

4th Annual First Nations Technology Conference

Pre-Conference Workshop

How First Nations Collaboration with Industry & Government Might Work

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Legal Update

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Dr. Danesh: . Our plan this morning in a few brief minutes, is to give a very kaleidoscopic overview of where we're at in the law, and to look at two topics: recent legal developments and where the law is going. We will discuss some of the implications for jurisdiction, decision-making, and permitting. These developments amount to the legal underpinnings of the necessary required shift from the Crown's referral system, to a true shared decision-making system. Further, what are the legal principles and underpinnings that are required for that shift? And then, at least from a legal perspective, what are some of the implications for the work that you do?

We will discuss three recent developments. The Tsilhqot'in case, which is the Title case from November of last year; very briefly, evolving consultation and accommodation case law; and finally the United Nations Declaration on the Rights of Indigenous Peoples, which recently came into force.

Douglas White: By way of setting up the discussion on the Tsilhqot'in Nation Case, we thought it would be worthwhile to give you a very brief overview of the history of the development of Aboriginal title jurisprudence in the Province. Many of you have been part of that history in recent times, but it's a very long story going back to the origins of the Province. It's one of the essential stories really, of this Province. It is the story of competing interests over land, ownership of land, and the ability to make decisions over how land is used in the Province.

In the early part of the colonial history of British Columbia, Indigenous peoples consistently made declarations and sought justice in relation to Aboriginal title that often fell on deaf ears. One later example is that of the Allied

Indian Tribes of British Columbia, which focused on bringing the whole issue of Aboriginal title and Aboriginal rights forward in Canada in the early part of the twentieth century. In the mid 1920's, the Allied Tribes went to Ottawa to discuss title and rights with the federal Crown. Simply put, the Crown's response was to amend the *Indian Act* to prohibit the raising of money to bring such questions forward again. So, from 1927 to 1951 Indigenous peoples were prohibited from seeking the advice of lawyers to bring title and rights cases forward.

After 1951, when this provision of *Indian Act* was removed, one of the first cases to address Aboriginal title was *White and Bob*, a treaty rights case in the early 1960s from the community where I'm from - the Snuneymuxw First Nation in Nanaimo.

The story of *White and Bob* represents an overview of the history of British Columbia's approach to Aboriginal title and rights - where in the early part of the colonial era, the Crown recognized the application of the principles reflected the *Royal Proclamation of 1763* - that the underlying title of the Aboriginal peoples of this part of the world has to be addressed by treaty – before the colonial governments could move forward and begin to make decisions about this land base. Two of the many people involved in *White and Bob* were Tom Berger, who was legal counsel throughout appeal of the convictions, and Frank Calder of the Nisga'a, who came in to politically support the Snuneymuxw. There were two main arguments in *White and Bob*. The first argument was that the document that was signed and negotiated between the Snuneymuxw people and James Douglas on behalf of the Crown was actually a treaty and that this treaty sets out meaningful rights in relation to hunting. The Crown countered that the document was not a treaty at all. The alternative argument, if the court did not recognize the document as a treaty, was that if a treaty was never signed, then that must mean that Aboriginal title remains and the Aboriginal rights that flow from that title must continue to exist. So, those are the two main arguments that for the first time were argued in the early 1960's.

Ultimately, the Supreme Court of Canada agreed with the British Columbia Court of Appeal and *White and Bob* was decided based on the recognition that

the document was a treaty, meaning that once the treaty hunting right was recognized, Provincial jurisdiction was pushed back.

The alternative *White and Bob* arguments of Aboriginal title and rights were then picked up by Frank Calder and the Nisga'a people, also with the help of Tom Berger, in the early 1970's, resulting in the landmark *Calder* decision on Aboriginal title. There, the Supreme Court of Canada found that Aboriginal title was recognized by the common law, but split 3-3 on the issue of whether or not it had been extinguished. On a legal technicality, the seventh Justice on the *Calder* panel refused to decide the case. Later, Dan George and his people brought the *Delgamuukw* case where the Supreme Court of Canada finally recognized that title had not been extinguished, which has opened up the modern era of Aboriginal title in Canada and it then became an issue of - if title is not extinguished in Canada - then where is it and what does it mean? To this day, Aboriginal title has not been established anywhere in Canada.

A few basic statements of the nature of Aboriginal title were set out in *Delgamuukw*. Aboriginal title includes jurisdiction to make decisions about the land and there is a Crown duty to consult related to any decision that may infringe title – and in certain instances requiring prior Aboriginal consent. But, the case was sent back to the lower courts for reconsideration with direction to properly consider oral evidence. Canada and BC continued to make decisions about lands without including Aboriginal title holders after this decision.

As we move to the *Haida* decision, for the first time the Courts addressed the continuing position of the federal and provincial Crown to ignore and deny Aboriginal title - to say that “Well, Aboriginal title might exist in theory, but you haven't proven it on the ground” - would no longer be a sufficient Crown approach. The Courts established that even prior to the recognition of Aboriginal title by the courts, the Crown has important core constitutional duties and obligations in relation to consultation and accommodation with First Nation peoples around the impacts of their decision making.

