

Proving Aboriginal Rights and Title after *Tsilhqot'in*

This paper was prepared by John J.L. Hunter Q.C. of the Vancouver law firm of Hunter Litigation Chambers, for a conference on "*Tsilhqot'in First Nation v. British Columbia: The Immediate Impact and Next Steps*" presented by the Pacific Business and Law Institute, March 4-5, 2008, Vancouver, B.C.

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I. Introduction

1. Over the past twenty years the Supreme Court of Canada has developed an extensive jurisprudence concerning the law of aboriginal rights and title in this country. The tests for the proof of aboriginal rights and title have been settled, but as with all developing areas of the law, new cases provide new opportunities to refine and explain these tests.

2. The trial level judgment in *Tsilhqot'in First Nation v. British Columbia* provides the most recent discussion of the standards for proof of aboriginal rights and title. This paper will review these standards and will comment on the treatment of the legal issues by the trial judge in *Tsilhqot'in*. In doing so, it must be borne in mind that *Tsilhqot'in* is at this point a trial level decision only and the jurisprudence in this area of law is almost exclusively to be found in the decisions of the Supreme Court of Canada.

II. Proving Aboriginal Rights

(i) The Test

3. The test for proving aboriginal rights is well settled. In order to be an aboriginal right, an activity must be an element of a practice, custom or tradition of an aboriginal group prior to contact with Europeans that was integral to the distinctive culture of the aboriginal group.¹

4. Thus there are both substantive and temporal requirements built into the definition. The first step in the process is to identify a modern activity and then relate it to a traditional activity or practice engaged in by the aboriginal group. This involves three elements.

5. First, evidence must be led of a traditional practice that is related to the modern activity at issue. Secondly, it must be established that the traditional practice took place within the aboriginal group asserting the right prior to contact with Europeans. Thirdly, it is not sufficient

¹ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 46 (“*Van der Peet*”). See also *R. v. Sappier*; *R. v. Gray*, [2006] 2 S.C.R. 686, at para. 20

that an aboriginal group is shown simply to have engaged in the relevant activity at the relevant time. The activity must have been integral to the distinctive culture of the aboriginal group. While the definition of aboriginal right is well settled, each of these three requirements has given rise to difficulty.

(ii) The “Distinctive Culture” Question

6. Not all traditional practices are protected aboriginal rights. The practice or custom must have been integral to the distinctive culture of the aboriginal group claiming that right. What does that mean?

7. The Court initially suggested that to meet the “integral to a distinctive culture” test, the practice, custom or tradition must have been a “a central and significant part of the society's distinctive culture”; it must have been “one of the things that truly made the society what it was”.² In a similar vein, the Court later suggested that the practice, custom or tradition must have “distinguished or characterized their traditional culture and lay at the core of the peoples' identity.”³

8. In its most recent formulation of the test, the Supreme Court has backed away somewhat from this expression of the integral nature of the practice or custom. In *R. v. Sappier; R v. Gray*⁴, the Court stated that this language “may have unintentionally resulted in a heightened threshold for establishing an aboriginal right” and went on to conclude that it was “necessary to discard the notion that the pre-contact practice upon which the right is based must go to the core of the society's identity, i.e. its single most important defining character.”⁵

9. The Court has also made it clear that “distinctive” does not mean “distinct”. An aboriginal practice does not need to be unique to the aboriginal group to be integral to the group's distinctive culture. The Court explained it in this way:

The focus of the Court should therefore be on the *nature* of this prior occupation. What is meant by "culture" is really an inquiry into the pre-contact way of life of

² *Van der Peet*, para. 55

³ *Mitchell v. The Queen*, [2001] 1 S.C.R. 911, at para. 12

⁴ [2006] 2 S.C.R. 686 (“*Sappier*”)

⁵ *Sappier*, para. 40

a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits. The use of the word "distinctive" as a qualifier is meant to incorporate an element of aboriginal specificity. However, "distinctive" does not mean "distinct" ...⁶

