R. *v.* Marshall, [1999] 3 S.C.R. 533

Donald John Marshall, Jr. *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General for New Brunswick,
the West Nova Fishermen's Coalition,
the Native Council of Nova Scotia
and the Union of New Brunswick Indians *Interveners*

Indexed as: R. *v.* Marshall

File No.: 26014.

1999: November 17.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci and Binnie JJ.

motion for rehearing and stay

Indians -- Treaty rights -- Fishing rights -- Accused, a Mi'kmaq Indian, acquitted of charges of fishing in violation of federal fishery regulations -- Accused found to possess treaty rights exempting him from compliance with regulations -- Whether accused should have been acquitted absent new or further trial to determine justification of regulations -- Whether government can regulate treaty right to fish by licensing regulations and closed seasons -- Scope of government power to regulate treaty right -- Whether judgment should be stayed pending disposition of rehearing if so ordered.

Appeals -- Supreme Court of Canada -- Jurisdiction -- Rehearing -- Intervener in appeal applying for rehearing -- Whether Supreme Court has jurisdiction to entertain application -- Rules of the Supreme Court of Canada, SOR/83-74, r. 1 "party".

An intervener in the *Marshall* appeal, the West Nova Fishermen's Coalition, applied for a rehearing of the appeal and, if granted, for a stay of the judgment pending the rehearing. The Coalition also sought a further trial limited to the issue whether the application of the fisheries regulations to the exercise of a

Mi'kmaq treaty right could be justified on conservation or other grounds. The parties and other interveners opposed the rehearing and any further trial. The intervener's application was primarily directed to the presumed effects of the Court's judgment on the lobster fishery. The *Marshall*appeal, however, related to fishing eel out of season contrary to federal fishery regulations. In its judgment of September 17, 1999, a majority of the Court concluded that Marshall had established the existence and infringement of a local Mi'kmaq treaty right to carry on small scale commercial eel fishery. The Crown had not attempted to justify either the licensing restriction or the closed season to limit the exercise of the appellant's treaty right. The appellant was therefore acquitted. The issue of justification was a new issue neither raised by the parties nor decided in this Court nor dealt with in the courts below.

Held: The motion for a rehearing and stay of the judgment should be dismissed.

In light of the extended definition of "party" in Rule 1 of the Supreme Court Rules, this Court has jurisdiction to entertain an intervener's application for a rehearing but will only do so in exceptional circumstances. Not only are there no such circumstances here but the intervener's application also violated the basis on which an intervener is permitted to participate in the appeal in the first place, namely acceptance of the record as defined by the Crown and the defence. In so far as the Coalition's questions are capable of being answered on the trial record in this case, the responses are already evident in the majority judgment and the prior decisions of this Court referred to therein.

The Crown elected not to try to justify the licensing or closed season restriction on the eel fishery in this prosecution, but the resulting acquittal cannot be generalized to a declaration that licensing restrictions or closed seasons can never be imposed as part of the government's regulation of the Mi'kmaq limited commercial "right to fish". The factual context for justification is of great importance and the strength of the justification may vary depending on the resource, species, community and time.

The federal and provincial governments have the authority within their respective legislative fields to regulate the exercise of a treaty right where justified on conservation or other grounds. The *Marshall* judgment referred to the Court's principal pronouncements on the various grounds on which the exercise of treaty rights may be regulated. The paramount regulatory objective is conservation and responsibility for it is placed squarely on the minister responsible and not on the aboriginal or non-aboriginal users of the resource. The regulatory authority extends to other compelling and substantial public objectives which may include economic

and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups. Aboriginal people are entitled to be consulted about limitations on the exercise of treaty and aboriginal rights. The Minister has available for regulatory purposes the full range of resource management tools and techniques, provided their use to limit the exercise of a treaty right can be justified on conservation or other grounds.

The Coalition's application is based on a misconception of the scope of the Court's majority judgment of September 17, 1999 and the appellant should not have his acquittal kept in jeopardy while issues much broader than the specifics of his prosecution are litigated.

Cases Cited

Distinguished: *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721; *M. v. H.*, 1999 CanLII 686 (SCC), [1999] 2 S.C.R. 3; **applied:** *R. v. Badger*, 1996 CanLII 236 (SCC), [1996] 1 S.C.R. 771; **referred to:** *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075; *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010; *R. v. Nikal*, 1996 CanLII 245 (SCC), [1996] 1 S.C.R. 1013; *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217; *R. v. Adams*, 1996 CanLII 169 (SCC), [1996] 3 S.C.R. 101; *R. v. Gladstone*, 1996 CanLII 160 (SCC), [1996] 2 S.C.R. 723; *R. v. Côté*, 1996 CanLII 170 (SCC), [1996] 3 S.C.R. 139.

Statutes and Regulations Cited

Aboriginal Communal Fishing Licences Regulations, SOR/93-332 [am. SOR/94-390].

Constitution Act, 1982, s. 35.

Fisheries Act, R.S.C., 1985, c. F-14, ss. 7(1), 43 [am. 1991, c. 1, s. 12].

Fishery (General) Regulations, SOR/93-53, s. 35(2).

Maritime Provinces Fishery Regulations, SOR/93-55, Sch. III, item 2.

Rules of the Supreme Court of Canada, SOR/83-74, Rules 1, 27.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 53.

MOTION FOR REHEARING AND STAY of *R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456. Motion dismissed.

Written submissions by *A. William Moreira*, *Q.C.*, for the applicant the West Nova Fishermen's Coalition.

