The Supreme Court of Canada's Decision in *Marshall* and *Bernard*: Its Implications for Aboriginal Title in British Columbia

By Peter R. Grant and Michael Lee Ross[1]

A. COMPETING ACCOUNTS OF THE IMPLICATIONS OF *MARSHALL* AND *BERNARD* FOR BC

On July 20, 2005, the Supreme Court of Canada released its judgment in *R. v. Marshall*; *R. v. Bernard* (*Marshall* and *Bernard*).[2] The *Marshall* case arose when Stephen Marshall and 34 other Mi'kmaq Indians were charged with cutting timber on Crown lands without authorization under the relevant Nova Scotia legislation. The *Bernard* case arose when Joshua Bernard, also a Mi'kmaq Indian, was charged with unlawful possession of 23 spruce logs he was hauling from the cutting site to a local saw mill without authorization under the relevant New Brunswick legislation. In both cases, the charges were provoked with the intention of "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."[3]

In both cases, the accused were convicted at trial. Although the convictions were upheld at the first level of appeal, they were reversed by the New Brunswick and Nova Scotia Courts of Appeal. The Supreme Court of Canada allowed the appeals and restored the convictions.

The Supreme Court of Canada's disposition of the cases rested on its conclusion that the trial judges

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[2] 2005 SCC 43 (hereinafter *Marshall* and *Bernard*).

[3] *Ibid*. at para. 5.

were correct in holding, first, that the Mi'kmaq people did not possess a treaty right to log on Crown lands for commercial purposes and, second, that the Mi'kmaq had failed to substantiate their claims for Aboriginal title to the areas in dispute.

Despite unanimously agreeing on the disposition of both cases, the Court divided 5 to 2 on the scope of the Mi'kmaq's right to trade under the 1760-61 Peace and Friendship treaties and on the test for Aboriginal title. On both issues, Justice LeBel (with Fish J. concurring) criticized the majority, whose reasons were written by Chief Justice McLachlin, for adopting a too restrictive approach. On the majority's test for Aboriginal title in particular, LeBel J.'s criticisms were trenchant, faulting the majority for focusing too narrowly on common law concepts of property and consequently adopting a test that implied the Court's acceptance of Athe position that [nomadic and semi-nomadic] 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.@[4].

Not surprisingly, especially given LeBel J.'s strong dissent, questions were immediately raised about the implications of the majority's apparently strict approach to Aboriginal title for British Columbia and other regions of Canada where Aboriginal title claims remain outstanding. For those of us preoccupied with the situation in British Columbia, the basic questions have been these:

Does the majority's approach to Aboriginal title have implications for BC?

If the majority's approach does have implications for BC, are those implications significant?

The initial answers to these questions were predictably of two opposing varieties. Some said that the Supreme Court of Canada's decision in *Bernard* and *Marshall* either had no implications for

[4] *Ibid*. at para. 127.

British Columbia or had none of any significance,[5] while others said that the decision had very significant implications.[6]

Those who said that the decision had very significant implications for British Columbia were themselves split into two camps according to whether they saw the implications as positive or negative. Nonetheless, both camps were in broad agreement, first, that the decision implied that Aboriginal title is not as extensive in British Columbia as had been commonly believed, and, second, that this in turn implied that the Crown's duties to consult in the face of unproven Aboriginal title claims and to accommodate them if necessary are generally speaking neither as extensive nor as deep as had been commonly believed.[7]

Those who view these implications as a setback have tended to look upon the majority's decision in *Marshall* and *Bernard* as an example of the common law's self-justifying dispossession of indigenous peoples and as the Court's partial reneging on its earlier unanimous decision in *Haida Nation*[8] in which the Court imposed limits on the Province's discretionary power over Crown lands, waters, and resources still subject to Aboriginal rights and title claims.

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[5]For instance, Grand Chief Edward John, of the First Nations Summit, in a Press Release issued by the First Nations Leadership Council on July 20, 2005, was quoted as saying that "Today's Marshall and Bernard decisions will not affect political or legal issues in British Columbia with respect to commercial logging. These decisions do not establish new legal principles."

