Court File No. 30063

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

- and -

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, PHILIP F. YOUNG

RESPONDENTS
(Appellants)

- and -

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INTERVENERS

JOINT FACTUM OF THE INTERVENERS KEPTIN JOHN JOE SARK AND KEPTIN FRANK NEVIN OF THE MI'KMAQ GRAND COUNCIL, THE NATIVE COUNCIL OF NOVA SCOTIA AND THE NEW BRUNSWICK ABORIGINAL PEOPLES COUNCIL

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PART I - STATEMENT OF FACTS

1. This factum is filed on behalf of Keptin John Joe Sark and Keptin Frank Nevin, of the Mi'kmaq Grand Council, the Native Council of Nova Scotia and the New Brunswick Aboriginal Peoples Council.

2. The Mi'kmaq Grand Council, or Sante Mawiomi wjit Mi'kmaq, has been the traditional authority for the Mi'kmaq Nation for at least hundreds of years. The Mi'kmaq Grand Council is also the ethical, moral and spiritual leadership of the Mi'kmaq nation. The Sante Mawiomi wjit Mi'kmaq continues to be recognized and supported by the Mi'kmaq and remains committed to and responsible for protecting the Mi'kmaq nation, its rights and dignities.

3. The Native Council of Nova Scotia ("NCNS") is an Aboriginal peoples representative organization for the Aboriginal community of Mi'kmaq/Aboriginal Peoples residing throughout traditional Mi'kmaq territory in Nova Scotia, undisplaced to reserves created pursuant to the *Indian Act*. NCNS has members and constituents who reside in various communities in Nova Scotia who are Mi'kmaq. Some NCNS members and constituents are registered as "status" Indians for the purpose of the *Indian Act* and others do not have "status" under that *Act*. NCNS advocates for and represents, with the guidance of the Mi'kmaq Grand Council, the rights and interests of off-reserve Mi'kmaq in Nova Scotia where the Treaty Rights or Aboriginal Title of the off-reserve Mi'kmaq may be affected by a decision of government and in the interpretation, application and implementation of those rights. Members and constituents of NCNS reside near and exercise harvest rights in areas affected by the decision in this appeal.

4. The New Brunswick Aboriginal Peoples Council ("NBAPC") is a representative organization for Aboriginal Peoples residing off reserve throughout New Brunswick, including in respect to their Treaty and Land Claim Rights. NBAPC has many hundreds of members in New Brunswick in various constituent communities. NBAPC also represents a wider Aboriginal constituency of off-reserve Aboriginal People in the Province of New Brunswick. Some of the members and constituents of

NBAPC are "status" Indians under the *Indian Act* living off reserve and some do not have "status" under the *Indian Act*. Members and the constituent communities of NBAPC assert the right to harvest and trade forest resources by virtue of Treaty rights and Aboriginal title. Although this case involves a harvest in Nova Scotia, the result of the case will impact on NBAPC harvesters.

5. The Interveners otherwise endorse the summary of facts of the Respondent.

PART II - THE QUESTIONS IN ISSUE

6. The Interveners will limit their submissions to the following issues in this appeal:

A. the Maritime Treaties as an unconditional surrender;
B. the beneficiaries of the Treaty right;
C. the characterization of the Treaty right;
D. the sufficiency of proof of Aboriginal Title;
E. the doctrine of exclusivity in assertion of Aboriginal Title;
F. whether actions of Canada under the *Indian Act* extinguished Aboriginal Title.

The Interveners otherwise accept and endorse the submissions of the Respondent.

PART III - ARGUMENT

A. THE TREATIES AS AN UNCONDITIONAL SURRENDER

7. The Crown seeks to convince this Court that the treaties of 1760/61 were not actually in "peace and friendship" as they are titled but were unconditional surrenders by which the Mi'kmaq conceded the British the right to settle Nova Scotia, retaining nothing for themselves but the right to be treated the same as any other British subject. This legal result had been the objective of the Crown in both *R v. Simon* [1985] 2 S.C.R. (1985), 24 D.L.R. (4th) 390. ("*Simon*") (in which the Attorney General of Nova Scotia participated) and *R v. Marshall,* [1999] 3 S.C.R. 456(1999), 177 D.L.R. (4th) 513 *("Marshall #1").* This legal result was denied by this Court in both *Simon* and *Marshall*. As Chief

Justice Dickson said in *Simon,* para. 50, *" ... None of the Maritime treaties of the eighteenth century cedes land*." This Court found to the same effect in *Marshall #1*, at para. 21. It seems inconsistent with the honor of the Crown that this argument, twice rejected, is made again.

