Court File No

FEDERAL COURT OF CANADA

BETWEEN:

WABANAKI FISHERIES ASSOCIATION and RICHARD BROOKS

Applicants

and

HIS MAJESTY THE KING IN RIGHT OF CANADA, as represented by THE MINISTER OF FISHERIES, OCEANS, AND THE CANADIAN COAST GUARD, FISHERIES AND OCEANS CANADA (DFO), AND THE ATTORNEY GENERAL OF CANADA

Respondents

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at **Fredericton, New Brunswick.**

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Issued by:

Address of local office:

82 Westmorland Street, Suite 200

Fredericton, NB, E3B 3L3

TO: Department of Fisheries and Oceans
99 Mount Pleasant Rd
P.O. Box 1009
St. George, NB E5C 3S9

AND TO: Canadian Coast Guard
4 Navy Way
Saint John, NB E2K 5L6

AND TO: Ministry of Fisheries and Oceans
144 Millennium Dr,
Quispamsis, NB E2E 6E6

AND TO: Department of Justice Canada
Suite 1400, Duke Tower
5251 Duke St
Halifax, NS B3J 1P3

APPLICATION:

This is an application for judicial review in respect of:

A decision of the Minister of Fisheries, Oceans and the Canadian Coast Guard, on March 11, 2024, to not issue elver licences and not open the Maritime Region elver fishery for the 2024 season, as well as the ongoing enforcement of this decision by agents of Fisheries and Oceans Canada with respect to the Applicants and similarly situated Indigenous fishers.

The applicant makes application for:

a) A declaration that the process leading to the Minister's decision breached the Crown's fiduciary and constitutional obligations to the Applicants and similarly situated Indigenous fishers, in violation of s. 35 of the *Constitution Act, 1982*;

b) A declaration that the Minister's decision violated s. 2.4 of the *Fisheries Act*, RSC 1985, c F-14;

c) A declaration that the Minister's decision unreasonably and unjustifiably interfered with the Applicants' right to fish for a moderate livelihood protected by s. 35 of the *Constitution Act, 1982*;

d) An order in the nature of *certiorari* setting aside the Minister's decision to not issue elver licenses and to not open the Maritime elver fishery for the 2024 season;

e) An interim injunction restraining the Respondents from enforcing the Minister's decision against the Applicants and similarly situated Indigenous fishers pending the resolution of this application;

f) A permanent injunction restraining the Respondents from enforcing the Minister's decision against the Applicants and similarly situated Indigenous fishers;

g) An order in the nature of *mandamus* requiring the Minister to meaningfully consult with and accommodate the Applicants' right to fish elvers for a moderate livelihood, in accordance with s. 35 of the *Constitution Act, 1982*;

h) An order of costs to the Applicants; and

i) Such further and other relief as this Honourable may deem appropriate permit.

THE GROUNDS FOR THE APPLICANT ARE:

Overview

1. On March 11, 2024, the Minister of Fisheries and Oceans ("MFO") announced that the 2024 elver (baby eel) fishing season would be closed and that anyone caught fishing would be prosecuted. The Applicants, an organization comprised of First Nations fishers, seek relief because the decision does not distinguish between the privilege-based fisheries (involving commercial licensees) and the rights-based fisheries (arising from Aboriginal and treaty rights). The rights-based fishery is protected by section 35 of the *Constitution Act*, 1982 as well as the *Peace and Friendship Treaties* of 1760 and 1761.

2. The March 11, 2024 decision—which is continuing, day-by-day—violates section 35 of the *Constitution Act,* 1982. It is depriving Indigenous fishers of the ability to seek a moderate livelihood; it fails to live up to Canada's international obligations; and it is harmful to the objective of reconciliation with First Nations.

3. In the decision, the Minister points to conservation concerns connected with "poaching"—a pejorative and discriminatory reference to Indigenous people who have attempted to assert their livelihood fishing rights. There is no pressing concern that the rights-based fishery will negatively impact conservation efforts; in Maine, United States, the season is open and indigenous fishers receive a significant percentage of the total quota.

