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David Reid* and
Stephanie Hickman**

Aboriginal Rights and the Atlantic
Canada Petroleum Industry

The authors explore the recent developments in Aboriginal law and their implications for the petroleum industry in Atlantic Canada. To set the stage, they provide a brief historical overview of Aboriginal settlement and land-use in the region, followed by a brief review of the petroleum industry's development in Atlantic Canada. After examining the state of the jurisprudence relating to Aboriginal rights generally, the authors turn to the current state of aboriginal rights, rights claims, and consultation obligations in the Atlantic Canadian context. The impact of the current state of the law on the petroleum industry is then analyzed and future trends outlined.

Les auteurs examinent les développements récents en droit des Autochtones et leurs conséquences pour l'industrie pétrolière au Canada atlantique. Pour situer le lecteur, ils font d'abord un survol historique de l'établissement des Autochtones et de leur utilisation des terres dans la région, suivi d'un aperçu du développement de l'industrie pétrolière au Canada atlantique. Après avoir analysé l'état de la jurisprudence traitant des droits des Autochtones en général, les auteurs se penchent sur l'état actuel des droits des Autochtones, de revendications de droits et des obligations de consultation dans le contexte du Canada atlantique. L'impact de l'état actuel du droit sur l'industrie pétrolière est ensuite analysé et les tendances futures sont décrites.

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Introduction

This paper explores recent developments in Aboriginal law and their implications for the petroleum industry in Atlantic Canada. To set the stage, a brief historical overview of Aboriginal settlement and land use in Atlantic Canada is provided. The paper then generally describes Aboriginal jurisprudence in Canada before moving to an examination of the current state of Aboriginal and treaty rights in Atlantic Canada. A brief summary of the status of Aboriginal and treaty right negotiations in each of the four Atlantic Provinces is then provided. The paper concludes with an analysis of how the current state of Aboriginal law in Atlantic Canada may impact on development of the petroleum industry in this region.

I. *Historical overview of Aboriginal settlement and land use*

1. *Maritime Provinces*

There are two primary Aboriginal groups in the Maritime Provinces: the Mi'kmaq and the Maliseet. The Mi'kmaq traditionally occupied parts of northern and eastern New Brunswick, Nova Scotia and Prince Edward Island. The Maliseet traditionally resided along the Saint John River in western New Brunswick.

Estimates from the early seventeenth century suggest the Mi'kmaq population to have been in the range of 3,500, while the Maliseet population

numbered about 1,000.¹ By this time, however both groups had likely suffered considerable decline in numbers due to epidemic diseases that arrived with the Europeans. Depending on the season, the Mi'kmaq resided either on the coast or in the interior. During the fall and winter months, activities centred around the hunting of seal, moose, beaver, otter, bear and caribou. In the spring and summer, life focused on coastal areas, with fishing being the primary activity.

In the seventeenth century, the Mi'kmaq and Maliseet became loyal allies of the French and partners in the fur trade.² By the 1713 Treaty of Utrecht, French possessions in Atlantic Canada were reduced to Prince Edward Island (Isle St. Jean) and Cape Breton Island (Isle Royale). During the period following the Treaty of Utrecht, the French constructed Fortress Louisburg on Cape Breton Island, while their Aboriginal allies continued raids and attacks on English ships and settlements. The British responded to the First Nation attacks by establishing a bounty on Mi'kmaq scalps.³ Hostilities continued until shortly after the fall of Louisburg in 1758, at which time the Mi'kmaq were forced to make peace with the English.⁴

In Nova Scotia (as of 2001) there are currently thirteen Mi'kmaq First Nation communities, with a combined population of approximately 12,000 people.⁵ There are thirty-eight reserves in Nova Scotia. In New Brunswick, there is a combined Maliseet and Mi'kmaq population of approximately 11,000 people, 7,400 of which reside on reserve.⁶ There are nine Mi'kmaq and six Maliseet First Nation communities in New Brunswick.⁷ There are two Mi'kmaq First Nation communities on Prince Edward Island.⁸ The population is estimated to be approximately 1,000 people, about half of whom live on the four reserves on the Island.⁹

2. Newfoundland and Labrador

At the time of first contact with Europeans, the Beothuk inhabited Newfoundland and Labrador. Estimates of their population vary from approximately 500 at the time of John Cabot's first visit in 1497 to 50,000.¹⁰

1. Alan D. McMillan, *Native Peoples and Cultures of Canada* (Vancouver: Douglas and MacIntyre, 1988) at 44.

2. *Ibid.* at 50.

3. *Ibid.* at 51.

4. *Ibid.*

5. Thomas Isaac, *Aboriginal and Treaty Rights in the Maritimes* (Saskatoon: Purich Publishing, 2001) at 34.

6. *Ibid.*

7. *Ibid.* at 33.

8. *Ibid.*

9. *Ibid.*

10. McMillan, *supra* note 1 at 42.

However, the Beothuk population dramatically plummeted after contact with the Europeans, and the death of the British captive, Shanawdithit, in 1829 is generally held to mark the date of the Beothuk extinction.¹¹ The causes of the severe population declines were primarily related to disease introduced by the Europeans and hostile encounters with the newcomers and with Mi'kmaq from Nova Scotia, who began to arrive in the province shortly after the arrival of the Europeans.¹² The Mi'kmaq do not appear to have begun settlement in Newfoundland until after the arrival of the Europeans.¹³ Following the extinction of the Beothuk nation, the Mi'kmaq remained as the only native inhabitants of the island of Newfoundland.

Today, in Newfoundland and Labrador, there is one Mi'kmaq First Nation: Miawpukek (Conne River) Band, located in southern Newfoundland. The population of this community is slightly over 2,500.¹⁴ Additionally, there are 1,235 Innu in Quebec and Labrador and 2,634 Inuit living primarily in the northern reaches of Labrador.¹⁵

II. *The nature of Aboriginal rights in Atlantic Canada*

1. *National Overview*

The legal foundation of Aboriginal rights in Atlantic Canada is largely the same as the rest of the country and, as such, this section will provide a brief overview of that foundation prior to exploring some of the unique features of Aboriginal rights in Atlantic Canada.

Aboriginal title and Aboriginal rights are not synonymous. The Supreme Court of Canada in *R. v. Adams* stated that Aboriginal title is "simply one manifestation of a broader based conception of aboriginal rights."¹⁶ In other words, Aboriginal rights, as recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*,¹⁷ are many and varied. Aboriginal title, in contrast, is a particular type of Aboriginal right, "distinct from other aboriginal rights because it arises where the connection for a group with a piece of land 'was of central significance to their distinctive culture.'"¹⁸

11. *Ibid.* at 44.

12. *Ibid.* at 43.

13. *Newfoundland (Minister of Government Services & Lands) v. Drew*, 2006 NLCA 53, (2006), 260 Nfld. & P.E.I.R. 1 at para. 41 [*Drew (C.A.)*].

14. Canada, "Aboriginal Peoples in the Atlantic Region," online: Department of Indian And Northern Affairs <http://www.ainc-inac.gc.ca/at/mp/pg31_e.html>.

15. Canada, "Miawpukek Band," online: Department of Indian And Northern Affairs <www.ainc-inac.gc.ca/at/abor_e.html>.

16. *R. v. Adams*, [1996] 3 S.C.R. 101 at para. 25 [*Adams*].

17. *Constitution Act*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*].

18. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 137 [*Delgamuukw*], quoting from *Adams*, *supra* note 16 at para. 26.

The Supreme Court of Canada has developed different criteria for the establishment of an Aboriginal title claim from those of an Aboriginal rights claim, which is different again from a treaty right (all of which will be discussed below). Regardless of the particular species of Aboriginal right, the Supreme Court has made clear in the decision of *Haida Nation v. British Columbia (Minister of Forests)*,¹⁹ that the Crown has an obligation to consult with Aboriginal peoples when it has real or constructive knowledge of an Aboriginal right that may be adversely affected by a government decision.²⁰ As it is often government action in the form of issuing permits and licences for industrial purposes that invoke the consultation obligation, industry generally, and the energy industry in particular, has a direct interest in understanding the nature of Aboriginal rights.

Although Aboriginal and treaty rights are constitutionally recognized by the *Canadian Charter of Rights and Freedoms*,²¹ much of the practical substance of Aboriginal and treaty rights has been left to the courts to determine. As a result of the evolution of jurisprudence since 1982, Canadian courts have established various legal thresholds that must be met to substantiate Aboriginal and treaty rights claims. For the purposes of this paper, Aboriginal rights will be divided into three species of rights: non-title rights, title rights, and treaty rights.

The general analytical framework for determining non-title Aboriginal rights can be discerned from the decisions of the courts. The following is a skeletal outline of the steps and considerations involved.

In its 1996 ruling in *R. v. Van der Peet*,²² the Supreme Court of Canada held that “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”²³ The Court set out ten guiding principles for judicial analysis of Aboriginal rights claims:

- Courts must take into account the perspective of Aboriginal peoples themselves;²⁴

19. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 [*Haida*].

20. *Ibid.* at para. 35.

21. Part I of the *Constitution Act, 1982*, *supra* note 17 [*Charter*]. S. 25 of the *Charter* specifically limits application of the *Charter* so as to prohibit its application in a manner that would infringe upon Aboriginal rights in Canada.

22. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*].

23. *Ibid.* at para. 46.

24. *Ibid.* at para. 49.

- Courts must identify precisely the nature of the claim being made in determining whether an Aboriginal claimant has demonstrated the existence of an Aboriginal right;²⁵
- In order to be integral, a practice, custom or tradition must be of central significance to the Aboriginal society in question;²⁶
- The practices, customs and traditions which constitute Aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact;²⁷
- Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims;²⁸
- Claims to Aboriginal rights must be adjudicated on a specific, rather than a general basis;²⁹
- For a practice, custom or tradition to constitute an Aboriginal right it must be of independent significance to the Aboriginal culture in which it exists;³⁰
- The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct;³¹
- The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence;³² and
- Courts must take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples.³³

If an Aboriginal group establishes an Aboriginal right, using the *Van der Peet* factors as a guide, it must then demonstrate that the actions of the Crown amount to a *prima facie* infringement upon this right. This is done by demonstrating, *inter alia*, that the action of the Crown constitutes an unreasonable interference with an Aboriginal right, imposes undue hardship or denies the rights holders their preferred method of exercising their right.³⁴

25. *Ibid.* at para. 51.

26. *Ibid.* at para. 55.

