Case Name:

R. v. Marshall

Between
Her Majesty the Queen, respondent, and
Stephen Frederick Marshall, Keith Lawrence Julien, Christopher James Paul, Jason Wayne Marr, Simon Joseph Wilmont, Donald Thomas Peterson, Stephen John Knockwood, Ivan Alexander Knockwood, Leander Philip Paul, William John Nevin, Roger Allan Ward, Mike Gordon Peter-Paul, John Michael Marr, Carl Joseph Sack, Matthew Emmet Peters, Stephen John Bernard, William Gould, Camillius Alex Jr., John Allan Bernard, Peter Alexander Bernard, Eric Stephen Knockwood, Gary Hirtle, Jerry Wayne Hirtle, Edward Joseph Peter-Paul, Angus Michael Googoo, Lawrence Eric Hammond, Thomas M. Howe, Daniel Joseph Johnson, Dominic George Johnson, James Bernard Johnson, Preston MacDonald, Kenneth M. Marshall, Stephen Maurice Peter-Paul, Leon R. Robinson, Phillip F. Young, appellants

[2002] N.S.J. No. 98
2002 NSSC 57
Docket: S.H. 170568

Nova Scotia Supreme Court
Halifax, Nova Scotia
Scanlan J.

Heard: February 4-8 and 11-13, 2002.
Judgment: March 1, 2002.
(155 paras.)

Counsel:

Bruce H. Wildsmith, Q.C., Eric A. Zscheile, and Paul J. Prosper, for the appellants.
Alexander M. Cameron and William M. Delaney, for the respondent.

¶ 1 **SCANLAN J.**:— The 35 appellants were convicted on charges that at various times and at various locations in Nova Scotia they did cut or remove timber from Crown land without authorization contrary to s.29(1) of the Crown Lands Act R.S.N.S. 1987, c.144. All of the

Appellants were registered or status Mi'kmaq Indians at the time of the offences and all but one were members of Nova Scotia Mi'kmaq Indian bands. All of the essential elements of the offences were admitted in two Agreed Statements of Fact. The Appellants claim they were entitled to gather products from the forest, including the wood harvested from the Crown lands based on treaty rights or Aboriginal rights they have in relation to Crown land.

Summary of Provincial Court Proceedings:

¶ 2 The trial in Provincial Court took place over a period of approximately 18 months, July 1999 to December 2000. The proceedings were substantial, both in terms of time and materials presented to the court. The transcript of the trial is in excess of 9,000 pages and I am told the exhibits are in excess of 25,000 pages. The Learned Trial Judge rendered his decision on March 8, 2001. The Learned Trial Judge ruled that the Appellants, did not have Aboriginal title or Aboriginal rights which would permit them to remove timber from any of the cutting sites. He also held that they did not have a treaty right which entitled them to cut timber at the sites in question. All of the accused were convicted. I will return to a more detailed analysis of the Trial Court decision.

¶ 3 I intend to deal with the issues before this court as follows:

a) general principles governing appeal proceedings.

b) principles of judicial caution with respect to findings of historical fact.

c) treaty rights of Mi'kmaq in Nova Scotia.

d) Aboriginal rights and title as relates to Crown lands and timber in Nova Scotia.

e) The Royal Proclamation of October 7, 1763.

General principles governing appeals:

¶ 4 An appeal court must re-examine and to some extent re-weigh and consider the effect of the evidence. (R. v. Yebes [1987], 2 S.C.R. 168 as affirmed and commented upon in R. v. Biniaris [2000] 1 S.C.R. The question for an appellate court is whether the verdict is unreasonable. The function of the Court on appeal is not to substitute itself for the jury or the trier of fact but to decide whether the verdict is one that a properly instructed jury (or trier of fact) acting judicially, could have reasonably rendered.

¶ 5 An appeal court must show a great deference to findings of credibility at trial. This deference has been expressed in terms of a "palpable and overriding error" test which was discussed in Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010 and in R. v. Van der Peet [1996] 2 S.C.R. 507. In his decision the Trial Judge stated several conclusions. It is the task of this court to determine whether those conclusions are reasonably supported by the evidence. This court is cognizant of the deference that must be given to the trial court and I apply the tests and standards as referred to in Yebes as referred to in Delgamuukw and Van der Peet. I point out as well that the court is cognizant of the fact that the standard of review applies not to individual portions of the evidence but to the evidence when considered as a whole.

Note of Judicial caution with respect to findings of historical fact:

¶ 6 During the trial the trial judge ruled that he was bound by the findings in earlier decisions which suggested that all Mi'kmaq bands in Nova Scotia had signed treaties in 1760-1761 which I will refer to as "the Halifax Treaties" (pages 5799 - 5803 trial transcript). He stated (p. 5803) "What I can't do, it seems to me, is hear evidence that, for example, there wasn't a treaty applicable to all the Mi'kmaqs in Nova Scotia." I am satisfied that it would be wrong in law to accept that ruling by the Learned Trial Judge.

¶ 7 At trial the Appellants referred to a number of cases which they suggested had determined that all Mi'kmaq bands in Nova Scotia had signed treaties. A review of those cases shows that issue was not squarely before the court in those cases. In that regard I refer to R. v. Marshall [1996] N.S.J. No. 246. There was little evidence before the Trial Judge in that case in relation to the extent or number of treaties signed throughout the province with the various bands. The federal Crown in R. v. Marshall was dealing with a single accused from Cape Breton. The evidence before the Trial Judge in this case and in R. v. Marshall would suggest the Cape Breton bands were represented at the Belcher's farm treaty ceremony and in that sense it was appropriate for the Crown in R. v. Marshall to acknowledge the existence of a treaty for the Cape Breton bands.

¶ 8 There is evidence in the present case to suggest that a number of other bands had also signed treaties but it is not clear that all bands had in fact signed treaties. The evidence in relation to other treaties and all other bands throughout Nova Scotia was not before the court in R. v. Marshall. In Marshall #1 [1999] 3 S.C.R. 456 the Supreme Court of Canada appears to have simply adopted the comments of Judge Embree as regards treaties throughout Nova Scotia without taking into account the absence of evidence on that point.

¶ 9 The treaty process in Nova Scotia was at the band level. There were a number of different bands throughout the province. The treaty process is important in terms of establishing rights at the time treaties were signed. Treaties were intended to be solemn agreements wherein the signatories would clearly understand they were binding themselves and their successor. The honor of the signatories is at stake. The importance of the treaty agreements is self evident in the present case. The Appellants are now calling upon the Crown to honor treaty agreements of 240 years ago. If the Appellants are correct in terms of their assertions of the rights they attained pursuant to those treaties then it may have a very substantial impact on all Crown resources in the Province of Nova Scotia. It is therefore essential that the Court first be satisfied there was a treaty with a particular band as well as the geographical area included in that treaty before imposing a burden on the Crown to fulfill the obligations of any treaty. This is an issue that should be determined based on the evidence available, not based on earlier cases in which the issue was not before the Court.

¶ 10 Many of the 1760 - 61 treaties before the court in the present case were not discovered until recent years. Historians are constantly locating old documents which shed new light on the history of Nova Scotia. This search has not ended. In the meantime it is not enough to assume that certain documents existed unless there is direct or indirect evidence to support the probable existence of those documents.

¶ 11 The Appellants suggested that to ask the Mi'kmaq to prove the existence of treaties with

all Mi'kmaq in Nova Scotia is to impose an impossible burden on the Mi'kmaq. They submit such evidence may well be lost for all time. In this regard I am cognizant of the comments of the Supreme Court of Canada in Mitchell v. M.N.R. [2001] 1 S.C.R. 911 at paragraph 27 where the court discussed the danger and inappropriateness of setting the evidentiary burden too high and thereby rendering rights illusionary. The fact that historians are still discovering documents, including a number of treaties now before the court, is suggestive of the fact that it is not impossible to locate such documents. Indeed where there is evidence to suggest a treaty existed but can no longer be located the courts have and should be prepared to accept that such a document did exist. But where there is evidence which suggests that a treaty may not have been executed by a particular band the court should not be blind to that evidence and assume the existence of a treaty.

¶ 12 The Appellants suggest there is evidence to support a finding that all Mi'kmaq had signed treaties. In this regard they refer to the fact that (p. 6923) in 1762 Governor Belcher stated treaties had been signed with all Mi'kmaq in Nova Scotia. It is important to note however that treaties could take many different forms and he could well have been referring to simple oaths of allegiance. It is not clear what Governor Belcher may have been referring to or if he even knew if all bands had indeed signed. There is evidence that could be understood as showing not all bands traveled to Halifax to sign treaties in the period 1760-61. Crown Counsel refers to Colonel Fry at Fort Cumberland, Nova Scotia, and a letter written in early 1760. He indicates that he was told that there would be a great many more Chiefs attend at Fort Cumberland for the purpose of discussing treaties. The correspondence listed fourteen such Chiefs in the ancient Province of Nova Scotia. Of the fourteen Chiefs there is no evidence of seven of them having signed a treaty. It is possible that some of the fourteen were included in treaties with other groups who did sign. In addition approximately twenty years after the 1760-1761 treaties there are references to Chiefs and bands whose names did not appear in the treaties of the 1760-1761 period.

¶ 13 The Crown notes at paragraph 81 of its brief that as many as fourteen of twenty-four bands show no evidence of a treaty in 1760. Again this point is especially important in Nova Scotia in view of the fact that treaties were signed and negotiated at the band level. Even in 1764 there were instructions issued to Nova Scotia's new Governor Wilmont. He was explicitly instructed to "endeavor to enter into a treaty with them" (see Dr. Reid's evidence, page 760). This is suggestive of the fact that in 1764 there were still bands who had not signed treaties. This is especially important in view of other evidence from Dr. Reid to the effect that throughout the 1760's the Mi'kmaq remained a military threat throughout Nova Scotia (page 1304). In 1775 Nova Scotia Governors were still being urged to enter into treaties with Mi'kmaq as evidenced by instructions to the Governors in 1775 (page 759). Other evidence is suggestive of the fact that there were treaties of submission or simple oaths of allegiance that involved no native demands or undertakings from the Crown. These were made at the various forts but as noted by Roderick MacKenzie writing from Fort Cumberland on March 28, 1761 (Exhibit 17, Volume 9, Tab 181):

> It may very probable so happen, that some of them who are most distant, may be unwilling to undertake that journey [Halifax] after coming here.

All of this evidence is suggestive of the fact that perhaps not all bands had signed treaties in 1760-1761. In the absence of agreements at the band level there may not be specific treaties with

the same terms and conditions as applied to for example the Cape Breton bands in R. v. Marshall.

¶ 14 The comments of the Court in R. v. Marshall #2 [1999] 3 S.C.R. 533 at para 17 highlight the importance of establishing band level treaties in the Province of Nova Scotia:

> In the event of another prosecution under the regulations, the Crown will (as it did in this case) have the onus of establishing the factual elements of the offence. The onus will the switch to the accused to demonstrate that he or she is a member of an aboriginal community in Canada with which one of the local treaties described in the September 17, 1999 majority judgment was made, and was engaged in the exercise of the community's collective right to hunt or fish in that community's traditional hunting and fishing grounds. The Court's majority judgment noted in para. 5 that no treaty was made by the British with the Mi'kmaq as a whole:
>
> > the British signed a series of agreements with individual Mi'kmaq communities in 1760 and 1761 intending to have them consolidated into a comprehensive Mi'kmaq treaty that was in fact never brought into existence. The British Governor in Halifax thus proceeded on the basis that local chief had no authority to promise peace and friendship on behalf of other chiefs in other communities, or to secure treaty benefits on their behalf. The treaties were local and the reciprocal benefits were local. In the absence of fresh agreements with the Crown, the exercise of the treaty 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 belong, and their exercise is limited to the purpose of obtaining from the identified resources the wherewithal to trade for "necessaries".

To ignore the issue of whether there were treaties with particular bands would render the above quoted passage meaningless.

