

# TOP FIVE 2014

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

## ***TSILHQOT'IN NATION v BRITISH COLUMBIA,*** **2012 SCC 47, [2012] 2 SCR 584**

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<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do>

### **Facts**

In the process of colonizing Canada the British Government, or Crown, entered into legal agreements with many of the diverse groups of Native people who had long been established here. These agreements, called **treaties**, set out the terms whereby Indigenous peoples gave up their claim to their traditional lands in exchange for reservations of land and other promises. While this happened throughout most of Canada, for the most part, it did not happen in British Columbia. The Tsilhqot'in Nation, a semi-nomadic Indigenous group, is one of hundreds of Indigenous groups in British Columbia with unresolved land claims.

In 1983, the Province of British Columbia granted a commercial logging licence on land considered by the Tsilhqot'in to be part of their traditional territory. In order to try to prevent this logging from happening, a claim was made for **Aboriginal title** to the land at issue on behalf of all Tsilhqot'in people. Aboriginal title is the concept that an Aboriginal group's rights to their traditional

lands survived the European settlement and remain valid unless they have been legally surrendered through a treaty or another formal legal process. Title claims require the group making the claim to show that their ancestors occupied the land in question prior to European assertion of sovereignty. In other words, they would need to establish that the land was under the group's control before it was claimed as new territory of a colonial state. The federal and provincial governments opposed the title claim.

### **Procedural History**

The British Columbia Supreme Court determined that to prove their title claim, occupation could be established by showing regular and exclusive use of sites or territory within the claim area. After considering the evidence presented, the Court ruled that the Tsilhqot'in had established title not only to village sites and areas maintained for the harvesting of roots and berries, but to larger territories which their ancestors used regularly and exclusively for hunting, fishing and other activities. The governments appealed.



The British Columbia Court of Appeal applied a narrower test for Aboriginal title: site-specific occupation. This Court held that, to prove sufficient occupation for title to land, an Aboriginal group must prove that its ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty. Based on this formulation, the Court of Appeal held that the Tsilhqot'in claim to Aboriginal title had not been established. The Tsilhqot'in appealed to the Supreme Court of Canada (SCC).

## Issues

1. How should Canadian courts define "occupation" of land for the purpose of assessing claims for Aboriginal title?
2. If Aboriginal title is established, what rights and responsibilities does it confer to the Crown and the Aboriginal group in question?
3. Under what circumstances, if any, could these rights and responsibilities be limited?

## Decision

A unanimous SCC allowed the appeal and granted a declaration of Aboriginal title over the area requested.

## Ratio

The SCC clarified the test for establishing Aboriginal title by laying out more specific rules for defining "occupation" of land. Chief Justice McLachlin, writing for the unanimous SCC, determined that to make a successful

claim for Aboriginal title, the Aboriginal group has the burden of meeting three criteria. The occupation must be:

- 1) **Sufficient**, meaning a strong presence that displays acts that demonstrate the land in question belonged to, was controlled by, or was under the exclusive guardianship of the claimant group.
- 2) **Continuous**, meaning that the present occupation must be rooted in pre-sovereignty times; and
- 3) **Exclusive**, meaning the Aboriginal group had the intention and capacity to retain exclusive control over the lands.

The SCC also ruled that in cases where Aboriginal title is claimed, the Crown has a duty to consult in good faith with potential claimant groups and seek consent for the use of the land even before title is proven in the courts. Furthermore, where the government's proposed use of the land is likely to have a negative impact on the group's use of it in the future, the government may be required to accommodate the claimants.

## Reasons

The SCC found that the trial judge appropriately applied the correct legal test to the evidence, and affirmed the trial judge's decision to grant Aboriginal title to the Tsilhqot'in. Although their population was small, the Tsilhqot'in regularly used the land, satisfying the "sufficient occupation" requirement. They were able to meet the



“continuous occupation” requirement by showing that Tsilhqot’in people had maintained a presence over time in the same or nearby areas. Exclusivity was established by evidence that prior to sovereignty, the Tsilhqot’in actively worked to keep others from occupying the land they considered to be their own and demanded permission from outsiders who wished to use the land.

According to the SCC, to have Aboriginal title means that the Indigenous group has the exclusive right to decide how the land is used and the right to benefit from those uses. But, Aboriginal title is collective, meaning it is held not only for the present generation but also for all succeeding generations. Therefore, the land cannot be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Chief Justice McLachlin noted, however, that this limitation on the use of land does not prevent the land from being used in modern ways. In other words, an Aboriginal group can decide to use title land in modern ways if these uses still protect the benefit of the land for future generations.

Finally, the Court clarified that while Aboriginal title means that the Crown must normally obtain consent from the title holder to use title land, there are some conditions under which Aboriginal title can be overridden. Specifically, the government must show:

- 1) That it met its obligation to consult and accommodate the Aboriginal group;
- 2) That its actions were backed by a compelling and substantial objective; and
- 3) That its action is consistent with the duty to respect the collective nature of Aboriginal title and to act balance the adverse effects on the Aboriginal interest.

The result is a balance that preserves the Aboriginal right while permitting effective regulation by the province. The SCC found that in this case, the province failed to consult the Tsilhqot’in or accommodate their interests in issuing commercial licenses affecting the land. The government therefore breached its legal duty of care to the Tsilhqot’in people.



## DISCUSSION

1. What is a treaty?
  
2. What is Aboriginal title?
  
3. How should disputes among the individuals of the group that holds Aboriginal title be settled? What if members of the group disagree about how to use the land?
  
4. What are some potential benefits and drawbacks to modern uses of land, like mining or pipelines, and traditional uses, like hunting and fishing?
  
5. Only 200 of the 400 members of the Tsilhqot'in Nation live on the lands in question. Should band members who live elsewhere participate in the decisions about the land's use? What about sharing in the profits from the land?
  
6. Métis peoples trace their descent from mixed ancestry of First Nations and Europeans. If Aboriginal title requires proof of occupation prior to the settlement of Europeans, does this mean that Métis peoples can never establish Aboriginal title?  
  
Would this be fair? Explain.