**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *R. v. Marr*, 2019 NSSC 327

**Date:** 20191120
**Docket:** Hfx No. 482693
**Registry:** Halifax

Her Majesty the Queen

*Appellant*

v.

Jolene Holly Marr and Frances Eileen Bignell

*Respondents*

**Judge:** The Honourable Justice Ann E. Smith

**Heard:** June 26, 2019, in Halifax Nova Scotia

**Counsel:** Leonard J. MacKay, for the Public Prosecution Service
Sarah A. Shiels, for the Respondent Ms. Marr
Richard W. Norman, for the Respondent Ms. Bignell

By the Court:

## Introduction

[1] The Respondents are members of the Sipekne'katik First Nation and designated to partake in the Food, Social and Ceremonial (FSC) fishery for lobster in Lobster Fishing Area (LFA) 34. This designation permits the fishing of 60 lobsters per day per fisher.

[2] The Respondents were charged with two sets of offences alleged to have occurred on October 21, 2015 and October 20, 2016. The charges relate to lobster they caught near Comeauville, Digby County and Saulnierville, Digby County. The Respondents were charged with catching and retaining more than 60 lobsters per day, contrary to s. 7 of the *Aboriginal Communal Fishing Licenses Regulations*, SOR/93-332. Both events involved the fishing of lobster within LFA 34, in Digby County.

[3] The trial arising from the 2015 charges was adjourned in order for the Respondents to make a *Rowbotham* application. The trial arising from the 2016 charges has not begun because it was adjourned for the *Rowbotham* application.

## Standard of Review

[4] The powers of a summary conviction appeal court are set out in s. 822(1) of the *Criminal Code*, which incorporates by reference the powers of the Court of Appeal as set out in s. 686 of the *Code*.

[5] A summary conviction appeal court may allow the appeal only where:

> (a) The verdict is unreasonable and cannot be supported by the evidence;
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> (b) the trial judge erred on a question of law; or
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> (c) there was a miscarriage of justice on any ground.

[6] The limited jurisdiction of a summary conviction appeal judge was described by the Nova Scotia Court of Appeal in *R. v. Martin*, 2017 NSCA 39 at para. 15, where the Court of Appeal referred to the previous decision of the Court of Appeal in *R. v. Pottie*, 2013 NSCA 68 (CanLII) at para. 16:

> [16] The standard of review for the SCAC judge when reviewing the trial judge's decision, absent an error of law or miscarriage of justice, is whether the trial judge's findings are reasonable or cannot be supported by the evidence. In undertaking this analysis the SCAC court is entitled to review the evidence at trial, re-examine it and re-weigh it, but only for the purposes of determining whether it is reasonably capable of supporting the trial judge's conclusions. The SCAC is not entitled to substitute its view of the evidence for that of the trial judge.

[7] A question of law is to be reviewed on a standard of correctness, while a question of fact is to be reviewed on a standard of palpable and overriding error: *Housen v. Nikolaisez*, [2002] 2 S.C.R. 235 (S.C.C.). A question of mixed fact and law is to be reviewed on a standard of palpable and overriding error: *Housen* at paras. 26-36. A question of mixed fact and law with an extricable error in principle can be characterized as an error of law. An extricable error in principle is one that "can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or a similar error in principle": *Housen*, at para. 36.

[8] Counsel agree and this Court finds that the standard of review on the issue of whether the charges were sufficiently serious to justify the appointment of state-funded counsel is correctness.

[9] However, counsel disagree as to the standard of review for the second issue – was the assistance of legal counsel essential to the conduct of a fair trial. The Crown says that the standard of review is one of correctness because the issue is one of pure law. The Respondents say that the standard of review for the second issue is palpable and overriding error, since the hearing judge made findings of mixed fact and law when assessing the Respondents' potential defences and determining whether they were factually and legally relevant to the charges.

**Analysis and Conclusions on the Standard of Review**

[10] The overarching issue is whether the trial judge erred in making the *Rowbotham* order. This issue hinges on whether the trial judge erred in holding that the complexity of the proposed Aboriginal or treaty rights defence was an adequate basis for ordering state-funded counsel, despite the absence of seriousness and complexity in respect of the offence itself. A sub-issue is whether the trial judge erred in holding that the Respondents were not required to meet the air of reality test by adducing evidence on all elements of their proposed defence.

[11] In my view these are questions of law, specifically of the applicable law on a *Rowbotham* application. There were no facts in dispute; on both issues, the question was what law was applicable to undisputed or uncontroversial facts. This suggests a correctness standard on both issues. I believe this case is similar to *R. v Bartibogue*, 2002 NBQB 147, and *R. v. Charles*, 2008 SKQB 206, where appeal courts treated the question of whether the *Rowbotham* test was met as a question of law.

**The decision under review**

[12] The trial judge relied on the restatement of the *Rowbotham* analysis for state-funded counsel in *R. v. Rushlow*, 2009 ONCA 461. In that case, Rosenberg J.A. said, for the court:

> [19] In considering whether to appoint counsel, the trial judge is required to consider the seriousness of the charges, the length and complexity of the proceedings and the accused's ability to participate effectively and defend the case. Because of the pervasiveness of legal aid, it will be the rare and exceptional case that the court will find it necessary to appoint counsel. This does not mean that counsel is only required in exceptional cases. Rather, it is the fact that legal aid is available for accused who cannot afford a lawyer that *Rowbotham* orders are exceptional.
>
> [20] Courts have considered a number of factors in determining whether appointing counsel is essential in view of the complexity and seriousness of the case. Generally, the courts look at the personal abilities of the accused, such as their education and employment background, their ability to read and their facility with the language of the proceedings. The courts will also consider the complexity of the evidence; the procedural, evidentiary and substantive law that applies to the case; the likelihood of especially complex procedures, such as a *voir dire*; the seriousness of the charges; the expected length of the trial; and the likelihood of imprisonment…

[13] In dealing with the seriousness of the charges, the trial judge held that the charges were regulatory, not criminal, ones, and that there was "no realistic likelihood … of incarceration" upon conviction. She held that the charges were "not serious."

[14] The trial judge went on to mention a series of cases out of the Alberta courts by the name of "*Caron"*, which eventually reached the Supreme Court of Canada. *R. v. Caron*, 2011 SCC 5, indicates that a superior court has jurisdiction to order interim funding for a proceeding in a lower court where it is essential to the administration of justice and the rule of law. It is not entirely clear from the trial

judge's reasons how this related to the *Rowbotham* analysis, although *Caron* did involve a constitutional claim. The accused in *Caron* claimed that the traffic offence with which he was charged was a nullity because the court documents were in English, and he asserted a right to use French before the Alberta courts. The Supreme Court of Canada was not dealing with *Rowbotham* in that case. As will be discussed below, another branch of the proceeding involved a *Rowbotham* application in the lower courts, which the Alberta Court of Appeal held was unmerited because the offence was not serious or complicated.

