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## CASE NOTE:

# *TSILHQOT'IN NATION V BRITISH COLUMBIA* 2014 SCC 44

by Brenda Gunn

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### INTRODUCTION

The Tsilhqot'in Nation is a grouping of six bands, living in central British Columbia ('BC'). Like most BC First Nations, the Tsilhqot'in Nation never signed a treaty with the Crown. In 1983 the Tsilhqot'in Nation first launched a lawsuit challenging logging licences granted within their traditional territory. When the claim was amended in 1998 to include a declaration for Aboriginal title, the long process to gain recognition of 1750 square kilometres of their traditional territory began. In June 2014, the Tsilhqot'in Nation became the first to have Aboriginal title officially declared by Canadian courts.

### BACKGROUND

In 1997, the Supreme Court of Canada ('SCC') made its first decision of Aboriginal title as a protected interest under s 35(1) of the *Constitution Act, 1982* in *Delgamuukw v British Columbia*.<sup>1</sup> Despite the Court's recognition that Aboriginal title is a protected right under s 35(1), the Court did not find title for the Wet'suwet'en First Nation. Rather, the Court simply concluded:

This litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. ... Ultimately, it is through negotiated settlements ... that we will achieve the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. Let us face it, we are all here to stay.<sup>2</sup>

While many lauded the decision as a win, the decision to send the parties back to the table was a setback.

When *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 (*Tsilhqot'in*) was heard by the British Columbia Supreme Court ('BCSC') in 2002, the trial lasted for 339 days over five years.<sup>3</sup> After hearing extensive evidence including from Elders, historians and other experts, Justice Vickers did not actually declare Tsilhqot'in Nation's title, but only found that they were entitled to a declaration of Aboriginal title to the claim area, as well as a small area outside the claim area, in principle.<sup>4</sup>

The British Columbia Court of Appeal decision in 2012 reduced the BCSC decision by deciding that not only had the Tsilhqot'in Nation not proven title to the entire claim area, but that they potentially only had claim over specific sites including continuously occupied village sites.<sup>5</sup> In the rest of the claim area, the Tsilhqot'in Nation's rights would be limited to Aboriginal rights to hunt, trap and harvest. This narrow site-specific approach caused much concern for Aboriginal people, particularly the ability of semi-nomadic peoples to prove occupation. In fact, the SCC criticized this approach as leaving 'small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping.'<sup>6</sup>

### TSILHQOT'IN NATION APPEAL

In their appeal to the SCC, the Tsilhqot'in Nation asked the Court for a declaration of title to the entire claim area, except for a small portion that is privately owned or under water.<sup>7</sup> They also argued that the forestry licenses unjustifiably infringe their rights.<sup>8</sup>

In their decision, the SCC applied the *Delgamuukw* test:

- (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.<sup>9</sup>

The Court in *Tsilhqot'in* referred to the requirements as 'It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.'<sup>10</sup> The challenge of applying the *Delgamuukw* test is that the Tsilhqot'in Nation are semi-nomadic, raising questions of what level of exclusive occupation would suffice to prove title, a question the Court had never directly considered.<sup>11</sup>

Citing *Western Australia v Ward* (2002) 213 CLR 1, the SCC held that sufficiency, continuity and exclusivity are concepts to be considered together,<sup>12</sup> cautioning courts: 'Not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully

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translating pre-sovereignty Aboriginal interests into equivalent modern legal rights.<sup>13</sup>

In relation to sufficiency of occupation the Court rejected the site specific approach, concluding that: '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.'<sup>4</sup> The Court reiterated earlier decisions as to the legal incidents of Aboriginal title:

Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.<sup>15</sup>

After determining that the Tsilhqot'in Nation had proven title to the claim area, the Court held that the forestry licences unjustifiably infringed that title.<sup>16</sup>

