HFX 506010

BURCHELLS LLP

Barristers & Solicitors

1801 Hollis Street, Suite 1800
Halifax, Nova Scotia
Canada B3J 3N4

t. 902.423.6361
f. 902.420.9326

www.burchells.ca

Jason T. Cooke
902.422.5374
jcooke@burchells.ca

File: 17181-1080043

May 10, 2021

VIA E-MAIL HalifaxSupremeCourt@courts.ns.ca

The Law Courts
1815 Upper Water Street
Halifax NS B3J 1S7

Dear Prothonotary:

Re: Chief Wilbert Marshall on his own behalf, and on behalf of the members of **Potlotek First Nation v. The Attorney General of Canada**
Notice of Application in Court

Please find attached for filing the following documents with respect to the above-noted matter:

1. Notice of Application in Court; and
2. Affidavit of Jason T. Cooke.

The filing fee for the attached Notice of Application in Court in the amount of $218.05 will paid via our firm's credit card once approval for filing has been given.

In accordance to the directions set out in the Essential Services Model, we are required to set out why the filing the attached documents are considered urgent or essential.

It is essential that the within documentation be filed with the Honourable Court and issued as soon as possible as the subject matter of the Application concerns the Applicants' exercise of their Treaty Rights, and actions being taken by the Respondent against the Applicants, both of which are taking place currently.

Further, obtaining the declarations sought by way of the Application are of paramount concern to the Applicants, whose member harvesters are fishing on a daily basis and interacting with the Respondent in an enforcement context. Any continued ambiguity about

the legitimacy of the Applicants' exercise of the Treaty Right is to the detriment of all parties involved, but of particular concern for the dignity, safety and economic security of harvesters. As you will recall, tensions surrounding exercise of the Treaty Right last year resulted in an injunction being ordered to protect the safety of harvesters of another Mi'kmaq First Nation.

As a result, it is essential that the within documentation be filed with this Honourable Court and issued as soon as possible.

If you have any questions or concerns with respect to the filing of the within documentation, please advise me immediately at jcooke@burchells.ca or by calling my direct line at 902-422-5374.

Yours very truly,

BURCHELLS LLP

JTC
Enlc.

Court Administration
MAY 10 2021
Halifax, N.S.

Form 5.07

2021

Hfx. No. 506010

Supreme Court of Nova Scotia

Between:

CHIEF WILBERT MARSHALL his own behalf, and on behalf of the members of **POTLOTEK FIRST NATION**

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION IN COURT

To: The Respondent

The Applicants request an order against you.

The Applicants are applying to the court for the following relief:

1. A declaration that the *Fisheries Act (Canada)*, RSC 1985, c F-14, and the regulations promulgated thereunder, namely the *Fisheries (General) Regulations*, SOR/93-53, the *Maritime Provinces Fishery Regulations*, SOR/93-55, the *Atlantic Fishery Regulations*, 1985 SOR/86-21, and the *Aboriginal Communal Fishing Licences Regulations*, SOR 92-332 (the "*Regulations*") unjustifiably infringe upon the Applicants' treaty right affirmed by the Supreme Court of Canada in *R. v. Marshall*, [1999] 3 SCR 456 (*"Marshall 1"*) and *Marshall v. Canada*, [1999] 3 SCR 533 (*"Marshall 2"*) to fish for a moderate livelihood (the "Treaty Right") by prohibiting or unduly restricting the Applicants from exercising the Treaty Right, failing to prioritize the Treaty Right, and constituting a unstructured discretionary administrative regime that fails to outline specific criteria for the exercise of that discretion in a framework that properly accommodates the existence of the Treaty Right;

2. A declaration that the *Fisheries Act*, and the *Regulations*, including provisions related to enforcement, are constitutionally inapplicable to the Applicants, and of no force or effect, pursuant to section 35(1) and section 52(1) of the *Constitution*

Act, 1982 to the extent they prohibit, or unduly restrict, the exercise of the Applicants' Treaty Right;

3. An injunction enjoining the Fisheries and Oceans Canada from enforcing the provisions of the *Fisheries Act* and *Regulations* against Mi'kmaq harvesters authorized by Potlotek First Nation fishing in compliance with the Livelihood Fisheries Plan; and

4. Such further and other relief as this Honourable Court may deem fair and just in the circumstances.

The Applicants started this application by filing this Notice on the date certified by the Prothonotary.