27. *Ibid.* at para. 60.

28. *Ibid.* at para. 68.

29. *Ibid.* at para. 69.

30. *Ibid.* at para. 70.

31. *Ibid.* at para. 71.

32. *Ibid.* at para. 73.

33. *Ibid.* at para. 74.

34. *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at para. 70 [*Sparrow*]. See also *R. v. Gladstone*, [1996] 2 S.C.R. 723 at paras. 40-43 [*Gladstone*].

Once a right and a *prima facie* infringement of the right is established, the Crown must discharge the burden of either:

- proving that the right was extinguished by an act of the Crown showing a clear intent to extinguish the Aboriginal right;³⁵ or
- justifying the infringement by demonstrating an appropriate objective while upholding the honour of the Crown “in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada’s aboriginal peoples.”³⁶

If the Crown cannot meet its burden, then the Aboriginal right takes precedence over the offending government action.

The 1997 decision of the Supreme Court of Canada in *Delgamuukw v. British Columbia*³⁷ remains the foundational decision on Aboriginal title in Canada. In that action, the hereditary chiefs of the Gitksan and Wet’suwet’en First Nations claimed 58,000 square kilometers of north-western British Columbia. By the time the case reached the Supreme Court, the nature of the First Nations’ claim had evolved from one of ownership to one of Aboriginal title.

In order to address the claim of Aboriginal title, the analytical framework set out in *Van der Peet*³⁸ needed to be modified. Although there is substantial over-lap between the prerequisites for establishing Aboriginal rights and Aboriginal title, Lamer C.J.C. noted two primary distinctions:

First, under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy, and second, whereas the time for the identification of aboriginal rights is the time of first contact, the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land.³⁹

Chief Justice Lamer then went on to set out the test to be met to prove Aboriginal title:

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

35. *Ibid.* (*Gladstone*), at paras. 31, 34, and 72, where Lamer C.J.C. noted that appropriate objectives are “the recognition of prior occupation of North America by Aboriginal peoples or ... the reconciliation of Aboriginal prior occupation with the assertion of the sovereignty of the Crown.” See also *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686 at paras. 56-60 [*Sappier*].

36. *Sparrow*, *supra* note 34 at para. 64.

37. *Supra* note 18.

38. *Van der Peet*, *supra* note 22.

39. *Delgamuukw*, *supra* note 18 at para. 142.

between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.⁴⁰

Assuming, for the moment, that an Aboriginal group meets the foregoing test, there is still the question of the nature of the title that the group has, *prima facie*, to establish. The answer is that Aboriginal title entitles the Aboriginal community to the “exclusive use and occupation of the land” in all ways that are not “irreconcilable with the nature of the group’s attachment to that land.”⁴¹ This, of course, begs the question of the nature of an Aboriginal group’s attachment to the land. The “irreconcilable use” limitation requires a re-examination of the evidentiary foundation which substantiated the Aboriginal title claim and, in particular, a re-examination of the nature of the Aboriginal group’s occupation of the land.

At paragraph 128 of *Delgamuukw*, Lamer C.J.C. makes the analytical observation that links the test to the inherent limitations of Aboriginal title:

one of the critical elements in the determination of whether a particular aboriginal group has aboriginal title to certain lands is the matter of the occupancy of those lands. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group’s distinctive culture.

Because of the “special bond” and its creation through particular types of activities, it would be inconsistent to create a form of title that permits the destruction of the foundations upon which it is built. Lamer, C.J.C. provides the examples of strip mining a hunting ground and turning land of ceremonial or cultural significance into a parking lot⁴² as activities that would be inconsistent with Aboriginal title.

It is also the special bond between Aboriginal groups and the lands they hold pursuant to Aboriginal title that leads to the general prohibition on alienating such lands, except to the Crown. These lands “are more than just a fungible commodity.”⁴³ The land has an important non-economic value that is unique to the relationship between the Aboriginal group and the land for which it holds Aboriginal title.

Notwithstanding the special bond between an Aboriginal group and specific lands, groups holding Aboriginal title may always surrender their

40. *Ibid.* at para. 143.

41. *Ibid.* at para. 117.

42. *Ibid.* at para. 128.

43. *Ibid.* at para. 129.

title to the Crown.⁴⁴ Such surrender would be in effect a renouncement of the special bond to the land and could be used by Aboriginal groups to enable them, or others, to use the land in ways that would be irreconcilable with Aboriginal title. As an example, it may be possible for an Aboriginal group to partake in an industrial activity that would otherwise be prohibited. The group could surrender its Aboriginal title over a portion of its Aboriginal title lands to the Crown in exchange for valuable consideration, which may include fee simple title to the land. This land would then be owned by the group as a fully transferable economic asset, capable of any sort of development that could have been permitted but for the existence of Aboriginal title. Such a surrender of Aboriginal title, however, would not and should not be taken lightly by an Aboriginal group, as a surrender ends the legal significance of the group's cultural and historical ties to the land.

In addition to the Aboriginal group's ability to enable the pursuit of activities that are inconsistent with Aboriginal title, the Crown may infringe Aboriginal title, as it may infringe other Aboriginal rights, where it can demonstrate appropriate justification. This justification is measured against a two part test:

1. The infringement of the Aboriginal right must be in furtherance of a legislative objective that is compelling and substantial;⁴⁵ and
2. The infringement must be consistent with the special fiduciary relationship between the Crown and Aboriginal peoples.⁴⁶

The all-encompassing nature of Aboriginal title means that an infringement is more likely to occur in the context of Aboriginal title than in the context of Aboriginal rights. Any interference with the Aboriginal group's use and enjoyment of the land could form the basis of an infringement, as the right to exclusive use and occupation of lands is much broader than a specific Aboriginal right to fish, harvest logs or hunt.

The Supreme Court of Canada decision in *R v. Badger*⁴⁷ noted that treaty rights are different from other forms of Aboriginal rights. Treaty rights are contained in official agreements between the Crown and native peoples and are enforceable obligations based on the mutual consent of

44. *Ibid.* at para. 131.

45. *Ibid.* at para. 161.

46. *Ibid.* at para. 162. For a further review and application of the principles outlined in *Haida*, *supra* note 19, see *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 [*Taku River*].

47. *R v. Badger*, [1996] 1 S.C.R. 771 [*Badger*].

the parties.⁴⁸ However, both Aboriginal and treaty rights are unique, or *sui generis*, and in both the honour of the Crown is engaged.⁴⁹

The Court in *Badger* also described the foundational principles of treaty interpretation in the Aboriginal context:

- A treaty represents an exchange of solemn promises between the Crown and the applicable First Nation;
- The honour of the Crown is always at stake when dealing with Aboriginal people and, as a result, treaty and statutory interpretation must be approached in a manner which maintains the integrity of the Crown;
- Any ambiguities or doubtful expressions in the wording of a treaty or document must be resolved in favour of the First Nation and any limitations which restrict the rights of the First Nation under the treaty must be narrowly construed;
- The onus of proving that a treaty or Aboriginal right has been extinguished lies upon the Crown; and
- There must be a strict proof of the fact of extinguishment and evidence of a clear and plain intention on the part of the government to extinguish treaty rights.⁵⁰

Chief Justice McLachlin in *R. v. Marshall*⁵¹ (dissenting in result, but not in respect of the applicable principles) summarized the principles of treaty interpretation as follows:

- Aboriginal treaties constitute unique types of agreements and attract special principles of interpretation;
- Treaties should be liberally construed and ambiguities and doubtful expressions should be resolved in favour of the Aboriginal signatories;
- The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interest of both parties at the time the treaty was signed;
- In searching for the common intention of the parties, the integrity and honour of the Crown is presumed;
- In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties;

48. *Ibid.* at para 76.

49. *Ibid.* at para. 78.

50. *Ibid.* at para. 41.

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

- The words of the treaty must be given the sense which they would naturally have held for the parties at the time;
- Technical or contractual interpretation of treaty wording should be avoided;
- While construing the language generously, courts cannot alter the terms of the treaty by exceeding what is possible or realistic from the language; and
- Treaty rights of Aboriginal peoples must not be interpreted in a static or rigid way; they are not frozen at the date of signature and the interpreting court must update treaty rights to provide for their modern exercise.⁵²

Further clarification of the rules of treaty interpretation can be found in Binnie J.'s reasons in *Marshall I*, in which he indicates that "'generous' rules of interpretation should not be confused with a vague sense of after-the-fact largesse."⁵³

When the Supreme Court released its decision in *Haida*⁵⁴ in November 2004, it further developed the concept of Crown consultation discussed in *Delgamuukw*, in which Lamer C.J.C. had affirmed that there "is always a duty to consult"⁵⁵ if there is a potential infringement. Chief Justice Lamer set out a spectrum of consultation that varies depending on the potential infringement:

The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.⁵⁶

In *Haida*, McLachlin C.J.C. confirmed that the former Chief Justice's observations in *Delgamuukw* "apply as much to unresolved claims as to

52. *Ibid.* at para. 78.

53. *Ibid.* at para. 14.

54. *Haida*, *supra* note 19.

55. *Delgamuukw*, *supra* note 18 at para. 168.

56. *Ibid.* at para. 168.

intrusions on settled claims.”⁵⁷ The duty to consult is rooted in the Crown’s legal obligation to uphold the “honour of the Crown” in all dealings with Aboriginal peoples.⁵⁸ The underlying logic of requiring consultation even before a claim is fully established was concisely stated by the Court:

To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.⁵⁹

The risk of depreciation of the value of a potential Aboriginal right before it is fully established necessitates that the duty to consult “arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”⁶⁰

In *Haida*, the Supreme Court made clear that consultation was not an end in itself. Consultation is by its nature an exchange of information and the content of such information can give rise to further duties: in particular, the duty to accommodate. Where the exchange of information reveals a strong *prima facie* case for an Aboriginal right “and the consequences of the government’s proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.”⁶¹

The process of consultation and accommodation is one of compromise. It does not provide Aboriginal groups with a veto over activities pending final settlement of Aboriginal claims.⁶² Further, the potential requirement of consent established in *Delgamuukw* was not extended to Aboriginal rights claims.⁶³ In addition, the Supreme Court made it clear that legal responsibility for the duty to consult rests solely with the Crown, although it does have the flexibility to “delegate procedural aspects of consultation to industry” as is often done in the environmental assessment process.⁶⁴ The fact that direct legal responsibility for consultation rests with the Crown, however, does not immunize third parties from the consequences of a breach of the Crown’s obligation. Permits, licences and approvals

57. *Haida*, *supra* note 19 at para. 24.

