STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. OJ-18-1

In the Matter of a Request for an Opinion of the Justices
Relating to a Question Posed by the House of Representatives

BRIEF OF
MALISEET TRIBAL REPRESENTATIVE TO THE MAINE LEGISLATURE, HENRY JOHN BEAR

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"*questions bearing ... upon the power and authority of the Legislature to pass ... legislation ..."* **can** *"properly be answered by the Justices*" (emphasis and paraphrasing mine)

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"*Legislature, having some action in view, has serious doubts as to their power and authority to take such action, under the Constitution, or under existing statutes."*

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INTRODUCTION

"The right to be let alone is indeed the beginning of all freedom."

- *William Douglas (1898-1980), Associate Justice of the United States Supreme Court.*

This brief is submitted on behalf of myself, Henry John Bear, and on behalf of other members of the Houlton Band of Maliseet Indians whom I represent in my capacity as their duly elected Maliseet Tribal Representative to the Maine House of Representatives. This brief is also submitted in my legislative capacity as the sole Sponsor of House Order 72; a Resolve propounding a Question and seeking an advisory opinion from the Justices of the Supreme Judicial Court.

As Maliseet Tribal Representative to the Maine House of Representatives, I am very honored to make these submissions to the Court. At the same time, I am very concerned about the continuing implications of the urgency of our health and economic circumstances or not answering the specific question propounded, especially in the coexisting circumstances of significant legislative doubt expressed by a majority of the Maine Legislature as to it's power and constitutional authority to enact gaming legislation that purports to regulate tribal gaming on tribal lands in the context of the decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

The right to ask the Justices of the Supreme Court for their opinion on important issues of law under Me. Const. art. VI, § 3 on "solemn occasions" should be construed strictly except where Justices put aside doubts as to whether such requests constitute appropriate occasions for advisory opinions in light of particular circumstances, and where answers are not adverse to private rights, and where answers are directed solely to questions of law of continuing importance.

The Question posed by the House of Representatives meets that standard and, if answered, would serve to remove the dark constitutional cloud that contributes to obstruct the view of all participants in our Tribal and State relationship. It would confirm, one way or the other, whether or not the opinions of the Tribe, the Legislature and other learned persons who determine that the 1987, U.S. Supreme Court's ruling in *Cabazon*, and in considering the express language and legislative history of the 1980 Maine Indian Claims Settlement and Implementing Acts, and Maine's gaming statutes that the *Cabazon* decision applies to the Maliseet Tribe in Maine.

I am concerned that the particular circumstances that exist in the present case, which are matters of legislative record and which will continue to consume all too much time and energy, will persist. Such circumstances have unnecessarily prolonged economic hardship in my community, and throughout the poorest and most remote regions. These circumstances have exacerbated health conditions and

resulted in the use and loss of significant public and tribal funding in the conduct of tribal gaming referendums, which has depleted our resources, frustrated our efforts at economic recovery, denied us our international right to self-determination, our goal of proving we govern, manage sophisticated businesses, and can pay our own way and set ourselves, once again, on our ancient path to physical, emotional and spiritual healing and sustainable well-being if we are allowed to do so by our neighbors.

In these circumstances, an Answer by the Justices to the Question propounded will not just be consistent with the Maine Constitution, including Article X, § 5, it will also be an act of humanity; an act which recognizes the relatively extreme health conditions, extreme economic marginalization of the Tribe and which will simultaneously honor the continuing trust relationship between the Tribe, the State and the United States as required by the above mentioned Section of the Constitution; a correcting of an historical imbalance, which will not necessarily, in the unique circumstances of this Question, be viewed as an unprecedented intrusion, by the Justices, into the political realm.

STATEMENT OF THE FACTS

The Maliseet People I represent are people of the Wabanaki Confederacy, which legally and politically predates the existence of the United States of America. We are the first people of the Wolastoqiyik; a 20 million acre, St. John

River drainage system comprising 5 million acres in northern Maine, and the balance in southern Quebec and western New Brunswick, Canada, respectively. The Maliseets are river people who still fish, hunt and gather where and as our ancestors did before us.

Access to forest and fishing resources are widely recognized as traditional pillars of our Maliseet tribal economy in the Aroostook region. But, it is not as well known that gaming has always been the third pillar of that economy, with a similarly strong factual basis and historic tradition.

Maliseets and our Wabanaki neighbors, the Mi'kmaq, Passamaquoddy and Penobscot, all played games of chance. They still do. In fact, the Penobscot Nation started the first, high stakes tribal bingo not too long ago, which represents a continuation of our Wabanaki gaming activity, tribal economy and tribal tradition in modern form.

