

**IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK**  
**TRIAL DIVISION**  
**JUDICIAL DISTRICT OF BATHURST**

**B E T W E E N:**

**HER MAJESTY THE QUEEN**

**Appellant**

**-and -**

**GERALD LAVIGNE, JR.**

**Respondent**

On appeal from the decision of the  
Honourable Judge J. Frederic Arsenault  
dated January 28, 2005

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**SUBMISSIONS OF THE RESPONDENT, GERALD LAVIGNE, JR.**

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SCHEDULE "A" - List of Authorities

**PART 1- FACTS**

1. On September 26, 2001, Mr. Gerald Lavigne, Jr. (“Mr. Lavigne”) was charged with unlawfully having a firearm in his possession during the closed season for hunting, contrary to Section 42(1)(a) of the New Brunswick *Fish and Wildlife Act*, S.N.B. 1980, c. F-14.1. Mr. Lavigne was also charged with unlawfully hunting moose, deer or bear without holding a valid license, in violation of Section 32(1)(b) of the *Fish and Wildlife Act* (the “charges”).
2. Following trial, Judge J. Frederic Arsenault acquitted Mr. Lavigne of all the charges, entering a verdict of “not guilty” on the charges. His Honour held that Mr. Lavigne is an aboriginal person within the meaning of s. 35 of the *Constitution Act, 1982* and that he had an aboriginal right to hunt wildlife and to be in possession of a firearm on the day of the charges.
3. Exhibit C-1, “Agreed Statement of Facts”, sets forth those facts agreed to by counsel for the Crown and counsel for Mr. Lavigne prior to trial.
4. The Crown appeals from the decision of Judge F. Arsenault on the grounds set forth in its notice of appeal dated February 18, 2005.

**PART II - ISSUES**

5. The grounds of appeal as summarized in the Appellant's appeal submissions are that the Learned Trial Judge erred in law when he:

- a. relied upon hearsay evidence which led to speculative conclusions in his judgment;
- b. employed the incorrect legal test in determining that the Respondent was Mi'kmaq and a member of the Pabineau Falls First Nation community; and
- c. held that community authority was not necessary for the Respondent to hunt in the traditional territory of the Pabineau Falls First Nation.

6. The appeal also raises the issue of the appropriate scope of judicial review from the decision of a Provincial Court judge.

**PART III - ARGUMENT****ISSUE 1: The Scope of Appellate Review**

7. The Respondent proposes to first address the issue of the scope of appellate review from the decision of the Provincial Court trial judge.

8. The duties of the Court on a summary conviction appeal have been set forth in a number of decisions of the Supreme Court of Canada. For example, in *Harper v. The Queen*, [1982] 1 S.C.R. 2, Estey, J. stated at p. 14 [Book of Authorities, Tab #1]:

An appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. The duty of the appellate tribunal does, however, include a review of the record below in order to determine whether the trial Court has properly directed itself to all the evidence bearing on the relevant issues. Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede.

9. More recently the standard of appellate review was addressed by the Supreme Court of Canada in *Van de Parre v. Edwards*, [2001] 2 S.C.R. 1014, at page 1025 where Justice Bastarache stated [Book of Authorities, Tab #2]:

As indicated in both *Gordon* and *Hickey*, the approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol*

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*(Guardian ad Litem of) v. Ashmore* (1999), 168 D.L.R. (4<sup>th</sup>) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot recover the evidence.

10. These parameters have consistently been upheld by appellate courts considering summary conviction appeals. For example, Cromwell, J.A. speaking for the Nova Scotia Court of Appeal stated in *R. v. Nickerson*, [1999] N.S.J. No. 210 (N.S.C.A.) as follows at para. 6 [Book of Authorities, Tab #3]:

Absent an error of law or a miscarriage of justice, the test to be applied by the summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence.

11. It is respectfully submitted that Judge Arsenault neither ignored, or misinformed himself as to the evidence and the law. As such the Respondent says that Judge Arsenault committed no material errors of law that would justify this Honourable Court substituting its decision for that of the trial judge.

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**ISSUE 2: The Alleged Reliance on Hearsay Evidence**

(a) Exhibit D-23 - "Mary Young"

12. Mr. Donald Morrison was called by the defendant at trial and qualified by the Court as an expert in the field of genealogy, entitled to give opinion evidence to the Court in the area of genealogy and genealogical research. (Transcript, January 6, 2004, p. 12).

13. Mr. Morrison prepared a family tree for Mr. Lavigne which was entered into evidence as Exhibit D-2. Mr. Morrison said that Exhibit D-2 identifies ninety (90) Aboriginal lines applicable to Mr. Lavigne's genealogy.

14. Marie Young (Lejeune) was identified on Exhibit D-2 as Mr. Lavigne's paternal great, great grandmother. Marie Young was born in 1836 in East Bathurst, New Brunswick, married Pierre (Peter) Boucher on August 4, 1863, and died on May 31, 1906.

15. Mr. Morrison stated that William Walter Lavigne was Mr. Lavigne's paternal grandfather and that William Walter Lavigne was the son of Jerome Lavigne and Ignatia (Agnes) Boucher. Agnes Boucher's mother was Marie Young (Lejeune) and her father was Pierre (Peter) Boucher. Marie Young (Lejeune)'s parents were Marie Chamberlain and Joseph-Athanase Young - Sauvage. The parents of Joseph-Athanase Young-Sauvage were Etienne Joseph (Young) - Micmac (born in about 1787) and Marie-Therese Lavigne.

16. The evidence of Mr. Morrison was uncontradicted by any Crown witness.

17. Dr. Janet Chute was called by the Defence and qualified to give opinion evidence as an anthropologist. Referring to Exhibit D-2, Dr. Chute testified that Marie

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Young's daughter, Agnes Boucher, married Jerome Lavigne, who was not enumerated as an "Indian" under the then provisions of the *Indian Act*. Dr. Chute said that in 1880 a patrilineal element was added to the *Indian Act* which meant that if a female married a non-native person, that female would be taken off the *Indian Act* band list. Because Jerome Lavigne had not been enumerated, Agnes Boucher lost her status when she married him, and their child, William Walter Lavigne subsequently did not have *Indian Act* status; nor did his son, Mr. Lavigne.

18. Accordingly, the undisputed evidence before the Court was that Marie Young (Lejeune) was an "Indian" and that her daughter Agnes lost her "Indian" status because she married a non-native person, Jerome Lavigne.

