Date: (2002-08-30)
Docket: 1010866; 1010867; 1010870; 101871
2002 NSPC 025

IN THE PROVINCIAL COURT
Cite as: R. v. Paul, 2002 NSPC 25

HER MAJESTY THE QUEEN

V.

GREGORY CHRISTOPHER PAUL AND JOHN PETER PAUL

DECISION

HEARD BEFORE: The Honourable Associate Chief Judge R. Brian Gibson, J.P.C.

DATE HEARD: May 13, 2002

DATE OF DECISION: August 30, 2002

SUBJECT: Application for State Funded Counsel

COUNSEL: Keith Ward and Lori-ann Veinotte, for the Prosecution
Kevin Coady, for the Defendants

[1] The Applicants, Gregory Christopher Paul, herein referred to as Gregory Paul, and John Peter Paul, herein referred to as John Paul, are before this Court charged with two offences allegedly arising on the 29th of June, 2000 in Canadian fisheries waters adjacent to Nova Scotia:

> "...did fish for snow crab without being authorized to fish for snow crab contrary to s.14(1)(b) of the Atlantic Fisheries Regulations, SOR/86-21 and did thereby commit an offence under s.78 of the Fisheries Act, R.S.C. 1985, c.F-14.
>
> AND FURTHER did obstruct a fishery officer carrying out duties or functions under the Fisheries Act, contrary to section 62 of the Fisheries Act, R.S.C. 1985, c.F-14 and did thereby commit an offence under s.78 of the Fisheries Act, R.S.C. 1985, c.F-14."

[2] The Applicants assert that they cannot receive a fair trial without the benefit of legal counsel and that they are unable to retain legal counsel. The Applicants further assert that a trial on these charges without the benefit of legal counsel would violate their rights embodied in S.7 and S.11(d) of the *Charter*. The Applicants therefore seek a permanent stay of these proceedings unless they are able to retain counsel funded by the State. I am mindful that the *Charter* does not provide a specific constitutional right for state-funded counsel and that it is only in rare circumstances that counsel will be "essential" to ensure a fair trial. See R. v. Rowbotham, (1988), 41 C.C.C. (3d) 1 (Ont. C.A.) at 66, 67 and 69; R. v. Keating, (1997), 159 N.S.R.

(2d) 357 (N.S.C.A.) at 367; R. v. Rain, (1998), 130 C.C.C. (3d) 167 at 177, 178 and 179.

[3] This application is made with the assistance of state-funded counsel as a result of a decision of this Court made October 15, 2001 following the decision in R. v. MacDonald, 2001 N.S.J. No.368 (N.S.C.A.).

[4] The Applicants carry the onus to present evidence and persuade me on a balance of probabilities that their *Charter* rights would be infringed if these charges proceeded to trial without the benefit of legal counsel. The test to be applied involves two related issues: (1) Can the Applicants receive a fair trial without legal counsel? (2) If not, have the Applicants exhausted all possible routes to obtain counsel?

[5] I have applied the above-stated test to the evidence and submissions presented in this application and within the context of the following seven factors: **(1) "Fairness" applies to the interests of both the State and Defence.** See R. v. Corbett, (1988), 41 C.C.C. (3d) 385 (S.C.C.) at 439, citing Laforest, J. in dissent; R. v. Harrer, (1995), 101 C.C.C. (3d) 193 (S.C.C.) at 201-202; **(2) the most favourable proceeding is not guaranteed.** See R. v. Lyons, (1987), 37 C.C.C. (3d) 1 (S.C.C.) at 46; R. v. Harrer, supra, at 202; **(3) assistance of defence counsel is not always**

