ABORIGINAL TITLE IS WHAT IT IS

Tsilhqot’in Nation v. BC
2014 Supreme Court of Canada 44
Paragraph 72

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I. INTRODUCTION

On June 26th, 2014 the Supreme Court of Canada (SCC) released its decision in Tsilhqot’in Nation v. British Columbia (Tsilhqot’in).¹ It is the first time Aboriginal title of a First Nation has been declared into law by the highest court in Canada. In previous SCC decisions, the Court acknowledged Aboriginal title exists. However, Tsilhqot’in is the first SCC decision to declare Aboriginal title exists over a specific tract of land converting approximately 2000 km² of Crown land into Tsilhqot’in title land. For that reason, legal scholars and political leaders have called the decision a game changer and opportunity for transformative change. The case acknowledges and vindicates what generations of First Nations people have been fighting for in courts, at political rallies, at negotiation tables, and through direct action. Tsilhqot’in is a historic decision for Aboriginal people in Canada and a landmark judgment in Aboriginal law. This paper will provide an overview of the decision and highlight legal principles established as the case proceeded through the BC Supreme Court (BCSC), the BC Court of Appeal (BCCA) and Supreme Court of Canada (SCC).

Ultimately, Tsilhqot’in is another push by the SCC towards reconciliation through negotiated agreements outside the courtroom. It is the first time the legal test to prove Aboriginal title set out in the Delgamuukw decision was successfully met.² In Tsilhqot’in, the SCC made an order declaring Aboriginal title exists and set out its’ key characteristics. The decision also re-states established law regarding the Crown’s procedural duty to consult with First Nations where Aboriginal title is asserted, before title is proven, confirming that the Crown has a spectrum of consultation duties proportionate to the strength of a Nation’s claim. Where a claim is particularly strong, the SCC established a new obligation for government to preserve the aboriginal interest. Another notable aspect of the decision is after title has been established; the Court found the Crown has a duty to seek the consent of the title-holder in order to use the land. The Court went further and set out serious consequences for those who infringe on Aboriginal title lands without consent of the title-holder.

Background to the Tsilhqot’in Case:

Tsilhqot’in Nation represents six communities: Tl’etinqox, ?Esdilagh, Yunesit’in, Tsi Deldel, Tl’esqox and Xeni Gwet’in. Their population is approximately 3,000 people. At trial, the original claim area comprised approximately 4,380 km² of the Nation’s traditional territory. The area included Xeni (Nemiah Valley) and much of the surrounding area, stretching north into Tachelach’ed (Brittany Triangle) and along the Tsilhqox (Chilko River) located in the interior of BC known as the Chilcotin region.

The issue that prompted the case was a conflict over timber harvesting within a pristine area of Tsilhqot’in territory. The Tsilhqot’in Nation opposed industrial logging, wanting to preserve the state of some of its traditional lands. The Nation also contested the Province’s right to allocate timber to third parties over its’ objections. The decision to launch an Aboriginal title case was an action of last resort.

¹ 2014 SCC 44. NB: Any citation to the Tsilhqot’in Supreme Court of Canada decision will only reference Para. # ² Delgamuukw [1997] 3 S.C.R. 1010
II. THE TSILHQOT’IN DECISION

A. CHARACTERISTICS OF ABORIGINAL TITLE

What Is Aboriginal Title?

The SCC decision clarified what Aboriginal title is: in brief, it is ownership and control. It is the right to derive economic benefits from the land and its resources, and the right to choose how lands will be used. The outcome of the Tsilhqot’in decision is that a new legal category of land ownership has been established in Canadian law.