[6]Kenneth J. Tyler, for instance, stated: AChief Justice McLachlin's majority decision may well turn out to be the most momentous ruling rendered by the Canadian courts to date in relation to the Crown's ability to manage public lands and resources in those parts of Canada not covered by land cession Treaties.@ Accordingly, Tyler went on to say that A. . .*the implications of the judgment, particularly for British Columbia, are immense*@ (emphasis added).@ AHas the Supreme Court Clarified *Delgamuukw*? Implications of the Bernard and Marshall Decision for the Concept of Aboriginal Title@ (Paper presented at the conference on AThe Supreme Court of Canada Decision in Bernard and Marshall,@ hosted by Pacific Business and Law Institute, 22 September 2005) at page 1.

[7]See, e.g., (1) ASupreme Court of Canada Rejects Aboriginal Commercial Logging Rights@ Western Canadian Business Law (July 2005), online: Lawson Lundell <www.lawsonlundell. com>; (2) Kevin O'Callaghan & Joanna Mullard, AThe *Marshall* and *Bernard* Decision: The Supreme Court of Canada Takes a Principled Approach to Treaty Rights and Aboriginal Title@ Aboriginal Bulletin (July 2005), online: Fasken Martineau DuMoulin <www.fasken.com>; and (3) Kenneth J. Tyler, AHas the Supreme Court Clarified *Delgamuukw*? Implications of the Bernard and Marshall Decision for the Concept of Aboriginal Title@ (Paper presented at the conference on AThe Supreme Court of Canada Decision in Bernard and Marshall,@ hosted by Pacific Business and Law Institute, 22 September 2005).

For their part, those who view the aforesaid implications as positive have tended to see the majority's decision as finally adopting a principled approach to the test for Aboriginal title[9] and, therefore, by reigning in Aboriginal title claims, restoring to the Province some of its rightful power to manage Crown lands and resources for the benefit of all British Columbians in the interim prior to the final resolution of those claims.[10]

Although the foregoing way of framing the debate over the implications of *Marshall* and *Bernard* for British Columbia helpfully serves to expose its ideological and political dimensions, it does little to clarify the associated differences in legal opinion and even less to point us in the direction of where the truth may, legally speaking, lie.

For purposes of legal analysis, a more helpful question is this:

Is the majority's approach to Aboriginal title in *Marshall* and *Bernard* consistent with the Court's earlier decision in *Delgamuukw*[11]?

This question is legally speaking more helpful about the implications of the decision because it provides a common legal reference point permitting us both to determine whether the majority's approach to Aboriginal title in *Marshall* and *Bernard* has any *new* legal implications for Aboriginal title claims in British Columbia and, if so, to more dispassionately gauge their relative significance.

Thus far, in the early stages of discussion on the relationship between *Marshall* and *Bernard* and

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[8] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [hereinafter *Haida Nation*].

[9] See, e.g., Kevin O'Callaghan & Joanna Mullard, AThe *Marshall* and *Bernard* Decision: The Supreme Court of Canada Takes a Principled Approach to Treaty Rights and Aboriginal Title@ Aboriginal Bulletin (July 2005), online: Fasken Martineau DuMoulin <www.fasken.com>.

[10] See, e.g., Kenneth J. Tyler, AHas the Supreme Court Clarified *Delgamuukw*? Implications of the Bernard and Marshall Decision for the Concept of Aboriginal Title@ (Paper presented at the conference on AThe Supreme Court of Canada Decision in Bernard and Marshall,@ hosted by Pacific Business and Law Institute, 22 September 2005).

[11] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].

Delgamuukw, most commentators have concluded that the majority's approach to Aboriginal title in *Marshall* and *Bernard* is inconsistent with the account of Aboriginal title set forth in *Delgamuukw*. Although they disagree on whether the majority's purported departure from *Delgamuukw* is a positive or negative development, they share the belief that *Delgamuukw* presented a more expansive view of Aboriginal title.[12]

Like before, those who take a negative view of the majority's purported narrowing of Aboriginal title have tended to look upon it both as furthering the Canadian legal system's dispossession of First Nations peoples in British Columbia and, consequently, as lessening the Crown's duties to consult them and accommodate their interests when dealing with lands, waters, and resources still subject to Aboriginal rights and title claims. Also like before, those who take a positive view of the majority's purported narrowing of Aboriginal title have tended to see it in contrasting terms.