[15] The trial judge in this case acknowledged that "seriousness" is usually framed in relation to whether the applicant faces the possibility of imprisonment if convicted of the offence:

> In terms of seriousness and I realize that, generally speaking, seriousness is assessed in terms of just looking at the offence in isolation and, mainly, it's, you know, what the … what's the possible penalty here? What are we talking about here? Is this person facing imprisonment? Are we talking about a charge where a person could be, you know, sentenced to two years of … years of custody or … and, as I said, this charge, looking at it just in isolation as a … as a violation of the Fisheries Act is not serious. If, however, you look at this in terms of the issue that has been raised and in terms of the … the issue that's at stake here, then it is serious. It is serious. We have two individuals here who are saying that they have a constitutional right that, as indigenous fishers, that they have a constitutional right pursuant to Section 35 or, alternatively, pursuant to Treaty rights that … that their rights under Section 35 will be infringed, Section 35 of the *Constitution* Act, and … so when you look at it in that context, it takes on … a much different character. I suppose, just as … the case involving Mr. Caron took on a … quite a different character from a *Motor Vehicle Act* matter to constitutional litigation with respect to language rights. So the charge is not serious in terms of the gravity of the offence or the potential consequences to either Ms. Bignell … or Ms. Marr, but clearly it is serious in terms of … the issues … that are raised. [Emphasis added.]

[16] The trial judge then considered "the complexity and length of time of the proceedings … to determine if the charges are complex…" After noting that the Crown's case appeared to be "neither complex nor lengthy", she said:

> The same cannot be said for what … I will refer to as the defence case or the applicant's case. Ms. Marr and Ms. Bignell … are both members of the Sipekne'katik band. The … constitutional argument that Ms. Marr proposes to advance is set out in her brief… Ms. Marr asserts an aboriginal or Treaty right to fish pursuant to Section 35(1) of the … *Constitution* Act. Ms. Marr believes that the scope of her aboriginal and Treaty rights in a modern context enable her to

> fish lobster in coastal waters. If counsel is appointed, the full scope of her entitlement and the foundation of her rights will be explored later with appropriate historical evidence tendered or adduced in support of her arguments and then there is some elaboration set out in the brief with respect to the approach that might be taken on behalf of … Ms. Marr if she had a lawyer representing her at the hearing and that includes an analysis … of the Simon case … as well as Treaty rights.
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> With respect to Ms. Bignell it's very similar… [S]he indicates that she intends to assert certain constitutional rights as an indigenous person in defence of these charges. Ms. Bignell is an indigenous person. The charges relate to violations of Aboriginal Communal Licenses. Ms. Bignell says that this case involves aboriginal rights to fish and the point at which such a right is limited by the regulatory power of the Crown in its dealings with aboriginal peoples and then, again, there is some further elaboration without prejudice to Ms. Bignell's right to make full answer and defence. She says there is a question with respect to whether or not there was compliance with the duty to consult and … for background with respect to that, reference is made to the Martin case, a decision of Judge Peter Ross and, further, the brief states, specifically Ms. Bignell intends to lead evidence with respect to the band's management plan and the agreement with the Department of Fisheries and … she says that the Aboriginal Communal Fishing Licenses in this case constitute a prima facie infringement of the Aboriginal Food, Social and Ceremonial Fishing Right and then it's anticipated that the Crown will, presumably, put forward the justification … as set out in *Sparrow*.

[17] The trial judge went on to consider the Crown's argument that the Defence was required to adduce evidence that would give an air of reality to its proposed defence, in this case, the criteria set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507. Having adverted to *Van der Peet*, the trial judge continued:

> … As I said, the first one, what is the particular right being raised? Well, I said that that has been set out very clearly … by both Ms. Bignell … and Ms. Marr. What aboriginal community is the defendant a member of? Well that's been … replied to for … these purposes, Sipekne'katik; evidence of membership to that community, but then when we get further down, one of the factors is establishment of continuity between historic practice and the contemporary right asserted. Further, is the right being claimed one that was historically and is presently being exercised in the local geographical area of concern and with respect to this argument, I can certainly understand that there has to be some justification and there's some … I mean, a Court just can't take … what has been called an exceptional step of ordering state funded counsel … without having a basis for doing so in terms of really assessing … is this something that is going to be heard or should be heard, if there's enough of a basis or a foundation for the argument to proceed, but really what the … the Crown seemed to be suggesting … was something much more than that and I agree with … the comments that

> were made on the last day by defence counsel that … if in fact Ms. Bignell and Ms. Marr were in a position to provide some evidence on each of those criteria then … we would not be here with respect to a *Rowbotham* application. It's just … it wouldn't make sense. [Emphasis added.]

[18] The trial judge also considered the decision of Judge Batiot in *R. v. Francis*, 2007 NSPC 28. In that case, Judge Batiot was concerned about the complexity of advancing a treaty rights argument as a self-represented accused. The trial judge in this case remarked that "it's clear that the trial will be complex, and the trial will be lengthy."

[19] With respect to Ms. Marr and Ms. Bignell's ability to participate effectively and defend the case, the trial judge noted that "[i]f not for the complexity of the issues that have to be dealt with here, I would have no hesitation whatsoever in finding that both individuals … would be able be able to participate effectively and defend the case." The proposed constitutional arguments, however, would:

> require considerable research and analysis in terms of relevant case law and most likely would involve the calling of expert witnesses. I realize … that the trial judge has a duty to assist, but the level of assistance that would be required here really involves a pre-trial and it's just beyond the scope of what a trial judge would be expected to do.

[20] The trial judge concluded that counsel was necessary for a fair trial and stayed the charges pending funding for appointment of counsel. That conclusion is the subject of this appeal.

**Issues**

[21] The Crown and the Respondents have framed the issue or issues in various ways.

[22] In my view, the central issue for this appeal is whether the trial judge erred in finding that a *Rowbotham* order was necessary to ensure a fair trial in the circumstances. There are various sub-issues that I must consider in the analysis, including the trial judge's reasoning in respect of the "air of reality" question and in respect of "seriousness." I will first review the law on *Rowbotham* orders in cases involving Aboriginal or treaty rights defences.

***Rowbotham* and Aboriginal and treaty rights defences**

[23] A trial judge must determine whether appointing counsel under a *Rowbotham* order is necessary for a fair trial on a case-specific basis, having regard to relevant factors, including the seriousness of the charges, the likelihood of imprisonment, the length and complexity of the proceedings in terms of the factual evidence, and the procedural, evidentiary and substantive law that would apply. (See *R. v. Imona-Russel*, 2019 ONCA 352 (CanLII at para. 40 ONCA))

[24] The interaction of Aboriginal or treaty rights defences with regulatory charges and *Rowbotham* applications has been considered in several cases. As noted above, the essentials of the *Rowbotham* analysis for deciding whether state-funded counsel should be appointed were set out by the Ontario Court of Appeal in *Rushlow*, which was cited by the trial judge. The basic parameters of the analysis are clear. What is less clear is whether, or in what circumstances, a complex defence is sufficient basis for such an order in the absence of a serious charge.

