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A Corner Turned: Supreme Court of Canada Decisions of the Year Past

Charlotte A. Bell, Q.C.*

I. INTRODUCTION

This year, the Supreme Court of Canada handed down two significant decisions, *R. v. Marshall*; *R. v. Bernard*¹ (and its Nova Scotia counterpart, *R. v. Stephen Marshall*),² and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*.³

Superficially read, these cases seem to represent a complete turnabout — in one case the Court adopts a very restrictive posture towards the protection of Aboriginal rights, and in the next, seems to adopt the opposite.

Upon a more thoughtful read, when taken together, the cases suggest a more cohesive approach, and indicate where the Supreme Court is heading in the area of assertion and protection of Aboriginal rights. The purpose of this paper is to examine the two cases with a view to extracting their themes, and then joining these themes together in the articulation of a cohesive theory that will reveal the direction the Court will likely go in future Aboriginal rights cases.

The paper will start with a brief review of the facts, findings of law, and conclusion as to the underlying approach of each case *seriatim*. It will conclude by comparing each of these seemingly inconsistent

* I gratefully acknowledge the fine work of my colleague Sheldon Massie in the following review of the cases. The entire case outline is his work. My work consists only of the sections headed "Impression of the Direction of the Supreme Court of Canada", and "The Balance in the Result." [The following is what I think, and not in any way reflective of the views or approaches of my employer or my instructing principal, the Department of Justice, or the Attorney General of Canada.]

¹ [2005] S.C.J. No. 44, [2005] 2 S.C.R. 220, 2005 SCC 43.

² *Id.*

³ [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, 2005 SCC 69.

approaches, and discussing how the apparent inconsistency can be resolved.

II. *R. v. JOSHUA BERNARD* AND *R. v. STEPHEN MARSHALL*

The Supreme Court of Canada released its decision in *R. v. Bernard* and *R. v. Marshall* on July 20, 2005. The Court held the accused had not established either a treaty right to commercially harvest timber or Aboriginal title to the logging sites.

1. Background

The two appeals arise from provincial prosecutions in New Brunswick and Nova Scotia for the commercial harvesting and sale of timber from provincial Crown land. The Aboriginal defendants asserted the unauthorized activity was a constitutionally protected right under the 1760-61 Halifax treaties, and as an incident of their communities' Aboriginal title to the land. Canada intervened in the appeals at the Supreme Court of Canada, heard together January 17, 2005, and argued against both propositions.

2. The Decision

The Court combined its reasons for both decisions, and was unanimous in their dismissal of the defendants' appeals from conviction. The reasons of McLachlin C.J. were concurred in by Major, Bastarache, Abella and Charron JJ. Justice LeBel wrote separate reasons with which Fish J. concurred.

The majority concluded the treaty at issue granted the Mi'kmaq the right to continue to trade in the products that they had traditionally traded with Europeans. The issue, properly framed, was whether trade in a particular commodity was in the contemplation of the parties at the time of the making of the treaty. On the evidence, the Court concluded that trade in timber was not within the contemplation of the parties. The majority also confirmed that though treaty rights are not frozen in time and can evolve, this evolution does not mean the core right or protected activity may transform itself, but that the modern means of exercising a right are protected.

The majority concluded that in order to establish Aboriginal title an Aboriginal society must provide proof of the intention and capacity to retain exclusive control over the claimed territory at the time of sovereignty. This means activity on the land that is sufficiently regular and exclusive to comport with title at common law. They concluded there were no grounds to interfere with the trial judges' findings that there was insufficient evidence of regular and exclusive use of the cutting sites by the Mi'kmaq people.

The Court also found that the jurisprudence and historical context did not support a conclusion that the *Royal Proclamation* of 1763 reserved Aboriginal title in the former colony of Nova Scotia, and there was no basis for finding title to the cutting sites on the basis of the earlier and discredited *Belcher's Proclamation* of 1762.

3. Impression of the Direction of the Supreme Court of Canada

(a) Treaty Rights

The Supreme Court of Canada has, in *Bernard*, clearly said that the exercise of traditional treaty rights will be protected. The emphasis here is on the word "traditional". A right practised at the time of treaty cannot transmute into a modern practice. And so, hunting, fishing and gathering, things that were done historically, will attract constitutional protection, even if the way one hunts, fishes or gathers changes, but these activities cannot evolve into activities such as lumbering or mining.

The Court came to the decision that it did by focusing on the "common intention" of the parties — certainly a legitimate exercise for interpreting an agreement between two parties.

But there was another common intention of the parties, another focus that could have been chosen, in order to determine what the parties had hoped to gain by entering into the treaty. The focus might well have been that the parties wished to ensure that the Mi'kmaq would not become a burden on the British Crown. The common intention of the parties with respect to how to achieve this focus, would be to enable the Mi'kmaq to participate in the economy of the British colony by giving them guaranteed access to the raw materials of the colony, which

they would then use to trade: a “strategy of economic aboriginal self-sufficiency”.⁴

If this approach to isolating the common intention of the parties had been employed, the result would have been to position the Mi’kmaq as partners in the exploitation of the resources of the provinces, and participants in the modern economy. Instead, the decision positions them as a community entitled to exercise traditional rights.

