

Current Developments on Aboriginal Title

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Current Developments on Aboriginal Title

Since the decision of the Supreme Court of Canada in *Delgamuukw v. The Queen*¹, the principal area of uncertainty concerning aboriginal title has concerned the geographical scope of the concept of aboriginal title. Does it refer to the traditional territory of Aboriginal people at the time of sovereignty or does it refer to a more limited area? The purpose of this paper is to describe that debate and its apparent resolution, while also making a few comments about the applicability of the principles of aboriginal title to water bodies.

Aboriginal Title and Aboriginal Rights

Although there is a common tendency to treat aboriginal rights and aboriginal title as two separate legal doctrines, the Supreme Court of Canada has stated that aboriginal title is “simply one manifestation of a broader-based conception of aboriginal rights”² and “a distinct species of aboriginal right.”³ Aboriginal title does not provide a separate source of legal rights. The *Constitution Act 1982* recognizes and affirms the “existing aboriginal and treaty rights of the aboriginal peoples of Canada”. Aboriginal title is one of those rights.

This principle was developed by the Supreme Court in *R. v Adams* and explained in the leading case of *Delgamuukw v The Queen* in these terms⁴:

The picture which emerges from *Adams* is that the aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the “occupation and use of the land” where the activity is taking place is not “sufficient to support a claim of title to the land” (at para. 26 (emphasis in original)). Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a

¹ [1997] 3 S.C.R. 1010 (“*Delgamuukw*”)

² *R. v. Adams*, [1996] 3 S.C.R. 101 at para 25, cited approvingly in *Delgamuukw* at para. 137

³ *Delgamuukw* at para. 2

⁴ *Delgamuukw*, at para. 138

site-specific right to engage in a particular activity. ... At the other end of the spectrum, there is aboriginal title itself. As *Adams* makes clear, aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to the land itself.

In distinguishing aboriginal title from other aboriginal rights, the Court has pointed out that:

... aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.⁵

The Court's decision in *Delgamuukw* determined that in order to support a claim for aboriginal title, an aboriginal group must establish that its ancestors had exclusive occupation of the land at the time of sovereignty.⁶ The occupation test was expressed in these terms:

In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title.⁷

The Standard of Occupation Debate

The question unresolved in *Delgamuukw* is what is meant by occupation in practical terms. Does it refer to occupation of the entirety of the traditional territory prior to sovereignty of each aboriginal group? Or does it refer to the occupation of those portions of the traditional territory physically occupied by each group, such as village sites and the immediately surrounding lands that were used intensively by the group, but excluding land used only seasonally and occasionally? The legal answer to this question depends on what is meant by "occupation" in the definition of aboriginal title.

In the majority judgment of Lamer C.J., the Chief Justice identifies two different theories that could be applied to define the requisite degree of occupation. The common law approach was

⁵ *Delgamuukw*, at para. 117

⁶ *Delgamuukw*, at para. 143. See also *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, at para. 55.

⁷ *Delgamuukw*, at para. 144

said to require actual physical occupation “established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracks of land for hunting, fishing or otherwise exploiting its resources”.⁸ The aboriginal perspective was said to derive from the pattern of landholdings according to aboriginal law. Chief Justice Lamer held that both perspectives should be taken into account in determining proof of occupancy.⁹

While this somewhat abstract approach respects the complexity of the problem, it provides little guidance to the lower courts in making an actual decision on demonstrated facts. It was only in 2005 that the Court addressed this problem and resolved the dilemma of how occupancy was to be proven in order to establish the exclusive rights of use and occupation referred to in the majority decision in *Delgamuukw*.

In *R v. Marshall; R v. Bernard*¹⁰, the Supreme Court was able to revisit the occupancy question in the context of a specific claim for aboriginal title that had to be addressed. The question in both cases was whether the Mi’kmaq had aboriginal title to certain lands in Nova Scotia and New Brunswick. The Respondents had been charged with unlawfully cutting timber in various locations in these two provinces. Their defence in part was that they were entitled to do so because they were members of the Mi’kmaq Nation who held aboriginal title to the land. Thus it became necessary to consider the geographical scope of the Mi’kmaq aboriginal title claim.

The trial judges in each of the cases had rejected the aboriginal title defence on the basis that aboriginal title required proof of regular and exclusive use of the cutting sites, applying the dictum of Chief Justice Lamer in *Delgamuukw* relating to the requirements of the common law. Such proof had not been established in the view of the trial judges. The Courts of Appeal held that this test was too strict and applied a less onerous standard for occupancy.¹¹ Use or occupancy on an occasional or seasonal basis ought to be sufficient, taking into account the aboriginal perspective.

