SUPREME COURT OF NOVA SCOTIA

Citation: Acadia First Nation v. Canada (Attorney General), 2013 NSSC 284

Date: 20130918
Docket: Hfx. No. 412642
Registry: Halifax

Between:

Chief Deborah Robinson and **Acadia First Nation**, on their own behalves and on behalf of the members of the Acadia Valley First Nation, **Chief Janette Peterson** and **Annapolis Valley First Nation**, on their own behalves and on behalf of the members of the Annapolis Valley First Nation, **Chief Frank Meuse** and **Bear River First Nation**, on their own behalves and on behalf of the members of the Bear River First Nation, **Chief Leroy Denny** and **Eskasoni First Nation**, on their own behalves and on behalf of the members of the Eskasoni First Nation, **Chief Sidney Peters** and **Glooscap First Nation**, on their own behalves and on behalf of the members of the Glooscap First Nation, **Chief Terrance Paul** and **Membertou First Nation**, on their own behalves and on behalf of the members of the Membertou First Nation, **Chief Robert Gloade** and **Millbrook First Nation**, on their own behalves and on behalf of the members of the Millbrook First Nation, **Chief Gerard Julian** and **Paqtnkek First Nation**, on their own behalves and on behalf of the members of the Paqtnkek Mi'kmaw Nation, **Chief Andre Paul** and **Pictou Landing First Nation**, on their own behalves and on behalf of the members of the Pictou Landing First Nation, **Chief Wilbert Marshall** and **Potlotek First Nation**, on their own behalves and on behalf of the members of the Potlotek First Nation, **Chief Norman Bernard** and **Wagmatcook First Nation**, on their own behalves and on behalf of the members of the Wagmatcook First Nation, **Chief Roderick Googoo** and **Waycobah First Nation**, on their own behalves and on behalf of the members of the Waycobah First Nation

Applicants / Respondents on Motion

v.

The Attorney General Of Canada

Respondent/Applicant on Motion

Judge: The Honourable Justice Peter P. Rosinski

Heard:	September 4 and 5, 2013, in Halifax, Nova Scotia
Counsel:	Naiomi Metallic and Jason Cooke, for the Applicant/Respondents on Motion
	Reinhold Endres, Q.C. and Kathleen McManus. for the Respondent/Applicant on Motion

By the Court:

INTRODUCTION

The Question in *Marshall*

[1] In *R. v. Marshall* [1999] 3 SCR 456 [*Marshall* No.1] the Supreme Court of Canada answered "yes" to the constitutional question:

> Are the prohibitions on catching and retaining fish without a license, on fishing during the closed time, and on the unlicensed sale of fish, contained in sections 4(1)(a) and 20 of the *Maritime Provinces Fishery Regulations* and section 35 (2) of the *Fishery (Gen.) Regulations*, inconsistent with the treaty rights of the Appellant contained in the Mi'Kmaq Treaties of 1760 - 61 and therefore of no force or effect or application to him, by virtue of sections 35 (1) and 52 of the *Constitution Act*, 1982?

[2] As a result of uncertainty concerning that decision raised by the intervener West Nova Fisherman's Coalition by way of a request for a reconsideration hearing, the Supreme Court refused to conduct a rehearing of the matter, but it did render a further decision clarifying *Marshall* No. 1- *R. v. Marshall* [1999] 3 SCR 533. (*Marshall* No. 2).

Clarification of *Marshall* No. 1

[3] In *Marshall* No. 2 the Court stated about *Marshall* No.1:

> In its majority judgment, the Court acquitted the appellant of charges arising out of catching 463 pounds of eel and selling them for $787.10. The acquittal was based on a treaty made with the British in 1760, and more particularly, on the oral terms reflected in documents made by the British at the time of the negotiations but recorded incompletely in the "truckhouse" clause of the written treaty. The treaty right permits the Mi'Kmaq community to work for a living through continuing access to fish and wildlife to trade for "necessaries", which a majority of the Court interpreted as "food, clothing and housing, supplemented by a few amenities". [para. 4]

[4] The Court went on to further state:

> As further pointed out in the September 17, 1999 majority judgment, the framers of the Constitution caused existing aboriginal and treaty rights to be entrenched in s. 35 of the *Constitution Act*, 1982. This gave constitutional status to rights that were previously vulnerable to unilateral extinguishment. The constitutional language necessarily included the 1760-61 treaties, and did not, on its face, refer expressly to a power to regulate. Section 35(1) simply says that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". In subsequent cases, some aboriginal peoples argued that, as no regulatory restrictions on their rights were expressed in plain language in the Constitution, none could be imposed except by constitutional amendment. On the other hand, some of the Attorneys General argued that as aboriginal and treaty rights had always been vulnerable to unilateral regulation and extinguishment by government, this vulnerability was itself part of the rights now entrenched in s. 35 of the *Constitution Act*, 1982. In a series of important decisions commencing with *R. v. Sparrow*, [1990] 1 S.C.R. 1075, which arose in the context of the west coast fishery, this Court affirmed that s. 35 aboriginal and treaty rights are subject to regulation, provided such regulation is shown by the Crown to be justified on conservation or other grounds of public importance. A series of tests to establish such justification was laid out. These cases were referred to in the September 17, 1999 majority judgment, but the applicable principles were not elaborated because justification was not an issue which the Crown chose to make part of this particular prosecution, and therefore neither the Crown nor the defence had made submissions respecting the government's continuing powers of regulation. The Coalition recognizes that it is raising a new issue. It submits "that it is plain in the Reasons for Judgment, and in the earlier decisions of the Provincial Court of Nova Scotia at trial and of the Nova Scotia Court of Appeal on initial appeal, that that issue [of regulatory justification] has been neither considered nor decided". [para. 6]

[5] The Court concluded its observations as follows:

> "The Attorney General of Canada's written argument on the appeal to this Court specifically stated that "[s]ince no such treaty rights have been established in this case, then there was no requirement for the Crown to justify its *Fisheries Act* regulations in accordance with ...R. v. Sparrow [supra] or R. v. Gladstone [[1996] 2 S.C.R. 723]"
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> The Majority judgment delivered on September 17, 1999, therefore directed the acquittal of the appellant on the evidence brought against him. The issue of justification was not before the Court and no judgment was made about whether or not such restrictions could have been justified in relation to the eel fishery had the Crown lead evidence and argument to support their applicability. [para. 14]

[6] In relation to the *Fisheries Act* and related regulations the Court stated as follows:

> The Majority judgment of September 17, 1999 did not put in doubt the validity of the *Fisheries Act* or any of its provisions [paragraph 33].
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> (Pursuant to this regulatory power, the Governor in Council had, in fact, adopted the *Aboriginal Communal Fishing Licenses Regulations*, discussed below.)
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> The *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332, referred to in the September 17, 1999 majority judgment, deal with the food fishery. These regulations provide specific authority to impose conditions where justified respecting the species and quantities of fish that are permitted to be taken or transported; the locations and times at which landing of fish is permitted; the method to be used for the landing of fish and the methods by which the quantity of the fish is to be determined; the information that a designated person or the master of a designated vessel is to report to the Minister or a person specified by the licence holder, prior to commencement of fishing; the locations and times of inspections of the contents of

> the hold and the procedure to be used in conducting those inspections; the maximum number of persons or vessels that may be designated to carry on fishing and related activities; the maximum number of designated persons who may fish at any one time; the type, size and quantity of fishing gear that may be used by a designated person; and the disposition of fish caught under the authority of the licence. The Governor in Council has the power to amend the *Aboriginal Communal Fishing Licences Regulations* to accommodate a limited commercial fishery as described in the September 17, 1999 majority judgment in addition to the food fishery. [para. 34] [emphasis added]

[7] The Court concluded:

> In other words, regulations that do no more than reasonably *define* the Mi'Kmaq treaty right in terms that can be administered by the regulator and understood by the Mi'Kmaq community that holds the treaty rights, do not impair the exercise of the treaty right, and therefore do not have to meet the *Badger* standard of justification. [para. 37]

[8] In relation to aboriginal peoples right to be consulted about limitations on the exercise of treaty rights the Court commented in *Marshall* No. 2:

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> The court has emphasized the importance in the justification context of consultations with aboriginal peoples.
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> • • •
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> The special trust relationship includes the right of the treaty beneficiaries to be consulted about restrictions on their rights, although, as stated in *Delgamuukw, supra* at paragraph 168:
>
> > The nature and scope of the duty of consultation will vary with the circumstances.
>
> This variation may reflect such factors as the seriousness and duration of the proposed restriction, and whether or not the Minister is required to act in response to unforeseen or urgent circumstances. [para. 43]

[9] As pointed out by the Court in paragraphs 12 and 13 of *Marshall* No. 2, the litigation of the existence and extent of treaty rights and any justifications related to infringements thereof can be placed before Courts by way of a constitutional reference, a prosecution under legislation, or by request for declaratory relief. Judicial review of the Minister of Fisheries' exercise of discretion may also be available as another means of potentially examining such issues, however I acknowledge Justice LeBel's comments in *R. v. Marshall* [2005] 2 SCR 220 at paras. 142-143, that "the criminal process is inadequate and inappropriate for dealing with such claims"; and the view of some Courts that the doctrine of "collateral attack" may cause courts to look with disfavour on such issues being brought up in the prosecution context: eg. see *R. v. Lefthand* 2007 ABCA 206 at paras. 19-25.

The Motion herein

[10] In the case at Bar, the Attorney General of Canada (hereinafter "Canada") argues that this Court should grant a summary judgment on the pleadings as they are drafted pursuant to CPR 13.03 and dismiss this proceeding.

[11] Counsel for Canada says that the pleadings as drafted are so devoid of material facts that the pleadings do not bring a real dispute forward to be litigated, and they are rather in the nature of a "private reference" as opposed to a constitutional reference statutorily permitted to be placed before courts by the respective provincial/territorial and federal governments.

[12] They say that the advantage of specifically placing the nature and extent of treaty rights and any justifications of restrictions thereon, by way of a prosecution based on more specific facts, or even a fact laden request for a declaration or judicial review of the Minister's fact specific exercise of discretion under the *Act* and regulations, is that the Court may be afforded at least a minimal, yet concrete, set of circumstances which are lacking in the case at Bar.

[13] The Applicants, 12 Aboriginal bands (hereinafter "the Chiefs"), resist this motion for summary judgment. They say that placing the nature and extent of treaty rights and any justification of restrictions thereon before Courts by way of a prosecution or a judicial review of the Minister's exercise of discretion, amount to a piecemeal, ineffective and inefficient approach to the resolution of such disputes. While there are cases where those means of litigation are appropriate, in their

view, given the **established** treaty right as discussed by the Supreme Court of Canada in *Marshall* No. 1 and in *Marshall* No. 2, Canada has had a positive obligation since then to accommodate their rights under the treaty, which Canada previously argued in the Supreme Court of Canada in *Marshall* did not permit them the right to a moderate livelihood fishery, and due to Canada's incorrect legal position on that issue, that Canada has had a duty to consult them regarding a redesign of the fisheries regime as it relates to them specifically.

[14] The Chiefs claim that the law contemplates the possibility of such relief, and that they are prepared to provide evidence to substantiate their claims that since the release of *Marshall* No. 1 and *Marshall* No. 2, no legislative changes (statutory or regulatory) relevant to their circumstances specifically have been enacted, and no effective consultation has taken place in relation to the redesign of the fishery that they say is necessarily and constitutionally required as a result of the Supreme Court of Canada decisions in *Marshall* No. 1 and *Marshall* No. 2.