8. As this Court said in *Simon, at para. 4*:

> *The Treaty (of 1752) was entered into for the benefit of both the British Crown and the Micmac people, to maintain peace and order as well as to recognize and confirm the existing hunting and fishing rights of the Micmac. In my opinion, both the Governor and the Micmac entered into the Treaty with the intention of creating mutually binding obligations which would be solemnly respected.... The Micmac Chief and the three other Micmac signatories, as delegates of the Micmac people, would have possessed full capacity to enter into a binding treaty on behalf of the Micmac. Governor Hopson was the delegate and legal representative of His Majesty The King. It is fair to assume that the Micmac would have believed that Governor Hopson, acting on behalf of His Majesty The King, had the necessary authority to enter into a valid treaty with them. I would hold that the Treaty of 1752 was validly created by competent parties.*

9. In its argument, the Crown fails to give any scope to the Mi'kmaq perspective. In fact, at para. 170 of its factum, the Crown says explicitly that there is little room for any aboriginal perspective in this case. How can that be? This Court said in *Marshall #1*, at para. 19:

> *The trial judge's view that the treaty obligations are all found within the four corners of the March 10, 1760 document, albeit generously interpreted, erred in law by failing to give adequate weight to the concerns and perspective of the Mi'kmaq people, despite the recorded history of the negotiations, and by giving excessive weight to the concerns and perspective of the British, who held the pen. The need to give balanced weight to the aboriginal perspective is equally applied in aboriginal rights cases...*

10. The Crown places a great deal of emphasis on the word "molested" in the Treaty language, arguing that this word in the 17th and 18th centuries had a single known meaning, the result of which is that the Mi'kmaq gave up any right to interfere with future British use of the lands of Mi'kmaki. The Interveners submit that there is insufficient evidence to suggest that this technical understanding of British law would have been known to the Mi'kmaq or that the word could have had only that one plain language meaning in 1760. We submit that the Crown's desired interpretation would be overly technical, would give excessive weight to the perspective of the British and would fail to give balanced weight to the aboriginal perspective. It is far more likely that the Mi'kmaq would have understood the term in accordance with its plain language meaning, the avoidance of conflict.

B. THE BENEFICIARIES OF THE TREATY RIGHT

11. It is implicit in the factual submissions of the Crown that it seeks to take some advantage of this Court's observations about "localness of treaties" in *R v. Marshall*,[1999] 3 S.C.R. 456, (1999), 179 D.L.R. (4th) 193 ("*Marshall #2*"), para. 17. This accounts for the recitation of the various locations of harvest. It also explains footnote #4, at page 10 of the Crown's factum where the Crown refers to an attempt to assign particular treaties to particular Indian Act reserves. The Crown returns to this concept of "reserves" at paragraphs 51 and 52.

12. The moment in time that this Court was referring to in *Marshall #2* was the timeframe immediately after the signing of the original treaties. It was not clear, for example, that in June of 1760, all the Mi'kmaq were going to agree to the same treaty relationship. In due course, they did. As well, there was some "localness" to the treaties themselves, specifically with respect to the location of truckhouses and the provision of hostages. These aspects were local. However, the overall treaty relationship that eventually resulted was applicable between the British and the Mi'kmaq as a whole. This is clear from *Marshall #1*, para. 5 which stated, "by the end of 1761, all of the Mi'kmaq villages in Nova Scotia had entered into separate but similar treaties".