Historically, we Wabanaki played a "game of chance" which in our language, is called "altestakon". The Mi'kmaq called it something similar, "waltestek".

Such games of chance or tribal gambling by our Wabanaki People have been documented as early as the 17th century onward. This specific game of chance involves bones being used as dice and sticks being used as chips to keep points.

Often, whole possessions were gambled away in a single night's gambling. Interestingly, such games of chance were also used as a dispute resolution system.

Property, hunting or even tribal or inter-tribal fishing and hunting territory disputes were resolved through gambling going back hundreds, perhaps thousands, of years.

The historical record establishes that following his capture from Pemequid at the end of the 17th century, the young Englishman John Gyles stayed with the Maliseets near present-day Houlton. During this period, he observed the Maliseet's interest in this game. Because of his Protestant New England background, Gyles was obviously and, in my view, improperly critical of both the game and the Maliseet players, citing concern that has been raised by non-tribal members at times in their discussions of our tribal gaming efforts at the Maine Legislature.

John Gyles' 17th century diary recorded, "By their play with dice they lose much time, playing whole days and nights together, sometimes staking their whole effects."

Gyles quickly learned, however, that gaming was part of the Maliseet economy. In fact, it still is. Of the current, eight Maliseet Bands located in Quebec and New Brunswick, Canada, four of them currently operate modest, Class II or III type casinos on tribal lands as a matter of right.

Gyles' diary indicates he learned to understand and accept the fact that gaming was and had always been an important part of Maliseet tribal culture and our tribal economy, and eventually changed his attitude toward gaming accordingly.

Clearly, credible, historical records show that gaming has been prevalent enough among Maliseets to produce our own version of gambling addiction as early as the late 1690's according to this Englishman's well preserved and oft cited journal; a journal that was written some 78 years before the United States declared it's independence from Great Britain, and 130 years before the establishment of the province of Maine as a separate State in 1820.

Gaming is and has been a truly Maliseet, cultural and traditional economic activity which, in the 21st century, is still practiced and supported by the sovereign government of our Maliseet Tribe and the Houlton Band of Maliseet Indians in modern gaming forms.

In 2012, the members of the Houlton Band of Maliseet Indians undertook and completed a comprehensive Community Economic Development Strategy which stated that local jobs for tribal members was the top priority and that task was not the sole responsibility of Tribal Chief and Council, but that tribal members needed to come together to accomplish economic improvement.

To that end, in 2013 our Maliseet tribal community met, developed, and voted to adopt a comprehensive Strategic Plan, which included, among other economic goals, the development and establishment of a Maliseet Tribal Casino on Tribal Trust Lands in Aroostook County in order to create local jobs and generate

much needed revenues for critical tribal government programs and services, including health, housing, education, infrastructure and economic development.

On September 13, 2013, the Houlton Band Council, passed and adopted Resolution Number 09-23-13-01, to "Authorize Houlton Band of Maliseet Indians Gaming on Tribal Lands in Aroostook County."

The Resolution restates the well-known fact that the Houlton Band of Maliseet Indians is a United States, federally recognized Indian Tribe.

The Resolution states the fact that it "is enacted pursuant to inherent sovereign powers possessed by the Houlton Band of Maliseet Indians as evidence by the Watertown Treaty of July 19, 1776, entered into between the St. John River Indians (Maliseets) and newly declared United States of America."

The Resolution also states the fact that, Article 6, Sections 2 and 3 of the said United States Constitution also states, "This Constitution …and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby", and, "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."

Further, the Resolution states that, “pursuant to it’s inherent, sovereign powers and the aforementioned Article 1, Section 8, Clause 3 of the Constitution, the Houlton Band of Maliseet Indians, through it’s Council, passes this resolution for the purpose of controlling public games on tribal trust lands located on the North Road in the Town of Houlton”.

The Resolution then states, “the Council deems it essential to the health, security, and general welfare of the Houlton Band of Maliseet Indians to pass his resolution for the purpose of regulating gaming activities on these tribal lands”.

The Resolution then states the types of authorized gaming on tribal lands, which could “include;

(a) Blackjack;

(b) Poker;

(c) All other banking and non-banking card games;

(d) Banked and non-banked dice games, excepting craps;

(e) Roulette;

(f) Baccarat;

(g) Wheel of Fortune;

(h) Keno;

(i) Games of chance utilizing electronic gaming equipment;

(j) All other games of chance currently authorized within the State of Maine or in any written agreement with any other non-Indian organization or Indian Band, Tribe or Indian Nation in the State of Maine".

