IN THE PROVINCIAL COURT OF NOVA SCOTIA
(Citation: R. v. McDonald et al, 2003NSPC034)

Date: July 8, 2003
Docket: 992062, 992093, 992094, 992096, 1002518, 992095, 992063, 992085, 1002511, 992122, 992123, 992124, 992125, 1002512, 992105, 992106, 992107, 992108, 1002514, 1002515, 1002516, 992066, 992067, 992087, 992088, 992089, 992090, 992068, 992086, 992084, 992083, 992081, 992115, 992116, 992118, 992117
Registry: Digby

BETWEEN:

HER MAJESTY THE QUEEN

-and-

ALEXANDER P. MCDONALD, CHAD ROBINSON,
HOLLY LYNN MCDONALD, LEON RUSSELL ROBINSON,
ANDREW S. ROBINSON, MARK LAWRENCE HOWE,
PETER ALLEN PAUL, JOHN PETER PAUL,
VANDORA LEE PAUL, GENEVIEVE R. JOHNSON

APPLICATION FOR DIRECTIONS

BEFORE:	The Honourable Judge Jean-Louis Batiot, J.P.C.
PLACE HEARD:	Comeauville, Nova Scotia
COUNSEL:	Keith Ward, Counsel for Her Majesty The Queen
	Lori-ann Esser, Counsel for Her Majesty The Queen
	Bruce H. Wildsmith, Q.C., Counsel for the Defendants
	Douglas Brown, Counsel for the Defendants

On May 8th, 2003 I rendered a decision on the **voir dire**, entitled **Justification Evidence**. The Crown now applies for directions. It has nine questions and I will set them out as worded:

A. RULING ON OBJECTION OF IRRELEVANCE OR IMMATERIALITY [Decision Paras. 45-56]

(i) At Paras. 48 to 51, the Court sets out a test of formality and common intention to discuss as a prerequisite to the admissibility into evidence of "discussions and agreements" between the Crown and First Nations. Is it the Court's view that this test applies to "consultations" as well?

(ii) Was it the Court's intention to apply the above test not only to "meetings", but also to informal exchanges of letters, e-mails, telephone calls, and any form of information transfer whatsoever?

(iii) Does this exclusionary test apply only to the content of communications emanating from First Nations, or does it apply as well to the content of Crown communications to First Nations?

(iv) Does this exclusionary test prevent the Prosecution from adducing the mere fact of communication (including date, parties and subject), as opposed to its content?

(v) Did the Court intend the span of time of exchanges to which this test applies, to be the entire post-Sparrow to post-Marshall period [i.e., 1990-2000]?

B. RULING ON 'WITHOUT PREJUDICE' PRIVILEGE [Decision Paras. 57-66]

(i) Is the Court of the opinion that, regardless of whether the post-Sparrow to post-Marshall [1990 - 2002] communications between the Crown and First Nations groups were marked with "without comment" or similar phrases, the privilege attached to "the whole process", and as such all inter-party communications during or about the process are privileged? When, if ever, is a communication between the parties between 1990 and 2002 not about "the process"?

(ii) Is the Court of the view that this privilege protects even the mere fact that an inter-party communication took place, or something less - - such as only the positions taken by the First Nations group?

(iii) Is the Court of the view that the privilege also attaches to communications originally directed to the public, to persons within government, or to non-First Nations third parties?

(iv) Is the Court of the view that the privilege also attaches to events that are not, in themselves, communications - - such as the issuance of licenses?

The Defence opposes this Application on the grounds that the Applicant has not shown that it is necessary or required for the intended purpose, that the decision speaks for itself, and that the Court is really asked to rule on anticipated questions of admissibility of evidence, as opposed to merely being asked for guidance on procedural matters

These questions relate essentially to the scope of the consultations or of the privilege. I will deal with them in that order.

Black's Law Dictionary, West Publishing Company, 1979, 5th Ed., at pg. 286, defines consultations as *Deliberation of persons on some subject*. **The Shorter Oxford English Dictionary on Historical Principles**, Oxford University Press 1973, Volume 1, at pg. 409 defines:

Consultation: ***1.*** *The action of consulting or taking counsel together; deliberation, conference 1548.* ***2.*** *A conference in which the parties, e.g. lawyers or medical practitioners, consult and deliberate 1425.* The other two definitions are not relevant.

To consult, at pg. 409: ***1.*** *To take counsel together, deliberate, confer 1565.* ***2.*** *To confer about, deliberate upon, consider -1703.* ***3****. To take counsel to bring about; to plan, devise, contrive -1658.* The other two are not on point.

At pg. 511, *to deliberate*: ***1.*** *To weigh in the mind; to consider carefully with a view to decision; to think over -1829.* ***2.*** *To use consideration with a view to decision; to think carefully; to take time for consideration.* ***3.*** *To resolve, determine -1633.*

It seems to me the plain meaning of the word *consultation*, in the present context is obvious: to consult is to discuss, to suggest, to inquire, to ascertain, to propose positions or possibilities to reach an agreement, even if it is to disagree. It implies a meeting, but not necessarily face to face. The essential ingredient is the fact that communications take place between two or more parties, on a specific topic, however such communications may be facilitated, but relating to the issue under discussion, in this case, deliberations affecting the exercise of the right asserted by the Defendants. It will thus be difficult to divorce one side of the equation from the other and still talk about a *consultation*. It is also clear that such consultations relate to the period post-**Sparrow**, and up to the date of the alleged offence.

I need not say anything more on this subject unless it be in a very specific context.

As for the extent of the privilege, the law is well settled and I need not make preliminary rulings.

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Jean-Louis Batiot, J.P.C.

July 8th, 2003

Comeauville, Nova Scotia