10. The Court also related the site-specific requirement previously recognized in the hunting and fishing cases to the integral nature of the activity:

The characterization of the claimed right in the present cases, as in *Adams, Côté* and *Mitchell*, imports a necessary geographical element, and its integrality to the Maliseet and Mi'kmaq cultures should be assessed on this basis.⁷

(iii) Contact Date

11. The relevant date for assessing the traditional practice or custom is the date of contact with Europeans.⁸ The rationale of using this date to measure traditional activities or customs is presumably based on the practical reality that contact with Europeans may have changed traditional practices so that it becomes difficult to separate out the custom that is truly integral to a traditional society from customs or practices that were modified by the influence of the Europeans.

12. The difficulty arises when there is some doubt about the date of effective contact or when there may be good evidence of contact with one group but only inferential evidence that this contact affected the cultures of related groups.

13. The Supreme Court has not been precise about the dates when contact occurred for purposes of assessing aboriginal rights. But in two cases from Quebec the date for contact was set at 1603, which was described as the year "when the French began to assume effective control over the territories of New France."⁹ The date would likely be earlier in the Maritimes and later in British Columbia for reasons driven by the history of European settlement of these areas.

⁶ *Sappier*, para. 45

⁷ *Sappier*, para 51

⁸ *Van der Peet*, para. 60

⁹ *R. v. Cote*, [1996] 3 S.C.R. 139, at para. 58

14. The challenge in presenting probative evidence of traditional practices at a time that pre-date contact with Europeans of a people that did not have a written language is clearly a significant one. The Court in *Van der Peet* addressed it in this way:

That this is the relevant time should not suggest, however, that the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.¹⁰

15. In *Sappier*, the Court addressed the requirement for flexibility in assessing the evidence in these terms:

Flexibility is important when engaging in the *Van der Peet* analysis because the object is to provide cultural security and continuity for the particular aboriginal society. This object gives context to the analysis. For this reason, courts must be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available.¹¹

16. Thus it is apparent that evidence led to establish that a particular practice was an integral part of a traditional aboriginal society is not restricted to evidence of pre-contact practices. Evidence of post-contact practices may be led so long as it is directed to establishing that a particular custom existed pre-contact and met the “integral to a distinctive culture” test.

(iv) Relationship of the Practice to the Claimed Right

17. Implicit in all of these requirements is the proposition that the claimed right is the modern equivalent of the traditional practice. It is of no real value to establish that a particular practice integral to the group’s distinctive culture existed prior to European contact unless it can be linked to a modern practice that can be said to be equivalent to or at least the logical evolution of the traditional practice.

¹⁰ *Van der Peet*, para. 62; see also *Sappier*, para. 34

¹¹ *Sappier*, para. 33

18. Early in the Court's jurisprudence it was established that what was protected by section 35 was not the specific traditional practice but the modern form in which those practices might be exercised. Aboriginal rights are not to be frozen in time.¹²

19. In *Sappier*, the Court expressed this concept in this way:

Although the nature of the *practice* which founds the aboriginal right claim must be considered in the context of the pre-contact distinctive culture of the particular aboriginal community, the nature of the *right* must be determined in light of present-day circumstances. As McLachlin C.J. explained in *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43, at para. 25, "[l]ogical evolution means the same sort of activity, carried on in the modern economy by modern means." It is the practice, along with its associated uses, which must be allowed to evolve.¹³

20. For this reason, precise identification of the modern right sought to be supported by the traditional practice is essential. Whether the modern right will be seen as a logical evolution of the traditional practice will often be a central challenge of an aboriginal rights case, whatever the evidence of the traditional practice.

II. The *Tsilhqot'in* Decision – Aboriginal Rights

21. In his judgment in *Tsilhqot'in*, the trial judge includes an extensive discussion of the test for aboriginal rights, the evidence before him relating to that test and his conclusions. He set out the tests in *Sparrow*, *Vander Peet* and *Sappier* and concluded that the *Tsilhqot'in* had established that at the date of contact traditional practices of hunting and trapping that could find modern expression in the same forms.