19. On September 26, 2001 when he was charged, Mr. Lavigne was asked by game warden Caissie whether he had a hunting permit. Mr. Lavigne produced a card indicating "The New Brunswick Aboriginal Peoples", Member #440 Micmac Council. Mr. Lavigne also produced papers indicating "Timber Moose". At trial, Mr. Lavigne testified that he is a member of the New Brunswick Aboriginal Peoples' Council ("NBAPC") and describes himself as a Mi'kmaq person.

20. Ms. Carole Ann Labillois-Slocum was called by the Defence. Ms. Labillois gave evidence that she is a Mi'kmaq person who at the time was the Communications Officer for NBAPC. Ms. Labillois stated that Mr. Lavigne applied for membership in NBAPC and that his application was ultimately approved. She identified Exhibit D-6 (alternate copy marked as Exhibit D-23) as the document provided by Mr. Lavigne in support of his application that proved to her that Marie Young was native and was listed as native in the 1861 Census. She described Exhibit D-6 as an excerpt from the 1861 Census which shows "Mary" at line 1105 as one of the children of Young, number 1081,

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who is identified under the title, "Race" as "native". (Transcript, January 8, 2003, pages 80-81)

21. Ms. Labillois said that the criteria for membership in NBAPC requires an applicant to demonstrate residency in New Brunswick for the last six months and to show that he or she is descendant of a verified and known aboriginal person as of July 1<sup>st</sup> 1867.

22. The information contained on the document marked as Exhibit D-6 satisfied Ms. Labillois that Mr. Lavigne met the criteria of being the descendant of a verified and known aboriginal person as of July 1<sup>st</sup> 1867.

23. Contrary to what the Crown suggests at paragraphs 4-6 of its appeal submissions, it is clear both from the trial transcript and the decision of Judge Arsenault, that neither Judge Arsenault nor Ms. Labillois on behalf of NBAPC, based their respective decisions that Mr. Lavigne was an aboriginal person, on the basis of the information contained on Exhibit D-23.

24. Mr. Lavigne submitted a document marked as Exhibit D- 23 to NBAPC as part of his application for membership. Ms. Labillois identified the document (as noted by a Paul Delicaet in January, 1999) as being a copy of pages from the four volumes of office records of the late Dr. B.G. Duncan who practised medicine in Bathurst from 1870 to 1934. The original volumes are in the possession of the Bathurst Heritage Society.

25. Defence counsel sought to enter the document into evidence, not for the truth of its contents, but rather to identify the documentation submitted by Mr. Lavigne in support of his application for NBAPC. Crown counsel objected to the document being entered into evidence on the grounds of relevancy.

26. At page 88 of the transcript of evidence on January 8, 2003, Judge Arsenault stated as follows beginning at line 20:

But it'll go to the weight. What, what Mr. Winch is saying is that, is - you know, I said I believe that it was inadmissible, and then Mr. Winch invited me to consider that maybe it ought to be admitted, but then made subject to a conclusion as to its weight. He's saying that it doesn't mean that it speaks as to the truth of the contents of that document, but it tells us why Ms. Labillois and her organization made the decision to consider this person to be a non-status, or rather a member of the, of her council, of the council.

27. After an adjournment, Judge Arsenault rendered an oral decision on the admissibility and relevance of Exhibit D-23 which is set forth at pages 94 - 98 of the transcript of trial on January 8, 2003. After referring to several passages on the issue of relevancy from the text, *Canadian Criminal Evidence*, 3<sup>rd</sup> edition, McWilliams at page 10, 1-10 and 1-0120, Judge Arsenault stated, in part, as follows beginning on page 96, line 10 of the transcript:

And I don't think that I have to quote from any other source to lay the basis for the decision, which I am rendering about this point. And that is that the Defendant in this case displayed to the game wardens a card from the New Brunswick People's Council. His defence was signalled very early in these proceedings.....

28. Judge Arsenault further stated at page 97, line 3:

And it now appears that an application has been made by his father to become a member of that particular association, and that application was accepted following the guidelines established by the council in respect of who will be taken in as a member of that association.

29. Judge Arsenault concluded at page 98, line 5 as follows:

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And I'm going to admit the document, not necessarily as to the truth of its contents, but as a, as part of the evidence which relates to the decision that was taken by the council to admit the applicant to its membership.

30. Although Ms. Labillois testified that Exhibit D-23 identified a woman by the name of Mary Young being seen as a patient of Dr. Duncan in 1899 and 1990 and that this woman was identified by the doctor as being Native, Ms. Labillois was clear that she could not conclude that the Mary Young who was Dr. Duncan's patient was the same Mary Young who was Mr. Lavigne's great great grandmother. Ms. Labillois testified that while most of the time NBAPC's membership committee is looking at Census records, that Exhibit D-23 showed that this Mary Young was part of the Bathurst community and known to be native. However, Ms. Labillois testified that NBAPC's membership committee did not rely upon the information in Exhibit D-23 as proving that Mr. Lavigne was native. At page 117 of the transcript (January 8, 2003), Ms. Labillois testified as follows in cross-examination, beginning at line 3:

Q. ...Wouldn't you agree with me that there is nothing in this document that indicates that the Mary Young listed here is related to the Lavigne family? There's nothing from this document that shows that is there?

A. Not, not by itself, no.

Q. No. Not by itself. In fact, there could be 4 or 5 Mary Youngs.

A. That's correct.

Q. Yes. So that document by itself is speculative. Wouldn't you agree?

A. That's right. And, that's why I indicated earlier that it was not necessary in, in the formula in proving the link from Gerald Lavigne Junior to Marie or Mary Young.

Q. A.Sure.

A. - but that was just an aside bit of information.

31. Judge Arsenault accepted the evidence of Donald Morrison, genealogist, that Mr. Lavigne is the fifth generation down from Joseph Young/Lejeune, Indian. (Decision of Judge Arsenault, page 10). His Honour did not, as is suggested by Crown counsel, “use this document (Exhibit D-23) to reach speculative conclusions about the Respondent’s ancestor”. This is made clear by Judge Arsenault’s statements immediately before the excerpts from his decision quoted at paragraph 5 of the Crown’s appeal submissions:

It can therefore be seen that the defendant represents the fifth (5<sup>th</sup>) generation down from the said Joseph Athanase Young/Lejeune. Even at that, additional, interesting and persuasive observations can be made about the lineage as it moves down from this ancestor towards the defendant.

32. Over the next several pages of his decision (pages 10-14) Judge Arsenault describes in paragraphs (a) through (e) those matters which he noted were “additional”, “interesting” and “persuasive” observations about Mr. Lavigne’s lineage. Crown counsel quotes only from paragraph (a) in its appeal submissions. However, it is clear that His Lordship also relied upon the other matters set forth in paragraphs (b) through (e).

