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Developments on Aboriginal Title

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I would like to thank the organizers of this conference, especially Arif Bulkan and Velma Newton, for inviting me to speak and welcoming me to Belize.

Tom Berger has made my task much easier by presenting the philosophical and legal underpinnings for Indigenous land rights, and providing an introduction to the development of the doctrine of Aboriginal title in Canada.

I am going to try to fill in some of the detail by drawing a composite picture of Indigenous rights in the four common law jurisdictions that I am familiar with, namely Canada, the United States, Australia, and New Zealand.

I will also talk about the important 2014 decision in *Tsilhqot'in Nation v. British Columbia*,¹ where the Supreme Court of Canada issued a declaration of Aboriginal title for the very first time.

At the outset, I would like to emphasize that Indigenous rights are not just rights to lands and resources – they include rights in relation to Indigenous law and governance authority.

I am going to address three main issues:

1. The source and proof of Indigenous rights;
2. The content of Indigenous rights; and
3. Extinguishment and infringement of Indigenous rights.

1. The Source and Proof of Indigenous Rights

Source and proof are so intimately linked that they can be conveniently addressed together.

¹ [2014] 2 S.C.R. 257.

In all four of the common law jurisdictions I am considering, Indigenous rights arise from occupation and use of land, usually at the time the British Crown acquired sovereignty (though the timeframe is different in United States – I’ll come back to that).

As Justice Judson of the Supreme Court of Canada stated in 1973 in the *Calder* case, already referred to in Tom Berger’s talk, “when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means”.²

This is consistent with the approach taken by the U.S. Supreme Court, going all the way back to Chief Justice Marshall’s seminal decision in *Johnson v. M’Intosh*³ in 1823. This approach was affirmed in 1941 by Justice William O. Douglas in *United States v. Santa Fe Pacific Railroad*,⁴ and has been applied in numerous decisions of the U.S. Court of Claims in cases on appeal from the Indian Claims Commission.⁵

The same approach, based on occupation and use, was applied by the High Court of Australia in *Mabo v. Queensland*⁶ in 1992, and more recently by the New Zealand Court of Appeal in *Attorney-General v. Ngati Apa*.⁷

However, the law in these four jurisdiction diverges somewhat on two questions, specifically: (1) What does occupation mean? and (2) What is the relevance of Indigenous law?

In the United States, occupation refers to occupation of territory rather than land. In the *Santa Fe Pacific Railroad* case, for example, Justice Douglas said that Indian title existed over lands that constituted the “definable territory” of the claimant tribe.⁸

² *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 at 328.

³ 21 U.S. (8 Wheat.) 543 (1823).

⁴ 314 U.S. 339 (1941).

⁵ See Michael J. Kaplan, “Proof and Extinguishment of Aboriginal Title to Indian Lands” (2003) LEXSEE 41 American Law Reports Federal 425.

⁶ (1992) 175 C.L.R. 1.

⁷ [2003] 3 N.Z.L.R. 643 (C.A.).

⁸ *United States v. Santa Fe Pacific Railroad*, above note 4 at 345.

This has meant that, as decided by the U.S. Supreme Court in *Worcester v. Georgia*⁹ in 1832, the Indian nations' rights to the territories in their exclusive occupation include property rights – title to land – *and* governmental authority, sometimes described as residual sovereignty.

So in the United States, Indian title and tribal sovereignty can be established by proof that an Indian nation was in exclusive occupation of a “definable territory” for a long time – occupation which could have originated *after* the territory became part of the United States.

There is *no requirement* in the United States that the occupation be in accordance with the laws of the Indian nation – this is simply assumed because it is obvious that every Indian nation had laws in relation to lands and other matters.¹⁰ So proof of Indigenous law is not necessary to establish Indian title and tribal sovereignty in the United States.

The *adequacy* of occupation is assessed in a culturally-appropriate way, taking into account the claimant nation's way of life. As Justice Baldwin stated in 1835 in *Mitchel v. United States*, Indian occupation “was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites”.¹¹

Likewise in Canada, the source of Aboriginal title is exclusive occupation of land, though the occupation has to be established at the time of Crown assertion of sovereignty.

