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Chapter 14B
MAPPING THE TERRITORY: ABORIGINAL TITLE AND THE DECISION IN *TSILHQOT'IN NATION V. BRITISH COLUMBIA*

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Synopsis

§ 14B.01 Introduction*

On June 26, 2014, the Supreme Court of Canada released a groundbreaking decision in *Tsilhqot'in Nation v. British Columbia*.[1] The Court granted the Tsilhqot'in Nation a declaration of Aboriginal title to approximately 1,700 square kilometers (km^2) of land in British Columbia. This decision is important as it is the first ever actual declaration of Aboriginal title in Canada.

Although the law relating to Aboriginal title in Canada is fairly "new" and not fully developed, the underlying issue is one of the oldest issues in the country—predating the creation of Canada itself. Since the earliest days of colonialism, the "land question" as it pertains to the rights of indigenous peoples has been discussed and debated. Clearly, that debate is still with us, and the discussion needs to continue.

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[1] 2014 SCC 44, [2014] 2 SCR 256.

The purpose of this chapter is to place the *Tsilhqot'in* decision in the broader context of Aboriginal title and indigenous land rights in Canadian law. Section 14B.02 provides a brief overview of the three basic legal regimes for Aboriginal land rights in Canada, namely historic treaties, modern treaties, and non-treaty areas. Section 14B.03 reviews the decision in *Tsilhqot'in* with a particular emphasis on the legal test articulated by the Supreme Court of Canada for the sufficiency of occupation required to establish proof of Aboriginal title. Section 14B.04 discusses the potential implications of the decision and some of the key remaining unanswered questions.

The *Tsilhqot'in* decision marks an important new chapter in a still-unfolding story of the effort to reconcile land rights of indigenous peoples, governments, and private interests.

§ 14B.02 Aboriginal Land Legal Regimes in Canada

In broad terms, Aboriginal land rights in Canada can be generally divided into three legal frameworks: (1) lands covered by historical treaties, (2) lands covered by modern treaties or comprehensive land claim agreements, and (3) lands not covered by treaties (whether historical or modern). Understanding the nature of these three legal regimes will enable a contextual appreciation for the *Tsilhqot'in* decision, its importance, and its implications.

[1] Historical Treaties

The historic treaty-making process occurred largely between the early 1700s and the 1920s. Detailing every historical treaty is beyond the scope of this chapter, but for present purposes, historical treaties can be grouped into two categories: those that include a land rights "surrender" provision and those that do not. Some of the earliest historical treaties—including for example the Treaties of Peace and Neutrality (1701–1760) and the Peace and Friendship Treaties (1725–1779), which cover the eastern maritime regions of Canada—do not include land rights surrender provisions.[2] By contrast, many of the later historical treaties contain a surrender provision that involved land cessions by Aboriginal signatories in exchange for various monetary payments and ongoing obligations on the Crown.[3] The largest grouping of historical treaties is what is known as the "Numbered

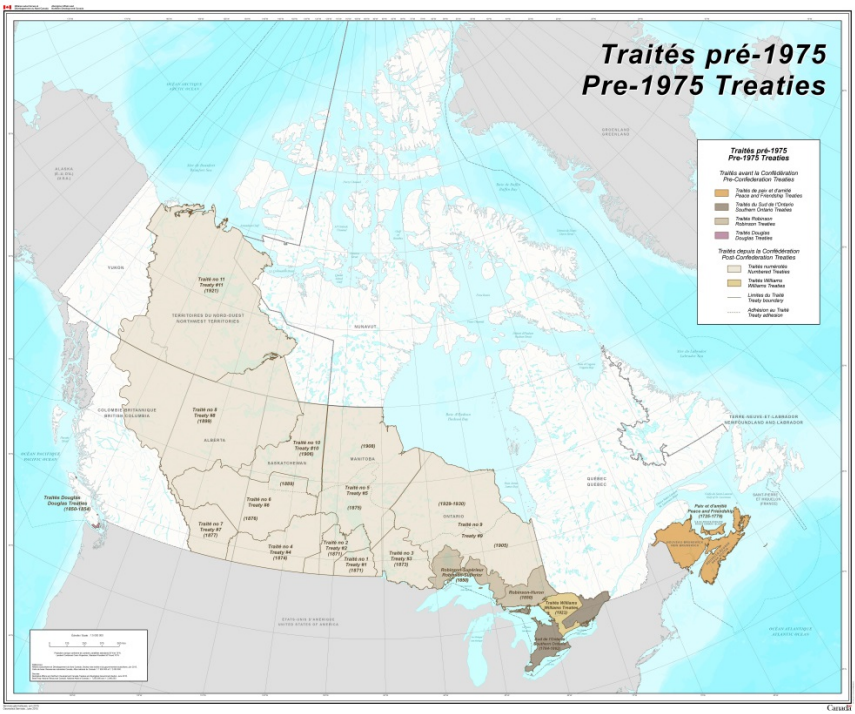
[2]Generally speaking, these treaties addressed issues such as the protection of village sites, the right to trade with the British, and the protection of traditional practices. The rich jurisprudence regarding the interpretation of these historic treaties is beyond the scope of this chapter. *See, e.g.*, *R. v. Marshall*, [1999] 3 S.C.R. 456; *Simon v. The Queen*, [1985] 2 S.C.R. 387.

