

Tsilhqot'in Nation v. British Columbia, 2007 BCSC 1700

Decision date: November 20, 2007

This case addresses issues related to consultation and affects the following chapters of EAGLE's "Nation to Nation: The Law of Consultation and Accommodation" materials: Chapter 2 (The Legal Landscape – History of Aboriginal-Crown Relations in British Columbia), Chapter 3 (Section 35(1) of the *Constitution Act, 1982*), Chapter 4 (The Crown's Obligations to Consult and Accommodate), Chapter 6 (Introduction to Canadian Governments and Division of Powers), Chapter 8 (Provincial Government) and Chapter 9 (Environmental Assessments).

This case involved a claim of Aboriginal Title and Rights over two large tracts of the traditional territory (the "Claim Area") of the Tsilhqot'in Nation (the "Tsilhqot'in"). The Tsilhqot'in sought court declarations regarding Tsilhqot'in rights and in relation to the issuance and use of certain forest licences. It also sought injunctions to prevent the issuance of cutting permits in the Claim Area. Logging proposals and fundamental land use disagreements triggered the litigation.

The court had to decide whether the Tsilhqot'in People had Aboriginal Rights and Title in the Claim Area, including specific rights to trade in the furs, pelts and other animal products obtained from the Claim Area. The Court also had to decide whether the *Forest Act* applies to Aboriginal Title lands and whether the issuing of forest licences, the granting of authorizations and any forest development activity unjustifiably infringes Aboriginal Rights in the Claim Area.

Ultimately, the claim for Aboriginal Title failed on a technicality: the Tsilhqot'in did not properly frame their claim. They had asked for a declaration of Aboriginal Title over the entire Claim Area, which the court did not find, instead of also requesting (as an alternative claim) such a declaration regarding smaller, identified portions of the Claim Area. The court agreed that Title exists regarding some of those portions but declined to make the declaration because the Tsilhqot'in had not properly referred to those portions in its claim. The claim for Aboriginal Rights, including the right to trade, succeeded.

Consultation and accommodation issues arose in a number of parts of the decision. The court offered important conclusions regarding consultation and accommodation obligations with respect to the Aboriginal Rights it recognized *and* the Aboriginal Title that it declined to officially recognize.

Tsilhqot'in Aboriginal Title

The judge generally decided that Aboriginal Title land is not "Crown land" as defined in B.C. forestry legislation and that the provincial *Forest Act* does not apply to Aboriginal Title land (see below). However, the decision to not declare the smaller portions as subject to Aboriginal Title meant that those principles did not necessarily apply to lands

over which Aboriginal Title was asserted or claim, rather than proven/declared.¹ In such cases, where the court has not yet found that an area is subject to Aboriginal Title, provincial laws may apply to that land and “the Crown's duty to consult, if properly discharged, gives adequate protection to any alleged Aboriginal interests.”² However, “[s]hould there be a later declaration of rights or title there is a serious risk that, without proper consultation and accommodation, these rights may be infringed.”³

In this case, the judge found that Crown land use planning “for its own economic benefit and the economic benefit of third parties... [is] a direct infringement on any Aboriginal title.”⁴ He noted: “the provincial forestry guidelines failed to prevent an infringement” and “if the current provincial forestry scheme applies to Aboriginal title land, then its application to Tsilhqot’in Aboriginal title land constitutes *prima facie* infringement or denial of Tsilhqot’in Aboriginal title triggering the need for justification.”⁵

When examining whether the government could justify such an infringement, the judge examined whether the infringement was consistent with the fiduciary relationship between the Tsilhqot’in people and the Crown. His examination of the relevant past Supreme Court of Canada decisions led him to explain that “the demands of the fiduciary relationship can manifest themselves in many... guises, including the duty of consultation...”⁶ More specifically, the judge stated clearly that “[w]here Aboriginal title exists or is alleged to exist, there is always a duty of consultation.”⁷

The judge found that “considerable effort [had] been made to engage Tsilhqot’in people in the forestry proposals and the land use planning in the Claim Area.”⁸ However, when he considered these efforts, he emphasized that “[t]he central question is whether all of this effort amounts to genuine consultation.”⁹ He looked at the *Forest Act* with respect to the Chief Forester’s task in setting the Annual Allowable Cut (the “AAC”) and noted that it did not mention Aboriginal Title or Rights. He explained that the Chief Forester thought this meant he could (and actually had no choice but to) ignore established or claimed Aboriginal Title or Rights. As a result, he ignored the potential for Tsilhqot’in Aboriginal Title and it was not mentioned as a relevant factor in the 1996 AAC.

