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# Aboriginal Title in Canada: Site-Specific or Territorial?

Kent McNeil

*Osgoode Hall Law School of York University, [kmcneil@osgoode.yorku.ca](mailto:kmcneil@osgoode.yorku.ca)*

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# ABORIGINAL TITLE IN CANADA: SITE-SPECIFIC OR TERRITORIAL?

Kent McNeil\*

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*This article describes three different approaches to Aboriginal title in Canada: (1) a common law approach, whereby title is based on physical occupation and defined by the common law; (2) an Indigenous law approach, whereby it is based on and defined by Indigenous law; (3) a territorial approach, whereby it is based on occupation of territory by effective control, manifested in part through the exercise of governmental authority. The author argues that the third approach, "territorial Aboriginal title," is consistent with the Supreme Court's 1997 decision in the Delgamuukw case, and supports an inherent right of self-government because it includes jurisdictional elements as well as property rights. He suggests that the Court should follow this approach in its important up-coming decision in the Tsilhqot'in Nation case.*

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*Cet article décrit trois façons différentes d'envisager le droit de propriété autochtone au Canada: (1) une approche dite «de common law» selon laquelle le droit de propriété est fondé sur l'occupation physique telle qu'elle est définie par la common law, (2) une approche de droit autochtone en vertu de laquelle il est analysé et défini selon le droit autochtone, (3) une approche territoriale fondée sur l'occupation réelle et la maîtrise tangible du territoire manifestées notamment par l'exercice du pouvoir dévolu au gouvernement. L'auteur soutient que la troisième approche, « le droit de propriété autochtone territorial », correspond à la position de la Cour suprême exprimée dans l'arrêt Delgamuukw rendu en 1997. Il appuie également le principe d'un droit inhérent à la gouvernance autonome, car elle comporte des éléments de compétence et de droits de propriété. L'auteur espère que la Cour adoptera cette approche dans l'important arrêt qu'elle rendra prochainement dans l'affaire Tsilhqot'in Nation.*

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\* Osgoode Hall Law School. In addition to the very helpful feedback received from fellow panelists and the other participants at the Law on the Edge Conference, Canadian Law and Society Association/Law and Society Association of Australia and New Zealand, University of British Columbia, July 1-4 2013, I would like to thank Kerry Wilkins for his very useful comments.

### 1. Introduction

This paper addresses the issue of Aboriginal title to land, and the relationship I see between Indigenous law and the common law in this context. In my understanding, there have been three judicial approaches to Aboriginal title:

1. A purely proprietary approach, based on occupation of land and the effect given to occupation by the common law (common law Aboriginal title).
2. An Indigenous law approach, whereby Aboriginal title arises from and is defined by pre-existing Indigenous law (Indigenous law title).
3. A territorial approach, whereby Aboriginal title is derived from both common law and Indigenous law and has governmental dimensions (territorial Aboriginal title).<sup>1</sup>

I am going to describe each of these, and then offer some critical comments on the Supreme Court of Canada's decision in *R v Marshall; R v Bernard*<sup>2</sup> and the British Columbia Court of Appeal's more recent decision in *William v British Columbia* (the *Tsilhqot'in Nation* case).<sup>3</sup>

### 2. Common Law Aboriginal Title

It is an obvious historical fact that Indigenous peoples were living in North America, and occupying and using land in accordance with their own ways of life, when the Europeans arrived and began to colonize the continent. In the settled parts of Canada first colonized by the British, the settlers brought the common law with them.<sup>4</sup>

Under the common law, people who are in occupation of land are presumed to have possession and thus title to the land they occupy.<sup>5</sup> So

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<sup>1</sup> Brian Slatery, "The Metamorphosis of Aboriginal Title" (2006) 85 Can Bar Rev 255 [Slatery, "Metamorphosis"], has identified three similar conceptions of Aboriginal title. However, he describes the third, which he supports, as "a *sui generis* right grounded in ancient relations between the Crown and Indigenous peoples;" see *ibid* at 263, elaborated on at 269-79.

<sup>2</sup> 2005 SCC 43, [2005] 2 SCR 220 [*Marshall/Bernard*].

<sup>3</sup> 2012 BCCA 285, [2012] 3 CNLR 333 (BCCA) [*Tsilhqot'in Nation*].

<sup>4</sup> *Connolly v Woolrich* (1867), 17 RJRQ 75 (Que SC), aff'd (*sub nom Johnstone v Connolly*) (1869), 17 RJRQ 266 (Que QB).

<sup>5</sup> *Calder v British Columbia*, [1973] SCR 313 *per* Hall J (dissenting on other grounds) at 368, 375 [*Calder*].

Indigenous peoples would have title under the common law to the lands they occupied at the time of the Crown's assertion of sovereignty.<sup>6</sup> This common law Aboriginal title neither depends on, nor is defined by, Indigenous law. It is a wholly common law concept. Moreover, it is purely proprietary; it does not necessarily entail governmental authority or political jurisdiction.

