SUPREME COURT OF CANADA

CITATION: R. *v.* Marshall; R. *v.* Bernard, [2005] 2 S.C.R. 220, 2005 SCC 43

DATE: 20050720
DOCKET: 30005, 30063

BETWEEN:

Her Majesty The Queen
Appellant/Respondent on the cross-appeal
v.
Stephen 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, Camillius 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 and Phillip F. Young
Respondents/Appellants on the cross-appeal
- and -
Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Forest Products Association of Nova Scotia, Keptin John Joe Sark and Keptin Frank Nevin (of the Mi'kmaq Grand Council), Native Council of Nova Scotia, New Brunswick Aboriginal Peoples Council, Congress of Aboriginal Peoples, Assembly of First Nations and Songhees Indian Band, Malahat First Nation, T'Sou-ke First Nation, Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively the Te'mexw Nations)
Interveners

AND BETWEEN:

Her Majesty The Queen
Appellant
v.
Joshua Bernard
Respondent
- and -
Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of British Columbia, Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Union of New Brunswick Indians, New Brunswick Forest Products Association, Keptin John Joe Sark and Keptin Frank Nevin (of the Mi'kmaq Grand Council), Native Council of Nova Scotia, New Brunswick Aboriginal Peoples Council, Congress of Aboriginal Peoples, Assembly of First Nations and Songhees Indian band, Malahat First Nation, T'Sou-ke First Nation, Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively the Te'mexw Nations)
Interveners

CORAM: McLachlin C.J. and Major, Bastarache, LeBel, Fish, Abella and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 109)	McLachlin C.J. (Major, Bastarache, Abella and Charron JJ. concurring)
	LeBel J. (Fish J. concurring)
CONCURRING REASONS: (paras. 110 to 145)	

R. *v.* Marshall; R. *v.* Bernard, [2005] 2 S.C.R. 220, 2005 SCC 43

Her Majesty The Queen *Appellant/Respondent on the cross-appeal*

v.

Stephen 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, Camillius 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
and Phillip F. Young *Respondents/Appellants on the cross-appeal*

and

Attorney General of Canada, Attorney General of Ontario,
Attorney General of Quebec, Attorney General of New Brunswick,
Attorney General of British Columbia, Attorney General of Alberta,
Attorney General of Newfoundland and Labrador,
Forest Products Association of Nova Scotia,
Keptin John Joe Sark and Keptin Frank Nevin
(of the Mi'kmaq Grand Council), Native Council
of Nova Scotia, New Brunswick Aboriginal
Peoples Council, Congress of Aboriginal Peoples,
Assembly of First Nations and Songhees Indian Band,
Malahat First Nation, T'Sou-ke First Nation,
Snaw-naw-as (Nanoose) First Nation and
Beecher Bay Indian Band (collectively the Te'mexw Nations) *Interveners*

and between

Her Majesty The Queen *Appellant*

v.

Joshua Bernard *Respondent*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of British Columbia, Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Union of New Brunswick Indians, New Brunswick Forest Products Association, Keptin John Joe Sark and Keptin Frank Nevin (of the Mi'kmaq Grand Council), Native Council of Nova Scotia, New Brunswick Aboriginal Peoples Council, Congress of Aboriginal Peoples, Assembly of First Nations and Songhees Indian Band, Malahat First Nation, T'Sou-ke First Nation, Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively the Te'mexw Nations) *Interveners*

Indexed as: R. *v.* Marshall; R. *v.* Bernard

Neutral citation: 2005 SCC 43.

File Nos.: 30063, 30005.

2005: January 17, 18; 2005: July 20.

Present: McLachlin C.J. and Major, Bastarache, LeBel, Fish, Abella and Charron JJ.

on appeal from the court of appeal for nova scotia

on appeal from the court of appeal for new brunswick

Indians — Treaty rights — Logging — Interpretation of truckhouse clause — Mi'kmaq Indians charged with cutting and removing timber from Crown lands without authorization, or with unlawful possession of Crown timber — Whether Mi'kmaq in Nova Scotia and New Brunswick have treaty right to log on Crown lands for commercial purposes.

Indians — Aboriginal title — Logging sites — Mi'kmaq Indians charged with cutting and removing timber from Crown lands without authorization, or with unlawful possession of Crown timber — Whether Mi'kmaq hold aboriginal title to lands they logged — Standard of occupation and type of evidence required to prove title — Whether Royal Proclamation of 1763 or Belcher's Proclamation of 1762 granted aboriginal title to Mi'kmaq.

This appeal deals with two cases. In *Marshall*, 35 Mi'kmaq Indians were charged with cutting timber on Crown lands in Nova Scotia without authorization. In *Bernard*, a Mi'kmaq Indian was charged with unlawful possession of spruce logs he was hauling from the cutting site to the local saw mill. The logs had been cut on Crown lands in New Brunswick. In both cases, the accused argued that as Mi'kmaq Indians, they were not required to obtain provincial authorization to log because they have a right to log on Crown lands for commercial purposes pursuant to treaty or aboriginal title. The trial courts entered convictions which were upheld by the summary conviction courts. The courts of appeal set aside the convictions. A new trial was ordered in *Marshall* and an acquittal entered in *Bernard*.

Held: The appeals should be allowed and the convictions restored. The cross-appeal in *Marshall* should be dismissed.

Per McLachlin C.J. and Major, Bastarache, Abella and Charron JJ.: The treaties of 1760-61 do not confer on modern Mi'kmaq a right to log contrary to provincial regulation. The truckhouse clause of the treaties was a trade clause which only granted the Mi'kmaq the right to continue to trade in items traditionally traded in 1760-61. While the right to trade in traditional products carries with it an implicit right to harvest those resources, this right to harvest is the adjunct of the basic right to trade in traditional products. Nothing in the wording of the truckhouse clause comports a general right to harvest or gather all natural resources then used. The right conferred is the right to trade. The emphasis therefore is not on what products were used, but on what trading activities were in the contemplation of the parties at the time the treaties were made. Only those trading activities are protected. Ancestral trading activities, however, are not frozen in time and the question in each case is whether the modern trading activity in issue represents a logical evolution from the traditional trading activities at the time the treaties were made. Here, the trial judges applied the proper test and the evidence supports their conclusion that the commercial logging that formed the basis of the charges against the accused was not the logical evolution of a traditional Mi'kmaq trading activity in 1760-61. [16-20] [25] [35]

The accused did not establish that they hold aboriginal title to the lands they logged. *Delgamuukw* requires that in analyzing a claim for aboriginal title, both aboriginal and European common law perspectives must be considered. The court must examine the nature and extent of the pre-sovereignty aboriginal practice and translate that practice into a modern common law right. Since different aboriginal practices correspond to different modern rights, the question is whether the practices established by the evidence, viewed from the aboriginal perspective, correspond to the core of the common law right claimed. Here, the accused did not

assert an aboriginal right to harvest forest resources but aboriginal title *simpliciter*. Aboriginal title to land is established by aboriginal practices that indicate possession similar to that associated with title at common law. The evidence must prove "exclusive" pre-sovereignty "occupation" of the land by their forebears. "Occupation" means "physical occupation" and "exclusive occupation" means an intention and capacity to retain exclusive control of the land. However, evidence of acts of exclusion is not required. All that is required is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that the group could have excluded others had it chosen to do so. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or the exploitation of resources. These principles apply to nomadic and semi-nomadic aboriginal groups; the right in each case depends on what the evidence establishes. Continuity is required, in the sense of showing the group's descent from the pre-sovereignty group whose practices are relied on for the right. On all these matters, evidence of oral history is admissible, provided it meets the requisite standards of usefulness and reasonable reliability. The trial judges in both cases applied the proper test in requiring proof of sufficiently regular and exclusive use of the cutting sites by Mi'kmaq people at the time of the assertion of sovereignty, and there is no ground to interfere with their conclusions that the evidence did not establish aboriginal title. [45-60] [70] [72]

The text, the jurisprudence and historic policy all support the conclusion that the *Royal Proclamation* of 1763 did not reserve aboriginal title to the Mi'kmaq in the former colony of Nova Scotia. On the evidence, there is also no basis for finding title to the cutting sites in *Belcher's Proclamation*. [96] [106]

Per LeBel and Fish JJ.: The protected treaty right includes not only a right to trade but also a corresponding right of access to resources for the purpose of engaging in trading activities. The treaty right comprises both a right to trade and a right of access to resources: there is no right to trade in the abstract because a right to trade implies a corresponding right of access to resources for trade. There are limits, however, to the trading activities and access to resources that are protected by the treaty. Only those types of resources traditionally gathered in the Mi'kmaq economy for trade purposes would reasonably have been in the contemplation of the parties to the treaties of 1760-61. In order to be protected under those treaties, trade in forest products must be the modern equivalent or a logical evolution of Mi'kmaq use of forest products at the time the treaties were signed. On the facts of these cases, the evidence supports the conclusion that trade in forest products was not contemplated by the parties and that logging is not a logical evolution of the activities traditionally engaged in by Mi'kmaq at the time the treaties were entered into. [110-118]

In the context of aboriginal title claims, 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 common law approaches. However, the role of the aboriginal perspective cannot be simply to help in the interpretation of aboriginal practices in order to assess whether they conform to common law concepts of title. The patterns and nature of aboriginal occupation of land should inform the standard necessary to prove aboriginal title. The common law notion that "physical occupation is proof of possession" remains but is not the governing criterion: the nature of the occupation is shaped by the aboriginal perspective, which includes a history of nomadic or semi-nomadic modes of occupation. Since proof of aboriginal title relates to the manner in which the group used and occupied the land prior to the assertion of Crown sovereignty, the mere fact that an aboriginal group travelled within its territory and did not cultivate the land should not take away from its title claim. Therefore, anyone considering the degree of occupation sufficient to establish title must be mindful that aboriginal title is ultimately premised upon the notion that the specific land or territory at issue was of central significance to the aboriginal group's culture. Occupation should be proved by evidence not of regular and intensive use of the land but of the tradition and culture of the group that connect it with the land. Thus, intensity of use is related not only to common law notions of possession but also to the aboriginal perspective. The record in the courts below lacks the evidentiary foundation necessary to make legal findings on the issue of aboriginal title in respect of the cutting sites in Nova Scotia and New Brunswick and, as a result, the accused in these cases have failed to sufficiently establish their title claim. [127-141]

The appropriateness of litigating aboriginal treaty, rights and title issues in the context of proceedings of a penal nature is doubtful. When issues of aboriginal title or other aboriginal rights claims arise in the context of summary conviction proceedings, it may be most beneficial to all concerned to seek a temporary stay of the charges so that the aboriginal claim can be properly litigated in the civil courts. Once the aboriginal rights claim to the area in question is settled, the Crown could decide whether or not to proceed with the criminal charges. [142-144]

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By McLachlin C.J.

Referred to: *R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456; *R. v. Marshall*, 1999 CanLII 666 (SCC), [1999] 3 S.C.R. 533; *Jack v. The Queen*, 1979 CanLII 175 (SCC), [1980] 1 S.C.R. 294; *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507; *R. v. Nikal*, 1996 CanLII 245 (SCC), [1996] 1 S.C.R. 1013; *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075; *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997]

3 S.C.R. 1010; *R. v. Adams*, 1996 CanLII 169 (SCC), [1996] 3 S.C.R. 101; *R. v. Côté*, 1996 CanLII 170 (SCC), [1996] 3 S.C.R. 139; *Powell v. McFarlane* (1977), 38 P. & C.R. 452; *Red House Farms (Thorndon) Ltd. v. Catchpole*, [1977] E.G.D. 798; *Keefer v. Arillotta* (1976), 1976 CanLII 571 (ON CA), 13 O.R. (2d) 680; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33 (CanLII); *Nowegijick v. The Queen*, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29; *R. v. Secretary of State for Foreign and Commonwealth Affairs*, [1982] 1 Q.B. 892; *R. v. Sioui*, 1990 CanLII 103 (SCC), [1990] 1 S.C.R. 1025.

