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Canada – Aboriginal title

9.8 In Canada, First Nations peoples' rights exist on a continuum between exclusive rights (aboriginal title),[8] and non-exclusive rights (aboriginal rights).[9] Aboriginal title in Canada is based on the recognition of use and occupation pre-sovereignty, while aboriginal rights require the identification of rights integral to culture at the time of sovereignty. The similarities to the idea of 'traditional' in the Australian context are evident.

Recognition of aboriginal title rights and title

9.9 The initial recognition of aboriginal title can be traced to the decision in *Calder v Attorney-General for British Columbia* (*'Calder'*)in 1971.[10] However, aboriginal title is now understood to be a subset of the broader category of aboriginal rights protected by s 35(1) of the *Constitution Act, 1982*.[11] Somewhat confusingly these are known as aboriginal title rights to distinguish them from aboriginal rights. Both are a subset of the broader aboriginal rights.

9.10 Section 35(1) of the *Constitution Act, 1982* recognises and affirms aboriginal and treaty rights. This section provides constitutional protection to rights existing at common law, but which remained unextinguished, at the date that provision came into force (17 April 1982).[12] Rights existing at common law in 1982 cannot be extinguished, although they can be infringed by sufficiently justified governmental action.[13]

9.11 While the provision protects *existing* aboriginal rights, the development of, and rationale for, the doctrine of aboriginal rights after 1982 has in turn been affected by the purpose and scope of s 35(1). Aboriginal rights (in a broad sense) protected by s 35(1) comprise a 'spectrum' of rights. They include within their range:

- **aboriginal rights: practices, customs and traditions integral to the distinctive culture of the group claiming the right;**
- **site specific rights to engage in particular activities on particular land; and**
- **aboriginal title: akin to a possessory title to the land.**
- **The distinction between these rights is the degree of connection to the land. The first two will be founded on activities or practices which fall short of the degree of connection required to found title, but which will nevertheless be recognised and affirmed by s 35(1). Where the degree of connection is less than that required to establish aboriginal title, claimants may make a claim of aboriginal rights (in a more restricted sense).**

9.12 While both aboriginal rights and aboriginal title are recognised and protected by s 35(1), each has evolved a distinctive test and standard of proof. They are consequentially also characterised by distinctive approaches to the question of evolution of rights and possible economic dimensions.

Establishing aboriginal title

9.13 In the latter part of the 20th century, recognition of a legally enforceable right to land held by indigenous groups can be traced to the decision of the Supreme Court of Canada in *Calder*.[15] According to Judson J in that decision, aboriginal title is sourced in the occupation of land prior to sovereignty. Similarly, in *Guerin v R*, Dickson J confirmed that aboriginal title was an independent legal right, based on historic occupation and possession and 'supported by the principle that a change in sovereignty does not in general affect the presumptive title of the inhabitants'.[16]

9.14 Aboriginal title is a burden on the radical title of the Crown. It is an independent legal interest which gives rise to a fiduciary duty.[17] In light of the enactment of s 35(1), *Constitution Act, 1982*, aboriginal title is now understood as a subset of the broader category of the 'aboriginal rights' protected by this section. While aboriginal rights are generally characterised as activities or practices, aboriginal title is characterised as a possessory right.[18]

9.15 In both *Calder* and the later case of *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* ('*Baker Lake*'), it was noted that the existence of an organised society was required to establish proof of occupation.[19] This requirement might suggest that an inquiry should be made into the laws and customs of that society, as for native title in Australia.[20] However, proof of aboriginal title in Canada has focused on occupation and possession, rather than the customs and traditions of aboriginal law.[21]

9.16 Significant clarification of the source and nature of aboriginal title was not provided until the decision of the Supreme Court of Canada in *Delgamuukw v British Columbia* ('*Delgamuukw*').[22] In that case, Lamer CJ located the source of aboriginal title in the

> physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law … What makes aboriginal title sui generis is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward.[23]

9.17 However, Lamer CJ went on to suggest that aboriginal law could be relied on to determine whether there was the occupation necessary to establish possession. The common law perspective relies on physical occupation as proof of possession, but the aboriginal perspective could, for example, look to patterns of land holding, allowable land uses, indigenous laws on trespass or rules on who can reside in the claim area in order to determine exclusive occupation.[24] Aboriginal title does not therefore rely on the content of aboriginal laws as such, but that content is relevant to determining whether there is exclusive occupation such as to point to 'title'.

