R. *v.* Marshall, [1999] 3 S.C.R. 456

Donald John Marshall, Jr. *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General for New Brunswick,
the West Nova Fishermen's Coalition,
the Native Council of Nova Scotia
and the Union of New Brunswick Indians *Interveners*

Indexed as: R. *v.* Marshall

File No.: 26014.

1998: November 5; 1999: September 17.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Binnie JJ.

on appeal from the court of appeal for nova scotia

Indians -- Treaty rights – Fishing rights -- Accused, a Mi'kmaq Indian, fishing with prohibited net during close period and selling fish caught without a licence in violation of federal fishery regulations -- Whether accused possessed treaty right to catch and sell fish that exempted him from compliance with regulations -- Mi'kmaq Treaties of 1760-61 -- Maritime Provinces Fishery Regulations, SOR/93-55, ss. 4(1)(a), 20 -- Fishery (General) Regulations, SOR/93-53, s. 35(2).

The accused, a Mi'kmaq Indian, was charged with three offences set out in the federal fishery regulations: the selling of eels without a licence, fishing without a licence and fishing during the close season with illegal nets. He admitted that he had caught and sold 463 pounds of eels without a licence and with a prohibited net within close times. The only issue at trial was whether he possessed a treaty right to catch and sell fish under the treaties of 1760-61 that exempted him from compliance with the regulations. During the negotiations leading to the treaties of 1760-61, the aboriginal leaders asked for truckhouses "for the furnishing them with necessaries, in Exchange for their Peltry" in response to the Governor's inquiry "Whether they were directed by their Tribes, to propose any other

particulars to be Treated upon at this Time". The written document, however, contained only the promise by the Mi'kmaq not to "Traffick, Barter or Exchange any Commodities in any manner but with such persons, or the Manager of such Truckhouses as shall be appointed or established by His majesty's Governor". While this "trade clause" is framed in negative terms as a restraint on the ability of the Mi'kmaq to trade with non-government individuals, the trial judge found that it reflected a grant to them of the positive right to bring the products of their hunting, fishing and gathering to a truckhouse to trade. He also found that when the exclusive trade obligation and the system of truckhouses and licensed traders fell into disuse, the "right to bring" disappeared. The accused was convicted on all three counts. The Court of Appeal upheld the convictions. It concluded that the trade clause did not grant the Mi'kmaq any rights, but represented a mechanism imposed upon them to help ensure that the peace between the Mi'kmaq and the British was a lasting one, by obviating the need of the Mi'kmaq to trade with the enemies of the British or unscrupulous traders.

Held (Gonthier and McLachlin JJ. dissenting): The appeal should be allowed and an acquittal entered on all charges.

Per Lamer C.J. and L'Heureux-Dubé, Cory, Iacobucci and Binnie JJ.: When interpreting the treaties the Court of Appeal erred in rejecting the use of extrinsic evidence in the absence of ambiguity. Firstly, even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement. Secondly, extrinsic evidence of the historical and cultural context of a treaty may be received even if the treaty document purports to contain all of the terms and even absent any ambiguity on the face of the treaty. Thirdly, where a treaty was concluded orally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written ones.

There was more to the treaty entitlement than merely the right to bring fish and wildlife to truckhouses. While the treaties set out a restrictive covenant and do not say anything about a positive Mi'kmaq right to trade, they do not contain all the promises made and all the terms and conditions mutually agreed to. Although the trial judge drew positive implications from the negative trade clause, such limited relief is inadequate where the British-drafted treaty document does not accord with the British-drafted minutes of the negotiating sessions and more favourable terms are evident from the other documents and evidence the trial judge regarded as reliable. Such an overly deferential attitude to the treaty document was inconsistent with a proper recognition of the difficulties of proof confronted by aboriginal people. The trial judge's narrow view of what constituted "the treaty" led to the equally narrow legal conclusion that the Mi'kmaq trading

entitlement, such as it was, terminated in the 1780s. It is the common intention of the parties in 1760 to which effect must be given. The trade clause would not have advanced British objectives (peaceful relations with a self-sufficient Mi'kmaq people) or Mi'kmaq objectives (access to the European "necessaries" on which they had come to rely) unless the Mi'kmaq were assured at the same time of continuing access, implicitly or explicitly, to a harvest of wildlife to trade.

This appeal should be allowed because nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship, as best the content of those treaty promises can now be ascertained. If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations. An interpretation of events that turns a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant is not consistent with the honour and integrity of the Crown. Nor is it consistent to conclude that the Governor, seeking in good faith to address the trade demands of the Mi'kmaq, accepted the Mi'kmaq suggestion of a trading facility while denying any treaty protection to Mi'kmaq access to the things that were to be traded, even though these things were identified and priced in the treaty negotiations. The trade arrangement must be interpreted in a manner which gives meaning and substance to the oral promises made by the Crown during the treaty negotiations. The promise of access to "necessaries" through trade in wildlife was the key point, and where a right has been granted, there must be more than a mere disappearance of the mechanism created to facilitate the exercise of the right to warrant the conclusion that the right itself is spent or extinguished.

There is a distinction to be made between a liberty enjoyed by all citizens and a right conferred by a specific legal authority, such as a treaty, to participate in the same activity. A general right enjoyed by all citizens can be made the subject of an enforceable treaty promise. Thus the accused need not show preferential trading rights, but only treaty trading rights. Following the enactment of the *Constitution Act, 1982*, the fact the content of Mi'kmaq rights under the treaty to hunt and fish and trade was no greater than those enjoyed by other inhabitants does not, unless those rights were extinguished prior to April 17, 1982, detract from the higher protection they presently offer to the Mi'kmaq people.

The accused's treaty rights are limited to securing "necessaries" (which should be construed in the modern context as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth. Thus construed, however, they are treaty rights within the meaning of s. 35 of the *Constitution Act, 1982*. 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. What is contemplated is not a right to trade generally for economic gain, but rather a right to trade for necessaries. The treaty right is a regulated right and can be contained by regulation within its proper limits. Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. Such regulations would accommodate the treaty right and would not constitute an infringement that would have to be justified under the *Badger* standard.

The accused caught and sold the eels to support himself and his wife. His treaty right to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Accordingly, the close season and the imposition of a discretionary licencing system would, if enforced, interfere with the accused's treaty right to fish for trading purposes, and the ban on sales would, if enforced, infringe his right to trade for sustenance. In the absence of any justification of the regulatory prohibitions, the accused is entitled to an acquittal.

Per Gonthier and McLachlin JJ. (dissenting): Each treaty must be considered in its unique historical and cultural context, and extrinsic evidence can be used in interpreting aboriginal treaties, absent ambiguity. It may be useful to approach the interpretation of a treaty in two steps. First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause. At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty's historical and cultural backdrop. A consideration of the historical background may suggest latent ambiguities or alternative interpretations not detected at first reading.

The treaties of 1760-61 do not grant a general right to trade. The core of the trade clause is the obligation on the Mi'kmaq to trade only with the British. Ancillary to this is the implied promise that the British will establish truckhouses where the Mi'kmaq can trade. These words do not, on their face, confer a general right to trade. Nor does the historic and cultural context in which the treaties were made establish such a right. The trial judge was amply justified in concluding that the Mi'kmaq understood the treaty process as well as the particular terms of the treaties they were signing. On the historical record, moreover, neither the Mi'kmaq nor the British intended or understood the treaty trade clause as creating a general right to trade. To achieve the mutually desired objective of peace, both parties agreed to make certain concessions. The Mi'kmaq agreed to forgo their trading autonomy and the general trading rights they possessed as British subjects, and to abide by the treaty trade regime. The British, in exchange, undertook to

provide the Mi'kmaq with stable trading outlets where European goods were provided at favourable terms while the exclusive trade regime existed. Both the Mi'kmaq and the British understood that the "right to bring" goods to trade was a limited right contingent on the existence of a system of exclusive trade and truckhouses. The finding that both parties understood that the treaties granted a specific, and limited, right to bring goods to truckhouses to trade is confirmed by the post-treaty conduct of the Mi'kmaq and the British. Soon after the treaties were entered into, the British stopped insisting that the Mi'kmaq trade only with them, and replaced the expensive truckhouses with licenced traders in 1762. The system of licenced traders, in turn, died out by the 1780s. The exclusive trade and truckhouse system was a temporary mechanism to achieve peace in a troubled region between parties with a long history of hostilities. When the restriction on the Mi'kmaq trade fell, the need for compensation for the removal of their trading autonomy fell as well. At this point, the Mi'kmaq were vested with the general non-treaty right to hunt, to fish and to trade possessed by all other British subjects in the region. The conditions supporting the right to bring goods to trade at truckhouses, as agreed to by both parties, ceased to exist.

It follows from the trial judge's finding that the "right to bring" goods to trade at truckhouses died with the exclusive trade obligation upon which it was premised that the treaties did not grant an independent right to truckhouses which survived the demise of the exclusive trade system. This right therefore cannot be relied on in support of an argument of a trade right in the modern context which would exempt the accused from the application of the fisheries regulations.

Cases Cited

By Binnie J.

Referred to: *R. v. Denny* (1990), 1990 CanLII 2412 (NS CA), 55 C.C.C. (3d) 322; *R. v. Badger*, 1996 CanLII 236 (SCC), [1996] 1 S.C.R. 771;*International Casualty Co. v. Thomson* (1913), 1913 CanLII 29 (SCC), 48 S.C.R. 167; *R. v. Taylor and Williams* (1981), 1981 CanLII 1657 (ON CA), 62 C.C.C. (2d) 227, leave to appeal refused, [1981] 2 S.C.R. xi; *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010; *R. v. Sioui*, [1990] 1 S.C.R.
1025; *Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335; *R. v. Horse*, 1988 CanLII 91 (SCC), [1988] 1 S.C.R. 187; *Simon v. The Queen*, 1985 CanLII 11 (SCC), [1985] 2 S.C.R. 387; *R. v. Sundown*, 1999 CanLII 673 (SCC), [1999] 1 S.C.R. 393; *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507, aff'g (1993), 1993 CanLII 4519 (BC CA), 80 B.C.L.R. (2d) 75; *Jack v. The Queen*, 1979 CanLII 175 (SCC), [1980] 1 S.C.R. 294; *R. v. Horseman*, 1990 CanLII 96 (SCC), [1990] 1 S.C.R. 901; *R. v. Isaac* (1975), 13 N.S.R. (2d) 460; *R. v. Cope* (1981), 1981 CanLII 2722 (NS CA), 132 D.L.R. (3d) 36; *M.J.B.*

Enterprises Ltd. v. Defence Construction (1951) Ltd., 1999 CanLII 677 (SCC), [1999] 1 S.C.R. 619; *The "Moorcock"* (1889), 14 P.D. 64; *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 S.C.R. 711; *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025; *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555; *Sikyea v. The Queen*, 1964 CanLII 62 (SCC), [1964] S.C.R. 642; *R. v. George*, 1966 CanLII 2 (SCC), [1966] S.C.R. 267; *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075; *R. v. Bombay*, [1993] 1 C.N.L.R. 92; *Province of Ontario v. Dominion of Canada and Province of Quebec; In re Indian Claims* (1895), 1895 CanLII 112 (SCC), 25 S.C.R. 434; *Ontario Mining Co. v. Seybold* (1901), 1901 CanLII 80 (SCC), 32 S.C.R. 1; *R. v. Gladstone*, 1996 CanLII 160 (SCC), [1996] 2 S.C.R. 723; *R. v. N.T.C. Smokehouse Ltd.*, 1996 CanLII 159 (SCC), [1996] 2 S.C.R. 672; *R. v. Nikal*, 1996 CanLII 245 (SCC), [1996] 1 S.C.R. 1013; *R. v. Adams*, 1996 CanLII 169 (SCC), [1996] 3 S.C.R. 101; *R. v. Côté*, 1996 CanLII 170 (SCC), [1996] 3 S.C.R. 139.

By McLachlin J. (dissenting)

R. v. Sundown, 1999 CanLII 673 (SCC), [1999] 1 S.C.R. 393; *R. v. Badger*, 1996 CanLII 236 (SCC), [1996] 1 S.C.R. 771; *R. v. Sioui*, 1990 CanLII 103 (SCC), [1990] 1 S.C.R. 1025; *Simon v. The Queen*, 1985 CanLII 11 (SCC), [1985] 2 S.C.R. 387; *R. v. Horseman*, 1990 CanLII 96 (SCC), [1990] 1 S.C.R. 901; *Nowegijick v. The Queen*, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29; *R. v. Horse*, 1988 CanLII 91 (SCC), [1988] 1 S.C.R. 187.

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Constitution Act, 1982, ss. 35(1), 52.

Criminal Code, R.S.C., 1985, c. C-46, s. 830 [rep. & sub. c. 27 (1st Supp.), s. 182; am. 1991, c. 43, s. 9 (Sch., item 15)].

Fisheries Act, R.S.C., 1985, c. F-14, s. 7(1).

Fishery (General) Regulations, SOR/93-53, s. 35(2).

Maritime Provinces Fishery Regulations, SOR/93-55, ss. 4(1)(*a*), 5, 20.

