

**J. Blackhawk Sr. Counsel Notes – CIAJ 2016 Legislative Drafting Conference**  
**“The New Legislative Counsel: At the Intersection of Law, Policy and Politics”**  
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**Introduction**

Thank you for inviting me to participate in the panel discussion. My area of practice is not legislative drafting, rather I work exclusively on section 35 Aboriginal rights and title matters on behalf of the Crown/Canada. I have been asked to help provide some additional context to the scenario you will be discussing for the remainder of the panel discussion, particularly some context in relation to practical consideration I have noted in relation to Aboriginal rights and title litigation.

Accordingly, my plan for my time is as follows:

- A brief overview of Tsilhqot’in decision, including a brief overview of the history behind the claim;
- Highlight some of the very clear and important distinctions between Aboriginal title lands and traditional lands and Aboriginal title and rights; and
- Finally, to highlight some tools and mechanisms legislative drafters and negotiation teams ought to consider employing to help reach agreements with Aboriginal collectives and to resolve, even if only temporarily, disputes.

I hope that you will find this additional information useful in your discussions of the scenario.

**1. Brief Background – Aboriginal Title – *Tsilhqot’in* Decision**

The *Tsilhqot’in* decision is an important historic milestone in the development of section 35 jurisprudence, as it is the first ever declaration of Aboriginal title over a specific area in Canada.

Background/history of the Tsilhqot’in claim:

To review, this was a claim by the Tsilhqot’in Nation, where they sought a declaration of s.35 Aboriginal title over an area approximately 4380 sq km, and declarations for s.35 Aboriginal Rights ( harvesting - hunting, trapping, gathering and use of wild horses) throughout the claimed area. They also sought a declaration that the provincial forestry legislation is constitutionally inapplicable to Aboriginal title lands on the basis of the doctrine of interjurisdictional immunity.

The claim area is in a region of central British Columbia surrounded by natural borders – rivers and mountains. With the exception of the Douglas Treaties on Vancouver Island and a portion

of Treaty 8 (the boundaries of Treaty 8 extend into northeastern BC), there are no land cession treaties throughout most of BC.

In 1983, BC granted Carrier Lumber Inc. a forest licence to remove trees from part of the claimed area. The Xenigwet'in First Nation (one of the six Tsilhqot'in Bands that make up the Tsilhqot'in Nation) objected to the logging and sought a declaration to prohibit logging in the area. The dispute resulted in a 1992 blockade that ceased upon promises made by then Premier Harcourt, that there would be no further logging without the consent of the Xenigwet'in. There were some settlement talks between the Xenigwet'in and the province, but an impasse was reached over the Xenigwet'in's claim to a right of first refusal to log. In 1988, the original claim for a declaration to prohibit logging was amended to include a claim for Aboriginal title on behalf of the Tsilhqot'in Nation.

In 2002, the BCSC trial commenced and continued for 339 days over the course of 5 years. In its 2007 judgement, the British Columbia Supreme Court declared that the Tsilhqot'in have Aboriginal rights to hunt and trap throughout the entire claimed area and forest activities authorised by the province were an unjustified infringement of their Aboriginal rights. The claim for a declaration of Aboriginal title was dismissed, for procedural reasons without prejudice to permit the Tsilhqot'in an opportunity to renew claims in a subsequent action. The Court went on to express a "non-binding opinion", that had the claim been properly plead, the Tsilhqot'in would have been entitled to a declaration of title over approximately 40% of the claim area (approximately 1750 sq km). The Court also noted that provincial forestry legislation is constitutionally inapplicable to title lands, but did not make a declaration to this effect.

Canada, BC and the Tsilhqot'in were granted leave to appeal the decision. In 2012 the British Columbia Court of Appeal dismissed all three appeals.

At the Supreme Court of Canada the Tsilhqot'in asked for a declaration of Aboriginal title over the area set out by the trial judge in his non-binding opinion (approximately 1750 sq km); lands submerged by water and privately owned lands were excluded from the claim. The Tsilhqot'in also sought confirmation that provincial forestry legislation unjustifiably infringes their Aboriginal title. There were no overlap/adverse claimed of title to the area by other Aboriginal groups. Both Canada and British Columbia opposed the claims. Neither Canada nor British Columbia sought to overturn the finding of Aboriginal rights to hunt, trap and harvest throughout the original claimed area (4380 sq km).

