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FIRST NATIONS STRATEGIC POLICY COUNSEL

Tsilhqot'in Case and Indigenous Self-Determination

Tsilhqot'in Chiefs at UBCIC office, June 26, 2014, in Vancouver, B.C. reacting to SCC court decision.

By Arthur Manuel, Indigenous Network on Economies and Trade (INET)

It is important to acknowledge with gratitude the courage and determination of the Tsilhqot'in People for moving our efforts to achieve self-determination one level higher.

The Supreme Court of Canada did unanimously recognize Aboriginal Title in the ***Delgamuukw*** Case in 1997 but this is the first case that Aboriginal Title has been recognized on the ground.

It is, in a sense, an important step in our anti-colonial struggle but that battle is still one that we must continue both inside and outside of Canada.

Aboriginal Title

With regard to Tsilhqot'in Aboriginal Title, the Supreme Court said they have title over 200,000 hectares (2,000 km^2) in the core of their territory. In comparison the Nisga'a total settlement lands amounted to 2,019 km^2 in return for extinguishing Aboriginal Title to their whole territory.

Here is the broad territorial declaration of Aboriginal Title that the Supreme Court of Canada granted:

> ***[94] With the declaration of title, the Tsilhqot'in have now established Aboriginal title to the portion of the lands designated by the trial judge with the exception as set out in para. 9 of these reasons. This gives them the right to determine, subject to the inherent limits of group title held for future generations, the uses to which the land is put and to enjoy its economic fruits. As we have seen, this is not merely a right of first refusal with respect to Crown land management or usage plans. Rather, it is the right to proactively use and manage the land.***

This decision will obviously affect the colonial status quo and future relationship Indigenous Peoples have with Canada and the provinces.

Colonialism

It is important to understand that colonialism in Canada is based upon "***dispossession, dependency and oppression***" of Indigenous Peoples. Under Canada's first constitution, the **British North America Act 1867**, all Aboriginal and Treaty property were given to the federal and provincial governments.

When you add up all the Indian reserve lands in Canada, Indian Reserves only make up 0.2% of Canada. This means the federal and provincial governments mutually and

Special points of interest:

- **SCC Landmark Ruling on Aboriginal title**
- **Tsilhqot'in & Impacts on Self-Determination**
- **Tsilhqot'in vs. Feds Termination Policies**
- **BCTC Process in Trouble?**
- **Harper Promotes Wernick to PCO**

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Mi'kmaq Woman facing off with RCMP at Elsipogtog.

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exclusively control 99.8% of our territory. This equation basically establishes access and benefits between Indigenous Peoples and Canadians.

Needless to say this has made us "***dependent***" on Canada for all our needs because we had no land or resources to take care of ourselves. That is the real tragedy of colonialism.

When we fight for our freedom and independence against this kind of colonialism, government or industry get injunctions and enforcement orders to oppress us. The police and the army are used to forcefully remove us from our lands claiming exclusive control over them. In fact the **United Nations** has condemned colonization in all its manifestations because it threatens world peace. This is why the Supreme Court of Canada tried to distance Canada from colonialism when related to us as Indigenous Peoples.

"What is clear in the Supreme Court ruling is that without using the racist Doctrine of Discovery, Canada has no claim on these lands and the court does not present any substantial evidence of how Canada acquired radical title from Indigenous Peoples"

Radical Title and Terra Nullius

In the ***Tsilhqot'in*** Case the SCC declared that "***assertion of European sovereignty***", resulted in Canada acquiring "***radical or underlying title***" to all our Aboriginal Title territory. The court itself acknowledges in paragraph 69 that Terra Nullius was not in effect in Canada, which means the "***assertion***" could only be made under the blatantly racist Doctrine of Discovery that allowed Europeans to roam the world and claim the lands on non-European (i.e. non-Christian) peoples.

What is clear in the Supreme Court ruling is that without using the racist Doctrine of Discovery, Canada has no claim on these lands and the court does not present any substantial evidence of how Canada acquired radical title from Indigenous Peoples. Like many of my Elders say: Where is your Bill of Sale? In fact Aboriginal Title is the radical or underlying title in Canada. That is why Aboriginal Title continues to exist.