Grounds for the order

The Applicants are applying for the order on the following grounds: See the attached Schedule "A".

Name of Witness	**Subject**
Chief Wilbert Marshall	All aspects of the Application, including but not limited to: • Lack of consultation by Respondent; • Preparation and implementation of the Applicants' Livelihood Fisheries Plan; and • Barriers to effective exercise of the Applicants' Treaty Right
Individual Mi'kmaw Harvesters	Their experiences in attempting to exercise the Treaty Right
Such other witnesses as deemed necessary	

Motion for directions and date

At on , 2021, the Applicants will appear before a judge at The Law Courts, 1815 Lower Water Street, Halifax, Nova Scotia, B3J 1S7, to make a motion for an order giving directions and appointing a time, date, and place for the hearing. The judge may provide directions in your absence, if you or your counsel fail to attend.

Affidavit on motion for directions

The Applicants file the affidavit of Jason Cooke, sworn on May 10, 2021, as evidence on the motion for directions. A copy of the affidavit is delivered to you with this Notice.

You may participate

You may file with the court a Notice of Contest, and any affidavit for the motion for directions, no more than fifteen days after this Notice is delivered to you or you are otherwise notified of the Application. Filing the Notice of Contest entitles you to notice of further steps in the Application.

Possible final order against you

The court may grant a final order on the Application without further notice to you if you fail to file a Notice of Contest, or if you or your counsel fail to appear at the time, date, and place for the motion for directions.

Filing and delivering documents

Any documents you file with the court must be filed at the office of the Prothonotary, The Law Courts, 1815 Lower Water Street, Halifax, Nova Scotia, B3J 1S7 (telephone #902-424-8962).

When you file a document you must immediately deliver a copy of it to the Applicants and each other party entitled to notice, unless the document is part of an *ex parte* motion, the parties agree delivery is not required, or a judge orders it is not required.

Contact information
The Applicants designate the following address:

D. Bruce Clarke, Q.C. and Jason Cooke
Burchells LLP
1800-1801 Hollis Street
Halifax, NS B3J 3N4
Phone: (902) 423-6361
Fax: (902) 420-9320

Documents delivered to this address are considered received by the Applicants on delivery.

Further contact information is available from the Prothonotary

Signature

Signed May 10, 2021.

D. Bruce Clarke, Q.C.
As Counsel for the **Applicants**

Jason T. Cooke
As Counsel for the **Applicants**

Prothonotary's certificate
I certify that this Notice of Application was filed with the court on May 10, 2021.

Prothonotary

AMY HARRISON
Deputy Prothonotary

Schedule "A"
Grounds for the Order

1. The Applicant Chief Wilbert Marshall ("Chief Marshall") is the Chief of Potlotek First Nation ("Potlotek"). Chief Marshall brings this Application on his own behalf and on behalf of the members of Potlotek.

2. Potlotek is a Mi'kmaw community, and Indian Band within the meaning of the *Indian Act*, RSC 1985, C I-5, located in Richmond County, Nova Scotia.

3. Together Chief Marshall, and Potlotek, are "the Applicants".

Background

4. In 1760-61, the Mi'kmaw signed a series of treaties with the British Crown, the predecessor of the Province of Nova Scotia ("the Province"), known as the "Peace and Friendship" treaties ("the 1760-61 Treaties") which guaranteed certain hunting, fishing, harvesting, and trading rights to the Mi'kmaw in return for peaceful relations with the British Crown.