[3]*See, e.g.*, Upper Canada Land Surrenders and the Williams Treaties (1781–1862/1923); Robinson Treaties (1850); Douglas Treaties (1850–1854).

Treaties." Entered into between 1871 and 1921, these treaties reached from what is now Ontario, across the prairies (Manitoba, Saskatchewan, and Alberta) and portions of the northern territories, to the northeast of British Columbia. The Numbered Treaties contemplated the surrender of lands in exchange for reserves, payments, and the continued right to hunt and fish in the surrendered areas.[4]

Figure 1 shows the approximate location and boundaries of historical treaties in Canada.

Figure 1. Pre-1975 Treaties[5]



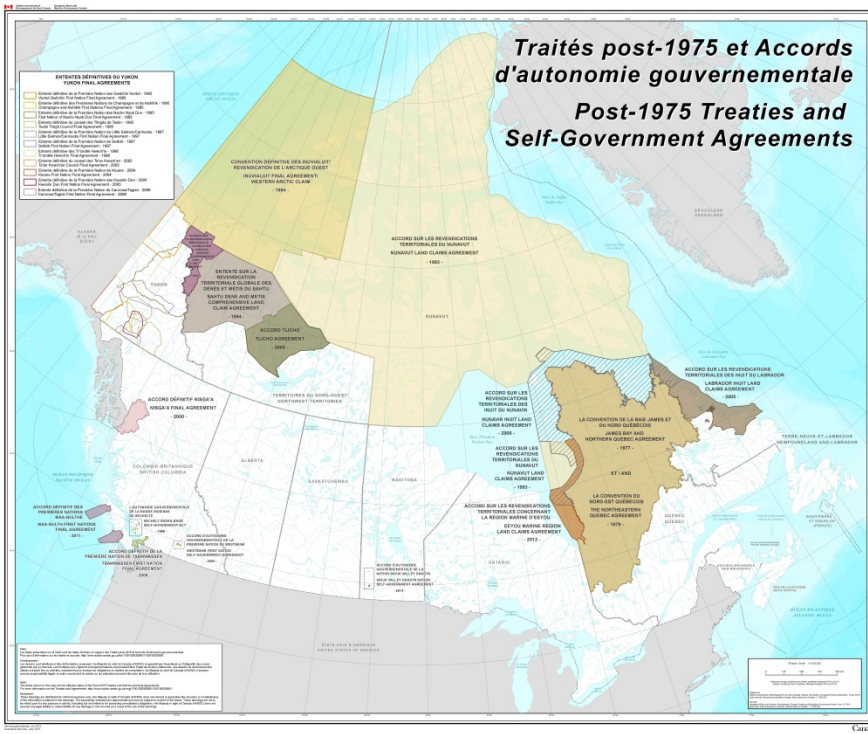
[4]For example, Treaty 8 states that "the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits . . . ." Treaty No. 8 (1899). While there are many issues (and voluminous jurisprudence) regarding the interpretation of such historic treaties, the Supreme Court of Canada has confirmed that the effect of the treaty is to convert the area to "surrendered" lands—albeit subject to ongoing Crown obligations, including the duty to consult. *See Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388.

[5]Aboriginal Affairs & Northern Development Canada (AANDC) (June 2015). Available in high resolution, in color, at www.rmmlf.org/proceedings.

common. Treaties have been concluded in northern Quebec and Labrador.[13] In British Columbia, the province with the largest concentration of non-treaty lands and over 200 First Nations, there are only a handful of modern treaties.[14]

Figure 2 depicts the boundaries of modern treaties in Canada.

Figure 2. Post-1975 Treaties and Self-Government Agreements[15]



Many of the modern treaties/land claim agreements employ language similar to the "cede, release, surrender" language used in the historic

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[13] Quebec: James Bay and Northern Quebec Agreement (1977), Northeastern Quebec Agreement (1978), Nunavik Inuit Land Claims Agreement (2008), Eeyou Marine Region Land Claims Agreement (2012); Labrador: Labrador Inuit Land Claims Agreement (2005).

[14] *See* Nisga'a Final Agreement (2000); Tsawwassen First Nation Final Agreement (2009); Maa-nulth First Nations Final Agreement (2011). In April 2016, the Yale First Nation Final Agreement will become effective.

[15] AANDC (June 2015). Available in high resolution, in color, at www.rmmlf.org/proceedings.

Numbered Treaties.[16] Other more recent modern treaties employ alternative language that purports not to extinguish Aboriginal land rights but rather to "modify" those interests by way of the terms of the modern treaty.[17] However, all of them purport to limit and define the Aboriginal group's land rights.

[3] Non-Treaty Areas: Pre-*Tsilhqot'in* Jurisprudence

In 1997, the Supreme Court of Canada would again be called on to address the issue of Aboriginal title in the seminal case of *Delgamuukw v. British Columbia*.[18] When initially commenced in 1984, the Gitksan and Wet'suwet'en's claim was to "ownership" and "jurisdiction" of the lands. By the time it reached the Supreme Court of Canada, the claim had been recast for Aboriginal title and self-government.