required. See: New Brunswick (Minister of Health and Community Services v. G.(J.), (1999), 177 D.L.R. 124 (S.C.C.) at 155, 156; R. v. Rowbotham, supra at 66, 69-70, citing Re: Ewing and Kearney and the Queen (1974), 18 C.C.C. (2d) 356 (B.C.C.A.) at 365-66; R. v. Taylor, (1996), 150 N.S.R. (2d) 97 (S.C.) at 101, aff'd (1996), 154 N.S.R. (2d) 378 (C.A.); R. v. Rain, supra at 178; **(4) fairness requires consideration of the Applicants' abilities.** See: New Brunswick (Minister of Health and Community Service) v. G.(J.), supra at 153, 154-155; R. v. Wilson, (1997), 121 C.C.C. (3d) 92 (N.S.C.A.) at 95; R. v. Taylor, supra at 101; R. v. Rain, supra at 182; **(5) the judge has a duty to assist.** See: New Brunswick (Minister of Health and Community Services) v. G.(J.), supra, at 153-154; R. v. Rain, supra at 178, 179, 191; R. v. McGibbon, (1988), 45 C.C.C. (3d) 334 (Ont.C.A.) at 347; R. v. Keating, supra at 364; **(6) length of a case is a consideration.** See: R. v. Rowbotham, supra at 69; R. v. Rain, supra at 182, 191; R. v. Drury, [2001] 1 W.W.R. 442 (Man.C.A.) at 450; **(7) the "serious and complex" nature of a case is a consideration.** See New Brunswick (Minister of Health and Community Services) v. G.(J.), supra; R. v. Rowbotham, supra; R. v. Wilson, supra; R. v. Rain, supra; R. v. Rockwood,

(1989), 49 C.C.C. (3d) 129 (N.S.C.A.); R. v. Wilcox, (2001) 152 C.C.C. (3d) 157 (N.S.C.A.).

[6] I conclude with respect to the charge of obstruction, contrary to S.62 of the *Fisheries Act*, that the Applicants can receive a fair trial without legal counsel. With respect to the charge of fishing for snow crab, contrary to S.14(1)(b) of the *Atlantic Fisheries Regulations*, I conclude that the Applicants cannot receive a fair trial without legal representation.

[7] It therefore is only necessary to consider the second part of the test in relation to the unauthorized crab fishing charge. In so doing I conclude that the Applicants have exhausted all possible routes to obtain legal counsel.

[8] In respect of the unauthorized crab fishing charge, this is one of those rare circumstances where counsel is essential to ensure a fair trial. Thus, I conclude that the Applicants' *Charter* right to a fair trial, as embodied in S.7 and S.11(d) of the *Charter*, would be violated if that charge proceeded to trial and the Applicants were unrepresented by legal counsel. The clearest of cases test for a stay of proceedings has been met and I therefore order a stay of proceedings of the unauthorized fishing charge in respect of both Applicants, conditional upon satisfactory arrangements being made by the Crown to fund legal counsel, as the appropriate remedy pursuant to S.24(1)

of the *Charter*. Aside from recognizing the possibility that there could be a dispute between the Crown and the Applicants as to what constitutes satisfactory funding arrangements to enable the Applicants to retain legal counsel, I have not considered that issue further. I believe the issue is best left to the parties to resolve themselves should the Crown wish to proceed with the prosecution of the unauthorized fishing charge. However, in the event that the parties are unable to resolve that issue, I hold a preliminary view, subject to receiving further submissions, that it would be within the jurisdiction of this court to provide further guidance as to what constitutes satisfactory funding arrangements to retain legal counsel.

[9] This Court is prepared to set a trial date for the obstruction charge as soon as the parties are ready to have the Court do so.

ANALYSIS

Circumstances Pertaining to the Alleged Offences

[10] These charges arose following observations of a fishing vessel subsequently identified as the Cody D, which were made from an airplane by a fishery

officer. The fishery officer suspected that this fishing vessel was engaged in crab fishing activities. The vessel, when observed, was approximately 20 miles off the coast of Nova Scotia near where Halifax County meets Antigonish County.

[11] Radio contact by a fishery officer located on the Department of Fisheries vessel, Cygnus, was established with an individual on the Cody D believed to be the Applicant, John Paul. During that radio contact there was a conversation between a fishery officer and the person believed to be John Paul.

