ABORIGINAL TITLE TO SUBMERGED LANDS IN CANADA: WILL TSILHQOT'IN SINK OR SWIM?

by Benjamin Ralston

The question of Indigenous rights to water bodies[1] has been legally and politically fraught for the common law jurisdictions of North America and the Antipodes alike. As a result, a complex and arcane array of statutes and jurisprudence have been generated in response to these claims. By way of overview, New Zealand courts have acknowledged the possibility of Māori establishing customary rights in areas of foreshore, seabed, riverbed and lakebed through the unique statutory regime of the Māori Land Court.[2] The Māori Land Court has occasionally acknowledged the factual existence of such rights,[3] and the New Zealand Parliament has seen fit to redirect these claims through legislation.[4] The High Court of Australia has rejected the possibility of exclusive Indigenous rights claims at sea under Australia's peculiar regime, the *Native Title Act 1993*,[5] yet it has acknowledged that non-exclusive native title rights can be proven, including commercial fishing rights.[6] Similarly, American courts have entertained Indigenous rights claims to submerged lands based on their own unique legal theories and histories, but claims of exclusive title in marine areas have so far been rejected.[7]

Canadian courts will be the focus of this paper and they too have an established line of jurisprudence acknowledging Aboriginal harvesting rights over water bodies.[8] Yet to date no claim of exclusive Aboriginal title to submerged lands has ever been determined on its merits by a Canadian court.[9] If successful, such a determination would have important ramifications for Crown-Indigenous relations with respect to water bodies across the country. Recent Aboriginal rights litigation in Canada has temporarily side-stepped the question.[10] Nonetheless, it is worth exploring how recent developments in Canadian law on Aboriginal title may not only bolster the strength of these claims but provide an example of a more just way forward for the resolution of similar claims elsewhere in the world.

(CANADIAN) ABORIGINAL TITLE

It is important to first clarify the idiosyncratic way in which Canadian law defines Aboriginal title as compared to other common law jurisdictions. In contrast to the Australian approach to native title as a 'bundle of rights', Canadian courts treat Aboriginal title as something separate and distinct from Aboriginal harvesting and activity rights.[11] Aboriginal title has a powerful proprietary dimension to it. Title holders retain all beneficial interest in their title lands and can use these lands for a wide variety of purposes, potentially including the exploitation of their subsurface minerals.[12]

Aboriginal title is also a constitutionally entrenched right in Canada. Federal and provincial governments can only infringe upon Aboriginal title lands if they can prove that doing so would be consistent with their fiduciary obligations towards Aboriginal peoples.[13] Aboriginal title carries with it substantial decision-making powers as well, including a requirement for the Crown to seek the title holders' consent before purporting to authorize developments on such lands.[14] It has been argued that Aboriginal title would be best analogized with provincial Crown title as it is collectively held, internally governed by a distinct legal system and limiting of the authority of other levels of government.[15]

When these exceptional features are taken into account it becomes apparent how recognition of such a right could significantly bolster Indigenous peoples' position in water governance. As a result, assertions of Aboriginal title to submerged lands are regularly invoked in a variety of high profile disputes in Canada, including over aquaculture, oil and gas transportation and commercial fishing.

ABORIGINAL TITLE AND CULTURAL SENSITIVITY

While the question of Aboriginal title to water bodies remains outstanding, Canadian courts now have a powerful precedent for recognition of terrestrial title claims in the Supreme Court of Canada's decision in *Tsilhqot'in Nation v British Columbia*.[16] Marking the first successful title claim in Canadian history, the Tsilhqot'in obtained a declaration of ownership and governance rights over approximately 1700km^2 of land. The decision does not address

Aboriginal title to submerged lands. On the contrary, the Tsilhqot'in deliberately avoided this issue by excluding all such lands from its claim.[17] Nevertheless, the Supreme Court's latest iteration of the test for proof of Aboriginal title has created more space for these claims to succeed in the future.

The key issue resolved in the *Tsilhqot'in* decision was the level of evidence required before an Indigenous claimant group is entitled to a declaration of title. The Tsilhqot'in argued that Aboriginal title could exist on a territorial basis whereas the federal and provincial governments argued that it was restricted to small, discrete tracts of land. Aboriginal title relies on proof that an Indigenous group not only occupied its territory prior to the assertion of European sovereignty over it, but that this occupation was of an intensity sufficient to ground title, for a continuous period from the assertion of European sovereignty to present time, and in a manner that was exclusive of other groups.[18]

