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R. v. Bernard

Between

Her Majesty the Queen on the information of Richard Kingston,Forest Service Officer, and Joshua Bernard

[2000] N.B.J. No. 138
Case No. 12130113

New Brunswick Provincial Court
Fredericton, New Brunswick
Lordon Prov. Ct. J.
Heard: January 22, April 19-23, 26-28, May 4-6, September 13-17, 20-23, 26-30 and October 5, 1999, and January 5-6, 2000.
Judgment: April 13, 2000.
(127 paras.)

Counsel:
J.T. Keith McCormick and Pierre Castonguay, for the Crown.
Bruce Wildsmith and Henry Bear, for the accused.

LORDON PROV. CT. J.:--

FACTS

[para1] Joshua Bernard is charged with unlawfully possessing timber from Crown lands, at or near the Mullin Stream Road, in the County of Northumberland and the Province of New Brunswick, on or about the 29th day of May, 1998, contrary to Section 67(1)(c) of The Crown Lands and Forests Act.

[para2] On May 29, 1998, Robert Amos and Michael Fletcher, Forest Service Officers employed by the Department of Natural Resources and Energy of the Province of New Brunswick, set up surveillance on the Mullin Stream Road near the access road to block 60-52. The access road is some fifteen miles from the intersection of the Mullin Stream Road and the main highway at Sunny Corner, New Brunswick.

[para3] This particular area of the north central part of the Province contains the watershed of the Northwest Miramichi River and its tributaries, most notably, the north and south branches of the Sevogle River and the Little Sevogle River. It is Crown land and is licensed to Repap Inc., a pulp and paper company under The Crown Lands and Forests Act.

[para4] The officers situated themselves so that they

would be able to observe vehicular traffic to and from block 60-52 where, they believed, unauthorized harvesting was being conducted by Native persons. Somewhere between 9:30 a.m. and 10:00 a.m., Officer Amos observed a tractor-trailer, gray in color with red pin striping, approach the intersection of the access road and the Mullin Stream Road. He noted that the trailer was partially loaded with spruce logs. Officers Amos and Fletcher followed the tractor-trailer out the Mullin Stream Road as far as the Eel Ground Reserve. At that point, they returned to their office.

[para5] Another Forest Service Officer, Joe Blacquier, positioned himself in a gravel pit near McNeil Brook approximately six to seven kilometres in the Mullin Stream Road. There he watched for the return of the truck. At approximately 1:00 p.m. Officer Amos followed the same gray

truck with red pin striping from the Department Office in Sunny Corner to the Mullin Stream Road. The trailer was now empty. Officer Amos did not follow the vehicle up the road because of the dust. He did, however, have radio communication with Officer Blacquier and informed him of the truck's location. Subsequently, he joined Officer Blacquier at the pit to continue the surveillance.

[para6] At 3:22 p.m. Officers Amos and Blacquier observed the same truck returning on the Mullin Stream Road with a partial load of spruce logs. Officer Amos observed the distinctive coloring of the vehicle as well as some lettering on the side, which he subsequently learned to read, "Bernard Trucking". Officers Amos and Blacquier, in separate vehicles, followed the truck for approximately seven miles. About one kilometre from where the Mullin Stream Road intersects with the main road, they observed the truck, which had been stopped by the combined effort of the R.C.M.P. and Forest Service Officers. There, the Defendant driver was arrested for removal of timber from Crown lands without having a permit.

[para7] At the same time, officers of the Forest Services seized the Defendant's tractor-trailer along with the spruce

logs. The entire unit was transported to the City of Fredericton where Forest Service Officer Richard Kingston cut three slices or disks from different logs of the cargo for matching purposes. Officer Kingston went to block 60-52 on the Mullin Stream Road in the area where the Defendant's truck had first been observed on the morning of May 29th, 1998. He then took the three slices or disks taken from the Defendant's truck and attempted to physically match the pieces to any of the numerous fresh cut stumps in the area. Upon obtaining what he believed to be a match between one of the pieces obtained from the Defendant's truck and one of the stumps, a piece was cut from the stump for further scientific comparison.

[para8] The log sample and the stump sample were subsequently examined at the Wood Science and Technology Centre at the University of New Brunswick. After scientific

comparison, it was concluded that a log from the Defendant's truck and a stump located on block 60-52 "were at one time part of the same piece of wood". (see Exhibit C-11)

[para9] On June 2nd, 1998 in order to more precisely determine the location of the stump which matched the log from the Defendant's truck, Officer Kingston accompanied Forest

Officer Peter George S. Pinder to the area of block 60-52. Officer Pinder is trained in the operation of the Global Positioning System (G.P.S.) instrument. Officer Pinder was shown the exact location of the stump, which matched the log, and he took a number of G.P.S. readings, two of which were at that stump. The location of all G.P.S. readings recorded by Officer Pinder were given to Hilary Guimond, a licensed New Brunswick land surveyor employed by the Department of Natural Resources and Energy. The purpose was to precisely determine the location of the stump, which matched the log on the Defendant's truck.

[para10] Mr. Guimond's responsibility with the Department is to "establish and reestablish crown boundaries and to certify where areas of cut have occurred on crown land". (see transcript of January 22nd, 1999 p. 164 1.5) Mr. Guimond uses the G.P.S. readings to determine the longitude and latitude of objects in question. He obtains the readings or somebody trained by him, in this instance, Mr. Pinder.

[para11] On June 4th, 1998, Mr. Guimond received from Officer Pinder a series of nine G.P.S readings taken at various locations from the Sunny Corner National Resources and

Energy Office to block 60-52 on the Mullin Stream Road. Readings were taken at known landmarks to confirm that the G.P.S. unit was functioning properly and to confirm the accuracy of the mapping in the area. Mr. Guimond also determined, from the G.P.S. readings taken at the stump identified by Officer Kingston to Officer Pinder, that the stump was located on Crown land approximated eight kilometres from the nearest freehold property and six kilometres from the nearest Indian reserve.

[para12] The Defence's evidence clearly established that the Defendant, Joshua Bernard is of Mi'kmaq descent, a registered status Indian, and a member of the Eel Ground Band near Miramichi, New Brunswick.

[para13] Mr. Bernard acknowledged during his testimony that, on the 29th of May 1998, he was operating the tractor-trailer described by Forest Service Officers at the time and places described by them. He was hauling wood for Mr. Stephen Paul from Crown land on the Mullin Stream Road to Anderson's Mill in Miramichi. He was to be paid for the scaled volume of wood hauled as determined by the scaler at the mill. Since it was the Defendant's first time in the Mullin Stream

area, he was unfamiliar with it, but was aware that he was on

Crown land. He did not have a license or permit from the Department of Natural Resources and Energy or a sub-license from Repap Inc. authorizing the removal of any of the wood. Mr. Bernard and his brother were in partnership in the operation of the tractor-trailer. The unit had been specifically purchased for participation in the Native commercial wood harvest.

[para14] The Defendant concedes the existence of a prima facie case:

> ".. ..the Defendant acknowledges the Crown's prima facie case, that is, that he was at the time and place alleged in possession of timber that had been cut by other Indians from Crown lands without authorization from the Crown. The spruce logs in question were in the course of being transported by the Defendant for sale to Anderson's Mill in Miramichi City".
>
> (Defendant's brief page 3, para. 6)

[para15] At the very outset of the trial all parties were

aware that the Defence intended to rely on the existence of an Aboriginal or treaty right as a defence to the charge. It was also acknowledged by the Crown and the Defence that the Defendant bears the burden of proof of the existence of any treaty or Aboriginal right which would exempt him from legal responsibility for his conduct. It was therefore agreed that after the Crown's witnesses provided the factual basis for the charge, that the Defence would call its witnesses to provide the evidentiary basis in support of an Aboriginal or treaty right. The Crown would then be permitted to call evidence in reply.

[para16] Proceeding in that fashion the Court heard several weeks of expert testimony presented by the Defence and the Crown and received in evidence some 27 volumes of documentary evidence in support of the opinions expressed. The documentation was gathered from a number of sources including the Public Archives of the Provinces of Nova Scotia, New Brunswick, Prince Edward Island, of the New England States, France, Great Britain and a variety of scholarly texts.

[para17] Among the experts called by the Defence were Dr. John G. Reid and Dr. William Wicken. Dr. Reid, a Ph.D. in

History, was declared as an expert in the history of Atlantic Canada and New England entitled to give opinion evidence with respect to the relationship between the British and Aboriginal people and the acquisition of British sovereignty in the area. In addition to expressing his opinion as to when the British acquired sovereignty over present day New Brunswick, he testified in detail about the relationship between the British and Aboriginal Indians in New England during the late 17th and early 18th centuries. He related how that experience impacted the treaty process between the British, Mi'kmaq, Maliseet, and

the Passamaquoddy of Nova Scotia.

