AFTER *BERNARD AND MARSHALL*

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As good historians and good storytellers know, the starting and ending points for one's narrative may determine whether one has a comedy, a tragedy, or a farce. For the Crown, the *Bernard* case began on 29 May 1998, when Joshua Bernard was arrested, his tractor trailer seized, and the logs he was hauling confiscated. For Bernard, and for the Mi'kmaq woodsworkers involved in the *Marshall* case in Nova Scotia, the events that brought them to court began much earlier, with the arrival of Europeans in what had, until then, been Mi'kmaq territory. The arrival of Europeans made new questions relevant – questions about sovereignty, jurisdiction and ownership of land and resources. In trying to work out answers to these questions today, we are faced with inconsistent claims about the basis of rights to land and resources in what is now Canada.

Rights of the non-aboriginal population in Canada are generally derived from Crown grants, either of fee simple estates, or of licences or leases or other kinds of permission to harvest resources on Crown land or in waters over which the Crown claims jurisdiction. The Crown's authority to make such grants, at least in parts of the country not covered by land surrender treaties, derives from the British claim to have acquired sovereignty in what became British North America on the basis of discovery and settlement, or, in some places, conquest of the earlier French colonizers. But at international law, claims to sovereignty based on discovery and settlement were possible only if the land were a *terra nullius*, an uninhabited land, with no prior occupants, or occupied by peoples who were so uncivilized that the colonizers could ignore their claims. Bruce Ryder calls the British claim to sovereignty based on discovery as the "ugly fiction" woven into the fabric of Canadian law.[1] Nonetheless, aboriginal peoples in Atlantic Canada claim rights that may predate the acquisition of British sovereignty: rights recognized in treaties signed by representatives of the British Crown and the Mi'kmaq, Maliseet and Passamaquoddy while Britain and France were fighting over who would rule in what became British North America; rights to aboriginal title derived from these peoples' occupation of the land, and other aboriginal rights derived from activities that were

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[1] Bruce Ryder, "Aboriginal Rights and *Delgamuukw v. The Queen*" (1994) Const. Forum 43; for more on this point, see in this volume Margaret McCallum, "Problems in Determining the Date of Reception in Prince Edward Island" (2006) 55 U.N.B.L.J. 3.

integral to the distinctive culture of the aboriginal peoples now claiming the right prior to their ancestors' contact with the European colonizers.

The papers in this section of the *University of New Brunswick Law Journal* explore some of the problems inherent in acting as if there were no conflict between the idea of Crown sovereignty and aboriginal or treaty rights. This section is a response to the decision of the Supreme Court of Canada in July 2005 in *R. v. Marshall; R v. Bernard*,[2] disposing of appeals in two separate cases, one from Nova Scotia and one from New Brunswick, on the rights of aboriginal peoples to engage in commercial logging on Crown land without the authorization required by provincial regulations. In both cases, the Mi'kmaq accused argued that they were acting pursuant to a treaty right to harvest wood in order to earn a moderate livelihood, and pursuant to the rights inherent in the aboriginal title that they claimed over the territory encompassing the cutting sites. The cases were quite different in terms of the scale of the logging involved, and the extent of the territory over which the accused asserted aboriginal title. In both, however, the Supreme Court rejected the defence based on treaty rights and the defence based on aboriginal title. The Supreme Court returned to these questions in the spring of 2006, in hearing arguments in two New Brunswick cases dealing with aboriginal or treaty rights to harvest wood for personal use.[3]

In *Bernard*, the trial judge heard expert testimony from three non-aboriginal university-based historians, a Mi'kmaq expert in the language, culture, oral history and traditions of the aboriginal people of eastern North America, and a non-aboriginal professional forester. The accused, a 19-year old Mi'kmaq, was a registered status Indian from the Eel Ground Reserve, on the Miramichi river system. He was charged with unlawful possession of 23 spruce logs that he was hauling from a single cutting site, working in partnership with family members. The Bernard family believed, following the decisions in the Provincial Court and the Court of Queen's Bench in *Peter Paul*, that they had a legal right to participate in the commercial harvest of wood from Crown land. Bernard's father said that he and his sons had stopped cutting when the New Brunswick Court of Appeal overturned the lower court decision in *Peter Paul*, and were simply cleaning up their site as directed by the provincial government when Joshua Bernard was arrested.[4]

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[2] 2005 SCC 43 [*Marshall and Bernard*].

