

## HOUSE OF COMMONS STANDING COMMITTEE ON FISHERIES, OCT 21, 2020

### IMPLEMENTATION OF MI'KMAQ TREATY RIGHTS TO FISH IN PURSUIT OF A MODERATE LIVELIHOOD: PRESENTATION BY THE REGROUPEMENT DES PÊCHEURS PROFESSIONNELS DU SUD DE LA GASPÉSIE

#### Introduction

I wish to thank the Chair and members of the committee for agreeing to hear from the 148 commercial lobster fishers from the Gaspé Peninsula represented this evening by the Regroupement des pêcheurs professionnels du sud de la Gaspésie inc. (Southern Gaspé professional fishers association—RPPSG).

My name is O'Neil Cloutier and I am the RPPSG Executive Director. I am also the President of the Quebec Commercial Fishermen's Alliance and Secretary of the Canadian Independent Fish Harvesters Federation, and I have been a professional owner-operator since 1983.

My colleague, Claire Canet, is a project manager with the RPPSG. She has a degree in French law and a university certificate in conflict resolution. She has practised as a lawyer and facilitator in New Zealand.

The RPPSG's mission is to ensure the sustainable development of the fishery by maintaining a balance between the economic needs of inshore fishers in the southern Gaspé Peninsula and the sustainability of the species they rely on, particularly American lobster.

#### Correspondence with Fisheries and Oceans Canada

1. On December 13, 2019, the Minister of Fisheries, Oceans and the Canadian Coast Guard (DFO) was mandated to pursue and accelerate reconciliation with First Nations. In this context, the negotiation process followed by DFO raises fundamental questions regarding the management of fishing activities, access to the resource for all, the sustainability of stocks and the economic balance of coastal communities that depend on fishing.
2. The violent incidents seen recently are symptoms of a flawed negotiation process pursued by the government and the constant exclusion of commercial fishers from discussions on fisheries management. The government's approach divides the coastal communities that all depend on fishing for a living. The situation is aggravated by the public and repeated use of violent terms such as "disgusting, racists, terrorists," not to mention that the recent events were caused by a minority of fishers and that the Coalition of Atlantic and Québec Fishing Organizations, of which the RPPSG is a member, does not tolerate violence.
3. Having familiarized itself with the bilateral negotiations surrounding the management of the lobster fishery between DFO and the Mi'kmaq communities, including the Listuguj Mi'gmaq Government (LMG), the RPPSG has repeatedly asked DFO to have any changes that may be made to the way the lobster fishery is managed be submitted to harvesting industry representatives for approval before they are incorporated into an agreement to be concluded between DFO and the LMG.
4. To date, the RPPSG has not received a response from DFO on the measures that were under discussion nor has it been consulted by DFO on these measures.<sup>i</sup>

5. Any change in an area's lobster conservation harvesting plan that favours one group of fishers inevitably causes inequalities and tensions within the fishing community itself and within the coastal communities that depend on the fishery.
6. The lack of communication and consultation by DFO on the changes made to the management plan for the Gaspé lobster fishery is at odds with the principles of co-management of the fishery with representatives of the harvesting industry.
7. Between September 5 and September 24, 2020, the RPPSG has:
  - a. alerted DFO to the risks associated with implementing management measures as part of reconciliation negotiations other than those implemented in the Gaspé Peninsula with the agreement of the First Nations;
  - b. requested the following information: the framework agreement signed with the First Nations of the Gaspé Peninsula for fisheries reconciliation negotiations, a copy of the agreements signed with the Maliseet of Viger and a copy of the fall subsistence fishing licence conditions for the Listuguj Band;
  - c. established a communication process with DFO concerning changes that could be made to the resource management terms and conditions before they are ratified by an agreement with the First Nations; and
  - d. implemented a process allowing First Nations, DFO and harvesting industry representatives to discuss issues that would be related to various fishery management regimes.
8. To date, no discussion process has been put in place by DFO despite the urgency of the situation.
9. The RPPSG has not received any information on the content of the management measures and the terms and conditions for exercising fishing rights being considered by DFO and the First Nations that would be included in a proposed agreement with those First Nations.

