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Treaty Interpretation After *R. v. Marshall*; *R. v. Bernard*

Mahmud Jamal*

I. INTRODUCTION

R. v. Marshall; *R. v. Bernard*¹ is no doubt one of the most important rulings on Aboriginal title and treaty rights to be released by the Supreme Court of Canada for some time. The decision contains much to ponder about both the nature of Aboriginal title and how to interpret historical treaties. This paper focuses on the treaty issues in *Marshall*; *Bernard*, against the backdrop of the Court's earlier rulings in *Marshall 1* and *Marshall 2*, and seeks to identify some issues and implications for treaty litigation arising out of the Court's ruling.

II. *MARSHALL*; *BERNARD* ON TREATY RIGHTS

1. The "Peace and Friendship" Treaties of 1760 and 1761

Marshall; *Bernard* is the third case in a trilogy of Supreme Court decisions dealing with the trade clause in the Mi'kmaq "Peace and Friendship" treaties. These treaties were concluded in 1760 and 1761 between the British and the Mi'kmaq peoples of the former colony of Nova Scotia, now the Provinces of Nova Scotia and New Brunswick. Briefly, the background to these treaties was that the British had succeeded in driving the French from Nova Scotia and wanted peace with their former enemies, the Mi'kmaq, who had been allies and trading partners with the French for almost 250 years. To secure peace, the British agreed under the treaties to set up trading posts or

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¹ [2005] S.C.J. No. 44, [2005] 2 S.C.R. 220 [hereinafter "*Marshall*; *Bernard*"].

“truckhouses” to allow the Mi’kmaq to continue their traditional trade formerly conducted with the French, but the Mi’kmaq were now required to trade exclusively with the British at the truckhouses. The pact was mutually beneficial in that the British acquired peace with the Mi’kmaq, while the Mi’kmaq preserved their access to European goods.²

The operative trade clause in the treaty expresses a straightforward negative covenant of the Mi’kmaq Chiefs not to trade except with the British at the truckhouses. It reads:

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....³

However, the interpretation of this clause has proved anything but straightforward. This brief but mischievous trade clause has now been the subject of *three* significant rulings from the Supreme Court of Canada. These rulings are reviewed below, as the background for a discussion of the treaty aspects of the *Marshall*; *Bernard* decision.

2. *Marshall I*

The first case in the trilogy is the Supreme Court’s 1999 ruling in *R. v. Marshall*, known as “*Marshall I*”.⁴ In *Marshall I*, the Court had to decide whether the trade clause protected the right of the Mi’kmaq peoples to engage in commercial fishing (or fishing for trade) contrary to federal fishing regulations. In a 5-2 decision, Binnie J. for a majority of the Court held that the Mi’kmaq had such a treaty right to “fish for trade”. Justice Binnie found that the treaty affirmed “the right of the Mi’kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities and trading for what in 1760 was termed ‘necessaries’”.⁵

² *Id.*, at paras. 7-8, *per* McLachlin C.J.

³ *Id.*, at para. 8.

⁴ [1999] S.C.J. No. 55, [1999] 3 S.C.R. 456 [hereinafter “*Marshall I*”]. Justice Binnie wrote reasons for the majority, agreed to by Lamer C.J., L’Heureux-Dubé, Cory and Iacobucci JJ. The dissenting reasons were authored by McLachlin J. (as she then was), and were agreed to by Gonthier J.

⁵ *Id.*, at para. 4.

Justice Binnie frankly accepted that this conclusion did not flow from the words of the written treaty itself. As he put it: “It seems clear that the words of the March 10, 1760 document, standing in isolation, do not support” the existence of such a treaty right. However, in his view this was not the end of the analysis: “[t]he question is whether the underlying negotiations produced a broader agreement between the British and the Mi’kmaq, memorialized only in part in the Treaty of Peace and Friendship”.⁶ Justice Binnie found such a broader agreement through an elaborate analysis of the wording of the treaty and extrinsic historical sources, including the historical and cultural context, earlier Mi’kmaq treaties with the British, the minutes of the negotiating sessions between the British and the Maliseet (who concluded a similar treaty with the British), and the expert evidence tendered at trial. Based on this review, he concluded that the treaty was “partly oral and partly written”.⁷

Justice Binnie stated that such a broader approach was justified because the Court had long since rejected a strict or technical approach to treaty interpretation. He nevertheless warned that “[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse”. As he explained, “the bottom line is the Court’s obligation is to ‘choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles’ the Mi’kmaq interests and those of the British Crown.”⁸

Justice Binnie acknowledged that while the right to fish was not mentioned either in the text of the treaty, or in the underlying negotiations, he was prepared to imply such a term, noting by analogy to the law of contract that “[c]ourts will imply a contractual term on the basis of the presumed intentions of the parties which is necessary to assure the efficacy of the contract”. In his view, such a presumed intention could be derived by applying the “officious bystander test” from contract law, a well known judicial construct for implying contractual terms that reflect the unexpressed will of the contracting parties to fill gaps that they have left.⁹ Justice Binnie concluded that, having regard to the honour of the Crown, an officious bystander would have inferred that the Mi’kmaq were assured continuing access to

⁶ *Id.*, at para. 7.

