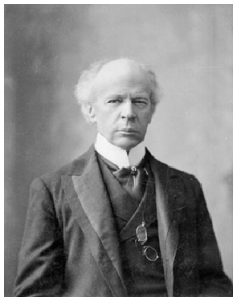
Searching for Justice in Canada's Courts:

INDG 419 / Crim 419
Fall 2023

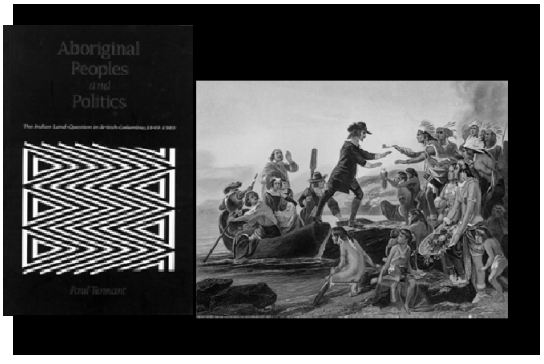
Title in BC

- In 1872, when Aboriginal people outnumbered settlers, the new Province of BC denied Aboriginal people the vote
- Only whites allowed to purchase fee-simple pre-empted land
- "Postage stamp" reserves established; refused to recognize Aboriginal title

Memorial Sir Wilfred Laurier, Premier of the Dominion of Canada From the Chiefs of the Shuswap, Okanagan and Couteau Tribes of BC (1910)



The Land Question in BC



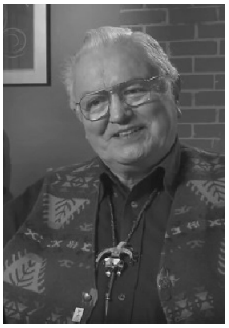
Calder v *BC* (Attorney General)

Calder v *BC* (Attorney General)

- Made it to the Supreme Court in 1973
- 3-3 decision technically a “loss”
- But 3 of Canada’s most heralded Supreme Court Justices – Emmet Hall, Wishart Spence and Bora Laskin – said that the Nisga’a had Aboriginal Title as their title had never been extinguished
- Beginning of the contemporary rights era

***Guerin* (1984)**

- 1957, Musqueam agree to lease land for golf club, specify terms
- Indian Agent changes deal
- Musqueam seek copy of lease
- Takes 12 years



***Guerin* (1984)**

- Musqueam sue feds for breach of trust
- Federal government argues they have no *legal* responsibility to band, only *political*
- Musqueam argue feds have *legal* obligation arising from *Royal Proclamation*
- Supreme Court agrees with Musqueam
  - RP means surrenders must pass through government
  - govt thereby incurs fiduciary obligation

Constitution Act, 1982

- Recognition of "existing" Aboriginal rights:
  - "35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."
- But what are these?
- Three constitutional meetings were held in an effort to give life to that constitutional phrase

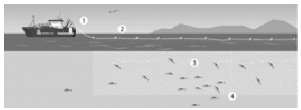
CBC - 1987

R. v. *Sparrow* (1990)

- After 5 years, issues became justiciable
- First case was *R.* v. *Sparrow*
- Supreme Court outlines the rules by which this and future rights cases would be adjudicated

R. v. *Sparrow* (1990)

- Crown argues
  - if there ever was a right, it was implicitly extinguished by the fishery and licensing that is incompatible with Aboriginal rights
  - "real Indians don't eat pizza"; i.e., rights are limited to what they were and how they were exercised at contact



Supreme Court's 4-step test

1. Is there an existing inherent right protected by section 35 (1) of the Constitution Act, 1982? (Onus of proof on the First Nation claiming the right)
   - Must identify specific right
   - Satisfy "integral to distinctive culture" test
   - Practice must predate arrival of Europeans
   - Must be continuity of practice
   - Documentation need not be written

4-step test

2. Has the inherent right claimed been extinguished prior to the enactment of section 35 (1) of the *Constitution Act,* 1982? (Onus of proof on the Crown)
   - Prior to 35(1) extinguishment could occur via surrender, Constitutional enactment, or validly enacted federal legislation
   - Must be "clear and plain intention" to extinguish
   - Legislation inconsistent not sufficient

4-step test

3. Has the inherent right been infringed by federal or provincial legislation? (Onus of proof on First Nation claiming the right)
   - Rights can be infringed, not absolute
   - Court must consider
     - » Is the limitation unreasonable?
     - » Does the regulation impose undue hardship?
     - » Does the regulation deny to the holders of the right their preferred means of exercising that right?