The Court confirmed the existence of Aboriginal title, which it described as a *sui generis* interest,[19] and summarized its content by two propositions—one positive, one negative:

(1) "[A]boriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes"; and

(2) "[P]rotected uses must not be irreconcilable with the nature of the group's attachment to that land."[20]

To establish title, the Aboriginal group must prove (1) the land was occupied prior to the time at which the Crown asserted sovereignty over the land; (2) if present occupation is relied on as proof of occupation pre-sovereignty, continuity between present and pre-sovereignty occupation must exist; and (3) at sovereignty, that occupation must have been exclusive.[21] Any infringements of Aboriginal title by the Crown require

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[16] *See, e.g.*, Umbrella Final Agreement Between the Government of Canada, the Council for Yukon Indians, and the Government of the Yukon § 2.5.1.4 (1993).

[17] *See, e.g.*, Tsawwassen First Nation Final Agreement, at pmbl. H (2007) ("Tsawwassen First Nation's existing aboriginal rights are recognized and affirmed by the *Constitution Act, 1982*, and the Parties have negotiated this Agreement under the British Columbia Treaty Commission process to provide certainty in respect of those rights and to allow them to continue and to have the effect and be exercised as set out in this Agreement.").

[18] [1997] 3 S.C.R. 1010.

[19] *Id.* paras. 112–15.

[20] *Id.* para. 117.

[21] *Id.* para. 143.

justification that (1) the infringement is in furtherance of a legislative objective that is "compelling and substantial," and (2) the infringement is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples.[22]

While the existence of title was confirmed, ultimately the Court did not issue the Gitksan and Wet'suwet'en any actual declarations of Aboriginal title due to defects in the pleadings. Aboriginal title was established firmly as a legal concept, but one that had yet to hit the ground.

In the wake of *Delgamuukw*, many Aboriginal groups in British Columbia commenced lawsuits to preserve their claim to Aboriginal title. The vast majority of these "protective writs" were filed to avoid concerns about possible limitation period arguments. Most of these claims have not proceeded; instead, they have been placed in abeyance while land claim negotiations (and/or other litigation test cases) are underway.

In 2005, the Supreme Court of Canada again addressed Aboriginal title in *R. v. Marshall* and *R. v. Bernard*.[23] The Court clarified that exclusivity requires proof of "effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so."[24] The Court went on to state that exclusivity is to be determined on the facts of each case, but in every case "the question is whether a degree of physical occupation or use equivalent to common law title has been made out."[25] On the facts, the Court found that the claim of Aboriginal title had not been made out. Aboriginal title remained a legal concept well established in theory, but it would not hit the ground until the Supreme of Canada's decision in *Tsilhqot'in*.

[4] The Duty to Consult: A Means to Protect Aboriginal Rights Including Title Pending Determination

With Aboriginal title firmly established as a concept, but not yet existing on the ground, attention turned to the question of what the Crown's obligations were prior to proof of the claim. The answer came in 2004: the Crown's duty to consult. The duty to consult is grounded in the honour of the Crown and is triggered when (1) the Crown has knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) the Crown

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[22] *Id.* paras. 161, 162.

[23] *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220.

[24] *Id.* para. 65.

[25] *Id.* para. 66.

contemplates conduct; and (3) such conduct if pursued may adversely affect an Aboriginal claim or right.[26] The Crown's duty to consult ensures that Aboriginal groups' interests will be adequately considered in the decision-making process; it does not give Aboriginal groups "a veto over what can be done with the land pending final proof of claim."[27] The Supreme Court of Canada has also considered the application of the duty to consult in the context of historic[28] or modern[29] treaties.[30]

§ 14B.03 Proving Aboriginal Title in the Courts: *Tsilhqot'in Nation v. British Columbia*

The Supreme Court of Canada's decision in *Tsilhqot'in* was the culmination of an extremely long legal proceeding. The original claim was brought against the Province and a number of timber companies in 1983 to stop timber harvesting in the Tsilhqot'in's traditional territory, located in the Cariboo-Chilcotin region of British Columbia. In 1998 (following the *Delgamuukw* decision in 1997), the original claim was amended to include a claim for Aboriginal title on behalf of all Tsilhqot'in people. The claim did not encompass the entire asserted traditional territory of the Tsilhqot'in, but was confined to an area that was approximately 5% of this territory (Claim Area).

[1] Trial Court Decision: The Territorial Approach to Aboriginal Title

The trial took over five years to complete, occupying 339 days of court time. The trial court declined to make a declaration of Aboriginal title over the Claim Area.[31] The court's refusal to grant Aboriginal title was grounded in what it found to be a deficiency in the pleadings. In particular, the Aboriginal group had pled a claim to the entire Claim Area and

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[26] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, para. 35; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, para. 31.

[27] *Haida*, 2004 SCC 73, para. 48.

[28] *See Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388.

[29] *See Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103.

