The Troubled Sequel:
Canadian Aboriginal Title revisited in the BC Court of Appeal

The Court of Appeal for British Columbia has recently handed down the much-awaited decision in *William v British Columbia*[1] - an appeal from a 2007 Supreme Court decision[2] regarding an important Canadian Aboriginal title and rights claim. In the original action, the chief of the Xeni Gwet'in community (one of six Tsilhqot'in bands) had sought a declaration of Tsilhqot'in Aboriginal title and Aboriginal rights (hunting, trapping and trading) in relation to part of the traditional Tsilhqot'in territory in the west central interior of British Columbia.[3] The action was provoked by proposed logging activities in the area, which the Tsilhqot'in people felt would involve the removal of their wood without benefit to their community (despite its housing and employment problems).[4] On the subject of Aboriginal title, this litigation is a slow-coming sequel to the watershed contemporary Canadian case of *Delgamuukw v British Columbia* (1997).[5] It addresses the important question of exactly what level of historical occupation is required for an Aboriginal title claim – the trial judge steering a middle path between arguments presented, but the Court of Appeal taking a significantly narrower approach.

The Canadian Context

The relevant history here can be briefly recounted. For an important period in the 1990s the key controversies in Canada produced a focus in the courts upon specific Aboriginal defences to fishery prosecutions (cf *Yanner v Eaton*[6] in Australia). The Canadian principles therefore developed for a time in that specific rights context, and indeed under the influence of the 1982 constitutionalisation of 'Aboriginal rights' by s 35(1) of the Canadian *Constitution Act*.[7] The *Sparrow* decision of 1990[8] focused particularly upon the post-*Constitution Act* status of identified Aboriginal rights, formulating a requirement that post-1982 infringements of s 35 rights must be 'justified'.[9] In broad terms, this methodology involves a search for a 'compelling and substantial legislative objective' and consistency with the Crown's fiduciary obligations to Aboriginal peoples (with specific inquiries into the scale of infringement and issues of compensation and consultation).[10] *R v Van der Peet*[11] then laid down the core of the contemporary framework, still in the specific rights context. Lamer CJC[12] identified there the 'purpose' of s 35(1),[13] and declared that in order to be an 'Aboriginal right' protected by the provision, 'an activity must be an element of a practice, custom or tradition integral to the distinctive [pre-contact] culture of the

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1 2012 BCCA 285.

2 *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700; [2008] 1 CNLR 112.

3 The claim area was made up of two parcels: 'Tachelach'ed' (or the 'Brittany Triangle') and the 'Trapline Territory': *Tsilhqot'in* (2007) at [40].

4 See *Tsilhqot'in* (2007) at [22]ff, [39], [98], [1295].

5 (1997) 153 DLR (4th) 193.

6 (1999) 201 CLR 351.

7 Section 35(1) provides: 'The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed'.

8 *R v Sparrow* (1990) 70 DLR (4th) 385.

9 At 407-10 (developed further in later cases).

10 See *R v Gladstone* (1996) 137 DLR (4th) 648 at [54]-[55].

11 (1996) 137 DLR (4th) 289.

12 With whom La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ concurred.

13 '…the protection and reconciliation [with Crown sovereignty] of the interests which arise from the fact that prior to the arrival of Europeans in North America Aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions.': (1996) 137 DLR (4th) 289 at 303, 309-10.

Aboriginal group claiming the right'.[14] This test produced controversy in the succeeding cases, particularly as regards its reliance on a notion of cultural centrality and its capacity to accommodate cultural change.

The *Delgamuukw* decision of 1997 brought the Canadian Supreme Court back to a more comprehensive Aboriginal claim, marking some retreat from the emphasis upon s 35(1) and a return to the language of the common law. Lamer CJC explained[15] that common law Aboriginal title is protected 'in its full form' by s 35(1), and that it is established in Canada essentially upon proof of exclusive occupation (by reference to physical occupation and Aboriginal law) as at the acquisition of sovereignty (not 'contact' as per the specific rights cases). It confers a right to the land itself and an entitlement to use it for a variety of purposes, subject only to the limitation that such uses must not be 'irreconcilable' with the nature of the attachment to the land. As to the exact relationship between 'rights' and 'title', Lamer CJC explained that 'rights' did not depend on an underlying claim to title or the unextinguished remnants of title, and that title is not merely a sum set of individual rights with no independent content. Aboriginal title, he said, is a distinct species of Aboriginal right arising from a sufficiently significant connection with a piece of land.