[para18] Dr. William Craig Wicken, a Ph.D. in History, was at the time of trial an Assistant Professor at York University. He was declared an expert ethnohistorian entitled to give opinion evidence with respect to Aboriginal people in eastern North America, their relationship with Europeans and their settlement of the area between 1600 and 1812. During his lengthy testimony, Dr. Wicken gave a description of Aboriginal society and its evolution during that period. He described in detail the inter-relationship between the Aboriginal particularly the Mi'kmaq, and the Europeans including the treaty making process. He focused on European colonization and

its impact on the Aboriginal societies.

[para19] The final expert called by the Defence was Stephen Augustine. He is a Mi'kmaq Indian from the Big Cove Reserve in New Brunswick. He is the hereditary Chief of Sigenigtog, one of the seven traditional Mawionis of the Mi'kmaq, encompassing the area from Tracadie, New Brunswick to Oxford Nova Scotia. He was declared as an expert in Aboriginal people of eastern North America entitled to give opinion evidence on their language, culture, customs ceremonies, and their oral history and traditions. His testimony focused on the Mi'kmaq system of knowledge, their oral history and traditions, particularly as they relate to Mi'kmaq political structure, territory, land use and occupancy and the treaty process.

[para20] In reply, the Court heard the evidence of two experts called by the Crown, Dr. Stephen Patterson and Dr. Gordon Baskerville. Dr. Patterson, also a Ph.D. in History, was declared an expert historian. He was qualified to give historical evidence on the British colonial experience in North America with emphasis on Aboriginal societies, their relationship with the British, New Brunswick and Nova Scotia

practices legislation, and policies respecting Aboriginal land and lumber. In addition to providing lengthy testimony on the treaty relationship between the British and the Aboriginal communities in ancient Nova Scotia, he provided considerable detail with respect to British land policy and early legislation.

[para21] Dr. Gordon Baskerville is a professional forester and, as such, was qualified to give expert testimony on forest management, strategic forest planning and analysis, particularly in relation to wood supply. In the late 1970's his analysis of the situation in New Brunswick forests led to the conclusion that New Brunswick was headed for a serious shortage in wood supply. As a result, a new forest management policy was adopted in the early 1980's focusing on sustainable forest, which would minimize the impact the expected shortage would have on the forest industry between 2015 and 2030.

ISSUES

[para22] The issues raised by the Crown and the Defendant are as follows:

(a) Does the Defendant have a treaty right to commercially harvest and sell forest products either individually or as part of an Aboriginal community?

(b) Does the Defendant have the right to commercially harvest and sell forest products either individually or as part of an Aboriginal community as an aspect of Aboriginal title?

(c) If such rights, referred to above, exist, have they been lawfully extinguished?

(d) Does the requirement to obtain authorization to process timber from Crown lands under sec. 67(1) of The Crown Lands and Forests Act, S.N.B., 1992, c-9, infringe a treaty or Aboriginal title right, and if so, is such infringement justifiable?

HISTORICAL CONTEXT

[para23] The Supreme Court of Canada has on numerous occasions emphasized the importance of historical and cultural context evidence in the interpretation of treaties. In R. v.

Badger, [1996] 1 S.C.R., 771 at page 798, Cory J. addressed the issue as follows:

> "...when considering a treaty, a court must take into account the context in which treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement."

And as recently as September of 1999 in R. v. Marshall, [1999] S.C.J. No. 55 at page 13, Binnie J., speaking for the majority of the Court, said.

> "...even in the context of the treaty document that purports to contain all of the terms, this Court has made clear in recent cases that extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty."

As a consequence of this principle courts are now being presented with considerable historical evidence in treaty

cases and this trial was no exception.

[para24] While there is disagreement among the experts on the significance and interpretation of the historical evidence, there was little or no disagreement among them on

the chronology of the significant historical events in the 17th and 18th centuries in eastern North America, which I will now endeavour to summarize.

[para25] History records that, according to John Cabot, in the late 1400's in the area now known as the Grand Banks, the cod were so plentiful that you could throw a basket over the side of a ship without looking and pull it back full of cod. This abundance of cod, not surprisingly, attracted many European fishermen to the area, including Basque, Spanish, Portuguese, French and English. Historians agree that this most likely accounts for the initial contact between the Europeans and the Indians of North America. By 1492, Columbus had discovered America and by 1534, Jacques Cartier had been to the Bay of Chaleur, in northern New Brunswick, where he encountered Mi'kmaq, who appeared familiar with Europeans and who had furs to trade.

[para26] The Mi'kmaq, at contact, were a hunting and fishing people, who migrated seasonally between their hunting grounds, usually inland, to the coast where they fished in the summer months. Some anthropologists have suggested that their population seemed sparse and dispersed and that a loose band structure characterized their sociopolitical organization. Others have described a more structured society. By the middle of the 18th century, Indian communities were still being identified by the island, river, bay or inlet they occupied with a chief at the head of each community. Sakamows or chiefs met as equals and there was no permanent centralized structure or overall authority.

[para27] Traditional Native culture was quick to feel the impact of European culture. The Indians were attracted to and adopted iron implements such as knives, axes, and eventually muskets, powder, and shot. In order to facilitate trade, the Indians needed to communicate with the Europeans and, as a result, in the early 1600's, we see the Mi'kmaq incorporating some Portuguese and other European words into their own language. At the same time, some Mi'kmaq had become accomplished sailors by experimenting with small sailing vessels utilized by the Europeans in the fishery and stored in

North America when they returned home with their catch.

[para28] The Indians of Acadia had been exposed to a number of European cultures for a considerable period of time. However, after the founding of Port Royal by the French in 1605 and other coastal settlements, the Indians were predominately influenced by them through their military, civil officials, missionaries and citizens. That influence would be significant.

[para29] The Mi'kmaq welcomed the French colonization process without resistance and established trade with them. They soon became, not only friends and allies of the French, but adopted their religion as well. With the spread of Christianity came inter-racial marriages between the Acadians

and the Mi'kmaq. This contributed to the allegiance of the Mi'kmaq to the French in time of war.

[para30] In the early 1600's, while settlement in Nova Scotia was sparse, major colonization was taking place in New England. Massachusetts Bay was established as a colony by the British in 1630 with a legislature empowered to make laws. By the turn of the century, Massachusetts Bay had been expanded

to include neighbouring colonies, most notably, the colony of Plymouth. The British would obtain valuable experience from their exposure to, and dealings with, the Indians of New England. This exposure would play a role in the British experience with the Mi'kmaq and Maliseet of the colony of Nova Scotia.

[para31] The colonization process was not without problems. The competing interests of the imperial European powers, particularly England and France, would not only lead to conflict between them, but with the Indians as well. In 1627, England and France were at war. The English led by the Kirke brothers, seized Quebec in 1629. In the 1630's, there was peace, but by 1654, the English led by Robert Sedgwick, began capturing some French settlements in Acadia. In 1666, England and France were at war again when the French intervened in England's war with the Netherlands. That war concluded with the signing of the Treaty of Breda in 1667, which saw the restoration of Acadia to the French. Geographic Acadia was never defined and therefore, there was some confusion as to the extent of it. The confusion over what geographic area was included in Acadia was to remain unresolved until approximately 1760. War between England and

France broke out again in the War of League of Augsburg, which was concluded by the Treaty of Ryswick in 1697.

[para32] Between 1675 and 1699, there were two major British conflicts with the Indians, the First Maine Indian War (1675-1678) involving several tribes of Sacos, Kennebecs and Penobscots and King William's War (1688-1699) involving Sacos, Kennebecs, Abenakis, Mi'kmaq, Maliseet and several other tribes. These wars produced a number of Abenaki treaties with the English, most notably, in 1678 and 1693.

[para33] In 1702 the English and the French again found themselves on opposite sides in a war, this time, the War of the Spanish Succession. This war was waged intermittently and was still in progress when the United Kingdom of Great Britain was formed by the Union of England and Scotland in 1707 and the fall of Port Royal in 1710. Port Royal was renamed Annapolis Royal by the British and, although the war was not officially over until the Treaty of Utrecht in 1713, the British immediately installed administration officials until a governor could be appointed.

[para34] In the Treaty of Utrecht, France ceded Acadia or

Nova Scotia "according to its ancient boundaries" to Britain. There is ambiguity in the English and French documentation and understanding. This left the British claiming that Acadia, "according to its ancient boundaries", included Nova Scotia, New Brunswick and eastern Maine but excluded Cape Breton and Prince Edward Island. The French, on the other hand, believed it included peninsular Nova Scotia only. Whatever its geographic boundaries, Acadia became the colony of Nova Scotia and Francis Nicholson was appointed its first governor with Annapolis Royal as the capital.

[para35] At the outset, Nova Scotia was populated mainly by Acadians and approximately 3000 Indians, 1500-2000 of which were Mi'kmaq. They were spread throughout modern-day Nova Scotia and eastern New Brunswick as far as Gaspé. The remainder comprised the Maliseet of the St. John River Valley and the Passamaquoddy on St. Croix. The British presence was very small and they were unable to establish a network of garrisons that would have placed an authority figure in the populated areas of the colony. Accordingly, until the late 1740's. they depended on the navy to carry their authority to the vast reaches of the colony.

