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To Dignity Through the Back Door: *Tsilhqot'in* and the Aboriginal Title Test

Andrée Boisselle[*]

I. INTRODUCTION

One of the most important aspects of the Supreme Court of Canada's judgment in *Tsilhqot'in Nation v. British Columbia*[1] consists in the clarification of the test for Aboriginal title. The judgment settles a controversy that had arisen following the Court's decisions in *R. v. Marshall*; *R. v. Bernard*[2] regarding the degree of historical use of the land consistent with the recognition of Aboriginal title. Setting aside the notion that title might only be established by Aboriginal groups on the "definite tracts of land" "intensively used" by their ancestors, the Court adopts a territorial approach to title, consistent with the fact that areas used intensively for sustenance and dwelling purposes are typically enclosed within a wider land base to which a given Indigenous society has a long-standing, living relationship, shaping its culture and its identity. This article critically examines the Court's clarification of the test. Beyond the important victory that the outcome of the case presents for Indigenous peoples across Canada, a closer look at the Court's reasoning exposes some of the troubling features of Aboriginal title doctrine, as well as other potentially deeply transformative features of this doctrine, as it now stands.

On the first count, I argue that while the Court suggests that the issue of title "must be approached from both the common law perspective and the Aboriginal perspective", it still fails to draw on Indigenous laws as a source of authoritative standards shaping the content of the title test itself. The test

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* I am grateful to Kent McNeil and Kerry Wilkins for reading a draft of this article and providing very helpful feedback. Needless to say, any shortcomings or errors are entirely my own.

1 [2014] S.C.J. No. 44, [2014] 2 S.C.R. 257, 2014 SCC 44 (S.C.C.) [hereinafter "*Tsilhqot'in*"].

2 [2005] S.C.J. No. 44, [2005] 2 S.C.R. 220 (S.C.C.) [hereinafter "*Marshall* and *Bernard*"].

remains unequivocally grounded in Euro-Canadian, common law norms, illustrating the difficulty of overcoming the Canadian legal system's deep-rooted ethnocentricity. As such, *Tsilhqot'in* inherits and perpetuates the profoundly skewed conceptual apparatus of Canadian jurisprudence framing the relationship between Indigenous peoples and the Crown.

However, I also believe that *Tsilhqot'in* effects a powerful resetting of the conversation on Indigenous land rights in Canada. This is not only because of the outcome in this particular instance, but for a deeper doctrinal reason. Indeed, one of the Court's most important contributions in *Tsilhqot'in* lies in its decisive association of the notion of "prior occupation" of the land — the main legal issue underlying the title test — with the historical *control* of the land rather than with the manner or intensity of its *use*. This amounts to a significant recharacterization of the evidentiary issue underlying title claims, since it focuses on the exercise of jurisdiction by Indigenous polities on their territory, rather than on their factual survival on the land. The Court's clarification of the meaning of occupancy directs the evidentiary focus on the political and legal agency of Indigenous societies on their traditional territories, and draws attention to the norms governing the historical recognition of territorial boundaries between and among Indigenous societies. Thus, although the Court relied solely on common law precedents to give meaning to the norm of occupation, its restatement of the title test in *Tsilhqot'in* effectively takes Indigenous normativity to the heart of the test, decisively moving Aboriginal rights jurisprudence past "*terra nullius*" thinking.

The arguments I develop in this article each correspond to a problem besetting Aboriginal title jurisprudence. The first is that this jurisprudence does not afford equal weight to Euro-Canadian and Indigenous normative commitments in establishing what relevantly qualifies as "prior occupation" of the land. The Supreme Court does not improve the record on that issue in *Tsilhqot'in*, missing an important opportunity to decolonize the Canadian legal imagination and to set Aboriginal rights jurisprudence on a truly reconciliatory path. The second problem, more technical, regards the skewed application of the common law norm of occupation: if the content of that norm is to draw solely on Euro-Canadian references and precedents, then it should at least be applied consistently across the common law rather than be given a *sui generis* interpretation in the context of Aboriginal rights that entrenches ethnocentric double standards. On this count, *Tsilhqot'in* represents an important doctrinal victory with far-ranging positive implications for Indigenous peoples in Canada.