[30] For further discussion, see Chris W. Sanderson, Q.C., Keith B. Bergner & Michelle S. Jones, "The Crown's Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose, and Limits of the Duty," 49 *Alta. L. Rev.* 821 (2012).

[31] *See Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700.

nothing less. However, the court did provide a non-binding "opinion" that the evidence proved Aboriginal title to a significant portion of the Claim Area, amounting to approximately 1,900 square kilometers, slightly less than half of the Claim Area.

[2] Court of Appeal Decision: The Site-Specific Approach to Aboriginal Title

The British Columbia Court of Appeal upheld the dismissal of the claim for Aboriginal title, but did so for different reasons.[32] It disagreed that the pleadings were defective, and instead found that the claim for Aboriginal title had erroneously been argued and presented as a territorial theory, as opposed to a site-specific approach. In denying the appeal, the Court provided that the Tsilhqot'in were free to pursue further litigation for claims of Aboriginal title to site-specific areas within the Claim Area.[33]

[3] Supreme Court of Canada: The Territorial Approach Endorsed

A central issue before the Supreme Court of Canada was whether semi-nomadic Aboriginal groups like the Tsilhqot'in could successfully claim Aboriginal title to broad territories, or if exclusive occupation was limited to definite tracts of land or settlement sites. The Court contrasted the approach of the lower courts:

> The trial judge in this case held that "occupation" was established for the purpose of proving title by showing regular and exclusive use of sites or territory. On this basis, he concluded that the Tsilhqot'in had established title not only to village sites and areas maintained for the harvesting of roots and berries, but to larger territories which their ancestors used regularly and exclusively for hunting, fishing and other activities.
>
> The Court of Appeal disagreed and applied a narrower test for Aboriginal title—site-specific occupation. It held that to prove sufficient occupation for title to land, an Aboriginal group must prove that its ancestors *intensively* used a definite tract of land with reasonably defined boundaries at the time of European sovereignty.[34]

The Court sided firmly with the trial judge, adopting the broader territorial approach of the trial judge and rejecting the site-specific occupation standard applied by the Court of Appeal, which the Court said would

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[32] *See William v. British Columbia*, 2012 BCCA 285.

[33] *Id.* para. 241.

[34] *Tsilhqot'in*, 2014 SCC 44, paras. 27–28.

result "in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights . . . ."[35]

[a] The Requirements of Aboriginal Title—Including "Sufficiency of Occupation"

What constitutes sufficient occupation to ground title? The Court found that it must be approached from both the common law and Aboriginal perspective and must involve a context-specific inquiry. The intensity and frequency of the use will change depending on the characteristics of the Aboriginal group and the land over which title is asserted.[36] "To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes."[37] The Court definitively rejected the site-specific approach of the Court of Appeal:

> There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is "sufficient" use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.
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> . . . .
>
> . . . . Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.[38]

The effect of a territorial approach is perhaps best demonstrated visually. Figure 3 is a map of the Claim Area that was used in the plaintiff's final argument at trial. It shows the specific sites (e.g., villages, pit houses, human remains) that were the subject of extensive evidence at trial. Figure 4 (attached as Appendix A to the decision of the Supreme Court of Canada) shows the "tract of land" (shown in darker area in center) over which the Court granted a declaration of title.

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[35] *Id.* para. 29.

[36] *Id.* para. 37.

[37] *Id.* para. 38.

[38] *Id.* paras. 42, 50.