The ruling stated that the characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. The court notes:

“It is this relationship that makes Aboriginal title unique and different from other forms of property ownership. Aboriginal title is what it is - the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership - for example - fee simple - may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or what it is not. As LaForest J. put it in Delgamuukw at Para. 190, “aboriginal title is not equated with fee simple ownership; nor can it be described with reference to traditional law concepts.” ³ [Emphasis added]

The decision sets out the key characteristics. Aboriginal title is:⁴

- **Collective in nature.** Aboriginal title is held collectively by the members of an Aboriginal group sharing language customs, traditions, historical experience, territory and resources at the time of European sovereignty assertion (1846 in BC). ⁵

- **Territorial.** Aboriginal title extends to territorial tracts of land that a Nation used exclusively and regularly.⁶

- **Economic benefits of the land and resources (beneficial rights).** The title-holders have the right to the benefits associated with the land—to use it, enjoy it, and profit from its economic development.⁷

- **Management rights.** Aboriginal title confers ownership rights similar to fee simple, including the right to decide how the land will be used and the right to proactively use and manage the land.⁸

³ Para. 72
⁴ Para. 67 - 76
⁵ Para. 74 & 86. The SCC Delgamuukw decision found the relevant date of assertion of European sovereignty in BC is 1846 when the Treaty of Oregon was signed between Canada & USA which established the border at the 49th parallel.
⁶ Para. 56 & 50
⁷ Para. 70
⁸ Para 73 & 94
Who Holds Aboriginal Title?

Aboriginal title is a collective right. For that reason, the SCC considered the question of who is the collective that holds aboriginal title. In other words, the court was asked to determine who is the proper rights holder? The Tsilhqot’in argued the Nation should be the proper rights holder, while the Province of BC maintained it should be the Indian Act Bands. The BC Supreme Court (BCSC) concluded:

“The proper rights holder ... is the community of Tsilhqot’in people. Tsilhqot’in people were the historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion. The Aboriginal rights of individual Tsilhqot’in people or any other sub-groups within the Tsilhqot’in Nation are derived from the collective actions, shared language, traditions and shared historical experience of the Tsilhqot’in Nation.”

The proper rights holder is determined by pursuing a fact-based inquiry that considers a number of factors. Significantly, the BC Court of Appeal (BCCA) considered the question and confirmed that the Aboriginal perspective of nationhood must be given greater weight:

“...the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself.”

“In the case before us, the evidence clearly established ... the Tsilhqot’in Nation, therefore, is the proper rights holder.”

The Supreme Court of Canada confirmed:

“Aboriginal title is vested in the Aboriginal group.”

Where was Aboriginal Title Recognized?

The Tsilhqot’in Nation’s original title claim was for 4,380 km² of their traditional territory. At the conclusion of hearing evidence following a 339-day trial, the BCSC found the Tsilhqot’in established title for approximately 40% of their claim area. The BCCA judgment dismissed that decision on Aboriginal title ruling the Tsilhqot’in had only proven Aboriginal rights to hunt and trap throughout their entire claim area. The BCCA decision was overturned when the SCC unanimously declared the Tsilhqot’in established title to approximately 2,000 km² of land. The SCC also confirmed Tsilhqot’in rights to hunt and trap throughout their entire territory.

Significantly, the SCC found that Aboriginal title is territorial in nature. That is, Aboriginal title is not limited to intensively used, small specific sites, as the Province argued (such as salt licks, fishing rocks, and buffalo jumps) – referred to as the postage stamp theory of Aboriginal title. Rather, the SCC recognized Tsilhqot’in Aboriginal title exists to tracts of land that were regularly used for hunting and fishing, or for otherwise utilizing resources.

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9 2007 BCSC Para. 470
10 2012 BCCA 285. Para. 149
11 BCCA Para. 150
12 SCC Para. 112 & 115
How is Aboriginal Title Recognized?

The Court set out that Aboriginal title can be established through a negotiated agreement or by declaration after proving title in court.14

An Aboriginal group asserting title in court must meet the legal test to prove title according to the following three criteria:15

- **Sufficient pre-sovereignty occupation:** This means proof of regular use prior to the assertion of European sovereignty (in 1846).16 The evidence is considered in the context of how the land was used, the carrying capacity of the land,17 and from the Aboriginal perspective.18 For the Tsilhqot’in, sufficient pre-sovereignty occupation extended to territorial tracts of lands used for hunting, fishing or use of other resources that reflected their nomadic and semi-nomadic way of life.19

- **Continuous occupation:** Where present occupation is relied on as proof of pre-sovereignty occupation, continuity must be rooted in pre-sovereignty times.20

- **Exclusive historic occupation:** The Aboriginal group must have had the intention and capacity to retain exclusive control over the lands at the time of sovereignty. For example, proving that others requested permission or made treaties with other aboriginal groups to access the land.21

Are There Limitations to Aboriginal Title?