1. Privileging Euro-Canadian Over Indigenous Normative Frameworks in Establishing What Relevantly Qualifies as "Prior Occupation" of the Land

The skewing of the normative dialogue on the respective rights and responsibilities of Indigenous and settler societies in favour of Euro-Canadian law is an old and pervasive feature of Canadian Aboriginal law. The Supreme Court's decision in *R. v. Van der Peet*,[3] in 1996, could be considered its first attempt at addressing the role of law as a crucial mechanism of colonial dispossession. Implicitly acknowledging that the unilateral imposition of foreign laws on Indigenous societies was unjust and had to change, the Court stated that the delineation of Aboriginal rights recognized and affirmed at section 35(1) of the *Constitution Act, 1982*[4] had to "take into account the perspective of the aboriginal people claiming the right. … while at the same time taking into account the perspective of the common law" such that "[t]rue reconciliation will, equally, place weight on each."[5] However, the Court proceeded in the same breath to insert a major caveat into this reconciliatory aspiration: taking into consideration "the Aboriginal perspective" had to be done without straining "the Canadian legal and constitutional structure".[6] In other words, the Court purports to recalibrate a relationship characterized by dispossession, oppression and assimilation by recognizing the "prior occupation" of the land by Indigenous people, but somehow without coming to terms with their full integrity as societies — sovereign over themselves and their lands, in a nation-to-nation relationship with the Canadian state.[7]

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[3] [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507 (S.C.C.).

[4] Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Constitution"].

[5] *Id.*, at paras. 49-50.

[6] *Id.*, at para. 49; see also *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 82 (S.C.C.) [hereinafter "*Delgamuukw*"].

[7] In *R. v. Pamajewon*, [1996] S.C.J. No. 20, [1996] 2 S.C.R. 821 (S.C.C.), the Court illustrated what it meant by framing the Aboriginal perspective so as not to strain the Canadian constitutional structure. The Aboriginal appellant was convicted for organizing gambling activities on reserve, in keeping with his band's regulation of those activities but contrary to the Canadian *Criminal Code*, R.S.C. 1985, c. C-46. His attempt to invoke s. 35(1) of the Constitution to protect his band's right to self-govern, including its right to manage its reserve lands as it saw fit, was rejected by the Supreme Court as casting its inquiry "at a level of excessive generality" (at para. 27). The Court proceeded to recharacterize the claim as "the right to participate in, and to regulate, high stakes gambling activities on the reservation" (at para. 26), to then rule that the evidence did not meet the threshold established in *Van der Peet* for a right to be protected by s. 35(1): it did not demonstrate that gambling "was of central significance to the distinctive culture" of the Ojibwa.

A year later, in *Delgamuukw*,[8] the Court began to navigate the tension inherent in this scheme which seeks reconciliation without strain. Faced with the challenge of theorizing Aboriginal title, the Court establishes that it is grounded "both in the common law and in the aboriginal perspective on land".[9] However, while this principle of placing "equal weight" on Euro-Canadian and Aboriginal perspectives on land quickly becomes a leitmotiv of the Court's Aboriginal rights and title jurisprudence, the manner in which it effectively conceives of and gives voice to each of the "dual perspectives" actually maintains Indigenous polities and their laws in a position of inferiority.[10]

In *Delgamuukw*, the Court locates the source of Aboriginal title in the occupation of land before the British assertion of sovereignty. The main onus on an Indigenous community claiming title over a piece of land will therefore be to demonstrate that it had occupied the territory within which that land was located for an indefinite period of time before the date of British sovereignty assertion over that specific part of the developing Dominion. The other two criteria that the Court enunciates as part of the title test — *continuous* occupation since British sovereignty, and *exclusive* occupation by the claimant group — are certainly also relevant to the establishment of title.[11] But the main battleground, in *Delgamuukw* as in *Tsilhqot'in*, consisted in the conceptualization of occupation itself, and it is on this central idea that the Supreme Court's

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In contrast, the Court's jurisprudence shelters the settler state's assertions of sovereignty from scrutiny. In *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at para. 49 (S.C.C.), Dickson C.J.C. writes: "while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown". See Kent McNeil, "Indigenous Nations and the Legal Relativity of European Claims to Territorial Sovereignty in North America", in Sandra Tomsons and Lorraine Mayer, eds., *Philosophy and Aboriginal Rights: Critical Dialogues* (Don Mills, Ontario: Oxford University Press, 2013), at 242 [hereinafter "McNeil, 'Indigenous Nations'"].