¶ 15 The importance of restricting findings in a proceeding to the issues and evidence before the court was highlighted by Lambert J.A. in Delgamuukw v. British Columbia (1993), 104 D.L.R. (4th) 470 (B.C.C.A) where he indicated at page 696:

> My second observation is that findings of historical fact based on historical or anthropological evidence given by historians and anthropologists should, in my opinion, be given only the kind of weight that other historians or anthropologists might give to them. There are some historical facts on which all historians agree. But there are many others on which historians disagree about the historical facts or about the interpretation of the events which brought about or followed from generally accepted historical facts. It is a strange situation indeed if a trial judge, in a case such as this, can make a finding on a question of

> historical fact on the basis of the evidence of one or two historians or anthropologists, particularly if he does not believe one or more of them, with the results that the historical facts would become frozen for ever as the basis for any legal decision about entitlement to rights. Historians and anthropologists and other social scientists do not always agree with each other. Circumstances change and new raw material is discovered and interpreted. The tide of historical and anthropological scholarship could, in a few years, leave a trial judge's findings of fact stranded as forever wrong.

¶ 16 The point made by the Respondent in this regard is that; there is a division of labor between historians and courts in aboriginal rights litigation. The courts are very much dependant on the work of historians and anthropologists and the materials presented to the court by experts working in those areas. As noted by a number of the experts in the case now before the courts, historians and anthropologists are constantly uncovering new materials. These new materials offer the experts and in turn the courts new insight to events which occurred hundreds, even thousands of year ago. Courts make findings of fact based on the evidence before the court. In cases which involve historical findings of fact the court must be cautious, keeping in mind that the experts then before the court may not have the final word as to the materials available to them and upon which they formulate their opinions. In that sense findings of historical fact must be recognized as being fluid, not frozen in time. If the courts refused to accept information as discovered by historians from time to time then decisions would soon become something of a fallacy unto themselves denying what may be convincing evidence recently unearthed or discovered by historians.

¶ 17 Justice must be based on truths as revealed by the evidence not as pre-determined by cases that have gone before. It would be an injustice for the court to deny a historical fact simply because a court had on a prior occasion decided an issue based on incomplete evidence. History is not frozen in time. Historians are constantly revisiting issues based on new discoveries. Courts do not possess any special wisdom which allows the trier of facts to see beyond the evidence. They rely on the expert historians and anthropologists and the limits of their knowledge. If courts were to refuse to revisit issues based on current information it would be to suggest that historical facts are only those as determined in a court of law. In cases such as now before the court, time alone will reveal that courts do not make history they only seek to find the truth and apply the law.

¶ 18 It is implicit in any decision that involves historical findings of fact, that the finding is based on the evidence then before the court. So long as the materials available do not materially and substantially change, litigants can expect that subsequent cases will follow the reasoning as established in earlier historical cases. There is no rule of law however which requires a court to ignore or exclude evidence so as to be consistent with an earlier case which may have been decided on incomplete historical evidence. No rule of law would suggest that the trier of fact must be blind as to the evidence. If historical evidence satisfies the court that a particular historical fact has been proven then the court must decide the issue based on the evidence before it. In R. v. Marshall the issue of whether all tribes signed treaties was not decided based on evidence. The comment of the trial judge on that issue resulted from a federal Crown concession, without evidence on the point. The Trial Judge's comment flowing from that admission was in the nature of obiter based on incomplete evidence. In that sense it carries even

less weight. It should not have been the basis of a refusal by the Learned Trial Judge in the present case to consider evidence in relation to the issue. The issue should have been dealt with by the trial judge. The issue of which bands had treaties will be decided by another court on another day. It is not necessary for the purpose of this decision that the issue be decided at this time.

Characterization of the Appellants Activities:

¶ 19 It is appropriate that the court characterize the nature of the Appellants' activities before addressing whether a treaty right, or an aboriginal right has been established. (See: Mitchell v. M.N.R. and R. v. Van der Peet). There were a number of cutting sites throughout the province. The evidence suggests the Appellants were engaged in commercial logging operations with varying sizes of clear cut operations. The clear cut operations involved modern harvesting equipment capable of harvesting on a large commercial scale.

¶ 20 There was no suggestion in the evidence that the cutting in question was incidental to other activities that require wood fibre. For example there is no evidence the wood was cut as firewood, for personal use or for the manufacture of items by or for the use of local communities. The approach taken by the Appellant's counsel at trial and before this court suggests the timber was cut as part of a Mi'kmaq general effort to earn a "moderate livelihood." In this regard I refer to para. 19 of the Appellants brief where it states:

> the sole defence of the defendants is that they, as Mi'kmaq Indians, have the right to harvest, and to participate in the harvesting and sale to trees, from Crown land.

¶ 21 The Learned Trial Judge characterized the activities in question and the rights asserted by the Appellants as the right to cut timber for sale. He stated at para. 143 of the decision:

> With respect to the treaties, I am convinced that cutting timber for sale is not the modern equivalent of any right the ancestors of the defendants acquired under the treaties.

¶ 22 In addition, in his decision R. v. Marshall (2001), 191 N.S.R. (2d) 323 at paragraphs 90 through 95, Judge Curran discussed Marshall #1 and Marshall # 2. He referred to trade in timber in those passages and stated in para. 95:

> Trade in logging is not the modern equivalent or a logical evolution of Mi'kmaq use of forest resources in daily life in 1760 even if those resources sometimes were traded. Commercial logging does not bear the same relation to the traditional limited use of forest products as fishing eels or any other species in 1760. ... Using a few trees to make things for personal use or incidental trade while leaving the surrounding forests standing is not the same as demolishing entire stands of forest for sales to sawmills or pulp-mills. Whatever rights the defendants have to trade in forest products are far narrower than the activities which gave rise to these charges.

¶ 23 As I have already noted the approach taken by the Appellants is that they, as Mi'kmaq's, have a right either pursuant to treaties or aboriginal rights to gather forest products from Crown lands. The suggestion is that what the Appellants did in this case is an extension of the

Aboriginal lifestyle which included gathering roots, firewood, birch bark for canoes and housing. Counsel also referred to sap, medicines, wood utensils, poles for homes and a number of other uses for forest products. The Appellants urged this court to simply consider how essential the forest resources were to the Mi'kmaq existence and, in a general way, say that all the forest had to yield was and is a part of the Mi'kmaq subsistence tool kit.

¶ 24 The Appellants submit that it is inappropriate to attempt to characterize the nature of the right at issue, saying this type of analysis "leads us dangerously down blind alleys." I am satisfied that without such characterization the court would be proceeding blindly. How could this court answer questions such as whether the actions of the Appellants are an evolution of a traditional practice or whether the actions of the Appellants were an integral part of the Mi'kmaq culture if this court does not first define the nature of the activities now under scrutiny?

¶ 25 I refer to the case of R. v. Gladstone, [1996] 2 S.C.R. 723 where the issue before the court was whether the Heiltsuk Band in British Columbia had historically traded in herring spawn on kelp. The court (para 23) referred to the Van der Peet test and said the first step in that test is the determination of the precise nature of the claim being made. The court in Gladstone referred to historical evidence of canoes loaded with tons of herring spawn on kelp being transported by the band, to be traded with neighboring bands which did not have similar access to that resource. It was determined in Gladstone that historical exploitation of the particular resource was commercial in nature.

¶ 26 A case which perhaps is of greater assistance in terms of determining the nature of the claim at issue here is R. v. N.T.C. Smokehouse Ltd., [1996] 2 S.C.R. 672. The Court in that case distinguished the situation in Van der Peet where there was a sale of 10 salmon for $50.00, from the situation in N.T.C. Smokehouse where there was the sale of 119,000 pounds of salmon by 80 people. The Court ruled at paragraph 18 that: "would appear to be much closer to an act of commerce-- "exchange of merchandise or services, esp. on a large scale."

¶ 27 It is not always easy to distinguish between commercial versus non-commercial. The Marshall #1 and #2 cases offer little assistance by referring to the concept of "the right to earn a moderate livelihood." A very large percentage of those involved, for example, in the commercial fishery would probably suggest they only earn a moderate living. If the media is to be believed, many of those involved in the fishery operate at a loss on a regular basis. Few would argue those fishers, even if operating at a loss are not engaged in the commercial fishery. Whether or not they earn a moderate livelihood they can be involved in the commercial fishery. The same could be said of the forest industry. Even a large harvesting operation may operate at a loss, not affording a modest livelihood to those involved, but surely it would be a commercial logging operation.

¶ 28 Many people who cannot or do not earn a moderate living in the fishery and forestry sectors are involved in commercial operations. Perhaps this issue is more appropriately analyzed by considering the scale of the operations having regard not only to the income derived therefrom but also having regard to the methods used and the potential impact of the operations on the overall resource base. In the present case it is not clear what, if any, contribution the harvest operations may have made to the Appellants livelihood. They were employing modern harvesting techniques and equipment. These methods would allow for harvesting of large portions of the overall resource. This was not a matter of harvesting a few trees for band or

individual use. It, like the herring spawn in the N.T.C. Smokehouse case, was the harvest of a resource on a scale that could only be characterized as commercial. The Appellants were harvesting trees at a level indicative of an intention to sell on a commercial scale. The evidence supports the Trial Judge's characterization of the Appellants activities in the present case as commercial logging.

Treaty Rights in Nova Scotia:

¶ 29 I now turn to the issue of whether the Appellants were afforded a defence based on the terms of treaties they may have had in Nova Scotia. The importance of ancient treaties is highlighted by Section 35(1) of the Charter which states:

> The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

¶ 30 The Crown in this appeal concedes there were treaties in two of the three areas where cutting occurred but suggests the evidence does not show that the third general area was included in any treaty. The Crown invites this court on appeal to decide that issue. I am not satisfied this is the type of issue that can or should be decided at the appeal level. It is a question of fact best left to the Trial Court to be decided based on the evidence. Having said that, I am satisfied I can still deal with issues necessary to decide this case on appeal. That is because even if the Appellants can show at future trials that all defendants were included in treaties similar to those 1760-1761 Halifax Treaties before the Trial Judge, I am satisfied the decision on appeal would not be changed.

¶ 31 Because it does not affect the outcome of this decision I begin by assuming, even in the absence of evidence, that all Appellants were covered by the Halifax Treaties. I then ask whether the treaties afforded the Appellants the right to cut trees from Crown lands as they did. I make the assumption that all treaties would have similar terms. I note for example the LaHave band, Treaty of Peace and Friendship included a trade clause as follows:

> And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by his Majesty's Governor at Lunenburg or Elsewhere in Nova Scotia or Acadia.

¶ 32 In Marshall # 1 the court (para 6) noted the above clause reflected a grant to the Mi'kmaq of a positive right to "bring the products of their hunting, fishing and gathering to a truck house to trade". The court said at paragraph 4:

> In my view, the 1760 treaty does affirm the right of the Mi'kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other [page 467] gathering activities, and trading for what in 1760 was termed "necessaries".

¶ 33 In Marshall #2 the Court revisited the term "gathering" and said at paragraph 19:

> 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.

¶ 34 Judge Curran held that commercial logging activities of the Appellants was not something which the Appellants were entitled to do pursuant to the 1760 - 1761 treaties. He concluded at paragraph 95:

> Trade in logging is not the modern equivalent or a logical evolution of Mi'kmaq use of forest resources in daily life in 1760 even if those resources sometimes were traded. Commercial logging does not bear the same relation to the traditional limited use of forest products as fishing for eels today bears to fishing for eels or any other species in 1760. Fishing is fishing whether or not the boats and equipment used to do it remains the same.