[3] *R. v. Sappier and Polchies*, [2004] N.B.J. No. 295 (C.A.) (QL), leave to appeal granted 2004 SCCA No. 415; *R. v. Gray* [2004] N.B.J. No. 291 295 (C.A.) (QL), leave to appeal granted 2004 SCCA No. 416. These cases will be argued together, although in *Sappier and Polchies*, the defence asserts both an aboriginal right and a treaty right under a 1725 treaty, while in *Gray*, the defence asserts only an aboriginal right.

[4] *R. v. Bernard*, [2000] N.B.J. No. 138 (Prov. Ct.) (QL); *R. v. Bernard*, [2003] N.B.J. No. 320 (C.A.) (QL); *Marshall & Bernard*, *supra* note 2. Historians Dr. William Wicken, Dr. John Reid and Hereditary Chief Stephen Augustine, employed with the Canadian Museum of Civilization, were called by the defence, and historian Dr. Stephen Patterson and forestry expert Dr. Gordon Baskerville were called by the Crown. Ken Coates, *The Marshall Decision and Native Rights* (Montreal and Kingston: McGill-Queen's University Press, 2000) at 169-70; *R. v. Peter Paul* (1998), 196 N.B.R. (2d) 292, 3 C.N.L.R. 221 (C.A.),

The site where the Bernard family worked was on the Little Sevogle River, the first significant tributary on the Northwest Miramichi River. Although there was no archaeological evidence of a pre-sovereignty Mi'kmaq presence on the cutting site itself, the defence offered uncontradicted expert evidence that the Sevogle area was part of traditional Mi'kmaq territory and that the Mi'kmaq used the entire watershed, "as part of their subsistence quest and traditional way of life." The defence also offered uncontradicted evidence that the Mi'kmaq, Maliseet, and Passamaquoddy each lived peaceably in their defined territory along different river systems, and each respected the other's boundaries. The "occasional visitors" in the Mi'kmaq territory were there with the permission of those who occupied the territory, and thus their presence confirmed the group's control over the territory.[5]

In *Marshall*, 35 Mi'kmaq, all registered status Indians, were charged with cutting timber on Crown lands without authorization, at multiple cutting sites spread across mainland Nova Scotia and Cape Breton Island. The sites varied in size from one hectare up to several hectares, and the amount cut ranged from a few cords to tractor trailer loads of wood. All but two of the accused were members of Indian bands, or related to Indians, whose reserves were close to where they were cutting. The defence of aboriginal title focussed not on proving title to specific cutting sites but on proving aboriginal title to the whole of Nova Scotia, including Cape Breton. The expert witnesses for the defence and the Crown agreed that at the time of contact, Nova Scotia was "occupied" by the Mi'kmaq, even though they were not everywhere throughout the whole area. The experts agreed, too, that the Mi'kmaq spent much of their time on the coast or on rivers near it, moving seasonally depending on the availability of resources.[6]

In both *Marshall* and *Bernard*, the parties proceeded on the assumption that the appropriate date for establishing proof of aboriginal title was the date of establishment of British sovereignty, a term that encompasses either the assertion or the acquisition of sovereignty. The Supreme Court adopted the following dates: for what is now mainland Nova Scotia, 1713, the date of the Treaty of Utrecht; for what is now Cape Breton, 1763, the date of the Treaty of Paris; and for what is now New Brunswick, 1759, the date of the fall of Quebec.[7] In all three Maritime provinces,

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rev'g (1997), 193 N.B.R. (2d) 321, [1998] 1 C.N.L.R. 209 (Q.B.), aff'g (1996), 182 N.B.R. (2d) 270, [1997] 4 C.N.L.R. 221 (Prov. Ct.).

[5] *R. v. Bernard*, [2003] N.B.J. No. 320 at paras. 116-19, 144, 148, 151 (C.A.) (QL), per Daigle J. (quotation at 117).

[6] *R. v. Marshall*, [2001] N.S.J. No. 97 (Prov. Ct.) (QL); *R. v. Marshall*, [2002] N.S.J. No. 98 (S.C.); *R. v. Marshall*, [2003] N.S.J. No. 321 (C.A.). The expert witnesses who testified in the *Bernard* case testified in *Marshall*, too, along with William Christianson, Curator of Archaeology at the Nova Scotia Museum, and Dr. Alexander von Gernet, an anthropologist.