Written submissions by *Bruce H. Wildsmith*, *Q.C.*, for Donald John Marshall, Jr., respondent on the motion.

Written submissions by *Graham Garton*, *Q.C.*, and *Robert J. Frater*, for Her Majesty the Queen, respondent on the motion.

Written submissions by *D. Bruce Clarke*, for the Native Council of Nova Scotia, respondent on the motion.

Written submissions by *Henry J. Bear*, for the Union of New Brunswick Indians, respondent on the motion.

The following is the judgment delivered by

1 THE COURT -- The intervener, the West Nova Fishermen's Coalition (the "Coalition"), applies for a rehearing to have the Court address the regulatory authority of the Government of Canada over the east coast fisheries together with a new trial to allow the Crown to justify for conservation or other purposes the licensing and closed season restriction on the exercise of the appellant's treaty right, and for an order that the Court's judgment, dated September 17, 1999, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456, be stayed in the meantime. The application is opposed by the Crown, the appellant Marshall and the other interveners.

One of the intervenors filed a motion applying for a rehearing of the Marshall case and an interim stay.

2 Those opposing the motion object in different ways that the Coalition's motion rests on a series of misconceptions about what the September 17, 1999 majority judgment decided and what it did not decide. These objections are well founded. The Court did not hold that the Mi'kmaq treaty right cannot be regulated or that the Mi'kmaq are guaranteed an open season in the fisheries. Justification for conservation or other purposes is a separate and distinct issue at the trial of one of these prosecutions. It is up to the Crown to decide whether or not it wishes to support the applicability of government regulations when prosecuting an accused who claims to be exercising an aboriginal or treaty right.

3 The Attorney General of Canada, in opposing the Coalition's motion, acknowledges that the Crown did not lead any evidence at trial or make any argument on the appeal that the licensing and closed season regulations which restricted the exercise of the treaty right were justified in relation to the eel fishery. Accordingly, the issue whether these restrictions could have been justified in this case formed no part of the Court's majority judgment of September 17, 1999, and the constitutional question posed in this prosecution was answered on that basis.

Because it's position was that the treaty didn't exist, the Crown had not led any evidence to justify infringement of the right.

The September 17, 1999 Acquittal

4 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".

Summary of the Marshall #1 decision.

5 The Coalition argues that the native and non-native fishery should be subject to the same regulations. In fact, as pointed out in the September 17, 1999 majority judgment, natives and non-natives *were* subject to the unilateral regulatory authority of successive governments from 1760-61 to 1982. Until adoption of the *Constitution Act, 1982*, the appellant would clearly have been subject to regulations under the federal *Fisheries Act* and predecessor enactments in the same way and to the same extent as members of the applicant Coalition unless given a regulatory exemption as a matter of government policy.

6 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 CanLII 104 (SCC), [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".

the court explains the history of debate over regulation based on earlier decisions--FNs had argued that their constitutional rights could only be regulated through constitutional amendment while govs had argued that regulation was an implied term of s. 35. The Court had decided that s. 35 rights are subject to regulations if justified.

7 The Coalition nevertheless says it would be an "injustice" to its members if the appellant is not put through a new trial on the issue of justification. The Coalition asks the Court in effect to transform the proceeding retroactively into an advisory reference or declaratory action. The Attorney General of Canada objects to this transformation. It was the Crown's decision to proceed against the appellant by way of an

ordinary prosecution. The appellant responded to the Crown's evidence. He was found not guilty of the case put against him.

No Stay of Judgment

8 The appellant, like any other accused who is found to be not guilty, is ordinarily entitled to an immediate acquittal, not a judgment that is suspended while the government considers the wider implications of an unsuccessful prosecution. The Attorney General of Canada did not at the hearing of this appeal, and does not now in its response to the Coalition's motion, apply for a stay of the effect of the Court's recognition and affirmation of the Mi'kmaq treaty right. Should such an application be made, the Court will hear argument on whether it has the jurisdiction to grant such a stay, and if so, whether it ought to do so in this case.

Status of the West Nova Fishermen's Coalition

9 Those in opposition challenge the status of the Coalition to bring this application. It is argued that the Coalition, being an intervener, does not have the rights of a party to ask for a rehearing. The Coalition was added as an intervener to this proceeding by order dated April 7, 1998. Pursuant to s. 1 of the *Rules of the Supreme Court of Canada*, SOR/83-74, as pointed out by the Coalition in its Reply, an intervener enjoys the status of a party to the appeal unless the text of a particular rule provides otherwise or unless the context of a particular rule does not so permit. While it would only be in exceptional circumstances that the Court would entertain an intervener's application for a rehearing, the extended definition of "party" in s. 1 of the Rules gives the Court the jurisdiction to do so. Not only are there no such exceptional circumstances here, but also the Coalition's motion violates the basis on which interveners are permitted to participate in an appeal in the first place, which is that interveners accept the record as defined by the Crown and the defence. Moreover, in so far as the Coalition's questions are capable of being answered on the trial record in this case, the responses are already evident in the September 17, 1999 majority judgment and the prior decisions of this Court therein referred to. The Crown, the appellant

An impt example of different rules of court granting diff status to intervenors.

Marshall and the other interveners all oppose a new trial on the issue of justification. They are right to do so, for the reasons which follow.