33. In paragraph (a) on page 10 of his decision, Judge Arsenault makes it very clear that he has not concluded that the Mary Young noted in Exhibit D-23, is the same Mary Young who is an Indian ancestor of Mr. Lavigne. Judge Arsenault merely notes certain facts that might so indicate, but he makes it clear that “it is possible that it was not” (the same Mary Young).

(b) The Opinion Evidence of Dr. Janet Chute

34. The Respondent says that the Crown’s submission that Judge Arsenault reached speculative conclusions with respect to Exhibit D-23 is without merit.

35. The Crown in its appeal submissions suggests that Judge Arsenault relied upon “hearsay” evidence given by Dr. Janet Chute, that certain of Dr. Chute’s evidence was “highly speculative” and that the trial judge accepted a “diminished onus as being sufficient to prove the view that the Respondent’s family was historically viewed as Mi’kmaq by the First Nations community in Bathurst”.

36. The Respondent adamantly disputes each of the Crown’s contentions.

37. Dr. Janet Chute was called by the Defence and qualified as an expert witness entitled to give opinion evidence as an anthropologist on Mi’kmaq cultural continuity and identification from European contact to present, and Mi’kmaq cultural practices, traditions and customs from European contact to present. (Transcript, January 7, 2003, page 16).

38. Hearsay is evidence of a statement made to a witness by a person who is not herself called as a witness. Such hearsay is inadmissible when the object of the evidence is to establish the truth of what was contained in the statement. (*R. v. O’Brien*, [1978] 1 S.C.R. 591) [Book of Authorities, Tab#4]

39. However, among the numerous exceptions to the rule against hearsay is the exception afforded to experts who are called to give opinion evidence. The learned authors, Sopinka, Lederman and Bryant state as follows in *The Law of Evidence in Canada* (Markham, Ontario: Butterworths, 1992 at page 547 [Book of Authorities, Tab #5]:

An expert’s knowledge is made up of the distilled assertions of others not before the court. Recognition of this hearsay basis of expertise has been adopted by Canadian courts for some time. One example is a New Brunswick decision [*Reference re Sections 222, 224 and 224A of the Criminal Code* (1971), 3 C.C.C. (2d) 243 (N.B.C.A.)] in which it was said:

A doctor, chemist, professional man or any other person who qualifies as an expert is not confined to opinions based solely on his personal experience of (sic) observations, but may draw on information obtained from lectures during his education in his particular field, textbooks, as well as from discussions with other persons learned in the same field. The weight to be given to any opinion is always a matter for the consideration of the trial Judge.

Thus, there is an acceptable hearsay component in the make-up of every expert's knowledge which is drawn upon in formulating the opinion.

40. In *Saint John (City) v. Irving Oil*, [1966] S.C.R. 581 (S.C.C.) [Book of Authorities, Tab #6]: the issue involved an expropriation by the city. The city's appraiser valued the property based upon calculations made from his unrecorded interviews with 47 persons who had been parties to sales of land in the area. The appraiser's opinion was held to be admissible. Richie J. for the court noted at para. 38 that if each of the appraiser's informants had to testify, valuation proceedings would take on "an endless character" and that what was at issue was the value of the appraiser's opinion, not the facts of each comparable transaction.

41. In *R. v. Lavallee*, [1990] 1 S. C. R. 852 (S.C.C.) [Book of Authorities, Tab #7]: the Supreme Court of Canada reviewed the circumstances in which expert opinion evidence may be admitted, notwithstanding that the opinion is based upon hearsay evidence. Wilson J., speaking for the majority, reviewed the Supreme Court's prior decision in *R. v. Abbey*, [1992] 2 S.C.R. 24 and at para. 78-81 interpreted *Abbey* as standing for the following propositions:

- a. An expert opinion is admissible if relevant, even if it is based on second-hand evidence;

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- b. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based;
  - c. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
  - d. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

42. Wilson J., in *Lavallee* clarified the fourth proposition, and rejected the proposition that every fact relied upon by the expert must be independently proven before any weight could be attached to an expert opinion. She stated at para. 89:

...*Abbey* does not, in my view, provide any authority for that proposition. The court's conclusion in that case was that the trial judge erred in treating as proven the facts upon which the psychiatrist relied in formulating his opinion. The solution was an appropriate charge to the jury, not an effective withdrawal of the evidence. In my view, as long as there is some admissible evidence to establish the foundation of the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony. The judge must, of course, warn the jury that the more the expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion.

43. Sopinka J., in a concurring judgment in *Lavallee*, noted that the principles underlying *Abbey* give rise to a contradiction: an expert opinion based entirely on hearsay will be admissible, but will be entitled to no weight. Justice Sopinka provided the following resolution at para. 97-99:

The resolution of the contradiction inherent in *Abbey*, and the answer to the criticism *Abbey* has drawn, is to be found in the practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise (as in *City of St. John*), and evidence that an expert obtains from a party to the litigation touching a matter directly in issue (as in *Abbey*).

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In the former instance, an expert arrives at an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise. A physician, for example, daily determines questions of immense importance on the basis of the observations of colleagues, often in the form of second or third-hand hearsay. For a court to accord no weight to, or to exclude, this sort of professional judgment, arrived at in accordance with sound medical practices, would be to ignore the strong circumstantial guarantees of trustworthiness that surrounds it...

Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with *Abbey*, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight...(emphasis added).

44. At paragraph 12 of the Crown's appeal submissions, reference is made to pages 11-13 of Judge Arsenault's decision where His Honour refers to certain parts of the evidence of Dr. Chute, including evidence she gave with respect to her discussions with a prominent Acadian historian, Father Clarence D'Entremont. Crown counsel argues at paragraph 13 of its appeal submissions that Dr. Chute "is not quoting from a learned study or documentary source to support her opinion that the Boucher family was "sheltered" and "brought into" Mi'kmaq culture. This witness is repeating a conversation with a third party, who told her that his "this is from oral tradition"..."

45. It is submitted that it is clear from decisions of the Supreme Court of Canada, that an expert may rely upon hearsay evidence she considers as part of her enquiries and practice within the scope of her field of expertise. Further, an expert may talk to, and rely upon information obtained from colleagues which as noted in *Lavallee* by

Sopinka J., might take the form of second and third hand hearsay. There was nothing objectionable from an evidentiary standpoint in Judge Arsenault referring to Dr. Chute's evidence concerning the Bouchers "being brought into the Mi'kmaq culture". In her practice as an anthropologist, this is exactly the kind of information that an expert would rely upon in assisting her formulation of an opinion.