## PROVINCIAL POWERS IN RELATION TO ABORIGINAL TITLE

The final question for the Court to consider was the application of provincial forestry laws to Aboriginal title. This constitutional issue arose because the *Constitution Act, 1867* gave provinces power over property and civil rights (s 92(13)) and the Federal Government power over Indians and lands reserved for Indians (s 91(24)). While the doctrine of interjurisdictional immunity had been held to protect the core of Indianness from incursion by provincial laws, the Court in *Tsilhqot'in* held that rights protected under s 35(1) of the *Constitution Act, 1982* could be infringed by provincial legislation if the test for justification is met: 'the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title. Rather, the s 35 *Sparrow* approach should govern.'<sup>17</sup> The court noted 'Aboriginal rights are a limit on both federal and provincial jurisdiction.'<sup>18</sup>

The Court seemed to come to this decision in part due to pragmatic concerns over creating different tests to determine the validity of provincial legislation and creating legislative vacuums.<sup>19</sup> The new approach to interjurisdictional immunity was confirmed in the SCC's subsequent decision in *Grassy Narrows First Nation v Ontario (Natural Resources)*, where the Court held that *Tsilhqot'in* provides a full answer to the question of provincial power to infringe treaty rights.<sup>20</sup>

## PROOF OF OCCUPANCY AND CONSENT

*Tsilhqot'in* is a win not only for the Tsilhqot'in Nation themselves, but also for the strong statements by the Courts on the standard of proof of occupancy for semi-nomadic peoples, as well as the

rejection of the Court of Appeal's site specific approach. Further, the Court strongly reiterated that consent is the standard for consultation and accommodation in areas where Aboriginal title is held.<sup>21</sup> Though the Court's phrasing awkwardly introduces uncertainties as to the power of governments to act contrary to the expressed will of the Aboriginal titleholders, the Court states that consent is required before the Crown can develop the land. However it seems to indicate that if consent is not attained, then the government can try to justify an infringement according to the *Sparrow* test:

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.<sup>22</sup>

However, it seems that the *Haida Nation* consultation spectrum applied to justifying infringements of Aboriginal title would require consultation to acquire the consent of the Aboriginal titleholder. Unfortunately, some commentators are using the *Tsilhqot'in* decision to continue engaging scare tactics by misrepresenting the decision and creating more animosity between Aboriginal people and the rest of Canadians: 'That decision, in a case involving the Tsilhqot'in Nation, gives aboriginals a de jure veto over any development on land where they have title, and a de facto veto, or something very close to one, over land where they claim to have title, even if not confirmed.'<sup>3</sup>

## CONCLUSION

A final noteworthy win in the *Tsilhqot'in* is the Court's actual declaration of title. While the previous courts shied away from such declarations, *Tsilhqot'in* presented a certain amount of finality for the Nation who has spent over thirty years litigating title, and even longer trying to engage the Canadian governments on the issue. If Canadian governments continue to stall negotiations, First Nations can take solace in the fact that the Court's may declare title. So even if the Federal Government believes that negotiated settlements better balance the interests of Aboriginal people and the rest of Canada, the Court will act when agreements fail to be reached.

Unfortunately, two months after this decision, the Tsilhqot'in Nation is still waiting to hear from Federal Government to begin the process of implementing this decision. The British Columbia provincial government has taken a more proactive approach to implementing the decision; a meeting was held the first week of September to begin conversations. Premier Clark's office released a press release where she was quoted as stating: 'We are committed to taking the next step towards securing a more prosperous, just

future for the Tsilhqot'in Nation and all British Columbians—together.<sup>24</sup> Tsilhqot'in Nation leader, Alphonse responded that: 'Ms. Clark's move to reach out to the Tsilhqot'in could signal the start of stronger communication and important relationships between his people and governments.'<sup>25</sup>

As a result of the *Tsilhqot'in* decision, many Aboriginal people are encouraged, believing they are in a stronger position to oppose developments which are occurring without proper consultation, such as the Northern Gateway pipeline.<sup>26</sup> In the few months since it was released, *Tsilhqot'in* has been cited several times.<sup>27</sup> Most notably in *Sam*, the Songhees Nation, who applied for an order directing Canada and the British Columbia governments to negotiate, arguing that *Tsilhqot'in* imposed an obligation on the Crown to negotiate with Aboriginal people.<sup>28</sup> Unfortunately, the British Columbia Supreme Court rejected this argument.<sup>29</sup>