[8] *Delgamuukw*, *supra*, note 6.

[9] *Id.*, at para. 147.

[10] See John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37:3 Osgoode Hall L.J. 537 [hereinafter "Borrows"].

[11] With regard to continuity: if the claimant group does not occupy its traditional territory anymore because it was displaced or dispossessed post-assertion of sovereignty, its title may still be recognized but only give rise to financial compensation rather than repossession of the land in question. Regarding exclusivity: if occupation was shared with another group, title may be recognized if those groups can demonstrate the exclusivity of their joint occupation as against other people. A declaration of title in such a case would imply the continuation of their shared possession and jurisdiction over the title area. See Kent McNeil, "Exclusive Occupation and Joint Aboriginal Title" (2015) 48:3 U.B.C. L.R. [hereinafter "McNeil, 'Exclusive Occupation'"].

reasoning in both of these seminal cases relies unduly on the common law, conveniently glossing over Indigenous political and legal autonomy.

Indeed, if the Court took seriously the parity suggested by its acknowledgment that true reconciliation requires that "equal weight" be placed on "Aboriginal perspectives" and on the common law, it would seek to formulate standards derived from a true *normative* dialogue between Euro-Canadian and Indigenous perspectives. In other words, to be on par with the common law, the relevant "Aboriginal perspectives" would have to be derived from the Indigenous laws pertaining to the manner in which they asserted their collective authority over the land. The Court's driving inquiry would be to find the place where those respective normative universes share actual *standards*.

Instead, although it recognized that the "relationship between common law and pre-existing systems of Aboriginal law"[12] plays a role in grounding Aboriginal title, the Court in *Delgamuukw* assigned very different roles to the legal traditions facing each other in that relationship. The normative source of Aboriginal title, Lamer C.J.C. explains, is the "physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law".[13] There is no reference to the contribution of Gitksan and Wet'suwet'en law in establishing that standard, and therefore seemingly no normative value ascribed to such a contribution. Chief Justice Lamer notes that while the parties agreed on appeal "that proof of historic occupation was required to make out a claim to aboriginal title,"[14] they disagreed on what should count toward such proof.[15] But rather than proceeding to examine Gitksan and Wet'suwet'en norms regarding occupation to determine how they might inform the Canadian standard underlying title, the Chief Justice's reasoning then reveals the discrepancy between the roles he reserves to each legal tradition.

"If" an Aboriginal society had laws in relation to land, begins Lamer C.J.C., such laws will help to establish the "aboriginal perspective on the occupation of their lands". Such perspective cannot, however, be "gleaned" exclusively from Indigenous laws. The status of those laws is

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[12] *Delgamuukw*, *supra*, note 6, at para. 114.

[13] *Id*.

[14] *Id*., at para. 146.

[15] The Crown asserted that in order to establish Aboriginal title, occupation should amount to the *physical* occupation of the land in question. The Gitksan argued that Aboriginal title arose at least in part from and "should reflect the pattern of land holdings" under their own laws: see *id*., at paras. 146-147.

on par with other elements of the "practices, customs and traditions of Aboriginal peoples" and must be assessed as a part of this whole.[16] As Lamer C.J.C. continues, the relegation of Indigenous laws to the role of historical facts among other pieces of *material evidence*, shaping what the Court calls "the Aboriginal perspective", gets ever clearer. Outlining the norm of occupation, that is, what constitutes sufficient occupation to ground title, the Chief Justice draws on common law standards "ranging from the construction of dwellings through cultivation and enclosure of fields to ... exploiting its resources".[17] Relevant Indigenous laws, including historical Indigenous system of land tenure and land use, shall serve alongside "the group's size, manner of life, material resources, and technological abilities"[18] as well as geographical information detailing "the character of the lands claimed"[19] to provide what seemingly amounts to a mere context of application for the common law norm of *sufficient occupation*. In other words, laws on the Indigenous side of the equation do not, for the purposes of interpreting the standard of occupation, actually play a direct normative role.