Figure 3. Claim Area

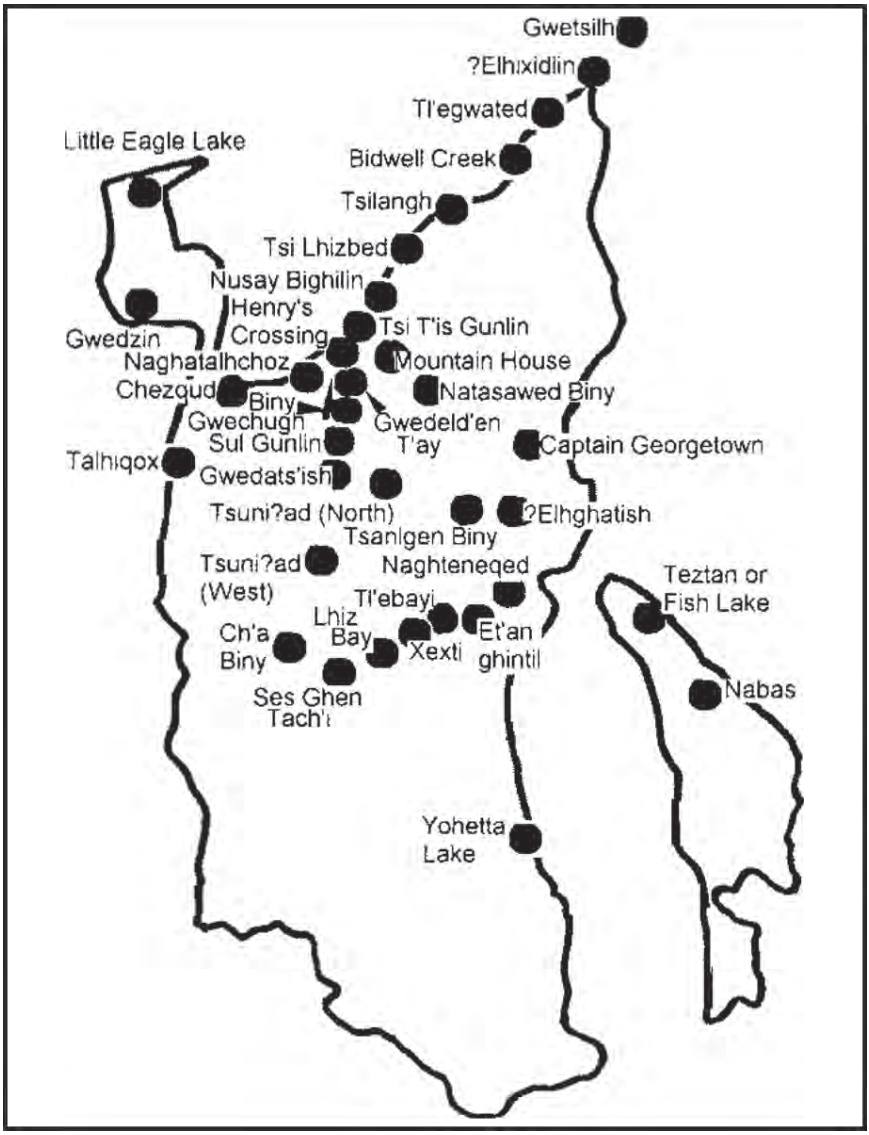
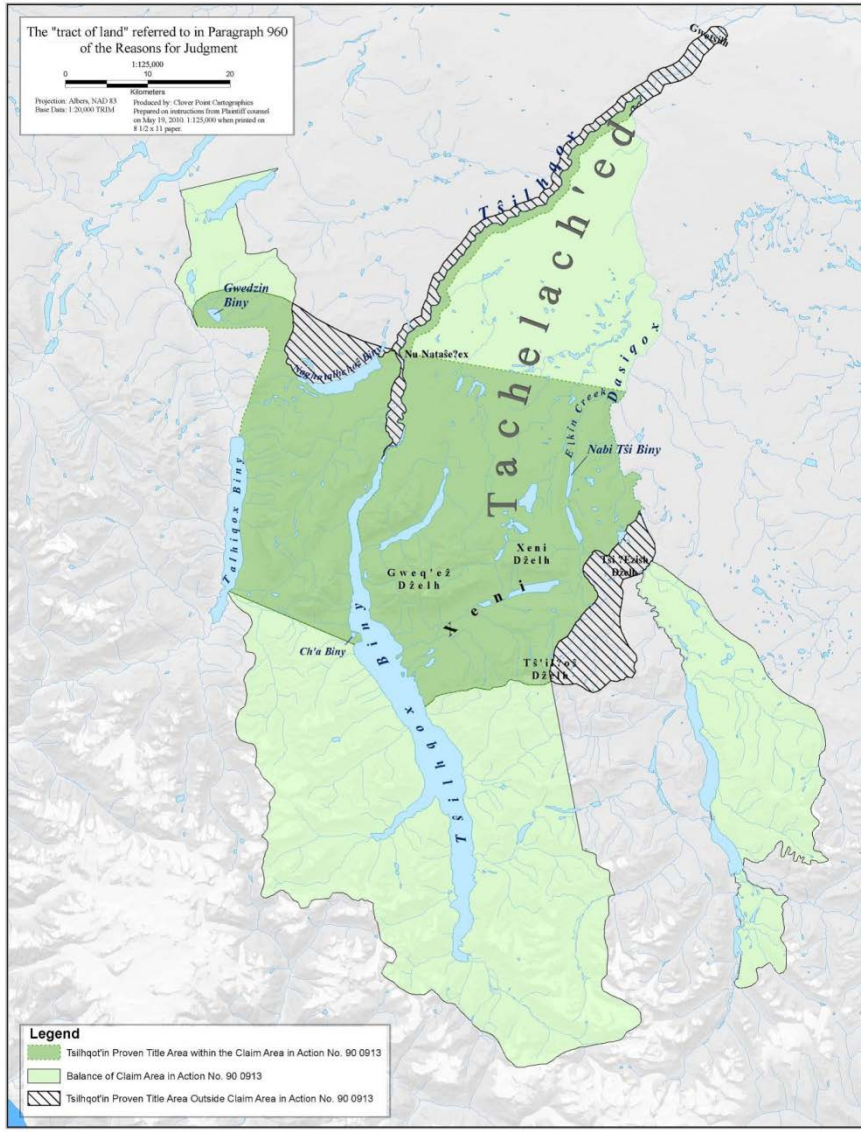


Figure 4. Tsilhqot'in Title Area[39]



[39]The darker area in the middle of the map shows the "proven title area" within the Claim Area; the lighter area shows the "balance of the Claim Area" where title was not proven (but rights were established); and the cross-hatched area shows the "proven title area" that was outside the Claim Area-and hence outside the scope of the declaration issued by the Court. A color version of this map is available on the Foundation website at www.rmmlforg/proceedings.