I would characterize the Supreme Court of Canada's approach to Aboriginal title in *Marshall/Bernard* and the British Columbia Court of Appeal's approach in the *Tsilhqot'in Nation* case as a proprietary, common law approach. I will come back to those decisions later.

### 3. Indigenous Law Title

In addition to occupying and using land, the Indigenous peoples of Canada had their own legal orders at the time of European colonization.<sup>7</sup> These legal orders included laws in relation to land.<sup>8</sup>

At the time of the British Crown's assertion of sovereignty, those laws and the land rights of the Indigenous peoples under those laws would have continued by virtue of the doctrine of continuity.<sup>9</sup> This doctrine has been

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<sup>6</sup> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 114, 149 [Delgamuukw]; Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), esp at 196-221 [McNeil, *Aboriginal Title*]. Crown assertion of sovereignty also raises issues of legality and legitimacy that I have addressed elsewhere; see Kent McNeil, "Negotiated Sovereignty: Indian Treaties and the Acquisition of American and Canadian Territorial Rights in the Pacific Northwest," in Alexandra Harmon, ed, *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008) 35; and 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* (Toronto: Oxford University Press, 2013) 242.

<sup>7</sup> See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

<sup>8</sup> See e.g. Leroy Little Bear, "Aboriginal Rights and the Canadian 'Grundnorm,'" in J Rick Ponting, ed, *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland & Stewart, 1986) 243; Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol 2, *Restructuring the Relationship* (Ottawa: Minister of Supply and Services Canada, 1996) pt 2 at 434-64; Richard Overstall, "Encountering the Spirit in the Land: 'Property' in a Kinship-Based Legal Order," in John McLaren, AR Buck, and Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 22.

<sup>9</sup> See Brian Slattery, *The Land Rights of Indigenous Canadian Peoples* (Saskatoon: University of Saskatchewan Native Law Centre, 1979) at 50-59; Mark D Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*" (1999) 44 McGill LJ 711; Kent McNeil and David

applied in Canada to the land rights of the French Canadians when Britain acquired New France from the French king in 1763.<sup>10</sup>

The doctrine of continuity has also been adopted and applied in the context of the land rights of the Indigenous peoples of Australia by the High Court, initially in *Mabo v Queensland*<sup>11</sup> in 1992. As a result, in Australia the source of native title (as Aboriginal title is called there) is the pre-existing laws and customs of the Indigenous peoples. Moreover, native title in Australia also receives its content and is defined by Indigenous laws and customs.<sup>12</sup> This sounds positive for Indigenous Australians because their laws are acknowledged and given effect. However, this approach has serious downsides.<sup>13</sup>

First of all, in order to have their land rights acknowledged by the Australian legal system, Indigenous Australians have to do more than prove that they occupied and used land at the time of Crown assertion of sovereignty. They also have to establish that they had laws or customs in relation to the land that gave them legal rights at that time. As this involves establishment of the legal orders of non-literate societies over 200 years ago (in eastern Australia), the problems of proof can be formidable.

Secondly, in Australia native title rights are limited to pre-existing rights. So if at the time of Crown acquisition of sovereignty an Indigenous people did not have laws or customs in relation to minerals, for example, they are not entitled to mineral rights on their native title lands.<sup>14</sup> The content of their land rights is thus frozen in the past at a time when they lived as hunters and gatherers.

Thirdly, under Australian law the Indigenous peoples have no inherent right of self-government. While some modification of their pre-existing

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Yarrow, "Has Constitutional Recognition of Aboriginal Rights Adversely Affected Their Definition?" (2007) 37 Sup Ct L Rev (2nd) 177 at 203-11.

<sup>10</sup> See *Drulard v Welsh* (1906), 11 OLR 647 (Ont Div Ct), rev'd on other grounds (1907), 14 OLR 54 (Ont CA). Admittedly, New France is regarded as having been acquired by Britain by conquest and cession rather than by settlement, but the High Court of Australia, in the cases cited in the next two notes, has held that the doctrine of continuity applies in settled territories as well. See also McNeil, *Aboriginal Title*, *supra* note 6 at 179-92.

<sup>11</sup> (1992), 175 CLR 1.

<sup>12</sup> See *Fejo v Northern Territory* (1998), 195 CLR 96; *Western Australia v Ward* (2002), 213 CLR 1 [*Ward*]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002), 214 CLR 422 [*Yorta Yorta*].

<sup>13</sup> See Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Sydney: Federation Press, 2008).

<sup>14</sup> *Ward*, *supra* note 12.

land rights is possible, they have no inherent jurisdiction to make new laws in relation to land or anything else.<sup>15</sup>

Fourthly, the High Court has held that loss of connection with the land and significant gaps in the practice of Indigenous laws and customs result in loss of native title.<sup>16</sup> This is so even if the loss of connection was caused by forcible dispossession by the colonizers.<sup>17</sup>

So far, Indigenous law has not been applied by Canadian courts in the way it has been in Australia. McLachlin J suggested in her dissent in *R v Van der Peet*<sup>18</sup> that it would be appropriate to base Aboriginal rights and title at least in part on pre-existing Indigenous law,<sup>19</sup> but her decision as Chief Justice in *Marshall/Bernard* is anything but an Indigenous law approach.