B. THIS PAPER'S THESES

In response to the foregoing questions and the various positions already staked out in early commentary on the Supreme Court of Canada's decision, this paper argues first of all that the majority's approach to Aboriginal title in *Marshall* and *Bernard* is consistent with the test for Aboriginal title first set forth in *Delgamuukw*. More specifically, it argues that the majority's approach is more accurately seen as a gloss on or addendum to rather than a departure from

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[12]For a thoughtful negative assessment of the Court's purported departure, see Peter W. Hutchins, AFrom Failure to Failure with No Loss of Enthusiasm - Implications of *R. v. Marshall* and *R. v. Bernard* for Aboriginal Peoples@ (Paper presented at the conference on AThe Supreme Court of Canada Decision in Bernard and Marshall,@ hosted by Pacific Business and Law Institute, 22 September 2005).

Within days of the release of the Supreme Court of Canada's decision, the *National Post* gave one of the country's most enthusiastic editorial spins to the majority's purported departure from *Delgamuukw*, writing: AThankfully, the Supreme Court . . . has now backed off its radical expansion of aboriginal rights [which the editorialist associated with *Delgamuukw* in particular].@ The paper felt it had to temper its enthusiasm however, with the observation that Athe court . . . gave lip service to the theory of Aaboriginal title@ promoted in Delgamuukw - which, if rigorously applied, would put most of the Canadian land mass under Aaboriginal title.@@ See AShrinking Native Preferences,@ Editorial, *The National Post* (22 July 2005) A16.

Delgamuukw[13].

This paper also argues, as a consequence of the forgoing thesis, that the implications of the majority's approach for British Columbia are, so far as the geographical extent of Aboriginal title is concerned, basically the same as the implications of *Delgamuukw.* More specifically, it argues that the majority's approach, if it differs at all from *Delgamuukw* on the geographical extent of existing Aboriginal title within British Columbia, likely differs by enlarging rather than reducing its extent.

C. THE MAJORITY'S APPROACH IS CONSISTENT WITH *DELGAMUUKW*

1. *Delgamuukw* v. *The Queen*

a. *Delgamuukw's* Evolution of *Van der Peet* and *Adams*

Although the Supreme Court of Canada had deliberated earlier on the topic of Aboriginal title in British Columbia,[14] *Delgamuukw* gave the Court its first opportunity to focus on Aboriginal title as an Aboriginal right protected by section 35(1) of the *Constitution Act, 1982*.[15]

In its efforts to determine Athe nature and scope of the constitutional protection afforded by s. 35(1) to common law aboriginal title,@[16] the Court drew its guiding principles from its then already substantial s. 35(1) jurisprudence previously developed in *Sparrow*,[17] *Van der Peet*,[18] *Adams*,[19] and other Aboriginal rights cases.

To remind itself of what it was trying ultimately to achieve, the Court in *Delgamuukw*[20] several

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[13]Although LeBel J.'s dissent is a helpful analysis, this paper will focus on the majority decision in *Bernard* and *Marshall* which has been the focus of the debate.

[14]Most famously, in *Calder v. British Columbia (Attorney-General)*, [1973] S.C.R. 313.

[15]*Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[16]*Delgamuukw*, *supra* n. 11 at para. 1.

[17]*R. v. Sparrow*, [1990] 1 S.C.R. 1075.

[18]*R. v. Van der Peet*, [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*].

[19]*R. v. Adams*, [1996] 3 S.C.R. 101 [hereinafter *Adams*].