Prior to the Supreme Court's 2014 decision in *Tsilhqot'in Nation*, it was not clear whether Aboriginal title had to be proven in relation to specific sites, such as villages and fishing places, or could be claimed and proven on a territorial basis over a larger area.

In her unanimous judgment, Chief Justice McLachlin adopted the territorial approach and applied it to declare Aboriginal title over a large area where the trial judge had found the Tsilhqot'in to be in exclusive occupation through their presence on the land and their use of it for hunting, fishing, and gathering natural resources.

⁹ 31 U.S. (6 Pet.) 515 (1832).

¹⁰ This was acknowledged by Marshall C.J. in *Johnson v. M'Intosh*, above note 3.

¹¹ 34 U.S. (9 Pet.) 711 at 746 (1835).

Evidence of Tsilhqot'in law had also been presented at trial to demonstrate their control over the land, and the Supreme Court relied on this as well in concluding that their occupation was exclusive. However, although proof of Indigenous law in relation to land can be used to help prove exclusive occupation, as was held by Chief Justice Lamer in the *Delgamuukw* case in 1997,¹² Aboriginal title in Canada does not depend on Indigenous law.

While accepting the territorial approach to Aboriginal title in *Tsilhqot'in Nation*, Chief Justice McLachlin did not acknowledge the residual sovereignty of the Indian nations in the way the U.S. Supreme Court has done ever since the decisions of Chief Justice Marshall in the 1820s and 1830s.

However, the Supreme Court held in the *Delgamuukw* case that Aboriginal title is communal and that the title-holding community has decision-making authority over their lands. In *Campbell v. British Columbia*,¹³ Justice Williamson of the B.C. Supreme Court held that this authority must be governmental in nature because a political structure is necessary for communal decisions to be made.

But while accepting that Aboriginal titleholders have the authority to manage their lands, Chief Justice McLachlin did not specify in *Tsilhqot'in Nation* whether this authority is governmental or not.

In New Zealand, in the leading case of *Attorney-General v. Ngati Apa*¹⁴ the Court of Appeal held in 2003 that the Maori had Aboriginal title to any lands occupied by them in accordance with Maori customs and usages at the time of Crown acquisition of sovereignty in 1840. Maori customs include Maori law, though as long as lands were being exclusively used by the Maori in 1840, it seems that they would have title, without having to establish that title as a matter of Maori law.

This can be contrasted with the situation in Australia, which is the real outlier among these four common law jurisdictions. Apart from statute, there was no acknowledgement that the Indigenous peoples of Australia had any legal rights to the lands they traditionally occupied until the High Court's momentous decision in *Mabo v. Queensland*¹⁵ in 1992.

¹² *Delgamuukw v. British Columbia*, [1997] 3 S.C.R 1010 at paras. 102, 148, 157.

¹³ [2000] 4 C.N.L.R. 1 (B.C.S.C.).

¹⁴ Above note 7.

¹⁵ Above note 6.

That decision reversed two centuries of denial by ruling that the Indigenous peoples of Australia do have native title – as Aboriginal title is called there – to the lands that they occupied in accordance with their traditional laws and customs at the time of the Crown’s acquisition of sovereignty.

In the words of Justice Brennan that were incorporated into the *Native Title Act 1993* (Cth), section 223(1), native title “has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.”¹⁶

As a result, for the Indigenous peoples of Australia to prove native title they have to show not only that they were in occupation of the claimed lands, but also that they had rights to those lands by virtue of their own laws.¹⁷ The stringent test for native title in Australia is out of step with the requirements for Aboriginal title in the other three common law jurisdictions we have examined.

In addition, it is inconsistent with the common law as developed in England over the centuries, whereby a person who is in exclusive occupation of land has title by virtue of that occupation as against anyone who cannot prove a better title, including the Crown.¹⁸

I now want to turn to the second issue to be discussed – the content of Aboriginal title.

2. The Content of Aboriginal Title

In the United States, Aboriginal or Indian title is an all-encompassing right, entitling the title-holding nation to exclusive possession and use of the land and the benefit of the natural resources on and under it, including standing timber and minerals.¹⁹ As mentioned earlier, the territorial nature of this title means that it includes governmental authority.²⁰

¹⁶ *Ibid.* at 58.