This reading of *Delgamuukw* is confirmed in the next major judgment of the Supreme Court on Aboriginal title in the sister cases of *Marshall* and *Bernard*, where the majority (now led by McLachlin C.J.C.) describes in the following terms its methodology for assessing the title claim at issue:

> The 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. … The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people. But in translating it to a common law right, the Court must also consider the European perspective; *the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it*.[20]

In this "exercise in translating aboriginal *practices* to modern *rights*",[21] as the majority calls it, the role of the "Aboriginal perspective" — *i.e.*, of the evidence adduced concerning the Indigenous material and normative universe pre-British sovereignty assertion — is to enable the

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16 *Id.*, at para. 148.
17 *Id.*, at para. 149.
18 *Id.*
19 *Id.*
20 *Marshall* and *Bernard*, *supra*, note 2, at para. 48 (emphasis added).
21 *Id.* (emphasis added).

judges to take what they conceive of as a culturally sensitive approach to the determination of Aboriginal rights. For the majority, this requires that the "translation" exercise "not be conducted in a formalistic or narrow way. The Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right."[22] But what remains at issue "is whether the [Aboriginal] practice corresponds to the core [common law] concepts of the legal right claimed".[23] This is a very different exercise than that of articulating the parameters of a collectivity's territorial authority, speaking equally to European and Indigenous sources of legitimacy.

Two of the Supreme Court justices in *Marshall* and *Bernard*, Lebel J. and Fish J., disown their colleagues' reasoning on that basis. While concurring with the majority on the result (*i.e.*, that the evidence offered in both cases was not sufficient to establish Aboriginal title), they denounce an approach "too narrowly focused on common law concepts relating to property interests".[24] They write:

> The role of the aboriginal perspective cannot be simply to help in the interpretation of aboriginal practices in order to assess whether they conform to common law concepts of title. The aboriginal perspective shapes the very concept of aboriginal title. "Aboriginal law should not just be received as evidence that Aboriginal peoples did something in the past on a piece of land. It is more than evidence: it is actually law. And so, there should be some way to bring to the decision-making process those laws that arise from the standards of the indigenous people before the court."[25]

Tsilhqot'in presented the Court with a new opportunity to restate its theoretical and methodological approach along the lines articulated by Lebel J. and Fish J., ushering a jurisprudence based on normative dialogue between equally respected legal orders. This is what placing "equal weight" on Euro-Canadian and Indigenous perspectives, respecting the inherent dignity of Indigenous societies, and moving beyond the colonial unilateral imposition of Euro-Canadian terms simply requires. Instead, the Court decided to continue on the path it has treaded since *Delgamuukw* – stating a powerful egalitarian principle, but shying away from giving it real effect, as if doing so might "strain the Canadian legal and constitutional order."

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22 *Id.*

23 *Id.*

24 *Id.*, at para. 110.

25 *Id.*, at para. 130, quoting John Borrows, "Creating an Indigenous Legal Community" (2005) 50 McGill L.J. 153, at 173.

Indeed, the Court reiterates in *Tsilhqot'in* the principle whereby "[t]he dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title."[26] The Court then acknowledges that in *Marshall* and *Bernard*, it set out the standard of occupation by sole reference to the common law, but claims that this is compatible with giving its due to the Aboriginal perspective on what occupation amounts to:

> The Court in *Marshall*; *Bernard* confirmed that nomadic and semi-nomadic groups could establish title to land, provided they establish sufficient physical possession, which is a question of fact. … While the issue was framed in terms of whether the common law test for possession was met, the Court did not resile from the need to consider the perspective of the Aboriginal group in question; sufficient occupation is a 'question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used'.[27]

In effect, the Court is saying that giving "equal weight" to the perspective of the common law and of the Aboriginal group is satisfactorily achieved by treating the first as law and the second as the factual context relevant to determining whether or not the legal standard has been met.

This reading is confirmed by the fact that in *Tsilhqot'in*, the Court clarifies the standard of occupation by sole reference to the common law — as I will now discuss, turning to the content of the standard itself. I will also show that although the judgment fails to put Euro-Canadian and Indigenous law explicitly on the same footing, the Court's interpretation of the common law standard of occupation shapes the title test in a manner that, *in practice if not in principle*, introduces into Canadian law some of the respect due to Indigenous laws and to the pre-existing sovereignty of Indigenous nations. In other words, *Tsilhqot'in* leaves us with a test for title that affirms the inherent dignity of Indigenous societies — if only through the backdoor.

