

IN THE SUPREME COURT OF CANADA

(On Appeal from the New Brunswick Court of Appeal)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT (Appellant)

- and -

DALE SAPIER and CLARKE POLCHIES

RESPONDENTS (Respondents)

- AND -

IN THE SUPREME COURT OF CANADA

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BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT (Respondent)

- and -

DARRELL JOSEPH GRAY

RESPONDENT (Appellant)

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PART I - STATEMENT OF FACTS

1. This factum is filed on behalf of the New Brunswick Aboriginal Peoples Council ("NBAPC").

2. NBAPC is a representative organization for Aboriginal Peoples residing off reserve throughout New Brunswick, including in respect to their Treaty and Aboriginal Rights. NBAPC has many hundreds of Maliseet and Mi'kmaq members in New Brunswick in various constituent communities across the Province. Some of the members and constituents of NBAPC are "status" Indians under the *Indian Act*, R.S.C., 1985, c. 1-5, who do not live on "reserves" and some of them do not have "status" under the *Indian Act*. Members and the constituent communities of NBAPC assert the right to harvest forest resources by virtue, *inter alia*, of Aboriginal rights, including in the areas of harvest involved in these appeals.

3. The Intervenor NBAPC otherwise endorses the summary of facts of the Respondents.

PART II - THE QUESTIONS IN ISSUE

4. The Intervenor will limit its submissions to the following issues in this appeal:
 - A. the Five-Part Test set out by the Court of Appeal, with respect to:
 - (i) the characterization of the Aboriginal Right claimed;
 - (ii) whether the Aboriginal Right is “site specific”;
 - (iii) the “integral to the distinctive culture” test;
 - B. the scope and application of the Maliseet Treaty of 1725, with respect to:
 - (i) the characterization of the Treaty right;
 - (ii) the beneficiaries and geographic scope of the Treaty right.

PART III - ARGUMENT

A. (i) THE CHARACTERIZATION OF THE ABORIGINAL RIGHT CLAIMED

5. The Court of Appeal stated at para. 33 of *Sappier and Polchies* (and similarly at para. 10 in Darrell Gray):

... [T]he jurisprudence tells us that it is not permissible to characterize an aboriginal right in terms of the species of fish being harvested (e.g. perch or salmon). Nor is it permissible to characterize the nature of the aboriginal right in terms of the means used in furtherance of the harvesting activity...

6. This is completely consistent with the nature of the characterization of the Aboriginal right at issue in prior decisions of this Court. This has not been done previously on a narrow, species specific manner. Rather, in each instance, the right has been described in fairly broad terms.

7. In *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 54 this Court stated that “In order to inform the Court’s analysis the activities must be considered at a general, rather than at a specific level”.

8. In *R. v. Powley*, [2003] 2 S.C.R. 207, the Court endorsed a non-species specific characterization at para. 19 and 20:

The first step is to characterize the right being claimed: *Van der Peet*, supra, at para. 76. Aboriginal hunting rights, including Métis rights, are contextual and site-specific. The respondents shot a bull moose near Old Goulais Bay Road, in the environs of Sault Ste. Marie, within the traditional hunting grounds of that Métis community. They made a point of documenting that the moose was intended to provide meat for the winter. The trial judge determined that they were hunting for food, and there is no reason to overturn this finding. The right being claimed can therefore be characterized as the right to hunt for food in the environs of Sault Ste. Marie.

We agree with the trial judge that the periodic scarcity of moose does not in itself undermine the respondents' claim. The relevant right is not to hunt *moose* but to hunt for *food* in the designated territory.

9. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, as noted by Robertson, J.A. at para. 34 of *Sappier and Polchies*, this Court “consistently referred to the aboriginal right to fish and not the aboriginal right to fish salmon.”

10. Similarly, Robertson, J.A. at para. 35 referred to *R. v. Nikal*, [1996] 1 S.C.R. 1013, and noted:

... Specifically, the right was framed in terms of the “right to fish for food and for ceremonial purposes”. While the primary focus of the decision was on the issue of infringement, it is notable that the species of fish, and the means by which they were caught, played no role in defining the nature of the aboriginal right being claimed..

11. In *Van der Peet*, *supra*, this Court said, at para. 84: “Oral evidence demonstrated that trade was incidental to fishing for food purposes.” As Robertson J.A. stated at para. 38 of *Sappier and Polchies*:

... Note, once again, that the aboriginal right is not framed in terms of the species of fish being caught. Rather, attention focuses on the right to trade in fish and the intensity of the trading activity.