[7] *Marshall and Bernard*, *supra* note 2 at para 71. Historians may puzzle over the difference between the date of acquisition of sovereignty in New Brunswick and in Cape Breton, especially as the trial judge in *Marshall* concluded that Britain "probably acquired sovereignty over Cape Breton" in 1758. See *R. v. Marshall*, [2001] N.S.J. No. 97 at para. 79 (Prov. Ct.) (QL).

the date for establishing the practices necessary to support a claim of aboriginal rights other than title is presumably the date of contact with the French, not with the British, but as the accused did not offer a defence based on an aboriginal right other than title, the court did not address that question.

The treaty right asserted by the accused in their defence was based on the same treaties at issue in the earlier *Marshall* case, in which the Supreme Court accepted that Donald Marshall, a Mi'kmaq, could assert a treaty right as a defence to a charge of catching and selling eels in violation of federal fishery regulations. As John McEvoy explains in his contribution to this issue, this *Marshall* decision affirmed the continued validity of rights contained in Treaties of Peace and Friendship made in 1760-61 between the British and First Nations in what is now New Brunswick, Nova Scotia and Prince Edward Island. In entering into these treaties, the British hoped to secure, if not the allegiance of the aboriginal peoples, at least their neutrality in Britain's war with France. The Supreme Court ruled that the treaty right to trade for necessaries at truckhouses established by the British encompassed the right to harvest resources to trade for a moderate livelihood.[8] Many Canadians reacted with hostility to the idea that aboriginal peoples were entitled to rights under treaties that were centuries old, and that the honour of the Crown required that these treaties by interpreted in a way that permitted the exercise of these rights in a manner appropriate to the modern context.[9] However, as David Bell demonstrates in his contribution to this issue, aboriginal peoples in Atlantic Canada had not forgotten about their treaty rights, even if the majority population had.

Mainstream recognition of treaty or aboriginal rights, however limited or grudging, is relatively recent. The federal government implemented its Comprehensive Land Claims process in 1973, only after the Supreme Court of

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[8] [1999] 3 S.C.R. 456; [1999] 3 SCR 533. Donald Marshall, Jr. was not involved in the timber harvesting at issue in *R. v. Marshall* (2005). For some of the extensive commentary on the *Marshall* (fishing) case, see Leonard I Rotman, "'My Hovercraft is Full of Eels': Smoking Out the Message in *R. v. Marshall*" (2000) 63 Sask. L Rev. 617; Thomas Isaac, "The Courts, Government, and Public Policy: The Significance of *R. v. Marshall*" (2000) 63 Sask. L Rev 701; Russel Lawrence Barsh and James (Sa'ke'j) Youngblood Henderson, "*Marshall*ing the Rule of Law in Canada: Of Eels and Honour" (1999) 11:1 Const. Forum 1, and the articles in the "Forum on *Marshall*" (2000) 23 Dal. L.J. at 5-182. On the role of historians as expert witnesses in *Marshall*, see John G. Reid, William C. Wicken, Stephen E. Patterson, and D. G. Bell, "History, Native Issues and Courts: A Forum" (1998) 28(1) Acadiensis 3. For the perspective of counsel for Donald Marshall, Jr., see Bruce H. Wildsmith, "Vindicating Mi'kmaq Rights: The Struggle Before, During and After *Marshall*" (2001) 19 Windsor Y. B. Access Just. 203. At p. 225, Wildsmith explains that the moderate livelihood limit on the treaty right was an invention of the Court, and not part of the submissions of counsel for the Crown.

[9] For critical commentary on the reactions of the media, the federal Department of Fisheries and Oceans, and non-aboriginal fishers, see Parker Barrs Donham, "Lobster Wars" (1999) 34(1) *Canadian Dimension* 26; "Lobster Wars and the Media" (1999) 34(5) *Canadian Dimension* 7; "Lobster Wars: 2001 Edition" (2001) 35(4) *Canadian Dimension* 5, all reprinted in Robert B. Anderson and Robert M. Bone, eds., *Natural Resources and Aboriginal People in Canada: Readings, Cases and Commentary* (Concord, Ont.: Captus Press, 2003) at 365-73.