[12] Attempts to board the Cody D at sea by Fishery Officers in a zodiac water craft launched from the Cygnus were unsuccessful. Conversation allegedly occurred between the Applicant, John Paul and a Fishery Officer in the zodiac during the boarding attempt.

[13] The Cody D was followed ashore to the community of Ecum Secum in Halifax County by Fishery Officers where they boarded, searched and seized items from the Cody D. During what may have been a period of detention while the Applicants were being charged with the offences mentioned above, the Applicant, John Paul, allegedly made utterances.

[14] Evidence will be adduced during the trial that neither the Cody D nor the Applicants were licenced to fish for crab by the Department of Fisheries and at the time of the alleged crab fishing activities, the snow crab fishing season in the area off the Eastern Shore of Nova Scotia where the Cody D was observed, was closed.

[15] The Applicants are both Mi'kmaq Indians, claiming to hold crab fishing licences on June 29, 2000 issued by the Indian Brook Chief. The Applicants claim that their fishing licenses were issued by the Chief of their Band pursuant to a treaty between by the Crown and the Mi'kmaq which gave the Mi'kmaq the right to fish.

[16] Two other individuals who were also aboard the Cody D on June 29th were charged with the same offences as the Applicants. These two individuals pled guilty to both offences and were ordered to pay fines of $7000 each in respect of the unauthorized crab fishing charge and fines of $2000 for one individual and $2500 for the other individual in relation to the obstruction charge.

Circumstances Pertaining to the Applicants

Education and Training

[17] John Paul is 37 years of age. His brother, Gregory Paul, is 31 years of age. Both individuals achieved a Grade 9 education. They described themselves as poor students and found schoolwork to be a struggle. John Paul described his reading skills as okay and his writing skills as poor. Gregory Paul described both his reading and writing skills as poor.

[18] Neither Applicant has had any formal training since leaving school except for a scuba diving course lasting nine weeks, taken to enable them to fish for sea urchins. Both individuals have worked primarily as fishermen during their adult lives, supplemented by odd jobs performed in their native community. They have fished for salmon, sea urchins, lobster and snow crab pursuant to licenses issued by the Chief of the Indian Brook Band. They have taken basic survival and safety sources to enable them to work on larger fishing boats as deckhands. John Paul also obtained his captain's certification two years ago but has never been employed as a captain of a vessel.

[19] Neither Applicant holds or has held a leadership position in their community. They claim to be uncomfortable making speeches or speaking to a group of people.

Legal Experience and Understanding

[20] Although each Applicant has had occasion to retain Legal Aid counsel in the past, they have no legal training. They are unfamiliar with legal concepts such as hearsay evidence, statements made to a person in authority or a *Voir Dire*. They have never represented themselves in Court in the past and do not know how to advance a treaty defence. They lack knowledge about how to deal with experts and what role experts and expert witnesses might play in a treaty defence. Neither Applicant knows how long it would take to conduct historical research or who would do it.

[21] Both Applicants currently are involved in a trial as defendants, together with approximately 24 other individuals, arising from alleged unlawful lobster fishing activities in the Bay of Fundy. Legal counsel has been retained by their Chief and Band Council to represent all defendants and to advance a treaty defence in respect to that matter. Neither of the Applicants, however, seem to have a clear understanding of the specifics of the treaty defence being advanced in that matter by their legal counsel. It appears that they rely heavily upon the legal counsel retained to represent them and the other defendants in that matter.

Financial Resources

[22] Since the time these charges arose, both Applicants have sustained themselves on Social Assistance income received from their Band Council, together with income earned from the performance of odd jobs in their community such as the mowing of lawns or cleaning of yards or basements. John Paul receives Social Assistance income in the amount of $185 every two weeks, supplemented by odd job income of approximately $150 to $200 per month. Gregory Paul, who is married, receives Social Assistance of $211 every two weeks supplemented by odd job income in the amount of $150 per month approximately. His wife is unemployed.