#### 4. Territorial Aboriginal Title

Under this approach, Indigenous land rights are not limited to property rights, as they are under the first two approaches. Instead, Indigenous peoples have governmental authority (that is, political jurisdiction) over the territories occupied by them at the time of Crown assertion of sovereignty, in addition to rights to the lands and resources within those territories.<sup>20</sup> This is the approach that has been taken in the United States

<sup>15</sup> *Yorta Yorta*, *supra* note 12.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> [1996] 2 SCR 507 at paras 261-75 [*Van der Peet*].

<sup>19</sup> See also *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 [*Mitchell*], *per* McLachlin CJC, delivering the main judgment (Binnie and Major JJ concurring in result) at para 10:

[A]boriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them .... Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada: see *Calder v Attorney-General of British Columbia*, [1973] SCR 313, and *Mabo v Queensland* (1992), 175 CLR 1 at 57 (per Brennan J), pp 81-82 (per Deane and Gaudron JJ), and pp 182-83 (per Toohey J).

<sup>20</sup> See Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5 *Tulsa J of Comp and Int'l L* 253, reprinted in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) 58 at 95-101 [McNeil, *Emerging Justice?*].

ever since the celebrated Cherokee Nation cases decided by Chief Justice Marshall in the 1830s.<sup>21</sup>

In numerous cases before the Indian Claims Commission that went up on review to the Court of Claims, the issue was whether the land in question had been part of the territory that the claimant Indian nation occupied and controlled for a long time before it was wrongfully taken by the US government.<sup>22</sup> If it had been, then prior to the taking the Indian nation would have had both title to the land and jurisdiction over it, as held by Marshall CJ in the Cherokee cases.<sup>23</sup>

What about Canada? Although the territorial title approach was not explicitly adopted in *Delgamuukw v British Columbia*<sup>24</sup> (the leading Aboriginal title case in Canada), I think Lamer CJC's decision points undeniably in that direction. He said that there are two potential sources of Aboriginal title: (1) occupation of land and the legal effect given to occupation by the common law – the common law Aboriginal title approach; and (2) Aboriginal systems of law – the Indigenous law approach.<sup>25</sup>

But, as I read his judgment, he then combined the two into an approach based on occupation that incorporates both physical occupation and occupation through the application of Indigenous law:

[T]he source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy.<sup>26</sup>

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<sup>21</sup> *Cherokee Nation v Georgia*, 30 US 1 (1831); *Worcester v Georgia*, 31 US 515 (1832).

<sup>22</sup> See e.g. *Sac and Fox Tribe of Indians of Oklahoma v United States*, 161 Ct Cl 189 (1963), cert denied 375 US 921 (1963); *Confederated Tribes of the Warm Springs Reservation of Oregon v United States*, 177 Ct Cl 184 (1966); *United States v Seminole Indians*, 180 Ct Cl 375 (1967); *Sac and Fox Tribe v United States*, 383 F 2d 991 (1967, Ct Cl), cert. denied 389 U.S. 900 (1967); *Turtle Mountain Band of Chippewa Indians v United States*, 490 F 2d 935 (1974, Ct Cl); *United States v Pueblo of San Ildefonso*, 513 F 2d 1383 (1975, Ct Cl). For a very useful survey of relevant American case law, see Michael J Kaplan, "Proof and Extinguishment of Aboriginal Title to Indian Lands" (2003) 41 ALR Fed 425. See also *Cohen's Handbook of Federal Indian Law*, Nell Jessup Newton, ed (New Providence, NJ: LexisNexis, 2012), §15.04[2] [*Cohen's Handbook*].

<sup>23</sup> See *Cohen's Handbook*, *ibid*, §15.04[2]. See also *United States v Santa Fe Pacific Railroad*, 314 US 339 (1941).

<sup>24</sup> *Delgamuukw*, *supra* note 6.

<sup>25</sup> *Ibid* at para 114.

<sup>26</sup> *Ibid* at para 147.

Elaborating on Indigenous law as a means of proving occupation, Lamer CJC continued:

As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.<sup>27</sup>

Other examples of relevant Indigenous laws are contained in this passage:

[T]he aboriginal group asserting the claim to aboriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the aboriginal nations in question, those treaties would also form part of the aboriginal perspective.<sup>28</sup>

Occupation through Indigenous law is a territorial approach: Indigenous peoples were in occupation of their traditional territories because they had laws, including laws in relation to land, that applied in those territories. To put it another way, they were in occupation because they exercised governmental authority over their territories, in part through the application of their own laws. Lamer CJC acknowledged this exercise of governmental authority not only by recognizing their capacity to make their own laws, but also by concluding that permission to use lands could be granted by treaty to other Aboriginal nations, as treaty-making authority is one of the attributes of independent, self-governing nations.<sup>29</sup>

International law relies on the same criteria for acquiring title to territory (also known as territorial sovereignty), namely, physical occupation and exercise of governmental authority.<sup>30</sup> International law therefore recognizes that the exercise of governmental authority over land is necessarily territorial. In domestic contexts, this exercise of authority by Indigenous peoples supports continuing self-government power, whether

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<sup>27</sup> *Ibid* at para 148.