Canada in *Calder* rejected the claim that acquisition of sovereignty by a European nation automatically extinguished aboriginal title.[10] As Shin Imai notes in his contribution to this issue, a decade after *Calder*, mainstream history texts continued to describe aboriginal peoples as primitive and to celebrate their extermination as removing an impediment to settlement. Entrenchment of existing aboriginal and treaty rights in s. 35 of the *Constitution Act, 1982* was official recognition of continuing unresolved questions about the relationship between the descendants of those who were here when the European colonizers arrived, the descendants of those colonizers, and the emigrants, or their descendants, who arrived in what we now call Canada after its original inhabitants had been defined as Indians and forced onto reserves.

The successful struggle for constitutional recognition of aboriginal and treaty rights furthered the development of national aboriginal organizations and provided an impetus for further struggles to claim the rights recognized and affirmed in s. 35.[11] Claims progressed slowly, if at all, through the comprehensive land claims process. In British Columbia, where most of the land was subject to unresolved land claims, the provincial government resisted the implications of the

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[10] *Calder v. the Attorney General of British Columbia* [1973] S.C.R. 313, a claim brought by the Nisga'a of the Nass Valley, British Columbia, for recognition of their title to their traditional lands. The court divided 3-3 on whether the Nisga'a title had been extinguished after the acquisition of British sovereignty, with the seventh member of the Court dismissing the Nisga'a claim on technical procedural grounds. The decision opened the possibility of negotiating comprehensive land claims treaties throughout Canada. The Nisga'a Treaty, ratified in 1998, and in force as of 11 May 2000, recognized Nisga'a ownership of about 10% of their traditional territory. For an overview of events from *Calder* forward, see Michael Asch, "From *Calder* to *Van der Peet*: Aboriginal Rights and Canadian Law, 1973-96" in Paul Havemann, ed., *Indigenous Peoples Rights in Australia, Canada and New Zealand* (Auckland: Oxford University Press, 1999) at 428-46; Royal Commission on Aboriginal Peoples, *Report, vol. 1, Looking Forward, Looking Back* (Ottawa: Supply and Services Canada, 1996), at 22-27.

[11] The current text of s. 35 reads:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis people of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provisions of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

For a non-aboriginal insider's view of the struggle for entrenchment of aboriginal and treaty rights, see Roy Romanow, "Aboriginal Rights in the Constitutional Process" in Menno Boldt and J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 73-82. For an alternative account, see Daniel Raunet, *Without Surrender, Without Consent: A History of the Nishga Land Claims* (Vancouver: Douglas & McIntyre, 1984) c. 14, "Nationalism Rising."

Calder decision and refused to participate in negotiations.[12] In October of 1984, representatives of the Gitksan and Wet'suwet'en First Nations applied to the British Columbia Supreme Court for a declaration recognizing their aboriginal title to and concomitant rights to possess their traditional territory and to govern it in accordance with their law. After numerous pre-trial proceedings, including several rulings on the admissibility of various kinds of evidence, the trial began in May 1987. In 1991, Chief Justice McEachern dismissed the plaintiffs' claim for ownership and jurisdiction. He held, though, that the Gitksan and Wet'suwet'en people, subject to the general laws of the province, had a continuing right to use unoccupied or vacant Crown land for aboriginal sustenance purposes.

Both the Gitksan and Wet'suwet'en hereditary chiefs and the Province appealed the trial decision to the Court of Appeal, which ordered a new trial. Both appealed again to the Supreme Court of Canada, which also ordered a new trial.[13] A new trial was necessary because the trial judge had failed to give appropriate weight to the oral history of the Gitksan and Wet'suwet'en – the record of their traditions and laws that had been transmitted from generation to generation through stories, songs and dances. Because the Supreme Court could not determine whether the plaintiffs' evidence, if properly assessed by the trial judge, would have established the factual basis for their assertion of aboriginal title, the Court was unable to resolve the fundamental question at issue between the parties – whether, and to what extent, the Gitksan and Wet'suwet'en First Nations had established and maintained aboriginal rights, including aboriginal title, over the territory in question.