4. The actual problem rests in the Government's historical mishandling of the elver fishing industry. The failure to properly accommodate the rights-based fishery has caused disputes between privilege-based fishers, who believe they can

monopolize the premier waters, and First Nation fishers, who rightly believe that they have a constitutional right to fish for a moderate livelihood in their traditional territories.

5. Faced with the manifestation of its own historical mismanagement of the fishery, the Government closed the season altogether and threatened arrests and prosecutions against anyone, including First Nation fishers, who fish for elvers during the closure. The decision was reached without meaningful consultation, without considering the need to accommodate the rights-based fishery, and without any conservation concern capable of justifiably limiting the rights-based fishery. This violation of section 35 warrants intervention of the Court.

The rights-based fisheries versus privilege-based fisheries

6. The rights-based fishery in the Atlantic provinces is linked to Aboriginal rights and treaty rights, the *Peace and Friendship Treaties* of 1760 and 1761, and the *Constitution Act*, 1982. It exists separate and apart from the regulated commercial fishery.

7. Aboriginal rights refer to practices, traditions and customs that distinguish the unique culture of each First Nation and were practiced prior to European contact. They include the inherent right of First Nations people to hunt, fish and carry on their traditional way of life on their ancestral lands.

8. Treaty rights emerged from historic treaties. The *Peace and Friendship Treaties* of 1760 and 1761 were negotiated and concluded between First Nation communities and the British Crown. The treaties were signed by a delegation representing the British Crown as well as representatives of the Maliseet, Mi'Kmaq, and Passamaquoddy—three First Nation communities that were traditionally located in what is now called New Brunswick, Prince Edward Island, Nova Scotia, the Gaspé

Peninsula of Quebec, and in parts of northeastern United States.

9. Treaty and Aboriginal rights are protected by section 35 of the *Constitution Act,* 1982. Nearly 25 years ago, the Supreme Court of Canada recognized that Indigenous people have "sustained themselves in part by harvesting and trading fish (including eels) since Europeans first visited the coasts of what is now Nova Scotia in the 16th century." The Court further held that the right to fish eels in order to maintain a moderate livelihood is protected by section 35 of the *Constitution Act*, 1982 and can only be limited by constitutionally compliant regulations.

10. The Applicants' right to harvest and trade fish (including elvers) is also protected by Aboriginal title in the territories at issue in this claim. The said Aboriginal title is based on the Wolastoqiyik occupation of the territories in question before the British assertion of sovereignty, the fact that the Wolastoqiyik have continued to occupy the territories in question since the British assertion of sovereignty, and the fact that, at the time of sovereignty, the Wolastoqiyik occupation of the said territories was exclusive. The Wolastoqiyik Aboriginal title, of which some of the Applicants are beneficiaries, has not been extinguished, whether by treaty or otherwise.

11. Consequently, the Applicants possess the right to fish for a moderate livelihood because they are members of First Nations Tribes that signed treaties with the Crown and who possess inherent Aboriginal rights—both of which are protected by section 35 of the *Constitution Act*, 1982. The rights-based fishery includes the right of Indigenous people to fish for food, social and ceremonial purposes, and to achieve a moderate livelihood.

12. Privileged-based fisheries are based on privilege. They involve revocable rights. They do not convey property rights; they are often fee-based, and they are subject

to limitations through license requirements and legislative and regulatory tools. The Government has broad discretion to regulate privilege-based fisheries.

13. While the Government can regulate rights-based fisheries where it has a valid objective, any interference with the rights-based fishery must be constitutionally justifiable under section 35 of the *Constitution Act,* 1982. Such a justification can impose a heavy burden on the Government, and it requires meaningful consultation, negotiation, and accommodation—none of which has occurred regarding the rights-based elver fishery. If there are conservation concerns, any regulation must accommodate the rights-based fishery before the privilege-based fishery.