<sup>28</sup> *Ibid* at para 157.

<sup>29</sup> See James Crawford, *Brownlie's Principles of Public International Law*, 8th ed (Oxford: Oxford University Press, 2012) at 369-71; Malcolm N Shaw, *International Law*, 6th ed (Cambridge: Cambridge University Press, 2008) at 198, 902-904.

<sup>30</sup> *Island of Palmas Case*, (1928) 2 RIAA 829; *Legal Status of Eastern Greenland Case*, (1933) 2 PCIJ, Series A/B, No 43; *Minquiers and Ecrehos Case*, 1953 ICJR 47. See Crawford, *ibid* at 221-26; Shaw, *ibid* at 502-507.



regarded as residual sovereignty of the Indian nations, as in the US,<sup>31</sup> or as an inherent right of self-government of First Nations, as held by Williamson J of the British Columbia Supreme Court in *Campbell v British Columbia*.<sup>32</sup>

So by acknowledging Indigenous law as a source of Aboriginal title and as a basis for proving occupation of land, Lamer CJC's approach to Aboriginal title in *Delgamuukw* was necessarily territorial. His conception of Aboriginal title therefore entailed both property rights and political authority.<sup>33</sup>

### 5. Regressing to Common Law Aboriginal Title in Canada

Surprisingly, in *Marshall/Bernard* McLachlin CJC ignored the Indigenous law aspects, and hence the territorial dimensions, of Lamer CJC's decision in *Delgamuukw*. She focused instead on physical occupation, and seems to have confined the role of Aboriginal perspectives to Aboriginal *practices* that the common law then translates into legal rights.<sup>34</sup> At the same time, she disagreed explicitly with the territorial approach that had been taken by Cromwell JA of the Nova Scotia Court of Appeal and Daigle JA of the New Brunswick Court of Appeal, favouring instead a site-specific approach whereby Aboriginal title has to be established by proof of physical occupation of specific sites (in this instance, where the Mi'kmaq accused had harvested timber).

In their minority judgment, LeBel and Fish JJ disagreed forcibly with McLachlin CJC's approach, which they thought relied too heavily on the

<sup>31</sup> See *Cohen's Handbook*, *supra* note 22, §4.01.

<sup>32</sup> [2000] 4 CNLR 1 [*Campbell*]. For more detailed discussion, see Kent McNeil, "Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence," in Hamar Foster, Heather Raven, and Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 129 [McNeil, "Judicial Approaches"].

<sup>33</sup> See *Campbell*, *supra* note 32, esp at paras 134-38, where Williamson J also relied on the fact that Lamer CJC had held that Aboriginal title is communal and that Aboriginal nations have decision-making authority over their communally-held lands – authority that Williamson J said must be governmental in nature. For further discussion, see Kent McNeil, "The Post-*Delgamuukw* Nature and Content of Aboriginal Title", in McNeil, *Emerging Justice?*, *supra* note 20 at 102 [McNeil, "Post-*Delgamuukw*"]; McNeil, "Judicial Approaches," *ibid*.

<sup>34</sup> For critical commentary, see "Special Forum: Perspectives on *R. v Marshall; R. v Bernard*" (2006) 55 UNBLJ 73; Slattery, "Metamorphosis," *supra* note 1 at 279-81.

common law and did not take account of Indigenous law and Indigenous conceptions of territory.<sup>35</sup>

I find McLachlin CJC's decision puzzling, in part because she concurred with Lamer CJC in *Delgamuukw* and thus seemed to endorse his acceptance of the role of Indigenous law in proving occupation, which I have argued is necessarily a territorial approach.<sup>36</sup> She also purported to follow the *Delgamuukw* decision in *Marshall/Bernard*. Moreover, in previous judgments she spoke of the "golden thread" of continuity of Indigenous law from pre-contact times to the present and said that Aboriginal rights that are sourced in Indigenous law continue until either surrendered by treaty or extinguished by legislation.<sup>37</sup>

Unfortunately, McLachlin CJC's limited, common law approach and her reliance on physical occupation have now been applied even more strictly by the British Columbia Court of Appeal in the *Tsilhqot'in Nation* case. Moreover, Groberman JA, whose judgment was concurred in by Levine and Tysse JJA, adopted the site-specific approach used by McLachlin CJC in *Marshall/Bernard*, even though Vickers J at trial in *Tsilhqot'in Nation* had pointed out that an Aboriginal title claim to a territory is different from a claim to Aboriginal title to specific sites in the context of a defence to a prosecution, as in *Marshall/Bernard*.<sup>38</sup>

