Implementation of the Supreme Court of Canada Decision in TSILHQOT'IN NATION v. BC (2014) SCC 44

INDIGENOUS PEOPLES AS DECISION MAKERS REGARDING ACCESS TO LANDS AND RESOURCES

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SOUTHERN INTERIOR

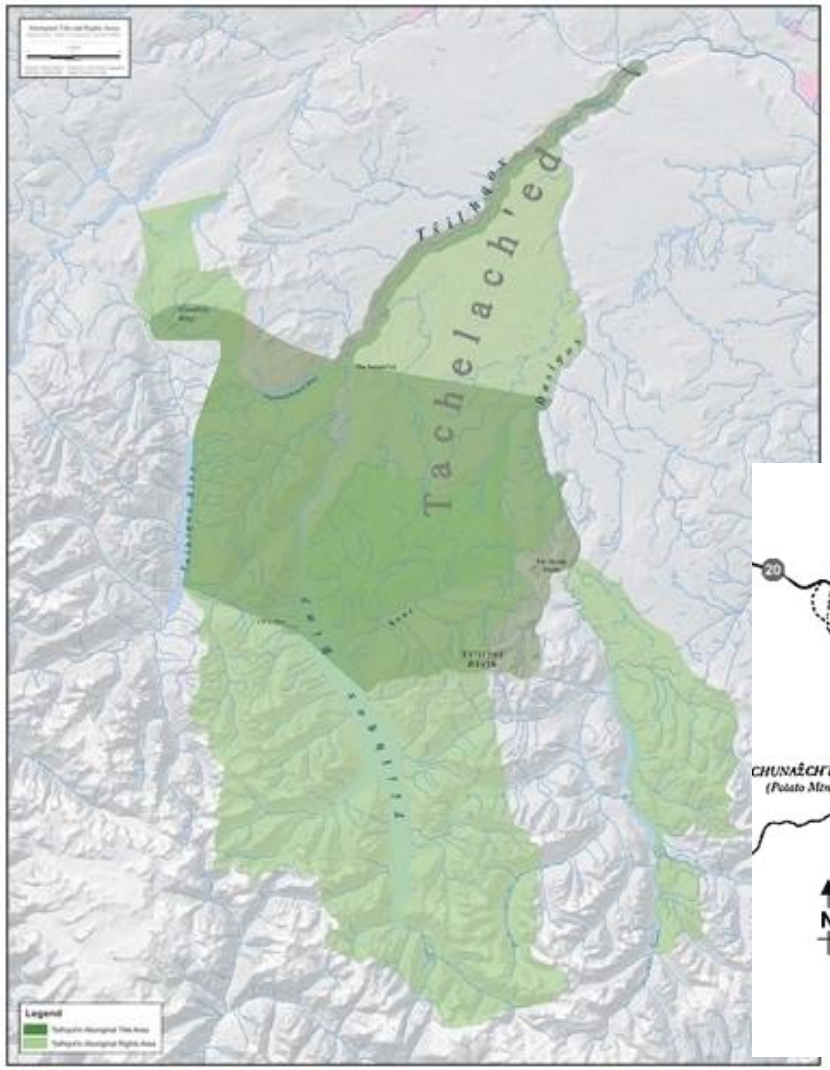
- Acknowledge that we are meeting and Thompson Rivers University ne Secwepemcul'ecw is located in Secwepemc territory
- Largest Indigenous Territories in British Columbia where historically no treaties have been signed
- Historical position (Laurier Memorial, etc.) is being maintained in regard to indigenous land rights and territorial governance
- Majority of the nations (who are the proper title and rights holders) are not part of the British Columbia Treaty process
- Issues regarding access to indigenous lands and resources at the forefront, failure to recognize indigenous rights causes economic uncertainty

Tsilhqot’in and counsel with legal team representing the Secwepemc, Okanagan and Union of BC Indian Chiefs Intervenors in the Tsilhqot'in case before the Supreme Court of Canada (Nov. 7, 2013)

