C.A.C. No. 129874

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Marshall, 1997 NSCA 89

Roscoe, Bateman and Flinn, JJ.A.

BETWEEN:		
DONALD JOHN MARSHALL, JR.		Bruce H. Wildsmith, Q.C. and Eric A. Zscheile
	Appellant	for the Appellant
- and -		
HER MAJESTY THE QUEEN IN RIGHT OF CANADA		Michael A. Paré and Ian MacRae
	Respondent	for the Respondent
		Appeal Heard: February 10 & 11, 1997
		Judgment Delivered: March 26, 1997

THE COURT: The appeal is dismissed as per reasons for judgment of Roscoe and Bateman, JJ.A. and Flinn, J.A. concurring.

ROSCOE and BATEMAN, JJ.A.:

The appellant, Donald Marshall Jr., was charged with three offences under the **Fisheries Act**, R.S.C. 1985, c. F-14. The matter proceeded in the Provincial Court before Judge John Embree on an Agreed Statement of Facts. These facts constituted

an admission by the appellant that he had committed the acts for which he had been charged. The defence offered by the appellant was that, as a Mi'kmaq, he had, under s. 35(1) of the **Constitution Act, 1982**, a constitutionally protected treaty right to fish and sell fish.

On June 27, 1996 convictions were entered on all three offences. The appellant appeals those convictions directly to this Court, on "a point of law", pursuant to s. 830 of the **Criminal Code**.

Evidence at Trial:

The Agreed Statement of Facts provided:

> a) Donald Marshall is a Mi'kmaq Indian registered under the provisions of the **Indian Act**.
>
> b) He is a member of the Membertou Band, a Mi'kmaq reserve situated at or near Sydney, Nova Scotia.
>
> c) On August 24, 1993 Marshall, accompanied by another person, fished for eels during a closed time in Pomquet Harbour, Antigonish County, Nova Scotia. At the time they were fishing from a small outboard motor boat using fyke nets, a type of fixed gear.
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> d) Once caught the eels were moved to holding pens which were situated near the Afton Reserve [acknowledged to be a Mi'kmaq reserve], also in Antigonish County.
>
> e) The eels were then moved from the holding pens, weighed and loaded onto a truck belonging to South Shore Trading Company Limited, of Port Elgin, New Brunswick.
>
> f) This company is engaged in the purchase and sale of fish.
>
> g) On this occasion Marshall sold 463 pounds of eels to South Shore Trading Company Limited for $1.70 per pound.
>
> h) Marshall had made other sales of eels to this same company on previous occasions during 1993.
>
> i) Marshall did not, at that time, hold any fishing licences which permitted him to fish for or sell eels from Pomquet Harbour.

The trial judge heard 41 days of testimony from three witnesses: Professor Patterson for the Crown and Dr. Reid and Dr. Wicken for the Defence. Each was qualified as an expert testifying, variously, as to historical and cultural matters relevant to the Mi'kmaq and British in the 17th and 18th centuries.

The Charges:

The offences of which the appellant was convicted are "... that he... did":

> 1. fish for or catch and retain fish (eels) without being authorized to do so under the authority of a license issued pursuant to *Maritime Provinces Fishery Regulations*, the *Fishery (General) Regulations*, or the *Aboriginal Communal Fishing Licenses Regulations*, contrary to section 4(1)(a) of the *Maritime Provinces Fishery Regulations*, made pursuant to the *Fisheries Act*, R.S.C., 1985, c. F-14, as amended, and did thereby commit an offence contrary to section 78(a) of the said *Fisheries Act*;
>
> 2. fish during the close time for eels with eel nets, which nets were not dip nets, in the waters of Pomquet Harbour covered by Item 2 of Schedule III of the *Maritime Provinces Fishery Regulations*, contrary to section 20 of the said *Regulations*, and did thereby commit an offence under section 78(a) of the *Fisheries Act*;
>
> 3. sell or offer to sell eels which had not been caught and retained under the authority of a licence issued for the purpose of commercial fishing or such other licence as provided for in section 35(2) of the *Fishery (General) Regulations*, thereby contravening Section 35(2) of the said *Regulations*, and did thereby commit an offence contrary to s. 78(a) of the *Fisheries Act.*

Issues on Appeal:

The appellant summarized the issues before this Court as follows:

> The prime issue in this appeal is the proper interpretation of the Mi'kmaq *Treaties of 1760-61*: Do they contain a right to catch fish and to trade or sell them? His Honour holds that the *Treaties of 1760-61* do not provide a defence to the charges. He holds at p. 40 of his Decision that the "trade clause in the 1760-61 Treaties gave the

> Mi'kmaq the right to bring the products of their hunting, fishing and gathering to a truckhouse to trade", but that in the absence of a system of truckhouses or licensed Indian traders in August 1993, there was no right to trade.
>
> We respectfully submit that this interpretation is in error, for the following reasons:
>
> 1. The Learned Trial Judge approaches the question as though what is required in the treaties is an express grant or conveyance of a general right to trade; recognition and affirmation of an implicit right is not enough.
>
> 2. The Learned Trial Judge fails to see that trade was “of the essence” of the treaty relationship, with the provision of truckhouses or licensed Indian traders being additional but secondary benefits to the parties.
>
> 3. The Learned Trial Judge adopts an interpretation that the Crown did not argue and which is inconsistent with the honour of the Crown and with the fiduciary nature of the Crown's treaty relationship to the Mi'kmaq.
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> 4. The Learned Trial Judge misplaces on the Appellant the burden of proof with respect to whether Her Majesty's decision to abandon the system of the truckhouses and licensed Indian traders terminated, suspended, or limited the right of the Appellant to trade under the Mi'kmaq *Treaties of 1760-61*.
>
> 5. The Learned Trial Judge holds that even though the Mi'kmaq *Treaties of 1760-61 were “*on the same terms*”* as the Maliseet *Treaty of February 23, 1760,* the Mi'kmaq Treaties did not incorporate by reference earlier treaties while the Maliseet Treaty did.

In addition to the above, the appellant raised a further issue:

> [T]he Learned Trial Judge erred in point of law in determining on a *voir dire* that the Crown was not estopped or precluded as a result of the decision of the Supreme Court of Canada in *R. v. Simon,* [1985] 2 S.C.R. 387 from tendering evidence to show that the *Treaty of 1752* was terminated by hostilities or other events after 1753.

Crown and Defence Positions at Trial:

The positions of the Crown and Defence were set out by the trial judge in his decision as follows:

> It is submitted, on behalf of the Defendant, that a series of treaties entered into between the British and the Mi'kmaq of Nova Scotia in 1760 and 1761 are the operative treaties for determining the relevant rights of the Defendant in this case. It is submitted that the *Treaties of 1760-61* possess a trade clause which gives the Defendant the right to fish and to sell the fish. These treaties should be read in the context of a chain of treaties from 1725 to 1779. That context, along with certain subsequent events which clarify the 1760-61 Treaty promise respecting trade, **confirms the understanding that the Mi'kmaq had free liberty to trade, without restriction**. The Mi'kmaq did not agree in the 1760-61 Treaties or otherwise that their rights to fish and sell fish were subject to unilateral regulation by the Crown. However, whether the Mi'kmaq agreed through the *Treaties of 1760-61* to be regulated in their fishing and trading activities or not, the legal test and analysis to be applied by this Court is the same and the regulation of the Defendant's fishing and trading activities that the Crown seeks to apply here must be justified by the Crown. . .
>
> . . . part of the Defence submission here is that **the Defendant has, under treaty, the right to fish and the right to sell the fish**. For the purposes of this case, those words "the right to fish and the right to sell the fish" are meant to be read together. This is not a case about "the right to fish", standing alone.
>
> This is the position taken by the Crown. The operative treaties for defining the treaty relationship between the Mi'kmaq and the Crown are the series of treaties entered into in Nova Scotia in 1760-61. **Those treaties do not grant any commercial fishing rights to the Mi'kmaq. If the Court determines that there is an implied right to commercial fishing in these treaties, then that right was subject to regulation ab initio**. Any commercial fishing right conveyed by these treaties to the Mi'kmaq is not infringed by the regulations here because the Crown's ability to regulate is inherent in any right that was conveyed. Further, if the Court concludes that a treaty right to a commercial fishery by the Mi'kmaq exists, that right is subject to the Crown's right to regulate the fishery and the Crown does not have to justify such regulation. Section 35(1) of the *Constitution Act, 1982* does nothing to change any of this.
>
> (emphasis added)

Standard of Review:

Appeals with respect to summary conviction proceedings may be brought pursuant to s. 813 or s. 830 of the **Criminal Code**. In Nova Scotia, the appeal pursuant to s. 830 is directly to the Court of Appeal (s. 829). Section 830 states, in relevant part:

> 830. (1) A party to proceedings to which this Part applies or the Attorney General may appeal against a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court on the ground that
>
> (a) it is erroneous in point of law;
>
> (b) it is in excess of jurisdiction; or
>
> (c) it constitutes a refusal or failure to exercise jurisdiction.