[25] The Nova Scotia Court of Appeal considered the evidentiary standards pertaining to *Rowbotham* applications in *R. v. MacDonald*, 2001 NSCA 137. Pointing out that the "central concern is whether the accused can receive a fair trial based on the nature of the case and the financial means of the accused", Glube C.J.N.S. said that "a complete examination of both of these aspects was not made by the motions judge." She continued:

> [3] … There must be an examination of the complexity of the proceedings, the seriousness of the offences, the length of the trial and the accused's ability to understand and conduct his own defence, as well as an examination of the person's financial means.
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> [4] The onus is on the accused to persuade the court on a balance of probabilities that his Charter rights are being infringed.
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> [5] On the circumstances as presented, much more evidence needs to be provided on the nature of the defence and the financial means of the accused before a final decision can be given as to whether or not the defence should be funded by the State...
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> [6] Unfortunately the evidence was inadequate for the motions judge to reach a conclusion on these essential requirements.
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> [7] Other than reciting the charges, the motions judge was not advised of the Crown's case. Although he stated what he thought the defence would be, this was neither confirmed nor denied by the respondent.
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> [8] Until the defence is known it cannot be determined whether or not the assistance of the trial judge would be sufficient to address Mr. McDonald's needs, where as in this case the motions judge found Mr. McDonald was capable of

> presenting himself well and handling himself in court. Although the motions judge addressed this, without knowing what the defence would be it was not possible for him to make a fully informed determination of this issue. In this case, the charge is not usually complex but the defence may or may not be.
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> [9] Further, there was no evidence or explanation of the consequences of a conviction to Mr. McDonald. The Crown has advised Mr. McDonald and the court that it will not be seeking incarceration.
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> [10] To evaluate these issues, trial judges are encouraged to make adequate inquiry into the nature of the defence and whether it is factually and legally relevant to the charge before the court. [Emphasis added.]

[26] Courts in several provinces have considered whether the assertion of an Aboriginal or treaty rights defence will, by itself, render a proceeding "complex" for *Rowbotham* purposes.

[27] In *R. v. Bartibogue*, 2002 NBQB 147, the Crown appealed a *Rowbotham* order. The Aboriginal respondents were charged with fishery offences, but did not face incarceration on conviction. The trial judge had held that state-funded counsel was necessary on a balance of probabilities. He held that the possibility of incarceration was not a prerequisite for seriousness. The case was one of "extreme importance" and "national importance", with the potential to severely impact the life of at least one accused and his family, as well as those of native fishers who "strongly and fervently believe in their right to fish lobster."

[28] On appeal in *Bartibogue*, the Court noted that the burden for appointing state-funded counsel is "a relatively heavy one." There had been evidence before the trial court respecting the complexity of the proposed Aboriginal or treaty rights defence. The witness was apparently an expert in the field, though not appearing as a qualified expert on the *Rowbotham* application. In allowing the appeal, Rideout J. concluded:

> [37] It is my view that there is nothing in the evidence before the Court which establishes that the cases are in fact outside the right to regulate preserved in the Minister. Nothing was introduced to suggest the test in *Badger*, *supra*, is involved. In addition, there is insufficient evidence indicating this is an aboriginal or treaty rights case. *R. v. MacDonald* [2001] N.S.J. No. 368 (N.S.C.A), held that it was incumbent upon the Respondents to introduce such evidence. Consequently, in my opinion, these are straight forward summary conviction cases.

[29] *Bartibogue* suggests that merely asserting an Aboriginal or treaty rights defence in response to a fisheries regulatory charge is not a sufficient basis to find

seriousness or complexity without some evidence that the situation is outside the Minister's regulatory power.

[30] In *R. v. Paul*, 2002 NSPC 25, the applicants were charged with *Fisheries Act* offences. They claimed that "their fishing licenses were issued by the Chief of their Band pursuant to a treaty between by the Crown and the Mi'kmaq which gave the Mi'kmaq the right to fish." Judge Gibson said, "[t]he Applicants carry the onus to present evidence and persuade me on a balance of probabilities that their *Charter* rights would be infringed if these charges proceeded to trial without the benefit of legal counsel." With respect to the treaty rights defence that would be the main focus of the trial, Judge Gibson said:

> [27] The Applicants have not tendered as evidence copies of any treaty or treaties. The only reference to a particular treaty or treaties is found in the testimony of John Paul where he referred to the treaty rights considered by the Supreme Court of Canada in the case of *R. v. Marshall*, [1999] 3 S.C.R. 456 (herein referred to as *Marshall I*). In the *Marshall* case, the Supreme Court of Canada determined that written treaties in 1760 and 1761 between the Crown and the Mi'kmaq gave the Mi'kmaq in Nova Scotia the right to fish to the extent that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present day standards and as may be established by regulation. I infer from the testimony of John Paul that the treaties made in 1760 and 1761 between the Crown and the Mi'kmaq are the same treaties from which he believes the Applicants rights to fish snow crab are either wholly, or at least partly, derived.
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> [28] The *Marshall I* case dealt specifically with eel fishing in Pomquet Harbour, Antigonish County. However, the decision in *Marshall I* would suggest that the scope of the treaties of 1760 and 1761 apply to the entire Province of Nova Scotia, the ocean waters adjacent to Nova Scotia and to many other species of fish. The extent and scope of the treaties of 1760 and 1761 and perhaps other treaties that may be adduced in evidence at trial, will likely depend upon other evidence, including expert evidence, necessary to determine whether snow crab fishing in ocean waters adjacent to Nova Scotia is included within the treaty right to fish.

[31] Judge Gibson considered "the sufficiency of the evidence and submissions regarding the existence of a treaty or treaties necessary to give an air of reality to the possibility that such defence can be advanced." He distinguished *Bartibogue*, where there was insufficient evidence that an Aboriginal or treaty right was involved:

> [33] [*Bartibogue*] seems to be also based, in part, upon a finding that there was insufficient evidence to indicate that the case involved an aboriginal or treaty

> right. This case before me is distinguishable from [*Bartibogue*] by virtue of the decision in *Marshall I* and the testimony given and submissions made before me which clearly suggest that the treaty defence will be based in part if not fully upon the 1760 and 1761 treaties dealt with the *Marshall I* decision. I do not believe that more than what has been presented is necessary to given [sic] an air of reality to the likelihood of a treaty defence and its relevance to the charge of unauthorized snow crab fishing.

[32] In considering the "fairness" aspect of the analysis, Gibson Prov. Ct. J. noted:

> [38] The State has the right to use its discretion and pursue whichever approach it wishes. However, if the State chooses to pursue the prosecutorial approach, it ought not have the unfair advantage of prosecuting Applicants who lack the financial resources to retain legal counsel and lack the ability to advance a treaty-based defence without the benefit of legal counsel.
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> [39] On the other hand, the State ought not be put to the cost of funding legal counsel for the Applicants unless minimally there is an air of reality to their treaty-based defence. Such a defence is likely to cause the proceedings to be protracted and expensive. [Emphasis added.]

[33] As to seriousness and complexity, Judge Gibson said:

> Cases "Serious and Complex "Nature is a Consideration
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> [43] The case authorities suggest that there must be evidence before the Court from which a conclusion can be reached that the case is both serious and complex. I am unaware of any case involving the retention of state-funded counsel where the Crown's case was essentially quite straightforward and it was the defence that involved the complexity. Despite that fact, the Crown concedes that, for the purpose of this application, the test for "complexity" may be met where the only complexity arises out of a defence that is both legally relevant to the charge and factually available. I conclude that the treaty defence is legally relevant to the unauthorized snow crab fishing charge and factually available. Nevertheless, I would like to add some further comment regarding complexity of the charge. First I will deal with the seriousness of the charges.
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> Seriousness of the Charges
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> [44] The more serious of these two charges is the charge of unauthorized fishing. The fines imposed upon the co-accused who pled guilty to both charges indicate that a higher fine, if there is a conviction of the Applicants on both charges, may by imposed in relation to the unauthorized fishing charge. Fines, if imposed upon the Applicants at the same level as those imposed upon the co-accused, would cause significant hardship. It is likely that the Applicants would face the possibility of serving default time in jail to satisfy the fines since neither have the ability to pay fines of that magnitude.