58. *Ibid.* at para. 16.

59. *Ibid.* at para. 27.

60. *Ibid.* at para. 35.

61. *Ibid.* at para. 47.

62. *Ibid.* at para. 48.

63. *Ibid.* at para. 48.

64. *Ibid.* at para. 53.

granted by the Crown remain subject to challenge. As such, the third party beneficiaries of such licences continue to have a direct interest in ensuring that the Crown meets its duty to Aboriginal peoples.

In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*,⁶⁵ McLachlin C.J.C. considered the Crown's duty to consult with and accommodate Aboriginal peoples when making decisions that may adversely affect as yet unproven rights and title claims. The Aboriginal Band participated in an environmental assessment process lasting three years which ultimately found the band disappointed in the result of a decision of Redfern Resources and the province to reopen an old mine. Chief Justice McLachlin found that the process of consultation undertaken by the province met the requirements of the duty to consult and accommodate:

Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process.⁶⁶

Discharging the duty to consult and accommodate does not require a duty to reach agreement, but it does require a participation element that is "meaningful" to the Aboriginal band. The duty is not dependent necessarily on where the Aboriginal band or community is situated, merely that an Aboriginal claim exists or potentially exists.

The duty to consult may also extend to private lands. In *Badger*,⁶⁷ the Supreme Court noted that treaty rights may be exercised on private land where the exercise of the treaty right is not incompatible with the existing visible land-use.⁶⁸ Arguably, therefore, a government decision authorizing an incompatible use would infringe an Aboriginal right and invoke the duty of consultation.

In 2005, the British Columbia Supreme Court in *Hupacasath First Nation v. British Columbia*⁶⁹ heard a petition for judicial review of the decisions of the Minister of Forests to remove certain privately owned land from a tree farm licence and to make a new annual allowable cut for that licence.⁷⁰ The lands in question were part of the geographical territory

65. *Supra* note 46.

66. *Ibid.* at para. 2.

67. *Badger*, *supra* note 47.

68. *Ibid.* at paras. 51, 65-66.

69. *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 1712, [2006] 51 B.C.L.R. (4th) 133 [*Hupacasath*].

70. *Ibid.* at para. 4.

over which the Hupacasath First Nation had Aboriginal rights claims. In its analysis, the Court held that fee simple title to land is not fundamentally inconsistent with Aboriginal rights:

I conclude that the principles articulated in *Haida Nation* and *Taku River* can apply outside the context of Crown land. The Crown's honour does not exist only when the Crown is a land-owner. The Crown's honour can be implicated in this kind of decision-making affecting private land. Here, the Crown's decision to permit removal of the lands from TFL 44 is one that could give rise to a duty to consult and accommodate.⁷¹

In *Paul First Nation v. Parkland (County)*,⁷² the Alberta Court of Appeal considered *Hupacasath* and attempted to limit the effect of the British Columbia Supreme Court's decision on the basis of its specific factual context. The Paul First Nation challenged the decision of the Subdivision and Development Appeal Board of Parkland County to grant a permit for the development of a gravel pit. It argued that the development would hinder its members' ability to travel on pilgrimage to Lac St. Anne and also their ability to access adjacent lands for hunting and herb gathering.⁷³ Thus, its Aboriginal rights would potentially be infringed and consultation was required. This argument was summarily rejected by the Alberta Court of Appeal, which held that any duty to consult with respect to private lands arising out of *Hupacasath*

must be restricted to the facts of that case as it involved an operative transfer of the lands into a publicly funded government program followed by an attempt to transfer the lands out of that program. The extensive involvement of the government was the primary factor that precipitated the duty to consult in that instance. Here, there is no allegation that government is involved in the proposed Burnco development. Therefore, the duty to consult does not arise.⁷⁴

Unfortunately, it appears that the Alberta Court of Appeal missed the underlying logic in *Hupacasath* and, to a lesser extent, *Badger*. It is not the "extensive involvement" of the Crown that gives rise to the duty to consult, but the potential impact of the Crown's decision on Aboriginal rights that invokes the duty to consult.

71. *Ibid.* at para. 199.

72. *Paul First Nation v. Parkland (County)*, 2006 ABCA 128, (2006), 384 A.R. 366 [Paul].

73. *Ibid.* at para. 9.

74. *Ibid.* at para. 14.

In the Newfoundland Supreme Court (Trial Division) decision in *Newfoundland (Minister of Government Services & Lands) v. Drew*,⁷⁵ Barry J. observed, in *obiter*, that certain instruments of title, issued by the Government of Newfoundland prior to Confederation, appeared to extinguish Aboriginal rights:

Thus, in the case of the Abitibi Freehold Lands, the grant of all the Crown's "estate, right, title interest, trust etc." in lands together with "the woods, ways, water-courses, mines, ores and minerals of every kind"; in the case of the Abitibi Charter Lands, the reviewable 99 year lease confirming and guaranteeing "title" and conferring "by way of grant, sale or devise, and not of exception, all timber and trees being on the said lands, and also all mines and minerals therein and thereunder"; and in the Abitibi Timber Leases, granted subject to the Crown lands legislation in force from time to time, vesting in the licence "the right to take and keep exclusive possession of the land", vesting "all right of property whatsoever in all trees and timber" and authorizing prosecution of "all trespassers", with reservation to the Crown of the right to grant cut-over land for agriculture or mining and to use timber for public works and reservation to the public of the right to cut timber for the fisheries, for fencing and for firewood and like purposes; would appear by necessary implication to preclude the exercise of Aboriginal rights over the Abitibi lands.⁷⁶

In contrast, an instrument of title from the Government, which by statute was subject to the right of the public to hunt and fish over the lands, left open the question of Aboriginal rights:

In the case of Corner Brook Pulp and Paper, the situation is not as clear, because of the conditions in sections 9 and 10 of the 1923 amendment to the 1915 statutory agreement which preserved for the public the right to "fish, shoot, hunt and trap over the lands and timber areas". The question arises whether a possible interpretation of this is that aboriginal rights to fish, shoot, hunt and trap (and the incidental right to have shelter for exercise of these rights) is preserved as part of the public right, a question I need not now answer.⁷⁷

On appeal, these findings of Barry J. were noted, but not directly addressed. The unsettled nature of the relationship between Aboriginal rights and the rights of private land owners, will require further judicial guidance.

75. *Newfoundland (Minister of Government Services & Lands) v. Drew*, 2003 NLSCD 105, (2003), 228 Nfld. & P.E.I.R. 1 [*Drew (Trial)*].

76. *Ibid.* at para. 1155. On appeal this observation was not contested by any party and, although noted by the Court of Appeal, was not disputed. The Abitibi did not participate in the appeal.

77. *Ibid.* at para. 1156.

2. *Atlantic Canada*

The national jurisprudence on Aboriginal rights is undoubtedly of great significance to establishing and defining Aboriginal rights in Atlantic Canada. However, the general national analytical framework is one that is, of necessity, refined to adapt to the factual circumstances of different parts of the country. Because of the many centuries of interaction between Aboriginals and non-Aboriginals in Atlantic Canada, historical complexities are multiplied. The interactions between the French and the British colonial powers and the Aboriginal inhabitants of Atlantic Canada provide much of the context, both legal and historical, for present day determinations of Aboriginal rights. In addition, Canada's own history as a confederated country, and particularly the inclusion of Newfoundland in 1949, adds another complexity.

In the period between the Treaty of Utrecht (1713) and the Treaty of Paris (1763), the British signed several peace and friendship treaties with the Mi'kmaq and the Maliseet. Most of the treaties contained the following common elements:

- A recognition of the British Crown's jurisdiction and dominion over the territory covered;
- An agreement that conflicts between Indians and British settlers would be settled according to British law;
- An understanding that the Indians would not molest British settlers; and
- An understanding that the British would not interfere with the Indians' hunting, fishing, planting and fowling activities.⁷⁸

The treaties signed in the Maritimes are unique in that there is no cessation or release by the First Nations of any rights.⁷⁹ The majority of treaties in other parts of Canada involve Aboriginal people ceding, releasing and surrendering their rights to land and their traditional activities in return for specific rights. However, in the Maritimes, the potential exists for Aboriginal rights to co-exist with treaty rights.

a. *Newfoundland and Labrador*

The decisions of the Supreme Court (Trial Division) and the Court of Appeal in *Newfoundland (Minister of Government Services & Lands) v. Drew*⁸⁰ provide an informative case study of the interplay between Atlantic Canada's unique historical circumstances and legal analysis. Litigation was precipitated by an application of the Provincial Crown ordering the

78. Isaac, *supra* note 5 at 26.

79. *Ibid.* at 27.

80. *Supra* note 13.

removal of certain hunting cabins erected by a number of Mi'kmaq from Conne River, in the Bay du Nord Wilderness Reserve. The defendants opposed the application, claiming that the cabins were "necessary for the exercise of claimed rights to fish, hunt and trap"⁸¹ in their traditional territory and that these pursuits were protected by Mi'kmaq treaty and Aboriginal rights.⁸²

As noted above, the historical record indicates that the Beothuk were the original inhabitants of the Island of Newfoundland, with the Mi'kmaq settling the island following the arrival of the Europeans. As we have also seen from *Van der Peet* and its progeny, non-title rights, with the notable exception of Métis rights, are crystallized at the time of European contact. Adding further complexity, the ongoing power struggle between Britain and France lead to a series of treaties in the 1700s, which were interrupted by hostilities among the British, the French and the Mi'kmaq. Finally, the political devolution of power to the Colony, and then the Dominion, of Newfoundland and Newfoundland's eventual inclusion in Confederation in 1949 present unique challenges when tracing the power of extinguishment and its use.

In his voluminous decision, Barry J. extensively reviewed the historical record as presented at trial. The evidence of first contact, linked as it is with the claim for Aboriginal rights, was of primary importance. Similarly, the period between approximately 1720 and 1770, during which a number of agreements were reached between the British and the Mi'kmaq, was thoroughly examined. Finally, the legislative history of Newfoundland from the granting of representative government in 1832 through to Confederation in 1949 was briefly examined in relation to the issue of extinguishment.

