APRIL 2008

By Cheryl Sharvit

REVIEW OF CHANGES TO THE LAW RELATED TO FORESTRY AND ABORIGINAL RIGHTS AND TITLE

Developments in the Law Since 2005

There have been some significant developments in the Aboriginal Rights and Title case law since these two papers were written, including four decisions of the Supreme Court of Canada, that are relevant to the context of British Columbia's forestry regime. In addition, British Columbia recently amended the *Forest Act* in an attempt to implement one of these decisions.

Aboriginal Title

In 2005, the Supreme Court of Canada gave its decision in *Bernard and Marshall*,[1] a case that began when members of the Mi'kmaq Nation were charged under provincial (Nova Scotia and New Brunswick) legislation with unlawfully harvesting timber. The Mi'kmaq raised Aboriginal Title as a defence, arguing that they do not need provincial authorization to log on their Aboriginal Title lands.

In *Delgamuukw*,[2] the Court held that Aboriginal Title is proven by establishing exclusive occupation of the land in question when the Crown asserted sovereignty. In *Bernard and Marshall*, the Court considered the standard of occupation required to prove Aboriginal Title.

Earlier jurisprudence of the Supreme Court of Canada characterized the law of Aboriginal Rights and Title as intersocietal law that serves to bridge Aboriginal and settler legal systems.[3] In this case, the Court held that to establish Aboriginal Title, Aboriginal peoples must demonstrate pre-sovereignty Aboriginal practices that amount to physical occupation or

[1] *R.* v. *Bernard*; *R.* v. *Marshall*, [2005] 2 S.C.R. 220.
[2] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010.
[3] *R.* v. *Van der Peet*, [1996]2 S.C.R. 507 at para. 42.

possession of the land associated with Title under English common law.[4] While the Court held that the practice must be viewed from the Aboriginal perspective, the legal lens through which the practice is viewed to determine if it amounts to a sufficient degree of occupation and possession is that of the common law.[5]

The Court held that the occupation must be physical, and can be established by evidence such as construction of dwellings, cultivation and enclosure of fields, or "regular use of definite tracts of land" for resource use.[6] The nature of the land and the manner in which it is commonly enjoyed are relevant considerations.[7] The exclusivity requirement does not require proof of acts of exclusion. Rather, it requires proof of an intention and capacity to retain exclusive control.[8]

Exclusive occupation is typically established by proving "regular occupancy or use of definite tracts of land" for resource harvesting and use and an intent and capacity to control.[9] Irregular or occasional use of undefined territories is insufficient. Aboriginal peoples who followed a seasonal round must show they maintained control over the whole area (e.g., that while they did not use their fishing grounds during the winter, they maintained control over the area and could exclude others from it).[10]

An issue arose in *Bernard and Marshall* regarding whether the Mi'kmaq had to prove exclusive occupation of the actual cutting sites at the time of sovereignty. The trial judges had required proof of regular and exclusive use of the cutting sites, whereas the Courts of Appeal held that it was sufficient to establish "incidental or proximate occupancy."[11] The Court held

[4] *Bernard and Marshall, supra* note 1 at para. 48.
[5] The Court confirmed, at para. 46, that the Court must consider both the Aboriginal and common law perspectives, but the Aboriginal perspective is not understood as a legal perspective.
[6] *Bernard and Marshall, supra* note 1 at para. 56. This is not exhaustive of the evidence that can establish exclusive occupation.
[7] *Ibid.* at para. 54. An example provided by the Court is marshy land that is useless except for shooting, in which case shooting over it may be sufficient to establish possession.
[8] *Ibid.* at paras. 57, 64-65.
[9] *Ibid.* at para. 70. The Court notes at para. 64 that "often, no right to exclude [in pre-sovereignty Aboriginal societies] arises by convention or law." This leaves open the possibility that Aboriginal Peoples could use their pre-sovereignty laws to establish an intent and capacity to control the lands.
[10] *Ibid.* at para. 58. If anyone could have used the land in question when the harvesting season was over, the occupation was not exclusive and will not suffice to establish Aboriginal Title.
[11] *Ibid.* at para. 41. Incidental occupation was described as occasional entry and acts from which an intention to occupy could be inferred, (para. 76) and proximate occupancy was described as occupation of an area near the cutting sites.

that the trial judges in the *Bernard* and *Marshall* cases did not err in requiring proof of regular and exclusive use of the cutting sites. The Mi'kmaq failed to establish such use of the cutting sites.