The Canadian Government failed to recognize the rights-based fishery

14. Following the *Marshall* decision, the Government of Canada adopted a policy-based approach to rights implementation. This approach involved two initiatives. The first was the *Marshall* Response Initiative ("MRI"), which was launched in 2000. In this initiative, Fisheries and Oceans provided communities that were referred to in the *Marshall* decision with "licenses, vessels and gear in order to increase and diversify their participation in the commercial fisheries and contribute to the pursuit of a moderate livelihood." The MRI was meant to be a one-year endeavour, but it was extended on three separate occasions.

15. The second initiative was the Atlantic Integrated Commercial Fisheries Initiative ("AICFI"). Within this 2007 initiative, the Department of Fisheries and Oceans ("DFO") provided certain First Nation communities with "fishing licenses across multiple species, vessels and gear, governance, capacity building, and training in order to increase and diversify the treaty nations participation in the commercial fisheries and contribute to the pursuit of a moderate livelihood for their members."

16. While these two initiatives allowed access to fisheries for some First Nations, they did not reflect the true recognition of Treaty and Aboriginal rights. Instead, the Government often took hardline negotiation positions—a "take it or leave it" stance that permitted some access to the commercial fishery but denied the existence of a rights-based fishery. Instead of ensuring rights-based fisheries were given priority, the DFO continued to place commercial and recreational fisheries above rights-based fisheries and gave rights-based holders 'what is left over' by claiming the reasons were based in conservation.

17. In March 2021, the Minister launched the moderate livelihood fishing plans process as a more flexible interim approach to recognizing rights-based fisheries. The Government did not consult First Nation communities on this new path before it was announced. It also made veiled threats of increased enforcement on the water. The failure to consult and the veiled threats threatened true reconciliation with First Nations.

18. Subsequently, the DFO entered moderate livelihood fishing plans for some First Nation tribes. In doing so, they issued moderate livelihood fishing licenses in the communal commercial licensing process pursuant to the *Aboriginal Communal Fishing Licenses Regulations*. These plans failed to properly recognize the rights-based fishery. Among many issues, the licencing scheme purported to give exclusive fishing rights in premier waters to privilege-based fishers.

The Senate Report that highlighted the problem

19. In July 2022, the Standing Senate Committee on Fisheries and Oceans released its report, *Peace on the Water: Advancing the Full Implementation of Mi'kmaq, Wolastoqiyik, and Peskotomuhkati Rights-Based Fisheries*. The report highlighted how the Government had mishandled its response to the rights-based fishery. It

explained that "the rights-based fisheries that were affirmed in the *Marshall* decision have yet to be fully implemented by the Government of Canada and the lack of implementation has led to rising tensions and even violence." The committee noted that the Government of Canada "acknowledges that rights-based fisheries should be given priority over privileged-based fisheries but this is not put into practice by fisheries and oceans Canada."

20. The Report further noted evidence of "systemic racism and structural violence that influence not just the legislative process but also responses to the exercise of First Nations fishing rights." It also referred to evidence that rights holders were being confronted with harassment when exercising their rights-based fisheries.

21. The Report recommended a new way forward. It explained that there must be true collaboration and a shared decision-making framework. Such an approach, the Report explained, would recognize that moderate livelihood fisheries are rights-based fisheries that provide rights holders with the ability to fish and sell the fish caught in pursuit of a moderate livelihood, and to co-govern and co-manage those fisheries.

22. The Report explained that rights-based fishers should not have to wait any longer for their rights to be fully implemented. The Committee recommended that "the Government of Canada must immediately begin to develop conservation measures, in cooperation with the Mi'kmaq, Wolastoqiyik, and Peskotomuhkati and ensure that Indigenous laws, principles and traditional knowledge are given equal value and legitimacy in implementing rights-based fisheries." The rights-based fisheries, according to the Committee, "must be under the sole jurisdiction of Indigenous peoples. How these fisheries are implemented and managed should be the result of discussions between rights-holders and the Government of Canada." The Committee also recommended transferring a portion of the quota from license

holders to First Nations.

