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Native Title in Canada and Australia post *Tsilhqot'in*: Shared Thinking or Ships in the Night?¹

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Abstract

*The Canadian decision of *Tsilhqot'in Nation v British Columbia* (BC Supreme Court, 2007) was a significant step in the resolution of a long-running timber dispute in western Canada, and the most important judicial exploration of Canadian 'Aboriginal title' since the watershed 2002 decision of *Delgamuukw*. The primary significance of this recent decision for Canada lies in its quite robust conclusions on provincial jurisdictional limitations, and its wrestle with emerging controversies over the exact areas to which the concept of Aboriginal title can attach. For Australian observers, the primary importance of the decision lies, it would seem, in the Court's disinterest in strict 'continuity' inquiries, its clear and pointed confirmation of the comprehensive and contemporary nature of the Aboriginal title interest, and its dissatisfaction with jurisprudential focus on the notion of 'society'. More broadly speaking, the *Tsilhqot'in* decision prompts renewed reflection on reconciliation processes in both countries, and in many ways reminds us of the self-evidently valuable nature of comparative study. This paper examines the *Tsilhqot'in* decision against the backdrop of the Canadian legal history, and attempts to explain its significance from both the Canadian and Australian perspectives.*

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INTRODUCTION

In international terms, Australia's 17 year-old native title doctrine is an addendum to a long and winding jurisprudence that stretches back as far as 1823 in the United States (US),² 1847 in New Zealand³ and 1887 in Canada.⁴ Set against this long history, one conspicuous feature of the contemporary Australian law is its relative disinterest in ongoing transnational comparison. Certain key overseas decisions, and the simple fact of Australia's long legal isolation, did clearly play an important role in the initial forging of Australia's new doctrine. However, Australia's engagement in the global exchange of ideas was always tentative and selective, and as Australian courts have steered deeper into the specific legal and political problems pressed upon them, there has been a generally strengthening resistance to comparative analogy.⁵

The development of Australian legal principles in this field has admittedly been fast and furious, and the task for the courts a taxing one. Moreover, the mounting detail in the Australian law (with crystallising specific differences) makes it increasingly difficult to hold up base reasoning for comparison. Yet differences in the treatment of Indigenous peoples demand rather than excuse exploration. Cooke P (in 1990) eloquently explained the central issue in the New Zealand context:⁶

[In] interpreting New Zealand parliamentary and common law it must be right for New Zealand Courts to lean against any inference that in this democracy the rights of the Maori people are less respected than the rights of Aboriginal peoples in North America.

Certainly international comparison is a suitable exercise for commentators. To the Australian comparative lawyer, the richest source of contemporary 'native title' case law is Canada – and there are historical, geographic and demographic similarities between Canada and Australia over and above the shared experience of all the key post-British countries. Inevitably there are some differences between countries that to varying degrees hide or complicate the core principle and reasoning for which the comparative lawyer searches. In an Australian-based examination of Indigenous rights jurisprudence in Canada, the relevant contextual differences include the long treaty history in many parts of that country, the courts' articulation of fiduciary duties in various contexts, and the constitutional intervention of 1982. Much could be said on all of these issues, however for present purposes it is sufficient to note that it is quite clear that these features of the Canadian legal history in no way preclude comparison on core native title principles.⁷ If we too readily assume that varying contexts and interfaces subsume core logic and meaning, we lose a valuable resource.

A very substantial Canadian decision was handed down in late 2007: *Tsilhqot'in Nation v British Columbia*.⁸ This decision of the British Columbia Supreme Court, a significant and closely reasoned step in the resolution of a long-running timber dispute in central British Columbia, ranges widely across various aspects

² *Johnson v M'Intosh*, 21 US 543, 8 Wheat 543 (1823).

³ *R v Symonds* (1847) NZPCC 387.

⁴ *St Catharines Milling and Lumber Company v R* (1887) 13 SCR 577; *St Catherine's Milling and Lumber Company v R* (1888) 14 App Cas 46.

⁵ See generally Richard H Bartlett, 'Australia's Museum Mentality' in Richard H Bartlett and Jill Milroy (eds), *Native Title Claims in Canada and Australia: Delgamuukw and Miriwung Gajerrong*, Centre for Aboriginal Programmes and Centre for Commercial and Resources Law, University of Western Australia, Perth, 1999, at 94.

⁶ *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 at 655.

⁷ See Simon Young, *The Trouble with Tradition: Native Title and Cultural Change*, Federation Press, NSW, 2008, chapter 3.

⁸ *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700; [2008] 1 CNLR 112 ('*Tsilhqot'in*'). As to the status of appeal proceedings, see below.

of Indigenous rights law and relevant Constitutional law. It has attracted much attention in Canada.⁹ For the Canadian lawyer, it is an important attempt at clarification and application of various components of the intricate Canadian principles. For the Australian lawyer, it is a fascinating and in many respects sobering read – illustrating different approaches to familiar issues and prompting deeper reflection on the post-colonial legal challenge.

THE CANADIAN BACKGROUND

Political context and formative jurisprudence

A review of Canada's formative legal history reveals a pattern of early settlement and treaty-making not dissimilar to that found in the US (this is consistent with the intersection and cross-influence in the development of these two countries). The process was driven by the successive colonial objectives of military/trading alliance, centralisation of land dealings and orderly settlement¹⁰ (and of course by the imperial policy of 'acquisition by purchase' ultimately formalised in the *Royal Proclamation of 1763*).¹¹ Settlement in much of the territory was therefore built upon on a series of treaties and agreements, particularly in Ontario, the prairies and ultimately the north.¹² Early treaties of peace gave way to treaty surrenders of Aboriginal lands accompanied by the creation of smaller reserves (and in many instances the preservation of subsistence rights over unoccupied surrendered lands).¹³ Jurisdiction over Aboriginal affairs was given to the central Canadian Government upon its formation in 1867,¹⁴ and from that time many aspects of the lives and reservation entitlements of Indigenous peoples were governed by federal regulation.¹⁵ The treaty-making process itself continued into the early 20th century in a number of the provinces, however from the 1920s there was a long period of governmental inaction on Indigenous land issues.¹⁶ Cases from the late 1960s and early 1970s¹⁷ ultimately coaxed the Canadian Government into

⁹ See for example, Kent McNeil, 'The Significance of *Tsilhqot'in Nation v British Columbia*', (in press), 4 March 2008; Dwight G Newman & Danielle Schweitzer, 'Between Reconciliation and the Rule(s) of Law: *Tsilhqot'in Nation v British Columbia*', *UBCLRev*, vol.41, 2008, at 249. All parties filed notices of appeal soon after the judgment, and whilst the appeal was stayed for a period pending negotiations that stay was lifted in February 2009 – the Court of Appeal noting the plaintiff's funding difficulties, but also noting that a year had passed and settlement negotiations had not been successful, that advancing the appeal might facilitate further attempts at settlement, and the fact that there was broader public interest in the matter. See *William v British Columbia* 2009 BCCA 83 at [6].

