SUPREME COURT OF NOVA SCOTIA

Citation: *Sipekne'katik First Nation v. Canada (Attorney General),* 2025 NSSC 354

Date: 20251030
Docket: Hfx, No. 510920
Registry: Halifax

Between:

Chief Michelle Glasgow on her own behalf and on behalf of the members of Sipekne'katik

Plaintiff

v.

Attorney General of Canada

Defendant

v.

Unified Fisheries Conservation Alliance

Intervenor

DECISION

Judge:	The Honourable Justice John A. Keith
Heard:	September 19, 2025, in Halifax, Nova Scotia
Oral Decision:	October 30, 2025
Counsel:	Nathan Sutherland and Dakota Bernard, for the Plaintiff Gwen MacIsaac and Jessica Harris, for the Defendant Richard Norman and John Boyle, for the Intervenor

By the Court:

Background and Issue:

[1] In this claim, the Sipekne'katik First Nation challenged the legality of federal and provincial legislation that allegedly infringed their treaty rights to fish and sell lobster for a moderate livelihood.

[2] The claim was grounded in treaty rights first memorialized by the Mi'kmaq Peace and Friendship Treaties of 1760–61. Section 35(1) of our *Constitution Act, 1982*, stamped those historic treaty rights with the imprimatur of constitutional importance.

[3] In two landmark cases from 1999, Donald Marshall, Jr., was charged with fishing for eels in the coastal waters off Pomquet Harbour, in Antigonish County, Nova Scotia during a time when the applicable regulations deemed this fishery to be closed (i.e. during a closed season).

[4] He was convicted at trial. The Nova Scotia Court of Appeal upheld his conviction. However, at the Supreme Court of Canada, he was acquitted. In recording this acquittal, the Supreme Court of Canada re-affirmed the Mi'kmaq constitutionally protected treaty rights and related treaty right to fish for a moderate livelihood. Those cases are *R. v. Marshall*, [1999] 3 S.C.R. 456 ("***Marshall 1***") and [1999] 3 S.C.R. 533 ("***Marshall 2***"). Justice Binnie (writing for the majority) said: "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" (at para. 7, *Marshall 1*).

[5] At para. 59, he elaborated:

> The concept of "necessaries" is today equivalent to the concept of what Lambert J.A., in *R. v. Vanderpeet* (1993), 80 B.C.L.R. (2d) 75 (B.C. C.A.) at p. 126, described as a "moderate livelihood". Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike. A moderate livelihood includes such basics as "food, clothing and housing, supplemented by a few amenities", but not the accumulation of wealth (*Gladstone, supra*, at para. 165). It addresses day-to-day

> needs. This was the common intention in 1760. It is fair that it be given this interpretation today.

[6] Important practical and legal questions remained at least partly (if not mainly) because certain key issues were not fully raised and argued before the Supreme Court of Canada in the *Marshall* cases. In particular, the Crown did not offer any evidence of justification for the prohibitions on eel fishing which formed the basis of the charges against Donald Marshall (para. 4 of *Marshall 1* and para. 15 of *Marshall 2*).

[7] This became a critical concern for the Supreme Court of Canada. As the Court confirmed in *Marshall 2*, aboriginal and treaty rights protected under s. 35 of the Constitution may be regulated but only if the Crown justifies it on broad public interest grounds such as conservation, for example. For present purposes, it is not necessary to delve deeply into the legal principles which drive a justification analysis except to say that the Court found this analysis was required but, again, not argued and therefore not decided in the *Marshall* cases.

[8] In *Marshall 2*, the Court further explained the problem. It repeated that justification was "required but was not argued and therefore not decided" (at para. 21). It cautioned that regulation tools like "a closed season" could be valid only if justified for conservation purposes and must be assessed "on a species-by-species basis", since "the complexities and techniques of fish and wildlife management vary" (paras. 21–22). However, the Court added that "catch limits that could reasonably be expected to produce a moderate livelihood... can be established by regulation" (para. 61). Ultimately the Court acknowledged the matter was not closed, stating that issues regarding other fisheries, such as lobster, could "be raised and decided in future cases" (para. 15).

