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Supreme Court of Canada Rejects Aboriginal Commercial Logging Rights

In a decision released Wednesday, July 20,¹ the Supreme Court of Canada has overturned Court of Appeal decisions from New Brunswick and Nova Scotia finding that Mi'kmaq people have a treaty right to harvest timber for commercial purposes. In so doing, the Court also provided guidance on how to assess aboriginal title claims. The decision is therefore of significance to forestry and other resource sectors in British Columbia and other parts of western and northern Canada where aboriginal title claims remain outstanding.

Background

The *Bernard* and *Marshall* cases arose out of the aftermath of the Supreme Court's decisions in *Marshall 1*² and *Marshall 2*.³ In those decisions, the Supreme Court held that "peace and friendship" treaties entered into between the British and the Mi'kmaq in 1760 and 1761 conferred on the Mi'kmaq the treaty right to engage in commercial fishing activities sufficient to earn a reasonable livelihood. Members of Mi'kmaq communities in New Brunswick and Nova Scotia believed that *Marshall 1* and *Marshall 2* meant that they had commercial rights to harvest other resources as well, including timber on Crown land. To establish that right, they commenced logging activities on Crown lands in locations in New Brunswick and Nova Scotia without seeking permits from the provincial governments. They were arrested and charged by the provincial governments with violating provincial forestry laws.

At trial in both cases, the Mi'kmaq relied on *Marshall 1* and *Marshall 2* as a defence to the charges, arguing that they had a treaty right to cut and sell timber. They argued that they also had aboriginal title to the lands on which they had cut the trees, and therefore did not need the permission of the provincial government to harvest the timber. In both cases, these arguments failed and the Mi'kmaq were convicted. However, upon appeal to the courts of appeal in New Brunswick and Nova Scotia, the convictions were overturned. The governments of New Brunswick and Nova Scotia appealed those decisions to the Supreme Court.

¹ *R. v. Marshall; R. v. Bernard*, 2005 SCC 43.

² *R. v. Marshall*, [1999] 3 S.C.R. 456.

³ *R. v. Marshall*, [1999] 3 S.C.R. 533.



The Supreme Court Decision

In unanimously overturning the two Court of Appeal decisions, the Supreme Court upheld the trial courts' decisions finding that there was no treaty right to harvest trees for commercial purposes, and that aboriginal title had not been established at the locations in question.

No Treaty Right to Commercial Harvesting of Trees

On the treaty right issue, the Court held that, while the treaty did protect some rights to harvest and dispose of certain commodities, commercial logging was not protected. Although treaty rights are not frozen in time, a claim to a modern treaty trading right must represent a logical evolution from a traditional trading activity at the time the treaty was made. The Supreme Court upheld the trial courts' decisions that, on the evidence before them, commercial logging was not one of the traditional trading activities that the treaties were intended to protect. In fact, the Supreme Court noted that commercial logging likely would have been seen as in conflict with the Mi'kmaq traditional way of life, due to its potential to interfere with fishing.

Aboriginal Title to Cutting Sites not Established

The Supreme Court then went on to consider the Mi'kmaq's alternative claim, that they had aboriginal title to the lands on which the logging occurred and therefore did not need governments' permission to cut the trees. The test for establishing aboriginal title was set out in the Court's 1997 *Delgamuukw* decision,⁴ which required exclusive occupation of land by an aboriginal community at the time of British sovereignty, with continuity to the present day. In *Bernard and Marshall*, the key aspects of the *Delgamuukw* test at issue included the meaning of exclusive occupation, how nomadic or semi-nomadic peoples could establish exclusive occupation, and continuity of occupation.

The Court held that exclusive occupation need not require proof that the aboriginal group physically excluded all others from the lands in question. Rather, the group had to demonstrate that it had "effective control" of the land — the ability to exclude others if it had chosen to do so.

The Court commented that nomadic or semi-nomadic groups may be able to establish aboriginal title to lands that they used. The Court noted that, at common law, possession of land does not require continuous physical occupation. In an aboriginal title context, the question is whether a nomadic group enjoyed sufficient physical possession to give them title to the land. Each case will turn on whether an aboriginal group can establish a degree of physical occupation or use equivalent to common law title.

⁴ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.



On the question of continuity, the Court held that modern-day claimants of aboriginal title must establish a connection with the pre-British sovereignty group upon whose use and occupation of the land the aboriginal title claim is based. This can be done by showing that the claimant group has maintained a substantial connection with the land since sovereignty.

While the Supreme Court recognized that the aboriginal perspective was important in assessing whether aboriginal title has been established, and that it was important to take into account oral histories and other traditional knowledge of aboriginal groups in making that assessment, aboriginal title is at root a common law right. Proof of aboriginal title must be sensitive to aboriginal perspectives, but nonetheless must meet common law standards for proof of title. The Supreme Court held that the trial courts applied the right standard in deciding that aboriginal title had not been made out by the Mi'kmaq, and criticized the courts of appeal for applying lower standards of proof. As a result, the Supreme Court upheld the trial courts' decisions to convict the Mi'kmaq.

Implications for Resource Developers in Western and Northern Canada

Although this decision arises out of cases in New Brunswick and Nova Scotia, it will have important implications for forestry and other resource industries in western and northern Canada. The Supreme Court has indicated that common-law standards for establishing title to land also apply to aboriginal title. While courts must be open to considering aboriginal perspectives on aboriginal title, and take a flexible approach to evidence supporting the claims, the standard for proof of aboriginal title must meet the common-law standard. This suggests it may be more difficult for aboriginal groups in non-treaty areas of western and northern Canada to establish aboriginal title.

In particular, the decision indicates that very strong evidence of occupation of land will be required to establish aboriginal title. Particularly in the *Bernard* case, there was compelling evidence pertaining to aboriginal title. The cutting site was approximately 15 kilometres from the oldest Mi'kmaq village in New Brunswick. It was in an area of numerous archaeological sites and was a place where Mi'kmaq families historically would camp in the winter. However, there was no evidence of occupation or use of the specific cutting site. The Court's finding that the evidence presented fell short of establishing aboriginal title shows that the bar has been set high for proof of aboriginal title. In the decision, the Court suggests that there may be a lower threshold for establishing aboriginal rights to gathering, hunting, trapping and fishing than for establishing aboriginal title to the lands and resources on which those rights are based.

Finally, the decision suggests that the Supreme Court will continue to take a cautious approach to determining whether treaties confer commercial rights on aboriginal groups. Since the controversy created by the Court's 1999 *Marshall 1* decision, the Court has shown a greater sensitivity to the economic consequences of its decisions. Although the decision dealt specifically with forest resources, we believe that the Court's reasoning should apply with equal force in the context of the commercial exploitation of other natural resources including oil and gas and minerals. The decision will make it more difficult for aboriginal groups to convince courts that they have aboriginal title to



resources or treaty rights to exploit resources which were unknown or not being exploited at the time that treaties were signed.

The Supreme Court of Canada has not yet finished with the question of aboriginal rights to forest resources. On Thursday, July 21, the Supreme Court gave the Government of New Brunswick permission to appeal two New Brunswick Court of Appeal decisions upholding aboriginal rights to cut trees on Crown lands for personal, as opposed to commercial, use.

For any additional information about the Supreme Court's *Bernard* and *Marshall* decision and its potential implications for your company, please contact any member of our Aboriginal Law Practice Group.

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