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Tsilhqot'in Nation v. British Columbia (The Williams Case)



T*silhqot'in Nation v. British Columbia, 2007 BCSC 1700*, referred to by some as the Williams case, consumed 339 days of trial time between November 2002, and April 2007.

The Court sat in Victoria and, for 5 weeks, in the Naghataneqed Elementary School in the Nemiah Valley.

Thirty counsel represented the interests of the three parties. Chief Roger Williams, as the representative plaintiff, sued on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation, with both the Province of British Columbia (Forestry) and the Attorney General of Canada as Defendants.

Chief William sought declarations of Aboriginal title over lands in the Cariboo Chilcotin region of British Columbia, commonly known as the Brittany Triangle and the Trapline Territory. When the trial concluded in mid-April of 2007, it finished almost 17 years to the day after the Trapline action was commenced (April 18, 1990). Mr. Justice Vickers issued his Reasons for Judgment on November 20, 2007, almost 9 full years after the Brittany Triangle action was commenced (December 18, 1998).

Since November 20, 2007, the case has been the source of much commentary. The reflections that follow can be added to the mix of voices, pro and con, that have already spoken and many that will certainly have something still to say.

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What the decision in *Tsilhqot'in* does *not* do is create new law. Instead, what it does is bring together in one place a restatement of the fundamental principles applicable to discernment by the courts of the existence of Aboriginal rights, including Aboriginal title. The decision serves also as a useful example of the application of those fundamental principles. Last, but by no means least, Mr. Justice Vickers, through the Reasons for Judgment, provides social commentary and an invitation to government, both provincial and federal, to move ahead with a reconciliation process.

While many may express reservations about this last point, namely social and political commentary as part of the decision-making process, the criticism of some commentators on that aspect of the *Tsilhqot'in* judgment ignores the usefulness and clarity otherwise provided by Mr. Justice Vickers for the benefit of the parties. Indeed, as Mr. Justice Vickers observed,

I took the invitation by counsel to express an opinion on Tsilhqot'in Aboriginal title to be an invitation to go where the evidence lead me. I acknowledge that in expressing this opinion, I am doing precisely what I was uncomfortable with in the course of the trial, namely setting boundaries that are ill defined and not contained within usual metes and bounds.¹

Background Facts

While the principal relief sought was a declaration of Aboriginal title, additional claims included declarations of Tsilhqot'in Aboriginal rights to hunt and trap and to trade in furs, pelts, and other animal products. The case raised squarely the issue of application of provincial forestry legislation and the forest licence process to harvesting on Aboriginal title lands and questions of infringement of Aboriginal title, including what damages might flow from that. As observed by Mr. Justice Vickers,

The triggering events for these proceedings were proposals to harvest timber in the Claim Area. There is a fundamental dispute between the Province and Tsilhqot'in people on the issue of land use. The result of this litigation has been to bring logging in the Claim Area to a halt.²

¹ *Tsilhqot'in Nation v. British Columbia, 2007 BCSC 1700, para. 958*

² *Tsilhqot'in Nation, para. 98*

He described the Tsilhqot'in as a distinct Aboriginal group that had occupied the Claim Area for over 200 years. Though semi-nomadic and clearly moving with the seasons, looking at the evidence as to village sites, cultivated fields, and "a well defined network of trails and waterways," he concluded that

Tsilhqot'in people occupied and used the land, the rivers, the lakes, and the many trails as definite tracts of land on a regular basis for the hunting, trapping, fishing and gathering. This is the land over which they held exclusionary rights of control: Marshall; Bernard at para. 77. This was the land that provided

security and continuity for Tsilhqot'in people at the time of sovereignty assertion: Sappier; Gray at para. 33.³

Evidence was tendered in fields of archaeology, anthropology, history, cartography, hydrology, wildlife ecology, ethnoecology, ethnobotany, biology, linguistics, forestry, and forest ecology.

