FISHING UNDER NETUKULIMK

by The Eastern Door

MI'KMA'KIK:--

It has been 21 years since Donald Marshall Jr. ("Marshall") was acquitted by the Supreme Court of Canada of illegal fishing under Canada's federal fishing laws and regulations. His defence was that the Peace and Friendship Treaties, specifically the treaties of 1760-61, provided him with a Treaty Right to harvest and sell fish.

Shortly afterwards, the Canadian government, through the arm of the Department of Fisheries and Oceans (DFO) Canada sent boats to stop the L'nuk from fishing. Images of DFO boats ramming L'nu boats in the harbour near Burnt Church are forever burned in the minds and memories of L'nuk. L'nuk realized – but refused to accept – that for Ottawa, the Rule of Law did not extend to Treaty Rights.

The Courts have stated that Indigenous rights cases are very difficult to litigate as they usually arise out of a criminal or quasi-criminal regulatory breach and are not well suited for litigation. The message from the Court is: Indigenous rights should be negotiated, not litigated.

When the Marshall case was won, L'nuk hopes and expectations were raised. L'nuk thought that maybe, just maybe, the next generation of L'nuk will be able to share in the generous bounty of the land and sea. Those hopes and expectations were quickly dashed when the DFO boats rammed the L'nu boats at Burnt Church. L'nuk knew then that despite the Court decision, efforts would continue to deny them a basic human right, implicitly guaranteed by the Treaty: the ability to earn a "moderate livelihood."

What was developed instead was a provisional program to provide communal access to the commercial fishery for L'nuk communities, coupled with extensive promises, by successive Canadian Governments, of negotiations on Treaty Rights after the situation (and the non-native fishers) had calmed down. Those negotiations did not materialize, leaving the L'nuk wondering when we would finally be able to fish and earn a moderate livelihood.

The L'nuk have been waiting patiently for 21 years to negotiate a framework for implementing the Marshall case and the Treaty Right to harvest and sell fish. There are many issues around the definition of the term "Moderate Livelihood" and these all need to be clarified and agreed upon.

In the meantime, other developments changed the dynamic of Canada-First Nations relations, most momentously the Truth and Reconciliation Commission ("TRC") with its Calls to Action, and the Murdered and Missing Indigenous Women and Girls Inquiry ("MMIWG") with its Calls to Justice.

TRC Call to Action number 45 (iv) calls upon the Canadian government to:

> *Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.*

In a similar vein, the MMIWG Calls to Justice Report stated that Cultural Safety is more than just cultural competency: *"…The creation of cultural safety requires, at a minimum, the inclusion of Indigenous languages, laws and protocols, governance, spirituality, and religion…"*

These two landmark "Calls" highlight the need for Indigenous laws, legal orders and legal principles to become a foundational component of the Reconciliation process. The L'nuk legal orders or principles, called Lnuwey Tplutaqan, provide authority for the L'nuk to enact laws, rules, and regulations, in a manner similar to how the Government of Canada can enact laws under the authority granted to it by the *Canadian Constitution Act* of 1982.

Section 91 and 92 of the *Canadian Constitution Act* grants authority to both the Federal and Provincial governments to enact laws under specific heads of power. For example, section 91(24) grants the federal government to enact laws for "Indians and lands reserved for Indians". The *Indian Act* was enacted under this section, and the *Fisheries Act* was enacted under the authority of section 91(12), governing the issuance of licenses. Indeed, section 2.3 of this *Act* specifically states: *This Act is to be construed as 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.* In Section 2.4, *When making a decision under this Act, the Minister shall consider any adverse effects that the decision may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982*

The Fisheries Minister routinely issues licenses, enacts and enforces wide-ranging regulations, under the authority of the *Fisheries Act*. Yet the Aboriginal Right of self-government is constitutionally protected under section 35 of the Constitution and trumps any legislation, rules or regulations enacted under section 91 of the *Act*.

It appears that DFO has abdicated its responsibility to negotiate in good faith and establish a legislative framework for the Moderate Livelihood fishery, the L'nu have now used their self-government powers and enacted L'nu fishing rules and regulations under the L'nuwey Tplutaqan legal order of Netukulimk, defined by the L'nu as including *"use of the natural bounty provided by the Creator" sufficient to ensure "the self-support of the individual and the community*".

Exercising self-government in accordance with Netukulimk – allowing L'nuk fishers to work legally and rightfully – is all the Sipekne'katik First Nation has done. This crucial point can be hard for non-native fishers and officials to grasp precisely because Netukulimk can authorize a licensing scheme for L'nuk, it acts to both grant and limit the rights of licensees. Conservation is the foundation of Netukulimk; accordingly, Sipekne'katik responsibly issued only 5 licenses, and limited each L'nuk fisher to the use of only 50 traps, in LFA 34. In contrast, there are nearly one thousand – 985 – non-native licenses, with each fisher permitted up to 400 traps – in the same area.

Conservation is not, however, the fundamental legal question here: *who* gets to regulate is the issue. This is essentially the same fight that DFO and Department of Indigenous & Northern Affairs had in 1999, because all the L'nuk have done, now as then, is seek to exercise – in a responsible and culturally appropriate manner – their rights to self-government, in order to regulate their Treaty Right.

In sum, the Sipekne'katik Fishers are fishing under the licensing scheme of the Sipekne'katik First Nation, enacted under authority of the Indigenous Legal Order of Netukulimk, as protected under section 35 of the *Canadian Constitution*.

The real fight now is with the Canadian Justice System. The Calls to Action and the Calls to Justice established the Reconciliation framework, and Canadian Legal Institutions must incorporate Netukulimk in its considerations of disputes among the L'nuk fishers and the non-Indigenous fishers. To ensure this happens – that justice is finally done – is the mission and work of the Eastern Door, a group of L'nu and Indigenous lawyers in Nova Scotia & Atlantic Canada.

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Note: the word L'nu means the people of the same tongue and is the preferred name of the tribe otherwise known as Mi'kmaq. L'nu is singular and L'nuk is plural.

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