[23] Neither Applicant owns real estate, a vehicle or other tangible assets. Neither Applicant has any savings or investments nor any expectation of an inheritance. Both Applicants may have an Income Tax liability arising from Income Tax Act assessments made in relation to the tax years of 1998, 1999 regarding John Paul and in relation to the years 1996 and 1997 regarding Gregory Paul. The status and amount of these liabilities appears unclear. Both Applicants claim to be exempt from these tax liabilities by virtue of their Indian status.

[24] John Paul resides at Millbrook with his sister where he is provided with room and board without charge. Gregory Paul resides rent-free at Hammonds Plains, Halifax County in a mobile home owned by his sister. The accommodations in which both Applicants reside are located on land reserved for the Indian Brook Band.

The Treaty Defence

[25] Although the *actus reus* is in dispute, it appears that the main focus of this trial and the time required for the trial will likely be related to a treaty-based defence.

[26] Both Applicants claim to hold licences to fish snow crab issued by their Band Chief. They claim that these licences were on board the Cody D when they were arrested and the vessel searched on June 29, 2000. Both Applicants believe that their Band, the Indian Brook Band, holds a collective right to fish flowing from a treaty or treaties between the Mi'kmaq and the Crown. They believe that the Band Chief and Council have the authority to control which Band members engage in fishing activities and for which species.

[27] The Applicants have not tendered as evidence copies of any treaty or treaties. The only reference to a particular treaty or treaties is found in the testimony of John Paul where he referred to the treaty rights considered by the Supreme Court of Canada in the case of R. v. Marshall, [1999] 3 S.C.R. 456 (herein referred to as Marshall I). In the Marshall case, the Supreme Court of Canada determined that written treaties in 1760 and 1761 between the Crown and the Mi'kmaq gave the Mi'kmaq in Nova Scotia the right to fish to the extent that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present day standards and as may be established by regulation. I infer from the testimony of John Paul that the treaties made in 1760 and 1761 between the Crown and the Mi'kmaq are the same treaties from which he believes the Applicants rights to fish snow crab are either wholly, or at least partly, derived.

[28] The Marshall I case dealt specifically with eel fishing in Pomquet Harbour, Antigonish County. However, the decision in Marshall I would suggest that the scope of the treaties of 1760 and 1761 apply to the entire Province of Nova Scotia, the ocean waters adjacent to Nova Scotia and to many other species of fish. The extent and scope of the treaties of 1760 and 1761 and perhaps other treaties that may be adduced in evidence at trial, will likely

depend upon other evidence, including expert evidence, necessary to determine whether snow crab fishing in ocean waters adjacent to Nova Scotia is included within the treaty right to fish.

[29] I considered the sufficiency of the evidence and submissions regarding the existence of a treaty or treaties necessary to give an air of reality to the possibility that such defence can be advanced. In that regard, I considered the decision of the Nova Scotia Court of Appeal in the case of R. v. MacDonald [2001] N.S.J. No. 368 and the New Brunswick Queens Bench decision of Rideout, J. in the case of R. v. Bartiboque et al [2002] N.B.Q.B. 147.

[30] As I understand the decision in the case of R. v. MacDonald, the Court of Appeal concluded that the trial judge did not make sufficient inquiry into the seriousness and complexity of the case or the means of the accused. The Court of Appeal noted in the MacDonald decision that the trial judge stated what he thought the defence would be, however, that was neither confirmed nor denied by the Respondent. It is noteworthy that the Respondent in the MacDonald case, when appearing before the trial judge seeking Charter relief in the form of state-funded counsel, was unrepresented. That is not the case before me. The Applicants are represented by experienced counsel

regarding this application as a result of the order I issued on October 15, 2001 for the provision of state-funded counsel to assist the Applicants to make this application. Their counsel, in addition to the evidence that the Applicants have presented, submits that the Applicants will advance a treaty defence to these charges.