Looking at almost 5 centuries of history, from the arrival of Sir Francis Drake along the Pacific coast in 1579, through the landing of Captain James Cook at Nootka Sound in 1778 and Captain Meares' annexation of the Straits of San de Fuca in 1788, to Captain George Vancouver's assertion

³ *Tsilhqot'in Nation*, para. 960

of sovereignty in 1792 and the establishment by the Hudson's Bay Company post at Fort Chilcotin in 1829, it is the Treaty of Oregon in 1846, dividing the United States and British territory west of the Rockies at the 49th parallel, that Mr. Justice Vickers concludes (as the Supreme Court previously in *Delgamuukw*⁴ and *Haida First Nation*⁵ had also done) was the "watershed date" for the assertion of sovereignty by the Crown over the Province, including the Claims Area.⁶

He rejected "a postage stamp approach to Aboriginal title." "It was government policy that caused them to alter their traditional lifestyle and live on reserves."⁷ He found ample evidence of payments made to the Chiefs of the Tsilhqot'in people by fur traders and others by way of presents or allowance for passage through Tsilhqot'in territories and lands.⁸

He found as well evidence that passage through some portions of Tsilhqot'in territory by other Aboriginal peoples without permission would place "lives at risk."⁹ Finally, he found continuity of occupation and resource gathering by the Tsilhqot'in in the Claim Area.¹⁰

On the issue that had triggered the litigation, namely forest use, Justice Vickers noted that even though Premier Harcourt in 1992 had given an undertaking to the Tsilhqot'in chiefs that no harvesting would occur without consent, nevertheless the Chief Forester in 1996 fully incorporated the Claim Area into the timber harvesting land base and ignored the potential for Tsilhqot'in Aboriginal title, indeed did not take it into account as a relevant factor in his decision.¹¹

