NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Marshall*, 2003 NSCA 105

Date: 20031010
Docket: CAC 178066
Registry: Halifax

Between:

Stephen Frederick Marshall, Keith Lawrence Julien, Christopher James Paul, Jason Wayne Marr, Simon Joseph Wilmot, 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 Emmett 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

v.

Her Majesty the Queen

Respondent

Judges: Cromwell, Saunders and Oland, JJ.A.

Appeal Heard: March 24, 25, 26 and 27, 2003, in Halifax, Nova Scotia

Held: **Leave to appeal is granted and the appeal is allowed per reasons for judgment of Cromwell, J.A.; Oland, J.A. concurring; Saunders, J.A. concurring by separate reasons.**

Counsel: Bruce H. Wildsmith, Q.C. and Eric A. Zscheile, for the appellants
Alexander M. Cameron and William D. Delaney, for the respondent
William Richards for the Intervenor, Attorney General of New Brunswick

Reasons for judgment: (Cromwell, J.A.; Oland, J.A. concurring)

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I. INTRODUCTION:

[2] The appellants, all of whom are status Mi'kmaq Indians, cut timber on Crown lands without authorization. That is an offence under s. 29 of the **Crown Lands Act**, R.S.N.S. 1989, c. 114 (the "**Act**"). They were charged and, at their trials, sought acquittals on the basis that they are entitled to cut timber on Crown lands by virtue of treaty rights or aboriginal title. The trial judge rejected these claims and entered convictions. The appellants' subsequent summary conviction appeal was dismissed. They now seek leave to appeal to this Court, arguing that the courts below applied wrong legal principles in considering whether their treaty rights and aboriginal title afforded defences to the charges.

[3] In my view, the courts below applied wrong legal principles with respect to both the treaty rights and aboriginal title defences.

[4] With respect to the claimed treaty rights, both the trial judge and the summary conviction appeal court asked the wrong question by inquiring whether the British and the Mi'kmaq contemplated a commercial harvest of trees for trade at the time of the 1760-61 treaties. To fall within the treaties, the activity giving rise to the charges must be traditional Mi'kmaq gathering or its logical evolution and the resource must be of a type traditionally gathered or its logical evolution. If these conditions are met, there is a treaty right to trade the fruits of the resource gathering to earn a moderate livelihood, subject to justified limitations and issues of extinguishment.

[5] With respect to aboriginal title, the courts below erred by insisting on evidence of intensive, regular use of the cutting sites, rather than asking simply whether there was sufficient evidence of occupation, to the standard I will describe in detail in my reasons, over a territory that includes the cutting sites.

[6] Leave to appeal should be granted, the appeal should be allowed and the convictions entered at trial should be set aside. In my view, while convictions are not inevitable, there is evidence upon which the accused could reasonably be convicted applying the correct legal principles. I would, therefore, order new trials on all charges.

II. FACTS RELATING TO THE CHARGES:

[7] The appellants cut timber on Crown lands at various locations on mainland Nova Scotia and Cape Breton between November of 1998 and March of 1999. The evidence at trial was that the cutting sites ranged in size from under one to several hectares and that the amount of wood removed varied from a few cords to tractor trailer loads. While the term "timber" under the **Act** means "... all trees of any size whether standing, fallen, cut or harvested" (s. 3(r)), the appellants, for the most part, were cutting large, standing trees. They harvested various types of wood, including saw logs (larger diameter logs over 10 inches used for lumber), stud wood (to be cut into 2 inch by 4 inch studs), hardwood fuel wood (normally used in furnaces) and pulpwood (for use in paper making). The harvesting included mature trees such as 70 to 80 year old spruce. Cutting was by chain saws and, in some instances, trees were removed from the forest to the roadside by large machines called forwarders. Cutting techniques ranged from clear cutting to somewhat more selective harvesting.

[8] Both the trial judge and the summary conviction appeal court ("SCAC") described the appellants' activities as "commercial logging". The SCAC added that the appellants had been involved in clear cutting using modern harvesting equipment and that there was no evidence that "... the cutting in question was incidental to other activities that require wood fibre ... or for the manufacture of items by or for the use of local communities." (para. 20).

[9] It was agreed at trial that the wood products cut at each site by the appellants were intended for sale to support themselves and their families. One of the appellants, Roger Ward, testified that he worked with a cutting crew for about four months, earning what he termed "a pretty decent living" of $500 to $600 a week, clear. He said that, in a good week, he could cut 5,000 to 6,000 linear feet of wood.

III. ISSUES AND STANDARD OF REVIEW:

[10] The application for leave to appeal lists 39 grounds and the respondent's notice of contention raises seven additional issues. The appeal raises three main questions, namely, whether the SCAC erred in law by rejecting defences based on (i) a treaty right to log for trade; (ii) common law aboriginal title; and (iii) aboriginal title flowing from the Royal Proclamation of 1763. The Crown's notice

of contention relates mainly to issues of cession and extinguishment. My analysis addresses each of these areas in turn.

[11] The scope of our review is limited to errors of law alone by the SCAC: see **Criminal Code**, s. 839.

IV. ANALYSIS:

1. Treaty Rights:

1.1 Judicial History:

(a) Provincial Court (Curran, P.C.J.) (Reported at (2001), 191 N.S.R. (2d) 323):

[12] The trial judge's findings with respect to treaty rights may be summarized as follows. The Mi'kmaq in 1760, and for a long time before, had gathered and used forest products, making canoes, baskets, snowshoes, toboggans, wigwams and other dwellings. It is likely that they traded some forest based items to the British and/or other Europeans at some point, but there is no evidence that they had sold or traded timber up to the time of the treaties or that they had cut stands of forest for themselves.

[13] The judge described the treaty right as the right to continue to obtain necessities through gathering and the appellants' activities as "commercial logging". To decide whether this was included in the treaty right, he applied a test requiring trade in logs to have been either in the contemplation of the parties to the 1760-61 treaties or a logical evolution of something that had been. He derived this test from para. 20 of **R. v. Marshall**, [1999] 3 S.C.R. 533; S.C.J. No. 66 (Q.L.) **"Marshall No. 2"** and, in particular, from the following passage:

> The September 17, 1999 majority judgment did not rule that the appellant had established a treaty right "to gather" anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower. No evidence was drawn to our attention, nor was any argument made in the course of this appeal, that trade in logging or minerals, or the exploitation of offshore natural gas deposits, was in the contemplation of either or both parties to the 1760 treaty; nor was the argument made that exploitation of such resources could be considered a logical evolution of treaty rights to fish and wildlife or to the

> type of things traditionally "gathered" by the Mi'kmaq in a 1760 aboriginal lifestyle.
>
> (Emphasis added)

[14] The trial judge found that the appellants had not met this test. He concluded at para. 95:

> ... 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. 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."
>
> (Emphasis added)

[15] There was no dispute at trial that trade in logging had not been in the contemplation of the parties. In view of the test he applied, the only issue for the judge concerned logical evolution. As for that issue, the judge focussed on the scale of the activity giving rise to the charges (i.e. "commercial logging" and "demolishing entire stands of forest") as compared to the traditional Mi'kmaq use of woods products (i.e. "using a few trees to make things for personal use"). This was the basis of his conclusion that the modern activity was not a logical evolution of the treaty right.

(b) Summary Conviction Appeal Court (Scanlan, J.) (Reported at (2002), 202 N.S.R. (2d) 42):

[16] The SCAC upheld the conclusions of the trial judge on this aspect of the case. However, the parties disagree about the basis of the SCAC's decision.

[17] The appellants say that the SCAC asked itself whether the commercial harvest of timber was in the contemplation of the parties at the time of the 1760 - 61 treaties. They refer in particular to para. 45 of the SCAC's reasons as demonstrating the point:

> [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 Judge's 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.
>
> (Emphasis added)

[18] The Crown, on the other hand, says that while the SCAC properly considered the evidence of whether there had been trade in logs, the test applied related to whether the modern activity was part of the Mi'kmaq gathering lifestyle and economy in 1760 or its modern equivalent.

[19] In my view, the SCAC, like the trial judge, applied a test requiring trade in logs to have been in the contemplation of the parties to the treaties. There is no disagreement by the SCAC with the trial judge's approach to this issue. Moreover, the SCAC said at para. 40 that "... 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 ..." and further, at para. 45, that the evidence supported "... 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." These passages, read in the context of the SCAC's affirmation of the trial judge's conclusion, in my view, make it clear that the court applied a test requiring trade in logs to have been in the contemplation of the parties at the time of the treaties.

1.2 Principal Grounds of Appeal:

[20] With respect to the treaty rights aspect of the appeal, the issues are these:

(1) Did the SCAC err:

(a) by mischaracterizing the treaty right by incorrectly focussing on the activity of logging and its scope rather than on the resource stated in more general terms?

(b) by requiring that trade in logs have been in the contemplation of the parties to the treaties?

(2) Should the convictions be upheld because the appellants failed to prove that: (i) they were members of a local aboriginal community benefiting from a treaty right to gather for trade; (ii) their activities were carried out within the area traditionally used by that community; or (iii) their activities were authorized by that community?

(3) Has the treaty right to cut trees been extinguished by pre-confederation statutes enjoining the cutting of trees or wood on Crown lands or by the extinguishment of aboriginal title?

1.2.1 Characterization of the Appellants' Conduct:

[21] A prosecution such as this under provincial legislation is not a declaratory action. The appellants' defence is that, if applied to them, the prohibition of cutting timber in the **Act** would infringe their treaty right to gather trees for trade. The issue is not, therefore, as it would be in a declaratory action, whether the legislation, in some circumstances, is capable of infringing treaty rights. Rather, the question is whether what the appellants were doing in contravention of the legislation constituted the exercise of the treaty right. The appellants do not attack the legislation generally, but its application to them in the circumstances of these charges.

[22] In my view, this is the correct way to approach the case. The Supreme Court of Canada proceeded this way in cases such as **R. v. Badger**, [1996] 1 S.C.R. 771 and **R. v. Marshall**, [1999] 3 S.C.R. 456; S.C.J. No. 55 (Q.L.) "**Marshall No. 1"**. In **Badger**, for example, the appellants did not simply have to establish that the legislation under which they were charged could, in some circumstances, infringe their treaty right. Rather, they had to establish that their conduct which gave rise to the particular charges before the court was the exercise of a treaty right. The focus was not on the interaction of the legislation and hypothetical conduct, but on the interaction between the legislation and the conduct giving rise to the charges.

[23] This is an important point for the case at hand. Section 29 of the **Act** prohibits not only the cutting or removal of timber (defined by the **Act** to mean trees of any size whether standing or fallen), but also the removal from Crown land of "other resources." Picking and taking away a mushroom and cutting down an 80 year old spruce tree both appear to be prohibited. The prohibition in s. 29 is, therefore, very broad and diverse conduct may be caught by it. It follows that the focus in this case should be on the particular type of conduct giving rise to these charges, leaving to another day the issues which may arise if markedly different sorts of conduct spawn future prosecutions under s. 29.

[24] To make out their defence, the appellants had to prove that their treaty right includes the conduct giving rise to these charges. For the purposes of analysis, their conduct should be characterized as the cutting of standing, mature trees for sale. I see nothing wrong with calling this logging or even "commercial logging". But, unlike the trial judge and the SCAC, I would not focus initially on the means by which the cutting was accomplished or on its scale. The means of exercising this right should generally be considered when asking the question of whether the activity is an appropriate evolution of the treaty right and the scale of the activity should generally be considered in connection with the "moderate livelihood" limitation.

1.2.2 The Treaty Right:

(a) Beneficiaries, Territoriality and Community Authority:

[25] The Crown submits that the appellants failed to prove three essential components of their treaty rights defence, namely: that they are beneficiaries of a treaty right to gather for trade; that they were exercising the right in a territory to which such a treaty relates; and that they did so with the required community authority. The issues for consideration, therefore, are whether each of the appellants has a treaty right to gather for trade and whether it is necessary for each of the appellants to demonstrate that the right was being exercised in a territory to which it applies and with the authority of the appropriate aboriginal community. I will address these last two points and then turn to the first.

(i) Territoriality and Community Authority:

[26] The respondent submits that even if all Mi'kmaq have a treaty right to cut trees on Crown land, the appellants failed to establish at trial that they were exercising that right with community authority and within that community's traditional territory. This submission is based principally on para. 17 of the Supreme Court's decision in **Marshall No. 2** which stated that an accused relying on a treaty rights defence must establish that he or she is a member of an aboriginal community with which one of the 1760-61 treaties was made and was exercising the rights with the community's authority in its traditional territory:

> 17 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 then 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 population 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 never in fact brought into existence. The trial judge, Embree Prov. Ct. J., found that by the end of 1761 all of the Mi'kmaq villages in Nova Scotia had entered into separate but similar treaties. [Emphasis added.]
>
> The British Governor in Halifax thus proceeded on the basis that local chiefs had no authority to promise peace and friendship on behalf of other local chiefs in other communities, or to secure treaty benefits on their behalf. The treaties were local and the reciprocal benefits were local. In the absence of a fresh agreement with the Crown, the exercise of the treaty rights will be limited to the area traditionally used by the local community with which the "separate but similar" treaty was made. Moreover, the treaty rights do not belong to the individual, but are exercised by authority of the local community to which the accused belongs, and their exercise is limited to the purpose of obtaining from the identified resources the wherewithal to trade for "necessaries".
> (Emphasis added)

[27] The practical importance of the community authority requirement is underlined by the respondent at para. 76 of its factum:

> 76. The requirement for proof that rights under the Halifax Treaties of 1760-61 are exercised by authority of the local community is obvious when viewed in the context of the oft expressed preference of Courts that aboriginal and treaty rights issues be dealt with on the basis of negotiation rather than litigation. In the absence of authority over the exercise of treaty rights by the local communities, it would be impossible for governments to negotiate with Mi'kmaq bands over resources that may be covered under the Halifax Treaties of 1760-61. In the absence of some limitation with respect to community authority, negotiation could only proceed with Mr. Marshall, Mr. Julien and the thirty-three other Appellants as individuals, as opposed to with the communities in which they live.
>
> (Emphasis added)

[28] The appellants submit that the Supreme Court's comments in **Marshall No. 2** concerning territoriality and community authority are purely *obiter* and need not be followed, that the statements were made without providing the parties an opportunity to make submissions with respect to these issues and that there are what the appellants refer to as "obvious inconsistencies" between what the Supreme Court said on these subjects in **Marshall No. 2** and what it did by acquitting Mr. Marshall in **Marshall No. 1**. In short, the question is whether the pronouncements on these subjects in **Marshall No. 2** are authoritative.

[29] In my view, they are. **Marshall No. 2** is a unanimous ruling of a six judge panel of the Supreme Court of Canada. It clearly and unequivocally states that the treaty rights in issue here may only be exercised by community members, with community authority within the community's traditional territory and that the accused bears the burden of proof on these points: **Marshall No. 2** at para. 17. Contrary to the appellants' submission, I cannot dismiss these statements as *obiter* or as made *per incuriam*. The purpose of the extensive reasons delivered in **Marshall No. 2** was to guide litigants and lower courts in future proceedings. It is not open to us, as an intermediate appellate court, to ignore or fail to follow the law as clearly set out by the Supreme Court of Canada, even if we were to be persuaded that its holding is inconsistent with previous decisions or that the court denied natural justice to the litigants by making the pronouncements it did.

[30] I would conclude that where the claimant of a treaty right relies on the exercise of that right in answer to a prosecution, the claimant is obliged to show that his or her actions giving rise to the charge were carried out with the authority of the aboriginal community of which he or she is a member and within that community's traditional authority.

[31] In light of the way this case has developed and the timing of the Supreme Court's judgment in **Marshall No. 2**, the Crown takes the position that it would not be appropriate to dismiss the appeal on the basis of any failure of the appellants to prove community authority or territoriality. I would, therefore, not dispose of the appeal on the basis of the absence of proof of community authority or territoriality.

[32] I would note, however, that the application of these requirements will give rise to difficult practical issues. Proof of the territory covered by the individual treaties of 1760 - 61will not be easy. There will also be complex issues to address in settling the mechanics of proving community authority and, to some extent, of showing membership in the relevant community. In light of the fact that the Crown argues that these requirements will not be dispositive in this case, further comment is best left to another day.

(ii) Did all the Mi'kmaq in Nova Scotia have a treaty right to gather for trade?

[33] The appellants' position is that all the Mi'kmaq in Nova Scotia entered into treaties similar to the one discussed in **Marshall No. 1** and **No. 2**. The trial judge in the present case ruled that he was precluded by **Marshall No. 1** from considering evidence on this issue: Trial Transcript at p. 5803. He concluded at para. 88 of his reasons that, by 1761, "... the Chiefs of all Mi'kmaq communities in Nova Scotia had signed similar treaties."

[34] The Crown challenged this conclusion before the SCAC. There, Scanlan, J. found that the trial judge had erred in finding that he was bound by previous cases to decide that all the Mi'kmaq had Halifax Treaties. The SCAC, while opining that there was a considerable amount of evidence that not all communities had signed treaties in 1760-61 (para. 13), did not find it necessary to decide the issue (para. 18).

[35] The first question then is whether, as the trial judge decided, **Marshall No. 1** settles this point in the appellants' favour. In my view, it does not and the SCAC was right to find the trial judge erred in this respect. I will explain.

[36] At trial in **Marshall No. 1**, the position of the federal Crown was that the operative treaties for defining the treaty relationship between the Crown and the

Mi'kmaq are the series of treaties entered into in Nova Scotia in 1760-61: **R. v. Marshall**, [1996] N.S.J. No. 246 (Q.L.)(Prov. Ct.) at para. 8. The trial judge in **Marshall No. 1** found as a fact that by the end of 1761, all Mi'kmaq in Nova Scotia had entered into separate treaties materially the same as the treaty considered in that case. He observed:

> [83] The submissions of the Crown and the Defendant here are based on the premise that these 1760-61 Treaties are valid treaties. The Defendant relies on these treaties, taken in their proper context, as the source of rights which he submits entitles him to an acquittal. The Crown, throughout, has considered these treaties as the operative ones for determining the extent of the Defendant's rights. The principal issues in this case revolve around determining the contents of the treaties and the meaning and interpretation of certain provisions.
>
> (Emphasis added)

[37] No issue was taken in **Marshall No. 1** as to whether there was a treaty applicable to Pomquet Harbour on the mainland near Antigonish (where Mr. Marshall fished for eels) or whether Mr. Marshall, as a Cape Breton Mi'kmaq, could exercise that right.

[38] When **Marshall No. 1** was before the Supreme Court of Canada, the trial judge's finding in that case that all Mi'kmaq had similar treaties was referred to and accepted: **Marshall No. 1** per Binnie, J. at para. 5. The Court adverted to the complications resulting from the fact that the British had signed a series of agreements in 1760-61 with individual Mi'kmaq communities and that the comprehensive, consolidated treaty that had been contemplated had never come into existence. The trial judge's finding that "... the written terms applicable to this dispute ..." were found in the March 10, 1760 treaty was the basis upon which the Court used that treaty, which was with the LaHavre Mi'kmaq, to determine treaty rights applicable to Pomquet Harbour: *per* Binnie, J. at para. 5. (This also probably explains why there is no discussion of how Mr. Marshall, as a Cape Breton Mi'kmaq, had a treaty right to fish in Pomquet Harbour.)

[39] The comments of the Court in **Marshall No. 2** concerning territoriality and community authority, to which I have already referred, are consistent with the view that the court had proceeded on the basis of Embree, P.C.J.'s finding that the written terms applicable to the case were the same as those in the LaHavre treaty. But, as **Marshall No. 2** makes clear, that was not a legal, but a factual finding. It follows,

as the Court stated in **Marshall No. 2** at para. 17 that, in future proceedings, the onus will be on the accused to show that he or she is a member of an aboriginal community with which one of the local treaties was made.

[40] As noted, the trial judge in the present case ruled that he should not "... hear evidence that ... there wasn't a treaty applicable to all the Mi'kmaqs in Nova Scotia ...". The SCAC found this to be an error of law and with that conclusion, I respectfully agree. While a great deal of evidence relevant to this issue was, in fact, adduced at trial — remember that **Marshall No. 1** was released roughly two months after this trial had started and after all of Dr. Reid's testimony and Dr. Wicken's direct evidence had been completed — the trial judge, for obvious reasons, did not evaluate it or make factual findings. The trial judge expressly said that he would not take such evidence into account.

[41] The Crown has, in effect, invited us to review the record and make a finding that at least some of the appellants failed to show that there were applicable local treaties. I doubt that we should do so for two reasons.

[42] First, the trial judge's ruling may well have affected the content of the record relating to this issue. On the basis of that ruling, the appellants were entitled to conduct the trial following the release of the **Marshall No. 1** judgment on the assumption that they did not need to establish the existence of a local treaty for every one of the cutting sites. To change the rules after the evidence had been completed would be procedurally unfair and risk substantive injustice.

[43] Second, although there is a good deal of relevant evidence in the record on this question, there have been few, if any, findings of fact in the courts below relating to it. On a second level of appeal such as this, which is restricted to questions of law alone, we should be hesitant to embark on a complex fact finding exercise like this one in these circumstances. There are real issues concerning the weight to be given to expert testimony and the correct inferences to be drawn from the proven facts. We are obviously at a disadvantage if we confront these issues solely on the basis of the transcript.

(b) Definition of the Treaty Right:

[44] In **Marshall No. 1**, the Supreme Court of Canada affirmed the treaty right of the Mi'kmaq to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities and trading them to achieve a moderate livelihood. The Court concluded that "[t]he surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the Badger test": **Marshall No. 1** at para. 56. To the same effect, in **Marshall No. 2** (para. 38), the Court noted that in **Marshall No. 1**, "... it was only hunting and fishing resources to which access was affirmed, together with traditionally gathered things like wild fruit and berries."

[45] In **Marshall No. 1** at para. 19, the Court accepted the following conclusion of the trial judge concerning the perspectives of the British and Mi'kmaq at the time of entering into the Treaty:

> 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. (Emphasis added)

[46] Of critical importance to the result in **Marshall No. 1** was the evidence of Dr. Patterson which the Court quoted at para. 37 of the majority judgment. Dr. Patterson agreed that the treaties were based on the assumption that the Mi'kmaq would have a variety of things to trade, some of which were mentioned and some of which were not. More fundamentally, he opined that:

> ...the British were recognizing [the Mi'kmaq] as the people they were. They [i.e. the British] 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 [Mi'kmaq] would continue to be a hunting and gathering people. ...
>
> (Emphasis added)

[47] The Court found that the right to hunt and fish and gather in order to have something to trade must be implied as a term of the treaty. To imply that element was necessary in order to ensure the efficacy of the parties' agreement in light of their objectives of peace and self-sufficiency and to be consistent with the acceptance by the British that the Mi'kmaq would continue to be who they were.

[48] Following the **Marshall** cases, the starting point for the analysis of the present appeal is that there is a treaty right to continue to obtain necessaries through hunting and fishing and gathering by trading the products of those traditional activities. In short, what was protected through the 1760 - 61 treaties was the ability of the Mi'kmaq to sustain themselves through trade in the products of their 1760's hunting, fishing and gathering lifestyle and economy.

