Aboriginal Law Bulletin

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Tsilhqot'in Nation v. British Columbia, 2007 BCSC 1700

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OVERVIEW

On November 21, 2007, Mr. Justice Vickers released the first decision regarding a claim for aboriginal title in B.C. since the Supreme Court of Canada released *Delgamuukw v. British Columbia* in 1997. Chief Roger William of the Xeni Gwet'in people sought declarations of aboriginal title in part of the Cariboo-Chilcotin region of B.C., on behalf of all Tsilhqot'in people. The area in which the Tsilhqot'in sought aboriginal title was defined as Tachelach'ed (Brittany Triangle) and the Trapline Territory (together the "Claim Area"), totalling approximately 440,000 hectares. The Tsilhqot'in also sought declarations of aboriginal rights to hunt and trap as well as trade in animal skins and pelts in the Claim Area.

The declarations of aboriginal title and claims for damages for infringement of aboriginal title were dismissed without prejudice to the Plaintiff's claims in the future. The declaration of a breach of aboriginal rights was granted but no damages were awarded.

The trial lasted 339 days and produced 485 pages of Reasons for Judgment. The trial judge summarized the numerous issues between the Tsilhqot'in, British Columbia and Canada as follows at paragraph 101 of his Reasons for Judgment:

1. Are the Tsilhqot'in people entitled to a declaration of aboriginal title to all or part of the Claim Area?

2. Does the *Forest Act* apply to aboriginal title lands?

3. Does the issuing of forest licences, the granting of authorizations and any forest development activity unjustifiably infringe aboriginal rights in the Claim Area?

4. Are the Tsilhqot'in people entitled to a declaration of aboriginal rights to hunt and trap birds and animals throughout all or part of the Claim Area?

5. Are the Tsilhqot'in people entitled to a declaration of an aboriginal right to trade in the furs, pelts and other animal products as a means of securing a moderate livelihood?

6. Are any claims advanced statute barred or otherwise affected by the doctrines of Crown immunity or laches?

7. Are the Tsilhqot'in people entitled to damages?

In final arguments (made only in writing), the Tsilhqot'in argued that the Court had jurisdiction to make a declaration of aboriginal title with respect to all or, alternatively, a portion of the Claim Area. In response, the Province and Canada argued that the Tsilhqot'in had only pleaded two definite tracts of land in the statement of claim: the Trapline Territory and Tachelach'ed and therefore, the alternative claim for a portion of the Claim Area should fail. The trial judge accepted this argument, finding that he could not decide the alternative argument as it would be prejudicial to the defendants, as they did not have a chance to lead evidence on claims to a portion of the Claim Area. Nonetheless, the trial judge went on to consider those issues he found he could not determine – he acknowledged that these opinions are not binding on the parties. As a result, a review of his decision can be separated into the aspects that are binding upon the parties and those that are not binding.

THE DECISION

I. Binding Aspects

The following are all binding upon the parties to this litigation and may carry precedential weight for future proceedings.

A. Tsilhqot'in Aboriginal Title[1]

The Test for Aboriginal Title[2]

In summarizing the nature of aboriginal title, the trial judge largely drew from the Supreme Court of Canada's earlier decision in *Delgamuukw*, including the test for proving aboriginal title is as follows:[3]

> …aboriginal title is proven by demonstrating three critical elements, … The aboriginal people must establish that they occupied the lands in question at the time when the Crown asserted sovereignty over those lands. "If present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation." And finally, "occupation must have been exclusive".

The Date of Crown Sovereignty[4]

The Treaty of Oregon in 1846 was the "watershed date" as there was a *de facto* British presence in the Claim Area by that time.

Pre-sovereignty Occupation[5]

The trial judge found that the Tsilhqot'in people occupied portions of the Claim Area prior to and at the time of sovereignty. However, on the evidence before him, he did not find sufficient use and occupation of the Claim Area as a whole.[6] Consequently, he found that, based on their originally framed claim of "all or nothing",

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[1] At paras. 473-962.
[2] At paras. 542-553.
[3] At paras. 539-542.
[4] At paras. 585-602.
[5] At paras. 542-545.
[6] At paras. 792-794.

the Tsilhqot'in did not satisfy the test for aboriginal title. Despite this ultimate conclusion on the question of aboriginal title, the trial judge went on, in *obiter dicta (not necessary to his decision)*, to provide his opinion as to whether the remainder of the test for aboriginal title was made out. (This part of the judgment is summarized below in the section titled "Non-Binding Aspects".)