The *Tsilhqot'in* trial decision in summary

The principles of *Van der Peet* and *Delgamuukw* were applied in the *Tsilhqot'in* trial decision.[16] Critically however, the judge (Vickers J) had concluded that a late attempt by the plaintiff to re-frame the original Aboriginal title claim, so as to include claims over smaller portions, would be prejudicial to the defendants and could not be allowed.[17] Given this, and his finding that sufficient occupation (at sovereignty) had not been established over the whole claim area, his Honour had considered he was not able to make a declaration of Aboriginal title.[18] However, he had noted the broader significance of the case and had taken the opportunity to set out the areas over which Aboriginal title did in his opinion exist on the evidence.[19] In doing so, his Honour had rejected the government parties' restrictive 'postage stamp' approach (as described by the plaintiff) to requisite Aboriginal occupation. Vickers J also did proceed to identify and declare the existence of certain specific Aboriginal (hunting and trapping) rights – including, notably, a right to trade in skins and pelts to secure a 'moderate livelihood' (without confinement to species), and a right to capture and use horses.[20]

Justice Vickers then went on to hold that for definitional[21] and constitutional[22] reasons the relevant BC forestry legislation[23] was inapplicable to forest resources on Aboriginal *title* lands. He also added, in case he was wrong on that point (and indeed for the purposes of the specific Aboriginal rights he had identified), that the forestry proposals constituted infringements on both the Aboriginal title and Aboriginal rights in issue – infringements that had not been justified as required under the Canadian doctrine (see above).[24]

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14 At 310 (bracketed note added).
15 (1997) 153 DLR (4th) 193 at 240-3, 249-53. Cory, Major and McLachlin JJ concurred.
16 *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700; [2008] 1 CNLR 112.
17 *Tsilhqot'in* (2007) at [102]-[129], [957].
18 See at [792]-[794], [825], [893], and [957].
19 See at [796]ff, [958]ff. This apparently encompassed about 40% of the claim area.
20 At [1240]-[1241], [1246], [1263], [1265].
21 At [978]-[981], [1012]-[1013].
22 At [1024]ff, [1032] and [1048].
23 *Forestry Act, R.S.B.C.* 1996, c. 157.
24 *Tsilhqot'in* (2007) at [1053], [1074]ff, [1107]ff, [1141], [1276]ff, [1294].

Ultimately then, Vickers J found that the Tsilhqot'in people were successful in the hypothetically recast claim relating to Aboriginal title (the formal dismissal of the actual claim was without prejudice to the making of new claims for declarations and damages[25]), and successful in the non-time barred portion of the claim relating to Aboriginal rights. The parties attempted to reach a settlement following the trial decision, on the strong urging of Vickers J, however ultimately the matter did proceed to appeal.[26]

The Appeal: Preliminary matters

A range of issues emerged on appeal[27] with respect to: the findings as to requisite occupation, the precise consequences of the manner in which the title claim had been advanced, the appropriate rights holder, the nature and extent of the specific Aboriginal rights identified, and the approach taken to infringement and justification. On the question of specific Aboriginal rights, and the issues relating to infringement and justification, the Court of Appeal largely agreed with the trial judge. However these matters were far less significant than the issues relating to Aboriginal title, and the conclusions on the Aboriginal title claim (also potentially more relevant to Australia) are the focus of the remainder of this article.

Justice Groberman J (Levine and Tysoe JJ agreeing in full) noted first his conclusion, contrary to that of the trial judge, that in procedural terms the plaintiff's claim *was* sufficiently pleaded to allow the court to find that Aboriginal title had been proven in respect of only part of the claim area.[28] Groberman J did feel that where a trial has proceeded 'on a certain theory' of Aboriginal title, it would be prejudicial to the defendants if the plaintiff were allowed to assert a 'completely different theory' in argument. Yet he concluded that the trial judge had apparently recast the lesser claim still on the basis of the plaintiff's 'territorial theory' (as characterised by the defendants), rather than the defendants' own narrower view (see below). Hence if the territorial theory was correct, Groberman J felt a declaration could and should have been made over the more limited territory. Yet he noted that if the defendants' theory was correct, this case did not provide a proper basis for findings built upon that narrower view (although dismissal of the territorial claim would not bar future site-specific claims).[29]

The Court of Appeal turned next to the identity of the 'proper rights holder' – an issue that has been similarly contentious in Australia. The trial judge had concluded that this was the Tsilhqot'in Nation. Groberman J confirmed this, with reference to the collective nature of the Tsilhqot'in territorial entitlements, despite the 'practical problems' it may give rise to owing to existing licensing arrangements and the lack of a Tsilhqot'in political structure with which governments could readily undertake required consultation. Groberman J noted that the Xeni Gwet'in (the smaller governmentally-recognised band) was the 'caretaker' or 'custodian' of the Tsilhqot'in rights within the claim area, and thereby had a special role to play in engaging with governments in respect of them.[30]

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25 At [1335]-[1336].