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

[34] Judge Gibson went on to discuss the "complexity" aspect in greater detail, specifically as it pertained to Aboriginal and treaty rights defences:

> [46] Cases involving treaty-based defences involve a four-stage approach. The first stage involves the presentation of evidence by the Crown in proof of the *actus reus*. There may be admissibility issues with respect to some of the evidence in this case and the Defence will want to cross-examine Crown witnesses.
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> [47] The second stage involves the presentation of any conventional defences to the charges.
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> [48] The third stage involves the calling of evidence to establish the treaty right. This will likely require the calling of historical evidence through documentation, expert witnesses and community witnesses.
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> [49] A disclosure issue may arise at this stage. The Crown, upon receiving notice of the treaty defence, may be required to disclose all the evidence that they intend to call in response. The Crown may make two responses if the treaty right is established. One being that the treaty right was extinguished. The other involves evidence of justification, being evidence directed at justifying the interference of the State with the established right.
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> [50] During the third stage, the Applicants, in attempting to establish the treaty right and the infringement thereof, will likely be required to show a certain degree of particularity. There are two criteria to be met here: 1) That the activity complained of is the preferred means to exercise the right. This involves evidence from the community. 2) That the actions of the State are an unreasonable limitation on the activity. This again would require evidence from the community, usually coming from a community leader.
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> [51] The fourth step provides the Crown with the opportunity to call evidence that establishes a justification of the infringement, once the infringement has been established. Justification evidence may relate to issues of safety, conservation and economic or regional fairness. Expert evidence from the realm of occupational safety and from biologists and conservationists would be likely. The issue of regional fairness would likely require evidence of the effect on the non-native community.

[35] Judge Gibson concluded that a treaty-based defence was "likely to result in a very complex trial." He held that counsel was necessary for the applicants to have a fair trial on the *Fisheries Act* charge.

[36] In *R. v. Francis*, 2007 NSPC 28, the applicants were Aboriginal individuals, each of whom was a member of the Indian Brook or Acadia bands, charged with various fisheries offences. They argued that they needed state-funded counsel in order to raise a defence that they had Aboriginal or treaty rights to fish. The Court accepted that it was necessary to establish an air of reality to the defence for state-funded counsel to be available. In the context of discussing related obstruction charges, Batiot Prov. Ct. J. said:

> In the prosecution of strict liability offences (as in these cases), proof of the *actus reus* is not difficult or complex; nor is the usual defense, ordinarily; except that of a Treaty or Aboriginal right, a complex procedure, in its preparation and at trial, because of the evidence that must, or can, be gathered, disclosed and presented by either side, to prove such a right, its breach, or the justification for such breach. Crucial therefore is whether such defense is relevant at all, or has an air of reality...

[37] Judge Batiot considered whether there was an air of reality to Aboriginal or treaty rights defences against the fisheries charges. He said:

> 72. Given the location of the waters on which they were charged, St. Mary's Bay, in the County of Digby, Nova Scotia and the respective locations of their Band, Indian Brook, near Truro, some three hundred kilometres away, and Acadia Band in Yarmouth, close to St. Mary's Bay, certainly it is a central issue.
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> 73. Messrs Paul and Peter-Paul, have presented, or referred to a copy of the 1752 Peace and Friendship Treaty.
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> 74. Without addressing the questions such Treaty may have raised in earlier court proceedings, on its face, it was entered into by His Excellency Peregrine Thomas Hobson Esq., Captain General and Governor in Chief in and over His Majesty's Province of Nova Scotia and Accadie, and Major Jean Baptiste Cope, Chief Sachem of the Tribe of Mick Mack Indians Inhabiting the Eastern Coast of the said Province. Para. 4 refers to a Truck House at River Chibenaccadie and that "the said Tribe of Indians shall not be hindered from, but have free liberty of hunting and fishing as usual".

[38] After referring to the contextual, case-by-case analysis described in *Sparrow* (*R. v. Sparrow*, [1990] 1 S.C.R. 1075*), Van der Peet* (*R. v. Van Der Peet*, [1996] 2 S.C.R. 507) and *Sundown* (*R. v. Sundown*, [1999] 1 S.C.R 393), Judge Batiot found

there was no air of reality to the defence as advanced by the Indian Brook applicants:

> 78. There is no evidence advanced by the Applicants from Indian Brook, near Shubenacadie, to link their status as Aboriginals living in Indian Brook, to their claim to fish for lobsters in St. Mary's Bay. They do hold a belief, even passionately, in their Aboriginal or Treaty rights to do so. That does not equate to evidence for such claim.
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> 79. Unfortunately, the only evidence with respect to fishing (or lack thereof) in these waters is that of Dr. Wickens, an expert, who testified for the Defendants in an earlier fisheries case involving Indian Brook. He stated that prior to 1760 (an important date to ascertain the existence of past Aboriginal practices incorporated into treaties), there was no evidence of fishing in St Mary's Bay.
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> 80. I may not take judicial notice, having heard that case, of all the various evidence presented there on that issue. It is only a hearsay statement in this Application. Such a statement does not amount to a fact. Indeed a fact established in another case may not, without more, be conclusive in any other case, as each must be decided on the evidence properly admitted at trial…

[39] The Indian Brook applicants' belief, in *R. v. Francis*, 2007 NSPC 28 "however passionately held or expressed," did not amount to sufficient evidence of an Aboriginal link to fish for lobsters in St. Mary's Bay. The situation was different for the Acadia band applicants, however:

> 83. Mrs. Francis and her son Peter Louis Francis, of Acadia Band, in the western part of the Province, are in a different position, given the proximity of Yarmouth to the waters of St. Mary's Bay, where they were apprehended.
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> 84. They refer – more particularly Mrs. Francis – to the 1752 Treaty which, on the evidence, does not help their position since it applies to the Tribe of the eastern part of the Province, and there are other *Treaties of Peace and Friendship*. However, they both claim their "*inherent right*" to fish, arising from their Aboriginal status, i.e., an Aboriginal right. Indeed Mrs. Francis' emphasis was the importance of that right attached to her *blood line*.
>
> 85. They both contest, by their plea of *not guilty*, the allegations made against them, of having contravened the means the fish and the catch limitations imposed under the *Aboriginal Communal Fisheries Regulations*... In light of these arguments, given the location of the Band, its proximity to the waters in question, her status, her evidence of the importance to fish for herself, and for members of her community, particularly the elders, with whom she shares her bounty, the availability of the resources, the traditional ways of Aboriginals to use their resources in proximity of their settlement, Mrs. Francis, and her son have presented sufficient evidence to give an air of reality to their claim.

> 86. This is not expert evidence, yet one within their own knowledge, learned through generational history. It is of course hearsay, but one which may be admitted at trial, where it will be buttressed by that of elders, and likely experts. It is entitled to consideration.

