Tsilhqot'in Nation v. British Columbia Backgrounder

Introduction

The ground-breaking decision of *Tsilhqot'in Nation* v. *British Columbia*,[1] released on November 21, 2007, offers the Province and Canada some incentive to recognize and affirm First Nations title and rights.

In *Tsilhqot'in*, Justice Vickers said he was unable to make a declaration of Aboriginal title, but concluded that the evidence before him proves that Tsilhqot'in title does exist in specific portions of Tsilhqot'in territory, comprising approximately 200,000 hectares. Vickers J. also found that the Tsilhqot'in people have an Aboriginal right to hunt and trap, to capture wild horses and to trade in skins and pelts, and that these rights were unjustifiably infringed by forestry activities authorized by the Province.

The Province was quick to dismiss the judgment as a non-binding statement of opinion. According to BC, since Vickers J. did not make a declaration of Aboriginal title, his findings regarding Aboriginal title lands are irrelevant. But they are relevant. Vickers' findings at the very least indicate the Tsilhqot'in claim is at the highest end of the consultation spectrum,[2] likely requiring Tsilhqot'in consent.[3] More broadly, Vickers J. makes a number of findings as to the implications of Aboriginal title that should impact future relations between the governments of Canada, British Columbia and First Nations.

Aboriginal Title

The *Tsilhqot'in* decision marks the first time a Canadian court has ruled that the evidence presented meets the *Delgamuukw*[4] test for Aboriginal title, thus exemplifying the type and extent of proof required. Under the *Delgamuukw* test, the Aboriginal claimant must satisfy three criteria:

(i) the land must have been occupied prior to the Crown's assertion of sovereignty[5];
(ii) at sovereignty, that occupation must have been exclusive; and
(iii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation.[6]

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[1] 2007 BSCS 1700, (hereinafter "*Tsilhqot'in*").
[2] In *Council of the Haida Nation* v. *British Columbia*, 2004 SCC 73 (hereinafter "*Haida*"), the Supreme Court of Canada described the range of required consultation as a spectrum. At the low end of the spectrum (where the Aboriginal claim is weak or the potential impact is minor), the government may only be required to give notice, disclose information, and discuss Aboriginal responses to the notice. At the high end of the spectrum (where the Aboriginal claim is strong and the potential infringement is significant), deep consultation aimed at finding a satisfactory solution may be required.
[3] The notion of "a satisfactory solution" referred to in *Haida* suggests that the solution would have to be satisfactory to both Crown and First Nations governments.
[4] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 (hereinafter "*Delgamuukw*").
[5] Vickers maintained 1846 (the date the British Crown asserted sovereignty over what is now known as British Columbia) as the relevant date for establishing Aboriginal title. This date has implications for the timing of proof and the effects of colonization that might interfere with the continuity requirement.
[6] *Delgamuukw*, *supra* note 4, at para. 143.

(i) Occupation

The Supreme Court of Canada ("SCC") set a very high standard of occupation required to prove Aboriginal title in *R* .v. *Marshall* and *R.* v. *Bernard.*[7] The SCC held that Aboriginal activity on claimed lands must be sufficiently regular and exclusive to compare with title at common law (e.g. fee simple title); seasonal hunting and fishing rights exercised in a particular area typically would not be sufficient to establish Aboriginal title.[8]

The *Marshall* and *Bernard* standard of occupancy appeared insurmountable for First Nations who relied on seasonal excursions to resource sites for subsistence. However, Vickers J. distinguishes *Marshall* and *Bernard*, noting that those cases involved Aboriginal title at specific sites whereas the Tsilhqot'in claim involved broader tracts of land, as well as site specific locations.[9] Justice Vickers finds that Tsilhqot'in village sites, cultivated land (from the Tsilhqot'in perspective) and their well defined network of trails and waterways demonstrate a clear pattern of seasonal land and resource use sufficient to establish occupation in specific portions of Tsilhqot'in territory.[10] Vickers' recognition of seasonal patterns and interconnecting links between significant sites reveals a more holistic view of First Nations' territories in line with many First Nations' perspectives on Aboriginal title. His finding of occupation also accords with Canadian case law that instructs that Aboriginal title must be understood by referencing both Aboriginal and Canadian perspectives.[11]

(ii) Exclusivity

Delgamuukw established that title will only vest in the Aboriginal community that held the ability to exclude others from the Aboriginal title lands.[12] *Marshall* and *Bernard* elaborated that "exclusive possession in the sense of intention and capacity to control is required to establish aboriginal title."[13]

The Tsilhqot'in presented evidence that they vigorously defended their territory and closely monitored and controlled its use by others. Based on this evidence, Vickers J. finds it reasonable to infer that the Tsilhqot'in could have excluded others from Tsilhqot'in title lands had they chosen to do so.[14] Therefore, the Tsilhqot'in met the test of exclusivity to certain portions of the Claim Area.[15]

(iii) Substantial Connection

The test for Aboriginal title requires claimants to show that their connection to their ancestral lands has been substantially maintained since the Crown asserted sovereignty.

