

# TSILHQOT'IN NATION V BRITISH COLUMBIA

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Supreme Court of British Columbia (Vickers J)  
20 November 2007  
2007 BCSC 1700

**Canada – Aboriginal rights and title – whether a declaration of Aboriginal title can be made over all or part of the Claim Area – determination of the proper rights holder – whether the *Forest Act*, RSBC 1996, c 157 applies to Aboriginal title lands – whether certain Tsilhqot'in Aboriginal rights exist within the Claim Area – whether the Province has infringed Tsilhqot'in Aboriginal rights – justification of infringement of Tsilhqot'in Aboriginal rights – limitation periods – reconciliation**

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## Facts:

In 1983, British Columbia granted Carrier Lumber Ltd ('Carrier') a forest licence authorising logging activities in an area (the 'Trapline Territory') within the traditional territory of the Tsilhqot'in. The Province approved Carrier's Forest Development Plan in 1989, and granted a cutting permit for blocks within the Trapline Territory in 1990. The plaintiff commenced action in the Supreme Court of British Columbia in 1990. The Court issued an injunction in 1991 enjoining Carrier from logging or conducting preparatory work within the Trapline Territory until trial. Following the injunction, forestry companies indicated interest in logging within a further area of Tsilhqot'in traditional territory ('Tachelach'ed' or the 'Brittany Triangle'). The Premier of British Columbia promised the Xeni Gwet'in people of the Tsilhqot'in Nation that there would be no further logging in their traditional territory without their consent. In 1997 and 1998, the Province granted forest licences to further logging companies, which permitted additional logging within the Trapline Territory and Tachelach'ed. The plaintiff commenced action with respect to the Brittany Triangle on 18 December 1998. The parties consented to the consolidation of the Trapline Territory and Brittany Triangle actions.

The plaintiff sought declarations of Tsilhqot'in Aboriginal title and certain defined Tsilhqot'in Aboriginal rights throughout Tachelach'ed and the Trapline Territory (the 'Claim Area'), and damages for infringement of Aboriginal title.

## Held, finding unjustified infringement of Aboriginal rights but declining to issue a declaration as to Aboriginal title:

1. The proper rights holder, whether for Aboriginal title or Aboriginal rights, is the community of the Tsilhqot'in people. The Aboriginal rights of individual Tsilhqot'in people or any other sub-group within the Tsilhqot'in Nation are derived from the collective actions, shared language, traditions and shared historical experiences of the members of the Tsilhqot'in Nation: [437]–[472], [1219]–[1222]; *Delgamuukw v British Columbia* [1997] 3 SCR 1010 ('*Delgamuukw*'), *R v Marshall*; *R v Bernard* [2005] 2 SCR 220 ('*Marshall*'), *R v Marshall* [2002] 3 CNLR 176, *R v Marshall* [2001] 2 CNLR 256, *R v Powley* [2003] 2 SCR 207 ('*Powley*'), *Baker Lake v Minister of Indian Affairs and Northern Development* [1980] 1 FC 518, *Calder v British Columbia (AG)* [1973] SCR 313 ('*Calder*'), *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)* [2001] 4 FC 451 considered.

2. The date of the assertion of British sovereignty in British Columbia is 1846: [586]–[607]; *Calder* [1973] SCR 313, *Delgamuukw* [1997] 3 SCR 1010, *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185 (BCSC), *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 (BCCA), *Haida First Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 ('*Haida*') followed.

3. The Tsilhqot'in people were present in the Claim Area at the time of first contact and at the time of sovereignty assertion: [650]–[681].

4. Tsilhqot'in people have continuously occupied the Claim Area before and after sovereignty assertion: [945]; *Delgamuukw* [1997] 3 SCR 1010 followed.

5. The evidence does not support regular use by the Tsilhqot'in people in the entire area of any of the discreet parts that make up the whole Claim Area. The entire body of evidence reveals village sites occupied for portions of each year. In addition, there were cultivated fields. These cultivated fields were tied to village sites, hunting grounds and fishing sites by a network of foot trails, horse trails and watercourses that defined seasonal rounds. These sites and their interconnecting links set out definite tracts of land in regular use by Tsilhqot'in people at the time of sovereignty assertion to an extent sufficient to warrant a finding of Aboriginal title. This tract of land is mostly within the Claim Area but not entirely: [682]–[911], [946]–[962]; *Delgamuukw* [1997] 3 SCR 1010, *Marshall* [2005] 2 SCR 220, *R v Sappier; R v Gray* [2006] 2 SCR 686 ('*Sappier*') followed.

6. The occupation of the area described was exclusive and sufficient to provide a foundation for Tsilhqot'in Aboriginal title: [912]–[944]; *Delgamuukw* [1997] 3 SCR 1010, *Marshall* [2005] 2 SCR 220 followed.

7. The case is framed as an 'all or nothing' claim to Aboriginal title over all of the lands. To allow the plaintiff to now seek declarations over portions of the Claim Area would be prejudicial to the defendants. A declaration of Tsilhqot'in Aboriginal title cannot be made with respect to smaller areas included within the Claim Area because they have not been separately pleaded: [102]–[130], [957]–[962]; *Delgamuukw* [1997] 3 SCR 1010 followed; *Biss v Smallburgh Rural District Council* [1964] 2 All ER 543 considered.

