# *Tsilhqot'in Nation v B.C.*

# Summary of Panel Discussions on the Supreme Court of Canada Decision

October 2014[1]

## About This Brief

This summary brief focuses on the significance and implications of the landmark Supreme Court of Canada decision *Tsilhqot'in Nation v B.C.*[2] This brief provides only a succinct, high-level overview of this detailed and complex decision, with a primary focus on summarizing the outcome of two expert panel discussions regarding the ruling. The Pacific Business & Law Institute hosted one of these two expert panel discussions, *The Tsilhqot'in Decision: What does it mean for Aboriginal Rights and Title in B.C. and Canada?,* as part of its "Dynamic Dialogue" webinar series on July 4th, 2014.[3] This event focused on the implications of the decision. The POLIS Water Sustainability Project partnered with the University of Victoria's Faculty of Law and Centre for Global Studies to host a second panel discussion, *Aboriginal Title and Provincial Regulation: The Impact of Tsilhqot'in Nation v B.C.*, on September 25th, 2014.[4] This event addressed specific aspects of the ruling, including the impact on First Nation communities and practical considerations for industry and government.

## Introduction and Case Details

*Tsilhqot'in Nation v B.C*. was, at its core, about the cultural survival of the Tsilhqot'in People. Six communities unified as one nation for the purposes of the lawsuit. Clear-cut logging planned by the Province on land surrounding the claim area provoked litigation, which resulted from the Tsilhqot'in belief in a sacred duty to protect their land.

The trial judge issued a decision in late 2007. Among findings of infringed aboriginal rights (e.g. hunting and trapping), the judge found that the Province had not done its due diligence with respect to consultation and research on the impacts of the proposed activities. Due to a finding of an unjustifiable infringement leading to unconstitutional acts by the provincial government, the forestry plans were struck down. Most significantly, the judge found that there was sufficient evidence to support the Tsilhqot'in Nation's aboriginal title claim in certain parts of their claim area, but declined to grant a declaration of aboriginal title for procedural reasons.

At the B.C. Court of Appeal, the Court dismissed the Province's appeal and affirmed all the aboriginal rights found by the trial judge. The Court also affirmed the finding that there was an unjustified infringement (logging was unlawful and unconstitutional). On the issue of aboriginal title, the Court said that it can only exist on very specific sites that were intensively used. This conservative, "postage-stamp" view of title is extremely Euro-centric with respect to land use and was insulting to the claimants.

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[1] Prepared by Raluca Hlevca, Megan Spencer, and Savannah Carr-Wilson, POLIS Water Sustainability Project.

[2] 2014 SCC 44.

[3] The panellists at this event were Jean Teillet, Partner, Pape Salter Teillet LLP; and John J.L. Hunter, Q.C., Senior Counsel, Hunter Litigation Chambers.

[4] The panellists at this event were Jay Nelson, General Counsel to the Tsilhqot'in Nation & Associate Counsel at Woodward & Company; Krista Robertson, Lawyer at JFK Law Corporation with expertise in Aboriginal Rights Law; and Dr. John Borrows, Canada Research Chair in Indigenous Law at the University of Victoria.

At the Supreme Court of Canada, aboriginal title was the only legal issue, as no other issue was appealed from the Court of Appeal. The Court rejected the B.C. Court of Appeal's "postage-stamp" view of aboriginal title and declared aboriginal title for the 40 per cent of claimed territory as per the trial judge's findings; appeal courts cannot change findings of fact because questions of fact can only be determined at the trial level. The Court found that contrary to the Province's arguments, title does exist beyond areas of historically intensive activity. The Court defined aboriginal title as a territorial ownership right to land that confers the right to proactively use and manage the land. It is not confined to traditional uses of the land and includes the right to benefit from the resources of the land (land and resource management). The Court framed aboriginal title as a collective right held not only for the present generation, but for all succeeding generations.

This unprecedented finding creates a space for indigenous law and legal traditions and indigenous systems of government. The Court confirmed that the Province and the Federal Government of Canada must seek consent from the Tsilhqot'in Nation to interfere with title. However, the Crown may use aboriginal title lands without aboriginal consent if they can substantially justify their imposition and still adhere to their fiduciary obligation to First Nations people. Solely economic reasons are not sufficient; rather, proposed actions must, among other requirements, provide "compelling and substantial objectives." Justification for interference with title can be achieved under exceptional circumstances only and must demonstrate that interference would only further reconciliation.

After title is asserted, but before it is proven, the *Haida*[5] consultation framework still applies. If the title claim is strong, the Province must take appropriate care to preserve the aboriginal interest in the claim area pending final resolution of the claim. The Court indicated that the Province should be prepared to revoke authorizations and projects pre-approved once title is proven by a nation. Industry and government can address the resulting uncertainty by seeking First Nation consent prior to the initiation of projects on land subject to title claims.

## Implications of the Decision

After this decision, there is a sense that the status quo is unacceptable and this case signifies a move toward a regime where there is recognition of First Nation rights to participate as whole partners in the future of their lands. This case has brought to light what has always been there—aboriginal title in land—and opens the door for other First Nations to make aboriginal title claims. Aboriginal title has changed from a legal concept recognized by the Supreme Court in 1997[6] to an achievable reality. There also is now a clearer interpretation of what is required to demonstrate aboriginal title.

