REJECTION OF THE "POSTAGE STAMP" APPROACH TO ABORIGINAL TITLE: THE *TSILHQOT'IN NATION* DECISION

These materials were prepared by Jack Woodward, Pat Hutchings and Leigh Anne Baker of Woodward & Company, Victoria, BC, for the Continuing Legal Education Society of British Columbia, January 18, 2008.

I. Introduction

This paper sets out to discuss aspects of the physical occupancy element of the test for Aboriginal title, and how Vickers J. interpreted and applied *Marshall; Bernard*[1] in the recently released *Tsilhqot'in Nation*[2] decision. *Tsilhqot'in Nation* is the most recent Aboriginal title case since the Supreme Court of Canada decided *Marshall; Bernard* in 2005. In fact, that SCC decision was released during the trial of *Tsilhqot'in Nation*, and the interpretation of its principles in and impact on the present case were hotly contested by all parties.

The crux of that debate in *Tsilhqot'in Nation* has been characterized as the "postage stamp" approach to Aboriginal title, as put forward by British Columbia and Canada, and the "cultural security and continuity" approach to title put forward by the plaintiff. After hearing all the parties' arguments on this issue, Vickers J. resoundingly and unequivocally rejected the "postage stamp" approach:

> [610] The plaintiff characterizes the foregoing arguments of the defendants as a postage stamp approach to Aboriginal title. I think that is a fair description. There is no evidence to support a conclusion that Aboriginal people ever lived this kind of postage stamp existence. Tsilhqot'in people were semi-nomadic and moved with the seasons over various tracts of land within their vast territory. It was government policy that caused them to alter their traditional lifestyle and live on reserves.

[1] *Marshall; Bernard*, 2005 SCC 43 ("*Marshall; Bernard"*).
[2] *Tsilhqot'in Nation*, 2007 BCSC 1700 ("*Tsilhqot'in Nation*")

And again later in the decision:

> [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 but a part of the land that has provided "cultural security and continuity" to Tsilhqot'in people for better than two centuries.

The arguments put forward by the parties regarding the interpretation of the principles and impact of *Marshall; Bernard* and Vickers J.'s findings on the issue are discussed below after a short summary of the *Tsilhqot'in Nation* case.

II. A Summary of the Background and Findings of *Tsilhqot'in Nation*

Tsilhqot'in Nation is the most recently decided Aboriginal title case. It is the first case in Canada to carve out Aboriginal title boundaries on a map. The case arose in response to forestry activities proposed for or occurring within the traditional territory of the Tsilhqot'in people. The Tsilhqot'in Nation consists of six bands and its traditional territory is located in central BC, in the Chilcotin Region named after them. The Xeni Gwet'in are one of the six Tsilhqot'in bands. Chief Roger William of the Xeni Gwet'in First Nation was the representative plaintiff in this action on behalf of the Xeni Gwet'in and the Tsilhqot'in Nation.[3]

The Tsilhqot'in people have long asserted their Aboriginal title to and rights on their traditional territory. The first legal action was launched in 1989 contesting forestry activities in the Nemiah Trapline Territory. An injunction was issued by consent, prohibiting logging by the forestry companies, in 1991. Following the injunction, forestry activities for the Brittany Triangle (called by its Tsilhqot'in name, Tachelach'ed, in the judgment) were proposed. In May of 1992, Tsilhqot'in members blockaded a bridge that was the key access point to the Brittany Triangle to prevent its upgrading to allow truck crossings. Within a week then British Columbia Premier Michael Harcourt promised the Xeni Gwet'in that there would be no logging on their traditional territory without their consent. When that promise was broken and new forestry licences were granted in 1997, the Xeni Gwet'in resumed their legal action for the Nemiah Trapline Territory and began one for the Brittany Triangle. The Xeni Gwet'in consolidated those two actions into the *Tsilhqot'in Nation* case in 2002. In this consolidated action they sought a declaration of Aboriginal title and rights to hunt, trap and trade in the Brittany Triangle and the Nemiah Trapline territory (the "Claim Area"), which at 438,100 hectares is just a portion of the Tsilhqot'in traditional territory. The Brittany Triangle and the Nemiah Trapline Territory lie within the heartland of their traditional territory.[4]

[3] *Tsilhqot'in Nation*, at paras. 24, 29-30, 34, 39.
[4] *Tsilhqot'in Nation*, at paras. 28, 60-91.