5. The Mi'kmaw living in the area now known as Cape Breton became signatories to the 1760-61 Treaties on June 25, 1761.

6. Among the rights in the 1760-61 Treaties was the promise of access to "necessaries" through trade in fish and wildlife with non-Indigenous people ("the Treaty Right").

7. The Mi'kmaq generally, and the Applicants in particular, have always asserted that they possess, *inter alia,* the Treaty Right.

The Marshall Decisions

8. On October 28, 1993, Donald Marshall Jr. was charged with selling 463 pounds of eels to a non-native fish company from New Brunswick for $787.10, which he had caught in Pomquet Harbour, Antigonish County, Nova Scotia.

9. In particular, Mr. Marshall was charged with failing to have a licence to fish for or sell eels pursuant to s. 4(1)(a) of the *Maritime Province Fishery Regulations* and s. 35(2) of the *Fishery (General) Regulations* and fishing within a closed time with improper nets contrary to s. 20 of the *Maritime Provinces Fishery Regulations.*

10. Mr. Marshall did not deny contravening the *Regulations*, but defended that he, as a Mi'kmaq person, had a valid treaty right to fish and sell his catch pursuant to the Peace and Friendship treaties of 1760-61.

11. On September 17, 1999, the SCC released its decision in *R. v. Marshall,* [1999] 3 SCR 456 ("*Marshall 1*") wherein the Court acquitted Donald Marshall Jr. of the charges on the basis that the Mi'kmaq (and other Aboriginal beneficiaries to 1760-61 treaties) had both a treaty right to trade and access to the fish and wildlife resources necessary to provide them with something to trade for a moderate livelihood (the "Treaty Right").

12. As part of its decision, the SCC upheld the trial judge's finding of fact that "by the end of 1761 all of the Mi'kmaq villages in Nova Scotia had entered into separate but similar treaties" (para. 5) and confirmed as a matter of law that the 1760-61 treaties affirmed "the right of the Mi'kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was "necessities"" (para. 4).

13. As part of defining the Treaty Right, the SCC noted that it was limited to "necessaries" and not to be the open-ended accumulation of wealth (hereafter "Moderate Livelihood"), and that, further, as a treaty right within the meaning of Section 35 of the *Constitution Act, 1982*, was subject to regulation that could be justified under the *Badger* test (*R v. Badger*, [1996] 1 SCR 771) (para. 7).

14. The SCC found *prima facie* infringements of Mr. Marshall's Treaty Right on the following basis:

    a. For Mr. Marshall to have satisfied the *Regulations*, he was required to secure a licence under either the *Fishery (General) Regulations*, the *Maritime Provinces Fishery Regulations* or the *Aboriginal Communal fishing Licences Regulations* ("*ACFLR*") (para. 62).

    b. The *Fisheries Act* and all of the *Regulations* placed the issuance of licences within the absolute discretion of the Minister (para. 63).

    c. There was nothing in the *Regulations* which gave direction to the Minister to explain how she or he should exercise this discretionary authority in a manner which would respect Mr. Marshall's Treaty Right (para. 64).

    d. Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing Aboriginal and Treaty Rights (para. 64).

    e. "Mi'kmaq treaty rights were not accommodated in the *Regulations*" (para. 64).

    f. With respect to the charge of fishing during a closed season, "there can be no limitation on the method, timing and extent of Indian hunting [or fishing] under a Treaty" (para. 65).

15. The SCC ordered the acquittal of Mr. Marshall and held the relevant provisions of the *Regulations* he had been charged under to be constitutionally inoperative against him (para. 64).