¶ 35 Even though I do not necessarily follow the logic of Judge Curran's comparison where he says fishing is fishing whether or not the boats and equipment remain the same, I am satisfied that he did not err in holding that the logging operations as engaged in by the Appellants were not a logical evolution of the activities traditionally engaged in by Mi'kmaq at the time the 1760-61 treaties were entered into. Judge Curran referred to the limited use of forest resources in traditional Mi'kmaq culture and economy at paragraph 91 of his decision. He said:

> There is no doubt the Mi'kmaq in 1760 and for a long time before gathered and used forest products. They made canoes, baskets, snowshoes and toboggans. They also gathered and used forest products in making their wigwams and other dwellings. There was no direct evidence that any of those items was traded either before the 1760-61 treaties were made or during the time of the truck houses. .... witnesses said it was likely the Mi'kmaq had traded some forest-based items to the British of other Europeans at some point.

The evidence supports these findings. There was no evidence the Mi'kmaq sold or traded in timber up to the time of the treaties. Chief Augustine a Mi'kmaq Grand Chief, qualified to give expert evidence in this case (transcript page 4707) testified to the effect that the Mi'kmaq probably did not contemplate trade in logs at the time the treaties were signed. This was an opinion shared by other experts including Dr. Von Gernet and Dr. Patterson.

¶ 36 There was evidence of a fairly substantial Acadian lumber trade prior to the date of the treaties but no evidence the Mi'kmaq participated in that industry or trade prior to 1760 - 1761. There was no evidence to suggest that the British or Mi'kmaq had any expectation that the Mi'kmaq would so participate after the treaties were signed.

¶ 37 Historically, the Mi'kmaq were a maritime based society. It was noted (p. 2896) that during the ceramic period they principally resided in coastal communities. According to one expert witness in this case, David Christianson, even after Europeans arrived and the Mi'kmaq became more dependant on the fur trade, they continued to be a maritime based society. Mr. Christianson said the Mi'kmaq still (p. 2894) "...derived approximately 90 percent of subsistence from marine resources."

¶ 38 Judge Curran notes at paragraph 92:

> There is no evidence the Mi'kmaq sold or traded timber up to the time of the treaties and no reason to believe they did. They had no need to cut stands of trees for themselves. The most they needed at any one time was a few 15 or 20 foot poles for their wigwams. Trees were readily available and Europeans could cut their own.

¶ 39 Judge Curran referred to Marshall #1 and the comments of Justice Binnie at paragraph 56, noting that in Marshall #1 the substance of the treaty was not the literal promise of a truck house but a treaty right to continue to obtain necessities by hunting and fishing and by trading the products of those traditional activities subject to a restriction that can be justified under the R. v. Badger [1996] 1 S.C.R. 771 test. In Marshall #2 the Court referred to the evidence of the hunting, fishing and gathering lifestyle of the Mi'Kmaq and said at paragraph 19:

> The word "gathering" in the September 17th, 1999, adjoining judgement, was used in connection with the types of resources traditionally "gathered" in an Aboriginal economy and which were thus reasonable in the contemplation of the parties to the 1760-1761 treaties.

¶ 40 There is no doubt that commercial logging of timber may contribute to Mi'kmaq efforts to obtain necessaries. That could be said of each and every exploitable resource in the Province of Nova Scotia. Even in applying "generous" rules of interpretation to the treaties, it cannot be said that either the British or the Mi'kmaq contemplated commercial harvest of trees for trade when the treaties of 1760-1761 were signed. In saying that I keep in mind that Mi'kmaq culture was an oral culture and that they did not have an opportunity to reduce all of the terms of the agreement to writing. We only have the British version of the agreement or treaties preserved. There is nothing in the written agreement which would suggest the Mi'kmaq would be harvesting logs or timber. I also refer to evidence outside the written agreement. For many years prior to these treaties being executed, the Acadians had a fairly substantial forest industry. The extent of the Acadian involvement in the timber harvesting is evidenced by Dr. Stephen Patterson's reference to building vessels and operating sawmills at page 6426-6427. Acadians were somewhat dependant on logging as one of their means of support without Mi'kmaq involvement. Commercial timber harvest is not something the Mi'kmaq depended upon as a commercial resource at that time. There were items of incidental trade derived from the forest. This included snow shoes, toboggans, baskets, saps or sirups. These products were incidental in nature and of rather minor importance in terms of traditional Mi'kmaq economy.

¶ 41 Although it does not appear to have been much of an issue in the present case, there is little doubt the Mi'kmaq did gather firewood from the forests and that this was an essential part of their lives. There is little doubt that it would be in the reasonable contemplation of the parties that this gathering of firewood would continue. I will return to the issue of the gathering of firewood later in this decision.

¶ 42 The main commercial trade with Europeans was the fur trade and the market hunting that developed to meet the demands of the fur trade. This market hunting only marginally changed the subsistence pattern of the Mi'kmaq as they became more dependant on the chase. In that sense the present case must be distinguished from the situation which existed in Gladstone. In Gladstone the exchange of spawn and kelp was, to a large extent, a significant defining feature of

the culture and economy of the Heiltsuk people prior to contact with Europeans. Logging was not a central, significant or defining feature of the Mi'kmaq people or their economy at any time prior to contact or after contact including the period when the treaties were signed. What few items, such as birch bark canoes or other forest products they may have had to trade were but incidental contributors to their subsistence.

¶ 43 Dr. Alexander Von Gernet indicated at page 7554-55 that he was unable to find anything in pre-contact, sixteenth, seventeenth or eighteenth century Mi'kmaq practices that even remotely resembles the modern practice of logging for commercial sale. He stated that it was hard to imagine how modern practice of logging could be rooted in traditional Aboriginal practice in those earlier centuries.

¶ 44 Mi'kmaq technology would not have allowed Mi'kmaq to exploit mature timber resources as evidence by the comments of Dr. Von Gernet at page 7534-7535. He referred to the fact that stone tools could in fact cut saplings quite effectively, however they are very poor when it comes to cutting large diameter trees. He said it would take forever to try and cut a larger tree down with a stone axe. Even the wooden cooking implements were not made from live trees. I quote Dr. Von Gernet (exhibit 90, page 75):

> This [cooking] kettle was of wood, made like a huge feeding trough or a stone watering trough. To make it they took the butt of a huge tree which had fallen; they did not cut it down, nor having tools fitted for that, had they any means to transport it; they had them ready made in nearly all places to which they went.

¶ 45 All of this evidence supports a finding that it was not in the contemplation of the British or Mi'kmaq that the Treaties would give the Mi'kmaq a right to commercially harvest timber. The evidence supports the Trial Judges conclusion that trade in logs or commercial logging was not a right afforded to the Mi'kmaq under any of the known treaties of 1760-1761. If there is a right to engage in commercial logging activities it would have to be based on something other than the treaties.

ABORIGINAL RIGHTS AND ABORIGINAL TITLE

The unique history of Mi'kmaq relations with Europeans is relevant:

¶ 46 Before engaging in a detailed analysis of the law as it related to aboriginal rights and title in this case it is important to appreciate the unique history of the Mi'kmaq Indians bands vis a vis relations with the Europeans. Many cases in Canada and the United States have dealt with the issue of native rights and title. Relatively few of these cases have dealt with native groups with historical backgrounds similar to Mi'kmaq. I note for example the evidence before the trial judge suggested that Mi'kmaq have had contact with Europeans for about 500 years, perhaps even longer. Compare this for example to many of the western and northern Aboriginal peoples who may have had little or no contact with Europeans prior to the middle or end of the 19th century. Courts must be alive to those very substantial historical differences when comparing cases and factual situations across North America.

¶ 47 From the time of recorded history Mi'kmaq have lived in what we now know as Nova Scotia including Cape Breton. They also occupied the area now known as Bay of Chaleur, Prince Edward Island and New Brunswick. For a time they also occupied parts of mainland

Newfoundland. When Jacques Cartier landed on the shores of the Bay of Chaleur in 1534 he was met by 300 Mi'kmaq wanting to trade furs, a sign they were already familiar with Europeans. By 1534 there had been many years of Portuguese fishermen coming to the coasts of the Maritimes to fish. By the time Cartier arrived the Mi'kmaq had even adopted a few words from the Portuguese language into their own language. By 1575 there was regular trading between the Mi'kmaq and Europeans along the coast of Nova Scotia. The evidence suggests the European presence was substantial as indicated by the fact that by 1578 there were 10-12,000 European fisherman, largely off Newfoundland, coming to fish and whale off the east coast each summer through fall season. In the 1520's the Portuguese attempted to establish a permanent settlement in Cape Breton but it did not last.

¶ 48 Prior to the British acquiring sovereignty to any parts of Nova Scotia there were centuries long relationships between the Mi'kmaq communities and the French. This was a symbiotic relationship which the French and Mi'kmaq valued. Throughout the first half of the 16th century there is evidence that the French encouraged open hostility between the British and Mi'kmaq even at times when the French and British were not at war. This was an apparent effort to prevent the British from establishing a solid foothold or maintaining a permanent presence in Nova Scotia.

¶ 49 In the opinion of at least some of the experts at trial the Mi'kmaq understood many European concepts. This included concepts such as sovereignty, treaty processes and conquest. Mi'kmaq were able to communicate using either the French language or through French Priests who had learned the Mi'kmaq language. In the 15th and 16th century the French introduced the Mi'kmaq to their European religion. The evidence suggests this religion became a very important part of the Mi'kmaq culture by the time the British arrived.

¶ 50 Prior to contact the Mi'kmaq were a maritime dependant society depending mainly on the sea to provide their food. They spent much of their time on the coast or on rivers near the coast. Geographically Nova Scotia is a relatively small province. There are no substantial inland river or lake systems such as those found in other parts of North America. It is perhaps this lack of large inland lake and river systems which made the Mi'kmaq a largely maritime oriented society.

¶ 51 Judge Curran noted the Mi'kmaq did not have permanent homes or permanent settlements. The evidence referred to birchbark or fur covered structures. They took the coverings for these shelters with them as they moved about, quickly rebuilding a wigwam by stretching the bark or furs over small poles in a new location. As they moved from time to time they did not necessarily return to the same places from year to year. Where they went and stayed depended on the availability of resources. The Mi'kmaq knew the lands and water and what they had to offer. There was something of a pattern to their coastal movements as they followed seasonal fish spawning migrations. This coastal existence changed somewhat in the 15th, 16th and 17th century as the fur trade became more important to the Mi'kmaq.

¶ 52 There is a lack of precise evidence as to the number of Mi'kmaq. Ethno-historians called by Crown and defence put the maximum total pre-contact population at 10,000 to 20,000. That included all of present day Nova Scotia, New Brunswick and Prince Edward Island and Bay Chaleur as we know it today. By 1610 - 1613 some estimates put the total number of Mi'kmaq at 3,500 living in this same large area. This reflects a substantial population decline after the

arrival of Europeans.

¶ 53 Historical references to Nova Scotia include an area much larger than present day Nova Scotia. The population numbers for Nova Scotia as we know it today were only a fraction of the total 3,500 Mi'kmaq population in 1600. The total Mi'kmaq population in the area we now know as Nova Scotia, in 1600 and at the time of British sovereignty was probably around 1,000.

¶ 54 Population statistics are important when considering population density and degrees of possible occupation by Mi'kmaq at the time of contact and at the time of sovereignly in present day Nova Scotia. It may be somewhat surprising to many to realize there was a fairly substantial amount of census data available as regards Mi'kmaq populations in the late 15th and 16th century. Even though this data is somewhat suspect in terms of including all Mi'kmaq dispersed throughout the province, it supports the conclusion that the total population was quite small. (Exhibit 28) This evidence shows the populations for many important Mi'kmaq villages or areas. None of the important areas of Mi'kmaq use had a substantial population in the 15th and 16th century. Even allowing for missing groups, the evidence supports the finding of the trial judge that the total population was quite small.

¶ 55 The availability of muskets made it easier to hunt large game. The evidence suggests the Mi'kmaq often hunted local areas to extinction. The incidental trade in furs, which likely began with the arrival of the Portuguese then continued with Cartier in 1534, developed into a full fledged fur trade in the late 16th century and into the 17th century. This change resulted in something of a change in the Mi'kmaq way of life. By the end of the 16th century they were somewhat less dependant on the sea for their survival. Their settlement patterns changed as they seasonally moved inland in pursuit of furs. The furs were then traded for metal wares, guns, powder, shot and other European goods. It is however important to put the dependance on inland activity in context. Even at the height of the fur trade this was still a largely maritime dependant society, relying on marine resources for up to 90% of their subsistence (See transcript page 2893-2894). As noted the introduction of the musket made it easier to kill large animals such as moose for fur and meat but inland movements in pursuit of fur and game would not have lasted for more than a couple of months in spring and fall even at the height of the fur trade (pages 2885-2886).