Groberman JA limited Aboriginal title to "definite tract[s] of land the boundaries of which are reasonably capable of definition."<sup>39</sup> He regarded definite tracts as "specific sites on which hunting, fishing, or resource extraction activities took place on a regular and intensive basis," such as "salt licks, narrow defiles between mountains and cliffs, particular rocks or promontories used for netting salmon, or, in other areas of the country, buffalo jumps."<sup>40</sup> In the numbered treaties, however, where vast areas of land were surrendered, the whole treaty area was defined and referred to as

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<sup>35</sup> *Marshall/Bernard*, *supra* note 2, esp at paras 110, 127-30. LeBel and Fish JJ concurred in result on the basis of the evidence, but disagreed with the majority on the correct approach to proving Aboriginal title.

<sup>36</sup> For critical discussion, see Kent McNeil, "Aboriginal Title and the Supreme Court: What's Happening?" (1996) 69 Sask L Rev 281 [McNeil, "What's Happening?"].

<sup>37</sup> *Van der Peet*, *supra* note 18 at paras 263-67; *Mitchell*, *supra* note 19 at para 10, as quoted.

<sup>38</sup> See *Tsilhqot'in Nation v British Columbia*, [2008] 1 CNLR 112 (BCSC) at para 582 [*Tsilhqot'in Nation BCSC*]. On the inappropriateness of litigating Aboriginal title claims in the context of prosecutions, see *Marshall/Bernard*, *supra* note 2 at paras 142-44, *per* LeBel J; Shin Imai, "The Adjudication of Historical Evidence: A Comment and an Elaboration on a Proposal by Justice LeBel" (2006) 55 UNBLJ 146.

<sup>39</sup> *Tsilhqot'in Nation*, *supra* note 3 at para 230.

<sup>40</sup> *Ibid* at para 221.

a “tract,” revealing that the term “definite tract” tells us nothing about the size of the area in question.<sup>41</sup> Moreover, when Lamer CJC stated in *Delgamuukw* that physical occupation could be established by “regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources,”<sup>42</sup> he did not say that the use had to be intensive; that qualification was added by Groberman JA.<sup>43</sup> Instead, Lamer CJC referred to the following passage from my book, *Common Law Aboriginal Title*:

Definite tracts over which they [the Indigenous people in question] herded domestic animals, and lands to which they resorted on a regular basis to hunt, fish, or collect the natural products of the earth, should be included [in the area occupied by them] as well, particularly if other individuals and groups were generally excluded therefrom. Probably even outlying areas that were visited occasionally, and regarded as being under their exclusive control, would also be occupied by them in much the same way as the waste of a manor would be occupied by the lord, though he might seldom go there.<sup>44</sup>

As we shall see below, the common law standard for occupation that Lamer CJC found to be applicable in this context does not require intensive use, or indeed any use at all in some circumstances – rather, what really counts is the intention to possess and the exclusion of others.

My main criticisms of the British Columbia Court of Appeal decision in the *Tsilhqot'in Nation* case are therefore twofold.<sup>45</sup> First, even if one

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<sup>41</sup> See e.g. Treaty 3 (1873), in Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Belfords, Clarke & Co, 1880) 320 at 322: “The tract comprised within the lines above described embracing an area of fifty-five thousand square miles.” Treaty 8 (1899), covering an even larger area, provided that “the said Indians ... shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as hereinbefore described;” see *Treaty No 8*, reprinted from the 1899 edition (Ottawa: Queen’s Printer, 1966) 12.

<sup>42</sup> *Delgamuukw*, *supra* note 6 at para 149.

<sup>43</sup> McLachlin CJC did use the word “intensive” in *Marshall/Bernard*, *supra* note 2, but not as a requirement. She stated at para 70:

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.

<sup>44</sup> McNeil, *Aboriginal Title*, *supra* note 6 at 202 [footnote omitted].

<sup>45</sup> For further criticism of the decision by a retired judge of the British Columbia Court of Appeal, see Douglas Lambert, “The *Tsilhqot'in* Case” (2012) 70:6 *The Advocate* 819.

accepts (which I do not<sup>46</sup>) that Aboriginal title depends *exclusively on physical occupation* of definite tracts of land, the test for occupation applied by the British Columbia Court of Appeal is inconsistent with common law authority relating to occupation of land and is therefore too strict.<sup>47</sup> My second criticism is that the site-specific, non-territorial approach is simply wrong. It pays too much attention to physical occupation and disregards Indigenous law. As discussed above, this approach is inconsistent with the *Delgamuukw* decision.