16. In written reasons issued on November 17, 1999, in *Marshall v. Canada*, [1999] 3 SCR 533 ("*Marshall 2*"), the SCC dismissed the West Nova Fishermen's Coalition's request for a rehearing of *Marshall 1*, and in so doing so further held:

    a. An individual's exercise of the Treaty Right would have to be authorized by the local Aboriginal community (para. 17).

    a. Justification for the infringement of the Treaty Right would need to happen on a "species-by-species" basis, noting "the complexities and techniques of fish and wildlife management vary from species to species and restrictions will likely have to be justified on a species-by-species basis (para. 21)."

    b. The implication of *Marshall 1* with respect to licences was not that licensing schemes as such are invalid, but that the imposition of a licensing restriction on the exercise of the Treaty Right had to be justified for conservation or other public purposes (para. 26).

    c. The imposition of a closed season on the exercise of the Treaty Right was not invalid as such, but it had to be justified (para. 29).

    d. With respect to the Court's comments in *Marshall 1* regarding the unstructured discretionary administrative regime in the *Fisheries Act* and *Regulations*, the SCC noted that "specific criteria must be established for the exercise by the Minister of his or her discretion to grant or refuse licences in a manner that recognizes and accommodates the existence of an aboriginal or treaty right" (para. 33) and that "the Governor in Council has the power to amend the *Aboriginal Communal Fishing Licences Regulations* to accommodate the limited commercial fishery as described in the September 17, 1999 majority judgment in addition to the food fishery" (para. 34).

    e. That "it is for the Crown to propose what controls are justified for the management of the resource, and why they are justified" (para. 41).

    f. That, in accordance with the *Badger* test, "Aboriginal people are entitled to be consulted about limitations and restrictions on [their rights]" and that "the concerns and proposals of native communities must be taken into account prior to establishing such limitation on the right" (paras. 43-44).

    g. Finally, that with respect to the justification process in the circumstances, after appropriate consultation with the Aboriginal community, the government could arrive at the conclusion that "the same techniques of resource conversation and management as are used to control the non-native fishery may be held to be justified", or, alternatively, it could conclude that the concerns and proposals of the native communities "might lead to different techniques of conservation and management in respect of the exercise of the Treaty Right" (para. 44).

From the *Marshall* Decisions to Present

17. Since *Marshall* was decided no substantive amendments have been made to the *Fisheries Act* or *Regulations* to accommodate the Treaty Right within the regulatory framework.

18. Further, no agreement has been reached between Canada and the Mi'kmaq of Nova Scotia concerning conduct of the Treaty Right.

19. In 2019, the *Fisheries Act* was amended to require that it 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 (section 2.3).

20. Further 2019 amendments to the *Fisheries Act* require that the Minister consider any adverse effects that a decision may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982* when making a decision under that Act (section 2.4).

21. Although Potlotek, and certain other First Nations in Nova Scotia, have received commercial licences from Fisheries and Oceans Canada, including under a program called the "Marshall Response Initiative," these are not, and were not intended to be, an implementation of the Treaty Right.

22. Beginning in 2019, Potlotek authoritized some of its members to begin exercising the Treaty Right in a limited manner.

23. Utilizing the information and experiences gained from this limited exercise, and with the participation and authorization of members of its community, Potlotek developed a Livelihood Fisheries Plan.

24. The Livelihood Fisheries Plan came into effect on September 30, 2020.

25. The Livelihood Fisheries Plan is a living document that is subject to on-going review and amendment depending on a myriad of factors, including community needs and conservation requirements.

26. Licences and tags are issued under the authority of the Chief and Council of Potlotek to its member harvesters.

27. Potlotek conducts harvest under its Livelihood Fisheries Plan in an area including St. Peter's Bay

28. St. Peter's Bay is within the scope of Potlotek's 1760-61 Treaty Right.

29. On March 2, 2021, the Honourable Bernadette Jordan, Minister of Fisheries and Oceans and Canadian Coast Guard (the "Minister"), wrote to Mi'kmaq First Nations in Nova Scotia communicating the Respondent's intention to, among other things, unilaterally restrict the Applicants' exercise of the Treaty Right with respect to lobster harvest to the established commercial season and require that harvesters obtain licences issued pursuant to the *Fisheries Act* (the "March 2021 Restrictions").