46. Dr. Chute gave evidence with respect to her knowledge of Father D'Entremont and his work, and her four year period of work with him as part of her own research. Dr. Chute testified as follows (Transcript, January 7, 2003, page 33, line 8:

Father D'entremont had to give up his priestly activities because of illness and spent 20 years of his remaining life studying Acadian history. He travelled as far as Louisiana, he travelled to the Missouri. He did extensive work in New Brunswick. He was the one who gave me the photocopies of the Caraquet/Ste. Famille records. We used to talk about Acadian. I worked with him for four years, and he - I was very interested in Mi'kmaq Acadian relationships at that time, and the only group that he ever spoke about as having close relationships besides the D'Entremonts and Muisés and Labradors were the Bouchers, and I just saw the name as quite exciting because of my past research experience, that's all.

47. Further, it is clear from both Dr. Chute's evidence and the decision of Judge Arsenault, that each relied upon the opinion of genealogist Donald Morrison with respect to the aboriginality of Mr. Lavigne's ancestors and the relationship between the Boucher and Lavigne families. Even without Dr. Chute's evidence in that regard, the genealogical evidence was clear and uncontradicted.

48. Crown counsel states that Judge Arsenault used the statements of Dr. Chute and certain exhibits to conclude that Mr. Lavigne and his father was a member of the First Nation community at Pabineau Falls, referring to Judge Arsenault's conclusions at pp. 28-

29 of his decision: “It is manifest that the community, the aboriginal community, has accepted these two individuals as their own.”

49. The Crown’s contention that Judge Arsenault concluded that Mr. Lavigne was a member of the Pabineau Falls community is not supported by the evidence. It is clear from his decision that Judge Arsenault relied upon a number of relationships between Mr. Lavigne and other Mi’kmaq persons, including NBAPC in concluding that the aboriginal community accepted him as being one of their own. This aspect of the Crown’s appeal submissions is responded to in more detail under Issue 3.

**ISSUE 3: The Test for Aboriginality**

50. Dating back to the time of colonization, European powers and foreign governments have attempted to eliminate Mi’kmaq rights to enjoy the bounty of their land. Integral to that process of rights elimination has been various forms of restrictions as to who and who is not entitled to claim an aboriginal right.

51. The *Indian Act* process for the identification of who is, and who is not, an “Indian” for purposes of that *Act* has its roots in the colonial system and later in a federal system which has sought to limit and exclude people entitled to certain government programs. Since the introduction of the *Indian Act* of 1876, federal policy with respect to Aboriginal people has been one of integration and assimilation into “mainstream” society. The reserve land system was a core mechanism used by government to seek to educate, integrate and assimilate Aboriginal people. While Bill C-31 eliminated the patrilineal eligibility rules for Indian “status” that had existed before its introduction, there continues to be a tiered system of Aboriginal recognition in Canada, with non-status aboriginal people being treated differently for the purpose of those programs than those with “*Indian Act*” status. The *Indian Act* has nothing to do with Aboriginal rights.

52. The introduction of section 35 of the *Constitution* changed the recognition of the rights of Aboriginal People. Aboriginal People who either never had status or who lost their status through the racist provisions of the *Indian Act*, or who left *Indian Act* reservations, have the same constitutional protection afforded to them by virtue of s. 35 of the *Constitution* as do “status” Indians. This is accepted by the Crown at paragraph 22 of its appeal submissions.

53. Crown counsel proposes that the Aboriginal community itself cannot be left to determine who is, or who is not an “Aboriginal” for the purpose of constitutional protection. Rather, Crown counsel states that it must be left to the Courts to determine, on a case-by-case basis who is or is not “Aboriginal”. The Crown proposes at paragraph 32 of its appeal submissions that three criteria should be factored into a determination of who is an aboriginal person pursuant to s. 35 of the *Constitution* : (1) aboriginal ancestry; (2) cultural awareness through self identification/living an aboriginal lifestyle; and (3) community acceptance.

54. We say that the Crown’s position that the Court should determine who is, or is not “Aboriginal” on a case by case basis is entirely impracticable, in contradiction of the Crown’s fiduciary duty to Aboriginal People, including the duty to consult, and contrary to the Supreme Court’s direction that section 35 of the *Constitution* is intended to reconcile Aboriginal rights within the *Constitution*. The Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [Book of Authorities, Tab #8] referred to both consultation and accommodation in describing the Crown’s fiduciary duties to Aboriginal People as did the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 S.C.C. 73 [Book of Authorities, Tab #9].

55. Further, we say that Aboriginal People themselves who are best placed to determine who is an Aboriginal Person. Neither the Courts or the Legislature are representative of Mi'kmaq people in New Brunswick.

56. Dr. Janet Chute gave expert evidence as an anthropologist that the 'test' she would apply as to whether a person is Mi'kmaq is as follows (Transcript, January 7, 2003, pages 43-46):

1. the degree to which the person has native ancestry, including by fosterage and adoption;
2. the person's relationship to a Mi'kmaq community;
3. the person's self-identification as Mi'kmaq.

57. As noted above, Mr. Donald Morrison's evidence with respect to Mr. Lavigne's native ancestry was uncontradicted by any Crown witness.

58. Mr. Lavigne testified that he identifies himself as a Mi'kmaq person. His evidence was that his father, Gerald Lavigne, Sr., told him that he was Mi'kmaq as a young boy. At school, he was referred to as "Gerald's little savage".

59. The Crown's suggestion that the second component of a test for aboriginality should include "living an aboriginal lifestyle" is devoid of logic or merit. While Judge Arsenault's states that Mr. Lavigne adhered to "an aboriginal lifestyle" at page 30 of his decision, Judge Arsenault does not elaborate on what aspects of Mr. Lavigne's lifestyle demonstrated that he was living an "Indian lifestyle".

60. The Crown does not indicate whether it takes the position that “Indian lifestyle” is to be measured against the lifestyle that existed at the time of contact or against a more modern manifestation of an “Indian lifestyle”.

61. The reality is that there is no single “Indian lifestyle” any more than there is a single style of life of any other ethnic, cultural or religious group. Aboriginal Peoples may engage themselves in whatever vocational, recreational and social activities they wish to, and may do so in an urban or rural context. Requiring a claimant to establish that he or she lives an “Indian lifestyle” in order to be entitled to claim Aboriginal rights flies in the face of the test established by the Courts in numerous cases as to who is an Aboriginal for the purposes of constitutional rights. Self-identification, ancestral connection (by birth, adoption or inclusion) and community acceptance are the proper components of that test.

62. No “Mi’kmaq” case has ever imported a requirement of an “Indian lifestyle”. The fact is that Mi’kmaq are not still wearing furs and trapping. They live in cities and towns. They have jobs, professions and vocations of every kind. Mi’kmaq children go to the mall, play on sports teams and engage in every conceivable social and educational activity as do their non-Aboriginal friends. None of these activities and interests prevent them from exercising their constitutionally protected rights.