4-step test

4. Can the infringement be justified? (Onus of proof on the Crown)
   - If an infringement, Crown must prove
     - (a) that the infringement took place pursuant to a compelling and substantial objective; and
     - (b) that the infringement is consistent with the Crown's fiduciary obligation to First Nations
   - Valid objectives include conservation, pursuit of economic and regional fairness, recognition of the historical reliance upon, and participation in, fish and wildlife harvesting by non-Aboriginal groups

Delgamuukw v *The Queen* (1997)

- Gitksan/Wet'suwet'en claim Aboriginal title and jurisdiction to/in traditional lands never extinguished
- Oral histories and songs (*adaox*) revealed
- McEachern lambasted for racist decision
- Case goes to Supreme Court

CANADA'S NATIONAL NEWSPAPER

THE GLOBE AND MAIL

Toronto, Friday, December 12, 1997 — Cloud and sun. High near -1. Details, map, S13.

Natives win on land rights

Top court rules that oral history gives bands constitutional claim in absence of treaties

The Globe and Mail

Native people have a constitutional right to own their ancestral lands and to use them almost entirely as they wish, the Supreme Court of Canada ruled yesterday.

The decision applies to natives who have not signed away their lands in treaties and so is especially explosive in parts of Atlantic Canada and most of British Columbia.

By ruling that aboriginal title to land has never been extinguished, the Supreme Court casts a thick cloud of uncertainty over the future of British Columbia's logging and mining industries.

BY ROBERT MAYAS, Vancouver
ERIN ANDERSSEN, Ottawa
SEAN FINE, Toronto

In a unanimous decision released yesterday, a six-member panel of the Supreme Court overturned a ruling of a B.C. court that dismissed claims from the Gitxsan and Wet'suwet'en First Nations to ownership of a 58,000-square-kilometre swatch of land in northwest British Columbia.

The Supreme Court concluded that a new trial is necessary. The trial judge erred by not taking into account oral histories of the natives presented to the court to establish their occupation and use of the land, the court found.

"Had the trial judge assessed the oral histories correctly, his conclusions on these issues of fact might have been very different," stated Chief Justice Antonio Lamer, who wrote the decision.

However, Chief Justice Lamer also stated that the court was not necessarily encouraging the natives to return to litigation to settle their dispute. Rather, he encouraged them to negotiate a settlement with the federal and provincial governments.

Ultimately it is through negotiated settlements, based on good faith and reinforced by the Court's ruling, that a reconciliation between native societies and the rest of Canada will be achieved, he wrote. "Let us face it, we are all here to stay."

Both the federal and provincial governments expressed a willingness yesterday to negotiate a settlement.

Negotiation is the preferred option of the federal government, Indian Affairs Minister Jane Stewart said yesterday. She called the judgment a "positive affirmation" of Ottawa's approach to land-claims issues.

Please see Native / A10
Jeffrey Simpson / A20

Delgamuukw v *The Queen* (1997)

- "Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures. The protected uses must not be irreconcilable with the nature of the group's attachment to that land."

Delgamuukw v *The Queen* (1997)

- In order to establish a claim to Aboriginal title, the Aboriginal group asserting the claim must establish that, when Crown asserted sovereignty
  - it occupied the lands in question; and
  - occupation was exclusive
- These requirements flow from the definition of Aboriginal title, which is defined in terms of the right to exclusive use and occupation of land.