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[12] For details on claims that have been settled and ongoing negotiations, see Canada, Department of Indian and Northern Affairs, "Comprehensive Claims Policy and Status of Claims" (current only to February 2003), online: <http://www.ainc-inac.gc.ca/ps/clm/brieft_e.html>. The index to Agreements <http://www.ainc-inac.gc.ca/pr/agr/index_e.html>, provides links to final agreements, agreements-in-principle, and framework agreements, as well as links to treaties, specific claims and annual reports filed under concluded agreements. See also Canada, Department of Indian and Northern Affairs, "Resolving Aboriginal Claims: A Practical Guide to Canadian Experiences", online <http://www.ainc-inac.gc.ca/pr/pub/rul/rul1_e.pdf>. The federal Comprehensive Claims policy is reproduced in Frank Cassidy, ed., *Reaching Just Settlements: Land Claims in British Columbia* (Lantzville, B.C. and Halifax: Oolichan Books and The Institute for Research on Public Policy, 1991), Appendix 4 at 116. British Columbia reversed its position on negotiating land claims in 1990. See the website of the British Columbia Treaty Commission: <http://www.bctreaty.net>.

[13] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*]. All of the justices agreed in the result, with Lamer C.J.C. writing reasons for himself, Cory and Major JJ., while La Forest J. wrote separate reasons for decision, concurred in by Justice L'Heureux-Dubé. Justice McLachlin stated that she concurred with Chief Justice Lamer and was in substantial agreement with Justice La Forest. In the Supreme Court, the Gitksan and Wet'suwet'en First Nations re-formulated their claim for ownership of, and jurisdiction over, their traditional territory into a claim for aboriginal title. As well, although the plaintiffs had originally brought their action as 51 individuals claiming rights for each House that they represented, they consolidated these into two collective or communal claims, on behalf of the Gitksan and Wet'suwet'en First Nations. The Supreme Court accepted the argument of the Province that it had been prejudiced by a change in the conceptualization and presentation of the claim without any change in the pleadings, also a reason for ordering a new trial.

At all three levels in *Delgamuukw*, judges expressed the hope that the parties would seek a resolution of the matter through negotiation rather than litigation. In the Supreme Court, Chief Justice Lamer observed that the litigation had been costly in economic and human terms, and added that the Crown was under "a moral, if not a legal, duty" to negotiate land claims questions in good faith.

> Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet* ... to be a basic purpose of s. 35(1) [of the *Constitution Act, 1982*] – "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." Let us face it, we are all here to stay.[14]

In order to facilitate the process of negotiations, and to set guidelines for further litigation, if necessary, Chief Justice Lamer summarized, clarified, and elaborated on the understanding of aboriginal title developed in earlier cases. These understandings can be stated as four main principles, as follows:

> 1. Aboriginal title is one among a range of aboriginal rights. It is like fee simple title in that the collectivity that holds aboriginal title is not limited to using the land in traditional ways; it differs from fee simple title in that it is not an individual, alienable interest in land.
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> 2. Aboriginal title derives from the prior occupation of what is now Canada by aboriginal peoples and is not extinguished by acquisition of sovereignty by a European state.
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> 3. To establish a claim to aboriginal title in particular lands, the claimants must prove that the claimants' ancestors had exclusive occupation of the land prior to the date of assertion of European sovereignty. Pre-sovereignty occupation may be proved by present occupation by a collectivity that can prove both its connection with the pre-sovereignty occupiers and continuity between present and past occupation.
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> 4. Once the claimants have established these things on the balance of probabilities, the burden shifts to those disputing the existence of aboriginal title to show that the title has been extinguished by events subsequent to the assertion of sovereignty, but prior to the enactment of s. 35(1) of the *Constitution Act*.

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[14] *Ibid.* at 1123-24.

Based on these principles, the Supreme Court considered in general terms what evidence would support a claim of aboriginal title, and how courts should handle evidence of orally-transmitted traditions and laws. The Court recognized that First Nations have the right to establish occupancy of their traditional territory with evidence of use that is consistent with the nature of the collectivity's use of the territory for sustenance, and with the collectivity's culturally specific relationship with the territory. Thus, aboriginal claimants can prove occupation with evidence of aboriginal laws in relation to land, including a system for determining rights to individual areas or laws governing land use, or with evidence of "regular use of definite tracts of land for hunting, fishing or otherwise exploiting [the land's] resources."[15] In assessing the available evidence, judges must admit evidence of the oral histories of First Nations collectivities, even where these might be otherwise excluded by the rule against hearsay evidence, and they must place this evidence "on an equal footing" with the types of historical evidence, such as documents, with which courts are more familiar.[16]