¹⁰ See generally Shaunnagh Dorsett and Lee Godden, *A Guide to Overseas Precedents of Relevance to Native Title*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1998, 15ff; cf *St Catharines Milling and Lumber Company v R* (1887) 13 SCR 577, Strong J.

¹¹ The *Royal Proclamation of 1763*, which applied generally to Britain's North American colonies, gave the Crown the sole right to purchase Indian lands and purported to restrict the westward spread of settlement. See generally Jeremy Webber, 'The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*', *Sydney Law Review*, vol.17, 1995, at 8; Richard H Bartlett, *Native Title in Australia*, 2nd ed, Butterworths, Sydney, 2004, at 701ff; Brian Slattery, 'The Constitutional Guarantee of Aboriginal and Treaty Rights', *Queen's Law Journal*, vol.8, 1982-83, at 265ff.

¹² As to discrepancies in the practices across Canada, see Kent McNeil, *Defining Aboriginal Title in the 90s: Has the Supreme Court Finally Got it Right?*, Robarts Centre, York University, Toronto, Ontario, 1998, at 7.

¹³ See generally Bartlett, above n 11, at 709ff; Dorsett and Godden, above n10, at 22ff. The system of reserves (which were also created by Orders in Council and legislation), was significantly expanded under the protective policies of the mid 19th century: see Dorsett and Godden, above n10, at 16ff (quoting from the Bagot Commission).

¹⁴ *Constitution Act 1867*, 30 and 31 Vict, c 3, s 91(24).

¹⁵ See the *Indian Act*, SC 1876, c 18 (and more the *Indian Act*, RSC 1985, c I-5). See Dorsett and Godden, above n10, at 18ff.

¹⁶ For discussion see Hamar Foster, 'Indigenous Peoples and the Law: The Colonial Legacy in Australia, Canada, New Zealand and the United States', *Asia-Pacific Legal Development*, 1998, at 472.

¹⁷ Particularly the crucial decision of *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145.

reassessing its long disregard of Aboriginal title claims, and into a new willingness to negotiate.¹⁸ This political revival led to the contemporary claims settlement processes in Canada, which in many respects are a return to the historical approach.¹⁹

As already alluded to, there was important early *judicial* recognition of Aboriginal title in Canada in the *St Catherine's* (or '*St Catharines*') *Milling* decisions of the 1880s.²⁰ The courts there were called upon to consider a land dispute ultimately between the new Dominion of Canada and the province of Ontario, and in the process four of six Canadian Supreme Court judges clearly acknowledged the existence of a broadly identified 'Indian' interest in unsurrendered lands (albeit with significant variation in reasoning).²¹ The Privy Council, on appeal, similarly acknowledged the existence of such an interest and described it as a 'personal and usufructuary right...dependent on the goodwill of the Sovereign'. Their Lordships expressly declined to express a view on the 'precise quality' of the interest, finding it sufficient for the resolution of the particular dispute before them to confirm that there was a 'substantial and paramount [Crown] estate' underlying such 'Indian title'.²²

The *St Catherine's* decisions left significant uncertainty as to whether the recognised Aboriginal interest had a source beyond the imperial *Royal Proclamation of 1763*, which as indicated above was a significant formalisation and reinforcement of important aspects of the early colonial policy and practice.²³ It was only in the watershed decision of *Calder*, emerging from British Columbia some 85 years later, that the Supreme Court clearly confirmed the independent common law existence of the interest.²⁴ The two leading judgments in *Calder* (by Judson J and Hall J)²⁵ differed on the principal issue of whether the asserted Aboriginal title had been extinguished, however both acknowledged that such title may arise independently of the *Royal Proclamation*.²⁶ This decision led a significant stream of contemporary case law, emanating predominantly from the non-treaty provinces, that continues apace today. And while this case did not explore the precise nature of the Aboriginal title interest or the mechanics of proof, passages from the judgments of Judson J and Hall J have had a broad and enduring influence on the later jurisprudence.

Calder was discussed and approved of in the subsequent Supreme Court decision of *Guerin* (1984).²⁷ *Guerin* identified a fiduciary-type duty restricting government dealings with conditionally surrendered Aboriginal lands, but did not itself significantly progress the understanding of the Aboriginal interest. Yet by the late 1970s lower Canadian courts had begun some interim formulation of principles relating to the

¹⁸ See the discussion in *R v Sparrow* (1990) 70 DLR (4th) 385 at 404ff; and Richard H Bartlett, 'The Source, Content and Proof of Native Title at Common Law' in Richard H Bartlett (ed), *Resource Development and Aboriginal Land Rights in Australia*, Centre for Commercial and Resources Law, UWA Murdoch University, Perth, 1993, 35 at 45ff.

¹⁹ See generally Bartlett, above n11, at 712ff, 721.

²⁰ *St Catharines Milling and Lumber Company v R* (1887) 13 SCR 577; *St Catherine's Milling and Lumber Company v R* (1888) 14 App Cas 46. Cf also the early decision of *Connolly v Woolrich* (1867) 17 RJRQ 75.

²¹ *St Catharines Milling and Lumber Company v R* (1887) 13 SCR 577 per Ritchie CJ (with whom Fournier J concurred) at 599, Strong J at 604, 605, 607, 621, Gwynne J at 663-4, 674-5. Cf however Henry J at 639-40, 641, Taschereau J at 643-4, 645, 647-8, 649.

²² *St Catherine's Milling and Lumber Company v R* (1888) 14 App Cas 46, at 54-5 (judgment delivered by Lord Watson).

²³ See the heavy reference to the Proclamation in the Privy Council judgment (Lord Watson), and the Supreme Court judgments of Strong and Gwynne JJ.

²⁴ *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145.

²⁵ One judge (Pigeon J) dismissed the appeal on a jurisdictional point, but Judson J (Martland and Ritchie JJ concurring) and Hall J (Spence and Laskin JJ concurring) considered the substantive issues of the existence and possible extinguishment of Aboriginal title.

²⁶ See particularly Judson J at 152 and Hall J at 200. And see also *Re Paulette and Registrar of Titles (No 2)* (1973) 42 DLR (3d) 8 at 26-7; *Hamlet of Baker Lake v Min of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513 at 541.