Barry J. held that by at least 1550 European contact had occurred and such contact was sufficient to prevent the creation of new Aboriginal rights:

Accepting that contact is in fact the legal test for aboriginal rights, it is clear, based on the archaeological evidence earlier noted that contact had occurred between the Europeans and the Mi'kmaq by 1550, long before any evidence of the arrival of the Mi'kmaq in Newfoundland.... Even accepting that this Court should not assume Mi'kmaq practices, customs and traditions immediately changed with initial European encounters, the archaeological assemblages in Nova Scotia satisfy me that by 1550 there were sufficient European influences on Mi'kmaq culture to prevent practices commencing after that date (such as fishing, hunting, and trapping in Newfoundland) from meeting the test of "aboriginal"

81. *Drew (Trial)*, *supra* note 75 at para. 3.

82. *Ibid.*

set out in *Delgamuukw* and *Mitchell*. Historical references to Mi'kmaq use of European technology such as shallops by 1602 support this timeframe.⁸³

As Barry J. emphasized, 1550 is a date considerably before the historical record shows Mi'kmaq arrival in Newfoundland. The Mi'kmaq did not carry on fishing, hunting and trapping in Newfoundland prior to first contact; thus there could be no creation of a Mi'kmaq Aboriginal right in Newfoundland to fish, hunt, and trap. In addition, Barry J. concluded that "even if the Mi'kmaq ancestors were present on the Island of Newfoundland before European contact, the Defendants have not proven on a balance of probabilities that they then fished, hunted or trapped in the territory known as the Bay du Nord Wilderness Area."⁸⁴

In the defendants' treaty rights claim, Barry J. focused his analysis on the four treaties upon which the defendants' founded their claim:

- The 1725 treaty negotiated at Boston by Paul Mascarene, on behalf of Nova Scotia, and subsequently ratified at Annapolis Royal in 1726 by John Doucett, Lieutenant Governor of Annapolis, and seventy-seven Mi'kmaq, Maliseet and Passamaquoddy representatives;
- The 1752 treaty signed by Nova Scotia Governor Peregrine Thomas Hopson and Chief Jean Baptiste Cope, on behalf of the Shubenacadie Band of Mi'kmaq;
- The 1759 Schomberg - Whitmore treaty; and
- The treaty of June 25, 1761, signed at Belcher's Farm in Halifax by Chief Jeannot, on behalf of the Cape Breton Mi'kmaq Band, and Lieutenant-Governor Belcher and colonial officials, on behalf of Nova Scotia.⁸⁵

Barry J. then addressed each in turn.

The Treaty of 1725-1726

Justice Barry rejected the defendants' claim for treaty rights pursuant to the Treaty of 1725-1726. He found that the forbearers of the defendants were not party to the treaty, noting that the draft treaty of 1725 made reference on seven occasions to the tribes or the government of the "Territories of Nova Scotia or Accadie and New England."⁸⁶ The Treaty ratified in 1726 contained numerous similar references, which demonstrated a common

83. *Ibid.* at para. 626.

84. *Ibid.* at para. 1156.

85. *Ibid.* at para. 995.

86. *Ibid.* at para. 1026.

intention of the parties that the treaty bind the natives of Nova Scotia only.⁸⁷ As such the geographic scope of the treaty did not extend to either Cape Breton, where the defendants' forbearers originated, or Newfoundland, the locus of the claim.

Interestingly, Barry J. also held that subsequent hostilities between the Mi'kmaq and the British effectively terminated the treaty:

As explained by Dr. Patterson, the Mi'kmaq allied themselves with the French when war broke out in 1744 between Britain and France. I agree with Dr. Patterson that the subsequent behaviour of both Mi'kmaq and British indicates that neither felt bound by the Treaty of 1725-26 and that both believed the treaty was terminated by their hostilities. Accordingly, even if the treaty had been intended to apply to Cape Breton Mi'kmaq, generally, which I do not accept, the Defendants cannot now rely upon this treaty as descendants of the Cape Breton band, since the treaty was repudiated by the parties.⁸⁸

The Treaty of 1752

Following the same reasoning as in his review of the Treaty of 1725-1726, Barry J. found that the Treaty of 1752 was geographically limited to Nova Scotia and did not include Cape Breton,⁸⁹ which at the time remained a French outpost. Further, the Court noted that the Supreme Court in *Marshall I*⁹⁰ had found the 1752 Treaty to be between the Crown and the Shubenacadie Band.⁹¹ In any event, like the previous treaty, Barry J. held that this treaty too was repudiated by subsequent hostilities:

This treaty was terminated by subsequent hostilities between the parties. Dr. Patterson confirmed that, as noted in *Marshall*, skirmishing commenced again in 1753 between the British and the Mi'kmaq. The Mi'kmaq signatory, Major Jean Baptiste Cape, staged a violent demonstration of his repudiation of the treaty. I note the subsequent treaties of 1761-62 did not renew this treaty and I am satisfied it was repudiated by the subsequent hostilities.⁹²

87. *Ibid.* Note that at the time of the agreement Cape Breton was not part of Nova Scotia, but was under French control.

88. *Ibid.* at para. 1027. This finding was also noted by the Supreme Court of Canada in *Sappier*, *supra* note 35 at para. 64.

89. *Ibid.* at para. 1030.

90. *Marshall I*, *supra* note 51.

91. *Drew (Trial)*, *supra* note 75 at para. 1031.

92. *Ibid.* at para. 1033.

The 1759 Schomberg - Whitmore Treaty

The Schomberg-Whitmore Treaty no longer appears to exist. Relying on secondary sources, the Court held that with the fall of Louisbourg on Cape Breton Island in July 1758 and the defeat of the French in Quebec in 1759, British Lieutenant Schomberg was charged with ending privateering out of Merigomish, Pictou County, Nova Scotia.⁹³ Further, articles of capitulation were signed by the Mi'kmaq at Pictou and Merigomish.⁹⁴ The missing Schomberg-Whitmore Treaty, however, appears to have been subsequently signed at Louisbourg and to have contained a pledge that the Mi'kmaq would be free to enjoy "all our possessions, your liberty, property with free exercise of your religion."⁹⁵

When interpreting the pledge, Barry J. held that:

The aboriginals dealing with Lieutenant Schomberg had territory within which to exercise any rights granted, namely, their traditional territory within Cape Breton. I conclude restricting any rights granted to that territory was the common intention that best reconciled Mi'kmaq and British interests.⁹⁶

In further support of this position, Barry, J. noted that Schomberg and his immediate superior, General Whitmore, had no jurisdiction to make any commitments with respect to any rights or privileges on the Island of Newfoundland, where other British representatives were responsible.⁹⁷ This view of the historical situation, however, was not used as a technical legal argument, but as an indicium of intent.

With the geographical reach of the Treaty determined, the Court turned to its substance, indicating that the Treaty likely "did not include trading rights or ... anything other than submissions and oaths of allegiance."⁹⁸ As such not only does the Schomberg-Whitmore Treaty not appear to give the Mi'kmaq rights to hunt, fish and trap in Newfoundland, it does not appear to give them those rights in Cape Breton.

Treaty of 1761 (Belcher Declaration)

In June of 1761, Chief Jeannot Pequidoualouet signed a treaty with the Acting Lieutenant Governor of Nova Scotia, Jonathan Belcher—the Treaty of 1761. Although this Treaty has not been found, the parties agreed that it was likely similar to that signed with the Shediac Band in the same month

93. *Ibid.* at para. 1036.

94. *Ibid.*

95. *Ibid.* at para. 1037.

96. *Ibid.* at para. 1038.

97. *Ibid.* at para. 1039.

98. *Ibid.* at para. 1042.

and it was likely the defendants' ancestors who were beneficiaries under the Treaty.⁹⁹ Nevertheless, Barry J. did not find that the Treaty gave rise to any treaty rights in favour of the defendants. By the time Governor Belcher signed the treaty, Cape Breton was controlled by the British.¹⁰⁰ However, as with the prior treaties, Barry J. did not find any intent on the part of the Crown to grant rights over lands in Newfoundland, which remained under separate political control.¹⁰¹ Similarly, Barry J. held that the nature of the Mi'kmaq visits to Newfoundland were not sufficient to include any new lands in the Mi'kmaq traditional territory:

The geographic extent of treaty rights is normally restricted to the territory that was part of the traditional territory of the aboriginal community at the time the treaty was made. I do not accept that the occasional and sporadic visits of the Mi'kmaq to Newfoundland between 1713 and 1761... establish that the Island of Newfoundland was part of the traditional territory of the Mi'kmaq, even if Governor Belcher was aware of the Mi'kmaq visits to Newfoundland, of which I have no evidence.... I do not agree that occasional Mi'kmaq appearances in Newfoundland before 1761, more than 200 years following initial contact with Europeans and utilizing European technology, warrant the conclusion that Governor Belcher should be taken to have intended to include Newfoundland in the territory affected by the Treaty of 1761. I am not satisfied the Mi'kmaq would have intended this either. I find support for this conclusion in the practice of the British, from at least as far back as the treaties of 1725-26, when separate treaties were prepared for Massachusetts, New Hampshire and Nova Scotia, which would have made very clear to natives that different British officials had authority to treat for different territories.¹⁰²

Extinguishment

Because Newfoundland did not join Confederation until 1949, the locus of the power to extinguish Aboriginal rights in Newfoundland had an evolution distinct from that in the Maritime Provinces. Although representative government came to Newfoundland in 1832 and responsible government in 1855, it is not clear precisely when the power to extinguish Aboriginal rights shifted from the Imperial Crown in Britain to the Newfoundland Crown. There is no pre-Confederation legislation specifically addressing Aboriginal matters, other than that prohibiting the removal of Innu and Nascapi-Montagnais from Labrador.¹⁰³ Nevertheless, as discussed above,

99. *Ibid.* at para. 1047.

100. *Ibid.* at para. 1050.

101. *Ibid.* at para. 1050.

102. *Ibid.* at para. 1054.