[9] The Supreme Court of Canada expressed hope that these matters were best resolved by negotiation (*Marshall 2* at para. 22) but equally confirmed that the Court would "resolve the points of conflict as they arise case by case". Thus, it repeated the caution that the acquittal of Mr. Marshall "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" (*Marshall 2* at para. 23).

[10] And so, the seeds of the current dispute were sown. Unfortunately, 26 years later, no clear resolution has been achieved. The issues that rose to surface in 1999 still exist and have generated considerable tension over the years.

In this case, concerns flared when, in 2020, Sipekne'katik initiated its own independent lobster fishery as part of a "Rights Implementation and Lobster Fishery Management Plan".

[11] That is not to say that there has not been any progress. Both the Crown and the Plaintiff in this case acknowledge progress and, in fact, say that this litigation sparked productive negotiations which ignited a renewed desire to negotiate towards a more stable, mutual understanding as to how the fisheries might best be regulated, having regard to the recognized interests of all parties - including the constitutional treaty rights of the Mi'kmaq.

[12] This action offered the possibility of moving towards greater clarity in the sense that the remaining unanswered questions following the *Marshall* decisions now assumed centre stage and demanded answers. This included the thorny issue of justification and the related questions such as: How do we define what is meant by the term "moderate livelihood"? And how might that concept be analysed or measured to ensure the treaty right is fully protected?

[13] In this action, the Plaintiffs brought the matter to a head. They originally alleged that the *Fisheries Act (Canada)*, *Fishery (General) Regulations*, *Atlantic Fishery Regulations*, *Fisheries and Coastal Resources Act (Nova Scotia)*, and *Fish Buyers' Licensing and Enforcement Regulations* criminalized treaty-based fishing and trading activities. Sipekne'katik subsequently discontinued its claims involving the provincial (Nova Scotia) statutes and regulations. However, as against Canada, they continued to assert that the federal laws were unconstitutional, as they unjustifiably infringe treaty rights and fail the justification test established in *R v. Badger*, [1996] 1 S.C.R. 77 ("***Badger***"). The Plaintiffs sought declarations that the impugned provisions are of no force or effect insofar as they apply to Sipekne'katik's treaty fishery, along with costs and further relief.

[14] The Crown defended the action and the Unified Fisheries Conservation Alliance ("**UFCA**") were granted Intervenor status.

[15] At the risk of oversimplification and solely for the purposes of framing the issues which underpin this action, I distill the issues contained in the pleadings as follows:

1. As indicated, Sipekne'katik launched an independent lobster fishery in 2020 in St. Mary's Bay, within Lobster Fishing Area 34, asserting that this was done pursuant to its treaty right to fish for a moderate livelihood. Sipekne'katik claimed its fishery is guaranteed as a constitutionally protected treaty right to fish and sell lobster for a

moderate livelihood. Sipekne'katik alleges that the *Fisheries Act* and related regulations infringe this right by failing to accommodate it, exposing members to arrest and prosecution. It further argues that these infringements are unjustified under the framework set out in *Badger*;

2. Canada acknowledges the existence of a treaty right to fish for a moderate livelihood but disputes its scope and content. It argues that the Courts have not yet determined whether lobster falls within the treaty right or the geographic extent of traditional fishing grounds. Canada also contends that "moderate livelihood" remains undefined and, even if infringement is found, it is justified by the need for a single, federally regulated commercial fishery. Canada asserts it has adequately consulted and accommodated Sipekne'katik; and

3. UFCA, the Intervenor, agrees the treaty right exists and further acknowledges the constitutional protections. However, it argues that this treaty right, properly defined, is limited by species and geography. It denies any infringement and alternatively claims any infringement is justified by broader regulatory, conservation, and fairness considerations – which involve a sharing of the resource and some consideration of its interests. UFCA further alleges that any duty to consult has been adequately accommodated.

[16] The dispute was originally brought forward as an application. However, it was very clearly too complicated to be adequately litigated using that procedural vehicle. On consent, it was converted to an action with the corresponding understanding that the Court would provide accelerated trial dates having regard to the shared recognition as to the underlying importance of the issues. All parties similarly agreed to abide by the Court's procedural directions so that the accelerated trial dates could be achieved.

