

COMMENTARIES

***TSILHQOT'IN NATION V. BRITISH COLUMBIA:* ABORIGINAL TITLE AND SECTION 35**

1. Introduction

The headline result of *Tsilhqot'in Nation v. British Columbia*¹ is that the Supreme Court of Canada confirmed the Aboriginal title of the Tsilhqot'in Nation in more than 1,750 square kilometres of land on which about 200 members² of the nation live. But, more importantly, this is only the most recent in a continuing line of Supreme Court of Canada cases³ breathing remarkable life into the cryptic s. 35(1) of the Constitution Act, 1982⁴ which emerged late in the constitutional process. It apparently received comparatively little analysis before becoming part of Canada's constitution.⁵ This

1. *Tsilhqot'in Nation v. British Columbia; Xenigwet'in First Nations v. British Columbia*, 2014 SCC 44 (S.C.C.).
2. The S.C.C. decision says that 200 Tsilhqot'in Nation people live in the claim areas today (para. 6) and 400 lived there at sovereignty (para. 59).
3. The principal decisions are *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313 (S.C.C.); *Guerin v. R.*, (*sub nom.* *Guerin v. Canada*) [1984] 2 S.C.R. 335 (S.C.C.); *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.); *R. v. Van der Peet*; *R. v. Vanderpeet* (1996), 137 D.L.R. (4th) 289, [1996] 2 S.C.R. 507 (S.C.C.), reconsideration / rehearing refused (January 16, 1997), Doc. 23803 (S.C.C.); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.); *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (S.C.C.); *R. v. Marshall*, [2005] 2 S.C.R. 220 (S.C.C.).
4. Section 35 follows together with the related s. 25 of the Constitution Act, 1982, including the amendments made by the Constitution Amendment Proclamation, 1983:
 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:
 - (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
 - (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.
 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
 - (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
 - (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
 - (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

comment provides an overview of the decision in *Tsilhqot'in* and critically analyzes some of its key implications.

2. The Judicial Process

The Supreme Court of Canada decisions flow from the conclusion reached by the court in 1973 “that Aboriginal rights survived European settlement and remain valid to the present day unless extinguished by treaty or otherwise”⁶ and that those rights existed in 1982 and hence are protected by s. 35(1). Prime among the court’s objectives is to “faithfully transl[ate] pre-sovereignty Aboriginal interests into equivalent modern rights.”⁷ The decisions respecting Aboriginal title relate to unceded land — land unaffected by treaties that determine land entitlement. Since unceded land includes much of British Columbia, significant portions of northern Québec, and probably much of the Atlantic provinces,⁸ the cases are of national importance.

The Supreme Court of Canada frequently indicates in these cases its belief that the issues are better settled by negotiation than by litigation.⁹ Unfortunately, the modern negotiation process has

5. “This provision [s. 35(1)] emerged late in the process of drafting the *Constitution Act, 1982*. . . . the legislative history suggested less than total enthusiasm by the first ministers.” Peter Hogg, “The Constitutional Basis of Aboriginal Rights”, in Maria Morellato, ed., *Aboriginal Law Since Delgamuukw* (Aurora, Canada Law Book, 2009), pp. 3-16, at p. 5.
6. *Tsilhqot'in*, *supra*, footnote 1, at para.19. The 1973 decision referred to is *Calder* (*supra*, footnote 3).
7. *Tsilhqot'in*, *supra*, footnote 1, at para. 32.
8. In the Maritime Provinces, treaties of “friendship, navigation and commerce” of the sort once used to end European wars prevailed. These do not contain land cessions. In Newfoundland, a condition of the recognition of the Qalipu is that no reserves are to be created for the newly recognized nation. Aboriginal title is not at issue since their presence dates only from colonial times, and the last Beothuk died in 1829. Labrador is not fully covered by land cession treaties. Discussion of whether treaties containing language releasing interests in land should in all cases be accepted as extinguishing aboriginal title is not within the scope of this case comment. For a careful analysis of the treaties entered into in the 1850s that released land claims of Indians in the Victoria district of Vancouver Island, see Wilson Duff, *The Fort Victoria Treaties*, *British Columbia Studies* No. 3 (Vancouver, 1969), pp. 3-57. See in particular “The Treaties: an Ethnographic Appraisal”, commencing at p. 51. These treaties were among the very few in British Columbia.
9. The force of this policy is well stated by Lamer C.J.C. when ordering a new trial (because the trial court had given insufficient weight to oral evidence) where the original trial lasted 374 days and produced a decision of nearly 400 pages, with 100 pages of schedules. In *Delgamuukw* (*supra*, footnote 3) he said:
 Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties

had only modest success, except in Québec in the 1970s and in the Territories, where far-reaching arrangements were concluded in the 1990s. In *Tsilhqot'in*, the Supreme Court of Canada rejected the argument of the federal and provincial governments for a restrictive test of Aboriginal title. The decision constituted the first legally binding recognition of Aboriginal title in Canada and will likely have a significant impact on negotiations relating to unceded land even where Aboriginal title is asserted without having been formally established. The present commentators hope that, over time, the confluence of a number of factors will increase the success rate of negotiations, a topic returned to below. Perhaps the most cogent consideration motivating parties to negotiate rather than litigate is the extraordinarily time-consuming and expensive nature of litigation in this area.

Those costs are demonstrated by some common elements in the long line of cases of which *Tsilhqot'in* is one. Almost invariably, the trial is extraordinarily lengthy, involving evidence of kinds unknown in other cases.¹⁰ The trial is followed by a Court of Appeal hearing that produces a complex decision, often by a divided court. Then there is a Supreme Court of Canada decision, often also by a divided court, that addresses the specific dispute before the court while adding further threads to an ever-developing legal tapestry answering some questions but usually producing lacunae to be filled by subsequent decisions after equally tortuous processes.

to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) “provides a solid constitutional base upon which subsequent negotiations can take place.” Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35 (1) — “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.” Let us face it, we are all here to stay.

Delgamuukw v. British Columbia. The references are to *R. v. Sparrow* and *R. v. Van der Peet*, *supra*, footnote 3.

10. In *Xeni Gwet'in First Nations v. British Columbia; Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 (B.C. S.C.) (the trial decision under review in the *Tsilhqot'in* case in the S.C.C.), Vickers J. provided an Executive Summary preceding his reasons. He said that at the trial “the court heard oral history and oral tradition evidence and considered a vast number of historical documents. Evidence was tendered in the fields of archeology, anthropology, history, cartography, hydrology, wildlife ecology, ethnoecology, ethnobotany, biology, linguistics, forestry and forest ecology.” The reasons for judgment clearly indicate considerable reliance on oral evidence of historic events, even preceding written language.

Tsilhqot'in followed this pattern. A 339-day trial having its genesis with preliminary motions in 1989 resulted in a 2007 decision of 1,387 paragraphs.¹¹ The legal costs of the Aboriginals were paid by the province.¹² The trial judge concluded, after extraordinarily detailed historical analysis, that Aboriginal title existed in an area smaller than claimed, but still extensive. Because of a problem with the pleadings, he refused to make an order to that effect. The British Columbia Court of Appeal in 2012 would have found in favour of Aboriginal title over a smaller area than did the trial judge, accompanied by Aboriginal rights lesser than title (for example hunting rights) over a wider territory; however, the British Columbia Court of Appeal also dismissed the claim for procedural reasons.¹³ In 2014, after a hearing with 17 interveners, the Supreme Court of Canada held that Aboriginal title was present in the much larger contiguous territory determined by the trial judge. This lengthy and expensive judicial process is typical. Moreover, since the evidentiary basis for Aboriginal title is daunting, the process will be difficult to streamline so long as the legal issues remain unchanged.