Here the appellant alleges that the decision of the trial judge is erroneous in point of law.

Preliminary Issues:

The appellant initially advanced a defence based upon an aboriginal right to engage in the trading of fish and, in addition, a right to do so granted pursuant to both the **Treaty of 1752** and the **Treaties of 1760-61**. Ultimately he asked that the trial judge decide the case solely on the basis of the **Treaties of 1760-61.** In this regard appellant's counsel said at the conclusion of the Crown's evidence:

> ...we are now prepared to subscribe to the position initially put forward by the Crown that there is no need to deal with the 1752 treaty, *per se*, or the suggestion that has been made that we might be relying upon the concept of aboriginal rights and an aboriginal right to engage in trade.
>
> . . . the case will be determined on the basis of whether the 1760, '61 treaties provide the necessary rights to Mr. Marshall and the Micmac to engage in the activities that he was engaged in.

The trial judge acceded to this request, limiting his decision to the **Treaties of 1760-61**. Accordingly the appellant, in presenting a defence, did not rely upon an aboriginal right to engage in trade, nor a right to do so pursuant to the **Treaty of 1752**.

Characterization of the Right Claimed by Defence:

Essential to the proper adjudication of such a case is identification of the precise treaty right claimed. Counsel for the appellant said at trial that it was the "right to catch fish and to trade or sell them". It was the appellant's submission that this right was part of a larger right to trade in all of the products of a hunting, fishing and gathering society, which right he claims was granted to the Mi'kmaq in the **Treaties of 1760-61**. In oral argument on the appeal, counsel for the appellant characterized the right asserted as a right to have a mechanism for trade.

The importance of properly characterizing the right claimed is highlighted in the following passage from **R. v. Pamajewon and Jones** (1996), 199 N.R. 321 (S.C.C.). Although that was a case concerning aboriginal rights, the principles are equally applicable to a treaty rights case. It is illustrative of the care which a court must take in defining the right claimed. Lamer, C.J.C., writing for the Court, said at p. 333:

> The appellants themselves would have this Court characterize their claim as to "a broad right to manage the use of their reserve lands". To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. **Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right**. The factors laid out in *Vanderpeet*, and applied, supra, allow the Court to consider the appellants' claim at the appropriate level of specificity;

> the characterization put forward by the appellants would not allow the Court to do so. (emphasis added)

And in **Van der Peet, supra**, at pp. 551 and 552:

> . . . **in assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed**; in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed. **The correct characterization of the appellant's claim is of importance because whether or not the evidence supports the appellant's claim will depend, in significant part, on what, exactly, that evidence is being called to support.**
>
> . . .
>
> To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right. In this case, therefore, the Court will consider the actions which led to the appellant's being charged, the fishery regulation under which she was charged and the practices, customs and traditions she invokes in support of her claim.
>
> It should be acknowledged that a characterization of the nature of the appellant's claim from the actions which led to her being charged must be undertaken with some caution. In order to inform the court's analysis the activities must be considered at a general rather than at a specific level. . . . (emphasis added)

In identifying the right asserted by the appellant, here, the trial judge said:

> At issue here is whether the Defendant, being a status Mi'kmaq Indian, has a right, under treaty, to fish and sell fish and, as a consequence, whether he should be acquitted on these charges.

The Defence is, in fact, asserting a Mi'kmaq treaty right to trade or sell fish *free of any regulation by the government*. Indeed, as the trial judge said, the Defence maintains that the **Treaties of 1760-61** confirm "the understanding that the Mi'kmaq had free liberty to trade [in all products of a hunting, fishing and gathering society], *without restriction*". In the context of these offences, the issue is not whether the Mi'kmaq can trade in fish, on the same basis as all other residents of Canada, but whether they have a preferential right to do so.

Interpretive Background:

Section 35(1) of the **Constitution Act, 1982** provides that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and confirmed". Section 35(1) does not create new rights, but rather, protects existing ones.

The treaties are to be given a just, broad and liberal interpretation. In **R. v. Sioui**, [1990] 1 S.C.R. 1025 Lamer, J., as he then was, writing for the court at p. 1036, explained why this is so:

> . . . once a valid treaty is found to exist, that treaty must in turn be given a just, broad and liberal construction. This principle, for which there is ample precedent, was recently reaffirmed in *Simon*. The factors underlying this rule were eloquently stated in *Jones v. Meehan*, 175 U.S. 1 (1899), a judgment of the United States Supreme Court, and are I think just as relevant to questions involving the existence of a treaty and the capacity of the parties as they are to the interpretation of a treaty (at pp. 10-11):
>
> > In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter

> employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

At p. 1068 Lamer, J. confirms that the goal is to deduce the common intention of the parties by interpreting the treaties in their historical context:

> In my view, the treaty essentially has to be interpreted by determining the intention of the parties on the territorial question at the time it was concluded. It is not sufficient to note that the treaty is silent on this point. We must also undertake the task of interpreting the treaty on the territorial question with the same generous approach toward the Indians that applied in considering earlier questions. Now as then, we must do our utmost to act in the spirit of *Simon*.
>
> The historical context, which has been used to demonstrate the existence of the treaty, may equally assist us in interpreting the extent of the rights contained in it. As MacKinnon J.A. said in *Taylor and Williams*, *supra*, at p. 232:
>
> > Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.

In ascertaining the common intention the court must take into consideration the context in which treaties were negotiated and committed to writing, including the limitations of the parties. The resulting interpretation must, however, be a realistic one. Chief Justice Lamer wrote in **Sioui, supra**, at p. 1069:

> . . . Even a generous interpretation of the document, such as Bisson J.A.'s interpretation, **must be realistic and reflect the intention of both parties**, not just that of the Hurons. **The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons' interests and those of the conqueror.** (emphasis added)

While treaties must be interpreted in their historical context, extrinsic evidence cannot be used as an aid to interpretation, in the absence of an ambiguity. At p. 1049, **Sioui, supra**, per Lamer, C.J.C.:

> As this Court recently noted in *R. v. Horse*, [1988] 1 S.C.R. 187, at p. 201, **extrinsic evidence is not to be used as an aid to interpreting a treaty in the absence of ambiguity or where the result would be to alter its terms by adding words to or subtracting words from the written agreement**. This rule also applies in determining the legal nature of a document relating to the Indians. However, **a more flexible approach is necessary as the question of the existence of a treaty within the meaning of s. 88 of the Indian Act is generally closely bound up with the circumstances existing when the document was prepared** (*White and Bob*, supra, at pp. 648-49, and *Simon*, *supra*, at pp. 409-10). In any case, the wording alone will not suffice to determine the legal nature of the document before the Court. On the one hand, we have before us a document the form of which and some of whose subject-matter suggest that it is not a treaty, and on the other, we find it to contain protection of fundamental rights which supports the opposite conclusion. The ambiguity arising from this document thus means that the Court must look at extrinsic evidence to determine its legal nature. (emphasis added)

The "more flexible" approach referred to above, is endorsed, then, only in determining whether the document is, in fact, a treaty, rather than with respect to the interpretation of that treaty, once found to exist, in the absence of ambiguity.

The **Treaties of 1760-61** comprise several separate treaties, entered into by the British with each Mi'kmaq Sakamow (Chief). The Mi'kmaq were a widely dispersed

people, organized by Bands or Districts. Because it would be difficult to get them all together at one time, the decision was made to enter into a treaty with each Band separately. It was hoped that at some future time there would be a grand re-affirmation of all of these treaties. That never happened. The trial judge found that the documents were indeed treaties and that all of the Mi'kmaq treaties were “materially the same”. An example of one of these treaties is reproduced in full in the Appendix to this judgment.

Alleged Errors in Interpretation:

The trial judge correctly instructed himself in the proper interpretive principles applicable to the assessment of a claim to a treaty right. Indeed, in his factum, the appellant acknowledges that the trial judge “purported to rely upon proper principles” but mispplied them.

The passage of the treaty (the "truckhouse clause") from which the appellant says the right to trade derives is:

> . . . 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 Lunenbourg or Elsewhere in Nova Scotia or Accadia.