It is critical to understand these deep-seated concepts because they are the essence of the **two-row wampum** and the parallel riding canoes analogies of the relationship between the settlers and us. Indigenous Peoples must not accept that Canada has radical title and we do not accept that our proprietary or Aboriginal Title is a burden on the Crown. If anything it is Crown Title, or any property rights they grant, that are a burden on Aboriginal Title. In fact Canadian settlers cannot claim rights to live on our land based on the racist legal concepts of 500 years ago but only through mutual recognition and affirmation of our human right to exist equally within our territories as Peoples.

You can see how this contradiction really confuses the SCC when they switched from the substantive legal decision on recognition of Aboriginal Title to the political decision about whether provincial government jurisdiction applies to Aboriginal Title Lands. Canada and the provinces always team up against Indigenous Peoples in cases involving Aboriginal Rights, both look at us as a threat to federal and provincial jurisdiction or law making power. This can be seen in the decision where the SCC set aside a long standing doctrine of federalism on interjurisdictional immunity which would have barred the provinces from exercising any control over Aboriginal Title lands and looked at section 35 as providing the basis for justifying the application of provincial law applying to Aboriginal Title lands.

RCMP deployed at Elsipogtog during Fracking protests.

The ***Tsilhqot'in*** case started from the fact that the BC government wanted to apply the **BC Forest Act** in Tsilhqot'in territory and issue logging licenses and the Tsilhqot'in objected to that intrusion into their territory. The **BC Forest Act** is basically an economic law that gives settlers or the "***broader political community***" the right to make money off the trees in Tsilhqot'in territory. This is the real battle in the Tsilhqot'in case between recognizing Aboriginal Title and contending with existing provincial jurisdiction. You can see the court struggle with the issue when they declare that the land is no longer Crown land, but Aboriginal Title land, and the timber is no longer Crown timber, but the Tsilhqot'in have the proprietary interests. While the court sees a role for the province regulating the lands, they question how they can allocate the resources that belong to the Tsilhqot'in. In the end

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the court repeatedly stresses that governments and proponents should get the consent of Indigenous Peoples before starting any development to save them the legal and economic uncertainty.

History speaks for itself. No one can deny the fact that the federal and provincial government system has been a total disaster for Indigenous Peoples. Indeed the federal and provincial government tag team against Indigenous Peoples in court cases despite the fact that Canada has a fiduciary responsibility to Indigenous Peoples. So we find no solace in the court referring to the fiduciary responsibility in this case. The federal and provincial government system is designed to make settlers rich at the expense of Indigenous Peoples Aboriginal Title and Rights. The **United Nations Human Development Index** calculates Indian people on the reserve as being ranked below rank 70 (where developing countries rank) and Canada ranked up near the top, including number one, from time to time.

The ***Tsilhqot'in*** case does give us very clear recognition of Aboriginal Title and Rights, as proprietary interests. The real outstanding issues are that the SCC politically dealt with the issue of provincial jurisdiction and failed to address the issue of Indigenous law and jurisdiction. It is important to realize that once the SCC recognizes Aboriginal Title it must also recognize Aboriginal Law because that is the legal process that Indigenous Peoples use to organize and manage our Aboriginal Title territories. This would also create competing jurisdictional conflicts between Aboriginal Laws and provincial government laws on forestry, mines, waterways, etc. These are outstanding issues that were not fully argued or addressed in the ***Tsilhqot'in*** case. It is up to us as Indigenous Peoples to implement the decision and our jurisdiction on the ground.