26 See *William v British Columbia* 2009 BCCA 83.

27 *William v British Columbia* 2012 BCCA 285.

28 At [104]-[119].

29 At [120]-[131].

30 At [137]-[157].

The Appeal: Aboriginal title

On the critical questions regarding proof of Aboriginal title, the defendants argued that the claimants must establish historical intensive occupation of areas with definite boundaries. The plaintiff emphasised the *Delgamuukw* requirement of 'exclusivity' and, as at the trial, objected to the suggestion that they must prove intensive regular use of well-defined areas because in a semi-nomadic context this failed to give effect to the Aboriginal perspective.[31] Against this backdrop, Groberman J emphasised that reconciliation of Aboriginal rights with Crown sovereignty 'demands not only a framework that is jurisprudentially defensible, but also one that presents a practical compromise and encourages consensual settlement'.[32] He also emphasised, as a 'fundamental' preliminary, his view that respect for Aboriginal rights 'safeguards the unique cultures of Aboriginal groups, and preserves their abilities to continue to live according to their traditions'. He felt that such respect was the 'proper focus of an Aboriginal rights analysis'.[33] Mapped against the jurisprudential history and critical debate (in Canada and elsewhere), there is much in these preliminary points that is contentious in the Aboriginal title context. As an immediate observation, this methodology reflects a renewed emphasis on compromise, cultural preservation and the 'reconciliatory' purposes of the doctrine – which are more a (controversial) product of the Canadian constitutional provisions than common law principle. His Honour had thereby set the scene for a quite restrictive interpretation of Aboriginal title in Canada.

On reviewing the Canadian case history as it stood immediately prior to *Delgamuukw*, although arguably with some selectivity and lack of historical depth,[34] Groberman J found a title doctrine that required some 'unstated' level of occupation or use, and required that the land was of 'central significance' to the 'distinctive culture'. And his Honour emphasised that traditional use of land will not necessarily found a claim to title; it may instead found mere specific Aboriginal rights.[35] He then rightly found support for the second proposition in *Delgamuukw* (non-exclusive original occupation might found a claim for specific Aboriginal rights), and indeed for the importance of acknowledging the potential uniqueness of and variation in Aboriginal land use.[36] And he cited what he saw to be indications that the Court in *Delgamuukw* felt that intensive presence at a particular site was the basis of Aboriginal title.[37] However there was some inattention to certain aspects of the *Delgamuukw* decision, which appears to have contributed to the strictness of Groberman J's ultimate conclusions. First, there was neglect[38] of an important clarification in *Delgamuukw* that the 'central significance' requirement (so prominent for specific rights) should not be explicitly included as part of the test for title, as the occupancy requirement in that test was sufficient to establish the requisite importance.[39] Groberman J said that this idea (that 'centrality' is automatic for title lands) is only sensible for intensive site-specific claims[40] – but this view perhaps rests on insufficient attention to the relevance of original exclusivity. And this is the second problem with Gorberman J's use of *Delgamuukw*. He appears to have very much played down, despite the urgings of the plaintiff, the importance of original 'exclusivity' in the *Delgamuukw* methodology.[41] This is a concept that has long been considered an important

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31 At [209]-[211].

32 At [170], see also [239].

33 At [171], citing *R v Sappier; R v Gray* (2006) 274 DLR (4th) 75 at [26] and [33].

34 Additional cases and views on 'occupation' are canvassed in S Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), chaps 4-5 (re the United States and Canada).

35 *William* (2012) at [183], [186].

36 At [191].

37 At [221]ff.

38 See eg at [172], [223].

39 See eg *Delgamuukw* (1997) at [151].

40 *William* (2012) at [223].

41 At [205]ff, [220].

translational tool in Indigenous land rights jurisprudence across many jurisdictions. Thirdly, and just as importantly, Groberman J has neglected the insistence in *Delgamuukw* that exclusive occupation was assessed by reference to both physical occupation and systems of Aboriginal law.

