

4th Annual First Nations Technology Conference

Pre-Conference Workshop: LEGAL UPDATE

February 21, 2008

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Topics

- 1. Recent developments in
Aboriginal law – where are
we at?**
- 2. Where we are going?
Implications for jurisdiction,
decision-making, and
permitting.**

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Recent Developments

- ***Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700**
- **Evolving Consultation/ Accommodation case law**
- **United Nations' Declaration on the Rights of Indigenous Peoples**

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Recent Developments – *Tsilhqot'in*

Context – The Outstanding Land Question in British Columbia

- **History and tradition of denial**
- ***Delgamuukw* – Title not extinguished**
- ***Haida* – Prior to proof, the Crown must meet obligations to consult and accommodate, and act honourably in all dealings with Aboriginal Peoples**

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Recent Developments – *Tsilhqot'in*

Core Issues

- **Scope of Title – the Province’s “small spots” theory; private lands**
- **Content of Title – jurisdiction, reconciliation**

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Recent Developments – *Tsilhqot'in*

Key Principles

- **Title = Right to choose, use, and economic component – “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.”**
- **Title can exist over large tracts of land**

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Recent Developments – *Tsilhqot'in*

Key Principles

- Fee simple grants do not extinguish Aboriginal Title
- Provincial land and resource laws do not apply to Aboriginal Title lands
- Proper Title and Rights holder is Nation
- 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.”

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Recent Developments – *Tsilhqot'in*

Status of Decision

- Declaration of Title not issued for technical reason
- Appeal?
- Provides guidance on reconciliation

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Recent Developments – *Tsilhqot'in*

Decision Endorsed Following Statement:

“...For Canada to advance to maturity... Aboriginal peoples must be able to bargain their way into a fair constitutional contract. This can only be accomplished with recognition on the Canadian side of the table of the position occupied by Aboriginal peoples: they come to these negotiations in the same state they were in 500 years ago, as organized societies existing ‘prior’ to the assertion of Crown sovereignty, societies organized according to separate and distinct conceptions of the good and of how to lead good lives.”

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Recent Developments – Consultation and Accommodation

- **Post-*Haida***, there have been almost 30 cases asserting a Crown failure to consult and accommodate. A failure to meet Crown obligations was found in a substantial majority of the decisions.
- Decisions have put various frameworks for decision-making and permitting into question.
(e.g., *Dene Tha'* – The Court found an obligation to consult arose “in relation to the development of the environmental and regulatory process”)

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Recent Developments – UN Declaration

UN Declaration of Rights of Indigenous Peoples

- Declaration of UN General Assembly
- Application in Canada
- Recognizes rights of Indigenous Peoples in relation to:
 - Self-Determination
 - Ownership of traditional lands
 - Jurisdiction over traditional lands
 - Redress, including restitution or compensation, for lands, territories and resources confiscated, taken, occupied, used or damaged without their free, prior and informed consent

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Where are we going?

Post-Xeni

- Increasing uncertainty for Industry
- Crown tenures, and authority to grant tenures in certain contexts, are increasingly questionable

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Where are we going?

Current Crown Engagement Model

- **Unilateral Crown decision-making**
- **Operational level, not strategic level**
- **Small-spots / site-specific**
- **Information-gathering and mitigation, not reconciliation and accommodation**
- **Downloading onto Industry**

Some Insufficiencies of Current Crown Engagement Model

- **Crown cannot assume jurisdiction – Probability of Title**
- **Failure to engage at strategic level – “collective right to plan for the use and enjoyment of that land for generations to come”**
- **Incomplete information base and gathering – “At present, British Columbia does not have a database that provides information on the individual species of wildlife or their numbers in the Claim Area. The Province has not conducted a needs analysis which would inform decision makers on the needs of the Tsilhqot’in people related to their hunting, trapping and trading rights.”**
- **Lack of a reconciliation or accommodation approach**
- **Lack of territorial-specific justification**

Future Directions

1. **Recognition-Based Engagement**
(e.g., focus on reconciliation, not on proof of strength of claim)
2. **Consent-based Shared Decision-Making**
(e.g., joint decision-making bodies; two decision-maker models; clear jurisdictional spheres)
3. **Strategic-Level Engagement** (e.g., land use planning; pre-screening)

Where are We Going?

- **Practical Implications of Jurisdiction – authority, responsibility and liability for First Nations decision making.**
- **Changed Legal Context may require changed information and analysis from a First Nations perspective and approach.**
- **Aboriginal Knowledge of the Environment takes into consideration different values, principles and concepts.**
- **Decision-making based upon Aboriginal Title Jurisdiction will need to incorporate the limitation articulated in *Delgamuukw*:**
“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”