Canada Constitution 1982

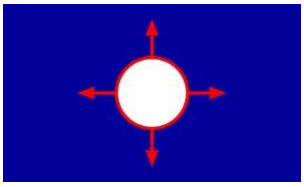
It is important to point out that it was not supposed to be the courts that defined the relationship between Crown Title and Aboriginal Title. It was supposed to be the Constitutional Conferences identified in what was section 37 of the Canada **Constitution Act 1982**. In fact, Canada had 4 such conferences in the 1980s and they failed in to arrive at a constitutional agreement and it was therefore left up to the Supreme Court to fill the gap and delineate the meaning of s.35. The court can never adequately solve that deadlock because precedent and the division of powers to the **BNA Act** that originally dispossessed us as Indigenous Peoples of our Aboriginal and Treaty Territories bind the SCC.

The constitutional deadlock over the meaning of Section 35 can only be resolved with the help of a third party, and the most logical is the **United Nations**. The **UN human rights bodies** oversee the implementation of the right to self-determination as initially recognized under **Article 1 of the International Covenant on Civil and Political Rights** and **Article 1 of the International Covenant Economic, Social and Cultural Rights**. Canada is actually a signatory to these International Human Rights Treaties and Canada should be applying these international law standards to their existing policies regarding Indigenous Peoples.

Canada claims that in Canada the right to self-determination is exercised by the state and covers Indigenous Peoples as Canadians. But as Indigenous Peoples we have a free standing right to self-determination, it is also the international remedy to colonization and enables us to determine our own political systems and economies. Canada's argument fails because we were unilaterally made Canadian without our consent and we never released our inherent rights and lands.

The big question is, if we are Canadian, why are so many of us impoverished? Normally the answer is that we as "***individuals***" do not succeed in modern society. The blame is on the individual to fit in and not the colonial system that denies us access to our own land and that has dispossessed us, made us dependent and oppressed us.

Canada and other States that occupy lands of Indigenous Peoples basically tried to con-



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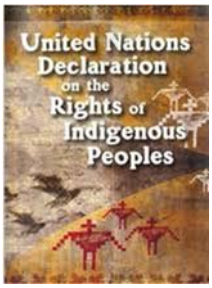

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vince the global community that Indigenous Peoples are not entitled to Article 1 and the right to self-determination simply because we are minorities within the larger occupying populations. As Indigenous Peoples we always maintained our right to self-determination and we fought for its international recognition.

In 2007 the United Nations passed the **UN Declaration on the Rights of Indigenous Peoples (DRIP)** which made it indisputable that self-determination is a right of Indigenous Peoples.

> **Article 3**
>
> ***Indigenous Peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.***

"Canada said that Indigenous Peoples are basically Canadians and that we exercised our right to self-determination when Canada as a state government exercised self-determination. They fail to address the fact that Indigenous Peoples are systemically impoverished and marginalized and that we were basically unilaterally made Canadians for political purposes"

In 2005 the **United Nations Human Rights Committee** asked Canada to provide answers on how **Article 1 on self-determination** was being applied to Aboriginal Peoples.

Canada said that Indigenous Peoples are basically Canadians and that we exercised our right to self-determination when Canada as a state government exercised self-determination. They fail to address the fact that Indigenous Peoples are systemically impoverished and marginalized and that we were basically unilaterally made Canadians for political purposes.

Canada tells international bodies that:

> ***27. In this traditional approach to self-determination, the entire population of Canada constitutes a "people" for the purposes of Article 1. The Canadian people exercise their right of self-determination as a sovereign nation state within the community of nations.***
>
> ***28. As well, in this traditional approach, indigenous collectivities and other peoples living within the existing state of Canada participate in the exercise of the right of self-determination as part of the people of Canada. Indigenous individuals in Canada benefit from all the rights in the international covenants. Canada has a government representative of the whole people belonging to the territory, without distinction of any kind.***

This is how Canada tries to deny us our rights as peoples, even though it is clear Canada has two basic constituencies, there are the Settlers and Indigenous Peoples. In 1982 the Settlers received the final symbol of their self-determination when the Canadian Constitution was patriated but because Indigenous Peoples opposed patriation of the Canadian Constitution until our land question was settled and the four Constitutional Conferences failed, then Indigenous Peoples have not achieved self-determination.

In regard to the **Constitutional Conferences on Aboriginal Matters**, it is conclusive that Indigenous Peoples were not considered as part of the mainstream settler people. In fact a mutual agreement would have had to be reached at the Constitutional Conferences for Indigenous Peoples to exercise self-determination within Canada.