22. The trial judge summarized the *Van der Peet* test in this way:

The test for Aboriginal rights set out in *Van der Peet* and elaborated on in subsequent jurisprudence involves, in essence, four stages:

1. characterizing the claimed Aboriginal right;

¹² See e.g. *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at paras. 24-27

¹³ *Sappier*, para 48

2. establishing that the ancestors of the claimant Aboriginal group engaged in particular practices, customs or traditions prior to European contact that correspond with the claimed right;
3. determining whether the ancestral practices, customs or traditions were integral to the distinctive culture of the Aboriginal group prior to European contact; and
4. determining whether there is continuity between the claimed Aboriginal right and the pre-contact practices, customs and traditions on which the right is based.¹⁴

23. In his consideration of the evidence on the existence of the claimed aboriginal rights, the trial judge commented on a few issues not settled in the current jurisprudence.

(i) Date of Contact

24. The trial judge addressed a question inherent in the date of contact test as to the extent of impact of European contact. The plaintiff argued that the contact date should be considered as the date of sustained or meaningful contact with Europeans, which was said to be 1829 or somewhat later.

25. The Province of British Columbia took the position that the relevant date was the date of first contact, regardless of the extent of that contact. This date was said to be 1793, on the basis that this was the date that Alexander Mackenzie completed his journey through British Columbia to the Pacific and was also the year Captain George Vancouver completed his survey of mainland British Columbia.

26. The trial judge determined the appropriate date for contact in British Columbia was 1793. He held that the relevant date was not the date of effective control but the date of first contact in any manner, which on the evidence was 1793. In doing so he referenced the Supreme Court jurisprudence on this point.¹⁵

27. The approach taken by the trial judge appears consistent with the Supreme Court's approach in early fishing and hunting cases. If it is not questioned on appeal, it would appear that the contact date for British Columbia, whether inland or on the coast, has now been set at 1793.

¹⁴ *Tsilhqot'in v British Columbia*, 2007 BCSC 1700, para. 1154 ("*Tsilhqot'in*")

¹⁵ *Tsilhqot'in*, paras 1180-1212

(ii) Scope of the Right

28. Another issue that arose in *Tsilhqot'in* and which appears to be unresolved in the Supreme Court's jurisprudence is the extent to which aboriginal rights are to be characterized broadly or narrowly. In *Tsilhqot'in* this question arose in connection with the plaintiffs' claim for trading rights generally. Canada took the position that trading rights must be expressed in a species specific manner. In other words, the position taken was that a right to trade would be too nebulous, whereas a right to trade certain articles or products that conformed to traditional trading practices would be consistent with the nature of the aboriginal rights test.

29. This position was rejected by the trial judge, who made the following comments:

In Canada's submission, the Court's jurisprudence indicates that trading rights must be characterized in a species-specific manner. By way of example, Canada points out that in *Gladstone*, the claimants established a right to trade herring spawn on kelp, rather than a right to trade all fish.

I disagree with Canada on this point. The Court has been silent on whether a right to trade must be characterized as species specific. In *Gladstone* the right claimed and the supporting evidence were entirely about herring spawn. In *Van der Peet* the defendant was charged after selling salmon but the right was characterized at para. 77 as "an aboriginal right to exchange fish for money or other goods" and not the right to exchange salmon for money. In *Smokehouse* the defendant was charged after selling and purchasing Chinook salmon caught under the authority of an Indian food fishing license. The right was characterized as "the exchange of fish for money or other goods": *Smokehouse* at para. 26. In *R. v. Marshall*, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513, the defendant was charged with catching and selling eels out of season. The treaty right was characterized as the right to obtain necessities through hunting and fishing.¹⁶

30. The question whether trading rights are required to be expressed in a species specific manner has not been discussed by the Supreme Court of Canada, although as the trial judge points out rights have been characterized in a way that suggests a more general scope. This is an issue which may be expected to arise in other commercial rights claims.¹⁷ It may well be one that attracts further appellate comment if this decision goes further.

