Tsilhqot'in Nation v. British Columbia: Cultural Security and the Promise of Site-Specific Rights

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I. INTRODUCTION

In addition to *Tsilhqot'in Nation v. British Columbia*'s potentially far-reaching impact on the law of Aboriginal title and the treaty negotiation mandates of both government and First Nations, Mr. Justice Vickers' approach to site-specific Aboriginal rights is also significant. His findings in this regard are of immediate practical significance to all First Nations who have established (or who have a strong *prima facie* case to) site-specific Aboriginal rights. The decision also speaks to the need for a recognition-based model for resource planning and regulation in British Columbia.

Throughout this paper, I will argue that the effect of this ruling is to breathe life into site-specific Aboriginal rights as a means to ensure the cultural and economic survival of First Nations.

II. CASE BACKGROUND

The genesis of *Tsilhqot'in Nation v. British Columbia*[1] was in the late 1980s. The Xeni Gwet'in (formerly the Nemiah Valley Indian Band) were a relatively isolated Band who relied, and continues to rely, on their traditional lands for their subsistence and well-being by fishing, trapping, hunting, gathering plants and berries, guiding and ranching. The Nemiah Valley remains relatively isolated, and is without hydro-electric power today.

According to Tsilhqot'in law, the Xeni Gwet'in are the caretakers of that part of Tsilhqot'in territory where they live and from which they derive their existence.

As explained by several witnesses at trial, by the late 1980s commercial forest harvesting had begun to affect the other five Tsilhqot'in communities. Xeni Gwet'in trappers were told by members of these other communities of the negative effect of logging on their ability to derive a livelihood from trapping. As the cutblocks edged ever closer to their trapline, the Tsilhqot'in People of Xeni declared a portion of Tsilhqot'in Territory as the Nemiah Aboriginal Wilderness Preserve through their August 23, 1989 Nenduwh Jid Guzit'in Declaration, and declared that there was to be no commercial logging or road building within this area.

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[1] 2007 B.C.S.C. 1700.

In 1989, the Province approved Carrier Lumber's forest development plan which proposed cutblocks within the Xeni Gwet'in trapline. The Nemiah Valley Indian Band filed a writ of summons on December 14, 1989, which was replaced with the writ in the *Tsilhqot'in Nation* case on April 18, 1990, claiming trapping rights to the Nemiah Valley Trapline, southwest of Williams Lake. Eventually, in 1998 a writ was filed in respect of the adjoining Brittany Triangle territory, the two actions were merged, and aboriginal title was claimed.

In short, from the start, the *Tsilhqot'in Nation* case was about protecting the Tsilhqot'in People of Xeni's livelihood and way of life against the threat of industrial logging over which they had no control through the assertion of their trapping rights.

III. A PRACTICAL FRAMEWORK FOR PRIORITIZING AND ACCOMMODATING ABORIGINAL RIGHTS

The *Tsilhqot'in Nation* decision provides practical tools for First Nations who have established site-specific rights, or who can demonstrate a strong prima-facie case to such rights, when facing resource development in their Aboriginal rights area.

A. Onus is on the Crown to acknowledge rights and develop "sufficient credible information" for assessing impacts

As stated by the Supreme Court of Canada in *Delgamuukw*, site-specific rights arise out of "activities which, out of necessity, take place on the land and indeed, might be intimately related to a particular piece of land."[2] Chief Justice Lamer then referenced his characterization of site-specific rights in *R. v. Adams*:

> Even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land. For example, if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land.[3]

In other words, site-specific aboriginal rights, while not a right to the land itself, are defined in relation to a particular geographic area, and may be grounded in an "intimate" prior connection to a particular tract of land, which deserves constitutional protection.[4]

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[2] *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010, at para. 138.
[3] *R. v. Adams*, [1996] 3 S.C.R. 101, at para 30.
[4] For clarity, the characterization of rights as "site-specific" should not be confused with the distinction made at paragraph 582 of the decision between evidence of "site-specific use and occupation," versus evidence ranging over tracts of land. Throughout this paper, the term "site-specific rights" has the meaning given to it in *Delgamuukw* and *Adams*, cited above.