While Vickers J. stopped short of a declaration of Aboriginal title, based on the evidentiary record he found that the Tsilhqot'in had met the test for proof of Aboriginal title to almost half of the Claim Area (almost 200,000 hectares), and additionally to areas outside of the Claim Area. While recognizing that his opinion as to the areas outside of the Claim Area were non-binding, even should a declaration of Aboriginal title be granted on appeal, he offered that opinion, based on the evidence heard and on the invitation to do so by British Columbia, in the expectation that it would allow the parties to come to a negotiated solution.[5] Aboriginal rights to hunt, trap and trade in skins and pelts to secure a moderate livelihood were also recognized and affirmed throughout the entire Claim Area.[6]

Some of Vickers J.'s most important findings on Aboriginal title include:

- the Tsilhqot'in met the test for Aboriginal title for almost half the Claim Area (para. 959);
- the BC *Forest Act* does not apply to lands that meet the test for Aboriginal title (para. 981);
- the application of the BC *Forest Act* infringes Aboriginal title (paras. 1053, 1068, 1075-1077, 1081);
- only the federal government has constitutional authority to legislate with respect to Aboriginal title lands, as set out under s. 91(24) of the Constitution of Canada (para. 1039);
- s. 88 of the *Indian Act* does not invigorate provincial legislation in its application to Aboriginal title lands (para. 1039);
- Parliament has a central role in matters relating to Aboriginal peoples and denial or avoidance of this constitutional responsibility is unacceptable (para. 1046);
- the Province has been violating Aboriginal title in an unconstitutional and therefore illegal fashion since it joined the federation in 1871 (para. 1047);
- the Province has no jurisdiction to extinguish Aboriginal title (para. 997);
- Aboriginal title is not extinguished by Provincial grants of land in fee simple or of any other interests (para. 998);
- consultation requires acknowledgement of Aboriginal title and infringement cannot be justified without that acknowledgement (para. 1141); and
- the BC *Limitation Act* does not apply to claims for unjustified infringement of Aboriginal title (para. 1314).

Some of Vickers J.'s most important findings regarding Aboriginal rights include:

- the Tsilhqot'in Nation has an Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing food, clothing, shelter, mats,

[5] *Tsilhqot'in Nation*, at paras. 959-962.
[6] *Tsilhqot'in Nation*, at para. 1240, 1265.

blankets and crafts, as well as for spiritual, ceremonial and cultural uses, inclusive of a right to capture and use animals for transportation and work (para. 1240);

- the Tsilhqot'in Nation has an Aboriginal right to trade in furs and pelts as a means to secure a moderate livelihood (para. 1246);
- forest harvesting activities are an infringement of Aboriginal rights to hunt and trap (para. 1288) and that infringement is not justified (para. 1294);
- consultation regarding potential infringements of Aboriginal rights to hunt and trap requires an assessment of the impact of forestry activities on wildlife (para. 1294);
- consultation requires acknowledgement of Aboriginal rights and infringement cannot be justified without that acknowledgement (para. 1294); and
- the BC *Limitation Act* applies to claims for unjustified infringements of Aboriginal rights other than title. The principle of discoverability applies, and the limitation period runs from the date when the party became aware of the cause of action. The period would thus begin to run from the time of the *Sparrow* decision on May 31, 1990. (para. 1319)

II. "Postage Stamps" vs. "Cultural Security and Continuity": Opposing Approaches to Aboriginal Title

The "postage stamp" debate arises with respect to the interpretation of "definite tracts of land" in the physical occupation element of the test for Aboriginal title. The following section sets out the case law on this issue, the arguments raised by the parties, and Vickers J.'s findings in *Tsilhqot'in Nation*.

A. The Standard of Occupation in the Test for Aboriginal Title

An explanation of the now rejected "postage stamp" approach to Aboriginal title requires a short discussion of the test for Aboriginal title. As set out in *Delgamuukw*[7], the leading case regarding the test for and scope of Aboriginal title:

> [143] In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

The SCC went on at para. 149 of *Delgamuukw* to provide further guidance as to the standard of physical occupancy required to ground a declaration of Aboriginal title:

[7] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 ("*Delgamuukw*").

> Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources: see McNeil, *Common Law Aboriginal Title, supra* at pp. 201-202. In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": Brian Slattery, "Understanding Aboriginal Rights", at pp. 758.