⁸ *Delgamuukw*, at para. 149

⁹ *Delgamuukw*, at para. 147

¹⁰ [2005] 2 S.C.R. 220, 2005 SCC 43 (“*Marshall/Bernard*”)

¹¹ *Marshall/Bernard*, at para. 41

Because the *Delgamuukw* decision defining aboriginal title was *obiter dicta*, it had not been necessary for the Court to decide whether a particular piece of land was covered by aboriginal title. *Marshall/Bernard*, however, was not an issue that could be resolved by taking into account two different perspectives. Under the aboriginal perspective as identified by the Court of Appeal judges who spoke on this issue, the Mi'kmaq had aboriginal title to the areas in dispute. Under the common law, as applied by the two trial judges, they did not. It was necessary, then, for the Supreme Court to resolve this issue, not in an abstract way, but in a way that dealt with the question at hand and provided guidance to future courts in addressing this issue.

The Court's majority judgment, written by McLachlin C.J. did not resile from the principle in *Delgamuukw* that the Court must consider both the aboriginal perspective and the common law perspective in analyzing a claim for aboriginal rights, but did go on to address the question "what we mean when we say that in determining aboriginal title we must consider both the common law and the aboriginal perspective".¹²

The answer to the question of how these perspectives can be balanced is for the Court "to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right".¹³ The task for the Court is to determine "whether the aboriginal practice at the time of assertion of European sovereignty . . . translates into a modern legal right, and if so, what right?"¹⁴

The Chief Justice summarized the process in this way:

In summary the Court must examine the pre-sovereignty or aboriginal practice and translate that practice into a modern right. The process begins by examining the nature and extent of the pre-sovereignty aboriginal practice in question. It goes on to seek a corresponding common law right. In this way, the process determines the nature and extent of the modern right and reconciles the aboriginal and European perspectives.¹⁵

¹² *Marshall/Bernard*, at para. 47

¹³ *ibid*, at para. 48

¹⁴ *ibid*, at para. 48

¹⁵ *ibid*, at para. 51

Applying that process to the issue before the Court, the Court resolved the dispute by adopting a common law approach to occupation:

“Occupation” means “physical occupation”. This “may be established in a variety of ways, ranging from the construction of buildings through cultivation and enclosure of fields to regular use of definite tracks of land for hunting, fishing or otherwise exploiting its resources”: *Delgamuukw*, for Lamer C.J. at para. 149.¹⁶

This approach to “occupation” was said to follow from “the definition of aboriginal title as “the right to *exclusive* use and occupation of land”.¹⁷ Thus the enhanced concept of exclusivity of use and occupation set out in the judgment of Chief Justice Lamer drove the conclusion that the corresponding modern legal right was “consistent with the concept of title to land at common law”¹⁸ and required actual physical occupation of definite tracts of land, as distinct from seasonal or occasional use of broad areas.¹⁹ The trial judgments were restored. Aboriginal title did not extend to the cutting sites at issue.

One way to illustrate the difference in approach is to consider the principles applied by the Nova Scotia Court of Appeal which were rejected by the Supreme Court of Canada. In reversing the trial judgment in the Nova Scotia case, Cromwell J.A., then a member of the Nova Scotia Court of Appeal and writing for that court, expressed his view of the required standard of occupation in this way:

The question, in my opinion, is not whether exclusive occupation of the cutting sites was established, but whether exclusive occupation of a reasonably defined territory which includes the cutting sites, was established.²⁰

A similar view was expressed by Vickers J. in a trial level decision in which he declined to make a declaration of aboriginal title but in *obiter dicta* stated an area over which he felt the evidence supported a finding of aboriginal title. His description of the geographical scope of aboriginal title is similar to that of Cromwell J.A. In rejecting what he characterized as a “postage stamp”

¹⁶ *ibid.*, at para. 56

¹⁷ *ibid.*, at para. 57, citing *Delgamuukw*, per Lamer C.J. at para. 155 (emphasis in original)

¹⁸ *ibid.*, at para. 57

¹⁹ *ibid.*, at para. 58

²⁰ *ibid.*, at para. 183

approach to title, he made these comments in evidence reference to the Supreme Court's decision in *Marshall/Bernard*:

A tract of land is not just a hunting blind or a favourite fishing hole. Individual sites such as hunting blinds and fishing holes are but a part of the land that has provided cultural security and continuity to Tsilhqot'in people for better than two centuries. A tract of land is intended to describe land over which Indigenous people roamed on a regular basis; land that ultimately defined and sustained them as a people.²¹

This view represents the territorial view of aboriginal title that has held sway with several influential academic commentators²² as well as Aboriginal claimants. Indeed Justice Vickers specifically endorses one of the academic criticisms of the Supreme Court's decision, quoting Professor Slattery's criticism of *Marshall/Bernard* in these terms:

Professor Slattery points out at p. 281 that reconciliation cannot be achieved by the current process of translating an historical right into one that corresponds with a modern common law right.²³

But that is precisely what McLachlin C.J.C. says in *Marshall/Bernard* is the Court's role:

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 question is whether the aboriginal practice at the time of assertion of European sovereignty (not, unlike treaties, when a document was signed) translates into a modern legal right, and if so, what right?²⁴

The territorial approach to aboriginal title appears to leave no room for the lesser, non-exclusive aboriginal rights that are central to our section 35 jurisprudence. The Supreme Court addressed this in *Marshall/Bernard* in these terms:

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. It would also obliterate the distinction that this Court has

²¹ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 [appeal pending] at paras. 1376-1377

²² See e.g. Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006), 85 Can. Bar Rev. 255 and Kent McNeil, "Aboriginal Title and the Supreme Court: What's Happening?" (2006), 69 Sask. L. Rev. 282

²³ *Tsilhqot'in*, at para. 1365

²⁴ *Marshall/Bernard*, at para. 48

consistently made between lesser aboriginal rights like the right to fish and the highest aboriginal right, the right to title to the land: *Adams* and *Côté*.²⁵

The effect of the *Marshall/Bernard* decision is to resolve the debate over the scope of aboriginal title. The territorial approach to aboriginal title has been decisively rejected by the Supreme Court of Canada. The standard of occupation required to establish occupation is that of actual physical occupation of defined tracts of land.

Aboriginal Title and Water Bodies

To date, aboriginal title has been discussed solely in terms of land. In distinguishing aboriginal title from other aboriginal rights, the Court has pointed out that:

... aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.²⁶

Even before the *Delgamuukw* decision, the Court had described aboriginal title as “an ‘interest in land’ which encompassed ‘a legal right to occupy and possess certain lands’”.²⁷ No court has yet determined whether the principles of aboriginal title can apply to bodies of water as well as tracts of land. However, in a case currently at trial before the Supreme Court of British Columbia²⁸, a group of Aboriginal nations from the west coast of Vancouver Island are arguing that the principles of aboriginal title can be adapted to coastal fishing nations whose sense of territoriality prior to British sovereignty included territorial sovereignty over the oceans and inland waters where they fished and travelled as well as over the land.

²⁵ *Marshall/Bernard*, at para. 77

²⁶ *Delgamuukw*, at para. 117

²⁷ *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 382, cited in *Delgamuukw* at para. 119.

²⁸ *Ahousaht Nation et al v. Canada (Attorney General) et al*, File No. S033335, Vancouver Registry

It will be some time before a definitive decision is rendered in relation this claim, but there are some fairly obvious hurdles that will need to be overcome for a title claim over water bodies to succeed.

The first difficulty lies in the standard of occupation described by the Supreme Court in *Marshall/Bernard*. If a broad territorial claim could satisfy the requirements for occupation sufficient to support aboriginal title, a claim for title over water that lies within the traditional territory of an Aboriginal nation could have force (subject to the exclusivity argument referenced below). The narrower concept of occupation of *Marshall/Bernard*, requiring actual physical occupation of definite tracts of land, presents greater challenges.

The other difficulty standing in the way of an aboriginal title claim is the statement by the Chief Justice Lamer in *Delgamuukw* that aboriginal title confers the right of *exclusive* occupation and use of the title lands for all purposes, so long as the use is not incompatible with the original use by Aboriginal people. This concept is relatively easy to understand when applied to land, but more difficult to apply on water, where the common law has for centuries recognized public rights of fishing and navigation that can be impaired only through legislation.

The Supreme Court of Canada considered the interplay between the historic public right to fish at common law and aboriginal rights to fish as part of their historic practices in *R. v. Gladstone*.²⁹ The Court held that section 35(1) of the Constitution Act had not extinguished the public right of fishing:

It should also be noted that the aboriginal rights recognized and affirmed by s. 35(1) exist within a legal context in which, since the time of the Magna Carta, there has been a common law right to fish in tidal waters that can only be abrogated by the enactment of competent legislation:

. . . the subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike.

. . .

[I]t has been unquestioned law that since Magna Charta [sic] no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation.

²⁹ [1996] 2 S.C.R. 723

(Attorney-General of British Columbia v. Attorney General of Canada, [1914] A.C. 153 (J.C.P.C.), at pp. 169-70, per Viscount Haldane.)

While the elevation of common law aboriginal rights to constitutional status obviously has an impact on the public's common law rights to fish in tidal waters, it was surely not intended that, by the enactment of s. 35(1), those common law rights would be extinguished in cases where an aboriginal right to harvest fish commercially existed. ... it was not contemplated by Sparrow that the recognition and affirmation of aboriginal rights should result in the common law right of public access in the fishery ceasing to exist with respect to all those fisheries in respect of which exist an aboriginal right to sell fish commercially. As a common law, not constitutional, right, the right of public access to the fishery must clearly be second in priority to aboriginal rights; however, the recognition of aboriginal rights should not be interpreted as extinguishing the right of public access to the fishery.

From this it appears that non-exclusive activity rights such as fishing rights can co-exist comfortably with the common law public fishing rights. It is less apparent how public fishing rights could be compatible with the exclusive nature of aboriginal title, which would on its face exclude all other activities such as fishing and navigation.

Thus, notwithstanding the apparent clarification by the Supreme Court of the standard of occupation required for a determination of aboriginal title, significant issues remain as to the nature of aboriginal title that will challenge the courts, parties and counsel for some time to come.

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