But the *Tsilhqot'in Nation* decision also confirms that provincial legislation of general application is constitutionally applicable, and can apply so as to infringe rights other than title, provided that such infringements can be justified.[5] Provincial legislation also applies to lands that are subject to unproven claims of Aboriginal title, if it can be justified.[6] Therefore, if a First Nation has established (or has a strong *prima facie* case) to site-specific rights in relation to an area of proposed provincially-authorized resource development activity, but has not established Aboriginal title, the question becomes the correct prioritization of the rights in relation to the interests of society, third parties and the Crown.

The decision raises the bar for governments seeking to justify infringements to site-specific rights. Vickers J. held that justification in the context of forest harvesting required that the province develop "sufficient credible information to allow a proper assessment of the impact on wildlife in the area."[7] He found that the absence of a provincial database providing information about the species and numbers of wildlife in the Claim Area, and the failure to conduct a needs analysis which would ensure that the needs of the Tsilhqot'in people in relation to their rights were addressed in planning and conducting forestry activities indicated that Tsilhqot'in rights had not been afforded any priority by the Crown.[8]

Observing that the basic thrust of the legislative mandate of the Ministry of Forests is maximizing the economic return from provincial forests, and that the objectives of maximizing productivity for commercial tree species may be at odds with the needs of wildlife species, Vickers J. found that the "continued well-being" of Aboriginal people is "low on the scale of priorities,"[9] and that "manag[ing] solely for maximizing timber values is no longer viable where it has the potential to severely and unnecessarily impact Tsilhqot'in Aboriginal rights." [10]

While his comments on capacity development for First Nations were few, Vickers J. did place the onus squarely on the shoulders of the Province to develop proper baseline information to assess impacts on Aboriginal rights. This will require a significant shift for provincial resource management agencies that rely on referral responses from First Nations to determine the existence of "Aboriginal interests." Further, as discussed below, prioritization of aboriginal rights in the future will also require that government managers assess the particular activity in the context of other resource development activities to address the cumulative impact on the right across the habitat area and the area used by the Aboriginal group to exercise the right.

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[5] *Tsilhqot'in Nation*, paras. 1041-1043.
[6] *Tsilhqot'in Nation*, paras. 978; 1013.
[7] *Tsilhqot'in Nation*, para. 1294.
[8] *Tsilhqot'in Nation*, para. 1293.
[9] *Tsilhqot'in Nation*, para. 1286.
[10] *Tsilhqot'in Nation*, para. 1294.

Finally, in the future, consultation that is not based on rights-recognition will not be adequate to justify infringements of established rights.[11] As elaborated on below, it is also likely that post-*Tsilhqot'in Nation*, the Crown must also acknowledge rights in a pre-proof context in order to satisfy its duty of accommodation.

B. Application of the *Tsilhqot'in Nation* decision to the management of resources other than forestry

Mr. Justice Vickers acknowledges the Supreme Court of Canada's observation in *Gladstone* that the content of the priority to be given to aboriginal rights must to some extent be case-specific.[12] While there may be means other than a database and needs analysis for assessing impacts, the bottom line is that regardless of the infringing activity, the Crown must "truly take into account the existence of the right"[13] through the development of "sufficient credible information."[14]

What constitutes "sufficient credible information"? Whether the information gathered to properly prioritize rights is developed through a comprehensive land use planning process based on rights recognition, or through genuine engagement by regulators administering a resource-specific management scheme, it will necessarily include sufficient baseline data to understand cumulative impacts of the various Crown-authorized activities occurring across the area used to exercise the right, and the various threats to survival of the species relied on for the exercise of the right. For example, in the case of a hunting right, a decision to approve an application for mineral exploration must consider the impact of the resource activity in the context of other Crown-authorized activities, and their combined effects on the pattern of subsistence of the Aboriginal group, migration route of animals, as well as other pressures on animal population and habitat.[15] As noted by Justice Vickers, there is no single government agency that views sustainability through a broad lens.[16] The lack of an inter-agency coordinated approach to assessing impacts on Aboriginal rights is likely to be a significant on-the-ground challenge to Crown resource managers post-*Tsilhqot'in Nation*.