23. Following the Senate Report, the MFO knew well that Canada had not made meaningful progress in rights implementation. It had failed to uphold the honor of the Crown by not implementing the *Marshall* decision. The Minister and Government saw there was an immediate need to take steps in cooperation with the First Nations communities in New Brunswick, Nova Scotia, Prince Edward Island, and the Gaspé Peninsula to amend and modify all relevant laws, regulations, policies, and practices regarding rights-based fisheries to ensure that they were in line with Canada's domestic and international obligations including the *Constitution Act* and the *United Nations Declaration on the Rights of Indigenous Peoples*. It further knew that there was a need to cooperate with the First Nations to create a new legislative framework that would allow for the full implementation of rights-based fisheries.

24. During the 2023 season, the Minister issued licences to First Nation tribes as well as other licensees. The licences restricted where indigenous people could fish and afforded them only a small percentage of the Total Allowable Catch ("TAC"), the quota of how many kilograms of elvers can be harvested in the season. This was another example of the "take it or leave it approach"; and it fueled growing friction between rights-based fishers and privilege-based fishers.

25. The unjust infringement of the rights-based fishery was then aggravated by confrontations initiated by privilege-based fishers.

The litigation strategy of privilege-based fishers

26. The March 11, 2024 decision implicitly refers to disputes between a licencee, Ms. Mary Holland, and indigenous people in New Brunswick.

27. Elver fishing is a second career for Ms. Holland. She practiced as a lawyer in Saint John, New Brunswick, focusing on litigation, family, wills, and estates. Her late husband was also a lawyer who worked as a Crown prosecutor. Her husband obtained a licence to harvest elvers and formed the company Brunswick Aquaculture. Ms. Holland has profited from the harvesting and sale of elvers for many years. The business was lucrative, especially in the last decade. Elvers sold for approximately $4,000 per kilogram (often higher), and Ms. Holland was given a TAC of 1500 kilograms — worth around $6,000,000 per year.

28. In the spring of 2020, Ms. Holland had a licence to harvest elvers in New Brunswick waters that flow into the Bay of Fundy. Between April 17, 2020, and April 27, 2020, her business had caught at least 53.9 kg of elvers, worth hundreds of thousands of dollars. Then the Ministry of Fisheries and Oceans prohibited Ms. Holland from further fishing.

29. Ms. Holland filed a lawsuit (SJC-307-2020), naming various ministers, bureaucrats, enforcement officers, and a scientist. They said that the actions of the Defendants represented "manifest abuse in the exercise of discretion" committed "in bad faith with the intent to injure the Plaintiffs by interfering with their economic interests." The filing included no factual foundation for such serious allegations of deliberate wrongdoing. The conspiratorial claim had no merit. The litigation strategy was abusive, and it became part of a pattern that eventually shifted to focus directly on rights-based fishers as well as First Nations Chiefs.

30. On March 3, 2021, the Ministry of Fisheries and Oceans ("MFO") announced that it intended to balance First Nations rights within the elver fishing industry. This was a step toward recognizing that Indigenous fishers had a constitutional right to be meaningfully included so that they could achieve a moderate livelihood.

31. In the spring of 2021 and onward, the Department of Fisheries and Oceans ("DFO") communicated with various licence holders, including Ms. Holland, explaining that the government was attempting to recognize the rights of Indigenous people to fish for elvers in their traditional territories. DFO officials also commenced a series of meetings, discussions, and other communications with licence holders in order to explore avenues for allowing indigenous people to fish elvers without increasing the TAC.

32. The discussions continued, and, eventually, DFO reduced the quotas of the licence holders to permit Indigenous fishers to harvest approximately 13.7% of the TAC. Licence holders were permitted to apply for additional quota if the TAC for the season was not exceeded. This meant the Indigenous people would get 13.7% of the TAC and the licensees approximately 86%; but, if the Indigenous people could not harvest their portion, the licensees could apply to harvest the remaining amount.