The case leaves questions about proof of occupation unanswered. The Mi'kmaq gave evidence that they exclusively occupied areas near the cutting locations, but they did not give evidence to establish Aboriginal Title over an area that included the areas where they cut the timber. Could the Mi'kmaq have proven Aboriginal Title by establishing exclusive occupation of a large tract of land that includes the cutting sites? This question is important in British Columbia, where there are few treaties and claims to Aboriginal Title cover almost the whole province. British Columbia and Canada have taken the position that Aboriginal peoples can only prove Aboriginal Title to small sites such as villages, enclosed cultivated fields, salt licks or narrow defiles where animals are hunted, or individual rocks or promontories used for fishing, and that they cannot prove Title to larger hunting or fishing areas.[12] This view of Aboriginal Title is in stark contrast to Aboriginal peoples' understanding of their Aboriginal Title as extending over their territories.

This dispute over the meaning of *Bernard and Marshall* was put to the test in the British Columbia Supreme Court in the *Tsilhqot'in*[13] case (also referred to as the *Xeni* or *Xeni Gwet'in* case). Mr. Justice Vickers rejected the Province's position, which he characterized as a "postage stamp" approach to Aboriginal Title:

> *[1376] What is clear to me is that the impoverished view of aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a 'postage stamp' approach to title, cannot be allowed to pervade and inhibit genuine negotiations. 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 part of the land that has provided 'cultural security and continuity' to Tsilhqot'in People for better than two centuries.*
>
> *[1377] 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.*

[12] See *Tsilhqot'in Nation* v. *British Columbia*, 2007 BCSC 1700, at paras. 556 and 608. This position appears to be inconsistent with the Supreme Court of Canada's statement in Marshall and Bernard, at para. 62, that Aboriginal Title could be established over "village sites and **larger areas** of land which they exploited for agriculture, hunting, fishing or gathering," if the Aboriginal People exercised exclusive control over those areas.
[13] *Ibid.*

The Tsilhqot'in people were described as a "semi-nomadic" people who did not live in year-round, permanent villages. They were not an agrarian people with cultivated fields in the European sense. Justice Vickers considered the perspective of the Tsilhqot'in people and concluded that their relationship with a land base consisting of a network of seasonal village sites, plant and berry harvesting areas, hunting grounds, fishing sites, and trails and watercourses amounted to Aboriginal Title over the area:

> *[959] The entire body of evidence in this case reveals village sites occupied for portions of each year. In addition, there were cultivated fields. These fields were not cultivated in the manner expected by European settlers. Viewed from the perspective of Tsilhqot'in people the gathering of medicinal and root plants and the harvesting of berries was accomplished in a manner that managed these resources to insure their return for future generations. These cultivated fields were tied to village sites, hunting grounds and fishing sites by a network of foot trails, horse trails and watercourses that defined the seasonal rounds. These sites and their interconnecting links set out definite tracts of land in regular use by Tsilhqot'in people at the time of sovereignty assertion to an extent sufficient to warrant a finding of Aboriginal title….*

While in the end Justice Vickers did not find that the Tsilhqot'in proved Aboriginal Title to the entire area they claimed, he did find that they had established Aboriginal Title to a large area – some 200,000 hectares.[14] Tsilhqot'in laws played a role in proving Aboriginal Title. In particular, there was evidence that the Chilcotin war was triggered at least in part by a violation of Tsilhqot'in law which requires payment for use of Tsilhqot'in lands by others, particularly where resource extraction is involved.[15] A work party building roads through Tsilhqot'in lands did not pay for the use of trails, cutting timber, catching fish and killing game.

Justice Vickers held that he could not make a declaration of Aboriginal Title because of a technical pleadings issue – the Tsilhqot'in claim was phrased as an "all-or-nothing" claim. Justice Vickers concluded that while the Tsilhqot'in established Aboriginal Title to a part of the area claimed, if he could not give a declaration of Aboriginal Title over the whole area, he could not give one at all.[16]

[14] This was about half of the area claimed.
[15] *Supra* note 12 at para. 282.
[16] *Ibid.* at para. 129

However, Justice Vickers also did not want all the time and effort that went into the trial to be for nothing, so he went on to give his opinion on the implications of a finding of Aboriginal Title, though technically his opinion is not binding. Justice Vickers intended his non-binding opinion to provide a framework for negotiations.[17]

The most significant aspect of Justice Vickers' conclusions is that the province's forestry legislation is inapplicable to Aboriginal Title lands. The reasoning would apply equally to all of the province's land and resource legislation. While *Delgamuukw* held that the Constitution precluded the Province from extinguishing Aboriginal Title, it left unresolved the question of what jurisdiction if any the Province has to interfere with Aboriginal Title or apply its land and resource legislation on Aboriginal Title lands.

