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What Does Radical Title Add to the Concept of Sovereignty?

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The Crown's radical title plays a larger role in the Supreme Court of Canada decision in *Tsilhqot'in* than it has in the Court's previous Aboriginal rights decisions. However, it is unclear what the Court means by radical title in *Tsilhqot'in* or what work the concept is performing. One way to try to figure this out is to reflect on our understanding of the relationship between Aboriginal title and the Crown's radical title before the *Tsilhqot'in* decision, describe *Tsilhqot'in*'s discussion of radical title, and then consider whether it adds anything to the concept of sovereignty.

Radical Title Pre-*Tsilhqot'in*

Pre-*Tsilhqot'in* it was generally understood that the Crown acquired radical title when it asserted sovereignty. The Crown's radical title was burdened by Aboriginal title. ("Radical title" is also referred to as the "ultimate" or "underlying" or "final" title.). See, for example, the Privy Council decision in *St. Catherine's Milling and Lumber Co v The Queen* (1888), 14 AC 46, [1888] JCJ No 1 at para 6: "[T]here has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished." See also *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 at para 145: "Aboriginal title is a burden on the Crown's underlying title. However, the Crown did not gain this title until it asserted sovereignty over the land in question."

Just what Aboriginal title is, how large an interest it is, and therefore how much of a burden it is on the Crown's radical title has been described in various ways. Those ways range from the dismissive "personal and usufructuary right, dependent upon the good will of the Sovereign" in *St. Catherine's* (at para 6) to that same case's expansive identification of Aboriginal title as an "Interest other than that of the Province" (at paras 10 and 12) and therefore an interest to which the Provincial Crowns' ownership of the "Lands, Mines, Minerals, and Royalties" within their boundaries is subject, pursuant to section 109 of the *Constitution Act, 1867*, 30 & 31 Vict, c 3. The Judicial Committee of the Privy Council's decision in *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 AC 399 at 402-404 and 409-410 (quoted in *Calder v Attorney General of British Columbia*, [1973] SCR 313, 1973 CanLII 4 at 354-355 and 401-402) reinforced the latter expansive understanding of Aboriginal title within the British Empire: "[T]itle to land occupied by a native community … is prima facie based … on a communal usufructuary occupation,

which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference." What is also clear in the pre-*Tsilhqot'in* jurisprudence is that the Crown's pre-surrender radical title is not a beneficial interest. The Crown only acquires the beneficial interest once the land is "disencumbered" of Aboriginal title: *St. Catherine's* at 59; *AG Canada v AG Quebec*, [1897] AC 199 at 205, 206; *Smith v R*, [1983] 1 SCR 554 at 562. Aboriginal title is therefore a very large interest.

Another way to approach the question of the content of the Crown's radical title pre-*Tsilhqot'in* is to ask what duties the Crown owed as a result of acquiring radical title and what rights or powers it gained when it acquired radical title.

On the question of the Crown's duties, our pre-*Tsilhqot'in* understanding was that there were none arising from radical title. *Guerin v The Queen*, [1984] 2 SCR 335, 1984 CanLII 25 is most instructive. The only reason the Court in *Guerin* discusses the Crown's radical title is that Aboriginal peoples have always had to deal with the Crown because Aboriginal title is only alienable to the Crown, i.e., they are vulnerable. In *Guerin* (at 376), Dickson J (as he then was) addressed the source of the Crown's fiduciary duty, stating "[t]he conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown." It is the inalienable-except-to-the-Crown nature of Aboriginal title that gave rise to the fiduciary duty owed by the Crown to Aboriginal people. The source of the fiduciary duty was not the Crown's radical title.

On the question of the rights or powers associated with radical title pre-*Tsilhqot'in*, the only entitlement was the Crown's exclusive entitlement to acquire the burden on its radical title by consent, i.e. by treaty in conformity with the terms of the Royal Proclamation, 1763. Any power to diminish Aboriginal title was not a power associated with radical title, but rather with sovereignty. The Crown as sovereign had the power to diminish Aboriginal title if it did so constitutionally — and just what it took to do so constitutionally changed over time. The Crown lost the ability to make laws by prerogative authority that impinged on Aboriginal title once it established a representative legislature; the representative legislature lost the power to extinguish Aboriginal title unilaterally with the coming into force of section 35 of the *Constitution Act, 1982*.