(b) Aboriginal Title

The map of Canada, as envisioned by some, looked very different before and after the *Bernard* and *Marshall* decisions. The 1997 *Delgamuukw* decision evoked visions of vast tracts of hunting territory, “exclusively used and occupied” by a First Nation (essentially, being under the sovereign power of a First Nation), that were declared to be, in the present day, lands from which the First Nation was entitled to exclude all others, even the Crown.

However, the *Bernard* and *Marshall* decisions introduced new language into the definition of Aboriginal title. The mantra “exclusive use and occupation” is now more adjective intense. In order to establish title to land, a claimant must demonstrate that their activity was “sufficiently regular and exclusive” and thus, comports with title at common law.⁵

This expanded definition severely limits the expectation of the size of a tract that can be declared subject to Aboriginal title. The speculation after *Delgamuukw* was that all of the territory between and around an even infrequently used hunting tract would qualify as Aboriginal title. Some might say that now, only actual village sites can qualify.

⁴ See: *R. v. Marshall*, [1999] S.C.J. No. 55, [1999] 3 S.C.R. 456 [hereinafter “*Marshall I*”], at para. 25: “Starvation breeds discontent. The British certainly did not want the Mi’kmaq to become an unnecessary drain on the public purse of the colony of Nova Scotia or of the Imperial purse in London, as the trial judge found.” ... “The same strategy of economic aboriginal self-sufficiency was pursued across the prairies in terms of hunting: see *R. v. Horseman*, [1990] 1 S.C.R. 901, *per* Wilson J., at p. 919, and Cory J., at p. 928. and para. 35 “The trade clause would not have advanced British objectives (peaceful relations with a self-sufficient Mi’kmaq people) or Mi’kmaq objectives (access to the European “necessaries” on which they had come to rely) unless the Mi’kmaq were assured at the same time of continuing access, implicitly or explicitly, to a harvest of wildlife to trade.”

⁵ *R. v. Marshall*; *R. v. Bernard*, *supra*, note 1, at para. 58.

III. *MIKISEW CREE V. CANADA*

The Supreme Court of Canada released its decision in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* on November 24, 2005.

The Court set aside a decision of the Minister of Heritage authorizing construction of a winter road in Wood Buffalo National Park. It found the Crown has an obligation to meaningfully consult Treaty 8 First Nations on decisions that may interfere with their right to hunt, trap and fish within the treaty territory, and that this duty had not been adequately met.

1. **Background**

Treaty 8 was made in 1899 and extends across what is now northern Alberta and parts of British Columbia, Saskatchewan and the Northwest Territories. It provides for the Indians' right “ . . . to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered . . . saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.”

The treaty encompasses Wood Buffalo National Park, within whose boundaries the Mikisew Cree First Nation have reserve land and carry on traditional hunting, fishing and trapping activities.

The Thebacha Road Society, an umbrella organization of community and other Aboriginal interests in the vicinity of the park, proposed and sought permission to construct the road through the park. As planned, it would have cut across the hunting and trapping territory of certain members of the Mikisew Cree First Nation. Following an environmental review, and some limited communications with the First Nation and its members, the Minister of Heritage (then responsible for the park) approved construction of the road.

At issue was whether the Minister of Heritage infringed the Treaty 8 rights of the First Nation in approving the road, and the nature of the Crown's obligations when “taking up” land pursuant to the treaty. The Crown argued the road did not infringe the treaty because the taking up or proposed use was contemplated by the treaty, and that the communications with the First Nation constituted adequate consultation in the circumstances.

2. The Decision

The Court accepted the Crown's argument that the road was one of the purposes contemplated by the treaty for which land may be taken up, and was not an infringement of the treaty right requiring justification. It found, however, that the Crown had an obligation to consult with the Mikisew Cree First Nation, whose treaty rights would be adversely affected by the construction of the road, and that on the facts of this case the duty was not met, the consultation never having effectively "got off the ground".

The Court found that the duty to consult flows from the honour of the Crown and its obligation to respect existing treaty rights, and is a "process" right. It also stated "... consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely, reconciliation."

Though the duty to consult arises whenever the low threshold of an "adverse impact" is evident, its content will vary with the degree of adverse impact. In the circumstances here its content was said to lie at the low end of the spectrum, but to be meaningful had to be direct, and in advance of any decision being made. It required notice and information about the project be provided, and interests and concerns be solicited, identified, and considered so that adverse impacts might be minimized, and where appropriate, concerns accommodated.

3. Impression of the Direction of the Supreme Court of Canada

The concept of "the honour of the Crown" has been articulated by courts in reasons for judgment for years, indeed for centuries. However, it has moved into the spotlight in the past two years, and appears to be replacing fiduciary duty as the construct employed by courts to achieve what they believe to be the fair and just result.