¹⁷ See *Members of the Yorta Yorta Community v. Victoria*, (2002) 214 C.L.R. 422.

¹⁸ For detailed discussion, see Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

¹⁹ See *United States v. Shoshone Tribe*, 304 U.S. 111 at 115-18 (1938); *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119 at 122-23 (1938); *Otoe and Missouri Tribe v. United States*, 131 F. Supp. 265 at 290-91 (1955), *cert. denied* 350 U.S. 848 (1955); *United States v. Northern*

In Canada, Aboriginal title is also a right to exclusive possession and use of the land, including surface and subsurface resources, for whatever purposes the titleholders choose.²¹ Because Aboriginal title is a complete beneficial interest, the Crown's underlying title has no beneficial content whatsoever.²²

However, unlike in the United States, there is an inherent limit on Aboriginal title in Canada – the lands can't be used in ways that will substantially deprive future generations of Indigenous titleholders of the benefit of the land.²³ There is thus a *sustainability* component to Aboriginal title that, in my opinion, would be well worth applying to all land in Canada.

Not all Indigenous land rights in Canada amount to Aboriginal title. There are also more limited, non-exclusive resource-use rights, such as site-specific hunting and fishing rights, that are subject to a different test for proof.²⁴

In New Zealand, exclusive Maori title is also all-encompassing, though most Maori title lands were either surrendered to the Crown or converted to Maori fee simple lands in the latter half of the 19th century. As in Canada, it is also possible for the Maori to enjoy non-exclusive resource-use rights, when provided for by Maori customs and usages.

Again, Australia is the exception where the content of native title is concerned. Because native title originates from and is defined by Indigenous laws and customs, the content of the title depends on those laws and customs.²⁵ So if, for

Paiute Nation, 393 F. 2d 786 at 796 (1968); *United States ex rel Chunie v. Ringrose*, 788 F. 2d 638 at 642 (1986).

²⁰ See *Worcester v. Georgia*, above note 9; *United State v. Mazurie*, 419 U.S.544 at 557 (1975); *United States v. Wheeler*, 435 U.S. 313 at 322-23 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *United States v. Lara*, 541 U.S. 193 (2004).

²¹ *Delgamuukw v. British Columbia*, above note 12 at paras. 116-24; *Tsilhqot'in Nation v. British Columbia*, above note 1 at paras. 67, 73.

²² *Tsilhqot'in Nation v. British Columbia*, above note 1 at paras. 70-71.

²³ *Delgamuukw v. British Columbia*, above note 12 at paras. 125-32; *Tsilhqot'in Nation v. British Columbia*, above note 1 at paras. 74-75, 86.

²⁴ The test, established in *R. v. Van der Peet*, [1997] 2 S.C.R. 507, requires proof that the custom, practice or tradition on which the Aboriginal right is based was integral to the distinctive culture of the Indigenous people claiming the right at the time of contact with Europeans.

²⁵ *Mabo v. Queensland*, above note 6 at 58; *Native Title Act, 1993* (Cth), s.223(1).

example, an Indigenous people had no laws and customs regarding subsurface resources, their native title would not extend to mineral rights.²⁶

The Australia approach to the content of native title rights involves a strict application of what is known as the doctrine of continuity. That doctrine provides that any property rights enjoyed under a pre-existing legal regime continue after the Crown acquires sovereignty. However, as applied in Australia, the approach ignores the significance of exclusive occupation, which as we have seen is the basis for all-encompassing Indigenous land rights in Canada and the United States.

Finally, in all four jurisdictions there is a restriction on alienation of Indigenous land title. In Canada, Australia, and New Zealand, it can only be surrendered to the Crown. In the United States, it can only be surrendered to the U.S. government.

3. Extinguishment and Infringement of Indigenous Rights

The question here is the extent to which Aboriginal title in particular is protected against extinguishment or infringement.

There are three potential sources of protection: (1) the common law; (2) constitutional provisions; and (3) statutory provisions. I am going to leave aside statutory provisions, which are too specific for my overview.

