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Establishing Aboriginal Title: A Return to *Delgamuukw*

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Case commented on: *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44

The declaration of Aboriginal title by the Supreme Court of Canada on June 26, 2014 — a first in Canada — is a momentous decision that should have long-lasting significance for the Tsilhquot'in Nation, other Aboriginal groups, and the rest of Canada. The unanimous Supreme Court decision made new law in the areas of the duty to consult and accommodate, governments' justification of infringements of Aboriginal title, and federalism — matters that my colleagues Nigel Bankes, Sharon Mascher and Jennifer Koshan will be writing about. On the law of Aboriginal title — the focus of this post — the decision is extremely important for at least two reasons. First, as part of its return to principles set out in the Court's 1997 decision in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, *Tsilhqot'in Nation* includes a return to an equal role for Aboriginal perspectives that includes Aboriginal laws, instead of the exclusive focus on Aboriginal practices that was a feature of *R v Marshall; R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220, the Court's second post-1982 decision on Aboriginal title. Second, *Tsilhqot'in Nation* clarifies an understanding of occupation that accords with a territorial approach to Aboriginal title, one that does not require and piece together intensive use of well-defined tracts of land. In doing so, the Court turned its back on the approach it took in *Marshall/Bernard*, an approach that was the source of the arguments made by the governments of Canada and British Columbia in *Tsilhqot'in Nation* and the basis of the British Columbia Court of Appeal decision in this case (*William v British Columbia*, 2012 BCCA 285). The June 26 decision therefore brings increased certainty to the law of Aboriginal title by clarifying the type of occupation that will ground Aboriginal title. It also increases the likelihood of more successful Aboriginal title claims and, hopefully, more intensive and good faith negotiations in modern land claims and treaty processes.

The unanimous decision in *Tsilhqot'in Nation* is written by Chief Justice Beverley McLachlin. She is the only member of the current Supreme Court who also heard *Delgamuukw* in 1997. In addition, she authored the majority judgment in *Marshall/Bernard* in 2005.

Chief Justice McLachlin tells us relatively little about the Tsilhqot'in people and their occupation of their traditional territory or about the evidence presented during 339 trial days before Justice David Vickers in the Supreme Court of British Columbia (*Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700). Justice Vickers' 1,382 paragraph judgment summarizes much of that evidence, but the Supreme Court of Canada's focus is on the law. They do mention that the immediate roots of this action are found in the province's 1983 grant of a forest licence to cut

trees in part of the Tsilhqot'in Nations' traditional territory. After blockades and unsuccessful negotiations, the Xeni Gwet'in First Nation — one of six bands that make up the Tsilhqot'in Nation — sued for a declaration prohibiting commercial logging. That lawsuit was amended in 1998, one year after *Delgamuukw* was decided, to include a claim for Aboriginal title on behalf of all Tsilhqot'in people. No mention is made of the gold and copper mine proposed for the area, but the Tsilhqot'in peoples opposition to that proposed mine and its consequences for area lakes and rivers is well known and another factor sustaining their quest for a say over at least some of their traditional territory (see, e.g., Kristian Secher, "Tsilhqot'in celebrate as feds again block New Prosperity mine", *The Hook,* 27 February 2014).

The test for Aboriginal title

The Chief Justice begins the discussion of the test for Aboriginal title by emphasising occupation. Initially, the test is put in the context of what she calls "a semi-nomadic indigenous group", a characterization of the six bands making up the Tsilhqot'in Nation (para 24, 29), but the test does apply to claims for Aboriginal title by all Aboriginal groups. The test is a highly contextual one (para 37). Intensity and frequency of use is to vary with the characteristics of the Aboriginal group and the nature of the land (para 37). The characteristics of the Aboriginal group include "its laws, practices, size, [and] technological ability" (para 41).

Chief Justice McLachlin reiterates (at para 26) the three-part test for Aboriginal title that was first set out in *Delgamuukw:*

> (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.

In her words, the type of occupation that grounds Aboriginal title must have three characteristics: "(i) it must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*" (para 25). The sufficiency of the Tsilhqot'in peoples' occupation was the main point of disagreement between the Tsilhqot'in Nation and government and also between the judges of the two lower courts.

