WHY THE *BERNARD* AND *MARSHALL* CASE DOESN'T HURT ABORIGINAL TITLE CLAIMS IN BRITISH COLUMBIA

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The recent decision of the Supreme Court of Canada in *R.* v. *Marshall*; *R.* v. *Bernard*[2] has created some anxiety and concern amongst First Nations[3] communities. In that case, the Court held that the Mi'kmaq do not have a treaty right to log commercially, nor do they have Aboriginal title to the lands that they logged.

Although this is certainly a disappointing decision, it does not spell doom for Aboriginal title claims in British Columbia, as I will set out below. To the contrary, the Court clarified and resolved some ambiguities in several aspects of the *Delgamuukw*[4] test for Aboriginal title, and arguably expanded some components of the test. For these reasons, the decision may be of considerable assistance to First Nations asserting Aboriginal title claims.[5]

1. Fact-specific

The decision is largely based on the particular facts and circumstances of the Mi'kmaq. The Court found that the Mi'kmaq did not present sufficient evidence to prove their Aboriginal title claim. The evidence that was before the Court is not fully laid out in the decision, so I cannot comment on whether the Court was correct in its assessment on this point. However, it certainly seems that the Court is willing to find that a First Nation has Aboriginal title, where the First Nation has sufficient evidence in support of its claim.

2. Generous Interpretation of Aboriginal Practices

In order to assess Aboriginal rights claims (including claims of Aboriginal title), a court must look at the pre-sovereignty practices of the First Nation and try to tie those practices to a modern legal right. The court must be generous in its examination and interpretation of the Aboriginal practice and should not require it to precisely fit the mold of a common law right. Rather, the practice need only "[correspond] to the core concepts of the legal right claimed."[6] In my opinion, the Court has taken great steps to recognize and integrate the aboriginal perspective, with the result that it may be much easier for a First Nation to assert and prove its Aboriginal rights.

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[1] With assistance from Jack Woodward, Patricia Hutchings, and David M. Robbins.
[2] 2005 SCC 43.
[3] In this paper, the term "First Nations" includes Indian Bands as recognized under the *Indian Act* and "aboriginal peoples" as defined in section 35 of the *Constitution Act, 1982*.
[4] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010.
[5] In this paper I will focus on the aspects of the decision that relate to Aboriginal title. I will not be discussing implications for treaty rights claims.
[6] See note 2, at para. 48.

3. Clarification of "Exclusive Occupation"

As set out in *Delgamuukw*, in order to establish an Aboriginal title claim, a First Nation must prove that its ancestors had exclusive occupation of the land pre-sovereignty. "Occupation" has been determined to mean "physical occupation". From *Delgamuukw*, physical occupation can be established in many ways, including the construction of homes and buildings, agricultural practices, and regular use of the land for hunting, fishing, and accessing resources.[7]

Importantly, the Court held that a First Nation does not have to provide overt evidence of acts of exclusion in order to prove "exclusive occupation", but need only demonstrate that it had effective control of the land, and that it could have excluded others from the land had it chosen to do so.[8] This is a relatively low threshold, and one that may be fairly easy to meet.

4. Nomadic and Semi-Nomadic Peoples may hold Aboriginal Title

In this decision, the Court makes it clear that nomadic and semi-nomadic First Nations are not barred from claiming Aboriginal title. Aboriginal title is a question of fact, based on the evidence in each particular case. In reality, of course, it may be difficult for a nomadic or semi-nomadic people to demonstrate a sufficient degree of use or occupation, but at least these groups have not been precluded from making such a claim.

The minority decision (concurring in result) is particularly eloquent with regard to the rights of nomadic and semi-nomadic First Nations:

> Taking into account the aboriginal perspective on the occupation of land means that physical occupation as understood by the modern common law is not the governing criterion. The group's relationship with the land is paramount. To impose rigid concepts and criteria is to ignore aboriginal social and cultural practices that may reflect the significance of the land to the group seeking title. The mere fact that the group travelled within its territory and did not cultivate the land should not take away from its title claim.[9]

5. Clarification of "Continuity"

In this decision, the Court has elucidated what it means by "continuity". Claimants need only demonstrate that their modern Aboriginal right is descended from the pre-sovereignty aboriginal practices of a group to whom they are connected. If the First

[7] See note 2, at para. 56, quoting para. 149 from *Delgamuukw* (see note 4).
[8] See note 2, at paras. 63-65.
[9] Se note 2, at para. 136.

Nation is claiming Aboriginal title, it must be able to show that its connection to the land has a central significance to its distinctive culture. "Central significance" is established where the First Nation can show that it has "maintained a substantial connection" with the land since sovereignty.[10]

6. Affirms that Oral History is Admissible

The Court makes it clear that oral history evidence must be admitted, where it meets the standards of usefulness and reasonable reliability set out in *Mitchell* v. *M.N.R.*[11] Further, the Court makes it clear that all evidence, both oral and documentary, must be considered from the Aboriginal perspective.[12]

7. Justification of Infringement

Once Aboriginal title has been recognized by a court, the Crown can only interfere with that title in specific circumstances. Arguably, the Court has raised the bar for justification in adopting the reasoning from *R.* v. *Sparrow*.[13] The Crown can only impinge on Aboriginal title where "it can establish that this is justified in pursuance of a compelling and substantial legislative objective for the good of larger society."[14]

This tempers the broad language in *Delgamuukw*, in which Chief Justice Lamer stated that a broad range of legislative objectives can justify infringement of Aboriginal title, such as "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims".[15]

8. Aboriginal Perspective Must be Considered

Finally, it is clear from this decision that the Aboriginal perspective is of utmost importance. Indeed, the phrase was mentioned more than 30 times.

It is now clear that the Aboriginal perspective and the common law perspective must be considered together when analyzing issues such as pre-sovereignty Aboriginal practices, the nature of the occupation of land (including territoriality, exclusion, and land use), and the admissibility of evidence, both oral and documentary. This is a thoughtful articulation and recognition of the Aboriginal viewpoint, and is a positive step forward.

[10] See note 2, at para. 67, citing *R.* v. *Adams* and *Delgamuukw*.
[11] 2001 SCC 33.
[12] See note 2, at paras. 68-69.
[13] [1990] 1 S.C.R. 1075, at p. 1113.
[14] See note 2, at para. 39.
[15] See note 4, at para. 165.

Conclusion

Although the result in the *Marshall* and *Bernard* case is disappointing, in my opinion the case will not have a detrimental effect on current claims in British Columbia. Indeed, this decision has helped to clarify the law, and in some ways has made it easier for First Nations to be able to prove their claims.