[17] The matter proceeded through the disclosure phase with the Crown predictably bearing the brunt of that particular burden. It ultimately disclosed thousands upon thousands of documents compared to a relatively modest amount disclosed by the Plaintiffs and the Intervenor.

[18] Then, on the eve of discovery examinations, the action stalled as the Plaintiff and Defendant Crown sought to engage in settlement negotiations. I granted two, consecutive six-month adjournments to allow those negotiations to continue but was eventually compelled to establish a schedule so that the matter might move forward. The first milestone on that newly established schedule was to begin discovery examinations. Again, on the eve of those

re-scheduled discoveries, the discovery examinations were abandoned. However, this time, the Plaintiff discontinued its claim.

[19] The Defendant federal Crown does not seek costs associated with this discontinuance. However, the Intervenor seeks substantial costs of about $400,000.00, or approximately 66% of its legal fees incurred.

[20] Both the federal Crown and the Plaintiff oppose costs to the Intervenor, although the main dispute exists between the Intervenor UFCA and the Plaintiffs, Sipekne'katik, who present sharply contrasting positions. The Plaintiffs argue that no costs should be awarded to UFCA, or alternatively, that any award should be nominal, capped at $5,000.00.

[21] UFCA grounds its arguments in the *Civil Procedure Rules* but acknowledges that serious issues arise given the well-established rule that intervenors are generally required to bear their own costs. UFCA says that the circumstances in this case give rise to an exception.

[22] UFCA begins with Rule 9.06, which presumes costs are payable to an opposing party upon discontinuance, and argues that it qualifies as such due to its adversarial position throughout the proceeding. UFCA also invokes Rule 35.10, which grants Intervenors the procedural rights of parties, and cites case law such as *Lynnview Ridge Residents' Action Committee v. Imperial Oil Ltd.*, 2005 ABCA 375 ("***Lynnview***"); *Canadian Union of Postal Workers v. Her Majesty in Right of Canada*, 2017 ONSC 6503 ("***CUPW***"); *Turner-Lienaux v. Nova Scotia (Attorney General)*, 1992 CanLII 4498 ("***Turner-Lienaux***"); and *Freeman v. Ponhook Lodge*, 2024 NSSC 1, to support its entitlement to a substantial contribution payable to an intervenor. It says that these cases demonstrate that intervenors with a direct and legitimate interest, who contribute meaningfully to the litigation, may be awarded costs—sometimes in the range of 40% to 78% of their legal fees.

[23] In contrast, Sipekne'katik argues that UFCA was not an "opposing party" within the meaning of Rule 9.06 and that the general rule against awarding costs to intervenors should apply. They emphasize given the treaty rights at stake, awarding costs to an intervenor against a First Nation would have a chilling effect on the pursuit of constitutional claims. Setting aside the issue of limited resources available to an historically impoverished community, they note that a multitude of intervenors often participate in constitutional claims. Exposing an indigenous band asserting constitutionally protected treaty rights to exponentially rising costs would be wrong. Sipekne'katik also contends that UFCA's involvement did not materially advance the

litigation, that its legal position largely mirrored that of the federal Crown, and that its legal fees were excessive and included entries unrelated to the proceeding. They cite *A.B. v. Bragg Communications Inc.*, 2010 NSSC 356, and *Ogichidaakwe v. Ontario (Minister of Energy)*, 2015 ONSC 7582 ("***Ogichidaakwe***"), to argue that Intervenors should not be awarded costs unless there is a compelling reason, which they say is absent here.

Costs Generally

[24] A judge has the broad discretion to award costs to ensure justice between parties. However, that discretion is guided by two key objectives: (1) indemnifying a successful party for reasonable litigation expenses, and (2) encouraging fair, efficient, and responsible litigation conduct.

[25] However, and all parties agree, unique rules regarding costs apply with respect to intervenors. Orkin on Costs at §2.18 "Intervener" begins:

> In general, an intervener should bear its own costs unless there is reason to depart from the rule. An intervener added as a party on its own initiative and participating fully in the proceedings may be liable for some or all of the costs of the proceedings, at least after the date of intervention, absent special circumstances that warrant a departure from the general principle that costs should follow the event. It would appear that some degree of participation in the proceedings is essential; thus, a party added on its own initiative which did nothing more than hold a watching brief was denied costs, but the court ordered interveners to pay additional costs incurred by reason of their intervention. An intervener was awarded costs where it supported the successful respondent and actively participated in the proceedings.