9.18 Aboriginal title post-sovereignty reflects the fact of aboriginal occupancy pre-sovereignty. It includes all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group—most notably the right to control how the land is used.[25]

9.19 The 2014 decision of the Supreme Court of Canada in *Tsilhqot'in Nation v British Columbia ('Tsilhqot'in Nation')* *confirmed that, when considering the question of whether there has been sufficient occupation to ground aboriginal title, a 'culturally sensitive approach' is required.*[26] *Such a culturally sensitive approach is* 'based on the dual perspectives of the Aboriginal group in question—its laws, practices, size, technological ability and the character of the land claimed—and the common law notion of possession as a basis for title'.[27]

9.20 However, the perspective of an Aboriginal group to possession might conceive of possession of land in a somewhat different manner than did the common law.[28] McLachlin CJ stated:

> **a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is 'sufficient' use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.[29]**

Continuity of occupation

9.21 *Continuity between the present and the period prior to sovereignty becomes an issue for aboriginal title when a claimant group seeks to rely on* present occupation in support of its claim. If direct evidence is provided of pre-sovereign use and occupation to the exclusion of others, 'such evidence establishes Aboriginal title. There is no additional requirement that the claimant group show continuous occupation from sovereignty to the present-day'.[30]

9.22 If present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation.If such evidence is provided, any real need to show continuity—other perhaps than in the sense of showing that the modern group are the descendants of the original holders—is negated.

9.23 In *Delgamuukw,* the Court has recognised the difficulty of proving pre-sovereign occupation, holding that

> **an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title. What is required, in addition, is a continuity between present and pre-sovereignty occupation, because the relevant time for the determination of aboriginal title is at the time before sovereignty.[31]**

9.24 The Supreme Court added:

> **The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title. To impose the requirement of continuity too strictly would risk "undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect" aboriginal rights to land.[32]**

9.25 In *Tsilhqot'in Nation*, McLachlin CJ elaborated on the notion of 'continuity', stating that 'continuity simply means that for evidence of present occupation to establish an inference

of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times'.[33]

9.26 ***The nature of occupation may change between sovereignty and the present. This will not preclude a claim for aboriginal title as long as—referring to Brennan J in Mabo [No 2][34]—a 'substantial connection between the people and the land is maintained'.[35]*** **Continuity does not require an unbroken chain of continuity between present and prior occupation.[36]**

Evolution of aboriginal title

9.27 Once aboriginal title has been established, it confers the right to full use of the land, analogous to the rights of the holder of a fee simple at common law. This means that activities on the land are not restricted to those undertaken prior to, or at, sovereignty. In *Tsilhqot'in Nation*, McLachlin CJ stated that, 'in simple terms, the title holders have the right to the benefits associated with the land—to use it, enjoy it and profit from its economic development'.[37] According to Lamer CJ in *Delgamuukw*:

> **Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title.[38]**

9.28 However, the range of uses to which the land may be put is subject to an 'inherent limit': 'they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title'.[39]

9.29 The scope of this inherent limit remains unclear. It rests on the importance of the continuity of the relationship of the group with the land. According to Lamer CJ, this 'relationship should not be prevented from continuing into the future'.[40] Thus, land cannot be used in a way which destroys its value for the practices on which occupation is based—for example, strip mining former hunting and fishing grounds, or turning lands with which the group has a special bond for ceremonial purposes into a parking lot.[41] Therefore, the ability of claimant groups to use the land for economic development is not entirely unlimited.

Different sources of title in Canada and Australia: different outcomes

9.30 Although the source of aboriginal title is different from that of native title in Australia (the former based on occupation, the latter based on laws and customs), after *Tsilhqot'in Nation* the facts which found a claim to aboriginal title in Canada and native title in Australia may be similar. It is likely that the facts of *Mabo [No 2]* would have been likely to satisfy the test in *Delgamuukw* and *Tsilhqot'in Nation* to establish a right of aboriginal title.[42]

9.31 However, the different bases for aboriginal title and native title may lead to differences in outcome. In particular, as aboriginal title in Canada is based on occupation, it founds a recognised possessory interest, a fee simple—it is a 'right to the land itself'.[43] In *Delgamuukw*,the Court noted it had taken pains to clarify that aboriginal title 'does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to

use and occupy the land and cannot compete on an equal footing with other proprietary interests.'[44]

Establishing aboriginal rights

9.32 To establish an aboriginal right, short of title, the claimants must prove that the practices, uses or customs claimed as aboriginal rights are 'integral to the distinctive culture' of the claimants.