103. *Ibid.* at para. 1078.

the Court did find a Crown grant to a pulp and paper company would have extinguished Aboriginal rights, if they existed.¹⁰⁴

The unanimous decision of the Court of Appeal confirmed Barry J.'s analysis and conclusions. It is noteworthy that, on appeal, the defendants/appellants took a new tack in their legal argument. They argued that the critical point in time for the establishment of Aboriginal rights is not the time of European contact, but the time of British sovereignty or control over the lands in question. They suggested this would be 1763, when the Treaty of Paris was signed between Britain and France.¹⁰⁵ The appellants' legal argument was summarized by the Court as follows:

The appellants say that the *Van der Peet* pre-European contact test is inconsistent with the purpose underlying s. 35(1) of the *Constitution Act, 1982*, that it lacks a convincing rationale and that it is not in harmony with the basic tenants [*sic*] of other aboriginal rights as laid down by the Supreme Court of Canada. The underlying purpose of s. 35(1), as indicated above, is the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions: *Van der Peet* at para. 44. The appellants say that the rigid "prior to contact with the Europeans" test adopted in *Van der Peet* was peculiar to the facts of that case and has, in fact, been applied with flexibility in subsequent cases. They refer to *R. v. Adams*, [1996] 3 S.C.R. 101, and *R. v. Côté*, [1996] 3 S.C.R. 139, two cases which were dealt with by the trial judge, but, more particularly and with greater emphasis, to *R. v. Powley*, [2003] 2 S.C.R. 207, and, less so, to *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220 (*Marshall* #3), which are decisions that postdate the trial judge's decision.¹⁰⁶

Based on this assertion of inconsistency with the *Constitution Act, 1982* and post-*Van der Peet*¹⁰⁷ flexibility, the appellants contended that it would be inequitable to deny to Mi'kmaq in Newfoundland Aboriginal rights granted to the Mi'kmaq in Nova Scotia because the Mi'kmaq moved to Newfoundland after European contact. Instead, they suggested "a two-pronged test that would allow for the mobility of aboriginal rights existing

104. *Ibid.* at para. 1155.

105. *Ibid.* at para. 7. It should be noted that by the Treaty of Utrecht in 1713 France had ceded sovereignty over Newfoundland to the British. However, the Treaty of Paris in 1763 transferred all French territory in North America to the British, with the exception of St. Pierre and Miquelon, effectively ending their North American power struggle.

106. *Drew (CA)*, *supra* note 13 at para. 44.

107. *Van der Peet*, *supra* note 22.

at the date of European contact, provided any move to the new location occurred before the establishment of effective British sovereignty.”¹⁰⁸

The appellants relied heavily on the adaptation of the *Van der Peet* criteria in *R. v. Powley*,¹⁰⁹ where the Supreme Court of Canada recognized that Métis Aboriginal rights arose in the period between European contact and effective European control. This was premised on the view that the “constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control.”¹¹⁰ Although the Court did not expressly refer to it, the Mi’kmaq, unlike the Métis, were not a people that “emerged between first contact and effective European control.” In concluding its analysis, the Court was clear and concise:

In summary, and with the greatest respect, *Powley* is not a break with the *Vanderpeet* test, and it does not, on any basis, signal the situational flexibility that the appellants seek. Nor does it exhibit the discrimination which the appellants contend it does. In the final analysis, the appellants’ argument is for the law as they would wish it to be, not as it is.¹¹¹

In summary, the *Drew* decisions demonstrate some of the unique historical complexities involved in assessing Aboriginal rights issues in Atlantic Canada. Leave to appeal the decision to the Supreme Court of Canada was recently dismissed.

In *Labrador Métis Nation v. Newfoundland & Labrador (Minister of Transportation & Works)*,¹¹² the Labrador Métis Nation brought an action against the Provincial Crown seeking a determination of its right to be consulted on the construction of a 250km section of the Trans Labrador Highway in south and central Labrador. The case was limited to a consideration of the right to be consulted and was not a determination of Aboriginal status or Aboriginal rights.

Fowler J. conducted a preliminary evaluation on both the strength of the Labrador Métis Nation’s claim and its ability to hold Aboriginal rights. Justice Fowler’s evaluation examined the question of the historical presence of the Labrador Métis in the defined area of the present occupation.

108. *Drew (CA)*, *supra* note 13 at para. 45. This approach was drawn primarily from Professor Brian Slattery’s critique in “Making Sense of Aboriginal and Treaty rights” (2000), 79 Can. Bar Rev. at 196.

109. *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207 [*Powley*].

110. *Ibid.* at para. 17.

111. *Drew (CA)*, *supra* note 13 at para. 67.

112. *Labrador Métis Nation v. Newfoundland & Labrador (Minister of Transportation & Works)*, 2006 NLTD 119, (2006), 258 Nfld & P.E.I.R. 257 [*Labrador Métis*].

Because of the nature of the application, the trial did not engage in the same level of expansive evidentiary presentation and review as in *Drew (Trial)*.¹¹³ Nevertheless, considerable historical evidence was put before the Court, including the use of expert witnesses in the fields of history and archaeology. Reviewing the scholarly evidence, Fowler J. observed that:

generally it is agreed that the period from first contact around 1550, to the period of effective European control around 1760 that there were Inuit people using the southern regions of Labrador in one capacity or another....

Whatever the date of full occupation by the Inuit it is the conclusion of this Court that there is a very high probability that the Inuit people emerged along the southern coast of Labrador prior to and continuous with the gradual appearance and introduction of the Europeans for at least two hundred years before effective control by the British.¹¹⁴

In the early post-contact period, these Inuit intermingled with Europeans. This intermingling and the historical evidence of their cultural practices led Fowler J. to conclude that “there is a strong case to be made for recognizing a regional community of Labrador Métis people of mixed Inuit and European ancestry along the east and south coast of Labrador.”¹¹⁵ Further, Fowler J. was satisfied that “the modern day people who claim that they are Métis are descendants from this early new culture and have, since the sixteenth century, gradually migrated throughout the south coastal region of Labrador.”¹¹⁶

Based on the foregoing, Fowler J. held that

There is a credible but unproven claim, the likelihood for recognition of the Labrador Métis people is on the high end of the spectrum and, notwithstanding that the lands claimed and use of the land claimed is still to be determined and the potential for damage or impairment to the claimed rights uncertain, the duty to consult must be on a meaningful level.¹¹⁷

He then went on to note that the claim to central Labrador is “historically less defined than to the coastal region of southern Labrador.”¹¹⁸ Nevertheless, the

113. *Supra* note 75.

114. *Labrador Métis*, *supra* note 112 at paras. 48-49.

115. *Ibid.* at para. 72.

116. *Ibid.*

117. *Ibid.* at para. 130.

118. *Ibid.* at para. 133.

Government of Newfoundland and Labrador was ordered to “immediately commence meaningful consultation with the Labrador Métis Nation.”¹¹⁹

b. *Maritime Provinces*

In Nova Scotia and New Brunswick the two Marshall decisions¹²⁰ continue to shape the evolution and application of Aboriginal rights in both provinces. Although the Marshall decisions undoubtedly had a national impact on the development of Aboriginal rights, their regional impact has been increased because of the historical and contextual similarities between the events analyzed in those decisions and subsequent decisions arising out of the historical realities of the region. As such, this section will re-examine the Marshall cases before considering the more prominent recent decisions stemming from Nova Scotia and New Brunswick.

Marshall I and *Marshall II* recognized a treaty right to fish for trade.¹²¹ The case arose from the arrest and prosecution of Donald Marshall Jr. for the capture and sale of 463 pounds of eel from the coastal waters off Nova Scotia. Specifically, he was charged with selling eel without a licence, fishing without a licence, and fishing during the closed season with illegal nets. The sole issue of the case was whether the accused had a defence based on an existing treaty right to fish for and trade eel.

The accused relied on a Mi'kmaq Treaty of Peace and Friendship (the Treaty) signed with the British on 10 March 1760, in Halifax, Nova Scotia. Specifically, the accused relied upon alleged oral terms and the implications of the trade clause in the text.¹²² The crucial trading clause provides as follows:

And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor.¹²³

Based largely on the interpretative principles outlined in the section on treaties above, the majority of the Supreme Court of Canada allowed the 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

119. *Ibid.* at para. 137.

120. *Marshall I*, *supra* note 51 and *R. v. Marshall*, [1999] 3 S.C.R. 533 [*Marshall II*].

121. In the case *R. v. Denny*, [1990] 55 C.C.C. (3d) 322 (N.S.C.A.), the Court recognized a limited Aboriginal right to fish for food.

122. *Marshall I*, *supra* note 51 at paras. 2-3.

123. *Ibid.* at para. 5.

and friendship as best the content of those treaty promises can now be ascertained.¹²⁴

Based on the historical record of the events and negotiations leading to the Treaty, the Court took the view that although the text of the Treaty did not explicitly guarantee a right to access wildlife, without the assurance of this right, the trade clause could not have advanced the British objective of peace with a self-sufficient Mi'kmaq people. Therefore, the right to fish was a guarantee implicit in the right to trade.¹²⁵ More precisely still, the Court found nothing in the record of negotiation leading up to or in the Treaty itself on the right to fish, but nevertheless implied this term into the text based on presumed intentions of the parties and regard for the honour of the Crown.¹²⁶ Justice Binnie characterized the treaty right as follows:

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.¹²⁷

The Court found that the fact that the Mi'kmaq rights to hunt, fish and trade under the Treaty were no greater than the rights enjoyed by other inhabitants did not detract from the higher protection they currently offer to the Mi'kmaq people, unless it could be demonstrated that those rights were extinguished prior to 17 April 1982.¹²⁸

After finding a treaty right to fish, the Court limited its scope.¹²⁹ The right contemplated was not a right to trade generally for economic gain and the accumulation of wealth, but was limited to the right to trade for the purposes of a moderate livelihood. This was characterized as the day to day needs of "food, clothing and housing, supplemented by a few amenities."¹³⁰ The Court took the position that catch limits could be established by regulation and enforced without violating treaty rights,

124. *Ibid.* at para. 4.

125. *Ibid.* at para. 35.

126. *Ibid.* at para. 43.

127. *Ibid.* at para. 56. In *R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220 [*Bernard*] at para. 19 the Court emphasized again that "the right conferred is not the right to harvest, in itself, but the right to trade" and at para. 20 that the right falls short of "a general right to harvest or gather all natural resources then used."

128. *Marshall I*, *supra* note 51 at para. 48.

129. *Ibid.* at para. 57.