### 6. *The Common Law Standard for Occupation*

I examined the common law requirements for occupation of land and related them to proof of Aboriginal title in *Common Law Aboriginal Title*,<sup>48</sup> and so will only summarize the main points here. The case law reveals that occupation of land is a question of fact that depends on all the circumstances. The nature of the land and the uses to which it could reasonably be put at the relevant time have to be taken into account. Lord O'Hagan put it this way in *Lord Advocate v Lord Lovat*:

The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests – all these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession.<sup>49</sup>

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<sup>46</sup> In *Aboriginal Title*, *supra* note 6, I presented Indigenous law title (ch 6) and common law title (ch 7) as *alternative* approaches. In *Delgamuukw*, Lamer CJC combined these two approaches to produce the territorial approach described above. Thereafter, I modified my own views to take into account the jurisdictional aspects of Aboriginal title; see McNeil, "Post-*Delgamuukw*," *supra* note 33; Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2002) 47 McGill LJ 473; McNeil, "What's Happening?" *supra* note 36. See also Slattery, "Metamorphosis," *supra* note 1.

<sup>47</sup> See also Nicole Petersen, "The Standard of Occupation for Aboriginal Title in *William v British Columbia*", (April 2013) [unpublished].

<sup>48</sup> *Supra* note 6 at 196-204.

<sup>49</sup> (1880), 5 App Cas 273 at 288 (HL), approved in *Johnston v O'Neill*, [1911] AC 552 at 583 (HL). See also the list of cases cited in McNeil, *Aboriginal Title*, *supra* note 6 at 200 n27. Note that, while many of the authorities I am relying on are from the nineteenth and early twentieth centuries, this is appropriate because the time when the Tsilhqot'in have to prove their occupation is 1846, the date at which Vickers J held that the Crown had asserted sovereignty over their territory; *Tsilhqot'in Nation BCSC*, *supra* note 38 at paras 601-602.

A large variety of acts can therefore demonstrate occupation, including perambulation,<sup>50</sup> hunting,<sup>51</sup> fishing,<sup>52</sup> cutting grass,<sup>53</sup> and even blazing trees.<sup>54</sup> In one case that went up on appeal from the British Columbia Court of Appeal to the Privy Council in London, mere payment of taxes on wild, unimproved land was held to be sufficient evidence of occupation to confer title.<sup>55</sup> In another case where the only act of occupation was placing markers at the four corners of the land, the Privy Council found that to be sufficient. Lord Guest observed:

Their Lordships do not consider that in order to establish possession it is necessary for a claimant to take some active step in relation to the land such as enclosing the land or cultivating it. The type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which is not being cultivated there is little which can be done *on the land* to indicate possession.<sup>56</sup>

Moreover, in assessing the acts of occupation, “the conditions of life and habits and ideas of the people” living there should be taken into account.<sup>57</sup> The relevant considerations are therefore social and cultural as well as physical.

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.<sup>58</sup> 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.<sup>59</sup> In other words, the occupier is not obliged to use the land in any particular way, as

<sup>50</sup> *Woolway v Rowe* (1834), 1 Ad & E 114 (KB).

<sup>51</sup> *Red House Farms Ltd v Catchpole* (1976), 244 EG 295 (Engl CA) [*Red House Farms*].

<sup>52</sup> *Curzon v Lomax* (1803), 5 Esp 60 (KB); *Bristow v Cormican* (1874), Ir R 10 CL 398 at 408 (Ex), aff’d (1878), 3 App Cas 641 (HL).

<sup>53</sup> *Cadija Umma v S Don Manis Appu*, [1939] AC 136 (PC) (on appeal from Ceylon) [*Cadija Umma*].

<sup>54</sup> *Halifax Power Co v Christie* (1915), 48 NSR 264 at 267 (NSSC) [*Halifax Power*].

<sup>55</sup> *Kirby v Cowderoy*, [1912] AC 599 at 602-3 [*Kirby*].

<sup>56</sup> *Wuta-Ofei v Danquah*, [1961] 1 WLR 1238 at 1243 (PC) [*Wuta-Ofei*] [emphasis added].

<sup>57</sup> *Cadija Umma*, *supra* note 53 at 141-42.

<sup>58</sup> See Frederick Pollock and Robert Samuel Wright, *An Essay on Possession in the Common Law* (Oxford: Clarendon Press, 1888) at 28-36; John M Lightwood, *A Treatise on Possession of Land* (London: Stevens and Sons Ltd, 1894) at 9-27; RDC Stewart, “The Differences between Possession of Land and Chattels” (1933) 11 Can Bar Rev 651 at 652-56.

<sup>59</sup> *Wuta-Ofei*, *supra* note 56; *Halifax Power*, *supra* note 54.