33. Ms. Holland saw the evolving policy of the federal government as a threat to their business operations. The reduced quota directly impacted their business. They also saw that the policy of recognizing Indigenous rights could lead to other decisions in the future that would give Indigenous fishers a larger portion of the elver quotas.

34. In 2022, Ms. Holland sought relief from the Court of Queen's Bench of New Brunswick, alleging that "poachers" were taking elvers from the waters where she had exclusive fishing rights. She did not include the MFO or the DFO in the action.

35. The Plaintiff understood that, practically speaking, elver fishing was far more profitable in waters close to the ocean. As elvers move upstream and feed, they

become more difficult to harvest in an effective manner. The Plaintiff realized that, if they could monopolize the good fishing spots, they could avoid the impact on the business of any governmental efforts to provide Indigenous fishers with a significant portion of the TAC. Specifically, they understood that relegating Indigenous fishers to the more northern watersheds could defeat indigenous efforts to harvest a significant portion of the TAC. If that happened, the licensees were more likely to obtain authorization to harvest the remaining portion of the TAC.

36. When the 2022 season commenced, Indigenous fishers began harvesting small quantities of elvers from waters that Ms. Holland and her employees were permitted to fish. She and her employees confronted the fishers. When they failed to drive them out, she reported the matter to the authorities. Both DFO and RCMP officers refused to act upon Ms. Holland's requests. They explained that the Indigenous fishers were permitted to exercise their rights and the authorities would not interfere unless some offence occurred.

37. The Plaintiffs then commenced an action against various First Nation Chiefs, without naming any individual fishers or the Government. The action was scandalous, frivolous, and vexatious. Among other things, it relied upon baseless claims without any effort to plead facts on the essential elements. The action was an abuse of process.

38. The Plaintiffs knew or ought to have known that the Federal Court proceedings were the proper forum for their grievance, given the constitutional and conservation issues at play, as well as the government's efforts to effect policy that would balance the competing considerations. By proceeding in the Court of Queen's Bench and by declining to name the government, the action obscured the central issue at hand: the interaction between protected treaty and Aboriginal rights versus the entitlements of licence holders versus conservation objectives.

39. The Plaintiffs made an *ex parte* application to the Court of King's Bench, in Saint John, New Brunswick, seeking an injunction that would prevent indigenous people from fishing in the watersheds covered by their licence. The application materials did not fairly describe the factual circumstances. The claims unfairly portrayed the behaviour of the Indigenous fishers, while offering an incomplete picture of what MFO and DFO officials and officers had conveyed to Ms. Holland. The pleadings deliberately attempted to portray the fishers as menacing and uncivilized. At one point, they described an indigenous man urinating with his back to Ms. Holland. That vignette, as well as others, were used to conjure a negative and harmful image of the fishers.

40. When Ms. Holland obtained the order, she and others working for her initiated further confrontations with Indigenous fishers. They also reported the matters to the authorities. Then they filed more evidence with the Court that further failed to fairly describe the factual circumstances.

41. The Plaintiffs subsequently initiated contempt proceedings against the Chiefs. The motion was baseless. There was no factual merit in the allegation, and it was unsupported by law. It was eventually dismissed.

42. The Plaintiffs have continued to wield the injunction and the threat of contempt as a means to keep Indigenous fishers out of the waters identified in the licence.

43. The litigation strategy of the Plaintiffs (the actions, motions, and *ad hoc* investigations) increased the complexity of this public law dispute. The strategy made it difficult for the Government to continue with its policy of taking quota from licence holders but leaving them with exclusive access to specified waters.

The Minister unconstitutionally prohibits rights-based fishing in 2024

44. On March 11, 2024, the Minister announced that the 2024 season would be closed. In her decision, she first pointed to a concern that "significant quantities of elvers [are] being fished illegally, jeopardizing the conservation of the species." She elaborated that "the fishery has also become the focus of harassment, threats and violence between harvesters and toward fishery officers, with a number of confrontations and incidents of violence creating an immediate threat to the management of the fishery and public safety." This was an unfounded narrative that had been deployed in Ms. Holland's pleadings.