¹⁶ *Tsilhqot'in*, paras 1164-65

¹⁷ For instance it has been raised in connection with a claim for an aboriginal right to trade in fish (without further specificity) currently at trial in *Ahousaht Nation et al v. Canada*

III. Proving Aboriginal Title

31. The jurisprudence on proof of aboriginal title is somewhat less developed than is the case for aboriginal rights other than title. The test was articulated in the leading case of *Delgamuukw v The Queen*¹⁸ in 1997. While the explanation of the content of aboriginal title and the test for its proof are reasonably clearly expressed, there are a number of issues left unresolved. As the Supreme Court put it in 2005, “Many of the details of how this [*Delgamuukw*] principle applies to particular circumstances remain to be fully developed.”¹⁹

32. More than ten years after the *Delgamuukw* judgment, no final decision declaring that an aboriginal claimant has aboriginal title over any land has been made by any court. Unfortunately the recent decision in *Tsilhqot’in* does not appear to be destined to assist much in resolving the outstanding legal questions.

(i) The Test

33. The test for proving aboriginal test was not settled until 1997 with the Supreme Court’s decision in *Delgamuukw v The Queen*. In this important decision, the Supreme Court stated a number of principles that have guided courts since that time in attempting to assess aboriginal title claims. Unfortunately, since almost the entire decision is *obiter dicta*, the Court did not have to wrestle with the application of these principles to a particular situation.

34. First, the Court explained that aboriginal title was a right of occupation of land. The concept was expressed in this way:

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. However, that range of uses is subject to the limitation that 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. This inherent limit... flows from the definition of aboriginal title as a sui

¹⁸ [1997] 3 S.C.R. 1010 (“*Delgamuukw*”)

¹⁹ *R v Bernard; R v Marshall*, [2005] 2 S.C.R. 220 at para 40

generis interest in land, and is one way in which aboriginal title is distinct from a fee simple.²⁰

35. The Court further explained the content of aboriginal title as follows:

... the content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.²¹

36. Thus, unlike aboriginal rights, aboriginal title is exclusive. Aboriginal rights can be shared so that issues of priority and accommodation find an important role in the expression of aboriginal rights. Aboriginal title is not however a shared occupancy right (although it can be shared between aboriginal groups). To hold that an aboriginal group has an exclusive occupancy right is to hold that no one else may occupy that land. It is interesting to speculate whether there might be some tangible illustration of aboriginal title by now if it had not been described in such absolutist terms.

37. In attempting to explain the relationship between aboriginal rights and aboriginal title, the Court resorted to the spectrum concept in these terms:

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

Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by

²⁰ *Delgamuukw*, para. 111

²¹ *Delgamuukw*, para. 117

s. 35(1), including site-specific rights to engage in particular activities. As I explained in *Adams*, this may occur in the case of nomadic peoples who varied “the location of their settlements with the season and changing circumstances” (at para. 27).²²

(ii) Proof of Aboriginal Title

38. The Court set out this test for the proof of aboriginal title:

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.²³

39. It is noteworthy, and susceptible of great confusion, that the date for assessment of aboriginal title is the date of sovereignty not contact, as is the case for aboriginal rights. This probably means that in British Columbia aboriginal rights are assessed as at about 1793 and aboriginal title as at 1846.²⁴

40. Lamer C.J.C. explains the necessity for different dates²⁵, but does not explain what happens if one aboriginal nation has the right to fish in an area as at the date of contact, but by the date of Crown sovereignty another aboriginal group has occupied the area to the exclusion of all others, thereby making a case for aboriginal title. This may not be a likely scenario in some parts of Canada, but there are very real prospects that in British Columbia the evidence will support such a conclusion.

(iii) Standard of Occupation for Aboriginal Title

41. Little is said by the Court in *Delgamuukw* about the extent to which land must have been physically occupied to support a finding of aboriginal title. This has created significant difficulties for subsequent courts, including the Supreme Court, as most aboriginal claimants

²² *Delgamuukw*, paras 138-139, per Lamer C.J.C.