Dr. Danesh: So when we get to *Tsilhqot'in* there are two key core underlying, unaddressed issues. One is the scope of Aboriginal title, in other words, when a Nation asserts and states we have title to this area, what is the size/area of land the law would recognize as title land. The province has approached this question with what a “small spots” approach. Justice Vickers in *Tsilhqot'in* called it the postage stamp approach. Essentially, what the province argued is that title only exists where a Nation could demonstrate intensive, continuous, exclusive ongoing use and occupation.

The second issue was the content of title. If title is found, what does it mean? What are the implications? What does it mean for jurisdiction? What does it mean for decision-making? Does the province have any jurisdiction or any lawful authorities left?

What did Justice Vickers find? Title has three essential components. The right to use, the right to choose, and the economic component. This is a quote from Justice Vickers: “To have any significance for Aboriginal people, Aboriginal title must bring with it the collective right to plan for the use and enjoyment of that land for generations to come.” This was known from *Delgamuukw*. Quite broadly, it was affirmed in *Tsilhqot'in*.

The second key principle rejection of the postage stamp approach. Title can exist over large extensive tracts of land. In *Tsilhqot'in*, the claim area was about 450,000 hectares. Title was found to 200,000 plus. So, about 45 to 50 percent of the claim area. This is a far cry from the negotiating positions taken in the treaty process for example. And there were important implications in how the court defined the tracts of land. For example, there had been a long discussion about what a “cultivated field” meant, and Justice Vickers insisted that that phrase would have to be understood from the Aboriginal perspective. So it doesn't mean that you have a traditional eurocentric notion of what type of agrarian practice this would be. An area of land where there had been berry picking sustained over generations, was a cultivated field. So an appropriately expansive view was affirmed, and the court insisted on the Aboriginal perspective being paramount in determining that. The decision also affirmed that fee simple

grants do not extinguish Aboriginal title. The full implications of this were not explored because of the facts of the case in issue, but the principle that title continues to exist over fee simple lands was affirmed. Again, the full details of that will have to be explored.

The next point, and one that has probably been discussed the most, is that Provincial land and resource laws do not apply to Aboriginal title lands. Where Aboriginal titles exists, the Provincial Crown is ousted. The Province has no jurisdiction to exercise or apply its laws over title land. If there is any Crown jurisdiction left, it is only with the federal government. In other words, the Province cannot justify an infringement on Aboriginal title lands. Specifically, in the *Tsilhqot'in* case, the Provincial *Forest Act* was in issue, and the finding in the case was that the *Forest Act* simply doesn't apply to those 200,000 hectares of Aboriginal title land. You can see the implications of that sort of ruling as you move to decision-making.

Finally, damages are appropriate when resources on Aboriginal title lands are unlawfully removed. The resources on Aboriginal title land belong to the Tsilhqot'in people and the unjustified removal of these resources would be a matter for appropriate compensation. We don't know the full implication of this principle, but it certainly seems to suggest damages for that taking.

In relation to the status of the decision: the declaration of title was not issued for a technical reason. So what that means is a formal order was not issued declaring title because of the defect in the pleading.

You've probably seen from public reports that notices of appeal have been filed, but that was to preserve the limitation period for filing an appeal, while discussions are going on. But what the case represents is that for the first time in Canadian history a court sat down and examined the scope and content of title, the evidence required for that, articulated what title means, and made findings to that effect. And those are the principles that we articulated. The key ones being, large tracts of land, no provincial Crown jurisdiction, no extinguishment because of the fee simple, and damages for unlawful infringement.

The decision endorsed the following statements, which gives a sense of where recognition based discussions need to go: “For Canada to advance to maturity, Aboriginal people must be able to bargain their way to their constitutional contract. This can only be accomplished with recognition on the Canadian side at the table. The position occupied by Aboriginal peoples, they come to these negotiations in the same state they were 500 years ago, as organized societies existing prior to the assertion of Crown sovereignty, societies organizing according to separate and distinct conceptions of the good, and of how to lead good lives.”

Very briefly, the second recent development: consultation and accommodation law. Post-*Haida* there have been almost 30 cases asserting a Crown failure to consult and accommodate. First Nations have won about 70-80 percent of those. And in British Columbia, depending on how you demarcate it, the Crown has won very few.

So the legal frameworks which are in place, are themselves deficient, dishonourable, and still stuck in a pre-*Haida* universe. Decisions are increasingly putting the frameworks for decision-making and permitting into question. *Dene Tha'* is a federal case in which the court found that an obligation to consult arose in relation to the development of the environmental and regulatory process. Another notable recent case is the *Platinex* decision - injunctions were granted with respect to mine, and then the court ordered a process for negotiations.

In another recent case – *Ka'a'Gee Tu* -- an entire oil and gas operation was simply shut down as the court found that the consulting-permitting process did not facilitate meaningful engagement.