Aboriginal title to water was not directly discussed by the Court, but panellists weighed in with the following predictions:

- This case does lay a foundation to make claims to watercourses and water sources (regular use areas, such as fishing sites and clam gardens which are on inter-tidal lands).
- There is strong potential for water title claims based on the language the Court used.
- Submerged lands (freshwater bodies and near-shore marine environments) that are surrounded by land found to have aboriginal title will likewise have aboriginal title, although the exact extent into a large water body is still unclear (e.g. 5 km, 7 km).

[5] *Haida Nation v British Columbia*, 2004 SCC 73.
[6] *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

The case raised the bar for consultation both before and after a declaration of title. The existence of aboriginal title will impact every level of consultation and will necessarily create a need for deeper and more significant consultation than has taken place to date. Once title is proven, consent is required for interference with the title land. Where consent is lacking, the government may have to cancel projects that proceeded before that claim was made (e.g. by revoking development permits). In areas of Canada covered by historic or modern treaties, it would be untenable to have a lower standard of consultation and likely the bar will be raised. The political climate around revenue sharing, for example, is one way that the bar is being raised across the country.

Responses to the judgment from government and industry are mixed and it is unclear to what extent government policy or industry practices will be affected. There is a tendency among these parties to minimize the impact of the case. There is a feeling of uncertainty that only time and subsequent cases will resolve. One noteworthy clarification for the government indicates that the Province can infringe aboriginal title under the Section 35 framework of justification, thus resolving a longstanding division of powers uncertainty. It is likely that the Province will be required to amend certain legislation to reflect the new reality of aboriginal title in B.C. For example, provisions in B.C.'s *Forest Act* that refer to Crown land can no longer apply to Tsilhqot'in land.

First Nations seeking to follow in the steps of the Tsilhqot'in Nation will need to be strategic about the extent of their title assertions to maximize leverage from the decision. In addition, there are complications that must be navigated. Many First Nations across Canada have been systematically relocated and divided into smaller bands by years of federal government policies. This will prove difficult for title claims; there will be a need to regroup into larger bands, as the Tsilhqot'in People have done. First Nations across Canada who reside in territories where aboriginal title has never been extinguished (i.e. non-treaty areas)—primarily in the Maritimes and in much of Quebec—are able to use the Tsilhqot'in decision as their precedent to seek title of their own.

The Tsilhqot'in case also established important and far-reaching principles about non-title aboriginal rights. Non-title rights, once proven, significantly raise consultation expectations beyond the *Haida* framework (close to consent level). This case stands as a precedent for the sufficiency of non-title rights to protection of a way of life.

## Significance of the Decision for Indigenous Communities

This Supreme Court of Canada decision is one of the best decisions in the world on aboriginal title. However, there are some challenges brought up by the decision that must be highlighted. While the Court rejected the doctrine of *terra nullius* (no one owned the land before European occupation; it was empty and open for title to be claimed by colonizers) and found that it never applied in Canada, the Court also said that at the time of assertion of European sovereignty, the Crown acquired underlying title of all the land in the province. This denigrates Indigenous Peoples, since by mere assertion of sovereignty in 1846 the Crown was able to claim these rights despite pre-existing aboriginal occupation. Three implications arise from this observation:

1. The burden lies with the First Nation seeking title to prove title to their land. There is a great expense associated with efforts to meet the legal test of sufficiency, exclusivity, and continuity of occupation to prove title in the present day. This creates an unequal playing field between Indigenous Peoples and the Crown. Costs will place court-ordered recognition of rights beyond the reach of most communities. [7]

[7] The Tsilhqot'in case is reported to have cost the claimants over $40 million to take to the Supreme Court.

2. The Crown has paramount status to encroach on aboriginal title in the public interest if it has a valid legislative objective and acts honourably, but not the other way around; the Crown must show it is necessary to achieve objectives and that the benefits are not outweighed by disadvantages to Indigenous Peoples. Proportionality is a one-way street not in favour of Indigenous Peoples. Panellist John Borrows suggests that perhaps it would be helpful to not always seek proportionality and reconciliation since it requires Indigenous Peoples to be conciliatory of colonial institutions and causes them to be compromised by colonialism in an attempt to reach “proportionality.”

3. Provincial laws of general applications are allowed to govern title lands. In 1971, provinces were given parliamentary authority to create provincial laws that apply to Indigenous Peoples. Now, the Court has stated that provincial laws can apply to title lands in order to avoid a legal vacuum in Canadian law. This statement does not recognize indigenous legal systems, which were used to prove the case; the Court undercuts its own conclusion. This finding goes against 250 years of Constitutional principles, as in 1763 in the *Royal Proclamation* lands were reserved for “Indians” and Indigenous Peoples understood that they had a nation-to-nation relationship with the federal government, not the provincial governments.

This decision is a significant victory for the Tsilhqot’in Nation and it represents a substantial step forward for aboriginal law in Canada. The two expert panel discussions that this brief draws on were important dialogues that helped further understanding about the significance and implications of this landmark decision. Building on these panel discussions, this brief highlights both the positive aspects of this decision and its most problematic and troubling aspects. The full implications of the decision will become clearer as time passes. The next few years will be vitally significant to the development of aboriginal law in Canada as governments integrate and respond to this ruling, and other courts interpret this groundbreaking precedent.