[31] The evidence presented with respect to the length of time and cost to advance the treaty defence was not particularly clear. The Applicant, John Paul, testified to his belief that the Marshall I case had cost in excess of one million dollars and took more than five years to resolve. The decision in the R. v. Marshall case would suggest that a significant number of weeks would be required to establish the treaty right through the expert evidence and evidence of community leaders. If the Applicants were successful in establishing the treaty right, further time would be required to determine whether the regulations were a reasonable limitation of the treaty right. Despite the lack of clarity with respect to the length of time and cost to present a treaty-based defence, I find that it would be costly and require a significant length of preparation and trial time.

[32] The R. v. Bartiboque decision appears to have been based upon two findings, one of which I respectfully suggest may be erroneous. The trial judge in that decision stated at paragraph 36:

> It would seem, therefore, that whether there are aboriginal or treaty rights in effect or not, the Government has the right to regulate subject to the Badger test. From a review of the charges, it is clear that the Provincial Court will be dealing with the enforcement of regulations and other regulatory provisions under the Fisheries Act."

> "It is my view that there is nothing in the evidence before the Court which establishes that the cases are in fact outside the right to regulate preserved in the Minister. Nothing was introduced to suggest the test in Badger, supra is involved. In addition, there is insufficient evidence indicating that this is an aboriginal or treaty rights case."

This quote seems to suggest that beyond establishing that the case involves a treaty right, there must be some evidence or submission that the test in R. v. Badger [1991] 1 S.C.R. 771 is involved. I conclude, however, that if the treaty right is established, it will be the Crown's burden to justify the regulations, following the Badger test. The Applicants, however, need not establish that the Badger test is involved.

[33] The R. v. Barteboque decision seems to be also based, in part, upon a finding that there was insufficient evidence to indicate that the case involved an aboriginal or treaty right. This case before me is distinguishable from the R. v. Barteboque case by virtue of the decision in Marshall I and the testimony given and submissions made before me which clearly suggest that the treaty defence will be based in part if not fully upon the 1760 and 1761 treaties dealt with the Marshall I decision. I do not believe that more than what has been presented is necessary to given an air of reality to the likelihood of a treaty defence and its relevance to the charge of unauthorized snow crab fishing.

[34] Although I am satisfied that there is an air of reality to the likelihood of a treaty defence to the unauthorized snow crab fishing charge, I am not satisfied that there is an air of reality to the likelihood of a treaty defence in relation to the obstruction charge. As stated at paragraph 33 in the R. v. Marshall decision [1999] S.C.R. 533 (herein referred to as Marshall II:

> "The majority judgement of September 17, 1999 did not put in doubt the validity of the Fisheries Act or any of its provisions."

The *Fisheries Act* makes clear that the powers of fishery officers, as set out in sections 49 to 56, apply to all persons. There is no air of reality to a treaty defence that would purport to establish that the powers given to fishery officers in the *Fisheries Act*, if exercised, would interfere with the Applicants' treaty right to fish. The Supreme Court of Canada in both Marshall decisions recognized that a treaty right is a limited right subject to being enforced. At paragraph 36 of Marshall II, the Supreme Court stated:

> "Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right."

[35] The powers of fishery officers are therefore as relevant and significant in relation to the enforcement of treaty rights as they are with respect to regulations and provisions of the *Fisheries Act* which pertain to anyone who is engaged in fishing activity or performing some act that may affect the fishery.

[36] I now to turn to specific comments regarding some of the seven factors listed above and their application to the evidence and submissions.

<u>"Fairness" Applies to the Interests of both the State and Defence</u>

[37] The evidence and record reveal that the Applicants are members if the Indian Brook Mi'kmaq community and have, from the outset of these charges, asserted that they have a treaty right to fish for snow crab. The Crown had the option to test or deal with that treaty issue in a number of ways, aside from pursuing a prosecution of the Applicants on both of these charges. Other approaches could have been either a reference or a declaratory action as stated in <u>Marshall II</u> at paragraph 13. Another approach, and perhaps the best approach, as stated in <u>Marshall II</u> at paragraph 22, would have been to pursue a "process of negotiation and reconciliation that properly considers the complex and competing interests at stake". All of these non-prosecutorial approaches likely would have involved the Indian Brook Mi'kmaq community and perhaps the entire Mi'kmaq community in Nova Scotia rather than placing the onus of establishing the treaty right upon the Applicants.

