Court File No. 30005

**SUPREME COURT OF CANADA**
(On Appeal from the Court of Appeal for the Province of New Brunswick)

**BETWEEN:**

**HER MAJESTY THE QUEEN**

Appellant

**AND:**

**JOSHUA BERNARD**

Respondent

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Court File No. 30063

**SUPREME COURT OF CANADA**
(On Appeal from the Court of Appeal for the Province of Nova Scotia)

**BETWEEN:**

**HER MAJESTY THE QUEEN**

Appellant

**AND:**

**STEVEN FREDERICK MARSHALL, KEITH LAWRENCE JULIEN, CHRISTOPHER JAMES PAUL, JASON WAYNE MARR, SIMON JOSEPH WILMOT, DONALD THOMAS PETERSON, STEPHEN JOHN KNOCKWOOD, IVAN ALEXANDER KNOCKWOOD, LEANDER PHILIP PAUL, WILLIAM JOHN NEVIN, ROGER ALLAN WARD, MIKE GORDON PETER-PAUL, JOHN MICHAEL MARR, CARL JOSEPH SACK, MATTHEW EMMETT PETERS, STEPHEN JOHN BERNARD, WILLIAM GOULD, CAMILIUS ALEX JR., JOHN ALLAN BERNARD, PETER ALEXANDER BERNARD, ERIC STEPHEN KNOCKWOOD, GARY HIRTLE, JERRY WAYNE HIRTLE, EDWARD JOSEPH PETER-PAUL, ANGUS MICHAEL GOOGOO, LAWRENCE ERIC HAMMOND, THOMAS M. HOWE, DANIEL JOSEPH JOHNSON, DOMINIC GEORGE JOHNSON, JAMES BERNARD JOHNSON, PRESTON MACDONALD, KENNETH M. MARSHALL, STEPHEN MAURICE PETER-PAUL, LEON R. ROBINSON, PHILLIP F. YOUNG**

Respondents

**FACTUM OF THE INTERVENER,**
**THE CONGRESS OF ABORIGINAL PEOPLES**

# I N D E X

## PART I - FACTS
### (a) Overview

1. The Congress of Aboriginal Peoples ("CAP") has intervened in these appeals to provide a perspective from Canada's Métis, off-reserve, and non-status Indians.

2. CAP supports the position of the Respondents in these appeals. The Respondents have valid, subsisting and enforceable treaty rights under the "Peace and Friendship" Treaties of 1760-61, which guarantee a right to trade and earn a moderate livelihood, in resources that were traditionally gathered as part of the Mi'kmaq economy of that time. It is not necessary to show that the Mi'kmaq specifically traded logs, or that they harvested logs on any particular scale, in order to raise a defence based upon the Treaties. The Respondents also have a communal right (with others) to aboriginal title in the areas where the infractions took place, which provides a valid defence to the charges.

3. On certain issues that arise, CAP submits that the analysis must take into account the particular interests of aboriginal people who are not status Indians under the *Indian Act*. There are many such people in the Atlantic provinces. These Aboriginal people also assert rights based upon treaties or aboriginal title, which rights are not confined to status Indians as defined by the federal government. The alleged requirement of prior "community authority" to exercise a treaty right should be analyzed with the circumstances of non-status Indians in mind. Likewise, the alleged requirement of continuous occupation by aboriginal title claimants should be considered from the perspective of claimants who are outside of the federal *Indian Act* structure.

### (b) The Congress of Aboriginal Peoples

4. CAP is a national Aboriginal organization representing approximately 850,000 Métis, off-reserve and non-status Indians. CAP is comprised of 12 provincial and territorial affiliates, including the Aboriginal Peoples Council of New Brunswick, and the Native Council of Nova Scotia. CAP was founded 33 years ago as the Native Council of Canada, and subsequently changed its name to the Congress of Aboriginal Peoples to better reflect the constituency and mandate of the organization. The mandate of CAP is to represent the collective and individual interests of its Métis, off-reserve and non-

status Indian constituencies. CAP works to advance the constitutional status of these constituencies, and to protect their Aboriginal, constitutional and treaty rights, including their rights protected by s. 35 of the *Constitution Act, 1982*.