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[7] [2005] S.C.J. No. 44, (hereinafter "*Marshall* and *Bernard*").
[8] *Ibid*, at para. 58.
[9] *Tsilhqot'in*, *supra* note 1, at para. 582.
[10] *Ibid*, at para. 944.
[11] *Delgamuukw*, *supra* note 4, at para. 112.
[12] *Ibid*, at para. 155.
[13] *Marshall* and *Bernard*, *supra* note 7, at para. 70.
[14] *Tsilhqot'in*, *supra* note 1 at para. 929.
[15] *Ibid*, at para. 943.

Prior to Vickers' ruling, the provincial and federal governments argued that the *Delgamuukw* test requires continuity, and that continuity was broken by the effects of colonization. However, Vickers J. clarifies that:

> Continuity is not a mandatory element for proof of Aboriginal title. It becomes an aspect of the test where an Aboriginal claimant relies on present occupation to raise an inference of pre-sovereignty occupation of the claimed territory.[16]
>
> Where an Aboriginal group provides direct evidence of pre-sovereignty use and occupation of land to the exclusion of others, such evidence establishes Aboriginal title. There is no additional requirement that the claimant group show continuous occupation from sovereignty to the present day.[17]

In other words, if a First Nation can establish exclusive occupation at the time of sovereignty, the First Nation does not need to prove continuity. Instead, claimants must demonstrate that a substantial connection between the people and the land has been maintained.[18]

Vickers J. finds that the presence of the Tsilhqot'in people in the Claim Area has been uninterrupted and continuous from prior to 1846 and up to the present time, thus meeting the substantial connection requirement. In reaching this conclusion, Vickers J. points to the ongoing Tsilhqot'in patterns of seasonal resource gathering. He also observes that despite governmental attempts to remove Tsilhqot'in people from their territory, the Tsilhqot'in have continued to gather resources and reside in the areas their ancestors have used for generations.

Vickers J. concludes that the Tsilhqot'in presented sufficient evidence to meet the *Delgamuukw* test for Aboriginal title to a significant portion of the Claim Area,[19] marking the first time a Canadian court has reached such a conclusion. Vickers J. declines make an official declaration of Aboriginal title due to a technicality in the Tsilhqot'in Statement of Claim.[20] Having expressed his opinion regarding the existence of Aboriginal title, Justice Vickers goes on to consider the consequences of his decision.

Jurisdictional Issues

The Federal Government has Exclusive Jurisdiction over Aboriginal Title Lands

Section 91(24) of the *Constitution Act, 1867* gives the federal government exclusive jurisdiction over "Indians and lands reserved for Indians". Justice Vickers finds that formally established Aboriginal title lands[21] are "lands reserved for Indians" under

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[16] *Ibid*, at para. 547.
[17] *Ibid*, at para. 548.
[18] *Delgamuukw*, *supra* note 4, at para. 154.
[19] Comprising approximately 200 000 hectares, or roughly half the Claim Area.
[20] In particular, the Tsilhqot'in pled for Aboriginal title over the entire Claim Area, neglecting to plead for smaller portions of the Claim Area in the event that Aboriginal title to the entire Claim Area was not granted. However, the Tsilhqot'in are appealing this decision. Their position is that the *Rules of Court, Law and Equity Act* and standard practice allow a judge to make a lesser and included order, such as a declaration of title to smaller portions of the overall Claim Area.
[21] i.e. in court.

federal jurisdiction. Therefore, only federal laws apply on these lands; provincial laws[22] do not. In other words, the Province is has no constitutional jurisdiction to authorize forestry activities, or any other resource use (such as mining, oil and gas, hydroelectricity, etc.) on proven Aboriginal title lands.[23]

Justice Vickers recognizes that the Province has been skating on thin constitutional ice for over a century. He observes that in acting as though it had constitutional authority over Aboriginal title lands in BC, the Province has been violating Aboriginal title in an unconstitutional and therefore illegal fashion ever since it joined Canada in 1871.[24] Vickers is aware that this conclusion will have serious implications for BC. By disputing the legitimacy of provincial laws on proven Aboriginal title lands, Vickers is warning the Province to negotiate in good faith, or risk being cut out of decision making regarding these lands altogether. Since the vast majority of BC is subject to outstanding Aboriginal title assertions, BC has a lot to lose once Aboriginal title is proven.