30. The Minister also indicated that authorized Moderate Livelihood harvesters fishing without the above-noted licences will be subject to enforcement actions by Fisheries and Oceans Canada.

31. The Applicants were not consulted about the March 2021 Restrictions, nor did the Applicants agree to voluntarily restrict their exercise of the Treaty Right in this manner.

32. On March 3, 2021, the Minister made a public announcement consistent with her letter of March 2, 2021.

33. Since at least January of 2021, a number of harvesters authorized by Potlotek since 2019 to exercise the Treaty Right have been charged with offences pursuant to the *Fisheries Act*, or have been the subject of other enforcement actions including seizure of fishing gear such as traps.

<u>The Respondent's Infringement of the Treaty Right</u>

34. The Applicants say that aspects of the current regulatory framework, that is, the provisions of the *Fisheries Act* and *Regulations* described in paragraphs 35, 38 and 41 below, and the unilateral imposition of the March 2021 Restrictions on the conduct of their authorized Moderate Livelihood Fishery, constitute *prima facie* infringements of Applicants' Treaty Right.

35. The Treaty Right is multi-species in nature. The imposition of a general prohibition against fishing without a licence and against selling fish without a licence, as well as a species-specific licensing regime, and prohibitions on retaining by-catch pursuant to the *Fisheries Act* and *Regulations*, infringe upon the Applicants' Treaty Right by effectively denying them the opportunity to harvest a range of fisheries resources for Moderate Livelihood purposes.

36. With respect to the March 2021 Restrictions in particular, the Applicants say that the requirement that authorized harvesters obtain commercial lobster licenses is an unreasonable restriction on the exercise of the Treaty Right and, in many cases will operate as a complete or near complete barrier to the Applicants in accessing the lobster fishery. These licenses are the product of a limited entry system, making them a finite and valuable resource that cannot be obtained by the Applicants as of right.

37. The Applicants further say that, since the *Marshall* decisions, neither the *Fisheries Act* or *Regulations* thereunder were amended to specify criteria for the exercise of

Ministerial discretion to grant or refuse licences in a manner that recognizes, accommodates, and prioritizes the Applicants' Treaty Right.

38. The Treaty Right is not time-limited in nature. The management scheme set out in the *Fisheries Act* and *Regulations* is based to a large degree on seasonal restrictions and time-limited openings. Insofar as the time that Mi'kmaq harvester may exercise the Treaty Right is restricted, and specialized vessels and gear are required for harvesting during a designated season, time limited openings infringe the Applicants' Treaty Right.

39. With respect to the March 21 Restrictions in particular, the Applicants say that the requirement that authorized harvesters restrict lobster harvesting activities to the established commercial season is an unreasonable restriction on the Applicants' Treaty Right because it impairs the exercise of the Treaty Right during preferred times.

40. For the Treaty Right to be meaningfully exercised, the Applicants must be able to lawfully harvest, retain, and sell fish harvested in accordance with the Livelihood Fisheries Plan.

41. Enforcement actions taken pursuant to the *Fisheries Act* or *Regulations* against harvesters authorized by Potlotek in relation to licensure, timing of harvest, or species-selection while acting in accordance with the Livelihood Fisheries Plan actively neutralizes the Applicants' Treaty Right and breaches the Honour of the Crown.

<u>The Infringements Cannot Be Justified</u>

42. Any and all infringements of the Applicants' Treaty Right by the Respondent must be justified via the test articulated in *R v. Badger*, [1996] 1 SCR 771.

43. This requires, among other things, a valid legislative objective, a consideration of the special trust relationship and the responsibility of Canada to the Applicants. The infringement must also be as minor as possible, and there must be reasonable compensation and consultation, including with respect to any conservation measures.