5. CAP has a long record of working to protect and advance the rights of Métis, off-reserve, and non-status Indians in international, national, and provincial fora. CAP "negotiated the inclusion of Métis in s.35 of the *Constitution Act, 1982*" as was recognized by the Royal Commission on Aboriginal Peoples. CAP has also frequently intervened or participated as a party in court proceedings, to protect and promote the rights of Métis, off-reserve, and non-status Indians.

> *Royal Commission on Aboriginal Peoples, Final Report* (Ottawa: Queen's Printer, 1996) Vol. 4, ch. 5, s. 1.3

6. CAP and its constituents are particularly affected by issues that touch upon the question of who are the beneficiaries of treaty rights and aboriginal title. While questions at to who are the beneficiaries of these rights arise only indirectly on these appeals, CAP is concerned that the tests for establishing treaty rights and aboriginal title are addressed in a manner that gives due regard to the interests of aboriginals other than status Indians living on reserve.

## PART II – POINTS IN ISSUE

7. CAP confines its submissions to the following issues:

1. Treaty Rights:
   - (a) The appropriate test for establishing the right to trade; and
   - (b) Whether community authority is required to exercise a treaty right.

2. Aboriginal Title:
   - (a) The trial court's jurisdiction;
   - (b) Whether uncertain boundaries are a bar to aboriginal title;
   - (c) Whether moderately nomadic people can claim aboriginal title;
   - (d) Whether aboriginal title is extinguished by Crown grant; and
   - (e) Whether there is a requirement of continuous occupation.

## PART III - ARGUMENT

### 1. Treaty Rights

### (a) Harvesting Trees for Trade Falls Within the Respondents' Treaty Rights

8. CAP adopts the Respondents' submissions that the majority of the New Brunswick Court of Appeal correctly concluded that the Respondent Bernard was validly exercising a treaty right to harvest and sell trees under the 1761 Treaty of Peace and Friendship. Since gathering of forest resources was part of the 1760's lifestyle and economy of the Mi'kmaq, trade in such resources to earn a "moderate livelihood" falls within the trade clause of the Treaty. The appropriate test is as set out by Justice Robertson – whether trees were a resource that was traditionally gathered in the 1761 Mi'kmaq economy. Alternatively, the Respondent Bernard's acts were within the "logical evolution" of the treaty right.

> *R. v. Bernard*, [2003] N.B.J. No. 320 (C.A.), paras. 194 - 204 *per* Daigle J.A., and paras. 366 - 372 *per* Robertson J.A

### (b) Prior "Community Authority" is Not Required to Exercise a Treaty Right

9. New Brunswick attacks the *Bernard* Court of Appeal's decision, *inter alia*, on the ground that the Respondent did not demonstrate that he was acting with "community authority" in harvesting and selling the trees. (Nova Scotia does not argue this point, so it is not in issue in the *Marshall* appeal, though it was the subject of *obiter* comments in the Nova Scotia Court of Appeal.)

> *Appellant's Factum (Bernard)*, paras. 94 - 101
>
> *R. v. Bernard*, *supra,* at paras. 373 - 380
>
> *cf. R. v. Marshall et al*, [2003] N.S.J. No. 361 (C.A.) at paras. 25 - 31 per Cromwell J.A.

10. There is no such requirement in previous case law, and requiring such a demonstration would be contrary to principle and precedent. This Court has already held that the test for whether an individual can exercise treaty rights is whether s/he can demonstrate a "sufficient connection" to the historic First Nation that signed the treaty (which may be satisfied by membership in an Indian Band that is linked to the historic First Nation.)

> *R. v. Simon*, [1985] 2 S.C.R. 387 at paras. 42 - 45

11. No previous treaty rights case has laid down a requirement of evidence of prior community authority. This Court has reviewed the evidence in detail in other major treaty cases, and has never commented upon whether the treaty right claimant did or did not posses such authority. If prior community authority is a matter of significance, it is inconceivable that this Court would not have mentioned it in reviewing the facts of these cases, or in its many previous iterations of the test for protected treaty rights under s.35.