Another highly unusual element of these decisions is that the substantive law on which they are based is almost entirely judge-made; s. 35(1) did not create new law, it simply preserved rights under the judge-made law that was unfolding before 1982 and continues to unfold now. In modern times, there is little legislation, federal or provincial, addressing these issues; indeed, among the many complex issues that required resolution in *Tsilhqot'in* was the extent to which forestry legislation and other statutes of general application would be operative in land over which Aboriginal title existed. Since s. 35(1), substantive change in this area of the law has been reserved to the courts. Put briefly, the substantive legal conclusions in *Tsilhqot'in* now form part of Canada's constitution,

11. *Supra*, footnote 10. The Herculean effort of Vickers J. as trial judge was applauded by all concerned in the subsequent litigation. He died not long after rendering his decision.
12. A series of court decisions was involved here, with the key award being made: 2004 BCSC 610 (B.C. S.C.), following the Supreme Court of Canada decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 (S.C.C.), which called for such orders in litigation where certain conditions were met. The orders are now sufficiently common that they are referred to generally as "Okanagan orders". The amount British Columbia was required to pay for the litigation costs of the plaintiff aboriginals in *Tsilhqot'in* is rumoured to have exceeded \$12 million.
13. *Xeni Gwet'in First Nations v. British Columbia; William v. British Columbia*, 2012 BCCA 285 (B.C. C.A.).

amendable only by a constitutional amendment, unless modified by subsequent Supreme Court of Canada decisions. We know of no evidence indicating that the statesmen involved in 1982 anticipated the impact of s. 35(1).

3. Proving Aboriginal Title and its Characteristics

Tsilhqot'in considers Aboriginal title to land. That is the highest and best form of Aboriginal entitlement developed in this area of judge-made law. But it is far from the only one. In *Delgamuukw*, referring to the prior Supreme Court of Canada decision in *R. v. Adams*,¹⁴ Lamer C.J.C. said:¹⁵

[T]he aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the “*occupation and use of the land*” where the activity is taking place is not “*sufficient to support a claim of title to the land*” (at para. 26 (emphasis in original)). Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. . . .

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At the other end of the spectrum, there is aboriginal title itself. . . . What aboriginal title confers is the right to the land itself.

Each of these entitlement levels has generated a separate line of judicial decisions of high complexity. Those analyzing *Tsilhqot'in* should remember that even where Aboriginal title is not found to exist, one of the lesser entitlement levels described by Lamer C.J.C. may be present.

Since *Tsilhqot'in* resulted in the first Canadian recognition of Aboriginal title, it contains more detail about the attributes of that title, although many important issues remain. The most salient elements of the Supreme Court of Canada's decision can be briefly summarized. Aboriginal title can be established only by court order or by agreement between the group concerned and the Crown. It applies to land under Aboriginal occupation prior to

14. (1996), 138 D.L.R. (4th) 657 (S.C.C.), at para. 30.

15. *Delgamuukw v. British Columbia*, *supra*, footnote 3, at para. 138. The quotation does not reference treaty or reserve lands, although they too are protected by s. 35.

sovereignty.¹⁶ Further, “it must be *sufficient*, it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.”¹⁷ Once established, Aboriginal title constitutes “an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.”¹⁸ This title confers rights akin to fee simple — occupancy, enjoyment of economic benefits, control over use and management — but subject to a major restriction in that the title is a collective one, so that the land cannot “be developed or misused in a way that would substantially deprive future generations of the benefit of the land.”¹⁹ (It is noteworthy in passing that this restriction may well impede the use of land held under Aboriginal title for its best economic purpose).

And land subject to Aboriginal title can be alienated only to the Crown. Neither federal nor provincial governments “could legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right unless such an infringement is justified in the broader public interest and is consistent with the Crown’s fiduciary duty owed to the Aboriginal group.”²⁰

16. At trial, Vickers J. accepted the date of the Oregon Boundary Treaty, 1846, as the date of sovereignty: *Xeni Gwet’in First Nations v. British Columbia*; *Tsilhqot’in Nation v. British Columbia*, *supra*, footnote 10, at para. 601. Neither the Court of Appeal nor the S.C.C. disagreed. On this, as on other historical topics, the decision of Vickers J. is a fascinating read.

17. *Tsilhqot’in*, *supra*, footnote 1, at para. 25. The parenthetical phrase merits further explanation. The most cogent explanation of it in the *Tsilhqot’in* sequence of decisions is at para. 548 of the decision at trial (*supra*, footnote 10):

Where an Aboriginal group provides direct evidence of pre-sovereignty use and occupation of land to the exclusion of others, such evidence establishes Aboriginal title. There is no additional requirement that the claimant group show continuous occupation from sovereignty to the present day. Upon the assertion of sovereignty, Aboriginal title crystallizes into a right at common law, and it subsists until it is amended or extinguished.