Exclusivity[7]

The trial judge found no evidence of adverse claimants at the time of sovereignty assertion in the Claim Area. As a result, he concluded that Tsilhqot'in people were in exclusive control of that area at the time of the Crown's sovereignty assertion.

Continuity[8]

The trial judge was also satisfied that the Tsilhqot'in people continuously occupied the Claim Area before and after sovereignty assertion. Citing from *Delgamuukw*, he held that there had been a "substantial maintenance of the connection between the people and the land" throughout this entire period.

In conclusion, on the claim for aboriginal title, the trial judge dismissed the claim without prejudice to the future, more limited Tsilhqot'in claims, holding:[9]

> [957] I am unable to find regular use in the entire area of any of the discreet three parts that make up the whole Claim Area, Tachelach'ed, or the Eastern and Western Trapline Territories. I am unable to make such a declaration of Tsilhqot'in Aboriginal title to smaller areas included within the whole because they have not been separately pleaded, as discussed earlier in Section 4 of these Reasons for Judgment.

B. Aboriginal Rights (Excluding Title)[10]

The trial judge applied the Supreme Court of Canada's four-step test as articulated in *R v. Van der Peet* in order to determine if there had been an infringement of Tsilhqot'in aboriginal rights.

Tsilhqot'in Aboriginal Rights[11]

Vickers J. characterized the Tsilhqot'in claim as "an Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals for work and transportation, [including horses,] food, clothing shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses" and "a Tsilhqot'in Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood".[12]

The trial judge concluded that the ancestors of the Tsilhqot'in people engaged in these rights and that it was integral to their distinctive culture. He was also satisfied that the hunting, trapping and trading practices of Tsilhqot'in people represented a modern expression of the activities as practiced by Tsilhqot'in people prior to contact with European people. Finally, the trial judge concluded that Tsilhqot'in people continuously hunted, trapped and traded throughout the Claim Area and beyond from pre-contact times to the present day.[13]

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[7] At para. 546.
[8] At paras. 547-553.
[9] At para. 957.
[10] At paras. 1142-1294.
[11] At paras. 1142-1268.
[12] At paras. 1240 and 1265.
[13] At paras. 1265-1268.

Infringements of Aboriginal Rights[14]

On the whole of the evidence, the trial judge concluded that forest harvesting activities are a *prima facie* infringement of the Tsilhqot'in hunting and trapping rights. This was based on a determination that the consequences to wildlife diversity and destruction of habitat were an unreasonable limit on the right to hunt and trapping.

Although the Province had consulted with the Tsilhqot'in, they had not acknowledged their aboriginal rights. This aspect of the trial judge's decision is unprecedented. As a result of this conclusion the trial judge held that the consultation did not justify the infringement of the rights. The trial judge found that the Province had to provide sufficient, credible information in order to assess the impact of the harvesting activities on the wildlife in the area. Without this information, the activities would continue to be an unjustifiable infringement.

C. Statutory Authority of Forest Act Provisions Impacting Aboriginal Rights[15]

The Tsilhqot'in argued that certain provisions of the *Forest Act* could not apply to their exercise of aboriginal rights because the Province did not have the constitutional authority to enact laws that would affect aboriginal rights. Specifically, they argued that provisions allowing for the management acquisition, removal and sale of timber could not apply to their aboriginal rights.

In considering this issue, the trial judge relied on *Delgamuukw* and *R v. Morris*, although *Morris* considered the application of provincial laws to treaty rights. Based on these decisions, he found that "s. 35 aboriginal rights are part of the core of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*". Therefore, provincial laws could not extinguish aboriginal rights. The impugned provisions of the *Forest Act* were not, however, *prima facie* inapplicable to aboriginal rights. The trial judge found the provisions did not go to the core of the aboriginal rights, leaving the Province free to justify any infringements they may cause.[16] In addition, the trial judge confirmed that pending proof of aboriginal title, the *Forest Act* applied in the area claimed to be aboriginal title area.