In *Marshall and Bernard*, the Supreme Court applied these legal principles to the evidence established at trial. In doing so, it seems the majority required proof of something that is closer to fee simple title than to aboriginal title. Nigel Bankes argues in his contribution to this issue that the two decisions are inconsistent, and attributes that inconsistency to the failure of the majority in the Supreme Court to take seriously the normative significance of the aboriginal perspective or of aboriginal conceptions of law. Paul Chartrand argues that the Supreme Court has articulated a new test for establishing aboriginal rights, which he calls the mirror test. Chief Justice McLachlin, writing for the majority in *Marshall and Bernard*, focused on, and re-interpreted, three specific requirements for proving aboriginal title:

> 1. continuity; defined by Chief Justice McLachlin as connection with the pre-sovereignty group upon whose practices the claimants rely as the basis for their claim to title;[17]
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> 2. exclusivity of occupation; defined by Chief Justice McLachlin as "the intention and capacity to retain exclusive control;"
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> 3. quality of use and possession necessary to establish occupation; defined by Chief Justice McLachlin as "physical occupation."[18]

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[15] *Ibid.* at 1101, citing Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 201-02.

[16] *Ibid.* at 1068-69.

[17] *Marshall and Bernard*, *supra* note 2 at paras. 63 and 67.

[18] *Ibid.* at paras. 55-57.

A brief examination of each of these highlights the way in which *Marshall* and *Bernard* has revised the requirements for proving aboriginal title.

Continuity

In *Delgamuukw*, Chief Justice Lamer acknowledged that it might not be possible for a First Nations collectivity to introduce evidence of their ancestors' occupation of the collectivity's traditional territory as of the moment of sovereignty. In such cases, the claimants might be able to prove occupancy at the date of sovereignty by extrapolating backwards from current occupancy, providing they could establish some continuity between the present and pre-sovereignty occupation. Chief Justice McLachlin's discussion of the continuity requirement in *Marshall and Bernard* seems to elevate it from an alternative means of proving pre-sovereignty occupation to an independent requirement for proving aboriginal title.

Exclusive Control

In *Delgamuukw*, Chief Justice Lamer recognized that the idea of exclusivity "is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of aboriginal title with caution ... [taking] into account the context of the aboriginal society at the time of sovereignty." Thus, an isolated act of trespass, or an agreement granting access to land and resources within another group's territory, would not preclude a finding of exclusivity, if the aboriginal community had the intention and capacity to retain exclusive control of the area. Where aboriginal communities could establish use or occupancy but not the exclusivity necessary for aboriginal title, the community might still establish the evidentiary basis for other aboriginal rights, such as the right to hunt and fish in a specific area, or to have access to specific sites used for ceremonial purposes.[19]

Chief Justice McLachlin, in elaborating on the requirement for exclusive occupation, emphasized the necessity of demonstrating "effective control of the land ... from which a reasonable inference can be drawn that [the group] could have excluded others had it chosen to do so."[20] Justice Daigle in the New Brunwick Court of Appeal offered a sensitive and detailed review of the evidence, suggesting that the treaties of Peace and Friendship between the British and the Mi'kmaq were evidence of the British recognition of the Mi'kmaq's control over their traditional territory.[21] In the Supreme Court, Chief Justice McLachlin did not discuss the exclusivity requirement separately from the other requirements for common law aboriginal title. In support of her conclusion that "there is no ground to interfere with the trial judges' conclusions on the absence of common law aboriginal title," she quoted the

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[19] *Delgamuukw*, *supra* note 13 at 1104-06, (quotation at 1104).

[20] *Marshall and Bernard*, *supra* note 2 at para. 65.

[21] *R. v. Bernard*, [2003] N.B.J. No 320 (C.A.) (QL) at paras. 60-73, 84-175.

conclusions of the trial judges in both cases, without providing a detailed review of the evidence.[22] It is thus impossible to determine in what respect the evidence was insufficient to establish that the Mi'kmaq enjoyed effective control of their traditional territory.