In *Mikisew Cree*, the "honour of the Crown" was applied to require that the Crown managed the infringing changes authorized in the treaty honourably.

However, the Supreme Court has previously held that it applies as a source of obligation independently of treaties as well. It has invoked the "honour of the Crown" as a central principle in resolving Aboriginal

claims to consultation in Aboriginal rights cases, both custom and practice rights, and land ownership rights.⁶

In *Haida Nation*, McLachlin C.J. extended its application to process:

The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, ...⁷

Justice Binnie potentially extended the blanket of the protection of the honour of the Crown to each and every aspect of Crown-First Nation relations. In *Mikisew Cree* he wrote:

... the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation of 1763*.⁸

Mikisew Cree infuses the honour of the Crown in the performance of every treaty obligation, from the making of a treaty, to interpreting a treaty, to applying treaty, and confirms that the concept will apply equally to Aboriginal rights as a central principle in resolving Aboriginal claims to consultation.

And so the Supreme Court has signalled that where there are Aboriginal and Treaty rights, these will be rigorously, if not ferociously protected by courts.

IV. THE BALANCE IN THE RESULT

In the time following the *Delgamuukw* decision, it was reasonable to predict that Aboriginal title would be based on the area over which a First Nation asserted sovereignty. Whatever the area ranged by a First Nation, whatever the intensity or frequency of use of a hunting or gathering ground, if it was travelled or used by a First Nation, it was considered to have the potential to be the Aboriginal title land of these users of the land at the time of sovereignty.

⁶ *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075; *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010; *Haida Nation v. British Columbia (Ministry of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 and *Taku River Tlingit Nation v. British Columbia*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550.

⁷ *Haida Nation, id.*, at para. 19. See also para. 35.

⁸ *Mikisew Cree, supra*, note 3, at para. 51.

The *Marshall* and *Bernard* decisions changed all that. In these decisions, the Supreme Court established the parameters of the lands that could be set aside for the exclusive use of the pre-sovereignty inhabitants. Common law Aboriginal title is now restricted to the areas that were actually used, frequently, by a First Nation community. Village sites will qualify, as will farms and perhaps hunting and gathering areas adjacent to the village sites if they were sufficiently regularly and exclusively used by the community.

These areas will roughly correspond, as a matter of historical fact, to the areas reserved in the pre-Confederation and numbered treaties that are now known as “reserves”. Aboriginal title will not extend over massive areas such as British Columbia, and the concern that Aboriginal peoples will be able to exclude all others from the use of such areas, is lifted.

Similarly, treaty rights will evolve, but not into the modern equivalent of the right protected by the treaty. Rather, only the means of exercising the right will receive constitutional protection. That means that historic custom and practices will continue, but not their modern equivalent. Gathering wood to build structures will not evolve into gathering lumber to sell to builders of subdivisions.

The implication of the *Bernard* and *Marshall* decisions is that an Aboriginal title land base will not be so extensive as to literally exclude (at least without the necessity of government expropriation after full compensation) non-Aboriginal communities from the use of huge tracts of land — in the case of British Columbia, most of the province. Treaty rights will not be so extensive that they invade the current economy and carve out large portions for the exclusive benefit of the holders of the treaty rights.

Rather, Aboriginal title will be protected based on the formula that roughly equates to that reflected in the historic treaties, sufficient land to establish and maintain a community that sustains some level of exploitation, with use for such activities as hunting, fishing and gathering together with the non-Aboriginal community, over a larger area. Treaty rights will be protected based on the principle that it is the preservation of traditional customs and practices and the traditional economy that are to be preserved, not the right to participate on a priority basis in all aspects of the modern economy.

In *Mikisew Cree*, the Supreme Court of Canada held that although the Crown had a right, recognized in a treaty, to build a road, it could not do so in any way that had even a modest negative impact on

adjacent treaty protected reserve lands, at least without meaningful and respectful consultation.

What the Supreme Court of Canada has signalled in this year's leading decisions is that "firstness" alone will not result in entitlement to constitutionally protected participation in the economy. It has also signalled, on the other hand, that where a constitutionally protected right exists, or may just possibly exist, it must receive a very high degree of deference and respect and no amount of infringement will be tolerated without (meaningful) consultation with the affected First Nation.

More importantly, the Court has signalled that it is not a preferential share of the economy that is protected by section 35 of the *Constitution Act, 1982*,⁹ but rather their diversity, the unique cultural identity of First Nation peoples.

It is not surprising that the Supreme Court of Canada has this year reinforced the position it so clearly expressed in *R. v. Van Der Peet*:

Section 35(1) provides the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, customs and traditions, is acknowledged and reconciled with the sovereignty of the Crown.¹⁰

It is the distinctiveness, the practices, customs and traditions that attract constitutional protection. Economic rights, whether section 35 rights or Charter rights, are not protected by the Canadian Constitution.

⁹ Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁰ [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507.