*R. v. Simon, supra*, at paras. 2-5; 42-45

*R. v. Marshall (No. 1)*, [1999] 3 S.C.R. 456, paras. 1, 8, 18

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12. In *Marshall (No. 2)*, this Court adverted to the communal nature of treaty rights, and noted that they are "exercised by authority of the local community to which the accused belongs". This should not be taken as a new test to be applied, but rather as a comment on the conceptual nature of treaty rights. The test remains as set out in *R. v. Simon*, whether the treaty rights claimant has shown a "sufficient connection" to the historic First Nation that signed the treaty, whether by membership in a registered Indian Band or by other means. *Marshall (No. 2)* did not purport to overrule *Simon* on this point.

*R. V. Marshall (No. 2)*, [1999] 3 S.C.R. 533, at para. 17

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13. Lower courts have applied the “sufficient connection” test of *Simon* in cases involving non-status Indians in the Atlantic provinces and elsewhere, and have specifically found that they met the test. Indeed, this Court used very careful language in *Simon*, foreseeing that other methods of demonstrating a connection to the historic First Nation that signed the treaty might be advanced in other cases. While it is not necessary in the present appeals to rule upon the nature of the required connection, since all Respondents in both appeals are status Indians and this clearly suffices under *Simon*, this Court should not adopt an approach that is both inconsistent with the *Simon* test, and could foreclose claims to treaty rights by a very significant segment of
**30** Canada’s aboriginal peoples.

*R. v. Simon*, *supra*

*R. v. Fowler* (1993), 134 N.B.R. (2d) 361 (Prov. Ct.)

*R. v. Harquail* (1993), 144 N.B.R. (2d) 146 (Prov. Ct.)

*R. v. Chevrier*, [1989] 1 C.N.L.R. 128 (Ont. Dist.Ct.)

14. "Community authority" is not part of the test for exercise of a treaty right. Community authority becomes relevant principally at the level of negotiations between governments and those who possess or claim treaty rights. As noted by Justice Robertson, in the New Brunswick Court of Appeal:

> Once it is established that a treaty right exists, it can be exercised by individual members of the aboriginal community until such time as it is modified or abrogated in accordance with the law. The communal nature of a treaty right is such that an individual's right can be affected so long as the change is authorized by those entitled to speak on behalf of the aboriginal community. To the extent that Mr. Bernard has a treaty right to trade in a resource, that right can be validly infringed or regulated, either by agreement reached with the government or by legislation that satisfies the *Badger* test.

*R. v. Bernard*, *supra*, para. 378, per Robertson J.A.

15. This Court has repeatedly emphasized that negotiation is the preferred process for resolving contentious issues of Aboriginal rights. Provided these negotiations comprise <u>all</u> relevant stakeholders (not just those whom the federal government chooses to recognize as status Indians), they can validly shape the content and regulation of such rights.

*Delgamuukw v. The Queen*, [1997] 3 S.C.R. 1010, at para. 186

*R. v. Marshall (No. 2)*, *supra* at para. 22

*Haida Nationv. British Columbia (Minister of Forests)*, 2004 S.C.C. 73 at para. 25

See also *R. v. Powley*, 53 O.R. (3d) 35 (C.A.) at para. 166; aff'd [2003] 2 S.C.R. 207

16. If a requirement that prior community approval be demonstrated is adopted as urged by the Appellant, this may severely and arbitrarily curtail the scope of treaty rights. This could be highly prejudicial to the Métis, off-reserve and non-status Indian communities represented by CAP, particularly if community authority is practically equated with permission from a local registered Indian Band. At the very least, if a

community authority requirement is found to exist, CAP submits that it must be interpreted broadly enough that treaty claims of Métis, off-reserve and non-status Indians are not arbitrarily foreclosed.

17. As noted by the Respondents in *Marshall*, the creation of the current 13 Mi'kmaq Indian Bands in Nova Scotia did not occur until the 1950's. Prior to that time, there was much disruption and dislocation of Mi'kmaq communities, and there is no reason to believe that Band lists accurately reflected the population of the Mi'kmaq nation. Periodic efforts were made to consolidate reserves, including an "ill-fated" attempt to consolidate all Mi'kmaqs in Nova Scotia on two reserves only in the 1940's (abandoned within a few years). Federal government policy favoured reducing the number of Indians within their responsibility. For many years the rules of eligibility for *Indian Act* status were blatantly discriminatory, and in CAP's view they continue to be, at the very least, arbitrary.