13. The Crown's approach takes an overly euro-centric view of the Treaty issues, failing to properly consider the Aboriginal perspective. The Treaty is not a document; it is a relationship with a people. The Mi'kmaq are an Aboriginal nation, with a geographic territory that includes the areas where the harvest occurred. The Mi'kmaq nation was not a divided group of disjointed communities but were organized in districts as a nation occupying their territory of Mi'kma'ki. The Treaty relationship between the Crown and the Mi'kmaq is the same treaty relationship throughout all of Mi'kmaq territory, not a series of individual documents.

14. It is not possible, for example, to suppose that the current *Indian Act* Bands are the modern equivalent of the original Treaty signatories, nor that Indian Act "status" has any direct relevance to whether that person has Aboriginal rights (*R. v. Fowler*, [1993] N.B.J. No. 85; *R. v. Harquail*, 1993 CarswellNB 478). The Treaty signatories were traditional leaders representing communities, most probably members of or connected to the Mi'kmaq Grand Council, the Sante Mawiomi wjit Mi'kmaq. The Grand Council survives today and is the closest direct link to the original signatories. It is a fallacy for the Crown to suggest that *Indian Act* Bands, which were created by decisions of government only in the last fifty years, or *Indian Act* reserves, which are the sad vestigial remainders of the once broad lands of the Mi'kmaq, or *Indian Act* registration numbers, assigned only a few generations ago, are somehow the only holders, controllers or indicia of the Treaty rights. Many Mi'kmaq do not have "status" under the *Indian Act* or continue to live in communities on their traditional lands and not on *Indian Act* reserves, represented by the Interveners NCNS and NBAPC.

15. A community of Mi'kmaq is a societal structure of people bound together by common ancestry, ideals, beliefs and a shared history, not a descriptor exclusively of a group that is defined with reference to an artificial criteria such as "status" under the Indian Act or a particular artificial geographic boundary such as an *Indian Act*-created reserve.

16. The nature of original Mi'kmaq communities has changed drastically since the 1700's due to external pressures from non-Aboriginal society. The government of Canada created the *Indian Act* and its discriminatory registration and reserve systems. Some forced community relocations occurred.

Residential schools were built. Some Mi'kmaq were assigned Indian Act registration numbers; others were not. Some Mi'kmaq moved onto reserves; others did not. Social and economic exclusion from Canadian society changed the composition and locations of some Mi'kmaq communities, with many Mi'kmaq remaining on their traditional lands throughout Nova Scotia, undisplaced to *Indian Act* reserves. In this context, who or what is the "community" that would be expected to give express or implied authorization? It clearly cannot be the *Indian Act* bands, whose capacity under the *Indian Act* is limited to their reserve boundaries and the powers conferred upon them by that federal legislation. *(R. v. Lewis*, [1996] 1 S.C.R. 921, [1996] S.C.J. No. 46)

17. There should be no necessity for a Mi'kmaw today to establish which Treaty document applied to his or her ancestors in 1760-61 or whether any particular Treaty document covered some particular geographic area. There is no evidence to suggest that either the Mi'kmaq or the British saw Nova Scotia as partially covered by a patchwork quilt of a treaty relationship, some areas or people covered, and other areas and people not. The treaty relationship ultimately created was not of local application, requiring any particular Mi'kmaw to limit his or her harvest or trade to a particular geographic area. A British trading post would not question a Mi'kmaq harvester as to whether a skin came from an animal that was caught in a particular geographic area based on where that person lived in 1760-61. Both sides to the relationship felt that, once the treaty-making period was concluded, all of the Mi'kmaq were parties to one relationship with the British. Today, all Mi'kmaq are beneficiaries of that treaty relationship.