This basis for Aboriginal title has not been tested in any actual decision in Canada of which we are aware. It is among the many potentials for future litigation, if an Aboriginal group attempts to claim title to land long since applied to some other purpose. (The media reported on January 7, too late for discussion in this case comment, that the Québec Court of Appeal ruled against a procedural motion by the Iron Ore Company of Canada seeking dismissal of a claim by Québec Innu tribes for damages and other remedies consequent upon mining and operating a railway over their tribal lands during a 60-year period. The Iron Ore Company alleged that the proper defendant should be the province of Québec. See *Globe and Mail, Report on Business*, January 7, 2015).

18. *Tsilhqot’in*, *supra*, footnote 1, at para. 69.

19. *Tsilhqot’in*, *supra*, footnote 1, at para. 74.

20. *Tsilhqot’in*, *supra*, footnote 1, at para. 139.

Almost every element of this high-level description stands atop issues of great complexity and importance. We have space to address only a few. One fundamental issue is the meaning of “occupation”, used but not fleshed out in prior decisions. In giving meaning to this word, the Supreme Court of Canada and the trial judge adopted a “territorial” approach. The Court of Appeal contrasted this territorial approach with a “postage stamp” or site-specific approach, requiring proof of more intensive occupancy of specific areas, and concluded in favour of the latter approach, supplemented by a lesser level of Aboriginal rights such as hunting rights to a wider area. The Court of Appeal commented:²¹

I see broad territorial claims to title as antithetical to the goal of reconciliation, which demands that, so far as possible, the traditional rights of First Nations be fully respected without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians, Aboriginal and non-Aboriginal.

Since the Court of Appeal agreed with the trial judge that the action should be dismissed because of procedural technicalities, it was unnecessary for the Court of Appeal to determine the specific land that satisfied its more site-specific approach.

In a brief analysis, the Supreme Court of Canada adopted (without calling it such) the territorial approach, commenting that this approach is “culturally sensitive”,²² thereby affirming the trial judge’s finding and leading to the award to the Tsilhqot’in of aboriginal title in more than 1,750 square kilometres of land (the procedural considerations that troubled the lower courts were no longer in issue). While it was a matter of happenstance that this particular set of facts was involved, it is noteworthy that the Aboriginal cause could not have been better served if the selection of the land for the test case had been done by careful strategic analysis. Isolated and sparsely inhabited, the land was not subject to overlapping Aboriginal claims, which characterize most claims for unceded land across British Columbia. The Tsilhqot’in made no claim to the portion of the land held by anyone other than the Crown, or to submerged land, or to surface or ground waters, leaving each of these issues for potential future litigation. So on these facts, the court’s use of exclusivity — whether the group “has historically acted in a way that would communicate to third parties

21. *Xeni Gwet’in First Nations v. British Columbia; William v. British Columbia*, *supra*, footnote 13, at para. 219, *per* Groberman J.A. for the court.

22. *Tsilhqot’in*, *supra*, footnote 1, at para. 44.

that it held the land for its own purposes”²³ — as the prime criterion for occupation was comparatively readily met. The court’s conclusion affirming Aboriginal title was, even so, reached only after the very lengthy litigation described above, which does not bode well for the duration of future litigation on more complex facts. And future situations where Aboriginal title might be asserted will almost certainly present more complex facts — water rights, competing fee simple claimants, overlapping title with other Aboriginal groups, and so on. Particularly serious controversies are likely to arise over land now “owned” by private sector persons who believe they have fee simple title, but over which Aboriginal title is asserted.

