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The Supreme Court Needs to Consider Both Common Law and Aboriginal Law When Resolving Land Disputes

What is this research about?

On May 29, 1998, Joshua Bernard, a Mi'kmaq from the Eel Ground Reserve in New Brunswick, was charged with the unlawful possession of 23 spruce logs. Another Mi'kmaq had cut the logs on lands that the province claimed to be Crown lands – lands owned by the government. Within the next year, authorities charged Stephen Frederick Marshall and 34 more Mi'kmaq Indians with cutting timber on Crown lands in Nova Scotia. Marshall and the others argued that they did not need permission to cut the logs because, as Mi'kmaq, they had the rights to harvest the logs to sell them. They based those rights on their Aboriginal title to the land where the cutting had taken place, and on a treaty right to harvest resources to make a modest living.

Bernard, Marshall and the other 34 Mi'kmaq were convicted. But on appeal, their cases – R v. Marshall; R. v. Bernard – made it all the way to the Supreme Court of Canada. Ultimately, though, the convictions were upheld in 2005 by Chief Justice McLachlin and Justice LeBel. Their decisions were important because this was the first time the Court had ruled on the validity of an Aboriginal title claim. Chief Justice McLachlin and Justice LeBel based their decisions on principles reached in the landmark case,

What you need to know:

The Delgamuukw approach to resolving Aboriginal land claims is superior to both a strict common law approach and a strict Aboriginal law approach. It acknowledges the unique qualities of Aboriginal title, and provides Aboriginal peoples with the legal support for their inherent right of self-government.

Delgamuukw v. British Columbia. But were those principles used properly in the case of Bernard and Marshall?

What did the researchers do?

Kent McNeil, Professor at Osgoode Hall Law School, York University, Toronto, researched the history of Aboriginal title in Canada. He then looked at the judgments of Chief Justice McLachlin and Justice LeBel in the case of Marshall/Bernard.

What did the researchers find?

Professor McNeil found that Chief Justice McLachlin's decision on the Aboriginal title

issue was a disappointing retreat from the truly innovative principles established in Delgamuukw v. British Columbia. Before Delgamuukw, the source of Aboriginal title in Canadian law remained uncertain. In other words, it was unclear whether the source of Aboriginal is the common law or Aboriginal law. In Delgamuukw, Chief Justice Lamer made the innovative decision to combine the two approaches, suggesting that Aboriginal peoples derive the title to their land from both common law and Aboriginal law. But although she claimed to have followed the Delgamuukw approach in the case of Marshall/Bernard, Chief Justice McLachlin appears to have based her decision mainly on common law. For her, Aboriginal law seems to have been of little relevance. As a result, the Mi'kmaq were unable to establish their Aboriginal title.

How can you use this research?

In future disputes over land claims made by Aboriginal peoples, the Supreme Court and other courts should either follow the principles established by the Delgamuukw case, or admit that they are retreating from those principles and changing the law.

About the Researchers

Dr. Kent McNeil is Professor, Osgoode Hall Law School, York University. This Research Snapshot is from his study, "The Territorial Rights of the Aboriginal Peoples of North America."

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Citation

A number of research papers resulting from this study were published, including: McNeil, K. (2006). Aboriginal title and the Supreme Court: What's happening? *Saskatchewan Law Review*, 69, 281-308. Available online at http://bit.ly/1hQ4Qsg

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Indigenous Peoples, Citizenship, Aboriginal law, Land claims, Common law

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