### Background on the lobster fishery in the Gaspé Peninsula - Non-Indigenous communities historically organized around the fishery that rely heavily on lobster fishing as a moderate source of income

10. Non-Indigenous populations in the Gaspé Peninsula were and still are highly dependent on commercial fisheries, particularly the lobster fishery. The lobster fishing season lasts 10 weeks in Lobster Fishing Areas ("LFAs") 19, 20 and 21, during which commercial lobster fishers derive part of their annual income.
11. The LFAs are organized into sub-areas.<sup>ii</sup>
12. Since the 17th century, the first permanent non-Indigenous coastal communities, with populations between 150 and 300 on the Gaspé and Chaleur Bay,<sup>iii</sup> mainly sustained themselves and fertilized the land with lobster found along the coasts.<sup>iv</sup>
13. At the time, lobster was very abundant. The commercial fishery began around 1870 and reached its peak around 1885–1886 before declining until the mid-2000s with periods of decline of stocks and economic decline.

14. These factors, combined with a drop in the landed price of lobster and an increase in fixed costs, led to a drop in lobster fishers' incomes, which no longer allowed them to survive solely through fishing.<sup>v</sup>
15. As noted by the Senate Committee on Fisheries in 2013, since 2008, the lobster fishery "has been facing economic and structural challenges on a scale never seen in the past."<sup>vi</sup>
16. The Senate Committee added the following:

With support from federal and provincial governments and the collective commitment of all industry participants, the lobster fishery has embarked on a number of initiatives to ensure its viability. The Committee believes that these initiatives are going in the right direction, but these efforts must be sustained. The lobster fishery must stay on course and continue to make needed changes to ensure stability and sustainability in the future. This is the overarching objective of the Committee's recommendations.<sup>vii</sup>
17. Even today, coastal communities in the Gaspé and Magdalen Islands region still depend heavily on the fishery as a source of employment income.<sup>viii</sup>
18. The Gaspé is the region with the 7th highest unemployment rate in Canada. The region is highly dependent on seasonal income from the fishery, especially lobster.<sup>ix</sup>
19. In 2017, 42.91% of Gaspé residents had a total annual income of less than \$24,999 and 34% between \$25,000 and \$49,999, or roughly 5% above the national rate for these two income brackets, which are 37.25% and 29.47% respectively.<sup>x</sup>
20. The Gaspé Peninsula is Quebec's main fishing region. In 2016, 54,037 tonnes of seafood products were landed in Quebec, of which 32,496 tonnes were landed in Gaspésie Bas-St-Laurent, representing nearly 61% of the landings for the entire province. These landings represent close to 54% of the total value of the province's landings in 2016.<sup>xi</sup>
21. In 2019, the commercial fishery in the Gaspé Peninsula, including the commercial fisheries carried out by the Gespeg, Gesgapegiag and Listuguj Mi'kmaq bands, represents a total value of \$186 million. Lobster caught in LFAs 19, 20 and 21 represents a value of nearly \$45 million, or 24% of this total value.<sup>xii</sup>
22. All Canadian First Nations and non-First Nations must have equal access to the natural resources in our oceans and land and sea territory in order to achieve food independence and ensure the socio-economic well-being of individuals and communities while preserving the sustainability of the resource for all. This principle is called Netukulimk by the Mi'kmaq.
23. In *Marshall 2*,<sup>xiii</sup> the Supreme Court of Canada stated in part:

[41] ... The Minister's regulatory authority is not limited to conservation. This was recognized in the submission of the appellant in Marshall in opposition to the Coalition's motion. He acknowledges that it is clear that limits may be imposed to conserve the species/stock being exploited and to protect public safety. Counsel for the appellant Marshall goes on to say: Likewise, aboriginal harvesting preferences, together with non-Aboriginal/community dependencies, may be taken into account in devising regulatory schemes. ... It is for the Crown to propose what controls are justified for the management of the resource, and why they are justified ...
24. Given the dependence on commercial fishing of the Indigenous and non-Indigenous coastal communities in the Gaspé Peninsula and the disastrous consequences of the process followed to date by DFO in the context of reconciliation, the RPPSG recommends the following to the Standing Committee on Fisheries and Oceans:

- a. That the Canadian government be unable to exclude a community from discussions that have an impact on the management of the fisheries and its terms and conditions, under the guise of government-to-government discussions; and
- b. That, prior to making decisions that will result in changes to the way natural resources are managed, it be essential that all the concerns of the relevant coastal communities are taken into account and that a transparent communication and decision-making process with these communities are established.