Prior to *Tsilhqot'in*, the Supreme Court held that the test for sufficient occupation required more than just 'occasional entry and use' of claimed lands.[19] Then, extrapolating from this, the British Columbia Court of Appeal went further by concluding that a semi-nomadic people like the Tsilhqot'in could only ever prove title to definite tracts of intensively used land such as village sites, salt licks and buffalo jumps.[20] Under this restrictive theory of Aboriginal title it would be difficult to imagine any successful claim to submerged lands beyond discrete, intensively used sites such as constructed fish weirs or clam gardens. However, a unanimous Supreme Court of Canada found in favour of the Tsilhqot'in's more expansive claim and clarified the parameters of a culturally sensitive approach to proof of title that must be applied in the future.[21]

A culturally sensitive approach to proof of title is capable of recognizing the regular use of Indigenous territories for hunting, fishing, trapping and foraging as sufficient occupation to ground a claim for Aboriginal title.[22] The evidence in the Tsilhqot'in litigation suggested there were only approximately 400 Tsilhqot'in people occupying the claimed lands when Crown sovereignty was asserted over British Columbia.[23] However, this fact had to be considered in context to the character of the Tsilhqot'in's land, which was harsh, mountainous and incapable of supporting more than between 100 and 1,000 people.[24] The evidence also clearly indicated that the Tsilhqot'in lived a semi-nomadic existence in their traditional territory, making seasonal rounds in order to obtain the necessaries of life.[25] Nonetheless, the Tsilhqot'in were able to prove sufficient occupation of their lands based on their oral traditions regarding geographic features of the claim area, evidence of Tsilhqot'in law, place names and traditional knowledge, a well-established network of trails in the area, evidence of plant harvesting and management and seasonal rounds of hunting, fishing and trapping in the area.[26]

The adequacy of the Tsilhqot'in's evidence for proof of Aboriginal title was readily endorsed by the Supreme Court, which stated that 'the notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic'.[27] In other words, it appears that a culturally sensitive approach to proof of title will tailor the evidentiary requirements to accommodate the unique way of life of the specific claimant group, rather than allowing these to preclude any particular way of life from giving rise to Aboriginal title.

This is a remarkable clarification in light of the fact that the Supreme Court had previously expressed doubt as to whether nomadic or even semi-nomadic occupation could ever successfully prove title.[28] However, the Supreme Court of Canada's culturally sensitive approach to proof of Aboriginal title is a principled one. Limiting Aboriginal title to only the most sedentary of Indigenous societies would risk reviving the Privy Council's infamous suggestion that some Indigenous peoples sit too 'low in the scale of social organization' for their land interests to be translatable into 'rights of property'.[29] While Canadian courts are likely to still apply exacting evidentiary standards for title claims, the test for sufficiency can no longer be argued to categorically exclude nomadic groups.

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CULTURAL SENSITIVITY AND SUBMERGED LANDS

Turning back to our initial focus, how might this culturally sensitive approach assist Indigenous groups claiming Aboriginal title to submerged land? Rather than examining this in the abstract, it may be helpful to address this question in context to specific factual findings. For this purpose, I will examine the facts from *Lax Kw'alaams Indian Band v Canada*.[30]

The Lax Kw'alaams are a Coast Tsimshian First Nation that set out to prove an Aboriginal right to commercially harvest and sell all species of fish within their traditional waters, but were unsuccessful at every level of court. In brief, the Lax Kw'alaams were able to prove that they engaged in extensive pre-contact trade in one specific

species (eulachon) but this practice was not accepted as having evolved into a right to trade all fish species in its marine territory. Initially, Lax Kw'alaams had pursued an alternative argument for commercial fishing rights based on their Aboriginal title over traditional fishing sites, but the title claim was severed prior to trial.[31] Interestingly, when the Supreme Court of Canada rejected Lax Kw'alaams' fishing right claim it went out of its way to emphasize that Lax Kw'alaams' claim to Aboriginal title 'remains outstanding'.[32] For this reason, the trial decision in the Lax Kw'alaams litigation provides a fascinating factual basis to re-examine the possibility of Aboriginal title to submerged lands.

An increased emphasis on cultural sensitivity in Aboriginal title litigation holds the promise that such claims might be recognised in Canadian law in spite of their unique complexities.