Canada tries to hide behind ongoing ineffective measures to assimilate Indigenous Peoples into the mainstream settler population. The **Royal Commission on Aboriginal Peoples (RCAP)** and the failure to substantively implement the **RCAP** recommendations make it clear that assimilation is the only means of fitting into Canada's existing vision of the government's national identity.

> ***29. In addition, Canada undertakes special measures for indigenous individuals and collectivities in Canada, to enable them to fulfill their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the government of the country of which they are citizens. In 1982, the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada were given constitutional recognition and affirmation.***

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Conclusion:

It is important to look at the ***Tsilhqot'in*** decision as a very significant step forward in terms of dealing with Canada's policy of dispossessing us as Indigenous Peoples. We need land or territory if we are to exercise our right to self-determination. We need to look at recognition of Aboriginal Title on the ground as a firm foundation to establish our jurisdiction and re-establish our Indigenous Laws back in our territory. In fact my late father, **Grand Chief George Manuel**, used to always tell me that you cannot have self-government without land because what would you govern. I want to add that with recognition and implementation of our governance and right to self-determination has to go hand in hand with land rights.

I believe that recognition of Aboriginal Title on the ground puts a very heavy onus on the Tsilhqot'in People and all of us to clearly put out your vision on how you see a new Canada and British Columbia, based on your right to use your land according to your economic, environmental, social and cultural vision of the future. This is a great challenge because Indigenous Peoples have been marginalized since we were dispossessed of our lands. We have not really participated in a big way in the economy since the fur trade. We must not be overcome by this awesome task but learn to work together and apply our laws on the ground.

I believe that in addition to the judicial system the International **Covenants on Civil and Political Rights** must be utilized in order to get indigenous jurisdiction recognized instead of having Aboriginal Title under provincial jurisdiction. There is a direct competition between Indigenous Peoples and the provincial governments. It was and continues to be the province that has benefited from our lands since BC joined confederation. I cannot think of very much change from existing disparity if BC continues to have jurisdiction over Aboriginal Title lands. BC's record speaks for itself.

Indigenous Peoples need to learn to work together. Canada is scheduled to appear before the **United Nations Human Rights Committee** in Geneva in October 2014 on the List of Questions and in July 2015 to make their **Periodic Review**. We need to address Canada's response in 2005 on self-determination and the issues left unaddressed in the ***Tsilhqot'in*** case. We need to be clear to the **UN Human Rights Committee** is that Indigenous Peoples, the rightful title holders have the right to self-determination and the right to jurisdiction and law making power over our Aboriginal Title Territories. We need reject the Supreme Court of Canada's political position that provincial law has jurisdiction over Aboriginal Title Lands as being colonial and against world peace. Implementation of our rights on the ground is going to be twice as hard as getting them recognized by the courts but the rewards will be real and they will benefit our children and future generations. A lot depends on us.

North American Indigenous Peoples' Caucus in Alta, Norway, June 2013.

NAIPC meeting in Kamloops, BC on Mar. 29, 2014. (Photo by R. Diabo)

"I believe that in addition to the judicial system the International **Covenants on Civil and Political Rights** must be utilized in order to get indigenous jurisdiction recognized instead of having Aboriginal Title under provincial jurisdiction. There is a direct competition between Indigenous Peoples and the provincial governments"

NAIPC meeting in Kamloops, BC Mar. 29, 2014

SCC Tsilhqot'in Decision and Canada's First Nations Termination Policies

PM-AFN Meeting of Jan. 11, 2013.

Bernard Valcourt, left, Minister of Aboriginal Affairs and Northern Development Canada, with Prime Minister Stephen Harper, right. (Photo courtesy of Canadian Press)

By Russell Diabo

On June 26, 2014, the **Supreme Court of Canada (SCC)** recognized that the **Xeni Gwet'in Tsilhqot'in People** have Aboriginal Title to a large part of their traditional territory. In the same decision, building on previous legal cases written to contain section 35 of Canada's constitution, the SCC set out a legal test for asserting and establishing Aboriginal Title in Canada.