Physical Occupation

Perhaps Chief Justice McLachlin thought it unnecessary to provide a detailed analysis of the exclusivity issue because, in her view, the paucity of evidence of occupation determined the outcome. The Chief Justice accepted as fact that in the winter, the Miramichi Mi'kmaq broke up into smaller hunting groups and dispersed inland, fishing and hunting in the interior. She accepted as well that this pattern of activity provided compelling evidence that the cutting site at issue in *Bernard* was within the range of seasonal use and occupation of the Miramichi Mi'kmaq. But in her opinion, such evidence was not enough to show the physical possession required as proof of aboriginal title: such evidence showed only "irregular use of undefined lands," not "regular use of defined lands."[23] Whether a nomadic people enjoyed sufficient "physical possession" to give them title to the land "is a question of fact, depending on the circumstances, 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."[24]

This reference to common law title suggests that the Chief Justice expected the same kind of proof of physical occupation that is required to prove rights to land by adverse possession. At common law, if a person claims title to land by occupation, relying on the doctrine of adverse possession, the claimant has to show actual physical possession of the land sufficient to displace the constructive possession enjoyed by the holder of the title to land. Generally, the best evidence of physical occupation is activity that visibly and substantially changes the land, such as cutting trees to make fields or pastures, growing crops, erecting fences and buildings, and generally making the land productive in European terms. Many First Nations communities sustained themselves from the land in ways that did not leave this kind of physical evidence of their occupation. Judges have chosen to use such terms as "physical presence," "presence amounting to occupancy," or "use and occupation" rather than the term "possession" in order to maintain a distinction between the quality of possession required to establish aboriginal title and the quality required to establish rights by adverse possession.[25]

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[22] *Marshall and Bernard supra* note 2 at paras. 79-83.

[23] *Ibid.* at paras. 73-83, quotation at 73.

[24] *Ibid* at para. 66.

[25] *Mabo v. Queensland* (1992), 107 A.L.R. 1 (H.C.), reasons for decision of Toohey J. at 146-47. Justice Toohey relied on the discussion on proof of occupation in *Hamlet of Baker Lake v. Minister of Indian Affairs* (1979), 107 D.L.R. (3d) 513 (S.C.C.).

As Nigel Bankes argues, although Chief Justice McLachlin acknowledged that in analyzing a claim for aboriginal title, a judge must consider both the aboriginal perspective and the common law perspective, she did not give them equal weight, as required by *Delgamuukw*.[26] Instead, she considered the aboriginal perspective only in determining whether an aboriginal practice can be "translated" into a common law right. To imagine the process in this way is to nullify the concept of aboriginal title. Aboriginal title is not common law title, but the right, recognized by the common law, of aboriginal peoples to continue to occupy their traditional territory. Chief Justice McLachlin used the term "common law aboriginal title" to distinguish the title claim based on occupation from a title claim based on Belcher's Proclamation of 1762 or the Royal Proclamation of 1763, but in interpreting that term, she focussed on the "common law" aspect of title at the expense of the idea of a claim to title that is prior to the common law, and that is distinct from a Crown grant of title and from rights to possession acquired by adverse possession.

In contrast, Justice LeBel in *Marshall and Bernard*, writing for himself and Justice Fish, recognized the existence of aboriginal title as distinct from common law title.

> Aboriginal conceptions of territoriality, land-use and property should be used to modify and adapt the traditional common law concepts of property in order to develop an occupancy standard that incorporates both the aboriginal and the common law approaches. Otherwise, we might be implicitly asserting the position that aboriginal peoples had no rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit within Euro-centric conceptions of property rights.[27]

Where does this leave us? As Shin Imai demonstrates, getting to the Supreme Court takes a great deal of time and money, especially in aboriginal and treaty rights cases, where those asserting the right can do so only on the basis of an extensive trial record created through spending weeks in court with expert witnesses guiding everyone through a mass of documents and other sources.[28] Parties who are granted leave to appeal to the Supreme Court are entitled to expect finality from the decision. In *Marshall* and *Bernard*, there is finality with regard to the charges – the

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[26] *Delgamuukw*, *supra* note 13 at 1104.