### The RPPSG's role in the management of the lobster fishery and the conservation of the species in order to ensure a sustainable fishery for all

- 25. Following the decline of the cod fishery, which was formerly the main fishery practised by lobster fishers, they had to turn to a single-species lobster fishery. Because of the pressure on stocks, lobster fishers have become involved in lobster management and conservation.
- 26. In 1992, significant conservation measures began to be implemented in the Gaspé Peninsula by the RPPSG, some of them in collaboration with DFO. The conservation measures are as follows:
  - a. an increase in the minimum size was gradually brought in between 1992 and 2003, with the minimum size of the lobster cephalothorax increasing from 76 mm to 82 mm (LFAs 20 and 21), followed by an increase from 82 mm to 82.55 mm in 2018 (LFAs 20 and 21);
  - b. voluntary v-notching of egg-bearing females in 1992;
  - c. mandatory release of v-notched individuals in 1994;
  - d. imposition of escape vents and escape panels with biodegradable attachments for lobster traps in 1994;
  - e. Imposition of one trap haul per day in 2003;
  - f. Repurchases and retirement of commercial fishing licences starting in 2003 to reduce fishing effort. 48 licences were bought back. These licence buy-backs were funded 75% by the RPPSG and 25% by DFO;
  - g. Repurchase of four scallop licences to protect lobster habitat;
  - h. Decrease in the number of traps per licence from 250 to 235 in 2006;
  - i. Decrease in the number of fishing days for all lobster fishers, including Listuguj. In 2006, the spring season was shortened from 70 to 68 days in LFAs 20 and 21;
  - j. Implementation of lobster larvae seeding in 2010;
  - k. Implementation of a standard fishing trap in 2010-2011;
  - l. Implementation of the electronic logbook for catch reporting in 2012;
  - m. Implementation of Gaspé lobster origin identifiers applied by all Gaspé lobster fishers including First Nations paid by the RPPSG and MAPAQ in 2012;
  - n. Gradual implementation of a maximum catch size (LFA 20) of 155 mm in 2008, 150 mm in 2009 and 145 mm in 2012. LFAs 19 and 21 gradually increased from 155 mm in 2016, 150 mm in 2018 and 145 mm in 2020; and

- o. Imposition of the maximum size in LFAs 21A and 21B<sup>xiv</sup> in 2018.
27. Several of these measures have been implemented in the Gaspé since 2006, through the Conservation Harvesting Plan (CHP), and have been accepted by all non-Indigenous and Indigenous lobster fishers in the Gaspé.
  28. To date, all these measures have resulted in a 30% reduction in fishing effort in LFA 20, but not in LFA 21, since the program to integrate Indigenous fishers into the lobster fishery has not led to reduced effort in this area.
  29. The RPPSG also funded and obtained sustainable fishing certification by the Marine Stewardship Council (MSC) for the lobster fishery in all areas of the Gaspé Peninsula. An upward change in fishing effort in the Gaspé Peninsula would be contrary to the MSC certification criteria.
  30. The use of ELOGs has been required by DFO since 2017 for all lobster fishers in the Gaspé Peninsula for the reporting of lobster catches except for the fall subsistence fishery conducted by Listuguj.
  31. Obviously no catch data were sent by LMG to DFO through an electronic logbook during the fall fisheries in Area 21B in 2018 and 2019.
  32. It is not clear how catch data during the subsistence fishery are collected by DFO to determine the volumes and nature of the stocks actually harvested during this fall subsistence fishery.
  33. Reliability of the data collected is essential for determining the status of the stocks and the resilience of the resource to the fishing effort in a given LFA.
  34. The causes of stock fluctuations are not well understood.<sup>xv</sup> However, in its 1995 report, the Fisheries Resource Conservation Council (FRCC) summarized in three key elements the factors likely to influence stock variation and the maintenance of lobster stocks in a “healthy” state: good egg production, reasonable fishing mortality and a biomass composed of several year-classes.<sup>xvi</sup>
  35. The regeneration power of lobster populations is known to be limited and depends on many unknown factors. This makes it essential that there be no change in the management of the lobster fishery that increases pressure on the stocks, when they have not recovered to a level that would allow an increase in fishing effort.
  36. Several stock management measures to protect the resource have been implemented since the beginning of the 20th century. The most important measures are
    - a. a prohibition on catching egg-bearing females (females whose eggs have been fertilized and are visible under their tail);
    - b. a minimum catch size;
    - c. selective traps allowing smaller lobsters to escape;
    - d. a fishing license system limiting entrants;
    - e. a restriction stating that traps are the only fishing gear permitted and a limit on the number of traps per licence;
    - f. the division of coastal areas into defined lobster fishing areas (LFAs); and
    - g. specific fishing seasons for each LFA.