[26] The Plaintiffs in this case rely heavily on *Ogichidaakwe*. In that decision, the Ontario Divisional Court denied costs to the Intervenors, H2O Power Limited Partnership and Resolute FP Canada Inc., despite their request for partial indemnity costs totaling $335,000.00.

[27] In that decision, the Grand Council Treaty 3 representing the Anishinaabe Nation alleged that the Ontario Crown breached its duty to consult with the affected indigenous nation before issuing a directive to the Ontario Power Authority (OPA), which led to a power purchase agreement with H2O Power. The Grand Council claimed this extended the life of hydroelectric facilities, causing new impacts on Treaty 3 rights. The dispute centered on the Crown's duty to consult Indigenous communities before decisions affecting their treaty rights.

[28] H2O Power was granted limited Intervenor status to address how the relief sought might affect its commercial interests. The Court emphasized that

H2O's role was restricted and its interest was "not central to the dispute" (para. 8), which was "understood to be between nations" (para. 8).

[29] The Court reaffirmed the principle that Intervenors are generally not entitled to costs (at para. 8). The Court then considered whether there was any reason to divert from that general rule in the circumstances. It concluded there was not, offering the following reasons:

1. **The Intervenor's Commercial Interests Were Not Central to the Dispute:** The Court wrote: "It may be that H2O had a commercial interest in the outcome but this was not central to the dispute" (at para. 8). The Court observed that the Intervenor's cost request was excessive and disproportionate but that was not a determinative factor;
2. **Constitutional Position of First Nations:** The Court emphasized the constitutional significance of the duty to consult and the broader context of reconciliation, stating: "Most importantly the duty to consult is the pragmatic manifestation of our collective recognition of the constitutional position of First Nations within Canada" (at para. 8);
3. **Nation-to-Nation Concerns and Settlement:** The Court further recognized that the dispute was between Indigenous nations and the Crown, and that settlement should be encouraged: "The concerns raised are understood to be between nations. Settlement of such issues is to be celebrated, not unnecessarily impeded by the threat that the First Nations involved may have to pay costs" (at para. 8); and
4. **Deterrent Effect of Cost Awards:** The Court warned that awarding costs against Indigenous communities could deter future constitutional litigation: "To impose a crippling award of costs against an aboriginal community of limited means in favour of a deep pocketed third party who has insinuated itself into the proceedings to protect commercial interests would only serve to deter important constitutional issues from being raised and would discourage settlement" (at para. 4).

[30] Sipekne'katik states that similar considerations apply here and militate towards no costs or, alternatively, a modest costs award.

[31] For its part, UFCA states that it intervened early in the litigation due to its members' direct stake in the outcome, particularly regarding the sustainable management of fisheries and the economic impact on non-Indigenous

fishers. Despite full participation—including disclosure, motions, expert engagement, and discovery preparation— Sipekne'katik abruptly discontinued the case twice, causing UFCA to incur significant legal expenses.

[32] UFCA argues that it qualifies for costs under Nova Scotia's *Civil Procedure Rules*, specifically Rule 9.06 and Rule 77, which presume costs are owed to opposing parties upon discontinuance. Although Intervenors typically bear their own costs, UFCA asserts that it meets the exception criteria established in caselaw. Again, it relies on *Lynnview* which confirmed exceptions to the general rule against awarding costs to intervenors; CUPW which sets out factors for awarding costs to intervenors; *Turner-Lienaux* which the Intervenor says affirms the principle that costs may be granted to Intervenors where a significant financial interest is at stake; and *Armoyan v. Armoyan*, 2013 NSCA 136, which does not deal with Intervenors but establishes parameters for substantial contribution in cost awards.

CONCLUSION

[33] The Court retains a general discretion to award costs that achieve justice between the parties. Unique considerations apply when assessing an intervenor's rights to costs. In particular, an intervenor is generally not entitled to claim costs. All parties acknowledge this legal reality although all parties also accept that the rule admits of exceptions in appropriate circumstances.