[40] Noting the importance of considering "the Aboriginal perspective of oral history, and what Aboriginals may view as central and significant of the society's distinctive culture", as discussed in *Delgamuuk* (*Delgamuuk v. British Columbia*, [1997] 3 S.C.R. 1010) Batiot Prov. Ct. J. said:

> 88. Even though each Applicant presents their own case and make their own claim, they both acknowledge that such a claim is made on behalf of the community. There is nothing in law preventing one member from making such a claim, as demonstrated in different cases, including *R. v. Marshall*, *supra*.
>
> 89. Both Mrs. Francis and Mr. Francis have testified that they are different from other people in Canada in that they have always known through family law that their people, the Mi'kmaq inhabited Turtle Island, i.e. "*present Nova Scotia*" and even though they lived or travelled between Maine and Nova Scotia she has always known that she had the right to fish because of her status as an Indian and had a duty to share her catch with her community, particularly the elders. She knew that these rights stayed with the blood line and she made sure that her children would be entitled to that right by having a Mi'kmaq father. She claims, as Mr. Francis does, to be L'NU and to fish in her community's traditional fishing grounds, a triable issue: *R. v. Marshall*, *supra*, at para 17 and 19.
>
> 90. Her evidence is sufficient to establish an *air of reality* to her claim, obviously one which will have to be proven at trial.
>
> 91. Even though Mr. Francis also fishes commercially in the winter, his claim of an Aboriginal right to fish for food, social and ceremonial purposes and the extent of such a right, is indistinguishable from that of his mother, both members of the same Band. It is also different from his ability to fish commercially in whatever capacity such license may give him, and which is not before this court.

[41] Judge Batiot ordered a stay of proceedings pending appointment of state-funded counsel for the Acadia Band applicants. There was no express discussion of the *Rowbotham* considerations of seriousness of the charges, or the possibility of imprisonment.

[42] In *R. v. Charles*, 2008 SKQB 206, the Crown appealed a *Rowbotham* order made by a Provincial Court judge in favour of two respondents charged with fisheries offences. The Provincial Court Judge had accepted that there was no likelihood of imprisonment, but stayed the matter under s. 7 on the ground that the respondents' psychological integrity was threatened as a result of the charges. She

relied on New Brunswick (*Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, where the majority held that s. 7 was implicated when child protection authorities sought custody of the applicants' children, and state-funded counsel was required. In *G.(J.)*, Lamer C.J.C. said, for the majority:

> 60 For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.

[43] The respondents in *Charles* claimed that "a conviction would make each of them feel less of a First Nations person. This, they say, engages s. 7 of the *Charter* as it was engaged in *G.(J.)*, either by way of threat to their psychological integrity or more generally by virtue of the seriousness of the interests at stake." Currie J. continued:

> [19] The evidence of Mr. Charles, at best, may be interpreted to mean that he feels that paying a fine on conviction would diminish his treaty rights, and so make him feel less of a First Nations person. Mr. Charles did not explain, however, how it is that being convicted and paying a fine would lead to this result. Mr. Ross, in his evidence, speculated about what would happen to his treaty rights and those of his grandchildren in the event of a conviction. He too, though, did not explain how a conviction and fine would lead to him or his grandchildren losing their treaty rights.
>
> [20] On an objective assessment, the evidence of Mr. Charles and Mr. Ross does not lead to the conclusion suggested by them. Nor does any other of the material that was before the Provincial Court indicate how a conviction and fine would put at risk their treaty rights or status as First Nations persons. Counsel referred to an issue involving two Indian bands, but that issue has no apparent relation to a treaty or to the charges. As described by counsel, that issue relates to where the accused allegedly had been fishing. The accused are not charged in relation to where they were fishing, however. The accused are charged in relation to the method by which they were fishing - namely, by snaring. Nothing in the material that was before the Provincial Court identifies an issue relating to the method by which the accused were fishing.

[44] The Court distinguished the respondents' situation from that of the parents in *G.(J.)*, holding that their concerns were "not of the same order of magnitude as the parental distress described by Chief Justice Lamer." He continued:

> [23] Mr. Charles and Mr. Ross wish to protect their treaty rights and their sense of being First Nations persons, for themselves and for their families. Even though that is so, the feelings that they anticipate in the event of being convicted under The *Fisheries Regulations and being fined $500 do not demonstrate that their psychological integrity is* threatened by this prosecution, in the sense recognized in G.(J.). Nor do those feelings demonstrate that, in any other way, this prosecution threatens their right not to be deprived of security of the person except in accordance with the principles of fundamental justice to security of the person.
>
> ….
>
> [25] In effect, the Provincial Court judge in this case found that the seriousness of the interests at stake was sufficient to require that Mr. Charles and Mr. Ross have counsel at trial. This was the effect of her applying the approach in *G.(J.)*, thereby engaging s. 7 of the Charter. For the above reasons, I respectfully conclude that the application of the approach in *G.(J.)* to this case constituted an error in law, and that the seriousness of the interests at stake in this case is not sufficient to require that Mr. Charles and Mr. Ross have counsel at trial.

[45] Ms. Marr argues that *Charles* is distinguishable because the issue in that case "had to do with the act, or method, or catching fish … not band jurisdiction of a treaty entitlement to fish." The Respondents also say *Charles* is distinguishable on the basis that the accused in that case could not explain how a conviction or fine on the offence would lead to a loss of treaty rights. They say *Charles* is similar to *Bartibogue*, where there was "insufficient evidence indicating this is an aboriginal or treaty rights case." There was, however, more evidence before the court in *Bartibogue* than in the present case.

## Arguments

### *Air of reality*

[46] The elements of the offences are not in dispute. There is no suggestion that complexity arises from the nature of the offences. Rather, any complexity arises from the proposed constitutional defence. The Crown says the Court must make a "reasonable inquiry" into the defence offered, as it is the only source of complexity in this proceeding, relying on the decision of the Nova Scotia Court of Appeal in *R. v. McDonald* (*supra*). If a proposed defence is not relevant to an issue at trial, the Crown says that the Court should not entertain it as a basis for a *Rowbotham* order. In order to establish this, the Crown says, the Respondents should be required to identify some evidence supporting the defence, and show how the defence is relevant at trial.

[47] More specifically, the Crown says the Applicants should be required to meet the air of reality test as described in *R. v. Cinous*, [2002] 2 S.C.R. 3, and *R. v. Pappas*, 2013 SCC 56, before the complexity of a proposed defence can underpin a *Rowbotham* order. For a defence to go to a jury, the majority in *Cinous* said, there must be some evidence that on which "a properly instructed jury acting reasonably could base an acquittal if it believed the evidence to be true." A defence must go to a jury when there is "direct evidence as to every element of the defence, whether or not it is adduced by the accused…" However, the majority added, "the mere assertion by the accused of the elements of a defence does not constitute direct evidence, and will not be sufficient to put the defence before a jury… ."