*Summary of Supreme Court of Canada Decision:*

On, June 26, 2014, the Supreme Court of Canada made the first declaration of Aboriginal title over a specific area of land in Canada. The Court made the following declarations:

1. The Tsilhqot'in Nation have Aboriginal title to an area of land in the interior of BC approximately 1750 sq. km.

2. The Province of British Columbia breached its duty to consult the Tsilhqot'in through its land use planning and forestry authorizations; and
3. As a matter of statutory interpretation, the B.C. *Forest Act*, does not apply, but B.C. can amend the *Act* to apply to Aboriginal title lands, subject to the need to justify any resulting infringement.

The decision builds off existing Aboriginal rights and title jurisprudence. Some highlights include:

*The Nature of Aboriginal title* – building off *Delgamuukw*, where the Court confirmed that Aboriginal title “encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, including non-traditional purposes, provided that these uses can be reconciled with the communal and ongoing nature of the group’s attachment to the land.” *Tsilhqot'in* confirms:

- Aboriginal title is unique; it confers ownership rights similar to fee simple ownership;
- The right to decide how the land will be used;
- The right of enjoyment and occupancy of the land;
- The right to possess the land;
- The right to the economic benefits of the land;
- And, the right to determine the use and management of the land

Unlike fee simple ownership, lands can only be alienated to the Crown and cannot be encumbered in ways that would prevent future generations from using or enjoying it; however, some changes – even permanent changes – to the land may be possible.

Once Aboriginal title is proven, the Crown owes a fiduciary duty to the Aboriginal group when dealing with their lands and the right to encroach on Aboriginal title if it can be justified in accordance with the test set out by the SCC.

*The test for proof of Aboriginal title* – building off earlier jurisprudence, *Delgamuukw* and *Bernard and Marshall*, the Court in *Tsilhqot'in* confirms to establish Aboriginal title, the claimant group must establish:

- **Sufficient occupation** of the land prior to European sovereignty;
- Where present occupation is relied upon as proof of occupation pre-sovereignty, there must be **continuity of occupation**;
- At sovereignty, **exclusive occupation**.

*Tsilhqot'in* provided further guidance on how to apply the test, particularly in the context of an Aboriginal group that participated in a seasonal trapping/hunting fishing economy over a large area of land. The Court confirmed that the test for Aboriginal title is based on the pre-sovereignty occupation of the area, that occupation must possess three specific characteristics:

sufficient, continuous (where present occupation relied on) and exclusive. The characteristics should be considered together as part of the inquiry.

- To determine sufficient occupation, the common law test for possession is considered alongside the perspective of the Aboriginal groups.
- Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but may extend to tracts of land that were regularly and exclusively used for hunting, fishing or otherwise exploiting resources.
- The test is case and fact specific.

This provides us guidance on the kinds of evidence necessary to satisfy a test for title in similar circumstances. Sufficient occupation, involves an analysis of both the common law test for possession and the Aboriginal perspective (laws, practices, size, technological ability and character/capacity of the land).

Aboriginal Rights - in *Adams* and *Coté* the Court found that s.35 Aboriginal rights (including title) fall on a spectrum. It is important to determine the nature of the interest to determine the appropriate right to protect that interest. This distinction is important – particularly with respect to the distinction between title and traditional lands that I will further highlight.

The importance of the Duty to Consult -

- The decision does not change the substantive law on the Crown's duty to consult Aboriginal groups when the Crown is contemplating a decision or action that has the potential to adversely affect asserted Aboriginal title or rights. (*Haida*)
- The level of consultation required and accommodation measures offered increases proportionately with the strength of the claim and the seriousness of the potential adverse impacts.

*Tsilhqot'in* confirms that consultation now plays a more prominent role with respect to the test to justify an infringement of Aboriginal title.

Infringement of Aboriginal rights and title – *Tsilhqot'in* confirms that Aboriginal rights are a limit on both federal and provincial legislative powers. Consistent with this in *Grassy Narrows*, the Court confirmed that Treaty rights are a limit on both federal and provincial legislative powers.

Building off earlier jurisprudence, *Sparrow*, the Court confirmed in *Tsilhqot'in* Aboriginal title may be infringed in two ways:

1. With the consent of an Aboriginal group; or
2. If the government can justify the infringement by demonstrating:
  - a. That it fully discharged its procedural duty to consult and if necessary accommodate;
  - b. A compelling and substantial objective (both broader public and Aboriginal perspectives are considered) ; and

- c. The proposed action is consistent with its fiduciary obligations to the group (proportionality – minimal impairment).

Application of Provincial Laws to Aboriginal title lands – Where there is no competing federal legislation, there is no jurisdictional limitation on the applicability of otherwise valid provincial laws to Aboriginal title lands. The only constitutional limitations are those protections set out under s. 35.