[49] The focus of the present case is on the treaty right to gather for trade. The parameters of this aspect of the treaty right have not been settled by the Supreme Court. As the Court stated in **Marshall No. 2** at para. 20:

> [20] ...[**Marshall No. 1**] ... did not rule that the appellant had established a treaty right "to gather" anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower. No evidence was drawn to our attention, nor was any argument made in the course of this appeal, that trade in logging or minerals, or the exploitation of off-shore natural gas deposits, was in the contemplation of either or both parties to the 1760 treaty; nor was the argument made that exploitation of such resources could be considered a logical evolution of treaty rights to fish and wildlife or to the type of things traditionally "gathered" by the Mi'kmaq in a 1760 aboriginal lifestyle. It is of course open to native communities to assert broader treaty rights in that regard, but if so, the basis for such a claim will have to be established in proceedings where the issue is squarely raised on proper historical evidence, as was done in this case in relation to fish and wildlife. Other resources were simply not addressed by the parties, and therefore not addressed by the Court in its September 17, 1999 majority judgment. ...
>
> (Emphasis added)

[50] The appellants and the respondent have each advanced tests which they submit should be used to determine whether the appellants' activities fall within the treaty right to gather for trade.

[51] The appellants contend that, after the **Marshall** judgments, there is a two part test for identifying conduct constituting the exercise of a treaty right to gather for trade:

> a. what natural resources were traditionally gathered by the Mi'kmaq in their 1760's traditional lifestyle and economy; and
> b. what natural resources today are the modern equivalent or a logical evolution for those resources?

[52] As expressed by the appellants:

> 56. ... under **Marshall** and the 1760-61 Treaties, there is a treaty right to trade, and a right to have access for the purpose of trade to "the types of things traditionally 'gathered' by the Mi'kmaq in a 1760 aboriginal lifestyle", which we know to include at a minimum fruits and berries, as well as those "resources [that] could be considered a logical evolution" of the types of things gathered by the Mi'kmaq as part of their 1760s lifestyle and economy. Our position is that the Mi'kmaq traditionally, as part of their 1760 lifestyle and economy, gathered trees and made a variety of uses of the trees so harvested, including as materials to build shelters, and to make canoes, toboggans, snowshoes, sleds, baskets and other containers that were of interest and use to the British and that were suitable objects for trade. The focus should be on the resource utilized, in this case "timber", which is defined to mean trees of all species and sizes. Further, if "logs" are the resource, then they are a modern equivalent or a logical evolution of the trees traditionally harvested in the Mi'kmaq economy.
>
> (Emphasis added)

[53] The appellants say that the right is to harvest and trade in trees. I note that the appellants are not attempting "... to show that the treaty right was intended in 1760 by *both* sides to include access to resources other than ... traditionally gathered things ..."(**Marshall No. 2**, para. 19). Rather, their position is that the conduct giving rise to these charges falls within the right to gather traditionally gathered things, namely trees, for trade.

[54] The respondent, on the other hand, submits (putting aside the question of evolution of the right for the moment) that the test for determining whether a particular gathering activity comes within the treaty right is whether a particular

activity of resource gathering for trade was reasonably in the contemplation of the parties to the treaty at the time it was made. For the respondent, the absence of evidence of Mi'kmaq trade in logs or of commercial logging in or before the 1760's is significant evidence that such trade could not have been in the contemplation of the parties and, therefore, not within the treaty right.

[55] The respondent essentially accepts the test set out by Savoie, J. in **R. v. Bernard** (2001), 239 N.B.R. (2d) 173; N.B.J. No 259 (Q.L.)(Q.B.) at para. 30; reversed 2003 NBCA 55, namely whether "commercial logging" was reasonably in the contemplation of the parties to the treaties and whether it is a logical evolution of the treaty rights to "... the type of things traditionally "gathered" ... in a 1760 lifestyle?" The first step in this approach, as I understand it, requires the parties to the treaties to have contemplated trade in logs. That is, after all, what "commercial logging" is.

[56] In my view, a test which focuses on what goods were contemplated by the parties in 1760 as ones being gathered for trade is an incomplete approach to the proper delineation of the treaty right in issue here. Following the **Marshall** judgments, what should be taken to have been in the contemplation of the parties is not the gathering of a particular resource or of a particular commodity for trade, but rather, ongoing access to the fruits of the traditional Mi'kmaq lifestyle and economy for sustenance through trade.

[57] In my respectful view, the approach advanced by the respondent on appeal and that adopted by the trial judge and the SCAC errs by focussing mainly on the question of which specific products were traded or contemplated for trade in 1760. This approach risks freezing the right in 1760 terms and does not pay sufficient attention to the treaties' underlying objective of Mi'kmaq self-sufficiency through trade in goods derived from their traditional hunting, fishing and gathering lifestyle and economy.

[58] As the courts below and the respondent have correctly noted, what was contemplated by the parties when the treaties were made is important for their interpretation. However, I do not read the **Marshall** judgments as requiring trade in a particular resource to have been in the contemplation of the parties. The Court said in **Marshall No. 2** that "[t]he word gathering ...[in **Marshall No. 1**] ... 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 ...” (Para. 19; emphasis added). I note that the reference is to gathering and types of resources, not to trade as being in the parties’ contemplation. As had been made clear in the **Marshall No. 1** judgment, what was in the contemplation of the parties and was the “surviving substance of the treaty” was continuing access for the purposes of trade to the fruits of the Mi’kmaq traditional hunting, fishing and gathering lifestyle and economy: see eg. paras. 4 and 56 of **Marshall No. 1**. The comment in para. 20 of **Marshall No. 2** to the effect that there was no evidence that trade in logging was in the contemplation of either or both parties did not lay down a test other than that elaborated in **Marshall No. 1** and reiterated elsewhere in **Marshall No. 2**. The Court found that what the parties contemplated was not trade in particular items, but access for the purposes of trade to the types of things traditionally gathered.

[59] The correct approach, in my opinion, is to assess the claimed treaty right in light of the traditional Mi’kmaq hunting, fishing and gathering lifestyle and economy of the 1760's. Both the resource and the activity must be considered. To determine whether the appellants’ activities are protected by this treaty right, the question to be answered is whether the conduct constituting the offences was “gathering things traditionally gathered” or its modern equivalent or logical evolution. The touchstone is gathering in the traditional 1760 lifestyle and economy of the Mi’kmaq people. To fall within the treaties, the activity must be traditional Mi’kmaq gathering or its logical evolution and the resource must be of a type traditionally gathered or its logical evolution. If these conditions are met, there is a treaty right to trade the fruits of the resource gathering to earn a moderate livelihood, subject of course to justified limitations and issues of extinguishment.

[60] In my opinion, the trial judge and the SCAC asked the wrong question by inquiring whether the British and the Mi’kmaq contemplated a commercial harvest of trees for trade when the treaties of 1760-61 were signed. In my view, the relevant treaty right consists of the right to trade the fruits of the traditional 1760's Mi’kmaq gathering lifestyle and economy, remembering that both the resource and gathering itself may evolve. It is not necessary, however, to show that trade in the specific resource was contemplated at the time of the treaties.

1.3 Extinguishment of Treaty Rights:

[61] The Crown submits on two bases that any treaty right to cut trees on Crown land for trade has been extinguished. First, the Crown says that two pre-

confederation statutes extinguished any such treaty right. Second, the Crown submits that if, as it argues, any aboriginal title has been extinguished, it follows that any treaty right to cut trees has also been extinguished.

[62] The appellants submit that the issue of extinguishment is not relevant to their claimed treaty rights. In their submission, **Marshall No. 1** affirmed the continuing validity of all the 1760 - 61 treaties and all of the evidence at trial was to the effect that the 1760 - 61 treaties remain valid and effective today.

[63] Contrary to the appellants' position, the issue of extinguishment of their treaty rights is, in my view, both a relevant and an open question. The **Marshall No. 1** decision did not address extinguishment. It is not authority for the proposition that all of the 1760 - 61 treaties remain in effect. As for the evidence at trial, the question of extinguishment is one of law and, even if expert opinions on the subject are admissible, the opinions of witnesses are not dispositive of the underlying legal questions.

[64] I will discuss the two bases of extinguishment relied on by the Crown in turn.

(a) Statute:

[65] The respondent Crown's position is that any treaty right to harvest trees on Crown land was extinguished by **An Act to Prevent Waste and Destruction of Pine or other Timber trees, on certain reserved and un-granted lands in this province**, 1774, c. 3 and **An Act concerning Trespasses to Crown Property**, 1859, c. 22. These statutes provide in relevant part as follows:

> **An Act to prevent Waste and Destruction of Pine or other Timber Trees, on certain reserved and ungranted Lands in this Province.**
>
> ...
>
> I. *Be it enacted by the Governor, Council and Assembly*, That if any person shall spoil, cut down, or any otherwise injure, or destroy any pines of any dimensions whatever, or any other timber trees, growing on the afore-recited, reserved, and ungranted lands, or shall cause the same to be done, or shall cut down or carry off any tree fit for a mast, from the said premises, for every tree so cut or carried off, and for each and every offence, or without having first obtained a license therefor, from the Governor, Lieutenant-Governor, or Commander in Chief, for the time

> being, certifying that the said pine trees, and timber so to be cut, are for the sole use of His Majesty, and for no other purpose. All such persons being duly convicted of the waste and trespass aforesaid, he or they shall forfeit and pay to His Majesty, a fine not exceeding one hundred pounds, on due conviction thereof, ...
>
> . . .
>
> **An Act concerning Trespasses to Crown Property**
>
> ...
>
> 1. No person, shall cut down or remove any trees or wood of any description on any crown-lands, or open any mine, or dig or raise any minerals belonging to the crown, or remove, use, injure, or destroy any trees, wood, lumber, or minerals, being crown property, without license from the Governor or other legal authority, ...

[66] The Crown submits that these **Acts** demonstrate the clear legislative intent necessary to extinguish a treaty right. While the statutes do not specifically refer to aboriginal persons or aboriginal title, the Crown submits that the absence here of the special provisions for aboriginals that are found in other pre-Confederation legislation governing resource use shows that the prohibition in the **Acts** was meant to apply to them.

[67] I cannot agree with this submission. The statutes do not prohibit all cutting and removal of trees or wood. They permit such cutting and removal under certain circumstances. Any right to cut is not extinguished but regulated. Contrary to the Crown's submission, these statutes do not provide "strict proof of the fact of extinguishment" or evidence of "a clear and plain intention on the part of the government to extinguish treaty rights.": see, e.g. **R v. Badger**, **supra** at para. 41.

(b) Extinguishment of Aboriginal Title:

[68] The Crown submits that if aboriginal title to land has been extinguished, it follows that treaty rights in relation to the land would also necessarily be extinguished.

[69] I cannot accept this argument. Following **R. v. Adams**, [1996] 3 S.C.R. 101, aboriginal rights are "freestanding"; they are not dependant on aboriginal title. The same is true of treaty rights. At para. 49, Lamer, C.J.C. said that although certain events (such as, in **Adams**, the flooding of land to build a canal and an express surrender of lands in exchange for payment) may have been adequate to demonstrate the required clear and plain intention to extinguish title, such acts were not sufficient to show a clear and plain intention to extinguish the aboriginal right to fish for food in that area. In my view, the same principle applies to treaty rights. Acts sufficient to extinguish title are not necessarily sufficient to extinguish treaty rights that may be exercisable on the land.

1.4 Summary Concerning Treaty Rights:

[70] My conclusions on this branch of the appeal are:

1. The SCAC erred in law with respect to the test for determining whether the appellants' treaty rights afford a defence to charges of cutting timber on Crown lands without authorization.

2. The appellants, as claimants of a treaty right, must show that they are beneficiaries of the claimed treaty right and they exercised it in the territory to which it applies with the authority of the relevant aboriginal community. The SCAC was right to conclude that the trial judge erred in law by holding that the first of these requirements had been settled by **Marshall No. 1**. However, it would not be appropriate on appeal to attempt to resolve the factual issue of whether the record established that all appellants has satisfied this requirement. With respect to territoriality and community authority, the Crown acknowledges that this appeal should not be disposed of on those bases and so those issues are best left to another day.

3. The Crown did not succeed on its contentions that any treaty right had been extinguished by pre-Confederation forestry statutes or that such rights were necessarily extinguished if any aboriginal title has been extinguished.

2. Common Law Aboriginal Title:

2.1 The Appellants' Position at Trial:

[71] The appellants defended the charges in part by claiming that the Mi'kmaq have aboriginal title to all of Nova Scotia and that they are persons who have the right, as one of the incidents of that title, to log on Crown lands. They did not, however, assert an aboriginal right apart from aboriginal title, to harvest forest resources either at the logging sites or elsewhere in the Province. As Mr. Wildsmith, counsel for the appellants, put it in argument at trial, "[w]e have never claimed as the basis for the activities an aboriginal right *per se*, only the specialized form called aboriginal title." (Transcript at p. 8650)

[72] The appellants claim aboriginal title at common law and on the basis of the Royal Proclamation of 1763. They say that they have shown that the Mi'kmaq were in exclusive occupation of Nova Scotia at the time of sovereignty as required by **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010. They also submit that the Royal Proclamation reserved virtually the entire Province, including the cutting sites, to the Mi'kmaq. The fundamental point is the appellants' claim that cutting trees on Crown lands is one of the incidents of aboriginal title which the Mi'kmaq possess on either or both of these bases.

2.2. Judicial History:

(a) Provincial Court:

[73] Applying the legal test to the facts as he found them, the trial judge concluded that the Mi'kmaq had failed to establish sufficient occupation to found common law aboriginal title to any of the cutting sites. In summary, he concluded at paras. 5 and 142 of his reasons:

> [5] ...

> (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;

[142] ...

> (a) The Mi'kmaq of 18th century Nova Scotia could be described as "moderately nomadic" as were the Algonquins in **Côté**, supra. The Mi'kmaq, too, moved with the seasons and circumstances to follow their resources. They did not necessarily return to the same campsites 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 the mainland 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 all the mainland was included in those lands. There just weren't enough people for that.
>
> (c) As for Cape Breton, there simply is 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 probability that their ancestors had aboriginal title to those sites.

[74] The trial judge found that the date of British sovereignty for mainland Nova Scotia was 1713 and that British sovereignty in Cape Breton was established in

1763. There is no dispute on appeal that these are appropriate dates for the purposes of determining common law aboriginal title.

[75] With respect to the issue of whether Mi'kmaq occupation was exclusive, the trial judge found that it was. In his view, there was no other aboriginal group in Nova Scotia in 1713 or 1763 and no reason to believe that there were any Europeans on any of the cutting sites, or for that matter on most of the mainland or in most of Cape Breton, at the relevant times (para. 137).

[76] The trial judge made a number of findings of fact about the nature of Mi'kmaq occupation before and at the times of British sovereignty. With respect to mainland Nova Scotia, he concluded that at sovereignty in 1713, the only people living in most of mainland Nova Scotia were about 1,000 Mi'kmaq. They were living near Port Royal, Minas, Cape Sable, LaHavre, Chebucto (or what is now Halifax), Musquodoboit and the St. Mary's River in Guysborough County, along the Northumberland Straight and near Chignecto (Amherst). They mostly lived near the coast and not at fixed locations throughout the year or from year to year. At the same time, there were about 2,500 Acadians in the Province, most of them living in a few concentrated areas along the Bay of Fundy and, in addition, there was a small British garrison at Annapolis.

[77] Despite their linguistic, social, religious, political and even external ties, the trial judge concluded that the Mi'kmaq had not become a fully developed nation or state by 1713. He noted that even in 1760 and 1761, after nearly half a century of struggling in common against the British, local Mi'kmaq communities were still autonomous. There was no Mi'kmaq government or Grand Council to speak on behalf of all of them. Each community spoke for itself.

[78] The trial judge found that the Mi'kmaq moved at will throughout mainland Nova Scotia in 1713 except perhaps in the Acadian areas and at Annapolis. However, there was, in his view, no persuasive evidence that they divided the entire territory among their communities or that they used all of the territory for their hunting, fishing and gathering. In the judge's opinion, "[i]t is almost certain there were substantial [tracts] of land unclaimed and largely unused between the communities."

[79] Turning to Cape Breton as of sovereignty in 1763, the trial judge found the picture as regards Mi'kmaq occupation less clear. Ultimately he concluded that, at

the relevant times, the Mi'kmaq "were few and the land was large. It is highly improbable that they used much of the land regularly."

[80] Having found that Mi'kmaq occupation was exclusive, the critical question for the trial judge was whether the appellants had established sufficient occupation at the particular cutting sites. He stated that "[t]he line separating sufficient and insufficient occupancy for title seems to be between nomadic and irregular use of undefined lands on the one hand and regular use of defined lands on the other." (para. 141). At the end of the day, however, the trial judge applied a test for sufficiency of occupation which required intensive and regular use of reasonably defined areas. As he put it:

> [139] The problem for the defendant[s] is that mere occupancy of land does not necessarily establish aboriginal title: (See **Delgamuukw, supra**, at paragraph 138, where Lamer, C.J. commented on **R. v. Adams (G.W.)**, [1996] 3 S.C.R. 101; 202 N.R. 89). If an aboriginal group has used lands only for certain limited activities and not intensively, the group might have an aboriginal right to carry on those activities, but it doesn't have title.
>
> [140] The Supreme Court considered the question of sufficient occupancy for aboriginal title in **R. v. Côté, supra**. In paragraph 60 Lamer C.J. said, for the majority, that the superior court judge who heard the first appeal in the case had "made a finding of fact which was directed at the proper question before the court." The question was whether the ancestors of the appellants, the Algonquins, had "exercised sufficient occupancy" to prove aboriginal title. According to the evidence, the Algonquins were "a moderately nomadic people who settled only temporarily and moved frequently within the area of the Ottawa River basin." Their habits were the result of "the presence and movements of their sources of sustenance,...governed by the changes of the seasons." Although the judge had found that the Algonquins frequented the territory at the relevant time, he decided that "in light of the itinerant hunting patterns and the thin population of the Algonquins" they had not "exercised real and exclusive possession" of the territory .
>
> (Emphasis added)

[81] That he applied a test based on intensive, regular use of reasonably defined areas is clear when some of his other conclusions are examined. For example, it was on the basis of his conclusion that the Mi'kmaq made "intensive" use of bays and rivers and nearby hunting grounds (para. 142) that the judge found that they (at least in the eighteenth century) "... likely had aboriginal title to lands around some

bays and rivers ...” and that they might have had “... some claim to coastal lands ...” (para. 5). The judge applied this test requiring intensive, regular use to fairly specific sites. This is evident from his conclusion that “ ... 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 ...” (para. 142).

(b) Summary Conviction Appeal Court:

[82] The SCAC found that the record reasonably supported the conclusions of the trial judge. Beyond that, the parties disagree about what legal principles were applied by the SCAC.

[83] The appellants say that the SCAC, by essentially adopting the trial judge’s conclusions, applied the same test as had the trial judge – a test requiring proof of regular, intensive use of the specific cutting sites. The respondent, on the other hand, says that this is a mischaracterization of the analysis in the courts below. In particular, the respondent points out that the finding by the trial judge is not consistent with a test requiring proof of use of very specific sites: he did, after all, opine that the Mi’kmaq probably had title “around” some bays and rivers, a finding not consistent with a highly site-specific approach.

[84] In my view, both the trial judge and the SCAC required proof of regular, intensive, use of land that included the cutting sites in order for aboriginal title to those sites to be established. This is clear in the reasons of the trial judge, as I have pointed out above. In the SCAC, there is no dissent from that approach; the trial judge’s conclusions and reasons were essentially confirmed. Although the courts below did not require that the precise boundaries of the areas of use be demonstrated, they did require proof that the areas of use include the cutting sites. This is consistent with the comments about title to land around bays and rivers, which appear to require intensive use of the sites for which title is claimed, even if the boundaries cannot be defined with precision.

[85] The SCAC noted at para. 113 that the appellants had to establish exclusivity at the time of sovereignty. Noting that the trial judge had not addressed the Acadian presence at the dates of sovereignty, the SCAC said that the impact of the presence of Europeans at the dates of sovereignty is “... something that should be addressed if the issue of Aboriginal title comes before the Court in future cases.” (para. 113).

However, aside from flagging this issue as one requiring consideration in future cases, the SCAC did not address it further.

[86] The SCAC appears to have been of the view that the 1760-61 treaties, which provided that the Mi'kmaq would "... not molest any of His Majesty's subjects ... in their settlements already made or to be hereafter made ..." was inconsistent with any claim to aboriginal title: see paras. 139, 140, 145.

2.3 Issues:

[87] This branch of the case raises the following issues:

(1) Did the SCAC err by:

(a) failing to overturn the trial judge's finding that the Mi'kmaq people were "moderately nomadic" comparable to the Algonquins?

(b) failing to overturn the trial judge's finding that at the date of British sovereignty, the Mi'kmaq did not occupy any portion of Cape Breton?

(c) applying a test for occupancy which required "intensive" use of specific sites rather than simply exclusive occupancy of a defined, although large, territory?

(d) concluding that, according to Supreme Court authority, a moderately nomadic people cannot show the degree of occupancy required to establish aboriginal title?

(e) concluding that European occupancy at the date of British sovereignty was relevant to the issue of exclusive occupation?

(2) Should the judgment of the SCAC be upheld on the basis that the appellants' activities were irreconcilable with aboriginal title?

[88] The appellants' main arguments consist of two grounds relating to findings of fact and four grounds relating to the applicable legal principles. I will first address the factual and then the legal issues. I will then turn to the notice of contention issue concerning irreconcilable use.

2.3.1 The factual issues:

[89] As noted, the appellants allege that the trial judge made two erroneous findings of fact and, therefore, that the SCAC erred by failing to intervene. The first challenged finding is that the Mi'kmaq people were moderately nomadic comparable to the Algonquins and the second is that, at the date of British sovereignty, the Mi'kmaq did not occupy any portion of Cape Breton.

[90] Both of these points relate to matters on which the appellants had the burden of proof on the balance of probabilities. It appears to be common ground, following **R. v. Van der Peet**, [1996] 2 S.C.R. 507 at para. 81, that the applicable standard of review is palpable and overriding error. Given that this appeal is limited to questions of law alone, I take the appellants' argument to be that the SCAC erred in law by misapplying the standard of review when it failed to intervene with respect to these two factual findings.

[91] The trial judge found that the Mi'kmaq "... could be described as "moderately nomadic" as were the Algonquins in **R. v. Côté**, [[1996] 3 S.C.R. 139]" (para. 142). In the SCAC, Scanlan, J. found that the evidence supported this conclusion (at paras. 110 and 117). He also stated at para. 107 of his reasons that:

> [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. ...
>
> (Emphasis added)

[92] The appellants say that the courts below erred by failing to take account of what they say are significant differences between the Mi'kmaq and the Algonquin. While, as described in **Côté** (para. 63), the Algonquins were people "who settled only temporarily and moved frequently", the appellants submit that this is not true of the Mi'kmaq who, they say, had stable summer village sites along the coast and winter hunting grounds in the interior, utilized by family aggregations over generations, with hunting territories passing from father to son, to his son, and so on, and assigned and re-assigned as families died out or new family units were created.