Aboriginal title has two limitations that are unique from other forms of land ownership in Canada. Firstly, it is inalienable, meaning the title-holder cannot sell Aboriginal title land to a third party. The title-holder may only permanently divest Aboriginal title land by surrendering it to the Crown after obtaining consent from its members.

Secondly, there is an inherent limitation to Aboriginal title. This means that lands cannot be used to substantially deprive future generations from benefit of the land. However, some changes—even permanent changes to the land—may be possible. Whether a particular use is irreconcilable for succeeding generations to benefit from the land is a matter to be determined as issues arise.22

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14 Para. 90
15 Para. 30
16 See Note 7
17 Para. 37 & 60
18 Alongside common-law notion of possession as a basis for title (Para. 34 & 35; 41)
19 Para. 38
20 Para. 46
21 Para. 47 & 48
22 Para. 74
B. AFTER TITLE HAS BEEN ESTABLISHED

Government Must Seek Consent of Title-holder:

The SCC emphasizes that Aboriginal title confers on the title-holding group the exclusive right to decide how the land is used and to benefit from those uses. ²³ However, in certain situations the law allows the Crown to exercise authority over Aboriginal title land. The legal term for this type of interference is *infringement*. The SCC makes the Crown’s legal obligations clear in circumstances where a government wants to infringe title-lands. **Prior to the infringement occurring, the government must:**

- **Seek consent** from the Aboriginal group to interfere with title-lands;
- **Then, if the government cannot obtain consent, it must demonstrate that infringement is justified.** ²⁴

To reiterate, because Aboriginal title carries with it the right to control the land, governments must obtain the consent of the Aboriginal title-holder for proposed activities on those lands. The Court emphasizes many times throughout the decision that obtaining a First Nation’s consent to a proposed project is the clearest way to justify infringement: ²⁵

> “Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.” ²⁶

[Emphasis added]

**To justify infringement on Aboriginal title lands without consent** of the Aboriginal title-holder, the Crown must follow these procedural steps: ²⁷

- Undertake the Crown’s legal procedural duty to consult and accommodate,
- Demonstrate a compelling and substantial public objective for the proposed activity, and
- Ensure the objective is consistent with the fiduciary duty owed to the Aboriginal group.

Once a compelling and substantial public objective is established, the government must show the objective to be consistent with the Crown’s fiduciary duty toward the Aboriginal collective. To determine whether the fiduciary duty has been met to justify infringement, the Court provides the following rules: ²⁸

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²³ Para. 88 – subject to the inherent limit
²⁴ Para. 90
²⁵ Para. 76, 88, 90, 91, 92, 97
²⁶ Para. 97
²⁷ Para. 88
²⁸ Para. 85-88
• **Inherent Limitation:** The proposed activity cannot substantially deprive future Aboriginal generations of benefit of the land.

• **Rational Connection:** The proposed activity must be necessary to achieve the government’s goal.

• **Minimal Impairment:** The Crown can go no further than necessary to achieve its objective.

• **Proportionality of Impact:** The benefits that may be expected to flow from the goal are not outweighed by adverse effects on the Aboriginal interest.

• **Reconcile Aboriginal Interest and Broader Public Objective:** The objective must further the goal of reconciliation.

In summary, Aboriginal title confers significant rights for the title-holder (including the right to use, enjoy, profit from, and proactively manage the land). Yet these rights are not absolute. The Crown maintains the ability to infringe Aboriginal title according to a strict legal process. However, justification for infringement is limited and weighted in favour of preserving the Nation’s interest.