By LeBel J.

Referred to: *R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456; *R. v. Marshall*, 1999 CanLII 666 (SCC), [1999] 3 S.C.R. 533; *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507; *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010; *Calder v. Attorney-General of British Columbia*, 1973 CanLII 4 (SCC), [1973] S.C.R. 313; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33 (CanLII); *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 1887 CanLII 3 (SCC), 13 S.C.R. 577; *R. v. Adams*, 1996 CanLII 169 (SCC), [1996] 3 S.C.R. 101.

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Crown Lands and Forests Act, S.N.B. 1980, c. C-38.1, s. 67(1)(*c*).

Treaties and Proclamations

Belcher's Proclamation (1762).

Mi'kmaq Treaties of 1760-61.

Royal Proclamation (1763), R.S.C. 1985, App. II, No. 1.

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APPEAL and CROSS-APPEAL from a judgment of the Nova Scotia Court of Appeal (Cromwell, Saunders and Oland JJ.A.) (2003), 218 N.S.R. (2d) 78, 687 A.P.R. 78, [2004] 1 C.N.L.R. 211, [2003] N.S.J. No. 361 (QL), 2003 NSCA 105 (CanLII), allowing an appeal from a judgment of Scanlan J. (2002), 202 N.S.R. (2d) 42, 632 A.P.R. 42, [2002] 3 C.N.L.R. 176, [2002] N.S.J. No. 98 (QL), 2002 NSSC 57 (CanLII), dismissing an appeal from a judgment of Curran Prov. Ct. J. (2001), 191 N.S.R. (2d) 323, 596 A.P.R. 323, [2001] 2 C.N.L.R. 256, [2001] N.S.J. No. 97 (QL), 2001 NSPC 2 (CanLII), convicting the accused of cutting and removing timber from Crown land without authorization. Appeal allowed and cross-appeal dismissed.

APPEAL from a judgment of the New Brunswick Court of Appeal (Daigle, Deschênes and Robertson JJ.A.) (2003), 262 N.B.R. (2d) 1,688 A.P.R. 1, 230 D.L.R. (4th) 57, 4 C.E.L.R. (3d) 1, [2003] 4 C.N.L.R. 48, [2003] N.B.J. No. 320 (QL), 2003 NBCA 55 (CanLII), allowing an appeal from a judgment of Savoie J. (2001), 239 N.B.R. (2d) 173, 619 A.P.R. 173, [2002] 3 C.N.L.R. 141, [2001] N.B.J. No. 259 (QL), 2001 NBQB 82, dismissing an appeal from a judgment of Lordon Prov. Ct. J., [2000] 3 C.N.L.R. 184, [2000] N.B.J. No. 138 (QL), convicting the accused of possessing timber from Crown land without authorization. Appeal allowed.

Alexander M. Cameron, *William D. Delaney* and *James Clarke*, for the appellant/respondent on the cross-appeal in *Marshall* and the intervener the Attorney General of Nova Scotia.

William B. Richards, *Pierre Castonguay*, *Sylvain Lussier* and *Iain R. W. Hollett*, for the appellant in *Bernard* and the intervener the Attorney General of New Brunswick.

Bruce H. Wildsmith, *Q.C.*, and *Eric A. Zscheile*, for the respondents/appellants on the cross-appeal in *Marshall* and the respondent in *Bernard*.

Mitchell R. Taylor and *Charlotte Bell*, *Q.C.*, for the intervener the Attorney General of Canada.

Robert H. Ratcliffe and *Mark Crow*, for the intervener the Attorney General of Ontario.

René Morin, for the intervener the Attorney General of Quebec.

John J. L. Hunter, *Q.C.*, for the intervener the Attorney General of British Columbia.

Robert J. Normey and *Donald Kruk*, for the intervener the Attorney General of Alberta.

Donald H. Burrage, *Q.C.*, and *Justin S. C. Mellor*, for the intervener the Attorney General of Newfoundland and Labrador.

Thomas E. Hart and *Harvey L. Morrison*, *Q.C.*, for the intervener the Forest Products Association of Nova Scotia.

D. Bruce Clarke, for the interveners Keptin John Joe Sark and Keptin Frank Nevin (of the Mi'kmaq Grand Council), the Native Council of Nova Scotia and the New Brunswick Aboriginal Peoples Council.

Andrew K. Lokan and *Joseph E. Magnet*, for the intervener the Congress of Aboriginal Peoples.

Bryan P. Schwartz and *Candice Metallic*, for the intervener the Assembly of First Nations.

Robert J. M. Janes and *Dominique Nouvet*, for the interveners the Songhees Indian Band, the Malahat First Nation, the T'Sou-ke First Nation, the Snaw-naw-as (Nanoose) First Nation and the Beecher Bay Indian Band (collectively the Te'mexw Nations).

Daniel R. Theriault, for the intervener the Union of New Brunswick Indians.

Mahmud Jamal and *Neil Paris*, for the intervener the New Brunswick Forest Products Association.

The judgment of McLachlin C.J. and Major, Bastarache, Abella and Charron JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 Can members of the Mi'kmaq people in Nova Scotia and New Brunswick engage in commercial logging on Crown lands without authorization, contrary to statutory regulation? More precisely, do they have treaty rights or aboriginal title entitling them to do so? These are the central issues on this appeal.

Do the Mi'kmaq can cut trees on crown land based on either Aboriginal title or a treaty right?

2 In the *Marshall* case, Stephen Frederick Marshall and 34 other Mi'kmaq Indians were charged with cutting timber on Crown lands without authorization, contrary to s. 29 of the *Crown Lands Act*, R.S.N.S. 1989, c. 114, between November 1998 and March 1999. The logging took place in five counties on mainland Nova Scotia and three counties on Cape Breton Island, in the Province of Nova Scotia. The accused admitted all the elements of the offence, except lack of authorization.

Facts in Marshall--cutting trees on crown land in several locations in NS without provincial authorization.

3 In the *Bernard* case, Joshua Bernard, a Mi'kmaq Indian, was charged with unlawful possession of 23 spruce logs he was hauling from the cutting site to the local saw mill in contravention of s. 67(1)(*c*) of the *Crown Lands and Forests Act*, S.N.B. 1980, c. C-38.1, as amended. Another member of the Miramichi Mi'kmaq community had cut the logs from Crown lands in the Sevogle area of the watershed region of the Northwest Miramichi River, in the Province of New Brunswick. Like the accused in *Marshall*, Bernard argued that as a Mi'kmaq, he was not required to obtain authorization to log.

Facts in Bernard--possession of logs cut on Crown land without provincial authorization.

4 In both cases the trial courts entered convictions. In both cases, these convictions were upheld by the summary appeal court. And in both cases, these decisions were reversed by the Court of Appeal. In *Marshall*, the convictions were set aside and a new trial ordered. In *Bernard*, the conviction was set aside and an acquittal entered.

Both lost at trial but were successful at the court of appeal.

5 The significance of these cases transcends the charges at stake. They were used as vehicles for determining whether Mi'kmaq peoples in Nova Scotia and New Brunswick have the right to log on Crown lands for commercial purposes pursuant to treaty or aboriginal title. Many witnesses, including experts in aboriginal history and treaty interpretation, testified. The trial judges made detailed findings of fact and the Justices of the Court of Appeal wrote extensive reasons. The cases now come before us for final determination of the issues.

6 I conclude that the trial judges in each case correctly held that the respondents' treaty rights did not extend to commercial logging and correctly rejected the claim for aboriginal title in the relevant areas. I would thus allow the appeals, dismiss the cross-appeal in *Marshall* and restore the convictions.

The SCC restored the decisions of the trial judges and restored the convictions.

II. Aboriginal Treaty Right

A. *The Background: Marshall 1 and Marshall 2*

7 In 1760 and 1761, the British Crown concluded "Peace and Friendship" treaties with the Mi'kmaq peoples of the former colony of Nova Scotia, now the Provinces of Nova Scotia and New Brunswick. The British had succeeded in driving the French from the area. The Mi'kmaq and French had been allies and trading partners for almost 250 years. The British, having defeated the French, wanted peace with the Mi'kmaq. To this end, they entered into negotiations, which resulted in the Peace and Friendship treaties. The existence of a treaty and a right to claim under it are questions of fact to be determined in each case. Although different treaties were made with different groups, for the purposes of this case we

assume that the main terms were the same, similar to those in *R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456 ("*Marshall 1*").

8 A critical aspect of the treaties was the trading clause, whereby the British agreed to set up trading posts, or "truckhouses", and the Mi'kmaq agreed to trade only at those posts, instead of with others, like their former allies, the French. In the crucial clause, the Mi'kmaq Chiefs agreed:

> 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 . . . .

The pact was mutual. The English were desirous of ensuring that the Mi'kmaq could continue to peacefully live in the area. To do this, the Mi'kmaq needed to trade for European goods, as they had been doing for more than two centuries. The English wanted the Mi'kmaq to do this with them, and not with the French. For their part, the Mi'kmaq wanted assurance that the English would provide trading posts where they could barter their goods and obtain necessaries.

9 In *Marshall 1*, a member of the Mi'kmaq nation was charged with fishing and selling eels contrary to Federal regulations. The defendant in that case, Donald Marshall Jr., admitted that he had caught and sold several hundred pounds of eel out of season. His defense was that the truckhouse clause of the treaties of 1760-61 gave him the right to catch and trade fish. The issue before the Court was whether the treaties conferred this right.

10 The majority of this Court concluded that the truckhouse clause amounted to a promise on the part of the British that the Mi'kmaq would be allowed to engage in traditional trade activities so as to obtain a

Summary of Marshall #1

moderate livelihood from the land and sea. The Mi'kmaq had traded in fish at the time of the treaties. Marshall's activity could be characterized as fishing in order to obtain a moderate livelihood. It was thus the logical evolution of an aboriginal activity protected by the treaties. Marshall was acquitted.

11 In response to a subsequent application for a rehearing, the Court issued reasons now known as *Marshall 2* (*R. v. Marshall*, 1999 CanLII 666 (SCC), [1999] 3 S.C.R. 533). In the course of these reasons, the Court commented on the nature of the right and the implication of *Marshall 1* on the right of the Mi'kmaq to harvest and sell other resources. It stated that treaty rights pertaining to activities other than fishing, like logging, would fall to be decided on such evidence as might be led in future cases directed to that issue.

12 Relying on their interpretation of *Marshall 1*, the respondents commenced logging activities on Crown lands in Nova Scotia and New Brunswick without authorization. They were arrested and charged. They raised the treaties and *Marshall 1* and *2* in support of the defense that they were entitled to log for commercial purposes without permit. Their arguments were rejected at trial and on summary appeal, but accepted on appeal to their respective provincial courts of appeal. The issue of whether the treaties of 1760-61 grant modern Mi'kmaq a right to log contrary to provincial regulation is now squarely before this Court.

Relying on Marshall #1 they started to commercial logging based on a claimed treaty right.

B. *The Scope of the Treaty Right*

13 *Marshall 1* and *2* held that the treaties of 1760-61 conferred on the Mi'kmaq the right to catch and sell fish for a moderate livelihood, on the ground that this activity was the logical evolution of a trading practice that was within the contemplation of the parties to the treaties. The cases now before us raise issues as to the scope of the right.

14 The respondents argue that the truckhouse clause, as interpreted in *Marshall 1* and *2*, confers a general right to harvest and sell all natural resources which they used to support themselves in 1760. Provided they used a form of the resource either for their own needs or for trade at the time of the treaties, they now have the right to exploit it, unless the government can justify limitations on that exploitation in the broader public interest. The respondents argue that they used forest products for a variety of purposes at the time of the treaties, from housing and heat to sleds and snowshoes, and indeed occasionally traded products made of wood, all to sustain themselves. Logging represents the modern use of the same products, they assert. Therefore the treaties protect it.

The argument was that the truckhouse clause gave rise to a treaty right to sell all natural resources used to support the Mi'kmaq in 1760, including forest products.