45. These comments were inaccurate and irresponsible. The Government knew or ought to have known that the problem emerged from its improper regulation of the privilege-based fishery and its failure to recognize the rights-based fisheries. For years it had not responded to the *Marshall* decision. When it was spurred to action, it adopted a "take it or leave it" approach that provided First Nations with the leftovers.

46. The situation with Ms. Holland was a dramatic example. The Government allowed her to assert a monopoly on premier elver fishing waters. The root of the problem rested in the regulatory scheme that purported to give her exclusive fishing rights in two seaside counties in New Brunswick and the refusal to acknowledge that rights-based fisheries exist outside of the licencing scheme. She capitalized on the situation by asserting exclusive fishing rights in court, then by conducting her own *ad hoc* investigations of supposed "poachers"—Indigenous fishers who were exercising their treaty and Aboriginal rights.

47. The Government knew what she had done. They knew that she was confronting fishers at the river. They did not act to prevent the situation. It was misleading and unfair to claim that the First Nations fishers were the problem.

48. The Minister further explained in her decision that "[i]n the light of all these considerations, it is clear that without significant changes, the risks to conservation of the species cannot be addressed and orderly management of the fishery cannot be restored." She added that the closure was necessary to address "unauthorized harvesting." She concluded, "I want to be clear that should anyone choose to fish for elvers they will be subject to enforcement action as per the Fisheries Act and the Maritime Provinces Fishery Regulations."

49. The decision violated section 35 of the *Constitution*. It unreasonably and unjustifiably interfered with the Applicants' Aboriginal and treaty right to fish for a moderate livelihood. The decision also violated s. 2.4 of the *Fisheries Act*, which imposes on the Minister a duty "to consider any adverse effects … [of her] decision on the rights of Indigenous Peoples of Canada".

50. The Minister incorrectly assessed her duty to consult and accommodate the Applicants, engaged in an unreasonably limited consultation process, offered no accommodation to indigenous fishers whose rights were impacted, and rendered a decision that is substantively unreasonable. The Minister's decision constitutes Crown conduct that affects a known Aboriginal treaty right as well as an asserted Aboriginal title claim. Accordingly, the honour of the Crown imposes a duty upon the Minister to consult with affected peoples and where necessary to accommodate the rights of those peoples.

51. The content of the duty to consult and accommodate exists on a spectrum and is determined by the strength of the claim to the rights in question as well as the potential severity of the impact of the decision on those rights. The Minister's conduct has, and continues to, affect the Applicants' rights in a substantially serious manner, eliminating their ability to exercise their rights whatsoever on threat of prosecution.

52. Because of these facts, the content of the duty to consult and accommodate the Applicants falls on the high end of the spectrum. The Minister's consultation process consisted of a 10-day period in which she received comments from stakeholders including First Nations groups. The Minister incorrectly assessed the duty to consult and accommodate on this decision as lesser in scope than it is and subsequently engaged in a consultation process that is unreasonably limited in content and scope. Further, the Minister did not offer any accommodation for the Treaty rights of the Applicants.

53. The Minister's decision is also substantively unreasonable. The *Fisheries Act* must be construed as upholding the rights of Indigenous peoples recognized and affirmed under section 35 of the *Constitution Act*, 1982. The Minister must consider any adverse effects on these rights when making any decision. The Minister's decision fails to acknowledge either of these requirements imposed on her by the statute enabling her decision.

54. Additionally, while the Minister has correctly noted general conservation concerns, there is no realistic or credible threat to the conservation of elvers and eels. Despite the allegations of poaching, the elver fishery is thriving in nearby Maine. In that jurisdiction, Indigenous fishers are allotted 22% of the TAC and are not limited in where they are allowed to fish. The conservation concern is speculative and unfounded, and therefore cannot be the basis for denying the treaty rights of the Applicants.