63. The Respondent says that Judge Arsenault erred when he failed to rely upon the Metis case of *R. v. Powley*, [2003] S.C.J. No. 43 [Book of Authorities, Tab #10] to determine the test for s. 35 Aboriginal status. The Crown relies upon *Powley* in proposing its test for aboriginality.

64. It is submitted that Judge Arsenault correctly determined that the Metis community acceptance test identified in *Powley* was inapplicable when dealing with non-Metis and “Indian” people. Judge Arsenault referred to *R. v. Fowler*, [1993] N.B.J. No. 85

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(N.B. Prov. Ct.) [Book of Authorities, Tab #11]. In that case, Mr. Fowler, a New Brunswick Maliseet who did not have status under the *Indian Act*, was held to have an Aboriginal right to harvest for food by virtue of his connection with the Maliseet First Nation.

65. Similarly, in *R. v. Harquil*, 144 N.B.R. (2d) 146 (N.B. Prov. Ct.) [Book of Authorities, Tab #12], a case which dealt with the harvest of a moose, a representative of the NBAPC testified and was accepted to give evidence on Mr. Harquil's ancestry. Mr. Harquil was the direct descendant of two Indians who married in Dalhousie, New Brunswick in 1867. The Court decided that Mr. Harquil had established his Indian ancestry to the extent that "he was part of a group of non-status Indians who enjoy the privileges recognized by the treaties".

66. We submit that *Fowler* and *Harquil* remain good law, unamended by *Powley*. If the Supreme Court of Canada had intended to change the law on the identification of Indian people all across Canada, one would expect that it would have done so expressly.

67. Alternatively, if the *Powley* tests do apply to all Mi'kmaq in Atlantic Canada, we submit that Mr. Lavigne meets them.

68. With respect to the "community acceptance" component of the legal test of aboriginal status, Crown counsel states several times in its appeal submissions that Judge Arsenault "accepted that the Respondent's community was the Pabineau Falls First Nation", and that Mr. Lavigne "failed to demonstrate acceptance into "any local Mi'kmaq community".

69. In fact, Judge Arsenault's recitation of the trial evidence makes it clear that Mr. Lavigne's community acceptance as a Mi'kmaq person came from the totality of his

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recognition as Mi'kmaq from NBAPC, the Mi'kmaq Grand Council, the Red Bank reserve and the Pabineau Falls reserve. It is evident on reviewing his findings, that Judge Arsenault was not just relying upon Mr. Lavigne's connection to the Pabineau Falls First Nation to demonstrate community acceptance, but upon his membership in NBAPC and Mi'kmaq people from both the Red Bank and the Pabineau bands.

70. In that regard, Judge Arsenault stated as follows at page 18, under the heading, "Is the Defendant an Aboriginal Person?":

Again, it bears repeating that Mr. Lavigne [Sr.] has consistently maintained a focus on an aboriginal heritage. While I say that now, I believe also that it will be legitimate to say, in light of everything else, that there has been over the years, not only recognition by the mainstream or non-native community of a connection between the most recent generations of this Lavigne family with aboriginals, but also that aboriginals themselves, particularly the Red Bank band and the Pabineau First Nation band, seem to have recognized this connection by interacting as they have with Mr. Lavigne Sr. and Gerald Lavigne Jr., the defendant. (emphasis added)

71. With respect to NBAPC's community acceptance of Mr. Lavigne, and after noting that Mr. Lavigne produced a NBAPC membership card to the game wardens when charged, Judge Arsenault stated as follows commencing at p. 22:

To explain and provide a background for the issuance of membership cards to applicants, the defendant called a spokesperson for the N.B. Aboriginal Peoples Council, Ms. Carole Anne Labilloy-Slocum. She is the membership clerk and communications officer for this council. This council, by the way, receives funding from the Province of New Brunswick and meets with various government departments and officials. One would think that such a fact confers some legitimacy on this body even in the eyes of the government of the province. I do not mean that the province has to sign off on all the positions advocated by the

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council but one should see it as a legitimate intervener.  
(Emphasis added)

72. Further at page 23 of his decision, Judge Arsenault made it clear that he was relying upon NBAPC's acceptance of Mr. Lavigne as a member of that aboriginal organization as one of the factors which lead him to determine Mr. Lavigne met the legal test for aboriginality. Judge Arsenault stated as follows:

Clearly, therefore, we do know that the recognized body, which the council is, considers and accepts that both Gerald Lavignes, father and son, are of the Aboriginal Peoples of New Brunswick.

73. In addition, Judge Arsenault relied upon the evidence given by Keptin John Joe Sark, as a member of the Mi'kmaq Grand Council, to determine that Mr. Lavigne was a Mi'kmaq person. Judge Arsenault stated as follows at page 25:

It is therefore obvious that in the light of the culture promoted by the Grand Council that both the defendant and his father are recognized as Mi'kmaqs.

74. Judge Arsenault also noted that Mr. Sark, on a personal level, recognized Mr. Lavigne to be Mi'kmaq. Judge Arsenault further stated at page 26:

In my opinion, evidence such as we've heard from Mr. Sark can, therefore, not be lightly dismissed.

75. Further, commencing at page 28, Judge Arsenault made a number of findings with respect to Mr. Lavigne's community acceptance from various sources:

It is manifest also that the community, the aboriginal community, has accepted these two individuals as their own...In the case of Mr. Lavigne Sr., the children of his spouse...are equally favoured by band munificence at Christmas....Further, and even more pertinently, I believe it must be said that it is not as if the defendant relied only on self-serving evidence....Additionally, the

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defendant's claim, as that of his father, to aboriginal status - found support from the authorized spokesperson of a provincially recognized body, NBPAC, a district representative of the Grand Council of 20 years standing, and last but not least, the support of an anthropologist..." (emphasis added).

76. The concept of "community acceptance" in the context of a Metis hunting case was recently considered by Provincial Court Judge Stansfield in *R. v. Willison* 2000 CarswellBC 975 [Book of Authorities, Tab #13]. Although a Metis case, it is noted that Stansfield J. adopts a flexible approach to the understanding of community, as follows at para. 77:

Counsel offered various dictionary definitions of "community" but, with respect, I find only limited assistance in knowing, for example, that the Canadian Oxford Dictionary defines community to include "all the people living in a specific locality" or "a specific locality, including its inhabitants", or even "a body of people having a religion, a profession etc. in common" (intuitively, the latter of those three seeming to be most applicable in this circumstance). It seems to me that just as the characterization of the right being claimed must be analyzed in a manner which is contextual and site specific, so too does the definition of "community" need to be contextual and site specific.