10 The Coalition requests a rehearing on the following issues:

1. Whether the Appellant is entitled to have been acquitted on a charge of unlicensed sale of fish, contrary to s. 35(2) of the *Fishery (General) Regulations*, in the absence of a new (or further) trial on the issue of whether that Regulation is or can be justified by the government of Canada;

2. Whether the Appellant is entitled to have been acquitted on a charge of out-of-season fishing, contrary to Item 2 of Schedule III of the *Maritime Provinces Fishery Regulations*, in the absence of a new (or further) trial on the issue of whether those Regulations are or can be justified by the government of Canada;

3. Whether the government of Canada has power to regulate the exercise by Mi'kmaq persons, including the Appellant, of their treaty right to fish through the imposition of licensing requirements;

4. Whether the government of Canada has power to regulate the exercise by Mi'kmaq persons, including the Appellant, of their treaty right to fish through the imposition of closed seasons;

5. In any event, what is the scope of regulatory power possessed by the government of Canada for purposes of regulating the treaty right; and

6. ... pursuant to section 27 of the *Rules of the Supreme Court of Canada*, [requests] an Order that [the Court's] judgment pronounced herein on the 17th day of September, 1999 be stayed pending disposition of the rehearing of the appeal, if ordered.

11 These questions, together with the Coalition's request for a stay of judgment, reflect a basic misunderstanding of the scope of the Court's majority reasons for judgment dated September 17, 1999. As

stated, this was a prosecution of a private citizen. It required the Court to determine whether certain precise charges relating to the appellant's participation in the eel fishery could be sustained. The majority judgment of September 17, 1999 was limited to the issues necessary to dispose of the appellant's guilt or innocence.

12 An order suspending the effect of a judgment of this Court is infrequently granted, especially where (as here) the parties have not requested such an order. This was not a reference to determine the general validity of legislative and regulatory provisions, as was the case, for example, in *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, at p. 780, where the Court suspended its declaration of invalidity of Manitoba enactments until "the expiry of the minimum period required for translation, re-enactment, printing and publishing". Nor was this a case where the Court was asked to grant declaratory relief with respect to the invalidity of statutory provisions, as in *M. v. H.*, 1999 CanLII 686 (SCC), [1999] 2 S.C.R. 3, where the Court suspended the effect of its declaration of invalidity of the definition of "spouse" for the purpose of s. 29 of the Ontario *Family Law Act*, R.S.O. 1990, c. F.3, for a period of six months to enable the legislature to consider appropriate amendments.

13 Here the Crown elected to test the treaty issue by way of a prosecution, which is governed by a different set of rules than is a reference or a declaratory action. This appeal was directed solely to the issue whether the Crown had proven the appellant guilty as charged. In his defence, the appellant established that the collective treaty right held by his community allowed him to fish for eels in what was described as "a small-scale commercial activity to help subsidize or support himself and his common-law spouse", and that the existing regulations under the *Fisheries Act*, R.S.C., 1985, c. F-14, had not recognized or accommodated that treaty right.

Impt of the diff rules of procedure.

14 As stated in para. 56 of the September 17, 1999 majority judgment, the treaty right was "to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the *Badger* test" (emphasis added). The *Badger* test (*R. v. Badger*, 1996 CanLII 236 (SCC), [1996] 1 S.C.R. 771) will be discussed below. The Crown, as stated, did not offer any evidence or argument justifying the licensing and closed season restrictions (referred to in the statute and regulations as a "close time") on the appellant's exercise of the collective treaty right, such as (for example) a need to conserve and protect the eel population. The eel population may not in fact require protection from commercial exploitation. Such was the assertion of the Native Council of Nova Scotia in opposition to the Coalition's motion:

> . . . Mr. Marshall was fishing eels. There are no possible conservation issues involving the eel fishery. They are not an endangered species and there is no significant non-native commercial fishery. They are a traditional harvest species, being harvested by Mr. Marshall in a traditional method and in relatively small quantities. There is simply no justificatory evidence that the Crown could have led.

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 CanLII 160 (SCC), [1996] 2 S.C.R. 723]". The written argument of the Attorney General for New Brunswick did not refer to the issue of justification at all, and neither the Attorney General of Nova Scotia nor the Attorney General of Prince Edward Island intervened on the appeal. 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 led evidence and argument to support their applicability.

Grounds on Which the Coalition Seeks a Rehearing

1. *Whether the Appellant is entitled to have been acquitted on a charge of unlicensed sale of fish, contrary to s. 35(2) of the Fishery (General) Regulations, in the absence of a new (or further) trial on the issue of whether that Regulation is or can be justified by the government of Canada*

15 The appellant, as any other citizen facing a prosecution, is entitled to know in a timely way the case he has to meet, and to be afforded the opportunity to answer it. The Coalition seeks a new trial on a new issue. The September 17, 1999 majority decision specifically noted at para. 4 that the treaty right

> was always subject to regulation. The Crown does not suggest that the regulations in question accommodate the treaty right. The Crown's case is that no such treaty right exists. Further, no argument was made that the treaty right was extinguished prior to [enactment of the *Constitution Act, 1982*], and no justification was offered by the Crown for the several prohibitions at issue in this case. [Emphasis added.]

The Attorney General of Canada affirms in opposition to the Coalition's motion the limited nature of the issues raised at trial:

> In this case, the intervener wishes to contest the appellant's entitlement to an acquittal by raising issues as to whether the regulations under which the appellant was charged could be justified in accordance with the test in *R. v. Sparrow*. That would clearly be a new issue in the proceedings. It is not open to the intervener to raise an issue that did not arise between the parties to the appeal. [Emphasis added.]