⁷ *Id.*, at para. 51.

⁸ *Id.*, at para. 14 (Binnie J.’s emphasis).

⁹ *Id.*, at para. 43.

resources in order to engage in traditional trading activities. In his view, to simply read the Mi'kmaq's positive trade demand into a negative Mi'kmaq covenant would not be consistent with the honour and integrity of the Crown.¹⁰ Justice Binnie thus held that "the surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessities through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the *Badger* test".¹¹

In dissent, McLachlin J. (as she then was) took a narrower view of what the treaty protected. She concluded that the treaty "created an exclusive trade and truckhouse regime which implicitly gave rise to a limited Mi'kmaq right to bring goods to British trade outlets so long as this regime was extant". The treaty granted no "freestanding" right to truckhouses or to trade outside of the truckhouse regime: "[t]he system of trade exclusivity and correlative British trading outlets died out in the 1780s and with it, the incidental right to bring goods to trade."¹²

Justice McLachlin was evidently concerned that the majority's conclusion created "an unintended right of broad and undefined scope".¹³ She warned presciently of the dangers of the majority's expansive approach, foreshadowing the Court's need to clarify *Marshall 1* in *Marshall 2* and to then further explain those reasons again in *Marshall; Bernard*. The majority's approach, she noted, rendered the treaty rights "inchoate" and made it impossible for the Crown to justify limitations on such treaty rights. This would function to create illegitimately an unintended right of broad and undefined scope. Instead, in McLachlin J.'s view the correct approach is to begin by defining the core of the treaty right and to seek its modern counterpart. This allows a court to assess whether the law in question derogates from that right and to address any justifications for such derogation in a meaningful way.¹⁴

While McLachlin J.'s reasons on the interpretation of the treaty did not command a majority of the Court, her discussion will continue to be relevant for distilling the canons of treaty interpretation established by earlier cases. She set out the following guiding principles:

¹⁰ *Id.*, at para. 52.

¹¹ *Id.*, at para. 56.

¹² *Id.*, at para. 70.

¹³ *Id.*, at para. 102.

¹⁴ *Id.*, at paras. 109-112.

This Court has set out the principles governing treaty interpretation on many occasions. They include the following.

- 1 Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation [...]
- 2 Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories [...]
- 3 The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed [...]
- 4 In searching for the common intention of the parties, the integrity and honour of the Crown is presumed [...]
- 5 In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties [...]
- 6 The words of the treaty must be given the sense which they would naturally have held for the parties at the time [...]
- 7 A technical or contractual interpretation of treaty wording should be avoided [...]
- 8 While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic [...]
- 9 Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context [...]¹⁵

3. *Marshall 2*

Exactly two months after releasing *Marshall 1*, the Court released *Marshall 2*,¹⁶ ostensibly to dispose of a motion for a re-hearing brought

¹⁵ *Id.*, at para. 78.

¹⁶ [1999] S.C.J. No. 66, [1999] 3 S.C.R. 533.

by an intervener in *Marshall 1*. However, the Court's now unanimous decision goes much further than simply rejecting the re-hearing request, taking the unusual step of elaborating extensively on the earlier majority ruling.

The Court in *Marshall 2* explained that *Marshall 1* recognized the Mi'kmaq's treaty right to "work for a living through continuing access to fish and wildlife to trade for 'necessaries', which a majority of the Court interpreted as 'food, clothing and housing, supplemented by a few amenities'".¹⁷ However, the Court emphasized that *Marshall 1* did not establish "a treaty right 'to gather' anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower". The Court cautioned that the question of whether the treaty protects trade in other natural resources, such as logging, minerals or offshore natural gas deposits, would have to await the presentation of proper historical evidence and argument in future cases.¹⁸

4. *Marshall; Bernard*

Just over four years later, the Court had to decide the very issue it had raised but refused to consider in *Marshall 2* — whether the treaty protected a right to engage in commercial logging. In *Marshall; Bernard*, the Court had before it appeals from Nova Scotia and New Brunswick in which various Mi'kmaq loggers had invoked the treaty in defence to provincial prosecutions for logging on Crown lands without authorization. The accused were all convicted at trial; and their initial appeals to the summary conviction appeal courts were dismissed; but their further appeals to the provincial courts of appeal were then allowed. In *Marshall*, the convictions were set aside and new trials ordered; while in *Bernard*, the conviction was set aside and an acquittal entered.¹⁹ On further appeal, the Supreme Court allowed both appeals, concluding that the treaty did not protect commercial logging.

¹⁷ *Id.*, at para. 4.

¹⁸ *Id.*, at paras. 19-20.

¹⁹ *Supra*, note 1, at para. 4, *per* McLachlin C.J.

Although the seven justices who heard the case were unanimous in the result, two sets of reasons were delivered.²⁰ Chief Justice McLachlin wrote for the majority of five justices; while LeBel J. wrote separate reasons for two justices concurring in the result.²¹

In her majority reasons, McLachlin C.J. stated that *Marshall 1* held that “the treaties of 1760-61 conferred on the Mi’kmaq the right to catch and sell fish for a moderate livelihood, on the ground that this activity was the logical evolution of a trading practice that was within the contemplation of the parties to the treaties”.²² The issue in *Marshall; Bernard* was now the scope of this right, and in particular, whether it extended to commercial logging.