The Provincial *Forest Act* Does Not Apply to Proven Aboriginal Title Lands

Justice Vickers held that the provincial *Forest Act*[25] does not apply to Tsilhqot'in title lands for two reasons. First, the *Forest Act* only applies to Crown timber on Crown land. It does not apply to lands or timber belonging to others (such as First Nations). Second, as explained above, the federal government has sole jurisdiction to authorize forestry activities on proven Aboriginal title lands. Therefore, Vickers concludes that BC has no constitutional authority to:

1) include of Tsilhqot'in title lands in the Timber Supply Area;
2) issue forestry tenures and authorizations in Tsilhqot'in title lands; or
3) make strategic planning decisions regarding Tsilhqot'in title lands.

The question then arises: what laws apply on proven Aboriginal title lands? Arguably, the Tsilhqot'in have an existing Aboriginal right of self governance, so their laws should continue to apply on proven Aboriginal title lands. However, the judge's conclusion that Aboriginal title lands are federal lands under section 91(24) allows federal laws to apply on Aboriginal title lands.

The *Indian Act*[26] only applies on Indian reserves, defined as lands set aside by the federal Crown for the use and benefit of Indian bands. Lands declared to be Aboriginal title lands by a court do not fit this definition,[27] so would not be subject to the *Indian Act* or to

[22] e.g. *Forest and Range Practices Act*, *Forest Act, Land Act, Mines Act, Water Act, Limitation Act*, etc.
[23] On asserted but not yet proven Aboriginal title lands, provincial laws may apply, but the Province must justify infringements of asserted Aboriginal title and rights. Justification is discussed in detail below.
[24] Vickers, citing Kent McNeil with approval, *Tsilhqot'in*, *supra* note 1, at para. 1047.
[25] R.S.B.C., 1996 c. 157, (hereinafter "*Forest Act*").
[26] R.S.C., 1985, c. I-5, (hereinafter "*Indian Act*").
[27] There is an obvious distinction between the federal Crown setting aside Indian lands in parliament versus a judge making a declaration of Aboriginal title in court. First Nations might prefer to maintain this distinction, as subjecting Aboriginal title lands to *Indian Act* governance would likely undermine traditional Aboriginal land and resource governance systems.

the *Indian Timber Regulations*[28].[29] Instead, the federal *Forestry Act*[30] and *Timber Regulations*[31] would likely apply to proven Aboriginal title lands.

The federal *Forestry Act* gives the Minister of Natural Resources, in certain circumstances,[32] the responsibility to protect and manage federal forests, including the disposal of timber and the granting of rights to the natural produce of the forest.[33] The *Act* does not specify environmental standards.

The federal *Timber Regulations* govern the cutting and removal of timber in federal forest areas. Under section 7(6)(d), a forest permit must set out terms and conditions respecting the cutting and removal of the timber for the protection of the forest area. Section 8 requires the conditions to:

- encourage regeneration and reforestation,
- avoid damage to vegetation or timber that is not covered by the permit, and
- avoid damage to the cutting and removal site and any animal habitats.

The *Regulations* are silent on how to protect forests, encourage regeneration and reforestation or avoid damage. Moreover, no federal policies or guidelines provide direction. Since environmental standards are not specified, it is up to federal forestry officers to decide what conditions are necessary to protect and regenerate forests. These conditions are created on a case-by-case basis, making consistency and oversight difficult. The current regime gives federal forestry officers a lot of power with minimal direction or supervision.

Under section 14, the Minister of Forestry may enter into an agreement for the cutting and removal of timber. Such an agreement may contain conditions respecting the:

- forest area in which the operator may cut and remove timber;
- quantity, product or species of timber that may be cut;
- protection of the environment; and
- location and standards for roads, trails, buildings or other works.