## Risks of fishing outside the spring commercial season in the Gaspé Peninsula

37. DFO's assessment of stock status is based on a review of indicators of abundance, demography, fishing pressure and productivity.
38. Although stock status shows an improvement in indicators and landings from 2005 to 2019, DFO is still recommending a reduction in fishing effort in LFA 20:

However, in Area 20, the small average size of commercial lobsters and the high exploitation rate suggest that reducing fishing effort must be pursued.<sup>xvii</sup>
39. In the last stock assessment (DFO, 2019), indicators of fishing pressure could not be estimated in LFA 21, but size structures suggest that they are rather high.<sup>xviii</sup> It was also noted that in LFA 21B, the catch per unit effort (CPUE) in fall 2018 was 74% higher than in 2015 and 162% higher than the historical average (2001-2017).<sup>xix</sup>
40. The study carried out by the RPPSG on the characterization of lobster catches by trap fishing in the two extremities of the Gaspé Peninsula (LFA 19, LFA 21) in 2017 showed that the size distribution in LFA 21 was rather typical of a high exploitation rate and a fishery that relies more on the recruitment of the year (the 1st moult class), since the following classes were not very present in the catches. Therefore, the lobster stock would be less resilient to fishing in case of low recruitment. The data collected by the RPPSG in 2017 followed the trend of DFO sampling.<sup>xx</sup>
41. It was observed that the fall subsistence fishery has an impact on both the stocks and the subsequent spring fishery in LFA 21.<sup>xxi</sup>
42. DFO has recommended that in 2009 and 2012, fishing effort in Area 21B should continue to be limited so that it remains below historical levels.<sup>xxii</sup>
43. An important conservation measure in lobster fisheries is the protection of egg-bearing females. In the Gaspé Peninsula, the spring fishing season ( $\pm$  April 25 to July 1) takes place before the new hatching of larvae<sup>xxiii</sup> and the new moult (July - September). With such a timeframe, primiparous females with a one-year reproductive cycle and multiparous females that spawn in successive years are fully protected from fishing by the conditions of fishing licenses prohibiting the capture of egg-bearing females.
44. However, a fall fishery allows the capture of females with a one-year reproductive cycle at the beginning of their post-moult cycle (which have just moulted and reached the minimum catch size), but before they lay their eggs (i.e. the same year before becoming primiparous females), and also multiparous females that have the capacity to lay in successive years, but before they lay another clutch of eggs. Therefore, a portion of the potentially egg-bearing females will be caught and retained in a fall fishery before they have time to lay their eggs and benefit from the conservation measures.<sup>xxiv</sup>
45. The risk of harvesting an unprotected fertilized female because these eggs are not yet visible under her tail is therefore greater in the fall than in the spring, since the yields from the fall fishery are about seven times higher than those observed in the spring in area 21B.<sup>xxv</sup>
46. Therefore, the impact of a fall fishery of females that are fertilized but have not yet laid eggs will not be felt until several years later since the larvae that could have hatched if these captured females had become egg-bearing would have subsequently taken six to eight years to reach their sexually mature size (about 84 mm in the Gaspé Peninsula) and be able to participate in the reproductive effort for the first time.<sup>xxvi</sup>

47. Furthermore, the lobsters that remain for the following spring fishery are then those under the minimum catch size and, a large proportion of these lobsters are not sexually mature. These two factors can therefore have significant consequences on the reproductive and fertilization capacity of the lobster population.
48. Considering the reproductive, fertilization and egg-hatching cycle, as well as other factors, from a scientific perspective, it is realistic to believe that in the medium term, the catch of egg-bearing females and a probable increase in fishing effort during a fall fishery will have a negative impact on the recruitment and stock levels of lobster for the following spring fishing seasons.
49. In a competitive fishing environment, we will remain in a vicious circle since the better the fall fishery, the more it will be favoured to the detriment of the spring fishery and future generations of lobster.