12. In *R. v. Adams*, [1996] 3 S.C.R. 101, and *R. v. Côté*, [1996] 3 S.C.R. 139, the aboriginal right was characterized as a claim to fish for food within the lakes and rivers of the Outouais Region.

13. The Intervenor NBAPC supports the finding of the Court of Appeal that the Aboriginal Right should be characterized at a general level as the right to harvest forest resources for personal and family use and should not be defined on a species specific basis.

(ii) WHETHER THE ABORIGINAL RIGHT IS “SITE SPECIFIC”

14. The Court of Appeal in *Sappier and Polchies* stated at para. 48:

The *Van der Peet* trilogy did not address the issue of whether an aboriginal right is site-specific... Aboriginal title is simply one manifestation of the doctrine of aboriginal rights. However, the Supreme Court also held that a protected aboriginal right falling short of aboriginal title may, nonetheless, have an important link to land. Moreover, the Court held that an aboriginal practice, that is entitled to protection as an aboriginal right, will be limited frequently to a specific territory or location, depending on the actual pattern of exercise of such an activity prior to contact with the Europeans. As such, an aboriginal right will often be defined in site-specific terms, with the result that it can only be exercised on a specific tract of land. This understanding of the law is found at para. 30 of *Adams*, which reads as follows:

The recognition that aboriginal title is simply one manifestation of the doctrine of aboriginal rights should not, however, create the impression that the fact that some aboriginal rights are linked to land use or occupation is unimportant. Even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land. For example, if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land. A site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish on the tract of land in question.

15. This Court stated in *Van der Peet, supra*:

31. More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

...

33. This approach to s. 35(1) is also supported by the prior jurisprudence of this Court. In *Calder, supra*, the Court refused an application by the Nishga for a declaration that their aboriginal title had not been extinguished. There was no majority in the Court as to the basis for this decision; however, in the judgments of both Judson J. and Hall J. (each speaking for himself and two others) the existence of aboriginal title was recognized. Hall J. based the Nishga's aboriginal title in the fact that the land to which they were claiming title had "been in their possession from time immemorial" (*Calder, supra*, at p. 375). Judson J. explained the origins of the Nishga's aboriginal title as follows, at p. 328:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. [Emphasis added.]

The position of Judson and Hall JJ. on the basis for aboriginal title is applicable to the aboriginal rights recognized and affirmed by s. 35(1). Aboriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the common law recognizes aboriginal land rights. As such, the explanation of the basis of aboriginal title in *Calder, supra*, can be applied equally to the aboriginal rights recognized and affirmed by s. 35(1). Both aboriginal title and aboriginal rights arise from the existence of distinctive aboriginal communities occupying "the land as their forefathers had done for centuries".

16. This quote from *Van der Peet* provides considerable guidance to the interpretation of the phrase "specific tract of land" from *Adams, supra*. This Court did not mean that the analysis of Aboriginal Rights was to be performed on a micro-system basis. The Mi'kmaq and Maliseet lived in organized societies, each with a territory recognized by themselves, and by other Aboriginal Nations, as their own. The Maliseet lived throughout the massive St. John River watershed area, which extends from the Atlantic Ocean into Maine. The Mi'kmaq lived in large watershed and coastal systems throughout their territory. Each Nation knew the ancestral lands over which it had rights and responsibilities.

17. Aboriginal Rights will exist on areas of land where the evidence for use and occupancy is not sufficient to found Aboriginal Title. We know from this that the test for the “site” for site-specific Aboriginal Rights is less rigorous than that for Aboriginal Title. In the circumstances of these appeals, that area is the territory of the Nation.

18. What did this Court mean in *Van der Peet, supra*, when it said that aboriginals “lived on the land in distinctive societies, with their own practices, traditions and cultures”. The Court did not mean that Aboriginal Nations were now obliged to prove the existence of such Rights, falling short of Title, on a parcel-by-parcel basis. We submit that the “land” the Court was referring to was the territory of the Nation in a broader sense.

19. The Aboriginal Rights of the Maliseet and of the Mi’kmaq exist in all of their respective territories and there is no need to present evidence to prove that any particular geographic location within that territory had more special significance to them before its resources can be harvested.