The standard of occupation was raised again before the Supreme Court of Canada in *Marshall; Bernard*. The SCC released *Marshall; Bernard* in 2005, while *Tsilhqot'in Nation* was still being heard. The *Marshall* and *Bernard* cases both arose after Mi'kmaq people were charged with regulatory offences after logging on Crown land within their claimed traditional territories without provincial authorization. In both cases the accused claimed that they were not required to obtain authorization to log.[8] The main issue in the *Marshall; Bernard* case was whether the Mi'kmaq people of Nova Scotia and New Brunswick have treaty rights or aboriginal title allowing them to log commercially on Crown lands without authorization and outside of provincial regulation.[9] In deciding that issue, the Supreme Court of Canada had to further consider the issue of what is the correct standard for occupation required to ground a declaration of Aboriginal title. This issue arose due to the fact that both the Courts of Appeal had applied a looser standard than the trial judges, thus requiring the correct legal standard to be clarified.[10]

The SCC in *Marshall; Bernard* rejected the standard for occupation applied by the Courts of Appeal and affirmed the one applied by the trial judges.[11] The Court summarized the findings of the lower courts as follows:

> [41] The trial judges in each of *Bernard* and *Marshall* required proof of regular and exclusive use of the cutting sites to establish aboriginal title. The Courts of Appeal held that this test was too strict and applied a less onerous standard of incidental or proximate occupancy.
>
> [42] Cromwell J.A. in *Marshall v. Canada* ((2003), 218 N.S.R. (2d) 78, 2003 NSCA 105 (N.S. C.A.)) adopted in general terms Professor McNeil's "third category" of occupation (*Common Law Aboriginal Title* (1989)), "actual entry, and some act or acts from which an intention to occupy the land could be inferred" (para. 136). Acts of "cutting trees or grass, fishing in tracts of water, and even perambulation, may be relied upon" (para. 136).
>
> [43] Daigle J.A. in *R. v. Bernard* (2003), 262 N.B.R. (2d) 1, 2003 NBCA 55 (N.B. C.A.), similarly concluded that it was not necessary to prove specific acts of occupation and regular use of the logged area in order to ground aboriginal title. It was enough to

[8] *Marshall; Bernard* at paras. 2-3.
[9] *Marshall; Bernard* at para. 1.
[10] *Marshall; Bernard*, at paras. 41-44.
[11] *Marshall; Bernard*, at paras. 72-77.

> show that the Mi'kmaq had used and occupied an area near the cutting site at the confluence of the Northwest Miramichi and the Little Southwest Miramichi. This proximity permitted the inference that the cutting site would have been within the range of seasonal use and occupation by the Mi'kmaq (para. 119).

The SCC re-emphasized that the principles set out in *Delgamuukw* were the correct standard to be applied:

> [56] "Occupation" means "physical occupation". This "may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources": *Delgamuukw, per* Lamer C.J., at para. 149.

And the Court at para. 59 of *Marshall; Bernard* further established that:

> To say that title flows from occasional entry and use is inconsistent with these cases and the approach to aboriginal title which this Court has consistently maintained.

Thus *Marshall; Bernard* can be seen as further direction from the SCC to the lower level courts to require evidence of "regular use of definite tracts of land" and to not apply a lower standard of inference from proximity to established areas of occupation or occasional entry and use.

B. The Standard of Evidence Required for a Finding of Aboriginal Title

Marshall; Bernard can also be seen as direction from the SCC regarding the evidentiary burden required to prove Aboriginal title. As the Court states:

> [44] The question before us is which of these standards of occupation is appropriate to determine aboriginal title: the strict standard applied by the trial judges; the looser standard applied by the Courts of Appeal; or some other standard? Interwoven is the question of what standard of evidence suffices.

The starting point of the analysis of the claim for Aboriginal title is on the practices established on the evidence. These practices must be viewed from the aboriginal perspective, and after they are established on the evidence, the practice can be translated into the modern common law right.[12] The SCC states at para. 77 of *Marshall; Bernard* that:

> 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.

[12] *Marshall; Bernard*, paras. 48, 60.

This requirement for sufficient evidence to meet the burden set out in the test for Aboriginal title can also be seen in the SCC's rejection of the New Brunswick Court of Appeal's finding in *Bernard*, where the standard of proximity to established areas of traditional settlement sites was applied.[13]

The evidence in the *Bernard* and *Marshall* cases can be characterized as being insufficient to establish Aboriginal title. The SCC in *Marshall; Bernard* highlighted some of the gaps in the findings of evidence made by the trial judges. The SCC notes at para. 79 that in *Marshall* the trial judge found that:

> b) On the mainland the Mi'kmaq made intensive use of bays and rivers and at least nearby hunting grounds. The evidence is just not clear about exactly where those lands were or how extensive they were. It is most unlikely all the mainland was included in those lands. There just weren't enough people for that.
>
> c) As for Cape Breton, there simply is not enough evidence of where the Mi'kmaq were and how long they were there to conclude that they occupied any land to the extent required for aboriginal title.
>
> d) In particular, there is no clear evidence that the Mi'kmaq of the time made any use, let alone regular use, of the cutting sites where these charges arose, either on the mainland or in Cape Breton.

