CASE COMMENT

***Tsilhqot'in v British Columbia*, 2014 SCC 44**

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Introduction

The Tsilhqot'in Nation are an indigenous people located in the Chilcotin Region of Central British Columbia where they maintain six (6) communities and have a total population of about 3,000 people.[1]

Background

In 1983 the Province of British Columbia granted Carrier Lumber Ltd a forestry licence to cut down trees on lands which the Tsilhqot'in Nation claimed they held Aboriginal Title.[2] The Xeni Gwet'in, one of the Tsilhqot'in Nations' 6 bands, objected to the issuance of the forestry licence and applied to the court for a declaration prohibiting commercial logging.[3] In 1998 the claim was amended to include a claim for Aboriginal Title on behalf of the Tsilhqot'in people.[4]

In 2002 the case was heard before Vickers J. at the British Columbia Supreme Court and lasted 339 days over a 5 year time period, with some of the trial taking place in one of the Tsilhqot'in First Nation communities.[5] The trial decision was handed down on November 20, 2007 with a finding that the Tsilhqot'in did in fact have Aboriginal Title to lands in and outside of the claim area but for procedural reasons, the court was unable to provide the Tsilhqot'in with a finding of Aboriginal Title.[6] The Tsilhqot'in appealed the decision to the British Columbia Court of Appeal and in 2012 the court dismissed the appeal, finding that the Tsilhqot'in aboriginal title claim had not been established as they applied a narrower aboriginal title test then the trial court, requiring

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[1] *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44, [2014] S.C.J. No.44, para 6.
[2] *Ibid* at 5.
[3] *Ibid.*
[4] *ibid*
[5] *Tsilhqot'in Nation v. British Columbia*, [2007], B.C.J. No. 2465.
[6] Supra at note 1, para 7.

site –specific evidence of occupation.[7] The Tsilhqot'in appealed the decision to the Supreme Court of Canada and on June 26, 2014, McLaughlin, C.J., writing on behalf of a full majority, found that the Tsilhqot'in claim to Aboriginal Title had been established and a declaration of Aboriginal Title over the area should be granted.[8] As well, the court found that the British Columbia government owed a duty to consult to the Tsilhqot'in and breached their duty when they failed to engage in meaningful consultation with the Tsilhqot'in with regards to the forestry authorizations.[9]

In the decision the court had to consider a number of issues including; what is the correct test for establishing Aboriginal Title to land?, whether the British Columbia *Forests Act, R.S.B.C.*1996, c. 157, applied to Aboriginal Title land?, and how public interest rights can be reconciled with Aboriginal title? [10]

With respect to the issue of Aboriginal title the court relied upon *Delgamuukw* in identifying the test for establishing Aboriginal Title, that being sufficient pre-sovereignty occupation; continuous occupation (where present occupation relied on); and exclusive historic occupation.[11] The court further held that *Delgamuukw* established a territorial use-based approach to Aboriginal title and that the proper application of the test is not to consider each element of the test independent of each other, but rather to consider them as a single, inclusive concept which provides insight into the issue of Aboriginal Title.[12] Further, the elements themselves are not to

[7] *Tsilhqot'in Nation v British Columbia,* [2012] B.C.J. No. 1302, para. 230.
[8] Supra at note 1, para. 153.
[9] Supra at note 1, para. 96.
[10] Supra at note 1, para. 1.
[11] Ibid, para. 30.
[12] Ibid, para 31, 32.

be the end of the inquiry, but rather the beginning point, with the goal of further understanding aboriginal title form both the aboriginal perspective and the common law.[13]

The court also rejected the argument that Aboriginal title must be confined to site-specific village sites and that *R v Marshall,* 2005 SCC 43 [2005] 2 S.C.R. 220, rejected the territorial approach to Aboriginal title. Instead, the court clarified that *R v Marshall* held that; "…*there must be proof of sufficiently regular and exclusive use of the land in question…"*[14]*,* and that semi-nomadic groups could establish Aboriginal Title, so long as they met the sufficiency test of physical possession.[15]