2. Dual Perspectives or Double Standards?

At issue in *Tsilhqot'in* was whether occupation consists in the "regular and exclusive use" of a given territory, or in a more stringent standard, the "intensive use of definite tracts of land". Applying the

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[26] *Tsilhqot'in*, *supra*, note 1, at para. 14.

[27] *Id.*, at para. 44, quoting *Marshall* and *Bernard*, *supra*, note 2, at para. 66.

former led Vickers J., the trial judge, to affirm the Tsilhqot'in people's title to a portion of the claim area as well as to a small area outside the claim area, totalling less than 5 per cent of what the Tsilhqot'in regard as their traditional territory.[28] The British Columbia Court of Appeal invalidated this conclusion, holding the correct legal standard to be the second one, effectively reducing the possible ambit of Aboriginal title to specific dwelling or harvesting sites — the equivalent of "postage stamp" areas within the Tsilhqot'in people's traditional territory. To understand the significance of the Supreme Court's clarification of what counts as "occupation" at common law, it is useful to re-examine the source of the divergence on this point between the trial judge (with whom the Supreme Court concurred) and the Court of Appeal.

The resolution of this divergence by the Supreme Court can again be traced back to *Delgamuukw*. In that case, Lamer C.J.C. relied on Professor Kent McNeil's seminal study, *Common Law Aboriginal Title*,[29] to expose the private property principles that could be used to ground Aboriginal title at common law:

> Professor McNeil has convincingly argued that at common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land …. Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources …[30]

This passage states the law correctly, insofar as possession does ground title at common law and can be established through occupation. However, a wide range of manifestations of possession and types of occupation have been accepted as grounding title at common law. The suggestion in the above passage that occupation means "physical" occupation, connoting the living presence of people on the specific parcel claimed, or their active presence mediated by artefacts indicating their "regular use" of the land, is not supported at common law. Requiring physical presence and regular use of the land amounts to applying a much higher standard to Aboriginal title claims than that

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[28] The claim area amounted to about 5 per cent of Tsilhqot'in traditional territory. The other 95 per cent were not in issue in the case.

[29] Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

[30] *Delgamuukw*, *supra*, note 6, at para. 149.

warranted by the jurisprudence. Summarizing the case law on this issue, Professor McNeil notes:

> At least as important as physical acts on or in relation to the land is the intention to hold and use the land for one's own purposes and to exclude others who have not been given permission to enter. This is why placing markers or blazing trees around the perimeter of the land demonstrate occupation, even if the land is not otherwise occupied or used. In other words, the occupier is not obliged to use the land in any particular way, as long as the intention to occupy is present and manifest through public acts in relation to the land and no one else is in actual occupation.[31]

Professor McNeil adds:

> At common law, effective control can be demonstrated by regular use of the land, but does not depend on use of specific sites. Indeed, the common law cases clearly reveal that control of, or even notice of intention to control, the perimeter of a tract of land is sufficient to establish occupation of all the land within the perimeter.[32]

In other words, what "occupation" means for the purposes of acquiring possessory title at common law is only "effective control". The norm has a subjective element — the intention to hold the land for one's own purposes — and an objective one — the capacity to concretize one's intention, and the signalling of one's intention to make it outwardly knowable. This exhausts the content of the norm. All other criteria, such as "physical presence on" or "use of" the land are evidentiary derivatives: accepted ways of demonstrating possession/occupation.

After the emphasis placed by Lamer C.J.C. on "physical" occupation, the majority's approach to the notion of occupation slipped further toward replacing its central criterion, effective control, with that of regular use, and even more stringently, of *intensive* use, in *Marshall* and *Bernard*. Witness the slippage in the following passage of the majority's judgment:

> In summary, exclusive possession in the sense of intention and capacity to control is required to establish aboriginal title. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources: *Delgamuukw*, at para. 149. *Less intensive uses may give rise to different rights*.[33]

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[31] Kent McNeil, "Aboriginal Title in Canada: Site-Specific or Territorial?", July 1, 2013, online: <http://ssrn.com/abstract=2294552> [hereinafter "McNeil, 'Aboriginal'"], at 12.

[32] *Id*., at 13.

[33] *Marshall* and *Bernard*, *supra*, note 2, at para. 70 (emphasis added).