[93] In my opinion, the evidence supports the trial judge's conclusion that the Mi'kmaq could fairly be characterized as a moderately nomadic people. I am not persuaded that the SCAC erred in its review of that conclusion of the trial judge. In addition, the appellants' argument overlooks a clear finding of the trial judge which they do not challenge. At paras. 48 and 49 of his reasons, the judge accepted Dr. von Gernet's opinion that there was no evidence that family hunting territories were an ancient Mi'kmaq tradition and that they could not be traced back with any degree of certainty beyond the second half of the 18th Century.

[94] The appellants also attack the SCAC's failure to intervene with respect to the trial judge's finding that "... there is too little evidence to conclude [that the appellants] had aboriginal title to any lands ...." in Cape Breton. To the extent that this is a finding of fact by the trial judge, I see no error in Scanlan, J.'s apparent conclusion that it does not disclose palpable or overriding error and is reasonably supported by the record. However, this submission is really another aspect of the appellants' argument that both the trial judge and the SCAC used an incorrect legal test for assessing sufficiency of occupation, a matter which I will discuss in the next section of my reasons.

2.3.2 Wrong Legal Principles:

[95] With respect to errors of legal principle, the appellants make four main submissions:

1. The SCAC erred by concluding that French occupancy at the date of British sovereignty was relevant to the issue of exclusive occupation.

2. The SCAC erred in concluding that the treaty promise by the Mi'kmaq not to molest the British in their settlements precluded the appellants from asserting a claim to aboriginal title and/or a claim to land granted and/or settled at any time by the Crown.

3. The courts below erred by applying a test for occupancy which required "intensive" use of specific sites rather than simply exclusive occupancy of a defined, although large, territory.

4. The courts below erred in concluding that, according to Supreme Court authority, a moderately nomadic people cannot show the degree of occupancy required to establish aboriginal title.

[96] I can deal with the first two of these alleged errors very briefly.

[97] With respect to the relevance of European occupancy at the date of British sovereignty, the SCAC clearly took no position and merely stated that it was a matter that would have to be considered in future proceedings. This *obiter* statement about what might be necessary in a future case is not an error of law.

[98] The second point is that the SCAC erred in concluding that the treaty promise not to molest the British in their present and future settlements is a cession of land that precludes the Mi'kmaq from asserting a claim to aboriginal title. I have doubts that the SCAC actually held this, but I will address the argument because the Crown submits that the 1760-61 treaties do cede land.

[99] In my opinion, the Supreme Court of Canada on two occasions has expressed the view that the 1760 - 61 treaties do not cede land. In **R. v. Simon**, [1985] 2 S.C.R. 387 at para. 50 a unanimous Court speaking through Dickson, C.J.C. stated that: "None of the Maritime treaties of the eighteenth century cedes land." In **Marshall No 1**, a majority of the Court speaking through Binnie, J. stated at para. 21 that there is no applicable land cession treaty in Nova Scotia. I would decline the Crown's invitation to dismiss these statements as uninformed *obiter*. In my view, they are unequivocal expressions of a considered opinion by our highest

Court which we are obliged to follow: see for example **R. v. Sellars**, [1980] 1 S.C.R. 527 at 529-530. If the SCAC held otherwise, it erred in law.

[100] That leaves for consideration the remaining two alleged errors in legal principle which I will consider in turn.

(a) The Test for Occupation:

[101] The appellants submit that both the trial judge and the SCAC which affirmed his conclusion erred by requiring intensive, regular use by the Mi'kmaq of narrowly defined, specific areas – the cutting sites in this case. They say that this placed the bar too high and that imposing such a standard would be fatal to any meaningful claim of a comprehensive nature.

[102] The appellants take particularly strong exception to para. 139 of the trial judge's reasons:

> [139] The problem for the defendant is that mere occupancy of land does not necessarily establish aboriginal title: (See **Delgamuukw**, supra, at paragraph 138, where Lamer C.J. commented on **R. v. Adams (G.W.)**, [1996] 3 S.C.R. 101; 202 N.R. 89). If an aboriginal group has used lands only for certain limited activities and not intensively, the group might have an aboriginal right to carry on those activities, but it doesn't have title.
>
> (Emphasis added)

[103] As noted earlier, and contrary to the respondent's submissions, I agree with the appellants that both the trial judge and the SCAC applied a test requiring proof of regular, intensive use of land that included the cutting sites. While the courts below did not require proof of the precise boundaries of this intensive and regular use, they did require that the specific logging sites be within an area or areas so occupied. The trial judge observed, for example, that there was no evidence that the Mi'kmaq used the cutting sites (para. 141) and the SCAC noted with approval that the trial judge "... restricted his findings to the areas where cutting occurred ..." (para. 75). The SCAC specifically sustained the trial judge's finding that there was no clear evidence that the Mi'kmaq of the time made any use, let alone regular use, of the cutting sites: (SCAC) para. 142. While the courts below did not require precise boundaries, they did require actual use of the cutting sites.

[104] The appellants raise as a central issue in this case the nature of the aboriginal occupation which must be shown to establish title. To date, there has been only limited guidance from the Supreme Court on this issue. As the trial judge observed,

"... the problem is to have a clear way of differentiating between sufficient and insufficient occupancy for title." (para. 141)

(i) Aboriginal Title - General Principles:

[105] The modern Canadian law relating to aboriginal title is built on three principles, each of which has shaped its development.

[106] First, aboriginal title is viewed as "one manifestation" of the broader conception of aboriginal rights: **R. v. Adams**, para. 25. While the tests which have developed to identify rights and title are distinct, their common features must nonetheless be borne in mind.

[107] Second, both aboriginal rights and aboriginal title have a common foundation. They both derive from the occupation of North America by distinctive aboriginal societies prior to European settlement: **Guerin v. Canada**, [1984] 2 S.C.R. 335 at 376; **R. v. Adams** at para. 35. As we shall see, this historic occupation is critically important for the consideration of title claims.

[108] Third, existing aboriginal rights, including aboriginal title, are confirmed by s. 35 of the **Constitution Act, 1982**. It follows that in considering aboriginal title claims, as in considering claims for aboriginal rights in general, the overall purpose of s. 35 must be given effect. That purpose is to provide "... the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies ... is acknowledged and reconciled with the sovereignty of the Crown.": **Van der Peet** at para. 31.

[109] The test for the proof of aboriginal title was set out in **Delgamuukw** as follows:

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

[110] The application of this test for aboriginal title is shaped by the three principles just described.

[111] The principle holding that aboriginal title is one manifestation of the broader conception of aboriginal rights influences the application of the test in several ways. The test for identifying aboriginal rights is "... directed at identifying the crucial elements of those pre-existing distinctive societies" and requires that "... in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.": **Van der Peet** at paras. 44 and 46. This test was directed to identifying "activities" which are aboriginal rights. But as their common origin would suggest, the "integral to a distinctive culture" test is also relevant to assessing claims for aboriginal title.

[112] In **Delgamuukw**, Lamer, C.J.C. developed this point in his discussion of the need for those claiming aboriginal title to prove exclusive occupancy at the time of European sovereignty. He concluded that **Van der Peet**'s "central significance" requirement also applies to aboriginal title. In the latter context, the requirement becomes that the claimants show that "... their connection with the piece of land ... was of a central significance to their distinctive culture." [**Delgamuukw** at para. 150]. However, Lamer, C.J.C. pointed out in the same paragraph that, "given the occupancy requirement in the test for aboriginal title, ... [it is hard to] imagine a situation where this requirement would actually serve to limit or preclude a title claim.": **Delgamuukw** at para. 151.

[113] The recognition that aboriginal title is one manifestation of aboriginal rights has led to the conception of "a spectrum" of rights linked to the degree of connection with the land. Lamer, C.J.C put it this way in **Delgamuukw**:

> 138 ... the aboriginal rights which are recognized and affirmed by s. 35(1) fall 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 (emphasis in original)). 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 site-specific right to engage in a particular activity. ...
>
> At the other end of the spectrum, there is aboriginal title itself. As *Adams* makes clear, aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to the land itself.
>
> (Emphasis added)

[114] The second principle, relating to the importance of the historic occupation of North America by distinctive aboriginal societies, provides a key element of the **Delgamuukw** test. Exclusive aboriginal occupation at sovereignty is the critical element in that test.

[115] The third principle, concerned with the reconciliatory purpose of s. 35 of the **Constitution Act,** has a specific corollary in aboriginal title claims. It means that both the common law perspective and the aboriginal perspective about ownership, occupation and use of land must be taken into account in applying the "exclusive occupancy" requirement.

[116] There are two main issues separating the parties with respect to the application of the **Delgamuukw** test to the facts of this case. The first concerns the nature of the occupation which must be demonstrated. The Supreme Court of Canada has, as yet, not been specific about the standard by which the "sufficiency" of occupation is to be assessed and the parties to this appeal are worlds apart on this question. The appellants advocate a standard based on exclusive aboriginal presence within their traditional territory while the respondent Crown would have us adopt a standard akin to the type of occupation that would support a claim to title based on adverse possession. The second area of dispute concerns whether continuity of occupation from sovereignty to the present must be shown. I will address these issues in turn.

(ii) Exclusive Occupation: The **Delgamuukw** Test:

[117] Exclusive occupation at the date of sovereignty is, as noted, a condition of aboriginal title. In **Delgamuukw**, the Supreme Court jurisprudence provided guidance as to how the occupancy test should be applied. The following are the most important principles in that regard.

[118] First, and as noted earlier, consideration of the occupancy and exclusivity requirements must take account of both the common law and the aboriginal perspective: **Delgamuukw** at paras. 147 and 156. Second, from the common law perspective, the basis of aboriginal title is possession. As Lamer, C.J.C. put it in **Delgamuukw** at para. 114, "[w]hat makes aboriginal title *sui generis* is that it arises from possession *before* the assertion of British sovereignty." The fact of physical occupation is proof of possession from the common law perspective. Third, there are degrees of occupation and there must be proof of "sufficient" occupation to establish title: **Delgamuukw** at para. 149. Fourth, physical occupation may be established by proof of activities on the land, including the construction of dwellings, cultivation of fields and regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources. Fifth, in assessing the sufficiency of the occupation, the group's size, manner of life, material resources, technological abilities and the character of the lands claimed should be considered: **Delgamuukw** at para. 149.

(iii) Occupation - Common Law Perspective:

[119] I turn, therefore, to the common law perspective concerning occupation. I will first place the common law of occupation in the context of the related terms "possession" and "title" and then elaborate on the common law relating to the nature of the acts necessary to constitute occupation.

[120] The common law distinguishes between occupation (or what may be called "possession in fact") and possession (or what may be called "possession in law"). Professor Kent McNeil, in his book, *Common Law Aboriginal Title* (1989), explained that occupation is concerned with the physical presence on or control of land, while possession is a legal conclusion about a person's physical relationship with a parcel of land due to presence on or control over it: *McNeil***,** at p. 6-7. As has been said, "Legal possession is altogether the work of the law; it is the possession of the right over a thing ...": Frederick Pollock and Robert S. Wright, *An Essay on the Law of Possession* (1888) at p. 6. However, generally speaking, a person who is in occupation of land (i.e. has possession in fact) will also be in possession of that land (i.e. have possession in law): *McNeil* at p. 8.

[121] It is also useful to refer to the central importance of possession to the common law conception of title. R. E. Megarry and H. W. R. Wade, *The Law of*

Real Property, 4th ed. (London: Stevens & Sons Ltd., 1975) have spoken of the "... essentially possessory character of title to land ..." (at p. 1004) and have noted that "title to land ... depended on the better right to possession (seisin) rather than vice versa. The concept of ownership [i.e. title] was never really disentangled from that of possession." (at p. 1005) They go on to state, in a passage cited with approval at para. 149 of **Delgamuukw**, that "... possession is a root of title..." and that "... [a]ny distinction between seisin and possession as the basis of title is obscured by the well-established rule that possession of land, if exclusive of other claimants and not otherwise explained, is evidence of seisin in fee simple." (at p. 1006). The same point is made in Cheshire and Burn's *Modern Law of Real Property*, 14th ed. (London Edinburgh: Butterworths, 1988) at p. 28 which was also cited with approval in **Delgamuukw** at para. 149:

> English land law has no doctrine akin to that of Roman law by which possession for a definite but short period had the positive effect of investing the possessor with *dominium*. ... What the vendor can do, however, and what he does in practice is to rely upon the fundamental principle that seisin is evidence of his title to the land.
>
> > With very few exceptions, there is only one way in which an apparent owner of English land who is minded to deal with it can show his right to do so; and that way is to show that he and those through whom he claims have possessed the land for a time sufficient to exclude any reasonable probability of a superior adverse claim.
>
> (Emphasis added)

[122] Thus, occupation which is "... exclusive of other claimants and not otherwise explained..." is evidence of title: *Megarry and Wade* at p. 1006. As McNeil puts it, an occupier, who is a person physically present on or in actual control of land, is considered by English law to be in possession in absence of circumstances which show that possession is in another. One in possession has the title that goes with possession; that is, "a mere possessor has a title as against trespassers and adverse claimants who cannot show title in themselves" (at p. 74). In addition, one in possession has a presumptive title according to the notion that possession is presumed to be rightful until proven otherwise: (pp. 73 - 75). Lamer, C.J.C. in **Delgamuukw** at para. 149 adopted this analysis by accepting the proposition that at common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to land.

[123] With that context, I turn to the nature of the acts required to establish occupation at common law.

[124] Whether a person is in occupation of land is viewed by the common law as a matter of fact which must be considered in light of all of the circumstances: *Megarry and Wade* at p. 1014; *Halsbury's Laws of England*, 4th ed., vol. 45 (London: Butterworths, 1985) at 636, "Tort" at para. 1394; **Calder v. Attorney-General of B.C.**, [1973] S.C.R. 313 at 391 citing with approval **United States v. Santa Fe Pacific Ry. Co.** (1941), 314 U.S. 339; **Ontario (Attorney General) v. Bear Island Foundation**, [1991] 2 S.C.R. 570; 83 D.L.R. (4th) 381. The specific legal context, the nature of the land and the nature of the acts must be considered.

[125] It has been held, for example, that very limited acts of occupation may be sufficient to permit a person to sue in trespass against a wrongdoer: see, for example, **Wuta-Ofei v. Danquah**, [1961] 3 All E.R. (P.C.) 596 at 600. By way of contrast, considerably more will be required to establish title by adverse possession as against a true owner. In A. H. Oosterhoff and W. B. Rayner, *Anger and Honsberger Law of Real Property*, 2nd ed., vol. 2 (Canada Law Book Inc., 1985), at p. 1516 the authors state that: "... in order to acquire a possessory title there must be an occupation of land which involves its actual and complete possession for all purposes to the exclusion of all others." (Emphasis added)

[126] The sort of acts that will constitute occupation depend not only on the legal context but on the nature of the land. As one leading English text puts it, "... possession means possession of that character of which the land is capable.": *Halsbury*, *op. cit.* at para.1394. Or, as a Canadian text puts it, "[t]he test in cases of land unsuitable for cultivation or other easily proved use is that such acts should be shown as would naturally be done by the true owner if he were in possession.": *Anger and Honsberger* at p. 1517. Thus, where land is "wild" or uncultivated, acts of occupation may suffice which would not be sufficient for the purposes of cultivated or settled land: *McNeil* at p. 200. *Pollock and Wright* at p. 31 set out this principle as follows:

> ... as to the quality of acts of dominion, they will be esteemed according to their subject-matter. Conduct which would be almost evidence of abandonment with regard to one kind of land may with regard to another be as good evidence of use and occupation as can be expected. 'By possession is meant possession of that

> character of which the thing is capable.' 'What acts amount to a sufficient occupation must depend upon the nature of the soil and the uses to which it is to be applied.' Where land is uncultivated and of little immediate use except for sport, shooting over it during some months of the shooting season may be enough to constitute *de facto* possession.

[127] As has been pointed out, one cannot occupy every inch of a parcel of land at the same time. For example, in **Re St. Clair Beach Estates Ltd. v. MacDonald, et al.** (1975), 5 O.R. (2d) 482 (H.C.J. Div. Ct.) at p. 488, the Court said

> In some cases possession cannot in the nature of things be continuous from day to day and possession may continue to subsist notwithstanding that there are sometimes long intervals between the acts of user. The owner of a farm cannot be said to be out of possession of a piece of land merely because he does not perform positive acts of ownership all the time.

[128] Particularly when dealing with unenclosed land, the question arises of how to define the territory to which acts of occupation are referable. *Pollock and Wright* (at p. 32) address this issue by quoting at length from a judgment of Parke B. in **Jones v. Williams** (1837), 2 M. & W. 326 at 331. A few excerpts will be helpful:

> Ownership may be proved by proof of possession, and that can be shown only by acts of enjoyment of the land itself; but it is impossible in the nature of things to confine the evidence to the very precise spot on which the alleged trespass may have been committed: evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did. In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same inclosure; for the ownership of one part causes a reasonable inference that the other belongs to the same person: ... I apprehend the same rule is applicable to a wood which is not inclosed by any fence. If you prove the cutting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole wood, although there be no fence, or distinct boundary, surrounding the whole; ...
>
> (Emphasis added)

[129] The common law relating to the sufficiency of acts of occupation, like the modern constitutional conception of aboriginal connection to land, may be seen as falling along a spectrum. At common law, "equivocal acts of possession referable to a limited right of user" may be sufficient to acquire certain prescriptive rights,

but not possessory title: *Anger and Honsberger* at p. 1516. Similarly, aboriginal rights protected by s. 35 of the **Constitution Act, supra**, have been said to "fall along a spectrum" depending on the nature of traditional use which may range from protected practices and customs, through "site specific" rights to engage in certain practices on land to aboriginal title to the land in question: see **Delgamuukw** at para. 138.

[130] It is necessary to say a word about the common law doctrine of constructive possession. When the word "constructive" is used in law, the reference is to something "... which is established by the mind of the law ... which has not the character assigned to it in its own essential nature, but acquires such character in consequence of the way in which it is regarded by a rule of policy or law...": Henry Campbell Black, *Black's Law Dictionary* (4th, 1968) at p. 386. And so constructive possession is "... not actual but assumed to exist, [such as] where one claims to hold by virtue of some title, without having the actual occupancy ..." (*Black's* at p. 1325).

[131] The operation of the doctrine of constructive possession is succinctly described in *Anger and Honsberger, supra* at 1517 - 1518:

> The rule as to constructive possession differs according to whether the claimant has documentary title or colour of title or is a trespasser without colour of title. Where a person having paper title to land occupies part of it, he is regarded in law as being in possession of the whole unless another person is in actual, physical possession of some part to the exclusion of the true owner. ...
>
> ... A person who has no title is in possession in law only of that part of which he is in possession in fact.
>
> ...
>
> As a general rule, when a person having colour of title enters in good faith upon land, as where it is proposed to be conveyed to him as purchaser or intending purchaser under what he believes to be a good title, he is presumed to enter according to the title, his entry is co-extensive with the supposed title and he has constructive possession of the whole land comprised in the deed.

[132] The respondent Crown takes the position that the appellants are, in effect, seeking to rely on constructive possession to establish their occupation and that

resort to this doctrine is inappropriate in aboriginal title cases. I agree that the doctrine of constructive possession is not relevant to the issue of aboriginal occupation. However, this does not take away from the point that, depending on the legal context and the nature of land, the common law recognized different qualities or natures of occupation as sufficient to ground possession in law. The dispute in this case, in my view, is not concerned with whether the law will "construct" occupation where there was none, but with the nature of the acts required to establish actual occupation. I, therefore, do not accept the respondent's submission that the appellants are, in effect, attempting to invoke the doctrine of constructive possession.

[133] According to Professor McNeil, the common law knows three different "standards" of occupation which apply depending on the context. He explains at pp. 197 - 198:

> ... The first applies where a person who has a right of entry seeks to acquire possession of land, in which case, at common law, a mere entry — i.e. the very slightest presence on the land — would suffice. The second situation, which is the converse of the first, involves an attempt by a person who has no right of entry to displace a rightful ... possessor, in which case a much stricter standard is applied. Since — in the presumed absence of a legal system — indigenous presence on and use of land would have been neither rightful nor wrongful immediately prior to the Crown's acquisition of sovereignty, neither of these standards is directly relevant here.
>
> The third standard, which lies somewhere between the other two, should perhaps be subdivided as it relates to two quite distinct situations. The first involves land in which no one has a present interest ... which at common law could be acquired by occupancy. The second involves land with respect to which the possession and title are uncertain, such as strips between parcels which lack a clearly-defined boundary. In each case possession, and therefore title, depends on occupation, which can be established by proof of acts performed on or in relation to the land.

[134] In connection with his third standard, Professor McNeil points to a distinction which is important for present purposes. It is the distinction between "occupation" and "occupancy". As he puts it at p. 73:

> ... occupation must be distinguished from occupancy. The latter occurs when a person either enters into occupation of an unowned thing, or is in occupation when

> a thing becomes unowned. This person, who is known as an occupant, is accorded not only possession, but a 'title by occupancy' as well. ...

[135] As the author points out, the concept of occupancy applies to land only in rare circumstances. But as we shall see, the concept is nonetheless highly relevant to aboriginal occupation of land which, from a European perspective, was previously "unowned."

[136] Which of these common law standards of occupation is most closely analogous to the situation of an aboriginal title claimant? Professor McNeil has argued, in my view, convincingly, that the most apposite standard is his third one, that applicable at common law to the so-called "general occupant." A general occupant is a person asserting possession of land over which no one else has a present interest or with respect to which title is uncertain.

[137] Professor McNeil examines the common law with respect to the nature of occupation required in this third category and summarizes his findings as follows at pp. 198 - 200:

> ... What, then, did one have to do to acquire a title by occupancy? ... [i]t appears ... that ... a casual entry, such as riding over land to hunt or hawk, or travelling across it, did not make an occupant, such acts 'being only transitory and to a particular purpose, which leaves no marks of an appropriation, or of an intention to possess for the separate use of the rider.' <u>There must, therefore, have been an actual entry, and some act or acts from which an intention to occupy the land could be inferred. Significantly, the acts and intention had to relate only to the occupation</u> — it was quite unnecessary for a potential occupant to claim, or even wish to acquire, the vacant estate, for the law cast it upon him by virtue of his occupation alone. ...
>
> Further guidance on what constitutes occupation can be gained from cases involving land to which title is uncertain. <u>Generally, any acts on or in relation to land that indicate an intention to hold or use it for one's own purposes are evidence of occupation. Apart from the obvious, such an enclosing, cultivating, mining, building upon, maintaining, and warning trespassers off land, any number of other acts, including cutting trees or grass, fishing in tracts of water, and even perambulation, may be relied upon. The weight given to such acts depends partly on the nature of the land, and the purposes for which it can reasonably be used.</u> ...
>
> (Emphasis added)

[138] This standard is distinct from the doctrine of constructive possession. It is concerned, not with attributing possession in absence of physical acts of occupation, but rather, with defining the quality of the physical acts of occupation which are sufficient to demonstrate possession in law.