Counsel queried how many persons are required to establish a community, how long those persons need to have been present in a particular location, and what degree of association the persons need to exercise with each other. I found it helpful to focus less on those and other specifics, and to reflect more on our understanding of ethnic "communities" within today's culturally diverse Canada.

In my view our current understanding of what constitutes an ethnic "community" is an appropriate reference point having regard to the Supreme Court's assertion that "the purpose and promise of Section 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of the Métis culture".

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It is my understanding of Section 35 in particular, but also of Canadian values at large as enshrined in other aspects of the constitution (for example, equality, freedom of religion), that Canada does not aspire to assimilation. Canada aspires to a society in which there is a common commitment to Canada, and to peace, order and good government, but in a way which not only permits but encourages persons to preserve and celebrate their distinctive cultural heritage. That is most obviously true in respect of Quebec's role within the federation, and increasingly underlies our understanding of the First Nations, but is equally true of other cultural groups. We are, after all, a nation composed of aboriginal peoples, and diverse immigrants.

Cultural "communities" are visibly and obviously apparent in larger urban centres like Vancouver, Toronto and Montreal. In some smaller centres they may not be so immediately apparent, but surely are just as real.

Using the Okanagan as an example, beyond the aboriginal communities there are relatively fewer visible minorities than in the large urban centres. But is it reasonable to say that the relatively few members of a particular visible minority in that context would not constitute a "community" if they chose to seek each other out to celebrate and to preserve their traditions, practices and culture? Could not a very small number of such persons constitute a meaningful "community"? Would not their reason for gathering essentially be indistinguishable from the objectives we are told pertain under Section 35 to aboriginal persons, including Métis? If we experienced a new or different level of immigration from a particular external country or cultural group, would it be necessary that they be present in this geographical area and associating for cultural purposes for several generations before they would constitute a "community"? (emphasis added)

77. Australian courts have adopted an Aboriginal identity test having similar criterion as those used in Canada for establishing aboriginality: ancestry, self-identification and community acceptance. However it is clear from a review of certain of the key Australian decisions, that the courts apply a flexible approach in considering the components of the test to the particular circumstances before them. The test for

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“Aboriginality” was established in the context of determining entitlement under land claims legislation and legislation giving Aboriginal people self-determination and self-management by having their own elected councils. In order to be on the election roll for such councils, individuals must demonstrate that they are “Aboriginal”.

78. It is especially informative to examine the Australian approach in the context of the “community acceptance” component of the test when examining that part of the Canadian legal test for aboriginality. Australian courts recognize that there is more than one kind of “community”. In fact in one of the oft-cited Australian cases on aboriginality, *Shaw v. Wolf*, (1998) Fed. No. 389/98 [Book of Authorities, Tab #14], Merkel, J. of the Federal Court of Australia refers to the concept of “communal acceptance”, rather than “community acceptance”, thereby emphasizing that a traditional local community may in modern times be dispersed and non-geographic. Merkel J. states as follows at page 9, under the heading, “Communal Recognition”:

#### Communal Recognition

Some form of communal identification or recognition will often form part of the process leading to self-identification. In determining whether there is communal identification or recognition the Court will consider the views held in a relevant Aboriginal, or even the general, community as to whether a person is regarded as an Aboriginal person. That evidence is relevant because in the modern Australian community such recognition is commonly the mode by which a person is identified as a person of the Aboriginal race of Australia. Communal identification may be based on physical, cultural, social or other attributes perceived in a particular community to exist in Aboriginal persons. Although the evidence will usually relate to views held by persons comprising the relevant community it is a communal, rather than personal, recognition that is relevant.

Community, like identity, is a social construct. A community may be a human settlement within a particular locality, a local social system -- comprising a set of relationships that take place wholly

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or mostly within a locality, or it may embrace a type of relationship between geographically dispersed individuals having some common sense of identity: *The MacMillan Student Encyclopedia of Sociology* (ed M Mann, 1983) at 56.

The relevant community might be the general Aboriginal community in a particular locality or a much smaller part of that community whose members reside in a specific locality or have some common historical, cultural or social characteristic. In some instances a community might consist of an extended Aboriginal family living in a particular locality. The Court, in having regard to evidence of identification or recognition by any relevant community, need not be concerned with defining the relevant community or communities other than in the most general sense. The weight to be attributed to such communal recognition as is found to exist will vary according to the facts of the particular case. (emphasis added)

79. Further, the Court in *Shaw v. Wolf* found that it was not necessary for an entire community to accept an individual as Aboriginal; it was sufficient to have some communal recognition (pages 13-14):

There is also a difficulty in placing too much weight on the opinions of individual persons, as to whether they recognize or do not recognize particular respondents as being Aboriginal. Opinions as to an individual's membership of the Aboriginal community will be based on highly subjective personal, social and political reasons and consequently vary from person to person. As a result of the complexity inherent in defining an Aboriginal community in Tasmania, throughout these reasons I have referred generally to community recognition, or to recognition by a section of a community, rather than to a defined community.

80. The Court in *Shaw v. Wolf*, recognized communal acceptance as being manifest by such factors as being member of an Aboriginal organization, being employed

with or doing volunteer work with an Aboriginal organization, running for office within an Aboriginal organization, and associating with other self-identifying Aboriginal people for social or other purposes.

81. Merkel J. in *Shaw v. Wolf* also recognized that the lack of documentary evidence and the reticence of some families of Aboriginal descent to publicly acknowledge that fact due to actual or perceived racism must also be taken into account in applying the three-part test for aboriginality. Merkel J. stated as follows at page 9:

In these circumstances Aboriginal identification often became a matter, at best, of personal or family, rather than public, record. Given the history of the dispossession and disadvantage of the Aboriginal people of Australia, a concealed but nevertheless passed on family oral "history" of descent may in some instances be the only evidence available to establish Aboriginal descent. Accordingly oral histories and evidence as to the process leading to self-identification may, in a particular case, be sufficient evidence not only of descent but also of Aboriginal identity.

82. In his concluding observations in *Shaw v. Wolf*, Merkel J. made the point that since the identification of aboriginality involves an important aspect of Aboriginal self-determination, it is best left for bodies with Aboriginal representation. He stated as follows at pages 57-58:

....in seeking to redress some of the wrongs of the past as well as to assist Aboriginal persons a number of laws have been enacted and services provided by the state which understandably are solely for the benefit of Aboriginal persons. Consequently, some criterion is necessary to define the beneficiary group. Aboriginality as such is not capable of any single or satisfactory definition. Clearly the Aboriginality of persons who have retained their spiritual and cultural association with their land and past will differ fundamentally from the Aboriginality of those whose ancestors lost that association.