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.<sup>60</sup>

In *Marshall/Bernard*, McLachlin CJC held that, in assessing occupation in order to determine whether Aboriginal title has been proven, a court has to decide whether the Aboriginal relationship with the land was such that it could be translated into title at common law.<sup>61</sup> Relying on English case law,<sup>62</sup> she affirmed that “[t]he common law recognizes that possession sufficient to ground title is a matter of fact, depending on all the circumstances, in particular the nature of the land and the manner in which the land is commonly enjoyed.”<sup>63</sup> She noted as well that, “where marshy land is virtually useless except for shooting, shooting over it may amount to adverse possession”, and “that a person with adequate possession for title may use it intermittently or sporadically.”<sup>64</sup> Citing *Delgamuukw*, she also said that “the common law recognizes that exclusivity does not preclude consensual arrangements that recognize shared title to the same parcel of land.”<sup>65</sup>

McLachlin CJC emphasized that assessment of the practices relied upon to establish title must take into account the Aboriginal perspective:

The aboriginal perspective grounds the analysis and imbues its every step. It must be considered in evaluating the practice at issue, and a generous approach must be taken in matching it to the appropriate modern right.<sup>66</sup>

For example, she commented as follows on the requirement of exclusivity:

[T]he people may have been peaceful and have chosen to exercise their control by sharing rather than exclusion. It is therefore critical to view the question of exclusion from the aboriginal perspective .... It follows that evidence of acts of exclusion is not required to establish aboriginal title. All that is required is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so.<sup>67</sup>

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<sup>60</sup> This explains why payment of taxes on the land was sufficient to establish occupation in *Kirby*, *supra* note 55.

<sup>61</sup> *Marshall/Bernard*, *supra* note 2 at paras 48-51, 69-70, 78.

<sup>62</sup> *Powell v McFarlane* (1977), 38 P & CR 452 at 471 (ChD).

<sup>63</sup> *Supra* note 2 at para 54.

<sup>64</sup> *Ibid*, citing *Red House Farms*, *supra* note 51, and *Keefer v Arillotta* (1976), 13 OR (2d) 680 (CA).

<sup>65</sup> *Marshall/Bernard*, *supra* note 2 at para 54, citing *Delgamuukw*, *supra* note 6 at para 158.

<sup>66</sup> *Marshall/Bernard*, *supra* note 2 at para 50; see also paras 45-49, 51, 64, 69-70, 78.

<sup>67</sup> *Ibid* at paras 64-65.

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.<sup>68</sup>

Most of the common law cases in which the issue of sufficiency of occupation has arisen have involved adverse possession where a wrongdoer claimed to have acquired a possessory title by ousting the rightful owner for the statutory limitation period. Aboriginal peoples claiming Aboriginal title are obviously *not wrongdoers* – on the contrary, they are claiming title because they were in *rightful occupation* of their traditional lands at the time of Crown assertion of sovereignty. The standard to be applied in determining whether they had the occupation required for title should therefore be considerably lower than that required for persons claiming title by adverse possession.<sup>69</sup>

However, in *Tsilhqot'in Nation* it is apparent that the British Columbia Court of Appeal applied a standard higher even than the standard for adverse possession by wrongdoers. Without referring to a single case involving sufficiency of occupation at common law, Groberman JA concluded that intensive and regular use of definite tracts of land is necessary to establish the occupation required for Aboriginal title. With all due respect, his test is inconsistent with the common law standard, approved by McLachlin CJC in *Marshall/Bernard*, which we have seen is more concerned with intention to control and exclusion of others than with specific use of the land, or indeed any use at all.<sup>70</sup>

Also missing from Groberman JA's analysis is any serious assessment of the Aboriginal perspective, which McLachlin CJC said "grounds the analysis and imbues its every step."<sup>71</sup> Judges should therefore be examining the evidence carefully to determine what uses and what standard of occupation and exclusion are appropriate to the specific

<sup>68</sup> *Wuta-Ofei*, *supra* note 56; *Halifax Power*, *supra* note 54.

<sup>69</sup> See *R v Marshall*, [2004] 1 CNLR 211 (NSCA) at paras 124-38; McNeil, *Aboriginal Title*, *supra* note 6 at 197-99. Even in adverse possession cases, judges have been much more willing to accord possession to "innocent" persons (i.e. those who honestly and mistakenly occupy someone else's land) than to conscious wrongdoers; see *Wood v Gateway of Uxbridge Properties Ltd* (1990), 75 OR (2d) 769 (Ont Gen Div); *Teis v Ancaster (Town)* (1997), 152 DLR (4th) 304 (Ont CA); *Elliott v Woodstock Agricultural Society*, 2008 ONCA 648, 298 DLR (4th) 577 at para 29 (Ont CA).

<sup>70</sup> See especially *Kirby*, *supra* note 55, a Privy Council decision on appeal from the British Columbia Court of Appeal, and *Wuta-Ofei*, *supra* note 56. See also the quotation from McLachlin CJC's judgment in *Marshall/Bernard*, *supra* note 43.

<sup>71</sup> *Marshall/Bernard*, *supra* 2 at para 55: see text accompanying note 66 *supra*.