[139] I would adopt, in general terms, Professor McNeil's analysis that the appropriate standard of occupation, from the common law perspective, is the middle ground between the minimal occupation which would permit a person to sue a wrong-doer in trespass and the most onerous standard required to ground title by adverse possession as against a true owner. The physical acts relied on as proof of occupation must be considered in light of the nature of the land and the purposes for which it could reasonably be used. Where, as here, we are dealing with a large expanse of territory which was not cultivated, acts such as continual, though changing, settlement and wide-ranging use for fishing, hunting and gathering should be given more weight than they would be if dealing with enclosed, cultivated land. Perhaps most significantly, and to use words quoted by *Pollock and Wright*, it is impossible to confine the evidence to the very precise spot on which the cutting was done: *Pollock and Wright* at p. 32. Instead, the question must be whether the acts of occupation in particular areas show that the whole area was occupied by the claimant.

(iv) Exclusive Occupation - The Aboriginal Perspective:

[140] I turn next to the aboriginal perspective. In **Delgamuukw**, Lamer, C.J.C. noted that the aboriginal perspective on occupation of land "... can be gleaned, in part, but not exclusively, from their traditional laws ..." at para. 148. So, for example, the Court referred to the pattern of land holdings under aboriginal law (at para. 147); to aboriginal laws relating to trespass (at para. 157) and to treaties among aboriginal groups relating to the right to have access to certain lands (at para. 157).

[141] Paying attention to aboriginal laws or patterns of land holding is consistent with the common law position that there can be no possession (in the sense of possession at law) without reference to a system of laws. As has been said, "[l]egal possession is altogether the work of the law ...": *Pollock and Wright* at p. 6. But the consideration of the aboriginal perspective concerning occupancy of land is not limited to the aboriginal rules relating to land tenure and use. It also extends to

taking into account the “conditions of life, habits and ideas of the people living in the locality”: *McNeil* at p. 201.

[142] It will be helpful to summarize the findings at trial and before the SCAC regarding the aboriginal perspective and to supplement them with additional references to the record. I am not dealing here with findings or evidence relating to actual use and occupation, but rather, to the aboriginal perspective concerning social organization, ownership and land use. It will be helpful to organize the discussion by considering three topics, namely: (i) polity; (ii)territoriality; and (iii) land tenure and use.

[143] Polity refers to a form or process of government. At trial, there was considerable evidence about how Mi’kmaq society was organized and directed. Dr. John Reid, for example, described the Mi’kmaq during the 1600's and 1700's as a “village society” in which larger questions were decided by a group of local leaders based on “a consensual form of polity” (Trial transcript, pp. 1015 - 1018). This view was, in the main, shared, but also amplified, by Dr. Wicken. In his opinion, the Mi’kmaq congregated in communities, which he called “summer villages”, had defined territories and had some form of larger Mi’kmaq polity, evidenced by the fact that they were organized to the extent that individuals could be authorized to speak for them — that there was some form of “broad assembly of Mi’kmaq polity” which united all of these communities. (Trial transcript, pp. 1631 and 1644) He concluded that there was some form of “customary law” which united the Mi’kmaq in a way that made it possible for them to co-operate in common (Trial transcript, p. 1651 *ff.*).

[144] One of the many issues at trial concerned the existence, at the time of British sovereignty, of a division of Mi’kmaq territory into seven districts, each with its own chief and united by a Grand Council headed by a Grand Chief. This was asserted by Chief Augustine to have been an ancient form of Mi’kmaq polity, while Dr. von Gernet thought it a development of the mid-18th century at the earliest.

[145] After reviewing the evidence, the trial judge accepted Dr. Von Gernet’s evidence on this point:

> **[55]** Mi'kmaq communities were allied with each other, with the French and with the other aboriginal groups in the Maritimes and Maine. However, as Dr. von Gernet put it, they did not have a fully-developed sense of being a nation. None of

> the French missionaries who wrote about the Mi'kmaq ever mentioned seven districts, a grand council or grand chief. Biard said they had "State Councils", but did not suggest those were formalized as a kind of government. From 1749 to 1759 the missionaries Le Loutre and Maillard claimed to speak at times for all the Mi'kmaq, but the treaties of 1749, 1752 and 1760-61 were all with individual communities. They were still a collection of communities.

[146] On the topic of the aboriginal perspective on territoriality, the trial judge made a number of findings which I shall summarize briefly.

[147] From the time of recorded history, the Mi'kmaq have lived in northeastern New Brunswick, Prince Edward Island and Nova Scotia including Cape Breton. Although the boundaries between Mi'kmaq territory and other native peoples living to the west may have been imprecise, there was no evidence that any other aboriginal group challenged the Mi'kmaq claim to live in that territory. At the date of sovereignty, they were the only people living in most of mainland Nova Scotia and there was no other aboriginal group here at that time. The evidence suggested that they were the only native inhabitants of Nova Scotia for at least twenty five hundred years.

[148] The judge found that the Mi'kmaq had a sense of territoriality and that they considered all of Nova Scotia to be their territory. While they did not have permanent settlements, they moved from time to time during the year and did not necessarily return to the same places each year. They were familiar with their territory and able to travel across it with ease.

[149] The courts below did not specifically address the aboriginal perspective on land tenure and use. However, there was considerable evidence on this issue, notably from Chief Augustine. I will quote some of this evidence *verbatim*:

> [**Volume 27, p. 4238 line 12 to page 4239 line 9]**
>
> Q So would each know where the territory of one begins and that of the other ends?
>
> A. In a general context, yes. There was a lot of travelling back and forth into each other's territories. And in that context, "territory" is a term that signifies a sense of proprietary ownership. In the same context, I cannot use it in our aboriginal terms because we don't have a term in our

indigenous languages that denote proprietary ownership in the way that it is understood today in the modern context.

Q. What kind of term would be appropriate?

A. The term that would best identify that would be a relationship to the land. That Iroquoian people had a relationship to the land. The Mi'kmaq had a relationship to the land. And whether they travelled into each other's territories, as long as they were not disrupting the way of life of those people that they would not run into any kind of problems. If they were to disrupt the way of life of the other people, then they would be dealt with according to how those individuals would deal with this kind of situation. And which was not always one rule or policy that that group would follow in terms of dealing with those individuals.

(Emphasis added)

Volume 27, page 4242, line 22 to 4243 line 9

A. Yes. Like I mentioned earlier, there is no -- in our philosophical understanding of our world, there was no proprietary ownership of territory in our regions, that everybody had the freedom to traverse through the land quite freely, as long as they did not interrupt the way of life of the other group.

And in this same context, when the European peoples arrived to our world, they were not repelled and told "This is our land; you can't arrive here. You can't stay here." It was the reverse. They were told "you are welcome here. There is food. There are animals. There are trees. There are plants. There are fish and birds that are available for your survival as well as for our survival."

(Emphasis added)

Vol. 27, Page 4244, line 16 to line 18

A. ... All of life that needed to be utilized to survive was available everywhere. And nobody withhold your survival from you.

Vol. 28, page 4248, line 15 to 4249, line 3

A. As I was indicating in the Creation Story, it was our understanding that we belong to the earth. So there is not a very strong element, not a strong element about proprietary ownership of the territories exclusive of

everybody else. However, there was a general understanding that Gesgapegiac, the people who are from the Gaspe region, knew where they were born and usually what happens, if an individual is born without a certain territory, they would be brought back to that same area where they were born and be buried back into their traditional territory. In that context, it is more considered as home. If you died in Onamagi and you were from Gesgapegiag, somehow your relatives will ensure that your body is brought back to where it belongs.

(Emphasis added)

Vol. 28, page 4250, Line 22 to page 4251, line 3

A. So the lines are very, very fluid and they are not very, very distinguishably this is the line that divides one district to another. There would be seem to be quite a wide buffer zone in between these two areas where individuals from either district would be able to camp in those areas, as long as they were not causing problems for those that were within that area.

(Emphasis added)

Volume 28, page 4251, line 8 to 4252, line 6

A. There is no word in our language that denotes a proprietary ownership. However, there is another word that we call alsosit.

(Emphasis added)

Q. Spelled?

A. A-L-S-O-S-I-T. It means like you're making like a bear and scratching the tree, in that you're designating to other people that normally you're camped around this area or you're trying to survive in this area. So you're marking the tree. Sometimes family emblems would be used to denote who was occupying this area.

Q. How would the question of who was occupying what area be controlled within the community?

A. There was not very strong of a control. I mean, there was, like I said, there was hardly any notion of proprietary ownership. It was more or less on the basis of the goodness of that individual, the goodness of the earth to provide. In that way, that relationship was held. There was, although an area might have been designated for an individual family, it does not

> exclude anybody else from surviving from the land, from entering into that area and utilizing whatever resources there are for their survival.
>
> As I keep going back and saying, as long as it does not disturb the way of life of those individuals within that territory.
>
> (Emphasis added)

[150] At trial, a good deal of time was spent on the issue of Mi'kmaq hunting territories. The defence evidence was to the effect that, at and before sovereignty, all of Nova Scotia had been divided into family hunting territories which passed from generation to generation patrilineally. The Crown evidence was to the effect that this was a post sovereignty development.

[151] At paras. 44 and 45 of his decision, the trial judge referred to the writings of LeClercq (who wrote in the last quarter of the 17th century) and Biard (who wrote early in that century) which indicated that a chief had the authority to assign hunting places and that chiefs would meet in "state Councils" during which they would, among other things, "divide up" the country according to bays or rivers. He made the following findings of fact:

> **[48]** Relying mainly on the work of Frank Speck, an American anthropologist, Dr. Wicken [a defence witness] testified that from at least 1700 all of Cape Breton and most of mainland Nova Scotia was divided into Mi'kmaq family hunting territories. The earliest documentary record he cited of family hunting territories was a list made in 1763 showing the Amquaret family hunting in part of the Annapolis Valley and the Nocout family hunting on the "Kenecoot" River. He also referred to a statement by Titus Smith, who conducted a survey of mainland Nova Scotia for the government in 1801-1802 that "at the close of the American war...Indians had divided all the hunting ground among their families."
>
> **[49]** Dr. von Gernet said there was no evidence family hunting territories were an ancient Mi'kmaq tradition. He said they existed in the 19th century, but could not be traced back with any degree of certainty beyond the second half of the 18th century. Based on the evidence presented in this case, Dr. von Gernet's conclusion is accurate.
>
> (Emphasis added)

[152] This is a significant finding of fact that family hunting territories were not an ancient Mi'kmaq tradition and that they could not be traced back to before 1750, which of course is after sovereignty on the mainland. Coupled with this is the trial

judge's finding (earlier referred to) that the division of Mi'kmaq territory into seven districts was not an ancient Mi'kmaq tradition and that this tradition, in fact, arose no earlier than 1750. Referring to the fact that the treaties of 1749, 1752 and 1760 - 61 were all with individual communities, the judge concluded (at para. 55) that the Mi'kmaq were "... a collection of communities ... " and that (at para. 131) "... there was "no persuasive evidence that they divided the entire territory among their communities or that they used all the territory ... [T]here were substantial tracts of land unclaimed and largely unused between the communities." (Emphasis added) The judge commented at para. 135 of his reasons, however, that according to Dr. von Gernet, the Mi'kmaq had a sense of territoriality and they made it clear to the British that they considered all of Nova Scotia to be their territory and they repeatedly accused the British of taking their land without permission.

[153] In the SCAC, Scanlan, J. accepted the trial judge's finding that neither the Grand Council nor the seven districts were ancient Mi'kmaq traditions. He did not otherwise deal directly with the trial judge's findings concerning the Mi'kmaq sense of territoriality, but made the following observations concerning the Mi'kmaq perspective on occupation of the territory:

> **[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.
>
> . . .
>
> **[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.

(v) Conclusion concerning the standard of occupation:

[154] Taking into account both the aboriginal and the common law perspectives, the standard of occupation described by Professor McNeil is, in my opinion, the most appropriate to apply to claims of aboriginal title. I say this for several reasons.

[155] First, the standard is the one applicable in the most closely analogous situations in the common law - that is, to property which is "unowned" or to land of which the boundaries are uncertain. The other two standards which McNeil describes would, in my opinion, not serve the purpose of reconciling aboriginal occupancy with British sovereignty. Treating the British as trespassers would not give weight or recognition to their sovereignty while insisting that the Mi'kmaq establish title by adverse possession would not give sufficient recognition to their long presence in Nova Scotia before sovereignty.

[156] Second, this standard is consistent with **Delgamuukw**'s broad outline of what is required to prove aboriginal title. That decision made it clear that physical occupation may be established in a variety of ways and that in considering the sufficiency of occupation, one should take account of the aboriginal group's size, manner of life, material resources, technological abilities and the character of the lands claimed (at para. 149). This direction seems to me to be similar to the approach to be used at common law in applying the standard I would adopt.

[157] Third, this standard is compatible with the Mi'kmaq perspective regarding territoriality and ownership. A more stringent standard would not be consistent with the culture of a people whose "subsistence quest" through hunting, fishing and gathering led them to frequent movement within the territory they considered theirs.

(vi) Continuity:

[158] The parties disagree as to whether an aboriginal title claimant must show continuity of occupation after sovereignty. The appellants' position is that under the **Delgamuukw** test, aboriginal title crystalizes at sovereignty. According to this

view, continuity of occupation thereafter is only relevant, to use the words of **Delgamuukw**, "... [i]f present occupation is relied on as proof of occupation pre-sovereignty...". The respondent's position is that, in addition to establishing exclusive occupation at the date of sovereignty, the claimants must also show a continuing substantial connection with the lands claimed up to the present time.

[159] The Supreme Court in **Delgamuukw** referred to ongoing aboriginal connection to the land after sovereignty in two contexts. It is necessary to address both in detail.

[160] The first reference is concerned with cases in which present day occupation is relied on as proof of occupation pre-sovereignty. In such cases, there must be continuity between the present and the pre-sovereignty occupation (para. 143). The requirement for continuity does not demand unbroken continuity of exclusive occupation, but rather a "substantial maintenance of the connection between the people and the land." (para. 153).

[161] This appears to be a way to facilitate proof of title given that "[c]onclusive evidence of pre-sovereignty occupation may be difficult to come by ..." and not an additional requirement (para. 152). Evidence of present day occupation plus evidence of a substantial connection with the land back to the time of sovereignty may be sufficient to prove exclusive occupation at sovereignty.

[162] This first reference to continuity is in my opinion consistent with the appellants' interpretation that title, once proved, is considered as having crystalized at the date of sovereignty and that there is no need to prove continuous occupation after that date. (This is subject to possible arguments concerning abandonment of the land and, of course, post-sovereignty events are relevant to issues of cession and extinguishment.)

[163] The second reference in **Delgamuukw** to ongoing connection with land concerns the requirement that the land be integral to the distinctive culture of the claimants. Lamer, C.J.C. affirmed at para. 151 that this "central significance to the distinctive culture" requirement is a "crucial part" of the test for all aboriginal rights, including aboriginal title. He noted, however, that given the occupancy requirement in the test for aboriginal title, it is difficult to "... imagine a situation where this requirement would actually serve to limit or preclude a title claim."(para. 151). This gives the impression that in title cases, exclusive occupancy at

sovereignty is the proxy for central significance. This impression is reinforced by the Chief Justice's earlier statement that "... under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy ..."(para. 142; emphasis added).

[164] However, at another point in the judgment, a requirement for ongoing "substantial connection" with the land after sovereignty is mentioned and this seems to be something akin to the requirement of continuity of occupation. I will quote the passage in full:

> ... in the case of title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants.(para 151).

[165] I find it difficult to reconcile this statement with the earlier one to the effect that, in title cases, the "integral to the distinctive culture test" is "... subsumed by the requirement of occupancy ..." (para. 142). In one case, occupancy at sovereignty is enough, whereas in the other, occupancy plus ongoing substantial connection is required. Moreover, any requirement for ongoing substantial connection with the land seems at odds with the purpose of s. 35(1) because insisting on post-sovereignty continuity would tend to "... perpetuat[e] the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect aboriginal rights to land": para. 153.

[166] I have found it helpful to trace the evolution of the continuity requirement through the aboriginal rights cases in order to place these comments in **Delgamuukw** in their proper context. Before doing so, however, it is necessary to remember the distinctions between the analysis required in rights cases, on the one hand, and title cases on the other.

[167] Lamer, C.J.C. in **Delgamuukw** recognized that the application of s. 35 of the **Constitution Act** must recognize and affirm two aspects of the prior presence of aboriginal peoples in North America — first, the occupation of land, and second, the prior social organization and distinctive cultures of aboriginal peoples on that land: para. 141. The aboriginal rights cases have given more emphasis to the second aspect while claims to aboriginal title have required more emphasis on the first: paras. 141 and 142. He noted, however, that "the tests for the identification of

aboriginal rights to engage in particular activities and for the identification of aboriginal title share broad similarities."

[168] However, two major distinctions between claims to title and rights should be recognized. They are: (i) that the requirement which applies in rights cases that the practice must be integral to the distinctive culture of the claimants is, in title cases, subsumed by the requirement of occupancy; and (ii) that the time for the identification of aboriginal rights is the time of first contact, whereas the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land: **Delgamuukw**, para. 142.

[169] It is important to bear in mind the rationale for the adoption of the date of sovereignty for consideration of aboriginal title rather than the date of contact used in rights cases. On this subject, the Chief Justice explained at paras. 144 and 145 of **Delgamuukw** that the time of sovereignty is used in title cases for a number of reasons, including these two:

> 145 First ... aboriginal title crystallized at the time sovereignty was asserted. Second, aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact. Under common law, the act of occupation or possession is sufficient to ground aboriginal title and it is not necessary to prove that the land was a distinctive or integral part of the aboriginal society before the arrival of Europeans. ...

[170] With that background, I will now briefly review the law relating to continuity of practices in the context of aboriginal rights claims. The starting point is **R. v. Van der Peet**. The most relevant discussion begins at para. 60 of the judgment following the heading "The Practices, Customs and Tradition which constitute aboriginal rights are those which have continuity with the traditions, customs and practices that existed prior to contact."

[171] Beginning at para. 60, the Court emphasizes that the relevant time to consider in identifying whether a right claimed meets the standard of being integral to the culture of the aboriginal community is the period prior to contact between aboriginal and European societies. However, the Court also adverts to the difficulty of producing evidence from pre-contact times about the practices, customs and traditions of the aboriginal community. The Court states that:

> ... evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. (Para. 62)

[172] The Court continues as follows:

> 63 I would note in relation to this point the position adopted by Brennan J. in Mabo, supra, where he holds, at p. 60, that in order for an aboriginal group to succeed in its claim for aboriginal title it must demonstrate that the connection with the land in its customs and laws has continued to the present day:
>
> > . . . when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.
>
> The relevance of this observation for identifying the rights in s. 35(1) lies not in its assertion of the effect of the disappearance of a practice, custom or tradition on an aboriginal claim (I take no position on that matter), but rather in its suggestion of the importance of considering the continuity in the practices, customs and traditions of aboriginal communities in assessing claims to aboriginal rights. It is precisely those present practices, customs and traditions which can be identified as having continuity with the practices, customs and traditions that existed prior to contact that will be the basis for the identification and definition of aboriginal rights under s. 35(1). Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).
>
> 64 The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in Sparrow, supra, at p. 1093, that "the phrase `existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time". The concept of continuity is, in other words, the means by which a "frozen rights" approach to s. 35(1) will be avoided. Because the practices, customs and traditions protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its

> own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.
>
> 65 I would note that the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact. It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom or tradition at a later date. Such an interruption will not preclude the establishment of an aboriginal right. Trial judges should adopt the same flexibility regarding the establishment of continuity that, as is discussed, infra, they are to adopt with regards to the evidence presented to establish the prior-to-contact practices, customs and traditions of the aboriginal group making the claim to an aboriginal right.
>
> (Emphasis added)

[173] In these paragraphs from **Van der Peet**, continuity has three aspects. The first relates to whether the disappearance of a practice, custom or tradition is inconsistent with its contemporary recognition. On this point, the Court in **Van der Peet** took no position: para. 63. The second aspect relates to proof of the "integral to the distinctive culture requirement" because the Court affirms that where the community can demonstrate that a practice, custom or tradition is (at the present time) integral to its distinctive culture and can show continuity of that practice back to pre-contact times, the community will have demonstrated an aboriginal right: para. 63. The third aspect relates to what we would refer to in a treaty rights case as the logical evolution of a treaty right. The Court refers in para. 64 to the need to interpret s. 35's affirmation of "existing aboriginal rights" flexibly so as to permit their evolution over time. This will prevent "a frozen rights approach".

[174] In my view, the judgment in **Van der Peet** is consistent with the view that continuity is a means of facilitating proof in a situation in which the claimant begins with an existing practice and then can show a reasonable measure of continuity back to the pre-contact period. This interpretation accords with the comments of the Court in **R. v. Gladstone**, [1996] 2 S.C.R. 723 beginning at para. 28 in which the Court said that **Van der Peet** held that "... a claimant to an aboriginal right need not provide direct evidence of pre-contact activities ... but need only provide evidence which is "directed at demonstrating which aspects of the aboriginal community and society have their origins precontact. ..."

[175] However, a somewhat different emphasis is given to the requirement of continuity in **R. v. Côté** and **R. v. Adams**. For example, at para. 69 of **Côté**, the Chief Justice, in discussing the **Van der Peet** analysis, states:

> 69 As part of the second stage of the *Van der Peet* analysis, there must also be "continuity" between aboriginal practices, customs and traditions that existed prior to contact and a particular practice, custom or tradition that is integral to aboriginal communities today: *Van der Peet*, *supra*, at para. 63; *Gladstone*, *supra*, at para. 28.
> ...
>
> (Emphasis added)

[176] This requirement was reiterated at para. 47 of **R. v. Adams**. However, in the preceding paragraph, having reviewed evidence supporting the conclusion that fishing for food in the St. Lawrence River, and in particular in Lake St. Francis, was a significant part of the life of the Mohawks from a time dating from at least 1603 and the arrival of Samuel de Champlain in the area [i.e., from contact] the Chief Justice held that this conclusion was sufficient to satisfy the **Van der Peet** test. He noted evidence that, at contact, the custom was a significant part of their distinctive culture and commented that this should be sufficient to demonstrate that, prior to contact, the custom was also a significant part of their distinctive culture: at para. 46.

[177] I would refer finally to **Mitchell v. Canada (Minister of National Revenue-M.N.R.)**, [2001] 1 S.C.R. 911; S.C.J. No. 33 (Q.L.). There, the Court stated that the **Van der Peet** test requires the claimant of an aboriginal right to prove three elements, namely: (i) the existence of the ancestral practice, custom or tradition advanced as supporting the claimed rights; (ii) that this practice, custom or tradition was integral to his or her pre-contact society in the sense that it marked it as distinctive; and (iii) reasonable continuity between the pre-contact practice and the contemporary claim: at para. 26.