Aboriginal title is a property right, and as such it enjoys the same *common law* protection as any property right. Intruders who enter Aboriginal title land without permission are trespassers, and the Aboriginal titleholders have the same remedies as other land owners: they can employ self-help to remove the trespassers, or they can go to court and get an injunction and damages.²⁷

The government, as the upholder of the rule of law, is obliged to use its authority to protect the property rights of Indigenous peoples. This also means that the *government itself* cannot take or infringe these rights unless it has statutory authority to do so. Ever since Magna Carta in 1215, property rights have been

²⁶ *Western Australia v. Ward* (2002) 213 C.L.R. 1.

²⁷ In *Tsilhqot'in Nation*, above note 1 at para. 90, Chief Justice McLachlin stated that, “[a]fter Aboriginal title to land has been established by court declaration or agreement, ... [t]he usual remedies that lie for breach of interests in land are available”. She was referring there to remedies against the Crown, but *a fortiori* the usual remedies against third parties would also be available.

protected against *executive* taking or infringement,²⁸ and this protection extended to Indigenous property rights when overseas territories were colonized by the Crown.²⁹

However, the common law does not protect property rights against *legislative* taking or infringement. Legislatures acting within their constitutional authority can enact statutes that authorize the taking or infringement of property rights, as long as the intention to do so is clearly and plainly expressed in the legislation.³⁰ Expropriation statutes, permitting the taking of private property for public purposes, are examples. But payment of compensation is required, unless expressly denied by the statute.³¹

Although the common law does not protect property rights against *legislative* taking and infringement, *constitutions* do provide such protection in some jurisdictions. Of the other four jurisdictions I am considering, the United States and Australia do have constitutional provisions protecting property rights generally.

The 5th Amendment of the U.S. Constitution provides that private property shall not “be taken for public use, without just compensation.”

Now remarkably, the U.S. Supreme Court in 1955 in the *Tee-Hit-Ton Indians*³² case held that Indian title is *not property* that is protected by the 5th Amendment. One justification given was that Indian title is more in the nature of sovereignty, which relates to the jurisdictional dimension of Indian title that I mentioned earlier.

²⁸ See *Attorney-General v. De Keyser's Royal Hotel*, [1920] A.C. 508 at 569 (H.L.); *Burmah Oil Co. v. Lord Advocate*, [1965] A.C. 75 (H.L.); *A.G. v. Nissan*, [1970] A.C. 179 (H.L.).

²⁹ See *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.); *Eshugbayi Eleko v. Government of Nigeria*, [1931] A.C. 662 (P.C.).

³⁰ See *Newcastle Breweries Ltd. v. The King*, [1920] 1 K.B. 584; *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629; *A.G. Canada v. Hallet & Carey Ltd.*, [1952] A.C. 427 (P.C.); *Colet v. R.*, [1981] 1 S.C.R. 2 at 10; *Clunies-Ross v. The Commonwealth* (1984) 155 C.L.R. 193 (H.C. Aust.).

³¹ See *Western Counties Railway Co. v. Windsor and Annapolis Railway Co.* (1882), 7 App. Cas. 178 at 188 (P.C.); *Commissioner of Public Works (Cape Colony) v. Logan*, [1903] A.C. 355 at 363-64 (P.C.); *Central Control Board (Liquor Traffic) v. Cannon Brewery Co. Ltd.*, [1919] A.C. 744 at 752 (H.L.); *De Keyser's Royal Hotel*, above note 28 at 542, 576, 579.

³² *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

However, I think the real basis for this decision was political and economic: the Supreme Court wanted Congress to have discretion to deal with the Indian tribes as it thought best without being subject to constitutional protections for property.

In Australia, section 51(xxxi) of the Constitution provides that any taking of property by Parliament has to be on “just terms”, but this provision does not apply to state legislatures and so has provided little protection to Indigenous land rights.

Aboriginal title and other Aboriginal rights do enjoy significant constitutional protection in Canada. In 1982, the *Charter of Rights and Freedoms* was added to our Constitution, providing important protections for civil rights. At the same time, section 35 of the *Constitution Act, 1982*, was added. It provides that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” A large body of case law has since grown up around section 35, which I don’t have time to even summarize.

But briefly, the Supreme Court of Canada has held, first of all, that as a consequence of section 35 Aboriginal rights, including title, can no longer be *extinguished unilaterally* by legislation.³³ Aboriginal title can only be surrendered with the *consent* of the Indigenous titleholders, for example in a modern land claims agreement.