The trial judge held that the **Treaties of 1760-61**, interpreted in their proper historical context, did not grant to the Mi'kmaq the right claimed by the appellant, and, thus, did not provide a defence to the charges.

(i) Incorporation of earlier treaties:

The appellant asserted that the **Treaties of 1760-61** "formally incorporate [or renew] the **Treaties of 1724-26**, the **Treaty of 1749**, the **Treaty of 1752** and the adhesions to 1752 made by the LaHave and Cape Sable Mi'kmaq".

The British had entered into a treaty with the Maliseet and Passamaquody in 1760, prior to the signing of the various Mi'kmaq **Treaties of 1760-61.** The Maliseet and Passamaquody treaties expressly renewed the earlier treaties. It was submitted by the appellant at trial that the Mi'kmaq treaties were made on the same terms as the Maliseet and Passamaquody treaties and, therefore, incorporated the earlier treaties.

In finding that the earlier treaties were not incorporated the trial judge wrote at p. 21:

> During 1760 and 1761, various representatives of the Maliseet and Mi'kmaq came to Halifax and entered into treaties with the British Governor or Lieutenant Governor. **The first treaty, dated February 23, 1760, was with the Maliseet and Passamaquody**. . . . **This treaty contains and confirms the Articles of Submission and Agreement entered into in Boston in 1725 and the subsequent articles entered into in Halifax in 1749 and ratified later that year at the mouth of the Saint John River**. It also acknowledges that those previous articles had been violated. By this treaty, the Maliseet agreed to "traffic and barter and exchange commodities" only at government truckhouses unless given permission to trade at some other place. The Governor in Council and the Maliseet Sakamows had, the week before, agreed to a valuation of various animal skins for the purpose of trading at truckhouses. A truckhouse was subsequently established at the mouth of the Saint John River for trade with the Maliseet.
>
> On February 29, 1760, Paul Laurent, Sakamow of the Mi'kmaq at LaHave and Michel Augustine, Sakamow of the Mi'kmaq at Richibouctou appeared before the Governor and Council to conclude a treaty of peace. The treaty made with the Maliseet earlier that month was communicated to them. **They expressed satisfaction with it and declared that all of the Mi'kmaq would be prepared to make peace on those conditions**. The British realized that it would be difficult to arrange for all of the Mi'kmaq representatives to attend at

> Halifax at one time and therefore it was resolved to present a separate treaty to each Sakamow as he arrived. It was anticipated that a general treaty would be made and a signing ceremony for all would be held at Fort Cumberland on a later occasion. There is no indication that this ever happened.
>
> **Paul Laurent entered into a treaty, on behalf of the LaHave village, on March 10th, 1760. Michel Augustine and Claude Rene (Sakamow of the Shubenacadie and Musquodoboit Mi'kmaq) entered treaties at the same time**. . . . By the end of 1761, it seems that all Mi'kmaq in Nova Scotia had entered into separate but similar treaties. Copies of some of those treaties have not been located and there may be minor variations between some existing treaties because of errors made in transcribing copies. Nevertheless, I am satisfied that all of these Mi'kmaq treaties were materially the same.
>
> **The Mi'kmaq treaties, as written and signed, do not renew, or even make mention of, any previous treaties.** . . . (emphasis added)

And at p. 3*6 et seq*:

> The Treaty of 1760 with the Maliseet and Passamaquody renews and confirms the Articles of Submission and Agreement made at Boston in December, 1725 and the subsequent ratification of those terms in 1749 (both in Halifax and at the Saint John River). **It clearly states what the parties are intending to renew and confirm by quoting the previous documents verbatim.** The *1760 Treaty* also includes additional terms. (emphasis added)

In support of his submission that the Mi'kmaq **Treaties** were made "on the same terms" as the Maliseet treaty and thereby incorporated the earlier treaties, the appellant relied in part upon an exchange between Mi'kmaq representatives and the British, on February 29, 1760. The trial judge referred to this meeting:

> At the February 29th meeting with the Governor and Council, the minutes reflect that the following exchange occurred with Paul Laurent and Michel Augustine:

> His Excellency then Ordered the Several Articles of the Treaty made with the Indians of St. John's River and Passamaquody to be Communicated to the said Paul Laurent and Michel Augustine who expressed their satisfaction therewith, and declar'd that all the Tribe of the Mickmacks would be glad to make peace upon the same Conditions.

The trial judge expressly directed himself to the issue of whether "there were any promises or commitments made by the British which were not included in the written treaties and which should be considered part of the treaties", and the relevance of the February 29th exchange. At p. 36 he wrote:

> Ten days later, Laurent and Augustine entered into their respective treaties. Those treaties make no mention of earlier treaties or the renewal of earlier treaties. In light of that, I have to determine the significance of what took place at the February 29th meeting . . .
>
> . . .
>
> It is my conclusion that the *1760-61 Mi'kmaq Treaties* did not renew earlier treaties. That is consistent with the treaties themselves and is confirmed by the manner in which they were viewed and acted on thereafter.
>
> **I am also satisfied there would not have been any misunderstanding by Laurent and Augustine over the contents of the treaty they were signing because of the exchange they had at the February 29th meeting . . .**
>
> In my view, the treaties entered into by Laurent and Augustine on March 10, 1760, did "make peace upon the same conditions" as the Maliseet and Passamaquody, and Governor Lawrence's characterization of the treaties to the Board of Trade as being "on the same terms" can't be quarrelled with. (emphasis added)

The trial judge referred to the conflicting evidence of the expert witnesses on this point. He noted that Professor Patterson, a Crown witness, testified that the omission of any reference to earlier treaties in the **Treaties of 1760-61** was intentional. Dr. Reid

and Dr. Wicken, for the Defence, testified that the Mi'kmaq would have believed that the earlier treaties were part and parcel of the new treaties. Clearly, the trial judge accepted the evidence of the Crown witness, Professor Patterson, on this issue.

Certain findings of fact by the Trial Judge are central to his determination:

At p. 34

> In the Nova Scotia of 1760, the Mi'kmaq and their Sakamows would have appreciated and understood the position that the British were in and what their objectives were . . . [The Mi'kmaq] had the history of their own relationship with the British in Nova Scotia over the last 50 years . . .
>
> > The British wanted their King to be King over all of the land and territory where the Mi'kmaq lived and beyond . . . the Mi'kmaq would have been under no misunderstanding about that.
> >
> > The general intent of the 1760-61 Treaties would also not have been the subject of any misunderstanding by the Mi'kmaq because of language or translation problems . . .

At p. 35:

> > . . . Every Mi'kmaq Sakamow or his representative came to Halifax in 1760 and 1761 and entered into these treaties. That process took over 18 months. There was no misunderstanding or lack of agreement between the British and the Mi'kmaq about the essential ingredients of these treaties as they appear in written form before me.

At p. 37:

> > . . . there would not have been any misunderstanding by Laurent and Augustine over the contents of the treaty they were signing . . .

At p. 38:

> > The Mi'kmaq would have developed an understanding of European written communication and the significance placed

> on it. More particularly, the Mi'kmaq did learn to appreciate the importance of the written word in treaty-making and the value of having a copy of a treaty as proof of what was agreed to.

There was ample evidence before the trial judge to support his finding that where renewal of earlier treaties was intended, the parties had, in past treaties, used express words to do so. In view of the evidentiary base, and the factual findings of the trial judge in relation thereto, he made no error of law in concluding that the earlier treaties were not incorporated.

The trial judge's finding that the earlier treaties were not incorporated is important in that the appellant relied upon certain wording in the **Treaty of 1752** to support his submission that the **Treaties of 1760-61** constitute the grant of a right. In particular, the **Treaty of 1752** states, in part:

> It is agreed that the said **Tribe of Indians shall not be hindered from, but have free liberty of Hunting and Fishing as usual** and that if they shall think a Truckhouse needfull at the River Chibenaccadie or any other place of their resort, they shall have the same built and proper Merchandize lodged therein, to be exchanged for what the Indians shall have to dispose of, and that in the mean time the said Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skin, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best Advantage. (emphasis added)

The trial judge concluded, however, that this treaty was not incorporated into the **Treaties of 1760-61**. The appellant, during the trial, had abandoned any reliance on the **Treaty of 1752** as a separate source of the right to trade in fish. Accordingly, that **Treaty** remained relevant only to provide historical context.