[para36] Between 1713 and 1758 Nova Scotia was governed by a governor and council appointed by the Crown. Governor Cornwallis was instructed to create a legislature in 1749, but never did so. The governor and council had legislative as well as executive powers and the responsibility, subject to his/her Majesty's instruction and approval, to make laws and administer British policies. Most of the Crown's instructions to colonial governors were delivered by the Board of Trade, which sat in London. For the most part, the Board of Trade was a very influential body. It sat in the middle between the King and Privy Council on the one hand, and the colonial governors and councils on the other. The Board of Trade was aware of the problems and concerns of the colonial governors and could influence official British colonial policy. Since the governors had little, if any, direct contact with the government officials in London, the instructions they received from the Board of Trade for the administration of the colonies were expected to be followed. The Board of Trade's instructions were sufficient authority for doing so.

[para37] Notwithstanding that Acadia had been ceded by France to the British in the Treaty of Utrecht, the Mi'kmaq and Maliseet Indians of Nova Scotia continued their alliance

with the French. The Mi'kmaq attacked the British fishermen and their settlements and participated with the Penobscots, the Abenakis, and other northern New England tribes in Dummer's War from 1722-1725. The treaties, which concluded this war, mark the beginning of the treaty making years between the British and the Mi'kmaq of Nova Scotia. Although there has been some suggestion that there was a treaty in 1722, there is no proof of such a treaty outside of a newspaper report in December of 1722.

[para38] In the fall of 1724, Lieutenant Governor William Dummer of New England who anticipated concluding peace with the Abenakis advised the Nova Scotia governor who dispatched Major Paul Mascarene to Boston to represent the interest of Nova Scotia. Similar treaties were negotiated on behalf of the colonies of Massachusetts Bay, New Hampshire and Nova Scotia with four Abenaki delegates on behalf of the several tribes throughout the colonies. The Abenaki delegates did not have authority to bind the various tribes and the treaties had to be ratified at Casco Bay and Annapolis Royal.

[para39] Throughout the summer of 1726 three ratification documents were signed at Annapolis Royal by representatives of

various Mi'kmaq villages throughout the colony, but it appears that all Mi'kmaq villages did not sign. Some Maliseet tribes did not ratify until two years later.

[para40] The British had hoped that the Treaty of Boston of 1725, as ratified in Annapolis Royal in 1726 by some Mi'kmaq and Maliseet and in 1728 by the remaining Maliseet, would bring the Indians of Nova Scotia and the British into peaceful co-existence in order to pursue a mutual beneficial trading relationship and the colonization of Nova Scotia. It did not happen, however, because the Indians continued to trade with their allies, the French. In a large gathering of Mi'kmaq in Antigonish in the fall of 1727, many Mi'kmaq Sakamows met with the military Governor of Louisburg pledging alliance and friendship with the French. As was the traditional practice, the French bestowed gifts of powder, shot, and other items on the Indians. A short time later, a similar meeting, attended by the Mi'kmaq from the Bay of Chaleur and the Miramichi, was held at Isle St. Jean during which the Indians pledged allegiance to the French King.

[para41] Those meetings alone did not account for the failure to achieve peace. The Mi'kmaq actively pursued trade

with the French whose lavish gifts were intended to nurture friendship. The French, drawing on their long relationship with the Mi'kmaq, incited them to acts of violence against the British and they used every occasion and opportunity to discourage them from pursuing peace with the British.

[para42] When the War of the Austrian Succession broke out between France and Britain, the Mi'kmaq were true to their promise of allegiance to the French. They participated fully in the hostilities against the British, acting as scouts, providing intelligence, and participating in raids, either alone or in co-operation with French troops. The war ended in 1748 when the Treaty of Aix-La-Chapelle was signed returning Louisburg, which had been captured by the British in 1745, to France. Britain now held peninsular Nova Scotia while France had control of Cape Breton and isle St. Jean. New Brunswick, as we know it, was claimed by both. The boundary issue was, by agreement between Britain and France, referred to a commission in an attempt to resolve the issue. Although they met for five

years from 1750, nothing was resolved.

[para43] Although the British had made peace with the French, hostilities continued with the Mi'kmaq. Instigated and encouraged by the French missionaries, particularly Father La Loutre, the Mi'kmaq attacked and killed soldiers and settlers throughout Nova Scotia. Increased colonization by the British added to the tension among the British, French, and Mi'kmaq. To counter the threat of Louisburg, Halifax was founded and fortified in 1749 by General Edward Cornwallis who was appointed governor. He had arrived with the contingent of British troops and more than 2000 new settlers. The French built Fort Beauséjour at Chignecto, which they believed was the boundary of British/French territory, and the British countered with the construction of Fort Lawrence near Amherst.

[para44] Governor Cornwallis recognized that he could not send settlers into the colony under the threat of attack by hostile Mi'kmaq. He made it known that he was prepared to treat with the Indians. In the summer of 1749, three Indians arrived in Halifax and negotiated a treaty with Cornwallis. Two were Maliseet from the St. John River and the third a Mi'kmaq by the name of Pedousaghtigh from the Chignecto Band. This treaty renewed the Treaty of 1726. It was subsequently ratified at the mouth of the St. John River on the 4th of September 1799 by the Maliseet.

[para45] Any hope that Governor Cornwallis had that this process might expand into a general treaty with all Nova Scotia Indians was short-lived. Within a few days of the signing, Governor Cornwallis received a letter from the Mi'kmaq of Cape Breton and Antigonish acknowledging themselves as allies of the French. Around the same time, Cornwallis was advised that the Mi'kmaq of Chignecto, the very group he had just signed a treaty with, had attacked two vessels and killed three Englishmen. More violence followed shortly thereafter when Mi'kmaq raiding parties seized a number of sailing vessels, captured twenty Englishmen in Canso, and killed four others near Halifax. British officials would not declare war on the Mi'kmaq, because they believed such an act would recognize them as free and independent people rather than rebels. Instead, they issued a proclamation ordering all British subjects to attack and destroy all Mi'kmaq wherever found and offering a reward for anyone so doing.

[para46] Although the British were at war with the Mi'kmaq, Governor Cornwallis wanted a treaty that would work. By fall of 1751 there were some signs of peace with the Mi'kmaq. Mascarene had advised Cornwallis that some Mi'kmaq indicated a willingness to go to Halifax to negotiate a treaty. By early 1752, although no Indians arrived in Halifax, their hostilities all but ceased. This fragile peace continued through the spring and into the summer of 1752. As a result, in July Governor Cornwallis issued a proclamation forbidding hostilities against the Indians. This effectively cancelled

the 1949 Proclamation.

[para47] When Peregrine Thomas Hopson took over as Governor of Nova Scotia in 1752, he believed a formal treaty with the Mi'kmaq was in Britain's best interest. He, therefore, actively pursued them and enticed them to come to Halifax with gifts and assurances for the future. He succeeded in getting Jean-Baptiste Cope, Sakamow of the Shubenacadie Mi'kmaq and three others to sign a treaty on behalf of their band consisting of 40 men, approximately 90 to 100 people in total. This treaty is dated the 22nd of November 1752.

[para48] Governor Hopson was cautious in his assessment of the significance of the 1752 Treaty. He realized that it was a treaty with one small group of Mi'kmaq, but he was hopeful that it might encourage other groups to sign as well. However, most Mi'kmaq were angry at Cope for signing with the British. Continued hostilities with the Indians into 1753, including

Copes band at Shubenacadie, dashed any hope of a lasting peace.

[para49] Some historians have concluded that the British were correct in their belief that the French continued to use their Indian allies to make war on the British. This assured that Nova Scotia was too unstable for its successful colonization by the British. The Indians action against the British also provided the French with time to prepare for all-out-war, including the attempted relocation of the Acadians to the New Acadia they hoped to create in the disputed territory west of Fort Beauséjour in New Brunswick.

[para50] In the fall of 1753 Governor Lawrence replaced Governor Hopson. He was a colonel in the British Army and had been stationed in Halifax prior to his appointment as governor. As such, he was familiar with the British policy in Nova Scotia. When he came to power, he was committed to making peace with the Indians and in late 1753 and early 1754 some discussions took place. Trouble began between the British and the French in the Ohio Valley in 1754, which marked the beginning of the Seven-Year War, which soon spread to Nova Scotia. It became known as the French-Indian War indicative of

the Indian support of the French in all aspects of the hostilities against the British.

[para51] Early in the conflict, in June of 1755, the English defeated the French at Fort Beauséjour, which had been defended jointly by the French and the Mi'kmaq. Shortly after the fall of Beauséjour in July 1755, the French abandoned their fort at St. John.

[para52] The year 1755 also marked the beginning of the expulsion of the Acadians. It was Governor Lawrence's belief that the Acadians, in no small way, were supporting the Mi'kmaq in their efforts against the British by supplying them with provisions. It was also his belief that cattle and other

provisions from Acadian farms were finding their way to Louisburg. The British concluded that, if they were to be successful in their attempt to control this region, something had to be done about the Acadians. To the end of the war the French encountered supply problems. They had to supply the Mi'kmaq, who were fighting for them, and provide for displaced Acadians who found their way to Louisburg. In addition, they had their own troops to feed and provisions were in short supply. Many believed that the supply problem at Louisburg

interfered with the preparation for the defence of that fort by the French.