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[11] *Tsilhqot'in Nation*, para 1294.
[12] *R. v. Gladstone*, [1996] 2 S.C.R. 723, cited in *Tsilhqot'in Nation* at para 1292.
[13] *Gladstone*, para. 63.
[14] *Tsilhqot'in Nation*, para 1294.
[15] It is likely not a sufficient answer to say that the First Nations can simply go elsewhere within their traditional territory to exercise the right. Consider *Mikisew Cree First Nation v. Canada* [2005] 3 S.C.R. 338, at para. 31. Although Treaty 8 specified that the surrendered land could be taken up from time to time for a variety of purposes, the Supreme Court of Canada held that the Crown had a duty to act honourably when changing lands from a category permitting the First Nation to hunt, to one that it could not. While a winter road was a permissible purpose under the treaty, the Court rejected the provincial government's argument that hunting was still possible elsewhere in the treaty 8 area, and similarly rejected the Federal government's argument that the effect of the road on the right generally was *de minimus*, holding that a "meaningful" right to hunt is to be ascertained in relation to territories in which the applicant exercised traditional rights, not the entire treaty 8 area.
[16] *Tsilhqot'in Nation*, para. 1301.

The question may be asked, in the case of reviewable projects under the BC Environmental Assessment Act and the Canadian Environmental Assessment Act, whether existing EA processes are capable of satisfying the criteria of rights-recognition and development of sufficient information to be able to properly assess impacts and prioritize Aboriginal rights. I do not propose, for the purposes of this paper, to undertake a thorough review of Provincial and Federal Environmental Assessment legislation in light of the *Tsilhqot'in Nation* decision. However, it is likely that modifications are required in the assessment and permitting of reviewable projects.

For instance, it is no longer practical for CEAA and the BCEAO to maintain the position that an environmental assessment process cannot be mandated to assess the impacts of a proposed project on the rights of Aboriginal peoples. To do so would be to preclude EA processes from adequately prioritizing Aboriginal rights, and the Ministers charged with making a decision would be required to conduct a separate analysis as to the impact on rights before making a decision (including potentially requiring the Agency to re-do baseline studies related to the wildlife, fish, plants etc. used in exercising the right; and developing information on the relationship between the exercise of the right and the continued well-being of the First Nation).

C. The Content of Accommodation of Site-Specific Rights, and the "Continued Well-being" of Aboriginal Peoples

The Claim Area in the *Tsilhqot'in Nation* case was and remains "a part of the land that has provided 'cultural security and continuity' to Tsilhqot'in people for better than two decades."[17] The Court held that Tsilhqot'in hunting, trapping and trading rights practiced in direct reliance on this landbase are an integral element of the traditional way of life and pattern of survival of the Tsilhqot'in people.

The existence of an Aboriginal right to a moderate livelihood that is directly linked to a specific tract of land demands an accommodation that reflects the inherent geographic and economic aspects of the right. Indeed, accommodation must ensure the "continued well-being" of the Aboriginal group, and must respect the economic and cultural relationship between the First Nation and the landbase on which the rights are exercised.

How might this translate in practice? To the extent that a First Nation possesses site-specific rights that are based on an "intimate" connection with a particular landbase on which it depends for a moderate livelihood, continued well-being, and cultural survival, there is a strong argument that accommodation of such rights includes such items as a share of the resource revenues, compensation where exercise of the right is diminished or precluded, and a measure of direct control over the level and type of resource extraction occurring across the landbase.

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[17] *Tsilhqot'in Nation*, para. 1376.

D. Application of the *Tsilhqot'in Nation* decision in a pre-proof context

> *Utilizing the concept of a spectrum proposed in Haida Nation (S.C.C.), I place the rights and title claimed here at the high end of the scale, requiring deep consultation and accommodation…. I have found the plaintiff is entitled to a finding of specific Aboriginal rights on behalf of all Tsilhqot'in people. On the whole of the evidence, and in particular with respect to forestry and land use planning throughout the Claim Area, the failure of the Province to recognize and accommodate the claims being advanced for Aboriginal title and rights leads me to conclude that the Province has failed in its obligation to consult with the Tsilhqot'in people. For these reasons, and for the reasons earlier expressed, the Province has failed to justify its infringement of Tsilhqot'in Aboriginal title.*[18]

Throughout this paper, I do not draw a distinction between the proper approach to accommodation of site-specific Aboriginal rights in a pre-proof context, versus the correct approach in the case of established rights. The reason is that in my view, the *Tsilhqot'in Nation* decision closes the gap between the pre-proof accommodation analysis prescribed by the Supreme Court of Canada in *Haida Nation,* and the accommodation required to justify infringements of established rights, per *Delgamuukw.*

In *Haida Nation,* the Supreme Court of Canada held that the Crown has a duty to consult and accommodate aboriginal rights in advance of their formal proof, and that this duty is proportional to the strength of the claim.[19] As set out above, Mr. Justice Vickers applied this duty to consult and accommodate to the Tsilhqot'in Nation's proven rights and held that such rights were at the "high end of the scale". In other words, the accommodation required to justify infringements to the Tsilhqot'in's established rights is of the same character as the accommodation discussed in *Haida Nation.* The difference is only a matter of degree.