[178] In my view, the requirement of continuity in these aboriginal rights cases was concerned with three things: first, whether the disappearance of a practice, custom or tradition prevents a contemporary claim seeking to revive it, a question on which the Court took no position; second, the facilitation of proof of a pre-contact practice, custom or tradition by showing sufficient continuity from a present practice back to the time of contact; third, a concept similar to the logical evolution

of treaty rights which affirms contemporary practice provided that it is sufficiently anchored in pre-contact practice, custom or tradition. Continuity is seen as a way to facilitate proof of pre-contact customs, practices and traditions and allowing these to be recognized in their present forms. I understand the third requirement as set out in **Mitchell,** for example, to relate to this last aspect, that is with the evolution of the traditional practice into its contemporary form.

[179] In both **Van der Peet** and **Delgamuukw**, the "continuing connection requirement" was adopted from the Australian decision of **Mabo v. Queensland, No. 2**, [1991-1992] 175 C.L.R. 1 (H.C.). In that case, Brennan, J, in the course of discussing the nature and incidents of "native title", speaks of loss of native title - of its being "washed away" by the "tide of history" (p. 60). I will quote the passage in full:

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. ... Though these are matters of fact, some general propositions about native title can be stated without reference to evidence.
>
> ... unless there are pre-existing laws of a territory over which the Crown acquires sovereignty which provide for the alienation of interests in land to strangers, the rights and interests which constitute a native title can be possessed only by the indigenous inhabitants and their descendants. ...
>
> Of course, since European settlement of Australia, many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it. But that is not the universal position. ... Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. ... However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs, based on tradition cannot be revived for contemporary recognition. Australian law can protect the interests of members of an indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and

> only where members of the clan or group acknowledge those laws and observe those customs (so far as it is practicable to do so). ...
>
> ... The Meriam people asserted an exclusive right to occupy the Murray Islands and, as a community, held a proprietary interest in the Islands. They have maintained their identity as a people and they observe customs which are traditionally based.

[180] In this portion of **Mabo**, continuing substantial connection is discussed in the context of whether there is a community ("clan or group") which continues to acknowledge traditional laws and customs relating to native title, thereby substantially maintaining their traditional connection with the land. The passages are premised on the notion that native title has its origin and derives its content from "... the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory." (p. 58). Thus, substantial connection goes to the ongoing validity of title, but seems to be mainly concerned with whether there continues to be an identifiable group which can assert the claim rather than with ongoing occupation of particular sites.

[181] However, at the point at which this **Mabo** language of connection with the land is adopted in **Delgamuukw**, the discussion concerns the requirement of continuity of occupation where present occupation is relied on as proof of pre-sovereignty occupation: at **Delgamuukw** para. 153. In other words, although the substantial connection issue, as addressed in **Mabo**, was concerned with the ongoing validity of native title, the context in which it was referred to in **Delgamuukw** was concerned with proof of occupation by evidence of present occupation coupled with evidence of the maintenance of a substantial connection between the people and the land back to the time of sovereignty. Importantly, the Chief Justice in **Van der Peet** at para. 63 was clear that his reliance on this part of **Mabo** did <u>not</u> relate to its "... assertion of the effect of the disappearance of a practice, custom or tradition on an aboriginal claim...", a point on which the Chief Justice took no position.

[182] To return to the place of continuity in Canadian aboriginal title cases, I would conclude that continuity of occupation from sovereignty to the present is not part of the test for aboriginal title if exclusive occupation at sovereignty is established by direct evidence of occupation before and at the time of sovereignty. This view is consistent with the basic principle underpinning **Delgamuukw** that title crystalizes

at that time. It also responds to the concern that requiring continuity of occupation after sovereignty would undermine the purpose of s. 35 by giving effect to displacement of aboriginals by Europeans as a result of post-sovereignty indifference to aboriginal rights. This approach is also mandated by the clear statement by the Court that the central significance requirement in title cases is "subsumed" by the requirement of occupancy. Subject of course to arguments relating to abandonment, cession and extinguishment, aboriginal title crystalizes at sovereignty and is made out by proof of exclusive occupation as of that date.

(vii) Conclusions Re: Occupation:

[183] In my respectful view, the courts below erred in requiring proof of regular, intensive use of the cutting sites to establish aboriginal title. In my opinion, this standard of occupation misapplies the common law perspective, fails to give equal weight to the aboriginal perspective, and does not take into account the nature of the land under consideration.

[184] The test as expressed in **Delgamuukw** is whether the claimant has established exclusive occupation at sovereignty of the lands claimed. The question, in my opinion, is not whether exclusive occupation of the cutting sites was established, but whether exclusive occupation of a reasonably defined territory which includes the cutting sites, was established. Insistence on proof of acts of occupation of the specific cutting sites within that territory is, in my opinion, not consistent with either the common law or the aboriginal perspective on occupation.

[185] I have not overlooked the Crown submission that the appellants have not established the boundaries of their occupation with sufficient certainty to demonstrate occupation of the whole present day province of Nova Scotia. In my view, that is not an issue which it is necessary for us to resolve in this case. To make out the defence on which they rely (and putting aside questions of whether proof of exclusive occupancy at sovereignty would afford a defence), the appellants do not have to establish Mi'kmaq aboriginal title to the whole province (although that is their claim); they have to show aboriginal title to the cutting sites. The question, therefore, is not whether the outer limits of the area of title have been established, but whether the cutting sites fall within an area to which aboriginal title has been proved.

[186] I should also add a word about the issue of whether the European presence in Nova Scotia at the date of sovereignty affects the analysis of the appellants' assertion of Mi'kmaq title. In my respectful view, this is not an issue that needs to be confronted in this case. While at trial the evidence of occupation was wide-ranging, the issue to which it was directed, given that aboriginal title was advanced as a defence to logging at the various cutting sites, was whether aboriginal title had been established to any of those sites. The trial judge found as a fact that there was no evidence of any European presence at any of those sites. That being so, I do not think that European presence elsewhere in Nova Scotia would affect the title claim advanced here which, given the nature of the proceedings, must be focused on those cutting sites.

[187] I, therefore, conclude that the courts below erred by insisting on evidence of intensive, regular use of the cutting sites, rather than asking simply whether there was sufficient evidence of occupation, to the standard I have described, over a territory that included the cutting sites.

(b) Moderately nomadic people:

[188] The trial judge, relying on **R. v. Côté**, appears to have been of the view that the Supreme Court had decided that moderately nomadic people like the Algonquins (and, in his view, the Mi'kmaq) generally could not show the sort of occupation of land necessary to sustain a claim for aboriginal title.

[189] The SCAC expressly approved the conclusion that the Mi'kmaq were a moderately nomadic people and did not comment adversely on the trial judge's conclusion that "moderately nomadic" peoples generally cannot show occupation sufficient to ground aboriginal title.

[190] The appellants take exception to this reliance on **Côté** and, in my opinion, they are correct to say that the trial judge misread the case and relied on it for a proposition that it does not support. As is apparent in para. 140 of his reasons the trial judge treated **Côté** as standing for the proposition that moderately nomadic peoples such as the Algonquins considered in that case could not demonstrate "sufficient occupancy" to prove aboriginal title. The trial judge stated that, in **Côté**, the Supreme Court had affirmed the conclusion of the summary conviction appeal court judge that, given the itinerant hunting patterns and thin population of the

Algonquins, they could not demonstrate that they had exercised real and exclusive possession over the disputed territories.

[191] In my respectful view, this is not a sound reading of **Côté**. This is apparent if the passage from **Côté** relied on by the trial judge is placed in its context within the structure of the judgment and of the issues being addressed by the Supreme Court.

[192] The starting point for the judgment of the Supreme Court in **Côté** was that the accused persons did not have to prove aboriginal title in order to establish an aboriginal right to fish in the place in question. The lower courts, however, had approached the case on the basis that the aboriginal right to fish was an aspect of aboriginal title. The Supreme Court therefore had to face the question of how to relate the findings of fact in the courts below to the issue of whether there was an aboriginal right to fish apart from proof of aboriginal title. The Court did not approve the findings in the courts below with respect to aboriginal title, but rather, reviewed the factual findings for the purpose of determining whether the Algonquins frequented the territory at the relevant time. Lamer, C.J.C. said at paras. 59 , 60, 67 and 68:

> 59 Following the example of *Van der Peet*, *Gladstone*, and *N.T.C. Smokehouse Ltd.*, and most recently, *Adams*, the role of this Court is to rely on the findings of fact made by the trial judge and to assess whether those findings of fact were both reasonable and support the claim that an activity is an aspect of a practice, custom or tradition integral to the distinctive culture of the aboriginal community or group in question. In this instance, both Barrière Prov. Ct. J. and Frenette J. made divergent findings of fact in relation to whether the Algonquins exercised sufficient continuous occupation over the disputed territory to give them aboriginal title to it. However, these particular findings do not relate specifically to the proper question at issue today: namely, whether the reliance on the rivers and lakes within the Z.E.C., particularly Desert Lake, as a source of food was a significant part of the life of the Algonquins prior to contact. Furthermore, as noted previously, the findings of Barrière Prov. Ct. J. were focused on the incorrect date; the trial judge scrutinized the occupation of the Algonquins at the time of British conquest, rather than the correct and much earlier date of the dawn of the 17th century.
>
> 60 However, Frenette J. did indeed make a finding of fact which was directed at the proper question before the Court in this case. On the question of title, Frenette J. undertook a comprehensive review of the historical and anthropological evidence in the record to determine whether the appellants had exercised sufficient occupancy over the Z.E.C. lands to satisfy the criteria set out in *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.).

He concluded that in light of the itinerant hunting patterns and the thin population of the Algonquins, the appellants had failed to demonstrate that the Algonquins exercised real and exclusive possession over the disputed territories. But in framing his findings of fact in relation to title, he found that the evidence did demonstrate that the Algonquins exerted a presence in the disputed territory at the time of contact. He stated at p. 125 (C.N.L.R.):

[TRANSLATION] If account is taken of all these factors and of the fact that the evidence shows that, given the number of Indians frequenting the territory in question, it was sparsely inhabited, while most of the Algonquins lived at the Sulpician mission at Lac des Deux-Montagnes (as noted by these anthropologists and by William Johnson), it must be concluded that the thesis put forward by the appellants is, at the very least, highly questionable and that it has instead been proved on a balance of probabilities that the Algonquins did not have real and exclusive possession of the territory in question. [Emphasis added.]

In short, while Frenette J. disputed the exclusive quality of the Algonquins' occupation of the Z.E.C., *he accepted that the Algonquins did indeed frequent the territory in question at the relevant time*. This finding is not contradicted by any other finding by Barrièère Prov. Ct. J.

...

67 In summary, following my survey of the record, I conclude that Frenette J. made a finding of fact that the Algonquins did frequent the Z.E.C. as part of their traditional lands at the time of contact. This finding was not contradicted by any of the findings of the Provincial Court, or for that matter, the Court of Appeal. ...

68 In light of the Crown's failure to elicit any contrary historical evidence at trial, the evidence produced at trial coupled with the findings of fact of the Superior Court is sufficient to support the inference that *fishing for food within the lakes and rivers of the territory of the Z.E.C.*, and in particular, Desert Lake, was a significant part of the life of the Algonquins from a time dating from at least 1603 and the arrival of French explorers and missionaries into the area. Fishing was significant to the Algonquins, as it represented the predominant source of subsistence during the season leading up to winter.

(Emphasis added)

[193] Thus, in **Côté**, the Court's focus on the SCAC's finding about the nature of Algonquin life was not concerned with whether the appellants could or could not establish title, but with whether fishing for food in the relevant area was a significant part of their life and culture. The Supreme Court did not approve or adopt the conclusion of the courts below that a nomadic people could never establish aboriginal title. The trial judge and the SCAC erred to the extent that they relied on **Côté** for the proposition that a moderately nomadic people could generally not establish aboriginal title.

[194] The issue of nomadic peoples claiming aboriginal title was left open by the Supreme Court of Canada in both **Adams** and **Delgamuukw**. In **Adams** at para. 28, the Chief Justice stated that he was taking no position on the point as to whether the Mohawks, who were found to have varied their settlements and not to settle exclusively in one location, were thereby precluded from establishing aboriginal title. The same point is clear in **Delgamuukw** at para. 139. There, referring to **Adams** and the reference to nomadic peoples, the Chief Justice was careful to say that the inability to establish aboriginal title may occur in such cases: para. 139. I think the most that can be said is that **Delgamuukw** stands for the proposition that the occupation and use of land is a matter of degree and that not every sort of occupation and use is sufficient to ground aboriginal title. However, it appears that "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" is sufficient: para. 149.

[195] To conclude on this point, I agree with the appellants that to the extent that the trial judge relied on **Côté** for the proposition that moderately nomadic people generally cannot establish aboriginal title, he erred in law. It follows that the SCAC erred in law by approving that conclusion.

2.3.3 Summary of Conclusions Re Common Law Aboriginal Title:

[196] In my view, the SCAC erred in law by requiring the appellants to prove intensive, regular use of the cutting sites to establish aboriginal title and in failing to set aside the holding of the trial judge that a moderately nomadic people, such as the Mi'kmaq, could generally not establish aboriginal title.

3. Aboriginal Title by Virtue of the Royal Proclamation of 1763:

[197] The appellants' position is that the Royal Proclamation reserved for the Mi'kmaq aboriginal title to unceded, unpurchased land which included the cutting sites. The respondent's position is that the Proclamation did not and, as a matter of constitutional law, could not have such an effect.

3.1 Judicial History:

(a) Provincial Court:

[198] At para. 107 of his reasons, the trial judge concluded that the Royal Proclamation applied to Nova Scotia and created reserves out of aboriginal lands not previously ceded to or purchased by the British. However, he also found that the Proclamation did not provide the Mi'kmaq with any rights to the cutting areas: at para. 43.

(b) Summary Conviction Appeal Court:

[199] The SCAC found at para. 137 that a liberal construction of the Proclamation would support the trial judge's conclusion that it applies to Nova Scotia, but only to the extent that land had already been reserved in Nova Scotia at the time of the Proclamation. However, the SCAC noted at para. 135 that the Proclamation was either "... not intended to apply to Nova Scotia or that it was intended to apply only in a limited sense." The court then summarized its conclusions as follows:

> **[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**.

3.2 Principal Grounds of Appeal:

[200] The issues to be addressed here are these:

(1) Did the SCAC err by:

(a) failing to find that the Royal Proclamation of 1763 reserved to the Mi’kmaq all unceded, unpurchased land in the Province?

(b) failing to apply the provisions of the Royal Proclamation regarding cession or purchase of aboriginal land?

(2) Should the convictions be upheld because the relevant provisions of the Royal Proclamation, for constitutional reasons, do not have the force of law in Nova Scotia?

[201] The appellants’ fundamental argument is that the SCAC erred concerning the effect of the Royal Proclamation as it applies in Nova Scotia. Their position is that the Proclamation reserved to the Mi’kmaq unceded, unpurchased land – in effect, the whole province.

3.3 Did the Proclamation reserve lands for the Mi’kmaq?

(a) Interpreting the Royal Proclamation:

[202] The Royal Proclamation was an Imperial Instrument issued by the King on October 7, 1763. It followed the first Treaty of Paris of the same year and was directed to the issue of how to administer and make secure the territories acquired by Britain in that treaty.

[203] The Proclamation is of great importance to the relationship between the Crown and aboriginal peoples. While it is not listed as one of the instruments included in the Constitution of Canada (see **Constitution Act, supra**, s. 52(2) and the Schedule thereto), the Proclamation is referred to in s. 25(a) of the **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11. This makes explicit the point that nothing in the **Charter** will be construed so as to abrogate any right or freedom recognized by the Proclamation. Moreover, there are many, high judicial pronouncements concerning the fundamental importance of the Proclamation; these have referred to it as the "Magna Carta of Indian rights in North America" and as the "Indian **Bill of Rights**": see, for example **R. v. Secretary of State of Foreign and Commonwealth Affairs**, [1982] 1 Q.B. 892 (C.A.) *per* Lord Denning at pp. 912-913; 917-918 and **St. Catherine's Milling and Lumber Co. v. The Queen** (1887), 13 S.C.R. 577 *per* Gwyne, J. at p. 625, aff'd (1888), 14 A.C. 46 (P.C.).

[204] The Proclamation, therefore, should be interpreted "... liberally ... and doubtful expression resolved in favour of the Indians.": **Nowegijick v. The Queen**, [1983] 1 S.C.R. 29 at 36. This does not mean, however, that a particular construction should be adopted simply because it favours aboriginal people. The wording, context and purpose of the Proclamation must be considered in order to arrive at an interpretation that, to the greatest extent, harmonizes the grammatical and ordinary sense of the words, read in their entire context, with the scheme and objects of the Proclamation: see, e.g., **R. v. Lewis**, [1996] 1 S.C.R. 921 *per* Iacobucci, J. at para. 66; Ruth Sullivan, *Sullivan and Dreidger on the Construction of Statutes*, 4th ed., (Butterworths, 2002) at 1.

[205] I will turn first to the text of the Proclamation and then to its context and purpose.

[206] I have found it helpful to set out in numbered paragraphs the so-called Indian provisions of the Royal Proclamation of 1763. This is attached as Appendix "A" to my reasons. Of course, the numbering and division of paragraphs does not exist in the original and have been inserted for ease of reference.

[207] On some occasions, the question has been asked whether the Royal Proclamation "applies" to Nova Scotia. This is a misleading and unhelpful way of putting the question. The Royal Proclamation undoubtedly "applies" to Nova Scotia in some of its aspects: the Proclamation, for example, annexed what is now Cape Breton and Prince Edward Island to what was then Nova Scotia. The real question is much narrower and concerns whether the Royal Proclamation had the effect of reserving lands here for the Mi'kmaq.

[208] The appellants rely particularly on three provisions in the Proclamation.

[209] The first is the language of the preamble that begins what I have labeled as Part IV of the Proclamation (" And whereas it is just and reasonable, and essential to Our Interest ... that the [Indians living under our protection] should not be ... disturbed in the Possession of such Parts of our Dominions ... <u>as not having been ceded to, or purchased by Us, are reserved to them</u> ... as their Hunting Grounds ..."). This, it is argued, reserves for the Mi'kmaq all land not ceded to or purchased by the British.

[210] I cannot accept this submission. The clause must be understood within the scheme of the Proclamation as a whole. This opening section of what I have labeled Part IV starting with the words "And whereas ... " is simply a recital which does not make any order or provision for anything. This is consistent with the structure of the Proclamation and with the language of the recital itself.

[211] The Proclamation contains a series of recital clauses beginning with words such as "Whereas" or "And whereas". These recital clauses state the rationale or motivating circumstances for the orders and directions set out in the operative clauses which follow. Each recital is followed by a series of directions in response

to the rationale or motivating circumstances referred to in the recitals. Viewed in the context of the structure of the Proclamation, these recital clauses, in my opinion, do not have any dispositive effect. Moreover, the recital clause in issue here, consistent with the structure of the Proclamation, should be understood as setting out a rationale or motivating circumstance. In that light, the reference in the recital to lands which "... are reserved to them..." should be understood as referring to a situation existing at the time of the Proclamation and explaining its purpose, that is, to lands which, at the time of the recital, had already been reserved for the Indians.

[212] The second provision relied on by the appellants is the concluding portion of what I have labeled article 1(b) of Part IV. This again refers to "... any Lands whatever, which, not having been ceded to, or purchased by Us as aforesaid, are reserved to the said Indians...".

[213] This portion of the Proclamation consists of three operative clauses (contained in what I have called sub-clauses (a) and (b)) responding to the goals or objectives stated in the recital which opens the Article. Of these operative clauses, (b) includes the text most strongly relied on by the appellants, but all of the components must be examined in order to interpret the clause.

[214] The opening component of clause (a) is directed to the Governors and Commanders-in-Chief "... of Our Colonies of Quebec, East Florida or West Florida" and directs them not to make certain land grants. Nova Scotia was not part of any of the three named colonies and it follows that this opening component clearly does not relate to Nova Scotia.

[215] The next component, found in clause (b), is directed to the Governors and Commanders-in-Chief of <u>other colonies or plantations in America</u>. This language is broad enough to include reference to Nova Scotia. The clause prohibits two types of land grant "... until Our further Pleasure be known...". The first relates to land "... beyond the Heads or Sources of any of the Rivers which fall into the Atlantick (sic) Ocean from the West and North-West..." and therefore does not relate to land in present day Nova Scotia. The second prohibition, which contains the language relied on by the appellants, relates to "... 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." The appellants say that this part of the clause is a direction which creates reserves of the named land for the Mi'kmaq. The critical interpretative issue is whether this is so.

[216] In my respectful view, this clause, read as part of the Proclamation as a whole, does not reserve for the Mi'kmaq any lands not previously reserved for them in Nova Scotia.

[217] The phrase on which the appellants rely referring to lands as "... not having been ceded to, or purchased by Us ... are reserved ... [for the several nations or tribes of Indians] ..." appears initially in a recital clause which is consistent with a statement of an objective, not with the creation of vast reserves of land. Throughout the proclamation, the operative clauses generally begin with expressions such as "We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure that ..." or "We have thought fit, with the Advice of Our Privy Council ..." or "We do hereby command ...". This directory language may be contrasted with the language of recital clauses which generally begin with "Whereas" or "And whereas". This supports the view that the phrase refers to a pre-existing state of affairs and is not a new or independent direction.

[218] There is one instance in the Proclamation (in what I have called Article 2(a)) where previously unreserved land is clearly reserved for Indians. The language used in that instance is " ... We do further declare it to be Our Royal Will and Pleasure, ... to reserve under Our Sovereignty, Protection and Dominion, for the Use of the said Indians, all the Lands and Territories ...". This reservation is accomplished in unambiguous language and relates to the Indian territory in the interior. It is not suggested that this provision reserves any land in Nova Scotia. It tends to show, however, that where the intention was to reserve previously unreserved lands, clear language to accomplish that intention was used. The wording of the express reservation of land found in Article 2(a) may be contrasted to that in the clauses relied on by the appellants. The differences support the view that these latter clauses refer to previously reserved lands.

[219] The Proclamation contains, in what I have labeled as Article 3 of Part IV, an order to remove people who have settled on "... 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 ...". The reference to "any lands within the Countries above described" is quite clearly a reference to the lands reserved in the Indian Territories by the immediately preceding clause. The use of the words "still reserved" in connection with the directive in relation to "any other lands" once again points to lands previously reserved. If, as the appellants contend, the Proclamation had just reserved for the Mi'kmaq virtually the entire Province of Nova Scotia (which of course included at the time what are now New Brunswick and Prince Edward Island), it would follow that this clause would necessarily have had the effect of ordering all settlers out of the area. But such an order appears irrational if viewed in light of the historical context.

[220] The final clause of the Proclamation (which I have called Article 5) supports the view that there is only one area reserved by the Proclamation and that was in the "Indian territory" of the interior as discussed above. The final clause provides:

> And We do further expressly enjoin and require all Officers ... within the Territories reserved as aforesaid for the Use of the said Indians, to seize ... all Persons ..., who, standing charged with Treasons, Misprisions of Treason, Murders, or other Felonies or Misdemeanours, shall fly from Justice, and take Refuge in the said Territory, and to send them under a proper Guard to the Colony where the Crime was committed ...