However, in *Tsilhqot'in* the Court found that the provincial *Forest Act* was not intended to apply to Aboriginal title lands – as the *Act* specifically applies to Crown lands and Crown timber, because Aboriginal title lands are not Crown lands, the *Act* cannot apply. However, the Court noted the province could amend the *Act* to permit its application to title lands, assuming that any infringement could be justified under s. 35.

Interjurisdictional Immunity – the doctrine of interjurisdictional immunity no longer has any role in the context of Aboriginal right – and the Court clarified that *Morris*, should no longer be followed, to the extent that it stands for the proposition that provincial governments are categorically banned from regulating the exercise of Aboriginal rights.” (para 150) Aboriginal rights, including title, are a “limit on both federal and provincial jurisdiction”. (para 144) The real issue is not federal vs. provincial jurisdiction, but the tension between Aboriginal rights holds ability to use the land in a manner of their choosing vs. regulation of the lands by the province, like all other lands – the *Sparrow* framework/justification test is a better tool to resolve this tension than interjurisdictional immunity.

This clarifies an area of significant uncertainty. This decision confirms that it is the Crown undivided that has a relationship with First Nations and s. 35 is the appropriate constitutional lens to review conflicts.

Summary - In the aftermath of *Tsilhqot'in* there continues to be a number of outstanding questions, including:

- Does Aboriginal title include a broader governance right over lands?
  - Role of the inherent limit? How will Aboriginal title holders be able to develop lands (should they so choose) in a manner that will not deprive future generations of the use of the land – does this mean lands must always be “pristine”?
- \* With the Court declaration we know the boundaries of the title held by the *Tsilhqot'in*, but the content of the title will likely be the subject of ongoing debate and negotiations between the *Tsilhqot'in* and both levels of government. For example, we know that the Government of BC has already commenced engagement with the *Tsilhqot'in* in an effort to try and define and ultimately resolve some of the outstanding governance questions.

## 2. Distinction Between Aboriginal Title Lands and Traditional Lands

### Aboriginal Title

Title lands are defined areas of land with clear boundaries. In Canada there is only one recognised area of Aboriginal title, that being the area declared by the SCC in *Tsilhqot'in*.

*Delgamuukw* established that Aboriginal title “encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, including non-traditional purposes, provided that these uses can be reconciled with the communal and ongoing nature of the group’s attachment to the land.” *Tsilhqot'in* confirms:

- Aboriginal title is unique; it confers ownership rights similar to fee simple ownership;
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- The right to the economic benefits of the land;
- And, the right to determine the use and management of the land.

Unlike fee simple ownership, lands can only be alienated to the Crown and cannot be encumbered in ways that would prevent future generations from using or enjoying it; however, some changes – even permanent changes – to the land may be possible.

Once Aboriginal title is proven, the Crown owes a fiduciary duty to the Aboriginal group when dealing with their lands and the right to encroach on Aboriginal title if it can be justified in accordance with the test set out by the SCC.

Outstanding Questions:

- How can Title lands be developed by the First Nation in a manner that maintains the Aboriginal interest? Does this mean only sustainable development practices/economic practices will be permitted?
- Can the Crown ever satisfy this element of the justification test once title has been established in an area?
- What are the Crown’s obligations in areas where there is an ongoing claim for title that is unresolved, but where arguably there is a strong claim for title?
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Following a finding of Aboriginal Title – practical considerations/questions:

- Who was responsible for road maintenance for highways that cross through *Tsilhqot'in* lands, do things like a right of way access for hydro lines and maintenance infringe Aboriginal title, and if so is it a justified infringement?
- Provincial forestry legislation does not apply to title lands as it is outside of the definition of Crown land, what other legislation is no longer applicable because of similar definitions – for example environmental protection?

- If new legislation or legislative amendments are needed, should this be provincial or federal as determined by section 91 or 92 of the Constitution?
- What role or space does First Nation law play in the governance of title lands? Must the Aboriginal title holders develop written/codified laws? To whom would Aboriginal laws apply? Must Aboriginal law complement existing Federal or Provincial laws in place – for example in the area of environmental protection?

### Traditional Lands

Less defined in geographic scope but area generally very large tracts of land. The boundaries and scope are generally known to the Aboriginal group claiming the area but may not generally known outside the community.

For example, in Tsilhqot'in, we were told that the original claim area 4380 sq km represented only 5 % of the total traditional lands held by the Tsilhqot'in. Accordingly, at this point, we do not know the full extent and location of all lands in BC the Tsilhqot'in claim are their traditional lands.