[15] Canada may be correct that, had the Chiefs requested a declaration specifically that the Aboriginal Communal Fishing Licenses Regulations (ACFLRs) are an unjustifiable infringement on the treaty rights granted in

Marshall No. 1 and *Marshall* No. 2, that approach would likely not have placed such a request for declaratory relief in the same jeopardy that exists here, where the declaratory relief claimed is less rooted in specific facts.

[16] I am of the view that the pleadings contained in the grounds of the Notice of Application in Court in this case are deficient to such an extent that I can confidently conclude that the pleading is "clearly unsustainable" as per CPR 13.03, and with due consideration to the incidental rules CPR 5.03(2)(b) and 5.05(5), 38.06 and 88, relied on by Canada.

The Pleadings

[17] The relief being sought in the Notice of Application is as follows:

The Applicants are applying to the Court for an Order:

> 1. Declaring that Canada has a positive obligation to accommodate the Applicants' treaty right to a moderate livelihood fishery recognized and affirmed by s. 35 of the Constitution Act, 1982 ("Section 35") and recognized in R. v. Marshall, [1999] 3 SCR 456 ("Marshall") and that Canada has failed to take steps to meet said positive obligation since Marshall.
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> 2. Declaring that said positive obligation is informed by the rule of law, the relationship between Canada and its Aboriginal people, the honour of the Crown, the United Nations Declaration on the Rights of Indigenous Peoples, and the duty to consult and accommodate, and that the following constitutes the bare minimum content of said positive obligation:

a. To recognize and accommodate the Applicants' right to fish for a moderate livelihood pursuant to a Mi'kmaq-regulated fishery without prosecution;

b. In the alternative to paragraph (a), to amend the Fisheries Act, R.S.C. 1985, c. F-14 ("Fisheries Act"), or its related regulations, namely the Fisheries (General) Regulations, SOR/93-53, the Maritime Provinces Fishery Regulations, SOR/93-55 and the Aboriginal Communal Fishing Licences Regulations, SOR/92-332 ("the Regulations"), to recognize and accommodate a moderate livelihood fishery licence;

c. If providing for a moderate livelihood fishery licence under paragraph (b), to amend the Fisheries Act and Regulations to provide the Minister of Fisheries and Oceans with specific criteria by which to exercise his licensing discretion in a manner that respects the treaty right of the Applicants to fish for a moderate livelihood recognized and affirmed by Section 35 and Marshall; and

d. If providing for a moderate livelihood fishery licence under paragraphs (b) and (c), to consult with and accommodate the Applicants with respect to the above-noted amendments prior to their enactment.

3. Declaring that a failure by Canada to meet the above-noted minimum content of said positive obligation means that the Fisheries Act and the Regulations are of no force and effect or application to the Applicants, by virtue of sections 35(1) and 52 of the Constitution Act, 1982, in respect of the moderate livelihood fishery of the Applicants as affirmed in Marshall.

4. Declaring that the definition of "Aboriginal fisheries" in the Fisheries Act introduced in Bill C-38, enacted as the Jobs, Growth and Long-term Prosperity Act, S.C. 2012, c. 19 ("Bill C-38"), and amended by Bill C-45, enacted as the Jobs and Growth Act, 2012, S.C. 2013, c. 31 ("Bill C-45"), is unconstitutional in that it does not include the treaty right of the Applicants to a moderate livelihood fishery recognized and affirmed by Section 35 and recognized in Marshall, and in that Canada failed to consult with and accommodate the Applicants regarding this definition either prior to its creation or amendment.

5. Finding such further and other relief as this Honourable Court may deem fair and just in the circumstances.

• • •

Grounds for the Order

The Applicants are applying for the order on the following grounds:

1. In September 1999, the Supreme Court of Canada, in *Marshall*, recognized and affirmed the Applicants' right, pursuant to treaties made with the Crown in 1760-61 and Section 35, to harvest and to sell fish to obtain a moderate livelihood for themselves and their families.

2. At the time of *Marshall*, the *Fisheries Act and the Regulations* were determined to be unconstitutional in that they did not recognize and accommodate the treaty right to fish for a moderate livelihood. The Supreme Court further determined that the Fisheries Act and Regulations were unconstitutional in not providing the Minister with specific criteria to be applied when exercising his discretion to license or not a Mi'kmaq livelihood fishery.

3. Since *Marshall*, the Crown in right of Canada has not amended the *Fisheries Act and Regulations* to recognize and accommodate the treaty right of the Mi'kmaq to fish for a moderate livelihood, or to provide the Minister with specific criteria to be applied when exercising his discretion to license or not a Mi'kmaq livelihood fishery.

4. Since *Marshall*, there has been at least one prosecution against Mi'kmaq in Nova Scotia for attempting to engage in moderate livelihood fishing, and representatives of the Crown in right of Canada have indicated that prosecution will be the result for any Mi'kmaq fishing without a licence.

5. Since *Marshall*, Canada has not implemented the *Marshall* decision nor recognized or accommodated the Applicants' right to a moderate livelihood fishery.

6. Since *Marshall*, Canada has not fulfilled its duty to consult with and accommodate the Applicants about their right to fish for a moderate livelihood.

7. Since *Marshall*, Canada has not provided anyone, including the Minister of Fisheries and Oceans and the Minister of Aboriginal Affairs and Northern Development Canada, with a mandate to negotiate the treaty right of the Applicants to fish for a moderate livelihood.

8. Since *Marshall*, the *Fisheries Act and the Regulations* have continued to prohibit the Applicants from exercising their treaty right to fish for a moderate

livelihood without a license and Canada has done nothing to recognize, implement or accommodate a livelihood fishery license.