It is readily apparent that there is a close correlation between the location of the specific sites that were the subject of evidence at trial and the area of the declaration of title. The primary difference at the Supreme Court level (compared to the Court of Appeal level) was that the declaration of title included the areas *in between and surrounding* the specific sites.

[b] Contents of Aboriginal Title

As to the contents of Aboriginal title, the Court found it is a unique and beneficial interest in the land that cannot be equated to other forms of property ownership.[40] Aboriginal title confers ownership rights similar to fee simple, including the right of enjoyment and occupancy of the land and the right to decide how the land will be used, possess the land, reap the economic benefits of the land, and pro-actively use and manage the land.[41] However, Aboriginal title is not absolute and must be held collectively for the present and future generations. It cannot be alienated except to the Crown, nor encumbered in a way that would prevent future generations of the group from using and enjoying it.[42]

[c] Once Aboriginal Title Is Established—Consent or Justification

Once Aboriginal title is established, governments and others seeking to use the land must seek the consent of the Aboriginal title holders.[43] If the Aboriginal group does not consent, the government's only recourse is to establish that the proposed incursion on the land is "justified."

> To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group.[44]

In respect of the third element (the Crown's fiduciary obligation), the Court stated that "the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. . . . This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit

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[40] *Tsilhqot'in*, 2014 SCC 44, para. 72.

[41] *Id.* para. 73.

[42] *Id.* para. 74.

[43] *Id.* para. 76.

[44] *Id.* para. 77 (citing *R. v. Sparrow*, [1990] 1 S.C.R. 1075).

of the land."[45] As discussed below, this qualification may have important ramifications where it comes to potential development on Aboriginal title lands.

§ 14B.04 Implications and Some Unanswered Questions

The long-term implications of the *Tsilhqot'in* decision will play out over the years (and decades) to come and, no doubt, the debate as to extent of implications will continue. This section attempts to simply identify and discuss some of the initial implications and outstanding questions in the wake of the decision.[46]

[1] Development on Aboriginal Title Land

Aboriginal title land "comes with an important restriction—it is collective title held not only for the present generation but for all succeeding generations."[47] As a result, it cannot be "developed or misused in a way that would substantially deprive future generations of the benefit of the land."[48] This restriction also applies to the Crown given that the Crown's fiduciary duty means that "incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land."[49]

The extent of this restriction remains uncertain. In *Delgamuukw*, the Supreme Court of Canada provided two examples:

> For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).[50]

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[45] *Id.* para. 86.

[46] *See also* Robin M. Junger, "Aboriginal Title and Mining in Canada—More Questions than Answers," 61 *Rocky Mt. Min. L. Inst.* 17A-1, § 17A.04 (2015) (discussion of outstanding questions post-*Tsilhqot'in*).

[47] *Id.* para. 74.

[48] *Id.*

[49] *Id.* para. 86.

[50] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 128.

In *Tsilhqot'in*, the Court expressly left this question open—although it did note that some changes, even permanent changes, may be possible.[51] It remains to be seen what types of changes might be found to be not "irreconcilable" with the ability of succeeding generations to benefit from the land.

Similarly, the joint restrictions on Aboriginal groups and the government also raise the question of whether and how development that *is* "irreconcilable" might ever proceed if all parties involved desired it. For example, if the Aboriginal group (current generation) wished to develop its hunting ground into a mine site, could it surrender/alienate its Aboriginal title to the Crown and could the Crown then authorize the development of a mine? This would be analogous to the manner in which many developments currently proceed on Indian Reserves, where the Aboriginal group consents to the Crown issuing a head lease (or other authorization) permitting the development on reserve land by a third party.

[2] Shortly Before Title Is Established—Preserving the Aboriginal Interest

The Court appears to outline a new "spectrum of duties applicable over time in a particular case":

> At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. *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.* Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified . . . ."[52]

The first two sentences reiterate familiar principles that were established in the Court's 2004 decision in *Haida*.[53] The final sentence above is also now familiar and discussed by the Court at length in *Tsilhqot'in*.

The third sentence remains somewhat mysterious. How can a point in time "*shortly before* a court declaration of title" be ascertained? No one can be certain a court will make a declaration of title before it has happened. The authors suggest that the Court must have meant a point in time shortly

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[51] *See Tsilhqot'in*, 2014 SCC 44, para. 74 ("Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.").

[52] *Id.* para. 91 (emphasis added).

[53] *See Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, paras. 43–45.

before a court decision on title is to be rendered (e.g., at an advanced stage of trial or at the close of trial, but prior to a decision being rendered). Similarly, even if the point in time can be identified, it is unclear what is required to take "appropriate care . . . to preserve the Aboriginal interest pending final resolution of the claim." Perhaps "appropriate care" would fall somewhere between the consult and accommodate standard (without a veto) and the need to seek consent or justify an infringement.