Sovereignty's Alchemy

John Borrows

Sovereignty's Alchemy

- Borrows asserts the Supreme Court's decision-making embodies an unequal legal framework that undermines Indigenous interests
  - Law fraught with double standards
  - Process is the punishment
  - Indigenous peoples must demonstrate title; Canada can wave magic sovereignty wand
  - On what basis does the Supreme Court get to define Aboriginal culture?

Haida v *BC* & *Taku River Tlingit* v *BC* (2004)

- Three questions addressed in the preliminary case were:
  - Is there an enforceable duty to consult prior to the definitive proof of aboriginal or treaty rights?
  - Is there an enforceable duty to accommodate disputed aboriginal and treaty rights prior to definitive proof of such rights?
  - Do any such duties apply to private parties?
- Answers were "Yes," "Yes," "No."

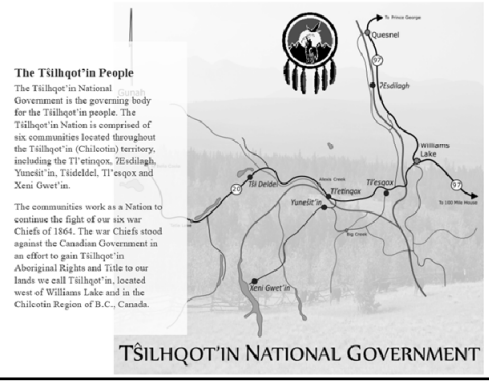
Haida v *BC* & *Taku River Tlingit* v *BC* (2004)

- Affirmed "duty to consult" as part of the honour of the Crown where treaties have not yet been concluded
- The Crown, acting honourably, "cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof"
- Obligations of Crown vary depending on severity of infringement; Crown may (and sometimes must) balance societal interests

Haida v *BC* & *Taku River Tlingit* v *BC* (2004)

- Crown must bargain/consult in good faith and cannot be inflexible; must minimize infringement; must accommodate Aboriginal interest
- However, "hard bargaining" is OK and an agreement need not necessarily be reached (i.e., the standard is "consultation" rather than "consent")

The Tŝilhqot'in People



Xeni Gwet'in First Nations v. *British Columbia* (2004)

- Case originated when the BC Government sold various licences that would allow for logging in Tsilqhot'in territory
- The Tsilqhot'in Nation asked for an all-or-none decision
- Vickers at BC Supreme Court said that his hands were tied; could not give "all," so must say "none," but...

Xeni Gwet'in First Nations v. *British Columbia* (2004)

- ... also made clear that if he were to be asked to make a more specific declaration, he would have awarded about 50% – 2,000+ sq.km – way more than any treaty settlement would be
- Xeni Gwet'in willing to negotiate, but lodged right to appeal just in case province got cold feet (which they did)

Xeni Gwet'in First Nations v. *British Columbia* (2004)

- Case then went to BC Court of Appeal
- New theory that the Court buys is that Aboriginal title cannot apply to a whole territory, but rather only to those limited sites on which activity can be proven
- Yet another example of Canada usurping any overlapping claims re identity, culture, territory

ABORIGINAL AFFAIRS VANCOUVER SUN FRI 25 JAN 2013 p B2

Top court to hear B.C. land rights case

Legal experts say the ruling will finally determine how title claims can be established

PETER O'NEIL
VANCOUVER SUN

OTTAWA – The Supreme Court of Canada agreed Thursday to hear a case at the centre of the decades-long legal fight over aboriginal claims to vast parts of British Columbia.

It involves the claim by the Tsilhqot'in First Nation to 4,380 square kilometres of territory west of Williams Lake.

The case, expected to be heard late this year or early next year, is considered by legal experts to be the most important aboriginal land case put to Canada's highest court since the 1997 Delgamuukw decision.

That decision, involving the Gitxsan and Wet'suwet'en First Nations in B.C., now the court recognizes that aboriginal "title" to land exists. The judges also set out how governments must consult, perhaps compensate, and even get consent to "infringe" on that title through projects such as mines, tree harvesting, and road construction.

But the court stopped short of declaring whether the Gitxsan and Wet'suwet'en had title to the lands being claimed, saying a new trial would be needed to make that determination.