Justice Vickers held that the *Forest Act*, which is about the management and allocation of forest resources, affects the core of Aboriginal Title, because Aboriginal Title includes jurisdiction to manage the lands and resources.[18] Only the federal government has constitutional authority to legislate in relation to "Indians and lands reserved for Indians", so only the federal government can rely on s. 35 of the *Constitution Act, 1982*, to justify infringements of Aboriginal Title, if it can meet the test for justification.[19] Justice Vickers also concluded that the trees on lands where Aboriginal Title exists are Aboriginal assets, and not provincial assets or Crown timber.[20] The province's forestry legislation can only apply to provincial forests.[21]

In the event his analysis was wrong and the *Forest Act* does apply, Mr. Justice Vickers went on to consider whether the *Forest Act* infringed Aboriginal Title, and if so, whether the infringement could be justified. He concluded that the Province's management scheme over the forests infringes Aboriginal Title. In particular, any attempt to apply the *Forest Act* to Aboriginal Title lands infringes Aboriginal Title, which carries with it a right to exclusive use and occupancy, a right to make decisions about the land, and a right to benefit economically from the land.[22]

[17] *Ibid.* at para. 1338.
[18] *Delgamuukw, supra* note 2 at para. 166.
[19] *Tsilhqot'in, supra* note 12 at paras. 1030-1031
[20] *Ibid.* at paras. 971-981, 1012-1013, 1044.
[21] *Ibid.* at para. 1010.
[22] *Ibid.* at paras. 1064-1068; 1074-1081.

Turning to the question of whether the Province could justify the infringement, Justice Vickers concluded that the legislative scheme manages solely for timber and does not provide for ecosystem management, which would allow for protection of non-timber values of importance to the Tsilhqot'in.[23] The Province failed to give priority to Aboriginal Title, and did not properly consider how its land use planning and forestry activities might ensure as little infringement as possible.[24]

With respect to consultation, the Province submitted a "consultation chronology" but Justice Vickers concluded that this record did not discharge the Crown's obligation - the question is not how many letters were sent or how many meetings took place, but whether the efforts amounted to "genuine consultation".[25] Although the Court in *Haida*[26] directed the Province to consult at the strategic planning level, this had not occurred, particularly in the setting of the allowable annual cut ("AAC").[27] This, Vickers J. concluded, is a fundamental flaw in the consultation process. The AAC was based on the assumption that unless and until Aboriginal Title is proven, all areas contribute to the timber supply.

Justice Vickers also found that the Tsilhqoti'in have Aboriginal Rights to hunt and trap over the entire claim area, and the Province, through its forestry legislation, has unjustifiably infringed those rights. The legislative scheme seeks to maximize timber production and economic returns, and protection of other values for the well-being of Aboriginal peoples "is very low on the scale of priorities."[28] Timber harvesting negatively impacts species diversity and abundance though direct mortality, imposition of roads and destruction of habitat.[29] Impacts on hydrology negatively impact aquatic and riparian species.[30] The Province could not justify the infringement because Aboriginal Rights were not given a priority – and the Province did not manage wildlife habitat to ensure the continued ability of the Tsilhqot'in to exercise their Aboriginal Rights into the future.[31]

[23] *Ibid.* at paras. 1097-1099.
[24] *Ibid.* at para. 1113.
[25] *Ibid.* at paras. 1123-1141.
[26] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511, 2004 SCC 73, at paras. 75-76.
[27] *Tsilhqot'in, supra* note 12 at para. 1125.
[28] *Ibid.* at para. 1286.
[29] *Ibid.* at para. 1276.
[30] *Ibid.* at para. 1283.
[31] *Ibid.* at paras. 1291-1293.

The initial reaction of the Province to the decision, as voiced in the media, is that the decision is not binding in relation to Aboriginal Title because Justice Vickers did not issue a declaration of Title. The decision ought to, however, affect how the Province engages in consultation and accommodation with Aboriginal peoples. The *Haida* and *Taku* decisions should be applied in light of this decision. The Province's present consultation framework reflects the Province's position that it has jurisdiction over Aboriginal Title lands, and assumes that the Province's postage-stamp theory of Aboriginal Title is sound.