9. In 2012, Canada through Bill C-38 placed for the first time a definition in the *Fisheries Act* of "Aboriginal fisheries", and later amended that definition through Bill C-45. The definition does not include a moderate livelihood fishery.

10. Canada through Bill C-38 and Bill C-45 defined "Aboriginal fisheries" in the *Fisheries Act* without fulfilling its duty to consult and accommodate the Applicants thereby breaching the constitutional duty of the Crown to consult with and accommodate the Applicants before making a decision or taking action that may adversely affect the constitutionally protected treaty right of the Applicants to fish for a moderate livelihood.

Position of the Attorney General of Canada

[18] In a nutshell, Canada says that the Chiefs have not pled sufficient material facts to put a real dispute before the Court, and therefore declaratory relief is simply not possible, because effectively the Court is being asked to make a declaration in a factual vacuum, and the Court should not do that because it would necessarily involve unforeseen consequences, including effects upon persons/interests not represented in the Application. Moreover, in doing so the Court would inappropriately, yet effectively be intruding into the legislative sphere by declaring that Canada has an obligation to legislate a new fisheries regime with due regard to accommodation of the treaty rights and the duty to consult – see the comments of Karakatsanis J. for the Majority in relation to the

limits of superior courts' "inherent jurisdiction" at paras. 29-31 and 41: *Ontario v. Criminal Lawyers Association of Ontario* 2013 SCC 43.

[19] Similarly, at this point, counsel for Canada says they are simply unable to respond intelligently as they do not know what factual case they are being asked to meet. Canada goes so far as to argue that the pleading does not even allow them to intelligently request particulars.

[20] Furthermore they say that, the legal premises upon which the Chiefs base their arguments are also flawed: that is, there is no authority that supports the Chiefs' view that Canada has a positive obligation to in effect redesign the fishery to recognize and accommodate the Chiefs' treaty rights; nor on a factual level have the Chiefs made an allegation that the existing regime is an unjustifiable infringement on their treaty right to a moderate livelihood fishery.

[21] Specifically in relation to the facts pleaded in the grounds in the Notice of Application in Court, counsel for Canada in reply argument noted that of those 10 grounds, grounds 3, 4 and 9 are the only apparent factual pleadings, whereas possibly ground 5 may be so considered. Canada asserts that grounds 1, 2, 6, 7, 8

and 10 are legal conclusions or statements sourced in legal propositions, and not material facts.

[22] On the other hand, if the Chiefs specifically claim that either the ACFLRs are unconstitutional for a failure to consult with the affected aboriginal peoples, or if they claimed that the ACFLRs do not accommodate their treaty right to fish for a moderate livelihood, then the dispute would be more capable of being resolved by way of declaratory relief.

[23] However, on an examination of those facts presently pleaded and law argued by the Chiefs, Canada says there simply is not even a glimmer of hope that the cause of action/declaratory relief requested here could succeed if the matter proceeded to hearing.

Position of the Chiefs

[24] In oral argument their counsel confirmed that they were unaware of any other cases such as the case at Bar where: a treaty right had been recognized, and that since then, the implications thereof had not been addressed by the Crown,

causing the aboriginal community to have to return to Court to argue that the Court in effect order that those actions by the Crown that necessarily flow from the earlier Court decision confirming the treaty right be undertaken.

[25] They also recognize however that successful requests for declaratory relief generally involve more specific factual circumstances than they are presenting by way of pleadings to the Court. Nevertheless, they argue that the factual pleadings are sufficient to avoid summary judgment dismissal of the proceeding. They observe that the submissions made to the Court in writing and oral argument by counsel for Canada clearly demonstrate that Canada sufficiently knows the case to meet, which forthcoming evidence and arguments, written and oral, will continue to clarify.

[26] Counsel for the Chiefs pointed out that Canada's arguments as to whether a judge should/would exercise his or her discretion to grant the declaratory remedy here is a question for the Application judge; my task is to determine only if the pleadings are clearly unsustainable, and it cannot be said with the required level of confidence that the Application judge in their exercise of discretion would decide

against making a declaratory order, making the proceeding “clearly unsustainable.”

Why the Motion for Summary Judgment on pleadings must be granted

[27] CPR 13.03 makes it clear that if the pleading discloses “no cause of action”, or makes a claim that is “clearly unsustainable” when the pleading is read on its own, and the facts pled are assumed to be true, then a judge "must set aside" the pleading - see also Justice Fichaud’s comments in *Innocente v. Canada* 2012 NSCA 36 at paragraph 23. If shown to be "clearly unsustainable", I have no discretion - the pleadings must be set aside, or an opportunity provided to amend the pleading pursuant to CPR 13.03 [4].

[28] There are not many cases which involve a request for declaratory relief being struck down on the basis that the pleadings are "clearly unsustainable". Fortunately this Court does have the guidance of our Court of Appeal as revealed in *Cape Breton v. Nova Scotia* 2009 NSCA 44. In that case the Cape Breton Regional Municipality applied for a declaration that the provincial government had breached its obligation under Section 36 of the *Constitution Act* to distribute

federal equalization payments to alleviate the economically depressed conditions in Cape Breton. Justice Murphy, [under the old Rule 14.25, *Nova Scotia Civil Procedure Rules* (1972), now similarly contained in Rule 13.03, of the *Nova Scotia Civil Procedure Rules* which came into force on January 1, 2009], ruled that those pleadings disclosed no reasonable cause of action.

[29] Insofar as the *Cape Breton* case was largely premised on the statutory interpretation applicable to Section 36 of the *Constitution Act*, it bears some similarity to this case where the Chiefs' argument is largely premised on the correct legal interpretation of *Marshall* No. 1 and *Marshall* No. 2 (which I recognize involved underlying unique and extraordinary principles of interpretation - see the Majority decision in *Marshall* No. 1 at paras. 9-14).