**Do Provincial Laws Apply to Aboriginal Title Lands?**

Generally speaking, Provincial laws apply to Aboriginal title lands, but the test for infringement applies. 29 For example, the SCC found that general regulatory legislation, such as laws that seek to manage the forests to deal with pest invasions and prevent forest fires will likely apply. 30 However, the SCC held that legislation that assigns Aboriginal property rights to third parties is a serious infringement that will not be lightly justified. 31 The Court found that issuing forest licenses to third parties is a direct transfer of Aboriginal property rights that meaningfully decreases ownership and therefore is an infringement that must be justified in cases done without Aboriginal consent. 32

**C. BEFORE TITLE IS ESTABLISHED**

**Can the Crown Make Land Use Decisions without Including First Nations?**

Even where Aboriginal rights or title are unproven, the decision restates established law regarding the Crown’s duty to consult. 33 These duties continue to apply to activities undertaken or decisions made by the Crown that may affect asserted but unproven title:

“Prior to establishment of title by Court declaration or agreement, the Crown is required to consult in good faith with any aboriginal groups asserting title in the land about proposed uses of land and, if appropriate, accommodate the interest of such claimant groups.” 34

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29 Para. 101 & 120  
30 Para. 123  
31 Para. 127  
32 Para. 124  
33 Haida 2004 SCC 73 and Taku 2004 SCC 74  
34 Para. 89
Further, the Court confirmed the Crown’s spectrum of duties for consultation corresponds directly to the strength of a Nation’s claim.\textsuperscript{35} For example, at one end of the spectrum, when a Nation asserts title, the standard duty of consultation and accommodation is triggered. In the middle of the spectrum, when a Nation makes a strong case for title, there is a rising level of the duty to consult. At the other end of the spectrum, after title is established the Crown must seek consent to infringe Aboriginal title lands (if consent is not obtained, the justification test applies).

The SCC also introduced a new responsibility for the Crown to preserve the Aboriginal interest in cases with strong title-claims:

“Where a claim is particularly strong – for example, shortly before a Court declaration of title– appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim.” \textsuperscript{36}

Notably, the Court held that the Tsilhqot’in Nation had a strong claim to title when the Crown engaged in forestry planning and activities on the claim area. This meant the duty to consult was at the high end of the spectrum, triggering the requirement for Crown to preserve the Tsilhqot’in interest:

“As the Tsilhqot’in had a strong prima facie claim to the land at the time of the impugned government action and the intrusion was significant, the duty to consult owed by the Crown fell at the high end of the spectrum...and required significant consultation and accommodation... to preserve the Tsilhqot’in interest.” \textsuperscript{37}

Overall, the decision heightens the Crown’s duty to consult and accommodate before title is established. The SCC emphasizes the requirement to seek consent of the Aboriginal group and gives special attention to the Crown’s duty to protect the Aboriginal interest. Further, once Aboriginal title is established, the Crown and industry may risk serious legal consequences if the project proceeded without consent or if the Crown cannot meet the justification test. Ultimately, these measures reflect another SCC push to establish a consent-based regime both before and after title is established.\textsuperscript{38}

**Consequences of Unjustified Infringement on Aboriginal Title Land:**

Another significant finding of the decision is directly related to the Crown’s consultation duty. That is, the Court set out a range of possible consequences for infringing on Aboriginal title land without obtaining consent and/or justifying that infringement. Although these consequences take effect after title is established, specific breaches of Crown duties were triggered before title, during the assertion of title stage:

“Once title is established, it may be necessary for the Crown to reassess prior conduct...For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of title if continuation of the project would be unjustifiably infringing.” \textsuperscript{39}

[Emphasis added]

\begin{flushleft}
\textsuperscript{35} Para 91
\textsuperscript{36} Para. 91
\textsuperscript{37} Para. 93
\textsuperscript{38} Para. 97
\textsuperscript{39} Para. 92
\end{flushleft}
The alleged breach in this case arises from the issuance by the Province of licenses permitting parties to conduct forestry activities and construct infrastructure on the land in 1983 and onwards, before title was declared … when Crown officials engaged in the planning process for the removal of timber … approval of cut blocks in a forest development plan … and allocation of cutting permits all occurred without meaningful consultation with the Tsilhqot’in. During this time, the Tsilhqot’in held a legal interest in the land that was not yet legally recognized.”

