Revisiting Aboriginal Title: The Marshall and Bernard Case

The decision of the Supreme Court of Canada in the *Marshall and Bernard* appeals (rendered as one judgement in July, 2005) appears to indicate a sea change in the Court's approach to the scope of Aboriginal title.

The Court dismissed the claims of Aboriginal title of the Mi'kmaq that were based on their having hunted and fished in the area for many generations before the arrival of the Europeans. The Court adopted a narrow view of Aboriginal title. This is of huge significance to British Columbia because the Aboriginal title claims of the Mi'kmaq are similar to the Aboriginal title claims being advanced in this province.

As a result of this decision, Aboriginal title will be much harder to prove, and may be found to exist only in relatively small areas. It is conceivable that subsequent court decisions may determine that Aboriginal title in British Columbia is limited to lands approximating the existing reserves.

Aboriginal groups are seeking to share with the Crown in the revenues from the resources of the province within the large tracts of land that constitute their claimed "traditional territories." These cases indicate that there may be no sound legal basis for the Crown to agree to do so, since the only areas where revenue sharing might be appropriate would be with respect to the relatively small parcels of land where Aboriginal title might be established.

Here is how we arrived at this point. In 1997, the Supreme Court of Canada decided, in *Delgamuukw*, that Aboriginal title still existed in British Columbia. Aboriginal title was described as similar to full ownership of the land. However, many aspects of Aboriginal title remained undecided, and the question of what land is actually subject to Aboriginal title is the most significant unresolved Aboriginal issue in British Columbia.

The recent *Marshall and Bernard* decision involves members of the Mi'kmaq Aboriginal community who had been charged with logging on Crown land in Nova Scotia and New Brunswick without a permit. There were two main defences advanced. The first defence was that the Mi'kmaq had a right to log based on the terms of a 1760 treaty. The second defence was that the Mi'kmaq had Aboriginal title to the various sites where the trees were cut. All of the accused were convicted at trial, but the provincial appellate courts set aside the convictions. The Supreme Court of Canada allowed the appeals and restored the convictions.

The "treaty right" defence failed because the Supreme Court found that although the treaty protected the Mi'kmaq rights to sell certain products, including some wood products, it could not be logically extended to a right to conduct commercial logging. The Court's consideration of the "Aboriginal title" defence is the part of the judgement that is of huge significance in B.C. *Delgamuukw* established that Aboriginal title required

proof of "exclusive occupation," and the Supreme Court considered what "exclusive occupation" meant in the specific instances of the cutting sites. The Court commented on the different approaches to proving Aboriginal title that had been taken by the trial judges and the lower appellate judges. The trial judges had taken a strict view that proof of Aboriginal title would require evidence of "regular and exclusive use of the cutting sites to establish Aboriginal title." The appellate judges had applied "a less onerous standard of incidental or proximate occupancy." The appellate judges were prepared to accept evidence of cutting trees, fishing, walking through the lands, or that the cutting sites were near established Mi'kmaq settlements, to establish sufficient occupation to justify a claim to Aboriginal title.

The Supreme Court adopted the strict view of the trial judges, and found that the Mi'kmaq had failed to establish Aboriginal title to any of the cutting sites, even though various sites had been used for fishing or hunting by the Mi'kmaq people, or were near their traditional settlements. The Court stated that "typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right,: and not Aboriginal title.

Although no land in Canada has ever been found by a court to be subject to Aboriginal title, virtually all of the British Columbia is subject to a claim of Aboriginal title by at least one Aboriginal group.

The stakes around Aboriginal title are enormous. If an Aboriginal group proves Aboriginal title to a tract of land, then it has a legal basis to direct how the land is used, and to demand a share of any revenues that are derived from the timber, mineral or oil resources taken from it. However, if it cannot prove title, it has no legal basis to direct the use of the land, or to share in the revenues from the land. Even if a lesser right to the land is proven, such as a hunting or fishing right, the legal position of the Aboriginal group is limited to seeking to avoid that right from being interfered with, or to being compensated for such interference.

This is not to suggest that all Aboriginal title claims in British Columbia are without foundation. The real issue is how much land will be subject to Aboriginal title. Whether or not Aboriginal title will be found in any circumstance will be dependant on specific facts relating to the Aboriginal group and its historical relationship to the particular land in question. However, these cases may encourage Aboriginal groups to be more willing to negotiate settlements of their Aboriginal title claims, since the risks of Aboriginal title litigation can now be seen to include total loss.

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