> Aucoin, P. & Paul, V., "Relations Between the Province of Nova Scotia and Aboriginal Peoples in Nova Scotia" (Sept. 1994, background paper to Royal Commission on Aboriginal Peoples), p.8
>
> Giokas, J., "The Indian Act: Evolution, Overview and Options for Amendment and Transition" (March 1995, background paper to Royal Commission on Aboriginal Peoples), p.59
>
> Shewell, H., *Enough to Keep Them Alive*: *Indian Welfare in Canada, 1873-1965* (U of Toronto Press, 2004), pp. 108-9
>
> *Lovelace* v. *Canada*, Communication No. R. 6/24, *Report of the Human Rights Committee,* U.N. GOAR, 36th Sess., Supp. No. 40, U.N. Doc. A/36/40, Annex 18 (1977) (views adopted Dec. 29, 1977)

18. While issues as to the accuracy and fairness of Band lists do not arise directly on these appeals (all respondents being status Indians), it is CAP's position that Band membership is poorly correlated to aboriginality in the Atlantic provinces. Likewise, there are large numbers of off-reserve Indians who, although having status under the *Indian Act*, may have little or no contact with Band authorities. (Donald Marshall, the defendant in *Marshall No.1 and No.2,* was living off-reserve at the time he was charged.) A requirement that persons claiming to exercise treaty rights must demonstrate that they do so with the prior authority of a local registered Indian Band could work a serious injustice to many Aboriginal people.

Palmater, P., "An Empty Shell of a Treaty Promise: *R. v. Marshall* and the Rights of Non-Status Indians" (2000) 23 Dal. L.J. 102, at 127

19. Since the enactment of s.35 of the *Constitution Act, 1982*, treaty rights have been protected as constitutional rights. Status under the *Indian Act* is a classification created entirely by federal statute. It does not define aboriginality, or "Indianness", or connection to an historic First Nation. The existence of constitutional rights cannot be contingent upon the existence of a particular statutory classification created by the federal government. A legislature cannot, by ordinary statute, create a binding pre-
**10** condition for the enjoyment of constitutional rights, particularly where the statutory classification is, in CAP's submission, arbitrary, anachronistic, and harsh.

See, e.g., *Prete v. Ontario* (1993) 16 O.R. (3d) 161 (C.A.), leave to appeal to SCC denied (Legislature cannot make the validity of constitutional claims conditional upon meeting the abbreviated limitations period of the *Public Authorities Protection Act*)

Palmater, P., "An Empty Shell of a Treaty Promise: *R. v. Marshall* and the Rights of Non-Status Indians" *supra* at 108-110

20. CAP therefore respectfully submits that this Court should reject the argument that
**20** demonstrating prior community authority is necessary to make out a defence based upon treaty rights. In the alternative, if community authority must be shown, this Court should specify (or at least leave open the possibility) that organizations other than registered Bands can be the source of such authority.

## 2. Aboriginal Title

21. CAP adopts the Respondents' submissions that aboriginal title may be supported under any one of the *Royal Proclamation, 1763*, Lieutenant Belcher's Proclamation, or common law aboriginal title. CAP's submissions will focus upon the proper approach to
**30** common law aboriginal title.

### (a) The Courts Below Had Jurisdiction to Rule on Aboriginal Title

22. Contrary to both Appellants' submission that the courts below had no jurisdiction to make a finding of aboriginal title, CAP submits that they were obliged to rule on this issue once the Respondents had raised it as a defence. Aboriginal title is a right

protected by s.35 of the *Constitution*, and therefore its existence, if made out, renders the provincial statutes that the Appellants sought to apply to the Respondents "of no force or effect" in relation to the Respondents (subject to possible justification by the Crown). A court must apply the law of the land, and must therefore determine whether a law it is asked to apply is valid, if its constitutional validity is placed in issue.