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APPEAL from a judgment of the Nova Scotia Court of Appeal (1997), 1997 CanLII 14992 (NS CA), 159 N.S.R. (2d) 186, 468 A.P.R. 186, 146 D.L.R. (4th) 257, [1997] 3 C.N.L.R. 209, [1997] N.S.J. No. 131 (QL), affirming a decision of the Provincial Court, [1996] N.S.J. No. 246 (QL), convicting the accused of three offences under the *Fisheries Act*. Appeal allowed, Gonthier and McLachlin JJ. dissenting.

Bruce H. Wildsmith, *Q.C.*, and *Eric A. Zscheile*, for the appellant.

Michael A. Paré, *Ian MacRae* and *Gordon Campbell*, for the respondent.

Bruce Judah, *Q.C.*, for the intervener the Attorney General for New Brunswick.

A. William Moreira, *Q.C.*, and *Daniel R. Pust*, for the intervener the West Nova Fishermen's Coalition.

D. Bruce Clarke, for the intervener the Native Council of Nova Scotia.

Henry J. Bear, for the intervener the Union of New Brunswick Indians.

The judgment of Lamer C.J. and L'Heureux-Dubé, Cory, Iacobucci and Binnie JJ. was delivered by

1 BINNIE J. – On an August morning six years ago the appellant and a companion, both Mi'kmaq Indians, slipped their small outboard motorboat into the coastal waters of Pomquet Harbour, Antigonish County, Nova Scotia to fish for eels. They landed 463 pounds, which they sold for $787.10, and for which the appellant was arrested and prosecuted.

2 On an earlier August morning, some 235 years previously, the Reverend John Seycombe of Chester, Nova Scotia, a missionary and sometime dining companion of the Governor, noted with satisfaction in his diary, "Two Indian squaws brought seal skins and eels to sell". That transaction was apparently completed without arrest or other incident. The thread of continuity between these events, it seems, is that the Mi'kmaq people have sustained themselves in part by harvesting and trading fish (including eels) since Europeans first visited the coasts of what is now Nova Scotia in the 16th century. The appellant says that they are entitled to continue to do so now by virtue of a treaty right agreed to by the British Crown in 1760. As noted by my colleague, Justice McLachlin, the appellant is guilty as charged unless his activities were protected by an existing aboriginal or treaty right. No reliance was placed on any aboriginal right; the appellant chooses to rest his case entirely on the Mi'kmaq treaties of 1760-61.

3 The trial judge ([1996] N.S.J. No. 246 (QL) (Prov. Ct.)) accepted as applicable the terms of a Treaty of Peace and Friendship signed on March 10, 1760 at Halifax. The parties disagree about the existence of alleged oral terms, as well as the implications of the "trade clause" written into that document. From this distance, across more than two centuries, events are necessarily seen as "through a glass, darkly". The parties were negotiating in March 1760 in the shadow of the great military and political turmoil following the fall of the French fortresses at Louisbourg, Cape Breton (June 1758) and Quebec (September 1759). The Mi'kmaq signatories had been allies of the French King, and Montreal would continue to be part of New France until it subsequently fell in June 1760. The British had almost completed the process of expelling the Acadians from southern Nova Scotia. Both the Treaty of Paris, ending hostilities, and the Royal Proclamation of 1763 were still three years in the future. Only six years prior to the signing of the treaties, the British Governor of Nova Scotia had issued a Proclamation (May 14, 1756) offering rewards for the killing and capturing of Mi'kmaq throughout Nova Scotia, which then included New Brunswick. The treaties were entered into in a period where the British were attempting to expand and secure their control over their northern possessions. The subtext of the Mi'kmaq treaties was reconciliation and mutual advantage.

4 I would allow this appeal because nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship, as best the content of those treaty promises can now be ascertained. In reaching this conclusion, I recognize that if the present dispute had arisen out of a modern commercial transaction between two parties of relatively equal bargaining power, or if, as held by the courts below, the short document prepared at Halifax under the direction of Governor Charles Lawrence on March 10, 1760 was to be taken as being the "entire agreement" between the parties, it would have to be concluded that the Mi'kmaq had inadequately protected their interests. However, the courts have not applied strict rules of interpretation to treaty relationships. In *R. v. Denny* (1990), 1990 CanLII 2412 (NS CA), 55 C.C.C. (3d) 322, and earlier decisions cited therein, the Nova Scotia Court of Appeal has affirmed the Mi'kmaq aboriginal right to fish for food. The appellant says the treaty allows him to fish for trade. In my view, the 1760 treaty does affirm the right of the Mi'kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed "necessaries". This right was always subject to regulation. The Crown does not suggest that the regulations in question accommodate the treaty right. The Crown's case is that no such treaty right exists. Further, no argument was made that the treaty right was extinguished prior to 1982, and no justification was offered by the Crown for the several prohibitions at issue in this case. Accordingly, in my view, the appellant is entitled to an acquittal.

Uphold the honour of the Crown.

Treaties are sui generis, therefore the rules of interpretation must be adapted and remain flexible.

Justice Binnie's expansive characterization of the treaty right--to be contrasted with Justice McLachlin's narrow characterization--see below.

Analysis

5 The starting point for the analysis of the alleged treaty right must be an examination of the specific words used in any written memorandum of its terms. In this case, the task is complicated by the fact 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

Treaty interpretation starts with an examination of the written words but is not limited to the written words.

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. Some of these documents are missing. Despite some variations among some of the documents, Embree Prov. Ct. J. was satisfied that the written terms applicable to this dispute were contained in a Treaty of Peace and Friendship entered into by Governor Charles Lawrence on March 10, 1760, which in its entirety provides as follows:

> Treaty of Peace and Friendship concluded by [His Excellency Charles Lawrence] Esq. Govr and Comr. in Chief in and over his Majesty's Province of Nova Scotia or Accadia with Paul Laurent chief of the LaHave tribe of Indians at Halifax in the Province of N.S. or Acadia.
>
> I, Paul Laurent do for myself and the tribe of LaHave Indians of which I am Chief do acknowledge the jurisdiction and Dominion of His Majesty George the Second over the Territories of Nova Scotia or Accadia and we do make submission to His Majesty in the most perfect, ample and solemn manner.
>
> And I do promise for myself and my tribe that I nor they shall not molest any of His Majesty's subjects or their dependents, in their settlements already made or to be hereafter made or in carrying on their Commerce or in any thing whatever within the Province of His said Majesty or elsewhere and if any insult, robbery or outrage shall happen to be committed by any of my tribe satisfaction and restitution shall be made to the person or persons injured.
>
> That neither I nor any of my tribe shall in any manner entice any of his said Majesty's troops or soldiers to desert, nor in any manner assist in conveying them away but on the contrary will do our utmost endeavours to bring them back to the Company, Regiment, Fort or Garrison to which they shall belong.
>
> That if any Quarrel or Misunderstanding shall happen between myself and the English or between them and any of my tribe, neither I, nor they shall take any private satisfaction or Revenge, but we will apply for redress according to the Laws established in His said Majesty's Dominions.
>
> That all English prisoners made by myself or my tribe shall be sett at Liberty and that we will use our utmost endeavours to prevail on the other tribes to do the same, if any prisoners shall happen to be in their hands.

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

These were the words in the document that gave rise the treaty right.

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

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

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

Paul Laurent

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

Chas Lawrence [Emphasis added.]

6 The underlined portion of the document, the so-called “trade clause”, is framed in negative terms as a restraint on the ability of the

Mi'kmaq to trade with non-government individuals. A "truckhouse" was a type of trading post. The evidence showed that the promised government truckhouses disappeared from Nova Scotia within a few years and by 1780 a replacement regime of government licensed traders had also fallen into disuse while the British Crown was attending to the American Revolution. The trial judge, Embree Prov. Ct. J., rejected the Crown's argument that the trade clause amounted to nothing more than a negative covenant. He found, at para. 116, that it reflected a grant to the Mi'kmaq of the positive right to "bring the products of their hunting, fishing and gathering to a truckhouse to trade". The Court of Appeal ((1997), 1997 CanLII 14992 (NS CA), 159 N.S.R. (2d) 186) found that the trial judge misspoke when he used the word "right". It held that the trade clause does not grant the Mi'kmaq any rights. Instead, the trade clause represented a "mechanism imposed upon them to help ensure that the peace was a lasting one, by obviating their need to trade with enemies of the British" (p. 208). When the truckhouses disappeared, said the court, so did any vestiges of the restriction or entitlement, and that was the end of it.

7 The appellant's position is that the truckhouse provision 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. It seems clear that the words of the March 10, 1760 document, standing in isolation, do not support the appellant's argument. The question is whether the underlying negotiations produced a broader agreement between the British and the Mi'kmaq, memorialized only in part by the Treaty of Peace and Friendship, that would protect the appellant's activities that are the subject of the prosecution. I should say at the outset that the appellant overstates 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*, 1996 CanLII 236 (SCC), [1996] 1 S.C.R 771).

The main issue was how broad was the treaty right and did its modern scope include the activities which led to the charges.

Justice Binnie characterized the right in such a way as to include an inherent limitation i.e. only fish to procure a moderate livelihood.

8 Although the agreed statement of facts does not state explicitly that the appellant was exercising his rights for the purpose of necessaries, the Court was advised in the course of oral argument that the appellant "was engaged in a small-scale commercial activity to help subsidize or support himself and his common-law spouse". The Crown did not dispute this characterization and it is consistent with the scale of the operation, the amount of money involved, and the other surrounding facts. If at some point the appellant's 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.

Evidentiary Sources

9 The Court of Appeal took a strict approach to the use of extrinsic evidence when interpreting the Treaties of 1760-61. Roscoe and Bateman JJ.A. stated at p. 194: "While treaties must be interpreted in their historical context, extrinsic evidence cannot be used as an aid to interpretation, in the absence of ambiguity". I think this approach should be rejected for at least three reasons.

The debate about using extrinsic evidence--only use it if there is an ambiguity in the written text?

10 Firstly, even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement. Rules of interpretation in contract law are in general more strict than those applicable to treaties, yet Professor Waddams states in *The Law of Contracts* (3rd ed. 1993), at para. 316:

> The parol evidence rule does not purport to exclude evidence designed to show whether or not the agreement has been "reduced to writing", or whether it was, or was not, the intention of the parties that it should be the exclusive record of their agreement. Proof of this question is a pre-condition to the operation of the rule, and all relevant evidence is admissible on it. This is the view taken by Corbin and other writers, and followed in the Second Restatement.

See also *International Casualty Co. v. Thomson* (1913), 1913 CanLII 29 (SCC), 48 S.C.R. 167, *per* Idington J., at p. 191, and G. H. Treitel, *The Law of Contract* (9th ed. 1995), at p. 177. For an example of a treaty only partly reduced to writing, see *R. v. Taylor and Williams* (1981), 1981 CanLII 1657 (ON CA), 62 C.C.C. (2d) 227 (Ont. C.A.) (leave to appeal dismissed, [1981] 2 S.C.R. xi).

11 Secondly, even in the context of a treaty document that purports to contain all of the terms, this Court has made clear in recent cases that extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty. MacKinnon A.C.J.O. laid down the principle in *Taylor and Williams*, *supra*, at p. 236:

Extrinsic evidence can be relied on even absent any ambiguity on the face of the treaty.

> . . . if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms.

The proposition is cited with approval in *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010, at para. 87, and *R. v. Sioui*, 1990 CanLII 103 (SCC), [1990] 1 S.C.R. 1025, at p. 1045.

12 Thirdly, where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms, *per* Dickson J. (as he then was) in *Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335. Dickson J. stated for the majority, at p. 388:

A treaty includes its oral terms.

> Nonetheless, the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms.

The *Guerin* case is a strong authority in this respect because the surrender there could only be accepted by the Governor in Council, who was not made aware of any oral terms. The surrender could *not* have been accepted by the departmental officials who were present when the Musqueam made known their conditions. Nevertheless, the Governor in Council was held bound by the oral terms which "the Band understood would be embodied in the lease" (p. 388). In this case, unlike *Guerin*, the Governor did have authority to bind the Crown and was present when the aboriginal leaders made known their terms.

13 The narrow approach applied by the Court of Appeal to the use of extrinsic evidence apparently derives from the comments of Estey J. in *R. v. Horse*, 1988 CanLII 91 (SCC), [1988] 1 S.C.R. 187, where, at p. 201, he expressed some reservations about the use of extrinsic materials, such as the transcript of negotiations surrounding the signing of Treaty No. 6, except in the case of ambiguity. (Estey J. went on to consider the extrinsic evidence anyway, at p. 203.) Lamer J., as he then was, mentioned this aspect of *Horse* in *Sioui*, *supra*, at p. 1049, but advocated a more flexible approach when determining the existence of treaties. Lamer J. stated, at p. 1068, that "[t]he historical context, which has been used to demonstrate the existence of the treaty, may equally assist us in interpreting the extent of the rights contained in it".

14 Subsequent cases have distanced themselves from a "strict" rule of treaty interpretation, as more recently discussed by Cory J., in *Badger*,*supra*, at para. 52:

> . . . when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement: see Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*(1880), at pp. 338-42; *Sioui*, *supra*, at p. 1068; *Report of the Aboriginal Justice Inquiry of Manitoba* (1991); Jean Friesen, *Grant me Wherewith to Make my Living* (1985). The treaties were drafted in

> English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. [Emphasis added.]