9.33 'Integral' emphasises practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society and therefore excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society's cultural identity.[45] **The language used has resonance for the Australian law expounding what is understood as traditional law and custom, (see Chapters 4 and 5).**

9.34 The practice, tradition or custom must be a defining feature which made the society what it was.[46] **It need not, however, be necessarily the most important defining feature of that society. The test does not require the practice founding the aboriginal right to go to the core of the claimant group.**[47] **Nor need the culture be shown to be fundamentally altered without this practice.**[48]

9.35 The practice, use, or custom must have been integral prior to European contact.[49] **Once an integral practice, custom or tradition has been identified, there must also be shown to be a reasonable degree of continuity between that practice and a modern practice or custom and a practice, tradition or custom.**[50]

9.36 In contrast to claims made under the *Native Title Act*, aboriginal rights doctrine focuses on activities rather than rights.[51] **Thus, what constitutes an aboriginal right might, for example, be the practice of fishing for subsistence purposes, rather than a right to fish. What is important is not the resource itself, but the practice by which it was extracted or harvested.**

9.37 The majority of decisions of the Supreme Court of Canada relating to aboriginal rights have arisen in the specific context of rights claimed as a defence to breach of provincial legislation, generally resource legislation. The exception to the instances where aboriginal rights were argued as a defence was *Lax Kw'alaams Indian Band v Canada* ('*Lax Kw'alaams*') which was a claim for a declaration of aboriginal rights.[52]

9.38 As s 35(1) of the *Constitution Act 1982* protects and affirms *existing* aboriginal rights, the demonstration of such a right can be a defence to a regulatory offence. The characterisation of the practice which founds an aboriginal right, and which therefore once proven provides a defence, is thus in part determined by what is required to establish the defence.[53]

9.39 At a practical level, therefore, s 35(1) provides a similar defence to regulatory offences as s 211 of the *Native Title Act*.[54]**However, s 35(1) protects and affirms all existing aboriginal rights. By contrast, s 211 is specifically limited to a particular prescribed class of activities**

found in s 211(3). Section 211 also only protects the class of activities where they are carried out for 'personal, domestic or non-commercial communal needs'.[55]

Proof of continuity

9.40 Aboriginal rights require proof of continuity of the rights claimed. In *Delgamuukw* Lamer CJ discussed,

> **difficulties inherent in demonstrating a continuity between current aboriginal activities and the pre-contact practices, customs and traditions of aboriginal societies … the requirement for continuity is one component of the definition of aboriginal rights.[56] Here, the 'continuity' may be physical, but also has a cultural dimension.[57]**

9.41 They are based on rights rather than occupation. According to *R v Marshall; R v Bernard*:

> **The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices. To claim it, a modern people must show that the right is the descendant of those practices.[58]**

9.42 In the case of aboriginal rights, continuity must be shown from pre-contact. According to the trial judge in*Lax Kw'alaams* 'the date of contact should be the date on which occurred the first direct arrival of Europeans in the area of the particular group of aboriginals'.[59] This is a question of fact.

9.43 A 'reasonable degree' of continuity is required. The question is whether the claimed modern right is demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice. In determining this, the court should take a generous but realistic approach to matching pre-contact to current practices.[60] A break in connection is not fatal. Inferences can be drawn as to the pre-contact practices based on modern practices.

9.44 With respect to aboriginal rights generally, the courts have noted that 'to impose the requirement of continuity too strictly would risk "undermining the very purpose of s 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect" aboriginal rights to land'.[61]

Evolution of aboriginal rights

9.45 Aboriginal rights may evolve. Claimants must establish that there was some element of the practice prior to contact that supports a modern evolved right (for example, some kind of trade). In addition, there must be proportionality and sufficient continuity between the pre-contact and modern practices.