¹ See para. 978. At para. 1013, he notes: “When particular lands are the subject of a declaration or a clear finding of Aboriginal rights or title, the situation has crystallized, and the definition of “Crown lands” and “Crown timber” no longer applies;” i.e., the B.C. *Forest Act* no longer applies because its provisions only apply to “Crown lands” and “Crown timber.”

² Para. 978.

³ Para. 978.

⁴ Para. 1077. He added: “The infringement takes place the moment Crown officials engage in the planning process for the removal of timber from land over which the Crown does not have a present proprietary interest.”

⁵ Para. 1081. This analysis was in case an appeal court decides that he is wrong and that provincial legislation *can* apply to Aboriginal Title lands.

⁶ Para. 1111.

⁷ Para. 1114.

⁸ Para. 1123.

⁹ Para. 1123.

The judge concluded that the failure of the Chief Forester to consult at this strategic planning level meant that the Crown was “unable to justify their actual infringements of Aboriginal title and rights that might flow from the decision.”¹⁰ In rejecting the Crown argument that an actual authorization to remove timber is required for an infringement to exist, he decided that:

all of the events that lead up to the granting of a cutting permit signal the Province’s intention to manage and dispose of an Aboriginal asset. These events demand consultation and, where necessary, appropriate accommodations where Aboriginal rights are claimed.¹¹

The judge emphasized that none of the relevant land use and forest management plans took into account any potential Aboriginal Title or Rights in the Claim Area. They did not acknowledge or address any such Title or Rights and they ignored Tsilhqot’in efforts to convince the Crown to acknowledge Tsilhqot’in Rights and Title during consultation.

The judge founded his assessment of the existence of Aboriginal Title in part on the idea of the “cultural security and continuity” of the Aboriginal community claiming Title and referred to not only the economic component of Aboriginal Title but also its essential cultural aspects.¹² His decision suggests that accommodation of Aboriginal Title (claimed or proven) must also have significant economic and cultural components, enabling the Aboriginal community to ensure its ability to derive “cultural security and continuity” from the relevant lands.¹³

Moreover, the “cultural security and continuity” approach to determining Aboriginal Title was in contrast with the government’s proposed “postage stamp” approach,¹⁴ which would limit Title areas to very small, specific tracts of land. The “cultural security and continuity” approach allows for a finding of Aboriginal Title to much larger, related or interconnected areas. If this approach survives appeals of this decision,¹⁵ it will also suggest a broader focus for consultation and accommodation obligations; i.e., government will have to concern itself with the potential impacts of its decisions and actions and industry development on larger areas rather than specific identified sites that have very restricted boundaries.

As mentioned below, the implications of this approach also include a need in the consultation and accommodation process for government consideration of the cumulative impacts of government decisions/actions and industry development on larger areas and impacts on habitat and wildlife diversity in the Title area. The potential need for shared or coordinated land-use planning will likely include the same broader considerations.

¹⁰ Para. 1128. He added: “This failure might result in a later claim for damages dependant on the consequences of the decision that was made.”

¹¹ Para. 1131.

¹² See, e.g., paras. 409-410.

¹³ See, e.g., paras. 416-417 and 419.

¹⁴ This term was the Tsilhqot’in characterization of the government’s theory. The judge adopted the term and used it several times in the judgment.

¹⁵ Both levels of government and the Tsilhqot’in have given notice of the intention to appeal the decision. If they do appeal it, a further appeal to the Supreme Court of Canada seems likely.