In a puzzling paragraph, the Chief Justice next makes the point that the three elements of the *Delgamuukw* test could be considered to be related aspects of a single concept, quoting from the High Court of Australia's decision in *Western Australia v Ward* (2002) 213 CLR 1 at para 89 for the idea that there is little merit in assessing the different elements of occupation separately (para 31). The Chief Justice ties the idea of a holistic approach to Aboriginal title to the Aboriginal perspective, saying that "ancestral practices" should not be forced "into the square boxes of common law concepts" (para 32). However, she then notes that sufficiency, continuity, and exclusivity are "useful lenses through which to view the question of Aboriginal title" (para 32) and in the following paragraphs she proceeds to consider each of those elements separately. A role for a more integrated approach to Aboriginal title is therefore left up in the air. Even more confusing is the fact this paragraph ends with the metaphor of translation, a metaphor introduced in the Chief Justice's judgment in *Marshall/Bernard.* In that earlier case she stated (at para 48) that "[t]he 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." In *Tsilhqot'in Nation,* she states that forcing "ancestral practices … into the square boxes of common law concepts" is to be avoided because it would "frustrate[e]

the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights" (para 32). The problems with *Marshall/Bernard*'s portrayal of Aboriginal title as a translated right held under English common law were succinctly described in Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) Can Bar Rev 255 at 279-81, an article unfortunately not cited by the Court in *Tsilhqot'in Nation*. Is the Chief Justice suggesting in this paragraph in *Tsilhqot'in Nation* that Aboriginal interests are to be translated into modern legal rights that are not common law concepts? Is this simply a way of saying Aboriginal title is *sui generis* (something she does say at para 72)? Or that it is an inter-societal concept? And what effect do those ideas have on the three elements of the *Delgamuukw* test?

Immediately following that particular paragraph, the Chief Justice turns to the first of the three elements of the *Delgamuukw* test.

On the central question of the sufficiency of occupation, the Chief Justice reaffirms *Delgamuukw* by holding that the issue must be looked at from both the common law and the Aboriginal perspective (para 34). And the Aboriginal perspective includes "laws, practices, customs and traditions of the group" (para 35), another *Delgamuukw* point. As pointed out in the opening paragraph, this is one of the ways in which the Chief Justice breaks with *Marshall/Bernard* and reaffirms the approach in *Delgamuukw*, i.e., she includes the laws of Aboriginal peoples and not just the facts of their physical occupation. (The omission of Aboriginal law in *Marshall/Bernard* was critiqued in the concurring judgment by Justices Fish and LeBel in that case.)The Aboriginal perspective appears to be taken more seriously, with the Chief Justice acknowledging that it might require a conception of the possession of land that differs from that of the common law (para 41).

In a key passage, the Chief Justice spells out the standard for sufficient occupation (para 38):

> [T]he Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.

On the sufficiency of occupation point, the Chief Justice also adopts (para 39) the reasoning of Justice Cromwell (as he then was) in *R v Marshall*, 2003 NSCA 105, rather than her own reasoning in *Marshall/Bernard* (the appeal from the Nova Scotia Court of Appeal decision). Justice Cromwell had analogised the standard to establish Aboriginal title to the requirements for general occupancy at common law, requiring an actual entry and actions from which an intent to occupy land could be inferred. The wide variety of acts that could be evidence of an intention to occupy land is emphasised, varying from obvious practices such as "enclosing, cultivating, mining, building upon, maintaining, and warning trespassers of land" to acts such as "cutting trees and grass, fishing in tracts of water, and even perambulation" (para 39). Exactly which acts will be sufficient to prove Aboriginal title depends on the nature of the land and the way of life of the Aboriginal people in question.

The Chief Justice also adopts Justice Cromwell's positioning of the standard of occupation, from the common law perspective, as lying between the minimal occupation which would permit a

person to sue a wrongdoer in trespass and the most onerous standard required to ground title by adverse possession as against a true owner (para 40).

Justice Vickers summarized (para 960 BCSC) the evidence in this case as revealing village sites occupied for portions of each year and tied to cultivated fields, hunting grounds and fishing sites by networks of foot trails, horse trails and watercourses that defined the seasonal rounds. He found these sites and their interconnecting links set out large tracts of land in regular use by Tsilhqot'in people at the time the Crown asserted sovereignty. Thus, for Justice Vickers, a finding of Aboriginal title to approximately 40 percent of the Claim Area was warranted (and the Claim Area was itself only about five percent of the Tsilhqot'in's traditional territory).

The key point of disagreement in the lower courts and between the parties was whether a court's approach to occupation should be what came to be called a "territorial approach" or whether it should be what became known as a "site specific approach."