[20]When referring to what the *Court* in *Delgamuukw* said, this paper will be referring to Chief Justice

times invoked *Van der Peet* for the Court's first articulation of the purpose of s. 35(1).[21]

In *Van der Peet*, Chief Justice Lamer, writing for the majority, anchored his purposive analysis of s. 35(1) in the general question: **Why were rights unique to Aboriginal peoples granted constitutional status in the *Constitution Act, 1982*?**[22]

As preliminary to answering this question, the Chief Justice observed that Aboriginal rights had common law status prior to their constitutionalization in 1982.[23] Thus, to appreciate why rights unique to Aboriginal peoples were constitutionalized, it was, he reasoned, necessary to understand why these rights enjoyed prior common law status. In his view, Aone simple fact@ sufficed to explain both why these unique rights enjoyed common law status in the first place and why they were subsequently constitutionalized, namely, the fact that:

> . . . when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.[24]

Impliedly, then, the constitutionalization of Aboriginal rights in 1982 was a constitutional recognition of Aboriginal peoples' prior occupation of the territory subsequently contained with the nation state of Canada.

Also as preliminary to answering the aforementioned general question, the Chief Justice observed that the common law status of Aboriginal rights did not shield them from Parliament's

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Lamer's reasons.

[21] *Delgamuukw*, *supra* n. 11 at, e.g., paras. 81, 148, & 186.

[22] *Van der Peet*, *supra* n. 17 at para. 27.

[23] *Ibid.* at para. 28.

[24] *Ibid*. at para. 30.

extinguishment powers. By granting Aboriginal rights constitutional status in 1982, Canada had internally limited its sovereignty and thus had solemnly committed itself to the survival and accommodation of Aboriginal peoples.

With these preliminaries in hand, the Chief Justice was able to articulate s. 35(1)'s purpose as follows:

> . . . what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown.[25]

In reference to the reconciliation purpose of s. 35(1), he went on to add how courts were to approach the task of determining Aboriginal rights:

The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.[26]

The Court in *Delgamuukw* invoked *Van der Peet* further to observe that fulfillment of s. 35(1)'s reconciliation purpose requires courts to take into account the Aboriginal as well as the common law perspective when tasked with determining Aboriginal rights.[27] In *Van der Peet*, Chief Justice Lamer elaborated the point as follows:

In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. In Sparrow, supra, Dickson C.J. and La Forest J. held, at p. 1112, that it is "crucial to be sensitive to the aboriginal perspective itself

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[25] *Ibid*. at para. 31.
[26] *Ibid*.

on the meaning of the rights at stake". It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. As has already been noted, one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada. To quote again Walters, at p. 413: "a morally and politically defensible conception of aboriginal rights will incorporate both [aboriginal and non-aboriginal] legal perspectives". **The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.**

It is possible, of course, that the Court could be said to be "reconciling" the prior occupation of Canada by aboriginal peoples with Crown sovereignty through either a narrow or broad conception of aboriginal rights; the notion of "reconciliation" does not, in the abstract, mandate a particular content for aboriginal rights. However, the only fair and just reconciliation is, as Walters suggests, one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.[28] (emphasis added)

The Court also invoked *Adams* to locate Aboriginal title within a range of Aboriginal rights protected by s. 35(1). In *Adams*, the Court distinguished between Aboriginal rights short of Aboriginal title and Aboriginal title, and determined that the existence of Aboriginal rights short of title does not depend upon the existence of Aboriginal title:

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[27] *Delgamuukw*, *supra* n. 11 at, e.g., paras. 81 & 112.
[28] *Van der Peet*, *supra* n. 17 at paras. 49-50.

> . . . **while claims to aboriginal title fall within the conceptual framework of aboriginal rights, aboriginal rights do not exist solely where a claim to aboriginal title has been made out.** Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition. The *Van der Peet* test protects activities which were integral to the distinctive culture of the aboriginal group claiming the right; it does not require that that group satisfy the further hurdle of demonstrating that their connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to aboriginal title to the land. **Van der Peet establishes that s. 35 recognizes and affirms the rights of those peoples who occupied North America prior to the arrival of the Europeans; that recognition and affirmation is not limited to those circumstances where an aboriginal group's relationship with the land is of a kind sufficient to establish title to the land**.[29] (emphasis added)

Building upon its analysis in *Adams,* the Court in *Delgamuukw* portrayed Aboriginal title as falling at one end of a spectrum of Aboriginal rights distributed according to their degree of connection to the land. The Court applied the spectrum analogy as follows:

> The picture which emerges from Adams is that the aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the "occupation and use of the land" where the activity is taking place is not "sufficient to support a claim of title to the land" (at para. 26 (emphasis in original)). Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. . . . At the other end of the spectrum, there is aboriginal title itself. As Adams makes clear, aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures.