44. The Applicants recognize that some of the above-noted *prima facie* infringements could constitute valid limitations on the Treaty Right, however, the Applicants repeat that for this to be the case, any and all limitations must be justified on a species-by-species basis.

45. The Applicants have not been meaningfully consulted by the Respondent with respect to accommodation of the Treaty Right to fish for a Moderate Livelihood.

46. The Applicants were not meaningfully consulted by the Respondent with respect to the March 2021 Restrictions which unilaterally impose limitations on the Applicants' exercise of the Treaty Right.

47. There has been no compensation from Canada to the Applicants for the infringement of the Applicants' Treaty Right to a Moderate Livelihood fishery.

48. Conservation is not endangered by the harvest authorized by the Applicants' Livelihood Fisheries Plan.

49. The Applicants rely on the statements of the SCC in *Marshall 1* and *Marshall 2* to inform the obligation of Canada in the circumstances, including that "It is for the Crown to propose what controls are justified for the management of the resource, and why they are justified" as well as of the comments by the SCC in *R v. Gladstone*, [1996] 2 SCR 723, that in establishing a justified infringement of a Treaty Right, the government must demonstrate that "in allocating the resource, it has taken account of the existence of the Aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users" (para. 62).

50. The Applicants further rely on the statements of the SCC in *Marshall 1*, citing *R v Adams*, 1996 CanLII 169 (SCC) that "if a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance...the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test. (para. 54)"

51. The Applicants say that the above-noted infringements upon their Treaty Right cannot be justified.

Court Administration
MAY 10 2021
Halifax, N.S.

Form 39.08

2021 Hfx No. 506010

Supreme Court of Nova Scotia

Between:

CHIEF WILBERT MARSHALL on his own behalf and on behalf of the members of **POTLOTEK FIRST NATION**

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF JASON COOKE

I, Jason Cooke, of Halifax, Nova Scotia, make oath and give evidence as follows:

1. I am a Partner at Burchells LLP, counsel to the Applicants.

2. I have personal knowledge of the evidence sworn in this affidavit except where otherwise stated to be based on information or belief.

3. I state, in this affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source.

4. Apart from the Applicant, all Mi'kmaq communities in Nova Scotia may have an interest in matters raised by this Application. These communities include Acadia First Nation, Annapolis Valley First Nation, Bear River First Nation, Eskasoni First Nation, Glooscap First Nation, Membertou First Nation, Millbrook First Nation, Paq'tnkek First Nation, Pictou Landing First Nation, Sipekne'katik First Nation, Wagmatcook First Nation, and We'koqma'q First Nation.

5. To the best of my knowledge at this time, the list of possible witnesses in the Notice of Application is complete, except with respect to names of some witnesses, which are being determined, and subject to any need for rebuttal witnesses. The anticipated witnesses for the Applicants at this time are: Chief Wilbert Marshall and Individual Mi'kmaw Harvesters.

6. A copy of all relevant, non-privileged documents within the possession or control of the Applicants will, applying best efforts, be provided to the Respondent on or before the deadline for the filing of affidavits in the proceeding.

7. The Applicants do not anticipate the need for discovery, but in the event that the parties proceed to discovery, the Applicants would fully participate.

8. The Applicants anticipate that only one hearing will be required for the merits of this Application.

9. The within Application concerns the ongoing exercise of the Applicants' Treaty Rights.

10. The within Application does not concerns rights subject to erosion.

11. To the best of my knowledge at this time, all information that could significantly affect the estimate of time needed to prepare for the hearing and the length of the hearing itself is set out in the Notice of Application in Court.

12. I swear this Affidavit in support of the Applicants' Application, and for no other improper purpose.

AFFIRMED TO at Halifax, in the County of Halifax, Province of Nova Scotia, this 10 day of May, 2021 before me:

A Barrister of the Supreme Court of Nova Scotia

BRENNAN W. MacDONALD
A Barrister of the Supreme Court of Nova Scotia

JASON COOKE