Recall, however, that the trial judge found the provisions of the *Forest Act* did infringe the Tsilhqot'in aboriginal rights and that the infringement was not justified. Therefore, the impugned provisions of the *Forest Act* did not apply to the Tsilhqot'in aboriginal rights. (Discussed in *B. Aboriginal Rights (Excluding Title)* above.)

D. Limitations[17]

The trial judge concluded that the B.C. *Limitation Act* did apply to the claims of unjustified infringement of aboriginal rights by the operation of s. 88 of the *Indian Act*. Specifically, he found that the running of time was triggered by the Supreme Court of Canada's decision in *R v. Sparrow*, in 1990. Therefore, any claims for unjustified infringements of aboriginal rights that arose prior to December 17, 1992 were barred.[18]

E. Damages[19]

The Tsilhqot'in claim for damages was based on findings of aboriginal title and infringement. As a result of the trial judge's dismissal of the

[14] At paras. 1269-1294.
[15] At paras. 963-1052.
[16] At para. 1041-1045.
[17] At paras. 1311-1331.
[18] At para. 1329.
[19] At paras. 1334-1337.

Tsilhqot'in claim to title, the claims for damages were also dismissed, although without prejudice to a renewal of such claims.

II. Non-Binding Aspects

The trial judge's opinion with respect to this claim, how aboriginal title - should it be found would interact with the *Forest Act* and the *Limitation Act* as well as the justification of infringement - should it occur, are not binding on the parties or subsequent proceedings.

A. Tsilhqot'in Aboriginal Title to Part of the Claim Area[20]

Consideration of Smaller Tracts of Land

Having found the Tsilhqot'in claim to aboriginal title could not succeed to the Claim Area, or to a part of the Claim Area because of prejudice to the defendants, the trial judge went on to consider the first branch of the test in relation to smaller "definite tracts of land" that were not pleaded individually. He undertook an analysis of lands both within and outside of the Claim Area based on the evidence before him. Based on this analysis, the trial judge offered his *opinion* that:[21]

> [959] … These sites and their interconnecting links set out definite tracts of land in regular use by Tsilhqot'in people at the time of sovereignty assertion to an extent sufficient to warrant a finding of Aboriginal title …

This statement was a very careful acknowledgment by the trial judge that he was not deciding that the Tsilhqot'in actually had aboriginal title in the area he defined. Because of his finding of prejudice to the defendants, it is open to the defendants in any further proceedings to adduce evidence to the contrary and it is possible that in future proceedings, a subsequent trial judge might conclude, on all the evidence, that the Tsilhqot'in did not have aboriginal title in the area he defined. The trial judge did conclude that if his finding of prejudice was overturned on appeal, that the Tsilhqot'in actually had aboriginal title in the area he defined and "his conclusions on aboriginal title were binding findings of fact in for those areas within the Claim Area". [22]

B. Statutory Authority of Forest Act Provisions Impacting Aboriginal Title[23]

The trial judge opined that because aboriginal title - like private land - was not "Crown land" as defined by provincial forestry legislation, the provincial *Forest Act* did not apply to aboriginal title land.

The trial judge stated that if he was wrong, and the definition of "Crown timber" did include the timber situated on Tsilhqot'in title lands, that it was necessary to consider the Tsilhqot'in argument regarding the doctrine of interjurisdictional immunity. As mentioned in the discussion regarding the application of the *Forest Act* provisions to aboriginal rights, the *Constitution Act, 1867* only grants the Federal government the power to enact laws that go to the core of "Indianness". The Tsilhqot'in argued that the Province did not have the constitutional authority to grant interests in timber on Tsilhqot'in title lands to third parties or to approve forest development activities on these lands, even under a law of general application.

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[20] At paras. 130, 686-962.
[21] At para. 959.
[22] At para. 962.
[23] At paras. 963-1052.