¶ 56 None of the time spent inland was used to harvest timber. Given the land mass, it is very unlikely they could have used or occupied much of the territory at any given time.

¶ 57 The Trial Judge noted (para 81) that during the 17th century, Nicholas Denny, an important merchant of that era working in and around Cape Breton said the Mi'kmaq had left the Island of Cape Breton when moose stocks collapsed. Between 1765 and 1767 according to Samuel Holland, only four or five Mi'kmaq families resided year round on Cape Breton Island although during the summer upwards of 300 families would come to the Bras d'Or Lakes. The evidence suggests that summer subsistence in Cape Breton and elsewhere was almost entirely marine based.

¶ 58 As noted by Judge Curran at Page 4 of his decision, claims to Nova Scotia or Acadia as it was sometimes known were numerous and contradictory in the 17th century. In 1603 the King of France purported to grant at least mainland Nova Scotia to a French aristocrat. In 1621 "New Scotland" was granted to a Scot. Scottish settlers were driven out in 1632. By 1650 about 300 Acadians were living near Port Royal as farmers and cattlemen. They used dykes to drain

marshes and develop rich farm lands. Acadian farmers became important exporters of food to New England and Louisbourg.

¶ 59 The English attacked and took over Port Royal in 1654 and retained the garrison until 1670 when, pursuant to the earlier signed Treaty of Brenda (1667), they turned it back to the French. The French presence in mainland Nova Scotia ended permanently in 1713 when the French ceded the mainland of Nova Scotia to the English by the Treaty of Utrecht. It took another 45 years for the English to resolve the issue of Cape Breton and for the French to finally cede that part of Nova Scotia to the English in 1758.

¶ 60 Judge Curran noted, at page 5 of his decision, that throughout the 17th century the Mi'kmaq continued to pursue the fur trade while maintaining much of their original lifestyle. They moved from the coast following anadromous fish along the rivers and lakes to the interiors and back again with the seasons and the resources. The Mi'kmaq and the Acadians lived, for the most part a separate existence. As the Acadian population increased the native population declined.

¶ 61 It is interesting to point out in relation to population declines that there may be a very substantial difference between the impact of Europeans on Mi'kmaq population in the 17th and 18th century when compared to other native populations in North America. Recall that by then there had been European contact and trade with Mi'kmaq for hundreds of years. This as compared to native communities in central North America which may not have been exposed to Europeans or their diseases over those same centuries. Some experts during the trial suggested this is a possible explanation as to why disease may not have had as substantial or sudden an impact on Mi'kmaq populations in the 18th and 19th centuries compared to other native populations in North America in that same time frame. The experts who testified on this subject suggest there had probably been an earlier drastic depopulation probably resulting from disease reducing the 10-12,000 Mi'kmaq to around 3,000 in the early 1600-1700's.

¶ 62 The Mi'kmaq travelled their territory with ease after the arrival of Europeans. They became adept at sailing french shallops (small coastal sail boats). Even before the Europeans arrived they would likely have traveled the lakes, rivers and oceans using either small light birch bark canoes or ocean going canoes.

¶ 63 Mi'kmaq warriors were a formidable force up to the mid 18th century and it was important to the French and later the British/English to maintain peaceful relations. The French had a long relationship with the Mi'kmaq prior to the middle of the 18th century. In spite of repeated British attempts to make peace the evidence at trial indicated the Mi'kmaq did not enter into a meaningful peace until at least 1760 when the French were finally defeated in Nova Scotia. Mi'kmaq attacks on British settlers were slowing growth of British settlement of Nova Scotia. The history of 17th and 18th century Nova Scotia is summed up as being a period of prolonged struggle between the British and French wherein they were to a greater or lesser degree almost constantly maneuvering for control of the larger prize; continental North America.

¶ 64 The Mi'kmaq were more or less aligned with the French throughout most of the struggle. There were many prolonged periods of declared or undeclared hostilities between the British and the Mi'kmaq in spite of several uneasy truces, even treaties (eg. 1725 treaty). At one point, 1756, Governor Cornwallis placed a bounty on Mi'kmaq scalps in Nova Scotia.

¶ 65 Even though the British and French were not always engaged in a formal war the British claimed the French were inciting the Mi'kmaq to continue hostilities. These prolonged hostilities were not one-sided. This was not just a situation of the British just attacking the French or Mi'kmaq or vice versa. Dr. Patterson for example referred to materials in French historical records to indicate the Mi'kmaq were taking British scalps to sell to the French. (At page 5600 of the transcript) He noted that a Mr. Le Loutre in August 1753 wrote that he had to pay "1800 argent de l'Acadia" for 18 scalps which the Mi'kmaq had taken from the English in different incursions "that they have made on their establishments during the last months."

¶ 66 The 16th -18th centuries were harsh times for all peoples of Nova Scotia. All the people then living in Nova Scotia had, at one level or another, been involved in a protracted dispute that had been going on for many decades. The transcript in this case is replete with examples of unimaginable atrocities which were committed by or inflicted upon all sides. It serves no purpose in these proceedings to attempt to apportion blame for what occurred in that time period. It is enough to say that there is more than enough blame to go around and that all sides endured a harsh existence in Nova Scotia in the 16th 17th and 18th centuries.

¶ 67 The Mi'kmaq had lined up four square with the French when hostilities broke out in the late 1750's even though there had been earlier treaties between the British and Mi'kmaq. (Page 5695 transcript) By 1756 seven hundred Mi'kmaq were employed by the French in guarding the coasts of Nova Scotia. This would have been around 1/3 of the total Mi'kmaq population at the time; certainly the vast majority of fighting age males. Dr. Patterson said that in Cape Breton the percentage would have been even higher. When one considers the high percentage of the total Mi'kmaq involved in fighting with the French against the British, in many ways it could be said the Mi'kmaq shared in the defeat.

¶ 68 There were 13,000 British troops, mostly regulars, delivered to Louisbourg to take the fortress in 1758 (page 5641). The size of that invading force would no doubt, according to Dr. Patterson, have left a substantial impact on the Mi'kmaq. The invading force alone was more than six times larger than the total Mi'kmaq population. This show of British strength perhaps had a role in subsequent treaty negotiations. In the treaty negotiations of 1760-1761 the Mi'kmaq did not come with demands or conditions.

¶ 69 This was a difficult period for all inhabitants in Nova Scotia. The British were still engaged in a massive war operation to consolidate the rest of their conquests in North America. The Acadians, perhaps due to the war and drought conditions were unable to contribute as they had in the past to the local food supply. (Page 3780) The Acadians themselves were starving and the Commanding officer at the English fortress wrote in the winter of 1759 that a group of Acadians had only enough provisions to keep 2/3 of them alive until spring.

¶ 70 Even after the defeat of the French the Mi'kmaq were potentially a formidable fighting force using stealth and guerilla tactics. The evidence indicates it was important to the British that they try and establish a formal peace with the Mi'kmaq, using the 1760-1761 treaties, so they could concentrate on solidifying their holdings in all areas captured from the French. The 1760-1761 treaties were the first lasting treaties the British had been able to negotiate with the Mi'kmaq.

¶ 71 By the time the treaties of 1760-1761 were signed there was a substantial European population in Nova Scotia. The French and British had been at war from 1744 to 1748. The British took Louisbourg from the French but returned it at the end of the war. By 1758 Louisbourg had a population of about five thousand, both military and civilian French inhabitants. Other than Louisbourg and St. Peters only a few French settlers were scattered around the Island. Britain probably acquired sovereignty over Cape Breton by 1758 and they certainly did by the time of the Treaty of Paris in 1763. Three different census has shown Mi'kmaq populations in Cape Breton Island. 196 people in 1708, 107 in 1722 and 142 in 1735. The expert witness who testified at the trial suggested that those census may not have included all of the Mi'kmaq population.

¶ 72 The size of the European population is evidenced by the fact the British had expelled 12,000-15,000 Acadians from Nova Scotia after 1758. In that same period there was a concerted British effort to attract settlers to Nova Scotia and they came in numbers never before or since witnessed in this province. The Mi'kmaq understood what was occurring on the ground and they would have realized the British were settling the province in large numbers. In the late 1750's and into the 1760's Europeans (British) were settling the province at a rate they had never witnessed before or since. Mi'kmaq were, by the date of sovereignty in Cape Breton, but a small percentage of the total Nova Scotia population. It is against this background that I consider the issues of Aboriginal Mi'kmaq rights and title claims in Nova Scotia.

Legal Analysis of Aboriginal Rights and Title:

¶ 73 Section 35(1) of the Charter states:

> The existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed.

¶ 74 The Appellants through counsel take the position that they have a valid claim pursuant to Section 35 Aboriginal Treaty Rights and Aboriginal Title to all of Nova Scotia. I refer for example to page 27 of the Appellants brief on appeal where counsel for the Appellants writes:

> ...Nova Scotia was part of the 'traditional lands' of the Mi'kmaq. Or, to adopt LaForest J.'s term from the same case, (Delgamuukw) Nova Scotia is the "ancestral territory" of the Mi'kmaq. If this is so, the key question emerges: why does that not include all of present-day Nova Scotia? On what legitimate basis can one exclude Mi'kmaq Aboriginal title to all or some of Nova Scotia?

¶ 75 It is not necessary for the purpose of the appeal to determine the issue of whether a valid claim of aboriginal title or rights exists in relation to all of Nova Scotia. The evidence before the trial court was not directed to that issue. The Learned Trial Judge restricted his findings to the areas where cutting occurred. Potential claims for other areas are best left for another day. The Learned Trial Judge held that if there is a valid claim for aboriginal title, it did not include the entire province.

¶ 76 At paragraph 5 of his decision Judge Curran stated a number of conclusions:

> (a) all the defendants, except perhaps Roger Ward, are entitled to exercise whatever remains of any aboriginal title or any treaty rights the Mi'kmaq

of Nova Scotia had in the 18th century;

(b) the Mi'kmaq of mainland Nova Scotia in the 18th century likely had aboriginal title to lands around some bays and rivers, but not to any of the cutting sites;

(c) the Mi'kmaq did not have aboriginal title to any part of Cape Breton Island;

(d) 18th century Mi'kmaq might have had some claim to coastal lands from Musquodoboit to the Strait of Canso and then along the Northumberland Strait to the New Brunswick border, but those lands did not include any of the cutting sites;

(e) the Mi'kmaq treaties of 1760-61 did not establish any right of which harvesting timber for sale is the modern equivalent; and

(f) each defendant is guilty as charged.

¶ 77 Aboriginal title is an aspect of Aboriginal rights as protected under Section 35 of the Canadian Charter of Rights and Freedoms. In Delgamuukw the Supreme Court of Canada provided a modern analysis of the issue of Aboriginal title. That case dealt with lands in British Columbia. I have already noted there are vast differences in the history of Aboriginal-European relations in British Columbia verses Nova Scotia. The comments of the Court in Delgamuukw however apply to the legal analysis of Aboriginal title in Nova Scotia.

¶ 78 Aboriginal title is derived from pre-sovereignty exclusive aboriginal occupation of land. This occupation may provide a right to use and occupy land. If aboriginal title is proven then the activities permitted on those title lands is not restricted to the activities which were integral to distinctive aboriginal cultures.