[48] The elements of an Aboriginal rights defence were set out by Lamer C.J.C., for the majority, in *R. v. Van der Peet*, [1996] 2 SCR 507, where the majority held that "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right." Chief Justice Lamer subsequently summarized, in *R. v. Gladstone*, [1996] 2 SCR 723:

> The first step in applying the *Van der Peet* test is the determination of the precise nature of the claim being made, taking into account such factors as the nature of the action said to have been taken pursuant to an aboriginal right, the government regulation argued to infringe the right, and the practice, custom or tradition relied upon to establish the right. At this stage of the analysis the Court is, in essence, determining what the appellants will have to demonstrate to be an aboriginal right in order for the activities they were engaged in to be encompassed by s. 35(1). There is no point in the appellants' being shown to have an aboriginal right unless that aboriginal right includes the actual activity they were engaged in; this stage of the *Van der Peet* analysis ensures that the Court's inquiry is tailored to the actual activity of the appellants.
>
> …
>
> 25 The second step in the *Van der Peet* test requires the Court to determine whether the practice, custom or tradition claimed to be an aboriginal right was, prior to contact with Europeans, an integral part of the distinctive aboriginal society of the particular aboriginal people in question. The Court must thus, as has just been noted, determine in this case whether the exchange of herring spawn on kelp for money or other goods, and/or the sale or trade of herring spawn on kelp in the commercial marketplace, were, prior to contact, defining features of the distinctive culture of the Heiltsuk.
>
> 26 …
>
> 28 In *Van der Peet*, at para. 62, this Court held that a claimant to an aboriginal right need not provide direct evidence of pre-contact activities to

> support his or her claim, but need only provide evidence which is "directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights". In *Van der Peet* this was described as the requirement of "continuity" -- the requirement that a practice, custom or tradition which is integral to the aboriginal community now be shown to have continuity with the practices, customs or traditions which existed prior to contact…

[49] The Crown identifies seven questions on which, in its submission, some evidence must be identified before an Aboriginal right defence can proceed: (1)What is the particular right being raised? (2) What Aboriginal community is the defendant a member of? (3) What evidence is there of the defendant's membership in that community? (4) From what historic community does the present-day community claim to be a successor? (5) How is such a right an element of practice, custom, and tradition, integral to the distinctive culture of that Aboriginal community? (6) What evidence is there of continuity between the historic practice and the contemporary right asserted? (7) Is the right being claimed one that was historically, and is presently, being exercised in the local geographical area of concern?

[50] As to a potential treaty rights defence, the Crown submits that the Respondents would be required to show what treaty right applied to the activity, and what basis they had to claim that right through ancestry. The considerations are not identical to those applicable to an alleged Aboriginal rights defence. The Crown says it is not clear that the trial judge turned her mind to that distinction; while she adverted to the questions of membership in a first nation and assertion of a right to fish, and referred to the factors identified in the Crown brief, the trial judge was allegedly led astray by the Respondents' conflation of "issues of infringement, justification, and consultation" with "the complexity of the charges and defence." Appearing to accept this approach, the trial judge recited "the arguments of the honour of the Crown, duty to consult and DFO-Band management agreements" while considering complexity. The Crown says that the trial judge did not consider whether there was an air of reality to the proposed defence.

[51] The Respondents say the Crown's position adds an element to the *Rowbotham* analysis by requiring evidence to give an air of reality to the elements of the defence in order to establish that the trial will be so complex as to require appointment of counsel. They concede that a *Rowbotham* order should not be made on the ground of "a fanciful, imaginary, or unnecessarily complicated

defence." *Cinous* only indicates that that a defence must not go to a jury without an air of reality being established. They say this principle has no application on a pre-trial application. They note that the Crown has not provided any law supporting the imposition of an air of reality test at this stage.

[52] The Respondents point to the Court of Appeal's remarks in *McDonald*, where the Court stated that a *Rowbotham* application based on an allegedly complex defence required the applicant to establish that the defence was "factually and legally relevant to the charge before the court." The Respondents say that establishing factual and legal relevance does not require them to "prove every element of the defence in advance of trial." Rather, they submit, "[i]t is a question of more general, discretionary precepts such as common sense and probability."

[53] This Court notes that in their written argument, the Respondents repeatedly characterize the Crown's position as one by which they would be required to "prove" the elements of the defence, not simply raise "some evidence" to establish an air of reality. This is apparently not inadvertent. They say the distinction makes no difference, since it would allegedly be impossible to know what would constitute "some evidence" on the various *Van der Peet* criteria, and it would be practically impossible for self-represented applicants to "present evidence in a format acceptable to the Court." The Respondents also say that requiring them to provide "proof of each element of the defence in advance of trial" would infringe their rights to a fair trial and to silence.

[54] Several of the earlier cases use the phrase "air of reality", and apparently accept it as a relevant standard, including *Paul* and *Francis*. At this stage, however, the Court of Appeal's reference to the proposed defence being "factually and legally relevant to the charge before the court" is perhaps more helpful. The "air of reality" test is designed to determine whether a defence should go to the trier of fact. That determination is made on the basis of the evidence at trial. It does not follow that an accused has no burden to meet in establishing that a defence is "factually and legally relevant."

[55] In this case, there has been no indication of the substance of the defence, only a bare assertion of an Aboriginal or treaty right. As in *Bartibogue*, there is no indication of how the Respondents' Aboriginal or treaty rights are allegedly violated by the charges, despite both Respondents having counsel for the *Rowbotham* application.

[56] I find that, in these circumstances, it is impossible to say that there is a proposed defence that is factually and legally relevant to the charges.

***"seriousness"***

[57] The Crown says the trial judge conflated the "seriousness of the charges" with the seriousness of the potential constitutional defence.

[58] The Respondents submit that *Rowbotham* does not require that the charges be serious. Seriousness is only one element of the analysis. They say they have an inherent right to fish, and are not bound by licensing legislation. Whether they are bound by the regulations is a constitutional issue that has not been decided by a Court. Therefore, they say, there is no basis to "dismiss their assertions as unfounded." They say this means the charges are serious, since a conviction "may curtail" their treaty rights.

[59] The Respondents argue that the charges are serious despite the lack of a risk of imprisonment. They say the Crown's definition of "liberty" under s. 7 of the *Charter* is too narrow, in that "liberty" is not limited to freedom from incarceration, but includes the right to exercise an Aboriginal or treaty right.

[60] It is certainly correct that "liberty" under s. 7 is not limited to freedom from imprisonment. But the Minister has the power to regulate the fishery, albeit in accordance with the relevant Aboriginal and treaty rights. In this case there is no evidence respecting the substance of the alleged violation.

[61] The Crown refers to *R. v. Caron*, 2007 ABQB 262, in support of the argument that state funding should not be ordered where there are no serious penal consequences and the constitutional issue is the only significant issue. In *Caron*, the accused was charged with a traffic offence. He raised a constitutional argument related to language rights, alleging that the *Alberta Languages Act*, which declared pre-1988 legislation valid notwithstanding their publication in English alone, was *ultra vires*. He claimed that the legislation diminished or abolished French language rights, contrary to the *Charter*. The trial judge dismissed a pre-trial *Rowbotham* application, but allowed a renewed application during trial, finding that the defence was complex. On appeal of the *Rowbotham* order, Marceau J. said:

> [94] Having looked at the history of the proceedings, it seems to me almost axiomatic that undertaking such a constitutional challenge to an Act of a provincial Legislature is almost always going to be an expensive proposition that

> cannot be undertaken by the ordinary citizen without special funding. In the result, the learned provincial court judge ordered funding for legal costs and the cost of retaining experts.