⁴ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 149

⁵ *Haida First Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, at para. 65

⁶ *Tsilhqot'in Nation*, paras. 585 through 601

⁷ *Tsilhqot'in Nation*, para. 610

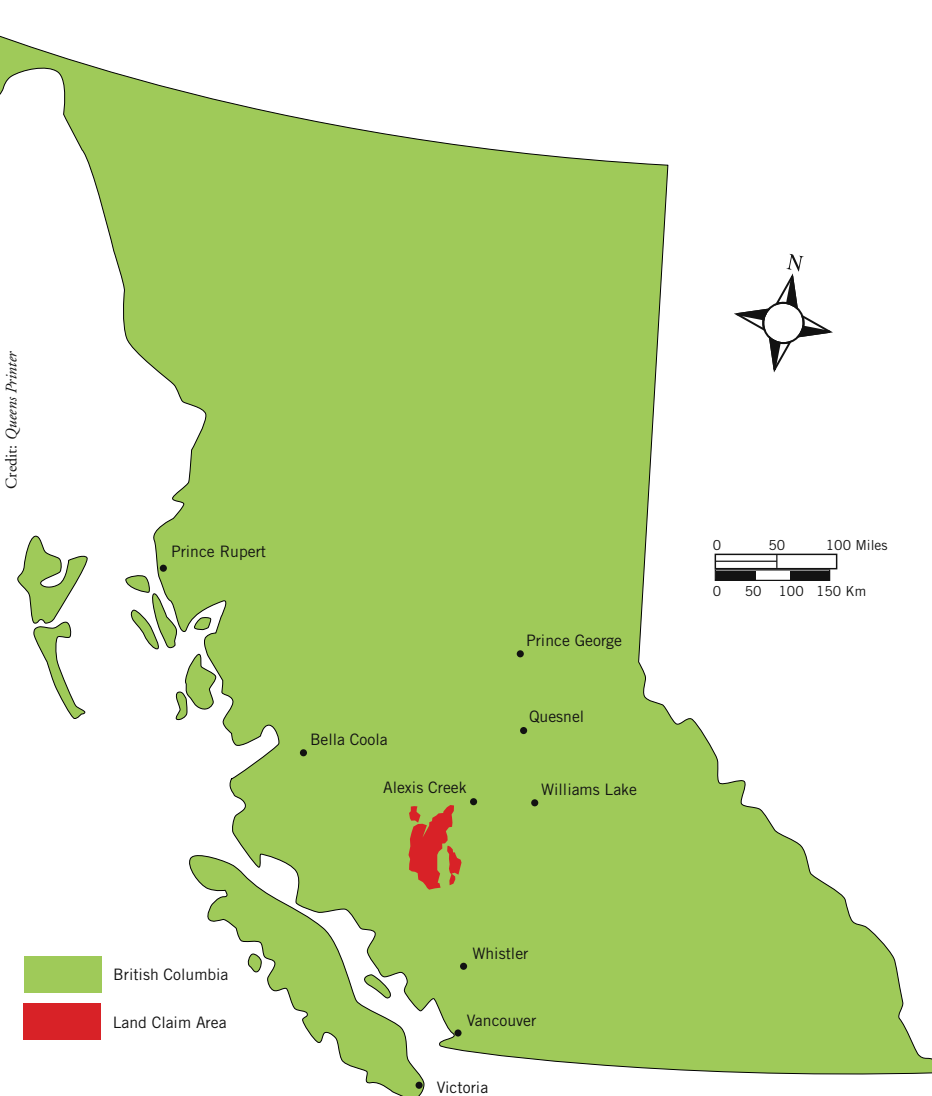
⁸ *Tsilhqot'in Nation*, para. 919

⁹ *Tsilhqot'in Nation*, paras. 929 through 937

¹⁰ *Tsilhqot'in Nation*, para. 949

¹¹ *Tsilhqot'in Nation*, paras. 1126 through 1128

Generalized Map of British Columbia showing the Claim Area



A 1992 local resource use plan, a 1993 draft Forest Management plan, and the 1994 Cariboo Chilcotin Land Use plan all failed to take into account any Tsilhqot'in Aboriginal title or Aboriginal rights that may exist.¹²

Examining the duty to consult, he observed that no accommodation was made by the Ministry of Forests for forestry proposals coming from the Tsilhqot'in people and that "from the perspective of forestry officials, there was simply no room to take into account the claims of Tsilhqot'in title and rights."¹³ It is against that background, both historical and current, that Mr. Justice Vickers reached his conclusions with respect to Aboriginal title issues.

Aboriginal Title Principles

This case does not create new law. Instead, it is a useful guide to the fundamental principles available to ascertain the existence (or not) of Aboriginal rights and title. It is helpful to re-examine those principles as restated in this case.

- 1 Aboriginal rights, including Aboriginal title, are communal rights. Aboriginal title is held communally and membership in the community must be determined by the Aboriginal community itself, not by others. Aboriginal title cannot be held by an individual Aboriginal person. Instead, it is a collective right held by all members of the community.¹⁴
- 2 Mr. Justice Vickers found that "the proper rights holder" was "the community of Tsilhqot'in people who shared "language, customs, traditions, historical experience, territory, and resources" but who had not necessarily come together as a recognized legal entity.¹⁵
- 3 Lands held pursuant to Aboriginal title cannot be transferred, sold,

12 *Tsilhqot'in Nation*, paras. 1132 through 1135

13 *Tsilhqot'in Nation*, para. 1139

14 *Tsilhqot'in Nation*, paras. 437 through 439 and para. 444

15 *Tsilhqot'in Nation*, paras. 469 through 470

or surrendered to anyone other than the Crown and, as a result, (are) inalienable to third parties.¹⁶

- 4 While rights are held communally, underlying title remains vested in the Crown.¹⁷
- 5 Aboriginal title "contains an inherent limit on the uses aboriginal peoples can make of their lands...lands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimant's attachment to those lands" (citing *Delgamuukw*).¹⁸
- 6 Aboriginal rights existed and were recognized by the common law prior to the enactment of section 35(1) of the *Charter of Rights* in 1982.¹⁹

This case does not create new law.