8. The logical date of first contact is 1793: [1166]–[1168], [1180]–[1211]; *R v Adams* [1996] 3 SCR 101 ('*Adams*'), *R v Côté* [1996] 3 SCR 139 ('*Côté*'), *R v Van der Peet* [1996] 2 SCR 507 ('*Van der Peet*'), *Sappier* [2006] 2 SCR 686, *R v Gladstone* [1996] 2 SCR 723 ('*Gladstone*'), *Mitchell v MNR* [2001] 1 SCR 911 ('*Mitchell*'), *R v Sappier* [2004] 4 CNLR 252, *R v Billy and Johnny* 2006 BCPC 48, *R v Deneault* 2007 BCPC 307 considered.

9. The ancestors of the Tsilhqot'in people engaged in the 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 was integral to their distinctive culture: [1157]–[1175], [1223]–[1240]; *Van der Peet* [1996] 2 SCR 507, *Marshall* [2005] 2 SCR 220, *Sappier* [2006] 2 SCR 686 followed; *Mitchell* [2001] 1 SCR 911, *Côté* [1996] 3 SCR 139, *Adams* [1996] 3 SCR 101, *Powley* [2003] 2 SCR 207, *Gladstone* [1996] 2 SCR 723, *R v NTC Smokehouse Ltd* [1996] 2 SCR 672 ('*Smokehouse*') considered.

10. The ancestors of the Tsilhqot'in people engaged in the right to trade in skins and pelts as a means of securing a moderate livelihood. This right was integral to their distinctive culture: [1157]–[1175], [1242]–[1265]; *Van der Peet* [1996] 2 SCR 507, *Marshall* [2005] 2 SCR 220, *Sappier* [2006] 2 SCR 686 followed; *Mitchell* [2001] 1 SCR 911, *Côté* [1996] 3 SCR 139, *Adams* [1996] 3 SCR 101, *Powley* [2003] 2 SCR 207, *Gladstone* [1996] 2 SCR 723, *Smokehouse* [1996] 2 SCR 672 considered.

11. The hunting, trapping and trading practices of the Tsilhqot'in people represent a modern expression of those activities as practiced by Tsilhqot'in people prior to contact with European people. The Tsilhqot'in people have continuously hunted, trapped and traded throughout the Claim Area and beyond from pre-contact times to the present day: [1176]–[1179], [1266]–[1268]; *Van der Peet* [1996] 2 SCR 507, *Marshall* [2005] 2 SCR 220, *Sappier* [2006] 2 SCR 686, *Mitchell* [2001] 1 SCR 911 followed.

12. British Columbia's forestry legislation is constitutionally applicable to land over which the Tsilhqot'in people have Aboriginal rights to hunt, trap and trade. [1041]–[1045], [1289]; *Delgamuukw* [1997] 3 SCR 1010 considered.

13. Forest harvesting activities are a *prima facie* infringement on Tsilhqot'in hunting and trapping rights and thus demand justification. In the absence of sufficient credible information to allow a proper assessment of the impact on the wildlife in the area, forestry activities are an unjustified infringement of Tsilhqot'in Aboriginal rights in the Claim Area. Although the Province did engage in consultation with the Tsilhqot'in people, this consultation did not acknowledge Tsilhqot'in Aboriginal rights. Therefore, it could not and did not justify the infringements of those rights: [1055]–[1062], [1123]–[1141], [1269]–[1294]; *R v Sparrow* [1990] 1 SCR 1075 ('*Sparrow*'), *Gladstone* [1996] 2 SCR 723, *Haida* [2004] 3 SCR 511, *R v Sampson* [1996] 2 CNLR 184 followed.

14. British Columbia's *Limitation Act* applies to the plaintiff's claims of unjustified infringement of Aboriginal rights by way of s 88 of the *Indian Act*, RSC 1985, c 1-5. The plaintiff's claims with respect to unjustified infringements of Aboriginal rights in the Trapline Territories are not barred by the passage of time as the limitation period was postponed until the Supreme Court of Canada's decision in *Sparrow* [1990] 1 SCR 1075. The plaintiff's claims with respect to unjustified infringements of Aboriginal rights in Tachelach'ed occurring prior to 17 December 1992 are statute-barred. A plea of laches cannot succeed: [1308]–[1331]; *R v Morris* [2006] 2 SCR 915 applied; *Delgamuukw* [1997] 3 SCR 1010, *Stoney Creek Indian Band v British Columbia* [1999] 1 CNLR 192, *MM v Roman Catholic Church of Canada*, (2001) 205 DLR (4th) 253, *Chippewas of Sarnia Band v Canada (Attorney General)* (2001) 195 DLR (4th) 135, *Blueberry River Indian Band, Wewaykum Indian Band v Canada* (1999) 27 RPR (3d) 157 distinguished.

15. Given the inability to make a declaration of Tsilhqot'in Aboriginal title, the damages claim must be dismissed. Any dismissal of the claim for damages is without prejudice to the right to renew these claims specific to Tsilhqot'in Aboriginal title land: [1334]–[1337].

*Note: in the course of lengthy obiter dicta, Justice Vickers provided an insightful discussion of a variety of different considerations in relation to the appeal in question and Aboriginal rights and title generally. His Honour's discussion of the reconciliation process is especially illuminating: see [1338]–[1382]. See also the following for further elaboration: oral history at [131]–[132], [196], [203]; Aboriginal title at [601]–[602], [607]–[610], [681]–[684], [687], [912]–[914], [929], [938], [943]–[962]; constitutional issues at [1001]–[1003], [1007]–[1049]; duty to consult at [1114]–[1121], [1131], [1136]–[1141]; Aboriginal rights at [1153]–[1154].*