[38] The State has the right to use its discretion and pursue whichever approach it wishes. However, if the State chooses to pursue the prosecutorial approach, it ought not have the unfair advantage of prosecuting Applicants who lack

the financial resources to retain legal counsel and lack the ability to advance a treaty-based defence without the benefit of legal counsel.

[39] On the other hand, the State ought not be put to the cost of funding legal counsel for the Applicants unless minimally there is an air of reality to their treaty-based defence. Such a defence is likely to cause the proceedings to be protracted and expensive.

[40] I am mindful that these proceedings would not likely be significantly lengthened nor the cost of state-funded counsel significantly increased if I concluded that the treaty-based defence applied to both charges. Thus, there is a certain temptation to order state-funded counsel in respect of both charges, recognizing that it would be of benefit to the Applicants. The principle of fairness, however, entitles the Crown to a finding from this Court that the treaty-based defence applies to only one of the charges if, in fact, there is not an air of reality to the treaty defence in respect of both charges.

Judge's Duty to Assist

[41] I conclude from my review of the case authorities that the judge's duty to assist is more in the nature of a protective role rather than that of performing

a proactive role. A treaty defence would require the trial judge to take a very proactive role, far beyond that which the case authorities contemplate. I am satisfied from the submissions and case authorities dealing with treaty defences that the nature of a treaty defence would require the Applicants to establish issues involving the substantial calling of evidence. This evidence could only be developed outside the courtroom through experts and community members. I conclude that this goes well beyond the duty of a judge to assist the accused to bring out their evidence "with full force and effect".

[42] There are a number of issues which will likely arise in relation to the Crown's proof of the *actus reus* that may require the trial judge to assist the Applicants if they are unrepresented. The evidence suggests that such issues might include the admissibility of statements made to a person in authority and search and seizure. However, those issues will likely only require the trial judge to assume the protective role as contemplated by the case authorities.

Cases "Serious and Complex"Nature is a Consideration

[43] The case authorities suggest that there must be evidence before the Court from which a conclusion can be reached that the case is both serious and complex. I am unaware of any case involving the retention of state-funded counsel where the Crown's case was essentially quite straightforward and it was the defence that involved the complexity. Despite that fact, the Crown concedes that, for the purpose of this application, the test for "complexity" may be met where the only complexity arises out of a defence that is both legally relevant to the charge and factually available. I conclude that the treaty defence is legally relevant to the unauthorized snow crab fishing charge and factually available. Nevertheless, I would like to add some further comment regarding complexity of the charge. First I will deal with the seriousness of the charges.

<u>Seriousness of the Charges</u>

[44] The more serious of these two charges is the charge of unauthorized fishing. The fines imposed upon the co-accused who pled guilty to both charges indicate that a higher fine, if there is a conviction of the Applicants on both charges, may by imposed in relation to the unauthorized fishing charge. Fines, if imposed upon the Applicants at the same level as those imposed

upon the co-accused, would cause significant hardship. It is likely that the Applicants would face the possibility of serving default time in jail to satisfy the fines since neither have the ability to pay fines of that magnitude.

[45] More significant is the loss of income, employment and the ability to earn a livelihood from fishing that will result if the Applicants are convicted of the unauthorized fishing charge. Both Applicants are fishermen and have been for most of their adult life. They lack the training, education or skills to take up other employment which could provide them with a modest livelihood. I am not satisfied that the impact arising from a conviction of the obstruction charge will be a loss of the ability to earn a livelihood from fishing.

Complexity of the Charges

[46] Cases involving treaty-based defences involve a four-stage approach. The first stage involves the presentation of evidence by the Crown in proof of the *actus reus*. There may be admissibility issues with respect to some of the evidence in this case and the Defence will want to cross-examine Crown witnesses.