The trial judge found that provincial management of timber; including acquisition, removal and sale of timber by third parties under the *Forest Act;* did not extinguish aboriginal title. In addition, the "provisions of the *Forest Act* that provide for the acquisition, removal and sale of timber by third parties go to the core of Aboriginal title". Therefore, the provisions could only apply to aboriginal title if they were incorporated by s. 88 of the *Indian Act*. Vickers J. held that s. 88 only incorporated laws that applied to "Indians" and not "Indian lands".[24]

As a result, he concluded that the *Forest Act* is constitutionally inapplicable to Tsilhqot'in aboriginal title lands.

C. Justification of Infringement of Aboriginal Title[25]

Although the trial judge opined that the *Forest Act* does not apply to Tsilhqot'in aboriginal title lands, he went on to provide opinions regarding the application of the current provincial forestry scheme, should his earlier conclusions be wrong. The trial judge found that although the enactment of the *Forest Act* itself would not constitute an infringement of aboriginal title, the application of the forestry scheme would constitute a "*prima facie* infringement or denial of Tsilhqot'in aboriginal title, which triggered the need for justification".[26]

The trial judge applied the test for justification, as set out in *Delgamuukw* (i.e., there must be a compelling and substantial objective and the Crown must act consistently with its fiduciary obligations), and concluded that the Province failed to establish a compelling and substantial legislative objective for forestry activities in the Claim Area for two reasons: (i) there was no evidence that the Claim Area was economically viable; and (ii) there was no compelling evidence that it is or was necessary to deter the spread of mountain pine beetle infestation.

The trial judge went on to state that where aboriginal title exists, there is always a duty to consult. Accordingly, he commented:[27]

> Utilizing the concept of a spectrum proposed in *Haida Nation* (S.C.C.), I place the rights and title claimed here at the high end of the scale, requiring deep consultation and accommodation. I have already noted there are areas of title inside and outside of the Claim Area. Aboriginal rights in the Claim Area have been acknowledged by the defendants in these proceedings. I have found the plaintiff is entitled to a finding of specific Aboriginal rights on behalf of all Tsilhqot'in people. On the whole of the evidence, and in particular with respect to forestry and land use planning throughout the Claim Area, the failure of the Province to recognize and accommodate the claims being advanced for Aboriginal title and rights leads me to conclude that the Province has failed in its obligation to consult with the Tsilhqot'in people. For these reasons, and for the reasons earlier expressed, the Province has failed to justify its infringement of Tsilhqot'in Aboriginal title.

[24] At para. 1039, 1045.
[25] At paras. 1082-1141.
[26] At para. 1081.
[27] At para. 1141.

D. The Limitation Act[28]

The trial judge found that for the same reasons the *Forest Act* did not apply to aboriginal title, the B.C. *Limitation Act* was also constitutionally inapplicable to Tsilhqot'in claims of unjustified infringement of aboriginal title, as well as to claims for damages arising out of such an infringement.

CONCLUSION

In strict legal terms, the Plaintiff's claims for aboriginal title were dismissed. The trial judge concluded that aboriginal title is not co-extensive to traditional territory. The dismissal was without prejudice to the Plaintiff's claim to aboriginal title to a smaller area. Whether these claims will be decided at a new trial is not clear.

The Plaintiff's claim for aboriginal rights 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 a right to trade in skins and pelts as a means of securing a moderate livelihood was allowed. In addition, the trial judge allowed the Plaintiff's claim that provisions of the *Forest Act* infringed their aboriginal rights, finding that the Province had not justified the infringement. However, no damages were awarded and no ancillary relief was granted for this infringement.

Acknowledging that the balance of his judgment dealing with aboriginal title was non-binding on the parties and *obiter dicta*, the trial judge expressed his views on a variety of subjects.

It is not an understatement to describe this part of the trial judge's reasons as unprecedented. It is difficult to predict the effect the trial judge's non-binding views will have on future proceedings.

For more information on the subject of this bulletin, please contact the authors:

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[28] At paras. 1308-1329.

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