### Risks related to the implementation of different fisheries management regimes

50. Sustainability and conservation are truly central to the activities of all commercial fishers because their moderate livelihood depends on the availability of the resource.
51. There is only one sea and only one lobster stock. Establishing independent management regimes would complicate or even make impossible the sustainable and effective management of stocks that would allow all communities that depend on the fishery to continue their activities in the long term, provide essential income to the coastal areas of Eastern Canada and allow equitable access to the resource in order to feed all the individuals who depend on it.
52. Any change to the measures of a conservation-based lobster fishing plan in an area that favours one group of fishers inevitably causes inequalities and tensions within the fishing community itself and within the other coastal communities that depend on the fishery.
53. Access to the sea for all is essential to maintain the commercial fishing activities that have been developed for over 150 years by non-Indigenous communities and which contribute greatly to the economic well-being of all coastal communities.
54. A fragmentation of the marine territory to the benefit of one community would necessarily have an impact on the capacity of other communities to live moderately from natural resources.
55. Furthermore, such a fragmentation in favour of one community or the exclusive recognition of a marine area in favour of one community would lead to the establishment of regional inequalities as well as to the denial of the fact that, historically, non-Indigenous groups have relied on fisheries resources and participated in their exploitation.
56. Fragmentation, combined with the establishment of different and competing fisheries management regimes, would have a direct impact on the management of fisheries and the power to regulate them, which is DFO's responsibility according to *Marshall 2*.<sup>xxvii</sup>

### The concept of subsistence fishing for achieving a moderate livelihood

57. One of the issues currently causing problems in the reconciliation process initiated by the Government of Canada is the different understanding, by First Nations and non-Indigenous fishers, of the concept of "subsistence fishing allowing for the attainment of a moderate

livelihood” where First Nations have access to significant sources of income and food through communal commercial licences.

58. This concept is currently not clearly defined by the federal government nor is it clearly established by case law.
59. Further to the *Marshall* decisions in 1999, First Nations were granted a number of commercial licences for several species, including lobster.
60. In the Gaspé Peninsula, DFO issued a total of 163 commercial lobster fishing licences in 2020 for LFAs 19, 20 and 21, including 148 for non-Indigenous fishers, 12 for the three Mi’kmaq First Nations of the Gaspé Peninsula and 3 for the Maliseet of Viger First Nation.<sup>xxviii</sup>
61. The Listuguj Mi’kmaq Band (LMG) operates a fall subsistence fishery with a number of traps equivalent to a spring commercial fishing licence.
62. At the time of the most recent census in 2016, the Gaspé Peninsula had a population of 90,311,<sup>xxix</sup> including approximately 2,676 in the three Mi’kmaq Bands of Gespeg (782),<sup>xxx</sup> Gesgapegiag (653)<sup>xxxi</sup> and Listuguj (1241).<sup>xxxii</sup>
63. Therefore, in 2020, DFO issued the equivalent of 1 lobster fishing licence for every 610 non-Indigenous inhabitants and 1 commercial lobster fishing licence for every 223 First Nations inhabitants.
64. Nova Scotia First Nations also have commercial lobster fishing licences.
65. The problem is illustrated by the situation in St. Mary’s Bay and the launch of the unregulated subsistence fishery in Cape Breton. In the Gaspé Peninsula, LMG wishes to market a portion of the lobsters caught in the fall under a subsistence fishery in order to pursue a moderate livelihood.
66. According to the current understanding of the Mi’kmaq First Nations, revenues from the regulated commercial fishery should not be taken into consideration in order to achieve a moderate livelihood.<sup>xxxiii</sup>
67. The concept of a moderate livelihood was referred to in 1993 by the British Columbia Court of Appeal in *Van Der Peet*.<sup>xxxiv</sup> In that case, Ms. Van Der Peet had sold salmon that she had caught. The British Columbia courts first considered whether Ms. Van Der Peet had an Aboriginal right to fish and dispose of the salmon she caught, including by marketing it. In 1981, the British Columbia Supreme Court found that Ms. Van der Peet had an Aboriginal right to sell the salmon she caught. The issue of the extinguishment of this right was referred to the British Columbia Court of Appeal. It was this court that, in 1993, considered the question of the continued existence of the aboriginal right to sell salmon.<sup>xxxv</sup> The Court found that Ms. Van Der Peet had committed an offence by selling fish while fishing under a subsistence licence.
68. Taggart J. stated incidentally that the concept of “moderate livelihood” is fundamentally subjective and difficult to apply.