This provision is not mandatory; therefore the Minister determines what conditions, if any, will be included. As mentioned above, the federal forestry regime lacks

[28] C.R.C., c. 961, (hereinafter "*Indian Timber Regulations*").
[29] The *Indian Act* and *Indian Timber Regulations* require band council consent before forestry can occur on Indian reserve lands. Section 25 of the *Indian Timber Regulations* requires foresters to abide by the laws of the province in which the forestry is occurring with respect to disposal of slash, prevention of fire hazard and the conduct of timber operations. This section brings operational aspects of provincial forestry regimes into federal law. However, no environmental protections are specified in the *Indian Act* or *Indian Timber Regulations*, so band councils decide what environmental protections, if any, are necessary to secure their consent.
[30] R.S.C., 1985, c. F-30, (hereinafter "*Forestry Act*").
[31] 1993 (SOR/94-118), (hereinafter "*Timber Regulations*").
[32] i.e. in relation to forest experimental areas or at the request of any federal department or agency.
[33] *Forestry Act*, s. 5.

environmental protection standards, and the case-by-case approach to setting conditions impedes consistency and oversight.

Overall, the federal forestry regime is insufficient and requires reform.

The federal government could incorporate provincial standards into the federal *Forestry Act* by adding a section that requires foresters to abide by the provincial forestry laws of the province in which they are operating. Regrettably, provincial standards often fall short of First Nations' expectations regarding environmental protections and Aboriginal involvement in decision making.[34] The *Tsilhqot'in* decision should be used as a catalyst to overhaul the forestry system.[35]

Provinces Lack Jurisdiction to Extinguish Aboriginal Title

The Province does not have the jurisdiction to extinguish Aboriginal title. As Vickers explains:

> Prior to the constitutional entrenchment of Aboriginal rights pursuant to s. 35(1) of the *Constitution Act, 1982* the power to extinguish Aboriginal title was an exclusive federal power under 91(24) of the *Constitution Act, 1867*.[36]
>
> …
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> Given that the jurisdiction to extinguish has only ever been held by the federal government, the Province cannot and has not extinguished these rights.[37]

The reasoning behind the federal government's sole jurisdiction to extinguish Aboriginal rights was the protection of Aboriginals against settlers. As Vickers J. explains:

> The idea was that the more distant level of government [i.e. the federal government] would be more likely [than provincial governments] to…protect the Indians against the interests of local majorities.[38]

This continues to be an issue. For example, BC has a longstanding presumption of jurisdiction over lands and resources, which Vickers J. calls into question. As a result of the BC's presumption, First Nations face an uphill battle in land and resource negotiations. BC complicates negotiations by taking unreasonable positions based on the premise that provincial legislation cannot accommodate First Nations rights and title.

However, BC does not have legal backing to support this position. Vickers recites constitutional and case law principles that instruct that Aboriginal rights are upstream of provincial legislation. Under section 109 of the *Constitution Act, 1867*, the provinces received their interests in lands and resources subject to prior interests, which include

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[34] For example, Tsilhqot'in resistance to the proposed forestry in their territory was fueled by their dissatisfaction with the provincial forestry regime which disregarded their title and rights, excluded them from forestry planning, and failed to address their social, cultural and ecological concerns.
[35] Possible reforms are discussed below.
[36] *Tsilhqot'in*, *supra* note 1, at para. 996. Now that Aboriginal rights have constitutional protection, they can no longer be unilaterally extinguished.
[37] *Ibid*, at para. 997.
[38] Vickers, citing Peter Hogg with approval, *ibid*, at para. 1008.

Aboriginal interests in land and resources.[39] Therefore, the BC must accommodate Aboriginal interests before provincial legislation can be applied.[40] BC cannot hide behind its provincial laws to circumvent its duties with respect to First Nations.

Since the Province has no authority to extinguish Aboriginal title and rights, Aboriginal title and rights cannot be extinguished via provincial land and resource management.

Third Party Interests Do Not Extinguish Aboriginal Title

Similarly, third party interests do not extinguish Aboriginal title. Since the jurisdiction to extinguish Aboriginal title was historically[41] only held by the federal government, the Province cannot extinguish Aboriginal title by granting interests to third parties.

Aboriginal Title Claims Are Not Barred by the Passage of Time

Justice Vickers rules that Aboriginal title claims are not barred by the passage of time. He finds that the provincial *Limitation Act*[42] does not apply to Aboriginal title lands for two reasons: 1) provincial laws do not apply on Aboriginal title lands; and 2) the Province does not have jurisdiction to extinguish Aboriginal title and cannot do so indirectly through the application of the *Limitation Act*.

Justice Vickers also finds that the Tsilhqot'in claim is not barred by *laches* (taking too long to assert their claim) because the Tsilhqot'in did not: engage in prolonged, inordinate, or excusable delay; acquiesce in the abandonment of their title; or give any grounds for belief that their Aboriginal title claim was abandoned.