(ii) Grant of right to fish and sell fish:

The appellant says that the truckhouse clause, in referring to trade at truckhouses, thereby acknowledged that the Mi'kmaq traded in the products of their hunting, fishing and gathering society. By virtue of this recognition, submits the appellant, the **Treaties of 1760-61** grant a right to trade in those products. The trial judge did not agree.

The appellant says that the trial judge erred in requiring an express grant or conveyance of a right to trade - that a recognition and affirmation of an implied right is enough. In this regard, following an extensive legal, historical and factual analysis the trial judge posed the following question:

> Is there anything stated in the trade clause or meant by the trade clause, explicitly **or implicitly**, that conveys any trading right to the Mi'kmaq beyond the context of the truckhouses and licensed traders? (emphasis added)

Various passages from the trial judge's decision provide the context for his rejection of the appellant's claim to the grant of a trading right. After referring to the cultural and linguistic differences between the Mi'kmaq and the British, the judge reviewed the state of relations between the parties upon entering these **Treaties**:

At p. 31:

> Another major component of the treaties' context is, obviously, the historical background. Some of that historical background I have set out in this decision. However, **there are some features of it that I consider to be particularly pertinent**.
>
> 1. The 1760-61 treaties were the culmination of more than a decade of intermittent hostilities between the British and the Mi'kmaq. Hostilities with the French were also prevalent in Nova Scotia throughout the 1750's, and the Mi'kmaq were constantly allied with the French against the British.
>
> 2. The use of firearms for hunting had an important impact on Mi'kmaq society. The Mi'kmaq remained dependant on others for gun powder and

> the primary sources of that were the French, Acadians and the British.
>
> 3. The French frequently supplied the Mi'kmaq with food and European trade goods. By the mid-18th century, the Mi'kmaq were accustomed to, and in some cases relied on, receiving various European trade goods.
>
> 4. The defeat of the French and their withdrawal from Nova Scotia left the Mi'kmaq to co-exist with the British without the presence of their former ally and supplier. Much of the Acadian population had also been expelled or displaced by 1760.
>
> 5. The British had been victorious over the French in Nova Scotia and they were in the process of conquering all of New France. They had cause to be more confident than ever before in the strength of their position in Nova Scotia.
>
> 6. The British wanted peace and a safe environment for their current and future settlers. Despite their recent victories, they did not feel completely secure in Nova Scotia.
>
> It is my opinion that this combination of factors contributed greatly to the atmosphere in which the *Treaties of 1760-61* were entered into. **The Mi'kmaq had lost their major ally and supplier**. **Their ability to carry on effective hostilities against the British was substantially reduced. The Mi'kmaq would have perceived the British to be in a superior military position in the Province.** At least as importantly, their justification for continuing hostilities against the British largely disappeared when the French departed. **The Mi'kmaq also needed a new supplier of European goods and the British had become the primary potential source of those goods.**
>
> (emphasis added)

At p. 35:

> It is fundamental to the *Treaties of 1760 and 1761* that they are peace treaties, that they acknowledge the jurisdiction of the British King over Nova Scotia, that any quarrels or misunderstandings between the Mi'kmaq and the British will be redressed according to British laws and that trade with the Mi'kmaq will be carried out in accordance with the terms in the trade clause. Those subjects are at the heart of the treaties...

As set out previously, the judge determined that the **Treaties**, as written, reflected the full agreement of the parties. At p. 39 he wrote:

> Having verified the actual contents of the Mi'kmaq *Treaties of 1760 and 1761*, I now refer to the trade clause, common to all. To re-state, that trade clause says:
>
> > 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 truckhouses as shall be appointed or established by His Majesty's Governor at [truckhouse location closest to the village in question] or elsewhere in Nova Scotia or Accadia.
>
> **It is submitted on behalf of the Defendant that this clause, considered in the appropriate historical context, gives the Mi'kmaq, and in particular the Defendant, the right to fish and the right to sell fish. Do these treaties convey such a right?**
>
> The Mi'kmaq of the 18th century lived and obtained their food by hunting, fishing and gathering. It is clear that the British in Nova Scotia in 1760 would have understood that. . . . All three witnesses who testified concluded that fish might be among the items that the Mi'kmaq would bring to trade at the truckhouses**.** (That fish might be fresh or dried.)
>
> **I accept as inherent in these treaties that the British recognized and accepted the existing Mi'kmaq way of life. Moreover, it's my conclusion that the British would have wanted the Mi'kmaq to continue their hunting, fishing and gathering lifestyle**. The British did not want the Mi'kmaq to become a long-term burden on the public treasury although they did seem prepared to tolerate certain losses in their trade with the Mi'kmaq for the purpose of securing and maintaining their friendship and discouraging their future trade with the French. **I am satisfied that this trade clause in the *1760-61 Treaties* gave the Mi'kmaq the right to bring the products of their hunting, fishing and gathering to a truckhouse to trade.**

At p 43:

> **The Defendant claims that the *1760-61 Treaties* provide him with a right to fish and sell the fish. The burden is on him to establish the existence of such a right in these treaties, by using the principles of interpretation to which I have referred. He has not met that burden**. The interpretation offered on behalf of the Defendant of the trade clause and

> the treaties, placed in the historical context which is suggested as the appropriate one, is not one that I accept. **I cannot conclude that it was the common intention of the parties that these treaties convey such a right.**
>
> Mr. Justice Lamer, speaking for the Court in *R.v. Sioui*, *supra*, at p. 1069 states:
>
> > Even a generous interpretation of the document, such as Bisson, J.A.'s interpretation, must be realistic and reflect the intention of both parties, not just that of the Hurons. The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons' interests and those of the conqueror."
>
> **The British did not intend to convey, and would not have conveyed, the right which the Defendant claims as a treaty right.** Mi'kmaq concerns in 1760 were very focused and immediate. **Conveying the right which the Defendant here claims from this trade clause is not even among the "various possible interpretations of the common intention" of the Mi'kmaq and the British**. (emphasis added)

The truckhouse clause cannot be interpreted in the abstract but must be read in the context of the **Treaty** as a whole. These were **Treaties** pursuant to which the Mi'kmaq were bringing themselves under British control. They became British subjects and received the benefit of British law and protection. These were, in essence, peace treaties negotiated following a long period of British/Mi'kmaq hostilities. Trade was not central to the **Treaties** but a vehicle by which the British could encourage the maintenance of a friendly relationship with the Mi'kmaq. Facilitating access by the Mi'kmaq to European goods was a means of ensuring that they would not find it necessary to trade with the French, should the opportunity present. It also addressed the British concern that the Mi'kmaq not be subjected to unscrupulous trading practices by other British subjects, which might destabilize peaceful relations.

The trial judge's finding that the “British did not intend to convey and would not have conveyed” the trading right asserted by the appellant is supported by the evidence, in particular that regarding the mercantile nature of the British economy; the fact that the Governor had been instructed not to place any subject in a preferential trading position; and the fact that, pursuant to this **Treaty**, the Mi'kmaq were submitting to British law.

While each treaty must be interpreted in accordance with the historical circumstances prevailing at the relevant time for the particular aboriginal group, the appellant could not point to any other case in which a treaty provision, worded in the negative, such as that above, had been held to constitute the grant of a right.

In **R. v. Sioui**, [1990] 1 S.C.R. 1025 members of the Hurons band were convicted of cutting down trees, camping and making fires in places not designated for such activity in the Jacques-Cartier park, contravening certain provisions of the **Quebec Parks Act**. The Hurons alleged that they were practising certain ancestral customs and religious rites which were the subject of a treaty between the Hurons and the British. The treaty provided:

> THESE are to certify that the CHIEF of the HURON tribe of Indians, having come to me in the name of His Nation, to submit to His BRITANNICK MAJESTY, and make Peace, has been received under my Protection, with his whole Tribe; and henceforth **no English Officer or party is to molest, or interrupt them in returning to their Settlement at LORETTE; and they are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English**: — recommending it to the Officers commanding the Posts, to treat them kindly. (emphasis added)

The court held that the treaty guaranteed to the Hurons the right to carry on their customs and religious rites and proceeded to interpret the territorial scope of the treaty rights, which territorial scope was not specifically addressed in the treaty itself.