¶ 79 Aboriginal rights, other than title rights, are in a different category in the sense that they do not form the basis of that broader scope of permitted activities. In this case for example, even if title to a particular parcel of land may not be proven the Court must address the issue of whether there is a narrower right established which would allow the Appellants to carry out the cutting operations as occurred in the present case. Aboriginal right to do certain activities may exist even in the absence of proof of title. See for example R. v. Adams (1996), 138 D.L.R. (4th) 657 and the R. v. Cote (1996) 138 D.L.R. (4th) 385 cases where there was a native right to fish even in areas where native title had not been established.

¶ 80 Because of the above noted distinction the Court must examine the issue of Aboriginal title separate from the issue of Aboriginal rights. Even though these are separate legal issues many of the facts relevant to one issue are applicable to both.

¶ 81 Justice Roscoe of the Nova Scotia Court of Appeal recently considered the broader concept of Aboriginal rights in R. v. Bernard 2002 N.S.C.A. She referred to a four stage analysis in assessing s. 35 rights and noted the burden of proof shifts back and forth through the four stages. At paragraph 21 Justice Roscoe referred to R. v. Sparrow, [1990] 1 S.C.R. 1075 and said the four stages each involve a number of factors to consider:

1. Was the claimant acting pursuant to an aboriginal right?

    a. How should the aboriginal right be characterized?

    b. What is the contemporary manner in which it may be exercised?

2. Was that aboriginal right extinguished before the enactment of s. 35?

    a. Is the intention of the Legislature to extinguish the aboriginal right clear and plain?

3. Does the legislation interfere with an existing aboriginal right?

    a. Is the limitation on the exercise of the aboriginal right reasonable?

    b. Does the regulation impose undue hardship?

    c. Does the legislation deny a preferred means of exercising the aboriginal right?

4. If there is prima facie interference, the investigation addresses whether there is justification for the infringement, which is determined by asking:

    a. Is there a valid legislative objective?

    b. If so, has the objective been implemented in a manner consistent with the honour of the Crown in dealing with aboriginal peoples?

    c. Has there been minimal impairment of the aboriginal right?

    d. If there has been an expropriation, has there been fair compensation?

    e. Has there been consultation with the aboriginal people?

¶ 82 In the present case the Appellants attempt to frame their case as an Aboriginal right to contribute to a moderate livelihood by harvesting trees from Crown lands. They also

suggest their Aboriginal rights included Aboriginal title to the Mi'Kmaq to all the cutting sites. I have already stated that I agree with the Trial Judge's characterization of the Appellant's activities as commercial harvest of timber.

¶ 83 The person challenging the legislation bears the onus of showing there is an aboriginal right in issue and that is has been infringed by the impugned legislation at the first and third stages. If the Crown claims extinguishment, it bears the onus of proving it. If the claimant proves infringement of the right in the third part of the test, at the last stage the Crown must meet the burden of proving justification.

¶ 84 The existence of aboriginal rights depends upon the history of the particular aboriginal community claiming the right (Vanderpeet page 318). This principle also applies to the issue of aboriginal title as noted by Hall J. in R. v. Calder [1973] S.C.R. 317. Occupancy necessary to establish Aboriginal possession is a question of fact and Aboriginal title should be determined on the facts pertinent to the band and not on a global basis. That is especially important in this case owing to the fact that Mi'kmaq were organized largely at the band level.

¶ 85 I point out again that Aboriginal rights can exist independent of Aboriginal title. That point was made clear in the sister cases of Adams and Cote. In Adams the Supreme Court said:

> While claims to Aboriginal title fall within the conceptual framework of Aboriginal rights, Aboriginal rights do not exist solely where the claim to Aboriginal title has been made out. Where an Aboriginal group has shown that a particular activity, custom or tradition taking place on the land was integral to the distinctive culture of that group, then even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land they will have demonstrated that they have an Aboriginal right to engage in that practice, custom or tradition. (page 667).

¶ 86 The existence of Aboriginal rights as a concept separate from Aboriginal title is an important factor to take into account when considering earlier cases such as Baker Lake (Hamlet) v. (Canada) Minister of Indian Affairs and Northern Development (1979) 107 D.L.R. (3d) 513. In Baker Lake the Court ruled that vast areas in the Northwest Territories were subject to the Aboriginal right and title of the Inuit. In view of Adams and Cote it is not clear that Baker Lake would have been decided as it was, given the Inuit claim was to hunt and fish in that case. It may well be that since Adams and Cote the Court would focus on the right to hunt and fish, affording those rights to the Inuit without necessarily recognizing Aboriginal title to vast tracts of land using the same evidence.

Aboriginal Title

¶ 87 I now wish the discussion to focus on the issue of Mi'kmaq title claims. In Delgamuukw Chief Justice Lamer stated the test for Aboriginal title is as follows [paragraph 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 a present occupation is relied upon as proof of occupation presovereignty, there must be continuity between present and presovereignty occupation, and

(iii) at sovereignty, that occupation must have been exclusive.

¶ 88 Chief Justice Lamer went on to discuss the concept of occupancy and the debate over proof of occupancy. He noted that from a theoretical stand point 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. The debate over proof of occupancy reflects two divergent views of the source of Aboriginal title. The Crown in Delgamuukw argued that Aboriginal title arises from physical reality at the time of sovereignty whereas the Aboriginals in Delgamuukw argued that Aboriginal title arises from and should reflect the pattern of land holdings under Aboriginal law. Chief Justice Lamer suggested that the source of Aboriginal title appears to be grounded in both common law and in the Aboriginal perspective on land. He concluded that it therefore follows that both perspectives should be taken into account in establishing the proof of occupancy.

¶ 89 Chief Justice Lamer went on to discuss at paragraph 49 the Aboriginal perspective of occupation referencing Professor Kent McNeill's text, My Aboriginal Title, Chessar and Burn, Modern Law of Real Property and McGary and Wade The Law of Real Property. Chief Justice Lamer said (paragraph 149):

> Physical occupation may be established in a variety of ways ranging from the construction of dwellings through cultivation and enclosure of fields through regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources: see McNeill, Common Law Aboriginal Title, supra at pp. 201-202. In considering whether occupation sufficient to ground title is established, one must take into the groups size, manner of life, material resources, and technological abilities, and the character of the lands claimed.

¶ 90 In Adams, Chief Justice Lamer (paragraph 26) made the point that a claim to title is made out when a group can demonstrate:

> That their connection with the piece of land...was of central significance to their distinctive culture.

¶ 91 An issue therefore in the present case is whether the lands in question were of central significance to the distinctive Mi'kmaq culture and whether their occupation is sufficient to ground title taking into account the nature of Mi'kmaq occupation. The answer to this question must take into account the size of the Mi'kmaq group their manner of life, material resources, technological abilities and the character of the lands claimed.

¶ 92 Nova Scotia is somewhat unique as regards pre British sovereignty history. There is evidence that France claimed Nova Scotia and indeed were granting land rights to French Nationals or Acadians. From an Aboriginal perspective the Mi'kmaq argue that all of ancient

Nova Scotia was Mi'kmaq territory. They were free to use the land as they wished for hunting, fishing, travel or trade even after the French arrived. They argue they occupied the lands to the exclusion of all others prior to contact. The Appellants argue that in the post contact period European occupancy was restricted to vary small local areas. The Mi'kmaq still considered most of ancient Nova Scotia as their territory. Certainly if one views the Aboriginal perspective as compared to the British perspective the Aboriginals would submit that they occupied the territory at the same time that the French, and then the British were claiming sovereignty.

¶ 93 Case law from another common law jurisdiction, Australia, points out there is a difference between territory and property. As noted in Mabo v. Queensland (No. 2) (1992) 175 C.L.R. 1 (Australia High Court) (page 44) quoting from Jurisprudence 7th ed. (1924):

> Territory is the subject matter of the right of sovereignty or imperium while property is the subject matter of the right of ownership or Dominum. These two rights may or may not co-exist in the Crown in respect of the same area. The Crown may own all the land and the territory or the land may be owned by the subject of the Crown. Subjects may own the land by virtue of grants from the Crown, which is the common method of European derived tender in North America. Indigenous inhabitants, however, have ownership rights and interests in the land that are recognized by common law.

¶ 94 As noted by Chief Justice Lamer in Van der Peet at page 308 it is a fallacy to equate sovereignty and beneficial ownership of land. In Nova Scotia French and Mi'kmaq sovereignty were replaced by British Sovereignty. British sovereignty and British claim to lands in Nova Scotia is, however, subject to the provable Mi'kmaq claims to rights and title. The change in sovereignty is evidenced for example by the 1760-1761 Halifax treaties and the other oaths of allegiances sworn on behalf of various bands. I refer, for example, to the wording of one of the Halifax treaties, [Exhibit 79, Volume 5, No. 111] where it stated the Mi'kmaq recognized:

> The jurisdiction and dominion of His Majesty George II over the territories of Nova Scotia or Acadia and we do make submission to His Majesty in the most perfect, ample and solemn manner.

As I have already noted British sovereignty does not automatically extinguish native rights of ownership.

¶ 95 This distinction between sovereignty and ownership is especially important in the context of the Mi'kmaq in Nova Scotia. The expert evidence adduced at trial suggests that the Mi'kmaq were the only native inhabitants of Nova Scotia for at least twenty five hundred years. Few would argue that they were not sovereign prior to contact. We must look beyond the issue of sovereignty to ascertain whether or not the Mi'kmaq had established aboriginal title to all of Nova Scotia as claimed by the Appellants.

¶ 96 Aboriginal title in Nova Scotia must be derived from historic occupation and possession of Mi'kmaq tribal lands (see Guerin v. (Canada) [1984], 2 S.C.R. 335.) Aboriginal title is based on the continued use and occupation of the land as part of the aboriginal peoples traditional way of life. (See paragraph 149 of Delgamuukw as quoted in paragraph 86 above).

¶ 97 In the case now before the Court I have already referred to the relatively small Mi'kmaq

population at the time of sovereignty. I also referred to the maritime existence which was a distinctive and defining aspect of the Mi'kmaq society and culture in Nova Scotia prior to the fur trade and the limited use of the interior after the fur trade.

¶ 98 In assessing a claim of Aboriginal title the Court must focus on the integral features of Aboriginal society at the date of sovereignty as compared to Aboriginal rights cases which focuses on distinct or core features of Aboriginal society at the date of contact with the Europeans. The difference is explained by Justice Lamer in Delgamuukw at paragraph 145 where he notes that Aboriginal title crystallizes at the time sovereignty was asserted. It therefore does not make sense to speak of a burden underlying title before that title existed.

¶ 99 Judge Curran suggested the date of British sovereignty for Cape Breton was either 1758 when Louisbourg fell or, at the latest, in 1763 with the Treaty of Paris. Judge Curran fixed the date of sovereignty for mainland Nova Scotia at 1713 when the French ceded mainland Nova Scotia to Britain.

¶ 100 The Crown argued on appeal that the more appropriate date for sovereignty on the mainland is 1749 when the British first came to settle in Halifax in large numbers with Governor Cornwallis. The Crown suggest that the small settlement at Port Royal prior to 1749 was little more than the planting of a flag. They argue the British did not really assert sovereignty on the mainland until 1749 when Cornwallis arrived with large numbers of settlers. Crown counsel suggest that sovereignty involves more than planting a flag. Actions short of full settlement are also sufficient to establish sovereignty. In the case of the British in Nova Scotia it was obvious to all that they were asserting a claim to mainland Nova Scotia after 1713. This is evident from the ongoing disputes with the French as to the limits of French territory on the mainland. The French never did manage to effectively assert any claim over Nova Scotia after 1713 on the mainland. It would have been clear to the Mi'kmaq as well that the British were asserting sovereignty to the Nova Scotia mainland. This was evidenced by the treaty negotiations in 1725 and 1726. The evidence satisfies me that it would be appropriate to defer to the finding of the Trial Judge on the issue of the date of British sovereignty on the mainland and Cape Breton.