Because environmental assessments are a primary vehicle through which government attempts to consult and accommodate, the “cultural security and continuity” approach has correspondingly important implications for the environmental assessment regimes of both provincial and federal governments.

Drawing on the *Delgamuukw*¹⁶ decision, the judge stated:

[T]he Crown has a duty to accommodate the participation of Tsilhqot'in people in developing the resources on their title lands. The conferral of fee simple lands for agriculture, and of leases and licences for forestry and mining must reflect the prior occupation of Aboriginal title lands.¹⁷

More broadly, the judge observed; “[p]rovincial policies either deny Tsilhqot'in title and rights or steer the resolution of such title into a treaty process that is unacceptable to the [Tsilhqot'in].”¹⁸ In a context where the Crown has made no effort to address Aboriginal Rights and Title, a Crown statement (as found in the AAC) “to the effect that a decision is made ‘without prejudice’ to Aboriginal title and rights does not demonstrate that title and rights have been taken into account, acknowledged or accommodated.”¹⁹ The judge noted that the consultations that did occur with the Ministry of Forests:

[u]ltimately failed to reach any compromise... largely [because]... there was no accommodation for the forest management proposals made by the Xeni Gwet'in people on behalf of Tsilhqot'in people... there was simply no room to take into account the claims of Tsilhqot'in title and rights.²⁰

The comments regarding Title lands generally suggest that province-wide policies and consultation efforts are not enough to satisfy the consultation duty with respect to specific land areas. Consultation related to specifically claimed areas is required. As indicated above, consultation must involve the acknowledgement of Aboriginal Title.

Because he did not make a declaration of Aboriginal Title, the lands are still potentially subject to provincial laws. The assertion of Aboriginal Title and Rights engaged the test from *Haida Nation v. British Columbia (Minister of Forests)*.²¹ The judge decided that the claimed Tsilhqot'in Title and Rights fell on the high end of the scale described in the *Haida* decision. He summarized:

¹⁶ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.).

¹⁷ Para. 1112. He added the suggestion: “Economic barriers to Aboriginal uses of their lands, such as licensing fees, may be reduced.”

¹⁸ Para. 1137.

¹⁹ Para. 1137. He added:

[A]t every stage of land use planning, there were no attempts made to address or accommodate Aboriginal title claims of the Tsilhqot'in people, even though some of the provincial officials considered those claims to be well founded.

The province's 1994 Caribou-Chilcotin Land Use Plan (the “CCLUP”) contained the statement. The judge commented (at para. 1135) that, despite the statement, “the CCLUP makes many detailed commitments to third party interests, and does indeed prejudice and infringe upon Tsilhqot'in Aboriginal title.”

²⁰ Para. 1139. At para. 1140 he contrasted the “good communication” with the Ministry of Lands, Parks and Housing. A consensus resulted, truly “without prejudice to the rights and title claims of Xeni Gwet'in and Tsilhqot'in people in the park area,” establishing and jointly managing Ts'il?os Provincial Park.

²¹ [2004] 3 S.C.R. 511 (S.C.C.) (the “*Haida* decision”).

[T]he failure of the Province to recognize and accommodate the claims being advanced for Aboriginal title and rights leads me to conclude that the Province has failed in its obligation to consult with the Tsilhqot'in people... [and, for these and the other reasons expressed above] the Province has failed to justify its infringement of Tsilhqot'in Aboriginal title.²²

Tsilhqot'in Aboriginal Rights

The judge found that a range of Aboriginal Rights existed throughout the Claim Area and that the Province had infringed them. When he examined whether the infringements were justified, he referred to his earlier discussion of provincial consultation with the Tsilhqot'in. Since the consultation “did not acknowledge Tsilhqot'in Aboriginal rights,” he concluded that “it could not and did not justify the infringements of those rights.”²³