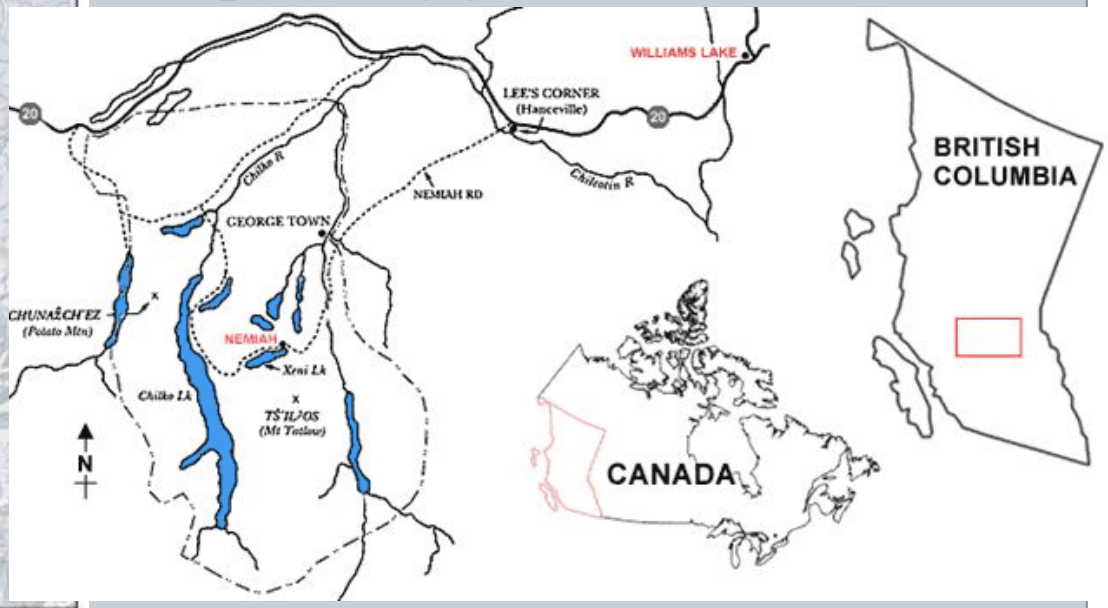
TSILHQOT'IN 2014 SCC 44

- Landmark Decision of the Supreme Court of Canada (rendered June 26, 2014)
- First ever declaration of Aboriginal Title in Canadian history
- Recognizes a broad territorial concept of Aboriginal Title
- Important precedent for Indigenous Peoples across BC, nationally and internationally
- Direct Implications for Land and Environmental Management and Decisions regarding proposed developments and access to lands and resources

ABORIGINAL TITLE LAND



Claim area and Aboriginal Title Area (dark)
Aboriginal Rights found throughout
Tachlach'ed – Chilko salmon spawning grounds in Title area



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**. (*Tsilhqot'in* para. 73)

The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land **must obtain the consent of the Aboriginal title holders**. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*. (*Tsilhqot'in* para. 76)

Tsilhqot'in, 2014 SCC 44

Para 69: The starting point in characterizing the legal nature of Aboriginal title is Justice Dickson's concurring judgment in Guerin, discussed earlier. At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of terra nullius (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the Royal Proclamation (1763), R.S.C. 1985, App. II, No. 1. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.

SUFFICIENT OCCUPATION

- The main question that the Supreme Court of Canada had to address in Tsilhqot'in is whether and how Aboriginal Title could be established on a territorial basis.
- Indigenous parties urged the court to apply a broader test, where Aboriginal Title could be established over a larger territory based on indigenous uses and laws.
- The governments argued that Aboriginal Title could only be established in a site-specific manner to small spots which had been intensively used.
- Most of the Province's criticisms of the trial judge's findings on the facts are rooted in its erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. (*Tsilhqot'in* para. 60)

Culturally sensitive approach

- The British Columbia Court of Appeal's approach referred to as cultural security was heavily criticized as misguided and rejected by academics and Indigenous Peoples alike.

- The Supreme Court of Canada agreed and ruled in para. 42 that:

  There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is "sufficient" use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.

SUFFICIENT OCCUPATION

- The Court upheld the territorial use based approach to Aboriginal Title, and elaborated that whether the respective Indigenous Peoples had the intention and capacity to control the land at the time of the assertion of sovereignty should take into account indigenous laws and factors such as the characteristics of the claimant group and the characteristics of the land (and its carrying capacity).
- Territorial approach enables Indigenous Peoples to bring claims to larger parts of their territories. Land use evidence can be used to establish Aboriginal Title on the ground.

Declaration of Aboriginal Title

- Powerful legal remedy (never granted before)
- recognizes that the land at issue is collectively owned by the respective Indigenous Peoples and not the Crown (the Crown has no beneficial interest in the land), and Indigenous Peoples hold the proprietary interests in the land and resources, e.g.: the timber on the Aboriginal Title land
- Goes hand in hand with indigenous jurisdiction and control over the land and Indigenous Peoples as decision-makers regarding access to their lands and resources

CONSENT

- Once Aboriginal Title is established proposed developments would be subject to consent of the respective Indigenous Peoples
- or absent that a stringent test where the Crown would have the justify the infringement of Aboriginal Title.
- Hard to imagine how Crown can justify substantive decisions regarding access to land and allocation of resources given that the Crown does not retain any beneficial interest in the Aboriginal Title lands and resources (and subject to fiduciary obligation)

CONSENT

- Following a declaration of Title the Crown might have to reassess prior conduct, which might require cancellation of a project that unjustifiably infringes Aboriginal Title
- Supreme Court of Canada reminded both the Crown and proponents, that the only way to obtain legal and economic certainty regarding proposed developments, is to secure the consent of Indigenous Peoples.

  [97] I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.

ECONOMIC DIMENSION

- Aboriginal Title and Rights have an economic dimension and jurisdictional element, just like consent – which is way to assert control and jurisdiction over lands and resources
- Failure to recognize Aboriginal Title and Rights creates economic and legal uncertainty
- Indigenous Peoples should be recognized as decision-makers regarding access to lands and resources.