[para53] In May of 1756, because of continued acts of hostility by the Mi'kmaq against the British, and in response to the French policy of paying for British scalps, Governor Lawrence issued a proclamation stating that the Indians should be searched out and destroyed. He offered a bounty to anyone so doing.

[para54] Throughout the rest of 1757 and into the winter and spring of 1758, the war continued in Nova Scotia until the British took the French fortress at Louisburg thereby eliminating the French as a serious presence in the colony. The following year, in 1759, the British captured Quebec and, in June of 1760, Montreal.

[para55] Although the fall of Louisburg marked a significant shift in the balance of power in Nova Scotia initially it provided little incentive to the Mi'kmaq and Maliseet to seek peace with the British. However, as the news of French defeats at Quebec and later at Montreal arrived in the area, the Indians appeared more open to seek peace.

[para56] The power in Nova Scotia to negotiate treaties with the Indians remained with the governor, notwithstanding the formation of the Legislature in 1758. The Maliseet and the Passamaquoddy were the first to show interest in a treaty when they attended Fort Frederick in the fall of 1759. They took an oath of allegiance to His Majesty and promised to live in peace and friendship with the British. The Indians were encouraged by the Commander of Fort Frederick to go to Halifax to negotiate and sign a treaty. While the Maliseet and Passamaquoddy were making their way to Halifax, Roger Morris, a Mi'kmaq accompanied by four others, arrived on the 9th of January 1760 and advised the governor that they represented a large number of Mi'kmaq who were interested in peace. They were given assurance that they could return to their tribes and advise them that they would be amicably received should they return to make peace.

[para57] Before any Mi'kmaq returned, the Maliseet and Passamaquoddy arrived and negotiated with the governor a treaty, which is dated the 23rd of February 1760. This treaty incorporates and confirms the articles of submission and agreement entered into in Boston in 1725 and the Treaty of

1749 signed at Halifax. In this treaty, which became a model for the Mi'kmaq treaties, the Maliseet and Passamaquoddy agreed to trade only with the British and only at truckhouses which were to be established for that purpose. Prior to the actual signing of the treaty the Maliseet and Passamaquoddy chiefs agreed on the value of the various animal skins that they would be bringing to the truckhouses.

[para58] Around the same time the Commander of Fort Cumberland (formerly Fort Beauséjour) received two Mi'kmaq chiefs, Paul Laurent, Chief of the tribes of LaHave, and Michel Augustine, Chief of the tribe of Richibucto, who advised him that there were several tribes of Mi'kmaq prepared to make peace. They were sent on to Halifax and, after being advised of the terms of the Maliseet-Passamaquoddy Treaty, agreed to sign on similar terms.

[para59] Initially, it had been the intention of the British to prepare treaties and have all Mi'kmaq Sakamows attend at a general treaty signing. It quickly became apparent that a general treaty signing would not be possible given the number of tribes and chiefs and the fact that the Mi'kmaq were largely dispersed people. Each Sakamow was to be treated with

separately as he presented himself in Halifax. On March the 10th, 1760 three separate treaties were made with Paul Laurent, Chief of the tribe of La Have, Michel Augustine, Chief of the tribe of Richibucto, and Claude Renee, Chief of the tribe of Shubenacadie and Musquodobiot.

[para60] In the spring of 1760 a large number of Mi'kmaq Sakamows began arriving at Fort Cumberland where the fort's commander. Colonel Frye, took their submissions to the British King, for themselves and their tribes, before sending them on to Halifax where Governor Lawrence would make the treaties. Included in the group, numbering fifteen or more, was the Sakamow of the Miramichi tribe, Louis Francis. By the fall of 1760, General Whitmore, Commanding Officer of Louisburg, was receiving some Indians who stated they were interested in making peace with the British. Whitmore described them as "naked and starving". He supplied them with provisions including arms and shot and encouraged them to proceed to Halifax to sign a treaty. However, it was not until June of 1761 that any of these Indians made it to Halifax. By then, Governor Lawrence, who died in October of 1760, had been succeeded by the absent Governor Ellis, whose duties in Nova Scotia were carried out by Chief Justice Jonathan Belcher as

Lieutenant Governor.

[para61] In June of 1761, four Mi'kmaq Sakamows, representing the tribes at Miramichi, Shediac Pokemouche and Cape Breton, were in Halifax to sign treaties. They attended at Governor Belcher's farm on the 25th of June 1861 where each Sakamow signed separate similar treaties. Annexed hereto as Appendix 1 is a transcribed copy of the complete text of that

treaty [Quicklaw note: The appendices are in preparation and will be added when available].

[para62] An important aspect of these treaties was the provision for the establishment of truckhouses where the Mi'kmaq were required to conduct any trading. The truckhouse concept originated in New England in an attempt to regulate trade with the Indians and in recognition that trade and peace were closely allied. Six truckhouses were established and quickly reduced to three when the government realized they were far too costly to maintain. Within a period of several years they were eliminated altogether.

[para63] By the end of 1761, with additional treaties being signed in October and November, all bands or communities

of Mi'kmaq, Maliseet, and Passamaquoddy in Nova Scotia had signed treaties with the British.

[para64] With peace came more colonists and their need for places to settle. There was also concern that colonial governors, who were granting land in colonies with vague western boundaries, might grant land to settlers where Native people were living or utilizing. Nova Scotia had a vague boundary with the New France. It was one of the colonies that received royal instructions enjoining it from making grants of land boarding on their colony. As a result, Governor Belcher issued a proclamation on May 4th, 1762. Belcher's Proclamation enjoined "all persons to avoid all molestation of the said Indians in their said Claims, till His Majesty's pleasure in this behalf shall be signified." (included as Appendix II)

[para65] In the early 1760's, the settlement of land vacated by the Acadians and the wild and unoccupied land in Nova Scotia proceeded uneventfully for the most part. Such was not the case in other colonies, particularly New York and South Carolina. There, some grants of land interfered with lands of the Mohawk and Iroquois, which were protected by treaty. This provided the background to the Royal Proclamation

issued on October 7, 1763 reserving large tracts of land for Aboriginal people. (included as Appendix III)

[para66] Although hostilities had ceased in Nova Scotia by 1760, the Treaty of Paris, officially ending the war between France and Great Britain, was not concluded until 1753. In that Treaty the French ceded Isle Royal and Isle St. Jean to the British to become part of Nova Scotia. They also ceded vast tracts of land throughout North America. Subsequent to the Royal Proclamation and the Treaty of Paris there was a plan for the management of Indian affairs, particularly in relation to trade, drawn up in London. It became the guidelines for the administration of Aboriginal relations in the New World.

[para67] The American Revolutionary War broke out in 1775 and, when France intervened on the side of the Americans in

1778, England and France were back at war. The French prepared a letter directed to the Native people of Acadia to join them and the Americans in the fight against the British. As a result, some Native leaders met with American military leaders and that contact or letter may have prompted some of the Mi'kmaq in the Miramichi to rebel against British authority by

attacking settlers. A British naval ship was sent to the area and with the assistance of Mi'kmaq who remained loyal to the Crown, the leaders of the rebellion were arrested and the situation was stabilized. As a result of the uprising, a treaty was made with the East Coast Mi'kmaq, including the Miramichi tribe, at Windsor on the 22nd of September 1779. This was the final treaty made between the British and the Indians of Nova Scotia. It ratified treaties made with the late Governor Lawrence or his successors, which would include the Treaties of 1760-1761. (A copy of this Treaty is annexed hereto as Appendix IV.)

[para68] Although there were no further formal treaties after 1779, the establishment of amicable relations between the Indians and the government opened the door for discussions. These discussions led to agreements between the parties, some with respect to land.

[para69] In keeping with the official policy to populate the colony, in 1783-1784 approximately 15,000 Loyalists arrived looking for land. The governor and council had a policy and procedure for granting land, which protected land occupied or utilized by Indians from being granted. Requests

by Indians for land during the same period saw the issuance of some twelve licenses of occupation including one to the Mi'kmaq of Miramichi consisting of 20,000 acres at the confluence of the Northwest Miramichi and the Little Southwest Miramichi Rivers.

[para70] New Brunswick became autonomous in 1784 and continued to set aside land for its Indians in keeping with the established policy. Land reservations in New Brunswick were considered quite generous and adequate, the reservation of land for the Miramichi Mi'kmaq being almost equal to land reserved for all Nova Scotia Mi'kmaq.

[para71] After New Brunswick was formed, the governor and council continued to administer Indian affairs notwithstanding that there was a legislature. By the 1840's authority had gradually shifted to the legislature which began to enact legislation to regulate the fishing as well as Crown land.

