July 11, 2012

# The implications of the Tsilhqot'in Case for the Numbered Treaties

**By Nigel Bankes**

**Cases Considered:**
*Williams v British Columbia*, 2012 BCCA 285, and *Lameman v Alberta*, 2012 ABQB 195

The unanimous decision of the British Columbia in *Williams*, (a.k.a. the Tsilhqot'in land claim case or the Brittany Triangle case) continues the trend in Canadian case law (beginning with *R v Marshall; R v Bernard*, 2005 SCR 43) of insisting that a claimant First Nation or other aboriginal people must establish exclusive occupation of particular tracts of land in order to obtain a declaration of aboriginal title. Indeed, the case comes close to suggesting, and as a matter of law, that a claimant people will hardly ever\never succeed on the basis of what the court describes as a territorial claim (at para 219) i.e. the claim that these lands (e.g. a particular watershed) are our lands because we were present in that territory (at para 206), living in accordance with our laws (including property laws) and using that territory to the exclusion of all others.

Justice Groberman writing for the Court of Appeal justifies this conclusion in a remarkably instrumental passage drawing upon the multi-faceted concept of reconciliation (here it seems in the sense of the duty of aboriginal people to be reconciled) (at para 239):

> … this view of Aboriginal title and Aboriginal rights is fully consistent with the case law. It is also consistent with broader goals of reconciliation. There is a need to search out a practical compromise that can protect Aboriginal traditions without unnecessarily interfering with Crown sovereignty and with the well-being of all Canadians. As I see it, an overly-broad recognition of Aboriginal title is not conducive to these goals. Lamer C.J.C.'s caution in *Delgamuukw* that "we are all here to stay" was not a mere glib observation to encourage negotiations. Rather, it was a recognition that, in the end, the reconciliation of Aboriginal rights with Crown sovereignty should minimize the damage to either of those principles.

At the same time the Court offers a thick and robust understanding of aboriginal rights which, as I will argue here, may have significant implications for the management of Crown lands, not just in the context of aboriginal rights, but also in the context of treaty-based harvesting rights. Thus, this post focuses on the aboriginal rights part of the decision leaving others to comment on the aboriginal title part of the judgement. The Court described the economic and social relationship between title and rights as follows (at para 238):

> The result for semi-nomadic First Nations like the Tsilhqot'in is not a patchwork of unconnected "postage stamp" areas of title, but rather a network of specific

> sites over which title can be proven, connected by broad areas in which various identifiable Aboriginal rights can be exercised. This is entirely consistent with their traditional culture and with the objectives of s. 35.

The Plaintiffs claimed a suite of aboriginal rights including the right to hunt, trap and fish throughout their traditional territory, the right to capture horses and the right to trade.

The Plaintiffs also alleged infringement i.e. that the Crown's practices of issuing permits to allow third parties to engage in commercial forestry activities (at para 245)

> … will, or are likely to, adversely affect the ability of the Xeni Gwet'in to exercise their right to carry out Trapping Activities by reducing the number of animals available and the number of species available to the Xeni Gwet'in; by compromising the ecological, cultural and spiritual integrity of the Brittany and the Trapline Territory; and by reducing the wildlife refuge potential, and available wildlife habitat of the Brittany and the Trapline Territory.

The Court confirmed that the threshold for establishing prima facie infringement is low and appropriately so if, as the Court concludes (*supra*), (at para 295) "Aboriginal rights short of title are the primary means by which the traditional cultures and activities of First Nations (and particularly those that are nomadic or semi-nomadic) are protected, it is essential that those rights be taken seriously." And in this case the Court declined to interfere with Justice Vickers' conclusion at trial to the effect that (at para 301, quoting para 1288 from the judgement at trial)

> Forest harvesting activities would injuriously affect the Tsilhqot'in right to hunt and trap in the Claim Area. The repercussions with respect to wildlife diversity and destruction of habitat are an unreasonable limitation on that right. For these reasons, I conclude that forest harvesting activities are a *prima facie* infringement on Tsilhqot'in hunting and trapping rights and thus demand justification.