²³ *Delgamuukw*, para. 143

²⁴ These were the dates which the trial judge concluded were applicable in *Tsilhqot'in*: see para. 601 for aboriginal title and para. 1212 for aboriginal rights.

²⁵ *Delgamuukw*, para. 144-145

have assumed that aboriginal title covers the entirety of their traditional territory and governments have generally assumed and asserted that aboriginal title is intended to reach only village sites and other similar areas actually occupied by the aboriginal people on a permanent basis.

42. The occupation issue was not definitively addressed by the Supreme Court of Canada until 2005 in two cases arising from New Brunswick and Nova Scotia, *R v Bernard; R v Marshall*.²⁶ In these cases, appellate judges in New Brunswick and Nova Scotia had expressed the view that substantial parts of these two provinces were covered by the aboriginal title of the Mi'kmaq people and it became necessary for the Court to address the scope issue.

43. It is clear that to establish aboriginal title, claimants must prove what Chief Justice McLachlin described as “exclusive pre-sovereignty occupation of the land by their forebears.” The question for the Court in *Marshall/Bernard* was what that meant in concrete terms.

44. The Court appears to have come down on the side of more geographically limited sites for aboriginal title. Invoking a passage from *Delgamuukw* which had not received a great deal of attention, the Court made the following observations:

“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.

“Exclusive” occupation flows from the definition of aboriginal title as “the right to *exclusive* use and occupation of land”: *Delgamuukw*, per Lamer C.J., at para. 155 (emphasis in original). It is consistent with the concept of title to land at common law. Exclusive occupation means “the intention and capacity to retain exclusive control”, and is not negated by occasional acts of trespass or the presence of other aboriginal groups with consent (*Delgamuukw*, at para. 156, citing McNeil, at p. 204). Shared exclusivity may result in joint title [page247] (para. 158). Non-exclusive occupation may establish aboriginal rights “short of title” (para. 159).

It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to

²⁶ [2005] 2 S.C.R. 220 (“*Marshall/Bernard*”)

comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right.²⁷

45. The Court also introduced the concept of fee simple back into the analysis. In *Delgamuukw*, the Supreme Court had made it clear that aboriginal title was *sui generis* and not to be equated with fee simple. In *Marshall/Bernard*, however, the Court, perhaps concerned that the lower courts were interpreting the scope of aboriginal title quite broadly, made a clear attempt to reign in the *sui generis* nature of the concept so that it is “consistent with the concept of title to land at common law”²⁸ and “invokes the common law perspective” as well as the aboriginal perspective. “The question is whether the practices established by the evidence, viewed from the aboriginal perspective, correspond to the core of the common law right claimed.”²⁹

46. Though it has received criticism³⁰, the Court’s decision in *Marshall/Bernard* appears to have settled one outstanding issue from *Delgamuukw* concerning the standard of occupation required for a finding of aboriginal title. One can also see a tendency to viewing rights based on traditional practices through the lens of shared aboriginal rights rather than exclusive aboriginal title.

47. The trial judgment in *Tsilhqot’in*, however, appears to have brought a degree of uncertainty back into this issue.

IV. The *Tsilhqot’in* Decision – Aboriginal Title

48. While the trial judge’s decision in *Tsilhqot’in* on aboriginal rights appears to follow the principles laid down by the Supreme Court in *Van der Peet* and *Sappier*, his decision on the aboriginal title issue is considerably more problematic. There are two aspects of the decision

²⁷ *Marshall/Bernard*, paras 56-58

²⁸ *Marshall/Bernard*, para 57

²⁹ *Marshall/Bernard*, para 60

³⁰ In relation to *Marshall/Bernard*, the influential academic commentator Brian Slattery has characterized the Supreme Court as “adrift in a conceptual sea, without benefit of star or compass”: “The Metamorphosis of Aboriginal Title”, [2006] 85 Can. Bar Rev. 255 at 256. Another perspective on the decision is that it is the logical consequence of the Court’s explanation of aboriginal title in *Delgamuukw*, an explanation that may be regarded as weakened by the fact that it was *obiter dicta* and therefore not required to address the consequences of the principles being enunciated.