18. To hold otherwise would also be to render the rights nugatory. After centuries of movement, intermarriage, centralization, disruption of communities and many other forces, it would be virtually impossible for any Mi'kmaw to identify all the locations where each of their ancestors from 11 generations ago may have been located in 1760. For the Mi'kmaq, a culture without written record, such an evidentiary requirement would have the effect of making the rights functionally inaccessible due to a lack of evidence

C. THE CHARACTERIZATION OF THE TREATY RIGHT

19. Treaty with the British in 1760 was not the first treaty-making experience for the Mi'kmaq. The Mi'kmaq had a long experience with relationships with neighboring aboriginal nations. Relationships grow and change over time. A treaty relationship is no different. The relationship can not evolve so as to be wholly transformed. However, it will naturally evolve over time. The Mi'kmaq Treaties constitute a "covenant chain" of treaties which illuminate and provide a basis for the relationship between the Mi'kmaq and the British. This treaty relationship started at least from the treaty process of 1725 and 1726 (Dummer's Peace). The Mi'kmaq Treaties evidenced a peace, friendship and trade relationship which would have been expected by both parties to have been flexible over time.

20. Certainly, Mi'kmaq culture was not static. No culture is. The Mi'kmaq would have experienced changes as a result of climatic changes and as a result of generations of European contact. These, and many others, had impacts on Mi'kmaq culture and their expectations of their relationship with the world around them.

21. What we lack in the historic material are clear reflections of what the Mi'kmaq and the British said to each other. We have the colonial Council minutes. These are minutes, mere summaries. The Treaty language itself is British legalese, something foreign to the Mi'kmaq. The speech of the Chief of Cape Breton (Unama'ki) at the Governor's Farm in 1761, although it would have been in Mi'kmaq, translated and then summarized, in stylized and flowery language, into English, does give a sense of the family-type relationship that the Mi'kmaq thought they were entering into. The British King would be their father; the British themselves their brothers. These types of familial relationships are by their very nature fluid, organic and evolutionary. The Mi'kmaq would have seen themselves as a people, with an economy and governance and leadership concepts, principles and beliefs, a culture that would continue to evolve in its relationship with the British.

22. This Court has already ruled against a strict language interpretation of the treaty trade right. In *Simon*, the Court said:

> *28 Having determined that the Treaty embodies a right to hunt, it is necessary to consider the respondent's contention that the right to hunt is limited to hunting for purposes and by methods usual in 1752 because of the inclusion of the modifier "as usual" after the right to hunt.*
>
> *29 First of all, I do not read the phrase "as usual" as referring to the types of weapons to be used by the Micmac and limiting them to those used in 1752. Any such construction would place upon the ability of the Micmac to hunt an unnecessary and artificial constraint out of keeping with the principle that Indian treaties should be liberally construed. Indeed, the inclusion of the phrase "as usual" appears to reflect a concern that the right to hunt be interpreted in a flexible way that is sensitive to the evolution of changes in normal hunting practices. The phrase thereby ensures that the Treaty will be an effective source of protection of hunting rights.*
>
> *30 Secondly, the respondent maintained that "as usual" should be interpreted to limit the treaty protection to hunting for non-commercial purposes. It is difficult to see the basis for this argument in the absence of evidence regarding the purpose for which the appellant was hunting. In any event, article 4 of the Treaty appears to contemplate hunting for commercial purposes when it refers to the construction of a truck house as a place of exchange and mentions the liberty of the Micmac to bring game to sale...*

23. This Court further stated in *Marshall #1*:

> *44 An example of the Court's recognition of the necessity of supplying the deficiencies of aboriginal treaties is Sioui, supra, where Lamer J. considered a treaty document that stated simply ... that the Huron tribe "are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English". Lamer J. found that, in order to give real value and meaning to these words, it was necessary that a territorial component be supplied, as follows, at p. 1067:*

> *The treaty gives the Hurons the freedom to carry on their customs and their religion. No mention is made in the treaty itself of the territory over which these rights may be exercised. There is also no indication that the territory of what is now Jacques-Cartier park was contemplated. However, for a freedom to have real value and meaning, it must be possible to exercise it somewhere.*
>
> *Similarly, in Sundown, supra, the Court found that the express right to hunt included the implied right to build shelters required to carry out the hunt. See also Simon, supra, where the Court recognized an implied right to carry a gun and ammunition on the way to exercise the right to hunt. These cases employed the concept of implied rights to support the meaningful exercise of express rights granted to the first nations in circumstances where no such implication might necessarily have been made absent the sui generis nature of the Crown's relationship to aboriginal people. 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.*

24. The natural resources of the land, including trees, were, and are, an integral part of Mi'kmaq life in both their material culture and their non-material culture. As an aspect of material culture, trees were used for wigwams, canoes, paddles, drums, toboggans, snowshoes, firewood and a myriad of other purposes. This was not limited to saplings. The Mi'kmaq would have had axes for generations prior to 1760 as a result of European trade. Large trees were used for a number of purposes. Ash for baskets was, and is, made from the separation of the wood fibre of a large diameter tree.