[30] Chief Justice MacDonald succinctly stated in *Cape Breton* at paragraph 2:

> Simply put, the CBRM's claim is not sustainable because it is premised on a purported constitutional obligation which, in this context, does not exist.

[31] Section 36 of the *Constitution Act* read in part:

> Commitments to promote equal opportunities

> 36.(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to:
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> (a) promoting equal opportunities for the well-being of Canadians;
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> (b) furthering economic development to reduce disparity in opportunities; and
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> (c) providing essential public services of reasonable quality to all Canadians.
>
> Commitment respecting public services
>
> (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services and reasonably comparable levels of taxation.

[32] CBRM took the position that Section 36 of the *Constitution Act* represents a legally enforceable constitutional commitment. That is that Section 36 "represents a justiciable commitment on the part of the Federal Government and the Provinces, enforceable at the instance of the CBRM" - at paragraph 14.

[33] Ultimately, our Court of Appeal concluded that after examining section 36 using the principles of statutory construction:

> "The cumulative effect of answering Professor Sullivan's three questions is inevitably as follows. In an appropriate context, S.36 might represent a justiciable commitment, but only among the federal and provincial governments who were privy to the agreement that is represented by S.36. It is not actionable by an individual or municipality such as the CBRM. Yet this is something the CBRM would have to establish if this matter were to proceed further. Therefore, this proposed interpretation respectfully offers no chance of success." [emphasis added]

> The Chambers Judge committed no error of law because it remains "plain and obvious" that these pleadings disclose no reasonable cause of action. Respectfully they are "certain to fail" and "absolutely unsustainable" - at paragraphs 86 and 87.

[34] Nevertheless, the Court of Appeal accepted that a Court should be hesitant to summarily strike claims which involve the justiciability of important issues of law that have yet to be judicially considered - paragraph 20.

[35] In the case at Bar, the Chiefs argue that, having established a treaty right to a moderate livelihood fishery, they are now entering into an uncertain and untested area of law, which they say may permit a court to conclude that upon the declaration of the treaty right such as in *Marshall* No. 1 and *Marshall* No. 2, the Crown has an obligation to create a legislative regime to reflect that treaty right after due consultation with the affected aboriginal group, or an obligation to revisit an existing legislative regime after due consultation with the affected aboriginal group to ensure that the treaty rights are accommodated.

[36] Several cases figure more prominently than others in relation to such earlier similar litigation.

[37] In *Shubenacadie Indian Band v. Canada* 2001 FCT 181 Justice Hugessen heard a motion by the Crown to strike a Statement of Claim under the *Federal Court Act* rules.

[38] While recognizing that the law was well-established regarding striking of statements of claim, Justice Hugessen noted that the Court should be particularly generous in assessing such claims:

> I turn now to the second aspect of the Motion which is to strike out the Statement of Claim as disclosing no reasonable cause of action. [para.5]
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> ... especially the case in this field, that is the field of aboriginal law, which in recent years in Canada has been in a state of rapid evolution and change. Claims which might have been considered outlandish or outrageous only a few years ago are now being accepted.
>
> If there is in a pleading a glimmer of a cause of action, even though vaguely or imperfectly stated, it should, in my view, be allowed to go forward. [para. 6]

[39] The Federal Court Rules at the time envisaged summary judgment on pleadings as opposed to on evidence separately, and Rule 221 respecting "striking out pleading" read as follows:

> Striking Out Pleadings
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> Marginal note: Motion to strike

> 221.(1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
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> (a) discloses no reasonable cause of action or defence, as the case may be,
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> (b) is immaterial or redundant,
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> (c) is scandalous, frivolous or vexatious,
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> (d) may prejudice or delay the fair trial of the action,
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> (e) constitutes a departure from a previous pleading, or
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> (f) is otherwise an abuse of the process of the Court,
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> and may order the action be dismissed or judgment entered accordingly.
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> Marginal note: Evidence
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> (2) No evidence shall be heard on a motion for an order under paragraph (1)(a).

[40] He set out the essence of the Schubenacadie Band's assertions in their Amended Statement of Claim at paragraph 7 of his decision, and went on to say:

> 8. I think those paragraphs can be roughly summarized as saying that the plaintiffs are Nova Scotia Mi'Kmaqs, that all Nova Scotia Mi'Kmaqs are and have always been members of a single aboriginal community that enjoys and has always enjoyed the right to fish unhindered in the waters off the coasts of Nova Scotia, that those rights were enshrined and confirmed in a series of treaty treaties entered into by the crown in 1760 and 61 and that those treaties, although separate, are to be likened in law to a single treaty to which the various Mi'Kmaq communities in Nova Scotia in 1760 and 61 adhered, much as happened historically in the case of the numbered treaties in Western Canada.
>
> 9. In my view, there is here, although stated with great generality, the essence of a claim to aboriginal rights both by treaty and at common law. Both parties have referred to and relied upon the two decisions of the Supreme Court of Canada in the single case of *R. v. Marshall* ... but it is extremely difficult to reconcile that language

> with other language to be found in *Marshall* and with the undoubted fact that the upshot of the *Marshall* case, and there was only one case, was that *Marshall* was in the end acquitted of fishing in an area to which he had by residence and band affiliation no claim under any treaty which are been entered into by the band to which he belonged.
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> • • •
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> 10. It would not, in my view, be appropriate on a motion of this sort to attempt to reconcile these views. [emphasis added]

[41] His decision was upheld by the Federal Court of Appeal: 2002 FCA 249. That Court agreed with Judge Hugessen that, in essence what the Crown was seeking was particulars, and that that option was still open to the Crown. Notably the Federal Court of Appeal stated:

> Although the pleading is broad and encompassed in general terms, these are not such defects as to permit the Statement of Claim to be struck out so long as a cause of action, however tenuous, can be gleaned from a perusal of the Statement of Claim… The motions judge found that it was difficult to reconcile the two decisions [Marshall] in some respects. We do not feel that the appropriate time to adjudicate such an issue is on a motion to strike the Statement of Claim." - Paragraphs 6 and 7 [emphasis added]

[42] Also cited by both parties in the case at Bar is *Cheslatta Carrier Nation v. British Columbia* 2000 BCCA 539, where the motions judge struck out the Statement of Claim of the Cheslatta Carrier Nation, but did grant leave to them to file an amended Statement of Claim within 30 days .