A potentially troublesome issue briefly discussed by the Court of Appeal in *Tsilhqot’in* is that of governance. In his extensive analysis of the Tsilhqot’in Nation the trial judge found that it comprises a group of bands forming a “homogeneous group of people” but not a nation in the governance sense.²⁴ One band, the Xeni Gwet’in, was looked to by the others as “caretaker” of the particular land involved in the proceedings. British Columbia argued that this meant the band should be the holder of Aboriginal title. This argument was rejected by the trial judge and the Court of Appeal, but the latter noted the potential difficulty in having a holder of Aboriginal title that lacks governance capacity to make decisions involving the land.²⁵ The Supreme Court of Canada did not address the issue, leaving no guidance on what we think may well emerge as a serious area of contention in dealing with future claims for Aboriginal title, and as a serious problem in situations where Aboriginal title is held by a group that lacks a governance regime. How, for example, would the group give consent to a development of the Aboriginal title land with less than unanimous agreement?

23. *Tsilhqot’in*, *supra*, footnote 1, at para. 38.

24. *Xeni Gwet’in First Nations v. British Columbia; Tsilhqot’in Nation v. British Columbia*, *supra*, footnote 10, at para. 458.

25. The Court of Appeal remarked:

It will, undoubtedly, be necessary for First Nations, governments and the courts to wrestle with the problem of who properly represents rights holders in particular cases, and how those representatives will engage with governments. I do not underestimate the challenge in resolving these issues and recognize that the law in this area is in its infancy. I do not, however, see that these practical difficulties can be allowed to preclude recognition of Aboriginal rights that are otherwise proven.

William v. British Columbia; Xeni Gwet’in First Nations v. British Columbia, *supra*, footnote 13, at para. 151.

Primarily because this litigation had its genesis in a challenge to forestry licences issued by the province, the Supreme Court of Canada commented on the enforceability of governmental initiatives affecting Aboriginal title land. It prescribed tests to be met where governmental action would over-ride “the Aboriginal title-holding group’s wishes on the basis of the broader public good.”²⁶ This passage of the court’s decision seems to us unfortunately widely worded. We believe it was intended to be focussed on specific land-related interventions such as forestry licences (those in issue here were invalidated). But the Aboriginal group might object to much other legislation. The sentencing provisions of the Criminal Code,²⁷ gender roles in property rights and collective decision-making, elements of human rights legislation and even the Constitution itself²⁸ could be examples. We consider it unlikely that the restrictive comments by the court would be applied to legislation such as this, but the distinction is not clearly made in its decision and we think that the scope of governmental actions that are susceptible to challenge in their application to Aboriginal title lands will likely be another complex source of future dispute.

Addressing the specific question of what “interests are potentially capable of justifying an incursion on Aboriginal title”,²⁹ the court first quotes with approval from an earlier decision³⁰ that appears to allow reasonable room for governmental incursions on Aboriginal title lands to implement wider public policy objectives. But the Supreme Court of Canada comments that follow seem considerably more restrictive. First, “incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.”³¹ We suppose that an underground mine with little effect on land use or water quality might qualify, but that widespread fracking or

26. *Tsilhqot’in*, *supra*, footnote 1, at para. 77.

27. R.S.C. 1985, c. C-46.

28. But see s. 25, quoted, *supra*, footnote 4.

29. *Tsilhqot’in*, *supra*, footnote 1, at para. 83.

30. “In my opinion, the development of agriculture, forestry, mining, and hydro-electric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support these aims, are the kinds of objectives that are consistent with the purpose and, in principle, can justify the infringement of Aboriginal title”: *Tsilhqot’in*, *supra*, footnote 1, at para. 83, quoting from *Delgamuukw v. British Columbia*, *supra*, footnote 3, at para. 165).

31. *Tsilhqot’in*, *supra*, footnote 1, at para. 86.

industrial forestry might not, as the impact on game and future use would be much greater. Bitumen mining on an Albertan scale is another instance of initiatives that we suppose would fail this test. Incidentally, if the bitumen facility was found to erode the collective benefit of the land for future generations, a judge might well invalidate a consensual agreement for the development between a resource developer and the Aboriginal title holder.

Second, the court stresses the fiduciary duty owed by the Crown to Aboriginals (itself a development of judge-made law) which “infuses an obligation of proportionality into the justification process.”³² This means there must be a rational connection between the incursion and the government’s goal, that the incursion must go no further than necessary to achieve the goal, and that the benefits from attainment of the goal not be outweighed by adverse effects on the Aboriginal interest.³³ The question may revolve around the meaning of “goal.” Suppose a transmission line connecting a hydroelectric scheme to a major market were proposed to cross Aboriginal title land. A wide clear-cut maintained by herbicides would be normal practice. Might a court find that the goal was not transmission but the supply of electricity to the city, and hence decide that a nuclear or gas-fired plant close to market would be a lesser incursion — regardless of cost?