15 This interpretation of the truckhouse clause in the treaties asks what resources were used by the Mi'kmaq to sustain themselves at the time of the treaties, and concludes that these resources continue to be available to the Mi'kmaq for the purpose of gaining a moderate livelihood. It takes *Marshall 2* as confirming that the truckhouse clause conferred a perpetual right to use "the types of resources traditionally 'gathered' in an aboriginal economy" (para. 19). The only question is what was "gathered" or used in 1760. If wood was gathered in any way, for any purpose, in 1760, modern Mi'kmaq have the right to log, subject only to such limits as the government can justify in the greater public good.

16 The appellant Crown takes a narrower view of the import of the truckhouse clause. It accepts *Marshall 1* and *2*, but argues that the respondents misread them. The appellant asserts that these cases did not decide that the truckhouse clause of the treaties granted a perpetual right to any natural resources used or "gathered" at the time, subject only to justification. On its view, the clause merely granted the Mi'kmaq the right to continue to trade in items traded in 1760-61. Only those trading activities were protected; other activities, not within the contemplation of the British and Mi'kmaq of the day, are not protected. The emphasis is not on what products were used, but on what *trading activities* were in the contemplation of the parties at the time the treaties were made. Ancestral trading activities are not frozen in time; the treaty protects modern activities that can be said to be their logical evolution. But new and

The debate was whether the truckhouse clause gave rise to a right to trade all natural resources gathered in 1760 or to trade in items traded in 1760.

different trading activities, like modern commercial logging, are not protected. To grant such protection, the appellant asserts, would be to transform the treaty right into something new and different.

17 For the reasons that follow, I must reject the respondents' interpretation of the scope of the right conferred by the truckhouse clause and endorse the view of the appellant. The purpose of the truckhouse clause, the wording of the clause, and holdings of this Court in *Marshall 1* and *2*, all lead inexorably to this conclusion.

The Court accepted that the treaty right was limited to the trading activities of 1760 and did not extend to all natural resources gathered by the Mi'kmaq in 1760.

18 I turn first to the purpose of the truckhouse clause as revealed by the historical record. The truckhouse clause was a *trade* clause. It was concerned with what could be traded. As discussed in *Marshall 1*, the British wanted the Mi'kmaq to cease trading with the French, whom they had just defeated, and trade only with them. The Mi'kmaq were willing to do this, but sought assurances that the British would provide trading posts, or truckhouses, where they could trade. The Mi'kmaq had been trading with Europeans for 250 years by this time, and relied on trading their products, like furs and fish, in exchange for European wares. The purpose of the truckhouse clause was to give the British the exclusive right to trade with the Mi'kmaq and the Mi'kmaq the assurance that they would be able to trade with the British as they had traded with the French in the past.

19 Thus, the truckhouse clause was concerned with traditionally traded products. The right to trade in traditional products carried with it an implicit right to harvest those resources: *Marshall 1*, at para. 35. But this right to harvest is the adjunct of the basic right to trade in traditional products. The right conferred is not the right to harvest, in itself, but the right to trade.

It was a right to trade, which implicitly included the right to harvest the resources traded at the time.

20 This is supported by the wording of the truckhouse clause. It speaks only of trade. The Mi'kmaq affirmed "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". Nothing in these words comports a general right to harvest or gather all natural resources then used.

21 The historic records and the wording of the truckhouse clause indicate that what was in the contemplation of the British and the Mi'kmaq in 1760 was continued trade in the products the Mi'kmaq had traditionally traded with Europeans. The clause affirmed that this trade would continue, but henceforth exclusively with the British.

22 This view of the truckhouse clause was confirmed by this Court in *Marshall 1* and *2*. In *Marshall 1* the majority, *per* Binnie J., proceeded on the basis that at the time of the treaties the Mi'kmaq had sustained themselves, in part, by trading fish with the Europeans:

> . . . the Mi'kmaq people have sustained themselves in part by harvesting and trading fish (including eels) since Europeans first visited the coasts of what is now Nova Scotia in the 16th century. [para. 2]
>
> . . .
>
> What is plain from the pre-Confederation period is that the Indian fishermen were encouraged to engage in their occupation and to do so for both food and barter purposes. [para. 25, quoting Dickson J. in *Jack v. The Queen*, 1979 CanLII 175 (SCC), [1980] 1 S.C.R. 294, at p. 311]

23 Thus, the ruling in *Marshall 1* was based on the proposition that *fishing for trade* in 1760 was a traditional activity of the Mi'kmaq. From this, Binnie J. concluded that the treaty conferred a right to continue to obtain necessaries through the traditional Mi'kmaq activity of trading fish. He concluded 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" (para. 56 (emphasis added)).

24 This is consistent with the assertion in *Marshall 2* that the fundamental issue is whether trade in a particular commodity "was in the contemplation of [the] parties to the 1760 treaty" (para. 20). It is also consistent with the reference in *Marshall 2* to treaty rights to "the type of things traditionally 'gathered' by the Mi'kmaq in a 1760 aboriginal lifestyle" (para. 20) like "fruits and berries" (para. 19). The respondents argued that the reference to fruits and berries shows that the treaty right extends beyond things traditionally traded, to a right to harvest anything the Mi'kmaq used in 1760. However, the evidence in *Marshall 1* in fact referred to the Indians trading fruits and berries with the Europeans.

25 Of course, treaty rights are not frozen in time. Modern peoples do traditional things in modern ways. The question is whether the modern trading activity in question represents a logical evolution from the traditional trading activity at the time the treaty was made: *Marshall 2*, at para. 20. Logical evolution means the same sort of activity, carried on in the modern economy by modern means. This prevents aboriginal rights from being unfairly confined simply by changes in the economy and technology. But the activity must be essentially the same. "While treaty rights are capable of evolution within limits, . . . their subject matter . . . cannot be wholly transformed" (*Marshall 2*, at para. 19).

Evolution issue--it must be "the same sort activity" carried in a modern economy by modern means. The activity "must be essentially the same."

26 In summary, what the treaty protects is not the right to harvest and dispose of particular commodities, but the right to practice a traditional 1760 trading activity in the modern way and modern context. The question is whether the logging here at issue is the logical evolution of a traditional Mi'kmaq trade activity, in the way modern eel fishing was found to be the logical evolution of a traditional trade activity of the Mi'kmaq in *Marshall 1*.

Another example of s. 35 rights being rights to an activity, not a right to a particular resource.

C. *The Test Applied*

27 The trial judges in both cases applied this test to the evidence before them, asking whether the respondents' logging activity could be considered the logical evolution of a traditional Mi'kmaq trade activity.

28 Curran Prov. Ct. J. in the *Marshall* case ((2001), 191 N.S.R. (2d) 323, 2001 NSPC 2 (CanLII)) asked whether there was any evidence that the Mi'kmaq had traded in wood products and timber at the time of the 1760-61 treaties. He emphasized the trade-based nature of the right and the need that it relate to traditional Mi'kmaq activities. And he asked himself whether the logging activity at issue before him could be considered to be the logical evolution of a traditional trade-based activity.

The question became whether there was evidence that the Mi'kmaq had traded in wood products in 1760.

29 Lordon Prov. Ct. J. in *Bernard* ([2000] 3 C.N.L.R. 184) asked essentially the same questions. He inquired whether the evidence showed a traditional Mi'kmaq trade in logs and wood. Emphasizing trade, he rejected the broader interpretation of the treaty that the Mi'kmaq were entitled to exploit all natural resources that they had used historically. To permit this would "alter the terms of the treaty" and "wholly transform" (para. 87) the rights it conferred, in his view.

30 Each judge applied the right test and asked himself the right questions. The remaining question is whether the evidence supports their conclusions of fact.

D. *The Factual Findings of the Trial Judges and the Evidence*

31 In each case, the trial judge concluded that the evidence did not support a treaty right to commercial logging.

32 In *Marshall*, Curran Prov. Ct. J. found no direct evidence of any trade in forest products at the time the treaties were made, but concluded that trade in forest products was likely "at some point":

> There is no doubt the Mi'kmaq in 1760 and for a long time before gathered and used forest products. They made canoes, baskets, snowshoes and toboggans. They also gathered and used forest products in making their wigwams and other dwellings. There was no direct evidence that any of those items was traded either before the 1760-61 treaties were made or during the time of the truckhouses. Despite that, both [appellants'] and [respondents'] witnesses said it was likely the Mi'kmaq had traded some forest-based items to the British or other Europeans at some point. [Emphasis added; para. 91.]

After comparing the evidence before him with the evidence of fishing for trade in *Marshall 1*, Curran Prov. Ct. J. concluded 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 gave rise to these charges. [para. 95]

33 In *Bernard*, Lordon Prov. Ct. J. made similar findings on similar evidence. He held that on the evidence "there was no traditional trade in logs", while "trade in wood products . . . such as baskets, snowshoes, and canoes was secondary to fur trade and was occasional and incidental" (para. 85). He noted that Chief Augustine had reluctantly conceded that it is "unlikely . . . that the Mi'kmaq contemplated commercial logging during th[e] treaty process" (para. 85). Nor did the evidence suggest that the British ever contemplated trade in anything but traditionally produced products, like fur or fish.

34 These findings were firmly grounded in the evidence given by expert and aboriginal witnesses at trial, as well as the documentation and the cultural and historical background. As Curran Prov. Ct. J. observed, "[the Mi'kmaq] had no need to cut stands of trees for themselves. . . . Trees were readily available and Europeans could cut their own" (para. 92). The experts agreed that it was probably in the 1780s before the Mi'kmaq became involved in logging and then only in a limited fashion as part of British operations. Logging was not a traditional Mi'kmaq activity. Rather, it was a European activity, in which the Mi'kmaq began to participate only decades after the treaties of 1760-61. If anything, the evidence suggests that logging was inimical to the Mi'kmaq's traditional way of life, interfering with fishing which, as found in *Marshall 1*, was a traditional activity.

35 I conclude that the evidence supports the trial judges' conclusion 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 1760-61. The trial judge in each case applied the correct test to findings of fact supported by the evidence. It follows that there is no ground upon which an appellate court can properly interfere with their conclusion on this branch of the case.

Commercial logging was not a logical evolution of the activity protected by the treaty right.

36 In view of this conclusion, it is unnecessary to discuss the scope of "moderate livelihood", and the issues of cultural attributes and community authority. It is also unnecessary to consider what territory different treaties may have covered, the precise terms of the treaties, the specific peoples who concluded treaties, and the need for different respondents to prove membership of a tribe that concluded an applicable treaty.

III. Aboriginal Title

37 The respondents claim that they hold aboriginal title to the lands they logged and that therefore they do not need provincial authorization to log. They advance three different grounds for title: common law; the *Royal Proclamation* of 1763 (reproduced in R.S.C. 1985, App. II, No. 1); and *Belcher's Proclamation*. I will consider each in turn.

A. *Aboriginal Title at Common Law*

38 Where title to lands formerly occupied by an aboriginal people has not been surrendered, a claim for aboriginal title to the land may be made under the common law. Aboriginal peoples used the land in many ways at the time of sovereignty. Some uses, like hunting and fishing, give rights to continue those practices in today's world: see *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507; *R. v. Nikal*, 1996 CanLII 245 (SCC), [1996] 1 S.C.R. 1013. Aboriginal title, based on occupancy at the time of sovereignty, is one of these various aboriginal rights. The respondents do not assert an aboriginal right to harvest forest resources. They assert aboriginal title *simpliciter*.

39 The common law theory underlying recognition of aboriginal title holds that an aboriginal group which occupied land at the time of European sovereignty and never ceded or otherwise lost its right to that land, continues to enjoy title to it. Prior to constitutionalization of aboriginal rights in 1982, aboriginal title could be extinguished by clear legislative act (see *Van der Peet*, at para. 125). Now that is not possible. The Crown can impinge on aboriginal title only if it can establish that this is justified in pursuance of a compelling and substantial legislative objective for the good of larger society: *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075, at p. 1113. This process can be seen as a way of reconciling aboriginal interests with the interests of the broader community.