[221] The clause requires that persons who flee to the reserved territory and take refuge are to be returned to the colony where the crime was committed. This provision would not make sense if, as the appellants submit, the Proclamation had reserved large parts of the existing colonies such as Nova Scotia for the Indians. In this clause, the phrase "the Territories reserved as aforesaid for the Use of the said Indians" must, therefore, refer to land outside the existing colonies. In my view, this underlines the distinction made in the Proclamation between the lands reserved by it in the interior and lands previously reserved elsewhere.

[222] The appellants say that their interpretation of the Proclamation is reinforced by what I have labelled Article 4(a). That provision enjoins "private Persons ... [from making] any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow

Settlement ... ". However, this language seems to me to be equally consistent with an intent to refer to newly reserved land or previously reserved land. It does not, therefore, materially support the appellants' interpretation and certainly does not detract from the interpretation which I prefer.

[223] The interpretation that I arrive at based on an analysis of the text is consistent with and supported by the comments of the unanimous Supreme Court of Canada in **R. v. Sioui**, [1990] 1 S.C.R. 1025. There, Lamer, J. (as he then was) stated at page 1052:

> Great Britain's *de jure* control of Canada took the form of the Treaty of Paris of February 10, 1763, a treaty which *inter alia* ensured that the "Inhabitants of Canada" would be free to practise the Roman Catholic religion. Some months later, the Royal Proclamation of October 7, 1763 organized the territories recently acquired by Great Britain and reserved two types of land for the Indians: that located outside the colony's territorial limits and the establishments authorized by the Crown inside the colony.
>
> (Emphasis added)

[224] This view is also consistent with the opinion of the majority of the Quebec Court of Appeal in **R. v. Côté** (1993), 107 D.L.R. (4th) 28 (Que. C.A.) per Baudouin, J.A. at 42 - 43:

> ... I am convinced, with the greatest deference for the contrary opinion, that the Royal Proclamation, 1763 was an attempt at consolidation and was simply intended to continue a stabilization effort that had been undertaken earlier. The territories it covered therefore included, in my opinion, only the Indian territory outside the colonies already existing or to be created, on the one hand, and on the other hand the lands previously set aside especially and specifically for the aboriginal peoples within these colonies. ...
>
> I am of the opinion, therefore, that the Royal Proclamation, 1763 simply recorded, acknowledged and stabilized the previously existing situation. It gave formal recognition to the aboriginal people of their then existing rights. It never had the effect of creating new rights within what was then the colony of Quebec.
>
> (Emphasis added)

[225] This judgment was reversed in part by the Supreme Court: **R. v. Côté**, **supra**, but the Court did not address the interpretation of the Royal Proclamation and made no adverse comment on the holding of the Quebec Court of Appeal in that regard: at para. 41.

[226] In my view, we are not obliged by **R. v. Isaac** (1975), 13 N.S.R. (2d) 450 (A.D.) to hold otherwise. It is not clear to me that the comments of MacKeigan, C.J.N.S. concerning the Royal Proclamation represented the views of a majority of the Court and in any event they were not central to his reasoning or disposition of the case.

[227] I have reviewed the numerous other authorities cited by the appellants on this issue, including **St. Catherine's Mining Company v. The Queen** (1888), 14 A.C. 46 (P.C.); **Calder v. Attorney General of British Columbia**, **supra**; **R. v. Secretary of State for Foreign and Commonwealth Affairs**, [1982] 2 All E.R. 118 and **Re Labrador Boundary**, [1927] 2 D.L.R. 401 (P.C.). In my view, none of them is inconsistent with the interpretation I would adopt.

(b) Context and Purpose:

[228] The rich record at trial provides extensive historical context for the Proclamation and sheds light on its purposes. That context and the purposes which it illuminates strongly support the interpretation I would adopt.

[229] The issue which prompted the Proclamation was how to administer and make secure the territories acquired by Britain in the first Treaty of Paris in 1763. From the beginning of the policy discussions between the Board of Trade and the Privy Council in relation to what became the Proclamation, the North American colonies were divided into two broad categories - those earmarked for settlement and those whose settlement would be deferred.

[230] Significantly, Nova Scotia was the prime example of the former category. It will be remembered that the Lords of Trade had urged "... the compleat Settlement

of Your Majesty's Colony of Nova Scotia, according to its true and ancient Boundaries ..." (Lords of Trade to Lord Egremont, June 8, 1763 in Adam Shortt and Arthur G. Doughty (eds.), *Documents Relating to the Constitutional History of Canada*, 1759-1791, Part I (Ottawa, 1918) at 135. Nova Scotia was viewed not only as an appropriate place for immediate settlement, but as having important resources in its fishery and for provision of masts for the Royal Navy from its forests. As Binnie, J. pointed out for the majority in **Marshall No. 1**, the recently concluded treaties with the Mi'kmaq of 1760-61 were designed to facilitate "a wave" of European settlement: at **Marshall No. 1**, para. 21.

[231] The so-called Indian territory in the interior to the west of the Appalachians was the prime example of the latter category in which settlement was to be postponed. The Proclamation provided, as noted, that lands should not be granted "...beyond the Heads or Sources of any of the Rivers which fall into the Atlantick Ocean from the West and North-West ...".

[232] Throughout the policy discussion leading up to the Proclamation, relations with aboriginal peoples were considered as an aspect of the future security of the colonies. There were two main concerns about potential conflict with the Indian population. One related to the friction likely to result from the movement of settlers into the "Indian territory". This was addressed by putting settlement in that territory on hold. The second was concerned with the potentially dangerous situations arising from the twin evils of disregard of existing Indian treaty rights and abusive land transactions with the Indian population. The latter concern was relevant to varying degrees in the existing colonies which included Nova Scotia, but it would seem from the historical record at trial that the problems that put this matter on the policy agenda were not related to, and did not originate in, Nova Scotia.

[233] In light of this historical context and of the policy development process that unfolded leading up to the Proclamation, it would be surprising to say the least if, having identified Nova Scotia as a priority area for immediate and extensive settlement, and having prepared the way for such settlement with the 1760-61 Mi'kmaq treaties, the Crown would at the same time reserve the entire province for the Mi'kmaq. Viewed in its historical context, such a provision would have made no sense.

[234] The same may be said about what I have labelled as Article 3 of Part IV ordering the removal of settlers from "... 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...". At the time of the Proclamation, the British had just prevailed in a lengthy war with the French with whom the Mi'kmaq had been allied. It was Imperial policy at the time to move promptly to settle Nova Scotia, a policy that was already being implemented at the time the Proclamation was made. Against that background, it defies reason as to why the King would order the removal of all settlers from the Province.

[235] To conclude, the construction of the Proclamation advanced by the appellants is contrary to the Imperial policies which the Proclamation sought to advance and is inconsistent with its text interpreted in light of the Proclamation as a whole. In my view, the Royal Proclamation does not support the appellants' claim to aboriginal title. Although I would not endorse everything said about the effect of the Proclamation in the courts below, I would affirm their fundamental conclusion that the Royal Proclamation does not afford the basis of a defence to the charges against the appellants.

[236] The appellants also submit that the purchase provisions in Article 4(a) prevent extinguishment of title by Crown grant. I have concluded that the Proclamation did not reserve lands in Nova Scotia. It is not suggested that any of the cutting sites were otherwise reserved. It follows that this provision is not relevant to the extinguishment of any aboriginal title to any of the cutting sites.

3.4 The Respondent's Constitutional Argument:

[237] In light of my conclusions concerning the correct interpretation of the Royal Proclamation, it is not necessary to address further the respondent's argument that it could not apply because the Crown had no legislative authority to act other than by statute in settled colonies with Legislatures such as Nova Scotia.

4. Cession, Justification, Extinguishment and Irreconcilable Use:

4.1 Issues:

[238] In this section, I will address the following issues:

(1) Do the 1760-61 treaties preclude the appellants from asserting a claim to aboriginal title to settled lands?

(2) Has any aboriginal title to the cutting sites been extinguished by pre-Confederation Crown grants of the lands or by abandonment?

4.2 Position of the Parties:

[239] Although extinguishment, cession and justification were live issues at trial, neither of the courts below found it necessary to address them. By way of its notice of contention, the Crown renews its submissions that any aboriginal title vesting in the Mi'kmaq at sovereignty has been ceded or extinguished. However, the Crown made no submissions on the issue of justification and it is, therefore, not necessary to consider that issue further. The appellants' position is that there has been no cession or extinguishment of their rights.

4.3 Cession:

(a) Treaty:

[240] The Crown submits that the 1760 - 61 treaties ceded Mi'kmaq territory to the British. (I note that while the Crown makes this submission, it is unwilling to commit itself to any position as to what territories these treaties relate.) For the reasons given in para. 98, above, I conclude that we are bound by decisions of the Supreme Court of Canada to reject the Crown's submission.

(b) By Acceptance of Reservations:

[241] The Crown argues that as lands were reserved for the Mi'kmaq, it was "necessarily implicit" that their claims outside the lands so reserved were relinquished. The Crown, however, does not point to evidence apart from the creation of reservations themselves showing a clear and plain intent to extinguish aboriginal title. Assuming that such intent may be established by necessary implication, the record here does not meet that standard. I agree with the appellants' submission that licences of occupation and land reserves provided some protection for the Mi'kmaq, but that there is no evidence these were accepted in lieu of any treaty or land rights they held.

4.4 Extinguishment:

(a) By Abandonment:

[242] The Crown submits that where a substantial connection with the land has not been maintained, any pre-existing aboriginal title is lost through abandonment. For the reasons given at para. 157 *ff.* , I would find that continuity is not part of the test for aboriginal title where, as here, exclusive occupation at sovereignty is sought to be established by evidence relating directly to the time before and at sovereignty. Moreover, in light of the present day Mi'kmaq reserves and the continuing and vital Mi'kmaq presence throughout the Province, I do not accept the submission that there has been any abandonment by them of their claims.

(b) By Pre-Confederation Crown Grant:

[243] The Crown submits that pre-Confederation Crown grants extinguish aboriginal title. If this is the case, any aboriginal title may have been extinguished on at least seven of the cutting sites.

[244] I prefer not to express a view on this issue on the basis of the material and submissions presently before the Court. This point is not, in my opinion, settled by any authority binding on us although there are several persuasive pronouncements supporting the respondent's position. There is a considerable body of case law in Australia and the United States on the point as well as a significant amount of

scholarly writing: see, for example, K. McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia*, (2001) and in particular the second essay in Part III, *"Extinguishment of Native Title: The High Court and American Law"*, p. 409 - 415. Many of these authorities and scholarly works have not been referred to by the parties and they, of course, have not had the opportunity of making submissions with respect to them.

[245] The issue of extinguishment by pre-Confederation Crown grant has a number of aspects of considerable and broad importance which have not been fully argued in this case. I will give two examples. If granted land reverts to the Crown, does any pre-existing aboriginal title that was extinguished by the grant revive when the Crown reacquires it? Did grants require legislative authority before they could extinguish aboriginal title and, if so, was there such authority for the grants in issue in this case? I mention these only by way of examples of the complex questions in relation to the submissions that Crown grants of the fee simple extinguish aboriginal title.

[246] This thorny point was not addressed at all by the courts below. As, in my view, there must be new trials in these cases, I would leave these questions for another day.

4.5 Irreconcilable Use:

[247] The Crown submits that the logging conducted by the appellants is irreconcilable with their title claims. The legal underpinning of this argument is found in paras. 125 - 128 of **Delgamuukw** where Lamer, C.J. concluded that:

> 128 ... lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place.

[248] The Crown says here that the logging practices which are the subject of the charge are irreconcilable with traditional Mi'kmaq land use practices and would involve demolishing the very forests that sustained their ancestors.

[249] While I, of course, accept the legal foundation of this submission, the record does not demonstrate its applicability to this case. The forestry practices engaged in by the appellants were, in the view of the witnesses called at trial, varied. The practices ranged from quite sound to disorganized and improper. It is important to remember that the overall scale of the operations was relatively small, that the laying of charges interrupted whatever harvesting had been planned, that trees are a renewable resource and that the existence of treaty or title rights does not preclude appropriate and necessary regulation. Bearing these facts in mind, I cannot accept the Crown's submission that the conduct before the Court destroyed the land for its traditional uses or the relationship between the Mi'kmaq and the land.

V. DISPOSITION:

[250] I have concluded that the SCAC made two main errors of law: first, by applying the wrong test for determining whether the appellants' activities were protected by the Treaties of 1760 - 61; and second, by applying the wrong standard to the issue of Mi'kmaq occupation for the purposes of determining the issue of aboriginal title. These conclusions give rise to the question of what order should flow from these findings of legal error. There are three options.

[251] First, the appeal could be dismissed if the Court were persuaded that, notwithstanding the errors, no substantial wrong or miscarriage had resulted from the convictions. The Crown relies on the proviso in s. 686(1)(b)(iii) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 (applicable to this appeal by virtue of s. 839(2)). To apply it, the Court must be persuaded that there is no reasonable possibility that the verdicts would have been different had the errors not been made. That would require us to find either that the legal errors were trivial or immaterial or that the evidence was so overwhelming that any other result would be impossible: see, for example, **R. v. Khan**, [2001] 3 S.C.R. 823 per Arbour, J. for the majority at paras. 29 - 31.

[252] In my opinion, the proviso should not be applied here. The legal errors below are not trivial and the Crown has not met the onerous burden of showing that there is no reasonable possibility of acquittals had the errors not been made.

[253] The proviso not being applicable, the appeal should be allowed. That conclusion gives rise to the second and third options open to the Court. Where an appeal is allowed on the basis of wrong decisions on questions of law, the appellate court may either direct an acquittal or order a new trial: s. 686(2)(a) and (b) (applicable by virtue of s. 839(2)). This is a discretionary decision. Generally, where there is evidence upon which the accused could reasonably be convicted, a new trial is ordered and where there is not, an acquittal is entered: see, for example, John Sopinka and Mark Gelowitz, *The Conduct of an Appeal*, 2d ed. (Butterworths Canada Ltd., 2000) at p. 145 and **R. v. Salajko**, [1970] 1 C.C.C. 352 (Ont. C.A.)

[254] Applying this test, I would order a new trial. In my view, there is evidence upon which the appellants could reasonably be convicted at a trial which applies the correct legal principles.

[255] I would, therefore, grant leave to appeal, allow the appeal, set aside the convictions and order new trials on all counts.

[256] I should add that I have reviewed the decision of the Newfoundland and Labrador Supreme Court in **The Queen in Right of Newfoundland v. Drew et al.**, [2003] N.J. No. 177 and of the New Brunswick Court of Appeal in **Bernard v. The Queen**, 2003 NBCA 55. The parties to the present appeal have not provided additional submissions concerning these authorities and my review of them does not cause me to reconsider the conclusions I have reached.

[257] I note that in **Bernard**, the New Brunswick Court stayed the effect of its ruling for a one year period. In the present case, unlike **Bernard**, we have not finally resolved the question of whether the appellants have a treaty right to engage in the conduct for which they were charged. I have found certain legal errors which,

in my view, necessitate a new trial. In the circumstances, it does not appear to me that any stay is required. However, I would hear the parties further on this issue if they consider it necessary.

Cromwell, J.A.

Concurred in:

Oland, J.A.

Appendix "A"

[Preamble] WHEREAS, We have taken into Our Royal Consideration the extensive and valuable Acquisitions in America, secured to Our Crown by the late Definitive Treaty of Peace, concluded at *Paris* the Tenth Day of February last, and beings desirous, that all Our loving Subjects, as well of Our Kingdoms as of Our Colonies in America, may avail themselves, with all convenient Speed, of the great Benefits and Advantages which must accrue therefrom to their Commerce, Manufactures, and Navigation; We have thought fit, with the Advice of Our Privy Council, to issue this Our Royal Proclamation, hereby to publish and declare to all Our loving Subjects, that We have, with the Advice of Our said Privy Council, granted Our Letters Patent under Our Great Seal of Great Britain, to erect within the Countries and Islands ceded and confirmed to Us by the said Treaty, Four distinct and separate Governments, stiled and called by the Names of Quebec, East Florida, West Florida, and Grenada, and limited and bounded as follows: viz.

....

1. We have also, with the Advice of Our Privy Council, thought fit to annex the Islands of St. John's, and Cape Breton or Isle Royale, with the lesser Islands adjacent thereto, to Our Government of Nova Scotia.

PART IV

...

Preamble

> And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds;

1. We do therefore, with the Advice of Our Privy Council, declare it to be Our Royal Will and Pleasure, that:

(a) No Governor or Commander in Chief in any of Our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions;

(b) as also, that no Governor or Commander in Chief in any of Our other Colonies or Plantations in America, do presume, for the present, and until Our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantick Ocean from the West and North-West, or upon any Lands whatever, which, not having been ceded to, or purchased by Us as aforesaid, are reserved to the said Indians, or any of them. (Emphasis added)

2. And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid:

(a) to reserve under 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,

(b) as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West, as aforesaid;

(c) 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 Our especial Leave and Licence for that Purpose first obtained.

3. And We do further strictly enjoin and require all Persons whatever, who have either wilfully 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.

4. And whereas great Frauds and Abuses have been committed in the purchasing Lands of the Indians, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent,

   (a) We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, that same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie: and in case they shall lie within the Limits of any Proprietary Government, they shall be purchased only for the Use and in the Name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose:

   (b) And We do, by the Advice of Our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our subjects whatever; provided that every Person, who may incline to trade with the said Indians, do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of Our Colonies respectively, where such Person shall reside; and also give Security to observe such Regulations as We shall at any Time think fit, by Ourselves or by Our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade;

   (c) And We do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all Our Colonies respectively, as well Those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such Licence shall be void, and the Security forfeited, in Case the Person, to whom the same is granted, shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.

5. And We do further expressly enjoin and require all Officers whatever, as well Military as those employed in the Management and Direction of Indian Affairs within the Territories reserved as aforesaid for the Use of the said Indians, to seize and apprehend all Persons whatever, who, standing charged with Treasons, Misprisions of Treason, Murders, or other Felonies or Misdemeanours, shall fly from Justice, and take Refuge in the said Territory, and to send them under a proper Guard to the Colony where the Crime was committed of which they stand accused, in order to take their Tryal for the same.

Separate concurring reasons for judgment concerning aboriginal treaty rights said to arise from the Treaties of 1760-61 (Saunders, J.A.):

Introduction

[258] I have read the comprehensive decision of my colleague Justice Cromwell. I agree with the disposition he proposes as well as his reasons leading to it in all respects, except his treatment of the aboriginal treaty right claimed by the appellants. In these separate, concurring reasons I will discuss what I consider to be the required analysis whenever a constitutional defence is invoked pursuant to s. 35(1) of the **Constitution Act**, 1982, in cases where the defence is said to arise from the treaties of 1760-61.

[259] The analytical framework I have chosen to adopt, in my respectful view, places greater emphasis on what I perceive to be the essential parts to the inquiry directed by the Supreme Court in **Marshall No. 1 and No. 2**, and in particular the fundamental question of what lay within the contemplation of the parties when they committed themselves to the rights and obligations prescribed by the Treaties of 1760-61. In addition, the analysis I have proposed stresses the importance of accurately characterizing the right claimed according to the evidence, and grounding that right to a treaty whose purpose was to preserve peace and trade between the parties.

[260] Justice Cromwell's approach links the intention of the parties to "on-going access to the fruits of the traditional Mi'kmaq lifestyle and economy and sustenance through trade." at ¶ 50, supra, whereas the approach I have articulated focusses on the *resource* and the *activity* at the time the treaties were executed and then whether the present day activity using that resource can constitute *a logical evolution* of Mi'kmaq treaty rights to fish, and to hunt, and to the types of things traditionally gathered by the Mi'kmaq in 1760. Put simply, in order to determine the existence and scope of a treaty right the emphasis in my respectful view, ought to be placed on the contemplation of the parties in 1760 and informed by the use to which the Mi'kmaq put such resources at that time. Unless it can be established that the activity or the resource had a traditional place in the Mi'kmaq lifestyle and economy, or that the modern day, impugned conduct is nothing more than a logical evolution

of their traditional use of such resources, constitutional treaty protection does not arise.

[261] Whereas Justice Cromwell finds that the courts below erred in posing or approving the wrong question, I have concluded that their mistake lay in the incompleteness of the analytical inquiry as it was expressed and applied.

[262] In order to fully consider each step of the analysis as well as explain what I would propose to be the test in subsequent cases, it will be necessary to set up the contextual framework by repeating some of the factual background to this case and its antecedents.

Background to the Claim of Aboriginal Treaty Right Protection

[263] Six of the 39 grounds of appeal advanced by the appellants in their notice of appeal relate to the Mi'kmaq treaties of 1760-61. These six grounds allege error on the part of Nova Scotia Supreme Court Justice J. Edward Scanlan, sitting as a summary conviction appeal court judge (the "SCAC judge") by failing to determine that the appellants have a treaty right under s. 35(1) of the **Constitution Act**, 1982 to commercially harvest timber from Crown lands without requiring the authorization of the Crown or having to comply with s. 29 of the **Crown Lands Act**, R.S.N.S. 1989, c. 114. Such an error on the part of the SCAC judge was, according to the appellants, prompted by: a misinterpretation of the substance of the Mi'kmaq treaties of 1760-61; a failure to find that the appellants' harvesting rights under those treaties included the right to harvest forest resources, which resources were the types of things traditionally gathered by the Mi'kmaq in their 1760-61 aboriginal lifestyle; that the present harvesting activities are the modern equivalent or a logical evolution of their use of forest resources in that period; and by mischaracterizing their current activities as commercial logging.

[264] In its notice of contention the Crown argues that the judgement appealed from should be affirmed on two additional grounds, these grounds said to derive from the decision of the Supreme Court of Canada in **R. v. Marshall**, [1999] S.C.J. No. 66 (**"Marshall No. 2"**). First, that the appellants failed to prove they were members of a local aboriginal community subject to the treaties, or that their activities were

carried out within the area traditionally used by that community. Second, that the appellants failed to prove that their activities were authorized by the local community or that they were engaged in the exercise of the community's collective right. My colleague has ably dealt with those contentions raised by the respondent.

[265] I will now briefly review the background that led up to the judicial consideration of these charges against the appellants at each of the two stages in the courts below.

[266] All of the defendants are Mi'kmaq. All were charged with cutting timber on Crown lands without authorization and further, in certain cases, with removing timber from Crown lands without authorization, contrary to s. 29 of the **Crown Lands Act**. The offences are alleged to have occurred between mid-November, 1998 and late March, 1999 in five counties on mainland Nova Scotia and three counties on Cape Breton Island. The charges, as set out in 21 separate Informations, were tried jointly.