[3] Once Title Is Established—Reassessing Prior Crown Conduct

The Court addresses, albeit briefly, the possible implications of a transition from asserted to proven Aboriginal title:

> Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. 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 the title* if continuation of the project would be unjustifiably infringing.[54]

What does the Court mean when it suggests the Crown "may be required to cancel the project"? Does it suggest that permits previously granted to developers will be cancelled? The limits of this statement remain unclear, but the authors suggest that the Court must have been contemplating a point in time when the Crown still holds decision-making power over a "project" and is still in a position to "cancel." Once a facility has been approved, built, and is already operating, it is no longer a project. It seems unlikely that the Court was contemplating the Crown requiring facility operators to deconstruct and remove existing operations.

[4] Consent

The Court made the following statement regarding the benefits of obtaining consent: "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."[55] The approach advocated is not new to natural resource developers in Canada and has in fact been a pillar of their success in many areas of the country. For many years, project proponents have been negotiating with Aboriginal groups and concluding agreements called impact-benefit agreements, cooperation agreements,

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[54] *Id.* para. 92 (emphasis added). *See* Junger, *supra* note 46, § 17A.05 (discussion of consent and justified infringement).

[55] *Id.* para. 97.

participation agreements, or various other names.[56] Many developers pursue a "two-track" approach which (1) seeks to adequately consult and accommodate with Aboriginal groups; and (2) if possible, negotiate an agreement that secures the support and consent of the Aboriginal group. The *Tsilhqot'in* decision has, in many ways, reinforced the wisdom of the approach that many project proponents had already adopted.

There remain several unanswered questions regarding consent that will be familiar to anyone who has negotiated agreements seeking consent. In cases of overlapping claims, is consent needed from all Aboriginal groups claiming title over the lands? Or is consent limited to those with the strongest claim? Even if the appropriate Aboriginal group can be identified, which individual or individuals have the authority to give consent—the Chief, the Band Council, or perhaps the membership as a whole? Can consent given by the current Chief and Council be made binding on subsequent Aboriginal governments? It is likely that the correct answers to these questions depend on the facts of each case. That being said, the Court's suggestion to "obtain consent" is often easier said than done.

[5] Litigation vs. Negotiation

In the wake of *Tsilhqot'in*, a fundamental question facing Aboriginal groups is whether they should pursue their claims through litigation or negotiation. Do they seek a declaration of Aboriginal title in the courtroom, or do they seek to confirm other land interests (including fee simple title) in treaty negotiations?[57] This is not a simple question, and there are a number of subsidiary questions arising along each path. If the litigation route is chosen, claims might be brought that include the Aboriginal group's entire territory or (as was the case in *Tsilhqot'in*) only a portion of the larger asserted traditional territory. For instance, an Aboriginal group may choose to pursue a claim to a very particular area, such as a site for a proposed mining project. Similar questions arise in the context of negotiations. Should the Aboriginal group pursue individual negotiations with the Crown on a project-by-project basis or should it concentrate efforts through the treaty process to pursue its claim to the entire traditional territory? Further, there may be a combination of litigation and/or negotiation

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[56] For further discussion, see Keith B. Bergner "Impact and Benefit Agreements Between Project Proponents and Aboriginal Groups: A Walking Tour of the Common Terms and Challenges," 53 *Rocky Mt. Min. L. Inst.* 25C-1 (2007) (unpublished) (copy available from author on request).

[57] Both routes obviously carry costs and risks. The length of time engaged in the trial and appeal periods involved in litigating Aboriginal rights and title claims can entail enormous expense. However, treaty negotiations are also a lengthy and costly process. Neither route comes with any certainty of outcomes.

strategies employed. These questions are complex in nature and no doubt depend on the facts of a given case and the goals of the Aboriginal group.

[6] Aboriginal Title vs. Fee Simple

The route chosen (litigation or negotiation) also influences the type of title that may be obtained. In *Tsilhqot'in* the Court stated: "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 is not."[58] The implication is that Aboriginal title, which holds many of the rights associated with fee simple, is not the equivalent of fee simple. Some of the most notable differences between Aboriginal title and fee simple are the restrictions on uses that are contrary to the Aboriginal group's relationship with the land and the inalienability of lands subject to Aboriginal lands except to the Crown. These differences are by no means insignificant and will no doubt be considered by Aboriginal groups in deciding whether to pursue litigation for Aboriginal title or negotiations for fee simple interests.

[7] Application of Provincial Laws to Aboriginal Title Lands

Another implication of the *Tsilhqot'in* decision is that while provincial laws apply generally to Aboriginal title lands, there are important constitutional limitations. Most notably, any abridgment of the rights flowing from Aboriginal title must be "backed by a compelling and substantial governmental objective and . . . be consistent with the Crown's fiduciary relationship with title holders."[59] While the Court went on to provide that "laws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will usually [meet this standard],"[60] questions remain about whether other legislative schemes will also meet this standard. It also remains to be seen how governments will exercise the jurisdiction they do have in respect of Aboriginal title lands. Will governments individually amend pieces of existing legislation (such as the *Forest Act*) to expressly apply to Aboriginal title lands (in addition to Crown land and private land), or will governments opt for a more overarching legislative approach? The British Columbia government and the Tsilhqot'in Nation have been engaged in discussions regarding the implication of the Court's decision.