(i) **Decision by Opinion**

49. The trial judge concluded that he could not make a declaration as to where aboriginal title was to be found, but rather gave what he described as a non-binding opinion on that subject. While his motive for doing so was apparently to advance the theme of reconciliation, this approach raises serious concerns as to the role of a trial judge in adjudicating cases that are brought before the court.

50. A central theme in the trial judgment is the importance of reconciliation as a guiding principle to the resolution of aboriginal rights and title claims. The Supreme Court has on several occasions emphasized the focus on reconciliation and the need for negotiated settlements as the preferable means to settle these claims. There is no controversy in that. It is not at all clear why the failure to come to a decision that could be the subject of an appeal contributes to reconciliation.

51. This was a case that was brought to trial by Aboriginal people who apparently wished to obtain certain legal remedies, including declarations of aboriginal title. The trial judge made what appears to be a unique decision, which he summarizes in his Executive Summary in this way:

The Court is not able, in the context of these proceedings, to make a declaration of Tsilhqot'in Aboriginal Title. The Court offers the opinion that Tsilhqot'in Aboriginal title does exist inside and outside the Claim Area.³¹

52. The trial judge then goes on to describe in some detail the areas which in his opinion (but not in his decision) constituted aboriginal title lands.

53. Following this Executive Summary, the trial judge provides a Preface and provides some comments on the reasons both for the organization of his Reasons for Judgment and his decision

³¹ *Tsilhqot'in*, p. iii

to give an extensive opinion on aboriginal title lands even though he was apparently unable to come to a decision on that issue:

It is not usual in the writing of judgments to provide a preface. This is not a usual judgment but, rather, part of a larger process of reconciliation between Tsilhqot'in people and the broader Canadian society. A reader will find the usual recitation of facts, the legal principles and the conclusions I have drawn. In the writing of a judgment, a court does not normally decide an issue if that decision is only to become unnecessary *obiter dicta* of the court. Because the Court is engaged in the broader process of reconciliation, I have departed from the usual practice and expressed my views on some issues that might not have been addressed but for the nature of these proceedings.³²

54. It is in the last seventeen pages of the judgment, entitled "Reconciliation" that the judicial philosophy behind this approach is set out. The section begins with this passage:

Throughout the course of the trial and over the long months of preparing this judgment, my consistent hope has been that, whatever the outcome, it would ultimately lead to an early and honourable reconciliation with Tsilhqot'in people. *After a trial of this scope and duration, it would be tragic if reconciliation with Tsilhqot'in people were postponed through seemingly endless appeals.*³³

55. It is not often a trial judgment includes a plea to dissatisfied litigants not to appeal. It is apparent that the trial judge was concerned that the normal appellate process will delay reconciliation between the Tsilhqot'in people and the Governments representing everyone else.

56. The plea not to appeal is particularly difficult to understand in the field of aboriginal law. Any dispute of any consequence in this evolving area of the law has advanced to the Supreme Court of Canada, where the highest court in the land explains what the law is. It is not uncommon for the decision of a trial judge to be reversed by the Court of Appeal (as happened in *Delgamuukw*) or even reversed by the Court of Appeal and then restored by the Supreme Court of Canada (as happened in *Marshall/Bernard*).

57. The difference in this case appears to revolve around the trial judge's view of his role in the reconciliation process. The trial judge raises the issue in this way:

³² *Tsilhqot'in*, para 18

³³ *Tsilhqot'in*, para 1338 (emphasis added)

In an ideal world, the process of reconciliation would take place outside the adversarial milieu of a courtroom. This case demonstrates how the Court, confined by the issues raised in the pleadings and the jurisprudence on Aboriginal rights and title, is ill equipped to effect a reconciliation of competing interests. That must be reserved for a treaty negotiation process. Despite this fact, the question remains: how can this Court participate in the process of reconciliation between Tsilhqot'in people, Canada and British Columbia in these proceedings?³⁴

58. The traditional answer to the question posed by the trial judge is that it is the role of a trial judge to decide the case put before him or her according to law. Subject to correction by the appellate courts, the parties will then know their legal positions and may govern themselves accordingly.