The BC Court of Appeal called Justice Vickers' approach a territorial approach (paras 125, 214 BCCA) that had been rejected by the Supreme Court of Canada in *Delgamuukw* (based on the examples used in that case rather than on the test it articulated) and, especially, in *Marshall/Bernard* (paras 219-225 BCCA). The Crown had argued, and the Court of Appeal agreed, that Aboriginal title could only be proven and declared for well-defined, intensively used areas. The Tsilhqot'in Nation characterized this approach as a "postage stamp" approach to Aboriginal title, a characterization Justice Vickers had agreed with (para 610 BCSC).

To the surprise of many, the Supreme Court of Canada rejected the narrow "postage stamp" or "site specific" approach to Aboriginal title used by the Court of Appeal, and adopted the broader territorial approach of Justice Vickers. Indeed, the Chief Justice recognized that *Delgamuukw* affirmed a "territorial used- based approach to Aboriginal title" (para 57). Thus the primary area of uncertainty in the test for Aboriginal title, introduced by *Marshall/Bernard*, has now been clarified by the Supreme Court.

In her discussion of Aboriginal title, the only mention by the Chief Justice of her judgment in *Marshall/Bernard* is in two paragraphs that refute British Columbia's interpretation of her decision in that 2005 case (paras 43-44). The province had argued that *Marshall/Bernard* rejected a territorial approach to Aboriginal title and instead required intensive use of specific, defined sites. The Chief Justice, however, held that *Marshall/Bernard* required only "sufficiently regular and exclusive use" of the land and followed *Delgamuukw* on this (para 44). She did acknowledge that her *Marshall/Bernard* decision framed the issue of sufficient physical possession in terms of whether the common law test for possession was met (para 44). However, she stated that the need to consider the perspective of the Aboriginal group was not abandoned in her earlier decision.

With all due respect, the Chief Justice's lack of reliance in *Tsilhqot'in Nation* on her own decision in *Marshall/Bernard* speaks more loudly than does her insistence that *Marshall/Bernard* has been misunderstood. Many people feared a negative outcome in *Tsilhqot'in Nation* based on the *Marshall/Bernard* decision.

Charlotte A. Bell, Q.C., "A Corner Turned: Supreme Court of Canada Decisions of the Year Past" (2006) 34 SCLR (2d) 433 at 436 sets out the general understanding of the difference between *Delgamuukw* and *Marshall/Bernard* after the latter case was decided:

> 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.
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> 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.

See also Kent McNeil, "Aboriginal Title in Canada: Site-Specific or Territorial?" (at 5), arguing that even though the territorial approach was not explicitly adopted in *Delgamuukw*, Chief Justice Lamer's decision "points undeniably in that direction." McNeil traces the British Columbia Court of Appeal's "postage stamp" approach directly back to Chief Justice McLachlin's decision in *Marshall/Bernard*, noting that "she disagreed explicitly with the territorial approach that had been taken by Cromwell J.A. (as he then was) of the Nova Scotia Court of …, favouring instead a site-specific approach whereby Aboriginal title has to be established by proof of physical occupation of specific sites …".

The governments of British Columbia and Canada and the British Columbia Court of Appeal adopted what they understood to be *Marshall/Bernard's* changes to the test set out in *Delgamuukw*. *Marshall/Bernard* has been forcefully criticized for ignoring Aboriginal law and for insisting on intensive use of specific sites in order to found Aboriginal title. See, for example, Paul LAH Chartrand, "R. *v. Marshall; R. v. Bernard*: The Return of the Native" (2006) 55 UNBLJ 135; Margaret McCallum, "After *Bernard* and *Marshall*" (2006) 55 UNBLJ 73; S. Imai, "The Adjudication of Historical Evidence: A Comment and an Elaboration on a Proposal by Justice LeBel" (2006) 55 UNBLJ 146; and Nigel D Bankes, "*Marshall* and *Bernard*: Ignoring the Relevance of Customary Property Laws" (2006) 55 UNBLJ 120. Unfortunately, none of this scholarly literature, nor that of Slattery, Bell or McNeil cited above, is cited by the Court (though earlier pieces by Slattery and McNeil are cited).

Tsilhqot'in Nation's repudiation of the widespread (mis)understanding of *Marshall/Bernard*, even if not acknowledged to be such, is welcomed — and necessary for a successful claim for Aboriginal title in this case.