Cumulatively, these tests impose a high threshold. And they have teeth.³⁴

[I]f the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing.

Accordingly, a major risk would be involved in proceeding, without consent of the relevant Aboriginal group or groups, with a project on Aboriginal title lands *or lands as to which Aboriginal title is asserted*.³⁵

4. Options Available to Proponents of Development of Aboriginal Title Land

The possible scope for assertion of Aboriginal title on unceded land is far-reaching. Major projects already in place might be the

32. *Tsilhqot'in*, *supra*, footnote 1, at para. 87.

33. *Tsilhqot'in*, *supra*, footnote 1, at para. 87.

34. *Tsilhqot'in*, *supra*, footnote 1, at para. 92.

35. See also *Haida Nation*, *supra*, footnote 3.

subject of claims asserted by various Aboriginal groups. As one possible example, the territories affected by the vast reservoirs of the Peace and Columbia River systems include unceded lands where Aboriginals dwelt. On the reasoning in *Tsilhqot'in*, an investor, whether government or private, wishing to initiate a project on Aboriginal title land or land as to which Aboriginal title is or may be asserted, has the following options unless the investor, and its bankers, are prepared to take the risk of proceeding without resolution of the issues:

- (1) Agreement between the relevant Aboriginal group or groups and the relevant Crown (remember, the Crown must be a party to the agreement) that Aboriginal title does not exist in the challenged land. We doubt that this alternative would be available as a practical matter, other than in rare cases. Even if the parties were prepared to reach such an agreement, it could subsequently be attacked, for example as to whether the correct Crown or Aboriginal group was involved or whether the group(s) was (were) properly bound by the agreement. Here the questions raised above as to the governance processes of the particular group would be relevant;
- (2) Fighting a court action as to the existence of Aboriginal title, with the Aboriginal group's legal expenses perhaps being paid by government. We comment sufficiently above on the costs, difficulties and delays of any such litigation; or
- (3) Arriving at a negotiated agreement with the Aboriginal group or groups.

In almost all situations, the third alternative — negotiation — will be preferred. This was true before *Tsilhqot'in*; it will probably prove to be even more true after *Tsilhqot'in*. All concerned — governments, Aboriginal groups, and private sector investors — would far prefer negotiation to the alternatives. Yet large commitments of resources and time on treaty negotiations have produced few successes. One of the co-authors of this comment (H.S.), has been involved in some of these negotiations. He attributes the lack of success to a number of factors, including their inherent complexity and the high stakes for the Aboriginal claimants. On each side, governmental and Aboriginal, the negotiating teams are typically too small, inadequately resourced (except where the Aboriginal side has the benefit of an Okanagan

order or equivalent),³⁶ subject to personnel changes, with limited authority and frequently amended instructions. The personal incentives applying to government and Aboriginal negotiators and their advisors may not conduce to celerity. The Aboriginal teams may be deeply distrustful of the government teams because of well-founded historical grievances; sometimes the groups even distrust their own leaders. Effective governance implies a scale or size of community appropriate to the subjects in question, but governments often select Aboriginal counterparties too small to exercise the wide powers accorded to self-governing entities in comprehensive claims negotiations and fail to adapt their negotiating mandates adequately to the circumstances of the particular group. And the governments, which are legally necessary parties to the negotiations, are sometimes fronting for private sector investors, with resultant communication problems. It is a wonder negotiations ever succeed.

Tsilhqot'in further reinforces the desirability of negotiated agreements and the undesirability of litigation as an alternative. Yet we are concerned that, at least in the short term (which could be lengthy) while negotiating cultures evolve, *Tsilhqot'in* could prove to be a serious impediment to the development of portions of Canada that have significant tracts of unceded land. Investors confronted with the decision-making environment created by *Tsilhqot'in* might well decide at the threshold not to proceed, favouring some other jurisdiction with their time and money. In any event, substantial delay is predictable with any project involving unceded land where Aboriginal title exists or might credibly be asserted and a negotiated agreement proves elusive.