In its Reply, the Coalition argues that to require the parties to deal with the issue of regulatory justification in the same trial as treaty entitlement "would be to impose an unreasonable and unworkable burden in aboriginal rights litigation at the trial level". Whatever may be the advantages or disadvantages of splitting these issues into a two-stage trial, no such proposal was made to the trial judge by the parties, and no such procedure was considered, much less adopted, in this case. As stated, the Crown here opposes a rehearing and opposes a new trial. The issues of concern to the Coalition largely relate to the lobster fishery, not the eel fishery, and, if necessary, can be raised and decided in future cases that involve the specifics of the lobster fishery. It is up to the Crown to initiate enforcement action in the lobster and other fisheries if and when it chooses to do so.

the intervenor was concerned about the lobster fishery

2. *Whether the Appellant is entitled to have been acquitted on a charge of out-of-season fishing, contrary to Item 2 of Schedule III of the Maritime Provinces*

Fishery Regulations, in the absence of a new (or further) trial on the issue of whether those Regulations are or can be justified by the government of Canada

16 The Coalition argues that a rehearing and a further trial are necessary because of "uncertainty" about the authority of the government to manage the fisheries. The Attorney General of Canada, acting on behalf of the federal government which regulates the fisheries, opposes the Coalition's position.

17 In the event of another prosecution under the regulations, the Crown will (as it did in this case) have the onus of establishing the factual elements of the offence. The onus will then switch to the accused to demonstrate that he or she is a member of an aboriginal community in Canada with which one of the local treaties described in the September 17, 1999 majority judgment was made, and was engaged in the exercise of the community's collective right to hunt or fish in that community's traditional hunting and fishing grounds. The Court's majority judgment noted in para. 5 that no treaty was made by the British with the Mi'kmaq population as a whole:

> . . . the British signed a series of agreements with individual Mi'kmaq communities in 1760 and 1761 intending to have them consolidated into a comprehensive Mi'kmaq treaty that was never in fact brought into existence. The trial judge, Embree Prov. Ct. J., found that by the end of 1761 all of the Mi'kmaq villages in Nova Scotia had entered into separate but similar treaties. [Emphasis added.]

The British Governor in Halifax thus proceeded on the basis that local chiefs had no authority to promise peace and friendship on behalf of other local chiefs in other communities, or to secure treaty benefits on their behalf. The treaties were local and the reciprocal benefits were local. In the absence of a fresh agreement with the Crown, the exercise of the treaty rights will be limited to the area traditionally used by the local community with which the "separate but similar" treaty was made. Moreover, the treaty rights do not belong to the individual, but are exercised by authority of the local community to which the accused belongs, and their exercise

The individual treaties are limited to the area traditionally used by the local community. They give rise to communal, not individual rights.

is limited to the purpose of obtaining from the identified resources the wherewithal to trade for "necessaries".

18 The September 17, 1999 majority judgment further pointed out that the accused will be required to demonstrate (as the appellant did here) that the regulatory regime significantly restricts the exercise of the treaty right. The majority judgment concluded on this point, at para. 64, that:

> In the circumstances, the purported regulatory prohibitions against fishing without a licence (*Maritime Provinces Fishery Regulations*, s. 4(1)(*a*)) and of selling eels without a licence (*Fishery (General) Regulations*, s. 35(2)) do *prima facie* infringe the appellant's treaty rights under the Treaties of 1760-61 and are inoperative against the appellant unless justified under the *Badger* test. [Emphasis added.]

19 At the end of the day, it is always open to the Minister (as it was here) to seek to justify the limitation on the treaty right because of the need to conserve the resource in question or for other compelling and substantial public objectives, as discussed below. Equally, it will be open to an accused in future cases to try to show that the treaty right was intended in 1760 by *both* sides to include access to resources other than fish, wildlife and traditionally gathered things such as fruits and berries. The word "gathering" in the September 17, 1999 majority judgment was used in connection with the types of resources traditionally "gathered" in an aboriginal economy and which were thus reasonably in the contemplation of the parties to the 1760-61 treaties. While treaty rights are capable of evolution within limits, as discussed below, their subject matter (absent a new agreement) cannot be wholly transformed. Certain unjustified assumptions are made in this regard by the Native Council of Nova Scotia on this motion about "the effect of the economic treaty right on forestry, minerals and natural gas deposits offshore". The Union of New Brunswick Indians also suggested on this motion a need to "negotiate an integrated approach dealing with all resources coming within the purview of fishing, hunting and gathering which includes harvesting from the sea, the forests and the land". This extended interpretation of "gathering" is not dealt with in the September 17, 1999 majority judgment,

Evolution of the right doesn't mean the right can be wholly transformed.

and negotiations with respect to such resources as logging, minerals or offshore natural gas deposits would go beyond the subject matter of this appeal.

20 The September 17, 1999 majority judgment did not rule that the appellant had established a treaty right "to gather" anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower. No evidence was drawn to our attention, nor was any argument made in the course of this appeal, that trade in logging or minerals, or the exploitation of off-shore natural gas deposits, was in the contemplation of either or both parties to the 1760 treaty; nor was the argument made that exploitation of such resources could be considered a logical evolution of treaty rights to fish and wildlife or to the type of things traditionally "gathered" by the Mi'kmaq in a 1760 aboriginal lifestyle. It is of course open to native communities to assert broader treaty rights in that regard, but if so, the basis for such a claim will have to be established in proceedings where the issue is squarely raised on proper historical evidence, as was done in this case in relation to fish and wildlife. Other resources were simply not addressed by the parties, and therefore not addressed by the Court in its September 17, 1999 majority judgment. As acknowledged by the Union of New Brunswick Indians in opposition to the Coalition's motion, "there are cases wending their way through the lower courts dealing specifically with some of these potential issues such as cutting timber on Crown lands".