> *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, at paras. 21, 32
>
> *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, at para. 28

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**(b) Uncertain Boundaries and Aboriginal Title**

23. It is not fatal to a defence based upon aboriginal title that there may be some uncertainty as to the limits of the area for which aboriginal title is claimed. All that need be shown on a defence to a prosecution is that the areas where the infractions occurred fall within the area for which aboriginal title can be established. This flows from the above submissions on jurisdiction. Courts have recognized that precise boundaries may be difficult to ascertain on an aboriginal title claim, but this should not preclude such claims from being accepted. Some lack of precision is to be expected, given the
**20** historical nature of these cases, which look back to conditions of almost 250 years ago.

> *Delgamuukw v. The Queen*, *supra*, at para. 195 *per* LaForest J.

**(c) Nomadic People and Aboriginal Title**

24. There is no bar to a "moderately nomadic people" establishing Aboriginal title. A requirement that Aboriginal title claimants show settled occupation and intensive use of land risks importing culturally-specific European norms that are inconsistent with the role of Aboriginal title in reconciling the interests of the Crown and Aboriginal peoples. Rather, in considering whether Aboriginal land use is sufficient to ground title, "one must
**30** take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed" – from both the Aboriginal perspective and that of the common law.

> *Delgamuukw v. The Queen,* [1997] 3 S.C.R. 1010, at para. 149 (citing B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 758)

25. Nova Scotia has argued that "there is little room for an 'Aboriginal perspective' in this case", and that "the common law alone governs any Native title in Nova Scotia". With respect, this misconceives the nature of Aboriginal title, as set out by this Court in *Delgamuukw*. Nova Scotia's argument neglects the fundamentally reconciliatory role that the common law of Aboriginal title has always played. The common law has always adapted to the social context in which it arises. The more recent development of the common law of Aboriginal title is a continuation of this process of adaptation. By its very nature, it must take into account both Aboriginal and non-Aboriginal perspectives.

Simpson, *An Introduction to the History of Land Law* (1961), pp. 101-2; 146-55 (customary rights of Anglo-Saxon villagers protected by common law after Norman conquest)

*Delgamuukw, supra* at para. 112

26. There is nothing inconsistent about the common law recognizing that its function includes the reconciliation of Aboriginal and non-Aboriginal perspectives. To the contrary, such adaptation is in the best tradition of the common law. Common law recognition of aboriginal title is flexible enough to allow for claims by moderately nomadic people, making such use of the land as the land itself and their own way of life would permit.

*Hamlet of Baker Lake v. Canada*, [1980] 1 F.C. 518, at 559-60

**(d) Aboriginal Title is Not Extinguished by Crown Grant**

27. The Appellants argue that in each instance where a Crown grant was made in fee simple, even if the land was subsequently reacquired by the Crown, aboriginal title was extinguished. They rely upon the Australian cases of *Wik Peoples v. Queensland* and *Western Australia v. Ward*.

*Western Australia v. Ward*, [2002] H.C.A. 28

*Wik Peoples v. Queensland*, [1996] H.C.A. 40

28. With respect, the Australian framework for aboriginal title is very different from the Canadian framework, and Australian authorities should be approached with caution. This is because (a) Australian courts denied recognition of aboriginal title for most of

Australia's history, under the discriminatory and discredited doctrine of *terra nullius*. (b) Australia has forms of land tenure that are unknown in Canada, such as the pastoral lease (at issue in *Wik*) (c) Australian courts have developed a different conceptual model for aboriginal title, based not upon occupation, but rather (in part) upon a showing of "connection" to the land according to the "laws and customs" of the aboriginal group. (d) Australia never had a treaty process and has never extended constitutional protection to aboriginal rights.