ANALYSIS

Treaty Right

[para72] The decision of the Supreme Court of Canada, in R. v. Donald Marshall Jr., [1999] S.C.J. No. 55 (Marshall 1) on the 17th of September 1999, and R. v. Donald Marshall Jr.,

[1999] S.C.J. No. 66 (Marshall 2) on the 17th of November 1999, has resolved many of the issues raised in this case, particularly the existence and origin of a right to trade and the nature and extent of that right enjoyed by Indians in New Brunswick. In Marshall 1 at paragraph 56 Binnie, J., speaking for the majority of the Court, said:

> "My view is that the surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the Badger test."

In Marshall 2, by way of explanation of its decision in Marshall 1, the court said in paragraph 17:

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

[para73] As a result of Marshall, the one treaty issue left to be decided is whether commercial harvesting of wood products is an evolution of traditional Miramichi Mi'kmaq gathering activities and, therefore, protected by a treaty right entrenched in sec. 35 of the Constitution Act, 1982.

[para74] On the evidence before me, I am satisfied that the Defendant knowingly participated in a commercial logging operation. The use of mechanical harvesters and large pulp trucks with prentice loaders and the transportation of saw

logs to a sawmill are consistent with a commercial logging operation.

[para75] As a member of the Eel Ground Band of Mi'kmaq, the Defendant claims a treaty right to participate in that commercial operation. The Mi'kmaq in Nova Scotia can trace their first treaty experience with the British back to 1725 when the Treaty of Boston was signed. It was to be ratified in Annapolis Royal by Nova Scotia Mi'kmaq. In 1726 many tribes did so. However, there is no evidence before me that the Miramichi Mi'kmaq ever ratified that treaty, nor were they signatories to treaties made by some Mi'kmaq in 1749 and 1752.

There is clear evidence, however, that the Miramichi Mi'kmaq were represented at Belcher's farm in 1761 and signed a treaty with the British, separate but similar, to other treaties signed at the same time. These treaties were stand-alone treaties which did not renew previous treaties but which contained some similar provisions.

[para76] Following a rebellion in 1779 by some Miramichi Mi'kmaq, a treaty was signed at Windsor on behalf of the Miramichi Mi'kmaq, which renewed and ratified the 1761 Treaty. Having considered the voluminous evidence, I find these

treaties to be valid subsisting treaties encompassing the Eel Ground Band of Mi'kmaq as one of the several Miramichi bands.

[para77] The trade clause in the 1761 treaty states that:

> "...we will not Traffick, Barter or Exchange any Commodities in any manner, but with such person or the Managers of such Truckhouses as shall be appointed or established by his Majesty's Governor at Fort Cumberland or elsewhere in Nova Scotia."

In 1779 the treaty provided an opportunity to trade as follows:

> "That immediate measures shall be taken to cause Traders to supply them with ammunition Clothing and other necessary Stores in exchange for their Furs and other Commoditys."

[para78] In interpreting treaties a number of principles have been established by the Supreme Court of Canada and they have been succinctly set out by McLachlin J. in Marshall 1 at paragraph 78 as follows:

1. "Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: R. v. Sundown, [1999] 1 S.C.R. 393, at para. 24; R. v. Badger, [1996] 1 S.C.R. 771, at para. 78; R. v. Sioui, [1990] 1 S.C.R. 1025, at p. 1043; Simon v. The Queen, [1985] 2 S.C.R. 387, at p. 404. See also: J. [Saké j] Youngblood Henderson, "Interpreting Sui Generis Treaties" (1997), 36 Alta, L. Rev. 46; L.I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test" (1997), 36 Alta. Law Rev. 149.

2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories; Simon, supra, at p. 402; Sioui, supra, at p. 1035; Badger, supra, at para. 52.

3. The goal of treaty interpretation is to choose from among the various possible interpretations of common

intention the one which best reconciles the interests of both parties at the time the treaty was signed; Sioui, supra, at pp. 1068 and 1069.

4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: Badger, supra, at para. 41;

5. In determining the signatories' respective understanding and intentions, the Court must be sensitive to the unique cultural and linguistic differences between the parties; Badger, supra, at paras. 52-54; R. v. Horseman, [1990] 1 S.C.R. 901, at p. 907.

6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time; Badger, supra, at para. 53 et seq.; Nowegijick v. The Queen, [1983] 1 S.C.R. 29, at p. 36.

7. A technical or contractual interpretation of treaty wording should be avoided: Badger, supra; Horseman, supra; Nowegijick supra.

8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic; Badger, supra, at para. 76; Sioui, supra, at p. 1069; Horseman, supra, at p. 908.

9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: Sundown, supra, at para. 32; Simon, supra, at p. 402."

[para79] A considerable amount of evidence was presented to the court on the significance of Mi'kmaq culture and language and how it affected the treaty process. In my deliberations I have considered the culture and oral traditions of the Mi'kmaq as described by Chief Augustine. However, the misgivings he expressed about the ability of the Mi'kmaq to understand and appreciate the language used in treaty negotiation and the treaties themselves are, in my opinion, contrary to the historical reality. The Mi'kmaq had by 1791 in excess of 250 years of contact with Europeans and a demonstrated ability to communicate with them. They enjoyed a long alliance and friendship with the French military, missionaries and the Acadians. That relationship resulted in some members of the Mi'kmaq communities acquiring the ability to speak French. Some Frenchmen also learned to speak Mi'kmaq,

most notably their long time friend and counsellor, Father Maillard. He was well known to the British and had on several occasions approached them on behalf of the Mi'kmaq. Because of his friendship with the Mi'kmaq and his ability to communicate with them in their own language as well as French and English he was retained by the British as an interpreter and, as such, interpreted several of the treaties to the Mi'kmaq. Additionally, in their negotiations with the British, the Mi'kmaq utilized Paul Laurent, a well know Mi'kmaq Sakamow who had become fluent in English as a result of being exposed to the British in Boston. Finally the Mi'kmaq had an extensive treaty making history with the British dating back to the 1720's. They were also aware of the treaty language and processes involving the British and other tribes as far back as the late 1600's. I have concluded that language would have posed no difficulty in the ability of the Mi'kmaq to

understand and appreciate the written documents as well as the oral representations made prior to, or after, the treaties were signed.

[para80] From an historical perspective, the 1760-1761 Treaties with the Mi'kmaq came at the conclusion of close to three decades of intermittent hostilities. Their allies, the French, were no longer a factor in Nova Scotia. With the fall of Quebec and Montreal, there was little hope for the return of the French. With the Acadians largely displaced, the Mi'kmaq had no source of European goods and provisions except the British. During the war years they had given up their traditional ways and had grown dependent on the French for provisions. They had grown accustomed to having firearms and ammunition. The British recognized that the successful colonization of the region depended on peace with the Mi'kmaq and for years attempted to negotiate a lasting peace. The Mi'kmaq were, at the time of the treaties, a people with a long history of trade with Europeans and, except during time of war, were largely faithful to their hunting, fishing and gathering ways. But now they were destitute "naked and starving", according to the British Commander at Fort Louisburg, and they came to Halifax prepared "to yield

ourselves up to you without requiring any Terms on our part". (Exhibit C-38 Tab 126).

[para81] In Marshall 2, the Supreme Court of Canada considered the word "gathering" and at paragraphs 19 and 20 had this to say:

> "19 ...Equally, it will be open to an accused in future cases to try to show that the treaty right was intended in 1760 by both sides to include access to resources other than fish, wildlife and traditionally gathered things such as fruits and berries. The word "gathering" in the September 17, 1999 majority judgment was used in connection with the types of the resources traditionally "gathered" in an aboriginal economy and which were thus reasonably in the contemplation of the parties to the

> 1760-61 treaties. While treaty rights are capable of evolution within limits, as discussed below, their subject matter (absent a new agreement) cannot be wholly transformed. ...This extended interpretation of "gathering" is not dealt with in the September 17, 1999 majority judgment, and negotiations with respect to such resources as logging, minerals or offshore natural gas
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> deposits would be beyond the subject matter of this appeal.
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> 20 The September 17, 1999 majority judgment did not rule that the appellant had established a treaty right "to gather" anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower. No evidence was drawn to our attention, nor was any argument made in the course of this appeal, that trace in logging or minerals, or the exploitation of off-shore natural gas deposits, was in the contemplation of either or both parties to the 1760 treaty; nor was the argument made that exploitation of such resources could be considered a logical evolution of treaty rights to fish and wildlife or to the type of things traditionally "gathered" by the Mikmaq in a 1760 aboriginal lifestyle. It is of course open to native communities to assert broader treaty rights in that regard, but if so, the basis for such a claim will have to be established in proceedings where the issue is squarely raised on proper historical evidence, as was done in this case in relation to fish and wildlife. Other resources were simply not addressed by the parties, and
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> therefore not addressed by the Court in its September 17, 1999 majority judgment. As acknowledged by the Union of New Brunswick Indians in opposition to the Coalition's motion, "there are cases wending their way through the lower courts dealing specifically with some of these potential issues such as cutting timber on Crown lands"."