- 7 Aboriginal title to land is a subset of the broader concept of Aboriginal rights, not *vice versa*. Aboriginal rights do not depend upon proof of "an overarching or underlying aboriginal title."²⁰ As a consequence, "aboriginal title does not subsist everywhere where aboriginal rights are carried out, and aboriginal title does not exist everywhere in a group's exclusive traditional territory."²¹ Likewise, not all traditional territory or ancestral lands used by an Aboriginal people are necessarily subject to Aboriginal title and while specific activity on a specific tract of land may give rise to an Aboriginal right, it may not be sufficient to satisfy the test for Aboriginal title.²²

16 *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.) *Macfarlane J.A.*, para 113

17 *Tsilhqot'in Nation*, para. 508

18 *Tsilhqot'in Nation*, para. 510

19 *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 at para. 30

20 *Tsilhqot'in Nation*, para. 518

21 *Tsilhqot'in Nation*, para. 523

22 *Tsilhqot'in Nation*, para. 530

8 The three critical elements that must be proven to demonstrate Aboriginal title are

- (a) pre-sovereignty occupation (i.e., the lands in question must have been occupied at the time when the Crown asserted sovereignty);
- (b) exclusivity of occupation of the lands, demonstrated by the ability to exclude others; and
- (c) if not "an unbroken chain of continuity between present and prior occupation," certainly maintenance of "a substantial connection between the people and the land."²³

There must be "regular use or occupancy of definite tracts of land" not "occasional entry and use."²⁴

- 9 "Use and occupation" can be looked at both by "locating those sites that would have a measure of permanency attached to them so that they could be characterized as possible villages, dwelling sites, cultivated fields, camping sites, resource gathering sites and the like," as well as "from a land use perspective."²⁵
- 10 The interest of the Crown in Aboriginal title lands "is residual and is only perfected on surrender of the land by the aboriginal title holders."²⁶

The essence of Aboriginal title is conveniently summarized by Mr. Justice Vickers at page 170 of the decision where he observes as follows.

[538] To summarize, Aboriginal title is a species of Aboriginal right which differs from Aboriginal rights to engage in particular activities. It confers a *sui generis* interest in land, that is, a "right to the land itself." That interest can "compete on an equal footing

23 *Tsilhqot'in Nation*, paras. 542 through 549

24 *Tsilhqot'in Nation*, para. 583

25 *Tsilhqot'in Nation*, paras. 947 to 948

26 *Tsilhqot'in Nation*, para. 510

with other proprietary interests”: *Delgamuukw*, para. 113.

[539] Aboriginal title confers a right to exclusive use, occupation and possession to use the land for the general welfare and present-day needs of the Aboriginal community: *Delgamuukw*, para. 121.

Aboriginal title also includes a proprietary-type right to choose what uses Aboriginal title holders can make of their title lands. Title is subject to an inherent limit which is defined by “the nature of the attachment to the land which forms the basis of the particular group’s aboriginal title”: *Delgamuukw*, para. 111.

Such inherent limits prohibit those uses that would destroy the ability of the land to sustain future generations of Aboriginal peoples: *Delgamuukw*, para. 128.²⁷

What is the Impact of the Decision?