Another description of reconciliation.

40 These principles were canvassed at length in *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010, which enunciated a test for aboriginal title based on exclusive occupation at the time of British sovereignty. Many of the details of how this principle applies to particular circumstances remain to be fully developed. In the cases now before us, issues arise as to the standard of occupation required to prove title, including the related issues of exclusivity of occupation, application of this requirement to nomadic peoples, and continuity. If title is found, issues also arise as to extinguishment, infringement and justification. Underlying all these questions are issues as to the type of evidence required, notably when and how orally transmitted evidence can be used.

B. *Standard of Occupation for Title: The Law*

41 The trial judges in each of *Bernard* and *Marshall* required proof of regular and exclusive use of the cutting sites to establish aboriginal title. The Courts of Appeal held that this test was too strict and applied a less onerous standard of incidental or proximate occupancy.

Geographical scope issue: was required of regular use and occupation of the specific cutting sites or a larger area of land?

42 Cromwell J.A. in *Marshall* ((2003), 218 N.S.R. (2d) 78, 2003 NSCA 105 (CanLII)) adopted in general terms Professor McNeil's "third category" of occupation (*Common Law Aboriginal Title* (1989)), "actual entry, and some act or acts from which an intention to occupy the land could be inferred" (para. 136). Acts of "cutting trees or grass, fishing in tracts of water, and even perambulation, may be relied upon" (para. 136).

Liberal definition of occupation.

43 Daigle J.A. in *Bernard* ((2003), 262 N.B.R. (2d) 1, 2003 NBCA 55 (CanLII)) similarly concluded that it was not necessary to prove specific acts of occupation and regular use of the logged area in order to ground aboriginal title. It was enough to show that the Mi'kmaq had used and occupied an area near the cutting site at the confluence of the

Northwest Miramichi and the Little Southwest Miramichi. This proximity permitted the inference that the cutting site would have been within the range of seasonal use and occupation by the Mi'kmaq (para. 119).

44 The question before us is which of these standards of occupation is appropriate to determine aboriginal title: the strict standard applied by the trial judges; the looser standard applied by the Courts of Appeal; or some other standard? Interwoven is the question of what standard of evidence suffices; Daigle J.A. criticized the trial judge for failing to give enough weight to evidence of the pattern of land use and for discounting the evidence of oral traditions.

45 Two concepts central to determining aboriginal rights must be considered before embarking on the analysis of whether the right claimed has been established. The first is the requirement that both aboriginal and European common law perspectives must be considered. The second relates to the variety of aboriginal rights that may be affirmed. Both concepts are critical to analyzing a claim for an aboriginal right, and merit preliminary consideration.

46 *Delgamuukw* requires that in analyzing a claim for aboriginal title, the Court must consider both the aboriginal perspective and the common law perspective. Only in this way can the honour of the Crown be upheld.

different perspectives--consider them both.

47 The difference between the common law and aboriginal perspectives on issues of aboriginal title is real. But it is important to understand what we mean when we say that in determining aboriginal title we must consider both the common law and the aboriginal perspective.

48 The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right. The question is whether the aboriginal practice at the time of assertion of European sovereignty (not, unlike treaties, when a document was signed) translates into a modern legal right, and if so, what right? This exercise involves both aboriginal and European perspectives. The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people. But in translating it to a common law right, the Court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it. This exercise in translating aboriginal practices to modern rights must not be conducted in a formalistic or narrow way. The Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right. The question is whether the practice corresponds to the core concepts of the legal right claimed.

While the court's should take a generous view, at the end of the day the Aboriginal practices must correspond to the core concepts of the common law legat right.

49 To determine aboriginal entitlement, one looks to aboriginal practices rather than imposing a European template: "In considering whether occupation sufficient to ground title is established, 'one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed'" (*Delgamuukw*, *per* Lamer C.J., at para. 149). The application of "manner of life" was elaborated by La Forest J. who stated that:

> . . . when dealing with a claim of "aboriginal title", the court will focus on the occupation and use of the land as part of the aboriginal society's *traditional way of life*. In pragmatic terms, this means looking at the manner in which the society used the land *to live*, namely to establish villages, to work, to get to work, to hunt, to travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites, etc. [Emphasis in original; para. 194.]

50 Thus, to insist that the pre-sovereignty practices correspond in some broad sense to the modern right claimed, is not to ignore the aboriginal perspective. The aboriginal perspective grounds the analysis

and imbues its every step. It must be considered in evaluating the practice at issue, and a generous approach must be taken in matching it to the appropriate modern right. Absolute congruity is not required, so long as the practices engage the core idea of the modern right. But as this Court stated in *Marshall 2*, a pre-sovereignty aboriginal practice cannot be transformed into a different modern right.

The Aboriginal practice must "engage the core idea of the modern right" but it cannot be transformed into a different modern right.

51 In summary, the court must examine the pre-sovereignty aboriginal practice and translate that practice into a modern right. The process begins by examining the nature and extent of the pre-sovereignty aboriginal practice in question. It goes on to seek a corresponding common law right. In this way, the process determines the nature and extent of the modern right and reconciles the aboriginal and European perspectives.

In this process, the court's search for historical Aboriginal practices that are correspond to core concepts in the common law--if they aren't knowable through the lens of the common law they aren't protected by s.35. This is reconciliation.

52 The second underlying concept — the range of aboriginal rights — flows from the process of reconciliation just described. Taking the aboriginal perspective into account does not mean that a particular right, like title to the land, is established. The question is what modern right best corresponds to the pre-sovereignty aboriginal practice, examined from the aboriginal perspective.

The Aboriginal perspective by itself is insufficient to ground a s. 35 right--it must be knowable through the common law, e.g. like a translation--but certain words aren't translatable.

53 Different aboriginal practices correspond to different modern rights. This Court has rejected the view of a dominant right to title to the land, from which other rights, like the right to hunt or fish, flow: *R. v. Adams*, 1996 CanLII 169 (SCC), [1996] 3 S.C.R. 101, at para. 26; *R. v. Côté*, 1996 CanLII 170 (SCC), [1996] 3 S.C.R. 139, at paras. 35-39. It is more accurate to speak of a variety of independent aboriginal rights.

54 One of these rights is aboriginal title to land. It is established by aboriginal practices that indicate possession similar to that associated with title at common law. In matching common law property rules to

Title is established through practices that indicate possession similar to the relation btw possession and title at common law.

aboriginal practice we must be sensitive to the context-specific nature of common law title, as well as the aboriginal perspective. The common law recognizes that possession sufficient to ground title is a matter of fact, depending on all the circumstances, in particular the nature of the land and the manner in which the land is commonly enjoyed: *Powell v. McFarlane* (1977), 38 P. & C.R. 452 (Ch. D.), at p. 471. For example, where marshy land is virtually useless except for shooting, shooting over it may amount to adverse possession: *Red House Farms (Thorndon) Ltd. v. Catchpole*, [1977] E.G.D. 798 (Eng. C.A.). The common law also recognizes that a person with adequate possession for title may choose to use it intermittently or sporadically: *Keefer v. Arillotta* (1976), 1976 CanLII 571 (ON CA), 13 O.R. (2d) 680 (C.A.), *per* Wilson J.A. Finally, the common law recognizes that exclusivity does not preclude consensual arrangements that recognize shared title to the same parcel of land: *Delgamuukw*, at para. 158.

You need to look at the type of land and what would ground title, e.g. for marshy land shooting over it might be enough to prove possession. Intermittent and sporadic use might also ground possession.

55 This review of the general principles underlying the issue of aboriginal title to land brings us to the specific requirements for title set out in *Delgamuukw*. To establish title, claimants must prove "exclusive" pre-sovereignty "occupation" of the land by their forebears: *per* Lamer C.J., at para. 143.

56 "Occupation" means "physical occupation". This "may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources": *Delgamuukw*, *per* Lamer C.J., at para. 149.

Sufficient occupation could range from constructing buildings, to enclosing fields to 'regular use of definite tracts of land' for hunting, fishing, etc.`

57 "Exclusive" occupation flows from the definition of aboriginal title as "the right to *exclusive* use and occupation of land": *Delgamuukw*, *per* Lamer C.J., at para. 155 (emphasis in original). It is consistent with the concept of title to land at common law. Exclusive occupation means "the intention and capacity to retain exclusive control", and is not negated by occasional acts of trespass or the

presence of other aboriginal groups with consent (*Delgamuukw*, at para. 156, citing McNeil, at p. 204). Shared exclusivity may result in joint title (para. 158). Non-exclusive occupation may establish aboriginal rights "short of title" (para. 159).

58 It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right. This is plain from this Court's decisions in *Van der Peet*, *Nikal*, *Adams* and *Côté*. In those cases, aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each year since time immemorial. However, the season over, they left, and the land could be traversed and used by anyone. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights.

Using land for hunting, fishing etc may not ground Aboriginal title if when the Indigenous ppl aren't present anyone could use or travel over the land.

59 The distinction between the requirements for a finding of aboriginal title and the requirements for more restricted rights was affirmed in *Côté*, where the Court held the right to fish was an independent right (para. 38). Similarly in *Adams*, the Court held that rights short of title could exist in the absence of occupation and use of the land sufficient to support a claim of title to the land: see *Adams*, at para. 26; *Côté*, at para. 39; *Delgamuukw*, at para. 159. To say that title flows from occasional entry and use is inconsistent with these cases and the approach to aboriginal title which this Court has consistently maintained.

Occasional entry and use of land might not be sufficient to ground title.

60 In this case, the only claim is to title in the land. The issue therefore is whether the pre-sovereignty practices established on the evidence correspond to the right of title to land. These practices must be assessed from the aboriginal perspective. But, as discussed above, the right claimed also invokes the common law perspective. The question is

whether the practices established by the evidence, viewed from the aboriginal perspective, correspond to the core of the common law right claimed.

61 The common law, over the centuries, has formalized title through a complicated matrix of legal edicts and conventions. The search for aboriginal title, by contrast, takes us back to the beginnings of the notion of title. Unaided by formal legal documents and written edicts, we are required to consider whether the practices of aboriginal peoples at the time of sovereignty compare with the core notions of common law title to land. It would be wrong to look for indicia of aboriginal title in deeds or Euro-centric assertions of ownership. Rather, we must look for the equivalent in the aboriginal culture at issue.

What are the core notions of common law title? How do Aboriginal practices at the of the assertion of sovereignty compare to these core notions? Don't just rely on Euro-centric assertions of ownership.

62 Aboriginal societies were not strangers to the notions of exclusive physical possession equivalent to common law notions of title: *Delgamuukw*, at para. 156. They often exercised such control over their village sites and larger areas of land which they exploited for agriculture, hunting, fishing or gathering. The question is whether the evidence here establishes this sort of possession.

63 Having laid out the broad picture, it may be useful to examine more closely three issues that evoked particular discussion here — what is meant by exclusion, or what I have referred to as exclusive control; whether nomadic and semi-nomadic peoples can ever claim title to land, as opposed to more restricted rights; and the requirement of continuity.

64 The first of these sub-issues is the concept of exclusion. The right to control the land and, if necessary, to exclude others from using it is basic to the notion of title at common law. In European-based systems, this right is assumed by dint of law. Determining whether it was present

Think of the Unist'ot'en trying to control access to their land by keeping out Coastal Gaslink.

in a pre-sovereignty aboriginal society, however, can pose difficulties. Often, no right to exclude arises by convention or law. So one must look to evidence. But evidence may be hard to find. The area may have been sparsely populated, with the result that clashes and the need to exclude strangers seldom if ever occurred. Or the people may have been peaceful and have chosen to exercise their control by sharing rather than exclusion. It is therefore critical to view the question of exclusion from the aboriginal perspective. To insist on evidence of overt acts of exclusion in such circumstances may, depending on the circumstances, be unfair. The problem is compounded by the difficulty of producing evidence of what happened hundreds of years ago where no tradition of written history exists.