²⁷ *Guerin v R* (1984) 13 DLR (4th) 321.

foundational issues of proof and content. Notable from this period was the Federal Court decision in *Hamlet of Baker Lake* (1979),²⁸ which concerned a claim in the North West Territories. Mahoney J in this case suggested (building upon US cases and *Calder*) that the prerequisites for the establishment of the claimed Aboriginal title were proof of ‘exclusive’ occupation by an ‘organised society’ at the time of British assertion of sovereignty.²⁹

Contemporary Canadian doctrine

For a period after the *Guerin* decision the major Canadian cases focused upon specific defences to fishery prosecutions. The Canadian principles therefore continued their development in that particular context, and indeed under the influence of the 1982 constitutionalisation of ‘Aboriginal rights’ by s 35(1) of the Canadian *Constitution Act*.³⁰ This new focus was previewed in the *Sparrow* decision³¹ of 1990 which, most importantly,³² formulated a (reasonably) enduring regime for the post-*Constitution Act* interaction of competing interests. This came in the form of a test for the ‘justification’ of post-1982 infringement of s 35 rights – one which sought to accommodate the provision’s ‘solemn commitment’ and the Crown’s fiduciary responsibility, but with cognisance of the sometimes countervailing needs and priorities of the broader society.³³ A further significant piece of the contemporary framework was laid down, still in the specific rights context, in the 1996 decision of *Van der Peet*.³⁴ In this case Lamer CJC³⁵ identified what he felt to be the purpose of s 35(1),³⁶ and declared that in order to be an ‘Aboriginal right’ protected by the provision ‘an activity must be an element of a practice, custom or tradition integral to the distinctive [pre-contact] culture of the Aboriginal group claiming the right’.³⁷ The nature and application of this test produced some controversy in the succeeding years, particularly as regards its capacity to accommodate cultural evolution.³⁸

The Supreme Court returned to a more comprehensive Aboriginal claim in the critical *Delgamuukw* decision of 1997,³⁹ with some retreat from the emphasis upon the purposes of s 35(1) and a return of the language of

²⁸ *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513.

²⁹ *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513 at 542-7.

³⁰ *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11. Section 35(1) provides: ‘The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed’.

³¹ *R v Sparrow* (1990) 70 DLR (4th) 385.

³² *Sparrow* was also concerned with pre-1982 extinguishment (note in that regard the important emphasis upon the need for a ‘clear and plain intention’ and the insufficiency of ‘mere regulation’ (at 400-1)).

³³ *R v Sparrow* (1990) 70 DLR (4th) 385 at 407-10. See further on this *R v Gladstone* (1996) 137 DLR (4th) 648, *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 and *Haida Nation v British Columbia* (2004) 245 DLR (4th) 33. (The test is discussed further below.)

³⁴ *R v Van der Peet* (1996) 137 DLR (4th) 289. See also the accompanying decisions in *R v NTC Smokehouse Ltd* (1996) 137 DLR (4th) 528; *R v Gladstone* (1996) 137 DLR (4th) 648.

³⁵ With whom La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ concurred.

³⁶ ‘...the protection and reconciliation [with Crown sovereignty] of the interests which arise from the fact that prior to the arrival of Europeans in North America Aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions’: *R v Van der Peet* (1996) 137 DLR (4th) 289 at 303 (and cf at 309-10).

³⁷ *R v Van der Peet* (1996) 137 DLR (4th) 289, at 310.

³⁸ See for example, Lisa Strelein, ‘“A Comfortable Existence”: Commercial Fishing and the Concept of Tradition in Native Title’ *Balayi: Culture, Law and Colonialism* vol.5, 2002; Russel Lawrence Barsh and James Youngblood Henderson, ‘The Supreme Court’s Van der Peet Trilogy: Naive Imperialism and Ropes of Sand’, *McGill Law Journal* vol.42, 1997; Bradford W Morse, ‘Permafrost Rights: Aboriginal Self-government and the Supreme Court in R v Pamajewon’ *McGill Law Journal* vol.42, 1997; Leonard I Rotman, ‘“My Hovercraft is full of Eels”: Smoking out the Message in R v Marshall’, *Saskatchewan Law Review*, vol.63, 2000; John Borrows, ‘Frozen Rights in Canada: Constitutional Interpretation and the Trickster’, *American Indian Law Review*, vol.22, 1997.

³⁹ *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193.

the common law.⁴⁰ Lamer CJC explained here that Aboriginal title at common law was protected ‘in its full form’ by s 35(1).⁴¹ Pursuant to this decision, Aboriginal ‘title’ in Canada is established essentially upon proof of exclusive occupation at the point of acquisition of sovereignty (by reference to physical occupation and systems of Aboriginal law). It confers a right to the land itself and an entitlement to use it for a variety of purposes, subject only to the limitation that such uses must not be ‘irreconcilable’ with the nature of the attachment to the land.⁴² This latter restriction, derived it seems largely from the constitutional context, is clearly far narrower than the ‘tradition’ restriction that is prominent in Australia.⁴³ As to the exact relationship between ‘rights’ and ‘title’, Lamer CJC explained⁴⁴ that ‘rights’ did not depend on an underlying claim to title or the unextinguished remnants of title,⁴⁵ and that title is not merely a sum set of individual rights with no independent content. Aboriginal title, he said, is a distinct species of Aboriginal right arising from a sufficiently significant connection with a piece of land.⁴⁶

Beyond these core conclusions in *Delgamuukw*, the decision produced some new controversy (for example the Court quite visibly softened the test for ‘justification’ of infringement)⁴⁷ and some apparent uncertainty. On issues of proof, for example, there was a notable lack of emphasis on the pre-existence of a ‘society’ (contrast the earlier *Baker Lake* decision) and significant ambiguity on issues of requisite continuity (at least to the eye of an Australian lawyer). On the latter point, Lamer CJC had expressly stated that if present occupation is relied on as proof of pre-sovereignty occupation there must be a ‘continuity’ between the two,⁴⁸ and elsewhere (although perhaps still in that context) referred to a ‘substantial maintenance of connection’.⁴⁹ Yet it was unclear exactly what was meant, and whether such requirements were generally applicable beyond the evidential strategy identified. Not dissimilar comments could be made about the discussion of continuity for the purposes of specific right claims in *Van der Peet*.⁵⁰ Certainly it is clear that no strict continuity of lifestyle requirement was apparently intended in the case of title⁵¹ (nor any general requirement of that type in the case of specific rights).

There has been a steady stream of lower court case law exploring the framework principles laid down in *Van der Peet* and *Delgamuukw* – predominantly in the specific rights context. The Supreme Court’s notable forays into the field, in the time since those formative decisions, have produced (inter alia):

- the reversal of an emerging strictness in the application of the *Van der Peet* test and confirmation that a practice undertaken merely for ‘survival’ purposes can be ‘integral to the distinctive culture’ of the people concerned for the purposes that test (*Sappier (2006)*);⁵²

⁴⁰ For further analysis (and reconciliation) of *Delgamuukw* and *Van der Peet*, and their relationship with pre-existing common law principle, see Young, above n7, at 60ff.

⁴¹ *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 249-50 (Cory, Major and McLachlin JJ concurred).

⁴² See especially *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 240-3, 253.

⁴³ See further Young, above n7, at 146ff.

⁴⁴ See also *R v Adams* (1996) 138 DLR (4th) 657.

⁴⁵ See *R v Adams* (1996) 138 DLR (4th) 657; *R v Cote* (1996) 138 DLR (4th) 385. And see the discussion in Kent McNeil, ‘Aboriginal Title and Aboriginal Rights: What’s the Connection?’, *Alberta Law Review*, vol.36, 1997.

⁴⁶ *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 251.

⁴⁷ See the discussion in the case under examination here: *Tsilhqot’in Nation* at [1345]ff.

⁴⁸ *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 253.