25. In addition, the forests played an important non-material cultural role. The forests were animate; they were not merely chattels or fixtures as Euro-Canadian law might view them. Trees are a part of the natural world, part of the resource bounty provided by the Creator. Spruce and ash for the Mi'kmaq had the same significance as cedar for the Haida.

26. The history of the Mi'kmaq is that of a trading society. There is much evidence of trade among the Mi'kmaq communities and with other Aboriginal nations prior to contact. The history of the

relationship between the French and the Mi'kmaq had been one based significantly on trade. The nature of the trade goods would vary depending on the trade relationship. In their trade with Europeans, the nature of the goods available to the Mi'kmaq from such trade would have changed over time. There is no reason to think that the Mi'kmaq looked at the trade with the British as being limited to the trade goods that they happened to be delivering and receiving in 1760.

27. The Mi'kmaq had, and have, rights to gather forest resources. The Mi'kmaq did so in traditional times and continue to do so today. (*Gray v. R*, 2004 NBCA 57 (2004-07-22)) In 1760, why would the British have attempted to prevent Mi'kmaq from trading in trees?

28. It is sufficient that there is evidence that forest resources, including trees, were harvested by Mi'kmaq at the time of the Treaty. Mi'kmaq gathered natural resources that were available to them, used them, sometimes processed them and sometimes traded them. They did so because that was what it took to sustain themselves, including by trading them for a moderate livelihood. Trees were part of the lifestyle and economy (both intra-Mi'kmaq and with others) of the Mi'kmaq. The finding of this Court in *Marshall #1*, at paragraph 4 was:

> *.. (T)he 1760 treaty does affirm the right of the Mi'kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed 'necessaries'.*

29. The Nova Scotia Court of Appeal proposed a different test in paras. 3 and 58 of its decision. The Court of Appeal required (1) that the activity today be "traditional Mi'kmaq gathering" or its logical evolution and (2) that the resource be of a type traditionally gathered, or its logical evolution.

30. It is not clear what the imposition of the "traditional activity" test adds to the "traditional resource" test. No example of what would, or would not, meet this test was provided by the Court of Appeal. This additional requirement is inconsistent with the tests set by this Court. This Court did not

require some further evidence of "aboriginal activity" in either *Marshall* or in *Simon* (which contemplated commercial sale as an aspect of the 1752 Treaty). The imposition of this further test was an error of law. We submit that the New Brunswick Court of Appeal in the companion case of *Bernard* advanced a test which better follows *Marshall* and that the New Brunswick approach is the correct one.

31. The Interveners submit that forest resources, including trees, were gathered by Mi'kmaq in 1760, including through the use of axes and hatchets. It may be that large trees can be more easily cut down today than in 1760. However, the size of the tree can not serve to define the nature of the right. Guns and transportation devices are better today than they were in 1760 as well. However, the technology does not define the characterization of the right. Changes in technology may assist the gatherer of the resource by making it easier, safer or more efficient. Any concerns with respect to quantity of the harvest are addressed in the "moderate livelihood" doctrine adopted by this Court. Concerns with respect to quantities are not relevant at the stage of the characterization of the right itself.