*Brenda Gunn is an Assistant Professor at the University of Manitoba, Faculty of Law. As a proud Metis woman she continues to combine her academic research with her activism pushing for greater recognition of Indigenous peoples' inherent rights as determined by Indigenous peoples' own legal traditions. Her current research focuses on promoting greater conformity between international law on the rights of Indigenous peoples and domestic law.*

1 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 ('*Delgamuukw*').  
 2 *Ibid* 186.  
 3 *Tsilhqot'in Nation v British Columbia* [2007] BCSC 1700.  
 4 *Ibid*.

5 *William v British Columbia* [2012] BCCA 285; *William v British Columbia* [2012] 33 BCLR (5th) 260.  
 6 *Tsilhqot'in Nation v British Columbia* [2014] SCC 44 at [29] ('*Tsilhqot'in*').  
 7 *Ibid* at [9].  
 8 *Ibid*.  
 9 *Delgamuukw* at [143].  
 10 *Tsilhqot'in* at [25].  
 11 *Ibid* at [24].  
 12 *Ibid* at [31].  
 13 *Ibid* at [32].  
 14 *Ibid* at [50].  
 15 *Ibid* at [73].  
 16 *Ibid* at [95-96].  
 17 *Ibid* at [151].  
 18 *Ibid* at [141].  
 19 *Ibid* at [145-147].  
 20 *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at [53].  
 21 *Tsilhqot'in* at [2].  
 22 *Ibid* at [77].  
 23 Jeffery Simpson, 'Tsilhqot'in Decision Brings Clarity but also Surprises', *Globe and Mail*, 19 July 2014 <<http://www.theglobeandmail.com/globe-debate/tsilhqot-in-ruling-brings-clarity-but-also-surprises/article19665089/>>.  
 24 Dirk Meissner, 'B.C. premier to address land ruling, hangings during historic visit to Tsilhqot'in Nation territory', *Globe and Mail*, 5 September 2014 <<http://www.theglobeandmail.com/news/british-columbia/clark-to-address-land-ruling-hangings-during-historic-visit/article20381414/>>.  
 25 *Ibid*.  
 26 Jeffery Simpson, above n 23.  
 27 Recent citations include *Chief Joe Hall v Canada Lands Company Limited* 2014 BCSC 1704 that government can justify infringements of Aboriginal rights; *Council of the Innu of Ekuanitshit v Canada (Attorney General)* 2014 FCA 189 regarding the standard of consultation.  
 28 *Sam v British Columbia*, 2014 BCSC 1783.  
 29 *Ibid*.

**Godmother's Gathering**

Silas Hobson  
 Acrylic on canvas, 880mm x 203mm





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## ARTIST NOTE SILAS HOBSON



Silas Hobson is an artist at the Lockhart River Art Centre. He has lived in the Lockhart River Aboriginal community, a remote area on the east coast of Cape York in Far North Queensland, his entire life. Silas has been painting since 1995 and was one of the original artists to be part of the group known as the Lockhart River Art Gang.

Silas describes his work as a contemporary but still spiritual response to the traditional culture and isolation of his community. Part of this is the importance of relationships, both with each other and with the land, the sea, and the animals. Print, painting and sculpture are used within his work to communicate the stories, traditions and beliefs of his community.

Silas' artworks are about local culture and his peoples' need for genuine equal rights. His art is about people listening and cooperating, also meeting places, dance festivals and celebrations. Central to this is the idea of people coming together, yarning amongst each other, teaching and learning about ways and cultures.

A large number of solo and group exhibitions including Silas' artworks have been displayed around Australia and internationally, including exhibitions in Italy, France, the UK and the United States. His work has also been featured in a number of local collections, including the National Gallery of Australia, the Art Gallery of NSW, the Queensland Institute of Technology Odgeroo Collection, the Flinders University Collection, the ATSI Permanent Collection, the Wollongong University Permanent Collection and the Queensland Art Gallery.