65 It follows that evidence of acts of exclusion is not required to establish aboriginal title. All that is required is 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. The fact that history, insofar as it can be ascertained, discloses no adverse claimants may support this inference. This is what is meant by the requirement of aboriginal title that the lands have been occupied in an exclusive manner.

Evidence of acts of exclusion isn't require to prove exclusive control. What is needed is demonstration of effective control which gives rise to a reasonable inference that they could have excluded others if they wanted to.

66 The second sub-issue is whether nomadic and semi-nomadic peoples can ever claim title to aboriginal land, as distinguished from rights to use the land in traditional ways. The answer is that it depends on the evidence. As noted above, possession at common law is a contextual, nuanced concept. Whether a nomadic people enjoyed sufficient "physical possession" to give them title to the land, is a question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used. Not every nomadic passage or use will ground title to land; thus this Court in *Adams* asserts that one of the reasons that aboriginal rights cannot be dependent on aboriginal title is that this would deny any aboriginal rights to nomadic peoples (para. 27). On the other hand, *Delgamuukw* contemplates that "physical occupation" sufficient to ground title to land may be established by "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" (para. 149). In each case, the question is whether a degree of physical occupation or use equivalent to common law title has been made out.

Key phrase-- "`regular use of definite tracts of land"

67 The third sub-issue is continuity. The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices. To claim it, a modern people must show that the right is the descendant of those practices. Continuity may also be raised in this sense. To claim title, the group's connection with the land must be shown to have been "of a central significance to their distinctive culture": *Adams*, at para. 26. If the group has "maintained a substantial connection" with the land since sovereignty, this establishes the required "central significance": *Delgamuukw*, *per* Lamer C.J., at paras. 150-51.

A garbled, confusing explanation of the continuity requirement.

68 Underlying all these issues is the need for a sensitive and generous approach to the evidence tendered to establish aboriginal rights, be they the right to title or lesser rights to fish, hunt or gather. Aboriginal peoples did not write down events in their pre-sovereignty histories. Therefore, orally transmitted history must be accepted, provided the conditions of usefulness and reasonable reliability set out in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33 (CanLII), are respected. Usefulness asks whether the oral history provides evidence that would not otherwise be available or evidence of the aboriginal perspective on the right claimed. Reasonable reliability ensures that the witness represents a credible source of the particular people's history. In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts.

Approach to evidence.

69 The evidence, oral and documentary, must be evaluated from the aboriginal perspective. What would a certain practice or event have signified in their world and value system? Having evaluated the evidence,

Explaining what taking an Aboriginal perspective on evidence means.

the final step is to translate the facts found and thus interpreted into a modern common law right. The right must be accurately delineated in a way that reflects common law traditions, while respecting the aboriginal perspective.

70 In summary, exclusive possession in the sense of intention and capacity to control is required to establish aboriginal title. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources: *Delgamuukw*, at para. 149. Less intensive uses may give rise to different rights. The requirement of physical occupation must be generously interpreted taking into account both the aboriginal perspective and the perspective of the common law: *Delgamuukw*, at para. 156. These principles apply to nomadic and semi-nomadic aboriginal groups; the right in each case depends on what the evidence establishes. Continuity is required, in the sense of showing the group's descent from the pre-sovereignty group whose practices are relied on for the right. On all these matters, evidence of oral history is admissible, provided it meets the requisite standards of usefulness and reasonable reliability. The ultimate goal is to translate the pre-sovereignty aboriginal right to a modern common law right. This must be approached with sensitivity to the aboriginal perspective as well as fidelity to the common law concepts involved.

Occupancy is a question of intensity of the use?

C. *Application of the Legal Test*

71 The cases proceeded on the basis that the British had established sovereignty in the middle of the 18th century: in *Bernard* 1759 and in *Marshall* 1713 for Mainland Nova Scotia and 1763 for Cape Breton. The British took sovereignty over lands populated by the French, Acadian settlers and the Mi'kmaq.

Date of assertion of sovereignty for modern-day NB based on Bernard.

72 The trial judge in each case applied the correct test to determine whether the respondents' claim to aboriginal title was established. In each

case they required proof of sufficiently regular and exclusive use of the cutting sites by Mi'kmaq people at the time of assertion of sovereignty.

Sufficiently regular and exclusive use of the cutting sites?

73 In *Marshall*, Curran Prov. Ct. J. reviewed the authorities and concluded that the line separating sufficient and insufficient occupancy for title is between irregular use of undefined lands on the one hand and regular use of defined lands on the other. "Settlements constitute regular use of defined lands, but they are only one instance of it" (para. 141).

The occupancy test applied in Marshall.

74 In *Bernard*, Lordon Prov. Ct. J. likewise found that occasional visits to an area did not establish title; there must be "evidence of capacity to retain exclusive control" (para. 110) over the land claimed.

Isn't this mixing up occupancy and exclusivity?

75 These tests correctly reflect the jurisprudence as discussed above.

76 Holding otherwise, Cromwell J.A. in *Marshall* held that this test was too strict and that it was sufficient to prove occasional entry and acts from which an intention to occupy the land could be inferred. Similarly, in *Bernard*, Daigle J.A. held that the trial judge erred in requiring proof of specific acts of occupation and regular use in order to ground aboriginal title. It was not in error to state, as Cromwell J.A. did, that acts from which intention to occupy the land could be inferred may ground a claim to common law title. However, as discussed above, this must be coupled with sufficiently regular and exclusive use in order to establish title in the common law sense.

77 Cromwell J.A. found that this additional requirement is not consistent with the semi-nomadic culture or lifestyle of the Mi'kmaq. With respect, this argument is circular. It starts with the premise that it would be unfair to deny the Mi'kmaq title. In order to avoid

Not it's not. Cromwell was applying the 'Aboriginal perspective principle to "semi-nomadic" people.

this result, it posits that the usual indicia of title at common law — possession of the land in the sense of exclusive right to control — should be diminished because the pre-sovereignty practices proved do not establish title on that test. As discussed, the task of the court is to sensitively assess the evidence and then find the equivalent modern common law right. The common law right to title is commensurate with exclusionary rights of control. That is what it means and has always meant. If the ancient aboriginal practices do not indicate that type of control, then title is not the appropriate right. 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. It would also obliterate the distinction that this Court has consistently made between lesser aboriginal rights like the right to fish and the highest aboriginal right, the right to title to the land: *Adams* and *Côté*.

the court keeps bouncing between 'the regular use' requirement and the 'exclusivity' requirement.

D. *Assessment of the Evidence*

78 The question remains whether the trial judges, having applied essentially the right test, erred in their assessment of the evidence or application of the law to the evidence. Absent this, there is no ground for appellate intervention. As discussed, the evidence of aboriginal practices must be assessed from the aboriginal perspective. The question is whether the practices on a broad sense correspond to the right claimed.

79 Curran Prov. Ct. J. in *Marshall* reviewed the facts extensively and summarized his conclusions as follows:

> a) The Mi'kmaq of 18th century Nova Scotia could be described as "moderately nomadic" as were the Algonquins in *Côté*, *supra*. The Mi'kmaq, too, moved with the seasons and circumstances to follow their resources. They did not necessarily return to the same campsites each year. Nevertheless, for decades before and after 1713 local communities on mainland Nova Scotia stayed generally in the areas where they had been.

Indigenous people can get caught in a catch-22; if they are 'semi-nomadic' they may not be 'regularly using' 'definite tracts' of land; if they are 'sedentary' they may not be sufficiently using their entire territory.

b) On the mainland the Mi'kmaq made intensive use of bays and rivers and at least nearby hunting grounds. The evidence is just not clear about exactly where those lands were or how extensive they were. It is most unlikely all the mainland was included in those lands. There just weren't enough people for that.

c) As for Cape Breton, there simply is not enough evidence of where the Mi'kmaq were and how long they were there to conclude that they occupied any land to the extent required for aboriginal title.

d) In particular, there is no clear evidence that the Mi'kmaq of the time made any use, let alone regular use, of the cutting sites where these charges arose, either on the mainland or in Cape Breton. The [Respondents] have not satisfied me on the balance of probability that their ancestors had aboriginal title to those sites. [para. 142]

80 Applying the law to these facts, Curran Prov. Ct. J. "concluded that the Mi'kmaq of the 18th century on mainland Nova Scotia probably had aboriginal title to lands around their local communities, but not to the cutting sites" (para. 143).

81 In *Bernard*, Lordon Prov. Ct. J. also made a thorough review of the evidence of Mi'kmaq occupation of lands at the time of sovereignty, and concluded that it did not establish title:

> Given the evidence before me, I cannot conclude that the land at the *locus in quo* was used on a regular basis for hunting and fishing. Such trips made there in 1759 would have been occasional at best. Occasional forays for hunting, fishing and gathering are not sufficient to establish Aboriginal title in the land.
>
> Furthermore, the evidence does not convince me that the Mi'kmaq were the only occasional visitors to the area. From the time of contact onward the Indians welcomed Europeans. . . .
>
> . . .
>
> There was no evidence of capacity to retain exclusive control and, given the vast area of land and the small population they did not have the

capacity to exercise exclusive control. In addition, according to the evidence of Chief Augustine, the Mi'kmaq had neither the intent nor the desire to exercise exclusive control, which, in my opinion, is fatal to the claim for Aboriginal title. [paras. 107-8 and 110]

Think about how onerous the test is compared to how easy it is for the Crown to acquire underlying title to Indigenous lands.

82 The Nova Scotia Court of Appeal did not criticize the findings of fact in *Marshall*, basing its reversal on the legal test. However, in *Bernard*, the New Brunswick Court of Appeal criticized aspects of Lordon Prov. Ct. J.'s approach to the facts. Daigle J.A. found that the trial judge failed to give appropriate weight to the evidence of the pattern of land use and discounted the evidence of oral traditions. Daigle J.A. emphasized that during the winter, the Mi'kmaq would break into smaller hunting groups and disperse inland, fishing and hunting in the interior. He also emphasized the proximity of the cutting sites to traditional settlement sites. However, these facts, even if overlooked by the trial judge, do not support a finding of aboriginal title on the principles discussed above. They amount only, as Daigle J.A. put it, to "compelling evidence . . . that the cutting site area . . . would have been within the range of seasonal use and occupation by the Miramichi Mi'kmaq" (para. 127). Assuming the trial judge overlooked or undervalued this evidence, the evidence would have made no difference and the error was inconsequential.

83 I conclude that there is no ground to interfere with the trial judges' conclusions on the absence of common law aboriginal title.

E. *Extinguishment, Infringement, Justification and Membership*

84 The Crown argued that even if common law aboriginal title is established, it was extinguished by statutes passed between 1774 and 1862

relating to forestry on Crown lands. Since aboriginal title is not established, it is unnecessary to consider this issue. Nor is it necessary to consider whether the statutes under which the respondents were charged infringe aboriginal title, or if so, whether that infringement is justified.

Finally, it is unnecessary to consider continuity issues relating to the sites claimed.

F. *Aboriginal Title Under the Royal Proclamation*

85 The respondents argue that the *Royal Proclamation* of 1763 (see Appendix) reserved to the Mi'kmaq title in all unceded, unpurchased land in the former Nova Scotia, which later was divided into Nova Scotia and New Brunswick. I agree with the courts below that this argument must be rejected.

86 The *Royal Proclamation* must be interpreted liberally, and any matters of doubt resolved in favour of aboriginal peoples: *Nowegijick v. The Queen*, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29, at p. 36. Further, the *Royal Proclamation* must be interpreted in light of its status as the "Magna Carta" of Indian rights in North America and Indian "Bill of Rights": *R. v. Secretary of State for Foreign and Commonwealth Affairs*, [1982] 1 Q.B. 892 (C.A.), at p. 912. I approach the question on this basis.