Traditional lands can generally be said to overlap with other First Nation lands – traditional, treaty or (if established) title lands. This leads to a whole host of questions:

- Who has the right to speak for the lands? (with whom should governments be negotiating with?)
- Which First Nation practices should be protected?
- Who has priority of right?
- Which First Nation laws/practices ought to be considered and ultimately govern?

Other questions:

- Given the geographic scope/size of traditional territories/lands what is the appropriate right to protect the Aboriginal interest? (Aboriginal title – a right to the land itself or Aboriginal rights – and specifically what rights? – link to *Adams and Cote*)
- What Aboriginal rights and practices will be protected? Harvesting, a right to practice spiritual activities in specific locations – specific usufructory rights.
- Will the nature of Aboriginal rights differ in areas depending on the nature of a particular First Nations claim – multiple First Nations with multiple rights?
- How will existing regulations impact First Nation rights? Is a regulatory review necessary?
- Can certain infringements of Aboriginal rights be justified?
- How to develop regulations that will balance all interests going forward?

For example in Tsilhqot'in we heard evidence that the area known as the Brittany Triangle, the northern most portion of the lands claimed in the original action, had not even been visited by

a single member of the Xeni Gwet'in (the First Nation bringing the claim on behalf of the Tsilhqot'in) in over 75 years. Should harvesting activities and lands of claimed spiritual significance in those areas receive the same level of protection as areas that are currently used and settled by the group receive?

The BCSC held that the Tsilhqot'in had Aboriginal rights to hunt and trap throughout the entire claim area (traditional lands) despite evidence of no or limited use of certain regions for almost a century. Further the Court held forestry activities authorised by the BC government were an unjustified infringement on their Aboriginal rights.

In the context of the scenario to be discussed these findings should be noted. This finding was upheld by the BCCA and neither Canada nor BC appealed this finding at the SCC.

### **3. Tools and Mechanisms for Managing Lands Subject to Aboriginal Claims**

Now the challenge will be how to resolve outstanding claims for title in an efficient manner. While there have been some success in the Courts, the process is very time consuming and costly. The progress in negotiations has also been very slow and costly. That said, Negotiated agreements that aim to accommodate Aboriginal interests are in many cases the better option.

In the wake of Tsilhqot'in it is clear that consultation and accommodation play important roles in the process. Further, where the Aboriginal group has established title, "consent" for certain activities may be required or the government must justify the infringement.

Things to consider:

- Co-management agreements for certain lands – including agreements with Aboriginal groups and other third parties and/or both levels of government
- Time limited agreements – that are reviewable at specific intervals to ensure that the agreements continue to meet the needs of all parties over the course of time
- Limited agreements – agreements that clearly highlight differences of opinion with respect to certain subjects and agreements that only propose to resolve certain issues (this could be accomplished with preambles, purpose clauses or statements, non-assertion or non-derogation clauses – that protect the parties' respective interests in litigation for the duration of the agreement and/or afterwards.

For example, the Eyford Report recommended that Canada move forward with the negotiation of such agreements, stating:<sup>1</sup>

Canada should take steps to negotiate non-treaty, government-to-government arrangements such as consultation protocols, incremental treaty measures, and reconciliation agreements with Aboriginal groups, independent of or in collaboration with British Columbia.

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<sup>1</sup> Douglas R. Eyford, "Forging Partnerships: Building Relationships – Aboriginal Canadians and Energy Development" a report to the Prime Minister, 29 November 2013.



Canada should enter into negotiations to advance reconciliation measures in areas of federal jurisdiction and responsibility in response to proposals from Coastal First Nations and Haida Nation.

Properly structured non-treaty agreements can provide a significant degree of predictability and clarity, which is all that most negotiated arrangements provide in practical terms. A variety of legal tools are available for accommodating Aboriginal claims including:

- Term lease agreements for use of the land – this could be employed to manage a variety of land uses;
- Licences for exclusive use and occupation of certain defined lands – again this could be employed to manage a variety of uses including economic development projects, resources harvesting licences or trap line management;
- A grant of a determinable or conditional fee in land – land would automatically revert back to the Crown if lands were no longer required by Aboriginal users and the agreement may be indefinite in duration;
- Land management and/or land use agreements that set out a framework for joint land-use planning, resource management and revenue sharing;
- Designation of lands as parks or other protected areas (for wilderness protection, education, study) or land withdrawals to preserve and protect lands from development; and
- Resource revenue sharing agreements.

Tools such as these have helped to manage interests and expectations of parties in some provinces, and many First Nations who have expressed frustration at the sweeping nature of modern treaties may be attracted to them.

## **Conclusion**

I hope that you have found this additional information useful and that it provided you with some additional information that will aid in the discussion in relation to the scenario. If you have any questions please feel free.

Thank you.