Despite our sovereign right, our gaming culture and our gaming history, there exists strong voices of concern that Maliseets should not be involved with gaming as part of our economy or of Maine's economy. Or, at least, not yet.

The Maine Legislature has repeatedly considered Maliseet Tribal proposals to authorize tribal gaming such as House Paper 838, Legislative Document 1201, "An Act to Authorize Tribal Gaming" and House Paper 999, Legislative Document 1447, "An Act to Recognize and Provide for the Right of the Houlton Band of Maliseet Indians to Operate a Casino on Houlton Band Trust Land Exempt from Certain Gaming Laws", but these proposals, among several other such tribal gaming proposals, failed to obtain passage and authorization by the Maine State Legislature.

On the other hand, this same State Legislature prefers to authorize and regulate non-tribal casinos, including the operation of table games and slot machines, pursuant to 8 M.R.S. chapter 31; prefers to authorize and regulate betting on harness racing pursuant to 8 M.R.S. chapter 11; and authorizes and regulates a lucrative state lottery pursuant to 8 M.R.S. chapter 14-A. All of which create much needed jobs and significant tax revenue to the State for it's essential

programs and services, which, for the most part, the tribes do not have funding access for essential tribal programs and on-reserve, tribal services, which is obviously unfair, discriminatory or worse.

This situation is not only unacceptable, it's also illegal according to a plain reading of the *Cabazon* ruling by the United States Supreme Court.

Furthermore, this situation, this reluctance to immediately recognize our historical reliance on tribal gaming as an important and continuing element of our economic culture and to immediately accommodate our modern-day strategic plan to pay for critical tribal government programs and services, including health and housing, must end, and this Question is one way by which that can happen sooner rather than later, and without expending any more time, energy and cost.

The current position of the State of Maine is that horse track operators in Maine, off-track betting operators and the currently licensed casinos attempt to argue that their operations are good for the Maine economy in their communities, but then seem to say that gaming operations by our tribe should not be permitted, or should not be permitted quite yet, despite our currently having the highest mortality, morbidity, obesity and diabetes rates, highest rates of unemployment, under employment, the highest rates of homelessness per capita, prescription drug abuse, out-of-home and tribal community child protective custody placements, and resulting high rates of suicide.

Maine public media consistently reports how successful, important and lucrative the non-tribal gaming businesses are in their respective Bangor and Oxford regions.

Reports of the Maine legislature contained in the public hearing records also indicate the same economic potential is possible with a Maliseet Tribal casino in Aroostook County. The Office of Fiscal Policy analyzed the proposed Maliseet Tribal Casino and projected it could, because of the Canadian market adjacent to the northern Maine border region, generate $194 million in gross annual gaming revenues. Other studies project the tribal casino could generate from between 80 and 120 critically needed jobs; jobs that will provide much needed revenue to both tribal and non-tribal members in the Aroostook region that will not be created without the establishment of this business proposal.

It is also a fact that the idea of a Maliseet tribal casino in Aroostook County has the unanimous support of both municipal and county governments, including the Council of the Town of Houlton and the Aroostook County Commission.

The revenues provided to the Houlton Band of Maliseet Indians by tribal gaming will ensure tribal self-sufficiency and self-determination and will be used by the tribal government for critical social and health programs vital to the well-being of tribal members including reducing chronically high rates of

unemployment, depression and mortality and providing services such as health care, elder care, housing and education.

The Supreme Court of the United States decided in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) that state and local governments do not have the authority to regulate gambling on Indian land if a form of gaming is legal in a state, then Indian Reservations may engage in that form of gaming.

The 128th Maine Legislature, by majority vote of the House of Representatives of House Order 72, passed the Resolve before adjourning "sine die" with the understanding that the Question would continue to represent an important question of law and continue to represent "a solemn occasion", and that this Question, if allowed to remain unresolved, would further exacerbate the depressed economic situation of the tribe, the deteriorating State and Tribal relationship, and further confound this legislature and future Maine Legislatures.

SUMMARY OF THE ARGUMENT

The Question presented represents a "solemn occasion" under Maine law. There exists an issue of "live gravity" before this and future Maine Legislatures. Due to existing circumstances, the Justices can and should set aside doubts as to whether this Request constitutes an appropriate occasion for an advisory opinion in light of such circumstances, where the answer is likely not to be adverse to any private rights, and where such an answer will be directed solely to a specific

question of law of continuing importance regarding the power and authority of the Legislature to enact, resist or reject tribal gaming legislation that is intended to alleviate disparate health and economic conditions and circumstances. That the legislature adjourned intending that this Question be answered by the Maine Supreme Judicial Court and having serious doubts as to their legislative power and authority to take up tribal gaming action under the Constitution, under proposed and anticipated, future tribal gaming legislation, or under existing statutes. This Court should conclude that a "solemn occasion" exists.