The content of the Crown's radical title pre-*Tsilhqot'in* was therefore very limited. That limited nature may be why radical title was so little discussed by the Supreme Court pre-*Tsilhqot'in.* In addition to the decision in *St. Catherine's Milling* rendered by the Privy Council as Canada's final court of appeal, and the (unnecessary) discussion in *Guerin* already referenced, only three other decisions touch on radical title: *Calder v Attorney General of British Columbia*, [1973] SCR 313, 1973 CanLII 4 at 354-355, quoting *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 AC 399 at 402-404; *R v Van der Peet*, [1996] 2 SCR 507, 1996 CanLII 216 at para 39, relying on *Mabo v Queensland (No 2)* (1992) 175 CLR 1, [1992] HCA 23 at 58; and *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 at para 145 (using radical title to set a date for proof of Aboriginal title). In most of these instances the Supreme Court merely quotes the words of others rather than developing the concept itself.

Radical Title in *Tsilhqot'in*: The Supreme Court's Exposition

In *Tsilhqot'in*, however, the Court develops the concept of radical title in its own words. The Court begins (at para 12) by attributing the invocation of radical title as the theory underlying Aboriginal title to Dickson J in *Guerin*. His judgment is said to be the "starting point" for

characterizing the legal nature of Aboriginal title (at para 69). (*St. Catherine's Milling* is not cited in *Tsilhqot'in*.) Dickson J is said to have held that the Crown acquired radical title to all the land in British Columbia at the time of assertion of European sovereignty, but this Crown title was burdened by the pre-existing and independent legal interests in land of the Aboriginal peoples who occupied and used the land prior to the arrival of Europeans (at paras 12 and 69, citing *Guerin* at 379-382). The idea of Aboriginal title attaching "as a burden on the underlying title asserted by the Crown at sovereignty" is reiterated in *Tsilhqot'in* (at para 75), as is the characterization of Aboriginal title as "an independent legal interest" (at paras 12, 69).

The Court then comments on the content of the Crown's title. Radical title is apparently "what is left when Aboriginal title is subtracted from it" (at para 70). And because Dickson J said in *Guerin* (at 382) that Aboriginal title is a beneficial interest in land, the Court concludes that the Crown "does not retain a beneficial interest in Aboriginal title land" (at para 70, emphasis added). They later add that "[t]he Crown's underlying title in the land is held for the benefit of the Aboriginal group and constrained by the Crown's fiduciary or trust obligation to the group" (at para 85).

Continuing with the "subtraction" idea, the Court next asks: "What remains of the Crown's radical or underlying title to land held under Aboriginal title?" (at para 71). The answer, according to the Court's interpretation of the authorities, is two things: (1) the fiduciary duty the Crown owes Aboriginal people when the Crown deals with Aboriginal lands, and (2) the right to encroach on Aboriginal title if the government can justify its encroachment (para 71).

Radical Title Post-*Tsilhqot'in:* Implications and Questions

What are we to make of the Court's explication of the Crown's radical title in *Tsilhqot'in*? Importantly, the general understanding that the Crown acquired radical title at the time of assertion of sovereignty, but burdened by Aboriginal title, remains the same. On this fundamental idea, there is no change.

What does the Court's emphasis on Aboriginal title as "an independent legal interest" add to that basic idea? It appears to be an acknowledgment of two things: first, that the Crown is not the source of Aboriginal title, and, second, that Aboriginal title is capable of being vindicated in a competition with the Crown, i.e., it is enforceable against the Crown. Again, these are important ideas although they have been around since *St. Catherine's*.