⁴⁹ *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 258.

⁵⁰ See further the discussion in Young, above n7, at 160.

⁵¹ See for example *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 258.

⁵² *R v Sappier; R v Gray* (2006) 274 DLR (4th) 75.

- an apparent realignment of the *Delgamuukw* test for exclusive occupation with reference to the (admittedly flexible) general law principles of possession – the Court emphasising the insufficiency of mere occasional entry and use (but also the importance of flexibility and consideration of the Aboriginal perspective and specific group characteristics) (*Bernard* (2005));⁵³
- some re-wording (but incomplete clarification) on the issue of any requisite continuity in the case of both title claims (*Bernard* (2005))⁵⁴ and specific rights claims (*Mitchell* (2001));⁵⁵ and
- some apparent dissatisfaction with the incremental dilution of the *Sparrow* standards for justification of infringement - and re-emphasis upon the importance of timely negotiation in that context (*Haida Nation* (2004)).⁵⁶

Clearly there was still ample scope for cogitation and fine tuning in the next major Canadian decision.

THE TSILHQOT'IN DECISION

Armed with this background, the essential reasoning and conclusions of the 2007 British Columbia Supreme Court decision in *Tsilhqot'in* become reasonably accessible. This case concerned an action by the chief of the Xeni Gwet'in community, one of six Tsilhqot'in bands, seeking a declaration of Tsilhqot'in Aboriginal title and Aboriginal rights (hunting, trapping and trading) in relation to part of the traditional Tsilhqot'in territory in central British Columbia.⁵⁷ The action was provoked by proposed logging activities in the claim area.⁵⁸ The trial of the matter (shared between Victoria and a school room in the relevant territory) lasted some 339 days (from November 2002), with the Court considering oral history and oral tradition evidence, vast numbers of historical documents, and supporting evidence drawn from a wide range of relevant disciplines.

Preliminary matters

In his judgment, Vickers J identified the critical dates for the relevant inquiries (that is, the dates of sovereignty assertion and contact).⁵⁹ And his Honour confirmed that the Tsilhqot'in community was the

⁵³ *R v Marshall; R v Bernard* (2005) 255 DLR (4th) 1. For a detailed critique of the majority reasoning, see Kent McNeil, 'Aboriginal Title and the Supreme Court: What's Happening?', *Saskatchewan Law Review*, vol.69, 2006.

⁵⁴ *R v Marshall; R v Bernard* (2005) 255 DLR (4th) 1. The majority referred only to the need for the claimants to establish their connection with the pre-sovereignty group (and show that a claimed right is the descendant of pre-sovereignty practices), and to the fact that maintenance of 'a substantial connection' with the land will establish the required 'central significance' of that land to the group's distinctive culture: at [67] (cf [38], [39], [70]) (this latter point was apparently a reference to Lamer CJC's reconciliation of title and rights principle in *Delgamuukw* – via the idea that proof of the occupation required for title (plus it seems 'substantial maintenance of connection' since then) automatically satisfied the 'integral to distinctive culture' test – see *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 247, 251, 256-7), cf *Tsilhqot'in* at [543]).

⁵⁵ *Minister of National Revenue v Mitchell* (2001) 199 DLR (4th) 385 (note particularly the reference to a generally applicable requirement of 'reasonable continuity' between the pre-contact practice and the contemporary claim (McLachlin CJC at 405). The decision in *R v Sappier; R v Gray* (2006) 274 DLR (4th) 75 also continues the ambiguity of Lamer CJC's original comments: see [48]ff.

⁵⁶ *Haida Nation v British Columbia* (2004) 245 DLR (4th) 33.

⁵⁷ The claim area was made up of two parcels of land known as 'Tachelach'ed' (or the 'Brittany Triangle') and the 'Trapline Territory'. See *Tsilhqot'in* at [40].

⁵⁸ See *Tsilhqot'in* at [22]ff, [39], [98], [1295].

⁵⁹ His Honour concluded that the dates for inquiry here, under the *Delgamuukw* sovereignty-focused test and the *Van der Peet* contact-focused test, were 1846 and 1793 respectively (although the choice of the latter date over the date of

appropriate holder of title (or other rights)⁶⁰ – noting particularly the broad approach taken to this issue in the Canadian precedent;⁶¹ the fact that the central ‘self’ of a Tsilhqot’in person was found in the common threads of Tsilhqot’in language, customs, tradition and shared history;⁶² and the fact that all Tsilhqot’in people were entitled to utilise any part of the entire Tsilhqot’in territory.⁶³ Vickers J also confirmed and emphasised the importance of avoiding an ‘ethnocentric view’ of the evidence, and giving due weight to what he respectively termed oral history evidence (actual recollections) and oral tradition evidence (passed down from beyond the speaker’s lifetime).⁶⁴ His Honour was clearly struck by the strength and depth of the Tsilhqot’in story - noting that their language, long history, oral traditions, and character were a significant contribution to Canadian society.⁶⁵

Title and/or rights?

Notwithstanding the above matters, Vickers J arrived at the preliminary conclusion that a late attempt by the plaintiff to reframe the original ‘all or nothing’ Aboriginal title claim over the whole claim area, so as to include claims over smaller portions, would be prejudicial to the defendants and could not be allowed.⁶⁶ On the basis of this conclusion, and his finding (on the ‘high’ *Bernard* standard⁶⁷) that occupation at sovereignty sufficient to ground Aboriginal title could not be established over the whole claim area,⁶⁸ Vickers J considered he was not able to make a declaration of Aboriginal title.⁶⁹ However, his Honour was clearly cognisant of the broader significance of the case, and indeed the emerging debate over the precise areas to which the concept of Aboriginal title could attach in the wake of *Bernard* (which is discussed further below). Accordingly, his Honour did take the opportunity to set out the locations (quite substantial areas both inside and outside the claim area) over which Aboriginal title did in his opinion exist here on the evidence.⁷⁰ He considered that there had been sufficient occupation of these areas at the time of sovereignty assertion,⁷¹ and that at that time the Tsilhqot’in people had effective control over them (they could have excluded others had they chosen to).⁷² ‘Continuity’, Vickers J went on to say, only becomes an aspect of the test where present

actual first contact (1808) was thought to be of no consequence on the evidence): see *Tsilhqot’in* at [601]-[602], [1211]-[1212].

⁶⁰ *Tsilhqot’in* at [470], [1222].

⁶¹ *Tsilhqot’in* at [445]ff – noting the emphasis in this context upon the relevant Aboriginal ‘Nation’.

⁶² See for example, *Tsilhqot’in* at [457], [470] and cf [340]ff.

⁶³ See for example, *Tsilhqot’in* at [360]-[361], [459], [468], [1220].

⁶⁴ *Tsilhqot’in* at [131]-[196], [203]. In the process, he rejected the view of the Crown expert that no weight should be given to oral tradition evidence without collaboration from outside sources (at [151]ff).

⁶⁵ See especially *Tsilhqot’in* at [20].