[para82] A close examination of the oral testimony, the documentation, and articles submitted confirms that the Mi'kmaq brought a variety of items to trade although the principal one was furs. In the thousands of pages of documents submitted, including diaries of French and English explorers and traders, Legislation of colonial government, Board of Trade correspondence, price lists collateral to the treaty, and excerpts of the scholarly texts, items that were subject to trade, other than furs, received very little attention. With respect to the Mi'kmaq' oral history and tradition, Chief Augustine testified as follows:

> "Q. All right. Is there anything in the oral tradition about what kinds of items were traded or supplied by the Mi'kmaq to the British as what were the things that were traded?

A. Like I said earlier, butter.

Q. I meant going from the Mi'kmaq to the British, not from the British to the Mi'kmaq.

A. From the Mi'kmaq, yes. There was a demand for beaver - beaver pelts, moose hides, bear hides, caribou hides, mink, muskrat. And I would imagine a bit of rabbit fur. Because we use rabbit fur quite extensively.

Q. Anything that's not related to animals?

A. There were some trade of canoes, toboggans, modes of travel, I guess. Snowshoes would be included in there. Because the British and the Europeans wanted to use these equipment to travel through the winter on the ice and the snow, and the toboggans. And the Mi'kmaq exchanged these. There would have been some fish as well, I mean, fish involved, some salmon, as a trade. And an occasional sturgeon" (see transcript of September 14th, 1999, pages 55-56).

All of which lead me to conclude that the primary focus of trade between the Mi'kmaq and the British was peltry.

[para83] In addition to snowshoes and toboggans mentioned by Chief Augustine, a review of the evidence confirms that a number of non-animal items were gathered and utilized by the Mi'kmaq and occasionally traded with the British. The Mi'kmaq made bows from maple, arrows from cedar birch bark baskets, canoes of birch bark, spruce resin for the seams spruce for wigwam frames, medicines from a variety of plants, lances, spears and dishes all made with a variety of wood products. This list is not intended to be exhaustive but illustrative of the utilization of a wide variety of wood products gathered by the Mi'kmaq.

[para84] All the experts agreed that there was no evidence to suggest that the Mi'kmaq ever harvested and traded logs with either the British or the French. The experts' consensus was that it was probably into the 1780's before the Mi'kmaq became involved in logging, and then only, in a limited fashion as part of British operations.

[para85] The evidence convinces me that there was no traditional trade in logs and that trade in wood products produced by the Mi'kmaq such as baskets snowshoes, and canoes was secondary to fur trade and was occasional and incidental. It was well after the Treaty of Windsor in 1779 that the Mi'kmaq became participants in commercial logging. It is unlikely, therefore that the Mi'kmaq contemplated commercial logging during that treaty process a fact reluctantly conceded to by Chief Augustine during the course of his testimony. There is nothing in the documentation that would suggest that the British ever contemplated a trade with the Mi'kmaq for

other than traditionally produced products. Given the cultural and historical background, and considering the circumstances which brought the Mi'kmaq to Halifax in 1761 it is clear that the main trade item was furs and that "other commodities" would include trade in items traditionally produced as part of the Mi'kmaq culture such as the items listed in paragraph 83 above. Only such items could be in the contemplation of the parties.

[para86] In Marshall 2 the Supreme Court left the door open for the argument to be made that the exploitation of the natural resources, including logging, minerals, and natural

gas, is a "logical evolution of treaty rights" to the type of things naturally gathered. That evolutionary process is not without limits because the right cannot be "wholly transformed". The Crown argues that the items traded bore the stamp of the Mi'kmaq culture as gatherers. These items were produced for their own everyday use for medicine religious and social purposes and occasionally were traded with the British. The Defendant argues that just as the eels in the Marshall case were sold "as is" without having been processed by Mr. Marshall, and thereby acquiring the stamp of Mi'kmaq culture, Mr. Bernard, the Defendant, should be able to sell raw forest products. In order to sustain themselves the Mi'kmaq migrated from the hunting ground to the shores and the mouths of rivers in spring and summer to fish for various species of fish including eels. This process is rich in tradition for many Mi'kmaq and although Mr. Marshall did not process the eels, that fishery bears the stamp of Mi'kmaq culture.

[para87] Given the cultural and historical context in which the Treaties of 1761 and 1779 were signed by the Mi'kmaq of the Miramichi as a hunting, fishing, and gathering society, it is my opinion that to interpret the right to "gather" as a right to participate in the wholesale uncontrolled

exploitation of natural resources would "alter the terms of the treaty" and "wholly transform" the rights therein conferred. Accordingly, in the context of the limited scope of treaty rights, as set out in Marshall, there is, in my opinion no right conferred in the Miramichi treaties which would permit the removal of wood from Crown land by the Defendant as part of an unregulated commercial harvesting operation.

ABORIGINAL RIGHT

[para88] During the presentation of oral arguments counsel for the Defendant made it clear that he was not attempting to establish an Aboriginal right to trade in logs per R. v. Van der Peet [1996], 2 S.C.R. 507. I would offer no further comment on the issue other than to say that there was no evidence before me that the harvesting of logs was in any way part of the distinctive culture of the Miramichi Mi'kmaq at the time of contact.

ABORIGINAL TITLE

[para89] The Defendant relies as part of his defence on an assertion that the harvesting and possession of logs at the

locus in quo by the Miramichi Mi'kmaq is permitted as an aspect of their Aboriginal title to the area. The test for the proof of Aboriginal title is set out by the Supreme Court of Canada in Delgamuukw v. British Columbia [1997], 3 S.C.R. 1010. Chief Justice Lamer, writing for the majority, stated at paragraph 143;

> "143 In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive."

[para90] The burden of proof accordingly rests with the Defendant. The Court held that any groups asserting a claim to Aboriginal title must establish that they occupied the land at the locus in quo at the time the Crown asserted sovereignty over it. At paragraph 145 the court said:

> "145 On the other hand, in the context of aboriginal
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> title, sovereignty is the appropriate time period to consider for several reasons. First, from the theoretical standpoint, aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law. Aboriginal title is a burden on the Crown's underlying title. However, the Crown did not gain this title until it asserted sovereignty over the land in question. Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted. Second, aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact."

[para91] The experts could not agree as to when the British acquired sovereignty over the area in question. The Defence maintains that sovereignty was acquired on the signing of the Treaty of Paris in 1763, while the Crown submitted that it was acquired in 1713 with the signing of the Treaty of Utrecht. The Supreme Court of Newfoundland expressed an

opinion on what was required to establish sovereignty in de La Penha v. Newfoundland, 46 Nfld. and P.E.I.R., p. 26 at paragraph 34:

> "It is a firmly established principle of international

> law that the acquisition of sovereignty over a territory does not occur merely by making a claim, no matter how formal the manner by which such claim was made. Graphic illustrations in history books often show courageous and resolute adventures firmly entrenching a flag on some barren soil, but such act, standing alone, does not necessarily constitute taking possession of the land so depicted."

[para92] Therefore, did the British acquire sovereignty with the signing of the Treaty of Utrecht? I think not. Although France ceded Acadia "according to its ancient boundaries" to Britain, almost immediately there was a dispute as to the extent of the geographic area encompassed in that description. The French believed it was limited to peninsular Nova Scotia, while the British believed that it included peninsular Nova Scotia, New Brunswick and part of Maine. In 1713, the British had a limited presence in New Brunswick and

were unable to prohibit the French from establishing Fort Beausejour on the border between Nova Scotia and New Brunswick. The French intended to create a new Acadia west of Fort Beauséjour in the disputed area. It was not until 1755 that the British were able to defeat the French and capture Fort Beauséjour. Around the same time, the French abandoned St. John. In 1758 Louisburg fell effectively ending French military presence in Nova Scotia and New Brunswick. The British followed the French into Quebec, which they captured in 1759. With the British Navy in the coastal waters of New Brunswick, the British had control of the entire region from Halifax to Quebec. The French did not formalize this de facto control over the area by the British until the Treaty of Paris in 1763. In my opinion, the British had acquired sovereignty over the area in question by 1759 notwithstanding that the area was not formally ceded by the French until 1763.

[para93] Before I turn to an examination of the use and occupation by the Miramichi Mi'kmaq of the locus in quo at the time of the acquisition of sovereignty by the British, I want to comment on the use of the word Miramichi to describe a specific geographic area. Miramichi did not describe a particular specific geographic location until the creation of

the City of Miramichi several years ago. Miramichi has alternately been used to describe a region encompassing a large area from the headwaters of the Southwest Miramichi River at Boisetown to Tracadie on Miramichi Bay to a much smaller area in and around the former towns of Chatham and Newcastle. During the trial, Miramichi was used to describe areas varying in size but, for the most part, referred to the area encompassing the watershed of the Northwest Miramichi River to the confluence of the Little Southwest Miramichi River and down stream to the confluence of the main river. Those reading the transcript of the proceedings should be alerted to this fact.

[para94] The Defence has suggested that the Crown's

admission that the Mi'kmaq are indigenous to the Miramichi River system is an admission prima facie of Aboriginal title to the locus in quo. In my opinion, that is an unfair characterization of the admission. Crown counsel stated the admission as follows: "If it will speed things up, your Honour, the Crown will admit that the Mi'kmaq live in this area." (see transcript of April 26th, 1999 p. 126) That admission is not sufficient, in my opinion to satisfy all the elements of the test for Aboriginal title set out in paragraph

89 above. If I were to state that I am from the Miramichi, I would have provided very little information as to the location of the land I own and occupy given the extent of the Miramichi region. The admission did not "speed things up" because counsel for the Defence proceeded to call several more days of evidence on the issue which leads me to conclude that he did not interpret the admission as such.