D. THE SUFFICIENCY OF PROOF OF ABORIGINAL TITLE

32. The land title rights of the Mi'kmaq exist in all of their territory and there is no need to prove that any particular area today had or has more or less special significance to the Mi'kmaq before its resources can be harvested. This Court in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, (1997) 153 D.L.R. (4th) 193 ("Delgamuukw", cited to D.L.R.), per Justice La Forest, in the minority, stated, at para. 199:

> *...Aboriginal occupancy refers not only to the presence of aboriginal peoples in villages or permanently settled areas. Rather, the use of adjacent lands and even remote territories to pursue a traditional mode of life is also related to the notion of occupancy. Viewed in this light, occupancy is part of aboriginal culture in a broad sense and is, therefore, absorbed in the notion of distinctiveness. To use the language of Van der Peet, proof of occupancy is proof of centrality.*

33. Chief Justice Lamer, for the majority stated similarly, at para. 149:

> *Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources... In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed...*

34. The Mi'kmaq were a nation with a sustainable seasonal transhumance[1] land use pattern that covered the coast, the river systems and the inland areas. Very few places in Nova Scotia can not be readily reached from either the coast or one of the watersheds. There is no legal requirement that the nature of the aboriginal occupation amount to "possession" as understood under the adverse possession concepts of English common law. In this case, the boundaries of what is now known as Nova Scotia constitute the definite tract of land over which Title is claimed.

35. The nature of occupancy of an area of land will depend on the Aboriginal nation involved and the characteristics of the land. The use of the land by the Mi'kmaq need not be agrarian in nature to give rise to Aboriginal title and must only be consistent with the Mi'kmaq traditional way of life. The Mi'kmaq were engaged in a seasonal transhumance land use pattern. Their use and occupation of the territory was as complete as it needed to be. They used it for all of the purposes that they required.

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[1] "Seasonal transhumance" is used here to describe the practice of moving from known resource location to known resource location within an area according to the time of year. This nomenclature seems better than the use of concepts such as being "nomadic" or "migratory', terms which contain negative value-laden images and are perhaps better used as descriptors of animal movement.

36. There will never be much evidence about the traditional use of a particular area of the forest. There simply is very little evidence available from time periods prior to significant European presence. However, Chief Justice Lamer in *Delgamuukw*, at para. 101, stated:

> *...The trial judge expected too much of the oral history of the appellants, as expressed in the recollections of aboriginal life of members of the appellant nations. He expected that evidence to provide definitive and precise evidence of pre-contact aboriginal activities on the territory in question. However, ...this will be almost an impossible burden to meet.*

37. The Mi'kmaq possessed and occupied all of Mi'kma'ki in the 1760s, except perhaps for a few identifiable European settlements, none of which were located in the area where the harvest in this case took place. There is no requirement that one area of land need have more cultural significance than another. It is only necessary that it have a cultural significance. There could never be any large body of evidence on the utilization of any particular area of interior woodland. There would have been no thought in the Mi'kmaq community that it was important to track this level of detail throughout the centuries in its oral histories. To require evidence of this nature would be to render the Aboriginal claim nugatory on an evidentiary standard. The cultural significance of Mi'kma'ki is in its nature as a territory, as a whole. The harvest sites are in that territory. It is not necessary that the area where the harvest occurred have any greater cultural significance than that.

E. EXCLUSIVITY IN THE ASSERTION OF ABORIGINAL TITLE

38. The Crown submits that the mere presence of some French and Acadians in Mi'kmaq territory in the 1760s prevents the Mi'kmaq from demonstrating exclusivity for the purposes of an Aboriginal title claim.

39. The doctrine of exclusivity is a concept applicable to the relationship between Aboriginal nations. The presence of some Europeans in the territory of an Aboriginal nation is irrelevant to the operation of this principle. The presence of Europeans may be relevant to extinguishment or justifiable

infringement issues. However, it is not a relevant consideration in the exclusivity test.

40. Exclusivity has to do with the knowledge by the Mi'kmaq, and the acceptance by their neighboring Aboriginal nations to the south and west, of Mi'kmaq rights to Mi'kma'ki. Those neighboring nations knew that if they made an incursion into Mi'kma'ki, the territory wold be defended. However, if individuals came as visitors, they could be welcomed within the Mi'kmaq worldview. This applied to British visitors as well. This standard meets the legal test for exclusivity.