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[29] *Adams*, *supra* n. 18 at para. 26.

> **Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to the land itself**.[30] (emphasis added)

Incorporating its analysis in *Adams* into its definition, the Court in *Delgamuukw* went on to define Aboriginal title as an Aboriginal right encompassing "the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures."[31]

b. The Aboriginal Perspective

The Court in *Delgamuukw* viewed Aboriginal title as a common law right having arisen from two sources: the prior occupation of Canada by Aboriginal peoples and the relationship between common law and pre-existing systems of indigenous law,[32] and, more generally, between the common law and Aboriginal perspectives on land.[33] The first source, the prior occupation of Canada, qualifies as a source of Aboriginal title as a common law right thanks to the application of the common law principle that occupation (this is, physical occupation) is proof of possession and, therefore, of title.[34]

However, because common law Aboriginal title attempts to protect the prior relationship Aboriginal peoples have with their lands and because their prior relationship with their lands is inseparable from their collective perspectives on - including their indigenous laws with respect to - their lands, the right also arises from the relationship between the common law and Aboriginal perspectives on land.

The Court in *Delgamuukw* delineated the test for proof of Aboriginal title as follows:

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[30] *Delgamuukw*, *supra* n. 11 at para. 138.
[31] *Ibid*. at para. 117. See also para. 155.
[32] *Ibid*. at paras. 114 & 145.
[33] *Ibid*. at para. 147.

[34] *Ibid*. at para. 114.

> In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.[35]

Basically, then, to establish a claim to Aboriginal title, the Aboriginal group must prove its exclusive pre-sovereignty occupation of the land it is claiming title to.

According to the Court, an Aboriginal group's pre-sovereignty occupation is, for purposes of the test for Aboriginal title, a function of their pre-sovereignty occupation of the land as understood from the vantage points of both the common law and Aboriginal perspectives on the land and the group's relationship to it.[36]

Referring to the reconciliation purpose of s. 35(1) previously articulated in *Van der Peet*, the Court in *Delgamuukw* explained the relevance of the Aboriginal perspective, including indigenous law, to the proving occupancy as follows:

> This approach to the proof of occupancy at common law [which requires taking the Aboriginal perspective into account] is also mandated in the context of s. 35(1) by Van der Peet. In that decision, as I stated above, I held at para. 50 that the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty required that account be taken of the "aboriginal perspective while at the same time taking into account the perspective of the common law" and that "[t]rue reconciliation will, equally, place weight on each". I also held that the aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples: at para. 41. As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but

[35] *Ibid*. at para. 143.
[36] *Ibid*. at para. 147.

> are not limited to, a land tenure system or laws governing land use.[37]

As for the relevance of the common law perspective to proof of occupancy, the Court held:

> However, the aboriginal perspective must be taken into account alongside the perspective of the common law. Professor McNeil has convincingly argued that at common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land. Physical occupation 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. 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."[38]

Put simply, an Aboriginal group's A[o]ccupancy 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.@[39]

As the Court's definition of Aboriginal title implies (Athe right to *exclusive* use and occupation of the land@), establishing a claim for Aboriginal title requires proving not merely physical but also exclusive pre-sovereignty occupation of the land.[40] Just as with the proof of occupation, so too, the Court said, Aproof of exclusivity must rely on both the perspective of the common law and the aboriginal perspective.@[41] Thus, as the Court explained, when considering a claim for Aboriginal title, courts are obliged to temper the common law perspective on exclusivity with the Aboriginal perspective:

> As with the proof of occupation, proof of exclusivity must rely on both the perspective of the common law and the aboriginal perspective, placing equal weight on each. At common law, a premium is placed on the factual reality of occupation, as encountered by the Europeans. However, as the common law concept of