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[58] *Tsilhqot'in*, 2014 SCC 44, para. 72.

[59] *Id.* para. 103.

[60] *Id.* para. 105.

[8] The Relationship Between the Nature of Occupation and the Nature of the Lands

As part of its submissions, the Province argued that the Tsilhqot'in population at the time of sovereignty, estimated at 400 members, could not have physically "occupied" the area over which the trial judge found they had proven title (approximately 1,900 km²).[61] In response, the Court found that it is not the number of members and size of the land that determine occupation; rather, occupation "must be considered in the context of the carrying capacity of the land . . . ."[62] In this case, "the land, while extensive, was harsh and was capable of supporting only 100 to 1,000 people."[63]

Such an approach suggests that where the quality and livability of the land is low, the Aboriginal group may have an easier time proving title over a large swath of land. By contrast, where the land in question is fruitful and livable, such as at the mouth of a river abundant in fish, Aboriginal title to a large tract may be harder to prove.

[9] Aboriginal Title in Cases of Overlapping Claims

In the Claim Area at issue in *Tsilhqot'in*, there were no adverse claims from other indigenous groups.[64] Thus the case did not address how competing Aboriginal claims of title to the same piece of land are to be reconciled especially given the "exclusive occupation" requirement for Aboriginal title. The Supreme Court of Canada has previously held that "shared exclusive possession" may be sufficient to meet this requirement.[65] Not surprisingly, areas that were historically the subject of shared use by several Aboriginal groups tend to be concentrated along waterways and valleys which acted as key transportation corridors. Interestingly, the BC Treaty Commission has put the onus on Aboriginal groups to resolve the issue of overlapping claims.[66] Resolution of such issues amongst neighbouring Aboriginal groups is clearly a desirable approach. However, while some limited progress has been made, extensive overlapping claims remain extremely common.

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[61] *Id.* para. 59.

[62] *Id.* para. 37.

[63] *Id.*

[64] *Id.* para. 6.

[65] *See R. v. Marshall; R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220, para. 57.

[66] *See* BC Treaty Comm'n, *Annual Report 2014*, http://www.bctreaty.net/files/pdf_documents/BCTC-Annual-Report-2014.pdf.

[10] Private Interests in Aboriginal Title Lands

By the time the *Tsilhqot'in* case reached the Supreme Court of Canada, the Tsilhqot'in were not seeking a declaration of Aboriginal title over the small portions of privately owned land within the Claim Area. As a result, the Court was not required to reconcile private interests in lands with Aboriginal title. The Ontario Court of Appeal has in the past concluded that the innocent third-party purchasers of former Indian Reserve lands (where those lands were not properly surrendered) are entitled to rely on the apparent validity of their title.[67] Whether a similar result would follow in the case of Aboriginal title interests remains to be seen.[68]

[11] Submerged Lands/Ocean Areas

The Tsilhqot'in also did not seek a declaration of Aboriginal title over underwater lands within the Claim Area. Thus, that issue remains outstanding. Further, given the inland location of the Claim Area, the Court was not called on to address whether a title claim could ever be established over ocean areas. On the one hand it is more difficult to conceive of there being the requisite sufficiency of occupation (continuous and exclusive) over an ocean area. However, given the broader territorial approach to title, one might wonder about a tightly grouped chain of islands with clear evidence of occupation on adjacent islands. These questions will remain until they are addressed in a future case.

[12] Subsurface/Mineral Rights

Does Aboriginal title include mineral rights?[69] The *Tsilhqot'in* decision does not address this issue. In *Delgamuukw*, the majority of the Court stated the view that "aboriginal title also encompasses mineral rights, and lands held pursuant to aboriginal title should be capable of exploitation in the same way . . . ."[70] That being said, mineral rights were not clearly at issue in that case and it is arguable that such a statement was made in obiter dictum. While this may well be persuasive for lower courts, the Court has shown a willingness to depart from the obiter of previous decisions. Irrespective of where the law might ultimately fall for Aboriginal title lands, an

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[67] *See Chippewas of Sarnia Band v. Canada (Att'y Gen.)* (2000), 51 O.R. 3d 641 (Ont. C.A.).

[68] *See Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505, para. 218 ("the law has not yet yielded any definitive answers to the question of what remains of aboriginal rights, including aboriginal title, after lands have become privately owned through conveyance of fee simple").

[69] *See* Junger, *supra* note 46 (discussion of Aboriginal title and subsurface rights).

[70] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 122.

Aboriginal interest in mineral subsurface rights has, to some extent, been recognized in treaty negotiations.

§ 14B.05 Conclusion

The decision of the Supreme Court of Canada in *Tsilhqot'in Nation v. British Columbia* marks a major milestone on the road to a better understanding of Aboriginal title, and the respective rights of Aboriginal peoples generally. Some questions are answered, particularly regarding the sufficiency of occupation necessary to prove title, but many more questions remain. The implications of this decision will play out over the years (and decades) to come.