9.46 The doctrine of continuity was identified in early decisions as the mechanism by which a 'frozen rights' approach could be avoided. The Supreme Court held that '[t]he evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their

protection as aboriginal rights'.[62] Practices can evolve in terms of both subject matter and manner of exercising the right.[63]

9.47 Canadian courts have consistently allowed evolution in the manner of exercising a right. In *R v Marshall*, McLachlin CJ referred to the possibility of 'logical evolution', stating that this means 'the same sort of activity, carried on in the modern economy by modern means. This prevents aboriginal rights from being unfairly confined simply by changes in the economy and technology'.[64]

9.48 In terms of evolution of the subject matter of a right, the Court has required some degree of proportionality and sufficient continuity between the pre-contact practice and the modern right claimed. Thus, in *R v Sappier; R v Gray*, a right to harvest wood for the construction of temporary shelters was recognised to have evolved into a right to harvest wood by modern means to be used in the construction of a modern permanent home.[65]

9.49 However, in *Lax Kw'alaams*, the claimed aboriginal right to commercial harvesting and sale of all species of fish within their traditional waters was considered to be qualitatively and quantitatively out of proportion to the pre-contact practices. While the band harvested a wide variety of fish resources, only trade in euchalon grease could be characterised as integral to their distinctive culture. Trade in euchalon grease could not found a modern right to commercially harvest and sell *all* fish species.[66] Binnie J gave the following examples:

> **A 'gathering right' to berries based on pre-contact times would not, for example, 'evolve' into a right to 'gather' natural gas within the traditional territory. The surface gathering of copper from the Coppermine River in the Northwest Territories in pre-contact times would not, I think, support an 'Aboriginal right' to exploit deep shaft diamond mining in the same territory.[67]**

9.50 The requirement that aboriginal rights be demonstrated to be integral to culture prior to contact operates to significantly limit what can be recognised as a modern right, and the form that right can take. It does not allow for rights that arose as a result of European influence to be recognised, regardless of their antiquity relative to European settlement. This is not dissimilar to the requirement in Australia that laws and customs be sourced in those acknowledged and observed prior to sovereignty, a requirement which has the same inherent limiting factor.

- **[8]**

  ***Delgamuukw v British Columbia* [1997] 3 SCR 1010; *Tsilhqot'in Nation v British Columbia* 2014 SCC 44.**

- **[9]**

  ***R v Van der Peet* [1996] 2 SCR 507.**

- **[10]**

  ***Calder v Attorney-General of British Columbia* [1973] SCR 313.**

- **[11]**

  ***R v Adams* [1996] 3 SCR 101.**

- **[12]**

  R v Sparrow **[1990] 1 SCR 1075.**

- **[13]**

  Ibid; *R v Van der Peet* **[1996] 2 SCR 507.**

- **[15]**

  Calder v Attorney-General of British Columbia **[1973] SCR 313.**

- **[16]**

  Guerin v The Queen **[1984] 2 SCR 335; *Amodu Tijani v Secretary, Southern Nigeria*** **[1921] 2 AC 399.**

- **[17]**

  Tsilhqot'in Nation v British Columbia **2014 SCC 44. For further discussion of the Crown's fiduciary duty, see below.**

- **[18]**

  Delgamuukw v British Columbia **[1997] 3 SCR 1010. The possessory right is however held to be inalienable.**

- **[19]**

  Calder v Attorney-General of British Columbia **[1973] SCR 313; *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development*** **(1979) 107 DLR 3d 513.**

- **[20]**

  See further Chs 4 and 5.

- **[21]**

  Kent McNeil, 'The Meaning of Aboriginal Title' in Michael Asch (ed), *Aboriginal Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* **(University of British Columbia Press, 1997) 135; ibid.**

- **[22]**

  Delgamuukw v British Columbia **[1997] 3 SCR 1010.**

- **[23]**

  Ibid [114].

- **[24]**

  Ibid [156]–[157].

- **[25]**

  Tsilhqot'in Nation v British Columbia **2014 SCC 44 [75].**

- **[26]**

  Ibid [41].

- **[27]**

  Ibid.
- **[28]**

  Ibid.
- **[29]**

  Ibid [42].
- **[30]**

  Tsilhqot'in Nation v British Columbia **(Unreported, BCSC, 20 November 2007) 1700, [548].**
- **[31]**

  Delgamuukw v British Columbia **[1997] 3 SCR 1010 [152].**
- **[32]**

  Ibid [153].