

SUPREME COURT OF CANADA

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

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30063

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

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

CONCURRING REASONS: LeBel J. (Fish J. concurring)
(paras. 110 to 145)

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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 — 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 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]

Cases Cited

By McLachlin C.J.

Referred to: *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [1999] 3 S.C.R. 533; *Jack v. The Queen*, [1980] 1 S.C.R. 294; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Côté*, [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), 13 O.R. (2d) 680; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *Nowegijick v. The Queen*, [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] 1 S.C.R. 1025.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35(1).

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Treaties and Proclamations

Belcher's Proclamation (1762).

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APPEAL and CROSS-APPEAL from a judgment of the Nova Scotia Court of Appeal (Cromwell, Saunders and Oland J.J.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, 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, 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, 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 J.J.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, 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.

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.

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.

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.

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.

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] 3 S.C.R. 456 ("*Marshall I*").

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 necessities.

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 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] 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.

B. *The Scope of the Treaty Right*

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] 2 S.C.R. 507; *R. v. Nikal*, [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] 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.

40 These principles were canvassed at length in *Delgamuukw v. British Columbia*, [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.

42 Cromwell J.A. in *Marshall* ((2003), 218 N.S.R. (2d) 78, 2003 NSCA 105) 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).

43 Daigle J.A. in *Bernard* ((2003), 262 N.B.R. (2d) 1, 2003 NBCA 55) 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.

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.

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.

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.

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.

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] 3 S.C.R. 101, at para. 26; *R. v. Côté*, [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 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: *Keefe v. Arillotta* (1976), 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.

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.

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.

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.

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.

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 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.

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.

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.

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, 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.

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, 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.

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.

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.

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).

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.

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 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*.

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.
- 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]

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] 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] 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 I* 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.