[34] Reconciling these positions requires balancing the unique role that intervenors play and the corresponding restrictions on their entitlement to demand costs, principles of fairness, the unique context of the litigation, and the conduct of the parties. Moreover, the following overarching policy concerns that influence an assessment of costs are germane as they also help provide analytical context:

1. The notion of indemnification for expenses reasonably associated with the conduct of litigation; and
2. Ensuring that parties approach litigation in a fair, responsible, and efficient manner. This includes, for example, encouraging settlement, winnowing or deterring frivolous claims or defences, discouraging unnecessary procedural steps, and facilitating access to justice.

(British Columbia (Minister of Forests) v. Okanagan Indian Bank, 2003 SCC 71, at paras. 22 and 26; *Tanious v. The Empire Life Insurance*

Company, 2019 BCCA 329. at para. 35; *Orkin on the Law of Costs*, 2nd Edition, at § 2:1; and Civil Procedure Rule 71.01(1).

[35] There is debate regarding the factors to be considered when assessing all of these issues. Turning to these factors:

1. **Nature and extent of the Intervenor's interest:** In my view, the Intervenor has an interest in this proceeding. I hasten to add (and I emphasize) that my analysis on this issue is solely for the purpose of assessing the Intervenor's entitlement to costs.

   I am mindful of the fact that any persons granted Intervenor status could claim some type of interest but, in my view and for the purposes of a costs analysis, the UFCA's claim to having an interest is much more clear having regard to, for example, the following phrases found in the Supreme Court of Canada's *Marshall 2* decision: "equitable sharing" and "equitable access" (at para 38). These phrases capture not only the constitutional importance of the Mi'kmaq treaty right but also the reality of having to now share a valuable and finite resource with non-indigenous groups such as the UFCA. How to turn this concept of equitable sharing into a meaningful and stable reality has proven elusive, but it does at least reflect the Intervenor's interest for the purposes of costs. I note that a financial interest may not be enough as the Court must consider both the nature and extent of the interest. However, I am satisfied that the nature and extent of UFCA was sufficient to weigh in its favour with respect to this particular factor – particularly given the broad social and economic issues at play;

2. **Nature and extent of the Intervenor's involvement or the degree to which the Intervenor helped:** This issue falls along a spectrum and examines the degree to which the Intervenor exerted a positive impact. On balance, I am satisfied this factor favours UFCA, who was very much engaged in the attempts to move towards a decision on the merits. I recognize what the Supreme Court of Canada has said about the importance of negotiation (not litigation) in the context of these types of cases; and the related fact that the UFCA was not entitled to be an active participant in those negotiations. Moreover, UFCA's position was adversarial in nature. The extent to which it "helped" should be viewed in that context. Overall, I am satisfied that this factor weighs in favour of UFCA for the purpose of costs. UFCA played an active role in pushing this matter forward and exerting

pressure which, in my view, helped create an urgency around the negotiations that the Plaintiff points to as the primary benefit achieved through this process. I also note the Crown's position that it did not speak for any particular non-indigenous group in its negotiations. Obviously, the Crown represents a multitude of interests and cannot purport to speak or lobby for one particular group. However, in this unique case and in the context of costs, this enhanced the Intervenor's involvement in the process;

3. **Resources of the Intervenor:** All parties agree that this factors is not a relevant consideration here;

4. **Success on the merits:** There are few cases where it can truly be said that the Intervenor is found to be successful on the merits. This is perhaps understandable given that their role is somewhat peripheral, by definition. It becomes more problematic here, where there was not a final decision on the merits given the Plaintiff's discontinuance. I consider this to be a neutral factor at best and more likely working against UFCA's claim for costs.