Oft quoted sentence/

"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 Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty (*Sioui*, *supra*, at p. 1049), the completeness of any written record (the use, e.g., of context and implied terms to make honourable sense of the treaty arrangement: *Simon v. The Queen*, 1985 CanLII 11 (SCC), [1985] 2 S.C.R. 387, and *R. v. Sundown*, 1999 CanLII 673 (SCC), [1999] 1 S.C.R. 393), and the interpretation of treaty terms once found to exist (*Badger*). The bottom line is the Court's obligation is 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 (emphasis added)). In *Taylor and Williams*, *supra*, the Crown conceded that points of oral agreement recorded in contemporaneous minutes were included in the treaty (p. 230) and the court concluded that their effect was to "preserve the historic right of these Indians to hunt and fish on Crown lands" (p. 236). The historical record in the present case is admittedly less clear-cut, and there is no parallel concession by the Crown.

Key principles

Search for the common intention of the parties.

The 1752 Mi'kmaq Treaty

15 In 1749, following one of the continuing wars between Britain and France, the British Governor at Halifax had issued what was apparently the first of the Proclamations "authorizing the military and all British subjects to kill or capture any Mi'kmaq found, and offering a reward". This prompted what the Crown's expert witness at trial referred to as a "British-Mi'kmaq war". By 1751 relations had eased to the point where the 1749 Proclamation was revoked, and in November 1752 the Shubenacadie Mi'kmaq entered into the 1752 Treaty which was the

Cornwallis statute in Halifax.

subject of this Court's decision in *Simon*. This treaty stated in Article 4 that:

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

16 It will be noted that unlike the March 10, 1760 document, the earlier 1752 Treaty contains both a treaty right to hunt and fish "as usual" as well as a more elaborate trade clause. The appellant here initially relied on the 1752 Treaty as the source of his treaty entitlement. In *Simon*, Dickson C.J., at p. 404, concluded that on the basis of the evidence adduced in that case, "[t]he Crown has failed to prove that the Treaty of 1752 was terminated by subsequent hostilities" and left the termination issue open (at pp. 406-7). The Crown led more detailed evidence of hostilities in this case. It appears that while the British had hoped that by entering the 1752 Treaty other Mi'kmaq communities would come forward to make peace, skirmishing commenced again in 1753 with the Mi'kmaq. France and Britain themselves went to war in 1754 in North America. In 1756, as stated, another Proclamation was issued by the British authorizing the killing and capturing of Mi'kmaq throughout Nova Scotia. According to the trial judge, at para. 63, during the 1750s the "French were relying on Mi'kmaq assistance in almost every aspect of their military plans including scouting and reconnaissance, and guarding the Cape Breton coast line". This evidence apparently persuaded the appellant at trial to abandon his reliance on the 1752 Peace and Friendship Treaty. The Court is thus not called upon to consider the 1752 Treaty in the present appeal.

17 It should be pointed out that the Mi'kmaq were a considerable fighting force in the 18th century. Not only were their raiding parties effective on land, Mi'kmaq were accomplished sailors. Dr. William Wicken, for the defence, spoke of "the Maritime coastal adaptation of the Micmac":

> There are fishing people who live along the coastline who encounter countless fishermen, traders, on a regular basis off their coastline.

The Mi'kmaq, according to the evidence, had seized in the order of 100 European sailing vessels in the years prior to 1760. There are recorded Mi'kmaq sailings in the 18th century between Nova Scotia, St. Pierre and Miquelon and Newfoundland. They were not people to be trifled with. However, by 1760, the British and Mi'kmaq had a mutual self-interest in terminating hostilities and establishing the basis for a stable peace.

Findings of Fact by the Trial Judge

18 The appellant admitted that he did what he was alleged to have done on August 24, 1993. The only contentious issues arose on the historical record and with respect to the conclusions and inferences drawn by Embree Prov. Ct. J. from the documents, as explained by the expert witnesses. The permissible scope of appellate review in these circumstances was outlined by Lamer C.J. in *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507, at para. 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".

19 In the present case, the trial judge, after a careful and detailed review of the evidence, concluded at para. 116:

> 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.]

The trial judge's framing of the treaty right.

The treaty document of March 10, 1760 sets out a restrictive covenant and does not say anything about a positive Mi'kmaq right to trade. In fact, the written document does not set out any Mi'kmaq rights at all, merely Mi'kmaq "promises" and the Governor's acceptance. I cannot reconcile the trial judge's conclusion, at para. 116, that the treaties "gave the Mi'kmaq the right to bring the products of their hunting, fishing and gathering to a truckhouse to trade", with his conclusion at para. 112 that:

> The written treaties with the Mi'kmaq in 1760 and 1761 which are before me contain, and fairly represent, all the promises made and all the terms and conditions mutually agreed to.

It was, after all, the aboriginal leaders who asked for truckhouses "for the furnishing them with necessaries, in Exchange for their Peltry" in response to the Governor's inquiry "Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this Time". It cannot be supposed that the Mi'kmaq raised the subject of trade concessions merely for the purpose of subjecting themselves to a trade restriction. As the Crown acknowledges in its factum, "The restrictive nature of the truckhouse clause was British in origin". 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. (See *Badger*, at para. 41, and *Sioui*, at p. 1036.) The need to give balanced weight to the aboriginal

Justice Binnie concluded that the trial judge failed to give sufficient weight to the concerns and perspective of the Mi'kmaq.

perspective is equally applied in aboriginal rights cases: *Van der Peet*, at paras. 49-50; *Delgamuukw*, at para. 81.

20 While the trial judge drew positive implications from the negative trade clause (reversed on this point by the Court of Appeal), such limited relief is inadequate where the British-drafted treaty document does not accord with the British-drafted minutes of the negotiating sessions and more favourable terms are evident from the other documents and evidence the trial judge regarded as reliable. Such an overly deferential attitude to the March 10, 1760 document was inconsistent with a proper recognition of the difficulties of proof confronted by aboriginal people, a principle emphasized in the treaty context by *Simon*, at p. 408, and *Badger*, at para. 4, and in the aboriginal rights context in *Van der Peet*, at para. 68, and *Delgamuukw*, at paras. 80-82. The trial judge interrogated himself on the scope of the March 10, 1760 text. He thus asked himself the wrong question. His narrow view of what constituted "the treaty" led to the equally narrow legal conclusion that the Mi'kmaq trading entitlement, such as it was, terminated in the 1780s. Had the trial judge not given undue weight to the March 10, 1760 document, his conclusions might have been very different.

21 The Court of Appeal, with respect, compounded the errors of law. It not only read the Mi'kmaq "right", such as it was, out of the trial judgment, it also took the view, at p. 204, that the principles of interpretation of Indian treaties developed in connection with land cessions are of "limited specific assistance" to treaties of peace and friendship where "the significant 'commodity' exchanged was mutual promises of peace". While it is true that there is no applicable land cession treaty in Nova Scotia, it is also true that the Mi'kmaq were largely dispossessed of their lands in any event, and (as elsewhere) assigned to reserves to accommodate the wave of European settlement which the Treaty of 1760 was designed to facilitate. It seems harsh to put aboriginal people in a worse legal position where land has been taken without their formal cession than where they have agreed to terms of cession. A deal is a deal. The same rules of interpretation should apply. If, as I believe, the courts below erred as a matter of law in these respects, it is open to an

appellate court to correct the errors in an appeal under s. 830 of the *Criminal Code*, R.S.C., 1985, c. C-46.

The 1760 Negotiations

22 I propose to review briefly the documentary record to emphasize and amplify certain aspects of the trial judge's findings. He accepted in general the evidence of the Crown's only expert witness, Dr. Stephen Patterson, a Professor of History at the University of New Brunswick, who testified at length about what the trial judge referred to (at para. 116) as British encouragement of the Mi'kmaq "hunting, fishing and gathering lifestyle". That evidence puts the trade clause in context, and answers the question whether there was something more to the treaty entitlement than merely the right to bring fish and wildlife to truckhouses.

(i) *The Documentary Record*

23 I take the following points from the matters particularly emphasized by the trial judge at para. 90 following his thorough review of the historical background:

> 1. The 1760-61 treaties were the culmination of more than a decade of intermittent hostilities between the British and the Mi'kmaq. Hostilities with the French were also prevalent in Nova Scotia throughout the 1750's, and the Mi'kmaq were constantly allied with the French against the British.
>
> 2. The use of firearms for hunting had an important impact on Mi'kmaq society. The Mi'kmaq remained dependant on others for gun powder and the primary sources of that were the French, Acadians and the British.
>
> 3. The French frequently supplied the Mi'kmaq with food and European trade goods. By the mid-18th century, the Mi'kmaq were accustomed to, and in some cases relied on, receiving various European trade goods [including shot, gun powder, metal tools, clothing cloth, blankets and many other things].

. . .

> 6. The British wanted peace and a safe environment for their current and future settlers. Despite their recent victories, they did not feel completely secure in Nova Scotia.

24 Shortly after the fall of Louisbourg in June 1758, the British commander sent emissaries to the Mi'kmaq, through the French missionary, Father Maillard (who served as translator at the subsequent negotiations), holding out an offer of the enjoyment of peace, liberty, property, possessions and religion:

> . . . my Reverend Father, It is necessary that I make known to you that your Capital Quebec has fallen to the arms of the King, my master, your armies are in flight, thus if you and your people are so reckless to continue [this war] without justification, it is certain that you will perish by starvation since you have no other assistance.
>
> So you, My Reverend Father, would do well to accept the olive branches that I send to you and to put me in possession of the vessels that your people took from me and return them all to me, I am commanded to assure you by His Majesty that you will enjoy all your possessions, your liberty, property with the free exercise of your religion as you can see by the declaration that I have the honour of sending you. [Emphasis added.]

25 In the harsh winter of 1759-1760, so many Mi'kmaq turned up at Louisbourg seeking sustenance that the British Commander expressed concern that unless their demand for necessaries was met, they would become "very Troublesome" and "entirely putt a Stop to any Settling or fishing all along the Coast" or indeed "the Settlement of Nova Scotia" generally. This is stated in the dispatch from the Governor at Louisbourg, Brigadier-General Edward Whitmore to General Jeffrey Amherst, based in New York, who commanded the British forces in North America:

> I acquainted you in some of my Letters in December [1759] and January [1760] last that the Indians were Come in, and that they had agreed to live with us upon a footing of Friendship. Accordingly Several of their Chiefs came in here and articles were agreed on and Signed by Them and Me in Form. On which Occassion as They pleaded they were Naked and Starving I Cloathed Them and gave Them Some Presents of Provisions etc. Afterwards Several Others came in to whom I was Obliged to do the like. And at this time the Chief of the Island is here who beside some Cloathing makes a demand of Powder, Shott, and Arms for four men, which if I would Remain in Peace with Them I find I must Comply with. They Say the French always Supplyed Them with these Things and They expect that we will do the Same. I can fore See that this will be a Constant annual Expence, and therefore I should be glad to have Your Directions both for my own Satisfaction and as a Rule to whoever may be left to Command here when I am Called away. Its Certain unless They are keep'd Quiet They might be very Troublesome to this Town with only a Small Garrison in it, and would entirely putt a Stop to any Settling or fishing all along the Coast, and which is yet of greater Consequence might much disturb and hinder the Settlement of Nova Scotia as They are so near to the back Settlements of that Province.
>
> (Dispatch dated November 14, 1760.)

It is apparent that the British saw the Mi'kmaq trade issue in terms of peace, as the Crown expert Dr. Stephen Patterson testified, "people who trade together do not fight, that was the theory". Peace was bound up with the ability of the Mi'kmaq people to sustain themselves economically. Starvation breeds discontent. The British certainly did not want the Mi'kmaq to become an unnecessary drain on the public purse of the colony of Nova Scotia or of the Imperial purse in London, as the trial judge found. To avoid such a result, it became necessary to protect the traditional Mi'kmaq economy, including hunting, gathering and fishing. A comparable policy was pursued at a later date on the west coast where, as Dickson J. commented in *Jack v. The Queen*, 1979 CanLII 175 (SCC), [1980] 1 S.C.R. 294, at p. 311:

> What is plain from the pre-Confederation period is that the Indian fishermen were encouraged to engage in their occupation and to do so for both food and barter purposes.

The same strategy of economic aboriginal self-sufficiency was pursued across the prairies in terms of hunting: see *R. v. Horseman*, 1990 CanLII 96 (SCC), [1990] 1 S.C.R. 901, *per* Wilson J., at p. 919, and Cory J., at p. 928.

26 The trial judge concluded that in 1760 the British Crown entered into a series of negotiations with communities of first nations spread across what is now Nova Scotia and New Brunswick. These treaties were essentially "adhesions" by different Mi'kmaq communities to identical terms because, as stated, it was contemplated that they would be consolidated in a more comprehensive and all-inclusive document at a later date, which never happened. The trial judge considered that the key negotiations took place not with the Mi'kmaq people directly, but with the St. John River Indians, part of the Maliseet First Nation, and the Passamaquody First Nation, who lived in present-day New Brunswick.

The most detailed treaty negotiations were actually with the Maliseet and Passamaquody, not the Mi'kmaq.