[27] *Marshall and Bernard*, *supra* note 2 at para. 127

[28] *R. v. Peter Paul*, [1998] S.C.C.A. No. 298, denying leave to appeal decision of New Brunswick Court of Appeal: (1998), 196 N.B.R. (2d) 292; 3 C.N.L.R. 221, rev'g acquittal of Peter Paul on charges of illegal logging on Crown land: (1997) 193 N.B.R. (2d) 321; [1998] 1 C.N.L.R. 209 (Q.B.); (1996) 182 N.B.R. (2d) 270; [1997] 4 C.N.L.R. 221 (Prov. Ct.). The Court gave no reasons for denying the leave application, but the inadequate record from the trial would have made an appeal almost impossible to argue.

accused are guilty. But given the nature of the evidence required to establish aboriginal rights or treaty rights, there can be no finality on these questions. We now know that the Mi'kmaq have no right, based on the 1760-61 treaties, to engage in the commercial harvest of logs. And we know that they have not yet established aboriginal title over all of mainland Nova Scotia and Cape Breton, or over the Bernard family cutting site on the Sevogle River – but that is all that we know.

Justice LeBel agreed with the majority in the Supreme Court that the accused had failed to establish the evidentiary basis for a defence based on aboriginal title, but he emphasized that these cases were not "a final determination of the issue of aboriginal title rights in Nova Scotia or New Brunswick. A final determination should be made only where there is an adequate evidentiary foundation that fully examines the relevant legal and historical record."[29] That process, though, requires a degree of literacy in historical, anthropological, and other research that judges, who are not trained in these disciplines, may lack. Both Shin Imai and Paul Chartrand cite examples of judges whose historical illiteracy, to use Tipene O'Regan's phrase, led them to conclusions about Aboriginal societies that the Supreme Court ultimately repudiated.[30]

For First Nations, the message of *Marshall and Bernard* must be enormously frustrating. They were here before the Europeans arrived, living in an organized society that sustained itself from the land. They can prove their connection to, use of, and control over, specific territories, although not perhaps to every hectare within that territory. It is as if, to borrow an image from Tom Molloy, the Federal Chief Negotiator for the Nisga'a Agreement,[31] you came home one night to find strangers living in your house. "We'll share with you if you can prove the house is yours," they say, "but you have to prove it without using any title deeds, and, by the way, all the neighbours who have known you for more than twenty years have disappeared, and you can't have any legal aid to help you prepare your argument." Maybe you find pictures of family events that show you in front of the fireplace in the living room, or eating at the picnic table in the backyard, but when

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[29] *Marshall and Bernard, supra* note 2 at para. 141.

[30] Tipene O'Regan, of the Ngai Tahu Maori Trust Board, commenting on Chief Justice McEachern's decision in *Delgamuukw*, said "Not all judges are historically illiterate." See "Understanding the Power Culture" in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C. and Montreal: Oolichan Books and the Institute for Research on Public Policy, 1992) at 290.

[31] Tom Molloy with Donald Ward, *The World Is Our Witness: The Historic Journey of the Nisga'a into Canada* (Calgary: Fifth House, 2000) at 60, writes "... if I were forced, suddenly, to demonstrate my right to [my house and lot in Saskatoon], without reference to the traditions and laws that have governed my society for generations, I would run into a few snags. Indeed, my ancestors ran into those same snags some eight hundred years ago when the English invaded Ireland and claimed for themselves land that had been farmed and hunted by the indigenous population for thousands of years. It was no good saying, "We are who we are. We have always been who we are. We have always lived here." We had no proof of it but our own history and traditions, a unique language and culture, and a relationship with God that our conquerors could not tolerate."

you point to the pictures as evidence that you occupied the house and the yard, the people in your house say, "Yes, but what about the kitchen? For all we know, you only passed through the kitchen on an irregular basis."

Nigel Bankes, in his contribution, focuses on the Supreme Court's refusal to give respect and credence to the idea of aboriginal customary law; Shin Imai raises questions about the likely distortions of the historical record when judges have to make findings about what happened in the past, knowing that their findings will have consequences for resource allocation today. He suggests, to avoid these problems, a process for separating the function of determining "historical facts" from the function of adjudicating the legal meaning of those facts. Paul Chartrand argues that the Supreme Court's decisions are consistent with a long-standing Canadian policy of recognizing aboriginal peoples' claim to, at best, a subsistence existence. John McEvoy's analysis of the Court's rejection of the treaty defence provides confirmation for Chartrand's argument. David Bell and Rusty Bittermann present historical evidence that aboriginal peoples persisted in claiming their right to exist as a people, with rights to land and resources, even when they seemed to be talking to people who, at best, would not listen, and, at worst, resisted their claims with state-sanctioned as well as free-enterprise violence. There is no reason to think that aboriginal peoples will give up their claims now.