As a result, the Mi'kmaq saw their claim to title denied in *Marshall* and *Bernard*, as the evidence presented regarding their connection to their traditional territory did not meet what the majority deemed to be the requisite *intensity* of land use. Writing for the British Columbia Court of Appeal in *Tsilhqot'in*, Groberman J. latched on to this notion of intensive use and turned it into the primary evidentiary threshold that claimants must meet to ground Aboriginal title.

As Professor McNeil pointed out, this was not only unsubstantiated at common law, but actually entrenched a double standard. Most common law precedents discussing the issue of sufficient occupation, he explained, involve cases of adverse possession. This means that the standard of occupation that deems "effective control" of the land over the statutory limitation period as sufficient to ground possessory title arose in the context of wrongdoing. It allows those who occupy land they did not originally own to acquire a possessory title over it by ousting the true owner. Since Aboriginal title claimants typically seek title over lands they have rightfully occupied for an indefinite period of time prior to the Crown's assertion of sovereignty, they should be held to a lower standard than wrongdoers. Instead, requiring them to prove the intensive use of their lands in order to see their title recognized effectively held them to a higher standard.[34] A double standard unfair to Aboriginal claimants was thus threatening to take hold in the case law following the Court of Appeal's judgment in *Tsilhqot'in*, based on the above reading of *Delgamuukw* and of *Marshall* and *Bernard*.

The Supreme Court's judgment in *Tsilhqot'in* puts an end to this budding line of jurisprudence. Firmly re-establishing the criterion of control at the core of the notion of occupation sufficient to ground title at common law, the Court even cuts out the reference to "physical" occupation in its quotation of the famous *Delgamuukw* passage reproduced above.[35] The Court forcefully states:

> The common law perspective imports the idea of possession and control of the lands. At common law, possession extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effective control is exercised.[36]

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34 McNeil, "Aboriginal", *supra*, note 31, at 13-14.

35 See *Tsilhqot'in*, *supra*, note 1, at para. 37.

36 *Id.*, at para. 36.

Although the Court does refer to the use of the land, this notion of use recedes to its proper place as evidence that may be offered toward fulfilling the actual legal criterion of effective control:

> To sufficiently occupy the land for purposes of title, the 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*.[37]

In summary, the Court thus affirms that it is the control of the land, rather than the manner and intensity of its use, that must remain the focus of the assessment of occupation. Even though this simply restates the existing common law standard, and does not draw upon Indigenous normativity to ostensibly ground the legitimacy of the title test equally in Indigenous legality,[38] the clarification of the norm still has important implications. Indeed, the nature of the evidence required to prove control over the territory leads us onto a terrain implying a much more egalitarian, nation-to-nation relationship between the settler state and Indigenous claimant groups than the one underlying Canadian Aboriginal law so far.

First, affirming the notion of control as the central requirement of possessory title brings the different elements of the test of occupation set

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[37] *Id*., at para. 38 (emphasis added).

[38] As discussed in the previous section, the Supreme Court views the "Aboriginal perspective" on the land as relevant, but considers it at the level of factual evidence serving to assess whether the common law standard has been met. It is interesting to note in that respect that the Supreme Court explicitly ties the examination of the use of the land to the role of the Aboriginal perspective in applying the test for title. All kinds of uses are relevant evidence to bring to the demonstration of effective control of the land by the claimant group:

> a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is "sufficient" use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law (*id*., at para. 42).

The trial judge, Vickers J., assessed the use by the Tsilhqot'in people of a large number of sites on the territory to which they claimed title, and determined that such use was regular and exclusive. The Supreme Court does not disturb that finding, given that the norm applied was "consistent with the correct legal test" and that no palpable and overriding error was shown in the factual conclusions. (*Id*., at paras. 51-52).

out in *Delgamuukw* in close proximity. In particular, the element labelled as "sufficient occupation" now appears as either equivalent to or subsumed under the element of "exclusive occupation". The Court defines the latter in very similar terms as occupation *tout court*: "the intention and capacity to control the land".[39] On that basis, it is fair to think that if an Indigenous group demonstrates its exclusive historical stewardship over a given territory, it needs to offer no further evidence with respect to the "sufficiency" of its occupation.[40]

This conceptual tightening redirects the tone and the evidentiary focus of the inquiry. The very concept of sufficient occupation suggests a threshold. It invites a comparison between Indigenous and Euro-Canadian conceptions of land and property that veers easily into the ethnocentric filtering of Indigenous societies' relationship to their lands through common law conceptions of property. The vague requirement that "cultural sensitivity" be shown in assessing whether the common law threshold is met does not adequately address the inherent bias of this framework.