And with respect to *Bernard*, the SCC notes at para. 80 that the trial judge found (emphasis added):

> Given the evidence before me, I cannot conclude that the land at the *locus in quo* was used on a regular basis for hunting and fishing. Such trips made there in 1759 would have been occasional at best. **Occasional forays for hunting, fishing and gathering are not sufficient to establish Aboriginal title in the land**. [para. 107]
>
> . . . . .
>
> **There was no evidence of capacity to retain exclusive control** and, given the vast area of land and the small population, they did not have the capacity to exercise exclusive control. In addition, according to the evidence of Chief Augustine, the Mi'kmaq had neither the intent nor the desire to exercise exclusive control, which, in my opinion, is fatal to the claim for Aboriginal title. [para. 110]

These findings of fact stand in stark contrast to the findings of fact in *Tsilhqot'in Nation*. It must be noted that the above emphasized gaps in the evidence in the *Bernard* case, namely irregular use and no evidence of capacity to retain exclusive control, were thoroughly addressed by the extensive evidence tendered in the *Tsilhqot'in Nation* case.

---

[13] *Marshall; Bernard*, at paras. 43, 72.

LeBel J. noted the following with respect to the evidentiary record in his dissenting opinion in *Marshall; Bernard*:

> [141] The record in the courts below lacks the evidentiary foundation necessary to make legal findings on the issue of aboriginal title in respect of the cutting sites in Nova Scotia and New Brunswick and, as a result, the respondents in these cases have failed to sufficiently establish their title claim. In the circumstances, I do not wish to suggest that this decision represents a final determination of the issue of aboriginal title rights in Nova Scotia or New Brunswick. A final determination should be made only where there is an adequate evidentiary foundation that fully examines the relevant legal and historical record. The evidentiary problems may reflect the particular way in which these constitutional issues were brought before the courts.

The *Bernard* and *Marshall* cases were regulatory offences, heard in the course of criminal proceedings.[14] The case proceeded on little evidence of occupation. In contrast, the *Tsilhqot'in Nation* case took 339 days to be heard, one of the longest civil trials in the history of Canada. Chief Roger William was on the stand for 46 days alone. 24 Tsilhqot'in people testified in court, and 5 more provided affidavit evidence.[15] 19 expert witnesses were called for the plaintiff.[16] 604 exhibits were entered into evidence. One of the exhibits was a collection of over 1000 core historical documents, admitted for the truth of their contents by agreement of all parties. The collection of core historical maps, consisting of between 150-200 maps, was another exhibit tendered. The common book of forestry documents comprised 58 volumes spanning some three or four thousand documents.[17] The volume of evidence put forward by the plaintiff alone in the *Tsilhqot'in Nation* case was massive, by any standard.

British Columbia attempted to argue in *Tsilhqot'in Nation* that "the evidence relied upon by the Plaintiff in the instant case to support his claim to title to the entire Claim Area was considered in *R. v. Marshall*; *R. v. Bernard* as insufficient to prove aboriginal title."[18] Given the lack of evidence for the large geographic areas and specific cutting sites claimed in the *Marshall; Bernard* cases, and the volume of evidence provided in *Tsilhqot'in Nation* regarding the Claim Area, this argument by the Province seems to misinterpret the findings regarding the evidentiary burden for Aboriginal title established in *Marshall; Bernard*. Vickers J. further distinguishes the evidence offered in the two cases, noting at para. 582 of *Tsilhqot'in Nation* that:

> While this case clearly raises similar issues with respect to the land use patterns of semi-nomadic people, there are differences. In *Marshall; Bernard* the persons accused both attempted to prove Aboriginal title at specific sites. Here the plaintiff's evidence is not limited to site specific use and occupation. The evidence ranges over tracts of land. The plaintiff argues the evidence proves a regular use of these tracts of land as well as use of site specific locations, sufficient to warrant a declaration of Aboriginal title.

---

[14] *Marshall; Bernard*, at para. 143-44.
[15] *Plaintiff Final Argument* at para. 229.
[16] *Plaintiff Final Argument* at page 1.
[17] *Plaintiff Final Argument* at para. 254.
[18] *BC Final Argument* at para. 496.

