Tsilhqot'in Nation v. *British Columbia*

A. Introduction

This action[1] was brought by Chief Roger William in his representative capacity as Xeni Gwet'in Chief (since 1991) on behalf of all Xeni Gwet'in and the 3000 Tsilhqot'in people in response to proposed forestry activity in remote Xeni Gwet'in traditional territory. The Xeni Gwet'in First Nations Government is one of six Tsilhqot'in bands in the Cariboo-Chilcotin region of British Columbia, southwest of Alexis Creek/Williams Lake. The Tsilhqot'in people had been pursuing a right of first refusal on all logging activities to ensure the maintenance of their traditional way of life.

Chief William sought declarations of Tsilhqot'in Aboriginal title for two areas of the Tsilhqot'in traditional territory, defined as Tachelach'ed (Brittany Triangle) and the Trapline Territory (the "Claim Area").[2] He also sought declarations of Tsilhqot'in Aboriginal rights to hunt and trap in the Claim Area and to trade in animal skins and pelts. Finally, Chief Williams sought compensation as damages for infringement of Aboriginal title rights by logging activities.

The case involves two actions against the provincial government – the "Nemiah Trapline Action" was commenced in the Supreme Court of British Columbia on April 18, 1990. The plaintiff commenced the "Brittany Triangle Action" on December 18, 1998. The court added the federal Crown as a party because of its Constitutional jurisdictions over "Indians and Lands Reserved for Indians." One of the longest in Canadian history, the trial endured for 339 days in both Victoria and Xeni (the Nemiah Valley). During the trial the court heard oral history and oral tradition evidence, and considered a vast number of historical documents. Counsel tendered evidence in the fields of archeology, anthropology, history, cartography, hydrology, wildlife ecology, ethnoecology, ethnobotany, biology, linguistics, forestry and forest ecology.

In summary, the court declined to make an award of aboriginal title because of a defect in the pleadings. The Statement of Claim pleaded aboriginal title to the whole Claim Area, not "or any portion thereof." However, Vickers J. did find, in obiter, aboriginal title to some 200,000 hectares of land and encouraged the parties to negotiate a settlement to achieve reconciliation. He also ruled that the Tsilhqot'in people have aboriginal rights to hunt, trap and trade furs to sustain a moderate livelihood throughout the Claim Area. Finally, Vickers J. concluded that the province has no jurisdiction to infringe aboriginal title lands and, under its forestry and land use planning activities, has been acting illegally.

All three parties (Chief William, Provincial Crown and Federal Crown) have appealed the decision.

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[1] *Tsilhqot'in Nation* v. *British Columbia* (2007) BCSC 1700.
[2] See map, *ibid*, p.460.

B. ISSUES

1. Aboriginal Title

The pleadings contemplated a finding of Aboriginal title to the whole Claim Area, not "or a portion thereof." In the reply arguments Chief William's counsel argued that the court had jurisdiction to find that portions of the Claim Area were subject to Aboriginal Title. Vickers J declined to award Aboriginal title to a portion of the Claim Area due to the defect in pleadings.[3] A plain reading of the pleadings confirmed that the plaintiff claimed Aboriginal title over all of the lands. Allowing a declaration for a portion of the Claim Area would be prejudicial to the Crown as parties in litigation are entitled to know the substance of the case to which they have to respond.

Aside from the defect in pleadings, Vickers J. expressed an opinion, in obiter, about the areas in Tsilhqot'in traditional territory (inside and outside the Claim Area) where there may be sufficient evidence to make a finding of Aboriginal title. He accepted that Britain acquired sovereignty over B.C. in 1846[4] and that the Tsilhqot'in people, a distinct Aboriginal group, had been present in the Claim Area for over 250 years based on the length of time required to develop the names and knowledge of the Claim Area plants used for food and medicine.[5] This presence was continuous and uninterrupted up to the present.[6]

He concluded that the Tsilhqot'in people exercised effective control or could have excluded others from a portion of the Claim Area, some 200,000 hectares of land that comprised their seasonal rounds – the village sites, hunting grounds, cultivated fields and fishing sites tied together by a network of foot trails, horse trails, and water courses. These sites and links between them identified definite tracts of land in regular use by the Tsilhqot'in people that would warrant a finding of Aboriginal title.[7] This land provided security and continuity for the Tsilhqot'in people in 1846 and should continue to do so.