59. The trial judge expresses his view of the answer to this question differently:

I have come to see the Court's role as one step in the process of reconciliation. For that reason, I have taken the opportunity to decide issues that did not need to be decided. For example, I have been unable to make a declaration of Tsilhqot'in Aboriginal title. However, I have expressed an opinion that the parties are free to use in the negotiations that must follow.³⁵

60. The difficulty with this approach is that the trial judge may be wrong. It is difficult to see how basing a negotiation on a judgment that may be wrong advances reconciliation.

61. It is apparent from the very next paragraph of the decision that the trial judge may be wrong in the manner in which he has formulated his opinion. Had he pronounced judgment on the basis of what follows, there would be a clear line of appeal. By framing his views as an opinion, non-binding and arguably non-appealable, the trial judge may be thought to have insulated his views from appellate review. It is not easy to see how this advances reconciliation.³⁶

³⁴ *Tsilhqot'in*, para 1357

³⁵ *Tsilhqot'in*, para 1375.

³⁶ A practical difficulty with this judicial approach is that it is unclear what status a non-binding opinion has. Will it be a part of the formal order? If it is not, how can the Respondents appeal the "opinion", since an appeal is taken from the formal order not the reasons for decision? The Respondents have already filed a Notice of Appeal so presumably this will be sorted out in due course.

(ii) Standard of Occupation

62. As previously discussed, the requisite standard of occupation for aboriginal title has been the subject of some controversy. While not resolving all possible disputes, a reasonable view of the *Marshall/Bernard* decision is that it supports what has been described as a “small places” theory – that aboriginal title will only be found on “definite tracts of land” which Aboriginal people used on a regular basis and can be said to have physically occupied.

63. The trial judge appears to take a different view of the impact of *Marshall/Bernard*. Early in his judgment, he describes it in this way:

Marshall; Bernard is the Supreme Court of Canada’s most recent decision on Aboriginal title. That case stands for the proposition that Aboriginal title is not co-extensive with any particular Aboriginal group’s traditional territory.³⁷

64. He amplifies on this with the following summary:

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

It appears to me that The Supreme Court of Canada has set a high standard, requiring “regular use or occupancy of definite tracts of land”. The Supreme Court has now clearly stated that “[t]o say that title flows from occasional entry and use is inconsistent with [...] the approach to aboriginal title which this Court has consistently maintained”: *Marshall; Bernard*, at para. 59.³⁸

65. When discussing Reconciliation, however, the trial judge is highly critical of the Government’s argument that aboriginal title is limited to regular use or occupancy of definite tracts of land, stating as follows:

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.³⁹

³⁷ *Tsilhqot’in*, para 554

³⁸ *Tsilhqot’in*, para 582-583

³⁹ *Tsilhqot’in*, para 1376

66. It seems at least arguable that what the trial judge calls an “impoverished view of Aboriginal title” is in fact consistent with the principles established in *Marshall/Bernard*. Perhaps it is not, but that is a determination that should ultimately be made at an appellate level.

V. Conclusion

67. The *Tsilhqot'in* decision does not appear to be inconsistent with the principles of aboriginal rights that have been set by the Supreme Court of Canada, although there may be narrow areas where the parties will want appellate review.

68. On the other hand, the approach taken by the *Tsilhqot'in* trial judge in respect of aboriginal title is very problematic, particularly in terms of his decision to express a non-binding opinion rather than a more conventional decision, but also in terms of his comments on the standard of occupation necessary to support aboriginal title after *Marshall/Bernard*.

69. It is to be hoped that the Court of Appeal will find a way to exercise its customary appellate jurisdiction to review this decision.

John J.L. Hunter Q.C.
March 2008