130. *Ibid.* at para. 59. The Court relied upon the meaning of "moderate livelihood" as it was expressed in *Gladstone*, *supra* note 34 at para. 165.

provided they allowed for an amount that could reasonably be expected to produce this moderate livelihood.¹³¹

Mr. Marshall was acquitted on the basis that he had a treaty right to fish for eel and sell eel to support himself and his wife. The closed season and the imposition of a discretionary licensing system interfered with his right to fish for trade purposes. The ban on the sale of Mr. Marshall's catch would infringe his right to trade for sustenance if it were enforced.¹³²

After the release of the 17 September 1999 decision in *Marshall I*, the West Nova Fisherman's Coalition (the Coalition) made an application to the Supreme Court of Canada for a rehearing to address the issue of the Government of Canada's regulatory authority over the fisheries; to order a new trial to allow the Crown to justify the licensing and closed season restrictions on the exercise of the accused's treaty rights; and to order a stay of the Court's decision in *Marshall I*. Both the appellant and the Crown opposed the application. The Court dismissed the Coalition's application, but took the opportunity to clarify what it identified as "a basic misunderstanding of the scope of the Court's majority reasons" that were reflected in the Coalition's application¹³³ and unjustified assumptions made by the Native Council of Nova Scotia.¹³⁴

The Court nevertheless stated that an accused could in future cases attempt to show that the treaty right intended in 1760 included access to "resources other than fish, wildlife and traditionally gathered things such as fruits and berries."¹³⁵

The Court was quick, however, to offer a clarification, and by implication a limitation, on which resources could conceivably be included in the right by explaining what was meant by the term "gathered" in the 17 September 1999 judgment. The term was to be interpreted as relating to the types of resources which could have reasonably been within the contemplation of the parties to the 1760-1761 treaties¹³⁶ and did not include "anything and everything" physically capable of being gathered.¹³⁷ More

131. *Marshall I*, *supra* note 51 at para. 61.

132. *Ibid.* at para. 66. The dissenting Justices, McLachlin J. and Gonthier J., held the view that the Treaties of 1760-61 did not grant a freestanding right to truckhouses or a general right to trade, and while they did create an exclusive trade and truckhouse regime which gave the Mi'kmaq the limited right to bring goods to British trade outlets, this system died out in the 1780s and correspondingly the right to bring goods to trade ended.

133. *Marshall II*, *supra* note 120 at para. 11.

134. *Ibid.* at para. 19.

135. *Ibid.*

136. *Ibid.*

137. *Ibid.* at para. 20.

pointedly, the Court commented on the unlikelihood that treaty rights would include, *inter alia*, offshore natural gas deposits:

No evidence was drawn to our attention, nor was any argument made in the course of this appeal, that trade in logging or minerals, or the exploitation of off-shore natural gas deposits, was in the contemplation of either or both parties to the 1760 treaty; nor was any argument made that the exploitation of such resources could be considered a logical evolution of treaty rights to fish and wildlife or to the type of things traditionally "gathered" by the Mi'kmaq in a 1760 aboriginal lifestyle.¹³⁸

Furthermore, the Court referred to three additional limits to treaty rights identified in *Marshall I*:

1. No treaty was made by the British with the Mi'kmaq population as a whole and that the area in which treaty rights could be exercised was limited to the area "traditionally used by the local community with which the ... treaty was made";
2. The rights could only be exercised under the "authority of the local community to which the accused belongs"; and
3. The scope of the right was limited to obtaining from the identified resource only what was necessary to trade for "necessaries."¹³⁹

The Court also clearly affirmed the government's general regulatory power as a possible justification of future restrictions on the exercise of treaty rights.¹⁴⁰ The Court indicated that in addition to conservation, other substantial and compelling objectives may include economic and regional fairness and recognition of the historic reliance of non-Aboriginal groups on the fisheries. Summing up its ruling on the issue of regulation, the Court stated:

The Minister has available for regulatory purposes the full range of resource management tools and techniques, provided their use to limit the exercise of a treaty right can be justified. If the Crown establishes that the limitations on the treaty right are imposed for a pressing and substantial public purpose, after appropriate consultation with the aboriginal community, and go no further than is required, the same techniques of resource conservation and management as are used to control the non-native fishery may be held to be justified. Equally, however, the concerns and proposals of the native communities must be taken into account, and this might lead to different techniques of conservation and management

138. *Ibid.*

139. *Ibid.* at para. 17.

140. *Ibid.* at para. 25.

in respect of the exercise of the treaty right.¹⁴¹

The Supreme Court of Canada decision in *Bernard*¹⁴² addresses Aboriginal title, Aboriginal rights and treaty rights in Nova Scotia and New Brunswick. *Bernard* originated out of appeals from the New Brunswick Court of Appeal decision in *R. v. Bernard*¹⁴³ and the Nova Scotia Court of Appeal decision in *R. v. Marshall*.¹⁴⁴ Both of these dealt with the issue of whether Mi'kmaq persons have treaty rights or Aboriginal title permitting them to log Crown land for commercial purposes.¹⁴⁵ The Court proceeded on the basis that the British had established sovereignty in 1759 in the relevant portions of New Brunswick, 1713 in mainland Nova Scotia, and 1763 in Cape Breton. The foundations of the treaty claims were the *Royal Proclamation*¹⁴⁶ and Governor Belcher's Proclamation.

Before undertaking the analysis of whether Aboriginal title was established, the Supreme Court made two preliminary statements regarding how the analysis must proceed. The first sets out the method by which the Aboriginal and European legal perspectives are to be considered. The second identifies Aboriginal title, not as a stand-alone right, but as one of the possible spectra of independent Aboriginal rights that may be affirmed.¹⁴⁷

With regard to legal perspectives, the task is to view the pre-sovereignty practice from the perspective of the Aboriginal people and then to translate this practice into a common law right. In order to accomplish this, one must consider the nature of the common law right and whether the particular Aboriginal practice fits it. Exact conformity to the precise legal parameters of the common law right is not necessary.¹⁴⁸ The Court stated that Aboriginal title is established by Aboriginal practices that indicate possession similar to that associated with title at common law.¹⁴⁹

141. *Ibid.* at para. 43-44.

142. *Supra* note 127.

143. *R. v. Bernard*, 2003 NBCA 55, (2003), 230 D.L.R. (4th) 57, 262 N.B.R. (2d) 1 [*Bernard (CA)*].

144. *R. v. Marshall*, 2003 NSCA 105, (2003), 218 N.S.R. (2d) 78 [*Stephen Marshall (CA)*].

145. In *Stephen Marshall (C.A.)*, Marshall and thirty-four other Mi'kmaq persons were charged with cutting timber on Crown lands in Nova Scotia without authorization contrary to s. 29 of the *Crown Lands Act*. *Bernard*, also Mi'kmaq, was charged with unlawful possession of spruce logs he was hauling from a cutting site to a local sawmill in contravention of s. 67(1)(c) of the *Crown Lands and Forests Act* (New Brunswick). In both cases the trial Courts entered convictions which were set aside by the respective Courts of Appeal. In *Stephen Marshall, (C.A.)* a new trial was ordered while in *Bernard* an acquittal was entered.

146. *Royal Proclamation 1763 (U.K.)*, reprinted R.S.C. 1985, App. II, No. 1 [*Royal Proclamation*].

147. *Bernard, supra* note 127 at para. 53.

148. *Ibid.* at para. 48. The question, stated by the Court, is "whether the practice corresponds to the core concepts of the legal right claimed."

149. *Ibid.* at para. 54.

Considering first the basis for Aboriginal title under the common law, the Supreme Court turned to the test established in *Delgamuukw*, and within the context of *Bernard (CA)*, further developed the idea of occupation.¹⁵⁰

In *Delgamuukw*, the standard of occupation was set out as the exclusive, pre-sovereignty occupation of the land of the Aboriginal group's forbears.¹⁵¹ The Court stated that the meaning of "exclusive" occupation is consistent with the concept of title to land at common law and means "the intention and capacity to retain exclusive control," but is not negated by occasional acts of trespass or the presence of other Aboriginal groups with consent.¹⁵² In *Bernard*, the Court recognized a person with adequate possession for title may choose to use it intermittently or sporadically and at common law, exclusivity does not preclude consensual arrangements that recognize shared title to the same parcel of land.¹⁵³ Furthermore, the Court stated that evidence of acts of exclusion are not required to establish Aboriginal title.¹⁵⁴ Rather "[a]ll that is required is a demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so."¹⁵⁵

The question of whether nomadic and semi-nomadic peoples can successfully claim Aboriginal title will depend on the evidence. The test will be whether a nomadic people had a sufficient "physical possession" to give them title to the land. This will be a question of fact, dependent on all the circumstances and, in particular, the nature of the land and the manner in which it is commonly used. In each case, the question is whether "a degree of physical occupation or use equivalent to common law title has been made out";¹⁵⁶ given the requirement for exclusive physical occupation of the land, the Court acknowledged that seasonal hunting and fishing rights exercised in a particular area will likely translate into Aboriginal rights to fish and hunt, not into Aboriginal title.¹⁵⁷

In *R. v. Marshall [Stephen Marshall (Trial)]*,¹⁵⁸ Curran Prov. Ct. J. concluded that the line separating sufficient and insufficient occupancy for title is between the irregular use of undefined lands on the one hand and regular use of defined lands on the other. Curran Prov. Ct. J. concluded that the Mi'kmaq of 18th century mainland Nova Scotia probably had

150. *Ibid.* at para. 40.

151. *Ibid.* at para. 149.

152. *Delgamuukw*, *supra* note 18 at para. 156.

153. *Bernard*, *supra* note 127 at para. 54.

154. *Ibid.* at para. 65.

155. *Ibid.*

156. *Ibid.* at para. 66.

157. *Ibid.* at para. 58.

158. *R. v. Marshall*, 2001 NSPC 2, [2001] 2 C.N.L.R. 256 [*Stephen Marshall (Trial)*].

Aboriginal title to lands around their local communities, but not to the sites from which the logs were harvested.¹⁵⁹ In *Bernard (Trial)*,¹⁶⁰ Lordon Prov. Ct. J. found that occasional visits to an area did not establish title, rather there must be “evidence of capacity to retain exclusive control.” He concluded that the land at the centre of the case was not used on a regular basis, as trips made there in 1759 would have been occasional forays for hunting, fishing and gathering. This was not sufficient to establish Aboriginal title.¹⁶¹

The Supreme Court of Canada found that the Mi’kmaq practice of moving inland in the winter to hunt and fish, and the proximity of the cutting sites to traditional settlement sites, amounted only to evidence that the cutting area would have been within the range of seasonal use and occupation by Miramichi Mi’kmaq. However, this alone would not support a finding of Aboriginal title. The Supreme Court of Canada found that to confer title in the absence of evidence of sufficiently regular and exclusive pre-sovereignty occupation would “transform the ancient right into a new and different right” and that this would obliterate the distinction that the Supreme Court had consistently made between lesser Aboriginal rights such as the right to fish and the highest form of Aboriginal right, the right to title to the land.¹⁶²

Finally, the Supreme Court addressed whether Aboriginal title arose as a result of the *Royal Proclamation* or Belcher’s Proclamation. The Court determined first that the *Royal Proclamation* applies to Nova Scotia.¹⁶³ However, the Supreme Court determined that the text of the document supported the Crown’s argument that it did not grant the Mi’kmaq title to all the territories of the former Colony of Nova Scotia.