While this declaration of Aboriginal title is not binding on the parties, Vickers J. set it out to assist the parties in their resolution of the issues post-litigation.

2. Aboriginal Rights

The Crown conceded that the Tsilhqot'in people have Aboriginal rights to hunt and trap birds and animals in the Claim Area, but asserted that they did not have the right to capture horses or to trade in skins and pelts.[8]

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[3] *Ibid* at para. 129.
[4] *Ibid* at paras 601-602.
[5] *Ibid* at para. 677.
[6] *Ibid* at para 945.
[7] *Ibid* at para 959.
[8] *Ibid* at para 1223.

Vickers J. ruled that the Tsilhqot'in people have Aboriginal rights to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses. This right is inclusive of a right to capture and use horses for transportation and work.[9] Even if there were no wild horses in the Claim Area pre-contact, the Tsilhqot'in used wild horses pre-contact and the right to capture and use them was a contemporary extension of the right to use plants and hunt and trap animals for livelihood. The Tsilhqot'in also have an Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood as trading for salmon resources with neighbouring coastal aboriginal groups was prevalent.[10] These rights have been continuous since pre-contact time, which the Court determined was 1793.

3. Rights Holders

Vickers J. concluded that the rights holders of Aboriginal title and rights are the Tsilhqot'in people not the *Indian Act*-created bands.[11] Aboriginal rights flow from collective actions and shared language, traditions and historical experiences. Band members identified first as Tsilhqot'in people and any Tsilhqot'in person could hunt and fish anywhere in the traditional territory.

4. Constitutional Issues

Under the *Forest Act* the ability to grant rights to harvest timber applies only to Crown land and forest resources. Vickers J. concluded that Aboriginal title lands are not "Crown lands" as defined in the *Forest Act*, therefore the provincial *Forest Act* does not apply to Aboriginal title lands.[12] In the alternative, where "Crown timber" as defined in the *Forest Act* is located on Aboriginal title lands, the *Forest Act* does not apply because of the doctrine of interjurisdictional immunity.[13] The jurisdiction to legislate with respect to Aboriginal rights lies with the Federal government pursuant to s. 91(24) of the *Constitution Act, 1967*. As core federal jurisdiction, the province cannot extinguish Aboriginal rights,[14] and it is the federal Crown's jurisdiction to authorize forestry and other activities such as mining and hydroelectric development on Aboriginal title lands. However, the *Forest Act* and provincial laws of general application still apply in areas where Aboriginal title is asserted but not proven.[15]

Vickers J. then considered the affect of the *Forest Act* if he was incorrect that it does not apply to Aboriginal title lands. He concluded that the impact of the provincial forestry regime on Aboriginal title lands is a prima facie infringement or denial of Aboriginal title that

[9] *Ibid* at paras 1230 and 1236.
[10] *Ibid* at paras 1246-1247.
[11] *Ibid* at paras 437-472.
[12] *Ibid* at paras 981 and 1013.
[13] *Ibid* at para 1032.
[14] *Ibid* at para 1027.
[15] *Ibid* at para 1045 (summary).

must be justified. Every stage of provincial land use planning processes offers potential for significant infringement of Aboriginal title. For the justification analysis, the provincial Crown failed to demonstrate that it had a compelling and substantial legislative objective for forestry activities in the Claim Area.[16] There was no evidence that the logging was viable or necessary to address the pine beetle infestation. While the provincial Crown had undertaken considerable consultation with the Tsilhqot'in people on forestry and land use planning in the Claim Area, it had not taken into account how forestry activities could infringe Aboriginal rights and title. Thus, the provincial Crown had not met its obligation to consult because it failed to recognize and accommodate claims for Aboriginal rights and title.