On the element of continuity, the second part of the test for Aboriginal title in *Delgamuukw*, the Chief Justice adds nothing to what was said in that case (para 45). *Delgamuukw* required that continuity between present and pre-sovereignty occupation be proved if the former was relied upon as proof of the latter. However, she does expand somewhat on the element of exclusivity, the third part of the test. *Delgamuukw* required that the Aboriginal group (or groups under the notion of shared exclusivity) had to have the intent and capacity to retain exclusive control over the land. The Chief Justice expands on exclusivity with examples similar to those set out in *Delgamuukw* (para 48), and adds an emphasis on context and the need to use both the common law and the Aboriginal perspective (para 49).

After setting out the clarified test for Aboriginal title, the Chief Justice then applies it to the facts of this case noting that, because it is a question of fact, the issue is whether Justice Vickers made a palpable and overriding error (para 52). The Chief Justice found that there was no basis on which to disturb the fact findings of Justice Vickers on the elements of sufficiency, continuity or exclusivity.

The content of Aboriginal title

Chief Justice McLachlin also took the opportunity in *Tsilhqot'in Nation* to discuss the characteristics of Aboriginal title. Before doing so, however, she discusses the content of the Crown's underlying or radical title in Aboriginal title land, a notion seldom discussed in Canadian jurisprudence.

She begins with the conceptually difficult but not new idea that the Crown acquired underlying title to all the land in British Columbia at the time of assertion of European sovereignty (para 69). Following that assertion, Aboriginal title is conceived of as a burden on the Crown's underlying title. The Chief Justice also says something about the content of the Crown's underlying title, stating that it is "what is left when Aboriginal title is subtracted from it" and it is not a beneficial interest in the land (para 70). Once Aboriginal title is declared, as it was in this case, what remains of the Crown's underlying title is two things: first, a fiduciary duty owed to the Aboriginal title holders when the Crown is dealing with the Aboriginal land, and, second, the right to encroach on the Aboriginal title if the government can justify the encroachment (paras 71, 85).

On the content of Aboriginal title, as the Chief Justice notes, *Delgamuukw* established that it "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes" (para 67). It is a beneficial interest in the land (para 70), conferring "the right to use and control the land and to reap the benefits flowing from it" (para 2). The incidents that attached to that title are analogised to those associated with fee simple titles: "the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land" (para 73). Aboriginal title holders may use their Aboriginal title land in modern ways if they wish to do so (para 75). These aspects of title — all previously set out in *Delgamuukw* — make up what the Chief Justice calls the "positive proposition" associated with the content of Aboriginal title (para 15).

There is also what the Chief Justice calls a "negative proposition" associated with Aboriginal title, namely, that the Aboriginal title holder's use of the land "must not be irreconcilable with the nature of the group's attachment to that land" (para 15, quoting *Delgamuukw* at para 117). The Chief Justice elaborates on this "important restriction" which she directly ties to the collective nature of Aboriginal title, a collective nature that not only encompasses the present members of the group, but also succeeding generations (para 74). As a result of this negative proposition or, to use *Delgamuukw*'s words, this inherent limitation, Aboriginal title land can only be alienated to the Crown; cannot be encumbered in ways that would prevent future generations from using and enjoying it; and cannot be developed or misused in ways that would substantially deprive future generations of the benefit of the land (para 74). Nonetheless, the

Chief Justice states that even permanent changes to the land may be possible. No examples are given. Although the Chief Justice elaborates somewhat on this inherent limitation on Aboriginal title, the scope of this limitation and the types of activities that are restricted are still uncertain and their resolution awaits a case in which the inherent limitation is itself the issue.

Other questions remain unanswered by *Tsilhqot'in Nation*. Neither continuity nor exclusivity were contentious in this case. Thus, for example, the significance of overlapping and competing claims to Aboriginal title over the same territory is uncertain.

Conclusion

As a result of the *Tsilhqot'in Nation* decision, we will most likely see many more First Nations bringing forward to the courts claims for declarations of Aboriginal title. Within hours of the *Tsilhqot'in Nation* decision the Tahltan First Nation announced it planned to launch an Aboriginal rights and title claim (Emma Crawford Hampel and Nelson Bennett "First Nations armed with Supreme Court ruling put mines in their sights" June 27, 2014, *The First Perspective*).

Tsilhqot'in Nation's clarification of the test for Aboriginal title and its return to the promise and more expansive nature of the territorial approach in *Delgamuukw* should also affect the positions of both First Nations and governments at treaty negotiation tables. Although the only question the rest of Canada (or at least the mainstream media) seemed to be interested in is the impact of the Court's decision on resource development, it seems likely that a much broader understanding of just how the ground has shifted will become both a necessity and a good in the future.