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[37] *Ibid*. at para. 148.
[38] *Ibid.* at para. 149 (citations omitted).
[39] *Ibid*. at para. 128.
[40] *Ibid*. at para. 155.
[41] *Ibid*. at para. 156.

possession must be sensitive to the realities of aboriginal society, so must the concept of exclusivity. Exclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of aboriginal title with caution. As such, the test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty. For example, it is important to note that exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by "the intention and capacity to retain exclusive control." Thus, an act of trespass, if isolated, would not undermine a general finding of exclusivity, if aboriginal groups intended to and attempted to enforce their exclusive occupation. Moreover, as Professor McNeil suggests, the presence of other aboriginal groups might actually reinforce a finding of exclusivity. For example, "[w]here others were allowed access upon request, the very fact that permission was asked for and given would be further evidence of the group's exclusive control.".

A consideration of the aboriginal perspective may also lead to the conclusion that trespass by other aboriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the aboriginal group asserting title. For example, the aboriginal group asserting the claim to aboriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the aboriginal nations in question, those treaties would also form part of the aboriginal perspective.[42]

c. Shared Aboriginal Title

The Court also recognized the possibility of shared exclusivity and, therefore, of joint Aboriginal title in cases in which two or more Aboriginal groups Alived on a particular piece of land and recognized each other's entitlement to that land but nobody else's.@[43]

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[42] *Ibid*. at para. 156-157 (citations omitted).

[43] *Ibid*. at para. 158.

d. Evidence for Aboriginal Title

The Court in *Delgamuukw* was particularly concerned with the evidentiary obstacles Aboriginal peoples face in getting their perspectives before the courts and accorded their proper weight in Aboriginal rights and title cases. To address this difficulty, the Court directed that the laws of evidence would have to be adapted accordingly. What this meant in practical terms, the Court explained as follows:

> In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past. Given that the aboriginal rights recognized and affirmed by s. 35(1) are defined by reference to pre-contact practices or, as I will develop below, in the case of title, pre-sovereignty occupation, those histories play a crucial role in the litigation of aboriginal rights.[44]

As this brief overview makes clear, the Supreme Court of Canada in *Delgamuukw* proposed a fairly flexible test for Aboriginal title. Some of the test's flexibility is undoubtedly due to the level of generality at which the Court addressed Aboriginal title. Taken by itself, this generality can encourage the illusion that the Court's test impliedly recognized Aboriginal title to virtually the whole of the Province. However, it remains a highly contextual test. That is to say, whether a particular Aboriginal group has Aboriginal title to a particular area depends upon the facts (such as the historical facts underlying claims of occupation and exclusivity) and the particular group's perspective on those facts. There is simply no way of knowing whether a particular group has Aboriginal title without first knowing something about those facts and about the accompanying Aboriginal perspective.

2. The Majority's Approach in *Marshall* and *Bernard*

[44] *Ibid*. at 84.

Any discussion of the relationship between the majority's approach to Aboriginal title in *Marshall* and *Bernard* and the Court's earlier approach in *Delgamuukw* must begin with how the majority in *Marshall* and *Bernard* viewed its task in relation to *Delgamuukw*. On this, the majority wrote:

> These principles [of the common law theory of Aboriginal title] 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.[45]

Thus, the majority saw itself as developing rather than departing from the general principles set forth in *Delgamuukw*.

a. The Strengthening of the Aboriginal Perspective

For its analytical point of departure, the majority chose *Delgamuukw*'s requirement that in evaluating claims for Aboriginal title, courts must take into account both the Aboriginal and the common law perspectives.[46]

Viewing the evaluation of Aboriginal rights and title claims as a process which aims at advancing the reconciliation purpose of s. 35(1) by taking into account the Aboriginal and common law perspectives, the majority went on to explain that the process of determining Aboriginal rights and title is akin to a process of translation:

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[45] *Marshall* and *Bernard*, *supra* n. 2 at para. 40.
[46] *Ibid*. at para. 46.