[43] The Court of Appeal dismissed the appeal by the Cheslatta Carrier Nation. Within their Statement of Claim was a request for declaratory relief. The Court of Appeal outlined the details of this in paragraph 3 of their decision. The declaration sought requested that the motions judge confirm an existing aboriginal right to carry out fisheries in relation to specific species.

[44] The Court of Appeal summarized the situation as follows:

> On appeal, the sole question is whether the chambers judge erred in ruling against the proceeding in the absence of an allegation of infringement or threatened infringement of a legal right. This raises the interrelated considerations of "utility" - whether the declaration sought would serve a useful purpose - and "reality" - the extent to which the proceeding must raise a "live controversy" [per Sopinka J. in *Borowski ,supra* at paragraphs 29 - 36] as opposed to a hypothetical or moot point." - [Paragraph 9] [emphasis added]

[45] Counsel for Canada in the case at Bar echoed the concern of the Court of Appeal that a declaration of the kind sought:

> ...would give the plaintiff the distinct tactical advantage in any discussions that may be ongoing between the Cheslatta and the government or other parties who may have conflicting interests with those of the plaintiff. But that tactical advantage does not by itself decide the question of whether a Court of law would or should entertain an action for a declaration of right in the general terms sought here. - [para. 11]

[46] Notably paragraphs 11 to 16 of *Cheslatta* were cited by the Supreme Court of Canada with favour recently in the *Manitoba Métis Federation Inc. v. Canada* 2013 SCC 14 at paragraphs 143.

[47] The Court of Appeal also referred to *Operation Dismantle Inc. v. Canada* [1985] 1 SCR 441 where Justice Dickson for the Majority approved a citation from a text on declaratory judgments:

> ...the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventative measure. [paras. 31-33]

[48] Ultimately the Court of Appeal in *Cheslatta* determined that the plaintiff had not pleaded a dispute which would be resolved by the declaration sought, as it was not "attached to specific facts" and that "until then, however, the declaration would not serve a legal purpose in terms of resolving a real difficulty, present or threatened." - [para. 17]

[49] The Court warned that this was particularly important in cases involving aboriginal rights, because such rights cannot be properly defined separately from the limitations on those rights - [para.18].

[50] In contrast, in the case at Bar, the right has already been articulated by the Supreme Court of Canada in *Marshall*; however any limitations thereon were not discussed in *Marshall*, and consequently neither were any justifications put forward by Canada.

[51] In the case at Bar, Canada notes that the ACFLRs have been discussed in *Marshall* No. 2 [paras. 33-34] and also in *R. v. Kapp* [2008] 2 SCR 483 [para. 7]; and *R. v. Huovinen* 2000 BCCA 427 [para. 29].

[52] Canada reiterates that there is a specific regime addressing aboriginal communal fishing licenses regulations (ie: the ACFLRs), which in fact predated the *Marshall* decisions, and therefore it is particularly inappropriate for the Court to be asked to provide a declaration as generally worded as sought here; and that that inappropriateness rises to a level of a "clearly unsustainable" pleading on the law, as much as on the lack of material facts.

[53] I agree with counsel for Canada when he says:

1. Although *Marshall* confirmed a treaty right to a moderate livelihood fishery, the Court made no comment on whether any existing limitations thereon properly accommodated that treaty right, or whether, if not accommodated by existing limitations, were there any valid justifications therefor put forward by Canada.

2. The ACFLRs existed at that time, but insofar as they may have been a limitation on the treaty right, they were not challenged directly, and therefore not addressed by the Court in its decisions;

3. *Marshall* did not say that the *Fisheries Act* and Regulations thereunder are unconstitutional;

4. *Marshall* said that all treaty rights are subject to inherent limitations, and it cannot be said that any limitation on fishing by the Mi'kmaq is therefore necessarily an infringement of the

treaty right because such limitation may in fact accommodate the treaty right - [para. 61];

5. *Marshall* did not expressly say that Canada has a positive obligation to implement a self-regulated Mi'kmaq fishery [under the auspices of the Minister of Fisheries or otherwise].

[54] Moreover, whatever are the existing limitations on the treaty right in question here, and whether the ACFLRs or other limitation on the treaty right accommodate that right, or are justified, has not been decided by the Supreme Court of Canada in *Marshall* or any other Court yet.

[55] If the Chiefs in this case are asking this Court in effect to answer those questions in paragraph 54, then they are asking the Court to declare such without a sufficiently pleaded factual foundation, and that approach makes the existing pleadings "clearly unsustainable" as being insufficiently "attached to specific facts".

[56] I would be prepared to grant leave to amend the Notice of Application in Court within 30 days of this decision if the Chiefs wish to do so.

[57] As noted earlier by counsel for Canada, if the Chiefs claim that the ACFLRs are unconstitutional for a failure to consult with the affected aboriginal peoples or if they claimed that the ACFLRs do not accommodate their treaty right to fish for a moderate livelihood, then this dispute may be more capable of being resolved by way of declaratory relief, depending on the evidence ultimately placed before the Court.