Since the Lax Kw'alaams trial was never directed at proof of title many key issues went uncanvassed.[33] Still, the British Columbia Supreme Court did reach several key factual findings that could assist a title claim if this portion of Lax Kw'alaams' claim were revived. The Court acknowledged that the Coast Tsimshian are a fishing people that owe their very existence to 'the abundance of marine and riverine food available to them'.[34] The evidence canvassed at trial indicated that Coast Tsimshian people primarily relied on the shallow waters of the continental shelf to harvest marine resources and their habitation sites were 'dominated by fish bones'.[35] They also cycled between camps throughout their traditional territory according to the seasonal availability of particular marine resources.[36] Lax Kw'alaams' ancestors used tidewater salmon traps and baited hooks trolled behind canoes for fishing, among other technologies.[37] Furthermore, their resource harvesting territories were subject to ownership and rights of access allocated between different groups and there was evidence that these groups exercised control over access to these territories against outsiders.[38]

The trial judge's cursory review of the evidence suggests that Lax Kw'alaams regularly used at least a few definite tracts of coastal and riverine lands for fishing and harvesting resources since prior to European contact.[39] The culturally sensitive test for title also requires courts to take note of the claimant group's 'laws, practices, size, technological ability and the character of the land claimed'.[40] Lax Kw'alaams' evidence firmly established that they are a fishing people that has engaged in extensive marine harvesting activities with a variety of fishing technologies over largely coastal and riverine areas. Their laws for ownership over resource harvesting territories could also be relevant to proof of title.[41]

If the notion of occupation must reflect the Coast Tsimshian's way of life, it seems reasonable that the test for sufficiency of occupation will be flexible enough to embrace a way of life that is heavily focused on marine territory. In fact, categorically rejecting Aboriginal title claims to submerged lands could be seen as the very antithesis of a culturally sensitive approach to the claims of coastal First Nations like Lax Kw'alaams.

CONCLUSION

After many years of theorizing Aboriginal title in the abstract, the Tsilhqot'in decision marks the first time a Canadian court has recognized Aboriginal title's factual existence. More Aboriginal title cases are proceeding to trial, including some that embrace vast areas of submerged lands.[42] An increased emphasis on cultural sensitivity in Aboriginal title litigation holds the promise that such claims might be recognized in Canadian law in spite of their unique complexities. Other jurisdictions have occasionally defused Aboriginal title claims to submerged lands by rigidly applying common law standards which run contrary to the approach in Tsilhqot'in. For example, the Chugach people of Alaska failed in their marine Aboriginal title claim due to evidence of their low population density.[43] Canadian jurisprudence, on the other hand, still has an opportunity to meaningfully reconcile the pre-existing interests of Indigenous peoples in submerged lands with those of the rest of Canadian society rather than dismissing such claims outright. There are still legal and practical hurdles to success.[44] However, Canadian courts have increasingly embraced the test for justified infringement of Aboriginal rights as an all-encompassing solution for balancing these rights against the interests of non-Indigenous Canadians.[45] In the event that an Aboriginal title claim to submerged lands is successful, Canada may have a unique opportunity to set the pace for reconciliation with respect to Indigenous water governance.

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1 This paper and the majority of cases it cites focus on claims to submerged land rather than to ownership of water itself due to the long-standing common law position that water cannot be owned until appropriated. See, eg, *Embrey v Owen* (1851) 6 Exch 353; Sir William Blackstone, Commentaries on the laws of England, Vol II (Oxford Clarendon Press, 3rd ed, 1768); Joshua Getzler, A History of Water Rights at Common Law (Oxford University Press, 2005).

2 See, eg, *Paki v Attorney-General* [2015] 1 NZLR 67; *Ngati Apa v Attorney General* [2003] 3 NZLR 643; *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321.

3 See, eg, *Lake Omapere* (1929) 11 Bay of Islands MB 253; *Lake Waikaremoana* (1917) 29 Wairoa MB 76; *Kauwaeranga* (1870) 4 Hauraki MB 236.

4 See, eg, Marine and Coastal Area (Takutai Moana) Act 2011 (NZ); *Lake Waikaremoana Act 1971* (NZ). Just prior to publication of this article the New Zealand High Court issued its first declaration of customary marine title under the *Marine and Coastal Area (Takutai Moana) Act 2011 in Re Tipene* [2016] NZHC 3199.

5 *Native Title Act 1993* (Cth); *Commonwealth v Yarmirr* (2001) 208 CLR 1.

6 *Akiba v Commonwealth of Australia* (2013) 250 CLR 209.

7 See, eg, *Idaho v United States*, 533 US 262 (2001); *Choctaw Nation v Oklahoma*, 397 US 620 (1970); *Village of Gambell v Hodel*, 869 F 2d 1273 (9th Cir, 1989); *Native Village of Eyak v Trawler Diane Marie Inc*, 154 F 3d 1090 (9th Cir, 1998).

8 See, eg, *Ahousaht Indian Band and Nation v Canada (Attorney General)* 2013 BCCA 300; *R v Gladstone* [1996] 2 SCR 723; *R v Sparrow* [1990] 1 SCR 1075.