...

It is unfortunate that the determination of a person's Aboriginal identity, a highly personal matter, has been left by a Parliament that is not representative of Aboriginal people to be determined by a Court which is also not representative of Aboriginal people. Whilst many would say that this is an inevitable incident of political and legal life in Australia, I do not accept that that must always be necessarily so. It is to be hoped that one day if questions such as those that have arisen in the present case are again required to be determined that that determination might be made by independently constituted bodies or tribunals which are representative of Aboriginal people. (emphasis added)

83. It is submitted that Judge Arsenault made no material error of law in his conclusion that Mr. Lavigne was an aboriginal person entitled to exercise s. 35 Constitutional rights. Indeed, Judge Arsenault concludes that in addition to Mr. Lavigne's recognition at a local level as being Mi'kmaq, he is also recognized as Mi'kmaq by the Red Bank band, the Pabineau Falls band and even by the "mainstream", non-Aboriginal community in Bathurst.

#### **ISSUE 4: The Concept of "Community Authorization"**

84. Judge Arsenault stated at p. 40 of his decision that he agreed with our post-trial written submissions on the issue of community authorization, including our submission that Mr. Lavigne had no need to seek authorization to engage in a personal harvest for food on the day of the charges. Judge Arsenault referred to the following statements contained in Mr. Lavigne's post-trial written submissions (paras. 114 - 126(b)):

114. It is anticipated that the Crown will argue that Mr. Lavigne required "community authorization" to harvest moose on the day of the charges.

115. The Defence submits that that argument lacks merit for the reasons which follow.

116. It is expected that the source of the Crown's "community authorization" argument can be traced to paras. 17 and 38 of the Supreme Court of Canada's decision in *Marshall (No. 2)* where the Supreme Court stated as follows:

In the event of another prosecution under the regulations, the Crown will (as it did in this case) have the onus of establishing the factual elements of the offence. The onus will then switch to the accused to demonstrate that he or she is a member of an aboriginal community in Canada with which one of the local treaties described in the September 17, 1999 majority judgment was made, and was engaged in the exercise of the community's collective right to hunt or fish in that community's traditional hunting and fishing grounds.

...

Moreover, the treaty rights do not belong to the individual, but are exercised by authority of the local community to which the accused belongs, and their exercise is limited to the purpose of obtaining from the identified resources the wherewithal to trade for "necessaries".

...

Other limitations apparent in the September 17, 1999 majority judgment include the local nature of the treaties, the communal nature of a treaty right, and the fact it was only hunting and fishing resources to which access was affirmed, together with traditionally gathered things like wild fruit and berries ... [emphasis added]

117. It is to be noted that the Supreme Court's remarks, as set forth above, were *obiter*. The main case had already been resolved, and in the course of denying a request for a re-hearing, the Supreme Court took the opportunity, without the benefit of submissions from counsel on the topic, to provide some of their thinking about the 1760-61 Treaties.

118. The Supreme Court's "communal authorization" statement must be understood in its context. Firstly, the Supreme Court was dealing with treaty rights, and not Aboriginal rights. As such, its comments were not directed to the exercise of Aboriginal rights. Secondly, even if the Supreme Court's statement is broad enough to include Aboriginal rights as well as treaty rights, on the facts before the Court, Donald Marshall, Jr. (who lived in Cape Breton) had no community authorization from any group for his eel fishing on mainland Nova Scotia and his subsequent commercial sale. If the Supreme Court intended this to be a legal requirement, Mr. Marshall would have been convicted or the motion for re-hearing granted.

119. It is submitted that the "community authorization" observation of the Supreme Court was nothing more than a philosophic statement about the nature of Aboriginal rights generally; that they flow from the existence of Aboriginal communities. That should not be taken to be a requirement that in each case an accused must show that there has been a formal permitting from an Aboriginal community. No case prior to *Marshall (No. 2)* has imposed such a formal requirement, even though all Aboriginal rights flow from the essential requirement that there had been organized Aboriginal communities.

120. In *R. v. Bernard* (2003) NBCA 55 (N.B.C.A.), a case involving an Aboriginal right to the commercial harvest of timber by the accused for necessities, the Crown, relying upon the *obiter* comments by the Supreme Court in *Marshall (No. 2)*, argued that Mr. Bernard was not entitled to invoke a defence based upon a treaty right to trade in logs, due to his failure to obtain "communal approval" from the Miramichi Mi'kmaq with respect to his harvesting operation.

121. Robertson, J.A., writing one of the majority judgments, responded to the Crown's argument as follows at para. 511:

I agree with counsel for Mr. Bernard that if Mr. Bernard were required to obtain community approval before commencing his harvesting operation, the requirement would be problematic. From whom would Mr. Bernard seek approval?  
There are three reserves in the watershed of the northwest Miramichi each with their own band

council and chief: Red Bank, Eel Ground and Burnt Church. However, I prefer not to pursue this line of attack. There is a simpler way to respond to the Crown's submission. [emphasis added]

122. Justice Robertson ruled that Aboriginal rights belonged to the Aboriginal community as a whole and not to individual members of the community and that therefore, “no one native has a right to exclude other members from exercising the same treaty right” (para. 512). Justice Robertson stated as follows at para. 514:

Once it can be established that a treaty right exists, it can be exercised by individual members of the aboriginal community until such time as it is modified or abrogated in accordance with the law. The communal nature of a treaty right is such that an individual's right can be affected so long as the change is authorized by those entitled to speak on behalf of the aboriginal community. To the extent that Mr. Bernard had a treaty right to trade in a resource, that right can be validly infringed or regulated, either by agreement reached with the government or through legislation that satisfied the *Badger* test. But in the absence of any agreement reached by the government and the Miramichi Mi'kmaq, Mr. Bernard is entitled to exercise his treaty right to trade for necessaries, subject of course to valid government restrictions.

...

In conclusion, I am of the view that the law does not require that a member of the Mi'kmaq community obtain community approval before exercising the treaty right to harvest and sell logs, unless the native community has validly imposed such a restriction on all members. [emphasis added]

123. Leave to appeal *R. v. Bernard* has been granted by the Supreme Court of Canada. The Court of Appeal's ruling with respect to "community authorization" is binding authority in New Brunswick until such time as the Supreme Court reverses that decision, if it does so.