An inquiry revolving around the proof of control presents a significantly different framework. Redirecting the evidentiary focus on Indigenous societies' historical recognition of each other's territorial boundaries, it purports to give effect to the international relations that prevailed within the Indigenous world when the Crown's claim to power on Indigenous peoples and their territories entered the diplomatic equation. Looking into the boundaries that had currency among Indigenous nations at that time and accepting them into Canadian law means that the state agrees to see Indigenous polities as they saw (and still see) each other — nations with jurisdiction over themselves and their respective territories — and to ascribe social power to that Indigenous characterization.[41]

Taking the so-called "Aboriginal perspective" into consideration acquires a different connotation under the framework focusing on the proof of boundaries and exclusive control. It certainly still serves to avoid ethnocentric assumptions, but since the goal is to give inter-Indigenous relations and recognition direct effect in Canadian law, Aboriginal practices have an immediate normative weight they did not

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[39] *Id*., at para. 48.

[40] This realization is supported by the Supreme Court's statement, early in its *Tsilhqot'in* judgment, to the effect that the three elements of the title test — the sufficient, continuous and exclusive occupation of the land — should not be considered independently, but as "related aspects of a single concept" (*id*., at para. 31).

[41] Accepting the inter-Indigenous settlement of overlapping claims in the intervening period as resolving the issue of boundaries rather than detracting from a title finding participates of the same logic.

have when they were examined to see whether they "fit" a common law right. An example of the central role of Indigenous intellectual resources in the inquiry into their control over the land is provided by the trial judge in *Tsilhqot'in*, Vickers J. In his careful examination of the Tsilhqot'in conception of boundaries, he quotes the expert report at length:

> It is important to consider the issue of boundaries from the Aboriginal perspective. …
>
> .....
>
> In Tsilhqot'in semi-nomadic society there were no boundaries in the sense that a boundary is currently understood with reference to set metes and bounds. In his discussion of Tsilhqot'in boundaries on p. 6 of his report, Dr. Brealy said:
>
> > 'Reconstructing boundaries of oral, relatively nomadic, societies in a cartographic register is an exceedingly hazardous undertaking, and never the more so than in the Chilcotin country. To begin with, boundary construction in such societies is, by definition, rather more a 'social', than it is a 'geographical', exercise. In oral societies, boundaries are recognized, understood and validated not by maps and plans, but from 'inside the collective' – i.e. by where creation narratives fade, where genealogical linkages can no longer be traced, where place names are not recognizable, and where languages become unintelligible. Indigenous boundaries often do trace, in metes and bounds fashion, defined watersheds, creeks or lakes, but even then as much by 'coincidence' as design and the lesser the degree of physiographic relief the more 'fuzzy' boundaries tend to get.'[42]

Carefully postulating precise boundaries of title claim areas to respond to what Vickers J. calls the "contemporary societal demand for limits"[43] will therefore be an exercise in determining the geographical reach of a range of cultural elements — the creation narratives, place names and language of the claimant group, and even more importantly, its kinship ties and political allegiances. As discussed earlier, the intention and capacity of the group to hold the land for its own purposes have both a subjective and an objective component. Any evidence of

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[42] *Tsilhqot'in Nation v. British Columbia*, [2007] B.C.J. No. 2465, 2007 BCSC 1700, at paras. 646 and 648 (B.C.S.C.) [hereinafter "*Tsilhqot'in* (B.C.S.C.)"].