[62] The Court noted that the respondent did not face a serious charge, and did not need a lawyer by virtue of the charge itself, but would need a lawyer to advance a "complex defence that is based on a constitutional challenge." Justice Marceau noted that the respondent was not seeking a stay, "because that would preclude him from arguing the real issue upon which he wishes a decision, the constitutionality of the *Languages Act*." Justice Marceau said:

> [98] I have not been able to find persuasive case law, civil or criminal, where state funding was granted where, as here, there are no serious penal consequences should the accused be convicted and, in fact, the constitutional question, not guilt or innocence, is the only serious question the accused wishes to argue…
>
> [99] I have a grave concern that were I to uphold the funding order of the learned provincial court judge, I would be deciding spending priorities for public funds, the very trap that the Court in [*R. v. Cai*, 2002 ABCA 299] warned against at para. 9 where it wrote:
>
> > Courts are not the best qualified agencies to determine spending priorities for public funds... Courts do not set, nor are they asked to set, elevated fees for doctors or other professionals such as nurses, accountants, or midwives. Courts do not set health care premiums, levels of taxation, sessional indemnities or jury fees.
>
> ….
>
> [101] The grave concern I have is that constitutional challenges, even meritorious ones, should not be indirectly funded under the guise of a Charter fair trial right just because they involve a quasi-criminal trial and are complex. It seems to me that to employ the Charter in that way is colourable and is to be discouraged.

[63] Justice Marceau distinguished *Paul* on the basis that the judge in that case was concerned about the possibility of imprisonment on default of paying a fine, a proposition that had been specifically rejected by the Alberta Court of Appeal in *R. v. Rain*, [1998] A.J. No. 1059, 1998 ABCA 315. In *Rain*, the Court said:

> [76] With respect, it is an error of law to conclude that the possibility of incarceration is enough to satisfy the requirement of "seriousness", in the assessment of need for counsel in cases such as this. If the possibility of incarceration was enough every offence in the *Criminal Code* and virtually every violation of most Alberta statutes would fall into the "serious" category. That is because s. 787(2) of the *Criminal Code* and s. 7(2) of the *Provincial Offences*

*Procedure Act*, S.A c. P-21.5 provide *g*eneral authority for imposing imprisonment in default of payment of any fine.

[77] The practical result of the position taken by the learned Summary Conviction Appeal Justice is to remove from consideration the question of "seriousness" in applications such as the one leading to this appeal. Such result is a radical and unwarranted departure from the jurisprudence both under common law and under the Charter.

[78] … The decision of this Court in *Robinson, supra* limits the right to funded counsel to those indigent accused who face "serious and complex criminal offences". If the possibility of incarceration was enough to satisfy the requirement of "seriousness" then the constant use of the word "serious" by this and many other courts in the context of applications such as this one would be redundant and meaningless. That is because as noted every criminal charge by definition would be "serious" since every one carries the theoretical possibility of imprisonment.

[79] The requirement that an offence be found "serious in that a conviction may result in imprisonment" must be based on more than theoretical possibility. At the very least it must be founded on a reasonable probability that a trial judge, correctly applying all relevant sentencing principles and considering all relevant circumstances, would not be in error by imposing a sentence of imprisonment, and that any monetary penalty correctly imposed would be beyond the means of the accused to pay and that the only alternative to payment was imprisonment in default. In the latter respect the availability of fine option programs is a necessary consideration. The learned Summary Conviction Appeal Justice disregarded the availability of such a program to Ms. Rain, although the reasons for the order under appeal drew attention to the program.

[64] Justice Marceau concluded, in *Caron*:

[109] The quasi-criminal regulatory offence faced by the accused in this case is far less serious than the criminal offence of impaired driving no matter what criterion is used. A conviction will not affect the accused's operator's licence which an impaired driving conviction would.

[110] The test in *Rain* requires a serious and complex charge. Earlier, the learned provincial court judge had rightly found that the charge was not serious. Nothing occurred in the interim to change the basis for that finding, and the finding itself was not revisited.

[111] As I am bound by the decision and reasoning in *R. v. Rain*, I conclude that state funded counsel is not required for a fair trial of the offence with which this accused is charged. In my view, raising a complex constitutional argument which, I agree, can only be fairly argued by counsel does not change the seriousness of the offence. That requirement for state funded counsel has not been met. The appeal is allowed and that portion of the November 7, 2006 judgment of the

> learned provincial court judge granting state funded interim costs to the Respondent is quashed.
>
> [112] If the learned provincial court judge concluded in his decision on November 6 that it was not necessary to find that the charge was serious in order to meet the test for state funded counsel set out in *Rain* and *Cai*, then he erred in law. If he concluded that the charge in this case was serious, then this constituted either an error in law (as per the analysis by Sulatycky J.A. in *Rain*) or a palpable and overriding error of fact or mixed fact and law. Either way, his order cannot stand on this basis.

[65] The Alberta Court of Appeal affirmed this conclusion: 2009 ABCA 34. The Court said the quasi-criminal charge "was neither serious nor complicated. What was potentially complicated was the constitutional challenge he advanced as a defence. Under neither R*owbotham* nor *Rain* would *Caron* have been entitled to state funding in Provincial Court."

[66] As I noted earlier, the trial judge did take notice of the *Caron* line of cases. The Alberta Court of Appeal in *Caron* held that a superior court could make an interim costs order, as contemplated by *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, respecting a lower court proceeding in circumstances where the real issue was not the charge against the accused, but a constitutional question of public importance. As noted earlier, that conclusion was affirmed: 2011 SCC 5. Binnie J. said, for the majority:

> 6 As a general rule, of course, it is for Parliament and the provincial legislatures to determine if and how public monies will be used to fund litigation against the Crown, but it has sometimes fallen to the courts to make such determinations. To promote trial fairness in criminal prosecutions, for instance, the courts have in narrow circumstances been prepared to order a stay of proceedings unless the Crown funded an accused in whole or in part: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Rain* (1998), 223 A.R. 359 (C.A.). In the civil context, *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, extended the class of civil cases for which public funding on an interim basis could be ordered to include "special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate" (para. 36). *Okanagan* was based on the strong public interest in obtaining a ruling on a legal issue of exceptional importance that not only transcended the interest of the parties but also would, in the absence of public funding, have failed to proceed to a resolution, creating an injustice. In *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38…, the majority affirmed that the injustice that would arise if the application is not granted must relate both to the individual applicant and to the public at large.

> This means that a litigant whose case, however compelling it may be, is of interest only to the litigant will be denied an advance costs award. It does not mean, however, that every case of interest to the public will satisfy the test...

[67] The *Caron* line of cases was referenced in a general way by the trial judge in the present case. But the issue before the Supreme Court of Canada was not *Rowbotham*, and no "interim costs" argument along the lines proposed by *Okanagan* and *Caron* (S.C.C.) is raised in the present case. To the extent that the trial judge relied on *Caron* as a foundation for the *Rowbotham* order, respectfully, this would be an error.

[68] To find seriousness based on a potential Aboriginal or treaty rights defence unsupported by evidence other than the Applicants' beliefs would, as the Court in *Caron* warned, amount to using the *Rowbotham* process as a method of funding *Charter* challenges. This is particularly the case where there are no specifics offered that would explain how the enforcement action might have been outside the Minister's regulatory power.

