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Response to Canadian Government Letters on Esgenoôpetitj (Burnt Church NB)

If you wrote to the Canadian government with concerns about their actions at esgenoôpetitj (Burnt Church NB), you may have received a reply recently. The Minister of Fisheries and Oceans, Herb Dhaliwal, and the Minister of Indian and Northern Affairs, Robert Nault, have both written to members of Christian Peacemaker Teams and others. They make a number of misleading statements and show little willingness to address the real issues.

It is important to keep the dialogue going with them (and their successors). I encourage you to reply to any letters you receive and to press for the honouring of Canada's treaty obligations to Aboriginal peoples. You might make the following points:

1. The ministers speak of a Phase I implementation of the Marshall decision based on "voluntary licence retirement", i.e. the government is buying licences from retiring non-Aboriginal fishers and transferring them to First Nations. This is a very slow response to the Marshall decision which insisted that Aboriginal people have a right to fish now and always had one. It is arrogant of Canada to insist that Aboriginal fishers must wait until non-Aboriginal fishers choose to retire before they can fish to earn a living. Aboriginal people had a right to fish first. It was denied. Now the government says they should wait longer to reclaim their right.
2. The ministers say that esgenoôpetitj (Burnt Church) First Nation was "asserting a unilateral right to fish commercially when, where and how much they wished". Esgenoôpetitj people want to fish as they have always fished: under their own management plan. They have a Fishery Act with regulations very similar to Canada's regulations and a similar quota, licensing and enforcement system. In June, Dhaliwal admitted he hadn't even read their plan, and I don't know if he has even yet. In his letters today he says that Aboriginal people are fishing "as they please". This is irresponsible scare-mongering.
3. The Fisheries Minister writes that mediation efforts failed. In September, the government and esgenoôpetitj agreed to mediation with Bob Rae as the mediator. Rae tried and quickly concluded there was little he could do unless parties were ready to sit down and really talk. Esgenoôpetitj said, "We're ready." The government was silent. So Rae left.

Why did mediation fail?

4. The Fisheries Minister also writes about lobster trap counts, catches and limits. The first thing Rae tried to do was get the parties to do joint inspections to count the number of traps in Miramichi Bay together and have a real, agreed basis from which to start. The federal Department of Fisheries and Oceans (DFO) refused and instead kept coming up with its own unsubstantiated assertions of what was in the water. So DFO's trap counts are highly suspect. Traps in the inner part of Miramichi Bay, which can be set from small dories, do catch more in the fall than in the spring. Similarly traps in the outer bay, which can only be fished with big commercial boats, catch more in the spring than traps in the inner bay do at that time of year. So his assertions about whose traps catch the most in which season is a smokescreen. The non-Aboriginal commercial fishers who fish the outer bay in the spring have 240,000 traps licenced by Canada and many more unlicensed ones as well. So the Aboriginal fall fishery in the inner bay is still only 2% of the total fishery.

5. The other agreements. The government makes much of the fact that they reached agreements with 29 of the 34 Mi'kmaq and Maliseet nations on the East Coast. These were interim, one-year agreements which all expire in March 2001. It should not be surprising that impoverished First Nations, with unemployment rates ranging as high as 90%, seeing both the carrot of short-term financial assistance and the stick of heavy-handed enforcement threats, chose to suspend their newly-affirmed treaty rights for a few months in the hopes of justice in the long term. It is perhaps more surprising that nations like esgenôpetitj took the long view immediately and refused to surrender their treaty right to fish despite the seizure and destruction of their equipment, ramming and sinking of their boats, arrests, and beatings by Canadian officials.

6. Treaty rights. Nault's letters say that he is concerned about the long-term implications of the Marshall decision and Aboriginal rights. But in the six years of arguing against Marshall and in the year since Marshall was affirmed, Canada has done little to facilitate the exercise of those rights. Instead, Nault has left the field (or ocean!) to the excessive enforcement actions of police and fisheries officers. Dhaliwal's letters do not address the issue of treaty rights at all. The Mi'kmaq have a right to their own commercial fishery. They were here first and their right is a priority right, whether we Canadians like it or not. Dhaliwal says he can infringe on that treaty right. The Mi'kmaq disagree. Disagreements like this ought to go to an international court. Furthermore, Canada's own Supreme Court has said that when Canada wants to infringe on Aboriginal rights, it must meet certain criteria: (1) it must be for a pressing Canadian interest, (2) there must first be consultation with the Aboriginal people affected, (3) the infringement must go no

further than required to meet the pressing Canadian interest, and (4) the alternative proposals of Aboriginal people must be taken into account. None of these criteria have been applied at esgenoôpetitj. Dhaliwal has offered no evidence of a compelling Canadian public interest, he has taken over the entire lobster fishery, and he has not consulted with esgenoôpetitj. On Sept. 7, 2000, a group of 20 lawyers with extensive knowledge of treaty law, including Donald Marshall's lawyer Bruce Wildsmith, issued an opinion that Canada "has made a serious error of law in its interpretation of the Marshall decision" and "has failed to disclose sufficient information to meet the necessary [infringement] criteria in the Burnt Church situation". So Canada is violating international conventions on treaties and is violating its own Supreme Court decisions.

I hope this information is helpful for you and that you will continue your correspondence with Canadian officials.