Vickers rejects all of the provincial and federal governments' extinguishment theories. In doing so, he reaffirms previous court findings that Aboriginal title has not been extinguished.[43] He concludes that the Tsilhqot'in have provided sufficient evidence to prove Aboriginal title over portions of the Claim Area. Moreover, he provides insight into the jurisdictional implications of proven Aboriginal title.

Justification of Infringements of Aboriginal Title and Rights

Vickers explains that Aboriginal title and rights may be infringed, subject to governmental justification of the infringement. To justify an infringement of Aboriginal title or rights, government must demonstrate that:

1. there is a compelling and substantial legislative objective;
2. the infringement is necessary;
3. the infringement is minimal;
4. Aboriginal rights and title are afforded an appropriate level of priority, considering their constitutional status;

[39] *Ibid*, at para. 996, and *Haida*, *supra* note 2 at para. 59.
[40] *Musqueam Indian Band* v. *British Columbia*, 2005 BCCA 128, at para. 19.
[41] As mentioned at *supra* note 36, since Aboriginal rights were constitutionally protected in 1982, Aboriginal rights can no longer be unilaterally extinguished.
[42] R.S.B.C. 1996, c. 266.
[43] e.g. *Delgamuukw*, *supra* note 4.

5. adequate consultation is occurring; and
6. fair compensation is available.[44]

Using these criteria, Vickers concludes that the Province has failed to meet the justification requirement for a number of reasons.

The legislative objective requirement requires the court to balance the needs of Aboriginal claimants against the needs of broader society. As part of the balancing, the court must consider whether the infringement is necessary and if there has been as little infringement as possible to achieve the legislative objective.

In *Tsilhqot'in*, Vickers finds no compelling and substantial legislative objective for forestry activities in the Claim Area. He determines that impact of logging on Tsilhqot'in rights and title is disproportionate to the economic benefits to broader society[45] and that logging in the Claim Area is not necessary to deter the spread of the mountain pine beetle. Vickers finds that the Province failed to consider how land use planning and forestry activities might infringe on Tsilhqot'in title and rights. Since the Province did not turn its mind to infringement, it has no basis to claim that there has been as little infringement as possible to achieve the legislative objective.

Regarding the priority requirement, Vickers indicates that a proper determination of priority must be based on adequate information. Without "sufficient credible information,"[46] the Province cannot properly assess the impacts on Aboriginal title and rights. The onus is on the Province to develop proper baseline information and assess impacts on Aboriginal rights.[47] Vickers finds that the absence of a provincial database providing information about the species and numbers of wildlife in the Claim Area, and BC's failure to conduct needs analysis indicate that Tsilhqot'in title and rights have not been afforded any priority by the Crown.

Vickers also observes that the Ministry of Forests' legislative mandate is maximizing the economic return from provincial forests while the needs of wildlife species and the continued wellbeing of First Nations are "low on the scale of priorities."[48] He notes that any model of sustainability that is driven solely by an economic engine is incapable of

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[44] *R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385 (S.C.C.).

[45] This finding is significant because the Province often assumes that economic growth is automatically a valid legislative objective. By finding that it is not, Vickers rebuts this assumption and signals that economic interests may not be sufficient to override constitutionally protected Aboriginal title and rights. Since Aboriginal rights enjoy constitutional protection while economic rights do not, Aboriginal rights should take priority over economic interests. Vickers reaffirms that protection of Aboriginal rights is paramount objective. (*Tsilhqot'in*, supra note 1, at para. 1291).

[46] *Ibid*, at para. 1294.

[47] Heather Mahoney, "*Tsilhqot'in Nation* v. *British Columbia*: Cultural Security and the Promise of Site-Specific Rights," in Continuing Legal Education Society Aboriginal Law: *Tsilhqot'in v. British Columbia* Conference Materials, January 18, 2008, (hereinafter "Mahoney Paper") at 3. Mahoney suggests that this will require a shift for provincial agencies that rely on referral responses from First Nations to determine the existence of Aboriginal interests. (*Ibid.*)

[48] *Tsilhqot'in*, *supra* note 1, at para. 1286.

properly considering social values such as Aboriginal title and rights.[49] Moreover, there is no single government agency that views sustainability through a broad lens taking into account the values of the people affected by government decisions.[50] This signals that resource managers will be required to take a broader view of sustainability and assess proposed activities in light of other resource developments to address the cumulative impacts on Aboriginal title and rights across habitat areas and areas used by First Nations to exercise their rights.[51] BC's economic agenda and lack of information lead Vickers to conclude that Tsilhqot'in title and rights were not given proper priority in the Province's land use and forestry planning.