Section 88 of the *Indian Act* does not validate the application of provincial legislation to Aboriginal title lands because it only applies to "Indians," and not "lands reserved for Indians."[17]

Regarding Aboriginal rights, Vickers J. concluded that provincial legislation applies to land where Aboriginal rights exist, and found that after a party has proven an Aboriginal right "the Crown's ability to alter or infringe upon any Aboriginal right would be faced with severe restrictions."[18] He found that logging reduced the diversity and abundance of wildlife species through direct mortality, impacts from roads and the destruction of habitat.[19] Forestry activities were an unjustified infringement of Tsilhqot'in Aboriginal rights absent adequate information assessing the impact of logging on wildlife in the area.

5. Honour of the Crown

The court restated, but does not expand, the obligations of the Crown to consult and accommodate aboriginal rights and title. Vickers J. noted that "the Province has taken unto itself the right to decide the range of uses to which lands in the Claim Area will be put, and has imposed this decision on the Tsilhqot'in people without any attempt to acknowledge or address Aboriginal title or rights in the Claim Area."[20] He concluded that the provincial Crown had not met its consultation obligations because it did not acknowledge Aboriginal rights during consultation, and therefore had not justified its infringement of Tsilhqot'in Aboriginal title. This implies that the provincial government will be held to a high standard of consultation in the rest of the Claim Area.

Vickers J. declined to address the issue of the Crown's role as fiduciary for Aboriginal communities where Aboriginal rights have been found.[21] Where Aboriginal title was not proven the Aboriginal interest was not specific enough for the "honour of the Crown" to require the Crown to act as a fiduciary in the best interests of the Tsilhqot'in people.

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[16] *Ibid* at para. 1107.
[17] *Ibid* at para 1039.
[18] *Ibid* at 1356.
[19] *Ibid* at para 1276.
[20] *Ibid* at para 1135.
[21] *Ibid* at paras 1302-1307.

Finally, Vickers J. clarifies that the contemporary notion of honour of the Crown is a national obligation: "'[h]onour of the Crown' in our country, in this age, translates to a matter of national honour, an obligation that all Canadians are bound to uphold and respect."[22]

6. Private Land and Aboriginal Title[23]

The Province has no jurisdiction to extinguish Aboriginal title and such title has not been extinguished on private land by a conveyance of fee simple title.[24] However, Vickers J. declined to declare Aboriginal rights and title on private lands in the Claim Area because the pleadings named only lands affected by forestry legislation.

7. Sustainability

Vickers J. examined the provincial forestry regime and considered expert witness evidence on its impact on the environment. In giving strong direction to the provincial Crown, he concluded that: [25]

> A legislative scheme that manages solely for timber, with all other values as a constraint on that objective, faces a formidable challenge when called upon to balance Aboriginal rights with the economic interests of the larger society…
>
> What is clear from the evidence of Dr. Kimmins is that "sustainability is multi-faceted, involving a complex of physical, biological, social, economic, institutional and cultural dimensions: Kimmins report at p. 41. Given the findings of Tsilhqot'in Aboriginal rights resulting from these proceedings, there will be a need for British Columbia to develop a new model of sustainability in the Claim Area. The burden is on British Columbia to prove that any future harvesting of timber will not infringe Tsilhqot'in Aboriginal rights. That burden will require close consultation with Tsilhqot'in people, taking into account all of the factors that bear on their Aboriginal rights, as well as the interests of the broader British Columbia community…
>
> It is not possible to predict the future in this changing environment. The need to protect Tsilhqot'in Aboriginal rights throughout the Claim Area brings with it the need for a fresh approach to sustainability. This challenge can be met through the development of cooperative joint planning mechanisms taking into account the needs that must be addressed on behalf of the Tsilhqot'in community and the broader British Columbia and Canadian communities.