We might move to a new paradigm, with Aboriginal groups rather than governments or distant corporations having a much greater share of the economic rents in projects on Aboriginal title land. This might be desirable on social policy grounds, and even fitting retribution for the abuses of the Aboriginal population that clearly have occurred in Canada. But relying on the legal approach to property rights, coupled with the uneven distribution of valuable resources, would exacerbate income disparities among First Nations. And the costs, not only in income transfers but also in economic opportunities foregone, could be considerable. The judge-developed rules concerning Aboriginal title could, in effect, impose significant efficiency limits and distributional quandaries on the economy as a whole.

36. *Supra*, footnote 12.

5. Recommendations and Conclusion

While Canadian governments are effectively powerless to change the substantive law enunciated in *Tsilhqot'in* and like cases (section 35(1) is not subject to the so-called “notwithstanding clause” in the Constitution), they have power to alter the playing field, establishing an environment in which the negotiating process can bear fruit. Perhaps the most significant Canadian effort in this regard is the British Columbia Treaty Commission (BCTC), established in 1992 by agreement among Canada, British Columbia and First Nations in British Columbia. Guided by that agreement and the 1991 Report of the British Columbia Claims Task Force,³⁷ a helpful report on the negotiating process published by a committee with representatives of all sides, the BCTC is not a party to negotiations except as a mediator. It helps to determine whether an Aboriginal group qualifies for negotiations, in terms of governance and other attributes. It attempts to advance the negotiations and facilitate fair and durable treaties. It has had some success. Its annual reports make a significant contribution. We hope more such initiatives will emerge, including imaginative action by Parliament.³⁸

One such action could be legislation establishing Canada’s policy for negotiating Aboriginal title and the related issue of self-government. Part could be procedural: a new body to lead the federal side, headed by a credible Order-in-Council appointee, reporting to Cabinet through the Minister of Aboriginal Affairs. It is too much to expect an agreed joint design for such a body, but credibility and respect from Aboriginal groups is attainable. The legislation might also:

- lay out ground rules and priorities for negotiations;
- define the characteristics of groups to be negotiated with, perhaps along the lines of the wise description of Vickers J.³⁹

37. See The First Nations of British Columbia, The Government of British Columbia, and The Government of Canada, “The Report of the British Columbia Claims Task Force” (June 28, 1991), online: <www.fns.bc.ca/pdf/BC_Claims_Task_Force_Report_1991.pdf>.

38. In *Haida* (*supra*, footnote 3) the Supreme Court of Canada commented “It is open to governments to set up regulatory schemes to address the procedural requirements . . . thereby strengthening the reconciliation process . . .” (para. 51).

39. “First Nations are not nation states; they are nations or culturally homogenous groups of people within the larger nation state of Canada, sharing a common language, tradition, customs and historical experiences”: *Xeni Gwet'in First Nations v. British Columbia; Tsilhqot'in Nation v. British Columbia*, *supra*,

rather than the paternalistic and colonial approach of federal legislation which uses an inadequate definition of “band” in the Indian Act⁴⁰ as the basis for an even less adequate definition of “First Nation”;

- specify that negotiations are to take place within the ambit of the Constitution (and with respect for Charter rights, despite s. 25);
- set out an initial list of subjects open for negotiation, as well as those not open (defence, foreign affairs, and banking are examples);
- provide for procedures for turning Aboriginal title into fee simple on request of the entitled Aboriginal group. The availability of such a procedure could be a significant attraction for groups that object to the collective nature of Aboriginal title and the concomitant restrictions on land use.

What remedy the courts will dictate for pre-1982 actions found now to have infringed Aboriginal title⁴¹ is not yet known. If they decide on a drastic remedy such as reversing the original Crown grants of the land, the legislation might provide for an alternative compensation remedy the parties could elect. Subsurface including groundwater rights might be made subject to negotiations, but flowing or tidal waters, as opposed to the fishes within them, might not. And so on. The idea would be that, within the law as laid down by the court, the government has policy and procedural choices available, and that setting out its own rules of engagement would accelerate progress. We believe that some imaginative planning in concert with co-operating Aboriginal groups could result in federal legislation that would improve what now seems to us a bleak situation.⁴² Enactment of such legislation would end the decades-long neglect by Parliament of this increasingly important

footnote 10, at para. 458. Of course, the problem of governance commented on above would need to be addressed. Perhaps as a condition to negotiation the First Nation that lacks a governance process would be required to develop one.