The Court found that a defence based on Belcher’s Proclamation faced formidable hurdles, including: whether Belcher had the authority to make the Proclamation; whether the Proclamation was merely a temporary and conditional order of His Majesty; and whether there was evidence of Mi’kmaq reliance or dishonourable Crown conduct.¹⁶⁴ The Court commented that Belcher’s Proclamation appeared to be intended to apply only to certain coastal areas and to hunting, fowling and fishing activities

159. *R. v. Bernard*, [2000] 3 C.N.L.R. 184 [*Bernard (Trial)*].

160. *Ibid.* at para. 155.

161. *Ibid.* at para. 107.

162. *Bernard*, *supra* note 127 at para. 77.

163. *Ibid.* at para. 87.

164. *Ibid.* at para. 105.

and, on the evidence, held that Belcher's Proclamation did not provide a defence to the charges against the respondents.¹⁶⁵

In coming to its conclusions on treaty rights, the Court addressed the scope of the treaty right found in *Marshall I* and *Marshall II*, and, in particular, whether the scope of that right extends to the harvest of logs from Crown land for commercial purposes. Affirming the principle established in *Marshall I*¹⁶⁶ the Supreme Court in *Bernard* reiterated that "the right to trade in traditional products carried with it an implicit right to harvest those resources,"¹⁶⁷ but it emphasized that the right is "not the right to harvest, in itself, but the right to trade."¹⁶⁸ The right is not "a general right to harvest or gather all natural resources then used."¹⁶⁹

The key issue at stake when determining the scope of a treaty right is whether the modern trading activity is a logical evolution of the traditional trading activity. Treaty rights are not frozen in time¹⁷⁰ and are not to be unfairly confined simply by changes in the economy or technology, but "[w]hile treaty rights are capable of evolution within limits, ... their subject matter ... cannot be wholly transformed."¹⁷¹

In *Stephen Marshall (Trial)*, the Provincial Court Judge found that the respondents had not met the legal test:

Trade in logging is not the modern equivalent or a logical evolution of Mi'kmaq use of forest resources in daily life in 1760 even if those resources sometimes were traded. Commercial logging does not bear the same relation to the traditional limited use of forest products as fishing for eels today bears to fishing for eels or any other species in 1760... Whatever rights the defendants have to trade in forest products are far narrower than the activities which give rise to these charges.¹⁷²

The Provincial Court Judge made similar findings in *Bernard (Trial)*.¹⁷³

The Supreme Court of Canada concluded that the evidence in both cases supported the trial judges' conclusions that the commercial logging that formed the basis of the charges against the respondents was not the logical evolution of traditional Mi'kmaq trading activity protected by the Treaties of 1760-1761 and, therefore, was not a protected right.

165. *Ibid.*

166. *Marshall I*, *supra* note 51 at para. 35.

167. *Bernard*, *supra* note 127 at para. 19.

168. *Ibid.* at para. 19. This right is subject to restrictions that can be justified under the *Badger* test; see *Marshall I*, *supra* note 51 at para. 56.

169. *Ibid.* at para. 20.

170. *Ibid.* at para. 25.

171. *Marshall II*, *supra* note 120 at para. 19.

172. *Stephen Marshall (Trial)*, *supra* note 158 at para. 95.

173. *Bernard (Trial)*, *supra* note 159.

The issue of whether there can be an Aboriginal right to log on Crown land was addressed in *R. v. Sappier*¹⁷⁴ when the Supreme Court of Canada considered appeals from two different cases: *R. v. Gray*¹⁷⁵ and *R. v. Sappier*.¹⁷⁶ Like *Bernard*, these cases involved the harvest of timber on Crown land. All three respondents¹⁷⁷ were charged with unlawful possession or cutting of Crown timber and the three argued in defence that they possess an Aboriginal and treaty right to harvest timber for personal use. In this case, unlike *Bernard*, the timber was not logged for commercial purposes, but Mr. Gray intended to use the timber for the purposes of making household cabinets, coffee and end tables and mouldings. Mr. Sappier and Mr. Polchies harvested wood for home and furniture construction and for firewood.

In addressing the Aboriginal right claim, the Supreme Court found it necessary to determine the precise characterization of the nature of the respondents' claims for the purposes of applying the test in *Van der Peet*.¹⁷⁸ The Court stated that it is critically important to:

identify a *practice* that helps to define the distinctive way of life of the community as an aboriginal community. The importance of leading evidence about the pre-contact practice upon which the claimed right is based should not be understated. In the absence of such evidence, courts will find it difficult to relate the claimed right to the pre-contact way of life of the specific aboriginal people, so as to trigger s. 35 protection.¹⁷⁹

The bulk of evidence led at trial went to the importance of wood to Aboriginal societies. The absence of evidence going to the practice presented considerable difficulty for the Court. Ultimately, however, the Court held that "courts must be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available."¹⁸⁰

The Court found that the way of life of the Maliseet and Mi'kmaq during the pre-contact period was that of a migratory people who lived from hunting and fishing and who used the rivers and lakes of Eastern Canada for transportation. The practice to be considered then was the harvesting of wood for certain uses that were directly associated with that way of life. Specifically, the Court characterized the practice as the harvesting of

174. *Sappier*, *supra* note 35.

175. *R. v. Gray*, 2004 NBCA 57, (2004), 273 N.B.R. (2d) 157 [*Gray*].

176. *R. v. Sappier*, 2004 NBCA 56, (2004), 273 N.B.R. (2d) 93 [*Sappier (CA)*].

177. Messrs. Sappier and Polchies R.M. are Maliseet and Mr. Gray is Mi'kmaq.

178. *Sappier*, *supra* note 35 at para. 20.

179. *Ibid.* at para. 22.

180. *Ibid.* at para. 33.

wood for domestic uses only for a member of the Aboriginal community.¹⁸¹ Thus, the right is strictly limited and characterized by the Court as to have no commercial dimension and harvested wood for “domestic” uses cannot be sold, traded or bartered to produce assets or raise money even if “the object of such trade or barter is to finance the building of a dwelling.”¹⁸²

After characterizing the practice, the Court identified the central question before it as “whether the practice of harvesting wood for domestic uses was integral to the distinctive culture of the Maliseet and Mi’kmaq, pre-contact.”¹⁸³ The Court considered whether a practice undertaken for survival purposes can meet the “integral to a distinctive culture” test.¹⁸⁴ While the Court determined that there is no such thing as an Aboriginal right to subsistence, it referenced prior cases (including *Van der Peet, R. v. Jones*¹⁸⁵ and *Mitchell*¹⁸⁶) as standing for the proposition that a traditional means of subsistence can in some cases be considered integral to the distinctive culture of the Aboriginal people.¹⁸⁷

The Court addressed the difficulties in establishing the meaning of “distinctive culture.” The Court explained that the proper analysis is to first inquire into the way of life of the Maliseet and Mi’kmaq prior to contact and then to seek to understand how the particular pre-contact practice relied upon relates to that way of life.¹⁸⁸ Following this analysis and noting a number of traditional uses of wood (i.e. shelter, transportation, fuel and tools), the Court found that harvesting wood for domestic uses undertaken for survival purposes was sufficient to meet the integral-to-a-distinctive culture threshold.

On the issue of the continuity of the claimed right with the pre-contact practice, the Court found the right to harvest wood for the construction of temporary shelters must be allowed to evolve into a right to harvest wood

181. *Ibid.* at para. 24.

182. *Ibid.* at para. 25. Binnie J. agreed with the disposition of the appeal for the reasons provided by Bastarache J., however, he disagreed with the ruling that harvested wood cannot be sold, traded or bartered and suggested that sale and barter should be permissible within the reserve or another Aboriginal community to produce assets or raise money for the construction of shelter as reflects a flexible concept of the exercise of Aboriginal rights within modern Aboriginal communities. *Sappier*, *supra* note 35 at para. 74.

183. *Ibid.* at para. 27.

184. *Ibid.* at para. 38.

185. *R. v. Jones*, [1996] 2 S.C.R. 821 at para. 28.

186. *Mitchell v. Minister of National Revenue*, 2001 SCC 33, [2001] 1 S.C.R. 911 at para. 12 [*Mitchell*].

187. *Sappier*, *supra* note 35 at para. 41.

188. *Ibid.* at para. 46.

by modern means to be used in the construction of a modern dwelling.¹⁸⁹ Any other conclusion would freeze the right in its pre-contact form.

In its conclusion, the Supreme Court of Canada found that Mr. Gray possessed an Aboriginal right to harvest wood for domestic uses on Crown lands traditionally used for that purpose by members of the Pabineau First Nation, while Messrs. Sappier and Polchies possessed an Aboriginal right to harvest wood for domestic uses on Crown lands traditionally harvested by members of the Woodstock First Nation.

III. *The current state of Aboriginal rights claims and negotiations in Atlantic Canada*

Canadian courts have on several occasions suggested that negotiation rather than litigation is the most appropriate method to resolve outstanding issues related to Aboriginal and treaty rights. To varying degrees, the governments of the Atlantic Canadian provinces have heeded this advice and commenced negotiations. The status of these negotiations will be summarized for each of the four provinces.

1. *Nova Scotia*

In September 1998, following negotiations related to the Sable Offshore Energy Project and the Maritime and Northeast Pipeline, Canada, Nova Scotia and the Assembly of Mi'kmaq Chiefs agreed to pursue a "Made-In-Nova Scotia Process" to deal with outstanding treaty, title and Aboriginal rights questions in Nova Scotia.¹⁹⁰

On 7 June 2002, the Mi'kmaq of Canada and Nova Scotia signed an umbrella agreement as part of the Made-In-Nova Scotia Process. This was followed by a framework agreement among the same parties which was concluded on 23 February 2007. A progress review is planned for 2009, with an agreement in principle expected in 2011. This agreement is expected to be followed by a final agreement and implementation plans.¹⁹¹

The umbrella agreement's recitals indicate that the outstanding issues among the parties include the inherent right to self-govern, Aboriginal rights (including assertions of title) and treaty issues. Pursuant to the agreement, the parties agreed to work together in good faith to resolve "mutual issues"; to negotiate a framework agreement for further negotiations; and to develop terms of reference for a consultation process

189. *Ibid.* at para. 48.