87 The first issue is whether the *Royal Proclamation* applies to the former colony of Nova Scotia. The *Royal Proclamation* states that it applies to "our other Colonies or Plantations in America" and at the beginning annexes Cape Breton and Prince Edward Island to Nova Scotia. Other evidence, including correspondence between London and Nova Scotia, suggests that contemporaries viewed the *Royal Proclamation* as applying to Nova Scotia (*Marshall*, trial decision, at para. 112). Interpreting the *Royal Proclamation* liberally and resolving doubts in favour of the aboriginals, I proceed on the basis that it applied to the former colony of Nova Scotia.

88 This brings us to the text of the *Royal Proclamation*. The text supports 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 respondents rely principally on three provisions of the *Royal Proclamation*.

89 The first provision is the preamble to the part addressing aboriginal peoples which reads:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.

90 As part of the preamble, this does not accord new rights. When the *Royal Proclamation* directed the reservation or annexation of land it used terms of grant ("We do therefore . . . declare it to be our Royal Will and Pleasure, that" or "We have thought fit, with the Advice of our Privy Council" or "We do hereby command") and referred to the specific tracts of land ("all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company").

91 The second provision of the *Royal Proclamation* relied on by the respondents is the following:

> We do therefore . . . declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief . . . in any of our other Colonies or Plantations in America do presume . . . to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or

> purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

92 The respondents argue that the underlined phrase reserved to the Mi'kmaq all unceded or unpurchased land within the colony of Nova Scotia. However, this phrase merely repeats the wording from the preamble. It does not create new rights in land. This is confirmed by the fact that it does not use the direct and clear language used elsewhere to reserve lands to the Indians, and is reinforced by its relation to subsequent provisions. If the *Royal Proclamation* had reserved virtually the entire province of Nova Scotia to the Mi'kmaq, the subsequent requirement, that settlers leave lands "still reserved to the . . . Indians", would have had the effect of ejecting all the settlers from the colony. Yet the historical evidence suggests extensive settlement of Nova Scotia shortly after the *Royal Proclamation*.

93 The third provision of the *Royal Proclamation* upon which the respondents rely requires that "no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement". The respondents argue that this reinforces reservation of Nova Scotia to the Indians. This language, however, is equally consistent with referring to newly reserved lands as it is to previously reserved lands and does not definitively argue in either direction.

94 The jurisprudence also supports the Crown's interpretation of the text of the *Royal Proclamation*. In *R. v. Sioui*, 1990 CanLII 103 (SCC), [1990] 1 S.C.R. 1025, this Court held that "the Royal Proclamation of October 7, 1763 organized the territories recently acquired by Great Britain and reserved two types of land for the Indians: that located outside the colony's territorial limits and the establishments authorized by the Crown inside the colony" (p. 1052 (emphasis added), *per* Lamer J.).

95 Finally, the historical context and purpose of the *Royal Proclamation* do not support the claim that the *Royal Proclamation* granted the colony of Nova Scotia to the Indians. The *Royal Proclamation* was concluded in the context of discussions about how to administer and secure the territories acquired by Britain in the first Treaty of Paris in 1763. In the discussions between the Board of Trade and the Privy Council about what would eventually become the *Royal Proclamation*, the imperial territories were from the beginning divided into two categories: lands to be settled and those whose settlement would be deferred. Nova Scotia was clearly land marked for settlement by the Imperial policy promoting its settlement by the "Planters", "Ulster Protestants", Scots, Loyalists and others. The Lords of Trade had urged "the compleat Settlement of Your Majesty's Colony of Nova Scotia": Lords of Trade to Lord Egremont, June 8, 1763, in *Documents Relating to the Constitutional History of Canada, 1759-1791* (2nd ed. rev. 1918), Part I, at p. 135. The settlement aspirations of the British were recognized by Binnie J. for the majority in *Marshall 1* when he stated that the recently concluded treaties with the Mi'kmaq of 1760-61 were designed to facilitate a "wave of European settlement" (para. 21). The *Royal Proclamation* sought to ensure the future security of the colonies by minimizing potential conflict between settlers and Indians by protecting existing Indian territories, treaty rights and enjoining abusive land transactions. Reserving Nova Scotia to the Indians would completely counter the planned settlement of Nova Scotia.

96 In summary, the text, the jurisprudence and historic policy, all support the conclusion that the *Royal Proclamation* did not reserve the former colony of Nova Scotia to the Mi'kmaq.

G. *Aboriginal Title Through Belcher's Proclamation*

97 Colonial governors, including those of the former colony of Nova Scotia, were issued a Royal Instruction on December 9, 1761 forbidding them from granting lands adjacent to or occupied by the Indians, including "any Lands so reserved to or claimed by the said Indians". Pursuant to the instruction, in 1762 the then governor of Nova Scotia, Jonathan Belcher, issued a Proclamation directing settlers to remove themselves from lands "reserved to or claimed by" the Indians. It

further directed that "for the more special purpose of hunting, fowling and fishing, I do hereby strictly injoin and caution all persons to avoid all molestation of the said Indians in their said Claims, till His Majesty's pleasure in this behalf shall be signified" (emphasis added).

98 Three issues arise in determining the applicability of *Belcher's Proclamation*: first the geographical area it covers, second, the activities it covers and third, whether it was concluded with the relevant authority.

99 First, *Belcher's Proclamation* defines areas from Musquodobiot to Canso, from Canso along the Northumberland Strait to Miramichi, Bay of Chaleur, Gulf of St. Lawrence and along the Gaspé "and so along the coast". Lordon Prov. Ct. J. in *Bernard* found that it granted only a "common right to the Sea Coast" (para. 116). I see no reason to disturb this finding.

100 Second, Lordon Prov. Ct. J. found that *Belcher's Proclamation* was, on its terms, limited to "hunting, fowling and fishing" and did not cover logging (para. 116). Again, I see no reason to reject this conclusion. These two conclusions alone suffice to resolve this issue.

101 The third issue is whether *Belcher's Proclamation* was issued with the relevant authority. *Belcher's Proclamation* provoked immediate adverse reaction and dissatisfaction from the Lords of Trade. On July 2, 1762, Belcher wrote to them to explain what he had done. He explained that he had made a return to the Indians "for a Common right to the Sea Coast from Cape Fronsac onwards for Fishing without disturbance or Opposition by any of His Majesty's Subjects". He went on to assure the Lords of Trade that it was only temporary "till His Majesty's pleasure should be signified". In fact, His Majesty never approved *Belcher's Proclamation*. The text of the Proclamation and the evidence of Drs.

Patterson and Wicken accepted by Lordon Prov. Ct. J. confirms its intended temporary nature (para. 116).

102 On December 3, 1762, the Lords of Trade responded in a strongly worded letter condemning *Belcher's Proclamation* and instructing that the Royal Instruction referred only to "Claims of the Indians, as heretofore of long usage admitted and allowed on the part of the Government and Confirmed to them by solemn Compacts". Interestingly, the Lords of Trade state that if it were necessary to reserve lands for the Indians it should not have been the lands along the coast, "but rather the Lands amongst the woods and lakes where the wild beasts resort and are to be found in plenty", supporting the view that *Belcher's Proclamation* did not grant rights over cutting sites further inland.

103 By letter of March 20, 1764 the Lords of Trade signified His Majesty's disallowance of *Belcher's Proclamation* to Belcher's successor, Governor Wilmot. The Lords of Trade noted that this claim was "inconsistent with his Majesty's Right, and so injurious to the Commercial Interest of His Subjects". They further stated that the grant of the coastal lands to the Indians was contrary to the true spirit and meaning of the Royal Instructions upon which *Belcher's Proclamation* was based. They referred to "His Majesty's disallowance" of such claim, though nowhere did they state that *Belcher's Proclamation* was void *ab initio*. The Lords of Trade instructed Governor Wilmot to "induce the Indians to recede from so extraordinary and inadmissible a claim, if he had not already done so"; however this was to be done in the "mildest manner". This was apparently done, although no formal action was taken to revoke *Belcher's Proclamation*.

104 Against this it is argued that what matters is what the Indians thought *Belcher's Proclamation* meant, as opposed to whether Belcher in

fact had the power to make the Proclamation. The Proclamation was never formally revoked. The Mi'kmaq were apparently told their claims to the colony's lands were invalid, although in the "mildest manner". However, there is no evidence that the British misled the Mi'kmaq or acted dishonourably toward them in explaining that *Belcher's Proclamation* was disallowed. I see no reason to interfere with the conclusion of Robertson J.A. in *Bernard* that "[t]his is one case where the Crown's silence cannot validate that which is otherwise invalid" (para. 409).

105 In summary, the defence based on *Belcher's Proclamation* faces formidable hurdles. Did Belcher have the authority to make it, or was it void *ab initio*, as claimed at the time? If it was valid, was it temporary and conditional on further order of His Majesty? If invalid, where is the evidence of Mi'kmaq reliance or dishonorable Crown conduct? Finally, whatever the legal effect of *Belcher's Proclamation*, it seems that it was intended to apply only to certain coastal areas and to "hunting, fowling and fishing". On the evidence before us, it is impossible to conclude that *Belcher's Proclamation* could provide a defence to the charges against the respondents.

IV. Conclusion

106 The trial judge in each case applied the correct legal tests and drew conclusions of fact that are fully supported by the evidence. Their conclusions that the respondents possessed neither a treaty right to trade in logs nor aboriginal title to the cutting sites must therefore stand. Nor is there any basis for finding title in the *Royal Proclamation* or *Belcher's Proclamation*.

107 The constitutional questions stated in *Marshall*, as follows:

1. Is the prohibition on cutting or removing timber from Crown lands without authorization pursuant to s. 29 of the *Crown Lands Act*, R.S.N.S. 1989, c. 114, inconsistent with the treaty rights of the respondents/appellants on cross-appeal contained in the Mi'kmaq Treaties of 1760-61, and therefore of no force or effect or application to them, by virtue of ss. 35(1) and 52 of the *Constitution Act, 1982*?

2. Is the prohibition on cutting or removing timber from Crown lands without authorization pursuant to s. 29 of the *Crown Lands Act*, R.S.N.S. 1989, c. 114, inconsistent with Mi'kmaq aboriginal title to the provincial Crown land from which the timber was cut or removed, by virtue of (i) exclusive occupation by the Mi'kmaq at the time the British acquired sovereignty over the area, or (ii) the *Royal Proclamation, 1763*, and therefore of no force or effect or application to the respondents/appellants on cross-appeal by virtue of ss. 35(1) and 52 of the *Constitution Act, 1982*?

should be answered in the negative.

108 The constitutional questions stated in *Bernard*, as follows:

1. Is the prohibition on unauthorized possession of Crown timber pursuant to s. 67(1)(*c*) of the *Crown Lands and Forests Act*, S.N.B. 1980, c. C-38.1 and amendments, inconsistent with the treaty rights of the respondent contained in the Miramichi Mi'kmaq Treaty of June 25, 1761, and therefore of no force or effect or application to the respondent by virtue of ss. 35(1) and 52 of the *Constitution Act, 1982*?

2. Is the prohibition on unauthorized possession of Crown timber pursuant to s. 67(1)(*c*) of the *Crown Lands and Forests Act*, S.N.B. 1980, c. C-38.1 and amendments, inconsistent with Mi'kmaq aboriginal title to the provincial Crown land from which the timber was cut, by virtue of (i) exclusive occupation by the Mi'kmaq at the time the British acquired sovereignty over the area, or (ii) *Belcher's Proclamation*, or (iii) the *Royal Proclamation, 1763*, and therefore of no force or effect or application to the respondent by virtue of ss. 35(1) and 52 of the *Constitution Act, 1982*?

should be answered in the negative.

109 I would allow the appeals, dismiss the cross-appeal in *Marshall* and restore the convictions. There is no order as to costs.