[58] In oral argument, counsel for the Chiefs did state, in effect, that it will be a matter of evidence whether the ACFLRs have accommodated the treaty right, and the government has consulted the Chiefs regarding the ACFLRs. However, it would be no answer in these circumstances to expect Canada to request particulars - CPR 38.10; which I note a party to an Application may provide by referring to evidence in an affidavit - CPR 38.10(2). The pleadings are simply too vague and conclusory regarding any infringement on the treaty right.

[59] Interestingly, in *Marshall* No. 2, the Court stated in part:

> The Minister's regulatory authority is not limited to conservation. This was recognized in the submission of the appellant in *Marshall* in opposition to the Coalition's motion. He acknowledges that it is clear that limits may be imposed to conserve the species/stock being exploited and to protect public safety... Likewise, aboriginal harvesting preferences, together with non-aboriginal/community dependencies, may be taken into account in devising regulatory schemes. ... It is for the Crown to propose what controls are justified for the management of the resource, and why they are justified [para. 41] [emphasis added]

[60] In Justice McLachlin's dissent in *Marshall* No. 1, she outlined a summary of the claims made by *Marshall* at para. 75:

> A. *The Rights Claimed*
>
> 1. The treaties conferred on the Mi'kmaq a general right to trade.
>
> 2. Alternatively, or in addition, the treaties conferred on the Mi'kmaq a right to truckhouses or licensed traders.
>
> B. *Justification Arguments*
>
> 1. In the event a general right to trade is established, the federal fisheries legislation governing fishing and trade in fish fails to accommodate this treaty right to trade.
>
> 2. The government has not shown that this failure is justified as required by s. 35 of the *Constitution Act, 1982*.
>
> 3. Therefore the federal fisheries legislation does not apply to the appellant and he is entitled to be acquitted.
>
> Alternatively, or in addition:
>
> 1. In the event a right to truckhouses or licensed traders is established, the government has been in breach of its treaty obligations since the 1780s.

> 2. The government has not shown that this infringement is justified as required by s. 35 of the *Constitution Act, 1982*.
>
> 3. Therefore the federal fisheries legislation does not apply to the appellant and he is entitled to be acquitted.

[61] These two citations give a better understanding of the context in which the Chiefs here claim the rights which they are now asserting.

[62] It seems to me from the written and oral submissions of the Chiefs, they are asserting that now that the treaty right to a moderate livelihood has been confirmed, "it is for the Crown to propose what controls are justified for the management of the resource, and why they are justified"; and that therefor the existing limitations [whatever they might be] which were introduced by Canada after the 1760-61 treaty right arose and which remain in place at present, are necessarily therefor not valid *vis à vis* the aboriginal persons thereby affected – there has been no consultation regarding the imposition of the existing limitations. Perhaps, more importantly, the Chiefs argue that since the "promise" made by Canada arose in 1760-61, that the onus is not only on Canada to justify them, but that Canada must justify them now that they are challenged, or propose a new

regime of limitations in consultation with the affected aboriginal bands – and it is a declaration to this effect that they seek.

[63] Although arguably, the Chiefs may have the onus to demonstrate an infringement of the treaty right at the hearing of the application, in the case at Bar they have plead in their grounds:

> 3. Since Marshall, the Crown in right of Canada has not amended the Fisheries Act and Regulations to recognize and accommodate the treaty right of the Mi'kmaq to fish for a moderate livelihood, or to provide the Minister with specific criteria to be applied when exercising his discretion to license or not a Mi'kmaq livelihood fishery.
>
> 4. Since Marshall, there has been at least one prosecution against Mi'kmaq in Nova Scotia for attempting to engage in moderate livelihood fishing, and representatives of the Crown in right of Canada have indicated that prosecution will be the result for any Mi'kmaq fishing without a licence.
>
> 5. Since Marshall, Canada has not implemented the Marshall decision nor recognized or accommodated the Applicants' right to a moderate livelihood fishery.

[64] Thus, it would appear that in spite of the generality of the pleadings in some respects, the Applicants have stated that "Canada has not amended the *Fisheries Act* and Regulations **to recognize and accommodate the treaty right of the Mi'kmaq to fish for a moderate livelihood, or to provide the Minister with specific criteria to be applied** when exercising his discretion to licence or not a

Mi'kmaq livelihood fishery....since *Marshall*, **Canada has not ... recognized or accommodated the Applicants' right to a moderate livelihood fishery ....[And] has not fulfilled its duty to consult with and accommodate the Applicants about their right to fish for a moderate livelihood**."

[65] The Chiefs thus appear to argue that the treaty right is being infringed by the mere fact that regulatory limitations on the right exist and those limitations inherently have not accommodated the right. That being the case, the onus to justify them would then be on Canada.

[66] However, these pleadings reveal certain deficiencies:

i) As a matter of law, they presume that *Marshall* found the *Fisheries Act and Regulations* (including by necessary implication also the ACFLRs) to be *prima facie* in violation of the treaty right - and that since no justification for such infringement was shown by Canada, in *Marshall*, that Canada therefore still has the onus to justify such infringement today, leading to their argument that Canada has a "positive obligation" to redesign the fisheries regime to accommodate their treaty right and to meaningfully consult them about the redesign

– with due respect to those that might differ with me, I conclude that that approach does not accord with the law as it presently stands;

ii) The claimed factual pleadings are fairly characterized as unsupported conclusions – they give no specifics as to what are the facts that lead to those conclusions.

[67] Such disconnect between the as yet unstated underlying facts, and the stated factual conclusions in the pleadings is fatal to the pleadings.

[68] There is no sufficiently specific claim as to what infringement, if any, there is of the treaty right to a moderate livelihood fishery.

[69] In some respects, the pleadings seem to suggest that any regulation of the treaty right is an infringement thereof – but that is clearly not the state of the law at present.