55. While the Minister expresses concern about public safety, any such concern is the result of the Respondents' own failure to manage competing claims to the fishery, as well as their failure to properly uphold the valid treaty rights of Indigenous fishers. Additionally, any safety concerns have been made worse

through the Respondents' enforcement actions, including threatening Indigenous fishers with prosecution, and demeaning. At times they have been demeaned and degraded. In one recent incident, a First Nation man, Blaise Sylliboy, was stripped of his belongings and forced to walk many kilometers back to safety. Moreover, the Minister's public safety concerns have been influenced by the negative stereotypes about Indigenous fishers harboured by non-Indigenous fishers, which have been expressly publicly and in court filings. Such actions on the part of the government stoke tensions rather than reduce them and are not in line with the goal of reconciliation.

The Applicants have standing to bring this application

56. Treaty and Aboriginal rights are held collectively by First Nations, but the Applicant's have standing to allege that their rights have been violated. The Applicant Wabanaki Fisheries Association is made up of indigenous elver fishers who are affected by the Respondents' unconstitutional and unlawful decision. They have standing to seek relief before the Court. Additionally, the Wabanaki Chiefs are confronted with ongoing abusive litigation that places them in personal jeopardy of monetary damages and even jail if they actively encourage the rights-based fishery. This additionally underscores the standing of the Applicants.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. The affidavit of Fred Moore;
2. The Report of the Standing Senate Committee on Fisheries and Oceans, *Peace on the Water: Advancing the Full Implementation of Mi'Kmaq, Wolastoqiyik, and Peskotomuhkati Rights-Based Fisheries.*
3. The evidence tendered before the Standing Senate Committee on Fisheries and Oceans in hearings before the release of the Report, *Peace on the Water: Advancing the Full Implementation of Mi'Kmaq, Wolastoqiyik, and Peskotomuhkati Rights-Based Fisheries.*
4. The pleadings and evidence in the *Holland v. Madawaska* actions and motions;

5. The affidavit of Richard Brooks;

6. Such further and other affidavit and other material as counsel shall advise and this Honourable Court shall permit.

THE APPLICANT REQUESTS the Respondent Minister of Fisheries, Oceans and the Canadian Coast Guard as well as the Respondent Fisheries and Oceans Canada to send a certified copy of the following material that is not in the possession of the Applicants but is in the possession of the Respondents to the Applicants and to the Registry:

1. Draft and final minutes and handwritten notes of meetings between the Minister or her representatives and any elver fishery stakeholders, including Indigenous fishers and organizations, as part of the 10-day consultation announced on February 13, 2024.

2. Draft and final briefing notes in the possession of the Minister or her representatives concerning the status of the 2024 elver fishery in the Maritime Region.

3. Draft and final memoranda in the possession of the Minister or her representatives regarding the status of the elver fishery in the Maritime Region, including memoranda describing conservation and public safety concerns, as well as memoranda proposing responses thereto.

4. All documents relied on by the Minister in making her March 11, 2024 decision.

5. Draft and final briefing notes in possession of the Minister or her representatives concerning the participation of the Department of Fisheries and Oceans in the Standing Senate Committee on Fisheries and Oceans' investigation into advancing the implementation of Indigenous rights-based fisheries.

6. Draft and final memoranda in the possession of the Minister or her representatives concerning the participation of the Department of Fisheries and Oceans in the Standing Senate Committee on Fisheries and Oceans' investigation into the advancement of Indigenous rights-based fisheries.

7. All documents relied on by the Minister and the Department of Fisheries and Oceans in preparation for their participation in the investigation of the Standing Senate Committee on Fisheries and Oceans into advancing the implementation of Indigenous rights-based fisheries.

8. Draft and final briefing notes in possession of the Minister or her representatives concerning the Government's response to the Standing Senate Committee on Fisheries and Oceans' report on advancing the implementation of Indigenous rights-based fisheries.

9. Draft and final memoranda in possession of the Minister or her representatives concerning the Government's response to the report of the Standing Senate Committee on Fisheries and Oceans on advancing the implementation of Indigenous rights-based fisheries.

10. All documents relied upon by the Minister and the Department of Fisheries and Oceans in preparation of the Government's response to the report of the Standing Senate Committee on Fisheries and Oceans on advancing the implementation of Indigenous rights-based fisheries.