The court held that sufficiency of occupation is a context-specific inquiry and that the trial judge correctly applied the test by considering all of the evidence which showed regular use of the territory by the Tsilhqot'in, as regular use of a territory will establish sufficiency.[16] As well, continuity of occupation does not require an unbroken chain of continuity but only needs to show an inference between present occupation and pre-sovereignty occupation.[17]The proximity between the archaeological sites and the recent occupation showed this inference, meeting the test for continuity. Finally, the fact that the Tsilhqot'in repelled people from their territory and required permission from outsiders before they could pass over it met the test for exclusivity.[18]

[13] Ibid.
[14] Supra, note 1, para. 43.
[15] Ibid, para. 44.
[16] Supra, note 1, para. 55.
[17] Supra, note 1, para 46.
[18] Supra, note 1, para. 58.

With respect to the duty to consult the Province had a duty to consult with the Tsilhqot'in, which was at the high end of the spectrum as their *prima facie* claim to the land was substantial.[19] The province breached this duty as even without recognized title to the land, the honour of the Crown requires the government to consult and accommodate on the uses to the land.[20] Where land is legally recognized as Aboriginal Title lands, before government can use the land, consent from the Aboriginal group is required. [21] Any use of the land without consent by government will require justification under s.35 of the Constitution, as established in *Sparrow*.[22]

With regards to the application of the *Forestry Act* on Aboriginal title lands, the court held that provincial laws apply but that the *Forestry Act* only applied to Crown lands, not Aboriginal title lands.

Case-Analysis

The *Tsilhqot'in* decision was significant to Aboriginal rights in Canada as for the first time the Supreme Court of Canada issued a declaration of Aboriginal Title. This was a surprising decision for the Tsilhqot'in are a semi-nomadic people and in considering the decision of *R v Marshall*, *R v Bernard,* 2005 SCC 43, the Supreme Court seemed to indicate that the exclusivity requirement under the *Delgamuukw* test would be site-specific, which could be difficult for a semi-nomadic people to meet.[23] In fact, LaBel J, in her dissenting opinion in *Marshall; Bernard* indicated this to be her primary concern with the majority reasoning in the application of the *Delgamuukw* test in *Marshall Bernard*; that being the site-specific exclusivity test as applied was

[19] Supra, note 1, para 93.
[20] Supra note 1, para. 95.
[21] Supra note 1, para 76.
[22] Supra note 1, para. 77.
[23] Para. 66.

too strict for semi-nomadic people and would amount to a denial of Aboriginal title. [24] LaBel J also raised concern that the majority reasoning did not balance the aboriginal perspective and the common law perspective, as required under *Delgamuukw,* but instead used the aboriginal perspective of the land as evidence for deciding if the aboriginal practice fit within the common law perspective.[25] The correct approach, according to Label J. would be to consider the nature of the occupation from an aboriginal perspective, regardless if the aboriginal group was a sedentary or semi-nomadic people.[26]

Based on the reasoning in *Tsilhqot'in* it appears that Label J. dissenting opinion in *Marshall* must not have fell on deaf ears as McLaughlin C.J. reasoning in *Tsilhqot'in* seems to reflect Label's J. dissenting principles. In applying the *Delgamuukw* test for Aboriginal title, McLaughlin states; "*…the court must be careful not to lose or distort the Aboriginal perspective by forcing the ancestral practices into the square boxes of common law concepts…".*[27] Recognizing the significance of the Aboriginal perspective McLaughlin goes on to highlight the requirement of considering the aboriginal perspective of possession as a distinct component of the *Delgamuukw* test, and then to take such findings and balance this alongside the common law perspective.[28]

McLaughlin J also addresses the intense use, site –specific test that the respondents argued was the requirement to be met for Aboriginal Title, based on *Marshall; Bernard,* and rejects the existence of the site-specific approach to Aboriginal title.[29] She further goes on to state that *Marshall; Bernard* did not reject the territorial approach[30] and states that the trial judge was

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[24] *Ibid*, para. 126.
[25] *Ibid, para. 129, 131.*
[26] *Ibid.*
[27] Supra, note 1, para. 32.
[28] Supra, note 1, para 41.
[29] Supra, note 1, para. 42.
[30] Supra, note 1, para 43.

correct in his application of the territorial approach to Aboriginal title.[31] Suffice to say that such reasoning, although correct and consistent with *Delgamuukw*, seemed to be a complete one-eighty from the reasoning in *Marshall;Bernard,* which up until the *Tsilhqot'in* decision, was seen as the leading jurisprudence on Aboriginal title.