[Emphasis added]

Another major incentive for the Crown to seek consent before title, is the possibility for past damages from unauthorized resource extraction after title is established. In the decision, the Court refers to the availability of damages:

“If the Crown fails to discharge its duty to consult [pre-proof] various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out…. The usual remedies that lie for breach of interest in the land are available.”

III. CONCLUSION

Summary & Implications of the Decision:

The Tsilhqot’in case is a landmark judgment by the SCC. It is the first time the legal test to prove title set out in Delgamuukw was successfully met. The Tsilhqot’in established Aboriginal title to approximately 2,000 km² of land. The decision established that Aboriginal title extends to territorial tracts of land regularly and exclusively used by the claimant group. It clarifies that title means ownership, control, management, and the right to derive economic benefits from the land. The decision restates that Aboriginal title is a collective right and found an answer to the question of who is the collective group that holds title: the historic community of people sharing language, customs, traditions, historical experience, territory, and resources at the time of assertion of European sovereignty.

Aboriginal title has unique attributes that distinguish it from other forms of land ownership in Canada. For example, it is inalienable, and cannot be sold to a third party. Furthermore, it has an inherent limitation that the land cannot be used to substantially deprive succeeding aboriginal generations (the title-holders) from benefit of the land. The Court set out that Aboriginal title may be established through a negotiated agreement or by court declaration after proving title according to strict legal tests. The Court noted that proving title is a fact-specific inquiry based on evidence provided that must meet the following criteria:

a) Sufficient pre-sovereignty occupation
b) Continuous occupation, and
c) Exclusive historic occupation.

40 Para. 96
41 Para. 89
42 Para. 90
Before title is established, there is a heightened emphasis on the Crown’s legal duty to consult and accommodate First Nations. The strength of claim must be assessed, and where there is a strong title-claim, there is a rising level of the consultation duty. As the Aboriginal group moves closer to establishing title, the new obligation for the Crown is to ‘preserve the Aboriginal interest’.

After-title is established, the Crown must seek consent from the title-holder for proposed activities on title-lands. If consent is not obtained, the Crown may still infringe on Aboriginal title, but only if it can demonstrate a compelling and substantial public objective for the proposed activity and ensuring it is consistent with the fiduciary duty owed to the Aboriginal group.

Most importantly, the risk and consequences of inadequate consultation have significantly increased for the Crown. For that reason, the approach advocated by the SCC is for government to seek consent for land-use decisions before or after title is established.43 Although consent is not a legal requirement, seeking consent as a procedural matter before-title is established may become a practical reality for government and industry.

**Formulate an Aboriginal Title Strategy:**

In the wake of *Tsilhqot’in*, First Nations are in a situation where action is required. The decision should be maximized to its potential. Yet, many questions remain to be answered and much work remains to be done. Upon review of the decision, and the succeeding action or lack of action from the Province, it is clear that the onus is on First Nations to organize internally and exert pressure on the Crown for reconciliation.

Looking forward, the question is how best to leverage this decision for transformative change. Considering the experience post-*Delgamuukw*, it is likely the Province will defer a response as long as possible. As a result, a passive response from First Nations would probably invite the status quo. Alternatively, action without deliberate thought or coordination will fail to maximize limited resources and could undermine a Nation’s reputation and its relationships. What is required is the development of an Aboriginal title strategy—a high level plan to achieve goals and objectives under conditions of uncertainty. A well-organized, proactive strategy will empower a First Nation to leverage this decision and set the agenda for reconciliation of their traditional title lands.

*Tsilhqot’in* makes it clear that reconciliation is the lens through which the Courts are making decisions on Aboriginal title:

> “What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society.” 44

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43 Para. 97
44 Para. 23