act of state: see *Sobhuza II* v. *Miller*, [1926] A.C. 518 at 252 (P.C.), and *Mabo* v. *Queensland* (1992), 107 A.L.R. 1 at 20, 58 (H.C.).[9]

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[6] Op cite, note2, para. 66-73, 83-88, *R* v. *Vukelich* 1996 BCCA 1005 (CanLII); *R* v. *Vautour,* NBKB, CCA-5-2020, unreported decision.

[7] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, at para. 42; *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97, at paras. 364-368 (B.C.C.A.), rev'd by the Supreme Court of Canada without disagreement on this point, [1997] 3 S.C.R. 1010,

[8] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, at para. 49. See also: *Calder* v. *British Columbia*, [1973] S.C.R. 313, , at p. 8, 37 (of QL version provided); *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335, at para. 22; *R.* v. *Pamajewon and Jones*, [1996] 2 S.C.R. 821, at paras. 23, 26, aff'g (1994), 95 C.C.C. (3d) 97 (Ont. C.A.),.

[9] *Delgamuukw* (BCCA), *supra,* para. 365.

14. Canadian courts, including this Honourable Court, are therefore bound to apply the laws of Canada over its territory and lack jurisdiction to question the validity of Canadian sovereignty, or as to how sovereignty was acquired.

V. Respondent's Notice of Application does not properly raise an aboriginal right or aboriginal treaty right constitutional challenge:

15. The only fact alleged in the constitutional notice by the Respondent is that he identifies himself a Mi'kmaq person, a member of the Eel River Bar First Nation, and that he is a registered Indian pursuant to the *Indian Act*, R.S.C. 1985, I-5. There is a total absence of a factual foundation supporting Mr. Caplin's claim to a possible protection of s. 35 of the *Constitution Act, 1982* in relation to his fishing activity of September 12, 2018.

VI. Rule of law:

16. Canada's judicial system is based on the application of the rule of law. This principle is entrenched in the preamble of the *Constitution Act, 1982*[10]. The laws of Canada should apply to all with the exception of exemptions recognized at law. One of those is exemption could be when the law infringes without justification the exercise of an aboriginal or treaty right.[11] In such circumstances, the law could potentially be declared constitutionally non-applicable pursuant to s. 35.[12]

17. The constitutional validity of the applicable law has to be presumed.[13] This presumption also applies for someone whose intention is to raise an aboriginal right or treaty right claim.[14] In this case, we must presume that the *Fisheries Act* is constitutionally valid and was applicable to the circumstances of the present matter.

VII. Respondent does not provide any factual foundation for an Aboriginal Right Claim

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[10] *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, paras. 59-64.
[11] *Martin* v. Canada (Attorney General) 2013 QCCA 302, para. 56.
[12] *R. v. Sparrow*, [1990] 1 R.C.S. 1075.
[13] *Thibault* v. *Collège des médecins*, 1998 CarswellQue 71 QCA, para.18.
[14] Op cite, note 12, para. 61 à 1109; R v. Marshall, [1999] 3 S.C.R. 533, para. 24.

18. The person claiming such right has to demonstrate on a balance of probabilities the following elements:

    a. What is the particular right being raised;

    b. What Aboriginal community he is a member of;

    c. Proof of membership to that community;

    d. From what historic community does his present-day community claim to be a successor of;

    e. How such a right was an element of practice, custom and tradition, integral to the distinctive culture of that historical Aboriginal community at the time of contact with the Europeans;

    f. Establishment of continuity between the historic practice and the contemporary right asserted;

    g. Is the right being claimed one that was historically and is presently being exercised in the local geographical area of concern;

    h. How does the law infringe on the right?[15]

19. The only facts alleged in the Constitutional notice is that the Respondent identifies himself as a Mi'kmaq from the Eel River Bar First Nation and, for that reason, he has an individual right to fish for lobster in the Bay of Chaleur.

20. However, the Respondent's constitutional notice is silent as to items d. to h. above. These are elements to be proven by the Respondent at trial and the notice of application has to provide the factual foundation for them. The Court cannot presume that Mr. Caplin has such a right and that the law infringes such alleged right on the sole basis that he identifies himself as a Mi'kmaq.

VIII. Respondent does not provide any factual foundation for an Aboriginal Treaty Right Claim

a. Treaties of Peace and Friendship of 1760-61:

[15] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507; *R.* c. *Powley*, [2003] 2 S.C.R. 207, paras 18 to 47

21. The Respondent wants to argue that he was exercising the right to fish lobster for a moderate livelihood as per the decision of the SCC in *Marshall*[16].

22. In *Marshall* No. 1, the SCC has recognized the existence of several treaties concluded in the years 1760-61 not by all but with a certain number of Mi'kmaq, Passamaquoddy and Malecite communities. The court recognized that members of those communities had a treaty right pursuant to s. 35 of the *Constitution Act, 1982*, to "continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restriction that can be justified under the *Badger* test."[17]

23. Such a commercial right is also limited only to allow them to aim toward a moderate livelihood. This concept includes "such basics as "food, clothing and housing, supplemented by a few amenities" but not the accumulation of wealth.[18] It addresses day-to-day needs."