The consultation requirement has been clarified in case law. Case law establishes that there is always a duty of consultation;[52] the level of consultation required depends on the strength of the Aboriginal claim and the potential impact of the proposed activity.[53] When consultation reveals the need to change government action to reduce interference with Aboriginal rights, the duty of accommodation arises.[54] Where an Aboriginal right is proven, the Crown's ability to alter or infringe the right is severely restricted[55] and deep consultation aimed at finding a satisfactory solution is required.[56]

Vickers places Tsilhqot'in title and rights at the high end of the *Haida* spectrum[57], requiring deep consultation and accommodation. He notes the volume of consultation evidence put forth by the Province in *Tsilhqot'in* but finds that these efforts do not amount to genuine consultation for three reasons.

First, Vickers finds that BC refused to acknowledge Aboriginal title and rights.[58] Vickers confirms that consultation that is not based on rights-recognition will not be adequate to justify infringements of Aboriginal title and rights.[59]

Second, Vickers acknowledges that the Province made no attempts to address or accommodate Tsilhqot'in claims.[60] He indicates that accommodation requires the Crown to respect the cultural and economic relationship between First Nations and the land base on which their rights are exercised. Therefore, the Crown must take measures to ensure

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[49] *Ibid*, at para. 1301.
[50] *Ibid.*
[51] Mahoney Paper, *supra* note 47, at 3. Mahoney anticipates that the lack of an interagency coordinated approach to assessing impacts on Aboriginal rights will be a significant challenge to Crown resource managers. (*Ibid*, at 4.)
[52] *Tsilhqot'in*, *supra* note 1, at para. 1114.
[53] *Haida*, *supra* note 2, at para. 39.
[54] *Ibid*, at para. 47.
[55] *Tsilhqot'in*, *supra* note 1, at para. 1356.
[56] *Haida*, *supra* note 2, at para. 44.
[57] For a description of the *Haida* spectrum, please see *supra* note 2.
[58] *Tsilhqot'in, supra* note 1, at para. 1136.
[59] *Ibid* at para. 1294.
[60] *Ibid*, at para. 1137.

the continuation of Aboriginal title and rights and the "continued wellbeing" of First Nations.[61]

Third, Vickers observes that BC failed to reach any compromise based on the mistaken belief that the forestry regime provided no room to accommodate Tsilhqot'in title and rights.[62] His finding reaffirms that the Province cannot hide behind its provincial laws to evade its constitutional duties to First Nations. Instead, the provincial regimes can and must accommodate Aboriginal title and rights.

Accordingly, he concludes that the Province has breached its duty of consultation.

Being unable to find a valid legislative objective, necessity, minimal infringement, appropriate priority, or adequate consultation, Vickers rules that BC is has not justified its infringement of Tsilhqot'in title and rights.[63] As a result, the land use planning and forestry activities at issue unconstitutionally violate Tsilhqot'in title and rights.

Overall, the *Tsilhqot'in* decision raises the bar for governments seeking to justify infringements to Aboriginal title and rights. The decision clarifies that a justification process that does not actually recognize and accommodate Aboriginal title and rights will not be sufficient to justify infringements. The decision also provides incentive for the Crown to properly engage First Nations in decision making. As Louise Mandell suggests:

> where there is a strong prima facie case, or probability of Aboriginal title, there is a corresponding strong probability that the Province has no property interest or jurisdiction. This level of uncertainty should compel meaningful engagement.[64]

Significant legislative and policy changes are required to align the provincial and federal decision making frameworks with the case law.[65]

Reconciliation

Justice Vickers provides the parties with instructions for reconciliation. He notes the definition of reconciliation as "restoration of harmony between persons…that had been in conflict."[66] He criticizes the current one-sided approach to reconciliation which assumes that First Nations will assimilate to Canadian society.[67] This approach runs contrary to recognition and affirmation of Aboriginal rights and title guaranteed under section 35(1)

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[61] Mahoney Paper, *supra* note 47, at 5. Mahoney suggests that accommodation may require a measure of direct control over the level and type of resource extraction occurring across the land base.
[62] *Tsilhqot'in*, *supra* note 1, at para. 1139.
[63] *Ibid*, at para. 1141. Vickers did not go on to consider the compensation portion of the justification analysis. Arguably, no amount of compensation would be sufficient to offset an unjustifiable infringement of Aboriginal title and rights.
[64] Louise Mandell, "*Tsilhqot'in Nation* v. *British Columbia*, 2007 BCSC 1700 (The "Xeni Decision") – An Analysis," in Continuing Legal Education Society Aboriginal Law: *Tsilhqot'in v. British Columbia* Conference Materials, January 18, 2008, (hereinafter "Mandell Paper"), at 4.1.11.
[65] *Ibid*. Possible reforms are discussed below.
[66] *Tsilhqot'in*, *supra* note 1, at para. 1339.
[67] *Ibid*, at para. 1342.