It also seems likely that a First Nation is also entitled to acknowledgment of their rights in a pre-proof context. This is particularly so in light of the Supreme Court of Canada's comments in *Haida,* namely that:"[t]o limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the 'meaningful content' mandated by the 'solemn commitment' made by the Crown in recognizing and affirming Aboriginal rights and title."[20] It would seem, then, that in a pre-proof context, the honour of the Crown requires that First Nations' rights be afforded a degree of acknowledgment, recognition and respect proportionate to the strength of the claim.

If First Nations are entitled to have their site-specific rights recognized in a pre-proof context, then it is also likely that resources "must be managed to ensure a continuation of those rights."[21] First Nations with a strong *prima facie* case to site-specific rights are

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[18] *Tsilhqot'in Nation*, para. 1141.
[19] *Haida Nation v. British Columbia (Ministry of Forests),* [2004] 3 S.C.R. 511, paras. 43-45.
[20] *Haida Nation,* para. 33.
[21] *Tsilhqot'in Nation*, para. 1291.

presumably then also entitled to require the Crown to do the analyses necessary to correctly prioritize their rights and ensure their continuation as part of the duty to accommodate in advance of formal proof.

IV. A NEW MODEL OF SUSTAINABLE LAND USE PLANNING FOR BRITISH COLUMBIA

> *Given the findings of Tsilhqot'in Aboriginal rights resulting from these proceedings, there will be a need for British Columbia to develop a new model of sustainability in the Claim Area. The burden is on British Columbia to prove that any future harvesting of timber will not infringe Tsilhqot'in Aboriginal rights. That burden will require close consultation with Tsilhqot'in people, taking into account all of the factors that bear on their Aboriginal rights, as well as the interests of the broader British Columbia community.*[22]
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> *The need to protect Tsilhqot'in Aboriginal rights throughout the claim area brings with it the need for a fresh approach to sustainability. The challenge can be met through the development of cooperative joint planning mechanisms taking into account the needs that must be addressed on behalf of the Tsilhqot'in community and the broader British Columbia and Canadian communities*[23].

Through these and other comments on sustainability, Mr. Justice Vickers is signalling to governments that legislated agency mandates that focus primarily on economic returns, and the lack of a coordinated system to address the full spectrum of sustainability issues and values are likely to lead to future challenges to government attempts to justify infringements to Aboriginal rights in the context of managing provincial resources.

While today the timber harvesting regime regulated by the Ministry of Forests and Range indeed accounts for values other than timber, and can reasonably be described as quite highly constrained by other resource management objectives, the *Tsilhqot'in Nation* decision suggests that any number of constraints on the timber harvesting regime will not cure the problem of adequate prioritization of s. 35 Aboriginal rights.

While there is certainly a role for timber harvesting regulators whose job it is to approve stewardship plans and grant cutting permits, the prioritization of uses on the landscape cannot ultimately be determined by an agency whose dominant mandate is maximizing economic returns.

The need for stakeholder-driven higher-level plans to guide the regulation of specific resource management activities on the land has been recognized at least since the early 1990s. However, as noted by Justice Vickers, the specific regulation of activities such as forestry is still driven very much by agencies whose mandate is primarily economic, and

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[22] *Tsilhqot'in Nation*, para. 1103.
[23] *Tsilhqot'in Nation*, para. 1106.

higher level planning to date has been characterized by the denial of rights at the planning table. The decision speaks to the need for a land use planning framework based on rights recognition. Failure to re-structure the land use planning framework in BC to reflect this rights-recognition premise risks uncertainty for third parties, and a failure to justify future resource management decisions when they are inevitably challenged.