[22] *Ibid* at para 1116.
[23] *Ibid* at paras 982-1000.
[24] *Ibid* at para 997.
[25] *Ibid* at paras 1099, 1103 and 1106.

8. Damages

Vickers J. dismissed the Tsilhqot'in people's claim for damages on procedural grounds but noted that this decision is without prejudice to the right to renew these claims on Aboriginal title lands because the resources on Aboriginal title lands belong to the Tsilhqot'in people and compensation is due where these resources are unjustifiably removed.[26]

9. Oral History and Oral Traditions Evidentiary Rulings[27]

Vickers J. reviewed the Supreme Court of Canada's statements on oral history and oral tradition in detail and rejected as legally unsound the inference raised by the expert for Canada that oral tradition evidence must be tested by the court by reference to external sources such as archaeological and written history.[28] He confirmed that oral tradition evidence, where appropriate, may be given independent weight, and differences of opinion on the formalities of story telling do not detract from the weight to be given oral histories or traditions.[29] Vickers J also rejected the Crown's expert witness testimony by finding that some oral tradition evidence does assist in constructing a reasonably reliable historical record of the actual use of some part of the Claim area prior to 1846. Where oral history or oral tradition is insufficient to establish a conclusion of fact, the court will corroborate the evidence from other records such as document by explorers, fur traders and missionaries.

Oral traditions are not precise and may change as they are transmitted over time.

Finally, Vickers J. acknowledged that the judicial system must broaden its view of what constitutes evidence and how evidence is interpreted so that claims involving oral history and oral tradition may be fairly adjudicated:[30]

> Courts that have favoured written modes of transmission over oral accounts have been criticized for taking an ethnocentric view of the evidence. Certainly the early decisions in this area did little to foster Aboriginal litigants' trust in the court's ability to view the evidence from an Aboriginal perspective. In order to truly hear the oral history and oral tradition evidence presented in these cases, courts must undergo their own process of de-colonization…This process requires a court to not only "peer beyond recorded history" but also to set aside some closely held beliefs about the reliability of oral history evidence.

[26] *Ibid* at paras 1334-1337.
[27] *Ibid* at paras 131-196.
[28] *Ibid* at paras 154-156.
[29] *Ibid* at paras 156-157.
[30] *Ibid* at paras 132-133.

10. Defences of Limitation Period and Laches

The provincial Crown raised two defences – that of limitation period[31] and laches.[32] The Crown asserted that Chief Williams could not assert a claim for unjustified infringement of Aboriginal rights and title because he was out of time under the *Limitation Act*. Vickers J. found that s.88 of the Indian Act served to apply the Limitation Act to claims of Aboriginal rights other than Aboriginal title. The *Limitation Act* could not apply to claims for Aboriginal title because the effect would be the province extinguishing Aboriginal title with the passage of time and application of the *Limitation Act*. For infringement of Aboriginal rights other than title, the limitation period of six years began from the date when a party would become aware of a cause of action, that being the Supreme Court of Canada's decision in *R.* v. *Sparrow*, May 31 1990. Vickers J. concluded that some claims for unjustified infringement of Aboriginal rights were and were not statute barred.

Vickers J. rejected the provincial Crown's assertion of laches. Chief Williams did not cause prolonged or inexcusable delay, or acquiesce in or give any grounds for belief that the Tsilhqot'in people had abandoned Aboriginal title. There was also no evidence that the province was prejudiced by Chief Williams in relation to Aboriginal title.

11. Reconciliation

Vickers J. concluded the judgment with a discussion of reconciliation and the need for it to occur outside the adversarial legal system.[33] He concludes:[34]

> 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.