5. **Whether the Intervenor's involvement was anticipated:** The issue is whether the Intervenor could be reasonably considered "interested people who might reasonably be expected to be engaged". Sipekne'katik points to the fact that the UFCA is a relatively new entity and, unlike many of the cases cited, lacks any clear historical connection or role in these matters. At the same time, I am compelled to note the involvement of a coalition of lobster fisherman who were heard in *Marshall 2*. In my view, on balance, this factor favours the UFCA. While it is true that they are a relatively new entity, particularly given the vast historical context of this dispute, they are an active and known entity with a very clear level of public engagement in a very important issue. Their involvement was anticipated and I might add virtually inevitable given the nature of the issues; and

6. **Terms of the Order:** The terms of the Order allowing intervention were silent on costs. So is the Intervenor's pleading. These facts reflect both the Court's and Intervenor's expectations. In particular, they suggest there was no such expectation or it would have been mentioned. This factor weighs against UFCA. That said, they were given full rights of participation on the understanding that the litigation would proceed in the manner originally anticipated, with an

accelerated trial and Court-directed milestones leading up to trial. Unfortunately, those expectations were not entirely met. As will be seen, the manner in which this matter proceeded was unusual and somewhat unfortunate given the late cancellation of discovery examinations – twice, and virtually the day before extensive amounts of time were set aside to complete that process. Unfortunately, UFCA was compelled to bear the brunt of these problems. As will be seen, this unique factor bears heavily on my decision regarding entitlement and quantum.

[36] Overall, in balancing the relevant considerations, given the highly unique and important nature of this dispute and UFCA's inextricable and focussed interest in it, I am satisfied that it is entitled to some measure of costs. This leads to the question of quantum.

[37] The Court retains a general discretion to award costs. I am satisfied that the assumptions embedded in the Tariff cannot reasonably be applied here and, as such, I am compelled towards a lump sum.

[38] However, the amounts being claimed by the Intervenor are extremely excessive in the circumstances. As mentioned, I am highly sympathetic to the concern that it prepared twice for discovery examinations that were cancelled at the last minute, resulting in unnecessary waste and delay. At the same time, I note:

1. Again, the Intervenor did not seek costs in terms of the Order or in its pleadings.
2. There are numerous issues involving the invoices submitted. It is extremely difficult to understand the level of effort and corresponding costs claimed in respect of Alex Cameron as there is almost no detail in those invoices – simply a record that work was done and a related amount with no accounting for time or a particular task. There was an inadequate accounting for the costs of transitioning the file from UFCA's original counsel (Blakes in Toronto) to its current counsel (Cox & Palmer). It would be unfair and unreasonable to ask that this cost be borne by Sipekne'katik.
3. UFCA's disclosure obligations were modest at best. The associated cost (from an indemnification perspective) would be similarly modest. UFCA disclosed a very small number of documents – particularly compared with the Crown, who disclosed many, many thousands of current and historical documents ranging from the history of the 18th century treaty rights to more modern initiatives.

4. There were numerous entries related to training which Sipekne'katik should not have to pay for.

[39] Overall, taking all of these factors into account, in my view, a serious injustice would arise were I to grant costs to UFCA in the amounts being claimed. At the same time, as indicated, the Intervenors were entitled to expect that the Court's directions regarding scheduling and the *Civil Procedure Rules* would be respected. I am also cognizant of the fact that, as mentioned, this proceeding was commenced as an application signalling all parties' desire for a speedy and efficient process. That same desire and commitment was expressed when the application was converted to an action and the Court agreed (with all parties' consent) to expedited trial dates and a related commitment to a streamlined, controlled, pre-trial process.

[40] In the circumstances, it would be fairly expected that this same commitment would be realized during the course of the litigation and that, for example, UFCA would be given appropriate notice of any decision to deviate from the Court-imposed process – and not be told that, for example, discoveries were to be cancelled virtually the day before they were scheduled to begin. Let alone have this occur twice. This resulted in significant wasted effort and unnecessary costs and it cannot simply be ignored or deemed inconsequential from a costs perspective.

[41] As mentioned, a governing principle on costs is to help ensure parties approach litigation in a fair, responsible, and efficient manner. Respectfully, UFCA was entitled to some degree of procedural consideration beyond that which was extended. That must attract consequences in terms of costs.

[42] In sum and in my view taking into account all these factors and circumstances, an appropriate costs award would be above that proposed by the Plaintiff but still relatively modest, particularly when compared to the Intervenor's demand. I award costs payable to the Intervenor in the amount of $15,000.00, payable forthwith.

Keith, J.