> 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.[47] [emphasis added]

The correspondence the courts are to look for is not, then, absolute congruity. To require strict correspondence, the majority recognized, would be to ignore the Aboriginal perspective. Rather, what the majority proposed is a broad sense of correspondence according to which it is sufficient, to establish a common law Aboriginal right, that the practices advanced in support of the right Aengage the core idea of the modern right.@[48]

The aforesaid process has two main stages. At the first stage, the court examines Athe nature and extent of the pre-sovereignty aboriginal practice in question.@[49] At the second stage, it >goes on to seek a corresponding common law right.@

In the case of Aboriginal title, a right to the exclusive occupation and use of the land, what the court must do, then, is examine the pre-sovereignty practices intended to support of the right in the light of the Aboriginal perspective on those practices to see if they engage to core ideas of the modern right, in this case, to see if they engage the ideas of occupation and exclusivity.

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[47] *Ibid*. at para. 48.
[48] *Ibid*. at para. 50.
[49] *Ibid*. at para. 51.

Like the Court in *Delgamuukw* and in *Van der Peet* before that, the majority of the Court in *Bernard* and *Marshall* insisted that the evidence Amust be evaluated from the aboriginal perspective.@[50] It is of interest that the majority stressed that:

> The right must be accurately delineated in a way that reflects common law traditions, **while respecting the aboriginal perspective.** [51] [emphasis added]

In short, the aboriginal perspective must be Arespected@ when the Court assesses the evidence of the nature of the aboriginal right or title.

In considering this issue, the Court referred to the aboriginal concepts of Aexclusive physical possession@:

> 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**.
>
> 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. [52] (emphasis added)

Some early commentators on *Marshall* and *Bernard* have pointed to this quotation to try to minimize the geographical extent of aboriginal title. However, it is in fact an example only to demonstrate that in aboriginal societies, the concept of Aexclusive physical possession equivalent

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[50] *Ibid*, at para. 69.
[51] *Ibid.*
[52] *Ibid*. at paras. 61-62.

to common law notions of title@ existed. This statement must be read in the context of the entire judgment, which does not require Aequivalency@ between aboriginal concepts and common law concepts.

In the example cited, the concept of Aexclusion@ is implicit. However the majority proceeded to find that

> . . . the people may have been peaceful and have to exercise their control by sharing rather than exclusion. It is therefore critical to view the question of exclusion from the aboriginal perspective. ... 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...[53]

In short, the Supreme Court of Canada has now made it clear that Aexclusive possession@ as an element of aboriginal title does not require Aacts of exclusion@.

The Court went on to observe that even at common law, Apossession... is a contextual, nuanced concept.@[54] This observation has been relied upon by the Supreme Court of British Columbia in *Her Majesty the Queen v. Jules*, a decision of Justice Sigurdson, in which he held, relying on *Marshall* and *Bernard* that Athe manner of proving regular and exclusive use is not by any means a straightforward proposition@. He also reiterated the requirement that Ain analyzing a claim for aboriginal title . . . both the aboriginal perspective and the common law perspective@ must be considered.[55]

Thus, the first court in British Columbia to have considered *Marshall* and *Bernard* does not see any retrenchment or reduction of the requirement to recognize and rely on the Aboriginal perspective in evaluating Aboriginal rights and title claims.

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[53] *Ibid.* at paras. 64-65.
[54] *Ibid.* at para.66.
[55] *Her Majesty the Queen v. Jules* [2005] BCSC 1312 at para. 43

b. Aboriginal Title and Nomadic Peoples

Anyone seriously entertaining the idea that the majority's approach to Aboriginal Title in *Marshall* and *Bernard* is more restrictive than the approach of the Court in *Delgamuukw* should ponder the majority's remarks on Aboriginal title and nomadic peoples.