24. Such rights are communal and not individual. They are attached to the specific site commonly used by the historical community who signed one of the treaties at the time of contact with the Europeans. Chief Justice Lamer in *Marshall* No. 2 stated as follows:

> "In the event of another prosecution under the regulations, the Crown will (as it did in this case) have the onus of establishing the factual elements of the offence. The onus will then switch to the accused to demonstrate that he or she is a member of an aboriginal community in Canada with which one of the local treaties described in the September 17, 1999, majority judgment was made, and was engaged in the exercise of the community's collective right to hunt or fish in that community's traditional hunting and fishing grounds. The Court's majority judgment noted in para. 5 that no treaty was made by the British with the Mi'kmaq population as a whole:
>
> > ... the British signed a series of agreements with individual Mi'kmaq communities in 1760 and 1761 intending to have them consolidated into a comprehensive Mi'kmaq treaty that was never in fact brought into existence. The trial judge, Embree Prov. Ct. J. found that by the end of 1761 all of the Mi'kmaq villages in Nova Scotia had entered into separate but similar treaties. [Emphasis added.]

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[16] *R. v. Marshall*, [1999] 3 S.C.R. 456 (*Marshall No. 1*); *R. v. Marshall*, [1999] 3 S.C.R. 533 (*Marshall No. 2*).
[17] *Marshall No. 1*, para. 56.
[18] R v. Gladstone

> The British Governor in Halifax thus proceeded on the basis that local chiefs had no authority to promise peace and friendship on behalf of other local chiefs in other communities, or to secure treaty benefits on their behalf. The treaties were local and the reciprocal benefits were local. In the absence of a fresh agreement with the Crown, the exercise of the treaty rights will be limited to the area traditionally used by the local community with which the "separate but similar" treaty was made. Moreover, the treaty rights do not belong to the individual, but are exercised by authority of the local community to which the accused belongs, and their exercise is limited to the purpose of obtaining from the identified resources the wherewithal to trade for "necessaries." [19] **(Emphasis added.)**

25. The person claiming a treaty right has to demonstrate on a balance of probabilities the following elements:

    a. The existence of an identifiable historical Mi'kmaq community in the area of Charlo, Restigouche County, province of N.B., that entered into one of the 1760-61 Peace and Friendship treaties (here and after being referred to as the Marshall treaties) with the British Crown;

    b. The existence of an identifiable contemporary Mi'kmaq community in the same geographical area with a connection to the historic community that benefited from such a treaty. There must be evidence of sufficient continuity between the historic community that was a party to the treaty and the modern community in the relevant area. The contemporary aboriginal community must be a modern manifestation of the collective that benefited from the treaty;

    c. That the claimant has self-identified as a member of the said contemporary Mi'kmaq community, which self-identification is long-standing and not of recent vintage;

    d. That the claimant has an ancestral connection to the historic Mi'kmaq community that entered into the treaty - only those members with a demonstrable ancestral connection to the historic community can claim s. 35 rights;

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[19] *Marshall No. 2*, para. 17

e. That the claimant has been accepted as a member of the contemporary Mi'kmaq community whose continuity with the historic community provides the legal foundation for the right being claimed;

f. This specific Marshall treaty right to trade extends to the item or commodity at issue (i.e., must be evidence that the historic community engaged in trading the item before the treaty, or that it was a trade item reasonably contemplated by the parties to the treaty; and

g. If there is an existing treaty right to trade in the item or commodity at issue, that such right has been infringed by the application to the claimant of the restriction imposed by the statutory or regulatory provision contravened.

26. The Supreme Court of Canada has stated that the Marshall treaties conferred a specific treaty right to trade, but limited to those items traditionally harvested as part of their hunting, fishing and gathering activities. In other words, items reasonably in the contemplation of the parties, or items traditionally gathered.

27. As well, once an applicant has established a treaty right and a prima facie infringement of that right, the burden shifts to the Crown to establish the infringement was justified in accordance with the two-part test set out in *Sparrow* (*R. v. Badger*, [1996] 1 S.C.R. 771 makes the two-part test in *Sparrow* applicable to treaties) and the notion of priority, as articulated in *R. v. Gladstone,* [1996] 2 S.C.R. 723.

28. The geographic extent of site-specific aboriginal and treaty rights is generally restricted to the territory traditionally used by the historic aboriginal community at the time of European contact (i.e., that community's traditional hunting and fishing grounds). Evidence of occasional and sporadic visits by members of the historic aboriginal community to another area does not establish that the visited area was part of the area traditionally used by that historic aboriginal community.

29. Historic Mi'kmaq and Maliseet communities were autonomous groups located in specific territories which constituted their resource base for subsistence purposes.