The Court cautioned that such a general and high level assessment would not ordinarily be permissible and that (at para 318) "The case should not be seen as authority for the proposition that any industrial activity that affects the diversity of species or abundance of wildlife will necessarily be inimical to an Aboriginal right to hunt or trap." But this was enough in this case to shift the onus to the Crown to justify the infringement. Here again the Court sided with the trial judge in concluding that the Crown had failed to do so. The precise basis for this conclusion is not completely clear since high authority (e.g. *R v Gladstone*, [1996] 2 SCR 723, *Delgamuukw v British Columbia*, [1997] 3 SCR 1010) confirms that, in appropriate cases, forestry activities, including commercial logging, qualifies as a legitimate legislative objective. What the Court seems to be suggesting is that the overall economic gains associated with such an activity need to be weighed against the values associated with protecting constitutional rights and protecting an enduring cultural connection with a particular territory and a set of activities. The Court apparently endorses this passage from Justice Vickers at trial (at para. 335 quoting para 1291):

> Recognizing Aboriginal rights to hunt and trap over an area means wildlife and habitat must be managed to ensure a continuation of those rights. Section 35(1) of the *Constitution Act, 1982* demands that the protection of those rights is a paramount objective. The declaration of Aboriginal rights is not intended to be hollow or short lived. Tsilhqot'in Aboriginal rights grew out of the pre-contact

> society of Tsilhqot'in people. This historical right is intended to survive for the benefit of future generations of Tsilhqot'in people.

Immediately following this passage the Court noted that given this conclusion it was not necessary for it to go on to consider whether the government's conduct was consistent with the Crown's fiduciary obligations and the honour of the Crown. This is somewhat confusing because, on one interpretation of the justification tests concrete meaning is attached to the honour of the Crown by having the Crown demonstrate that it has accorded appropriate priority to the aboriginal interest (e.g. *R v Sparrow*, [1990] 1 SCR 1075 and *Gladstone*); and yet it seems that that is exactly what the Court has just endorsed in following Justice Vickers at trial and endorsing the lexical priority of intergenerational cultural protection.

In any event, the case supports the following sort of proposition: "An aboriginal [and a treaty] right to hunt (and trap) within traditional territory may preclude the Crown from developing or exploiting the resources of those territories if the result is such that the right is rendered illusory, hollow or short-lived. A right may become hollow or short lived if the Crown's development activities destroy habitat and impair wildlife diversity on a [large] [significant scale]." Implicit (if not explicit) in this proposition is the idea of a threshold or some sort of limit on development which is tied to both ecosystem function and cultural flourishing.

There are similar threshold ideas in the jurisprudence of the UN Human Rights Committee on Article 27 of the International Covenant on Civil and Political Rights. For example, in a relatively recent case involving water transfers in Peru that affected the traditional activities of an indigenous community (*Angela Poma Poma v Peru* (2009)), the HRC discussed the threshold question as follows (at paras 7.2 – 7.7):

> … the exercise of the cultural rights protected under article 27 … manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. The protection of these rights is directed to ensure the survival and continued development of cultural identity, thus enriching the fabric of society as a whole.
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> The Committee recognizes that a State may legitimately take steps to promote its economic development. Nevertheless, it recalls that economic development may not undermine the rights protected by article 27. Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. [M]easures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27.
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> … The Committee also observes that the author has been unable to continue benefiting from her traditional economic activity owing to the drying out of the land and loss of her livestock. The Committee therefore considers that the State's action has substantively compromised the way of life and culture of the author, as

> a member of her community. The Committee concludes that the activities carried out by the State party violate the right of the author to enjoy her own culture together with the other members of her group, in accordance with article 27 of the Covenant.

I think that both lines of jurisprudence are relevant to the numbered treaties of the prairies insofar as they inform the claim discussed in another post (see here) that the Crown's liberty to take up land under the terms of the numbered treaties is not unlimited. It is subject to both procedural limits (the duty to consult, *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69) and substantive limits (the treaty right to hunt cannot be made illusory). The issue of the substantive limit on the Crown's liberty to take up lands is precisely what is at issue in the *Lameman* litigation, a case in which Justice Browne has recently declined to grant a motion to strike.