C. Applying *Marshall; Bernard*: Arguments as to What Qualifies as "Definite Tracts of Land"

Vickers J. had to decide on the application of the principles and the impact of *Marshall; Bernard* on the claims of the semi-nomadic Tsilhqot'in people. The importance of this case was noted by Vickers J.:

> [582] The case at bar turns on an application of the principles enunciated by the Supreme Court of Canada in *Marshall; Bernard*.

After taking 13 pages to review the *Marshall; Bernard* decision, Vickers J. concludes at para. 583 that the standard set by the Supreme Court of Canada for proof of Aboriginal title is high. The test requires "regular use or occupancy of definite tracts of land". Occasional entry and use of land is not sufficient to meet the required standard for occupation in the test for Aboriginal title.

Vickers J. states at para. 554 that the *Marshall; Bernard* decision "stands for the proposition that Aboriginal title is not co-extensive with any particular Aboriginal group's traditional territory." He notes further that while the parties accept that proposition, they disagree as to what it means and on the case's application.

The major source of disagreement seems to revolve around the definition and scope of "definite tracts of land." This is where the "postage stamp" vs. the "cultural security and continuity" debate arises.

The Crowns put forward the argument that *Marshall; Bernard* decision reduced Aboriginal title to smaller spots or "postage stamps," a characterization put forward by the plaintiff and accepted by Vickers J.[19] The BC Crown specifically argued that *Marshall; Bernard* stood for the proposition that Aboriginal title is reduced to small, specific sites:

> Examples might be a specific berry patch, a particular fishing site which members of a community utilized regularly to catch and preserve fish, or a specific site where game was known to congregate and where the members of a particular community went regularly to harvest animals for their needs. But the fact that the members of an aboriginal community would harvest plants, fish, or game wherever they happened to find them does not convert a large territory in which those people roamed into a "definite tract".[20]

The plaintiff responded to the defendant's argument with the following, as summarize by Vickers J. at para. 556 of *Tsilhqot'in Nation*:

---

[19] *Tsilhqot'in Nation*, at paras. 610, 1376.
[20] *BC Final Argument*, at para. 1329.

> …the defendants have taken an untenably narrow view of Aboriginal title, completely divorced from the realities of Aboriginal life. The plaintiff argues that the defendants misunderstand the characterization of definite tracts of land used by the Tsilhqot'in people for hunting, fishing and gathering, and are attempting to confine Aboriginal title to narrowly defined pinpoint sites. He says British Columbia's acknowledgement that Aboriginal title might be established in some exceptional circumstances to a specific "salt lick" or a "narrow defile" where game concentrate each year as opposed to a more broadly used area for hunting, fishing and gathering, is entirely incorrect. In the submission of the plaintiff, this is not the promise of Aboriginal title foretold by the foregoing decisions.

The plaintiff's final argument set out in further detail the non-economic component of the inherent and unique value of the land:

> [409] While Aboriginal title lands hold an inherent and important economic component, their significance extends far beyond their economic value. They are, by definition, the portions of a First Nations' ancestral lands to which they are bound in a relationship of central and defining cultural significance. Indeed, the test for proof of Aboriginal title expressly operates as a proxy for identifying such a relationship. As Lamer C.J. affirmed in *Delgamuukw*, Aboriginal title arises "where the connection of a group with a piece of land 'was of a central significance to their distinctive culture'".
>
> > *Delgamuukw* (SCC), para. 137, quoting from R. v. *Adams*, [1996] 3 S.C.R. 101 at para. 26 ['*Adams* (SCC)']
>
> [410] Aboriginal title holds an important cultural component that protects the inherent and unique value of the land to the title-holding Aboriginal nation. Aboriginal title lands are more than a fungible commodity: they are repositories of language, history, and spirit. They provide not only the economic base of survival required to sustain a First Nation into the future, but also the constitutional protection for an ancient and distinctive society to flourish. Aboriginal title lands are inextricably linked to cultural survival.
>
> > *Delgamuukw* (SCC), para. 129; *Osoyoos Indian Band* v. *Oliver (Town)*, [2001] 3 S.C.R. 746 at para. 46 ["The aboriginal interest in land will generally have an important cultural component that reflects the relationship between an aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community"].
> >
> > See also: *Platinex Inc.* v. *Kitchenuhmaykoosib Inninuwug First Nation*, [2006] O.J. No. 3140, 2006 CarswellOnt 4758 (Ont. S.C.J.), para. 80 ["The land is the very essence of their being. It is their very heart and soul … Aboriginal identity, spirituality, laws, tradition, culture and rights are connected to and arise from this relationship to the land"]; Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Service Canada, 1996) at 425 ["Land is absolutely fundamental to Aboriginal identity …"].