40. R.S.C. 1985, c. I-5.

41. See *supra*, footnote 17.

42. The federal government has ventured some way down the path we suggest. The Department of Aboriginal Affairs and Northern Development Canada has a policy of negotiating treaties and has a comprehensive policy governing treaty negotiations; see “Renewing the Federal Comprehensive Land Claims Policy”, online: <<http://www.aadnc-aandc.gc.ca/eng/1405693409911/1405693617207>>. The comment period on proposed revisions to the treaty negotiations policy

area. While that neglect continues, the necessary dialogue between the judicial and legislative branches cannot occur nor can the court be properly criticized for lack of deference.

Aboriginal title vividly illustrates the authority which s. 35(1) conferred on the courts. The inefficiencies involved in having such an important topic addressed on a piece-meal, case-by-case basis through immensely complex, expensive and protracted court proceedings with no room for intervention by Parliament can hardly be overstated. In this context, the court's decision is remarkable. It carries very great weight, as a unanimous decision delivered by the Chief Justice herself. As it relates to the principal ingredients of the decision, such as exclusivity being the test for Aboriginal occupation to establish Aboriginal title, the tone is didactic: explaining the court's conclusions as if they were established law, requiring only the necessity for clear communication. Yet, on the topic of exclusivity, the previous law was far from settled, as evidenced by the British Columbia Court of Appeal decision in favour of a site-specific test for Aboriginal occupation.

On questions other than those essential to the decision, the court's conclusions are far less specific. Indeed, as noted throughout this case comment, the issues left outstanding are far-reaching and seem to us almost certain to lead to further forays into this area by the courts, including the Supreme Court of Canada. We share the hope of the court that these issues can be effectively addressed by negotiation, but we mention above our concern that a negotiating culture sufficient to deal with them may take a long time to develop. Perhaps governmental interventions to improve the negotiating environment can improve the situation.⁴³

One final comment. Because of s. 35(1), the Supreme Court of Canada is the ultimate adjudicator on these issues. It is called on to deal with complex issues of public policy of a type that is — and, in our view, ought to be — ordinarily reserved for legislative process. Short of a constitutional amendment, or the court reversing itself, its judgments on these issues cannot be altered. It seems to us

ended in December, 2014; these proposals would, in our view improve the policy, but would only address some of the points that seem to us essential.

43. Negotiations include settling treaties. Here the initiative mentioned in footnote 42 is of particular relevance. Professor Hogg comments:

The enormous detail of the thick document that contains a typical modern land claim agreement testifies to the impossibility of regulating aboriginal claims through litigation. [Hogg, *supra*, footnote 5, at p. 196]

We agree, while noting that treaty negotiations are entered into only where the aboriginal entitlement to land is clear. Many of the issues identified in this comment arise in deciding whether aboriginal entitlement is present.

perfectly appropriate given this enormous responsibility that considerations such as economic implications and political outcomes should be relevant to the judicial process, even if not determinative. It is troubling to us that no reference is made in the court's decision to such possible implications. The decision reads as a technical treatise on the law, with didactic overtones. Just as we hope that the constituencies affected by the court's decision are in the process of adaptation to a negotiating mode, we also hope that the court itself is on a learning curve towards more clearly taking into account the far-reaching consequences of its decisions.

Harry Swain and James Baillie*

* Harry Swain is a former Deputy Minister of Indian Affairs, and of Industry Canada. James Baillie is a Senior Counsel at Torys LLP. We are grateful to Professor Peter Hogg for discussing with us some of the constitutional and policy implications of the *Tsilhqot'in* decision. He carries no responsibility for any of the analysis or opinions in this case comment. We are also grateful to a number of people who commented on an earlier op-ed piece by us published in the *National Post* (February 5, 2015).