Groberman J also examined the post-*Delgamuukw* Supreme Court decision in *R v Marshall; R v Bernard*[42] particularly emphasising the apparent loose equation at one point there (by McLachlin CJC for the majority) of the occupation required for Aboriginal title with the notion of 'possession' under general common law principles.[43] His Honour was correct that *Marshall* signaled some recalibrating of the *Delgamuukw* test for exclusive occupation with reference to general common law standards – the Court there noting that seasonal hunting and fishing (where the area was left in-between times to be traversed and used by anyone) gave rise only to specific rights.[44] However, *Marshall* also emphasised the flexibility and context-specific nature of the common law notion of possession, the fact that Aboriginal societies *did* often exercise such control over their village sites and larger areas (exploited for agriculture, hunting and fishing or gathering), and the importance of interpreting the requirement of physical occupation 'generously' and taking into account the Aboriginal perspective. Moreover, McLachlin CJC in *Marshall* placed more emphasis on *Delgamuukw's* notion of 'exclusivity' than Groberman J.[45]

Ultimately, armed with this apparent disinterest in broad exclusivity, Groberman J looked hard for evidence establishing intensive occupation or use of well-defined tracts of land. He found here a lack of permanent village sites (as opposed to encampments and wintering sites) and no cultivating or enclosing of fields. And while there was evidence of hunting and fishing in many parts of the claim area, he considered there were only a few specifically-delineated hunting or fishing sites, and only a few locations which may have been used 'intensively'.[46] His Honour then confirmed that the claim (albeit only some 5% of asserted traditional territory) could only be described as a 'territorial' one, as was the trial judge's recast version.[47] And Groberman J held that a territorial claim did not meet the tests from the Supreme Court cases, nor fit with the purposes behind s 35 or the rationale for common law recognition of Aboriginal title. Moreover, he saw such claims to be 'antithetical to the goal of reconciliation, which demands that, so far as possible, the traditional rights ... be fully respected without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians'.[48] This interpretation of the common law 'rationale' and reconciliatory goal (ie preservation of traditional lifestyle[49]), and indeed the troubling references to 'full respect' and 'unnecessary limitations', are destined to be controversial as the commentary on the decision emerges. For one, *Delgamuukw* made it very clear that Aboriginal *title* (as distinct from specific rights) was not confined to the preservation of traditional activities (see above).

Ultimately the Court of Appeal therefore disagreed with the trial judge's analysis on the Aboriginal title issue, but upheld his formal dismissal order on the basis that neither the claim to Aboriginal title as advanced nor the hypothetically recast version were sustainable. It was noted however that the Tsilhqot'in were entitled to pursue more site-specific title claims.[50]

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42 (2005) 255 DLR (4th) 1.

43 *William* (2012) at [198], [225].

44 Eg *Marshall* (2005) at [58].

45 *Marshall* (2005) at [56]ff.

46 *William* (2012) at [215]ff, [230].

47 At [217], [228]. Contrast the plaintiff's own view: at [209].

48 At [217]-[219], [239] (quote from [219]).

49 See also at [171], [231]-[232], and [235] ('cultural security').

50 At [241] (see also [120]-[131].

Conclusion

The appeal decision in *William* is an important step in the maturing of the contemporary Canadian Aboriginal title doctrine. Perhaps not, as commentary will quickly point out, for its sustainable refinement of the doctrine, but rather for its identification of apparently unresolved issues in its application. It suffers some disconnection from the deeper jurisprudential debates and trends in this difficult field of law, and in this respect continues the British Columbian courts' tradition of producing controversial decisions in the complex cases that emerge from this non-treaty province. In general terms, the decision might appear to unduly subjugate the Aboriginal perspective on the nature of the First Nations' rights, and revive a western bias in the assessment of land usage that has periodically plagued the cases in many jurisdictions.

The main issue in the case – precisely what level of historical occupation must be established in an Aboriginal title claim - is certainly a matter that offers up varying answers and requires further close consideration. However the Court of Appeal judgment proffers a bipolarisation of Aboriginal title 'theories' that is in truth not sustained by the legal (or political) history. The supposed 'site specific' theory of Aboriginal title has little clear precedent in Canada (beyond a few ambiguous and less than consistent passages in *Delgamuukw* and *Marshall/Bernard*), in the US, in Australia or in New Zealand. The rigorous adoption of that theory - with a determined reincorporation of the reconciliatory 'purposes' of s 35 of the *Constitution Act*, a downplaying of the long-central notion of original 'exclusivity', and some reinvention and confinement of the 'rationale' of common law aboriginal title - is a surprising step in a jurisdiction that has in recent years led the field in this area of law. It is very likely that this issue will be looked at very closely in any further appeal.