Two contrasting interpretations were presented to the Court. The first interpretation, presented by the Mi’kmaq respondents, focused on the *use* of resources, and contended that if the resource in issue was *gathered* or *used* by Mi’kmaq in an Aboriginal economy in 1760, in any way or for any purpose, then it was protected by the treaty.²³

The second interpretation, urged by the Crown, contended that the treaty protected only those *trading activities* that were in the contemplation of the parties at the time of the treaty. The emphasis was thus not on what products were *used*, but on the *contemplated trading activities*. Chief Justice McLachlin stated that the Crown “accepts *Marshall 1* and 2”, but argued that the truckhouse clause “merely granted the Mi’kmaq the right to continue to trade in items traded in 1760-61. Only those trading activities were protected; other activities, not within the contemplation of the British and Mi’kmaq of the day, are not protected”. Chief Justice McLachlin noted that the Crown also accepted that “ancestral trading activities are not frozen in time; the treaty protects modern activities that can be said to be their logical evolution”. However, the Crown argued that modern commercial

²⁰ Justice Binnie recused himself from the hearing because before his appointment to the bench he had been retained by the Attorney General of New Brunswick in connection with *R. v. Paul*, [1998] N.B.J. No. 439, 153 D.L.R. (4th) 131 (C.A.), a case involving a claimed right of the Mi’kmaq to harvest timber for trade in New Brunswick and Nova Scotia: see letter from S.C.C. Registrar to parties and interveners dated December 17, 2004. As a result, McLachlin C.J. was the only justice from *Marshall 1* who sat on *Marshall; Bernard*. (Justice Major had been on the Court during *Marshall 1* and 2, but did not sit on either case; Major J. did however sit on *Marshall; Bernard*).

²¹ Justices Major, Bastarache, Abella and Charron concurred with the Chief Justice’s reasons, while Fish J. concurred with the reasons of LeBel J.

²² *Id.*, at para. 13.

²³ *Id.*, at paras. 14-15.

logging was not protected because it would transform the treaty right into something new and different.²⁴

Chief Justice McLachlin preferred the Crown's interpretation. She found that its argument was supported by the purpose of the truckhouse clause and its wording, and by the historical record as interpreted in *Marshall 1* and 2.

Chief Justice McLachlin explained that the purpose of the clause was to be a *trade* clause, concerned with what could be traded.²⁵ It was concerned "with traditionally traded products". Chief Justice McLachlin noted that while this right to trade in traditional products "carried with it an implicit right to harvest those resources", this was merely as "the adjunct of the basic right to trade in traditional products. The right conferred is not the right to harvest, in itself, but the right to trade".²⁶

Chief Justice McLachlin further noted that nothing in the wording of the truckhouse clause conferred "a general right to harvest or gather all natural resources then used".²⁷

Chief Justice McLachlin concluded that this view was also consistent with the historical record as interpreted in *Marshall 1* and 2, which supported a limited treaty right to "trade in the products the Mi'kmaq had traditionally traded with the Europeans".²⁸

Chief Justice McLachlin also cautioned that this interpretation did not preclude treaty rights from evolving as a result of changes in the economy or technology; however, she explained that any such evolution must involve an evolved treaty-protected activity that is "essentially the same". "Logical evolution means the same sort of activity, carried on in the modern economy by modern means. This prevents aboriginal rights from being unfairly confined simply by changes in the economy and technology. But the activity must be essentially the same". Chief Justice McLachlin affirmed that while treaty rights are capable of evolution within limits, their subject matter cannot be wholly transformed.²⁹

In conclusion, McLachlin C.J. held that the treaty does not protect "the right to harvest and dispose of particular commodities", but rather

²⁴ *Id.*, at para. 16.

²⁵ *Id.*, at para. 18.

²⁶ *Id.*, at para. 19.

²⁷ *Id.*, at para. 20.

²⁸ *Id.*, at paras. 21-24.

²⁹ *Id.*, at para. 25.

protects only “the right to practice a traditional 1760 trading activity in the modern way and modern context”.³⁰

Chief Justice McLachlin found that the trial judges in both cases had correctly identified this focus on trade as being the scope of the treaty right, and based on the evidence had found that the Mi’kmaq people did not engage in any traditional commercial logging activity at the time of the treaty.³¹ She noted that while the evidence did disclose some secondary, occasional and incidental trade in wood products, in items such as baskets, snowshoes and canoes, there was no evidence of any traditional trade in logs.³² As McLachlin C.J. stated: “Logging was not a traditional Mi’kmaq activity. Rather, it was a European activity, in which the Mi’kmaq began to participate only decades after the treaties of 1760-61.”³³ To the contrary, McLachlin C.J. noted that there was evidence that logging was “inimical to the Mi’kmaq’s traditional way of life, interfering with fishing”, which was a traditional activity.³⁴ Further, one of the Mi’kmaq witnesses had even conceded the unlikelihood that the Mi’kmaq contemplated commercial logging during the treaty process. There was similarly no evidence that the British ever contemplated trade in anything but traditionally produced products, like fur or fish.³⁵ Chief Justice McLachlin therefore rejected the treaty claims in both appeals.