¶ 101 As noted, the burden is on the Appellants to establish possession at the date of sovereignty. Once possession is established at the date of sovereignty and all of the prerequisites to Aboriginal title have been established then Aboriginal title is a right in land. This is more than the right to engage in specific activities which may be themselves Aboriginal rights. Aboriginal title confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs or traditions which are integral to the distinctive cultural of Aboriginal society. (See page 241 Delgamuukw) The only limitation on Aboriginal title is that the use to which the lands are put must not be irreconcilable with the nature of the native attachment to lands. An example of irreconcilable use might be strip mining.

¶ 102 Courts must be careful not to set impossible standards in terms of evidence to use and occupation of lands. Much of the evidence as to use and occupation may be lost forever. Historians and anthropologists can give opinion as to probable lifestyle of native groups. From this reconstruction, and in some cases, with the assistance of oral history, the Court can determine reasonably probable life patterns even in the absence of hard evidence of things like native settlement sites. The issue of degree of occupancy will be determined using these reasonable probabilities.

¶ 103 Not every use of land will establish title. In this regard I refer to Delgamuukw paragraph 137:

> Thus although Aboriginal title is a species of Aboriginal right recognized and affirmed by Section 35(1), it is distinct from other Aboriginal rights because it arises where the connection of a group with a piece of land "was of central significance to their distinctive culture."

para 138:

> ...the Aboriginal rights which are recognized and affirmed by Section 35(1) follow along a spectrum with respect to their degree of connection with the land. At the one end, there are those Aboriginal rights which are practices, customs and traditions that are integral to the distinctive Aboriginal culture of the group claiming the right. However, "the occupation and use of the land" where the activity is taking place is not "sufficient to support a claim of title to the land". (At para 26). Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed might be intimately related to a particular piece of land. Although an Aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a specific right to engage in a particular activity. (my emphasis added)

¶ 104 In Nova Scotia for example there may be Aboriginal rights which include the right to hunt or fish on particular tracts of land and those Aboriginal rights may well be enforceable by Mi'kmaq hunters or fishers. A separate and distinct issue however is whether there is Mi'kmaq title to a particular piece of land.

¶ 105 Aboriginal rights can vary with respect to their degree of connection to the land and it is noted at paragraph 27 in Delgamuukw:

> ...some Aboriginal groups may be unable to make out a claim to title, but will nevertheless possess Aboriginal rights that are recognized and affirmed by Section 35(1), including such specific rights to engage in particular activities.

¶ 106 In Delgamuukw the Supreme Court of Canada referred to Adams in explaining Aboriginal rights short of title rights may occur in situations of nomadic peoples who varied "the location of their settlement with the season and changing circumstances". The Court recognized this did not alter the fact that nomadic peoples survived through reliance on the land prior to contact with the Europeans and that many of their practices, customs and traditions which took place on the land were integral to their distinctive cultures.

¶ 107 In the case now before the Court, I refer again to the fact that one of the most distinctive aspects of Mi'kmaq culture is their attachment to the sea, rivers and lakes. This was a defining feature in pre-contact and post-contact Mi'kmaq societies. The onset of the fur trade made the Mi'kmaq more reliant on the chase. In relation to the hunting aspect of their subsistence they were even more nomadic than they would have been in their maritime subsistence routine. The evidence refers to the Mi'kmaq in their quest for furs and meat and the fact they may have hunted areas to extinction and then moved to new areas where the game

might be more plentiful.

¶ 108 In cases dealing with Aboriginal rights and Aboriginal title the Court must keep in mind the spectrum referred to in Delgamuukw. Occasional use of land prior to contact or at the time of sovereignty is not enough to establish Aboriginal title. I reject the submission as put forth by the Appellants that the Mi'kmaq occupied all of Nova Scotia prior to contact to the extent required to prove title. The term occupation is not an absolute term as it applies to the concept Aboriginal title. There are degrees of occupation. Some use and occupation of the lands may be sufficient to establish particular rights short of title. As noted by Judge Curran, given the rather small number of Mi'kmaq at the time of contact and at the time of sovereignty they simply could not use all of the land in Nova Scotia at the same time. I accept the argument by the Respondent that the law in relation to Aboriginal title may have evolved since Baker Lake. The Court now recognizes there are distinctions between Aboriginal rights to hunt or fish and Aboriginal title rights.

¶ 109 I take into account the Aboriginal perspective in terms of the issue of occupation as it relates to title. The Appellants argued that the Mi'kmaq were not a nomadic people in the sense that there was a pattern to their subsistence quest. They knew the land and the resources that it had to offer. Even though they might not return to the same spot each year their knowledge of the resource base would mean if a particular resource was not available in one area in a given year they knew where else to look.

¶ 110 To the extent that they might return to certain lakes or rivers or sections of the coastline on a more regular basis it may be possible in future cases for the Mi'kmaq to prove aboriginal title to some of those areas. This will depend on the evidence as to occupation of a particular site. As regards their activities on the inland portions of Nova Scotia where the cutting occurred in this case I defer to the decision of the Learned Trial Judge. There is evidence to support his finding the Mi'kmaq were a moderately nomadic people as referred to in paragraph 140 of Judge Curran's decision.

¶ 111 The Appellants referred to Common Law Aboriginal Title, Kent MacNeil, Clarendon Press, Oxford, 1989 and the fact that the author described occupation at page 201 as:

> Occupation is a matter of fact involving exclusive physical control of land, coupled with an intention (usually implied) to hold or use it for ones own purpose. The degree of control necessary to establish occupation depends first, on whether the complainant, or no one, or another (in ascending order) is known to have a title, and secondly, on any other relevant circumstances, including the nature, utility, value, and location of the land, and the conditions of life, habitats, and ideas of the people living in the locality.

There is no doubt the Mi'kmaq "occupied" Nova Scotia at a certain level, the issue however is whether they occupied it to the extent necessary to prove Aboriginal title.

¶ 112 Counsel for the Appellants also referred to Aboriginal Treaties covering large tracts of land across Canada suggesting that the governments of this country have recognized Aboriginal title to large tracts of land; larger than Nova Scotia. There is not enough material before the Court here to determine the precise nature of admissions made by the governments in those

treaties. In that sense it is difficult to determine how those treaties compare to the situation in Nova Scotia. Treaty agreements can be comprehensive agreements recognizing bundles of rights. A particular treaty may not address the issue of proof of Aboriginal title for specific parcels of land. In some cases there may even be competing claims by different Aboriginal groups to particular parcels of land. One of the elements required to prove Aboriginal title is exclusivity yet a treaty may be negotiated without resolving conclusively the issue of which Aboriginal group, if any, has title to a particular parcel of land. In summary treaty agreements can address bundles of rights. Aboriginal title is but one possible aspect of the treaty agreements. Because I do not have the details of the lands settlement agreements or treaties referred to by the Appellants it does little to advance their argument in the present case.

¶ 113 I had mentioned above that one of the things that must be proven by claimants when asserting Aboriginal title claims is exclusivity at the time of sovereignty. The issue was not addressed by the Trial Judge in this case but in view of the large numbers of Europeans in Nova Scotia and Cape Breton at the time of sovereignty it is something that should be addressed if the issue of Aboriginal title comes before the Court in future cases. I again point out that in 1713 there were large numbers of French in Nova Scotia. By 1758, in Cape Breton there was a very large British military force. Given these numbers the Court will have to determine if the Mi'kmaq had exclusive occupation at the time of sovereignty or the ability to assert any claim to exclusive right of occupancy.

¶ 114 On the issue of occupancy I take into account the evidence that was presented to the Trial Judge in relation to the division of territories by the Mi'kmaq. He referred at paragraph 44 to Father Christian LeCleric, a French Missionary who lived among the people of the Gass Bay for several years beginning in 1675. Father LeCleric wrote of the society he found saying that in 1675 there were no longer large assemblies in the form of councils that had existed long before, nor were there heads of families, elders or chiefs with clear authority to regulate affairs or decide upon war and peace. Father LeCleric referred to only a few chiefs who exercised feeble power, and that was based upon the good will of his people. Only one chief had the authority to assign hunting places or redistribute fur to take care of the needy. He went on to describe, in subsequent passages, State Councils during which Mi'kmaq divided up the country according to bays or rivers.

¶ 115 In paragraph 48 Judge Curran referred to the evidence of Dr. Whicken who testified that from at least 1700 all of Cape Breton and most of Mainland Nova Scotia was divided into family hunting territories. There is also reference in Judge Curran's decision to the oral tradition and evidence of Stephen Augustine, a Hereditary Mi'kmaq Chief from New Brunswick and member of the Mi'kmaq Grand Council. The Learned Trial Judge acknowledged that Chief Augustine knows a great deal about Mi'kmaq culture and history. The Trial Judge did not appear to doubt the truthfulness of Chief Augustine. The evidence would appear to support a determination by the Trial Judge to the effect that while Chief Augustine was telling the truth as he knew it, much of Chief Augustine's evidence was not historically accurate and Judge Curran specifically ruled:

> I was not persuaded by him that Grand Council or seven districts were ancient Mi'kmaq traditions.

I refer to other evidence which supported the Trial Judge's conclusion. Dr. Von Gernet referred

to evidence Chief Augustine gave in relation to a wampum belt at the Vatican Archives. Chief Augustine suggested this was a representation of the linking of the Mi'kmaq nation with Christianity when Membertou was baptized in the early 1600's. Dr. Von Gernet went to the Vatican Archives and studied the belt, finding conclusive evidence that it had been made by Aboriginals in Quebec as a gift for the Pope more than 200 years after Membertou's baptizism. It was conceded by the Appellant's counsel at trial that the belt had nothing to do with Nova Scotia or the Mi'kmaq. Dr. Von Gernet cautioned about neo-traditionalism in relation to proof of historical events. He recognized that many traditions are very important to many modern native societies. That does not necessarily mean they are rooted in history.

¶ 116 Both Van der Peet and Delgamuukw make it clear that oral evidence is important in terms of conveying Aboriginal perspective. That does not mean it must be accepted as being historically accurate if there is convincing evidence to the contrary. Oral tradition is not any better than documentary evidence and it is not to be blindly accepted over a mountain of documentary evidence. The risks associated will oral history or oral tradition become very apparent when as in the present case it became obvious that the wampum belt was not part of Mi'kmaq history. In spite of this lack of connection the self proclaimed interpreter of wampum belts in this case testified as to his reading of the belt and what it meant to the Mi'kmaq people.

¶ 117 It is easy to understand the Mi'kmaq perspective wherein they feel they occupied Nova Scotia to the exclusion of all others. In Nova Scotia, as we know it today, there were natural geographic boundaries mainly defined by the surrounding ocean. There is no evidence at least for the last 2000 years starting around 500 years ago that anyone other than the Mi'kmaq occupied Nova Scotia. In that sense they were the only occupants. As noted there are degrees of occupation, some are sufficient to establish title and some are not. I am satisfied there is evidence to support the Trial Judge in his conclusions when he stated at paragraph 142:

> (a) the Mi'kmaq of 18th Century Nova Scotia could be described as "moderately nomadic" as were the Algonquin and Cote, supra. They did not necessarily return to the same camp sites each year. Nevertheless, for decades before and after 1713 local communities on mainland Nova Scotia stayed generally in the areas where they had been.
>
> (b) on mainland Nova Scotia the Mi'kmaq made intensive use of bays and rivers and at least nearby hunting grounds. The evidence is just not clear about exactly where those lands were or how extensive they were. It is most unlikely that all the mainland was included in those lands. There just were not enough people for that.
>
> (c) as for Cape Breton there is simply not enough evidence of where the Mi'kmaq were and how long they were there to conclude that they occupied any land to the extent required for Aboriginal title.
>
> (d) in particular, there is no clear evidence that the Mi'kmaq of the time made any use, let alone regular use, of the cutting sites where these charges arose, either on the mainland or in Cape Breton. The defendants have not satisfied me on the balance of probabilities that their ancestors had Aboriginal title to those sites.

¶ 118 In view of the above noted comments, I find that it is not necessary to deal with the issue of extinguishment or abandonment in relation to Aboriginal title at the cutting sites.