In **R. v. Horseman**, [1990] 1 S.C.R. 901 the court considered **Treaty 8** signed in 1899 “which guaranteed substantive hunting rights to certain Indian people”. The treaty provided:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that **they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered** as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. (emphasis added)

In **R. v. Bombay**, [1990] 1 C.N.L.R. 92 (Ont.C.A.) the Indian participants surrendered to the Government ". . . all their rights, titles and privileges whatsoever, to the lands included within the following limits . . ." The treaty provided:

> Her Majesty further agrees with Her said Indians that they, **the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered** as hereinbefore described, subject to such regulation as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government. (emphasis added)

The treaty under consideration in **R. v. Badger**, [1986] 1 S.C.R. 771 was worded as follows:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that **they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations** as may from time to time be made by the Government of the country. . . (emphasis added)

In **R. v. Taylor and Williams** (1981), 62 C.C.C. (2d) 227 (Ont.C.A.) the treaty document itself did not contain a reservation of hunting and fishing rights, however, the court held that the promises contained in minutes of the council meeting, which preceded and followed the signing of the provisional agreement which led to the written agreement, formed a part of the treaty. Those minutes provided that **"[t]he Rivers are open to all and you have an equal right to fish and hunt on them"**. Counsel for both parties to the appeal had "agreed that the minutes of this council meeting recorded the oral portion of the 1818 treaty and are as much a part of that treaty as the written articles of the provisional agreement" (per MacKinnon, A.C.J.O. at p. 230).

In each of these examples the right held to be granted in the treaty is an express right, albeit, one that may need further interpretation as to its extent. Certain companion or incidental rights, although not referred to expressly, may be implied to give effect to the meaning of the grant. While we agree with the appellant's submission that "a treaty may be a source of rights without expressly granting and conveying the rights", that is not to say that every reference in a treaty document to practices such as hunting or fishing or trading constitutes a treaty right to do so.

In **R. v. Simon**, [1985] 2 S.C.R. 387 the Court considered whether the **Treaty of 1752** contained a right to hunt and, if so, the scope of that right. In finding that the treaty did, indeed, embody a right to hunt, Dickson, C.J.C. wrote at p. 401:

> Article 4 of the *Treaty of 1752* states, **"It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting & Fishing as usual..."** What is the nature and scope of the "liberty of Hunting & Fishing" contained in the Treaty?
>
> The majority of the Nova Scotia Court of Appeal seemed to imply that the Treaty contained merely a general acknowledgement of pre-existing non-treaty aboriginal rights and not an independent source of protection of hunting rights upon which the appellant could rely. **In my opinion**, **the Treaty, by providing that the Micmac should not be hindered from but should have free liberty of hunting and fishing as usual, constitutes a positive source of protection against infringements on hunting rights**. The fact that the right to hunt already existed at the time the Treaty was entered into by virtue of the Micmac's general aboriginal right to hunt does not negate or minimize the significance of the protection of hunting rights expressly included in the Treaty. (emphasis added)

The appellant refers, in particular to the further words of Dickson, C.J.C. at p. 402, which passage is italicized:

> Having determined that the Treaty embodies a right to hunt, it is necessary to consider the respondent's contention that the right to hunt is limited to hunting for purposes and by methods usual in 1752 because of the inclusion of the modifier "as usual" after the right to hunt.
>
> . . .
>
> . . . the respondent maintained that "as usual" should be interpreted to limit the treaty protection to hunting for non-commercial purposes. It is difficult to see the basis for this argument in the absence of evidence regarding the purpose for which the appellant was hunting. *In any event, article 4 of the Treaty appears to contemplate hunting for commercial purposes when it refers to the construction of a truck house as a place of exchange and mentions the liberty of the Micmac to bring game to sale*: see **R. v. Paul**, supra, at p. 563 per Ryan J.A., dissenting in part.
>
> It should be clarified at this point that the right to hunt to be effective must embody those activities reasonably incidental to the act of hunting itself, an example of which is travelling

> with the requisite hunting equipment to the hunting grounds. . .

The appellant submits in this regard:

> . . . it is implicit in the right to bring furs, feathers, etc. to truckhouses for trade that one has the right to hunt and fish and gather to obtain the trade items, and then the right to trade those goods. What is centrally recognized is the right to trade; truckhouses are a refinement, subordinate to the overriding importance of the right to trade.

In **Simon, supra**, however, an aboriginal hunting right already existed at the time of the treaty. The treaty itself contained positive words of protection: “shall not be hindered”; “free liberty of hunting and fishing as usual”. The appellant, here, did not attempt to establish that there was a pre-existing aboriginal or treaty right to trade and abandoned reliance upon the **Treaty of 1752**, which was the focus in **Simon**. While in the **1760-61 Treaties**, in referring to trading at truckhouses, the British are recognizing that the Mi'kmaq traded, that does not of itself constitute a grant of a right to trade. It must be remembered that the appellant is not asserting that the Mi'kmaq simply enjoyed the same right to trade as other British subjects, but that they were granted a preferential trading right.

Many of the treaties considered in the cases cited to this panel involved the ceding of land by the Indians. The fact that the Indians had given up land rights undoubtedly bore upon the interpretation of the treaties. The court would be entitled to presume that the Indians must have received concessions or favours in return for relinquishing such valuable rights. The interpretation of the rights under consideration in such cases often related to the extent of the continuing use by the Indians of the lands surrendered. In return for land, rights were reserved or granted to the Indians without

any expression as to where or how such rights could be exercised. The rights granted would be meaningless if not exercisable on a particular tract of land.

In **R. v. Sioui, supra**, for example, the Hurons were granted in the treaty "free Exercise of their Religion, their Customs, and Liberty of trading with the English". The interpretive exercise is illustrated by the remarks of Lamer, C.J.C. at p. 1071:

> However, the British Crown's desire to colonize the conquered land and use that land for its benefit cannot be doubted. Murray had been engaged for years in a war the purpose of which was to expand the wealth, resources and influence of Great Britain. It is unlikely he would have granted, without further details, absolute rights which might paralyze the Crown's use of the newly conquered territories.
>
> Accordingly, **I conclude that in view of the absence of any express mention of the territorial scope of the treaty**, **it has to be assumed that the parties to the treaty of September 5 intended to reconcile the Hurons' need to protect the exercise of their customs and the desire of the British conquerors to expand . . .** I readily accept that the **Hurons were probably not aware of the legal consequences**, and in particular of the right to occupy to the exclusion of others, which the main European legal systems attached to the concept of private ownership. Nonetheless **I cannot believe that the Hurons ever believed that the treaty gave them the right to cut down trees in the garden of a house as part of their right to carry on their customs.** (emphasis added)

Although the general principles of interpretation enunciated are applicable, these cases are of limited specific assistance in interpreting the **Treaties of 1760-61**. In these **Treaties** the significant "commodity" exchanged was mutual promises of peace. Each party had an interest in ensuring the end of hostilities. That was the essence of the treaties.

In respect of the cases cited which concern aboriginal rights, again, certain of the interpretive principles are applicable, however, aboriginal rights cases suffer from a limitation which exists to a significantly lesser extent in a treaty case - a complete lack of written documentation. This was recognized by Lamer, C.J.C. in **Van der Peet, supra**, at pp. 558-559:

> In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of **the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in.** The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case. (emphasis added)

We acknowledge that some difficulty is presented by the treaty rights cases because the written records surrounding the treaties were kept by the British not the aboriginals. The trial judge here, however, was alive to that problem.

The trial judge found that the wording of the truckhouse clause in the **Treaties of 1760-61**, interpreted in its historical context, did not bear the meaning ascribed to it by the appellants. It did not grant or confirm a right to trade. We are not persuaded that he erred in point of law in so finding.

(iii) Grant of a Right to Trade at Truckhouses:

In oral submission before the panel the appellant, while not abandoning the grounds of appeal presented in his factum, adopted a position concerning the treaty right granted which he had not urged upon the trial judge, nor raised in his factum.

The appellant submits that the trial judge, although not requested to do so by either counsel, found that the **Treaties of 1760-61** granted to the Mi'kmaq a “right to trade at truckhouses”. This, he submits, was a promise by the Crown to establish and maintain a “trading mechanism” for the Mi'kmaq. The appellant says that the fact that the Crown no longer provides truckhouses or a comparable trading mechanism renders the regulatory scheme established by the government (here, the *Fisheries Regulations* pursuant to which the appellant was charged), of no force and effect as regards the Mi'kmaq. The demise of the truckhouse system, in counsel's submission, constitutes an infringement of the treaty right to trade at truckhouses. The appellant relies, principally, upon the following words of the trial judge:

> . . . I am satisfied that this trade clause in the *1760-61 Treaties* gave the Mi'kmaq the right to bring the products of their hunting, fishing and gathering to a truckhouse to trade.