Justice LeBel agreed with the majority’s conclusion that the treaty did not protect commercial logging. However, LeBel J. placed a different emphasis on the nature of the right, or rights, protected by the treaty. Justice LeBel’s reasons emphasized that the treaty protected *both* a right to trade *and* a right of access to resources for the purpose of trade.

Justice LeBel’s reasons repeatedly emphasized that two separate rights are protected, albeit two “closely intertwined” rights. He stated that “the protected treaty right includes not only *a right to trade* but also *a corresponding right of access to resources for the purpose of engaging in trading activities*”.³⁶ Elsewhere, LeBel J. noted that

³⁰ *Id.*, at para. 26.

³¹ *Id.*, at paras. 27-34.

³² *Id.*, at para. 33.

³³ *Id.*, at para. 34.

³⁴ *Id.*

³⁵ *Id.*, at para. 33.

³⁶ *Id.*, at para. 110 (emphasis added).

“although the treaty does protect traditional trading activities, the treaty right comprises *both a right to trade and a right of access to resources*. There is no right to trade in the abstract because a right to trade implies a corresponding right of access to resources for trade”.³⁷ He later repeated the dual character of the *rights* (as compared to *right*): “The treaty protects *both a right to trade and a right of access to resources*, and *these rights* are closely intertwined”.³⁸

Based on his “two rights” approach to the treaty, LeBel J. articulated the test for treaty protection slightly differently from the majority. Justice LeBel’s test asked whether “the resource and resource-extracting activity for which the respondents seek treaty protection must reasonably have been in the contemplation of the parties”.³⁹

However, based on the evidence in these cases, LeBel J. agreed with the Chief Justice that logging was not in the contemplation of the parties and was not the logical evolution of Mi’kmaq treaty rights.⁴⁰ Consequently, in the result LeBel J. similarly rejected the treaty claims.

III. SOME ISSUES AND IMPLICATIONS FLOWING FROM *MARSHALL*; *BERNARD*

1. What Was Left Unsaid?

The relative brevity of the reasons in *Marshall*; *Bernard* belie their complexity. Indeed, the reasons are as interesting and important for what they omit as for what they contain.

For example, the Court’s reasons leave the impression that the Crown had accepted *Marshall 1* as binding authority. Indeed McLachlin C.J. stated that the Crown “accepts *Marshall 1* and 2, but argues that the respondent misread them”. But this was not quite right. While the Attorney General of New Brunswick (as well as the Attorneys General of Canada, Ontario, Quebec, British Columbia, Alberta and Newfoundland and Labrador) accepted *Marshall 1* and 2 as good law, the Attorney General of Nova Scotia emphatically did not. Nova Scotia directed a substantial portion of its appellant’s factum to the argument

³⁷ *Id.*, at para. 112 (emphasis added).

³⁸ *Id.*, at para. 113 (emphasis added).

³⁹ *Id.*, at paras. 116-117.

⁴⁰ *Id.*, at para. 125.

that the majority decision in *Marshall 1* was *per incuriam* because the significance of certain evidence tendered in that case had not been fully appreciated by the Court.⁴¹ Nova Scotia's position was that "there is no right to hunt, fish and gather and trade for necessities" under the 1760-61 treaties.⁴² For unstated reasons, the Court decided not to address this argument.

The Court also decided not to address the content of the "moderate livelihood" limit to the exercise of the treaty right emerging from *Marshall 1* and 2.⁴³ For example, in the *Bernard* case the accused had failed to establish, as part of his defence, that his logging was limited to securing necessities. The only evidence was that he had purchased a tractor-trailer to participate in the "Native commercial wood harvest", and that he was caught hauling 23 spruce logs, his second load that day alone. There was no other evidence as to whether his overall logging activities were below the moderate livelihood limit, nor evidence as to whether he was *already* earning a moderate livelihood through other forms of traditional hunting, fishing and gathering for trade, which he was now seeking to supplement through logging. Such a lack of evidence effectively left the lower courts guessing the value of the logs harvested and without any information about other potential sources of income from the exercise of treaty rights.

Similarly, the Court declined to deal with issues such as whether the accused were exercising their claimed communal treaty rights with "community authority" (and how to prove such authority), as well as other thorny issues such as the territories covered by the treaty and possible extinguishment of the treaty rights through pre-Confederation legislation.⁴⁴

2. Does *Marshall; Bernard* Merely Clarify or Retrench from *Marshall 1*?

Marshall; Bernard clarifies and maybe even retrenches somewhat from the sweeping approach to treaty interpretation in *Marshall 1*, just as

⁴¹ Nova Scotia had not participated in *Marshall 1*.

⁴² Factum of the Attorney General of Nova Scotia, at paras. 87-122.

⁴³ *Supra*, note 1, at para. 36.