103) Irrespective of its origins, in my view the concept of a “moderate livelihood” does not provide an appropriate or practical basis for articulating the scope and nature of aboriginal rights or the scope of the aboriginal priority to exercise such rights. The notion of what constitutes a “moderate livelihood” is inherently subjective. Even if it could be ascertained how and, more importantly, by whom, such a fluid standard could be determined, the extent to which the sale of salmon was realizing more than a “moderate livelihood” would be impossible to police. Indeed, commercial sale with a view to achieving an excessive lifestyle is difficult to discern from commercial sales for more modest objectives.



69. Wallace J. considers, incidentally, that the concept of “moderate livelihood” must be analyzed in the context of all other sources of income.

165) In my opinion the aboriginal fishing rights of the Sto:lo people have included and still include a right, to be exercised in accordance with their rights of self-regulation, including recognition of the need for conservation, to catch and if they wish, sell, themselves and through other members of the Sto:lo people, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a moderate livelihood, and, in any event, not less than the quantity of salmon needed to provide every one of the collective holders of the aboriginal right with the same amount of salmon per person per year as would have been consumed or otherwise utilized by each of the collective holders of the right, on average, from a comparable year’s salmon run, in, say, 1800.

70. It should be noted that this notion of a moderate livelihood is subjective and that it is doubtful whether it is appropriate for establishing the scope and nature of an Aboriginal or treaty right.

71. In *Marshall 1*,<sup>xxxvi</sup> Binnie J. commented:

[59]: A moderate livelihood includes such basics as “food, clothing and housing, supplemented by a few amenities”, but not the accumulation of wealth. It addresses day-to-day needs. This was the common intention in 1760. It is fair that it be given this interpretation today.

72. In paragraph 61 of this decision, Binnie J. suggests that the government may establish through regulations what is meant by a moderate livelihood.

[61] Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi’kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such regulations would not constitute an infringement that would have to be justified under the *Badger* standard.

73. However, as Taggart J. points out in *Van Der Peet*, this is a subjective notion and therefore difficult to apply.

74. Binnie J. stated the following in *Marshall 1*:<sup>xxxvii</sup>

[7] ... In my view, the treaty rights are limited to securing “necessaries” (which I construe in the modern context, as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth. The rights thus construed, however, are, in my opinion, treaty rights within the meaning of s. 35 of the Constitution Act, 1982, and are subject to regulations that can be justified under the *Badger* test (*R. v. Badger*, [1996] 1 S.C.R. 771).

75. The Minister of Fisheries and Oceans has the right to regulate the exercise of the subsistence fishing right and, by extension, to decide whether, within this framework, the band or individual fishing for the band may partially dispose of the catch to achieve a moderate standard of living provided that such regulation meets the *Badger* test.

76. The RPPSG is of the view that the government may limit the exercise of the right to fish for subsistence to achieve a moderate livelihood for resource conservation and public interest considerations as clarified by the court in *Marshall 2*.<sup>xxxviii</sup>

40 (b) The paramount regulatory objective is the conservation of the resource. This responsibility is placed squarely on the Minister and not on the aboriginal or non-aboriginal users of the resource. The September 17, 1999 majority decision referred to *Sparrow*, *supra*, which affirmed the government’s paramount authority to act in the interests of conservation. This principle was

repeated in *R. v. Gladstone*, 1996 CanLII 160 (SCC), [1996] 2 S.C.R. 723, *Nikal, supra, Adams, supra, R. v. Côté*, 1996 CanLII 170 (SCC), [1996] 3 S.C.R. 139, and *Delgamuukw, supra*, all of which were referred to in the September 17, 1999 majority judgment.

41 (c) The Minister's authority extends to other compelling and substantial public objectives which may include economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups. The Minister's regulatory authority is not limited to conservation. This was recognized in the submission of the appellant Marshall in opposition to the Coalition's motion ....