Counsel for the appellant says that the trial judge, while correct in finding that the treaty conferred a right, erred in failing to properly consider the consequences of the Crown's abandonment of this system of truckhouses or licensed traders. On this issue the trial judge said:

> In my opinion, the significance to both the Mi'kmaq and the British of the trade clause in their *Treaties of 1760 and 1761* is rooted **in the circumstances that existed at that time**. It was a pre-requisite to the Mi'kmaq being able to trade under the terms of the trade clause that the British provide truckhouses or appoint persons to trade with. **When the British stopped doing that, the *requirement* (or if I had taken the Defence view, the option) to trade with**

> **truckhouses or licensed traders disappeared**. The trade clause says nothing about that eventuality and **it is my view that no further trade right arises from the trade clause**. (emphasis added)

The “circumstances that existed at that time” are outlined in detail in the trial judge's decision and partially summarized in the extracts from the judgment reproduced above: the British and the Mi'kmaq wished to make peace; the Mi'kmaq relied upon European goods; they had lost their allies and source of supply of European goods; the British had been victorious over the French; by ensuring that the Mi'kmaq did not trade with the French or Acadians, the British were more likely to maintain peaceful relations with the Mi'kmaq; the British could restrict the Mi'kmaq trading by providing the needed European goods at the truckhouses.

In interpreting the judge's words “. . . the right to bring the products of their hunting, fishing and gathering to a truckhouse to trade...” it is crucial to remember that the trial judge was not asked to consider whether the **Treaties of 1760-61** granted to the Mi'kmaq, a *treaty right* to trade at truckhouses.

It was the Crown's position at trial that the truckhouse clause constituted a trade restriction imposed by the British upon the Mi'kmaq requiring them to trade exclusively at truckhouses. The evidence tendered by the appellant at trial was to the effect that the trade clause did not dictate exclusivity - that the Mi'kmaq would not have accepted such a term. The trial judge rejected the appellant's position:

> The opinion was offered in Defence evidence that this trade clause was not interpreted as limiting with whom the Mi'kmaq could trade, only as limiting, from the British side, who could trade with the Mi'kmaq . . .

. . .

> . . . The interpretation offered on behalf of the Defendant of the trade clause and the treaties, placed in the historical context which is suggested as the appropriate one, is not one that I accept . . .

In support of the submission that the trial judge found that the **Treaties** granted a right to trade at truckhouses, the appellant referred to the evidence of the Crown expert witness, Professor Patterson who, the Defence submits, testified that these **Treaties** did indeed grant to the Mi'kmaq the right to trade at truckhouses. The relevant portion from the cross-examination by counsel for the appellant is:

> Q. And I guess we can see from the price list that what the Micmac had to trade were furs and feathers, for specific reference, but I assume, more generally, whatever things hunting, fishing, and a gathering society could be expected to have.
>
> A. I think that's fair. Yes.
>
> Q. And that could include fish.
>
> A. I would think so. Yes. I would rather suspect that there wouldn't be much demand for it and rather difficult since there was no refrigeration in those days. But, in theory, at least, it didn't exclude fish.
>
> Q. Okay. You don't have any examples of trade that actually did take place involving fish or anything else in the truckhouses.
>
> A. In the truckhouses?
>
> Q. Yes.
>
> A. No. I don't think that I've seen specific references to that. But, to tell you the truth, I haven't taken pains to determine what actually was exchanged beyond what I've seen from these general documents. I mean the price list gives you a pretty good idea of the kinds of things that were available and that were commonly traded in that time.
>
> And I simply assume that that was a fair estimation of what there was. Fish do not appear on the list but they're not excluded either. So it's reasonable to assume that they might have been.
>
> Q. I guess it's fair to say that the British would have understood that the Micmac lived and survived by hunting and fishing and gathering activities.

A. Yes, of course.

Q. **And that in this time period, 1760 and '61, fish would be amongst the items they would have to trade. And they would have the right under this treaty to bring fish and feathers and furs into a truckhouse in exchange for commodities that were available**.

A. Well, it's not mentioned but it's not excluded. So I think **it's fair to assume that it was permissible.**

Q. Okay. It's fair to say that it's an assumption on which the trade truckhouse clause is based.

A. That the truckhouse clause is based on the assumption that natives will have a variety of things to trade, some of which are mentioned and some not. Yes, I think that's fair.

Q. Yes. **And wouldn't be out of line to call that a right to fish and a right to bring the fish or furs or feathers or fowl or venison or whatever they might have, into the truckhouses to trade.**

A. Ah, a right. I think the implication here is that there is a right to trade under a certain form of regulation.

Q. Yes.

A. -- that's laid down. And if you're saying right to fish, I've assumed that in recognizing the Micmac by treaty, the British were recognizing them as the people they were. They understood how they lived and that that meant that **those people had a right to live in Nova Scotia in their traditional ways**. And, to me, that implies that the British were accepting that the Micmac would continue to be a hunting and gathering people, that they would fish, that they would hunt to support themselves. I don't see any problem with that.

It seems to me that that's implicit in the thing. Even though it doesn't say it, and I know that there seems to, in the 20th century, be some reluctance to see the value of the 1760 and 1761 treaties because they're not so explicit on these matters, but I personally don't see the hang-up. Because it strikes me that there is a recognition that **the Micmac are a people and they have the right to exist**. And that has -- carries certain implications with it.

More than this, the very fact that there is a truckhouse and that the truckhouse does list some of the things that natives are expected to trade, implies that the British are condoning or recognizing that this is the way that natives live. They do live by hunting and, therefore, this is the produce of their hunting. They have the right to trade it.

. . .

> A. Well, my understanding of this issue, Mr. Wildsmith, has developed and grown with my close reading of the material. It's the position that I come to accept as being a reasonable interpretation of what is here in these documents. (emphasis added)

This same evidence was the focus of lengthy submissions at the conclusion of the trial by counsel for the appellant. He urged an interpretation of Professor Patterson's evidence which supported the grant of a general right to trade. This issue was extensively canvassed before the trial judge. In our view, taking into account the fact that the appellant was not claiming at trial the grant of a right to trade at truckhouses, Professor Patterson is using the word “right” in the context of “permissible” and not to mean the grant of a treaty right. Indeed, he uses “permissible” interchangeably with “right” in his testimony. It is in that same context that the trial judge refers to a “right to trade at truckhouses”.

The trial judge's conclusion that the only implication for the Mi'kmaq of the demise of the truckhouses was that they were free to trade in the same manner as all other subjects of the Crown supports the conclusion that he found that the clause restrained Mi’kmaq trade, rather than granted a right to trade at truckhouses. He was asked only to consider whether the treaties granted a right to trade in fish arising from a more general grant of a right to trade. From a reading of the decision as a whole one can only conclude that he interpreted the truckhouse provision as imposing a restriction on Mi'kmaq trading. He referred, above, to the “requirement” to trade at truckhouses. He wrote, at p.22, in reference to the Maliseet truckhouse clause (which was the same as the Mi'kmaq clause):

> . . . By this treaty, the Maliseet agreed to “traffic and barter and exchange commodities” only at government truckhouses

> **unless given permission** to trade at some other place. (emphasis added)

The appellant says that it the fact that the trial judge found that the trade clause was beneficial to the Mi’kmaq supports his position. It does not automatically follow from this that a treaty right to trade was granted, nor does it follow that the clause was not in restraint of trade, taking into account the circumstances existing at the time. The truckhouses were beneficial to the Mi'kmaq insofar as they provided a source of European goods. These had been in short supply for the Mi'kmaq since their principal trading partners, the French and Acadians had been driven from the territory. The trial judge wrote:

> The Mi'kmaq needed European goods and those goods could be obtained at advantageous rates from government truckhouses. The British desired a friendly and harmonious relationship with the Mi'kmaq and they believed that this relationship could be, in part, secured and maintained through trade.

This does not change the character of the clause as restrictive of trade.

The fact that under the **Treaties of 1760-61** the Mi’kmaq were authorized and required to trade goods only at the truckhouses does not constitute the grant of a right to do so. The truckhouse clause was not a condition of peace with the Mi'kmaq. It was, rather, a mechanism imposed upon them to help ensure that the peace was a lasting one, by obviating their need to trade with enemies of the British.

The trial judge was correct when he concluded that the only implication from the demise of the truckhouses and licensed traders was that the Mi'kmaq were free to trade in the same manner as all other residents of the territory. The truckhouse clause simply cannot bear the interpretation placed upon it by the appellant, nor do the judge's words,

interpreted in context, support the submission that he found that the **Treaties of 1760-61** granted a treaty right to trade at truckhouses.