of the *Constitution*. Vickers observes that reconciliation should ideally take place outside the adversarial court system and encourages the parties to return to negotiations to reconcile Tsilhqot'in interests with those of the broader society. He discourages endless appeals[68] and expresses hope that his decision will assist the parties in finding a resolution.[69]

Implications

As mentioned above, the *Tsilhqot'in* decision raises the bar for governments seeking to justify infringements of Aboriginal title and rights. It also increases the duty of consultation by clarifying that genuine consultation requires recognition, respect and true accommodation of Aboriginal title and rights. The decision should help to create a more level playing field in government to government negotiations. In areas where there is strong evidence of Aboriginal title, there is a corresponding weak foundation for provincial jurisdiction.[70] This threat to provincial jurisdiction should provide a strong incentive for the Province to truly reconcile First Nations' title and rights with provincial objectives.

Opportunities for Reform

On the whole, the *Tsilhqot'in* decision provides the impetus for reform.

Vickers suggests a new model of sustainability that would entail "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."[71] Vickers' proposed solution seems geared toward the resolving the specific Tsilhqot'in situation. However, the *Tsilhqot'in* decision should be used as a catalyst to overhaul current land and resource management at both the federal and provincial levels of governance.

At both levels, "recognition and proper prioritization of Aboriginal rights would lead to First Nations having a role in designing the process, a prominent seat at the planning table, and depending on the strength of the claim, something approaching equal decision-making."[72] Engaging First Nations in a consent-based shared decision making process is the most obvious way to achieve certainty and should be the foundation for land and resource management frameworks going forward.[73]

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[68] However, all parties have already filed their notices of appeal.

[69] This is often the disappointing outcome of litigation. Courts continue to send the parties back to negotiation; such negotiation is often unsatisfactory and ends up back in court (e.g. *Gitanyow First Nation* v. *British Columbia*, 2004 BCSC 1734). The potential implications of *Tsilhqot'in* may provide sufficient incentive for reconciliation that is satisfactory to all parties. However, true reconciliation will likely require an overhaul of legislation, regulations, and policies. Possible reforms are discussed below.

[70] Mandell Paper, *supra* note 64, at 4.1.12.

[71] *Tsilhqot'in*, *supra* note 1, at para. 1106. Arguably, since Vickers concludes that BC has no constitutional authority to be involved in forestry planning on Tsilhqot'in title lands, the new model should be developed between the federal and Tsilhqot'in governments.

[72] Mahoney Paper, *supra* note 47, at 8.

[73] Mandell Paper, *supra* note 64, at 4.1.11.

Foundational elements of any proposed reform include:

- First Nations' engagement in developing and approving the proposal;
- the recognition, affirmation and protection of Aboriginal title and rights;[74]
- reforms must meet or exceed the standards established in Aboriginal case law;
- the constitutional priority of Aboriginal title and rights must be reflected in the proposed reforms; and
- a broad view of sustainability (including cumulative effects) must be applied.

At the federal level, one possibility is for the federal and First Nations governments to jointly develop new legislation, regulations and policies that would apply to proven Aboriginal title lands. The new regime could incorporate First Nations' expectations regarding decision-making, social, cultural and ecological concerns.[75]

Louise Mandell lists several areas where Canada's involvement is essential to achieve reconciliation reforms, including:

- the collaborative development of a federal consultation…framework;
- aligning the Comprehensive Claims Policy with the evolving jurisprudence to make treaty mandates consistent with recognition and reconciliation;
- funding the processes of reconciliation, including the collaborative development of new institutions, such as new dispute resolution processes;
- involving the [First Nations] Leadership Council in a collaborative process to make changes to federal legislation affecting Aboriginal title and rights; and
- funding Aboriginal governments, such as through transfer payments, to strengthen their capacity to fulfill consultation obligations.[76]

The federal government could also play a supporting role to First Nations in provincial reform processes.[77] Involving the federal government might help to rebut BC's longstanding presumption of jurisdiction over natural resources and ensure that the honour of the Crown is upheld[78]. On the other hand, at present, the federal government does not take a protective role with respect to First Nations, opting instead to oppose First Nations in negotiations and litigation. Vickers J. instructs that reconciliation will require a shift away from adversarial approaches.[79]