The judge also apparently linked the determination of the adequacy of the consultation (and, therefore, the justification of potential infringements of Aboriginal hunting and trapping rights) with a need for “proper assessment of the impact [of forestry activities] on the wildlife in the area.”²⁴ This information is essential to government identification and assessment of relevant Aboriginal Rights, interests and needs as per its constitutional duty of consultation. Arguably, the relevant Aboriginal community should or must provide much of this information or at least assist in gathering it and this suggests meaningful, detailed and comprehensive government engagement of the affected Aboriginal community or as the judge termed it: “genuine consultation.”²⁵

Earlier, the judge generally observed

Recognizing Aboriginal rights to hunt and trap over an area means wildlife and habitat must be managed to ensure a continuation of those rights. Section 35(1) of the *Constitution Act, 1982* demands that the protection of those rights is a paramount objective. The declaration of Aboriginal rights is not intended to be hollow or short lived. Tsilhqot'in Aboriginal rights grew out of the pre-contact society of Tsilhqot'in people. This historical right is intended to survive for the benefit of future generations of Tsilhqot'in people.²⁶

Clearly, wildlife and habitat management that will “ensure a continuation” of the related hunting and trapping (and trading) Aboriginal Rights requires sufficient understanding of that wildlife and habitat. The absence of a government wildlife/habitat database and a needs analysis regarding Tsilhqot'in hunting, trapping and trading rights indicates

²² Para. 1141.

²³ Para. 1294.

²⁴ Para. 1294. He explained:

To justify harvesting activities in the Claim Area, including siculture activities, British Columbia must have sufficient credible information to allow a proper assessment of the impact on the wildlife in the area. In the absence of such information, forestry activities are an unjustified infringement of Tsilhqot'in Aboriginal rights in the Claim Area.

²⁵ Para. 1123.

²⁶ Para. 1291.

inadequate resource management and insufficient accommodation of the rights.²⁷

More generally and as indicated above, consultation must involve the acknowledgement of Aboriginal Rights.

Fiduciary Duty/Honour of the Crown

The judge decided that he did not need to consider arguments of the Tsilhqot'in and the Province regarding the possible Crown breach of fiduciary duty. Instead, he decided that "in this case it is sufficient to go no further than a consideration of the duty to consult, grounded in the honour of the Crown."²⁸ He referred to several Supreme Court of Canada decisions, including the *Haida* decision and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*.²⁹ The *Haida* decision, he noted, involved rights that were "insufficiently specific" because they had not yet been proven. The *Mikisew* decision involved treaty rights that had not necessarily been infringed, but that had been affected in a way that engaged the honour of the Crown and the duty to consult. He found that he had the discretion in these circumstances to focus on whether the duty to consult had been met and to limit his examination to that question.

Sustainability

The judge discussed the concept of sustainability in more than one part of the decision and, at one point, generally commented that, given his findings of the existence of Tsilhqot'in Aboriginal Rights:

[T]here 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.³⁰

Whether in respect to protecting Aboriginal Rights and Title or ensuring other aspects of sustainability, the discussion regarding the need for adequate baseline ecological data must apply equally to the development of sustainable resource use in the Province. As noted above, such data must be developed at least in significant part in consultation with the relevant Aboriginal community of the area.

The Rights Holder – Who Should Be Consulted?

One of the contentious issues in the case was the question of who is the proper rights holder. The question had potential technical ramifications for the case if the wrong group

²⁷ See para. 1293. These government failures are also related to the constitutional requirement that Aboriginal Rights have priority over other the resource use rights of others (as set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.)).

²⁸ Para. 1304.

²⁹ [2005] S.C.R. 338 (the "*Mikisew*" decision). See our synopsis of this case at: <http://www.eaglelaw.org/education/pubpage/conandaccomm/mikisew%20case%20update%2006%2020%2006.pdf>.

³⁰ Para. 1103. He suggested that "cooperative joint planning mechanisms" could take into account the needs and interests of both groups.

applied for the declaration that they held Aboriginal Rights and Title and the judge decided another group actually held the rights. The controversy involved whether or not the Xenigwet' in First Nations Government, an *Indian Act* band (the "Xenigwet' in" – formerly the Nemiah Valley Indian Band), could seek such a declaration and benefit from a determination of rights that the larger Tsilhqot' in Nation properly holds as communal rights.³¹ Aside from the technical impact on the case, the answer to this question could limit, or expand, the proper Aboriginal group with whom a court will expect the Crown to consult when Rights or Title and the related duty of consultation are at issue.