F. WHETHER THE *INDIAN ACT* EXTINGUISHED ABORIGINAL TITLE

41. The Crown argues in paragraphs 192 and 197 of its factum that the operation of the section 88 of the *Indian Act* and the creation of *Indian Act* reserves extinguished Aboriginal title.

42. The Interveners submit that the *Indian Act* does not, except in the first phrase of section 88, deal with the constitutional rights of Aboriginal nations. It is federal legislation which attempted, with some success, to break down Aboriginal nations into smaller, controllable, parts. It assigned to those smaller parts certain characteristics based on Euro-Canadian culture. It provided those *Indian Act* structures with limited municipal-style jurisdictions applicable to specified, and limited, land bases. In the last few generations, it assigned registration numbers to some, but not all, Mi'kmaq. It failed to take traditional Aboriginal governance structure or concepts into account.

43. In this context, it is striking that Attorney General of Nova Scotia, the law officer of the Crown most aware of the Crown's duty of honor in its dealings with Aboriginal people, seeks to use the *Indian Act* and its reserve system to extinguish Aboriginal rights. This is an impoverished view of that duty of honor. In response to the specific legal points, the Interveners say that the language of section 88 was intended to protect Aboriginal treaty rights, not extinguish them.

44. The Interveners further submit that the *Indian Act* reserve system was never accepted by the Mi'kmaq as a satisfaction and accord for all of their land rights. In fact, each of the Sante Mawiomi wjit

Mi'kmaq, NCNS and NBAPC represent Mi'kmaq who have never accepted the reserve-based system and who continue to occupy Mi'kma'ki, undisplaced to *Indian Act* reserves. There is also no evidence that government implemented the reserve system with the intention of extinguishing Aboriginal Title.

PART IV – SUBMISSION ON COSTS

45. The Interveners do not seek costs nor should they be subjected to pay costs other than the disbursements as provided for in the order granting leave to intervene.

PART V - RELIEF SOUGHT

46. The Interveners submit that the Appeal should be dismissed. Both constitutional questions should be answered in the affirmative. With respect to Cross-Appeal, the Interveners submit that there is no need for a new trial and the Respondents should be acquitted on the facts before the court.

47. The Interveners support the granting of a one-year stay for a period of time after the decision of this Court to allow for consultation, accommodation and reconciliation. To date, the doctrine of "consultation and accommodation" imposed since *R. v. Sparrow* [1990] 1 S.C.R. 1075 , (1990) 70 D.L.R. (4th) 385 has been largely a failure. Despite the duty of honor of the Crown, consultation and accommodation has generally not worked. One problem is that there seems to be no effective remedy available to Aboriginal peoples when the Crown breaches its obligations. The failure of the Crown to consult the Mi'kmaq with respect to the forests of Nova Scotia was not an important issue in this appeal. Any stay granted by this Honourable Court should reflect that the Crown's obligation to consult, accommodate and reconcile be inclusive of all the Mi'kmaq people, including those Mi'kmaq communities represented by NCNS and the Mi'kmaq Grand Council.

All of which is respectfully submitted this day of December, 2004.

D. BRUCE CLARKE

Solicitor for the **Interveners**

SCHEDULE "A"

List of Authorities

1. *R v. Marshall*,[1999] 3 S.C.R. 456, (1999), 179 D.L.R. (4th) 193.
2. *R v. Marshall*, [1999] 3 S.C.R. 456, (1999), 177 D.L.R. (4th) 513.
3. *R v. Simon* [1985] 2 S.C.R. (1985), 24 D.L.R. (4th) 390.
4. *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, (1997) 153 D.L.R. (4th) 193.
5. *Haida Nation v. British Columbia* 2004 SCC 73
6. *R. v. Sparrow* [1990] 1 S.C.R. 1075, (1990) 70 D.L.R. (4th) 385.
7. *R. v. Lewis*, [1996] 1 S.C.R. 921, [1996] S.C.J. No. 46
8. *Gray v. R*, 2004 NBCA 57 (2004-07-22)
9. *R. v. Fowler*, [1993] N.B.J. No. 85
10. *R. v. Harquail*, 1993 CarswellNB 478