190. Mikmaq Rights Initiative, "Recent Decisions," online: Mikmaq Rights Initiative <www.mikmaqrights.com/recDecisions.php>.

191. Mikmaq Rights Initiative, "Timeline," online: Mikmaq Rights Initiative <www.mikmaqrights.com/timeline.php>.

to address the nature of and process for the requirement of government to consult with the Mi'kmaq of Nova Scotia.

The framework agreement was signed by the thirteen Mi'kmaq Chiefs, Her Majesty the Queen in Right of Nova Scotia and Her Majesty in Right of Canada. The recitals to the agreement are informative, in that they provide background information that may be relevant to negotiations (e.g. *Marshall I, Delgamuukw* and *Stephen Marshall*). The recitals also reference the constitutional protection for existing Aboriginal and treaty rights pursuant to s. 35 of the *Constitution Act, 1982*. They define the broad issues to be negotiated as being the differing views with respect to the legal status and effect of specific Mi'kmaq treaties and the existence, scope, extent and beneficiaries of Mi'kmaq rights and title.

The term "Mi'kmaq Treaties" is defined as the treaties between the ancestors of the Mi'kmaq of Nova Scotia and the British Crown, including those signed in 1725-1726, 1749, 1752 and 1760-1761. The negotiations pursuant to the framework agreement are not intended to be a renegotiation of the Mi'kmaq Treaties, nor as a process which may lead to their extinguishment. Rather, the objectives are to reconcile the respective rights and interests of the parties through an accord that sets out the manner in which the Mi'kmaq of Nova Scotia will exercise constitutionally protected rights respecting land, resources and governance. The accord is to be preceded by a memorandum of understanding, which will be a compilation of the negotiations.¹⁹² The timeline for the memorandum of understanding is six years from the date of execution of the framework agreement.¹⁹³ The accord is expected within three years from the signing of the memorandum of understanding.¹⁹⁴

2. *New Brunswick*

In New Brunswick, the Mi'kmaq and Maliseet First Nations, Province of New Brunswick and the Government of Canada are currently involved in tripartite exploratory discussions, the goal of which is to get a better understanding of each party's interests and to establish a common understanding to determine whether there are sufficient grounds to proceed with framework agreement negotiations.¹⁹⁵

192. Framework Agreement, s. 22.

193. Framework Agreement, s. 26.

194. Framework Agreement, s. 28.

195. Canada, "Negotiation Tables Update," online: Department of Indian and Northern Affairs, DIAN website <www.ainc-inac.gc.ca/ps/clm/atr/ntu_e.html>.

3. *Prince Edward Island*

The Province of Prince Edward Island and the Mi'kmaq First Nations communities in the province are currently involved in bilateral exploratory discussions to get a better understanding of each party's interests and to establish a common understanding to determine whether to proceed with framework agreement negotiations.¹⁹⁶

4. *Newfoundland and Labrador*

The Labrador Inuit Land Claims Agreement (the Agreement) was signed by the President of the Labrador Inuit Association, the Premier of Newfoundland and Labrador, the provincial Minister Responsible for Aboriginal Affairs, and the federal Minister of Indian Affairs and Northern Development on 22 January 2005.

The Labrador Inuit Association represents approximately 5,300 Inuit and Kabloonagajuit (individuals of partial Inuit ancestry) who live primarily in five coastal communities (Nain, Hopedale, Makkovik, Postville and Rigolet) and the Upper Lake Melville area of Labrador.

The Agreement establishes the Labrador Inuit Settlement Area (Settlement Area) totalling approximately 72,500 square kilometres of land in northern Labrador, including 15,800 square kilometres of Inuit-owned lands, known as Labrador Inuit Lands. The Settlement Area also includes an adjacent Ocean Zone of 48,690 square kilometres and provides for the establishment of the Torngat Mountains National Park Reserve, consisting of approximately 9,600 square kilometres of land within the Settlement Area. The Government of Canada has agreed to transfer \$140 million to the Labrador Inuit, as well as \$156 million for implementation of the Agreement.

The Agreement provides for the creation of the Nunatsiavut Government, five Inuit community governments and Inuit community corporations to represent Inuit living outside the Settlement Area. The government will be democratically elected and financially accountable to the electorate. The Nunatsiavut Government will be empowered to make laws applicable to Inuit in Labrador Inuit Lands and Inuit communities on culture, language, education, health and social services and for the administration of Inuit law, including necessary enforcement structures.

The Agreement is a final settlement of the Aboriginal rights of the Labrador Inuit in Canada. In exchange for the rights and benefits specified in the Agreement, the Labrador Inuit will accede and release to Canada and Newfoundland and Labrador all of their Aboriginal rights outside of the

196. *Ibid.*

Labrador Inuit Lands and Aboriginal rights related to subsurface resources within the Labrador Inuit Lands. The Labrador Inuit will retain all of their Aboriginal rights within the Labrador Inuit Lands.

Within the Labrador Inuit Lands, the Inuit have ownership of 3,950 square kilometres (1,525 square miles) of land containing quarry materials and have a twenty-five per cent ownership interest in subsurface resources. In the Settlement Area outside of the Labrador Inuit Lands, the Nunatsiavut Government will receive fifty per cent of the first \$2,000,000 and five per cent of any additional provincial revenues from subsurface resources. Existing mineral rights holders in the Labrador Inuit Lands may continue to access these Lands and regulation of such rights will remain with the Government of Newfoundland and Labrador; however, any amendments or extensions to existing exploration or quarrying operations must receive joint approval from the Province and the Nunatsiavut Government.

The largest and most significant mineral development in Labrador is the Voisey's Bay Project. The Agreement provides that the Nunatsiavut Government will receive five per cent of provincial revenues from subsurface resources of the Voisey's Bay area. Voisey's Bay area will not be within the Labrador Inuit Lands, nor in the Settlement Area.

IV. The way forward for the oil and gas industry: dealing with uncertainty

The existence of Aboriginal and treaty rights in Atlantic Canada and the accompanying duty to consult where such rights may be infringed are important considerations for any oil and gas project in the region. From a narrow legal perspective, it is the Crown that bears the burden of the duty to consult with Aboriginal peoples. Nonetheless, it is in a proponent's best interest to take a proactive role in considering potential Aboriginal claims due to the permits and approvals required to commence virtually any project in the region. A proponent should undertake a preliminary assessment of possible Aboriginal claims and, when necessary, consult with Aboriginal groups through impact studies, joint meetings and environmental assessments.

This consultation for such development projects arises when there is a recognized right or the potential for a claim by an Aboriginal group. The duty to consult "will vary with the circumstances, but always requires meaningful, good faith consultation and willingness on the part of the

Crown to make changes based on information that emerges during the process.”¹⁹⁷ There is, however, no duty to reach an agreement.

Since the arrival of the Mi’kmaq in Newfoundland was post-first contact with European peoples it is unlikely that a claim for non-title Aboriginal rights by this group will be successful.¹⁹⁸ However, because the time for the identification of Aboriginal title is the time at which the Crown asserted sovereignty over the land (which may, in Newfoundland’s case, have been after the arrival of the Mi’kmaq), it remains to be seen whether a claim for Mi’kmaq Aboriginal title might be successful. It is worth noting, due to the limited geographic area encompassed by the Mi’kmaq people in the province, that it seems unlikely that a successful claim would be of relevance to an oil and gas project.

It is clear that the Peace & Friendship Treaties signed by Aboriginal groups in Nova Scotia and considered in *Drew (Trial)*, do not provide the basis for treaty rights claims in Newfoundland and Labrador. In Labrador, the Labrador Inuit Land Claims Agreement clarifies certain Aboriginal issues in regard to the defined Settlement and Labrador Inuit Land Areas. The agreement creates substantive Aboriginal rights in Northern Labrador. However, Aboriginal rights for the Innu and the Métis have yet to be definitively determined.

In the Maritimes, decisions such as *Marshall I*, *Marshall II*, *Bernard* and *Sappier* have confirmed that specific Aboriginal and treaty rights to trade, hunt, harvest wood (for domestic use) and to gather traditional resources exist in the Maritime Region. The term “traditional resources” has not been fully defined, but the decisions in *Marshall II* and *Bernard* clarify, in principle, that the right to gather resources is not a right to gather all resources that can be gathered and further suggests that the right to gather resources specifically does not include a right to offshore natural gas deposits.¹⁹⁹

Aboriginal title has not yet been judicially established in the Maritime Region; however, the historic records relied upon in the cases referenced previously suggest that there is a high degree of likelihood of the possibility of a successful claim.

As a result of the Supreme Court of Canada’s comments in *Marshall II* concerning offshore natural gas deposits,²⁰⁰ there is likely no duty to consult Aboriginal communities in connection with infrastructure and

197. *Taku River*, *supra* note 46 at para. 29.

198. *Drew (Trial)*, *supra* note 75 at para. 1156.

199. *Marshall II*, *supra* note 121 at para. 20 and *Bernard*, *supra* note 128 at para. 20.

200. *Ibid.*

works located in the offshore regions of the Maritime Provinces. However, because of the potential infringements of Aboriginal and treaty rights to hunt, fish, harvest wood and gather resources, the inshore and offshore activities related to offshore projects (e.g. pipelines, storage facilities and service/supply infrastructure) may attract a duty to consult and possibly accommodate.

The duty to consult is particularly relevant for projects located in the Maritime Provinces where Aboriginal and treaty rights have been judicially established. The situation in Newfoundland and Labrador is less clear. Consideration will have to be given to the geographic location of the proposed activity. For example, any activity in the Settlement and Labrador Inuit Land Areas will have to abide by the terms of the Labrador Inuit Land Claims Agreement. In light of the judicial reasoning regarding treaties signed by the Mi'kmaq in *Drew (Trial)*,²⁰¹ it is unlikely that consultations with the Mi'kmaq of Newfoundland regarding Aboriginal treaty rights claims will be an issue. However, consultations may be required for activities to be located in the area of existing Mi'kmaq communities (i.e. Conne River) as a result of potential Aboriginal title claims.

201. *Drew (Trial)*, *supra* note 75. Justice Barry found that Treaties signed by Mi'kmaq representatives had either been extinguished, terminated by hostilities, were inapplicable due to geographic considerations or that treaty rights claims were void for vagueness of language.