27 The trial judge found as a fact, at para. 108, that the relevant Mi'kmaq treaty did "make peace upon the same conditions" (emphasis added) as the Maliseet and Passamaquody. Meetings took place between the Crown and the Maliseet and the Passamaquody on February 11, 1760, twelve days before these bands signed their treaty with the British and eighteen days prior to the meeting between the Governor and the Mi'kmaq representatives, Paul Laurent of LaHave and Michel Augustine of the Richibucto region, where the terms of the Maliseet and Passamaquody treaties were "communicated" and accepted.

28 The trial judge found (at para. 101) that on February 29, 1760, at a meeting between the Governor in Council and the Mi'kmaq chiefs, the following exchange occurred:

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

Governor Lawrence afterwards confirmed, in his May 11, 1760 report to the Board of Trade, that he had treated with the Mi'kmaq Indians on "the same terms".

29 The genesis of the Mi'kmaq trade clause is therefore found in the Governor's earlier negotiations with the Maliseet and Passamaquody First Nations. In that regard, the appellant places great reliance on a meeting between the Governor and their chiefs on February 11, 1760 for the purpose of reviewing various aspects of the proposed treaty. The following exchange is recorded in contemporaneous minutes of the meeting prepared by the British Governor's Secretary:

> His Excellency then demanded of them, Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this time. To which they replied that their Tribes had not directed them to propose any thing further than that there might be a Truckhouse established, for the furnishing them with necessaries, in Exchange for their Peltry, and that it might, at present, be at Fort Frederick.
>
> Upon which His Excellency acquainted them that in case of their now executing a Treaty in the manner proposed, and its being ratified at the next General Meeting of their Tribes the next Spring, a Truckhouse should be established at Fort Frederick, agreable to their desire, and likewise at other Places if it should be found necessary, for furnishing them with such Commodities as shall be necessary for them, in Exchange for their Peltry & and that great care should be taken, that the Commerce at the said Truckhouses should be managed by Persons on whose Justice and good Treatment, they might always depend; and that it would be expected that the said Tribes should not Trafic or Barter and Exchange any Commodities at any other Place, nor with any other Persons. Of all which the Chiefs expressed their entire Approbation. [Emphasis added.]

30 It is true, as my colleague points out at para. 97, that the British made it clear from the outset that the Mi'kmaq were not to have any commerce with "any of His Majesty's Enemies". A Treaty of Peace and Friendship could not be otherwise. The subject of trading with the British government as distinguished from British settlers, however, did not arise

until after the Indians had first requested truckhouses. The limitation to government trade came as a response to the request for truckhouses, not the other way around.

31 At a meeting of the Governor's Council on February 16, 1760 (less than a week later), the Council and the representatives of the Indians proceeded to settle the prices of various articles of merchandise including beaver, marten, otter, mink, fox, moose, deer, ermine and bird feathers, etc. Prices of "necessaries" for purchase at the truckhouse were also agreed, e.g., one pound of spring beaver could purchase 30 pounds of flour or 14 pounds of pork. The British took a liberal view of "necessaries". Two gallons of rum cost one pound of spring beaver pelts. The oral agreement on a price list was reflected in an Order in Council dated February 23, 1760, which provided "[t]hat the Prizes of all other kinds of Merchandize not mention'd herein be Regulated according to the Rates of the Foregoing articles". At trial the Crown expert and the defence experts agreed that fish could be among the items that the Mi'kmaq would trade.

32 In furtherance of this trade arrangement, the British established six truckhouses following the signing of the treaties in 1760 and 1761, including Chignecto, Lunenburg, St. John, Windsor, Annapolis and "the Eastern Battery" along the coast from Halifax. The existence of advantageous terms at the truckhouses was part of an imperial peace strategy. As Governor Lawrence wrote to the Board of Trade on May 11, 1760, "the greatest advantage from this [trade] Article . . . is the friendship of these Indians". The British were concerned that matters might again become "troublesome" if the Mi'kmaq were subjected to the "pernicious practices" of "unscrupulous traders". The cost to the public purse of Nova Scotia of supporting Mi'kmaq trade was an investment in peace and the promotion of ongoing colonial settlement. The strategy would be effective only if the Mi'kmaq had access *both* to trade *and* to the fish and wildlife resources necessary to provide them with something to trade.

33 Accordingly, on March 21, 1760, the Nova Scotia House of Assembly passed *An Act to prevent any private Trade or Commerce with the Indians*, 34 Geo. II, c. 11. In July 1761, however, the "Lords of Trade and Plantation" (the Board of Trade) in London objected and the King disallowed the Act as a restraint on trade that disadvantaged British merchants. This coincided with exposure of venality by the local truckhouse merchants. As Dr. Patterson testified:

> . . . the first Indian commissary, Halifax merchant, Benjamin Garrish, managed the system so that it was the Government which lost money while he profited usuriously.

34 By 1762, Garrish was removed and the number of truckhouses was reduced to three. By 1764, the system itself was replaced by the impartial licensing of private traders approved by the London Board of Trade's "Plan for the Future Management of Indian Affairs", but that eventually died out as well, as mentioned earlier.

35 In my view, all of this evidence, reflected in the trial judgment, demonstrates the inadequacy and incompleteness of the written memorial of the treaty terms by selectively isolating the restrictive trade covenant. Indeed, the truckhouse system offered such advantageous terms that it hardly seems likely that Mi'kmaq traders had to be compelled to buy at lower prices and sell at higher prices. At a later date, they objected when truckhouses were abandoned. The trade clause would not have advanced British objectives (peaceful relations with a self-sufficient Mi'kmaq people) or Mi'kmaq objectives (access to the European "necessaries" on which they had come to rely) unless the Mi'kmaq were assured at the same time of continuing access, implicitly or explicitly, to wildlife to trade. This was confirmed by the expert historian called by the Crown, as set out below.

The written text was inadequate and incomplete.

(ii) *The Expert Evidence*

36 The courts have attracted a certain amount of criticism from professional historians for what these historians see as an occasional tendency on the part of judges to assemble a "cut and paste" version of history: G. M. Dickinson and R. D. Gidney, "History and Advocacy: Some Reflections on the Historian's Role in Litigation", *Canadian Historical Review*, LXVIII (1987), 576; D. J. Bourgeois, "The Role of the Historian in the Litigation Process", *Canadian Historical Review*, LXVII (1986), 195; R. Fisher, "Judging History: Reflections on the Reasons for Judgment in *Delgamuukw v. B.C.*", *B.C. Studies*, XCV (1992), 43; A. J. Ray, "Creating the Image of the Savage in Defence of the Crown: The Ethnohistorian in Court", *Native Studies Review*, VI (1990), 13.

37 While the tone of some of this criticism strikes the non-professional historian as intemperate, the basic objection, as I understand it, is that the judicial selection of facts and quotations is not always up to the standard demanded of the professional historian, which is said to be more nuanced. Experts, it is argued, are trained to read the various historical records together with the benefit of a protracted study of the period, and an appreciation of the frailties of the various sources. The law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can. In this particular case, however, there was an unusual level of agreement amongst all of the professional historians who testified about the underlying expectations of the participants regarding the treaty obligations entered into by the Crown with the Mi'kmaq. I set out, in particular, the evidence of the Crown's expert, Dr. Stephen Patterson, who spent many days of testimony reviewing the minutiae of the historical record. While he generally supported the Crown's narrow approach to the interpretation of the Treaty, which I have rejected on points of law, he did make a number of important concessions to the defence in a relatively lengthy and reflective statement which should be set out in full:

Justice Binnie replies to criticism from historians.

Q. I guess it's fair to say that the British would have understood that the Micmac lived and survived by hunting and fishing and gathering activities.

A. Yes, of course.

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

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

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

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

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

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

Q. Yes.

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

It seems to me that that's implicit in the thing. Even though it doesn't say it, and I know that there seems to, in the 20th century, be some reluctance to see the value of the 1760 and 1761 treaties because they're not so explicit on these matters, but I personally don't see the

hang-up. Because it strikes me that there is a recognition that the Micmac are a people and they have the right to exist. And that has – carries certain implications with it.

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

Q. And you have, in fact, said that in your May 17th, 1994 draft article.

A. That's correct.

Q. Yeah. And you testified to that effect in the *Pelletier* case, as well.

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

38 The trial judge gave effect to this evidence in finding a *right* to bring fish to the truckhouse to trade, but he declined to find a treaty right to fish and hunt to obtain the wherewithal to trade, and concluded that the right to trade expired along with the truckhouses and subsequent special arrangements. The Court of Appeal concluded, at p. 207, that Dr. Patterson used the word "right" interchangeably with the word "permissible", and that the trade clause gave rise to no "rights" at all. I think the view taken by the courts below rather underestimates Dr. Patterson. No reason is given for doubting that Dr. Patterson meant what he said about the common understanding of the parties that he considered at least implicit in this particular treaty arrangement. He initially uses the words "permissible" and "assumption", but when asked specifically by counsel about a "right" to fish and to trade fish, he says, "Ah, a *right*" (emphasis added), then, weighing his words carefully, he addresses a "right to fish" and concludes that "by treaty" the British did recognize that the Mi'kmaq "had a right to live in Nova Scotia in their traditional ways" (emphasis added) which included hunting and fishing and trading their catch for necessaries. (Trading was traditional. The trial judge found, at para. 93, that the Mi'kmaq had already been trading with Europeans, including French and Portugese fishermen, for about 250 years prior to the

making of this treaty.) Dr. Patterson said his opinion was based on the historic documents produced in evidence. He said that this was "the position that I come to accept as being a reasonable interpretation of what is here in these documents" (emphasis added). Dr. Patterson went on to emphasize that the understanding of the Mi'kmaq would have been that these treaty rights were subject to regulation, which I accept.

39 Dr. Patterson's evidence regarding the assumptions underlying and "implicit" in the treaty were generally agreed with by the defence experts, Dr. John Reid and Dr. William Wicken. While the trial judge was not bound to accept the whole or any particular part of Dr. Patterson's evidence, even if supported by the other experts, I do not think there was any basis in the evidence for the trial judge to find (at para. 129) that the appellant's claim, to the extent it tracked Dr. Patterson's evidence, was "not even among the 'various possible interpretations of the common intention'" of the parties when they entered into the 1760 Treaty. Lamer J. in *Sioui*, *supra*, at p. 1069, it will be recalled, said it was the Court's duty to search amongst such reasonable interpretations for the one that best accommodates the interests of the parties at the time the treaty was signed. The trial judge erred, I think, because he thought he was boxed in by the March 10, 1760 document.

The court needs to search for the common intention of the parties--the trial judge was tied too closely to the written text.

40 In my view, the Nova Scotia judgments erred in concluding that the only enforceable treaty obligations were those set out in the written document of March 10, 1760, whether construed flexibly (as did the trial judge) or narrowly (as did the Nova Scotia Court of Appeal). The findings of fact made by the trial judge taken as a whole demonstrate that the concept of a disappearing treaty right does justice neither to the honour of the Crown nor to the reasonable expectations of the Mi'kmaq people. It is their common intention in 1760 – not just the terms of the March 10, 1760 document – to which effect must be given.

Justice Binnie invoked the honour of the Crown to conclude that, in contrast to the trial judge and Justice McLachlin, that the treaty right didn't vanish.

Ascertaining the Terms of the Treaty

41 Having concluded that the written text is incomplete, it is necessary to ascertain the treaty terms not only by reference to the fragmentary historical record, as interpreted by the expert historians, but also in light of the stated objectives of the British and Mi'kmaq in 1760 and the political and economic context in which those objectives were reconciled.

42 I mentioned earlier that the Nova Scotia Court of Appeal has held on several occasions that the "peace and friendship" treaties with the Mi'kmaq did not extinguish aboriginal hunting and fishing rights in Nova Scotia: *R. v. Isaac* (1975), 13 N.S.R. (2d) 460, *R. v. Cope* (1981), 1981 CanLII 2722 (NS CA), 132 D.L.R. (3d) 36, *Denny*, *supra*. We are not here concerned with the exercise of such a right. The appellant asserts the right of Mi'kmaq people to catch fish and wildlife in support of trade as an alternative or supplementary method of obtaining necessaries. The right to fish is not mentioned in the March 10, 1760 document, nor is it expressly noted elsewhere in the records of the negotiation put in evidence. This is not surprising. As Dickson J. mentioned with reference to the west coast in *Jack*, *supra*, at p. 311, in colonial times the perception of the fishery resource was one of "limitless proportions".

43 The law has long recognized that parties make assumptions when they enter into agreements about certain things that give their arrangements efficacy. Courts will imply a contractual term on the basis of presumed intentions of the parties where it is necessary to assure the efficacy of the contract, e.g., where it meets the "officious bystander test": *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, 1999 CanLII 677 (SCC), [1999] 1 S.C.R. 619, at para. 30. (See also: *The "Moorcock"* (1889), 14 P.D. 64; *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 S.C.R. 711; and see generally: Waddams, *supra*, at para. 490; Treitel, *supra*, at pp. 190-94.) Here, if the ubiquitous officious bystander had said, "This talk about truckhouses is all very well, but if the Mi'kmaq are to make these

Principles from contract law.

promises, will they have the right to hunt and fish to catch something to trade at the truckhouses?", the answer would have to be, having regard to the honour of the Crown, "of course". If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations. The honour of the Crown was, in fact, specifically invoked by courts in the early 17th century to ensure that a Crown grant was effective to accomplish its intended purpose: *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, at p. 67b and p. 1026, and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555, at p. 56b and pp. 557-58.