The plaintiff, in his final argument, goes on to state that Aboriginal title serves to protects distinctive Aboriginal societies:

414. As this suggests, Aboriginal title plays a central role in fulfilling the promise of s. 35(1); that is, ensuring the survival of First Nations as distinctive societies within Canada by identifying and protecting their integral and defining features.

415. As Lamer C.J. observed in *Delgamuukw*, "[i]mplicit in the protection of historic patterns of occupation is a recognition of **the importance of the continuity of the relationship** of an aboriginal community to its land over time" (para. 126). The inherent limit, for example, rests on the recognition that this culturally sustaining "relationship should not be prevented from continuing into the future" (para. 127).

> *Delgamuukw* (SCC), paras. 126-27 (emphasis added).

416. By safeguarding the "special bond between the group and the land" (*Delgamuukw*, para. 127), Aboriginal title preserves the connection to the land that was and remains necessary to sustain Aboriginal communities as distinctive societies. It preserves the foundation of their economies, their cultures, their history, their spirituality and their distinctive ways of being. It carves out an essential constitutional space for First Nations to sustain themselves into the future. Such protection is crucial in the face of intensifying pressures to develop First Nations' lands in ways that profoundly affect their communities, their traditional practices and their distinctive ways of life.

> *Delgamuukw* (SCC), paras. 126-27 (emphasis added).

417. Aboriginal title traces its origins to the collision of Aboriginal and European nations in North America. The concept of Aboriginal title provided a means of reconciling competing interests through the recognition and protection of the lands occupied and possessed by Aboriginal societies. The British policy of recognizing the entitlement of First Nations to such lands, and protecting these lands against encroachment in the absence of surrender by treaty, were essential measures for the peaceful settlement of British North America.

. . . . .

418. Recognition of the Aboriginal entitlement to the lands that sustained them was the animating principle of Canadian settlement. In the words of the current Chief Justice of the Supreme Court of Canada,

> The fundamental understanding -- **the *Grundnorm* of settlement in Canada** - was that **the aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown**, on terms that would ensure to them and to their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them.
>
> > *Van der Peet* (SCC), para. 272 (*per* McLachlin J.) (dissenting, but not on this point) (emphasis added).

> 419. Aboriginal title, in its origins as in the present day, is inextricably linked to the continued survival and vibrancy of distinctive Aboriginal societies within Canada.

D. Rejection of the "Postage Stamp" Approach

Based on the definition of "definite tracts of land" found to be applicable in the case, and as established on the evidence, Vickers J. found that the test for Aboriginal title had been satisfied in areas both within and outside the Claim 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…

Vickers J. went on in the above paragraph to carve out on the map the areas where the test for Aboriginal title had been met. This area is almost 200, 000 hectares, almost half the size of the Claim Area. He then went on to state:

> [960] The foregoing describes a tract of land mostly within the Claim Area but not entirely. It is an area that was occupied by Tsilhqot'in people at the time of sovereignty assertion to a degree sufficient to warrant a finding of Tsilhqot'in Aboriginal title land from three perspectives. First, there are village sites as I have discussed earlier. Second, there are cultivated fields, cultivated from the Tsilhqot'in perspective. These were the valleys and slopes of the transition zone used and managed by Tsilhqot'in people for generations that provided them with root plants, medicines and berries. Third, by a well defined network of trails and waterways, Tsilhqot'in people occupied and used the land, the rivers, the lakes, and the many trails as definite tracts of land on a regular basis for the hunting, trapping, fishing and gathering. This is the land over which they held exclusionary rights of control: *Marshall*; *Bernard* at para. 77. This was the land that provided security and continuity for Tsilhqot'in people at the time of sovereignty assertion: *Sappier; Gray* at para. 33.

Based on Vickers J.'s comments and findings, it can be seen that he accepted the plaintiff's arguments as to how the case law requires that "definite tracts of land" be conceived. First Nations need a land base if they are to survive into the future as a distinct group.

E. Pleading the Definite Tracts of Land

The issue of "definite tracts of land" also arose in *Tsilhqot'in Nation* with respect to the pleadings. Vickers J. decided it as a preliminary issue and his conclusions there prevented him from making a declaration of Aboriginal title.[21]

The debate was surrounding whether the pleadings as framed defined the Brittany Triangle (called by its Tsilhqot'in name, Tachelach'ed, in the judgment) and the Nemiah Trapline Territory as the two sole definite tracts of land allowed to be claimed.