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[74] There should not be a large discrepancy between the levels of First Nations involvement in planning with respect to proven versus asserted Aboriginal title lands. Whether Aboriginal title is proven or not, First Nations must be engaged at all levels of planning and management with respect to their territories.
[75] Interestingly, the First Nations Leadership Council (comprised of the Assembly of First Nations, First Nations Summit and Union of British Columbia Indian Chiefs) is developing "recognition legislation" to guide the federal and provincial governments to recognize and affirm Aboriginal title and rights.
[76] Mandell Paper, *supra* note 64, at 4.1.13.
[77] As Vickers J. observes, the federal government has a central role in all Aboriginal matters as well as a duty to safeguard the constitutional rights of First Nations. (*Tsilhqot'in*, *supra* note 1, at para. 1046.)
[78] e.g. the negotiation process is fair, First Nations' concerns are actually being addressed, dispute resolution measures are adequate, etc.
[79] *Tsilhqot'in*, *supra* note 1, at para. 1360.

At the provincial level, regarding lands subject to Aboriginal title assertions that have not yet been proven, First Nations and provincial governments could work together to amend provincial legislation, regulations and policies to reflect case law standards of recognition and affirmation of Aboriginal title and rights to address First Nations' concerns. The amended legislation could include a joint planning mechanism to ensure a meaningful role for First Nations in planning regarding asserted but not yet established Aboriginal title lands.[80]

Mahoney suggests that "to be consistent with Vickers J.'s finding in *Tsilhqot'in Nation…*, the Province must take immediate measures to ensure that resource management regimes:

1. provide for the identification, acknowledgement, and assessment of site-specific rights by an agency or process mandated to consider such rights, and not just as a constraint on other objectives;
2. afford proper priority to the rights after gathering and analyzing information about the conditions required for the continued exercise of the right (including baselines related to the needs of the wildlife, fish, plants or other as the case may be; and the needs of the First Nation in relation to these resources);
3. look at the cumulative impacts of all infringing acts (for example, a cutblock may be unjustifiable not because of its effect by itself, but because of the effect of all activities on the land base used to exercise the right);
4. properly accommodate and provide for the continued exercise of Aboriginal sustenance and moderate livelihood rights by ensuring that the ability of the First Nation to rely on the economic component of this right is not jeopardized and/or by ensuring that the Aboriginal group has access to a share of the economic benefit of the resource activity;
5. are guided by a process for setting management priorities that is not constrained at the outset from binding economic objectives (for example in the case of forestry, this means that the process is not constrained at the outset by a non-negotiable rate of cut.)"[81]

Conclusion

To conclude, the *Tsilhqot'in* decision reaffirms that Aboriginal title continues to exist in BC. The judge rules that the Tsilhqot'in provided sufficient evidence to prove Aboriginal title over specific portions of the Claim Area, thus revealing the type and extent of evidence required to meet the *Delgamuukw* test for Aboriginal title. The burden of proving Aboriginal title still lies on First Nations. However, the decision highlights the jurisdictional implications of Aboriginal title, once proven. The decision also increases the standards for justifying infringements of Aboriginal title and rights.

[80] Interestingly, Jessica Clogg proposes land use planning and forestry tenure reforms to improve recognition and affirmation of Aboriginal title and rights. Please see the "Tenure Reform" Paper online at: http://www.wcel.org/wcelpub/2007/14263.pdf and the "Land Use Planning: Law Reform" Paper at: http://www.wcel.org/wcelpub/2007/14264.pdf .

[81] Mahoney Paper, *supra* note 47, at 8.

More importantly, the *Tsilhqot'in* decision offers a powerful opportunity for positive change. The decision has already reinvigorated First Nations' unity and revitalized reconciliation strategies. For example, the First Nations Leadership Council[82] is developing a unified strategy for the recognition of Aboriginal title. Outcomes to date include a declaration affirming Aboriginal title in British Columbia and a letter to the governments of BC and Canada formally demanding recognition of Aboriginal title. The First Nations Leadership Council is also drafting "recognition legislation" and exploring opportunities for collaborative litigation to leverage the *Tsilhqot'in* decision to improve respect for First Nations title and rights on a broader scale. However, the federal and provincial governments are resistant to change.[83] Therefore, First Nations must be persistent with their strategies to drive that change forward.

[82] comprised of the Assembly of First Nations, First Nations Summit and Union of British Columbia Indian Chiefs.

[83] e.g. the governments immediately dismissed Vickers' findings as a statement of opinion, and are already appealing the decision.