Practically speaking, where there is a strong *prima facie* case, or probability of Aboriginal Title, there is a corresponding strong probability that the Province has no property interest or jurisdiction to manage the forests. This level of uncertainty should inform consultation. Shared authority over decision making at both the strategic and operation levels of forest management is the best way to move forward where there is a strong Aboriginal Title claim.

Another Supreme Court of Canada decision about Aboriginal Rights and forestry is *R. v. Sappier; R. v. Gray.*[32] The Court upheld an Aboriginal Right to harvest trees for domestic purposes (shelter, transportation, fuel and tools).[33] These two cases originated with charges against Maliseet and Mi'kmaq individuals for harvesting timber without provincial authoriziation. In defence, they claimed an Aboriginal Right to harvest timber for personal use. They had intended to use the logs to build houses and make furniture, cabinets and mouldings.

The Court rejected the Crown's argument that practices engaged in for survival purposes cannot meet the test for Aboriginal Rights because they do not meet the "integral to a distinctive culture" test from *Van der Peet*.[34] The Court held that the traditional means of survival of Aboriginal peoples should be protected, and clarified that it is not necessary to establish that the practice on which the Right is based went to the core of the society's identity.[35]

[32] R. v. Sappier; R. v. Gray, [2006] 2 S.C.R. 686.
[33] *Ibid.* at para. 2.
[34] *Ibid.* at para. 38.
[35] *Ibid.* at para. 40.

The decision clarifies that Aboriginal Rights protect Aboriginal peoples' way of life and relationship with the lands and resources. Aboriginal Rights are based on pre-contact practices that help define the distinctive way of life of the people. In this case, the trial judge found that the pre-contact Maliseet and Mi'kmaq were migratory peoples who used the rivers and lakes for transportation and lived essentially from hunting and fishing. The Court then considered how the pre-contact practice of harvesting timber would relate to that way of life and concluded that the people would have harvested wood for domestic uses including shelter, transportation, fuel and tools. The Court held that the right did not include a right to sell, barter or trade the wood, even for the purpose of to finance the building of a home or provide for the non-timber parts of the home.[36]

The Court also reaffirmed that Aboriginal Rights are not frozen in their pre-contact form. The pre-contact practice of harvesting timber to be used to construct temporary shelters translates in modern times into a right to harvest wood to build modern homes.[37]

This decision has led the Province of British Columbia to amend its *Forest Act*.[38] In particular, the Act has been amended to remove the upper limit with respect to volumes for free use permits for a traditional and cultural activity. This amendment was made in acknowledgement of the fact that more than 250 m^3 (the previous upper limit) will often be required for housing. In the debates, the Minister of Forests indicated that the regulations will be changed to add residential buildings to the uses for which a free use permit can be entered into with First Nations. The Province also removed a restriction that only allowed free use permits to be entered into with Aboriginal people for traditional and cultural activities if they did not have sufficient accessible timber on land they own or occupy.

Another significant decision of the Supreme Court of Canada which originated in British Columbia is *R.* v. *Morris*.[39] Two members of the Tsartlip Band were charged with offences under the provincial *Wildlife Act* for hunting at night with the aid of a light. The Tsartlip

[36] Mr. Justice Binnie, in dissent, differed on this point and was of the view that barter and sale within the community should be part of the right. *Ibid*, para. 74.
[37] *R. v. Sappier; R. v. Gra, supra* note 32 at para. 48.
[38] Bill 8 – 2008, *Forests and Range Statutes Amendment Act*, 2008.
39 *R.* v. *Morris,* [2006] 2 S.C.R. 915.

raised their Douglas treaty[40] Right to hunt as a defence. The Court held that Treaty Rights do not include a right to put lives or property at risk, but the Tsartlip's night hunting practices were and had always been safe.[41] They were therefore exercising Treaty Rights when engaged in the activities that led to the charges.

The Court held that the Province cannot regulate treaty hunting rights. Like Aboriginal Rights and Title, Treaty Rights lie within federal jurisdiction over "Indians, and Lands reserved for the Indians". The province's wildlife legislation is inapplicable to the extent that it regulates or infringes Treaty Rights to hunt. The Court held that the ban on night hunting and hunting with illumination infringed the Treaty Right.[42] Section 88 of the *Indian Act*[43] incorporates provincial laws into federal law, making them applicable to and in respect of "Indians". However, s. 88 shields Treaty Rights from provincial regulation.[44]

The cases raises questions relevant to forestry. If the Province cannot infringe Treaty Rights by regulating or prohibiting their exercise, can it authorize logging activities that negatively impact the wildlife species that are hunted in the exercise of Treaty Rights? The courts have not decided this issue.