124. In *R. v. Sappier and Polchies*, 2003 NBPC2, (N.B.Prov.Ct) Judge Cain of the Provincial Court of New Brunswick dismissed the charges against the defendants who had harvested timber for personal use on Crown Lands, allegedly in violation of the *Crown Lands and Forests Act* of New Brunswick. There was no evidence before the Court that either Mr. Sappier or Mr. Polchies had community authorization of any kind to harvest timber.

125. There was no evidence before the Court in the within matter that:

- (1) any consultation by government with the off-reserve Aboriginal community on harvest of wildlife had occurred;
- (2) any agreement had been entered into by the Mi'kmaq community that harvest would be restricted; or
- (3) any Mi'kmaq community or group had imposed any restrictions on Mr. Lavigne's right to harvest.

126. In the alternative, if some form of community authorization is required, we submit:

- a. This Honourable Court may take judicial notice that the nature of the original Mi'kmaq communities has changed drastically since the 1700s due to external pressures from non-Aboriginal society. Other Canadians started to use the land in many areas that these Mi'kmaq communities had occupied. The government of Canada created the *Indian Act* and its registration and reserve system. Community resettlements occurred. Discriminatory and economic pressures from Canadian society changed the composition and location of these communities, with many Aboriginal people being located off *Indian Act* reserves. In this context, who or what is the "community" that would be expected to give express or implied authorization?

It clearly cannot be *Indian Act* bands, whose capacity under the *Indian Act* is limited to their reserve boundaries and powers conferred upon them by that federal legislation.

b. The nature of such community authorization must be considered in the context of Mi'kmaq society. This was a non-coercive society. Individuals were free to act as they wished, subject to disapproval being expressed if the individual trespassed some community norm. As a result, the concept of "authorization" in a Mi'kmaq community should be taken to exist unless the community has expressed some disapproval of the actions of the individual. There is no evidence of such disapproval being before the Court in Mr. Lavigne's case.

85. The Crown's position on "community authorization" ignores the reality that many Mi'kmaq people in times past were dispossessed of their own land and resources. Geographic communities of Mi'kmaq were fragmented and in some cases, eradicated. Mi'kmaq people who live off-reserve, may not reside close to other Mi'kmaq living off-reserve. To which "community" should such persons look for authorization, if indeed any such authorization is necessary? As noted by the Australian Federal Court in *Shaw v. Wolf (supra)*, "...community may embrace a type of relationship between geographically dispersed individuals having some common sense of identify" (p. 9).

86. In the alternative, if express or implied community authorization is a requirement, we submit that this requirement is fulfilled by Mr. Lavigne's membership with the New Brunswick Aboriginal Peoples' Council and NBAPC's approval of wildlife harvest. Mr. Lavigne produced a "Timber Moose" card issued to him by NBAPC at the time of the charges.

87. The Court heard the evidence of Ms. Carol Labillois, communications officer for NBAPC. She testified that NBAPC is an organization that represents the community

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of off-reserve Aboriginal people in New Brunswick. The mandate of NBAPC is to advocate for Rights recognition, to implement Rights management systems, to improve social and economic conditions for off-reserve Aboriginal peoples and to provide certain programs and services to them.

88. Since Ms. Labillois' testimony in this matter, the Federal Court of Canada, sitting in Fredericton, New Brunswick, held that NBAPC is engaged in Aboriginal activities of a federal nature, pursuant to s. 91 of the *Constitution Act, 1982*. Justice Pinard in *Brown v. New Brunswick Aboriginal Peoples' Council*, [2003] F.C.J. No. 1494 (Fed.Ct.T.D.) [Book of Authorities, Tab #15] stated at para. 10 as follows:

I am in agreement with the adjudicator's conclusion that this objective [to fight for treaty rights and status for those currently disenfranchised under the *Indian Act*], combined with the applicant's primary position that members of aboriginal ancestry are entitled to similar benefits as are those with status under the Act, and the fact that the applicant is primarily funded by the federal government, means that the applicant's primary function falls under the federal jurisdiction over "Indians, and land reserved for Indians".

89. Ms. Labillois gave evidence that Mr. Lavigne was accepted by NBAPC as being Mi'kmaq for purposes of NBAPC's hunting regime. Further, Mr. Lavigne's evidence was that he produced his NBAPC membership card when he was charged.

90. In conclusion on this issue, it is submitted that Judge Arsenault committed no reviewable error in his determination that *R. v. Bernard* remains binding law in New Brunswick and accordingly, as concluded by Robertson J. A. "...the law does not require that a member of the Mi'kmaq community obtain community approval before exercising the treaty right to harvest and sell logs, unless the native community has validly imposed such a restriction on all members."

**PART IV - RELIEF SOUGHT**

91. It is respectfully submitted that the Crown's appeal from the decision of the trial judge, Judge Arsenault, be dismissed in its entirety and that this Honourable confirm the verdict of not guilty to the charges.

All of which is respectfully submitted this            day of July, 2005.

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**Her Majesty the Queen**

**IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK**

**TRIAL DIVISION**

**JUDICIAL DISTRICT OF BATHURST**

**B E T W E E N:**

**HER MAJESTY THE QUEEN**

**Appellant**

**-and -**

**GERALD LAVIGNE, JR.**

**Respondent**

On appeal from the decision of the  
Honourable Judge J. Frederic Arsenault  
dated January 28, 2005

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**BOOK OF AUTHORITIES OF THE RESPONDENT,  
GERALD LAVIGNE, JR.**

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## APPENDIX “A” - List of Authorities

1. *Harper v. The Queen*, [1982] 1 S.C.R. 2
2. *Van de Parre v. Edwards*, [2001] 2 S.C.R. 1014
3. *R. v. Nickerson*, [1999] N.S.J. No. 210 (N.S.C.A.)
4. *R. v. O'Brien*, [1978] 1 S.C.R. 591
5. *The Law of Evidence in Canada* (Markham, Ontario: Butterworths, 1992 at page 547
6. *Saint John (City) v. Irving Oil*, [1966] S.C.R. 581 (S.C.C.)
7. *R. v. Lavallee*, [1990] 1 S. C. R. 852 (S.C.C.)
8. *R. v. Sparrow*, [1990] 1 S.C.R. 1075
9. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 S.C.C. 73
10. *R. v. Powley*, [2003] S.C.J. No. 43
11. *R. v. Fowler*, [1993] N.B.J. No. 85 (N.B. Prov. Ct.).
12. *R. v. Harquill*, 144 N.B.R. (2d) 146 (N.B. Prov. Ct.
13. *R. v. Willison* 2000 CarswellBC 975
14. *Shaw v. Wolf*, (1998) Fed. No. 389/98
15. *Brown v. New Brunswick Aboriginal Peoples' Council*, [2003] F.C.J. No. 1494 (Fed.Ct.T.D.)