PUBLICATION: Vancouver Sun
DATE: 2009.04.27
EDITION: Final
SECTION: Issues & Ideas
PAGE: A7

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SOURCE: Special to the Sun

Aboriginal title? Mr. Campbell, meet Mr. Harcourt

There is again a political desire to breathe life back into "aboriginal title," a moribund concept that has seduced politicians and bedevilled the courts for nearly four decades. History has a way of repeating itself in British Columbia politics and nowhere is this truer than in the recognition and reconciliation legislation promised by Gordon Campbell.

In March 1991, the British Columbia Supreme Court in its *Delgamuukw* decision rejected a claim of aboriginal title to 22,000 square miles of northern British Columbia. The court concluded that all such aboriginal interests in land were extinguished by British Columbia in the years before Confederation. The B.C. government had won and the claimants of aboriginal title had lost decisively in court.

That should have been the end of the debate, but between the time the B.C. Supreme Court rendered its decision in *Delgamuukw* and the appeal of the decision to the B.C. Court of Appeal, the NDP government of Mike Harcourt came to power.

The Harcourt government wanted to recognize aboriginal title, but the landmark Delgamuukw decision stood in the way. If his support of aboriginal title was to succeed, Harcourt had to undermine the B.C. Supreme Court decision.

To that end the Harcourt government dismissed the legal team that had won the decisive victory in the B.C. Supreme Court, appointed a new legal team sympathetic to the native cause and directed it to concede the key elements of the case the province had won at trial: That there was no aboriginal right or title to land and that there had been a blanket extinguishment of aboriginal rights or title to land before British Columbia's entry into Confederation. The province thus surrendered the high ground on the key issues it had won at trial.

The Court of Appeal ignored Harcourt's concession on aboriginal title. The matter was then appealed to the Supreme Court of Canada with the province again abandoning the position it had successfully argued at trial. The Harcourt government asked the Supreme Court to recognize an aboriginal right or interest in land and to base such recognition on an acknowledgement that there had not been a blanket extinguishment of aboriginal rights in land.

Harcourt's concession of aboriginal title was again rejected. The Supreme Court of Canada did not grant a declaration of aboriginal title. Rather, it determined that, to support a claim of aboriginal title, an aboriginal group had to provide evidence that its ancestors had "exclusive occupation" of the land at the time of British sovereignty.

Unfortunately the Supreme Court left unresolved what, in practical terms, "exclusive occupation" meant. Did it mean occupation of the entirety of the traditional territory before sovereignty, or did occupation refer only to those parts of the traditional territory physically occupied by each group, such as village sites and the immediately surrounding lands that were intensively used by the group, but excluding land used only seasonally or occasionally?

The court ordered a new trial to address the claim to aboriginal title raised in *Delgamuukw*, but the matter never did go back to trial. The issue of what constituted "exclusive occupation" was left unresolved by the courts until the *Marshall/Bernard* decision of the Supreme Court of Canada in 2005.

In that decision the Supreme Court rejected a claim of aboriginal title to timber-cutting sites in New Brunswick and Nova Scotia. Significant in the British Columbia context, the Supreme Court cautioned against the reckless and indiscriminate conferring of aboriginal title in the absence of evidence of sufficiently regular and exclusive pre-sovereignty occupation and warned that to do so would transform the right or practice into a new and different right:

"The common law right to title is commensurate with exclusionary rights of control. That is what it means and has always meant. If ancient aboriginal practices do not indicate that type of control, then title is not the appropriate right.

"To confer title in the absence of evidence of sufficiently regular and exclusive pre-sovereignty occupation, would transform the ancient right into a new and different right."

In rejecting aboriginal title, the Supreme Court approved several "tests" that might be used in evaluating a claim:

- "The line separating sufficient and insufficient occupancy for title is between irregular use of undefined lands on the one hand and regular use of defined lands on the other."

- "Occasional visits to an area [for hunting, fishing and gathering] did not establish title; there must be evidence of capacity to retain exclusive control over the land claimed."

- The presence of Europeans may undermine claims of exclusive control and therefore undermine the claim of aboriginal title.

The 2005 *Marshall/Bernard* decision of the Supreme Court of Canada explained in practical terms the evidence necessary to establish aboriginal title. The court made clear that mere seasonal or occasional visits to an area for hunting, fishing or gathering was not sufficient to establish aboriginal title, noting that while such practices might give rise to a more limited right, such as an aboriginal right to hunt for food, but they certainly did not give rise to a right to aboriginal title to the land.

For that to occur there must exist both a clear intent and an ability to exclude all others from the area. The free movement or welcoming of fur traders, explorers, prospectors, miners,

missionaries, Hudson Bay Co. personnel and government officials would work to undermine claims of exclusive control, making the application of aboriginal title beyond a few village sites virtually impossible.

The Supreme Court had now put British Columbia in the strongest position with regard to aboriginal title since before the Harcourt government came to power in 1991.

Yet that was not to be. The Campbell government in February 2009 did the unthinkable and "pulled a Harcourt," declaring that it was now a believer and it would recognize aboriginal title throughout British Columbia without any requirement for claimants to title to provide any evidence or proof that they indeed qualified for aboriginal title.

Again, as Harcourt had done in 1992, Campbell has snatched defeat from the jaws of victory.

The province immediately gave notice to the B.C. Supreme Court that it was withdrawing from a case involving a claim of aboriginal title to coastal waters off Vancouver Island because it was no longer able to take "a strictly legal position regarding the test for aboriginal title."

It is not known what position the province will take in the *Tsilhoquot'in* case now before the B.C. Court of Appeal. If the Campbell government declares that aboriginal title exists throughout the province and that aboriginal claimants need not provide any evidence of exclusive control and occupation in a defined area as set out by the Supreme Court in Marshall/Bernard, will the province fire its legal team in the *Tsilhoquot'in* case, hire new lawyers more sympathetic to the aboriginal position and simply concede the key aspects of aboriginal title as was done by Harcourt in *Delgamuukw*?

The promise by the Campbell government to recognize aboriginal title to land throughout British Columbia has encouraged those native leaders who already believe that natives hold title to all lands in the province and that the rest of us are at best tenants and at worst trespassers on their land.

Recognition of aboriginal title would transfer control of 95 per cent of British Columbia to native leaders who represent little more than three percent of the population. If you own it, control it and have title to it, it follows that revenues which flow from the land such as stumpage fees, mining royalties, rents and access fees for recreational and sporting activities that you impose will be yours.

How the provincial treasury, robbed of these revenues, would maintain its obligations to all British Columbians, including roads, medical and education services, is not addressed by Campbell's recognition and reconciliation proposal.

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