⁴⁴ *Id.*

Marshall 2 had done so in respect of *Marshall 1*.⁴⁵ Certainly, there were those who (like McLachlin J. in *Marshall 1*) had highlighted the Trojan-horse approach to treaty interpretation endorsed by Binnie J. For example, Professor Peter Hogg called *Marshall 1* “a remarkable example of the generous interpretation of an Indian treaty”.⁴⁶ In his view, “[i]t was a considerable stretch to interpret this clause, in form nothing more than a negative restraint on the ability of the Mi’kmaq to trade with non-governmental purchasers, as a protection of the defendant’s commercial fishing activity.”⁴⁷

Dean Patrick Monahan similarly warned that *Marshall 1* could lead to a very expansive approach to treaty interpretation going well beyond the written treaty language, and indeed could relegate the written treaty terms to merely “one more piece of evidence in clarifying the true agreement of the parties”. As Dean Monahan explained:

The rule that a Treaty is defined by the terms of the written document appears to have been qualified materially by the Supreme Court decision in *R. v. Marshall*. [...]

It is true, as Binnie J. pointed out in *Marshall*, that courts have in the past been willing to interpret rights in a Treaty so as to make the exercise of those rights effective and meaningful. What is novel about the approach of the majority in *Marshall*, however, was the Court’s willingness to imply a term into a Treaty to render effective a right that was not part of the Treaty itself. Moreover, the approach in *Marshall* invites litigants to argue that the “real Treaty” is the understanding of the parties, as reflected in the context underlying the negotiations, as opposed to the written Treaty document itself. On this theory, the written document merely becomes one more piece of evidence of the real agreement of the parties. This approach to treaty interpretation goes significantly beyond previous cases, which had focused on giving meaning and effect to the written language of the

⁴⁵ See, for example, Bruce H. Wildsmith, Q.C., “Vindicating Mi’kmaq Rights: The Struggle Before, During and After *Marshall*” (2001) 19 Windsor Y.B. Access Just. 203, at 229, 235, who was counsel for the appellant in *Marshall 1* and 2, and for the respondents in *Marshall; Bernard*, who stated that *Marshall 2* is “so inconsistent” with *Marshall 1* that the Supreme Court “cannot have appreciated the significance of what it was saying”, and that he “cannot help feeling a sense of betrayal by the Supreme Court of the traditional image of justice as the lady in blindfold, weighing the arguments and evidence before her”.

⁴⁶ Peter W. Hogg, *Constitutional Law of Canada*, vol. 1, loose-leaf ed. (Scarborough: Carswell, 1992) section 27.6(d), at 27-32.

⁴⁷ *Id.*, at 27-33.

Treaty, and could have material implications for the interpretation of a wide variety of treaties.⁴⁸

At the end of the day, whether *Marshall; Bernard* is described as merely clarifying *Marshall 1* or retrenching from it probably involves more semantics than substance. Clearly, this latest majority decision is now the lens through which the earlier rulings must be viewed. But how ironic it is that it would fall to McLachlin C.J. — the only remaining justice from *Marshall 1* — to explain the ambit of the earlier ruling from which she had dissented.

3. How to Ascertain Common Intention?

If the bottom line of treaty interpretation is to ascertain the parties' common intention at the time the treaty was made, then *Marshall; Bernard* offers valuable guidance on how to prove that intention.

First, the ruling shows that direct evidence of intent may be tendered through witnesses. Here, for example, the Court relied on Chief Augustine's testimony that, in his view, it was "unlikely" that the Mi'kmaq contemplated commercial logging during the treaty process.⁴⁹ Counsel should therefore take heed that they are not limited to arguing common intent based on the entrails of the historical record.

Second, the ruling shows that Aboriginal oral history can be critical evidence *against* a treaty claim. In this case, both McLachlin C.J.⁵⁰ and LeBel J.⁵¹ relied on the evidence of Chief Augustine to the effect that Aboriginal oral history recorded that logging was inimical to the Mi'kmaq's traditional fishing way of life. The Court inferred from this that logging cannot have been contemplated by the parties as having been protected by the treaty. The Mi'kmaq's oral history, as recounted by Chief Augustine, contained stories of how

British people [were] coming in and cutting timber, cutting large big trees and moving them down the river systems and clogging up the

⁴⁸ Patrick Monahan, *Constitutional Law*, 2d ed. (Toronto: Irwin Law, 2002), at 452-53, 454-55. See also Bradford W. Morse, "Aboriginal and Treaty Rights In Canada", ch. 17 of Gérald-A. Beaudoin & Errol Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. (Markham, ON: LexisNexis Butterworths, 2005), at 1171-1257, at 1209.

⁴⁹ *Id.*, at para. 33.

⁵⁰ *Id.*, at para. 34.

⁵¹ *Id.*, at para. 122.

rivers, I guess, with bark and remnants of debris from cutting up lumber. And this didn't allow the salmon to go up the rivers...⁵²

The lesson is thus that Aboriginal oral history can cut both ways.

Third, the Court explicitly considered post-treaty conduct as evidence of the parties' intent at the time of the treaty. The Court noted that the Mi'kmaq did not engage in logging until the 1780s, several decades after the treaty was concluded, and that it "was only in the 19th century that the Mi'kmaq began to harvest forest resources to trade in forest products with the British".⁵³ Again, therefore, counsel can and should look to the parties' conduct *after* the claimed treaty right was concluded.