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 (at p. 1031) 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. [Emphasis added.]

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

Implied rights are necessary to ensure the meaningful exercise of the right, e.g. right to access, carry a gun, build a cabin, etc.

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.

Rights of the Other Inhabitants

45 My colleague, McLachlin J., takes the view that, subject to the negative restriction in the treaty, the Mi'kmaq possessed only the liberty to hunt, fish, gather and trade "enjoyed by other British subjects in the region" (para. 103). The Mi'kmaq were, in effect, "citizens minus" with no greater liberties but with greater restrictions. I accept that in terms of the *content* of the hunting, fishing and gathering activities, this may be true. There is of course a distinction to be made between a liberty enjoyed by all citizens and a right conferred by a specific legal authority, such as a treaty, to participate in the same activity. Even if this distinction is ignored, it is still true that a general right enjoyed by all citizens can nevertheless be made the subject of an enforceable treaty promise. In *Taylor and Williams*, *supra*, at p. 235, the treaty was found to include a term that "[t]he Rivers are open to all & you have an equal right to fish & hunt on them", and yet, despite the reference to equal rather than preferential rights, "the historic right of these Indians to hunt and fish" was found to be incorporated in the treaty, *per* MacKinnon A.C.J.O., at p. 236.

Citizens plus or citizens minus?

46 Similarly, in *Sioui*, at p. 1031, as mentioned above, the treaty provided that the Hurons would be "received upon the *same terms* with the Canadians" (emphasis added), yet their religious freedom, which in terms of content was no greater than that of the non-aboriginal inhabitants in 1760, was in 1990 accorded treaty protection.

47 The Crown objects strongly to any suggestion that the treaty conferred "*preferential* trading rights". I do not think the appellant needs to show *preferential* trading rights. He only has to show *treaty* trading rights. The settlers and the military undoubtedly hunted and fished for sport or necessaries as well, and traded goods with each other. The issue here is not so much the content of the rights or liberties as the level of legal

protection thrown around them. A treaty could, to take a fanciful example, provide for a right of the Mi'kmaq to promenade down Barrington Street, Halifax, on each anniversary of the treaty. Barrington Street is a common thoroughfare enjoyed by all. There would be nothing "special" about the Mi'kmaq use of a common right of way. The point is that the treaty rights-holder not only has the *right* or liberty "enjoyed by other British subjects" but may enjoy special treaty *protection*against interference with its exercise. So it is with the trading arrangement. On June 25, 1761, following the signing of the Treaties of 1760-61 by the last group of Mi'kmaq villages, a ceremony was held at the farm of Lieutenant Governor Jonathan Belcher, the first Chief Justice of Nova Scotia, who was acting in the place of Governor Charles Lawrence, who had recently been drowned on his way to Boston. In reference to the treaties, including the trade clause, Lieutenant Governor Belcher proclaimed:

> The Laws will be like a great Hedge about your Rights and properties, if any break this Hedge to hurt and injure you, the heavy weight of the Laws will fall upon them and punish their Disobedience.

48 Until enactment of the *Constitution Act, 1982*, the treaty rights of aboriginal peoples could be overridden by competent legislation as easily as could the rights and liberties of other inhabitants. The hedge offered no special protection, as the aboriginal people learned in earlier hunting cases such as*Sikyea v. The Queen*, 1964 CanLII 62 (SCC), [1964] S.C.R. 642, and *R. v. George*, 1966 CanLII 2 (SCC), [1966] S.C.R. 267. On April 17, 1982, however, this particular type of "hedge" was converted by s. 35(1) into sterner stuff that could only be broken down when justified according to the test laid down in *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075, at pp. 1112 *et seq.*, as adapted to apply to treaties in *Badger*, *supra*, *per* Cory J., at paras. 75 *et seq.* See also *R. v. Bombay*, [1993] 1 C.N.L.R. 92 (Ont. C.A.). The fact the *content* of Mi'kmaq rights under the treaty to hunt and fish and trade was no greater than those enjoyed by other inhabitants does not, unless those rights were extinguished prior to April 17, 1982, detract from the higher *protection*they presently offer to the Mi'kmaq people.

S. 35 acts as shield or a protection for rights.

The Honour of the Crown

49 This appeal puts to the test the principle, emphasized by this Court on several occasions, that the honour of the Crown is always at stake in its dealings with aboriginal people. This is one of the principles of interpretation set forth in *Badger*, *supra*, by Cory J., at para. 41:

> . . . the honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.

50 This principle that the Crown's honour is at stake when the Crown enters into treaties with first nations dates back at least to this Court's decision in 1895, *Province of Ontario v. Dominion of Canada and Province of Quebec; In re Indian Claims* (1895), 1895 CanLII 112 (SCC), 25 S.C.R. 434. In that decision, Gwynne J. (dissenting) stated, at pp. 511-12:

> . . . what is contended for and must not be lost sight of, is that the British sovereigns, ever since the acquisition of Canada, have been pleased to adopt the rule or practice of entering into agreements with the Indian nations or tribes in their province of Canada, for the cession or surrender by them of what such sovereigns have been pleased to designate the Indian title, by instruments similar to these now under consideration to which they have been pleased to give the designation of "treaties" with the Indians in possession of and claiming title to the lands expressed to be surrendered by the instruments, and further that the terms and conditions expressed in those instruments as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which with the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown. [Emphasis added.]

See also *Ontario Mining Co. v. Seybold* (1901), 1901 CanLII 80 (SCC), 32 S.C.R. 1, at p. 2.

51 In more recent times, as mentioned, the principle that the honour of the Crown is always at stake was asserted by the Ontario Court of Appeal in *Taylor and Williams*, *supra*. In that case, as here, the issue was to determine the actual terms of a treaty, whose terms were partly oral and partly written. MacKinnon A.C.J.O. said for the court, at pp. 235-36:

> The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of "sharp dealing" should be sanctioned. Mr. Justice Cartwright emphasized this in his dissenting reasons in *R. v. George*, . . . 1966 CanLII 2 (SCC), [1966] S.C.R. 267 at p. 279, where he said:
>
> > We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such a manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.
>
> Further, if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible: *R. v. White and Bob* (1964), 1964 CanLII 452 (BC CA), 50 D.L.R. (2d) 613 at p. 652 . . . (B.C.C.A.); affirmed . . . [1965] S.C.R. vi. . . .

This statement by MacKinnon A.C.J.O. (who had acted as counsel for the native person convicted of hunting offences in *George*, *supra*) has been adopted subsequently in numerous cases, including decisions of this Court in *Badger*, *supra*, para. 41, and *Sparrow*, *supra*, at pp. 1107-8.

52 I do not think an interpretation of events that turns a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant is consistent

with the honour and integrity of the Crown. Nor is it consistent to conclude that the Lieutenant Governor, seeking in good faith to address the trade demands of the Mi'kmaq, accepted the Mi'kmaq suggestion of a trading facility while denying any treaty protection to Mi'kmaq access to the things that were to be traded, even though these things were identified and priced in the treaty negotiations. This was not a commercial contract. The trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown. In my view, with respect, the interpretation adopted by the courts below left the Mi'kmaq with an empty shell of a treaty promise.

Contradictory Interpretations of the Truckhouse Clause

53 The appellant argues that the Crown has been in breach of the treaty since 1762, when the truckhouses were terminated, or at least since the 1780s when the replacement system of licensed traders was abandoned. This argument suffers from the same quality of unreasonableness as does the Crown's argument that the treaty left the Mi'kmaq with nothing more than a negative covenant. It was established in *Simon*, *supra*, at p. 402, that treaty provisions should be interpreted "in a flexible way that is sensitive to the evolution of changes in normal" practice, and *Sundown*, *supra*, at para. 32, confirms that courts should not use a "frozen-in-time" approach to treaty rights. The appellant cannot, with any show of logic, claim to exercise his treaty rights using an outboard motor while at the same time insist on restoration of the peculiar 18th century institution known as truckhouses.

interpret treaty provisions flexibly--they aren't frozen in time.

54 The Crown, on the other hand, argues that the truckhouse was a time-limited response to a temporary problem. As my colleague McLachlin J. sets out at para. 96, the "core" of the treaty was said to be that "[t]he Mi'kmaq agreed to forgo their trading autonomy and the general trading rights they possessed as British subjects, and to abide by the treaty trade regime. The British, in exchange, undertook to provide the Mi'kmaq with stable trading outlets where European goods were provided at

favourable terms while the exclusive trade regime existed". My disagreement with that view, with respect, is that the aboriginal people, as found by the trial judge, relied on European powder, shot and other goods and pushed a trade agenda with the British because their alternative sources of supply had dried up; the real inhibition on trade with the French was not the treaty but the absence of the French, whose military had retreated up the St. Lawrence and whose settlers had been expelled; there is no suggestion in the negotiating records that the truckhouse system was a sort of transitional arrangement expected to be temporary, it only became temporary because the King unexpectedly disallowed the enabling legislation passed by the Nova Scotia House of Assembly; and the notion that the truckhouse was merely a response to a trade restriction overlooks the fact the truckhouse system offered very considerable financial benefits to the Mi'kmaq which they would have wanted to exploit, restriction or no restriction. The promise of access to "necessaries" through trade in wildlife was the key point, and where a right has been granted, there must be more than a mere disappearance of the mechanism created to facilitate the exercise of the right to warrant the conclusion that the right itself is spent or extinguished.

55 The Crown further argues that the treaty rights, if they exist at all, were "subject to regulation, *ab initio*". The effect, it is argued, is that no *Badger* justification would be required. The Crown's attempt to distinguish *Badger* is not persuasive. *Badger* dealt with treaty rights which were specifically expressed in the treaty (at para. 31) to be "subject to such regulations as may from time to time be made by the Government of the country". Yet the Court concluded that a *Sparrow*-type justification was required.

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.

Justice Binnie's characterization of the treaty right.

The Limited Scope of the Treaty Right

57 The Crown expresses the concern that recognition of the existence of a constitutionally entrenched right with, as here, a trading aspect, would open the floodgates to uncontrollable and excessive exploitation of the natural resources. Whereas hunting and fishing for food naturally restricts quantities to the needs and appetites of those entitled to share in the harvest, it is argued that there is no comparable, built-in restriction associated with a trading right, short of the paramount need to conserve the resource. The Court has already addressed this issue in *R. v. Gladstone*, 1996 CanLII 160 (SCC), [1996] 2 S.C.R. 723, *per* Lamer C.J., at paras. 57-63, L'Heureux-Dubé J., at para. 137, and McLachlin J., at para. 164; *Van der Peet*, *supra*, *per* L'Heureux-Dubé J., at para. 192, and *per* McLachlin J., at para. 279; *R. v. N.T.C. Smokehouse Ltd.*, 1996 CanLII 159 (SCC), [1996] 2 S.C.R. 672, *per* L'Heureux-Dubé J., at para. 47; and *Horseman*, *supra*, *per* Wilson J., at p. 908, and Cory J., at pp. 928-29. The ultimate fear is that the appellant, who in this case fished for eels from a small boat using a fyke net, could lever the treaty right into a factory trawler in Pomquet Harbour gathering the available harvest in preference to all non-aboriginal commercial or recreational fishermen. (This is indeed the position advanced by the intervener the Union of New Brunswick Indians.) This fear (or hope) is based on a misunderstanding of the narrow ambit and extent of the treaty right.

Characterizing the right to include an inherent limit in order to avoid a purely commercial right with priority over other harvesters.

58 The recorded note of February 11, 1760 was that "there might be a Truckhouse established, for the furnishing them with necessaries" (emphasis added). What is contemplated therefore is not a right to trade generally for economic gain, but rather a right to trade for necessaries. The treaty right is a regulated right and can be contained by regulation within its proper limits.

59 The concept of "necessaries" is today equivalent to the concept of what Lambert J.A., in *R. v. Van der Peet* (1993), 1993 CanLII 4519 (BC CA), 80 B.C.L.R. (2d) 75, at p. 126, described as a "moderate livelihood". Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike. A moderate livelihood includes such basics as "food,

A right to sell the products of hunting and fishing in order to obtain a moderate livelihood.

clothing and housing, supplemented by a few amenities", but not the accumulation of wealth (*Gladstone*, *supra*, at para. 165). It addresses day-to-day needs. This was the common intention in 1760. It is fair that it be given this interpretation today.

60 The distinction between a commercial right and a right to trade for necessaries or sustenance was discussed in *Gladstone*, *supra*, where Lamer C.J., speaking for the majority, held that the Heiltsuk of British Columbia have "an aboriginal right to sell herring spawn on kelp to an extent best described as commercial" (para. 28). This finding was based on the evidence that "tons" of the herring spawn on kelp was traded and that such trade was a central and defining feature of Heiltsuk society. McLachlin J., however, took a different view of the evidence, which she concluded supported a finding that the Heiltsuk derived only sustenance from the trade of the herring spawn on kelp. "Sustenance" provided a manageable limitation on what would otherwise be a free-standing commercial right. She wrote at para. 165:

> Despite the large quantities of herring spawn on kelp traditionally traded, the evidence does not indicate that the trade of herring spawn on kelp provided for the Heiltsuk anything more than basic sustenance. There is no evidence in this case that the Heiltsuk accumulated wealth which would exceed a sustenance lifestyle from the herring spawn on kelp fishery. [Emphasis added.]