20. Both the Maliseet and the Mi’kmaq were a nation with a sustainable land use pattern that covered the coast, the river systems and the inland areas. Very few places in New Brunswick can not be readily reached from either the coast or one of the watersheds. Their use and occupation of the territory was as complete as it needed to be. They used it for all of the purposes that they required. In this case, the territory of the Aboriginal Nation constitutes the tract of land over which the “site-specific” Aboriginal Rights are claimed.

21. There will never be much evidence about the traditional use of a particular area of the forest. There is simply very little evidence available from time periods prior to significant European presence. However, Chief Justice Lamer in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 101, stated in relation to Aboriginal Title:

...the trial judge expected too much of the oral history of the appellants, as expressed in the recollections of aboriginal life of members of the appellant nations. He expected that evidence to provide definitive and precise evidence of pre-contact aboriginal activities on the territory in question. However, ...this will be almost an impossible burden to meet ...

22. There is no requirement that one area of land need have more cultural significance than another. The entire territory has cultural significance. There could never be any large body of evidence on the utilization of most woodland areas. There would have been no thought in the Mi'kmaq or Maliseet communities that it was important to track this level of detail throughout the centuries in their respective oral histories.

23. To require evidence of this nature would be to deprive Aboriginal people of their constitutional rights on an evidentiary standard. This would be inconsistent with the stated policies of this Court on Aboriginal right issues. The cultural significance of their respective territory is in its nature as a territory, as a whole. The harvest sites are in that territory. It is not necessary that the area where the harvest occurred have any greater cultural significance than that.

(iii) THE “INTEGRAL TO THE DISTINCTIVE CULTURE” TEST

24. The Court of Appeal stated in *Sappier and Polchies*:

[55] In brief, the Supreme Court held that the integral to the distinctive culture test does not require that the practice be “distinct”. It need only be “distinctive”. Alternatively stated, an activity for which an aboriginal right is being claimed does not have to be distinct to the aboriginal group in question, in the sense that it is “unique” to their culture. Rather, the aboriginal group need only establish that the activity is distinctive, in the sense that it was an integral or defining characteristic of their culture. Thus, the fact that other cultures may have engaged in the same activity does not undermine the claim to an aboriginal right to harvest a natural resource. For example, fishing for food is an activity common to many cultures and, therefore, not distinct to any one. However, so long as the activity of fishing for food was an integral part of the aboriginal culture, that activity may qualify as an aboriginal right.

[56] It is important to note that the Supreme Court expresses the integral to the culture test in a number of ways. As a negative proposition, it has been held that the practice cannot exist simply as an “incident” to another practice, but must itself be of integral significance to the aboriginal society. At para. 70 of *Van der Peet*, Chief Justice Lamer wrote: “Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as an aboriginal right...”.

[57] The integral to the distinctive culture test is also expressed in terms of a “central, significant or defining feature” of an aboriginal society or as a “significant” aspect of aboriginal life, or one that “represented an important mode of survival” for the aboriginal society ... The most recent formulation of the integral test is found in the reasons of Chief Justice McLachlin, at para. 12 of *Mitchell*:

[...] Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact. The practice, custom or tradition must have been "integral to the distinctive culture" of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (*Van der Peet, supra*, at paras. 54-59 (emphasis in original)). This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society's cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society in question.

[58] In short, the integral to the distinctive culture test requires the court to determine whether the activity in question was of “central significance” or a “defining feature” of the aboriginal group, such that its culture would have been “fundamentally altered” without it. The integral test is not met if the activity in question were merely an “incidental” or “marginal” aspect of the aboriginal culture. In turn, the meaning of the terms incidental and marginal is tied to the frequency with which the aboriginal community engaged in the practice.

[59] Having regard to the Supreme Court jurisprudence, it is clear to me that the integral to the distinctive culture test represents a significant obstacle in those cases where the aboriginal right being claimed involves a trading activity. In three of the four cases, the aboriginal group failed to meet this test. In all of the cases where the claimed right involved a right to fish for food, the aboriginal group was successful. It should come as no surprise to see that claims of an aboriginal right to harvest a natural resource for trade purposes are more likely than not to fail. This is true so long as the onus is on the aboriginal group to

establish that the trading activity existed prior to contact with Europeans and that it occurred with relative frequency, such that the practice cannot be characterized as incidental or marginal.