Fourth, the Court's decision shows more generally how critical it is for an Aboriginal claimant to tender appropriate evidence to establish a treaty claim. The ruling shows great sensitivity to the historical record and evidences considerable reluctance to engage in abstract conjecture outside that record. In this vein, it is noteworthy that the "ubiquitous officious bystander", who had figured so prominently in *Marshall 1* as a means of inferring a treaty right to fish, is totally out of sight in this ruling. The message seems to be that in the future treaty rights will not lightly be inferred absent a proper historical foundation.

4. How Far Can Treaty Rights "Logically Evolve"?

Another judicial concept that had figured prominently in *Marshall 1* and 2, but which is much more tightly constrained in *Marshall; Bernard*, is the concept of logical evolution of treaty rights.

In *Marshall 2*, the Court had said that "[w]hile treaty rights are capable of evolution within limits [...] their subject matter (absent a new agreement) cannot be wholly transformed".⁵⁴ This language had been debated extensively by the lower courts in *Marshall* and *Bernard*, and formed the basis for the argument advanced by the Aboriginal respondents and interveners that trade in some wood products at the time of the treaty could "logically evolve" into a right to engage in commercial logging.

⁵² *Id.*, cited in LeBel J.'s reasons.

⁵³ *Id.*, at para. 121.

⁵⁴ *Marshall 2*, at para. 19.

The Court in *Marshall; Bernard* has emphatically rejected this line of reasoning. As McLachlin C.J. explained: “Logical evolution means *the same sort of activity*, carried on in the modern economy by modern means [...] the activity must be essentially the same”.⁵⁵ This approach necessarily invites a *qualitative comparison* between the traditional trade activity and the claimed modern, evolved treaty right. It poses the question, is the activity essentially the same, or is it fundamentally different? In this case, the Court accepted the lower court’s qualitative comparison that “[c]ommercial logging does not bear the same relation to the traditional limited use of forest products as fishing for eels today bears to fishing for eels or any other species in 1760”.⁵⁶ Effectively, the Court found that commercial logging was a universe removed from limited traditional wood use, and as such the former could not logically evolve into the latter.

This narrower approach to the “logical evolution” of treaty rights is entirely consistent with the Court’s prior decisions. The Court has properly eschewed a “frozen-in-time approach to treaty rights”, and ruled that treaty provisions must be interpreted “in a flexible way that is sensitive to the evolution of changes in normal practice”.⁵⁷ Thus, a treaty right to fish for trade can evolve into the right to fish using an “outboard motor”;⁵⁸ a treaty right to hunt can evolve into a right to hunt with a rifle;⁵⁹ and a right to build shelter incidental to the right to hunt can evolve into a right to build a log cabin for the purpose of hunting.⁶⁰ The

⁵⁵ *Marshall; Bernard*, at para. 25 (emphasis added).

⁵⁶ *Id.*, at para. 32, citing the reasons of Curran Prov. Ct. J. in *Marshall*. See to similar effect LeBel J.’s reasons, at para. 124:

Is the exploitation of timber resources a logical evolution of treaty rights? Given the cultural and historical context in which the treaties were signed, to interpret the right of access to resources for the purpose of engaging in traditional trading activities as a right to participate in the wholesale exploitation of natural resources would alter the terms of the treaty and wholly transform the rights it confirmed. Accordingly, trade in logs is not a right afforded to the Mi’kmaq under any of the treaties of 1760-61 because logging represents a fundamentally different use from that which would have been in the contemplation of the parties.

⁵⁷ *Marshall 1*, at para. 53, *per* Binnie J.

⁵⁸ *Id.*

⁵⁹ *Simon v. The Queen*, [1985] S.C.J. No. 67, [1985] 2 S.C.R. 387, at 402, *per* Dickson C.J.

⁶⁰ *R. v. Sundown*, [1999] S.C.J. No. 13, [1999] 1 S.C.R. 393, at para. 32, *per* Cory J.

question in each case is to determine “what modern practices are reasonably incidental to the *core* treaty right in its modern context”.⁶¹

The purpose of rejecting the frozen-in-time approach is to give meaning to the protection of “existing” Aboriginal and treaty rights under section 35(1) of the *Constitution Act, 1982*. It allows section 35(1) rights to be “affirmed in contemporary form rather than in their primeval simplicity and vigour”.⁶² The Court’s decision in *Marshall; Bernard*, while faithful to this approach, helpfully explains the limited ambit of what will (and will not) constitute a logical evolution.

5. Is There Any Difference Between McLachlin C.J. and LeBel J. on the Treaty?

As noted, LeBel J. felt the need to issue separate reasons concurring in the result in *Marshall; Bernard*, which naturally raises the question of whether LeBel J.’s reasons differ in substance from those of McLachlin C.J. on the treaty issue, and if so, how?

In her treaty analysis, McLachlin C.J. placed the emphasis on what was *traded*. She then found that the trade right carried with it “an *implicit* right to harvest those resources”, which was merely the “*adjunct* of the basic right to trade in traditional products”.⁶³ Chief Justice McLachlin’s analysis therefore proceeds on the basis of a single, express treaty right to trade, accompanied by an implied right to harvest resources for trade.