The Supreme Court has nonetheless held that, despite section 35, Aboriginal rights can still be *infringed* by or pursuant to legislation, provided the infringement can be justified by the government on a strict test.

Briefly, the government must prove that there is a valid legislative objective behind the legislation, which usually isn’t hard to do. But that is just the *first* part of the test. The *second* part requires the government to prove that it has respected the Crown’s fiduciary obligations to the Aboriginal people by (1) consulting with them about the proposed infringement; (2) infringing the right as little as possible; and (3) paying compensation for the economic impact of the infringement.

So although justifiable infringement is *theoretically* possible, *in reality* governments should negotiate with Aboriginal rights holders and *get their consent* to actions that will impact negatively on their rights.³⁴

³³ *R. v. Van der Peet*, above note 24 at para. 28; *Mitchell v. MNR*, [2001] 1 S.C.R. 911 at para. 11.

³⁴ See *Tsilhqot’in Nation*, above note 1 at para. 76.

The most significant development in Aboriginal rights law in Canada in the past 12 years has been the Supreme Court's imposition on governments of a *duty to consult* with Indigenous peoples, even when their rights have not yet been established.³⁵ This duty arises when their claimed rights could be negatively affected by government action, such as authorization of resource development, including mining and harvesting of forests.

As long as the Indigenous people concerned have a credible claim, even though not yet proven in court, and the government is aware of that claim, consultation has to take place before any action that would have a potential negative impact on the claimed rights can go ahead. While this does not give Indigenous peoples a veto over resource development, it does make them players and give them considerable clout in negotiating benefits for their communities.

As I have said, this duty to consult is in relation to *claimed but unproven* rights. Where rights have been *proven*, as in the case of the Tsilhqot'in people in British Columbia who had their Aboriginal title recognized by the Supreme Court a couple of years ago, consent is almost always going to be required. As the Supreme Court said in the *Tsilhqot'in Nation* decision, consent can *only* be dispensed with if the government can meet the justifiable infringement test.³⁶ And as I noted earlier, this will rarely be possible.

Moreover, in *Tsilhqot'in Nation*, the Supreme Court said that, even if justified, infringements can't substantially diminish the benefit of the land for future generations.³⁷ So the *sustainability* restriction on Aboriginal title applies to governments as well as to the titleholders themselves.

As a result, where Aboriginal title has been established, Canada will almost invariably have to obtain the "free, prior and informed consent" of the Indigenous people concerned before taking action that might impact their rights. This is required both by Canadian law and by the United Nations Declaration on the Rights of Indigenous Peoples (e.g. Articles 19 and 28).

³⁵ This duty was first articulated by the Supreme Court of Canada in *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511, and *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550, and has been applied in numerous decisions at all levels of courts across the country since then.

³⁶ *Tsilhqot'in Nation*, above note 1 at para. 90.

³⁷ *Ibid.* at para. 86.

4. Conclusions

Our comparison of Indigenous rights in the United States, Canada, Australia, and New Zealand has revealed many similarities, but also some major differences, especially where Australia is concerned.

The U.S. Supreme Court has gone the furthest in acknowledging extensive land rights and residual sovereignty, but has denied constitutional protection to Indigenous land rights. In Canada, land rights equivalent to those of the Indian nations in the United States have been recognized and given constitutional protection, but the Supreme Court has not yet expressly acknowledged the jurisdictional dimensions of these rights.

The High Court of Australia has taken the most restrictive approach to Indigenous rights, using the doctrine of continuity to limit their scope and denying the Indigenous peoples any governmental authority. In New Zealand, Indigenous land rights that have not been converted to common law interests can be as extensive as in the United States and Canada, but they do not enjoy any constitutional protection against legislation.

After initially voting against it, these four settler states have now adopted the UN Declaration on the Rights of Indigenous Peoples. What has yet to be determined is the impact the Declaration will have on their domestic laws. If they are serious about implementing it, significant adjustments to their legal systems will no doubt need to be made. I expect that future developments in Indigenous rights will happen as governments and courts begin to take the terms of the Declaration seriously.