LEGAL ARGUMENT

I. A Solemn Occasion exists for the Question Propounded.

1. A "solemn occasion" exists for the Question propounded for two reasons

There is, in the present circumstances, an issue of "live gravity" before the entire Maine Legislature, including the House of Representatives, as represented by the majority vote of House Order 72 that they Resolved that, "it appears to the House of Representatives of the 128th Legislature that … is an important question of law and that this is a solemn occasion." (Attachment 1) Although, where the House adjourned indefinitely, "*sine die*", which could be determined as fatal to the issue, it is no impediment in the novel circumstances of the present matter, as the House may still be, either, recalled by either the Executive or State Legislature, and the House expected and still expects this important Question be answered.

It is significant, to establishing that fact, that not a single Member of the Maine House voiced any doubt that the Question did not represent either an important question of law or a solemn occasion, and the Court should not act as a veto with respect to that subjective, majority House vote now.

The fact that the Tribal Representative, the only non-voting member in the House, sponsored the Resolve and obtained passage of House Order 72 is significant in our having first established for the House members the disparate circumstances of tribal members, the apparent application of the 1987 U.S. Supreme Court ruling in Cabazon regarding tribal gaming, and that the Question is specific as to both the common law ruling and an internal tribal gaming matter; a Question and Answer that is expected to clarify State gaming law, eliminate current legislative doubt as regards legislative powers, and that will have no legal impact on any private rights outside of Maliseet tribal lands.

2. The Question Properly Seeks an Advisory Opinion.

The Tribal Representative of the House has properly sponsored this House Order 72, which obtained majority passage by the Maine House of Representatives. While the House recognizes the separation of powers has long been held to require that the Justices decline to answer a request "made by one branch of government for an advisory opinion regarding the power, duty, or authority of another branch." The answer to the propounded question will have the

effect of clarifying the law as regards tribal gaming for the Maliseet People who are legally poised, by way of an approved Houlton Band of Maliseet Indians Tribal Gaming Resolution and by way of the act of forbearance on the part of Maine State Legislature and State law enforcement, to immediately act to develop, establish and operate a tribal casino on Maliseet Tribal lands in Aroostook County in accordance with it's duly passed and adopted Houlton Band Council Resolution, in accordance with the 1987 ruling of the U.S. Supreme Court in Cabazon, and on the Answer of the Justices. Accordingly, the Justices should answer the Question as propounded by the House so that the Tribe can finally, and without any further threat of legislative interference or judicial violence, proceed to develop its economic plan, to heal and to restore ourselves to full self-determination, self-sufficiency and to creating much needed jobs and revenue for essential tribal government programs and services that will not otherwise be funded and provided to our People by the State or the United States.

Furthermore, the Question propounded is similar to the question answered affirmatively by the U.S. Supreme Court in Cabazon. In that case, California failed to persuade the Court that Congress had granted to the State criminal jurisdiction over tribal lands within the State's borders. But, the Supreme Court agreed with the Tribe and held that because California did not prohibit gambling as a criminal act – and in fact encouraged it via the state lottery – they must be deemed regulatory in

nature, and the authority to regulate gaming activities on tribal lands fell outside those powers granted by federal law.

In Maine, Maliseet lands taken into trust once acquired … will entail some exemptions from state laws.

The Maine Indian Claims Settlement Act does not preclude the *Cabazon*, common law decision, which reinforces federal Indian policy, from applying to the benefit of the Maliseet People, especially where the State of Maine has state licensed gambling facilities, a State lottery and racetrack betting that places it squarely under the *Cabazon* rule.

In these circumstances, the Tribe is under threat of judicial violence from the State of Maine by the fact that Maine's gambling prohibitions are found in its criminal code, which the State Legislature has doubt's regarding the constitutionality of such criminal law, and such doubt arguably not only justifies the answering of the Question propounded, but also represents a defense to the enforcement of such criminal laws by way of the application of *Cabazon* in Maine.

In the oft referred to, *Passamaquoddy v. Maine*, 75 F.3d 784 (1st Cir. 1996), the federal Indian Gaming Regulatory Act (IGRA), 25 U.S.C. chapter 29, was ruled inapplicable in Maine, but that ruling said nothing about the 1987 ruling of the U.S. Supreme Court in *Cabazon*, which preceded, by one year, the federal enactment of IGRA in 1988 to give effect to the Cabazon ruling, and IGRA did

not displace *Cabazon's* application in Maine to the benefit of the Maliseet Tribe. In fact, the *Passamaquoddy* ruling is prima facia proof that Maine cannot regulate Maliseet gaming activities if these are conducted on tribal lands because *Cabazon* still applies to control the relationship between all State's and Tribes who may conduct gaming, including the State of Maine.