So far, that new trial has never taken place. Many B.C. First Nations have tried to resolve their claims through negotiations, with limited success.

Now, legal experts say, the Supreme Court likely will use the latest case to set out how aboriginal land title can be established.

"It's a huge case. It's Delgamuukw No. 2, in a sense," said University of B.C. law professor Gordon Christie, a specialist in aboriginal law.

Both the B.C. Supreme Court, in 2007, and the B.C. Court of Appeal, in 2012, accepted the Tsilhqot'in claim that they have traditional rights to the land. However, both courts differed significantly on how far those rights extend.

B.C. Supreme Court Justice David Vickers delivered a broad interpretation in his 2007 ruling, saying that a nomadic people who used a large area of land periodically over many years had a right to claim title to that land.

That is the basis of First Nations' claims that blanket the entire land mass of the province.

But Vickers, citing a technicality, didn't issue an order granting title.

Last year, B.C.'s appeal court rejected Vickers' ruling, saying a title claim must be based on a specific occupancy and intensive and exclusive use of a site.

The law does not "support the idea that title can be proven based on a limited presence in a broad territory.

But Vickers, citing a technicality, didn't issue an order granting title.

Last year, B.C.'s appeal court rejected Vickers' ruling, saying a title claim must be based on a specific occupancy and intensive and exclusive use of a site.

The law does not "support the idea that title can be proven based on a limited presence in a broad territory," Justice Harvey Groberman wrote for the appeal court.

The Tsilhqot'in, in announcing plans to appeal last year, said the decision was "regressive" and would generate uncertainty for all Canadians.

"For us, the Court of Appeal denied the legitimacy of our laws, our ways of life, who we are as Tsilhqot'in people," Joe Alphonse said in a statement Thursday. He is tribal chairman and chief of Tl'etinqox-t'in community, one of the six nations that make up the Tsilhqot'in First Nation.

UBC's Christie said the Supreme Court of Canada could finally spell out in detail its view of aboriginal title claims.

"The Supreme Court is going to have a chance to actually sit down and say, 'this is what we meant in previous cases, this is how it plays out here.' A lot of questions will be answered."

He said the court has in the past indicated a need to meld common law with aboriginal traditions. If the top court wants to follow through on that commitment, he said, it needs to recognize more clearly that aboriginal rights include ownership of at least some land.

"There are pretty good arguments that aboriginal title has to have some territorial component to it," he said. "If they don't take territory into account they've pretty much ignored the aboriginal perspective."

He said the current court has given indications it is "fairly conservative," suggesting a relatively narrow interpretation.

Regardless of which route the court takes, both the 2007 and 2012 decisions recognized aboriginal rights that must be considered before development takes place.

That will create new uncertainty for projects like Taseko Mines Ltd's proposed gold-copper project near Williams Lake that is opposed by the Tsilhqot'in, he said.

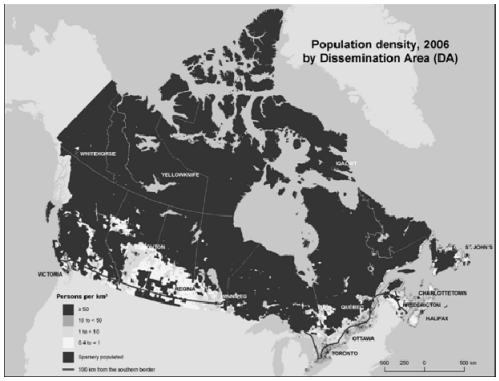
A Taseko spokesman said in an email Thursday that neither the 2007 nor the 2012 rulings suggested there was aboriginal title in the mine property.

"There will be limited impact on the New Prosperity project," he said.

Alphonse disagreed, saying in a statement that both lower courts recognized aboriginal rights in the area of the mine. He said the federal government acknowledged those rights when it turned down Taseko's original proposal in 2010.

"Taseko Mines has a lot to be worried about. This case is about all our ownership of the land, including the area that would be mined," he said.