21 The fact the Crown elected not to try to justify a closed season on the eel fishery at issue in this case cannot be generalized, as the Coalition's question implies, to a conclusion that closed seasons can never be imposed as part of the government's regulation of the Mi'kmaq limited commercial "right to fish". A "closed season" is clearly a potentially available management tool, but its application to treaty rights will have to be justified for conservation or other purposes. In the absence of such justification, an accused who establishes a treaty right is ordinarily allowed to exercise it. As suggested in the expert evidence filed on this motion by the Union of New Brunswick Indians, the establishment of a closed season may raise very different conservation and other issues in the eel fishery

than it does in relation to other species such as salmon, crab, cod or lobster, or for that matter, to moose and other wildlife. The complexities and techniques of fish and wildlife management vary from species to species and restrictions will likely have to be justified on a species-by-species basis. Evidence supporting closure of the wild salmon fishery is not necessarily transferable to justify closure of an eel fishery.

22 Resource conservation and management and allocation of the permissible catch inevitably raise matters of considerable complexity both for Mi'kmaq peoples who seek to work for a living under the protection of the treaty right, and for governments who seek to justify the regulation of that treaty right. The factual context, as this case shows, is of great importance, and the merits of the government's justification may vary from resource to resource, species to species, community to community and time to time. As this and other courts have pointed out on many occasions, the process of accommodation of the treaty right may best be resolved by consultation and negotiation of a modern agreement for participation in specified resources by the Mi'kmaq rather than by litigation. La Forest J. emphasized in *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010 (a case cited in the September 17, 1999 majority decision), at para. 207:

Negotiating a modern agreement may be the preferable route.

> On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake.

23 The various governmental, aboriginal and other interests are not, of course, obliged to reach an agreement. In the absence of a mutually satisfactory solution, the courts will resolve the points of conflict as they arise case by case. The decision in this particular prosecution is authority only for the matters adjudicated upon. The acquittal ought not to be set aside to allow the Coalition to address new issues that were neither raised by the parties nor determined by the Court in the September 17, 1999 majority judgment.

3. *Whether the government of Canada has power to regulate the exercise by Mi'kmaq persons, including the Appellant, of their treaty right to fish through the imposition of licensing requirements*

24 The government's power to regulate the treaty right is repeatedly affirmed in the September 17, 1999 majority judgment. In addition to the reference at para. 4 of the majority decision, already mentioned, that the treaty right "was always subject to regulation", the majority judgment further stated, at para. 7:

> In my view, the treaty rights are limited to securing "necessaries" (which I construe in the modern context, as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth. The rights thus construed, however, are, in my opinion, treaty rights within the meaning of s. 35 of the *Constitution Act, 1982*, and are subject to regulations that can be justified under the *Badger* test. . . . [Emphasis added.]

At para. 38, the majority judgment noted that:

> Dr. Patterson went on to emphasize that the understanding of the Mi'kmaq would have been that these treaty rights were subject to regulation, which I accept.

At para. 58, the limited nature of the right was reiterated:

> What is contemplated therefore is not a right to trade generally for economic gain, but rather a right to trade for necessaries. The treaty right is a regulated right and can be contained by regulation within its proper limits. [Emphasis added.]

At para. 64, the majority judgment again referred to regulation permitted by the *Badger* test. The Court was thus most explicit in confirming the regulatory authority of the federal and provincial governments within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives, discussed below.

Because this sentence referred to the possible provincial regulation of treaty rights it later caused a lot of confusion--Morris and Olsen.

25 With all due respect to the Coalition, the government's general regulatory power is clearly affirmed. It is difficult to believe that further repetition of this fundamental point after a rehearing would add anything of significance to what is already stated in the September 17, 1999 majority judgment.

26 As for the specific matter of licences, the conclusion of the majority judgment was *not* that licensing schemes as such are invalid, but that the imposition of a licensing restriction on the appellant's exercise of the treaty right had not been justified for conservation or other public purposes. The Court majority stated at para. 64:

> . . . under the applicable regulatory regime, the appellant's exercise of his treaty right to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Mi'kmaq treaty rights were not accommodated in the Regulations because, presumably, the Crown's position was, and continues to be, that no such treaty rights existed. In the circumstances, the purported regulatory prohibitions . . . are inoperative against the appellant unless justified under the *Badger* test. [Emphasis added.]

27 Although no evidence or argument was put forward to justify the licensing requirement in this case, a majority of the Court nevertheless referred at para. 64 of its September 17, 1999 decision to *R. v. Nikal*, 1996 CanLII 245 (SCC), [1996] 1 S.C.R. 1013, where Cory J., for the Court, dealt with a licensing issue as follows, at paras. 91 and 92:

> With respect to licensing, the appellant [aboriginal accused] takes the position that once his rights have been established, anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement. It is said that a licence by its very existence is an infringement of the aboriginal right since it infers that government permission is needed to exercise the right

and that the appellant is not free to follow his own or his band's discretion in exercising that right.

> This position cannot be correct. It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. The ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a *Charter* or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. Section 1 of the *Canadian Charter of Rights and Freedoms* is perhaps the prime example of this principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society.

28 The justification for a licensing requirement depends on facts. The Crown in this case declined to offer evidence or argument to support the imposition of a licensing requirement in relation to the small-scale commercial eel fishery in which the appellant participated.