⁶⁶ *Tsilhqot’in* at [102]-[129], [957]. See also in this regard *Tsilhqot’in Nation v British Columbia* [2008] BCJ No 871; 2008 BCSC 600.

⁶⁷ Vickers J ultimately seemed to paraphrase the *Bernard* standard as requiring ‘regular use or occupancy of definite tracts of land’ (*Tsilhqot’in* at [583]) – but this in itself is of course a potentially variable standard.

⁶⁸ See *Tsilhqot’in* at [792]-[794] (especially regarding the absence of evidence with respect to the northern and central portions of ‘Tachelach’ed’ (the triangle)); at [825] (much of the Western Trapline area not occupied to the necessary extent); at [893] (Eastern Trapline territory not occupied to the necessary extent); and at [957] (general conclusion).

⁶⁹ *Tsilhqot’in* at [957]. Note the view expressed on this approach in McNeil, above n9, at 6ff.

⁷⁰ See *Tsilhqot’in* at [796]ff, [958]ff. His Honour rejected the government parties’ extreme ‘postage stamp’ approach (as described by the plaintiff) to requisite occupation – see further below.

⁷¹ *Tsilhqot’in* at [959]ff (note the emphasis on ‘definite tracts of land in regular use’ - and the explanation by reference to village sites, gathering/harvesting sites, and defined trail networks for hunting, trapping, fishing and gathering).

⁷² See *Tsilhqot’in* at [928]ff (note the emphasis on there being no evidence of adverse claimants at the time of sovereignty, and on the fact that the Tsilhqot’in had been there in sufficient numbers to monitor any presence of Europeans – who were aware that the Tsilhqot’in considered this to be their land). See also at [429], [960].

occupation is relied on to raise an inference of pre-sovereignty occupation.⁷³ However he did proceed to point to the liberality in the ‘continuity’ and ‘substantial connection’ notions from *Delgamuukw*,⁷⁴ and ultimately briefly noted (with lingering ambiguity as to the exact nature of the requirements and when they applied) that these notions were satisfied on the facts.⁷⁵

Vickers J did identify and declare the existence of the following specific Aboriginal rights (each said to be integral to the distinctive pre-contact Tsilhqot’in culture):⁷⁶

- an Aboriginal right to hunt and trap birds and animals throughout the claim area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses; and
- an Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood.

Notably, Vickers J rejected the defendants’ argument for exclusion (from the first listed right) of the entitlement to capture horses for transportation and work. It was said that on the evidence a pre-contact Tsilhqot’in use of horses could be inferred, or alternatively that this entitlement should be included because it was an appropriate contemporary extension (that is, evolution) of the pre-contact right (given the constantly changing biodiversity).⁷⁷ Vickers J also rejected Canada’s argument that the second listed right should be restricted to specific species of animals, noting that such an approach would unduly frustrate the modern exercise of this right.⁷⁸

On the question of continuity in the context of these specific rights, Vickers J did not express with the same conviction the point that ‘continuity’ was only required where contemporary activity was relied upon in establishing the historical activity. However, he did explain at one point that the ‘requirement of continuity’ in this context had two aspects: it reflected that evidence of post-contact activity may be led (given the evidential challenges faced) provided it was ‘directed’ at and ‘rooted in’ pre-contact activities; and it ensured that the claimed right or modern manifestation of the pre-contact activity can ‘evolve’ (but within limits).⁷⁹ Once again, at least to the eye of the Australian lawyer, there is lingering uncertainty as to the nature of the ‘requirement’ and when exactly it is to be applied (this is discussed further below).⁸⁰

The provincial forestry legislation

In turning to the implications of his (informal) finding of Aboriginal title, Vickers J held first that the relevant provisions of provincial forestry legislation⁸¹ did not apply to the identified lands - timber

⁷³ *Tsilhqot’in* at [547]ff. This was perhaps particularly prompted by the Province’s attempt to argue that the grant of fee simple had caused a break in ‘continuity’: at [994]. As to the effect of fee simple grants, see below.

⁷⁴ *Tsilhqot’in* at [549]ff.

⁷⁵ ‘I am satisfied Tsilhqot’in people have continuously occupied the Claim Area before and after sovereignty assertion. There has been “a substantial maintenance of the connection” between the people and the land throughout this entire period.’ (Citing *Delgamuukw* at [153].) Perhaps this inclusion (at least as regards continuity per se) is explained by the fact that Vickers J apparently did consider post-sovereignty use and occupation in interpreting the original position: see for example *Tsilhqot’in* at [949]. See further below.

⁷⁶ *Tsilhqot’in* at [1240]-[1241], [1246], [1263], [1265].

⁷⁷ *Tsilhqot’in* at [1223]ff.

⁷⁸ *Tsilhqot’in* at [1246].

⁷⁹ *Tsilhqot’in* at [1177], cf [1168], [1214], [1215].

⁸⁰ See also Vickers J’s quoting of the *Bernard* emphasis on simple identification of rights holders and descent of the rights (*Tsilhqot’in* at [1266]) and his quick conclusions stated at [1267]-[1268].

⁸¹ *Forestry Act*, R.S.B.C. 1996, c. 157.

harvesting rights could only be granted over Crown timber on Crown land, and hence the provisions did not apply to those areas meeting the test for Aboriginal title.⁸² Moreover, his Honour held that in any event British Columbia lacked the constitutional authority to manage forestry resources on Aboriginal title lands. This was not because of the ‘paramountcy’ of any particular conflicting federal legislation.⁸³ Rather, the doctrine of ‘interjurisdictional immunity’ was engaged: s 35 Aboriginal rights (including title) were said to be part of the ‘core’ of federal jurisdiction under s 91(24) of the *Constitution Act, 1867*⁸⁴ (and hence could not be extinguished by provincial legislation), and the provisions of the relevant forestry legislation would themselves go to the ‘core’ of Aboriginal title as they would affect a primary asset and render meaningless the idea of Aboriginal management of the relevant lands.⁸⁵ Accordingly, the forestry legislation was inapplicable where it intruded or touched upon forest resources on Aboriginal title lands.⁸⁶

Vickers J then proceeded to consider the distinct s 35-bred issues of infringement and justification, to cover the possibility that he was incorrect on the points explained in the preceding paragraph and the provincial forestry legislation did apply to Aboriginal title lands.⁸⁷ He had also determined that the constitutional objections to the application of the provincial forestry legislation did not apply in the case of the specific Aboriginal rights identified here, such that justification of infringement was the critical issue in that context.⁸⁸ However, before proceeding to issues of justification, it is worthwhile to note that another very significant point about constitutional power arose indirectly. Vickers J considered himself unable to declare rights in relation to the privately held lands within the claim area.⁸⁹ However he did emphasise (distinguishing the Australian situation) that prior to the constitutional entrenchment of Aboriginal rights in 1982, the power to extinguish Aboriginal title (and Aboriginal rights) was an exclusive federal power under s 91(24) of the *Constitution Act, 1867*, and that therefore the Province could not have extinguished such rights by the conveyance of a fee simple within the claim area.⁹⁰

On the matters of infringement and justification, in the case of Aboriginal title, Vickers J noted that the right to use resources, to choose land use, and to direct and benefit from the economic potential of the land were all aspects of Aboriginal title.⁹¹ And he concluded that any attempt to engage the forestry legislation

⁸² *Tsilhqot'in* at [978]-[981], [1012]-[1013] (the latter reference appears to settle the earlier ambiguity as to whether the lands were not ‘Crown lands’ or the timber not ‘Crown timber’ (it seems both are ultimately identified as obstacles)). It was further explained that until there was a finding of Aboriginal title, there must be a presumption that forest lands (not privately held) are Crown lands. When Aboriginal title (or indeed rights) are claimed, the ‘duty to consult’ is engaged (which in combination with possible injunctive relief and subsequent damages claims was seen to give adequate protection): at [978].