9 In *Walpole Island First Nation v Canada (Attorney General)* [2004] 3 CNLR 351, the Ontario Superior Court of Justice commented on two Crown arguments against recognising Aboriginal title to the bed of a navigable lake in a preliminary application to strike the claim, but held that the plaintiffs should have the opportunity to fully develop their position at trial.

10 See, eg, *Lax Kw'alaams Indian Band v British Columbia (Attorney General)* 2006 BCSC 1463; *Ahousaht Nation v Canada (Attorney General)* 2009 BCSC 1494. In both cases the plaintiffs sought greater commercial fishing access in their marine territories based on claims of Aboriginal title and Aboriginal fishing rights. However, the former claims have yet to be determined.

11 *R v Van der Peet* [1996] 2 SCR 507, 547 [42].

12 *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 257, 292 [70], 306 [116] (*Tsilhqot'in*); see obiter dicta in *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1084 [118]-[124] (*Delgamuukw*).

13 *Tsilhqot'in* [2014] 2 SCR 257, 297 [84]-[87].

14 Ibid; but see Gordon Christie, 'Who Makes Decisions over Aboriginal Title Lands' (2015) 48(3) *UBC Law Review* 743, where limitations on the recognition of jurisdiction in Tsilhqot'in are discussed.

15 Brian Slattery, 'The Constitutional Dimensions of Aboriginal Title' (2015) 71 *Supreme Court Law Review* 45.

16 *Tsilhqot'in* [2014] 2 SCR 257.

17 Ibid 271 [9].

18 Ibid 277 [25]-[26].

19 *R v Marshall; R v Bernard* [2005] 2 SCR 220, 247 [58]-[59].

20 *William v British Columbia* 2012 BCCA 285, 69 [221], 71 [230].

21 Ibid 16 [41]-[42], 18 [50].

22 *Tsilhqot'in* [2014] 2 SCR 257, 283 [42].

23 Ibid 280 [37].

24 Ibid 280 [37], 289 [60].

25 *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700, 134-139 [380]-[397].

26 Ibid 146-148 [426]-[432], 226-232 [653]-[671], 233 [673]-[674], 234-235 [676]-[677], 235[679].

27 *Tsilhqot'in* [2014] 2 SCR 257, 280 [38].

28 See, eg, *R v Marshall; R v Bernard* [2005] 2 SCR 220, 249 [66] (McLachlin CJ), 271 [127], 275 [134] (LeBel J dissenting); *Delgamuukw* [1997] 3 SCR 1010, 1095 [139].

29 *Re Southern Rhodesia* [1919] AC 211, 233-234.

30 *Lax Kw'alaams Indian Band v Canada (Attorney General)* [2011] 3 SCR 535 (*Lax Kw'alaams*).

31 Ibid 540 [1]; *Lax Kw'alaams Indian Band v British Columbia (Attorney General)* 2006 BCSC 1463.

32 *Lax Kw'alaams* [2011] 3 SCR 535, 570 [73].

33 For example, the test for proof of Aboriginal title centers around a different historic time period from the test for proof of Aboriginal fishing rights, which could have had complex ramifications for the plaintiffs' evidence.

34 *Lax Kw'alaams Indian Band v British Columbia (Attorney General)* 2008 BCSC 447, 85 [225].

35 Ibid 86 [230].

36 Ibid 87-89 [231]-[238].

37 Ibid 89 [239]-[243].

38 Ibid 96-98 [260]-[266].

39 Ibid 166 [492].

40 *Tsilhqot'in* [2014] 2 SCR 257, 282 [41].

41 Ibid 285 [49].

42 See, eg, *Haida Nation v British Columbia*, Action No L020662 British Columbia Supreme Court, Vancouver Registry.

43 *Eyak v Blank*, 688 F 3D 619 (9th Cir. 2012) as discussed in William H Howery, 'Native Village of Eyak v Blank: Fish is Best Rare; Justice, Not So Much' (2014) 44 *Golden Gate University Law Review* 47, 73.

44 See, eg, Rebecca Brown and James Reynolds, 'Aboriginal Title to Sea Spaces: A Comparative Study' (2004) 37 *University of British Columbia Law Review* 449; H. W. Roger Townshend, 'Aboriginal Title to the Beds of Water Bodies' (Paper presented at the Indigenous Bar Association Conference, Winnipeg, 19 October 2012); Paula Quig, 'Testing the Waters: Aboriginal Title Claims to Water Spaces and Submerged Lands - An Overview' (2004) 45 *Les Cahiers de droit* 659.

45 See, eg, *Sga'nism Sim'augit (Chief Mountain) v Canada (Attorney General)* 2013 BCCA 49; *Tsilhqot'in* [2014] 2 SCR 257, 314 [139]-[140].