[267] I think it important to emphasize that in these proceedings all of the essential elements of the offences were admitted in two agreed statements of fact. The appellants admitted cutting timber on the lands or removing timber from the lands as charged, but said that no authorization was required. They had the burden of establishing their defence on a balance of probabilities. They claimed constitutional protection pursuant to s. 35(1) of the **Constitution Act**, 1982. Such protection, in their submission, derives from three sources. First, they say their Mi'kmaq ancestors had aboriginal title to all of Nova Scotia, which they have inherited as beneficiaries. Second, they claim that the treaties entered into in 1760-61 with all Mi'kmaq in Nova Scotia, give them a right to harvest forest products. In their view that right includes the commercial harvesting of timber. Finally, they say that their title is established by the *Royal Proclamation of 1763.* It is the second alleged genesis of constitutional protection that I propose to consider, in these separate reasons, while concurring in the result.

[268] The trial in the Provincial Court spanned 18 months, from July 1999 to December 2000. The proceedings were substantial, both in terms of time and documentation presented to the court. The transcript of the trial covers 65 volumes

comprising almost 10,000 pages. The exhibits comprise an addition 41 volumes and exceed 25,000 pages. The Honourable Patrick H. Curran (as he then was, now Chief Judge of the Nova Scotia Provincial Court) rendered his decision on March 8, 2001. He ruled that the appellants did not have aboriginal title or aboriginal rights which would permit them to cut or remove timber from any of the cutting sites. Judge Curran also held that they did not have a treaty right to cut or remove timber at the sites in question. All of the accused were convicted. On May 22, 2001, Judge Curran sentenced the appellants. On each count a fine in the amount of $200.00 was imposed, together with a Victim Fine Surcharge of $30.00 and court costs of $50.00, for a total of $280.00. Five appellants were convicted on two counts; the others on one count. The appellants did not appeal their sentences.

[269] They appealed their convictions in the Supreme Court of Nova Scotia. After eight days of argument, Justice J. E. Scanlan, sitting as a summary conviction appeal court judge filed a written decision dated March 1, 2002 in which he dismissed all appeals, upholding the appellants' convictions, but for somewhat different reasons than those espoused by the trial judge. In a notice of appeal filed March 22, 2002 the appellants then brought an appeal to this court, claiming some 39 errors on the part of the summary conviction appeal court judge.

[270] Before embarking upon a detailed consideration of the issues that arise from this segment of the appeal, I wish to comment upon the standard of review, particularly with regard to the special circumstances that arise in aboriginal cases.

Standard of Review

[271] There is a limited scope to appellate review in a case such as this. These appeals may be taken, with leave of this court, pursuant to s. 839 of the **Criminal Code**, upon any ground that involves a question of law alone.

[272] In their written submissions, after acknowledging that an alleged error of fact "per se is not a ground of appeal" the appellants, citing in **Yebes v. The Queen** (1988), 36 C.C.C. (3d) 417 argued:

> . . . it is appropriate to review the evidence to see if, based on the evidence, the findings of fact are reasonable.

> While undoubtedly an assessment as to whether a verdict is unreasonable raises a question of law, such a question does not arise in the circumstance of these appeals. The appellants admitted all elements of the offences. In such circumstances the only real issues at trial were: whether the appellants had established either the treaty rights or the aboriginal rights or title claimed; whether the Crown had established extinguishment of any of the claimed rights; whether any unextinguished treaty or aboriginal rights had been infringed by s. 29(1) of the **Crown Lands Act**; or whether any such infringement of rights was justified. Each of those issues required proof on a balance of probabilities, either by the appellants in their claim for aboriginal or treaty rights, or by the Crown, depending upon the issue involved.

[273] The standard of appellate review with respect to a trial judge's findings of fact is one of palpable and overriding error. In **R. v. Van der Peet**, [1996] 4 C.N.L.R. 177 (S.C.C.) Lamer, C.J., stated at ¶'s 81-83:

> 81 It is a well-settled principle of law that when an appellate court reviews the decision of a trial judge that court must give considerable deference to the trial judge's findings of fact, particularly where those findings of fact are based on the trial judge's assessment of the testimony and credibility of witnesses. In Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802, Ritchie J., speaking for the Court, held at p. 808 that absent a "palpable and overriding error" affecting the trial judge's assessment of the facts, an appellate court should not substitute its own findings of fact for those of the trial judge:

> > These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its

> assessment of the balance of probability for the findings of the judge who presided at the trial.
>
> . . .
>
> I would also note that the principle of appellate court deference has been held to apply equally to findings of fact made on the basis of the trial judge's assessment of the credibility of the testimony of expert witnesses, N.V. Bocimar S.A. v. Century Insurance Co. of Canada, [1987] 1 S.C.R. 1247, at pp. 1249-50.
>
> 82 In the case at bar, Scarlett Prov. Ct. J., the trial judge, made findings of fact based on the testimony and evidence before him, and then proceeded to make a determination as to whether those findings of fact supported the appellant's claim to the existence of an aboriginal right. The second stage of Scarlett Prov. Ct. J.'s analysis -- his determination of the scope of the appellant's aboriginal rights on the basis of the facts as he found them -- is a determination of a question of law which, as such, mandates no deference from this Court. The first stage of Scarlett Prov. Ct. J.'s analysis, however -- the findings of fact from which that legal inference was drawn -- do mandate such deference and should not be overturned unless made on the basis of a "palpable and overriding error". This is particularly the case given that those findings of fact were made on the basis of Scarlett Prov. Ct. J.'s assessment of the credibility and testimony of the various witnesses appearing before him.

[274] See as well the most recent decision of the Supreme Court on the standard of appellate review in **Housen v. Nikolaisen** (2002), 211 D.L.R. (4th) 577.

[275] As was apparent during oral argument in this court, no serious issue was taken on these appeals with respect to the correctness of the trial judge’s findings of fact.

Framing the “Test” in the Courts Below

[276] In reviewing for error it will first be necessary to isolate that which both the trial judge and the SCAC judge said about the activity for which constitutional protection was sought, and the “test” that each applied to that assessment.

[277] After a careful review of the evidence presented at trial, Judge Curran dealt with his assessment of the treaties at ¶'s 84-95 of his decision. Based on the arguments made by counsel for the appellants during the trial, Judge Curran defined the activity for which the appellants sought constitutional protection as being "a right to harvest forest products", that right said to include ". . . the commercial harvesting of timber." Judge Curran seems to have treated this "right" as being synonymous with a "right to trade in logging." He referred to what he considered to be the key portions of the Supreme Court's decisions in **Marshall (No. 1) and (No. 2)** in arriving at his ultimate conclusion that "trade in logging" or "cutting timber for sale" was not the modern equivalent of any right acquired under the treaties.

[278] Judge Curran considered the majority decision in **Marshall (No. 1)** at ¶ 56 wherein the rights established by the treaties were said to entitle the Mi'kmaq:

> . . .to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the Badger test.

[279] Later, in **Marshall No. 2**, the Court amplified what it had said about the treaties giving the Mi'kmaq the right to "gather" as well as hunt and fish. Further elaboration was provided at ¶ 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.

[280] From these two pronouncements, the trial judge drew a distinction between trading items which the Mi'kmaq traditionally gathered as part of their aboriginal economy in 1760, and the cutting, selling or trading of timber. The latter could not, in Judge Curran's opinion, be said to be the modern equivalent or logical evolution of the Mi'kmaq's use of forest resources almost 250 years ago. He said:

> 91. 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 truckhouses. Despite that, both prosecution and defence witnesses said it was likely the Mi'kmaq had traded some forest-based items to the British or other Europeans at some point.
>
> 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.
>
> . . .
>
> 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 (sic) the same. 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.

[281] We see that the “test” applied by the trial judge was to ask whether the appellants had shown that commercial logging was the modern equivalent or logical evolution of their use of forest resources in daily life in 1760.

[282] Curran, Prov. Ct. J. answered that question in the negative, concluding:

> 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.

[283] For his part, the learned SCAC judge conducted his own extensive review of the evidence. His analysis of the treaty rights is found at ¶'s 29-45 of his judgment. While perhaps not as clearly expressed as the trial judge's statement of the test to be applied when considering the treaty rights claimed by the appellants, Scanlan, J. concludes at ¶'s 34, 35, 40, 42 and 45:

> 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.
>
> . . .
>
> 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 . . .
>
> 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 . . . 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.
>
> . . .
>
> 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 . . . 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. . . . 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.
>
> . . .
>
> 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 (sic) 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. (underlining mine)

[284] It appears from the SCAC judge's comments that the test he applied zeroed in on the scope of the impugned present day activity and sought to contrast that with traditional aboriginal practices in earlier centuries. In his test Scanlan, J. does not seem to put the same emphasis on the "modern equivalent" or "logical evolution" criteria.

[285] The appellants say that both lower courts applied the wrong test to the question of what resources were included in the treaty right to harvest and trade for a livelihood. They argue that Judge Curran and Justice Scanlan focused on the *activity*, that is to say logging, rather than the *resource*, in other words, trees. As well each erred in focusing on the magnitude or scale of the activity. They say the scale or scope of harvesting only becomes relevant if it exceeded "moderate" livelihood requirements as proposed in **Marshall (No. 1)**, or if it undermined the requirements for resource conservation, at the justification stage of the analysis.

[286] The respondent says that both the trial judge and the SCAC judge applied the proper test in conducting their analysis of the claimed treaty right. The trial judge's conclusion that trade in logging is not the modern equivalent of or a logical evolution from Mi'kmaq use of forest resources in the 1760's, a conclusion shared by the SCAC judge, was in the Crown's view soundly based on the evidence. In the alternative, if a wrong test were applied by either or both lower court judges, then the respondent says the curative provision of s. 686(1)(b)(iii) may be resorted to, as the verdict would necessarily have been the same if no such error had occurred. See,

for example, **R. v. Jacquard**, [1997] 1 S.C.R. 314; **R. v. Eisenhauer** (1997), 123 C.C.C. (3d) 37 (N.S.C.A.).

[287] For reasons that I will explain, I am of the respectful opinion that both the trial judge and the SCAC judge erred in their articulation and application of the "test" in that their expression of the test was incomplete. In the analysis that follows I will set forth what I consider to be the proper expression of the test and its application to the evidence.

Analysis

[288] In essence, the appellants say that both lower court judges erred in misconstruing the test by getting side-tracked in at least two respects. First, by focusing on the activity rather than the resource. Second, by emphasizing the scope of the activity rather than the type of resource for which the present day right is asserted.

[289] Lying at the heart of the appellants' submission is the assertion, as advanced in their factum, that in **Marshall (No. 1)** and **Marshall (No. 2)** the Supreme Court of Canada:

> "adopted two criteria:
>
> a. What natural resources were traditionally gathered by the Mi'kmaq in their 1760s traditional lifestyle and economy; and
>
> b. What natural resources today are the modern equivalent or a logical evolution from those resources gathered in the 1760s.

[290] Thus, in the appellants' submission, the lower court judges both asked themselves the wrong question. The inquiry ought not to have been directed to the activity per se, but rather to the resources which reasonably ought to be protected by the treaty right.

[291] In argument before us at the hearing, counsel for the appellants suggested that the British objective in negotiating treaties with the Mi'kmaq was two-fold: to ensure peace and make the Mi'kmaq self-sufficient. In counsel's view, the case on appeal is "about the right to work" and "part of the ongoing reconciliation spectrum between aboriginal peoples and the Crown." Whereas fish comprised a part of Mi'kmaq resources in the 18th century, so too did wood. Such was part of the forest resource utilized by the Mi'kmaq. In the appellants' submission, had the trial judge and the summary conviction appeal court judge:

> . . . asked the right question, namely were trees "resources traditionally 'gathered' in an aboriginal [Mi'kmaq] economy" and lifestyle from the 1760s, they could not help but conclude trees were part of resources without which the Mi'kmaq could not have survived.

> Thus, the appellants say that as part of their 1760 lifestyle and economy the Mi'kmaq traditionally gathered trees and made use of the trees so harvested in a variety of ways, including using the materials to build shelters, make canoes, toboggans, snowshoes, sleds, baskets, and containers that were of interest to the British and were suitable for trade. The appellants say the focus should have been on the resource utilized, in this case "timber", which is defined in the **Crown Lands Act** to mean trees of all species and sizes. Alternatively, if "logs" are found to be the resource, then the appellants say they are a modern equivalent or a logical evolution of the trees traditionally harvested in the Mi'kmaq economy.

[292] In the result the appellants say that the two lower courts erred, not on matters of fact per se, but in the limited tests they adopted and the failure to apply to the facts as found what the appellants say were the two essential criteria established by the Supreme Court of Canada.

[293] With great respect to counsel for the appellants, I do not consider these submissions to be persuasive. They are based on a faulty premise and too selective

an application of the principles established by the Supreme Court in **Marshall (No. 1)** and **Marshall (No. 2)**.

[294] In my view it is wrong to suggest that the essence of the Supreme Court's judgments in **Marshall (No. 1)** and **Marshall (No. 2)** may be reduced to "two criteria" or that the criteria are as framed by the appellants at ¶ [288] above. While these two questions, as cast by counsel for the appellants, form part of the proper assessment of what may be constitutionally protected by an aboriginal treaty right, the inquiry is incomplete. In my view it is an altogether artificial proposition to suggest that the *resource* lies at the heart of the analysis, to the exclusion of the *activity*. One cannot consider the *resource* without regard to the *activity* which surrounds it. The two cannot be treated in isolation as a kind of theoretical or abstract vacuum. One cannot parse the judgments of the court in **Marshall** by hiving off certain words here and there to support the appellants' position. The whole of the Court's judgments must be examined in order to understand the paradigm developed in those and other cases for the adjudication of aboriginal treaty rights.

[295] As we have seen in this and other parts of Canada, cases such as these have real life consequences for the people who lay claim to, and who use, and whose duty it is to protect our natural resources.

[296] One cannot speak of fish, the resource of our oceans and waterways, without at the same time considering fishing, that is to say the activity by which fish are caught. One cannot speak of game, the resource of our woodlands, without considering hunting, the activity by which game is killed.

[297] So too, one cannot - as the appellants suggest - isolate the *resource* and simply ask whether, generically, it includes the kinds of things gathered and used by the Mi'kmaq in their 18th century lifestyle and economy. Neither can one simply assume that present day commercial logging constitutes nothing more than the modern equivalent or logical evolution of the gathering of those same resources in the 1760's. To me these are as much the "wrong questions" as the errors ascribed by the appellants to the judges below.

[298] In order to understand and properly apply the principles articulated by the Court in **Marshall (No. 1)** and **Marshall (No. 2)**, one must first recall the context of that case both present and past. One should remember the circumstances under which Mr. Marshall came to be prosecuted and how the defence advanced on his behalf was characterized by his counsel, together with the historical and cultural context of the period when the treaties were signed.

[299] Donald Marshall, Jr. admitted catching 463 pounds of eels with illegal nets, without a licence and during the closed season, all contrary to the federal fishery regulations. He would be found guilty as charged unless his activities were said to be protected by an existing aboriginal or treaty right. He chose to base his defence entirely on the Mi'kmaq treaties of 1760-61. Based on the trial judge's finding that by the end of 1761 all of the Mi'kmaq in Nova Scotia had entered into separate but similar treaties, whose terms were as set out in a Treaty of Peace and Friendship, signed at Halifax, on March 10, 1760, the case required the Court to determine the implications of the so-called "trade clause" in that document.

[300] Mr. Marshall argued that the treaty allowed him to fish for trade. The Court agreed, finding at ¶ 4 that the 1760 treaty did 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 gathering activities, and trading for what in 1760 was termed 'necessaries'.

[301] In **Marshall (No. 1)** 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 of 1760-61 did not grant such a right or, in the alternative, that if the right had been granted, it was a regulated right from the beginning. In acquitting Mr. Marshall the majority of the Supreme Court observed that catch limits that could reasonably be expected to produce a moderate livelihood might be established by regulation and enforced without violating the treaty right. The majority held that such regulations "would accommodate" the treaty right and would not constitute an infringement that would have to be justified applying the **Badger** standard. On the facts of the case as presented the majority held that a ban on sales would, if enforced, infringe Mr. Marshall's right to trade for sustenance and that in:

> . . . the absence of any justification of the regulatory prohibitions, the appellant is entitled to an acquittal. (at ¶ 66)

[302] Some weeks later, an intervenor, a regional coalition of Nova Scotia fishermen applied for a rehearing. They asked the Court to address the regulatory authority of the government of Canada over the east coast fisheries. They requested a new trial to enable the Crown to seek to justify its regulatory restrictions, and sought an order that the majority judgment, dated September 17, 1999 be stayed in the meantime. That application was opposed by the Crown, and by Mr. Marshall, and other intervenors. In an unanimous decision seen by many commentators as a clarification of its majority judgment two months earlier, the Court gave further expression to some of its earlier pronouncements, thus leading to the two judgments commonly referred to as **Marshall (No. 1)** and **(No. 2)**, to which I will now refer in some detail.

[303] Given the nature of the prosecution, the particular defence upon which Mr. Marshall relied and the manner in which his activities were characterized by the Court, it seems clear that the Court's necessarily narrow and specific focus concerned fishing, and trade. It was, after all, the so-called "trade clause" which the Court was called upon to interpret, having regard not only to the text of the treaty, but to the underlying negotiations between the Mi'kmaq and the British at that time. The trade clause read:

> 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 Accadia.

[304] In its submissions the appellants' position "not only incorporated the alleged right to trade, but also the right to pursue traditional hunting, fishing and gathering activities in support of that trade." In this, Binnie, J., writing for the majority, held that the appellant had "overstated" his case.

> In my view, the treaty rights are limited to securing 'necessaries' (which I construe in the modern context, as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth. The rights thus construed, however, are, in my opinion, treaty rights within the meaning of s. 35 of the Constitution Act, 1982, and are subject to regulations that can be justified under the Badger test (R. v. Badger, [1966] 1 S.C.R. 771).

[305] During argument before the court, Mr. Marshall, as noted by Justice Binnie, advised the court that he had been "engaged in a small-scale commercial activity to help subsidize or support himself and his common-law spouse." Such a characterization was not disputed by the Crown and in the opinion of the majority was:

> . . . consistent with the scale of the operation, the amount of money involved, and the other surrounding facts. If at some point the appellants trade and related fishing activities were to extend beyond what is reasonably required for necessaries, as hereinafter defined, he would be outside treaty protection, and can expect to be dealt with accordingly.

[306] These introductory comments suggest to me that as a first step in deciding the extent of the treaty right, one must articulate with some precision, the nature of the claim being advanced, which will then oblige the trial judge to very carefully consider the impugned activity, the extent of that activity and the type of resource subjected to that activity. These questions are not, as the appellants here would suggest, only asked at the justification stage of the inquiry. I think they are essential to a proper analysis of the treaty right itself and whatever constitutional protection such might provide.

[307] It was for this reason in my opinion, that Binnie, J. was very careful in expressing at the outset, the limitation upon treaty rights to securing "necessaries", which is to say a moderate livelihood. He rejected categorically any notion of an uncapped or open ended accumulation of wealth. He particularly noted the limited scope of Mr. Marshall's and his companion's fishing. It was described as a small-scale commercial activity by which Mr. Marshall had sold 463 pounds of eels for $787.10 to support himself and his spouse. Accordingly, the scope of Mr. Marshall's eel fishing was an important preliminary question that went to the heart of his treaty right. The Court said that if his "trade and related fishing activities"

ever extended beyond what he reasonably needed to support himself and his family, he would lose any treaty right protection that might otherwise have been afforded.

[308] These same sentiments were expressed more vigorously by a unanimous court in **Marshall (No. 2)** at ¶ 20:

> The September 17, 1999 majority judgment did not rule that the appellant had established a treaty right 'to gather anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower. . . .

[309] The Court makes it clear that the scope or extent of the activity is a most relevant question, in the early stages of treaty rights' analysis. Moreover, the Court expressly states that Mr. Marshall's treaty right "to gather" was limited, limited to the extent described in **Marshall (No. 1)** to securing necessaries. It was not intended to promote the attainment of wealth or the taking of "everything physically capable of being gathered." These then are limits upon the treaty right and are triggered by the assertion of the right itself. They do not, as the appellants suggest, simply arise at the *justification* stage of the inquiry. The fact is that none of the comments from the Court to which I have just referred are linked or reserved to the issue of justification. In fact, as the court makes clear in its unanimous judgment in **Marshall (No. 2)** at ¶ 14:

> The issue of justification was not before the Court and no judgment was made about whether or not such restrictions could have been justified in relation to the eel fishery had the Crown led evidence and argument to support their applicability.

[310] In this case, the appellants partially base their defence upon the assertion that the 1760-61 treaties give them a right to harvest forest products which, in their representations before the trial judge, was said to include the commercial harvesting of timber. Thus, their focus at trial was on so-called "forest products" which they said included "timber." This characterization of the right changed when the appellants appeared before the SCAC There they claimed "a right to harvest and trade forest resources." In their arguments before this court, the appellants sought to re-characterize the treaty right on a considerably narrower basis, something they now refer to as "the right to harvest and trade trees."

[311] The appellants ought not now be entitled to re-characterize the right so as to fundamentally alter the basis upon which the case was argued before the SCAC. A right to harvest and trade forest resources is broader than a right to harvest and trade trees. The appellants cannot seek to establish an error of law on the part of Scanlan, J. by attempting to redefine the right for which constitutional protection is claimed.

[312] Although **Mitchell v. Canada**, [2001] S.C.J. No. 33 was an aboriginal rights as opposed to an aboriginal treaty case, nonetheless, Chief Justice McLachlin's comments for the majority (Major and Binnie, JJ. concurring in the result by separate, additional reasons) are instructive. She commenced the analysis of the aboriginal right claimed in that case in the following terms:

> Before we can address the question of whether an aboriginal right has been established, we must first characterize the right claimed. The event giving rise to litigation merely represents an alleged exercise of an underlying right; it does not, in itself, tell us the scope of the right claimed. Therefore it is necessary to determine the nature of the claimed right. At this initial stage of characterization, the focus is on ascertaining the true nature of the claim, not assessing the merits of this claim or the evidence offered in its support. (underlining mine)

> While there may be differences between the characterization of a treaty right and the characterization of an aboriginal right, it is important to commence either analysis by clarifying the scope of the right for which the claimants seek constitutional protection under s. 35(1) of the **Constitution Act**, 1982.

[313] In **Van der Peet**, supra, Chief Justice Lamer, at ¶'s 51 and 53 observed:

> . . . 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 tradition, custom or practice being relied upon to establish the right. In this case, therefore, the Court will consider the actions which led to the appellant's [sic] being charged, the fishery regulation under which she was charged and the customs, practices and traditions she invokes in support of her claim. (underlining mine)

[314] This same approach to properly characterizing the claimed aboriginal right was applied by Lamer, C.J., in **R. v. Gardner**; **R. v. Jones**, [1996] 2 S.C.R. 821. In that case the appellants described their claim as "a broad right to manage the use of their reserve lands." The Chief Justice concluded that this was excessively general and having regard to the criteria enumerated in **Van der Peet**, said that the correct characterization was a right to participate in and to regulate high stakes gambling activities on the reservation.