25. This Court said in *Van der Peet, supra*, at para. 50:

It is possible, of course, that the Court could be said to be "reconciling" the prior occupation of Canada by aboriginal peoples with Crown sovereignty through either a narrow or broad conception of aboriginal rights; the notion of "reconciliation" does not, in the abstract, mandate a particular content for aboriginal rights. However, the only fair and just reconciliation is.... one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.

26. This requires some consideration of the Maliseet and Mi'kmaq nations' perspectives on their own culture and then a consideration of how those perspectives are reconciled within the common law.

27. The Mi'kmaq and Maliseet nations would have seen themselves as peoples, with their own governance and leadership concepts, principles and beliefs, a culture that would continue to evolve in its relationship with Europeans. Their cultures were neither static nor capsulated into discrete categories. Perhaps no culture is.

28. The forest resources of the land, were, and are, an integral part of Maliseet and Mi'kmaq life in both their material culture and their non-material culture. As an aspect of material culture, trees were used for wigwams, canoes, paddles, drums, toboggans, snowshoes, firewood, baskets and a myriad of other purposes. The forests also played an important non-material cultural role. The forests were animate; they were not merely chattels or fixtures as Euro-Canadian law might view them. Trees are a part of the natural world, part of the resource bounty provided by the Creator.

29. The Maliseet and Mi'kmaq had distinctive cultures. This can not really be the subject of argument. They were Aboriginal nations that governed themselves as hunter-

gatherer societies, quite distinctive from the agrarian European societies that came to interact with and settle around them.

30. The “inherent to the distinctive culture” test has brought with it dangers in interpretation. It led the Provincial Court to hold that forest resource harvest was not “inherent” because, if there was a devastating event that caused all trees in the Province of New Brunswick to disappear, the Aboriginal nations of the province would still be Aboriginal. This is a misunderstanding of what this Court meant by this test.

31. The language used to describe Aboriginal issues sends messages to the public, to enforcement officials, to Crown prosecutors and to Aboriginal people themselves. It is not the goal of section 35 of the Constitution to reconcile and protect only “distinct” or exotic attributes of Aboriginal cultures. Section 35 protects more than just the material manifestations of the culture. Clearly, the culture itself is more important than its material manifestation from time to time.

32. “Integral to the distinctive culture” is a relatively recent introduction to Aboriginal law and we are still sorting through the connotations of this phrase. What is clear is that the “integral to the distinctive culture” test has never been used by this Court to deny constitutional protection to an Aboriginal practice that existed pre-contact. The test was used in *Van der Peet, supra*, to distinguish incidental commercial aspects of Aboriginal culture that arose post-contact as a result of European influence.

33. For the Maliseet and Mi’kmaq nations, the use of forest products for personal and family use clearly pre-dated European contact as a consistent and regular feature of their distinctive culture. The relationship between Maliseet and Mi’kmaq people and the forests of New Brunswick is a major feature of their respective cultures. It is a cultural feature which is equivalent in all respects to any other hunter-gatherer activity in their cultures. It is indistinguishable from both hunting and fishing, two activities which the courts have long accepted as being “integral” to Aboriginal cultures.

34. The Intervenor NBAPC submits that forest resources, including trees, were gathered by Mi'kmaq and Maliseet in their pre-contact societies, and this has continued to today. Changes in technology, in the size of the shelter or in the shape of the furniture do not change the characterization of the right.

B.(i) THE CHARACTERIZATION OF THE TREATY RIGHT

35. The Maliseet Treaties are sacred and are to be honoured. The key clause in the Maliseet Treaty of 1725 reads as follows:

That the Indians shall not be molested in their persons, Hunting, Fishing and Planting Grounds nor in any other their Lawful Occasions by His Majesty's Subjects or their Dependants...

36. The Court of Appeal followed accepted canons of Treaty interpretation in reviewing the circumstances of the Treaty parties, their understandings of their relationship at the treaty-making time, definitions of Treaty words as they were commonly understood at the treaty-making time and internal consistency in the Treaty document itself. Based on the application of all of these various aids to interpretations, the Court of Appeal concluded that the phrase "Hunting, Fishing and Planting Grounds nor in any other their Lawful Occasions" included the right to harvest timber for personal use on Crown lands.