British Columbia argued that the plaintiff had advanced an "all or nothing" claim and that accordingly, (at para. 106):

> the Court may only find Aboriginal title to the Claim Area in either Tachelach'ed or the Trapline Territory, or reject the claim outright. British Columbia characterizes the plaintiff's original review of the evidence as:
>
> > ... a vast amount of loosely organized information concerning a number of uses to which a variety of geographic areas -- some relatively localized, some not, some inside the Claim Area, some not -- have in different times and by different sets of people been put. Rarely does the Plaintiff include details that would allow the Court to understand what the evidence shows concerning the frequency, intensity or general time frame for the alleged traditional use in question.
> >
> > Because the Plaintiff has chosen to organize his review of the evidence of use of land in Appendix 3 by season, as opposed to by use for traditional purposes or by specific geographic location (as in [British Columbia's] Appendix 2), it is very difficult to analyse the evidence in a way that might be helpful to the Court.

And further, both defendants argued that (at para. 110):

> they are prejudiced by the plaintiff's late stage attempts to convert the pleaded definite tracts of land -- Tachelach'ed and the Trapline Territory - into smaller definite tracts of land. In their submission, the plaintiff is bound by his pleadings and cannot succeed simply by saying the smaller definite tracts of land are all included in the greater Claim Area.

The plaintiff responded by putting forward the argument that the Court does, in fact, have jurisdiction to find that portions of the Claim Area are definite tracts of land:

> [107] In his reply, the plaintiff takes issue with British Columbia's characterization of his argument and his review of the evidence. The plaintiff argues that the Court has jurisdiction to make a declaration of title with respect to all or a portion of the Claim

[21] *Tsilhqot'in Nation,* at para. 102-130.

> Area. In particular, he argues the Court has jurisdiction to find that portions of the component parts of the Claim Area, Tachelach'ed and the Trapline Territory, may also be found to be definite tracts of land that qualify for a declaration of Aboriginal title.

With respect to the remedies available to the plaintiff, Vickers J. found that:

> [116] The plaintiff relies upon the provisions of s. 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. That provision sets out a direction to the Court to grant "all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter...". I interpret those words to mean that appropriate remedies are to be granted for those matters that have been pleaded and proven to the satisfaction of the court at trial.

Vickers J. reviewed *Delgamuukw,* where on appeal the plaintiffs had amalgamated the individual House claims into two claims, one brought by the Gitksan Nation and the other brought by the Wet'suwet'en Nation. The SCC in that case found that the appellants were not allowed on appeal to reframe their case in a different manner because of the resulting prejudice to the respondents.[22]

The plaintiff argued that the finding in *Delgamuukw* was distinguishable, on the basis that the plaintiffs in *Delgamuukw* were asking the Court to declare rights to the larger area after smaller tracts of lands had originally been pleaded. In *Tsilhqot'in Nation,* the plaintiff argued the Court could make a declaration to the Claim Area or its lesser included areas.

Vickers J. concluded on the "preliminary issue" that:

> [129] I am bound by the conclusions reached by the Supreme Court of Canada in *Delgamuukw*. I conclude that the reply argument Appendices 1A and 1B are a reframing of the plaintiff's case. The case is framed as an "all or nothing" claim. To allow the plaintiff to now seek declarations over portions of the Claim Area would be prejudicial to the defendants.

Later in the judgment, however, Vickers J. states that:

> [961] It should be borne in mind that this view of Tsilhqot'in Aboriginal title is not binding on the parties given the conclusion I have reached in Section 4 on the preliminary issue. If I am wrong on this preliminary issue, then my conclusion on Tsilhqot'in Aboriginal title, insofar as it describes land within Tachelach'ed and the Trapline Territory, is binding on the parties as a finding of fact in these proceedings.

In the plaintiff's respectful opinion, this issue was incorrectly decided based on the law and Aboriginal title could have been granted to all or a portion of the Claim Area, based on the

[22] *Tsilhqot'in Nation,* at paras. 112-114.

pleadings as set out. Given this finding, however, it would be wise for Aboriginal title claimants to include the exact area, “or any portions thereof,” for which title will be proven, as an alternate plea.