⁸³ *Tsilhqot'in* at [1025].

⁸⁴ Which conferred upon the Parliament of Canada responsibility over matters relating to ‘Indians and Lands reserved for the Indians’.

⁸⁵ *Tsilhqot'in* at [1024]ff.

⁸⁶ *Tsilhqot'in* at [1032], [1048]. Section 88 of the *Indian Act* could not operate to save the provincial laws here as its direction that provincial laws of general application were applicable to and in respect of ‘Indians’ could not ‘reinvigorate’ provincial laws in their application to Aboriginal title lands: at [1033]ff.

⁸⁷ *Tsilhqot'in* at [1053].

⁸⁸ *Tsilhqot'in* at [1041]ff, [1289].

⁸⁹ The plea of infringement at the heart of the action did not extend to such areas, as the forestry legislation complained of did not apply to private lands: at [992]-[993] (there was no plea of infringement by the Province’s granting of private interests).

⁹⁰ *Tsilhqot'in* at [996]-[998]. The interaction of the respective interests in such a situation was said to be ‘unclear’ and would depend on a range of factors: at [999]-[1000]. See also the view expressed on this in McNeil, above n9, at 8ff.

⁹¹ *Tsilhqot'in* at [1077] (paraphrasing *Delgamuukw*).

provisions in that context constituted a prima facie infringement of the Aboriginal title.⁹² Then applying the established two-part test for ‘justification’ of infringement,⁹³ his Honour held that: no ‘compelling and substantial legislative objective’ for forestry activities in the claim area had been established;⁹⁴ and the forestry legislative scheme was not consistent with the ‘fiduciary relationship’ between the Crown and Aboriginal peoples.⁹⁵

Vickers J then turned to the issues of infringement and justification in the context of the specific Aboriginal rights to hunt, trap and trade. He held that the impact of forest harvesting on species diversity and abundance was such there was prima facie infringement to be justified.⁹⁶ For reasons not dissimilar to those explained in the Aboriginal title context, the infringement was found not to have been justified.⁹⁷

Delay and damages

Finally, on more procedural matters, Vickers J concluded that:

- a) the plaintiff’s claim for infringement of Aboriginal title was not time-barred by the provincial limitation of actions legislation⁹⁸ (based upon a similar constitutional analysis to that employed in relation to forestry regulation of Aboriginal title), however the specific rights infringement claims with respect to one part of the claim area *were* statute barred;⁹⁹
- b) British Columbia’s plea of laches could not succeed given the jurisprudential history in relation to British Columbia, the reasonableness of the plaintiff’s actions (and their non-abandonment of the interests), and the lack of evidence of prejudice to British Columbia;¹⁰⁰ and
- c) the claim for damages must be dismissed (given the inability of the Court to make a declaration of Aboriginal title in the circumstances) – but without prejudice to a renewal of the claims as they pertain to Tsilhqot’in Aboriginal title lands.¹⁰¹

Ultimately therefore, the Tsilhqot’in people were successful in the hypothetically recast claim relating to Aboriginal title, and in the non-time barred portion of the claim relating to Aboriginal rights.

⁹² *Tsilhqot’in* at [1053], [1074], [1077]. The simple enactment of the general legislation would not itself have such effect: at [1074].

⁹³ *Tsilhqot’in* at [1083].

⁹⁴ Owing particularly to remaining questions over economic viability and the ability of logging to deter a problematic beetle infestation: *Tsilhqot’in* at [1107]-[1108].

⁹⁵ Owing particularly to the lack of attention to and minimization of disruption, and the Province’s failing in its obligation to consult – which applied to existing or alleged Aboriginal title and in this case was at the upper and more onerous end of the *Haida Nation* scale: *Tsilhqot’in* at [1113], [1114], [1141].

⁹⁶ *Tsilhqot’in* at [1276]-[1288].

⁹⁷ Lack of attention to species details and numbers, and to relevant needs of Tsilhqot’in people, indicated to Vickers J that these Aboriginal rights were not a priority in the forestry harvesting process. There was also inadequate consultation. See *Tsilhqot’in* at [1294].

⁹⁸ *Limitation Act*, RSBC 1996, c 266.

⁹⁹ This was on the basis of a finding that s 88 of the *Indian Act* (see above) did operate to apply the *Limitation Act* to the specific rights claims, coupled with the later commencement of the actions in respect of one part of the claim area (‘Tachelach’ed’ or the ‘Brittany Triangle’). See *Tsilhqot’in* at [1329].

¹⁰⁰ *Tsilhqot’in* at [1330]-[1331].

¹⁰¹ *Tsilhqot’in* at [1335]-[1336].

CONCLUSION: IMPLICATIONS FOR CANADA, MESSAGES FOR AUSTRALIA?

Various aspects of Vickers J's reasoning and conclusions are significant in the Canadian context. Some notable tolerance of evolution and intermittency of use can be found in Vickers J's identification and delimitation of specific Aboriginal rights.¹⁰² And his arguments for flexibility in the handling of oral history and oral tradition evidence were various and weighty.¹⁰³ Moreover, his conclusions on the jurisdictional and constitutional issues (explained in detail above) are potentially of great importance in the ongoing interplay of federal, provincial and First Nations' rights in Canada. Yet there was also a more fundamental, theoretical issue addressed in this case that clearly troubled the Court and continues to accumulate controversy in Canada; namely, the area to which Aboriginal title can attach.

Aboriginal title: traditional territory or something less?