[43] *Id.*, at para. 649.

other Indigenous groups' knowledge that the land belonged to the claimant group, and their attitudes in light of that knowledge, will bolster the latter's title claim. In that regard, it is important to note that the Supreme Court foregrounds the claimant group's laws, their treaties with other nations, and their enforcement policies:

> Exclusivity should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. … Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control.[44]

I have thus discussed two implications of the clarification offered by the Supreme Court concerning the standard of occupation at common law, in particular regarding the fact that it turns on the proof of control rather than on the use of land: aside from streamlining the test for title, it equips Canadian Aboriginal law to take Indigenous political and legal agency much more seriously — affirming a nation to nation relationship between the Canadian state and Indigenous societies. I now conclude with a third implication, which goes in the same direction. Shifting the focus of Aboriginal title law from use to control puts an end not only to an emerging double standard in the common law of private property (whereby Indigenous claimant groups would have been held to a higher standard than adverse possessors), but also to a longer-lived double standard in public law, concerning the application of the notion of sovereignty. This notion, usually examined by Canadian Courts in Aboriginal contexts for the purpose of determining the date when it was asserted by the Crown in different parts of the territory that incrementally became Canada, "involves both a measure of settled occupation and a measure of administrative control"[45] but certainly not that the territory as a whole be physically occupied, settled or used for any purpose at all.[46] Associating the

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[44] *Tsilhqot'in*, *supra*, note 1, at para. 48. See also McNeil, "Exclusive Occupation", *supra*, note 11. This explains why I equate the notion of Indigenous control over territory that the Supreme Court puts forward in *Tsilhqot'in* with *de jure* jurisdiction rather than with simple *de facto* control.

[45] *Tsilhqot'in* (B.C.S.C.), *supra*, note 42, at para. 596, quoting Lambert J., in *Delgamuukw v. British Columbia*, [1993] B.C.J. No. 1395, 104 D.L.R. (4th) 470 (B.C.C.A.).

[46] See the discussion above, *supra*, note 7.

occupation required to ground title with the intention and capacity to control the land is thus not only correct in private property law, but is also the right standard to apply in the realm of law that should be applied in the first place to actual nations, as opposed to individual persons in the domestic realm. Until that standard is properly applied to Indigenous claimant groups, the Canadian state perpetuates the racist vision that prevented the recognition of Indigenous nations as the equivalent of nation states in the eyes of the European powers colonizing North America, and produced the infamous proposition that the continent was *terra nullius* until European powers asserted jurisdiction over it.[47]

II. CONCLUSION

The Supreme Court in *Tsilhqot'in* still skirted the principle it has reiterated since *Delgamuukw*, that "equal weight" should be given to Euro-Canadian and Indigenous perspectives in the legal reasoning leading up to the recognition and delineation of Aboriginal rights and title. With respect to the title test, the Court merely clarified that the standard of occupation that must be met to ground possessory title at common law has to do with the intention and capacity to control the land, rather than with the manner and use of the land in question. If evidence concerning the manner and intensity of land use by the claimant group is available, it can of course still be relied upon to show that the group held the land for its own purposes, both in its own eyes and in the eyes of other Indigenous groups[48] — but such proof is only subservient to the demonstration of historical control. Proving "exclusive" occupation should automatically fulfil the criterion of "sufficient" occupation, since it is now clear that control underlies those two elements of the title test.

But this seemingly innocuous clarification of the common law of possessory title has poised Canadian Aboriginal law to give effect to a much more egalitarian, nation-to-nation relationship between Indigenous

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[47] See McNeil, "Indigenous Nations", *supra*, note 7; Borrows, *supra*, note 10; Robert J. Miller, Jacinta Ruru, Larissa Behrendt & Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010); and Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 2012). See also Kent McNeil's critical essay reviewing those two books, forthcoming in the *Osgoode Hall Law Journal*.

[48] This approach might be advantageous to Aboriginal groups that would find it more challenging to prove their laws at the time of Crown assertion of sovereignty than to show their regular use of the land through relevant "practices, customs and traditions" at that period of their history.

nations and the settler state. Indeed, affirming that the title test rests on the proof of control puts the issue of Indigenous territories' boundaries, and therefore of Indigenous nations' recognition of each other's authority and jurisdiction over their respective territories, at the forefront of the legal inquiry. It effectively places Indigenous normativity — treaties between neighbouring Indigenous nations, permissions granted, denied or skirted to enter a group's territory — at the heart of Canadian law. This not only averts the creation of a double standard within the common law of private property, but more importantly, it may finally signal the end of a long-lived double standard in Canadian public law and at international law, whereby the sovereignty of European nations rests on the intention and capacity to control a vast expanse of territory — while the ownership and jurisdiction of Indigenous nations over territories they have occupied for time immemorial is altogether denied, or made to depend on more stringent criteria such as the regular use of those lands.