37. This approach to treaty interpretation is similar to that of this Court in *Simon v. The Queen*, [1985] 2 S.C.R. 387, in considering the proper meaning to give to the insertion in the Mi'kmaq Treaty of 1752 of the phrase "as usual" after the right to hunt. At para. 26 the Court said:

First of all, I do not read the phrase "as usual" as referring to the types of weapons to be used by the Micmac and limiting them to those used in 1752. Any such construction would place upon the ability of the Micmac to hunt an unnecessary and artificial constraint out of keeping with the principle that Indian treaties should be liberally construed. Indeed, the inclusion of the phrase "as usual" appears to reflect a concern that the right to hunt be interpreted in a

flexible way that is sensitive to the evolution of changes in normal hunting practices. The phrase thereby ensures that the Treaty will be an effective source of protection of hunting rights.

38. The Court of Appeal in *Sappier and Polchies* determined that using wood in modern times for constructing a home and furniture and for firewood was a logical evolution of the many and varied uses made of wood by Maliseet for dwellings, tools, boats, furniture, firewood and other uses at the Treaty-making time. There can be no requirement that the modern dwelling must mirror a 1725-style home nor that furniture be limited to that used in 1725. Treaty rights are not frozen to their manner of expression at the treaty-making time. A modern bungalow and furniture is a current expression of the Treaty right, not a transformation of it.

39. The Intervenor NBAPC supports the Court of Appeal decision on the scope of the Treaty Right. However, as a matter of importance and priority, the Aboriginal Right to harvest forest resources long pre-dated the Treaties. The Intervenor NBAPC states that the Aboriginal Right is by itself sufficient to support the acquittals in the *Sappier and Polchies* appeal.

(ii) BENEFICIARIES AND GEOGRAPHIC SCOPE OF THE MALISEET TREATY OF 1725

40. In paragraph 20 of *Sappier and Polchies*, the Court of Appeal stated:

In conclusion, the respondents possess a treaty right to harvest trees on Crown lands traditionally occupied by members of the Maliseet community now living on the Woodstock (First Nation) Reserve...

41. The specific finding of the Court of Appeal on this issue was within the discretion of the Court and sufficient for the purposes of disposing of the particular case. However, the language used could give the impression that such Treaty Rights are limited to only members of modern *Indian Act* Bands or that there was some evidentiary requirement to provide proof today that a person currently living in one Aboriginal community had to

harvest forest resources in the location(s) where his or her ancestors lived at various times in the past.

42. Numeric registration under the *Indian Act* has nothing to do with Treaty or Aboriginal rights. A person can be a “status Indian” without being Aboriginal. A person can certainly be Aboriginal without having been given a registration number by the Department of Indian Affairs. Similarly, many Aboriginal people (quite possibly the majority) do not live on *Indian Act* reserves. [Palmer, P. “Forum on *R. v. Marshall: An Empty Shell of a Treaty Promise: R. v. Marshall* and the Rights of Non-Status Indians”, (Spring, 2000) 23 Dalhousie L.J. 102]

43. There is no geographic restriction in the Maliseet Treaty. The Maliseet occupied at least the lengthy St. John River watershed. This Court in *R. v. Marshall (No. 2)*, [1999] 3 S.C.R. 533, referred to “localness” of the Mi’kmaq Treaties signed in 1760-61. That description was specific to the circumstances of the Mi’kmaq Treaty-making process in 1760-61. It was not clear in June of 1760, for example, that all the Mi’kmaq were going to agree to the same Treaty relationship. In due course, they did. As well, there was some “localness” to the Mi’kmaq Treaties themselves with respect to the location of truckhouses and the provision of hostages. These aspects were local. However, the overall Treaty relationship that eventually resulted was applicable between the British and the Mi’kmaq as a whole. This is clear from *R. v. Marshall (No.1)*, [1999] 3 S.C.R. 456, para. 5 which stated, “[B]y the end of 1761, all of the Mi’kmaq villages in Nova Scotia had entered into separate but similar treaties”.

44. Certainly, the Maliseet entered into a single Treaty relationship as a nation (described as the “St. John’s River Indians”) with the British in both 1725 and 1760.

45. It is not possible, therefore, to infer:

- (a) that there was any “localness” or geographic restriction to the Maliseet Treaty. The Treaty signatories were traditional leaders representing the Maliseet Nation;
- (b) that current *Indian Act* Bands are the modern equivalent of the original Treaty signatories. *Indian Act* Bands were created by unilateral decisions of government only in the last fifty or so years. *Indian Act* reserves are tiny compared to the lands of the Maliseet Nation; or
- (c) that *Indian Act* “status” has any particular relevance to whether a person has Aboriginal rights. *Indian Act* registration numbers were only assigned a few generations ago and the criteria for such registration is at the discretion of Parliament, which has changed it a number of times.