Finally, the Supreme Court of Canada has also elaborated on the duty to consult and accommodate set out in *Haida* and *Taku*, and the application of those cases in the context of Treaty Rights. The *Mikisew* case[45] originated in Alberta. The Mikisew are signatories to Treaty 8, which also has signatories in Northeastern British Columbia. The Treaty states that the Aboriginal People have the right to hunt, trap and fish "throughout the tract surrendered … and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes." The latter half of this quote is often referred to as the "taken up" clause of the treaty.

40 Between 1850 and 1854, Governor James Douglas entered into treaties with Aboriginal Peoples on parts of Vancouver Island. In Northeastern British Columbia, Treaty 8 is in place, and this decision should apply to preclude the Province from regulating the rights under that Treaty as well.

41 See *R. v. Morris, supra* note 39 at paras. 56-59..

42 *Ibid.* at para. 60.

43 Section 88 of the *Indian Act* is a provision which makes laws of general application applicable to Indians. It reads, in part, "Subject to the terms of any treaty or any other Act of Parliament, all laws of general application…in any Province are applicable to an in respect of Indians…"

44 See *R. v. Morris, supra* note 39 at para. 45.

45 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* [2005] 2 S.C.R. 388.

The federal government approved a winter road through the Mikisew reserve, in order to provide winter access for isolated northern Alberta communities, without any consultation with the Mikisew. The Mikisew protested, and Canada moved the proposed road to run along the boundary of the reserve, again, without any consultation with the Mikisew. The road would go through Mikisew traplines and hunting grounds.

The Court held that in light of the taken up clause, the parties to the Treaty must have contemplated that the Crown could take up lands, and that when it does so, the lands are removed from the land base over which the First Nations have Treaty Rights to hunt, trap and fish.[46] The decision of the B.C. Court of Appeal in *Halfway River*[47] held that any interference with rights to hunt under the Treaty must be justified. The Court in *Mikisew* disagreed, and held that a taking up of land is an infringement that must be justified if, for a particular Treaty 8 First Nation, so much land has been taken up that no meaningful right to hunt remains over its traditional territories.[48] This is so because, while the Treaty allows Canada to take up lands, there was an oral promise at the time of the treaty that "the same means of earning a livelihood would continue after the treaty as existed before it".

The Court also held that every taking up of land under the Treaty triggers a duty to consult.[49] The process through which lands are transferred from lands over which First Nations retain rights to hunt, trap and fish, to lands taken up for other purposes must be consistent with the honour of the Crown.[50] The Court rejected Canada's position that any duty to consult and accommodate was fulfilled through the negotiation of the Treaty in 1899.[51]

While in relation to asserted Aboriginal Rights and Title the courts will inquire into whether the Crown has knowledge (real or constructive) of the potential existence of an Aboriginal Right or Title, in the case of treaties, the Crown always has notice of the Treaty and its contents.[52] A duty to consult therefore arises any time the Crown contemplates conduct that might adversely affect the Treaty Rights.

[46] *Ibid.* at para. 30.
[47] *Halfway River First Nation v. British Columbia* (1999), 178 D.L.R. (4th) 666.
[48] *Mikisew, supra* note 45 at para. 48.
[49] *Ibid.* at para. 55.
[50] *Ibid.* at para. 56.
[51] *Ibid.* at paras. 53-54.
[52] *Ibid.* at para. 34.

Putting lands to use as a road reduces the territory over which the Mikisew can hunt and trap and has negative impacts on wildlife on adjacent lands not being taken up for the road. The content of the Crown's duty to consult depends on the degree of potential infringement. In this case, the duty was at the lower end. The Court described the road as "fairly minor", and noted that the lands were surrendered.[53] The Crown had to: provide to notice to Mikisew of the decision being contemplated; inform itself of the impact the project could have on the exercise of Treaty Rights; provide to Mikisew all information relevant to the potential adverse impacts on Mikisew; engage with Mikisew directly, not through public consultation; solicit and seriously consider Mikisew's concerns; act in good faith with the intention of substantially addressing Mikisew concerns; attempt to minimize adverse impacts; and demonstrably integrate Mikisew's representations into the proposed plan of action.[54]

The Court held that in this case the Crown failed to fulfil its duty to consult. Moving the road cannot qualify as accommodation because this was done unilaterally without consultation.[55] The road approval was quashed and the Minister was directed to consult and reconsider the application.

[53] *Ibid.* at para. 64.
[54] *Ibid.* at para. 64.
[55] *Ibid.* at para. 66.