[47] The second stage involves the presentation of any conventional defences to the charges.

[48] The third stage involves the calling of evidence to establish the treaty right. This will likely require the calling of historical evidence through documentation, expert witnesses and community witnesses.

[49] A disclosure issue may arise at this stage. The Crown, upon receiving notice of the treaty defence, may be required to disclose all the evidence that they intend to call in response. The Crown may make two responses if the treaty right is established. One being that the treaty right was extinguished. The other involves evidence of justification, being evidence directed at justifying the interference of the State with the established right.

[50] During the third stage, the Applicants, in attempting to establish the treaty right and the infringement thereof, will likely be required to show a certain degree of particularity. There are two criteria to be met here: 1) That the activity complained of is the preferred means to exercise the right. This involves evidence from the community. 2) That the actions of the State are an unreasonable limitation on the activity. This again would require evidence from the community, usually coming from a community leader.

[51] The fourth step provides the Crown with the opportunity to call evidence that establishes a justification of the infringement, once the infringement has been established. Justification evidence may relate to issues of safety,

conservation and economic or regional fairness. Expert evidence from the realm of occupational safety and from biologists and conservationists would be likely. The issue of regional fairness would likely require evidence of the effect on the non-native community.

[52] I conclude that a treaty-based defence is likely to result in a very complex trial.

CAN THE APPLICANTS RECEIVE A FAIR TRIAL WITHOUT LEGAL COUNSEL?

[53] With respect to whether the Applicants can receive a fair trial without legal counsel, I conclude, based upon the above analysis, that the Applicants cannot receive a fair trial with respect to the unauthorized crab fishing charge without the benefit of legal counsel. I conclude otherwise with respect to the obstruction charge simply because the Applicants have not persuaded me that there is an air of reality to a treaty-based defence with respect to that charge, nor that that charge otherwise involves seriousness or complexity requiring legal counsel.

HAVE THE APPLICANTS EXHAUSTED ALL POSSIBLE ROUTES TO OBTAIN COUNSEL?

[54] The evidence reveals that the Applicants are currently living in poverty, supported in part by their Band and by relatives. They have no realizable assets. They have requested assistance from the Indian Brook Chief and Band Council. That request was rejected due to the deployment of the Band's limited resources to retain counsel and advance a treaty-based defence on behalf of the Applicants and 24 other community members who are currently being tried on charges stemming from alleged unauthorized lobster fishing activities in the Bay of Fundy.

[55] Applications to the Nova Scotia Legal Aid Commission for legal representation by both Applicants have been rejected as have the appeals made by both Applicants in respect of the Commission's initial decisions of rejection. No evidence was offered suggesting that requests were made to private counsel to represent the Applicants on a *pro bono* basis. The length of preparation and trial time to advance a treaty offence do not, in my opinion, make the possibility of legal counsel acting on a *pro bono* basis remotely feasible. I am of the opinion that evidence of such requests for

pro bono representation are unnecessary with respect to this particular application.

[56] The likely very high cost of advancing a treaty-based defence do not make feasible the likelihood that any community members or relatives of the Applicants would be in a position to assist the Applicants in any meaningful way to retain legal counsel. The cost of advancing a treaty-based defence is not actually known, however, the Applicant John Paul testified to his belief that in excess of one million dollars was expended to advance the treaty-based defence on behalf of Donald Marshall in the Marshall I case. The decision in the R. v. Marshall cases may have the effect of reducing somewhat the cost of advancing a treaty-based defence in this particular matter. Nevertheless, it is reasonable to expect that the cost of advancing a treaty-based defence in this matter will be very high and well beyond the financial ability of the Applicants nor any one close to them such as family members upon whom they might call for assistance.

[57] I conclude that the Applicants have exhausted all possible routes to obtain legal counsel.

[58] I wish to thank both counsel for their thorough and helpful submissions.

R. Brian Gibson, J.P.C.
Associate Chief Judge