[para95] In Delkamuukw, supra, per Mr. Justice Lamer, at paragraph 149, the Court sets out some criteria for proof of occupation:

> "...Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources: see McNeil, Common Law Aboriginal Title, at pp. 201-2. In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": Brian Slattery, "understanding Aboriginal
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> Rights", at p. 758."

[para96] On the requirement of exclusivity of the occupation the Court had this to say at paragraph 155:

> "Finally, at sovereignty, occupation must have been exclusive. The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to exclusive use and occupation of land. Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right".

And at paragraph 156:

> "...Thus, an act of trespass, if isolated would not undermine a general finding of exclusivity, if aboriginal groups intended to and attempted to enforce their exclusive occupation."

[para97] Although the Court heard considerable viva voce

evidence on the issue of the Miramichi Mi'kmaq, use and occupation of land, much of it is not supported by documentation relating specifically to the Miramichi. That problem was explained by Dr. Wicken as follows:

> "The Miramichi is not an area which is well documented in the European, I mean we have to recognize this, this is a real problem. When I pointed you to from Richard Denys 1688 census and from the other material that I've brought to your attention are, in fact, the only, to my knowledge the only documents which actually talks about population and number the area throughout the 17th and 18th century" (see transcript of 27th April, 1999 pp. 51-52)

And at page 56:

> "...we don't have this kind of fine information for the Miramichi or for any part of New Brunswick to my knowledge..."

[para98] Nevertheless we are able to get a fairly clear picture of the Miramichi Mi'kmaq community at the time of sovereignty. They like their brothers, were hunting and

fishing, gathering people who would migrate up and down the Miramichi River seasonally. Summers would find them congregated in large numbers at summer villages like Burnt Church. In winter, they moved inland particularly to the area of the confluence of the Little Southwest Miramichi and the Northwest Miramichi Rivers. Dr. Wicken testified that there was some uniqueness to the Miramichi situation in that the settlements at the confluence of the Northwest Miramichi, the Little Southwest Miramichi, and at the mouth of the Northwest Miramichi had some permanency to them. Although the Mi'kmaq continued to move about in the region as the change in circumstances warranted, Dr. Wicken explained that uniqueness as follows:

> "...one of the peculiarities of the Miramichi Mikmaq is that the area in the confluence of where Red Bank is located today as well as on that area of the Northwest Miramichi from there until the confluence of the Southwest and Northwest Miramichi there appears to be some settled population, a permanent population that inhabits that area both in spring, summer and possibly as well into the fall and then hung from the area, disperse from that area during the winter and it seems to be as a
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> result of the particular large salmon runs that are found in that area as well as the rich. Other resources that are found within that region." (see transcript of May 5th, 1999, pp. 48-49)

[para99] These areas, by sovereignty, were well established and well defined as Mi'kmaq area of occupation and are now included in the Indian reserves in Red Bank and Eel

Ground.

[para100] To what extent they would disperse from these areas and to where is uncertain. The Sevogie watershed, the area from which the Defendant was hauling wood, is not referred to specifically in the documents of the relevant period. Nevertheless. Dr. Wicken concluded that the Mi'kmaq of Miramichi:

> "...occupied the Northwest Miramichi and they would have used the Sevogle area, that this would have been an extension of their territory which they would have hunted, used, possibly camped I can't say that they definitively camped on the little Sevogle I don't know definitively." (see transcript of April 27th, 1999 p. 53)

In doing so, he admitted that there was a "degree of speculation" and that it was his "best guess". The difficulty in defining hunting territory for a particular period resulted partly from the fact, that with the influx of settlers in the 1760's, there was an increase in demand for furs and that increase demand resulted in an expanding hunting territory to meet it.

[para101] Although Chief Augustine expressed the belief that the Miramichi Mi'kmaq occupied the Sevogle area, his opinion was in conflict with much of the historical evidence. My assessment of his testimony was that he was uncertain as to when and to what extent the Miramichi Mi'kmaq might have utilized that area for their traditional activities and that it may very well have been subsequent to 1760.

[para102] The lack of documentation, specifically in relation to the Miramichi, makes it difficult to estimate the Mi'kmaq population of the area. We know that in 1688, Nicholas Denys estimated the population to be approximately 500. In 1735, French missionaries estimated it to be 300-400, and by 1766 a Nova Scotia census estimated the Cape Sables, the

Mi'kmaq, the St. Johns (Maliseet) and the passamaquoddy totalled 1500. While it is difficult to estimate with any degree of accuracy what the Miramichi Mi'kmaq population in 1759 was, the evidence indicates that it was not particularly large.

[para103] Notwithstanding that the entire geographic area of present-day New Brunswick was considered in 1759 to be the territory of either the Mi'kmaq, the Maliseet or the Passamaquoddy, it is clear from the evidence that there were vast areas of the province that were considered wild and available to be granted without interfering with any land that was occupied or used for hunting and fishing by Indians. In 1998 when the Defendant went to the area where the wood was cut it remained as undeveloped woodland.

[para104] There was no evidence to suggest that in recent

years this land was occupied or used by the Red Bank or Eel Ground Bands. Indeed, the Defendant testified that he was unfamiliar with the area and that it was his first trip there.

[para105] In 1783, there was a grant of a license of occupation of approximately 20,000 acres at Red Bank to Chief

John Julien. Dr. Patterson said these licenses of occupation "were issued to Natives for them to live where they were living or the places where they chose and to hunt and fish in the vicinity." (see transcript of September 21st, 1999 p. 110) The Red Bank license was considered very generous at the time considering the number of people in the community. It did not include the locus in quo, but there was never any suggestion by the chief or members of his tribe to suggest that it should have been. Dr. Patterson described the Red Bank license as "adequate as living space and it gave them enough living space to do traditional things in terms or hunting and fishing" (see transcript of September 21st, 1999 p. 113)

[para106] The archaeological evidence presented is of little assistance as the study conducted was concentrated on Red Bank and vicinity, in the area traditionally occupied by the Miramichi Mi'kmaq. It did not extend into the Sevogle area where the cutting was taking place.

[para107] Given the evidence before me, I cannot conclude that the land at the locus in quo was used on a regular basis for hunting and fishing. Such trips made there in 1759 would have been occasional at best. Occasional forays for hunting,

fishing and gathering are not sufficient to establish Aboriginal title in the land.

[para108] Furthermore, the evidence does not convince me that the Mi'kmaq were the only occasional visitors to the area. From the time of contact onward the Indians welcomed Europeans. Dr. Patterson described this situation as follows:

> "...I have never seen any evidence that the Mi'kmaq resisted the presence of French settlers here in New Brunswick, that they ever told them "Get out" or "You're on my land". What I see instead is an aboriginal people who culturally did not make claim to all of the land and who welcomed in their midst people who they believed they could trade with, be friends with, exchange ideas with and effectively live over the long haul with. So that in this period of contact and encounter what we see is an accommodation between native people and Europeans; that means that by the end of this period, say 1713 if we will, it's not really the end, but by that period of time the Mi'kmaq are not exclusive occupiers of territory that they once traditionally held, they are sharing it with Europeans." (see transcript of September 20th, 1999 at
>
> pp. 154-155)

Chief Augustine concurred in that assessment made by Dr. Patterson when he stated:

> "In terms of territory or the surface on land upon which we stand and share with all other living people, despite any treaties let's say that are signed or agreed to anybody who comes on those land, even non-Indian, non-Indian people who want to hunt and fish and survive and live off the land, well they have rights as well just as Bernard would have a right to go and obtain something for his living." (see transcript of September 15th, 1999 p. 122)

[para109] He went on to say that hunting territory assigned to a Mi'kmaq family was not to be considered for their exclusive use but that anyone could use it. That of course, included the Maliseet, a neighboring tribe to the west who, according to Dr. Wicken and Chief Augustine had extensive contact with the Mi'kmaq.

[para110] In Delgamuukw, supra at paragraph 156, the

Supreme Court said:

> "For example, it is important to note that exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by 'the intention and capacity to retain exclusive control' (McNeil, Common Law Aboriginal Title, supra, at p. 204). Thus, an act of trespass, if isolated, would not undermine a general finding of exclusivity, if aboriginal groups intended to and attempted to enforce their exclusive occupation."

There was no evidence of capacity to retain exclusive control and, given the vast area of land and the small population they did not have the capacity to exercise exclusive control. In addition, according to the evidence of Chief Augustine, the Mi'kmaq had neither the intent nor the desire to exercise exclusive control, which, in my opinion, is fatal to the claim for Aboriginal title.