Recognition and proper prioritization of rights would lead to First Nations having a role in designing the process, a prominent seat at the planning table, and depending on the strength of the claim, something approaching equal decision-making. While *Delgamuukw* makes clear that Aboriginal title includes an economic component, post *Tsilhqot'in Nation*, a strong claim to sustenance and/or moderate livelihood rights means that the process must also acknowledge the economic component of such rights.

We are beginning to see new models of land use planning emerge that the principles enunciated in the *Tsilhqot'in Nation* case can help refine.[24] But land use plans, particularly when they are collaborative, take a notoriously long time to develop. In the interim, the honour of the Crown requires that the Province identify, acknowledge, and accommodate site-specific Aboriginal rights. To be consistent with Vickers J.'s findings in *Tsilhqot'in Nation* in relation to site-specific rights, the Province must immediately take measures to ensure that resource management regimes:

1. provide for the identification, acknowledgment, and assessment of site-specific rights by an agency or process mandated to consider such rights, and not just as a constraint on other objectives;
2. afford proper priority to the rights after gathering and analysing information about the conditions required for the continued exercise of the right (including baselines related to the needs of the wildlife, fish, plants, or other resources as the case may be; and the needs of the First Nation in relation to these resources);
3. look at the cumulative impacts of all infringing acts (for example, a cutblock may be unjustifiable not because of its effect by itself, but because of the effect of all activities on the land base used to exercise the right);
4. properly accommodate and provide for the continued exercise of Aboriginal sustenance and moderate livelihood rights by ensuring that the ability of the First Nation to rely on the economic component of this right is not jeopardized and/or by ensuring that the Aboriginal group has access to a share of the economic benefit of the resource activity; and
5. are guided by a process for setting management priorities that is not constrained at the outset by binding economic objectives (for example, in the

[24] See, for example, the *Haida Gwaii Strategic Land Use Agreement* between the Indigenous People of Haida Gwaii and the Province of British Columbia dated September 13, 2007, available online at the BC Integrated Land Management Bureau website: http://ilmbwww.gov.bc.ca/lup/; British Columbia has also developed Government to Government agreements on Land Use Planning with a number of other First Nations, but, at least in some cases, these agreements may not adequately recognize Aboriginal rights as required by *Tsilhqot'in Nation.* See, for example, Agreement on Land Use Planning between the Squamish First Nation and the Province of British Columbia, dated June 14, 2007.

case of forestry, this means that the process is not constrained at the outset by a non-negotiable rate-of-cut.)

V. CONCLUSION

> *…[T]he way we see aboriginal rights is we need … the right to plan our area. The right to survive. Like, the thing I use is forever. We're gonna always be there. All the things that happen in our area, we had to take all that into consideration, what we need. We, ourselves, have to put a plan in place. We always think about that, on how are we going to survive here for a long time. Sustainability again is always the issue.*
> *… [W]e need to plan our whole area. And then after we got all the information we need, then we look at economics, putting areas that we're going to do certain things, from traditional stuff to a new economy. Like creating employment for our people … [A]s a Tsilhqot'in person, I need that right to protect my future.*
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> **From the Direct Examination of Xeni Gwet'in Councillor David Setah, BC Supreme Court, Feb 4, 2005, *Tsilhqot'in Nation v. British Columbia***

As the last paragraphs of the decision make clear, Mr. Justice Vickers heard loud and clear the various witnesses who spoke to the critical connection between Tsilhqot'in traditional territory and "cultural security and continuity." The *Tsilhqot'in Nation* decision offers a practical means to give expression to the promise of aboriginal rights as a means of securing a future for aboriginal peoples.

Where a First Nation has proven site-specific moderate livelihood rights, or can demonstrate a strong *prima facie* case, the inquiry becomes: "in light of the cumulative impacts of all other Crown authorized activities on the land, what is the impact of the activity on the needs of the First Nation to continue, at the minimum, a moderate livelihood, sufficient to ensure cultural survival into the future?" Accommodation requires a *genuine engagement* by Crown resource decision-makers with the conditions of cultural and economic survival of Aboriginal peoples, and the resources and data to determine how the use of the natural resources will affect these conditions. In the face of site-specific rights and resource management decisions that might affect them, the Crown must engage in a detailed and concrete inquiry about what measures are necessary to "ensure a continuation of the right" and the "continued well-being" of the Aboriginal people.