The Ruling on the Voir Dire - Treaty of 1752:

The sixth issue raised in the appellant's factum concerns the question of whether the trial judge erred in allowing the Crown to present evidence that the **Treaty of 1752** had been extinguished by hostilities. It is an alternative argument we are asked to consider only in the event that this Court does not find the existence of a right to trade in the **Treaties of 1760-61**. Initially the appellant had planned to defend the charges against him on the basis of the **1752 Treaty** in addition to the **1760-1761 Treaties**. The appellant submits that the trial judge's ruling on the *voir dire*, held to determine whether the hostilities question was *res judicata* as a result of the Supreme Court of Canada's decision in **R. v. Simon**, [1985] 2 S.C.R. 387, caused the appellant to abandon his reliance on the **Treaty of 1752** as a direct source of a treaty right to trade.

The *voir dire* was held when appellant's counsel objected to direct evidence respecting hostilities after the signing of **1752 Treaty** from the Crown's historian, Professor Patterson, during his third day of testimony. The appellant submitted affidavits with documents from the court record of **Simon,** to support the position that the question of whether the **Treaty of 1752** had been extinguished was *res judicata*. It was submitted that there was historical material before the Supreme Court of Canada describing hostilities after 1753 and that the Crown relied on those references in their written submissions to the Supreme Court.

In **Simon,** the issue was whether the appellant enjoyed hunting rights pursuant to the **Treaty of 1752**, so as to preclude his prosecution pursuant to the **Lands and Forests Act**, R.S.N.S. 1967, c.163. On appeal, by way of stated case from the Provincial Court to the Appeal Division of the Supreme Court of Nova Scotia, Mr. Simon's convictions were confirmed. (See (1982), 49 N.S.R. (2d) 566). The majority held that if the **Treaty of 1752** was a valid treaty, it was effectively terminated in 1753 when the Mi'kmaq Chief who had signed the **Treaty** in 1752, Major Jean Baptiste Cope and his band killed six Englishmen. (See [1985] 2 S.C.R. at p. 396). In the Supreme Court, Chief Justice Dickson, writing for the Court, disagreed that the Crown had proven termination as a result of hostilities and said at page 404:

> It may be that under certain circumstances a treaty could be terminated by the breach of one of its fundamental provisions. **It is not necessary to decide this issue in the case at bar since the evidentiary requirements for proving such a termination have not been met.** Once it has been established that a valid treaty has been entered into, the party arguing for its termination bears the burden of proving the circumstances and events justifying termination. The inconclusive and conflicting evidence presented by the parties makes it impossible for this Court to say with any certainty what happened on the eastern coast of Nova Scotia 233 years ago. **As a result, the Court is unable to resolve this historical question. The Crown has failed to prove that the Treaty of 1752 was terminated by subsequent hostilities**.
>
> . . .
>
> I conclude from the foregoing that **the Treaty of 1752 was not terminated by subsequent hostilities in 1753.** The treaty is of as much force and effect today as it was at the time it was concluded. (emphasis added)

In his ruling on the *voir dire*, the trial judge referred to these passages of the **Simon** decision and concluded that although the decision was a decision *in rem*, in the sense that it was conclusive for or against everyone in respect of the issues decided therein, the Supreme Court of Canada was only basing its conclusions on the lack of proof

respecting hostilities in 1753 and did not decide whether the treaty had been terminated by other conflicts. The trial judge determined that the Supreme Court:

> . . . did not decide whether the *Treaty of 1752* was terminated by hostilities or other events after 1753 alone, or in combination with hostilities in 1753. Consequently, the Crown is not precluded from tendering such evidence and attempting to make such an argument in this case.

After this ruling the Crown presented four more days of evidence of its expert, Professor Patterson. After the completion of his cross-examination and upon the opening of the case for the Defence, appellant's counsel advised the court:

> I alerted Mr. Pare to one matter that I would like to bring up before we actually start with our evidence and that is that, **in light of the testimony given by Dr. Patterson in the Crown's case-in-chief, in particular, Dr. Patterson's evidence during the last session in cross-examination in the period April 18 through April the 20th, 1995, and in particular, his evidence at roughly pages 156 through 158**, we are prepared to request that the Court make its determination in this case on the basis of the 1760, '61 treaties with the Micmac **and only on that basis**.
>
> In other words, that we are now prepared to subscribe to the position initially put forward by the Crown that **there is no need to deal with the 1752 treaty**, per se, or the suggestion that has been made that we might be relying upon the concept of aboriginal rights and an aboriginal right to engage in trade.
>
> . . .
>
> So we will be directing our evidence, and since the last day we have gone through some momentous revisions or adjustments to our evidence to pare down the volume of it to a more manageable length on the basis that **the case will be determined on the basis of whether the 1760, '61 treaties provide the necessary rights to Mr. Marshall** and the Micmac to engage in the activities that he was engaged in.
>
> . . . So thus **you will not be hearing from us any argument that the basis of the right is the '52 treaty and we hope the**

> **Court will be content in light of that statement to restrict its decision, the scope and the ambit of its decision to the 1760 and '61 treaties** but, of course, I guess like many of these things, it is within Your Honour's discretion. (emphasis added)

It is reasonable to infer from the record that the reason for the change in direction by the Defence was not the trial judge's ruling respecting the effect of the **Simon** decision, but the evidence of Professor Patterson. This raises the issue of whether a defendant who has the opportunity to argue two separate defences to a charge can abandon one of them at trial, with the result that the trial judge does not rule on its effect, and then later raise that defence at the appeal. The statements of Lambert, J.A. in **R. v. Vidulich** (1989), 37 B.C.L.R. 391 at page 398 are applicable in these circumstances:

> An accused must put forward his defences at trial. If he decides at that time, as a matter of tactics or for some other reason, not to put forward a defence that is available, he must abide by that decision. He cannot expect that if he loses on the defence that he has put forward, he can then raise another defence on appeal and seek a new trial to lead the evidence on that defence.

Having determined, for whatever reason, not to present evidence on the issue of applicability the **Treaty of 1752**, and to specifically ask the trial judge not to consider it, it is not open for the appellant to change direction at this point.

There is nothing on the record that indicates that the decision not to continue with the defence based on the **Treaty of 1752** was as a result of the trial judge's ruling on the *voir dire*. Nonetheless, since both parties have argued the issues fully, it is appropriate to examine whether he erred in law in deciding that the question of whether the treaty was extinguished by hostilities was open for his consideration.

As noted above, the appellant submits that the Supreme Court decision in **Simon** is a decision *in rem*, for all time, and for all people on the question of the validity of the **Treaty of 1752**. Reference is made to **Saanichton Marina Ltd. v. Claxton** (1988), 43

D.L.R. (4th) 418 (B.C.S.C.) where the court declined to allow the Crown to question whether it was bound by an agreement entered into by the Hudson's Bay Company when "precisely that issue" had been decided in the earlier decision of **R. v. White and Bob** (1964), 50 D.L.R. (2d) 613 (B.C.C.A.) which was affirmed in the Supreme Court of Canada ((1965), 52 D.L.R. (2d) 481).

An analysis of an issue of *res judicata* is best started with an examination of the basic principles, found in **The Doctrine of Res Judicata** by G. Spencer Bower and A.K. Turner, 2nd Edition (London, Butterworth's) where the doctrine is defined in paragraph 9 as:

> The rule of estoppel by *res judicata*, which, like that of estoppel by representation, is a rule of evidence, may thus be stated: where a final judicial decision has been pronounced by either an English, or (with certain exceptions) a foreign, judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, and, in the case of a decision *in rem*, any person whatsoever, as against any other person, is estopped in any subsequent litigation from disputing or questioning such decision on the merits, whether it be used as the foundation of an action, or relied upon as a bar to any claim, indictment or complaint, or to any affirmative defence, case, or allegation, if, but not unless, the party interested raises the point of estoppel at the proper time and in the proper manner.

In paragraph 19 of the eminent text the authors state that the party who wishes to set up *res judicata* by way of estoppel has the burden of proving six elements, the last two of which are critical in this matter:

> (v) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;
>
> (vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive *in rem*.

We will first deal with the question of whether the previous decision, that of the Supreme Court of Canada in **Simon**, involved a determination of the same question as this case. Obviously the **Simon** case dealt with the same treaty and the final result was that Mr. Simon was acquitted of the **Lands and Forests Act** charges because the Supreme Court of Canada concluded that he "has a valid treaty right to hunt under the **Treaty of 1752** " (page 414).