4. *Whether the government of Canada has power to regulate the exercise by Mi'kmaq persons, including the Appellant, of their treaty right to fish through the imposition of closed seasons*

29 The regulatory device of a closed season is at least in part directed at conservation of the resource. Conservation has always been recognized to be a justification of paramount importance to limit the exercise of treaty and aboriginal rights in the decisions of this Court cited in the majority decision of September 17, 1999, including *Sparrow*, *supra*, and *Badger*, *supra*. As acknowledged by the Native Council of Nova Scotia in opposition to the Coalition's motion, "[c]onservation is clearly a first priority and the Aboriginal peoples accept this". Conservation, where necessary, may require the complete shutdown of a hunt or a fishery for aboriginal and non-aboriginal alike.

30 In this case, the prosecution of the appellant was directed to a "closed season" in the eel fishery which the Crown did not try to justify, and that is the precise context in which the majority decision of September 17, 1999 is to be understood. No useful purpose would be served for those like the Coalition who are interested in justifying a closed season in the lobster fishery if a rehearing or a new trial were ordered in this case, which related only to the closed season in the eel fishery.

5. *In any event, what is the scope of regulatory power possessed by the government of Canada for purposes of regulating the treaty right?*

31 On the face of it, this question is not raised by the subject matter of the appeal, nor is it capable of being answered on the factual record. As framed, it is so broad as to be incapable of a detailed response. In effect, the Coalition seeks to transform a prosecution on specific facts into a general reference seeking an advisory opinion of the Court on a broad range of regulatory issues related to the east coast fisheries. As was explained in *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, the Court's jurisdiction to give advisory opinions is exceptional and can be invoked only by the Governor in Council under s. 53 of the *Supreme Court Act*, R.S.C., 1985, c. S-26. In this instance, the Governor in Council has not sought an advisory opinion from the Court and the Attorney General of Canada opposes the Coalition's attempt to initiate what she calls a "private reference".

32 Mention has already been made of "the *Badger* test" by which governments may justify restrictions on the exercise of treaty rights. The Court in *Badger* extended to treaties the justificatory standard developed for aboriginal rights in *Sparrow*, *supra*. Cory J. set out the test, in *Badger*, *supra*, at para. 97 as follows:

The relationship between Sparrow and Badger.

> In *Sparrow*, at p. 1113, it was held that in considering whether an infringement of aboriginal or treaty rights could be justified, the following questions should be addressed sequentially:

> First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. . . .

At page 1114, the next step was set out in this way:

> If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin*, *supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified. . . .

Finally, at p. 1119, it was noted that further questions might also arise depending on the circumstances of the inquiry:

> These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.
>
> We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians. [Emphasis in original.]

33 The majority judgment of September 17, 1999 did not put in doubt the validity of the *Fisheries Act* or any of its provisions. What it said, in para. 66, was that, "the close season and the imposition of a discretionary licensing system would, if enforced, interfere with the

appellant's treaty right to fish for trading purposes, and the ban on sales would, if enforced, infringe his right to trade for sustenance. In the absence of any justification of the regulatory prohibitions, the appellant is entitled to an acquittal" (emphasis added). Section 43 of the Act sets out the basis of a very broad regulatory authority over the fisheries which may extend to the native fishery where justification is shown:

REGULATIONS

43. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations

(*a*) for the proper management and control of the sea-coast and inland fisheries;

(*b*) respecting the conservation and protection of fish;

(*c*) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish;

(*d*) respecting the operation of fishing vessels;

(*e*) respecting the use of fishing gear and equipment;

(*e.*1)respecting the marking, identification and tracking of fishing vessels;

(*e.*2)respecting the designation of persons as observers, their duties and their carriage on board fishing vessels;

(*f*) respecting the issue, suspension and cancellation of licences and leases;

(*g*) respecting the terms and conditions under which a licence and lease may be issued;

(*g.*1)respecting any records, books of account or other documents to be kept under this Act and the manner and form in which and the period for which they shall be kept;

(*g.*2)respecting the manner in which records, books of account or other documents shall be produced and information shall be provided under this Act;

> (*h*) respecting the obstruction and pollution of any waters frequented by fish;
>
> (*i*) respecting the conservation and protection of spawning grounds;
>
> (*j*) respecting the export of fish or any part thereof from Canada;
>
> (*k*) respecting the taking or carrying of fish or any part thereof from one province to any other province;
>
> (*l*) prescribing the powers and duties of persons engaged or employed in the administration or enforcement of this Act and providing for the carrying out of those powers and duties; and
>
> (*m*) where a close time, fishing quota or limit on the size or weight of fish has been fixed in respect of an area under the regulations, authorizing persons referred to in paragraph (*l*) to vary the close time, fishing quota or limit in respect of that area or any portion of that area.
> [Emphasis added.]

(Pursuant to this regulatory power, the Governor in Council had, in fact, adopted the *Aboriginal Communal Fishing Licences Regulations*, discussed below.) Although s. 7(1) of the *Fisheries Act* purports to grant the Minister an "absolute discretion" to issue or not to issue leases and licences, this discretion must be read together with the authority of the Governor in Council under s. 43(*f*) to make regulations "respecting the issue, suspension and cancellation of licences and leases". Specific criteria must be established for the exercise by the Minister of his or her discretion to grant or refuse licences in a manner that recognizes and accommodates the existence of an aboriginal or treaty right. In *R. v. Adams*, 1996 CanLII 169 (SCC), [1996] 3 S.C.R. 101, also cited in the September 17, 1999 majority judgment, the Chief Justice stated as follows at para. 54:

Adams point--unstructured discretion.