77. The concept of a moderate livelihood could be defined by regulation by the government without having to meet the *Badger* test.
78. Any definition of a moderate livelihood, if it is possible to establish one objectively so that the concept is applicable, should be established for all Canadians and should not relate only to fisheries.
79. The RPPSG suggests that the pursuit of income from subsistence fishing in order to achieve a moderate livelihood while ignoring the substantial income derived from commercial fisheries is tantamount to the pursuit of wealth accumulation.
80. The RPPSG suggests, on the one hand, that in the event that such a notion were to be considered, it is the totality of measures and sources of income for a community that should be taken into account. For example: existing commercial fishing accesses, private income of the households making up the community, government assistance redistributed in that community, tax exemptions, access to other sources of income specific to that community, etc.
81. The RPPSG suggests, on the other hand, that the examination of the notion of subsistence fishing to achieve a moderate livelihood must take into account the total income of a band and individuals practising a subsistence fishery, failing which, it would have the consequence of endorsing the practice of a subsistence fishery allowing for the accumulation of wealth, which would be contrary to jurisprudence.
82. The exclusion of other sources of income in the consideration of the concept of subsistence fishing in order to obtain a moderate livelihood could only lead to the establishment of economic inequality between Indigenous and non-Indigenous communities.
83. The RPPSG suggests that when establishing a fisheries regulation or agreement, the department may take into account not only Indigenous harvesting preferences, but also the dependence of a non-Indigenous community or region on a given resource.

## ENDNOTES

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<sup>i</sup> E-mail sent September 5, 2019 from O'Neil Cloutier to Patrick Vincent (DFO); letter dated October 2, 2019 from O'Neil Cloutier to Patrick Vincent (DFO); letter dated October 16, 2019 from O'Neil Cloutier to Patrick Vincent (DFO); letter dated October 16, 2019 from O'Neil Cloutier to Patrick Vincent (DFO); letter dated October 16, 2019 from O'Neil Cloutier to Patrick Vincent (DFO). Letter dated November 7, 2019 from the RPPSG to DFO and minutes of the discussion meeting with DFO on October 30, 2019; e-mails from the RPPSG to Jean Picard (DFO) dated February 28, 2020; e-mails from the RPPSG to Maryse Lemire (DFO) dated August 24, 2020.

<sup>ii</sup> Map of LFAs in the Gaspé Peninsula

<sup>iii</sup> Maryse Grandbois, "Le développement des disparités régionales en Gaspésie 1760-1960," *Revue d'histoire de l'Amérique Française*, Vol. 36, Issue 4, March 1983, pp. 484-486.

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- <sup>iv</sup> Fisheries and Oceans Canada, [A Brief History of the Lobster Fishery in the Southern Gulf of St. Lawrence](#); Gulf Region, Fisheries and Oceans Canada, Moncton, 2012, p. 6.
- <sup>v</sup> Rabia Sow, [Monographie de l'industrie québécoise du homard d'Amérique](#), Department of Agriculture, Fisheries and Food, Government of Quebec, 2012, p. 17.
- <sup>vi</sup> Standing Senate Committee on Fisheries and Oceans, [The Lobster Fishery: Staying on Course](#), May 2013, see Executive Summary.
- <sup>vii</sup> Ibid.
- <sup>viii</sup> Quebec Department of Agriculture, Fisheries and Food, [Données socio-économiques](#), 2013.
- <sup>ix</sup> Statistics Canada, [Regional unemployment rates used by the Employment Insurance program, three-month moving average, seasonally adjusted](#), September 2020.
- <sup>x</sup> Revenu Québec, [Le revenu total des particuliers](#), 2017 taxation year.
- <sup>xi</sup> Quebec Department of Agriculture, Fisheries and Food, [Pêches et aquaculture commerciales au Québec en un coup d'œil, Portrait statistique, Édition 2017](#), see Executive Summary and point 2.4.
- <sup>xii</sup> Fisheries and Oceans Canada, [Preliminary results for the 2019 Commercial Fisheries season in Quebec](#); Fisheries and Oceans Canada, [Données préliminaires de débarquement de homard en Gaspésie de 2017 à 2019](#), page 1.
- <sup>xiii</sup> [R. v. Marshall](#), [1999] 3 S.C.R. 533, 1999 CanLII 666 (SCC).
- <sup>xiv</sup> Regroupement des pêcheurs professionnels du sud de la Gaspésie, [Protocole pour l'échantillonnage en Gaspésie ZPH 19-21](#), 2017; Jean Côté, [Caractérisation des captures de homards dans les zones de pêches 19 et 21](#), PowerPoint presentation, 2017.
- <sup>xv</sup> Fisheries and Oceans Canada, [A Brief History of the Lobster Fishery in the Southern Gulf of St. Lawrence](#); Gulf Region, Fisheries and Oceans Canada, Moncton, 2012, p. 6.
- <sup>xvi</sup> Fisheries Resource Conservation Council, [A Conservation Framework for Atlantic Lobster](#), Report for the Minister of Fisheries and Oceans. November 1995, 53 pp., and appendices, p. 47.
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