One central theme from the *Tsilhqot’in* decision emerges for Mr. Justice Vickers: There must be reconciliation and it must happen in a timely fashion. While he did not strike down the *Forests Act*, finding it to be general legislation not specific to the *Tsilhqot’in* lands, nevertheless Mr. Justice Vickers concluded that application of the provincial regulatory regime (including the planning component) did infringe Aboriginal rights and title.²⁸

As the Court observed, “to have any significance for Aboriginal people, Aboriginal title must bring with it the collective right to plan for the use and enjoyment of the land for generations to come.”²⁹

In considering the import of the *Tsilhqot’in* decision, the key is to remember that the Court concluded it could not make the declarations sought because of the way the case had been framed on the pleadings. Nevertheless, Justice Vickers, at the invitation of the parties, specifically identified areas or

27 *Tsilhqot’in Nation*, paras. 538 through 539

28 *Tsilhqot’in Nation*, para. 1054

29 *Tsilhqot’in Nation*, para. 1066

tracts of land that warranted “a finding of Aboriginal title.”³⁰ Having done so, having concluded that Aboriginal rights and title had been infringed by the Province, he struggled with what role the Court might play in a process of reconciliation:

The case demonstrates how the Court, confined by the issues raised in the pleadings and the jurisprudence on Aboriginal rights and title, is ill equipped to effect a reconciliation of competing interests. That must be reserved for a treaty negotiation process. Despite this fact, the question remains: How can this Court participate in the process of reconciliation between *Tsilhqot’in people, Canada and British Columbia in these proceedings?*³¹

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- [1369] The narrow role this court can play in defining *Tsilhqot’in* Aboriginal rights in the Claim Area lies in an application of the jurisprudence to the facts of this case. I can only hope that it will assist the parties in finding a contemporary solution that will balance *Tsilhqot’in* interests and needs with the interests and needs of the broader society.
- [1371] Recognition that Aboriginal people have historical rights to their ancestral homelands regardless of whether they had developed

30 *Tsilhqot’in Nation*, para. 959

31 *Tsilhqot’in Nation*, para. 1357

conceptions of “ownership,” “property,” or “exclusivity” quickly moves the debate to the real question: What interests are at stake and how are they to be reconciled?³²

He observed:

- [1375] I have come to see the Court’s role as one step in the process of reconciliation. For that reason, I have taken the opportunity to decide issues that did not need to be decided. For example, I have been unable to make a declaration of *Tsilhqot’in* Aboriginal title. However, I have expressed an opinion that the parties are free to use in the negotiations that must follow.³³

It is this commentary, “deciding issues that did not need to be decided,” the invitation to reconciliation and further negotiation and resolution through the treaty process, that have all perhaps attracted the most criticism of the *Tsilhqot’in* decision. Yet the role played by the Court here, as observed elsewhere in the decision, is a role previously played by Canada’s highest court and artfully articulated by Chief Justice McLachlin in the *Haida Nation* case, focusing on a vision of reconciliation through negotiated settlements.³⁴

It is not surprising, then, that Mr. Justice Vickers leaves with us and with government, federal and provincial, for our collective consideration these closing remarks.

As a consequence of colonization and government policy, *Tsilhqot’in* people can no longer live on the land as their forefathers did. How is a former semi-nomadic existence, one that cannot be replicated in a modern Canada, to be given “cultural security and

32 *Tsilhqot’in Nation*, paras. 1369 and 1371

33 *Tsilhqot’in Nation*, para. 1375

34 *Haida First Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, at paras. 20 and 32

continuity” in this twenty-first century and beyond? Governments and Tsilhqot’in people must find an accommodation that reconciles the historical Tsilhqot’in place in Canada with the place of their neighbours who come from all corners of the world.³⁵

We are left with this final observation.

Reconciliation is a process. It is in the interests of all Canadians that we begin to engage in this process at the earliest possible date so that an honourable settlement with Tsilhqot’in people can be achieved.³⁶

The legacy of the *Tsilhqot’in* decision is not the creation of new law. Some suggest it creates a platform from which new solutions to centuries-old issues may be found. Most lawyers and some politicians ask how one appeals a decision about “issues that did not need to be decided.” Whichever view one takes, the journey for the Tsilhqot’in, for Canada and for British Columbia, is far from over. ▲

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³⁵ *Tsilhqot’in Nation*, para. 1379

³⁶ *Tsilhqot’in Nation*, para. 1382