The judge found that the cases he reviewed pointed to "the larger First Nation that existed at the time of contact or sovereignty" as the relevant rights holder.³² He found that no particular legal entity represents all Tsilhqot' in People. With some discussion as to how Tsilhqot' in People saw themselves and their membership in their community, he noted:

Self identification may shift... to cultural identification depending on the circumstances. What remains constant are the common threads of language, customs, traditions and a shared history that form the central "self" of a Tsilhqot' in person. The Tsilhqot' in Nation is the community with whom Tsilhqot' in people are connected by those four threads.³³

Tsilhqot' in people make no distinction among themselves at the band level as to their individual right to harvest resources.... as between Tsilhqot' in people, any person in the group can hunt or fish anywhere inside Tsilhqot' in territory. The right to harvest resides in the collective Tsilhqot' in community....³⁴

The judge did suggest some distinction among the different Tsilhqot' in groups, with regard to their responsibilities if not their rights. He explained:

In the modern Tsilhqot' in political structure, Xenigwet' in people are viewed amongst Tsilhqot' in people as the caretakers of the lands in and about Xenigwet' [Nemiah Valley], including [the relevant part of the Claim Area]. Other bands are considered to be the caretakers of the lands that surround their reserves.³⁵

He also looked at historical accounts of European encounters with the ancestors of the Xenigwet' in and other Tsilhqot' in people. Ultimately, he concluded that the proper rights holder is "the community of Tsilhqot' in people," the "historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion."³⁶ Because the Xenigwet' in derived their identity from and were members of the larger Tsilhqot' in People, they were rights holders in common with the other Tsilhqot' in people.

³¹ Aboriginal Rights and Title are communal rights.

³² Para. 445.

³³ Para. 457. At para. 469, he reiterated: "Their true identity lies in their Tsilhqot' in lineage, their shared language, customs, traditions and historical experiences."

³⁴ Para. 459.

³⁵ Para. 468.

³⁶ Para. 470. He noted that this determination applied with respect to both Aboriginal Rights and Title.

This decision suggests that, although the greater Tsilhqot'in Nation holds the Rights and Title, the Xenigwet'in would be an appropriate group with whom the Crown should consult – at least with respect to the lands over which they have responsibility within the larger Tsilhqot'in territories. When larger or multiple portions of the Tsilhqot'in territories are involved, consultation with representatives of the larger community or a combination of representatives of different relevant Tsilhqot'in *Indian Act* bands may be more appropriate.

Important related legal issues

In response to an invitation from the Tsilhqot'in Nation and the British Columbia government, the court offered its opinion regarding the application of Aboriginal Title to smaller tracts of land inside and outside the Claim Area. The judge identified specific areas that did and did not meet the test for Aboriginal Title and areas that might meet the test. He also made the following findings:³⁷

1. Aboriginal title land is not “Crown land” as defined by provincial forestry legislation. The provincial *Forest Act* does not apply to Aboriginal title land. The jurisdiction to legislate with respect to Aboriginal title land lies with the Federal government pursuant to s. 91(24) of the *Constitution Act, 1967*.³⁸
2. The Province has no jurisdiction to extinguish Aboriginal title and such title has not been extinguished by a conveyance of fee simple title.
3. Tsilhqot'in people have an Aboriginal right 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.
4. Tsilhqot'in people have an Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood.
5. These rights have been continuous since pre-contact time which the Court determines was 1793.
6. Land use planning and forestry activities have unjustifiably infringed Tsilhqot'in Aboriginal title and Tsilhqot'in Aboriginal rights.

³⁷ Pp. iv – v. Excerpted from the executive summary of the decision.

³⁸ Related to this point, the judge decided that section 88 of the *Indian Act* did not have the effect of allowing provincial laws to apply to Aboriginal Title lands. See paras. 1033-1040 and 1045-1049.