*Wik Peoples v. Queensland*, *supra*

*Mabo v. Queensland (No. 2)*, (1992) 175 C.L.R. 1, at 40-43, 58-60 *per* Brennan J (Mason CJ & McHugh J concurring); cf. concurring judgment of Toohey J. at 206-14 finding a possible "possessory title", drawing heavily on Kent McNeil, *Common Law Aboriginal Title* (O.U.P., 1989)

29. In this very different context, Australian courts have applied an "inconsistency of incidents" test, whereby aboriginal title is extinguished by crown grant only to the extent that the incidents of the grant are inconsistent with the incidents of native title established under the laws and customs of the claimant group. In so doing, they have specifically noted that Australian law may not mirror Canadian law in this respect. CAP submits that just as this Court has warned against applying U.S. constitutional precedents without considering the significant and structural differences between the constitutions of Canada and the U.S., Australian doctrine cannot be imported without considering these major differences between the legal frameworks of the two countries.

*Western Australia v. Ward*, *supra*, at para. 79

*R. v. Keegstra*, [1990] 3 S.C.R. 697, at para. 51

30. As pointed out by the Respondents, North American courts have taken a different approach to the issue of whether a Crown grant may extinguish aboriginal title. Substantial authority exists for the proposition that a Crown grant may be subject to the burden of pre-existing aboriginal title, allowing the holders of such title to assert their rights against the grantee (though with possible limitations as to available remedies). If the land is subsequently reacquired by the Crown, there is no reason why the holders of aboriginal title should not be permitted to assert the same rights against the Crown.

*U.S. v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941)

*Chippewas of Sarnia Band v. Canada (Attorney General)*, (2000) 51 O.R. (3d) 641 (C.A.) (leave to appeal to S.C.C. denied), at paras. 275, 292-295

31. Aboriginal title in Canada can be extinguished by **legislative** action only. In *Calder*, Hall J. stated that aboriginal title could not be extinguished "except… by competent **legislative** authority, and then only by **specific legislation**" (language approved by Dickson J. (as he then was) in *Guerin*.) Earlier, in *St. Catherine's Milling*, the Privy Council reasoned that aboriginal "tenure" depended "upon the good will of the Sovereign" because it was sourced in the Royal Proclamation which reserved lands to the Indians "for the present". This opened the door to an argument that as executive acts created aboriginal title, they could also destroy it. In *Guerin*, Justice Dickson "recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands," not from the Royal Proclamation. This gave rise to a property right, not a personal right dependant on the good will of the Sovereign. Property rights cannot be extinguished by executive action. This closes the door on Nova Scotia's submissions that executive acts, such as Crown grants, destroyed aboriginal title; or that Crown grants against a background of **general** property statutes extinguished it.

*Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313, at 402 *per* Hall J. (dissenting, Spence & Laskin JJ. concurring)

*Guerin v. The Queen*, [1982] 2 S.C.R. 335, at 376

See also *Delgamuukw*, supra., para 113 ("This Court has taken pains to clarify that aboriginal title is only "personal" in this sense [inalienability except to the Crown], and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests")

See generally, K. McNeil, *Extinguishment of Aboriginal Title in Canada* (2001-02), 33 Ott. L. Rev. 301, at pp. 311-316

*cf. St. Catherine's Milling v. The Queen*, (1889) 14 A.C. 46, at 54-5

### (e) No Requirement of Continuous Occupation

32. CAP takes exception to the purported requirement that Aboriginal title claimants must demonstrate not only proof of occupation by a historic Aboriginal community at the

time of sovereignty, but also continuous occupation since that time. With respect, there is no such requirement at law.

33. Continuity is an important aspect of proof of title where present occupation is relied upon to establish occupancy at the time of sovereignty. Even then, it must be applied in a manner that is sensitive to the evidentiary difficulties that are inherent to claims of this nature and that arise from oral traditions – such that an unbroken "chain of title" in British common law terms is not an appropriate requirement.

*Delgamuukw, supra* at para. 152-53

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34. However, where occupancy at the time of sovereignty can be established by means other than present occupation (such as historical records and evidence of oral tradition), continuous occupation should not be a requirement to establish subsisting Aboriginal title. This is because title is relative. If an historic Aboriginal Nation held Aboriginal title at sovereignty, its title was superior to that of the entire world, including the Crown's claim. Absent cession or extinguishment in some legally effective manner, the descendant community enjoys the same rights today, because no person or entity (including the Crown) has a better claim. The descendant community should not have to continually re-establish its Aboriginal title.