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.

61 Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such regulations would *not* constitute an infringement that would have to be justified under the *Badger* standard.

Regulating the right in order to enforce the inherent limit, i.e. no more than a moderate livelihood is not an infringement.

Application to the Facts of this Case

62 The appellant is charged with three offences: the selling of eels without a licence, fishing without a licence and fishing during the close season with illegal nets. These acts took place at Pomquet Harbour, Antigonish County. For Marshall to have satisfied the regulations, he was required to secure a licence under either the *Fishery (General) Regulations*, SOR/93-53, the *Maritime Provinces Fishery Regulations*, SOR/93-55, or the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332.

63 All of these regulations place the issuance of licences within the absolute discretion of the Minister. Section 7(1) of the *Fisheries Act*, R.S.C., 1985, c. F-14, so provides:

> **7.** (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on. [Emphasis added.]

The *Maritime Provinces Fishery Regulations* provides that the Minister "may issue" a commercial fishing licence (s. 5). The *Aboriginal Communal Fishing Licences Regulations* state as well that the Minister "may issue" a communal licence to an aboriginal organization to carry on food fishing and related activities (s. 4). The licences described in the *Fishery (General) Regulations* are all discretionary as well, although none of those licences would have assisted the appellant in this situation.

64 Furthermore, there is nothing in these regulations which gives direction to the Minister to explain how she or he should exercise this discretionary authority in a manner which would respect the appellant's treaty rights. This Court has had the opportunity to review the effect of discretionary licensing schemes on aboriginal and treaty

rights: *Badger*, *supra*, *R. v. Nikal*, 1996 CanLII 245 (SCC), [1996] 1 S.C.R. 1013, *R. v. Adams*,1996 CanLII 169 (SCC), [1996] 3 S.C.R. 101, and *R. v. Côté*, 1996 CanLII 170 (SCC), [1996] 3 S.C.R. 139. The test for infringement under s. 35(1) of the *Constitution Act, 1982* was set out in *Sparrow*, *supra*, at p. 1112:

> To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

Lamer C.J. in *Adams*, *supra*, applied this test to licensing schemes and stated as follows at para. 54:

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test. [Emphasis added.]

An unstructured discretionary administrative regime may = an infringement of an Aboriginal/treaty right. In Aboriginal law this is referred to as the 'Adams point'

Cory J. in *Badger*, *supra*, at para. 79, found that the test for infringement under s. 35(1) of the *Constitution Act, 1982* was the same for both aboriginal and treaty rights, and thus the words of Lamer C.J. in *Adams*, although in relation to the infringement of aboriginal rights, are equally applicable here. There was nothing at that time which provided the Crown officials with the "sufficient directives" necessary to ensure that the appellant's treaty rights would be respected. To paraphrase *Adams*, at para. 51, under the applicable regulatory regime, the appellant's exercise of his treaty right to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Mi'kmaq treaty rights were not accommodated in the Regulations because, presumably, the Crown's

Test for infringement for aboriginal rights same as for treaty rights.

position was, and continues to be, that no such treaty rights existed. In the circumstances, the purported regulatory prohibitions against fishing without a licence (*Maritime Provinces Fishery Regulations*, s. 4(1)(*a*)) and of selling eels without a licence (*Fishery (General) Regulations*, s. 35(2)) do *prima facie* infringe the appellant's treaty rights under the Treaties of 1760-61 and are inoperative against the appellant unless justified under the *Badger* test.

The regulation resulted in a prima facie infringement of the treaty right.

65 Further, the appellant was charged with fishing during the close season with improper nets, contrary to s. 20 of the *Maritime Provinces Fishery Regulations*. Such a regulation is also a *prima facie* infringement, as noted by Cory J. in *Badger*, *supra*, at para. 90: "This Court has held on numerous occasions that there can be no limitation on the method, timing and extent of Indian hunting under a Treaty", apart, I would add, from a treaty limitation to that effect.

Unless it forms part of the right, any limitation on the method, timing or extent of exercising a treaty right is a prima facie infringement.

66 The appellant caught and sold the eels to support himself and his wife. Accordingly, the close season and the imposition of a discretionary licensing system would, if enforced, interfere with the appellant's treaty right to fish for trading purposes, and the ban on sales would, if enforced, infringe his right to trade for sustenance. In the absence of any justification of the regulatory prohibitions, the appellant is entitled to an acquittal.

Disposition

67 The constitutional question stated by the Chief Justice on February 9, 1998, as follows:

> Are the prohibitions on catching and retaining fish without a licence, on fishing during the close time, and on the unlicensed sale of fish, contained in ss. 4(1)(*a*) and 20 of the *Maritime Provinces Fishery Regulations* and s. 35(2) of the *Fishery (General) Regulations*, inconsistent with the treaty rights of the appellant contained in the Mi'kmaq Treaties of 1760-61 and therefore of no force or effect or application to him, by virtue of ss. 35(1) and 52 of the *Constitution Act, 1982*?

Appeal allowed.

should be answered in the affirmative. I would therefore allow the appeal and order an acquittal on all charges.

The reasons of Gonthier and McLachlin JJ. were delivered by

MCLACHLIN J. (dissenting) --

I. Introduction

68 The issue in this case is whether the appellant Marshall, a Mi'kmaq Indian, possesses a treaty right that exempts him from the federal fisheries legislation under which he was charged with fishing without a licence, fishing with a prohibited net during the closed period, and selling fish caught without a licence.

69 At trial, Marshall admitted that he caught and sold 463 pounds of eels without a licence and with a prohibited net within closed times. The only issue at trial was whether he possessed a treaty right to catch and sell fish that exempted him from compliance with the federal fisheries legislation and mandated his acquittal. The trial judge held that he did not. The Nova Scotia Court of Appeal dismissed his appeal. Marshall now appeals to this Court.

70 I conclude that the Treaties of 1760-61 created an exclusive trade and truckhouse regime which implicitly gave rise to a limited Mi'kmaq right to bring goods to British trade outlets so long as this regime was extant. The Treaties of 1760-61 granted neither a freestanding right to truckhouses nor a general underlying right to trade outside of the exclusive trade and truckhouse regime. The system of trade exclusivity and correlative British trading outlets died out in the 1780s and with it, the incidental right to bring goods to trade. There is therefore no existing right to trade in the Treaties of 1760-61 that exempts the appellant from the federal fisheries legislation. The charges against him stand.

The treaty right vanished with the truckhouse trading system in the 1780s.

II. Relevant Treaty and Constitutional Provisions

71 *Trade Clause in Treaties of 1760-61*

> 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 [insert location of closest truck house] or Elsewhere in Nova Scotia or Accadia.

Constitution Act, 1982

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

III. Judgments

72 The trial judge, Embree Prov. Ct. J., concluded ([1996] N.S.J. No. 246 (QL)) that the trade clause in the Treaties of 1760-61 imposed an obligation on the Mi'kmaq to trade only at English truckhouses or with licensed traders. The clause gave the Mi'kmaq a limited "right to bring" their trade goods (the products of their hunting, fishing and gathering lifestyle) to such outlets or traders to trade. The trial judge found that when the exclusive trade obligation and the system of truckhouses and licensed traders fell into disuse, the "right to bring" disappeared. He concluded, at para. 125:

> It was a pre-requisite to the Mi'kmaq being able to trade under the terms of the trade clause that the British provide truckhouses or appoint persons to trade with. When the British stopped doing that, the requirement (or if I had taken the Defence view, the option) to trade with truckhouses or licensed traders disappeared. The trade clause says nothing about that eventuality and it is my view that no further trade right arises from the trade clause.

73 The trial judge was unequivocal on the limited nature of this Treaty "right to bring" goods to truckhouses and licensed traders to trade. He concluded that the British did not intend to convey, and would not have conveyed, a trading right beyond the limited right to trade at truckhouses and with licensed traders within the exclusive trade regime, and that the Mi'kmaq appreciated and understood the position and objectives of the British. In light of these conclusions, he rejected the appellant's claim that the Treaties granted him a treaty right to catch and sell fish. He found, at para. 129, that such an interpretation was not even among the "various possible interpretations of the common intention" of the Mi'kmaq and the British.

74 The Court of Appeal ((1997), 1997 CanLII 14992 (NS CA), 159 N.S.R. (2d) 186), *per* Roscoe and Bateman JJ.A., affirmed the trial judge's decision that the Treaties of 1760-61 did not grant a treaty right to catch and sell fish. The court found, at p. 200, that "the mercantile nature of the British economy; the fact that the Governor had been instructed not to place any subject in a preferential trading position; and the fact that, pursuant to this *Treaty*, the Mi'kmaq were submitting to British law" all lent support to the trial judge's conclusion. Unlike the trial judge, however, the Court of Appeal concluded that the Treaties did not grant any right to trade, not even a limited "right to bring" goods to truckhouses. The court held that the mere reference to trading at truckhouses in the trade clause of the Treaties of 1760-61 could not, without more, constitute the grant of a right to trade. The Treaties of 1760-61 were peace treaties, not land cession treaties, and hence no grant of rights could be presumed. Moreover, the negative language of the clause was unlike that traditionally found in rights-granting treaties. The Court of Appeal concluded, at p. 200, that the Treaties of 1760-61 were negotiated following a long period of British-Mi'kmaq hostilities and that "[t]rade was not central to the *Treaties* but a vehicle by which the British could encourage the maintenance of a friendly relationship with the Mi'kmaq". The requirement imposed upon the Mi'kmaq to trade solely at truckhouses was characterized as a mechanism to help ensure the maintenance of peace. Thus, while the Treaties made trade at truckhouses "permissible", they did not confer a legal right on the Mi'kmaq to do

so. The Court of Appeal upheld the trial judge's decision and dismissed the appeal.

IV. The Issues

75 The ultimate issue before the Court on this appeal is whether the appellant possesses a treaty right which exempts him from the federal fisheries legislation under which he is charged. The arguments urged in support of this position, however, are more difficult to articulate. The appellant's oral and written submissions, taken together, suggest that he contends that the Treaties of 1760-61 granted either or both of two separate rights, one unlimited, one more restricted. The appellant's arguments may be summarized as follows:

A. *The Rights Claimed*

1. The treaties conferred on the Mi'kmaq a general right to trade.

2. Alternatively, or in addition, the treaties conferred on the Mi'kmaq a right to truckhouses or licensed traders.

B. *Justification Arguments*

1. In the event a general right to trade is established, the federal fisheries legislation governing fishing and trade in fish fails to accommodate this treaty right to trade.

2. The government has not shown that this failure is justified as required by s. 35 of the *Constitution Act, 1982*.

3. Therefore the federal fisheries legislation does not apply to the appellant and he is entitled to be acquitted.

Alternatively, or in addition:

1. In the event a right to truckhouses or licensed traders is established, the government has been in breach of its treaty obligations since the 1780s.
2. The government has not shown that this infringement is justified as required by s. 35 of the *Constitution Act, 1982*.

3. Therefore the federal fisheries legislation does not apply to the appellant and he is entitled to be acquitted.

76 I will first consider the principles of interpretation relevant to this appeal. I will then consider in turn the appellant's "general trade right" and "right to trading outlets" arguments.

77 It should be noted that the appellant does not argue for an aboriginal (as distinct from treaty) right to trade on this appeal.

V. Discussion

A. *What Principles of Interpretation Apply to the Interpretation of the Treaty Trade Clause?*

78 This Court has set out the principles governing treaty interpretation on many occasions. They include the following.

This summary is now the accepted and often relied on overview of the principles of treaty interpretation.

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R. v. Sundown*, 1999 CanLII 673 (SCC), [1999] 1 S.C.R 393, at para. 24; *R. v. Badger*, 1996 CanLII 236 (SCC), [1996] 1 S.C.R. 771, at para. 78; *R. v. Sioui*, 1990 CanLII 103 (SCC), [1990] 1 S.C.R. 1025, at p. 1043; *Simon v. The Queen*, 1985 CanLII 11 (SCC), [1985] 2 S.C.R. 387, at p. 404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997), 36 *Alta. L. Rev.* 46; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997), 36 *Alta. L. Rev.* 149.

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

3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: *Sioui*, *supra*, at pp. 1068-69.

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

5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: *Badger*, *supra*, at paras. 52-54; *R. v. Horseman*, 1990 CanLII 96 (SCC), [1990] 1 S.C.R. 901, at p. 907.

6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: *Badger*, *supra*, at paras. 53 *et seq.*; *Nowegijick v. The Queen*, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29, at p. 36.

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

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

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

79 Two specific issues of interpretation arise on this appeal. The answer to each is found in the foregoing summary of principles.