Aboriginal Rights:

¶ 119 I turn to the broader issue as to whether any Aboriginal right, short of title rights, afford a defence to the Appellants in the present case. There are situations in which specific rights short of title rights might afford a defence. I refer for example to the Hitsuk tribe in British Columbia harvesting herring spawn on kelp or the Adams and Cote examples of fishing. There the accused had a right to harvest a resource and the right to harvest was not dependant on the establishment of title claims.

¶ 120 In the present case, as I have already noted in the discussion of treaty rights, there is nothing in terms of distinctive Mi'kmaq culture, identity, or activities which identifies them with commercial logging or the right to harvest logs in this case. The Mi'kmaq use of forests was limited to hunting, travel and incidental use of forest resources. The arguments of the Appellants do not convince me that any Aboriginal rights of the Mi'kmaq include the right to harvest trees as occurred in the present case. There is nothing in terms of Mi'kmaq culture or society that could be said to have logically evolved into commercial logging operation. This is true whether we speak of the pre-contact or post-contact period up to the 18th century. There is no broader Aboriginal Right that allows the Appellants to commercially harvest timber from Crown lands.

The Royal Proclamation of October 7, 1763

¶ 121 The Appellants submit that even if they did not have Aboriginal title established through use and occupation they have a claim to Nova Scotia pursuant to the Royal Proclamation of October, 1763 which they say reserved all the unsettled lands in 1763 unto the Mi'kmaq. Section 25(a) of the Charter as enacted in 1982 makes it clear that the Royal Proclamation of October 7th, 1763 continues to be an important part of Canadian law. Section 25(a) of the Charter states:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including:
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7th, 1763;

¶ 122 There is a difference between title claims made as "Aboriginal title claims" versus "claims for title pursuant to the Royal Proclamation". As noted in Delgamuukw the opening of land to settlement is said to be an infringement not an extinguishment of Aboriginal title. If, however, there was no Aboriginal title, and I have already indicated there was no Aboriginal title to the areas where the cutting occurred, then the issue of title reserved pursuant to the Royal Proclamation must be addressed. If there was no Aboriginal title established prior to the Royal Proclamation then the Mi'kmaq could only obtain title pursuant to the Proclamation if that was the intention of the statute. That is why it is important that the Court address the issue of whether the Proclamation intended to confer title upon the Mi'kmaq.

¶ 123 The Appellants argue that they acquired title pursuant to the terms of the Royal Proclamation of 1763 to all but a few parts of Nova Scotia where there were established European settlements in 1763. I am satisfied that the issue of whether or not the Royal Proclamation applied to Nova Scotia is a question of law and should be reviewed as such.

¶ 124 The critical parts of the Royal Proclamation under which the Appellants assert title to Nova Scotia are found at Exhibit 79, Volume 7, tab 154, pages 166 and 167:

> 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, have not having been ceded to or purchased by us, by reserve to them, or any of them, as their hunting grounds. - we do therefore, with the advise of our Privy Council, declare it to be our well 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 pretense 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 their further pleasures be known, to grant warrants of survey, or pass patents for any lands beyond the heads or sources of any of the rivers which fall into the Atlantic Ocean from the west and northwest, 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.
>
> And, we do further declare it to be our will and pleasure, for the present as aforesaid, to reserve unto our sovereignty, protection, and dominion, for the use of the said Indians, all the lands and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company, as also all the land and territories lying to the west which fall into the sea from the west and northwest as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever or taking possession of any of the lands above reserved, without a special leave and license for that purpose first obtained.
>
> And, we do further strictly enjoin and require all persons whatever to have either willfully or inadvertently seated themselves upon any lands within the countries above described, or upon any other lands which, not having been ceded to or purchased by us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements.

¶ 125 The issue of whether the Royal Proclamation applied to Nova Scotia has been unresolved for many years. A number of courts have reached different conclusions as regards the geographical area included in that statute. As examples of the various rulings on this issue I refer to R. v. Isaac (1975) 13 N.S.R. (2d) 460 in which MacKeigan, C.J.N.S. as he then was, held that the Royal Proclamation applied to Nova Scotia but it appears that the court at that time felt

that it only applied to the lands "reserved to the Indians".

¶ 126 More recently the Court of Queens Bench in New Brunswick Joshua Bernard v. Her Majesty The Queen 2001 N.B.Q.B. 82 upheld the Trial Judge's finding that the Royal Proclamation did not apply to New Brunswick which was part of Nova Scotia in 1763.

¶ 127 In Paul v. Canadian Pacific Limited (1983) 53 D.L.R. (4th) 487 Justice LaForest, then sitting as a Judge of the New Brunswick Court of Appeal, rejected the assertion that the Royal Proclamation applied to New Brunswick, which was part of Nova Scotia. In Delgamuukw Justice LaForest said that the Royal Proclamation reserved territories including large portions of the area now comprising Ontario, Quebec and the Prairie Provinces. He did not indicate that the Royal Proclamation applied to the Maritime Provinces. In Re: Labrador Boundary [1927] 2 D.L.R. 401, the Privy Council said the Royal Proclamation applied around the Great Lakes or north of the St. Lawrence.

¶ 128 In R. v. Smith [1980] 4 C.N.L.R. 29 Le Dain J. for the Federal Court of Appeal at page 5 of the decision noted the difference of opinions on the issue of whether the Royal Proclamation applied to ancient Nova Scotia saying:

> There has been a difference of opinion as to whether the Proclamation, insofar as Indian rights are concerned, apply to the territory that was separated from Nova Scotia to become the Province of New Brunswick.

At page 19 he wrote:

> On the assumption that the Royal Proclamation of 1763 applied to the territory of New Brunswick, which, in my respectful opinion, appears to be the conclusion supported by the weight of judicial opinion to which I referred earlier in these reasons...

At page 23 of the decision Justice Le Dain stated:

> Admittedly, the question of the application of the Proclamation is a difficult one, but my own view is that it's terms, although not free from uncertainty at several places, are on the whole broad enough to include the territory that became New Brunswick. (Note: The Supreme Court of Canada reversed the decision of the Federal Court of Appeal in a case reported [1983] 1 S.C.R. 554 but not resolve the issue of the application of the Proclamation to Nova Scotia.)

¶ 129 In the present case Dr. Patterson testified that in his opinion the Royal Proclamation did not apply to Nova Scotia. The position as put forth by Dr. Patterson suggests that statute was intended to include the lands to the west of the old colonies; Nova Scotia then being one of the old colonies. He referred specifically to the fact that the major areas of concern for the British, as regards native population were the wild lands west of the Appalachians. This included the area where there had been much unrest including the Pontiac rebellion.

¶ 130 I refer also to Lieutenant Governor Belcher's Proclamation issued in 1762. The argument that the Crown did not intend to reserve all of the unsettled land in Nova Scotia to the Mi'kmaq is perhaps supported by the fact that Governor Belcher on May 4, 1762 issued a

proclamation stating that coastline in northeastern Nova Scotia would be reserved for the Mi'kmaq. This reserved area would have extended along the south coast of mainland Nova Scotia from Musquodoboit to Canso, along the Strait of Canso and then along Northumberland Strait from the Gulf of St. Lawrence to the Bay of Cheleur. Governor Belcher said that the Mi'kmaq claimed the lands for their hunting, fowling and fishing. Governor Belcher ordered all other persons to:

> avoid all molestation of said Indians in their said claims until His Majesty pleasure in this behalf shall be signified.

He also ordered:

> all who, without lawful authority unto the prejudice of the Mi'kmaq, and taken any of the claimed lands to remove themselves.

¶ 131 Later in 1762 the governing, Board of Trade, reacted angrily to Belcher's proclamation saying that encouraging the Mi'kmaq to put in any claims to lands in Nova Scotia and then in some way establishing the claim by proclamation was "imprudent, and not warranted" by the instructions of December, 1761. In August, 1763, Governor Belcher learned of the Board of Trade's reaction and he asked the Executive Council whether it would be prudent for him to revoke it or alter it. Council said it would not be prudent to do so at the time. It was noted in June of 1764 by Governor Wilmont that Mi'kmaq claims seemed "to have subsided" and he did not want to give them "cause for quarrel". The Proclamation was not revoked by Governor Belcher but it was never given the effective law.

¶ 132 Judge Curran noted at paragraph 102 of his decision, the Belcher Proclamation would not have assisted the Appellants at trial. The Proclamation applied only to coastal lands and did not include any of the cutting sites. Again I reference the maritime identity of the Mi'kmaq. I refer to the passages of Judge Curran from the original decision, paragraphs 103 to 108 which state as follows:

> In 1763 several treaties had been signed in Nova Scotia with a large number of Mi'kmaq bands. The policy of settlement was clearly underway and the British Government clearly understood that the Mi'kmaq settlements were perhaps numerous but small and there was already a substantial European presence in Nova Scotia. The Mi'kmaq had witnessed an invading force of British that had already conquered their most powerful Allie, the French. As noted by Dr. Patterson the Mi'kmaq, unlike many other native peoples in North America, by the 1760's knew what treaties encompassed, they had participated in a very skillful manner in treaty negotiations for many decades and because of their regular contact and alliance with the French and the British use of translators they would have been able to understand interpretations of treaties and treaty discussions.

¶ 133 It is not likely that any comments I offer in the present case will do much to resolve the issue of what was intended for ancient Nova Scotia when the Proclamation was issued. Dr. Patterson presented a forceful argument as to why he felt the Proclamation was not originally intended to apply to Nova Scotia.

¶ 134 The events since 1763 suggest that if the Proclamation applied to Nova Scotia little attention was paid to its terms. In his book Aboriginal and Treaty Rights in the Maritimes Purich Publishing Ltd. 2001 Thomas Isaac, p 31-32 suggests the 1763 Proclamation was:

> For a variety of reasons ... ignored by the governor of Nova Scotia, and in both New Brunswick and Nova Scotia, Indian lands were reserved only upon the request of the Indians. As a result, until a reserve policy was established, settlers or the Crown simply occupied land without regard for the Aboriginal inhabitants.

This passage is premised on the assumption that the Proclamation did apply.

¶ 135 Events on the ground suggest the Proclamation was either not intended to apply to Nova Scotia or that it was intended to apply only in a limited sense. I refer for example to the fact that both immediately before and immediately after the issuance of the Proclamation it was clear the intention of the British was to colonize the province. There was an active settlement policy which encouraged the granting of lands and settlement of much of Nova Scotia. The Respondent's brief pointed out that the vast majority of the cutting sites had at one time been granted by the crown although subsequently reacquired. The government approach in the decades after the Proclamation was to attempt to identify parcels of lands which, through long usage owing to their significance to the Mi'kmaq way of life was of importance to the native population. I note the comments of Judge Curran at paragraphs 114-118 of his decision:

> Despite Francklin's words, the first known attempt by the Government of Nova Scotia to set lands aside for the Mi'kmaq did not happen until 1771. Over the next half century the government set other lands aside, but the total reserved land in all of mainland Nova Scotia and Cape Breton was (and is) less than 30,000 acres, not much more than what had been granted to Lieutenant-Governor Francklin himself.
>
> Whatever the intentions of the British government and the Nova Scotia government towards the Mi'kmaq, events outside the province soon marginalized the Mi'kmaq in Nova Scotia. The American Revolution began in the 1770's. There were many British Loyalists in the 13 colonies which became the original American states. When the British lost the war in America, the King and the British government opened the doors of Nova Scotia and the rest of British North America for the Loyalists. So many came to Nova Scotia that the Mi'kmaq were soon just a small part of the total population.
>
> As directed by the King, the government granted lands to the newcomers and the Mi'kmaq were squeezed out of many areas. By the 1790's the plight of the Mi'kmaq was clear. In 1794 the "Mickmack Indians" sent a petition to Lieutenant-Governor John Wentworth in which they said:
>
> That all Nova Scotia is Coast and Rivers and that the English have taken all the Coast and Rivers, and make Roads and Settlements through the Woods every where, and leave no place for the indian to hunt in.
>
> Later in the petition they stated:

> That when they made Peace with the English, there was Country enough in Nova Scotia for all the English, French and Indians then in the Province.
>
> In the decades after 1794 there were several other petitions of a similar nature. The most eloquent of them was Peminout's petition to Queen Victoria quoted at the beginning of this decision.
>
> In the 19th century some Nova Scotia government officials began to recognize the sorry state of the Mi'kmaq. In 1801 and 1802 Titus Smith, a noted naturalist, made a survey of the entire mainland Nova Scotia for the government. Along with detailed comments about the topography, flora and fauna of the land, he made several observations about the Mi'kmaq. In particular, he noted that nearly all the moose and beaver in the province had been destroyed and there were far fewer caribou than before. He said the result of the scarcity of game was that "the internal parts of the Province are but little frequented by the Indians in the winter", although in the summer "they take considerable quantities of Salmon, Gasperaus and Eels, in the different Rivers which they frequent." He said he thought many of the Mi'kmaq had left the province because he had been told at many settlements there were not half as many as there had been years before.
>
> In the years that followed the government encouraged the Mi'kmaq to settle permanently on fixed sites and become farmers. Some did, but many others continued to try to eke out an existence from the much-reduced waters and hunting lands left to them. Settlers and squatters often encroached upon reserved land. Although government officials were generally sympathetic when the Mi'kmaq complained of encroachments, the problems often continued. Over time the Mi'kmaq were often left with less desirable land. Sometimes, as at the large Indian Brook Reserve near Shubenacadie, the land was a considerable distance from the water that had been so important to them.