30. For example, the Eskasoni First Nation is a reserve with historic roots in and continuity to the Cape Breton Mi'kmaq community and, as such, its existing site-specific collective aboriginal and treaty rights are exercisable within the territory traditionally used by that historic community at the time of European contact, which territory did not extend to the waters of the Atlantic Ocean next to Yarmouth, Nova Scotia. There is no historic evidence linking the Cape Breton Mi'kmaq, as an organized community, in the vicinity of Yarmouth, either as a place of residence or a place of regular or occasional resource use. The historic Cape Breton Mi'kmaq community was not involved in exploiting the resources in this area or in participating in the particular use of the waters or lands in or near Yarmouth.

31. In *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, the Supreme Court of Canada noted that it had imposed a site-specific requirement on aboriginal hunting and fishing rights it recognized in *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Cote,* [1996] 3 S.C.R. 139; *Mitchell v. MNR*, [2001] 1 S.C.R. 911; and *R. v. Powley* [2003] 2 S.C.R. 207.

32. Our understanding of the Respondent's application is that by being a Mi'kmaq, he is asking the Court to take for granted that he has the right to fish pursuant to the described treaties and that the law does not apply to him.

33. As stated above, if the Respondent wanted to make a claim that he was exercising at the time an aboriginal treaty right to fish pursuant to a possible s.35 of the *Constitution Act, 1982*, he would have to provide evidence in due course to that effect and his Notice of Constitutional Question application should disclose the factual basis supporting such claim. It does not.

34. Furthermore, the Respondent claims having an individual treaty right when the rights provided in such treaties are communal in nature and not individual.[20]

35. It is therefore the Crown's position that the Respondent's application does not disclose any factual basis supporting a possible s.35 claim and therefore the Court should not embark on holding a hearing on such claim.

b. <u>Treaty of Peace and Friendship of 1752:</u>

[20] *Marshall* No. 1 and No. 2, op.cite;

36. The SCC considered this treaty in *Simon* v. *R.* Chief John Batiste Cope, executed the said treaty on behalf of the Shubenacadie Mi'kmaq tribe, the historical community of now the Sipekne'katik First Nation in Nova Scotia. The evidence at trial was to the effect that Simon, as a member of that the Sipekne'katik First Nation could raise the said treaty as a defence.[21]

37. In the above matters, the Respondent is a member of the Eel River Bar First Nation and not of the Sipekne'katik First Nation. Not being a member of the latter, he would not be entitled to benefit from the said treaty.

38. For the same reasoning as expressed above in paragraphs 33 and 34, his Notice of Constitutional Question application should disclose the factual basis supporting such claim. It does not.

39. The Simon case confirms that aboriginal treaty rights protected by s. 35 of the *Constitution Act, 1982* are communal and not individual. So did *Marshall No. 1* and *Marshall No. 2.*

40. It is therefore the Crown's position that the Respondent's application does not disclose any factual basis supporting a possible s.35 claim and therefore the Court should not embark on holding a hearing on such claim.

IX. Res judicata and issue estoppel do not apply :

41. The Respondent wants to argue that the SCC decision in Marshall decided all the issues relating to the Peace & Freindship Treaties of 1760-61 and that the doctrine of issue estoppel and res judicata should apply.

42. Recently, the NBCA summarized such a defence as follows:

> Issue estoppel is a branch of the doctrine of *res judicata*. It generally precludes a party from relitigating issues decided in prior judicial proceedings where three conditions are met: (1) the same question has been decided; (2) the judicial decision that is said to create the estoppel was final; and (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the

[21] *Simon* v. *R*, [1985] 2 S.C.R. 387, pages 407-408

estoppel is raised or their privies (*Danyluk*, at para. 25; *Toronto (City)*, at para. 23; *Penner*, at para. 29).[22]

43. In the Marshall decision, the Court decided that Donald Marshall was a member of the contemporary aboriginal community who had ties with an aboriginal historic community who was a signatory of one of the 1760-61 treaties with the British. As a member of such community, it was allowing him to fish eels for trade to achieve a moderate livelihood. The Court came to the conclusion that the regulation in that case was an unjustified infringement and Marshall was acquitted.

44. In this case we are not dealing with the same parties and we are not dealing with the same set of facts. The three conditions necessary to consider the res judicata are not met and the Court should not entertain it.

45. Again, the Court cannot presume that Mr. Caplin could exercise such treaty right as described in the Marshall decision. He needs to provide in due course the evidence to prove that the principles established in that decision applies to his case. Before we get to that, he needs to provide a proper constitutional notice with a factual foundation supporting his claim. Again, his notice does not provide this foundation.

X. S. 15 of the *Charter* does not apply in the circumstances:

46. In the presentation of the Crown's case on the actus reus, Variation Order 2018-013 was put in evidence. The said order confirms that the minimum size limit for lobsters being fished by commercial fishermen was the same that was in the communal fishing licence issued to the Eel River Bar First Nation which is also in evidence, that is of 77 mm.

47. As a consequence, the claim for discrimination pursuant to s. 15 of the Charter does not stand.

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[22] *Vautour & al.* v. *Her Majesty the Queen in right of the Province of NB & al.*, 2021 NBCA 4 (CanLII), para. 73.