[70] The pleadings as drafted are “clearly unsustainable”.

[71] As the Court of Appeal in *Chesletta Carrier Nation* noted:

> The foregoing reasons for following the usual rule against exercising jurisdiction in the absence of a "live controversy" apply in my view with the even greater force where the definition of aboriginal rights in issue. In my view, such rights cannot be properly defined separately from the limitation of those rights. [para. 18]

[72] Having said that, I am, nevertheless, keenly aware that given the continuing evolution in the area of aboriginal law, and the fact that no cases have previously considered this precise scenario, particularly in the context of a request for declaratory relief, it would seem unwise for a Court to consider itself to be confident about the state of the law regarding the issues raised at this stage in the proceedings.

[73] While the Crown's duty to consult arises generally when the Crown has knowledge, real or constructive, of the potential existence of aboriginal title or right, and contemplates conduct that might adversely affect those rights, in the circumstances here the Chiefs may be said to characterize their argument, based on the three-part test in *Rio Tinto Alcan Inc.* v. *Carrier Sekani Tribal Council* 2010 SCC 43 regarding when the Crown has such a duty, as follows:

1. After *Marshall* the Crown had real knowledge of a further potential treaty claim and keeping in mind that proof that the claim will succeed is not required to trigger the duty to consult [they claim that the existence of the treaty right since 1760-61 has never been the subject of consultation with the Chiefs regarding limitations on their right to a moderate livelihood fishery];

2. There must be Crown conduct or a Crown decision [since 1760-61 the Crown has proceeded to impose limitations on the treaty right to a moderate livelihood fishery without consultation, and which does not accommodate the treaty right];

3. There must be a possibility that the Crown conduct may affect the aboriginal treaty right - [the *Fisheries Act and Regulations* clearly “affect” the aboriginal treaty right to a moderate livelihood fishery].

[74] In a similar vein Chief Justice McLachlin for the Court discussed "the question of what government action engages the duty to consult" at paragraphs 43 and 44 of *Rio Tinto Alcan* in relation to element number 2 above noted.

[75] She stated:

> It has been held that such action is not confined to government exercise of statutory powers.
>
> • • •
>
> This accords with the generous purposive of approach that must be brought to the duty to consult.
>
> Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. The potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher-level decisions" that may have an impact on aboriginal claims and rights.
>
> • • •
>
> We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand* 2007 ABCA 206. [paras. 37-40]

[76] The Chiefs may argue, as their counsel touched on in oral argument, that the Crown made "promises" in 1760-61, and though somewhat factually distinct from the specific "promise" that Canada made with the Métis as negotiated in the 1870 *Manitoba Act*, the honour of the Crown is also engaged here, and the honour of the Crown may require that the Crown take a broad purposive approach to the

interpretation of the "promise" and to act diligently to fulfill it – [*Manitoba Métis Federation Inc. v. Canada* 2013 SCC 14 at paras. 65- 75].

[77] Notably, in *Manitoba Métis* Chief Justice McLachlin went on:

> [Regarding the honour of the Crown and its requirement to act diligently] this duty has arisen largely in the treaty context, where the Crown's honour is pledged to diligently carrying out its promises... In its most basic iteration the law assumes that the Crown will always intend to fulfill its solemn promises, including constitutional obligations... But the duty goes further: if the honour of the Crown is pledged to the fulfilment of its obligations, it follows then that the honour of the Crown requires the Crown to endeavour to ensure its obligations are fulfilled... As stated by Binnie J in *Little Salmon* at paragraph 12, "it is up to the parties, when treaty issues arise, to act diligently to advance their respective interests. Good government requires that decisions be taken in a timely way." This duty applies whether the obligation arises in a treaty, as in the precedents outlined above, or in the *Constitution*, as here. [para. 79]

[78] Nevertheless, in spite of such possible legal argument, I am still of the view that if presented as drafted now, the judge hearing the application would have to exercise their discretion against granting a declaration as sought here because the pleaded facts, (as yet not expanded upon by evidence of a similar nature) do not provide a clear enough picture of the Chiefs' specific position such that the declaration sought could be said, to be supported by or "attached to specific facts" or, present a real, present or threatened, dispute to be resolved by the Court.

[79] Concurrently, Canada would be proportionately uncertain of what its position should be regarding any implied infringement of the treaty right and any justifications that it might be able to provide.

[80] It would be appropriate for the Chiefs to file an Amended Notice of Application in Court specifying material facts in support of their claim that their treaty right is being infringed or not being accommodated; and that this infringement came about without consultation.

Summary

[81] Based on the written and oral arguments made before me, the Chiefs appear to be requesting declarations that would address the following:

(i) Since a treaty right to a moderate livelihood fishery has been confirmed in *Marshall* as having existed, and promised by the Crown since 1760-61, as a matter of law therefore, the onus is on the Crown to revisit the existing fisheries regime or propose a new fisheries regime, in consultation with the Chiefs, which accommodates the

treaty right; and that the existing fisheries regime infringes on the right, and until such infringements are justified by the Crown, the existing fisheries regime is invalid;

(ii) In the alternative, if there is no positive obligation on Canada as above-noted as a matter of law, then that the Chiefs be given leave to amend their pleadings.

[82] The declarations sought, rely on legal premises not in accord with the present state of the law, and require greater factual specificity in the pleadings, such that the pleadings as constituted are "clearly unsustainable" as contemplated by CPR 13.03.

[83] I am of the view that the Chiefs should be given 30 days to amend their pleading if they wish.

Conclusion

[84] The motion is conditionally granted since leave to amend is granted; that is, unless the Chiefs wish to amend their pleadings within 30 days of this Decision, the pleadings will be struck out. By that date I will accept submissions on costs if the parties are unable to agree thereon.

Rosinski, J.