BELCHER'S PROCLAMATION

[para111] The Defendant takes the position that the Proclamation of Governor Belcher, issued May 4th, 1762, was recognition by the British of Aboriginal title to the land described in the Proclamation. (see Appendix II). Belcher had received instruction from London, which included the direction that all of these governors, who received such an instruction, were to refrain from making grants to lands bordering on their colonies. It was Dr. Patterson's view that those instructions really had little to do with Nova Scotia, a view that on the face seems to have merit. Nevertheless, Governor Belcher, because of earlier claims by the Indians, claims which he himself did not recognized, decided to act by issuing his

Proclamation.

[para112] The Proclamation defines geographic areas from Musquodobiot to Canso, from Canso along Northumberland Strait to Miramichi, Bay of Chaleur, Gulf of St. Lawrence, and Gaspé "and so along the coast". It is silent as to whether it had any application inland.

[para113] The Proclamation provided for the removal of people who, without lawful authority, wilfully or inadvertently, found themselves on land reserved or claimed by the Indians. It went on to enjoin all persons:

> "...for the more special purpose of hunting, fowling and fishing, I do hereby strictly injoin and caution all persons to avoid all molestation of the said Indians in their said Claims, till His Majesty's pleasure in this behalf shall be signified."

[para114] There was an immediate adverse reaction throughout Nova Scotia to Belcher's Proclamation it being the belief of many, that the Proclamation was neither warranted nor authorized by the Royal Instruction. When Belcher received word of the Board of Trade's dissatisfaction he wrote to them to explain what he had done. In his letter (Exhibit C-38 Tab 139) the governor stated that he had made a return to the Indians "for a Common right to the Sea Coast from Cape Fronsac onwards for Fishing without disturbance or Opposition by any of His Majesty's Subjects." He went on to assure the Board of Trade that it was only temporary "till His Majesty's pleasure should be signified".

[para115] It certainly wasn't very long before His Majesty's pleasure was signified by the Board of Trade. In a very strong-worded letter, the Board of Trade condemned Governor Belcher for his Proclamation and signified His Majesty's "disallowance" of it. They instructed the Governor to find a way to advise the Indians of His Majesty's disallowance of their claim. This was apparently done, although there was no formal action taken to revoke the Proclamation.

[para116] Having considered all the evidence, I have concluded as follows:

(a) That in issuing his Proclamation, Belcher exceeded the authority granted in the Royal Instructions;

(b) That the Proclamation was to be temporary "until His Majesty's pleasure could be signified" a position advocated by Dr. Patterson (see transcript of the 23rd of September 1999 pp. 144-145) and Dr. Wicken. (see transcript of the 5th of May 1999 pp. 93-94);

(c) That the Proclamation provided only a "common right

to the Sea Coast". This is consistent with Belcher's explanation of what he believed he had done and is

consistent with the words of the Proclamation;

(d) That the Proclamation was limited to 'hunting, fowling and fishing" and does not purport to include the activity complained of in this instance:

(e) That, in any event, the claim was disallowed by His Majesty as signified by the Board of Trade and the Indians were advised of that decision. It is not without some significance that the Indians with Belcher's Proclamation as its basis, advanced no further claims.

[para117] I therefore conclude that Belcher's Proclamation does not afford a defence to the charge set out above.

THE ROYAL PROCLAMATION

[para118] The Royal Proclamation has been advanced as a source of Aboriginal title. In assessing its application to modern-day New Brunswick, it is important to put it into historical context. The Proclamation was the product of the development of a revised British policy to deal with the

administration of the vast new territory acquired by the British as a result of the Treaty of Paris. Included in the administration policy was a strategy to deal with the Native people.

[para119] The Board of Trade was asked by the Secretary of State to make recommendations to the Crown on the development of the new policy. The Secretary of the Board of Trade, John Pownall, made a draft report which was to form the basis of the final report by the Board of Trade to the King. An examination of that draft (Exhibit C-40, Tab 149) gives some insight into the thinking that went into the final report. Dr. Patterson summarized Pownall's thinking in part as follows:

> "This is the focus and if I can just say parenthetically here, there is no mention here of Nova Scotia. There is no mention of any part of Nova Scotia nor can I see mention of anything that has to do with Nova Scotia. The concern is with the aboriginal people of the interior." (see transcript of the 28th of September 1999, p. 7)

And at page 11:

> "So he's thinking very much in terms of this interior and I think it's important that we get that in our minds because that really is the direction that all of this early discussion points us."

[para120] It is not surprising that Pownall's thinking is reflected in the final report sent by the Board of Trade to

the King in June of 1763. (Exhibit C-40 Tab 148) In it, the Board of Trade makes a number of recommendations of significance to Nova Scotia. Firstly, the Board recommends that the focus of the new policy be on trade and the expansion of the economy of the colony by the exploitation of its resources. They identify Nova Scotia as important in terms of the fishery, furs, and its forest resource. It identifies New Brunswick as an important source of timber for masts for the Royal Navy and lumber. Secondly, the Board of Trade views the settlement of Nova Scotia as important. It identifies Nova Scotia as a settlement colony and recommends and encourages settlers in the crowed colonies of New England to relocate to Nova Scotia rather than west of the Appalachians where conflict with the interior Indians was certain. Thirdly, the Board of Trade recommends the establishment of defined western boundaries of the existing colonies. Essentially, the

jurisdiction of existing colonies should not extend beyond the Appalachian Mountains. They recommend that Nova Scotia include all the tracts of land from Cape Roziere along the Gulf of St. Lawrence, including the coast of Bay of Fundy to the Penobscot River. Isle St. Jean and Cape Breton Island would also be under the jurisdiction of Nova Scotia. Fourthly, the Board of Trade recommended the formulation of a policy for dealing with the Native people beyond those western boundaries. It suggests as a general rule, and subject to exceptions as circumstances dictate, that all land to the west, around, and to the south of the Great Lakes to the Mississippi, and south to the Gulf of Mexico, be considered Indian country open to trade, but not to grants and settlements.

[para121] The King's response to the recommendations was essentially favourable. Over the next several months through correspondence back and forth these recommendations are refined. During this time period, what initially was intended to be instructions to the governors developed into a proclamation. The issuing of the Proclamation takes on some urgency following the Pontiac uprising.

[para122] In all the discussions and correspondence

leading up to the issuance of the Proclamation, the focus is on the Indians of the interior and setting aside land for their needs. There is no discussion about the reservation of land in Nova Scotia.

[para123] When the Proclamation is published it implements many of the recommendations set out above. It defines the western boundary of Nova Scotia and attaches Isle St. Jean and Cape Breton Island to Nova Scotia. It establishes the government in Quebec, Florida, and Grenada. It defines a new Indian territory consistent with the recommendation of the Board of Trade and provides that there will be no grants or settlements in that area. The Proclamation goes on to provide as follows:

> "And whereas it is just and reasonable, and essential to

> our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. - We do therefore,
>
> with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor, or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective GovernmentS, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents of any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them."

It is this clause that is advanced as reserving land in Nova Scotia for the Mi'kmaq.

[para124] Dr. Patterson in his testimony interpreted that paragraph as follows:

> "Now the way I read this I see that they're saying governors in the established colonies won't pass patents or grant lands beyond this new boundary line nor will they attempt to interfere with any lands that have already been reserved to natives within their colonies. Unless, of course, those lands have been seeded (sic) to or purchased by us. This is talking about lands that are reserved. Lands that are already reserved. It says: Or upon any lands whatever which not have been seeded (sic) to or purchased by us as aforesaid are reserved to the said Indians or any of them. It's not saying: We're hereby reserving all the lands to them. That doesn't make sense. What it's saying is any lands which are already reserved must be respected. That's the nature of this proclamation. And I think that's supported by the draft." (see transcript of September 28, 1999, pp. 59-60)

There is no evidence that there was any reserved land in Nova Scotia up to and including 1763. They were to come some time later.

[para125] The examination of the historical evidence surrounding the issuance of the Proclamation is valuable

evidence in clearing up any ambiguity in its language. It clearly establishes that there was never any intent to reserve

land for Indians in Nova Scotia, a colony marked as a settlement colony, nor does it recognize reserved land unless reserved prior to the Proclamation. I accept as correct the interpretation of the Proclamation by Dr. Patterson as set out above.

[para126] I believe that to be the conclusion of the Court of Appeal of New Brunswick in Doe Dem. Burk v. Cormier et al. (1890), 30 N.B.R. 142 (N.B.C.A.). In Delgamuukw, supra, the Supreme Court of Canada described the Indian country as 'vast tracts of territory (including large portions of the area now comprising Ontario, Quebec and the Prairie provinces)". In Re: Labrador Boundary (1972), 2 D.L.R. 401, the Judicial Committee of the Privy Council held that the Indian country referred to in the Royal Proclamation was located around the Great Lakes in the interior of the continent. I cannot, therefore, conclude that the Royal Proclamation of 1763 provides the Defendant with a defence to the charge against him.

[para127] Having reached the conclusions that I have as set out above, I see no need to address the issues of

extinguishment or justification. Accordingly, I find the Defendant guilty as charged.

LORDON PROV. CT. J.

* * * * *

APPENDIX

[Quicklaw note: The appendices are in preparation and will be added when available.]

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