Because the relationship of the Tribes and State of Maine has deteriorated to it's lowest point in recent memory, that violent conflicts have erupted in our rivers and along our coast as between State law enforcement and the Tribes over jurisdictional issues involving water quality and commercial fishing resources, and that this situation is likely to both continue due to extremely poor economic conditions being experienced by the Tribes unless constitutional doubt and jurisdictional issues, as represented, in part, by the propounded Question, are immediately resolved and these present circumstances clearly, I respectfully submit, represent a "solemn occasion" upon which the Propounded Question ought to be answered by the Justices.

The 1980 Indian Claims Settlement and Implementing Acts preserve Tribal government authority and does not prohibit the application of *Cabazon*, and the Justices here should see that Supreme Court was crystal clear that the Legislature placing and keeping State gaming law in the criminal code sections does not make it a "criminal" law under *Cabazon*, which requires the total prohibition of gaming

in the State, and Maine does not criminally prohibit all gaming. It has, in effect, decided to discriminate as between winners and losers in the Maine gaming industry. The State's history to date has been to prefer non-tribal casinos over tribal casinos, which is not only unacceptable, it is clearly a form of economic marginalization that must be justly recognized, exposed and stopped to prevent further, unnecessary and unjustified economic and health related harm to the Tribes. It is said that, "Justice delayed, is justice denied". It is also true that, "Tribal economic recovery delayed, is Tribal economic recovery denied." The effect of refusing to answer the Question propounded will be "justice denied", in my respectful opinion.

CONCLUSION

Maliseets prefer to avoid conflict, protracted, costly, time and energy consuming litigation and risking further deterioration of an otherwise hopeful relationship with the governments of Maine and the United States as represented by the recent passage of House Order 72. Maliseets have repeatedly submitted tribal gaming proposals to the State that were the products of mutual cooperation, representing shared job and revenue benefits, and solemn agreements at the municipal, county and state levels without success. While at the same time we have witnessed the repeated success of lucrative non-tribal gaming proposals become licensed by and expand throughout the State of Maine. Self-determination and

planned economic development is critically vital to address serious economic marginalization and resulting, chronic health conditions in the Tribe, but this has been, ultimately, inconsistently and arbitrarily denied, all of which is a matter of legislative record. Reasons for such denials include holding out for more money for the State, to protect the existing casino profit margins, or that others, including the Tribes, must wait until gaming studies have been completed or until the State first adopts a competitive bidding process for any new casino proposals. This, in my respectful opinion, has been interpreted by the tribe as code for a form of economic marginalization. On the other hand, a Maliseet Tribal Resolution authorizing gaming on Maliseet tribal trust lands specifically set aside by the United States Government for tribal gaming, though valid law, is perceived as contrary to Maine criminal law and the Tribe is under present threat of judicial violence if it were to attempt to enforce this tribal law on tribal lands in Aroostook County and begin conducting certain gaming activities. The majority of the Maine legislature has agreed and found that it appears that this is, in the existing circumstances of tribal economic hardship and that the Legislature is fully informed about as a result of public hearings on the several and various tribal gaming proposals over the past 25 years, an unacceptable situation, fraught with constitutional doubt and represents an important question and a solemn occasion. This subjective finding in House Order 72 by the Maine House of Representatives

ought not to be disturbed by an objective veto of the Justices, in my respectful opinion. I, therefore, respectfully submit that, for these reasons, the Question properly seeks an advisory opinion and the Justices should accept this submission and the majority vote of the 128th Maine House of Representatives in passing House Order 72 on behalf of current and future House Members as prima facia evidence of present, exigent circumstances warranting judicial notice and providing justification of and for the Justices to consider this an appropriate circumstance to answer the question. Furthermore, the justice should take into consideration the cited rulings of the Massachusetts Supreme Judicial Court. In each of these instances, the Commonwealth's highest court considered the solemn occasions that came before them. This provided clarity to the Massachusetts' Legislature, and thus removed the body's serious doubts. With the novel facts and issues presented, the circumstances here, I respectfully submit, ensure that the Question propounded still complies with the *Opinion of the Justices*, 2017 ME 100, 22, 162 A.3d 188 and that this evidence supports the existence of a present, "solemn occasion" as required by Article VI, section 3 of the *Maine Constitution*.

Dated October 12, 2018

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