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate

> the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test. [Emphasis added.]

While *Adams* dealt with an aboriginal right, the same principle applies to treaty rights.

34 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.

35 Despite the limitations on the Court's ability in a prosecution to address broader issues not at issue between the Crown and the defence, the majority judgment of September 17, 1999 nevertheless referred to the Court's principal pronouncements on the various grounds on which the exercise of treaty rights may be regulated. These include the following grounds:

Examples of how a treaty right might be regulated.

36 (a) *The treaty right itself is a limited right*. The September 17, 1999 majority judgment referred to the "narrow ambit and extent of the treaty right" (para. 57). In its written argument, the Coalition says that the only regulatory method specified in that judgment was a limit on the quantities of fish required to satisfy the Mi'kmaq need for necessaries. This is not so. What the majority judgment said is that the Mi'kmaq treaty right does not extend *beyond* the quantities required to satisfy the need for necessaries. The Court stated at para. 61 of the September 17, 1999 majority judgment:

> 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. Such regulations would *not* constitute an infringement that would have to be justified under the *Badger* standard. [Underlining added; italics in original.]

Regulations that "define" the right but don't impair it do not have to be justified.

37 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.

38 Other limitations apparent in the September 17, 1999 majority judgment include the local nature of the treaties, the communal nature of a treaty right, and the fact it was only hunting and fishing resources to which access was affirmed, together with traditionally gathered things like wild fruit and berries. With regard to the Coalition's concern about the fishing rights of its members, para. 38 of the September 17, 1999 majority judgment noted the trial judge's finding that the Mi'kmaq had been fishing to trade with non-natives for over 200 years prior to the 1760-61 treaties. The 1760-61 treaty rights were thus from their inception enjoyed alongside the commercial and recreational fishery of non-

natives. Paragraph 42 of the September 17, 1999 majority judgment recognized that, unlike the scarce fisheries resources of today, the view in 1760 was that the fisheries were of "limitless proportions". On this point, it was noted in para. 53 of the September 17, 1999 majority judgment:

> It was established in *Simon* [*Simon v. The Queen*, 1985 CanLII 11 (SCC), [1985] 2 S.C.R. 387], at p. 402, that treaty provisions should be interpreted "in a flexible way that is sensitive to the evolution of changes in normal" practice, and *Sundown* [*R. v. Sundown*, 1999 CanLII 673 (SCC), [1999] 1 S.C.R. 393], at para. 32, confirms that courts should not use a "frozen-in-time" approach to treaty rights.

Evolution of the right.

The Mi'kmaq treaty right to participate in the largely unregulated commercial fishery of 1760 has evolved into a treaty right to participate in the largely regulated commercial fishery of the 1990s. The notion of equitable sharing seems to be endorsed by the Coalition, which refers in its written argument on the motion to "the equal importance of the fishing industry to both Mi'kmaq and non-Mi'kmaq persons". In its Reply, the Coalition says that it is engaged in discussions "with representatives of the Acadia and Bear River Bands in southwestern Nova Scotia and takes pride that those discussions have been productive and that there is reason to hope that they will lead to harmonious and mutually beneficial participation in the commercial lobster fishery by members of those Bands". Equally, the Mi'kmaq treaty right to hunt and trade in game is not now, any more than it was in 1760, a *commercial* hunt that must be satisfied before non-natives have access to the same resources for recreational or commercial purposes. The emphasis in 1999, as it was in 1760, is on assuring the Mi'kmaq equitable access to identified resources for the purpose of earning a moderate living. In this respect, a treaty right differs from an aboriginal right which in its origin, by definition, was *exclusively* exercised by aboriginal people prior to contact with Europeans.

How treaty rights by nature are defined in relation to non-Indigenous ppl.

39 Only those regulatory limits that take the Mi'kmaq catch *below* the quantities reasonably expected to produce a moderate livelihood or other limitations that are not inherent in the limited nature of the treaty right itself have to be justified according to the *Badger* test.

Any restriction on gathering/selling enough of resource to maintain a moderate livelihood would have to be justified.

40 (b) *The paramount regulatory objective is the conservation of the resource. This responsibility is placed squarely on the Minister and not on the aboriginal or non-aboriginal users of the resource.* The September 17, 1999 majority decision referred to *Sparrow*, *supra*, which affirmed the government's paramount authority to act in the interests of conservation. This principle was repeated in *R. v. Gladstone*, 1996 CanLII 160 (SCC), [1996] 2 S.C.R. 723, *Nikal*, *supra*, *Adams*, *supra*, *R. v. Côté*, 1996 CanLII 170 (SCC), [1996] 3 S.C.R. 139, and *Delgamuukw*, *supra*, all of which were referred to in the September 17, 1999 majority judgment.

41 (c) *The Minister's authority extends to other compelling and substantial public objectives which may include economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups.* The Minister's regulatory authority is not limited to conservation. This was recognized in the submission of the appellant 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". Counsel for the appellant Marshall goes on to say: "Likewise, Aboriginal harvesting preferences, together with non-Aboriginal regional/community dependencies, may be taken into account in devising regulatory schemes" (emphasis added). In *Sparrow*, *supra*, at p. 1119, the Court said "We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification." It is for the Crown to propose what controls are justified for the management of the resource, and why they are justified. In *Gladstone*, *supra* (cited at para. 57 of the September 17, 1999 majority judgment), the Chief Justice commented on the differences between a native *food* fishery and a native *commercial* fishery, and stated at para. 75 as follows:

> Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances*, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of

Canadian society may well depend on their successful attainment. [Emphasis in original.]