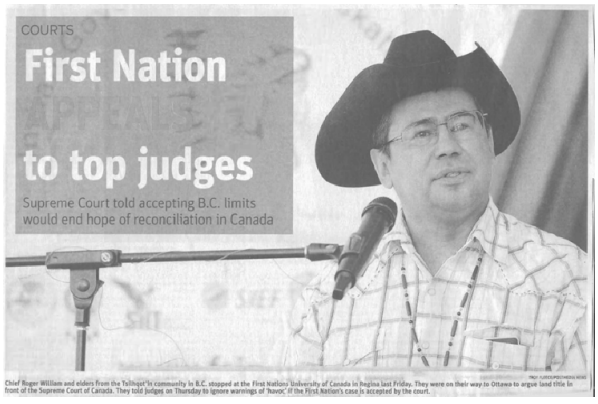
"The law does not support the idea that title can be proven based on a limited presence in a broad territory."



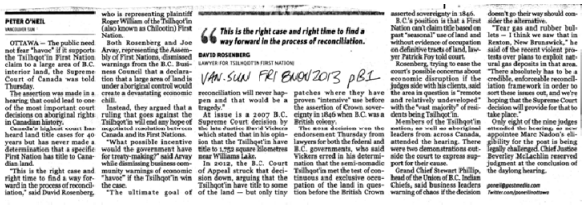
COURTS

First Nation to top judges

Supreme Court told accepting B.C. limits would end hope of reconciliation in Canada



Chief Roger William and elders from the Tsilhqot'in community in B.C. stopped at the First Nations University of Canada in Regina last Friday. They were on their way to Ottawa to argue land title in front of the Supreme Court of Canada. They told judges on Thursday to ignore warnings of "havoc" if the First Nation's case is accepted by the court.



PETER O'NEIL
VANCOUVER SUN

OTTAWA — The public need not fear "havoc" if it supports the Tsilhqot'in First Nation claim to a large area of B.C. interior land, the Supreme Court of Canada was told Thursday.

The assertion was made in a hearing that could lead to one of the most important court decisions on aboriginal rights in Canadian history.

Canada's highest court has heard land title cases for 40 years but has never made a determination that a specific First Nation has title to Canadian land.

"This is the right case and right time to find a way forward in the process of reconciliation," said David Rosenberg, who is representing plaintiff Roger William of the Tsilhqot'in (also known as Chilcotin) First Nation.

Both Rosenberg and Joe Arvay, representing the Assembly of First Nations, dismissed warnings from the B.C. Business Council that a declaration that a large area of land is under aboriginal control would create a devastating economic chill.

Instead, they argued that a ruling that goes against the Tsilhqot'in will end any hope of negotiated resolution between Canada and its First Nations.

"What possible incentive would the government have for treaty-making?" said Arvay while dismissing business community warnings of economic "havoc" if the Tsilhqot'in win the case.

"The ultimate goal of reconciliation will never happen and that would be a tragedy."

> *This is the right case and right time to find a way forward in the process of reconciliation.*
>
> DAVID ROSENBERG
> LAWYER FOR TSILHQOT'IN FIRST NATION

VAN. SUN FRI 8 NOV 2013 pB1

At issue is a 2007 B.C. Supreme Court decision by the late Justice David Vickers which stated that in his opinion that the Tsilhqot'in have title to 1,750 square kilometres near Williams Lake.

In 2012, the B.C. Court of Appeal struck that decision down, arguing that the Tsilhqot'in have title to some of the land — but only tiny patches where they have been and that would be a tragedy."

At issue is a 2007 B.C. Supreme Court decision by the late Justice David Vickers which stated that in his opinion that the Tsilhqot'in have title to 1,750 square kilometres near Williams Lake.

In 2012, the B.C. Court of Appeal struck that decision down, arguing that the Tsilhqot'in have title to some of the land — but only tiny patches where they have proven "intensive" use before the assertion of Crown sovereignty in 1846 when B.C. was a British colony.