And Professor Brian Slatterly summarizes:[35]

> Aboriginal title has undergone a significant transformation from the colonial era to the present day. In colonial times, Aboriginal title was governed by Principles of Recognition based on ancient relations between the Crown and Indigenous American peoples. With the passage of time, this historical right has evolved into a generative right, governed by Principles of Reconciliation. As a generative right, Aboriginal title exists in a dynamic but latent form, which is capable of partial articulation by the courts but whose full implementation requires agreement between the Indigenous party and the Crown. The courts have the power to recognize the core elements of a generative right—

[31] *Ibid* at paras 1311-1329.
[32] *Ibid* at paras 1330-1331.
[33] *Ibid* at paras 1338-1382.
[34] *Ibid* at para 1382.
[35] The Metamorphosis of Aboriginal Title (Vancouver: Continuing Legal Education Society, January 2008) at 1.

> sufficient to provide the foundation for negotiations and to ensure that the Indigenous party enjoys a significant portion of its rights pending final agreement. However, the courts are not in a position to give a detailed and exhaustive account of a generative right in all its facets. This result can be achieved only by negotiations between the parties.

C. Discussion

A multitude of issues arise from this case that challenge the Crown and legal community to take a more comprehensive and creative approach to giving effect to Aboriginal rights and title. It also arguably expands the ability of indigenous communities to include a conservation or environmental mandate in their assertion of Aboriginal rights and title. Non-indigenous communities and environmental organizations will be looking to work with First Nations to leverage this conservation right for better environmental protection on the rural landscape. Developing relationships with the Crown and with environmental organizations poses both ethical and legal questions for legal practitioners in this area.

1. Reconciliation

This judgment is yet another call from one branch of government (judicial) to another (legislative) to act honourably and get on with reconciling Aboriginal entitlements. Both the First Nations Summit and Union of B.C. Indian Chiefs have recently released declarations (see attached) calling for the provincial government to enact reconciliation legislation that would acknowledge Aboriginal rights and title and create a legally enforceable framework for conducting negotiations in good faith. Who has and what is the next move?

2. Consultation

Even though Vickers J. did not establish any additional requirements for consultation for land where aboriginal title has not been proven, in practice will or should there be heightened Crown consultation duties?

3. Forestry

Where does this leave forestry in B.C. on the 95 percent of the land base that is Crown land? Will there be a greater focus on the cumulative impacts of resource development? Will the provincial government embrace ecosystem-based forestry and radically change B.C.'s approach to forestry or is it business as usual?

4. Collaboration Between First Nations and Environmental Organizations

How can environmental groups and First Nations work together to further the emerging sustainability aspect of aboriginal rights and title? What approaches can ensure that these relationships and conversations take place in a respectful, open and fair manner?

For More Information

The Case
Tsilhqot'in Nation v. *British Columbia*, 2007 BCSC 1700
http://www.courts.gov.bc.ca/jdb-txt/sc/07/17/2007bcsc1700.pdf

Continuing Legal Education Society Materials
Patrick Foy, Another Opinion: The Test Used by Vickers J. for Proof of Aboriginal Title (Vancouver: Continuing Legal Education Society, January 2008)

Heather Mahoney, *Tsilhqot'in Nation v. British Columbia*: Cultural Security and the Promise of Site-Specific Rights (Vancouver: Continuing Legal Education Society, January 2008)

Louise Mandell, Tsilhqot'in Nation v. British Columbia, 2007 BCSC 1700 (The "Xeni Decision") - An Analysis (Vancouver: Continuing Legal Education Society, January 2008)

Brian Slatterly, The Metamorphosis of Aboriginal Title (Vancouver: Continuing Legal Education Society, January 2008)

Jack Woodward, Rejection of the "Postage Stamp" Approach to Aboriginal Title: The *Tsilhqot'in Nation* Decision (Vancouver: Continuing Legal Education Society, January 2008)

Other
Blakes Cassels & Graydon, The *Tsilhqot'in Nation* Decision on Aboriginal Rights and Title (November 2007)