From the Canadian perspective, the primary importance of the *Tsilhqot'in* decision perhaps lies in its illustration of the troubled Canadian search for an appropriate middle ground between the 'territorial' and 'postage stamp' approaches to the assessment of exclusive occupation for Aboriginal title purposes.¹⁰⁴ The former approach, apparently pressing a greater focus on the exclusivity aspect of the requirement and a final full retreat from western land-use bias, was understood by Vickers J to have been rejected by the *Bernard* decision.¹⁰⁵ However, Vickers J clearly criticised and rejected the latter alternative advocated by the government parties (a piecemeal approach limiting Aboriginal title to particular primary sites), noting the lack of evidence supporting this interpretation of original Aboriginal existence (which was semi-nomadic) and the fact that it was government policy that prompted greater (but not complete) settlement on reserves.¹⁰⁶ Ultimately his tone and quoting of commentary belies some dissatisfaction with the fate of the 'territorial' approach,¹⁰⁷ and he concludes by cautioning against any continued pursuit of the extreme alternative: 'the impoverished view of Aboriginal title... characterized by the plaintiff as a "postage stamp" approach... cannot be allowed to pervade and inhibit genuine negotiations'.¹⁰⁸

'Continuity'

These various matters are also of interest to the Australian jurist, and the last issue will descend quickly upon the Australian courts should they proceed to a coherent recognition of the possible existence of a comprehensive native 'title' upon proof of original exclusive occupation.¹⁰⁹ However, another aspect of the incremental Canadian advances in this case uncovers a more immediately striking point for the Australian observer. As noted earlier there was some attempt here to clarify matters on the issue of 'continuity' in Canada, particularly as regards Aboriginal title. Vickers J explained that 'continuity' *only* becomes an aspect of the test for Aboriginal title where present occupation is relied for the purposes of proving pre-sovereignty

¹⁰² As to evolution, see the discussion above and especially *Tsilhqot'in* at [1178]-[1179], [1237]ff; as to intermittency see [1248], [1263].

¹⁰³ See for example, *Tsilhqot'in* at [147] (accommodation of change in oral tradition over time), at [167] (differences of opinion on the formalities of story telling not significant), at [173] and [665] (commonality of oral traditions across different groups not surprising), [177] (importance of questioning accuracy of western records used in assessment of oral tradition evidence), and at [178] (the need to focus on themes and lessons rather than specific details).

¹⁰⁴ See the arguments of the parties: *Tsilhqot'in* at [554]ff, [603]ff.

¹⁰⁵ *Tsilhqot'in* at [554].

¹⁰⁶ *Tsilhqot'in* at [610], [613].

¹⁰⁷ *Tsilhqot'in* at [1367]ff.

¹⁰⁸ *Tsilhqot'in* at [1376].

¹⁰⁹ For detailed discussion on the issue of native title 'content' in Australia, see Young, above n7, at 291ff, 384ff.

occupation; where a group provides direct evidence of exclusive pre-sovereignty occupation there is no additional requirement for it to show continuous occupation to the present day. Upon the assertion of sovereignty, it was said, Aboriginal title crystallised into a right at common law - and it subsists until surrendered or extinguished.¹¹⁰ However, Vickers J goes on to note (apparently but not clearly in relation to this limited evidential context) the fact that Aboriginal claimants need not establish an unbroken chain of continuity and the fact that they must demonstrate maintenance of a substantial connection between the people and the land.¹¹¹ Structurally, this remains somewhat unclear (particularly via the general reference to maintenance of connection).¹¹² And this is exacerbated by his Honour's quick unexplained reference elsewhere to the fact that the requirements of continuity and maintenance of connection had been satisfied on the facts.¹¹³

Yet the critical point here for Australian purposes can be extricated from the ambiguity, which in fact indicates that this is perhaps only significant ambiguity to the Australian onlooker raised on the exacting principles of *Yorta Yorta*.¹¹⁴ Whatever theorising we might engage in on the structural point about exactly when the notions of continuity and connection apply, a close reading of this case reveals that there was in fact very little attention to or interest in specific continuity (or indeed recent circumstances at all – the evidential line to the present often only extended at best to childhood reminiscences of Elders).¹¹⁵ And there was certainly no concern about significant post-sovereignty cultural change.¹¹⁶ Isolated references to continuity of particular practices (until the present or more commonly just 'into' the 20th century)¹¹⁷ came with no apparent attribution of significance or assessment.¹¹⁸ The present, and continuity thereto, did appear to be just mild evidential pointers to the situation as at sovereignty. Ultimately then it must be observed that whether *Tsilhqot'in* applies notions of continuity and/or connection as an incident of a retrospective

¹¹⁰ *Tsilhqot'in* at [547]-[548].

¹¹¹ *Tsilhqot'in* at [549].

¹¹² The reference to connection is unclear owing to the change in language (is this meant to be distinct from the 'continuity' so carefully restricted to the evidential context earlier?) and the fact that there are indications it might be a general requirement in the rationale for the relevant original comments in *Delgamuukw* as interpreted by *Bernard* (that is, it helped satisfy the *Van der Peet* 'integral' test so as to neatly admit Aboriginal title to the new constitutional methodology – see the explanation in the earlier discussion of *Bernard's* input post-*Delgamuukw*). Yet Vickers J does seem to ultimately group maintenance of connection back in with continuity: *Tsilhqot'in* at [553].

¹¹³ *Tsilhqot'in* at [153] (see the longer discussion above).

¹¹⁴ *Members of Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

¹¹⁵ See *Tsilhqot'in* at [651], [739], [959] (actual consideration and conclusions on occupation (and exclusivity) focused on the point of sovereignty); at [388], [799], [884], [887] (acknowledgement of declining use); at [781]-[782], [817], [834], [862], [905] (living sites long left); at [369]ff, [862] (examination of housing practices with little attention to recent past); at [952] (little travel around claim area today); at [33] (only 15 persons presently living off reserve in the claim area); at [752] (loss of some spiritual connections); at [994]ff (interpretation of the Province's argument that past grants of fee simple broke 'continuity' purely as an argument about extinguishment – with the implication that that *had* inevitably been a break in physical continuity held no other doctrinal significance).

¹¹⁶ See for example: *Tsilhqot'in* at [379], [388], [436], [870], [949], [952], [1379] (original semi-nomadic lifestyle including harvesting and trapping significantly changed via government policy, collapse of fur market, adoption of ranching, changing social order etc); at [436], [952] (*Tsilhqot'in* people no longer live as their forefathers did – but very differently); at [624]ff (population shifts and re-groupings); at [388], [790], [884], [887], [952] (predominance of ranching (and its impacts on population, land uses etc)); at [952] (modern occupations); at [425] (introduction of burial rituals by missionaries); at [952] (settlement by non-first nations peoples bringing many changes); at [353] (changes in land use acceptable); at [471], [472] (approval of comments that community rules can be formally or informally changed in accordance with shifting group attitudes, needs and practices – evolving with new needs and circumstances).

¹¹⁷ See for example: *Tsilhqot'in* at [384], [420], [424], [651], [717], [744], [847], [870], [887], [949].

¹¹⁸ Similar comments could be made in respect of the specific rights deliberations – see for example: *Tsilhqot'in* at [1256], [1263], [1268].

evidential strategy, applies them as a part of the generally applicable test, or just applies them gratuitously (in line with the ‘cover all bases’ approach adopted in this case), these notions in Canada are a far cry from the requirements that have developed in Australia. And whilst the cataloging of evidence in Canadian cases may look superficially similar to that undertaken in the large Australian cases, it is in fact a very different exercise.