[315] This approach was adopted by the New Brunswick Court of Appeal in **R. v. Peter Paul**, [1998] N.B.J. No. 126, a case where the accused, a Mi'kmaq, admitted taking bird's eye maple logs from Crown lands, intending to sell the three logs for up to $3,000 as part of a business venture on his part. He claimed that as a Mi'kmaq he was not obliged to first obtain the Crown's authorization. In allowing the appeal, directing that a conviction be entered and remitting the matter to the provincial court for sentence, the court noted that the first stage of the analysis was to consider and accurately characterize the aboriginal claimants' conduct which led to the prosecution. The court said:

> <u>The act that led to Mr. Peter Paul's charge</u> was the harvesting of three maple logs. Mr. Peter Paul acknowledged that the three logs were to be sold.
>
> . . .

> The activity being relied upon to establish the right is Mr. Peter Paul's practice of harvesting wood or wood products on Crown Land and exchanging those logs for money. Mr. Peter Paul's claim is thus best characterized as an aboriginal right to harvest and sell timber. (underlining mine)

[316] Thus it can be seen that the court's attention is first directed to the activity and not just the resource.

[317] In **Marshall (No. 2)**, submissions were made on behalf of the Native Council of Nova Scotia with respect to the effect of the Halifax treaties of 1760-61 "on forestry, minerals and natural gas deposits off shore." The court's response to these submissions included the following at ¶ 20:

> . . . No evidence was drawn to our attention, nor was any argument made in the course of this appeal, that trade in logging or minerals, or the exploitation of offshore natural gas deposits, was in the contemplation of either or both parties to the 1760 treaty. . . . (Underlining mine)

[318] I have concluded from the record in this case that the initially characterized treaty right as being "a right to harvest and trade forest resources" and the attempted re-characterization as "a right to harvest and trade trees" are too general and too vague. I think the conduct should be described for what it is. There is no question in my mind that the activity which the appellants seek to justify on the basis of the treaties of 1760-61 is appropriately characterized as "commercial logging", a description adopted by the trial judge at ¶ 95 and by the SCAC judge at ¶ 28. During the course of the summary conviction appeal hearing, counsel for the appellants conceded that his clients were clear cutting and logging:

> THE COURT
>
> > Can I just make sure that I'm not misapprehending some of what transpired in the evidence. My understanding was that there were clear-cut areas.
>
> MR. WILDSMITH

> That the Mi'kmaq were harvesting in a clear-cut fashion? Yes, I think that's a fair thing to say, but a lot of those cutting sites were quite small, and we normally think about clear-cutting as being on quite a large scale. . . . But I think it's probably fair to say that the logging took most of the things that were of commercial scale. They weren't bothering with smaller trees that were not of any value. And they were cutting them down with chain saws and then hauling them or skidding them out to roadside.

[319] This exchange was hardly surprising in light of the evidence given by many foresters, conservation officials and enforcement officers who testified as to the hectares cut, board feet taken, and the extent of completely unorganized harvesting and resulting waste. All of this amply supported the conclusions reached by the trial judge and the SCAC judge.

[320] In characterizing the right claimed by the appellants under the treaties, Scanlan, J. focused first on the evidence pertaining to the activities which they sought to justify under the claimed treaty right. He said at ¶ 19:

> 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.

> In focusing on the nature of the activity which the appellant claimed was done pursuant to a treaty right, Justice Scanlan appropriately considered the first factor referred to in **Van der Peet**, above. I find that Justice Scanlan did not err in law in characterizing the right claimed as being commercial logging.

[321] Having determined how the present day activity ought to be characterized, the next stage of the inquiry then obliges the judge, in a treaty rights case, to determine the common intention of the parties to the 1760-61 treaties. Contrary to the appellants' arguments before us, this step in the analysis has neither been subsumed nor previously answered by the Court in **Marshall (No. 2)**. Since this case involved a different activity and a different resource than that which was concerned by the

Court in **Marshall (No. 1)** and (**No. 2**) it obliged both the trial judge and the SCAC judge to consider and determine the common intention of the parties to the 1760-61 treaties. Both decisions of the Supreme Court are replete with references to this essential inquiry. I need only refer to a few. In **Marshall (No. 1)**, Binnie, J., for the majority, observed at ¶ 14:

> "Generous" rules of interpretation should not be confused with a vague sense of after-the-fact largesse. The special rules are dictated by the special difficulties of ascertaining what in fact was agreed to.
>
> . . .
>
> The bottom line is the Court's obligation is (sic) to "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles" the Mi'kmaq interests and those of the British Crown (Sioui, per Lamer J., at p. 1069).

And further at ¶ 40:

> It is their common intention in 1760 -- not just the terms of the March 10, 1760 document -- to which effect must be given. (underlining mine)

[322] McLachlin, J. (as she then was) in dissent (joined by Gonthier, J.) noted among her several principles of interpretation:

> 3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed:
>
> . . .
>
> 4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed:

> . . .
>
> 5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties . . . (underlining mine)

[323] Finally, in **Marshall (No. 2)**, the unanimous court confirmed, yet again, in ¶ 20, the fundamental importance of determining what:

> . . . was in the contemplation of either or both parties to the 1760 treaty.

[324] For all of these reasons there can be no doubt that in considering the appellants' treaty right in this case, both the trial judge and the SCAC judge were obliged to address the question whether a particular activity was reasonably within the contemplation of the parties to the treaties of 1760-61.

[325] There was no error on the part of the SCAC judge in asking himself what the appellants say is "the wrong question," or in focusing upon and correctly characterizing the present day activity for which the appellants sought constitutional protection, or in finding that the evidence fully supported the trial judge's conclusion that commercially harvesting timber, trading in logs or commercial logging was not a right afforded to the Mi'kmaq under any of the treaties of 1760-61. Neither did either judge err in addressing the scope or extent of the activities undertaken by the appellants on Crown land. All were essential parts to the inquiry they were obliged to undertake. Where I think the judges below erred was in their articulation, and application to the evidence, of the proper test in determining a treaty right.

A Proper Formulation of the test

[326] Whereas in this portion of the judgement I am addressing treaty rights as opposed to other types of aboriginal rights, one should first determine the common intention of the parties when they agreed to be bound by the treaty's terms. This, I think, is the overarching consideration in deciding treaty rights cases.

[327] I take from **Marshall (No. 1)** and (**No. 2)** as well as the other leading cases on aboriginal claims, the following principles that ought to be applied in treaty cases. For ease of reference, I will set out in a list the principles I think have particular application to this case:

1. The court's duty is to determine what the parties agreed to, not simply by reference to the text of the treaty, but by ascertaining and giving effect to their common intention.
2. One chooses from among the various interpretations of the common intention of the parties, that which best reconciles the Mi'kmaq interests with those of the Crown.
3. A more flexible approach is required when considering the existence of treaties.
4. It amounts to error to restrict one's inquiry to the bare text of the treaty.
5. Even absent ambiguity, one may look to extrinsic evidence to ascertain the historical and cultural context of a treaty.
6. The text should not be subjected to a strict and technical, or overly rigid, modern construction.
7. However, generous rules of interpretation do not mean lax methodology or no rules at all.
8. In order to fairly and accurately determine the common intention of the parties at the time the treaties were made in 1760-61, one ought to look at their individual or combined objectives.
9. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed.

[328] In **Marshall (No. 1)** the majority emphasized particular findings of Judge Embree, the trial judge in that case, which described the parties' objectives in binding themselves by treaty. The British "wanted peace and a safe environment for their current and future settlers." Despite their recent victories in war, the British did not feel completely secure in Nova Scotia. Peace with the Mi'kmaq would assist the British in both their short and long term goals.

[329] It would seem obvious that peace, together with liberty, security and protection under British sovereignty would have been an objective of the Mi'kmaq. The winter of 1759-1760 had been especially harsh. The Mi'kmaq went to the British seeking help and sustenance. Recognizing that the Mi'kmaq ought not to "become an unnecessary drain on the public purse of the colony of Nova Scotia or

the Imperial purse in London" the British sought to protect the traditional Mi'kmaq economy, including their customary hunting, gathering and fishing.

[330] Reference to these objectives informed the Supreme Court's understanding of the signatories' intentions, which in turn enabled it to define the 1760-61 treaty right available to Donald Marshall, Jr., when fishing for eels.

[331] Another primary objective for the Mi'kmaq was to have access to the European "necessaries" on which they had come to rely.

[332] As emphasized by the majority in **Marshall (No. 1)**, the trade clause in the treaties would not have advanced the British objectives of securing peace, promoting colonial settlement, or the Mi'kmaq objectives of being able to provide for themselves and having access to European items upon which they had come to rely, unless the Mi'kmaq were assured at the time the treaties were signed, of:

> . . . continuing access, implicitly or explicitly, to wildlife to trade.

[333] In **Marshall (No. 1)** the majority endorsed the evidence given by Dr. Patterson for the Crown, wherein he had expressed the view that through their treaties with the Mi'kmaq, the British had recognized that the Mi'kmaq "had a right to live in Nova Scotia in their traditional ways" which the court said "included hunting and fishing and trading their catch for necessaries."

[334] It must be recalled that trading was a traditional practice of the Mi'kmaq. They had been trading with the French and the Portuguese for 250 years prior to the signing of the treaties of 1760-61.

[335] Having regard to the honour of the Crown and the other principles to which I have referred, the majority in **Marshall (No. 1)** citing the "officious bystander test" said it would imply a contractual term on the basis of the presumed intention of the parties in order to assure the efficacy of their contract. Thus, Binnie, J. wrote:

> While I do not believe that in ordinary commercial situations a right to trade implies any right of access to things to trade, I think the honour of the Crown requires nothing less in attempting to make sense of the result of these 1760 negotiations.

[336] After taking into account all of these factors, the majority of the court in **Marshall (No. 1)** then gave expression to the treaty right in that case. Its essence is found in Justice Binnie's statement at ¶ 56:

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

> Clearly the key to the treaty right therefore lies in the Court's focus upon the traditional activities from which the Mi'kmaq acquired (or made) the products which they then traded for the necessaries to which they had become accustomed in their day to day lives in the mid 18th century.

[337] In the immediately succeeding paragraph, the majority provides further elaboration as to what it means by "necessaries". It unequivocally sets limits or parameters to the constitutional protection afforded by the treaty right. Under its marginal heading The Limited Scope of the Treaty Right, the majority in ¶'s 57 ff addresses the Crown's concerns that the result of their decision will be an "uncontrollable and excessive exploitation" of our natural resources. The court is very clear when it says that such a:

> . . . fear (or hope) is based on a misunderstanding of the narrow ambit and extent of the treaty right. (underlining mine)

[338] Again, using words clearly intended to set limits, Binnie, J. went on to say:

> ¶ 58 . . . What is contemplated therefore is not a right to trade generally for economic gain, but rather a right to trade for necessaries.
>
> . . .
>
> ¶ 59 The concept of "necessaries" is today equivalent to . . . a "moderate livelihood". Bare subsistence has thankfully receded . . . as an appropriate standard of life . . . A moderate livelihood includes such basics as "food, clothing and housing, supplemented by a few amenities", but not the accumulation of wealth. . . . It addresses day-to-day needs. This was the common intention in 1760. It is fair that it be given this interpretation today.

[339] Finally, the majority emphasized, yet again, the importance of putting oneself in the place of the parties at the time they entered into the treaties almost 250 years ago. It is from that perspective that one determines the extent and type of traditional activities which enabled the Mi'kmaq to trade for what they needed at that time. Accordingly, the court emphasized that having a right to trade for one's day to day needs and provide a moderate livelihood was fundamentally different than pursuing a commercial enterprise. Binnie, J. stressed:

> ¶ 60 The distinction between a commercial right and a right to trade for necessaries or sustenance . . .
>
> In this case, equally, it is not suggested that Mi'kmaq trade historically generated "wealth which would exceed a sustenance lifestyle". Nor would anything more have been contemplated by the parties in 1760. (underlining mine)

[340] These clearly articulated limits were restated by a unanimous court in **Marshall (No. 2)**. In that judgment the court explained what it meant by its use of the action word "gather", again under the over-arching perspective of the contemplation of the parties to the 1760-61 treaties. The court said:

> ¶ 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. While treaty rights are capable of evolution within limits, as discussed below, their subject matter (absent a new agreement) cannot be wholly transformed. Certain unjustified assumptions are made in this regard by the Native Council of Nova Scotia on this motion about "the effect of the economic treaty right on forestry, minerals and natural gas deposits offshore". The Union of New Brunswick Indians also suggested on this motion a need to "negotiate an integrated approach dealing with all resources coming within the purview of fishing, hunting and gathering which includes harvesting from the sea, the forests and the land". This extended interpretation of "gathering" is not dealt with in the September 17, 1999 majority judgment, and negotiations with respect to such resources as logging, minerals or offshore natural gas deposits would go beyond the subject matter of this appeal.
>
> ¶ 20 The September 17, 1999 majority judgment did not rule that the appellant had established a treaty right "to gather" anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower. No evidence was drawn to our attention, nor was any argument made in

> the course of this appeal, that trade in logging or minerals, or the exploitation of off-shore natural gas deposits, was in the contemplation of either or both parties to the 1760 treaty; nor was the argument made that exploitation of such resources could be considered a logical evolution of treaty rights to fish and wildlife or [page549] to the type of things traditionally "gathered" by the Mi'kmaq in a 1760 aboriginal lifestyle. It is of course open to native communities to assert broader treaty rights in that regard, but if so, the basis for such a claim will have to be established in proceedings where the issue is squarely raised on proper historical evidence, as was done in this case in relation to fish and wildlife. Other resources were simply not addressed by the parties, and therefore not addressed by the Court in its September 17, 1999 majority judgment. As acknowledged by the Union of New Brunswick Indians in opposition to the Coalition's motion, "there are cases wending their way through the lower courts dealing specifically with some of these potential issues such as cutting timber on Crown lands".

[341] These passages inform us that in addition to examining the traditional activities of the Mi'kmaq - which on the evidence would include fishing, hunting, gathering and trading - an altogether appropriate inquiry, one might also look to the "types of resources" traditionally gathered by the Mi'kmaq in their economy and which could then reasonably be said to have been in the contemplation of the parties when they entered into the treaties of 1760-61. While, as the Court made clear, treaty rights may evolve over time, it is always within limits and the "subject matter" of the treaty "cannot be wholly transformed."

[342] The "subject matter" of the applicable treaty or treaties in this case must mean the traditional activities; the types of resources traditionally gathered by the Mi'kmaq in their economy and lifestyle; the things (products) acquired or made by the Mi'kmaq as a result of those traditional activities and which they then traded for their day to day sustenance, together with access to the things that were to be traded.

[343] At all events the "subject matter" as I have described it, must be reasonably linked to the traditional Mi'kmaq economy which, in the context of this case and these treaties, centres the inquiry on *what, and for what, they traded*? Only then can one properly address what the Court has described as the fundamental question, that being what was reasonably in the contemplation of the parties to the 1760-61 treaties?

[344] In this again we must be mindful of the difference between the *resource* and *activity*. The Mi'kmaq caught and traded fish. Thus fish was both the resource used

and the item traded for something else. By contrast, the Mi'kmaq did not trade the resource, that being the forest or its trees. They made things from the resource which they then traded for necessaries, for example, canoes for cooking pots, baskets for blankets or metal tools and weapons. Thus they took what they gathered manually, made it into a tradeable item and sold it for something else. These trading customs, part of the traditional Mi'kmaq lifestyle and economy in the mid 18th century is manifestly different than professing to have a treaty right to harvest all of the resource, of whatever kind or quantity, subject only to limits of justification and conservation.

[345] Logic dictates that one has to look at the thing being taken when considering the impugned present day activity in benefit of trade, whether it be a species of fish like eel; a species of crustacean like lobster; or a species of wildlife such as beaver or moose. Similarly, as was well understood by Judge Curran at trial, one has to look at the use to which the Mi'kmaq put the thing in 1760 in the context of the Mi'kmaq traditional trade in that era. Looking at it through those eyes, can it reasonably be suggested that the Mi'kmaq participated in the trade of timber or logs? On the evidence, the answer is clearly in the negative. The Mi'kmaq, the British and the Europeans all had access to the forests. It was not a part of the Mi'kmaq tradition to build walled settlements or palisade type fortifications using stands of 60-80 foot timbers. Unlike, for example, the Haida in British Columbia, such huge mature trees were not used for dwellings, or ceremonial purposes, or constructing large ocean-going vessels. None of these kinds of activities or use of these types of resources, which one might expect in other parts of Canada, were intrinsic to the Mi'kmaq lifestyle and trading economy three centuries ago.

[346] In **Marshall (No. 2)** the Court was careful in its choice of words so as to set up a contra-distinction between action words like "gather" or "gathering" and "exploitation." Exploitation has a much different connotation than gathering. The former suggests a broader and less conservation-oriented activity than the meaning attached to gathering. The difference must have been deliberate. Gathering typically suggests a manual, limited, measured, careful and non-obtrusive activity, as one would imagine in gathering such items as eggs, herbs, moss, seaweed, rosebuds, branches or berries. It describes an activity where with some care, one would pick up, save and later put to use that which had been gathered, either alone or in the company of others.

[347] That seems a far different proposition than exploitation. One would not say, for example, that driving a skidder in the woods was gathering tree limbs or that operating a rock crusher in a quarry was gathering pebbles. Such an interpretation would be absurd.

[348] In my opinion, the Court's use of the word "exploitation" in **Marshall (No. 2)** suggests something far more dramatic and labour intensive than mere gathering. Moreover, considerations of prudent selection and conservation seem far less important when one describes the activity as being exploitation, as opposed to gathering.

[349] These distinctions serve as another clear indication of the Supreme Court's view that the kind and extent of activity are critical elements of the analysis, and to be undertaken at its early stages when assessing aboriginal treaty cases.

[350] The Mi'kmaq were a coastal people. Their occasional excursions into the interior along its rivers and waterways were in search of wildlife, fur and fish, which they needed to sustain themselves and to acquire items for trade. These activities were consistent with the Mi'kmaq lifestyle and trading customs.

[351] Their forays into the interior were not to harvest timber or trade in logs. Such would have been entirely inconsistent with the traditional Mi'kmaq lifestyle and economy and therefore hardly an activity or use of a resource which could be said to be within the reasonable contemplation of the Treaties' signatories.

[352] This case was not about wandering through the forests gathering herbs to make aboriginal medicines or remedies that might be sold in order to provide a moderate income. This case was not about stripping birch trees of their bark in order to build and sell canoes. This case was not about gathering branches to make snowshoes, baskets or toboggans, which might be sold to interested buyers. Nor was it about finding wood for cooking fires and warmth, or cutting 20 foot poles for wigwams to provide shelter. This was a case about cutting stands of mature trees as part of an operation intended to be a commercial harvest of logs and timber. Such a finding by Judge Curran, endorsed by Justice Scanlan, was a perfectly reasonable conclusion based upon the evidence and the representations of counsel. I am not persuaded that the trial judge or the summary conviction appeal court judge erred in so characterizing the appellants' activities and their use of these resources. Nor do I think the SCAC judge erred in finding that a commercial timber harvest was not

something the Mi'kmaq depended upon as a traditional activity or commercial resource in 1760-61, or in concluding that trade in logs or commercial logging was not a right afforded to the Mi'kmaq under any of the known treaties of that era.

[353] Where I differ in the approach taken by both the trial judge and the SCAC judge, is in framing the test that ought to have been applied in this case. Based on the principles declared in both **Marshall (No. 1)** and **(No. 2)** and as I explained earlier, it is not enough to focus only upon the *activity* or the *resource* to the exclusion of the other. Each must be carefully examined in the circumstances of that particular case, having regard to the principles set out at ¶ [326] above, in order to ascertain the reasonable contemplation of the parties to the 1760-61 treaties. Any extension or evolution of those treaty rights must have clearly defined limits. The court's explanation of what might be sought or acquired in future, does not mean and was never intended to mean anything and everything capable of physical acquisition. There must be a link, based on reason, that connects the impugned present day activity to the traditional aspects of the Mi'kmaq lifestyle and economy. Only then might the extension of the treaty right be considered to be "a logical evolution" rather than something by which the subject matter of the treaty would be "wholly transformed."

[354] For all of these reasons then, I believe the test that ought to have been applied in this case, may best be expressed as follows:

> *Has the claimant satisfied the trier of fact to the requisite balance of probabilities that the Mi'kmaq of Nova Scotia have a constitutionally protected Treaty right to harvest timber on Crown land, because of any one or more of the following established criteria:*
>
> *(i) timber falls within the types of resources traditionally gathered by the Mi'kmaq in their aboriginal economy and therefore was reasonably within the contemplation of the parties to the 1760-61 treaties, or*
>
> *(ii) trade in logs was an activity of the Mi'kmaq in their aboriginal economy and therefore was reasonably within the contemplation of the parties to the said treaties, or*
>
> *(iii) the exploitation of timber through present day commercial logging constitutes a logical evolution of Mi'kmaq treaty rights to fish and wildlife or to the type of things traditionally gathered by the Mi'kmaq in their 1760 aboriginal lifestyle and economy.*

[355] In my opinion, these three criteria are disjunctive. That is to say, proof of any one of these three criteria in and of itself, will afford an accused constitutional protection under the treaty. There is nothing in the court's unanimous judgment in **Marshall (No. 2)**, particularly in the critical ¶'s 19 and 20 to suggest that these are conjunctive criteria, in other words that unless both (i) and (iii) or (ii) and (iii) are proved, the claim to treaty right protection must fail.

[356] A few weeks ago Crown counsel forwarded to the Registrar a copy of the decision of the Newfoundland and Labrador Supreme Court in **The Queen in Right of Newfoundland v. Drew et al.**, [2003] N.J. No. 177 (Q.L.). Having considered that comprehensive judgment of Barry, J. together with the very recent judgments of the New Brunswick Court of Appeal in **Bernard v. The Queen**, [2003] NBCA 55, and **R. v. Paul (appeal by Sockabasin),** [2003] NBCA 60, my conclusions and the reasoning that led me to them have not changed.

Disposition:

[357] I agree with my colleagues' disposition and that we ought to exercise our discretion by ordering a new trial. This is not a case where I can say that I am satisfied there is "no realistic possibility of a guilty verdict on a new trial". **R. v. Haslam** (1990), 56 C.C.C. (3d) 491 (B.C.C.A.). On the contrary, there is evidence upon which the appellants could reasonably be convicted at a trial where proper legal principles are applied.

[358] Accordingly, I agree that we ought to grant leave to appeal, allow the appeal, set aside the convictions and order new trials on all counts.

[359] I tried to make it plain at the beginning that cases have consequences. It is important that the parties and others who frequent Nova Scotia's forests understand the consequences of this one. The appeal is allowed because of what we consider to have been errors of law on the part of both judges who dealt with the prosecution in the courts below. A new trial has been ordered because there is evidence upon which the accused could be convicted, were the proper legal principles expressed and applied.

[360] Whether the accused in this case can satisfy the burden that lies with them to prove a defence to these charges will await another day and another trial.

Saunders, J. A.