By contrast, LeBel J. did not appear to prioritize the rights in this way. In his view, two separate rights are involved, albeit two “closely intertwined” rights. In his view, the treaty protected *both* a right to trade *and* a right of access to resources for the purpose of trade.

⁶¹ *Marshall 1*, at para. 78, *per* McLachlin J., dissenting but not on this point (emphasis added).

⁶² *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at 1093, *per* Dickson C.J. and La Forest J., affirmed in *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 32, *per* Cory J. for the Court. The Court’s Aboriginal rights jurisprudence equally eschews frozen rights. Thus, as Professor Hogg has explained, citing *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507, at para. 73, *per* Lamer C.J.: the “bone hook would be replaced by the steel hook”, and “the bow and arrow by the gun”, but “a practice that has evolved into modern practices must trace its origins to the pre-contact period. Contemporary practices that developed ‘solely as a response to European influences do not qualify’”: P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1992) looseleaf, vol. 1, at 27-20.

⁶³ *Marshall; Bernard*, at para. 19 (emphasis added).

Is there any practical difference between McLachlin C.J.'s "one right" approach and LeBel J.'s "two rights" approach? It would seem that such a difference could materialize only if one of LeBel J.'s closely intertwined rights could somehow become unstuck from the other, such that the right of access to resources could be exercised separate and apart from whether the resource was ultimately traded. However, in various places LeBel J. qualifies the right of access to resources as being "for the purpose of engaging in trading activities",⁶⁴ and as a "right of access to resources for trade".⁶⁵ This suggests that the access right is not free-standing at all, but rather is superglued to the trade right.

However, LeBel J.'s approach arguably could lead to a different approach to proving a treaty right. On his view, it would seem that evidence would be needed for both the trade right and the access right, whereas under McLachlin C.J.'s approach proof of the access right would be unnecessary as that right would be inferred from proof of the trade right.

Perhaps it is also conceivable that resources could be harvested for the *purpose* of trade (and thus authorized by treaty) without actually being traded. On this view, LeBel J.'s two rights approach could yield a different result than McLachlin C.J.'s approach.

However, barring such unusual instances at the periphery, it would seem that LeBel J.'s approach involves more of a difference in emphasis than substance.

6. What Will Be the Impact for Future Resources?

There is little doubt that *Marshall; Bernard* will largely foreclose attempts to extend this treaty to cover other resources such as minerals and offshore natural gas deposits, which had been identified by Aboriginal groups in *Marshall 2* as being protected.⁶⁶ *Marshall; Bernard* refocuses the analysis on traditional *trade* activities. Aboriginal peoples must now establish that a resource was a "traditionally traded product" and show evidence of "trade in products [which] the Mi'kmaq traded with the Europeans". This is most unlikely to extend to minerals

⁶⁴ *Id.*, at para. 110.

⁶⁵ *Id.*, at para. 112.

⁶⁶ *Marshall 2*, at para. 19.

and offshore natural gas deposits, although the determination of such matters will of course ultimately depend on the historical evidence.

7. Should Treaty Rights Be Determined in Summary Conviction Proceedings?

Lastly, LeBel J.'s reasons in *Marshall; Bernard* contain a very interesting analysis of the appropriateness of determining treaty rights and Aboriginal title claims in summary conviction proceedings.

By way of background, in *Bernard* one of the justices of the New Brunswick Court of Appeal had pointed out the procedural unfairness in using summary conviction proceedings to make findings on Aboriginal title that could cloud the property rights of non-parties.⁶⁷ In *Bernard*, the claim for Aboriginal title covered from one quarter to one third of the Province of New Brunswick, while in *Marshall* it extended to the entire Province of Nova Scotia. The Aboriginal title claims also raised broader issues, such as whether the Mi'kmaq were required to share the forest resources with the present Crown licensees and whether Aboriginal title was extinguished by the creation of reserves. Before the Supreme Court, several of the parties and interveners echoed these concerns and urged the Court to refrain from addressing the Aboriginal title issues in the context of these summary conviction proceedings.

While McLachlin C.J.'s reasons did not refer to these arguments,⁶⁸ they were picked up in LeBel J.'s concurring reasons. Interestingly, LeBel J. concluded that it was time for the Court to "re-think the appropriateness of litigating aboriginal treaty, rights and title issues in the context of criminal trials". As he explained:

The issues that are determined in the context of these cases have little to do with the criminality of the accused's conduct; rather, the claims would properly be the subject of civil actions for declarations. Procedural and evidentiary difficulties inherent in adjudicating aboriginal claims arise not only out of the rules of evidence, the interpretation of evidence and the impact of the relevant evidentiary

⁶⁷ *R. v. Bernard*, [2003] N.B.J. No. 320, 230 D.L.R. (4th) 57, at 226, at para. 112 (C.A.), per Robertson J.A.

⁶⁸ Although McLachlin C.J. clearly accepted that "[t]he 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" (*supra*, note 1, at para. 5).

burdens, but also out of the scope of appellate review of the trial judge's findings of fact. These claims may also impact on the competing rights and interests of a number of parties who may have a right to be heard at all stages of the process. In addition, special difficulties come up when dealing with broad title and treaty rights claims that involve geographic areas extending beyond the specific sites relating to the criminal charges.