Dated this 15 day of May, 2024.

Nathan Gorham, KC, Breana Vandebeek, and Adrian Forsythe
GORHAM VANDEBEEK
201-36 Princess Street
Saint John, NB, E2L 1K2
Tel: (506) 644-8714
Fax: (866) 463-7351
Email: gorham@gvlaw.ca
forsythe@gvlaw.ca

Counsel for the Applicant

Federal Court Cour fédérale

Date: 20240712

Docket: 24-T-79

Toronto, Ontario, July 12, 2024

PRESENT: The Honourable Mr. Justice A. Grant

BETWEEN:

WABANAKI FISHERIES ASSOCIATION AND RICHARD BROOKS

Applicants

and

HIS MAJESTY THE KING IN RIGHT OF CANADA, as represented by THE MINISTER OF FISHERIES, OCEANS, AND THE CANADIAN COAST GUARD, FISHERIES AND OCEANS CANADA (DFO), and THE ATTORNEY GENERAL OF CANADA

Respondents

ORDER

UPON MOTION in writing filed on June 5, 2024, pursuant to Rule 369 of the *Federal Courts Rules*, in which the Applicants request:

a) An Order allowing the Applicants to file their application on the grounds that it constitutes a challenge to ongoing Crown conduct and is therefore not subject to the 30-day time limit;

b) Alternatively, an Order pursuant to section 18.1(2) of the *Federal Courts Act* [*FCA*] and Rule 3 of the *Federal Courts Rules* granting the Applicants an extension of time to seek judicial review of the Minister of Fisheries and Oceans' March 13, 2024

decision to close the 2024 elver fishery to Indigenous fishers as well as of the ongoing enforcement actions taken by Fisheries and Oceans Canada.

c) An Order for expedited procedure for the hearing of this motion.

AND UPON reviewing the Applicant's submissions and reply submissions in support of the motion;

AND UPON reviewing the Respondent's written submissions opposing the Applicant's motion;

AND UPON considering Rule 3 of the *Federal Courts Rules*;

AND UPON disregarding the evidence contained in the Applicant's Reply, as the introduction of such evidence in a Reply deprived the Respondent of the opportunity to respond to it;

AND UPON being satisfied that, *at the very least*, it is likely that the Applicant Richard Brooks – a member of the St. Mary's First Nation – has standing to bring this application as an individual asserting his treaty right to fish for a moderate livelihood;

AND UPON considering the criteria for an extension of time, as set out in *Canada (Attorney General) v Hennelly*, [1999] FCJ No 846 (FCA), in addition to the interests of justice;

AND UPON concluding that, irrespective of whether the 30-day time limit should apply to this application, the *Hennelly* criteria for an extension of time have been met, as the Applicants have established that: i) they have a continuing intention to pursue this application; ii) the application has some merit; iii) no prejudice to the respondent arises from the delay; and iv) a reasonable explanation for the delay exists.

AND UPON agreeing with the Applicant that many of the arguments contained in the Respondent's submissions – including those related to standing – may involve complex and unresolved questions of fact and law, and are therefore more appropriately considered in the context of a full judicial review application;

AND UPON considering the Applicants' request for an expedited procedure, and the Respondent's alternative request that this matter proceed as a specially managed proceeding;

AND UPON noting that the Applicants' have prepared a draft Notice of Application, as contained within their Motion Record:

THIS COURT ORDERS that:

1. The Applicant is granted an extension of time, *nunc pro tunc* to serve and file its Notice of Application for judicial review of the Minister of Fisheries and Oceans' March 13, 2024, decision to close the 2024 elver fishery to Indigenous fishers as well as of the ongoing enforcement actions taken by Fisheries and Oceans Canada;

2. The Applicants shall serve and file the Notice of Application within **fifteen [15]** days from the date of this Order.

3. This matter will proceed as a specially managed proceeding.

4. There are no costs.

"Angus G. Grant"
Judge