The discussion re legislative objectives in Gladstone applies to treaty rights.

This observation applies with particular force to a treaty right. The aboriginal right at issue in *Gladstone*, *supra*, was by definition exercised exclusively by aboriginal people prior to contact with Europeans. As stated, no such exclusivity ever attached to the treaty right at issue in this case. Although we note the acknowledgement of the appellant Marshall that "non-Aboriginal regional/community dependencies ... may be taken into account in devising regulatory schemes", and the statements in *Gladstone*, *supra*, which support this view, the Court again emphasizes that the specifics of any particular regulatory regime were not and are not before us for decision.

42 In the case of any treaty right which may be exercised on a commercial scale, the natives constitute only one group of participants, and regard for the interest of the non-natives, as stated in *Gladstone*, *supra*, may be shown in the right circumstances to be entirely legitimate. Proportionality is an important factor. In asking for a rehearing, the Coalition stated that it is the lobster fishery "in which the Applicant's members are principally engaged and in which, since release of the Reasons for Judgment, controversy as to exercise of the treaty right has most seriously arisen". In response, the affidavit evidence of Dr. Gerard Hare, a fisheries biologist of some 30 years' experience, was filed. The correctness of Dr. Hare's evidence was not contested in reply by the Coalition. Dr. Hare estimated that the non-native lobster fishery in Atlantic Canada, excluding Newfoundland, sets about 1,885,000 traps in inshore waters each year and "[t]o put the situation in perspective, the recent Aboriginal commercial fisheries appear to be minuscule in comparison". It would be significant if it were established that the combined aboriginal food and limited commercial fishery constitute only a "minuscule" percentage of the non-aboriginal commercial catch of a particular species, such as lobster, bearing in mind, however, that a fishery that is "minuscule" on a provincial or regional basis could nevertheless raise conservation issues on a local level if it were concentrated in vulnerable fishing grounds.

43 (d) *Aboriginal people are entitled to be consulted about limitations on the exercise of treaty and aboriginal rights*. The Court has emphasized the importance in the justification context of consultations with aboriginal peoples. Reference has already been made to the rule in *Sparrow*,*supra*, at p. 1114, repeated in *Badger*, *supra*, at para. 97, that:

> The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

Consultation is an impt part of justification.

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 para. 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. As stated, if the consultation does not produce an agreement, the adequacy of the justification of the government's initiative will have to be litigated in the courts.

44 (e) *The Minister has available for regulatory purposes the full range of resource management tools and techniques, provided their use to limit the exercise of a treaty right can be justified*. If the Crown establishes that the limitations on the treaty right are imposed for a pressing and substantial public purpose, after appropriate consultation with the aboriginal community, and go no further than is required, the same techniques of resource conservation and management as are used to control the non-native fishery may be held to be justified. Equally, however, the concerns and proposals of the native communities must be taken into account, and this might lead to different techniques of conservation and management in respect of the exercise of the treaty right.

45 In its written argument on this appeal, the Coalition also argued that no treaty right should "operate to involuntarily displace any non-aboriginal existing participant in any commercial fishery", and that "neither the authors of the Constitution nor the judiciary which interprets it are the appropriate persons to mandate who shall and shall not have access to the commercial fisheries". The first argument amounts to saying that aboriginal and treaty rights should be recognized only to the extent that such recognition would not occasion disruption or inconvenience to non-aboriginal people. According to this submission, if a treaty right would be disruptive, its existence should be denied or the treaty right should be declared inoperative. This is not a legal principle. It is a political argument. What is more, it is a political argument that was expressly rejected by the political leadership when it decided to include s. 35 in the *Constitution Act, 1982*. The democratically elected framers of the *Constitution Act, 1982* provided in s. 35 that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized *and affirmed*" (emphasis added). It is the obligation of the courts to give effect to that national commitment. No useful purpose would be served by a rehearing of this appeal to revisit such fundamental and incontrovertible principles.

An example of good legal writing.

6. . . . *pursuant to section 27 of the Rules of the Supreme Court of Canada, [requests] an Order that [the Court's] judgment pronounced herein on the 17th day of September, 1999 be stayed pending disposition of the rehearing of the appeal, if ordered*

46 At no stage of this appeal, either before or after September 17, 1999, has any government requested a stay or suspension of judgment. The Coalition asks for the stay based on its theory that the ruling created broad gaps in the regulatory scheme, but for the reasons already explained, its contention appears to be based on a misconception of what was decided on September 17, 1999. The appellant should not have his acquittal kept in jeopardy while issues which are much broader than the specifics of his prosecution are litigated. The request for a stay of the acquittal directed on September 17, 1999, is therefore denied.

A Stay of the Broader Effect of the September 17, 1999 Majority Judgment

47 In the event the respondent Attorney General of Canada or the intervener Attorney General for New Brunswick should determine that it is in the public interest to apply for a stay of the effect of the Court's recognition and affirmation of the Mi'kmaq treaty right in its September 17, 1999 majority judgment, while leaving in place the acquittal of the appellant, the Court will entertain argument on whether it has the jurisdiction to grant such a stay, and if so, whether it ought to do so in this case.

Disposition

48 The Coalition's motion is dismissed with costs.

Motion dismissed.

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Solicitor for Her Majesty the Queen, respondent on the motion: The Attorney General of Canada, Ottawa.

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