The reasons of LeBel and Fish JJ. were delivered by

LEBEL J. —

I. Introduction

110 I have read the reasons of the Chief Justice. While I am in agreement with the ultimate disposition, I have concerns about various parts of them. Briefly, the protected treaty right includes not only a right to trade but also a corresponding right of access to resources for the purpose of engaging in trading activities. On the facts of the cases on appeal, however, the parties to the treaties did not contemplate that the forest resources to which the Mi'kmaq had a right of access would be used to engage in logging activities. On the issue of aboriginal title, I take the view that given the nature of land use by aboriginal peoples — and in particular the nomadic nature of that use by many First Nations — in the course of their history, the approach adopted by the majority is too narrowly focused on common law concepts relating to property interests.

Criticize the majority for privileging common law concepts relating to ppty interests.

111 The Chief Justice's reasons review the judicial history and factual background of these cases, and I do not intend to summarize them again. I will refer only to such elements of the evidence and history of this case as may be required for the purposes of my analysis. I will first consider the rights protected under the treaties of 1760-61. I will then turn to the issue of aboriginal title and in particular the nature of the occupation needed to ground a title claim. Finally, I will comment on the difficulties that arise when aboriginal rights claims are litigated in the context of summary conviction trials. My comments will not address the interpretation of the *Royal Proclamation* of 1763 (reproduced in R.S.C. 1985, App. II, No. 1), or of *Belcher's Proclamation* because I agree with the Chief Justice's analysis and conclusions on these issues.

II. Aboriginal Treaty Right

112 The Chief Justice concludes that "what the treaty protects is not the right to harvest and dispose of particular commodities, but the right to practice a traditional 1760 trading activity in the modern way and modern context" (para. 26). In my view, although the treaty does protect traditional trading activities, the treaty right comprises both a right to trade and a right of access to resources. There is no right to trade in the abstract because a right to trade implies a corresponding right of access to resources for trade.

Is this a distinction without a difference?

113 The treaty protects both a right to trade and a right of access to resources, and these rights are closely intertwined. This appeal requires us to determine what this implies in a modern setting in respect of the use of resources. The modern activity must bear some relation to the traditional use of forest products in the Mi'kmaq economy. More specifically, the issue to be decided is whether the current use of forest resources for logging falls within the Mi'kmaq people's right of access to resources for the purpose of engaging in trading activities.

114 The treaties of 1760-61 affirm the right of the Mi'kmaq people to continue to provide for their own sustenance. Unless the treaty protects the Mi'kmaq's access to resources, the objectives of the treaty cannot be advanced. In *R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456 ("*Marshall 1*"), Binnie J. noted that the British saw the Mi'kmaq trade issue in terms of peace, and that peace was bound up with the ability of the Mi'kmaq people to sustain themselves economically. He wrote:

> The British certainly did not want the Mi'kmaq to become an unnecessary drain on the public purse of the colony of Nova Scotia or of the Imperial purse in London, as the trial judge found. To avoid such a result, it became necessary to protect the traditional Mi'kmaq economy, including hunting, gathering and fishing. [para. 25]

The treaties of 1760-61 assured the Mi'kmaq a right to live in their traditional way. This traditional way of life included hunting and fishing, and trading. The Mi'kmaq

had been trading with Europeans for many years prior to the making of these treaties.

115 The parties to the treaties must have intended that the Mi'kmaq would have access to resources in order to have something to bring to the truckhouse. The access was related to a particular use, namely trading for necessaries as part of the Mi'kmaq traditional economy. The treaties represented a promise by the British that the Mi'kmaq would be allowed to have access to resources in order to engage in traditional trading activities so as to obtain a moderate livelihood. It was for this reason that Binnie J. wrote 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" (*Marshall 1*, at para. 56). The Court reiterated this understanding in *R. v. Marshall*, 1999 CanLII 666 (SCC), [1999] 3 S.C.R. 533 ("*Marshall 2*"), when it stated that "[t]he treaty right permits the Mi'kmaq community to work for a living through continuing access to fish and wildlife to trade for 'necessaries'" (para. 4).

116 In *Marshall 2*, the Court emphasized that only those types of resources traditionally gathered in the Mi'kmaq economy — and not everything that is physically capable of being gathered — would reasonably have been in the contemplation of the parties to the treaties (paras. 19-20). There are limits to the trading activities and access to resources that are protected by the treaty. The parties contemplated access to the types of resources traditionally gathered in the Mi'kmaq economy for trade purposes. Thus, the resource and resource-extracting activity for which the respondents seek treaty protection must reasonably have been in the contemplation of the parties. It is not enough for the respondents to demonstrate that the Mi'kmaq had access to and use of forest resources at the time the treaties entered into force. Any access to forest products must relate to the use of such resources as intended by the parties at the time the treaties were signed.

117 In order to be protected under the treaties of 1760-61, trade in forest products must be the modern equivalent or a logical evolution of Mi'kmaq use of forest products at the time the treaties were signed. This was the basis upon which Binnie J. found a right to take and trade fish in *Marshall 1*:

> . . . the Mi'kmaq people have sustained themselves in part by harvesting and trading fish (including eels) since Europeans first visited the coasts of what is now Nova Scotia in the 16th century. [para. 2]

118 On the facts of the cases on appeal, there was direct evidence that trade in forest products was not contemplated by the parties. The evidence also supports the finding that logging is not a logical evolution of the activities traditionally engaged in by Mi'kmaq at the time the treaties were entered into. There was no evidence either that the Mi'kmaq sold or traded in timber at the time of the treaties or that the parties contemplated the commercial harvesting of trees for trade at that time.

119 The courts below found that, at the time the treaties were made, the Mi'kmaq gathered and occasionally traded in wood products. There is a fundamental difference between logging and the use to which the parties must have contemplated the resources would be put. The evidence is reasonably clear that the Mi'kmaq and the British did not trade in logs or timber. As a result, any access to forest resources for trade is limited to types of trading activities related to the use of forest resources in the Mi'kmaq lifestyle and economy of 1760-61.

120 The evidence in and holdings of the courts below support the conclusion that the Mi'kmaq gathered and may occasionally have traded in "bows from maple, arrows from cedar, birch bark baskets, canoes of birch bark, spruce resin for the seams, spruce for wigwam frames, medicines from a variety of plants, lances, spears and dishes": *R. v. Bernard*, [2000] 3 C.N.L.R. 184, at para. 83. According to Mi'kmaq oral

history and tradition, testified to by Chief Augustine, "[t]here were some trade of canoes, toboggans, modes of travel . . . . Snowshoes would be included in there. Because the British and the Europeans wanted to use these equipment to travel through the winter on the ice and the snow, and the toboggans": *Bernard*, at para. 82.

121 At both trials, Chief Augustine conceded that the Mi'kmaq probably did not contemplate trade in logs at the time the treaties were signed: see *Bernard*, at para. 85, and *Marshall*, at para. 63. As found by the trial judge in *Marshall*, "[t]here is no evidence the Mi'kmaq sold or traded timber up to the time of the treaties and no reason to believe they did. They had no need to cut stands of trees for themselves. . . . Trees were readily available and Europeans could cut their own": *R. v. Marshall* (2001), 191 N.S.R. (2d) 323, 2001 NSPC 2 (CanLII), at para. 92. Further, there is evidence that large logs could not have been cut down, since the Mi'kmaq lacked the appropriate tools to do so. In *Bernard*, there was no evidence suggesting that the Mi'kmaq ever harvested and traded in "logs" or timber with either the British or the French. The experts agreed that it was probably not before the 1780s that the Mi'kmaq became involved in logging, and then only in a limited way as part of British operations: *Bernard*, at para. 84. It was only in the 19th century that the Mi'kmaq began to harvest forest resources to trade in forest products with the British.

122 Moreover, there was some evidence before the New Brunswick courts that logging may even have *interfered with* the Mi'kmaq's traditional activities, such as salmon fishing, at or around the time the treaties were made. With respect to stories from Mi'kmaq oral history from after 1763, Chief Augustine testified that

> the stories were mostly about British people coming in and cutting timber, cutting big large trees and moving them down the river systems and clogging up the rivers, I guess, with bark and remnants of debris from cutting up lumber. And this didn't allow the salmon to go up the rivers . . . .

(Direct examination of Stephen Augustine, Factum of the Intervener New Brunswick Forest Products Association, at p. 41)

Given this evidence, it is doubtful that the right of access to forest resources for trade would be for the purpose of engaging in logging and similar resource exploitation activities.

123 The trial courts below concluded that trade in forest products was not in the contemplation of the parties in 1760. This conclusion is consistent with the evidence adduced at trial. The parties did not contemplate access to forest resources for purposes other than trade in traditional products, such as bows, arrows, baskets, and canoes.

124 Is the exploitation of timber resources a logical evolution of treaty rights? Given the cultural and historical context in which the treaties were signed, to interpret the right of access to resources for the purpose of engaging in traditional trading activities as a right to participate in the wholesale exploitation of natural resources would alter the terms of the treaty and wholly transform the rights it confirmed. Accordingly, trade in logs is not a right afforded to the Mi'kmaq under any of the treaties of 1760-61 because logging represents a fundamentally different use from that which would have been in the contemplation of the parties.

125 The right to trade and the right of access to resources for trade must bear some relation to the traditional use of resources in the lifestyle and economy of the Mi'kmaq people in 1760. I conclude that the evidence supports the Chief Justice's conclusion that logging was not in the contemplation of the parties and was not the logical evolution of Mi'kmaq treaty rights.

III. Aboriginal Title

126 Although the test for aboriginal title set out in the Chief Justice's reasons does not foreclose the possibility that semi-nomadic peoples would be able to establish aboriginal title, it may prove to be fundamentally incompatible with a nomadic or semi-nomadic lifestyle. This test might well amount to a denial that any aboriginal title could have been created by such patterns of nomadic or semi-nomadic occupation or use: nomadic life might have given rise to specific rights exercised at specific places or within identifiable territories, but never to a connection with the land itself in the absence of evidence of intensive and regular use of the land.

127 In my view, 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 common law approaches. Otherwise, we might be implicitly accepting 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. See S. Hepburn, "Feudal Tenure and Native Title: Revising an Enduring Fiction" (2005), 27 *Sydney L. Rev*. 49.

128 It is very difficult to introduce aboriginal conceptions of property and ownership into the modern property law concepts of the civil law and common law systems, according to which land is considered to be a stock in trade of the economy. Aboriginal title has been recognized by the common law and is in part defined by the common law, but it is grounded in aboriginal customary laws relating to land. The interest is proprietary in nature and is derived from inter-traditional notions of ownership: "The idea is to reconcile indigenous and non-indigenous legal traditions by paying attention to the Aboriginal perspective on the meaning of the right at stake" (J. Borrows, "Creating an Indigenous Legal Community" (2005), 50 *McGill L.J*. 153, at p. 173).

129 This Court has on many occasions explained that aboriginal title is a *sui generis* interest in land. A dimension of the *sui generis* aspect of aboriginal title that is of particular relevance to the issues on appeal is the source of such title. As with all aboriginal rights protected by s. 35(1) of the *Constitution Act, 1982*, aboriginal title arises from the prior possession of land and the prior social organization and distinctive cultures of aboriginal peoples on that land (*R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507, at para. 74, cited in *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010, at para. 141). It originates from "the prior occupation of Canada by aboriginal peoples" and from "the relationship between common law and pre-existing systems of aboriginal law" (*Delgamuukw*, at para. 114). The need to reconcile this prior occupation with the assertion of Crown sovereignty was reinforced in *Delgamuukw* when Lamer C.J. stated that common law aboriginal title "cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives" (para. 112). The Court must give equal consideration to the aboriginal and common law perspectives. An analysis which seeks to reconcile aboriginal and European perspectives may not draw a distinction between nomadic and sedentary modes of use or of occupation. Both modes would suffice to create the connection between the land and the First Nations which forms the core of aboriginal title.