III. Reconciliation and the “Cultural Security and Continuity” Approach

Vickers J. succinctly makes the connection between the protection and recognition of Aboriginal title lands and the process of reconciliation, one of the purposes of, as well as one of the promises enshrined in, s. 35 of the *Constitution Act, 1982*. His statements on this issue are deserving of reproduction in full:

> [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 but a 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. The recognition of the long-standing presence of Tsilhqot'in people in the Claim Area is a simple, straightforward acknowledgement of an historical fact.
>
> [1378] Given this basic recognition, how are the needs of a modern, rural, Indigenous people to be met? How can their contemporary needs and interests be balanced with the needs and interests of the broader society? That is the challenge that lies in the immediate future for Tsilhqot'in people, Canada and British Columbia.
>
> [1379] As a consequence of colonization and government policy, Tsilhqot'in people can no longer live on the land as their forefathers did. How is a former semi-nomadic existence, one that cannot be replicated in a modern Canada, to be given "cultural security and continuity" in this twenty-first century and beyond? Governments and Tsilhqot'in people must find an accommodation that reconciles the historical Tsilhqot'in place in Canada with the place of their neighbours who come from all corners of the world.
>
> [1380] Land is a critical component in the resolution of this dispute.

Thus Vickers J. can be seen as affirming the “cultural security and continuity” approach as a requirement in the process of reconciliation, as well as the arguments put forward by the plaintiff in his final argument, such as those included in the section above. The approach taken by Vickers J. affirms the need for Aboriginal title lands in order for the Tsilhqot’in to survive as distinct people, now and in the future.

IV. Conclusion

Tsilhqot'in Nation has established the principled approach to Aboriginal title litigation in Canada. It sets a number of new legal precedents in both Aboriginal title and Aboriginal rights. The *Tsilhqot'in Nation* case required Vickers J. to apply the established Supreme Court of Canada tests for Aboriginal title to the facts at hand. Based on the voluminous amounts of evidence presented, and the strict application of the legal tests, Vickers J. found that the Tsilhqot'in people had met the test for Aboriginal title. This finding, along with the other conclusions drawn in the decision, has ground-breaking implications for Aboriginal title, the duty to consult, Aboriginal rights and the division of powers in Canada. This decision has already been appealed by all parties.

The rejection of the "postage stamp" approach to Aboriginal title and the embracing of the "cultural security and continuity" approach is one of the major precedents set by this litigation. This decision should restrain the Crowns from making such "impoverished" arguments in the future, and emphasizes the aboriginal perspective that is required under the common law.

This decision affirms that First Nations need a land base if they are to survive as distinct groups into the future. A "postage stamp" approach to Aboriginal title does not adequately reflect or protect the rights recognized in s. 35 of the *Constitution Act, 1982*. The "postage stamp" approach would lead to the extinction of First Nation societies, and would eviscerate the right of First Nations to live as a distinct group, now and in the future, on the lands that they historically occupied. The Crowns need to reconcile First Nations' constitutionally-protected Aboriginal right and title with those of the larger Canadian society. The focus should be on prioritizing the First Nations' continued existence as a distinct cultural group with a guaranteed economic base to sustain them.

It must be kept in mind, however, that while *Tsilhqot'in Nation* demonstrates that it is possible for a semi-nomadic group to meet the test for Aboriginal title, the amount of evidence, expense and time involved makes the idea of Aboriginal title litigation prohibitive for most First Nations. The oral history given by the Tsilhqot'in witnesses, many of them from an older generation, was essential. The costs of the litigation were extremely high. The plaintiff's costs were initially covered through fundraising and the support of the Assembly of First Nations, the David Suzuki Foundation and the Western Canada Wilderness Committee. When those sources could no longer cover the costs, the Tsilhqot'in people had to ask for, and were granted, an advance cost order. Given the developing case law in that area, it may be more difficult in the future for First Nations to secure an advance cost order for their Aboriginal title litigation.

Given the immense costs and barriers to Aboriginal title litigation, few First Nations will be able to pursue it. The only practical way forward is for the Crown to embrace reconciliation based on the existence, not the extinguishment, of Aboriginal title. A new model is required to set out on this path. To fully implement the implications of this decision, and as well to address the reproaches set out in it, new approaches to treaty negotiations and new statutory regimes that

fully acknowledge the existence of asserted and proven Aboriginal title are required, at minimum.

Although not the focus of this paper, the implications for Aboriginal rights presented by this decision are equally as important. It requires the Crowns to consult and accommodate Aboriginal rights to ensure that the impacts of the Crowns' activities are not so egregious as to impinge the First Nation's ability to survive into the future. In order to meet the standards set out in this decision the Crowns will have to develop a new model for their activities in areas where Aboriginal rights are asserted or established. A discussion of Vickers J.'s conclusions on Aboriginal rights can be found in Heather Mahony's paper, also presented at this conference.