80 The first issue of interpretation arises from the Court of Appeal's apparent suggestion that peace treaties fall in a different category from land cession treaties for purposes of interpretation, with the result that, when interpreting peace treaties, there is no "presumption" that rights

were granted to the aboriginal signatories in exchange for entering into the treaty. This raises the issue of whether it is useful to slot treaties into different categories, each with its own rules of interpretation. The principle that each treaty must be considered in its unique historical and cultural context suggests that this practice should be avoided.

81 The second issue of interpretation raised on this appeal is whether extrinsic evidence can be used in interpreting aboriginal treaties, absent ambiguity. Again, the principle that every treaty must be understood in its historical and cultural context suggests the answer must be yes. It is true that in *R. v. Horse*, 1988 CanLII 91 (SCC), [1988] 1 S.C.R. 187, at p. 201, this Court alluded with approval to the strict contract rule that extrinsic evidence is not admissible to construe a contract in the absence of ambiguity. However, subsequent decisions have made it clear that extrinsic evidence of the historic and cultural context of a treaty may be received absent ambiguity: *Sundown*, *supra*, at para. 25; *Badger*, *supra*, at para. 52. As Cory J. wrote in *Badger*, *supra*, at para. 52, courts interpreting treaties "must take into account the context in which the treaties were negotiated, concluded and committed to writing".

82 The fact that both the words of the treaty and its historic and cultural context must be considered suggests that it may be useful to approach the interpretation of a treaty in two steps. First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause. As noted in *Badger*, *supra*, at para. 76, "the scope of treaty rights will be determined by their wording". The objective at this stage is to develop a preliminary, but not necessarily determinative, framework for the historical context inquiry, taking into account the need to avoid an unduly restrictive interpretation and the need to give effect to the principles of interpretation.

83 At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty's historical and cultural backdrop. A consideration of the historical background may suggest latent ambiguities or alternative interpretations not detected at first reading. Faced with a possible range of interpretations, courts must rely on the historical context to determine which comes closest to reflecting the parties' common intention. This determination requires choosing "from among the various possible interpretations of the common intention the one which best reconciles" the parties' interests: *Sioui*, *supra*, at p. 1069. Finally, if the court identifies a particular right which was intended to pass from generation to generation, the historical context may assist the court in determining the modern counterpart of that right: *Simon*, *supra*, at pp. 402-3; *Sundown*, *supra*, at paras. 30 and 33.

84 In the case on appeal, the trial judge heard 40 days of trial, the testimony of three expert witnesses, and was presented with over 400 documents. After a meticulous review of this evidence, the trial judge stated, at para. 92:

> With the full benefit of the cultural and historical context, I now need to address the following questions. What did the Mi'kmaq and the British agree to and intend to agree to in the Treaties of 1760 and 1761? Directly related to that are the questions of Mi'kmaq understanding of these treaties' contents. Did they understand and agree to all of the written portions of the treaties before me? Were there other statements or promises made orally which the Mi'kmaq considered were part of these treaties and which have an impact on their meaning? Did the Mi'kmaq consider that previous treaties were renewed by and combined with the 1760-61 Treaties? Are there any other aspects of the historical record, whether referred to me by Counsel for the defendant or otherwise, which reflect on the contents or the proper understanding of the contents of these treaties?

The trial judge's review of the historical context, the cultural differences between the parties, their different methods of communication, and the pre-treaty negotiations, led him to conclude that there was no misunderstanding or lack of agreement between the British and the Mi'kmaq that trade under the treaties was to

be carried out in accordance with the terms of the trade clause. Having come to this conclusion, the trial judge turned again to the historical context to interpret the content of such terms, in accordance with the parties' common intention. In my opinion, the trial judge's approach to the interpretation of the Treaties of 1760-61 is in keeping with the principles governing treaty interpretation. With the greatest respect for the contrary view of my colleague, Justice Binnie, I find no basis for error in the trial judge's approach.

B. *Do the Treaties of 1760-61 Grant a General Right to Trade?*

85 At trial, the appellant argued that the treaty trade clause conferred on the Mi'kmaq a general trading right. The trial judge rejected this submission, finding that the treaties conferred only a limited "right to bring" goods to truckhouses and licensed traders to trade. The Court of Appeal went even further, finding that the treaties conferred no trade right at all. Before this Court, the appellant once again advances the argument that the Treaties of 1760-61 conferred a general trade right on the Mi'kmaq.

86 Before addressing whether the words of the treaties, taken in their historic and cultural context support a general treaty right to trade, it is necessary to distinguish between a right to trade under the law applicable to all citizens, and a treaty right to trade. All inhabitants of the province of Nova Scotia or Acadia enjoyed a general right to trade. No treaty was required to confer such a right as it vested in all British subjects. The Mi'kmaq, upon signing the Treaties of 1760-61 and thereby acknowledging the jurisdiction of the British king over Nova Scotia, automatically inherited this general right. This public right must be distinguished from the asserted treaty right to trade. Treaty rights are by definition special rights conferred by treaty. They are given protection over and above rights enjoyed by the general populace. Only rights conferred by treaty are protected by s. 35 of the *Constitution Act, 1982*. I note that while rights enjoyed by the general populace can be included in treaties, where this occurs, they become separate and distinct treaty rights subject to a higher level of protection. The appellant in this case must establish a distinct treaty right if he is to succeed.

(1) The Wording of the Trade Clause

87 This brings me to the words of the treaty trade clause. It states:

> 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 [insert location of closest truck house] or Elsewhere in Nova Scotia or Accadia.

The clause is short, the words simple. The Mi'kmaq covenant that they will "not traffick, barter or Exchange any Commodities in any manner but with [British agents]" (emphasis added). The core of this clause is the obligation on the Mi'kmaq to trade only with the British. Ancillary to this is the implied promise that the British will establish truckhouses where the Mi'kmaq can trade. These words do not, on their face, confer a general right to trade.

88 The next question is whether the historic and cultural context in which the treaties were made establishes a general right to trade, having due regard for the need to interpret treaty rights generously. I will deal first with the linguistic and cultural differences between the parties, then with the historical record generally.

(2) Cultural and Linguistic Considerations

89 The trial judge found that there was no misunderstanding or lack of agreement between the British and the Mi'kmaq that trade under the treaties was to be carried out in accordance with the terms of the trade clause, and that the Mi'kmaq understood those terms. He addressed and discounted the possibility that the French-speaking Mi'kmaq might not have understood the English treaty terms. The record amply supports this conclusion. French missionaries, long allied with the Mi'kmaq, were employed by the British as interpreters in the treaty negotiations. In the

course of the negotiations, the Mi'kmaq were referred to an earlier treaty entered into by the Maliseet and Passamaquody, containing a similar trade clause in French. Some of the Mi'kmaq appeared to have acquired English; the records speak of Paul Laurent of LaHave, a Mi'kmaq Sakamow and one of the first signatories, as speaking English. More generally, by the time the Treaties of 1760-61 were entered into, the record suggests that the Mi'kmaq had developed an understanding of the importance of the written word to the British in treaty-making and had a sufficiently sophisticated knowledge of the treaty-making process to compare and discern the differences between treaties. The trial judge was amply justified in concluding that the Mi'kmaq understood the treaty process as well as the particular terms of the treaties they were signing. There is nothing in the linguistic or cultural differences between the parties to suggest that the words of the trade clause were not fully understood or appreciated by the Mi'kmaq.

(3) The Historical Context and the Scope of the Trade Clause

90 After a meticulous review of the historical evidence, the trial judge concluded that: (1) the Treaties of 1760-61 were primarily peace treaties, cast against the background of both a long struggle between the British and the French in which the Mi'kmaq were allied with the French, and over a decade of intermittent hostilities between the British and the Mi'kmaq; (2) the French defeat and withdrawal from Nova Scotia left the Mi'kmaq to co-exist with the British without the presence of their former ally and supplier; (3) the Mi'kmaq were accustomed to and in some cases dependent on trade for firearms, gunpowder, food and European trade goods; and (4) the British wanted peace and a safe environment for settlers and, despite recent victories, did not feel completely secure in Nova Scotia.

91 Considering the wording of the trade clause in this historical context, the trial judge concluded that it was not within the common intention of the parties that the treaties granted a general right to trade. He found that at the time of entering the treaties, the Mi'kmaq wanted to secure peace and continuing access to European trade goods. He described

the Mi'kmaq concerns at the time as very focussed and immediate. The British, for their part, wanted peace in the region to ensure the safety of their settlers. While the British were willing to support the costly truckhouse system to secure peace, they did not want the Mi'kmaq to become a long-term burden on the public treasury. To this end, the trial judge found that the British wanted the Mi'kmaq to continue their traditional way of life. The trial judge found that the interpretation of the treaty trade clause which best reconciled the intentions of both parties was that the trade clause imposed an obligation on the Mi'kmaq to trade only at British truckhouses or with licensed traders, as well as a correlative obligation on the British to provide the Mi'kmaq with such trading outlets so long as this restriction on Mi'kmaq trade existed. This correlative obligation on the British gave rise to a limited Mi'kmaq "right to bring" goods to trade at these outlets. When the British ceased to provide trading outlets to the Mi'kmaq, the restriction on their trade fell as did the limited "right to bring" which arose out of the system of mutual obligations.

92 Although trade was central to the Treaties of 1760-61, it cannot be doubted that achieving and securing peace was the preeminent objective of both parties in entering into the treaties. See: *"As Long as the Sun and Moon Shall Endure": A Brief History of the Maritime First Nations Treaties, 1675 to 1783* (1986), at pp. 101-2; The MAWIW District Council and Indian and Northern Affairs Canada, *"We Should Walk in the Tract Mr. Dummer Made": A Written Joint Assessment of Historical Materials ... Relative to Dummer's Treaty of 1725 and All Other Related or Relevant Maritime Treaties and Treaty Negotiations* (1992), at pp. 23-24, 31-34 and 90; and L. F. S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (1979), at p. 63.

93 The desire to establish a secure and successful peace led each party to make significant concessions. The Mi'kmaq accepted that forging a peaceful relationship with the British was essential to ensuring continued access to European trade goods and to their continued security in the region. To this end, the Mi'kmaq agreed to limit their autonomy by trading only with the British and ceasing all trading relations with the French. Agreeing to restricted trade at truckhouses made the limit on

Mi'kmaq autonomy more palatable as truckhouses were recognized as vehicles for stable trade at guaranteed and favourable terms. See: O. P. Dickason, "Amerindians Between French and English in Nova Scotia, 1713-1763", *American Indian Culture and Research Journal*, X (1986), 31, at p. 46; and MAWIW District Council and Indian and Northern Affairs Canada, *supra*, at pp. 23, 31 and 32.

94 The British, for their part, saw continued relations between the Mi'kmaq and the French as a threat to British dominance in the region and to British-Mi'kmaq relations. Although the fall of the French in 1760 established British power in the region, the trial judge concluded, at para. 90, that the British "did not feel completely secure in Nova Scotia". Evidence submitted at trial indicated that the British feared the possibility of a renewed military alliance between the Mi'kmaq and the French as late as 1793. These concerns of the British are reflected in the Treaties of 1760-61, which, in addition to restricting Mi'kmaq trade, prevent the Mi'kmaq from attacking British settlers and from assisting any of the Crown's enemies. The British were also acutely aware that trading between unregulated private traders and the Mi'kmaq was often unfair and the cause of many disruptions of the peace. Preventing such disruptive practices was a central concern of the Nova Scotia governors and the British Board of Trade who hoped to cement the fragile peace in the region.

95 To secure the peace, the British therefore required the Mi'kmaq to trade only at truckhouses, even though truckhouses ran counter to the British policy not to place the Crown in a monopolistic trading position and imposed a significant financial burden on the public purse. The Nova Scotia government in "Remarks on the Indian Commerce Carried on by the Government of Nova Scotia 1760, 1761 and part of 1762", expressed the view that the benefits of "Settling [of] the Province and securing the Peace of the New Settlers" were "much more than an Equivalent for any exceedings" in cost, (see: R. O. MacFarlane, "Indian Trade in Nova Scotia to 1764", *Report of the Annual Meeting of the Canadian Historical Association with Historical Papers*(1935), 57, at pp. 59-60; Upton, *supra*, at p. 63; J. Stagg, *Anglo-Indian Relations in North*

America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763 (1981), at p. 278; W. E. Daugherty, *Maritime Indian Treaties in Historical Perspective* (1983); and "*We Should Walk in the Tract Mr. Dummer Made . . .*", *supra*, at p. 90. On British policy see: Letter from the British Board of Trade to Lieutenant Governor Belcher, March 3, 1761, and June 23, 1761; Board of Trade and Privy Council Minutes, June 23 and July 2, 1761).

96 To achieve the mutually desired objective of peace, both parties agreed to make certain concessions. The Mi'kmaq agreed to forgo their trading autonomy and the general trading rights they possessed as British subjects, and to abide by the treaty trade regime. The British, in exchange, undertook to provide the Mi'kmaq with stable trading outlets where European goods were provided at favourable terms while the exclusive trade regime existed. This is the core of what the parties intended. The wording of the trade clause, taken in its linguistic, cultural and historical context, permits no other conclusion. Both the Mi'kmaq and the British understood that the "right to bring" goods to trade was a limited right contingent on the existence of a system of exclusive trade and truckhouses. On the historical record, neither the Mi'kmaq nor the British intended or understood the treaty trade clause as creating a general right to trade.