The next recent development, very briefly, is the UN Declaration, which Doug will speak to.

Douglas White: Another very important development in the past year, was the passing by the UN General Assembly of the *Declaration on the Rights of Indigenous Peoples*, on September 13, 2007, which was the culmination of 20 years of negotiation between Indigenous peoples and states around the world.

It's a very expansive statement of rights of Indigenous peoples that will begin to be used in different ways. I'm going to talk briefly of the potential uses of it.

First, in terms of the application of this declaration, I want to give a little background on what a General Assembly resolution is. Simply put, it's a statement adopted by the General Assembly. The General Assembly is the most democratic body of the United Nations, where every nation around the world has a seat at the General Assembly, and every nation has a vote. When this resolution came forward to adopt the Declaration, a vast majority of the nations voted yes; four nations voted no, including Canada, along with the United States, New Zealand and Australia. There was a group of 11 abstentions, but it was a well-received document by most of the nations around the world, save for those few exceptions.

The General Assembly resolution does not have binding force in law on states as a matter of international law, but the Declaration becomes an important statement and step in the development of customary international law. It's been stated by many commentators that aspects of the *Declaration* reflect elements of pre-existing customary international law. This is important, since existing customary international law is considered by the Courts to be adopted within the common law of Canada, and thereby has binding force. Parliamentary supremacy means that Parliament can create legislation and modify the common law, but only within the constraints of the constitutional framework of Canada. Canada is limited in this sense by section 35 of our Constitution.

The Declaration is a very expansive document. It has an amazing range of recognition about Indigenous people's rights around the world. Many of them have to do with cultural sovereignty issues, but also Aboriginal title and Indigenous title around the world. It recognizes very clearly Indigenous ownership over lands, and jurisdiction over those lands. Importantly, about 20 percent of the *Declaration* articles contain discussion of relevance to the duty to consult and accommodate. It's expressed slightly differently in the language of the *Declaration*. But it sets up the duties and obligations of states when they are making decisions that may have impacts on Indigenous rights and title to consult

with, and to seek to gain the free and informed consent of the Indigenous people and to provide compensation and accommodation where necessary.

Dr. Danesh: We're just about out of time, but very quickly. Where are we going and where are we heading—post-*Haida* and post-*Tsilhqot'in*? Obviously we are in a climate of increasing uncertainty for industry and for the Crown. The jurisdictional principle puts into question any certainty of tenures that might be issued to industry going forward pursuant to a provincial law. The heart the problem is the Crown's current engagement model, and the underlying legal theory of the province in which the province is open to admitting Aboriginal rights, rights which they would assert have no jurisdictional or economic component, and they're also willing to say they recognize small spots on title - but none are recognized as of yet - and to engage through that lens. So you get an engagement model that is on the premise of unilateral Crown decision making because under that theory, there would appear to be very little Aboriginal jurisdiction to be identified

The future direction that was articulated as part of the *New Relationship* document and has been articulated consistently through the law, is towards recognition based engagement. Recognition based engagement would mean nobody would come to First Nations saying: "Show us your right to the claim, show us your interest in the area". Recognition based engagement is engagement on the assumption of title being held, and so the approach is somebody wants to do something in this area, what do you think? Do you think there is a way we can proceed or not? And it flows into what is necessarily a true shared decision making model. There are three general models. The first model is to have joint decision making authorities. In other words, you have entities or bodies, First Nations and non-First Nation, that would make binding decisions together. The second model is a two decision makers model. The acknowledgement clearly, that there are separate governments that have to make separate decisions and issue separate approvals. Anyone who wants to do anything in an area has to get approval from both of those two decision

makers. The two decision-makers interact along the way through exchange of information, technical data etc. The third is that you can have jurisdictional spheres so, for example, in this area, on this issue, the First Nation is the sole decision maker - on that area, on that issue, on certain types of decisions, the Crown has jurisdiction and decision making. That is sort of the three broad categories that you could organize a true shared decision making process.

Doug White: What does all this mean in relation to the use of technology and providing analysis and information, and categorizing knowledge for Indigenous government and Crown decision makers? It may be that decision making based upon Aboriginal title will have to take into consideration different values and principles. Information and knowledge will have to be reflected in the analysis in ways that we don't necessarily always do when we're in a reactionary mode to the Provincial referrals system. Decision makers will have to recognize the authority and responsibility that are engaged by First Nations leadership, and First Nations as a whole, in a new decision making process that lines up with what Roshan described as shared decision making.

There are also important legal constraints on Indigenous jurisdiction based upon the Aboriginal title jurisprudence, such as that articulated by Chief Justice Lamer in *Delgamuukw* where he talked about an important limitation on uses of land based in Aboriginal title: "Lands subject to Aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to Aboriginal title in the first place." As analysts, therefore, you will need to clearly articulate that Indigenous relationship with the land, both as the basis of title, and as a constraint on decision-making about title lands.