

Class 2.3

Common Law Aboriginal Title

Agenda

1. Review: Life Estate
2. Context & Overview
3. Source
4. Nature and Content
5. Proof
6. Infringement
7. *Terra Nullius*

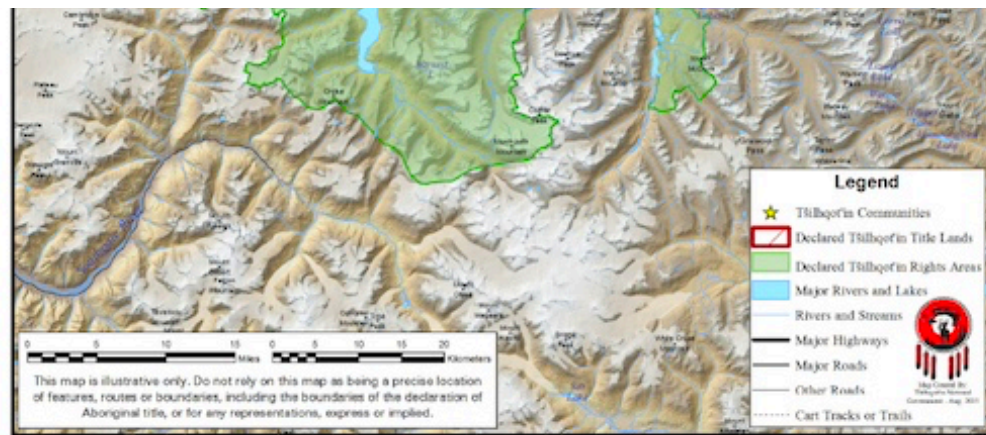
Aboriginal Title and Colonial Land Relations

- *Universalism*
- *Ahistoricism*

Overview

- Royal Proclamation, 1763
- *St. Catherine's Milling* (1888)
- *Calder v British Columbia* (1973)
- *Delgamuukw v British Columbia* (1997)
- *Tsilhqot'in v British Columbia* (2014)

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St. Catherine's Milling

- Source of Aboriginal title: Royal Proclamation, 1763
- Content of Aboriginal title: “personal and usufructory right”, “dependent on the goodwill of the sovereign” that is inalienable, except to the Crown
- Surrender or extinguishment of Aboriginal title: can be “surrendered or otherwise extinguished”

Source:

Delgamuukw/Tsilhqot'in

1. Occupation prior to the assumption of Crown sovereignty; and
2. Relationship between common law and Indigenous law

Nature & Content

Is Aboriginal title like a common law estate in land?
Why or why not?

Aboriginal Title is...

1. *Sui generis*
2. Beneficial interest in land that includes right to exclusive use and occupation
3. Inalienable
4. Inherently limited
5. Communal

Test for Proof of Title

1. Sufficient
2. Continuous
3. Exclusive

Sufficiency

Occupation must be sufficient to ground Aboriginal title.

Tsilhqot'in Law (Hana)

Seasonal round as process of renewing reciprocal obligations in relationships to the land and territory.

Continuity

Where present occupation is relied on as proof of occupation pre-sovereignty there must be continuity between present and pre-sovereignty occupation.

Exclusivity

There must have been exclusive occupation of the land at the time of sovereignty (intention and capacity to retain exclusive control).

Infringement

Crown must show:

- it has discharged its duty to consult and accommodate;
- has a compelling and substantial objective
- action is consistent with Crown's fiduciary obligation

Terra Nullius

At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the Royal Proclamation (1763), R.S.C. 1985, App. II, No. 1. (*Tsilhqot'in*, para 70)