97 The parties' pre-treaty negotiations and post-treaty conduct point to the same conclusion. I turn first to the pre-treaty negotiations. British negotiations with the Mi'kmaq took place against the background of earlier negotiations with the Maliseet and Passamaquody on February 11, 1760. These negotiations led to the treaty of February 23, 1760, the first of the 1760-61 Treaties. When Mi'kmaq representatives came to negotiate peace with the British 18 days later on February 29, 1760, they were informed of the treaty entered into by the Maliseet and Passamaquody and agreed to make peace on the same conditions. The minutes record that at the very outset of the February 11, 1760, meeting, the Maliseet and Passamaquody representatives were informed:

> . . . that it was now expected that they should engage, in behalf of their Tribes, that they will not aid or assist any of His Majesty's Enemies, nor hold any Correspondence or Commerce with them.

The Maliseet and Passamaquody consented to this term of trade exclusivity. After some discussion about "hostages" the following exchange took place:

> His Excellency then demanded of them, Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this Time. To which they replied that their Tribes had not directed them to propose any thing further than that there might be a Truckhouse established, for the furnishing them with necessaries, in Exchange for their Peltry, and that it might, at present, be at Fort Frederick.
>
> Upon which His Excellency acquainted them that in case of their now executing a Treaty in the manner proposed, and its being ratified at the next General Meeting of their Tribes the next Spring, a Truckhouse should be established at Fort Frederick, agreable to their desire, and likewise at other Places if it should be found necessary, for furnishing them with such Commodities as shall be necessary for them, in Exchange for their Peltry & and that great care should be taken, that the Commerce at the said Truckhouses should be managed by Persons on whose Justice and good Treatment, they might always depend; and that it would be expected that the said Tribes should not Trafic or Barter and Exchange any Commodities at any other Place, nor with any other Persons. Of all which the Chiefs expressed their entire Approbation. [Nova Scotia Executive Council Minutes, February 11, 1760.]

98 The pre-treaty negotiations between the British and the Maliseet and the Passamaquody, indicate that the aboriginal leaders requested truckhouses in response to their accommodation of the British desire for restricted trade. The negotiations also indicate that the British agreed to furnish truckhouses where necessary to ensure that the Maliseet and the Passamaquody could continue to acquire commodities and necessities through trade. The negotiations highlight the concessions that both the aboriginal and the British signatories made in order to secure the mutually desired objective of peace. The negotiations also indicate that

both parties understood that the treaties granted a specific, and limited, right to bring goods to truckhouses to trade.

99 This finding is confirmed by the post-treaty conduct of the Mi'kmaq and the British. Neither party's conduct is consistent with an expectation that the treaty granted the Mi'kmaq any trade right except the implied "right to bring" incidental to their obligation to trade exclusively with the British. Soon after the treaties were entered into, the British stopped insisting that the Mi'kmaq trade only with them. The British replaced the expensive truckhouses with licensed traders in 1762. The system of licensed traders, in turn, died out by the 1780s. Mi'kmaq adherence to the exclusive trade and truckhouse regime was also ambiguous. Records exist of Mi'kmaq trade with the French on the islands of St. Pierre and Miquelon in 1763 and again in 1767: Upton, *supra*, at pp. 64-65.

100 The fall of the licensed trading system marked the fall of the trading regime established under the Treaties. This left the Mi'kmaq free to trade with whomever they wished, like all other inhabitants of the colonies. The British expressly confirmed that the obligation on the aboriginal signatories to trade exclusively with the British fell with the demise of the truckhouse and licensed trader system at a meeting between two Maliseet Sakamows and the Lieutenant Governor of Nova Scotia on July 18, 1768:

> Chiefs 9.
>
> We shall be glad that the Prices of Goods were regulated, as formerly, for Beaver skins were Sold at a better price than some people will now give for them.
>
> Answer
>
> There is no Restriction on your Trade you may Traffick with those who sell Cheapest, which will be more for your Interest than limitting the Price of Beaver.

(Nova Scotia Executive Council Minutes, July 18, 1768.)

101 The record thus shows that within a few years of the signing of the Treaty, the Mi'kmaq treaty obligation to trade only with the British fell into disuse and with it the correlative British obligation to supply the Mi'kmaq with trading outlets. Both parties contributed to the demise of the system of mutual obligations and, apart from a lament that prices were better regulated under the truckhouse system, neither seems to have mourned it. The exclusive trade and truckhouse system was a temporary mechanism to achieve peace in a troubled region between parties with a long history of hostilities. To achieve this elusive peace, the parties agreed that the trading autonomy possessed by all British subjects would be taken away from the Mi'kmaq, and that compensation for the removal of this right would be provided through the provision of preferential and stable trade at truckhouses. When the restriction on the Mi'kmaq trade fell, the need for compensation for the removal of their trading autonomy fell as well. At this point, the Mi'kmaq were vested with the general non-treaty right to hunt, to fish and to trade possessed by all other British subjects in the region. The conditions supporting the right to bring goods to trade at truckhouses, as agreed to by both parties, ceased to exist.

102 The historical context, as the trial judge points out, supports the view that the British wanted the Mi'kmaq to maintain their traditional way of life and that trade was important to the Mi'kmaq. From this, Binnie J. suggests that the purpose of the treaty trading regime was to promote the self-sufficiency of the Mi'kmaq, and finds a treaty right to hunt, to fish, and to trade for sustenance. Yet, with respect, the historical record does not support this inference. The dominant purpose of the treaties was to prevent the Mi'kmaq from maintaining alliances with the French. To this end, the British insisted on a treaty term that the Mi'kmaq trade exclusively with British agents at British trading outlets -- the truckhouses. Implicit in this is the expectation that the Mi'kmaq would continue to trade. But it does not support the inference that the treaty clause conveyed a general right to trade and to sustenance. The treaty reference to the right to bring goods to truckhouses was required by and incidental to the obligation of

the Mi'kmaq to trade with the British, and cannot be stretched to embrace a general treaty right to trade surviving the exclusive trade and truckhouse regime. To do so is to transform a specific right agreed to by both parties into an unintended right of broad and undefined scope.

103 The importance of trade to the Mi'kmaq was recognized in two ways. First, as discussed above, so long as the Mi'kmaq were bound to an exclusive covenant of trade with the British, the British promised to provide the Mi'kmaq with truckhouses at which they could trade on favourable terms and obtain the European products they desired. Second, as noted, upon entering into a treaty with the British and acknowledging the sovereignty of the British king, the Mi'kmaq automatically acquired all rights enjoyed by other British subjects in the region. Although these rights were supplanted by the exclusive trade and truckhouse regime while it was extant, when this regime came to an end, the Mi'kmaq trading interest continued to be protected by the general laws of the province under which the Mi'kmaq were free to trade with whomever they wished.

104 I conclude that the trial judge did not err – indeed was manifestly correct -- in his interpretation of the historical record and the limited nature of the treaty right that this suggests.

(4) The Argument on the Treaty of 1752

105 The appellant suggests that when the Treaties of 1760-61 are considered together with the earlier Treaty of 1752, the inference arises that the parties understood the trade clause of the later treaties to confer a general trade right on the Mi'kmaq. The Treaty of 1752 stated that "the said Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best Advantage" (emphasis added). These words, unlike the words of the Treaties of 1760-61, arguably confer a positive right to trade. The appellant admits that this broad right, if that is what it was, was

supplanted by the quite different negative wording of the Treaties of 1760-61. However, he suggests that when the exclusive trade-truckhouse regime of the Treaties of 1760-61 fell into disuse, the more general trade right of the Treaty of 1752 was revived. The difficulty with this argument is that the Treaty of 1752 was completely displaced by the new Treaties of 1760-61, which pointedly made no reference to a general right to trade. Moreover, the different wording of the two treaties cannot be supposed to have gone unperceived by the parties. To conclude that the parties would have understood that a general right to trade would be revived in the event that the exclusive trade and truckhouse regime fell into disuse is not supportable on the historical record and is to "exceed what is possible on the language", to paraphrase from *Sioui*, *supra*.

106 In summary, a review of the wording, the historical record, the pre-treaty negotiations between the British and the Maliseet and Passamaquody, as well as the post-treaty conduct of the British and the Mi'kmaq, support the trial judge's conclusion that the treaty trade clause granted only a limited "right to bring" trade goods to truckhouses, a right that ended with the obligation to trade only with the British on which it was premised. The trial judge's conclusion that the treaties granted no general trade right must be confirmed.

C. *Do the Treaties of 1760-61 Grant a Right to Government Trading Outlets?*

107 The appellant suggests both in the alternative and in addition, that the trial judge's decision makes it clear that the Treaties of 1760-61 granted a right to truckhouses or licensed traders which was breached by the government's failure to provide such outlets after the 1780s. In the absence of government outlets and any justification for the failure to provide them, the appellant suggests that the federal fisheries regulations are inconsistent with his right to a Mi'kmaq trade vehicle and therefore are null and void in their application to him and other treaty beneficiaries. This argument rests on one aspect of the trial judge's finding, while ignoring the other. Specifically, it asserts the right to truckhouses as an independent freestanding treaty right, while ignoring the

finding that this was a dependent right to bring goods to truckhouses collateral to the obligation to trade exclusively with the British. It follows from the trial judge's finding that the "right to bring" goods to trade at truckhouses died with the exclusive trade obligation upon which it was premised, that the treaties did not grant an independent right to truckhouses which survived the demise of the exclusive trade system. This right therefore cannot be relied on in support of an argument of a trade right in the modern context which would exempt the appellant from the application of the fisheries regulations.

108 Even if the appellant surmounted the trial judge's finding that the "right to bring" died with the exclusive trade obligation upon which it was premised, he has failed to establish how a breach of the obligation to provide trading outlets would exempt him from the federal fisheries regulations and, specifically, acquit him of illegally catching fish and illegally selling them to a private party. In my opinion, it is difficult to see how a government obligation to provide trading outlets could be stretched to include a treaty right to fish and a treaty right to trade the product of such fishing with private individuals. Even a broad conception of a right to government trading outlets does not take us to the quite different proposition of a general treaty right to take goods from the land and the sea and sell them to whomever one wishes.

109 This brings me to a variation on the appellant's argument of a right to trading outlets. When pressed on the exact nature and scope of the trade right asserted, the appellant at times seemed to suggest that this did not matter. A finding that the treaties granted a right to truckhouses or licensed traders, undefined as it might be in scope and modern counterpart, would shift the onus to the government to justify its failure to provide such trading outlets, he suggested. The absence of any justification would put the government in breach and preclude it from applying its regulations against the appellant.

110 The appeal of this argument cannot be denied. It engages, at a superficial glance, many of the concerns that underlie the principles of interpretation addressed at the outset of these reasons. The treaty rights of aboriginal peoples should be interpreted in a generous manner. The honour of the Crown is presumed and must be upheld. Ambiguities must be resolved in favour of the aboriginal signatories. Yet the argument, in my opinion, cannot succeed.

111 A claimant seeking to rely on a treaty right to defeat a charge of violating Canadian law must first establish a treaty right that protects, expressly or by inference, the activities in question, see: *Sioui*, *supra*, at pp. 1066-67. Only then does the onus shift to the government to show that it has accommodated the right or that its limitations of the right are justified.

112 To proceed from a right undefined in scope or modern counterpart to the question of justification would be to render treaty rights inchoate and the justification of limitations impossible. How can one meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope? How is the government, in the absence of such definition, to know how far it may justifiably trench on the right in the collective interest of Canadians? How are courts to judge whether the government that attempts to do so has drawn the line at the right point? Referring to the "right" in the generalized abstraction risks both circumventing the parties' common intention at the time the treaty was signed, and functioning illegitimately to create, in effect, an unintended right of broad and undefined scope.

113 Instead of positing an undefined right and then requiring justification, a claim for breach of a treaty right should begin by defining the core of that right and seeking its modern counterpart. Then the question of whether the law at issue derogates from that right can be explored, and any justification for such derogation examined, in a meaningful way.

114 Based on the wording of the treaties and an extensive review of the historical evidence, the trial judge concluded that the only trade right conferred by the treaties was a "right to bring" goods to truckhouses that terminated with the demise of the exclusive trading and truckhouse regime. This led to the conclusion that no Crown breach was established and therefore no accommodation or justification required. The record amply supports this conclusion, and the trial judge made no error of legal principle. I see no basis upon which this Court can interfere.

VI. Justification

115 Having concluded that the Treaties of 1760-61 confer no general trade right, I need not consider the arguments specifically relating to justification.

VII. Conclusion

116 There is no existing right to trade in the Treaties of 1760-61 that exempts the appellant from the federal fisheries regulations. It follows that I would dismiss the appeal.

Appeal allowed, GONTHIER *and* MCLACHLIN JJ. *dissenting.*

Solicitor for the appellant: Bruce H. Wildsmith, Barss Corner, Nova Scotia.

Solicitor for the respondent: The Attorney General of Canada, Halifax.

Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.

Solicitors for the intervener the West Nova Fishermen's Coalition: Daley, Black & Moreira, Halifax.

Solicitors for the intervener the Native Council of Nova Scotia: Burchell, Hayman, Barnes, Halifax.

Solicitors for the intervener the Union of New Brunswick Indians: Getty, Bear, Fredericton.