Justice LeBel concluded that "there is little doubt that the legal issues to be determined in the context of aboriginal rights claims are much larger than the criminal charge itself and that the criminal process is inadequate and inappropriate for dealing with such claims". He suggested that in future when Aboriginal rights issues arise in the context of summary conviction proceedings, the Crown should consider seeking a temporary stay of the charges to allow the Aboriginal claims to be properly litigated in the civil courts. Once the claims are adjudicated in civil courts, "the Crown could then decide whether to proceed with the criminal charges".⁶⁹

There is considerable force to LeBel J.'s analysis that Aboriginal title and treaty claims should be addressed only in a properly constituted action for a declaration and not in a regulatory prosecution. It seems only fair that private parties throughout the province should not have their property rights thrown into limbo without knowing precisely the claims alleged and having an opportunity to be heard.

To this end, the courts have traditionally found that Aboriginal title claims require proper pleadings. In *Delgamuukw v. British Columbia*, for example, it will be recalled that the Supreme Court ordered a new trial after concluding that a pleadings defect (the title claim was framed differently on appeal than at trial) prevented the Court from considering the merits of the appeal.⁷⁰ Similarly, other courts have traditionally required title claims to be framed within properly constituted actions.⁷¹

⁶⁹ *Supra*, note 1, at paras. 142-44. This can be contrasted with the Court's approach in *Marshall 2*, at para. 13, which seemed to accept that the Crown was responsible for the procedural posture of the case as a criminal proceeding: "Here the Crown elected to test the treaty issue by way of a prosecution, which is governed by a different set of rules than is a reference or a declaratory action. This appeal was directed solely to the issue whether the Crown had proven the appellant guilty as charged."

⁷⁰ [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at paras. 76-7, *per* Lamer C.J.

⁷¹ See *Western Forest Products Ltd. v. Skidegate Indian Band*, [1985] B.C.J. No. 2994 (S.C.), *per* McKay J., refusing to allow the Haida to raise Aboriginal title in defence to an injunction, insisting instead on "a properly constituted action" against the Crown (at para. 20).

It is arguably no answer to these concerns to say that the Court is stuck with the procedural posture of a regulatory case and that any affected private parties should intervene at trial. The courts are justifiably concerned about permitting interveners where liberty interests are at stake,⁷² given the spectre of unfairness (“ganging up” on the accused), delay in the proceedings and prejudice to the accused’s right to a fair trial.⁷³ As such, it seems only fair that such broad-ranging Aboriginal title and treaty issues should be addressed only where all interested parties have the right to be present and protect their interests.

Justice LeBel’s suggestion that the criminal proceedings be stayed to allow for civil claims raises several practical issues, however. Presumably a criminal proceeding could be stayed only with the accused’s concurrence to become a civil plaintiff. A criminal defendant may well agree to the staying of the criminal charges, but they must then also agree to file a statement of claim and to move the civil proceedings forward as plaintiff. This could substantially change the cost, strategy and dynamics of Aboriginal litigation, and it is at least an open question as to whether an Aboriginal accused would have any interest or incentive in agreeing to such a proposal.

Nevertheless, for the moment LeBel J.’s interesting analysis of this problem of litigation of Aboriginal issues in the criminal courts remains a minority view. It is an open question as to whether his suggestion will be adopted in future cases.

IV. CONCLUSION

While *Marshall; Bernard* raises many interesting questions, the decision will not be the last word on Aboriginal logging rights in the Maritimes or, perhaps, even elsewhere in Canada. On July 21, 2005, the day after releasing *Marshall; Bernard*, the Supreme Court granted leave to appeal in *R. v. Sappier and Polchies* and *R. v. Gray*, two cases in which the New Brunswick Court of Appeal (the same panel from *R. v. Bernard* no less) had affirmed the existence of both Aboriginal and treaty rights of

⁷² *R. v. Seaboyer and Gayme*, [1986] O.J. No. 128, 50 C.R. (3d) 395, at 398 (C.A.); *R. v. Finta*, [1990] O.J. No. 2282, 1 O.R. (3d) 183, at 186 (C.A.).

⁷³ *R. v. O’Connor*, [1993] B.C.J. No. 1466, 82 C.C.C. (3d) 495, at 501-502 (C.A.); *R. v. Ross*, [1992] N.S.J. No. 405, 76 C.C.C. (3d) 536, at 541 (C.A.). Some have even said that it would be improper to convict an Aboriginal accused based on arguments raised by interveners: see *R. v. Alfred*, [1993] B.C.J. No. 2277, [1994] 3 C.N.L.R. 88, at 95-96 (S.C.).

the Mi'kmaq and Maliseet Aboriginal peoples to engage in logging on Crown lands for "personal use" (as opposed to trade).⁷⁴ It remains to be seen what the Court will make of these renewed logging claims.

⁷⁴ *R. v. Sappier and Polchies*, [2004] S.C.C.A. 415; *R. v. Gray*, [2004] S.C.C.A. 416. The Supreme Court heard oral argument on May 17 and 18, 2006 and reserved its rulings. The treaty issue arose only in *R. v. Sappier and Polchies*, based on a 1725 treaty between the Maliseet and the British Crown.