130 The role of the aboriginal perspective cannot be simply to help in the interpretation of aboriginal practices in order to assess whether they conform to common law concepts of title. The aboriginal perspective shapes the very concept of aboriginal title. "Aboriginal law should not just be received as evidence that Aboriginal peoples did something in the past on a piece of land. It is more than evidence: it is actually law. And so, there should be some way to bring to the decision-making process those laws that arise from the standards of the indigenous people before the court" (Borrows, at p. 173). In the Nova Scotia Court of Appeal, Cromwell J.A. tried to reflect on and develop the notion of occupation in order to reconcile aboriginal and common law perspectives on ownership: *R. v. Marshall* (2003), 218 N.S.R. (2d) 78, 2003 NSCA 105 (CanLII), at

Criticism of the CJ's interrogation of the Aboriginal perspective to find indicators of core common law principles.

paras. 153-56. He attempted to take the different patterns of First Nations land use into consideration in order to effect a legal transposition of the native perspective and experience into the structures of the law of property. He stayed within the framework of this part of the law while remaining faithful to the tradition of flexibility of the common law, which should allow it to bridge gaps between sharply distinct cultural perspectives on the relationship of different peoples with their land.

131 At common law, the physical fact of occupation is proof of possession. This explains the common law theory underlying the recognition of aboriginal title that is set out by the Chief Justice at para. 39: "an aboriginal group which occupied land at the time of European sovereignty and never ceded or otherwise lost its right to that land, continues to enjoy title to it". If aboriginal title is a right derived from the historical occupation and possession of land by aboriginal peoples, then notions and principles of ownership cannot be framed exclusively by reference to common law concepts. The patterns and nature of aboriginal occupation of land should inform the standard necessary to prove aboriginal title. The common law notion that "physical occupation is proof of possession" remains, but the nature of the occupation is shaped by the aboriginal perspective, which includes a history of nomadic or semi-nomadic modes of occupation.

132 At the time of the assertion of British sovereignty, North America was not treated by the Crown as *res nullius*. The jurisprudence of this Court has recognized the factual and legal existence of aboriginal occupation prior to that time. In *Calder v. Attorney-General of British Columbia*, 1973 CanLII 4 (SCC), [1973] S.C.R. 313, Judson J. wrote that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries" (p. 328). Hall J., dissenting, also found that indigenous legal traditions pre-existed the Crown's assertion of sovereignty, and he recognized the existence of concepts of ownership that were "indigenous to their culture and capable of articulation under the common law" (p. 375).

133 The *Royal Proclamation* of 1763 is evidence of British recognition of aboriginal modes of possession of the land. As La Forest J. noted in *Delgamuukw*, the huge tracts of lands that were reserved for aboriginal groups were not limited to villages or permanent settlements (para. 200). In a similar vein, the Robinson Treaties, the Numbered Treaties, and the entire treaty system did not formally acknowledge the existence of aboriginal title, but nonetheless evince the Crown's recognition that aboriginal peoples possessed certain rights in the land even if many of them were nomadic at the time. The Crown's claim to sovereignty did not affect aboriginal rights of occupancy and possession. In *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33 (CanLII), McLachlin C.J., writing for the majority, wrote:

> Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them: see B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727. [para. 10]

134 Nomadic peoples and their modes of occupancy of land cannot be ignored when defining the concept of aboriginal title to land in Canada. "The natural and inevitable consequence of rejecting enlarged *terra nullius* was not just recognition of indigenous occupants, but also acceptance of the validity of their prior possession and title" (Hepburn, at p. 79). To ignore their particular relationship to the land is to adopt the view that prior to the assertion of Crown sovereignty Canada was not occupied. Such an approach is clearly unacceptable and incongruent with the Crown's recognition that aboriginal peoples were in possession of the land when the Crown asserted sovereignty. Aboriginal title reflects this fact of prior use and occupation of the land together with the relationship of aboriginal peoples to the land and the customary laws of ownership. This aboriginal interest in the land is a burden on the Crown's underlying title.

135 This qualification or burden on the Crown's title has been characterized as a usufructuary right. The concept of a community usufruct over land was first discussed by this Court in *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 1887 CanLII 3 (SCC), 13 S.C.R. 577. Ritchie C.J. used this concept as an analogy to explain the relationship between Crown and aboriginal interests in the land. The usufruct concept is useful because it is premised on a right of property that is divided between an owner and a usufructuary. A usufructuary title to all unsurrendered lands is understood to protect aboriginal peoples in the absolute use and enjoyment of their lands.

136 If this form of *dominium utile* is recognized as belonging to aboriginal peoples and the *dominium directum* is considered to be in the Crown, then it seems to follow that the test for proof of aboriginal title cannot simply reflect common law concepts of property and ownership. The nature and patterns of land use that are capable of giving rise to a claim for title are not uniform and are potentially as diverse as the aboriginal peoples that possessed the land prior to the assertion of Crown sovereignty. The fact that a tract of land was used for hunting instead of agriculture does not mean that the group did not possess the land in such a way as to acquire aboriginal title. 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.

137 The standard of proof required to ground a claim must therefore reflect the patterns of occupation of the land prior to the assertion of British sovereignty. If the presence of an aboriginal group on the land at the time of the assertion of sovereignty is the source of aboriginal title and the explanation for the burden on the Crown's underlying title, then

pre-sovereignty patterns of use are highly relevant to the issue of occupation.

138 As explained above, the common law principle that "occupation is proof of possession in law" supports the proposition that the claimant must demonstrate physical occupation of the land claimed. In the context of aboriginal title claims, the physical fact of sedentary and continuous occupation is only one of the sources of title. According to Lamer C.J. in *Delgamuukw*, aboriginal title affords legal protection to historical patterns of occupation in recognition of the importance of the relationship of an aboriginal community to its land (para. 126). At paragraph 128 he explained that

> 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.

This point was reinforced in the reasons of La Forest J.:

> As already mentioned, when dealing with a claim of "aboriginal title", the court will focus on the occupation and use of the land as part of the aboriginal society's traditional way of life. In pragmatic terms, this means looking at the manner in which the society used the land to live, namely to establish villages, to work, to get to work, to hunt, to travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites, etc. [Emphasis deleted; para. 194.]

Later in his reasons, La Forest J. stated:

> As already suggested, aboriginal occupancy refers not only to the presence of aboriginal peoples in villages or permanently settled areas. Rather, the use of adjacent lands and even remote territories to pursue a traditional mode of life is also related to the notion of occupancy.

> Viewed in this light, occupancy is part of aboriginal culture . . . . [para. 199]

If the aboriginal perspective is to be taken into account by a court, then the occupancy requirement cannot be equated to the common law notion of possession amounting to a fee simple. On the contrary, proof of aboriginal title relates to the manner in which the aboriginal group used and occupied the land prior to the assertion of Crown sovereignty.

139 The aboriginal perspective on the occupation of their land can also be gleaned in part, but not exclusively, from pre-sovereignty systems of aboriginal law. The relevant laws consisted of elements of the practices, customs and traditions of aboriginal peoples and might include a land tenure system or laws governing land use.

140 In *Delgamuukw*, Lamer C.J. acknowledged having stated in *R. v. Adams*, 1996 CanLII 169 (SCC), [1996] 3 S.C.R. 101, that a claim to title is made out when a group can demonstrate "that their connection with the piece of land . . . was of a central significance to their distinctive culture" (*Adams*, at para. 26). He concluded that this requirement, while remaining a crucial part of the test for aboriginal rights generally, is subsumed by the requirement of occupancy in the test for aboriginal title. This demonstrates that anyone considering the degree of occupation sufficient to establish title must be mindful that aboriginal title is ultimately premised upon the notion that the specific land or territory at issue was of central significance to the aboriginal group's culture. Occupation should therefore be proved by evidence not of regular and intensive use of the land but of the traditions and culture of the group that connect it with the land. Thus, intensity of use is related not only to common law notions of possession but also to the aboriginal perspective.

141 The record in the courts below lacks the evidentiary foundation necessary to make legal findings on the issue of aboriginal title

in respect of the cutting sites in Nova Scotia and New Brunswick and, as a result, the respondents in these cases have failed to sufficiently establish their title claim. In the circumstances, I do not wish to suggest that this decision represents 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. The evidentiary problems may reflect the particular way in which these constitutional issues were brought before the courts.

IV. Summary Conviction Proceedings

142 Although many of the aboriginal rights cases that have made their way to this Court began by way of summary conviction proceedings, it is clear to me that we should re-think the appropriateness of litigating aboriginal treaty, rights and title issues in the context of criminal trials. The issues that are determined in the context of these cases have little to do with the criminality of the accused's conduct; rather, the claims would properly be the subject of civil actions for declarations. Procedural and evidentiary difficulties inherent in adjudicating aboriginal claims arise not only out of the rules of evidence, the interpretation of evidence and the impact of the relevant evidentiary burdens, but also out of the scope of appellate review of the trial judge's findings of fact. These claims may also impact on the competing rights and interests of a number of parties who may have a right to be heard at all stages of the process. In addition, special difficulties come up when dealing with broad title and treaty rights claims that involve geographic areas extending beyond the specific sites relating to the criminal charges.

143 There is little doubt that the legal issues to be determined in the context of aboriginal rights claims are much larger than the criminal charge itself and that the criminal process is inadequate and inappropriate for dealing with such claims. I note that in the New Brunswick Court of Appeal, Robertson J.A. raised a number of concerns to support his view that summary conviction proceedings are not conducive to adjudicating fairly on claims of aboriginal title: *R. v. Bernard* (2003), 262 N.B.R. (2d)

1, 2003 NBCA 55 (CanLII), at paras. 450-60. See also Daigle J.A.'s reasons, at para. 210.

144 The question of aboriginal title and access to resources in New Brunswick and Nova Scotia is a complex issue that is of great importance to all the residents and communities of the provinces. The determination of these issues deserves careful consideration, and all interested parties should have the opportunity to participate in any litigation or negotiations. Accordingly, when issues of aboriginal title or other aboriginal rights claims arise in the context of summary conviction proceedings, it may be most beneficial to all concerned to seek a temporary stay of the charges so that the aboriginal claim can be properly litigated in the civil courts. Once the aboriginal rights claim to the area in question is settled, the Crown could decide whether or not to proceed with the criminal charges.

V. Disposition

145 For these reasons, I would concur with my colleague, allow the appeals, dismiss the cross-appeal in *Marshall* and restore the convictions.

APPENDIX

Royal Proclamation of 1763

> Whereas We have taken into Our Royal Consideration the extensive and valuable Acquisitions in America, secured to our Crown by the late Definitive Treaty of Peace, concluded at Paris, the 10th Day of February last; and being desirous that all Our loving Subjects, as well of our Kingdom as of our Colonies in America, may avail themselves with all convenient Speed, of the great Benefits and Advantages which must accrue therefrom to their Commerce, Manufactures, and Navigation, We have thought fit, with the Advice of our Privy Council, to issue this our Royal Proclamation, hereby to publish and declare to all our loving Subjects, that we have, with the Advice of our Said Privy Council, granted our Letters Patent, under our Great Seal of Great Britain, to erect, within the Countries and Islands ceded and confirmed

to Us by the said Treaty, Four distinct and separate Governments, styled and called by the names of Quebec, East Florida, West Florida and Grenada, and limited and bounded as follows, viz.

. . .

We have also, with the advice of our Privy Council, thought fit to annex the Islands of St. John's, and Cape Breton, or Isle Royale, with the lesser Islands adjacent thereto, to our Government of Nova Scotia.

. . .

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. — We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also, that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.

And, We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose; And we do, by the Advice of our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside, and also give Security to observe such Regulations as We shall at any Time think fit, by ourselves or by our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade:

And we do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all our Colonies respectively, as well those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such Licence shall be void, and the Security forfeited in case the Person to whom the same is granted shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.

> And we do further expressly enjoin and require all Officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, within the Territories reserved as aforesaid for the use of the said Indians, to seize and apprehend all Persons whatever, who standing charged with Treason, Misprisions of Treason, Murders, or other Felonies or Misdemeanours, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper guard to the Colony where the Crime was committed of which they stand accused, in order to take their Trial for the same.

Appeals allowed and cross-appeal in Marshall dismissed.

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