[69] This Court notes that the Respondents' counsel stated in oral argument that they were on limited retainers and had no funding for expert consultation. Contrary to their submissions, however, I do not believe that showing "legal and factual relevance" of a defence necessarily requires an accused to lead evidence to establish all elements of the defence ahead of trial. But it similarly cannot be satisfied by a mere suggestion that there might be some as yet undefined defence, with no specific legal theory offered to support it. The court on a *Rowbotham* application cannot simply assume that an Aboriginal person charged with a fisheries offence might have a treaty or Aboriginal rights defence as a basis to order state-funded counsel.

[70] Counsel also suggested that the Respondents' right to silence would be violated if they were required to disclose details of a proposed defence. But this leads to a circular argument. If an accused need only claim to have a complex defence, without disclosing what it consists of, the Court would have no way to assess the seriousness or complexity of the proposed defence.

[71] In my view the approach taken by the Alberta Court of Queen's Bench and Court of Appeal in dealing with the *Rowbotham* application in *Caron* is persuasive in this case. The charges are neither serious nor complex. They are straightforward, and there is no prospect of a sentence of imprisonment upon conviction. As in *Caron*, the only source of complexity is a potential defence to charges that are not, in themselves, serious or complex.

**Conclusions on "air of reality" and seriousness" arguments**

[72] I find that the Respondents have made a bare assertion of an Aboriginal or treaty right to fish, including in excess of the provisions of the *Aboriginal Communal Fishing Licenses Regulations*.

[73] The Respondents have not shown that the defences they raised are factually and legally relevant to the charges before the Court.

[74] I also find that the charges are neither serious nor complex.

[75] The Respondents did not meet the *Rowbotham* test, and as such, the trial judge erred in law in finding that a *Rowbotham* order was necessary to ensure a fair trial.

**International Law**

[76] The Respondents also submit that the application must be viewed through the prism of the *United Nations Declaration on the Rights of Indigenous Peoples*. They refer to *R. v. Hape*, [2007] 2 S.C.R. 292, where the majority confirmed the need to interpret the *Charter* in accordance with relevant principles of international law "whenever possible." While the declaration includes a broad statement of the right of Indigenous peoples to have "access to financial and technical assistance from states", the Respondents provide no argument as to why the Declaration would mandate any particular result in the present case. They also concede that the Declaration is not legally binding. They argue, however, that the principles of the Declaration reflect customary international law, as well as embodying principles that also appear in the *International Covenant on Economic, Social, and Cultural Rights*, which Canada ratified in 1976. The Respondents make no argument as to why these broad principles would be directly relevant on a *Rowbotham* application and I find that in the appeal before this Court, they are not.

**Sections 7 and 11(d)**

[77] Given the conclusion that the *Rowbotham* test was not met on the grounds that the charge was not serious and the proposed defence was not shown to be legally and factually relevant, the specifics of alleged *Charter* violations are academic. I will, however, review the parties' arguments.

[78] The Crown submits that "[r]egulatory offences do not engage s. 7 of the Charter, since there is no risk of incarceration." The authority allegedly supporting

this proposition is *R. v. Wilcox*, 2001 NSCA 45, which does not say this in so many words. In *Wilcox*, Cromwell J.A. (as he then was) said, for the court:

> [109] Applying these considerations, the *Fisheries Act* is clearly regulatory in nature. The alleged offences in issue here are, to paraphrase LaForest, J. in *Thomson,* far removed from the typical concerns of the criminal law: 509. The enforcement and penal provisions are ancillary to the Act's regulatory purpose. The conduct in issue does not give rise to the sort of moral disapprobation or stigma associated with true criminal offences. As for penalties, no term of imprisonment is available under the Act for first offences. As the Supreme Court of Canada said in *Fitzpatrick*, the Act addresses important regulatory objectives relating to conservation and management of the fishery for the benefit of everyone depending on it for their livelihood; the Act's purpose is to help ensure the survival of the fishery and the fair distribution of its profits: at § 29 and 35.
>
> [110] I conclude that this case concerns regulatory offences in a highly regulated industry. This factor supports the view that the requirements of ss. 7 and 8 of the Charter, as developed in the context of criminal law, should be applied more flexibly in this regulatory context. This consideration underpins the more specific analyses of ss. 7 and 8 which follow.

*Wilcox* supports a flexible application of sections 7 and 8 of the *Charter* in the context of regulatory offences, but does not exclude them entirely.

[79] There was, however, no argument on this appeal that appeared to point to a s. 7 issue. The only evidence (as distinct from speculative legal argument respecting Aboriginal fishing rights) in support of the proposed defences is the Respondents' Band membership and their sincerely held beliefs in their right to fish. While the Respondents correctly argue that s. 7 of the *Charter* is not limited in its application to situations where there is a risk of incarceration, they do not provide authority for their argument that s. 7 is engaged by an alleged violation of Aboriginal or treaty rights. Even if there were such authority, however, some evidence would be required to give a foundation to the alleged s. 7 violation.

[80] The Respondents also say their s. 11(d) right to a fair trial would be violated if they are required to go to trial without counsel. This conclusion follows from the trial judge's findings that the trial would be long and complex; that their constitutional arguments would require extensive research and probably expert witnesses; and that the assistance required would be beyond that expected of a trial judge. The Respondents say that the question of whether they are subject to the regulations, and whether subjecting them to the regulations *prima facie* violates an "underlying indigenous right", is a complex issue and that it would be unfair for

them to be required to go trial without counsel. Once again, the evidence consists of the Respondents' sincerely-held beliefs in their right to fish.

[81] The burden on a *Rowbotham* application is with the accused, to prove on a balance of probabilities that a *Charter* right will be violated if she is required to go to trial without counsel.

[82] The Crown says *Rowbotham* requires violations of both ss. 7 and 11(d). The Respondents say a *Rowbotham* order can rest on a violation of s. 11(d) alone. This argument appears to misconstrue the language of *Rowbotham*. In that case, the Court said:

> 183 The right to retain counsel, constitutionally secured by s. 10(b) of the *Charter*, and the right to have counsel provided at the expense of the state are not the same thing. The *Charter* does not in terms constitutionalize the right of an indigent accused to be provided with funded counsel. At the advent of the *Charter*, legal aid systems were in force in the provinces, possessing the administrative machinery and trained personnel for determining whether an applicant for legal assistance lacked the means to pay counsel. In our opinion, those who framed the *Charter* did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. <u>However, in cases not falling within provincial legal aid plans, ss. 7 and 11(d) of the *Charter*, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial</u>. [Italics in original; underlining added.]

[83] The Court in *Rowbotham* in effect treated ss. 7 and 11(d) as a joint guarantee of fair trial rights. It does not appear that the Court was contemplating the two as separate and distinct rights. In other words, if the Court concludes on a balance of probabilities that the accused cannot receive a fair trial without counsel, then ss. 7 and 11(d) would both be violated.

**Conclusions**

[84] I therefore conclude that the trial judge erred in finding that this matter was sufficiently serious and complex that state-funded counsel was required. I am not persuaded that there was a basis to find that the proposed defence was factually and legally relevant to the charges. In any event, as the Court held in *Caron*, I cannot conclude that it is sufficient simply to assert a complex constitutional

defence where the charge itself is not serious. As such I am unable to conclude that the Respondents' fair trial rights will be contravened by going to trial without counsel.

[85] Accordingly, I quash the stay and remit the matter to the trial judge, or another Provincial Court Judge, for hearing.

Smith, J.