But what are we to make of the idea that radical title is "what is left when Aboriginal title is subtracted from it" or that the appropriate question is what "remains of the Crown's radical or underlying title to land held under Aboriginal title?" This way of conceptualizing radical title is attributed to section 109 of the *Constitution Act, 1867* which makes Provincial ownership "subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same" and to *Delgamuukw* (presumably a reference to para 175 where Lamer CJ holds that, while section 109 vests underlying title in provincial Crowns, it qualifies provincial ownership by making it subject to the "any Interest other than that of the Province in the same" and noting that in *St. Catherine's Milling*, the Privy Council held that Aboriginal title was such an interest). The subtraction and remainder language is a new and metaphorical way to talk about the concept of the Crown's radical title being burdened by or subject to Aboriginal title but it is not obvious that the new language adds anything of value.

The Court's conclusion that the Crown "does not retain a beneficial interest in Aboriginal title land" is perhaps the most troubling specific passage. It suggests that, at least before an actual declaration of Aboriginal title, the Crown's radical title is a beneficial interest. It may be wrong to rely too heavily on one word, but "retain" means "to keep or to hold, to continue to have." The Court could have said that, because Aboriginal title is a beneficial interest in the land, the Crown's radical title cannot be a beneficial interest, but it did not. Instead it implies that Aboriginal title takes away the Crown's beneficial title. At best, this seems like a confusing way to frame the issue but it also seems to contradict the idea that the Aboriginal title is independent of the Crown's interest and came first.

It is difficult to know what to make of the later idea (at para 85) that the Crown's radical title "is held for the benefit of the Aboriginal group." Is the Court really suggesting that the Crown holds its radical title in trust for the Aboriginal group? If so then the Aboriginal group should be able to collapse the trust and take a full legal and beneficial title – an idea the Privy Council scuttled a long time ago in *St. Catherine's*.

Lastly we come to the Court's idea that what remains of the Crown's radical title once Aboriginal title is subtracted are two related elements: (1) the fiduciary duty the Crown owes Aboriginal people when the Crown deals with Aboriginal lands, and (2) the right to encroach on Aboriginal title if the government can justify its encroachment.

As for the fiduciary duty (and as we have already noted above) it seems to us that the foundation for the duty is not the Crown's radical title but rather its inalienable-but-to-the Crown quality. It is not helpful to ascribe such a duty to the Crown's title. The Court has spent a lot of time and effort in narrowing the ambit of the Crown's fiduciary duty to Aboriginal peoples in cases like *Wewaykum Indian Band v Canada*, [2004] 4 SCR 245 at paras 72 *et seq* and *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623, 2013 SCC 14 (CanLII). It seems cavalier to suggest that radical title is the source of fiduciary obligations rather than ideas such as vulnerability or (better still) reasonable expectations of a duty of undivided loyalty: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 (CanLII), [2011] 2 SCR 261.

And what of the Court's enumeration of a "right to encroach" as part of the Crown's radical title? Surely the Crown's power to encroach, constitutionally exercised, is an aspect of sovereignty, or *imperium*. Whether the encroachment was an exercise of raw political and military power in the early days of European exploration and settlement, or unilateral extinguishment by federal legislation pre-1982, or a post-1982 justifiable infringement, radical title cannot justify a power to encroach. Encroachments are the acts of a sovereign exercised in lawful ways. Sanctioning this power as an element of the Crown's radical title does not legitimize or add the patina of respectability to what is occurring.

Conclusion

It appears that there is more to the Crown's radical title than we thought pre-*Tsilhqot'in*. If the subtraction/retaining framing is not a mis-framing, then Aboriginal title is now conceived of as

something that takes away from the Crown's radical title. The Court's conceptualization of radical title now includes what was formerly thought of as the sovereign's power (executive or the legislature) to encroach upon Aboriginal title.

None of the Court's new ideas about the Crown's radical title seem particularly helpful or explanatory. Some of them obscure the exercise of political power by wrapping that exercise in the concept of title rather than sovereignty. In the end, we conclude that the notion of the Crown's radical title does not add anything valuable to the concept of sovereignty; instead it is mere obfuscation of the sort that the Court decried in *Delgamuukw* (at para 122) in relation to the much misunderstood decision in *St Catherine's*.