The duty to consult was also another primary issue that the *Tsilhqot'in* decision addressed, building on the previous duty to consult case law as found in *Sparrow*[32]*, Delgamuukw*[33] *and Haida*[34]. As was established in *Delgamuukw* a spectrum analysis is to be considered when government is fulfilling the duty to consult where the level of consultation will vary depending on the aboriginal right at issue.[35] In some instances the fulfillment of the duty may only require dialogue, where at the other end of the spectrum, deeper consultation and accommodation would be required and in; "…*some cases may even require the full consent of an aboriginal nation."*[36]. Since *Delgamuukw* the courts have struggled with the spectrum analysis debating as to the level of consultation required, with the *Haida* decision stipulating that agreement from the Aboriginal group is not required.[37] However, in *Tsilhqot'in* the court clarified the duty to consult and established that with respect to recognized Aboriginal title lands, consent of the Aboriginal group will be required before government can undertake any development or action on such lands.[38] Any government action that occurred on such lands prior to title being established would have to be stopped in order for the government to then fulfill the fiduciary duty owed to the Aboriginal

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[31] Supra, note 1, para 54.
[32] *R v Sparrow*, [1990] S.C.R. 1075, [1990] S.C.J. no. 49.
[33] *Delgamuukw v British Columbia,* [1997] 3 S.C.R. 1010, [1997] S.C.J. No. 108.
[34] *Haida Nation v British Columbia (Minister of Forests*), 2004 SCC 73, [2004] S.C.J. No 70.
[35] Supra, note 33, para.168.
[36] *Ibid.*
[37] Supra, Note 34, para 42. See para 21 -25 where the court discusses the various levels of the duty to consult.
[38] Supra, Note 1, para. 91.

group and to preserve the interests of the Aboriginal group.[39] This has been a significant finding for Aboriginal people for even without recognized title, if the evidence provided to government demonstrates a strong *prima facie* Aboriginal title claim, accommodation through consultation should mean a preservation of land interests.

For government, the ability to proceed with legislation or development on Aboriginal title lands without the consent of Aboriginal groups would require a s.35 justification as established in *Sparrow,* where one component of the test requires that the government's infringement is backed by a compelling and substantial legislative objective in the public interest.[40] In *Tsilhqot'in* the government argued that pest control and economic interests were the substantial and legislative objective in issuing cutting permits.[41] However, the court clarified that this objective did not meet the test as there was no evidence of the economic viability of the forestry cutting nor of the spread of the beetle through the forests. Thus, for the substantial objective test to be met there must be clear evidence to support the objective, beyond the mere assertion of government for the need to legislate.

Conclusion

In considering the *Tsilhqot'in* decision it is apparent that the Supreme Court of Canada has taken a route to the recognition of Aboriginal title that after the *Marshall; Bernard* decision of 2005, many thought would never occur. The unanimous decision has stayed true to the previous established case law of *Sparrow, Delgamuukw,* and *Haida,* and at the same time has clarified the misconceptions surrounding Aboriginal title for semi-nomadic groups, as had been raised in *Marshall; Bernard.* It is now clear that the test for Aboriginal title will be based on a territorial

[39] *Ibid*.
[40] Supra, Note 32, para. 71.
[41] Supra, Note 1, para. 126.

approach with the aboriginal perspective of possession and occupation of land having as significant a role in the analysis as the common law perspective. This approach is the correct approach as it is consistent with the *sui generis* character of Aboriginal title as land possession for an Aboriginal group will always rely on concepts distinct from non- aboriginal society. Although it took some time for the Supreme Court to get there, through the careful consideration of the dissenting opinions in *Marshall; Bernard* the court now appears to be back on track with the original intention of Lamer J. in *Delgamuukw.*