46. The Treaties belong to the Maliseet Nation. *Indian Act* Bands are not the only holders of Treaty rights. Many Maliseet do not have “status” under the *Indian Act*. (Palmer, P., “Forum on *R. v. Marshall*”, *supra*] Maliseet who do not have “status” registration numbers under the *Indian Act* are also beneficiaries and holders of Treaty and Aboriginal Rights. (*R. v. Fowler* (1993), 134 N.B.R. (2d) 361; *R. v. Harquail* (1993), 144 N.B.R. (2d) 146; *R. v. Acker*, 2004 NBPC 24; *R. v. Lavigne*, 2005 NBPC 8). Many Maliseet continue to live in communities on their traditional lands throughout New Brunswick, not on *Indian Act* reserves, and are represented by the Intervenor NBAPC.

PART IV – SUBMISSION ON COSTS

47. The Intervenor NBAPC does not seek costs nor should it be subjected to pay costs other than the disbursements as provided for in the order granting leave to intervene.

PART V - RELIEF SOUGHT

48. The Intervenor, NBAC submits that the Appeals should be dismissed. The constitutional questions should be answered in the affirmative.

49. If, as a result of the decision in these appeals, a stay is granted for the purpose of consultation, accommodation and reconciliation, the Intervenor NBAPC should be involved in those processes. To date, the doctrine of “consultation and accommodation” recognized by this Court has not been a success. The failure of the Crown to consult the Mi’kmaq and Maliseet with respect to the forests of New Brunswick was not, for example, an issue in this appeal. These cases should not even have been necessary if consultation, accommodation and reconciliation were working properly.

50. Any stay granted by this Honourable Court should reflect that the Crown’s obligation to consult, accommodate and reconcile during the period of that stay must be inclusive of all the Maliseet and Mi’kmaq people, including those Aboriginal communities represented by NBAPC.

51. All of which is respectfully submitted.

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April , 2006.

PART VI

LIST OF AUTHORITIES

Cases	Paragraph	Source
<i>Delgamuukw v. British Columbia</i> , [1997] 3 S.C.R. 1010	21	RBA Gray 1 RBA S&P 1
<i>R. v. Acker</i> , 2004, NBPC 24	46	Tab 1
<i>R. v. Adams</i> , [1996] 3 S.C.R. 101	12, 16	RBA Gray 3 RBA S&P 7
<i>R. v. Côté</i> , [1996] 3 S.C.R. 139	12	RBA Gray 6 RBA S&P 10
<i>R. v. Fowler</i> (1993), 134 N.B.R. (2d) 361	46	Tab 2
<i>R. v. Harquail</i> (1993), 144 N.B.R., (2d) 146	46	Tab 3
<i>R. v. Lavigne</i> , 2005 NBPC 8	46	Tab 4
<i>R. v. Marshall (No. 2)</i> , [1999] 3 S.C.R. 533	43	RBA Gray 10
<i>R. v. Marshall (No. 1)</i> , [1999] 3 S.C.R. 456	43	RBA Gray 9 RBA S&P 15
<i>R. v. Nikal</i> , [1996] 1 S.C.R. 1013	10	ABA Gray 15 ABA S&P 15
<i>R. v. Powley</i> , [2003] 2 S.C.R. 207	8	RBA Gray 13 RBA S&P 19
<i>R. v. Sparrow</i> , [1990] 1 S.C.R. 1075	9	RBA Gray 16 RBA S&P 21
<i>R. v. Van der Peet</i> , [1996] 2 S.C.R. 507	7, 11, 15, 16, 18, 25, 32	RBA Gray 18 RBA S&P 23
<i>Simon v. The Queen</i> , [1985] 2 S.C.R. 387	37	RBA Gray 19 RBA S&P 6

Other Authorities

Palmater, P., “Forum on *R. v. Marshall*: An Empty Shell of a Treaty Promise: *R. v. Marshall* and the Rights of Non-Status Indians”, (Spring, 2000) 23 Dalhousie L.J. 102] 42, 46 Tab 5

PART VII - STATUTORY REFERENCES

Statutes	Paragraph	Source
<i>Constitution Act</i> , 1982	31	RBA S&P 25