PUBLICATION: Vancouver Sun
DATE: 2005.08.02
EDITION: Final
SECTION: Editorial
PAGE: A8
SOURCE: Vancouver Sun
ILLUSTRATION: Photo: Canadian Press archives / In 1999, a truck loadedwith logs headed down a road near Minto, N.B., as natives cut logs on Crown land in defiance of provincial law.

B.C. accord and court ruling give natives reason to negotiate, not litigate

---

In 1999, the Supreme Court of Canada released its famous Marshall decision, in which the court held that treaties give members of the Mi'kmaq First Nation in Nova Scotia and New Brunswick the right to catch and trade eels out of season.

That led many Mi'kmaqs to believe they had complete freedom to use the land however they wished. The federal government disagreed and it charged Mi'kmaqs with logging without authorization in 1999.

The natives challenged their convictions and, two weeks ago, the Supreme Court finally ruled on the matter in a judgment that helped to clarify the nature of aboriginal treaty rights and aboriginal title. And while native groups in British Columbia claim the judgment won't affect them, it should act as an incentive for them to proceed with negotiations rather than more court cases.

That's precisely what the major native groups in B.C. are expected to do in the coming months. A statement of intent -- titled The New Relationship -- reached between first nations groups and the provincial government is expected to produce greater sharing of natural resources, revenues and decision-making and end decades of unproductive confrontation and litigation.

In the most recent case, the Mi'kmaqs first argued that they had authorization to log under the "Peace and Friendship" treaties concluded between them and the British in 1760 and 1761. (These are the same treaties under which the original Marshall judgment was decided.) The Mi'kmaqs argued the treaties guaranteed their right to use the forests for commercial logging since their ancestors logged the land when the treaties were signed.

However, the 18th-century Mi'kmaqs logged to provide shelter and canoes for themselves, not to trade in lumber. The court correctly concluded that the parties didn't

contemplate logging for trading purposes when the treaties were signed, therefore the treaties didn't give the Mi'kmaqs the right to log commercially.

The court thus distinguished the original Marshall decision from the current case, in that Mi'kmaqs did trade in fish in the 1760s and retained the right to fish for eels out of season.

The decision affirms that any native group claiming it has a treaty right to engage in certain trading behaviours will have to show that those behaviours are the same as, or a logical evolution of, behaviours that were contemplated by the parties when the treaties were concluded.

The second prong of the Mi'kmaqs' argument concerned aboriginal title: The natives argued they did not need authorization to log since they hold aboriginal title to the lands they logged. This gave the court a chance to reiterate what constitutes aboriginal title and to provide further guidance on what evidence is needed to establish it.

The court held that the Mi'kmaqs were required to prove their forebears had "exclusive occupation" of the land on which they were logging. In essence, this means they had to have effective control of the land.

Yet the evidence presented at trial was insufficient to establish effective control: The Mi'kmaqs were "moderately nomadic" and did not always return to the same sites each year. Consequently, the court ruled that while the Mi'kmaqs might have aboriginal title to lands around their local communities, the evidence was inadequate to establish title to all the land they claimed, including the sites on which they logged.

This, of course, leaves it open for the Mi'kmaqs to offer better evidence to prove they indeed possess title to all the land claimed. But the onus clearly rests with aboriginal groups to provide the necessary evidence for such a determination and, needless to say, that won't be easy.

Similarly, aboriginal groups will need to prove that any trade practices protected under aboriginal treaties are the same as, or a logical evolution of, those that the parties contemplated when the treaties were completed. Again, this is a tall order.

Consequently, rather than spending many more years in court, and many more millions of dollars, it might well be more productive for all parties to put their efforts into negotiations.

This court decision and the goodwill generated by the new accord in B.C. will be severely tested as first nations groups and the province get down to the nitty-gritty of deal-making. But if there is political will to be fair-minded on both sides -- treaty settlements that will benefit all British Columbians -- a new relationship between first nations and the wider community can be forged.