In attempting to ascertain if the precise issue of whether the treaty was terminated by subsequent hostilities, was "determined" by the Supreme Court, it is interesting to note that the question of whether there were hostilities, which is presumably a question of fact, appears not to have been raised before the trial judge in **Simon**. No evidence was directed to the issue of hostilities at the trial. The matter came to the Appeal Division on the basis of a stated case on an agreed statement of facts, in which the trial judge set out the facts that established the *actus rea* of the offences and a description of the place where the acts took place. The trial judge had assumed that the treaty was a valid treaty and that Mr. Simon was a direct descendant of the aboriginal parties to the treaty. The trial judge was of the view that the treaty did not apply to lands settled by the white man and occupied for farming. (See 49 N.S.R. (2d), pages 568 - 570). It is not clear from the decision of Macdonald, J.A. if the parties raised the issue of hostilities in the Appeal Division, or if the court on its own (after referring to the decision of Patterson, J. in **R. v. Syliboy**, [1929] 1 D.L.R. 307 who had made note of subsequent hostilities) relied on passages from **Beamish Murdoch's History of Nova Scotia** to support the opinion that if there was a valid treaty, it was terminated by subsequent hostilities.

Although the affidavits submitted to the trial judge on the *voir dire* to which were attached portions of the record from the Supreme Court of Canada, including the factums, should probably not have been admitted, (see **Spencer-Bower and Turner,**

supra, paragraph 213 *et seq*.), neither party objected. In any event, the affidavits simply make it clear that the question of hostilities became a central focus in the Supreme Court. Both the provincial Crown and the appellant submitted reams of archival documents directed at supporting and questioning, respectively, the passages from **Murdoch** upon which Macdonald, J.A. had relied. At least one of the intervenors also filed historical material. There does not appear to have been any application to admit fresh evidence. No doubt, it was as a result of these materials that Chief Justice Dickson said: "The inconclusive and conflicting evidence presented by the parties makes it impossible for this Court to say with any certainty what happened on the eastern coast of Nova Scotia 233 years ago." In others words, no finding of fact was made on this point. In the absence of evidence that the treaty was terminated by subsequent hostilities, the issue was not determined. Although the issue was "before" the Supreme Court, it was not "decided". The court, we believe, was only saying that Macdonald, J.A. was in error in deciding that hostilities had terminated the treaty because there was no proof of those hostilities. In fact, the question of whether hostilities *could* terminate a treaty is still open based on the comment from page 404 of the decision of Dickson, C.J.: "It may be that under certain circumstances a treaty could be terminated by the breach of one of its fundamental provisions."

The issue of subsequent hostilities in **Simon** was not clearly and conclusively determined. If there was any ambiguity as to whether the issue was determined, the appellant failed to meet the burden of proving the estoppel (see page 148, *(***The Doctrine of Res Judicata, supra**).

To summarize, the appellant did not in our opinion, prove on the *voir dire* that the Supreme Court in **Simon** determined that the **1752 Treaty** was not terminated by hostilities. We disagree with the trial judge's statement that "the issue of whether the

Treaty of 1752 was terminated by subsequent hostilities was square before the Supreme Court of Canada", if "square" is taken to mean that the issue was clearly and decisively and affirmatively decided. Although the Crown has not cross-appealed that finding nor the conclusion of the trial judge that "the Supreme Court specifically concluded that the treaty was not terminated by subsequent hostilities in 1753", we would not endorse them as being correct.

The trial judge also concluded that the decision in **Simon** was an *in rem* decision, which removed the requirement for the appellant to prove that he was a party to, or a privy to a party to, the earlier decision and allows him to plead *res judicata* and take advantage of decisions conclusively made in that case. In view of the conclusion reached on the question of identity of the issue, it is not necessary to comment on whether that is correct.

The Burden of Proof of Infringement of a Treaty Right:

The trial judge correctly identified the burden upon the parties. He wrote at p. 6:

> The burden of demonstrating the existence of a treaty right, protected under Section 35(1), rests with the Defendant. Likewise, the Defendant bears the burden of proving that there has been a **prima facie** infringement of that right. The Crown bears the burden of justifying any such infringement of the treaty right.

The appellant submits that the failure to provide truckhouses is a *prima facie* infringement of the treaty right, at which point the burden shifts to the Crown to justify the infringement. At trial the Crown did not attempt to justify the alleged infringement of the right to trade in fish, having taken the position that the **Treaties** did not grant such a right or, in the alternative, that if the right had been granted, it was a regulated right *ab initio*. The Crown did not attempt justification of the alleged right to trade at truckhouses

because this was not a right claimed by the Defence at trial. Justification does not arise unless the court has found that there is an aboriginal or treaty right and that the right has been infringed. Here, the trial judge having found that a treaty right had not been granted, issues of justification and infringement did not arise. The trial judge did not err.

Disposition:

We would dismiss the appeal.

Roscoe, J.A.

Bateman, J.A.

Concurred in:

Flinn, J.A.

APPENDIX

1760

Treaty of Peace and Friendship concluded by the Governor and Commander in chief of Nova Scotia with Paul Laurent Chief of the LaHave tribe of Indians - at Halifax - Authenticated copy - ... having signature of Governor Laurence - ... and in the - holograph of Richard Bulkeley Esquire - his Secretary

Five folio pages-",

Treaty of Peace and Friendship concluded by H.E.C.L. Esq. Govr and Comr. in Chief in and over his Majesty's Province of Nova Scotia or Accadia with Paul Laurent chief of the LaHave tribe of Indians at Halifax in the Province of N.S. or Acadia.

I, Paul Laurent do for myself and the tribe of LaHave Indians of which I am Chief do acknowledge the jurisdiction and Dominion of His Majesty George the Second over the Territories of Nova Scotia or Accadia and we do make submission to His Majesty in the most perfect, ample and solemn manner.

And I do promise for myself and my tribe that I nor they shall not molest any of His Majesty's subjects or their dependents, in their settlements already made or to be hereafter made or in carrying on their Commerce or in any thing whatever within the Province of His said Majesty in any thing whatever within the Province of His said Majesty or elsewhere and if any insult, robbery or outrage shall happen to be committed by any of my tribe satisfaction and restitution shall be made to the person or persons injured.

That neither I nor any of my tribe shall in any manner entice any of his said Majesty's troops or soldiers to desert, nor in any manner assist in conveying them away but on the contrary will do our utmost endeavours to bring them back to the Company, Regiment, Fort or Garrison to which they shall belong.

That if any Quarrel or Misunderstanding shall happen between myself and the English or between them and any of my tribe, neither I, nor they shall take any private satisfaction or Revenge, but we will apply for redress according to the Laws established in His said Majesty's Dominions.

That all English prisoners made by myself or my tribe shall be sett at Liberty and that we will use our utmost endeavours to prevail on the other tribes to do the same, if any prisoners shall happen to be in their hands.

And I do further promise for myself and my tribe that we will not either directly nor indirectly assist any of the enemies of His most sacred Majesty King George the Second, his heirs or Successors, nor hold any manner of Commerce traffick nor intercourse with them, but on the contrary will as much as may be in our power discover and make known to His Majesty's Governor, any all designs which may be formed or contrived against His Majesty's subjects. 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 Lunenbourg or Elsewhere in Nova Scotia or Accadia.

And for the more effectual security of the due performance of this Treaty and every part thereof I do promise and Engage that a certain number of persons of my tribe which shall not be less in number than two prisoners shall on or before September next reside as Hostages at Lunenburg or at such other place or places in this Province of Nova Scotia or Accadia as shall be appointed for that purpose by His Majesty's Governor of said Province which Hostages shall be exchanged for a like number of my tribe when requested.

And all these foregoing articles and every one of them made with His Excellency C.L., His Majesty's Governor I do promise for myself and on of sd part - behalf of my tribe that we will most strictly keep and observe in the most solemn manner.

In witness whereof I have hereunto putt my mark and seal at Halifax in Nova Scotia this day of March one thousand

Paul Laurent

I do accept and agree to all the articles of the forgoing treaty in Faith and Testimony whereof I have signed these present I have caused my seal to be hereunto affixed this day of March in the 33 year of His Majesty's Reign and in the year of Our lord - 1760

Chas Lawrence

By his Excellency's Command

Richard Bulkeley - Secty

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C.A.C. No. 129874

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

DONALD JOHN MARSHALL, JR.

Appellant)

	)	
	)	
- and -	)	REASONS FOR
HER MAJESTY THE QUEEN IN	)	JUDGMENT BY:
RIGHT OF CANADA	)	
	)	Roscoe and
Respondent	)	Bateman, JJ.A.
	)	