For Canada’s own purposes, the most satisfactory interpretation here would appear to be that for Aboriginal title ‘continuity’ is required only for the purposes of the retrospective evidence strategy (as explicitly suggested by Vickers J) and/or to properly identify contemporary rights and rights holders with the historic versions (as indicated in *Bernard*). However, in reality it might be a frequent requirement because it would seem there will often be some reliance on evidence of present activities and/or a need for descendent claimants to properly identify themselves with the relevant history. In the case of specific rights, the notion of continuity takes on the added role of setting the (somewhat uncertain) outer limits of the capacity for evolution – but this appears to be simply a matter of identification (again) rather than requiring actual temporal continuity.¹¹⁹

The more elusive Aboriginal title notion of ‘substantial maintenance of connection’, on the other hand, appears to be tied up (at least since *Bernard*) with the neat incorporation of ‘title’ into the *Van der Peet* constitutional methodology,¹²⁰ and indeed with Lamer CJC’s original ‘irreconcilable uses’ limitation on Aboriginal title content.¹²¹ It would therefore logically seem to be generally applicable. Yet it appears, in light of these jurisprudential foundations and Vickers J’s methodology and conclusions (including his apparent rejection of a continuity of occupation requirement), that the maintenance of connection requirement may be little more than a requirement of non-abandonment and non-destruction.¹²²

Miscellaneous messages and the comparative exercise revisited

There were many other (less problematic) aspects of the *Tsilhqot’in* decision that are also of interest in the Australian context. Of course the decision squarely affirmed the critical Canadian ‘rights’ versus ‘title’ distinction¹²³ (that has been regularly but largely unsuccessfully pressed by dissenting Australian voices), with clear confirmation of the comprehensive and contemporary nature of title¹²⁴ and the quite striking addendum that Aboriginal title lands (upon their being found to be such) are apparently not ‘Crown lands’.¹²⁵ There was also implicit approval of the equally important (and in Australia equally incomplete) distinction between the communal Aboriginal title interest and its inter se division.¹²⁶

¹¹⁹ See the earlier discussion of Vickers J’s comments on continuity in the context of the specific rights identified.

¹²⁰ That is, the ‘integral to distinctive culture’ test is satisfied in the case of title upon proof of requisite occupation at sovereignty plus (it seems) substantial maintenance of connection: see the explanation in the earlier discussion of *Bernard*’s input post-*Delgamuukw* and in the examination above of the ambiguity in *Tsilhqot’in*.

¹²¹ See the discussion of *Delgamuukw* above, and the more detailed examination in Young, above n7, at 146.

¹²² Note Vickers J’s emphasis at one point upon the fact that *Tsilhqot’in* reverence for the land and its role as a central theme in their lives continues: *Tsilhqot’in* at [436].

¹²³ *Tsilhqot’in* at [518]ff.

¹²⁴ See for example: *Tsilhqot’in* at [539], [978], [1048].

¹²⁵ See for example: *Tsilhqot’in* at [980]-[981], [1012]-[1013] (discussed above). The liberal Canadian approach to Aboriginal title ‘content’ has been explored in detail in a number of articles since the handing down of the critical decision in *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193. For detailed discussion on the issue of native title ‘content’ in Australia, and elsewhere, see Young, above n7, especially at 291ff, 384ff.

¹²⁶ See: *Tsilhqot’in* [471], [1370]. For discussion of these two distinctions in various jurisdictions and the arguments of key commentators and minority judges, see Young, above n7. Note also (particularly) the work of Noel Pearson, Richard Bartlett, Lisa Strelein, Kent McNeil and Brian Slattery.

The decision also reminds us that extensive past extinguishment of native title in Australia (and indeed the very notion of partial extinguishment) is largely a product of this country's historical failure to centralise dealings in Aboriginal lands. This should perhaps be remembered in our ongoing development of extinguishment theories – and care taken lest the necessary absence in the comparative law of coherent alternative answers to Australia's peculiar problem leads to a narrowing of thought on the issue in this country.

More notably, given the current jurisprudential focus on 'normativity' and 'society' in Australia, it is interesting that Canada appears now to have turned away to some extent from earlier emphasis upon notions of 'society'. Vickers J rightly noted that Lamer CJC in *Delgamuukw* had quietly left this old emphasis out of his formulation of principle,¹²⁷ and he himself added (in the course of criticising certain lower court approaches to the identification of the rights holding entity):¹²⁸

The search for a pan-Tsilhqot'in decision-making institution is not unlike the *Bake Lake* test for an 'organised society'. Such an approach is weighed down with superficial value judgments about Aboriginal ways of life. The need to measure traditional Aboriginal societies against the legal ideals and institutions of a 'civilised society' has passed.

Ultimately, it is little surprise that the Canadian courts continue to regularly note that Australian law is 'significantly different' to that of Canada.¹²⁹ Yet certain parts of Vickers J's detailed and articulate discussion in *Tsilhqot'in* are clearly of universal importance, even to the most reclusive Australian legal observer. At the end of his judgment, in a section simply entitled 'Reconciliation', his Honour conducts a review of judicial and academic opinions on the broader issues at play - and voices support for calls to properly respect Aboriginal entitlements (in their contemporary 'generative' form¹³⁰) in the reconciliation process,¹³¹ via meaningful negotiation in full context and mutual compromise rather than unilateral assessment and imposition of notions of the 'greater good'.¹³² And he (correlatively) expresses the strong view that narrowly defined 'win/lose' court proceedings are inadequate (indeed perhaps disruptive) in this context.¹³³ He adds at the end:¹³⁴

I confess that early in this trial, perhaps in a moment of self-pity, I looked out at the legions of counsel and asked if someone would soon be standing up to admit that Tsilhqot'in people had been in the Claim Area for over 200 years, leaving the real question to be answered... [concerning] the consequences that would follow... I was assured that it was necessary to continue the course we were set upon.

These final comments of Vickers J, at the very least, suggest that the title chosen for this article is not an accurate description of the choice facing Australia lawyers and governments. Inattention to the rich body of unfolding experience in Canada is perhaps not so easy as avoiding a ship in the night. The *Tsilhqot'in* decision is more a personal visit from Dickensian ghosts of Christmas past, present and future.

¹²⁷ See *Tsilhqot'in* at [454]. See further Young, above n7, at 150, 329ff.

¹²⁸ *Tsilhqot'in* at [453], quoting *Calder* per Hall J on the fact that anthropological understanding had greatly progressed.

¹²⁹ See *Tsilhqot'in* at [520] (particularly in the context of extinguishment, rights v title etc).

¹³⁰ Quoting Brian Slattery, 'The Metamorphosis of Aboriginal Title', *Can Bar Rev*, vol85, 2006.

¹³¹ Including in the context of the test for justification of infringement: see the earlier discussion of this test and its evolving application.

¹³² *Tsilhqot'in* at [1338]ff, [1364]ff.

¹³³ See *Tsilhqot'in* at [1338]ff, cf [16]. For further discussion see McNeil, above n9. Disappointingly, at the time of writing negotiations have so far proven unfruitful in the *Tsilhqot'in* matter, and an appeal is set to proceed: see *William v British Columbia* 2009 BCCA 83.

¹³⁴ *Tsilhqot'in* at [1373].

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