On the issue of Awhether nomadic and semi-nomadic peoples can ever claim title to aboriginal land, as distinguished from rights to use the land in traditional ways,@ the majority answered simply, Ait depends on the evidence.@ The majority went on to explain that because Apossession at common law is a contextual, nuanced concept,@ and because Awhether a nomadic people enjoyed sufficient >physical possession' to give them title to the land, is a question of fact, depending on all the circumstances,@ the possession of Aboriginal title by nomadic peoples could not be ruled out *a priori*.[56]

In *Adams*, the Court considered the issue of whether nomadic peoples can claim Aboriginal title in passing. Reasoning in support of its conclusion that not all Aboriginal rights are tethered to Aboriginal title, the Court broached to issue as follows:

> To understand why aboriginal rights cannot be inexorably linked to aboriginal title it is only necessary to recall that some aboriginal peoples were nomadic, varying the location of their settlements with the season and changing circumstances. That this was the case does not alter the fact that nomadic peoples survived through reliance on the land prior to contact with Europeans and, further, that many of the practices, customs and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures. The aboriginal rights recognized and affirmed by s. 35(1) should not be understood or defined in a manner which excludes some of those the provision was intended to protect.[57]

The Court in *Delgamuukw* quoted the forgoing passage from *Adams* to explain why some Aboriginal

[56] *Marshall* and *Bernard*, *supra* n. 2 at para. 66.

peoples, and, in particular, nomadic peoples, may be unable to prove Aboriginal title on account of their insufficient degree of connection to their lands.[58]

Its recognition that nomadic peoples may possess Aboriginal title demonstrates that the majority in *Marshall* and *Bernard* have, if anything, a less restrictive approach to Aboriginal title than the Court's initial approach in *Delgamuukw*.

c. Conclusion: The Implications for BC

The original test for Aboriginal title proposed by the Supreme Court of Canada in *Delgamuukw* is highly contextual. Because it is highly contextual, it tells us next to nothing about the geographical extent of Aboriginal title in British Columbia.

The majority in *Marshall* and *Bernard* saw itself as adding refinements to the account of Aboriginal title set forth in *Delgamuukw.* Those refinements included elaborations on the obligation of courts to incorporate both the common law and Aboriginal perspectives into their evaluations of Aboriginal rights and title claims, on the standard of occupation, and on what is needed to prove exclusivity. Despite these refinements, the test for Aboriginal title that emerges from the majority's reasons in *Marshall* and *Bernard* remains no less contextual than the *Delgamuukw* test - a conclusion recently confirmed by Justice Sigurdson in *Jules*. Thus, the majority's test tells us no more about the geographical extent of Aboriginal title in British Columbia than the test in *Delgamuukw*.

Although the standard of occupation advanced by the majority in *Marshall* and *Bernard* eliminates certain ambiguities in *Delgamuukw*, this development is offset by the majority's insistence that

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[57] *Adams*, *supra* n. 18 at para. 26.
[58] *Delgamuukw*, *supra* n. 11 at para. 139.

Aboriginal groups need not adduce evidence of acts of exclusion to prove exclusive occupation.

In any case, the standard of occupation advanced by the majority does not change the fact that the majority's test remains no less dependent on the facts and the Aboriginal group's perspective on those facts and, therefore, no less contextual than the *Delgamuukw* test.

But even granting for the sake of argument that the standard of occupation advanced by the majority in *Marshall* and *Bernard* - a standard that may be summed up by the phrase Aintensive and regular use@ - may work to significantly lessen the geographical extent of Aboriginal title elsewhere in Canada, it is unlikely to yield similar results in British Columbia. This is because of the particular history of First Nations peoples in this Province. Many First Nations in British Columbia enjoyed a period of roughly 40 to 50 years between contact and the assertion of British sovereignty in 1846, a period during which, it should be added, they maintained their independence and collective control over their lives and their territories. During this period, many of British Columbia's First Nations, on the coast as well as in the interior, expanded beyond their pre-existing trade relations with one another to participate in the worldwide fur trade. For most of these First Nations, participation in the fur trade, whether as trappers, suppliers, packers or intermediaries, arguably led to a more intensive occupation and use of their territories. Thus, by 1846, many First Nations in British Columbia were occupying and using larger portions of their traditional territories more intensively and more regularly than they had occupied and used them previously at contact.

There is, then, no good reason to think that the geographical extent of Aboriginal title under the majority's test in *Marshall* and *Bernard* is at all less than its extent under the original *Delgamuukw* test.