The area decision was the endorsement Thursday from lawyers for both the federal and B.C. governments, who said Vickers erred in his determination that the semi-nomadic Tsilhqot'in met the test of continuous and exclusive occupation of the land in question before the British Crown asserted sovereignty in 1846.

B.C.'s position is that a First Nation can't claim title based on past "seasonal" use of land and without evidence of occupation on definitive tracts of land, lawyer Patrick Foy told court.

Rosenberg, trying to ease the court's possible concerns about economic disruption if the judges side with his clients, said the area in question is "remote and relatively undeveloped" with the "vast majority" of residents being Tsilhqot'in.

Members of the Tsilhqot'in nation, as well as aboriginal leaders from across Canada, attended the hearing. There were two demonstrations outside the court to express support for their cause.

Grand Chief Stewart Phillip, head of the Union of B.C. Indian Chiefs, said business leaders warning of chaos if the decision doesn't go their way should consider the alternative.

"Tear gas and rubber bullets — I think we saw that in Kenora, New Brunswick," he said of the recent violent protests over plans to exploit natural gas deposits in that area. "There absolutely has to be a credible, enforceable reconciliation framework in order to sort those issues out, and we're hoping that the Supreme Court decision will provide for that to take place."

Only eight of the nine judges attended the hearing, as newappointee Marc Nadon's eligibility for the post is being legally challenged. Chief Justice Beverley McLachlin reserved judgment at the conclusion of the daylong hearing.

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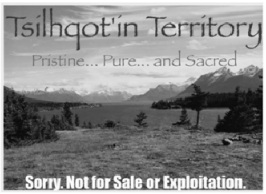


Tsilhqot'in Nation v. BC

Tsilhqot'in Nation v. BC

- The SCC clarified the *Delgamuukw* test and concluded that the following three requirements must be present to establish Aboriginal title:
  - sufficient pre-sovereignty occupation;
  - continuous occupation (where present occupation is relied on); and
  - exclusive historic occupation.

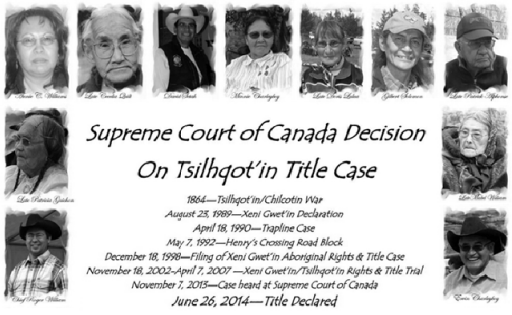
Tsilhqot'in Nation v. BC

- The SCC affirmed that Aboriginal title "extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty."
- the SCC rejected the BCCA's theory of a "network of specific sites over which title can be proven."

Tsilhqot'in Nation v. BC

- "Crown must seek the consent of the title-holding Aboriginal group to developments of the land"
- But ... Crown can also proceed IF
  - it discharged its procedural duty to consult and accommodate
  - its actions are backed by a compelling and substantial objective; and
  - the governmental action is consistent with the Crown's fiduciary obligation to the group.

Tsilhqot'in Nation v. BC



Where are we now?

- At 2015 UBCIC AGM Louise Mandell said Crown had run out of extinguishment theories:
  - Inferiority
  - Regulation
  - Small isolated spots
  - Treaty

Where are we now?

- Or will there be any such cases?
- Louise Mandell in 2016 started looking at alternatives to litigation
- Her advice
  - Re-establishing nations
  - Just do it (fill the void)

Where are we now?

- Newest development in Canadian law comes from BC decision to introduce legislation that will begin to incorporate the principles of the UNDRIP into provincial law
- Meanwhile, Indigenous law (as distinct from Aboriginal law) begins to get a foothold at Uvic, McGill

A Place for Indigenous Law?

- Canada's courts deliver Canada's law
- Impossible for them to question the basis of their own existence
- Conflicts like the one in Wet'suwet'en territory better understood as a clash of legal orders
- How might they be reconciled?
- And is there one "Indigenous Law"?