Aboriginal society at the time in the geographical location in question, taking into account, as Lamer CJC directed in *Delgamuukw* and McLachlin CJC affirmed in *Marshall/Bernard*, “the group’s size, manner of life, material resources, and technological abilities, and the character of the lands claimed.”<sup>72</sup> This approach is also in keeping with the common law, which directs that “the conditions of life and habits and ideas of the people” need to be taken into account.<sup>73</sup>

### 7. Conclusion: Applying *Delgamuukw*

In summary, the main problems I have identified with a strictly common law approach to Aboriginal title are that it ignores Indigenous law and does not include governmental authority. As a consequence, it does not take into account the significant developments in the jurisprudence in the *Delgamuukw* and *Campbell* decisions. Moreover, the British Columbia Court of Appeal decision in *Tsilhqot’in Nation*, while purporting to take a common law approach, in fact applied a test for Aboriginal occupation that is much stricter even than the common law test for adverse possessors who are known wrongdoers. The standard of occupation applied by the Court of Appeal is therefore discriminatory and must be rejected.

The Indigenous law approach, while acknowledging the existence and continuing application of Indigenous law, suffers from serious shortcomings that have become glaringly apparent in Australia: (1) in addition to showing a connection with the land, Indigenous peoples in Australia have to prove they had laws or customs that gave them rights in relation thereto prior to Crown acquisition of sovereignty; (2) the content of their land rights is limited to the rights under their pre-existing laws and customs; (3) they have no inherent governmental authority that would permit them to make new laws or significantly change their pre-existing laws; and (4) loss of their connection with the land and discontinuance of their laws and customs in relation thereto result in loss of their land rights.

In *Delgamuukw*, Lamer CJC adopted the common law approach, but went significantly beyond it by incorporating Indigenous law into the test for establishing Aboriginal title. In so doing, he acknowledged the

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<sup>72</sup> *Delgamuukw*, *supra* note 6 at para 149, quoting from Brian Slattery, “Understanding Aboriginal Rights” (1987) 64 Can Bar Rev 727 at 758, adopted in *Marshall/Bernard*, *supra* note 2 at para 49. McLachlin CJC also approved La Forest J’s statement in *Delgamuukw* that, “when dealing with a claim of ‘aboriginal title’, the court will focus on the occupation and use of the land as part of the aboriginal society’s *traditional way of life*,” see *Delgamuukw*, *supra* note 6 at para 194 [emphasis in original], quoted in *Marshall/Bernard*, *supra* note 2 at para 49.

<sup>73</sup> *Cadija Umma*, *supra* note 53 at 141-42.



importance and relevance of Indigenous law, while avoiding the problems with native title in Australia by not relying on Indigenous law to define the content of Aboriginal title. Instead, he maintained that Indigenous law is a source of Aboriginal title that can be used to prove the occupation upon which the title depends. Given that a society's laws in relation to land are generally territorial in their application,<sup>74</sup> Lamer CJC's conception of Aboriginal title is necessarily territorial. Moreover, as held by Williamson J in the *Campbell* decision, Aboriginal title as conceptualized by Lamer CJC includes governmental authority. Unlike Aboriginal title under a strictly common law approach, it is more than a proprietary interest. It is also jurisdictional.

Lamer CJC's approach to Aboriginal title is an innovative advance in the jurisprudence that was concurred in by the current Chief Justice. It resolves the dilemma of having to choose between the common law and Indigenous law as the source of Aboriginal title. At the same time, it can be used to explain the distinction between the external and internal aspects of Indigenous title, identified by Brian Slattery.<sup>75</sup> Externally, as against the outside world, Aboriginal title is a generic right that, subject to the limit that the lands cannot be used in ways irreconcilable with the connection with the land on which the title is based,<sup>76</sup> does not vary from one title-holding group to another. Internally, the Indigenous law of each group continues to apply to govern landholding within their territory. Moreover, this law is not frozen in time at the moment of Crown assertion of sovereignty. It is dynamic, and can be modified at any time through the exercise of the group's right of internal self-government.<sup>77</sup>

We have seen that the British Columbia Court of Appeal's decision in the *Tsilhqot'in Nation* case deviated substantially from both the common law standard for occupation of land and the *Delgamuukw* decision on the role of Indigenous law in proving Aboriginal title. In January, 2013, the Supreme Court of Canada granted leave to appeal. The appeal was heard on November 7 of that year. With all due respect, I think the Supreme Court should overturn Groberman JA's decision and apply the combined

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<sup>74</sup> The kinds of laws Lamer CJC gave as examples – trespass laws, a land tenure system, and laws governing land use – tend to be laws of general application that typically would apply throughout an Indigenous people's territory; see quotations accompanying notes 27 and 28, *supra*.

<sup>75</sup> Slattery, "Metamorphosis," *supra* note 1 at 270, 279.

<sup>76</sup> *Delgamuukw*, *supra* note 6 at paras 125-32. For criticism of this inherent limit on Aboriginal title, see McNeil, "Post-*Delgamuukw*," *supra* note 33 at 116-22.

<sup>77</sup> *Campbell*, *supra* note 32. See also Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can Bar Rev 196 at 212-15; McNeil, "What's Happening?," *supra* note 36 at 291-93.

common law/Indigenous law approach to proof of Aboriginal title that was firmly established by the Court's own decision in *Delgamuukw*.