¶ 136 The Supreme Court of Canada has noted the importance of historical evidence of events which occurred at the time of the promogation of statute in terms of interpreting a statute. For example the introductory comments of Chief Justice Lamer as he then was in R. v. Sioui at page 434 where he stated:

> Our courts and those of our neighbors to the south have already considered what distinguishes a treaty with the Indians from other agreements affecting them. The task is not an easy one. ... this court adopted the comment of Norris J. A. in R. v. White & Bob (1964), 50 D.L.R. (2d) 613, ... that the courts should show flexibility in determining the legal nature of a document recording a transaction with the Indians. In particular, they must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration. ...
>
> As the Chief Justice said in Simon, supra:

> treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favor of the Indians...

¶ 137 A liberal construction of this statute would support the conclusion reached by Judge Curran that the Royal Proclamation did apply to Nova Scotia but only to the extent that land had already been reserved in Nova Scotia at the time of the Proclamation.

¶ 138 I am satisfied that the evidence presented at trial in relation to what occurred in the years immediately preceding the Royal Proclamation of 1763 and the things that occurred in Nova Scotia following the 1763 Proclamation confirm this interpretation. This is a position which is consistent with the decision in R. v. Isaac (1975) 13 N.S.R. (2d) 460, wherein then Chief Justice MacKeigan indicated the Royal Proclamation of 1763 did apply to reserve lands and the accused in that case retained the right to hunt and fish on Mi'kmaq Reserves.

¶ 139 Even prior to the Proclamation, the terms of the 1760-1761 treaties have clearly indicated an intention by the British to continue colonization of Nova Scotia. This is indicated by the following clause as contained in the Halifax treaties:

> And I do promise for myself and my tribe that I nor they shall not molest any of His Majesty's subjects or their dependants in their settlements already made or to be hereafter made, or in carrying on their commerce, or in anything whatever within the Province of His said Majesty or elsewhere. Exhibit 79, tab 125-126 re: treaty concluding peace with Marimachee, Shediac, Pokemouche and Cape Breton Districts of Mi'kmaq signed at Halifax, June 25th, 1761.

¶ 140 The Respondent Crown referred to a number of cases from the 16th century which suggests that the term molest referenced interference with land holdings or title. I refer, for example, to Rex v. Crook 1731 1 Barr K.B. 282, 94 E.R. 279 where the Court referred to a defendant forging a conveyance of a free hold of another with an intention to "molest it". Gree v. Rolle 88 E.R. 747 a case where the Court was dealing with an action to recover possession of property and the Court referred to the issue as "molest the possession of him" in reference to trespass against property. In R. v. Crook Fitz-Gibbon 261-94 E.R. 747 the Court was referencing falsification of a deed with the intent that the state of free hold of any person in or to any lands shall or may be molested, troubled, defeated, recovered or charged. These cases all suggest the use of the word "molest" in the 1700's is different than the every day usage today. It would appear that in the 16th and 17th century the term was used in reference to interference with property rights. Today we would perhaps more readily identify the terms to molest with interference with, or annoyance of a person.

¶ 141 I again refer to the Aboriginal perspective as it relates to the Proclamation. Counsel for the Appellants makes the point that it is important to understand this Proclamation from the Aboriginal perspective as well as from the British perspective. The Mi'kmaq would have understood what they saw on the ground. The Mi'kmaq witnessed the biggest influx of settlers ever to occur in the history of the Province of Nova Scotia. The Crown in the late 1750's was encouraging "planters" and other settlers to come to Nova Scotia to occupy not only the lands of recently expelled Acadians but other tracts of land in the "wild and uncleared parts of the country" as referenced at page 6075 of the trial transcript.

¶ 142 The historical evidence in the present case suggests that if the Proclamation applied to Nova Scotia it applied in a limited way. The unique history of Nova Scotia vis a vis European relations with the Mi'kmaq and the settlement of the province meant Mi'kmaq and the British would have interpreted the Proclamation as not reserving all of Nova Scotia to the Mi'kmaq. The British had just fought a very costly war to dislodge the French from Nova Scotia and the Mi'kmaq fought along side the French. It is inconceivable that the British would immediately thereafter hand it back to the Mi'kmaq and at the same time undertake a massive settlement program in the Province.

¶ 143 This is different than areas west of the Appalachians where there had been little contact or settlement and where there was, relative to the European population, a very large and powerful Native population. In many parts of the continent the Aboriginal population by far exceeded that of the British who were still trying to consolidate their hold on the continent after many years of hostilities with the French. The French had in many cases been allied with the various Native tribes and it was of the utmost importance that the British maintain good relations with the Native tribes in those western areas.

¶ 144 In Nova Scotia it was also important that there be good relations with the Mi'kmaq but the situation as regards relative populations was vastly different than in the middle or western part of the continent. The Mi'kmaq were very much allied with the French in the defence of Louisbourg. In many ways they shared in that defeat and found themselves in a very difficult position after the French were defeated. The centuries old alliance between the Mi'kmaq and French was virtually at an end and the trade they depended on no longer existed. The French had been expelled back to France or to the south. The Mi'kmaq had no place to go.

¶ 145 There were no pre-conditions in the 1760-1761 treaties. The evidence would not support any suggestion that the British or Mi'kmaq understood the Mi'kmaq to be the owners of the entire province at the time of the 1763 Proclamation, subject only to a few English or Acadian enclaves. The evidence suggests just the opposite.

¶ 146 There was a small population of Mi'kmaq spread throughout the province and it was to be determined what portions of the province was important to them. This identification process was made more difficult because of the roaming lifestyle of the Mi'kmaq. It is almost certainly true that there was a lack of commitment to the process of identifying and setting aside "Indian lands". This was perhaps due to the fact that it was not in the interest of the government of the day to set aside any more lands than were required. In spite of any lack of commitment Crown counsel refers to Exhibit 79, tab 209 and says that thousands of acres were set aside for the Mi'kmaq according to a report of May 1820. The Crown urges the Court to refer to the plans included in that exhibit, suggesting this land was often much sought after by non-natives; it being some of the most fertile land available.

¶ 147 In Nova Scotia there is evidence of several Mi'kmaq applying for and receiving grants of land subsequent to the Proclamation. This is suggestive of the fact that at least some of them acknowledged Crown ownership of lands. It would be inconsistent with Mi'kmaq claims of ownership that they would have to apply for a grant of lands which they already owned. One of the many complaints by Indian commissioners trying to assist the Mi'kmaq at the time was that the native population would often sell lands which they had been granted. A solution was that the land eventually was held in trust for them so that there was seldom an outright grant which

would allow them to sell the land. In addition there was a prohibition which attempted to prevent non-natives from buying native lands. All of this occurred as the Crown was actively encouraging settlement of the province.

¶ 148 In summary I am satisfied the evidence is not conclusive on the issue of whether the Royal Proclamation of October 1763 applied to present day Nova Scotia. If it did apply to Nova Scotia it was not intended to reserve the entire Province for the Mi'kmaq. It was, at most, the basis of a policy that encouraged the identification of lands which were significant to the Mi'kmaq way of life. Once those lands were identified they were to become subject to rules which afforded those lands a unique status. This eventually developed into a system of reservations in Nova Scotia. I do not interpret the Proclamation as going beyond that in Nova Scotia. If there is a valid claim to lands in Nova Scotia outside of the reserves it must be established on the basis of aboriginal title as established through avenues other than the 1763 Proclamation.

¶ 149 Before I leave the issue of the Royal Proclamation of 1763, I refer to the position taken by the Crown as regards constitutional constraints in 1763 governing what the King was able to do in Nova Scotia. A governing legislature was established in Nova Scotia in 1758. Constitution law of 1763 therefore may well have prevented the Proclamation from applying. In this regard I refer to a case Campbell v. Hall [1774] 98 E.R. 1045. In that case the King levied a sugar tax in Granada. A planter resisted the imposition of the tax. The Court held that after a legislature was granted to a colony the Crown can no longer rule by Royal Proclamation (see page 255 of the decision). Campbell v. Hall therefore would suggest the Crown could no longer act through Royal prerogative in Nova Scotia. Even though there were constitutional limits on the King after 1758, I am satisfied the Crown policy of affording protection to "Indian Lands" was accepted as applying to Nova Scotia. The honour of the Provincial Crown is at stake in ensuring that once those lands were identified that proper processes were adhered to if the identified lands were to be ceded or purchased. It would be inappropriate for the Crown to now attempt to retreat from that position 250 years later.

¶ 150 Conclusion: The appeals must be dismissed.

Looking to the Future:

¶ 151 I would make one final observation which is clearly in the nature of obiter. During the course of arguing this appeal Crown counsel indicated the Mi'kmaq of Nova Scotia may have valid claims in parts of this province other than at the cutting sites. The Courts, in earlier decisions have referred to the fact that many of the issues still outstanding between Aboriginal communities and governments are best resolved through a process of negotiations as opposed to litigation. Litigation, whether criminal or civil, is slow and extremely expensive. This adversarial approach does nothing to further the process of reconciliation. Surely after waiting 240 years it is time to move on and resolve the outstanding issues in a comprehensive way. The process of reconciliation must begin if native and non-native communities in this province are to move forward and prosper together. There are limitations in what can be done after 240 years but it is best to address the issues before another century goes by.

¶ 152 It may be in the interest of all involved if the outstanding issues can be resolved by identifying bundles of possible rights or entitlements and resolving the grievances through a

comprehensive settlement. If the issues are not addressed in a global way then a piecemeal approach will continue. In this regard I refer for example to issues such as gathering of firewood. This case did not involve gathering firewood. It is likely that in 1760 the Mi'kmaq and British would have expected that this is the type of activity or right that would continue.

¶ 153 If a comprehensive agreement cannot be achieved, then in order to gain access to Crown lands for the purpose of gathering, for example firewood, the interests of native and non-native communities would have to be considered. The Crown forests are now extensively utilized through a series of private leases or agreements. Crown forests are now subjected to very intensive forest management. It would not be possible to allow random access to the forest at this time. It would be in the interest of native and non-native communities to ensure sound management practices continue.

¶ 154 Communal negotiations would offer an opportunity to assess community needs and see what the requirements of the community might be, beyond that which could be provided from existing reserve lands. This could be achieved through band level negotiations or through any other community level organization the parties might agree to. The negotiations could take into account the existing commitments of the Crown as regards Crown land while fulfilling Crown obligations to native communities.

¶ 155 A lasting resolution to these matters will only be achieved through negotiation. A lasting resolution will provide an opportunity for reconciliation.

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