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35. If an historic Aboriginal Nation held aboriginal title at the time of sovereignty, the Crown's title was merely radical. For the Crown to be able to claim a fee simple interest today, it must be able to trace its title to a source that is superior to that of the descendant Aboriginal community. The Crown must prove its present title like anyone else. If the historic Aboriginal Nation surrendered its interest to the Crown, or the Crown successfully extinguished the Aboriginal Nation's interest, the Crown's title expanded to a full legal and beneficial interest. Possibly, the Aboriginal Nation could abandon its title (although there is no clear authority for this proposition). However, in the absence of any such event, the Crown has no basis to assert a superior claim to the descendant

**30** community's, even if the descendant community no longer occupies the lands.

McNeil, *Common Law Aboriginal Title*, *supra* at p. 85

*R. v. Marshall*, et al, *supra*, *per* Cromwell J.A., paras. 161, 181

See generally *Mabo v. Queensland (No.2)*, *supra* p.207-14 *per* Toohey J.

36. In the alternative, if any "continuity" requirement does exist, it is not a requirement of continuous occupation, but rather one of ongoing connection to the lands claimed. The terminology of "connection with the land", originally used in *Mabo* and referred to somewhat ambiguously by this Court in *Delgamuukw*, is not necessarily equated with occupation in those cases. A strict requirement of unbroken occupation would perpetuate past injustice, given the lengthy history of marginalization and subjugation of Canada's aboriginal peoples. Such connection may be fulfilled by the continued presence of Mi'kmaq on and off reserves at various locations throughout Nova Scotia and New Brunswick, their use of the claimed lands generally, and/or their beliefs that the lands are important to their culture, history and identity. There should not be any need to show a particular level of use of the particular cutting sites.

*Mabo v. Queensland (No. 2),* supra at 59-60 per Brennan J.

*Delgamuukw*, *supra* at para. 153

37. This is another issue that may have significance to the question of who are the beneficiaries of aboriginal title. In *Delgamuukw*, this Court held that "aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community" [emphasis added]. The terminology used is not confined to Indian bands or registered Indians; rather, it is certainly broad enough to encompass others who are sufficiently connected to the historic Aboriginal Nation to be considered members of the descendant community.

*Delgamuukw*, *supra* at para. 115

38. This Court is not required to decide in the present appeals who may be the beneficiaries of aboriginal title. There is no dispute that all of the Respondents are members of the Mi'kmaq nation. However, CAP is concerned that a continuity requirement, if found to exist, could be applied in such a way as to preclude claims based upon aboriginal title by members of the Mi'kmaq nation who do not have status under the *Indian Act*. It is CAP's position that a present claimant must show "sufficient

connection" to the historic community to assert a claim based upon aboriginal title, similar to the test applied for treaty rights. Conceptually, there is no reason to distinguish between treaty rights and Aboriginal title for this purpose. Both are a form of rights recognized by the Crown as part of its fiduciary obligation towards Aboriginal peoples. Both invoke “the honour of the Crown”.

*Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 379

39. For present purposes, CAP is particularly concerned that a continuity requirement may foreclose claims by members of Aboriginal communities who fall outside of the framework of the *Indian Act*, but are nevertheless sufficiently connected to the historic Aboriginal Nation that they possess aboriginal title rights. In *R. v. Powley*, this Court recognized that aboriginal persons who were not status Indians had faced particular challenges in maintaining their identity, and have often been "invisible" or have "gone underground". At the very least, if a continuity requirement is to be imposed, CAP submits that it should be framed in terms that acknowledge that there are Aboriginal people and communities beyond those registered under the *Indian Act*.

*R. v. Powley, supra*, para. 27

## PART IV - ORDER REQUESTED

40. CAP respectfully submits that these appeals should be dismissed, and the cross-appeal in *R. v. Marshall* be allowed. CAP does not ask for costs, and respectfully requests that it not be liable for costs to any other party.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: September 21, 2023

Joseph E. Magnet (Counsel)
University of Ottawa

Andrew K. Lokan
Paliare Roland Rosenberg Rothstein LLP

Solicitors for Congress of Aboriginal Peoples

## PART V - TABLE OF AUTHORITIES

### Legal References

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