IMPORTANT PRECEDENT

- Historically most Indigenous Peoples in BC did not sign treaties, so the land rights issue remains unresolved
- To prove Aboriginal Title have to establish exclusive occupation at the time of assertion of sovereignty (for BC: 1846 Oregon Boundary Treaty)
- The Supreme Court also recognized that there are hundreds of Indigenous Peoples or Nations in British Columbia with unresolved land claims (para. 4)
- Okanagan/Secwepemc logging cases are the next in line, were awaiting outcome in Tsilhqot'in and raise issue of indigenous jurisdiction squarely

Application of Provincial Laws

SCC holds that Forest Act does not apply to Aboriginal Title lands

Same applies to other land, resource, environmental legislation

What is required to substantively recognize and implement Aboriginal Title

Province will need to amend land and natural resource legislation to apply to Aboriginal Title lands – since directly affects Aboriginal Title and Rights triggers high level duty to consult

IMPLEMENTATION

Feb. 11, 2016 the Tsilhqot'in National Government (TNG) and the Province of British Columbia signed the Nenqay Deni Accord centering around 8 pillars of reconciliation:

1. Tsilhqot'in Governance
2. Strong Tsilhqot'in Culture and Language
3. Healthy Children and Families
4. Healthy Communities
5. Justice
6. Education and Training
7. Tsilhqot'in Management Role for Lands and Resources in Tsilhqot'in Territory
8. Sustainable Economic Base

Nenqay Deni Accord

- Develop a comprehensive framework for longer term negotiations to reconcile: the rights, interests and goals of the Tsilhqot'in Nation and BC in Tsilhqot'in Territory; their respective jurisdictions, governance, laws and responsibilities; and promote outcomes that reflect consensus and consent
- Distinguishes Declared Title Area, Category A lands – under ownership control and management of Tsilhqot'in Nation; and Category B lands (where aim is consensus and consent)
- Implementation Funding: $4,200,000 within 30 days of effective date, $3,000,000 (March 1, 2017 and 2018) and further funding for years 4 and 5

Nenqay Deni Accord

- Tsilhqot'in Governance
- Tsilhqot'in Management Role for Lands and Resources in Tsilhqot'in Territory
  - Decision-Making regarding different categories of land
  - Fish and Wildlife Panel
  - Immediate Commitment to Moose Recovery
  - Environmental Assessments
  - Inclusion of Indigenous Knowledge
- Sustainable Economic Base

INDIGENOUS GOVERNANCE OVER LANDS AND RESOURCES

2 Day DETERMINING ACCESS conference on Theory and Practice of Indigenous Governance over Lands and Resources brought together leading indigenous and non-indigenous legal scholars and academics and practitioners in the field to discuss the issue with Southern Interior Indigenous Nations

Panels on: Indigenous territorial governance in the Interior
Indigenous territorial governance; Indigenous law and Indigenous governance; Environmental stewardship (fisheries, forests and waters); and Indigenous Knowledge and Alliances

INDIGENOUS ENVIRONMENTAL ASSESSMENTS

- Tseil-Waututh Nation conducted their own assessment process in accordance with their Indigenous law and made a decision by consensus regarding the proposed Transmountain Pipeline expansion Project
- Stk'emlups te Secwepemc are undertaking their own assessment process being in relation to the Ajax Mine proposal
- They are also in court – and in a very powerful position to challenge these potential projects and developments

Indigenous Control over Access to Indigenous Knowledge and Biodiversity

Profs. Tesh Dagne and Nicole Schabus are conducting a research project on Indigenous Peoples' Control over Access to Biodiversity and Indigenous Knowledge in the Interior of British Columbia that aims to identify concerns Indigenous Peoples in the Interior have regarding access to their knowledge and biodiversity in their territories.

Access to indigenous knowledge and biodiversity are or should be subject to the consent of Indigenous Peoples and can provide a starting point for developing broader indigenous territorial authority.

Convention on Biological Diversity (CBD)

- Article 8(j) deals with traditional knowledge as a key tool for in situ protection
- Conference of the Parties recognized prior informed consent requirements (in 2002 pre Haida @ SCC)
- PIC is a right claimed by states to regulate access to resources – important to get indigenous PIC to access implemented at the same footing
- Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Benefit-Sharing – recognizes indigenous PIC regarding access to TK, associated genetic resources, etc.

Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Benefit-Sharing

Full Title: Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization

Received sufficient numbers of ratifications to enter into force

First Meeting of the Parties to the Nagoya Protocol, October 13-17, 2014, Pyoengchang, Republic of Korea

First meeting of the Subsidiary Body on Implementation will be held on 2-6 May 2016 at ICAO HQs in Montreal

WE ARE ALL CALLED UPON:

TO IMPLEMENT the direction of the Supreme Court of Canada

TO IMPLEMENT the Truth and Reconciliation Commission Calls to Action (including implementation of the UN Declaration on the Rights of Indigenous Peoples and the right to self-determination)

TO WORK TOGETHER WITH INDIGENOUS PEOPLES TO address issues REGARDING ACCESS to LANDS AND RESOURCES

TO RECOGNIZE INDIGENOUS GOVERNANCE OVER LANDS AND RESOURCES AND IMPLEMENT CONSENT STANDARDS AND CONSENSUS DECISION MAKING