The reaction to the SCC Tsilhqot'in decision has been wide ranging from jubilation by the Tsilhqot'in Chiefs and other First Nation leaders, to dismay and alarm from industry spokespeople and other Canadian Settler opinion makers.

"However, there are other aspects of the ***Tsilhqot'in*** decision that are dangerous and a threat to First Nations and require a local, regional, national and international political response for those First Nations who are up to it"

Reaction from Colonial Crown governments has been muted or silent for the most part, except for the B.C. government, **Premier Christy Clark** has called for a meeting between her Cabinet and Chiefs in B.C. on September 11, 2014.

It is not surprising that the B.C. provincial government is being proactive by calling for an early meeting with First Nations because 50% of the Comprehensive Land Claims in Canada are in B.C. where self-government is also being negotiated at the same time in the Comprehensive Claims negotiations. Some mainstream media have previously commented that with overlaps, First Nations are claiming 110% of the province.

My reading of the SCC ***Tsilhqot'in*** decision is that it is probably about as far as the SCC was prepared to go in recognizing Aboriginal Title.

It is good that the SCC recognized the Tsilhqot'in have Aboriginal Title to a large part of their traditional territory and that the SCC didn't subscribe to the "***postage stamp***" theory of Aboriginal Title, which the **B.C. Court of Appeal** was postulating in this case.

The postage stamp theory was devised in the lower court, where the Judge sought to circumscribe the collective territorial land rights of Indigenous nations and bands into small intensively used and occupied areas. If successful, the adoption of this theory would have fragmented Indigenous territory and further entrenched Western notions of settlement over Indigenous forms of land use, such as those of semi-nomadic societies.

It is also good that the SCC recognized that "***consent***" of the Aboriginal Title holders is required and that the "***beneficial interest***" in the Aboriginal Title territory belongs to the Aboriginal Title holding group and not the Crown, the SCC made it clear that "***this is not merely a right of first refusal with respect to Crown land management or usage plans. Rather, it is the right to proactively use and manage the land.***" [Paragraph 94] Or as the SCC more clearly put it "***Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits.***" [Paragraph 18]

However, there are other aspects of the ***Tsilhqot'in*** decision that are dangerous and a threat to First Nations and require a local, regional, national and international political response for those First Nations who are up to it!

Some of the dangerous aspects are as follows:

- The SCC ruled that based upon the assertion of European sovereignty the Crown

'Termination Policies' continued from page 6

has "***Radical or underlying title***", thus keeping the racist Doctrine of Discovery alive in Canada;

- "***The claimant group bears the onus of establishing Aboriginal title***";
- "***Governments can infringe Aboriginal rights conferred by Aboriginal title***";
- "***As a general proposition, provincial governments have the power to regulate land use within the province. This applies to all lands, whether held by the Crown, by private owners, or by the holders of Aboriginal title.***" (emphasis added)
- "***Provincial regulation of general application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework.***"

In addition to the threatening aspects of the ***Tsilhqot'in*** decision noted above, there is nothing in the SCC decision that addresses the jurisdiction or laws of the Tsilhqot'in, which means the pre-existing sovereignty or self-government of the Tsilhqot'in wasn't addressed in the case.

"In addition to the threatening aspects of the ***Tsilhqot'in*** decision noted above, there is nothing in the SCC decision that addresses the jurisdiction or laws of the Tsilhqot'in, which means the pre-existing sovereignty or self-government of the Tsilhqot'in wasn't addressed in the case"

Therefore, the court did not rule on whether or not the federal government's **Aboriginal self-government policy** is constitutional or not.

Finally, the SCC ***Tsilhqot'in*** decision made it clear that Aboriginal Title lands cannot be "***alienated except to the Crown***", as was set out in the **Royal Proclamation of 1763**.

This means if Aboriginal Title holding First Nations give their consent to extinguishment their Aboriginal Title can still be extinguished to the Crown.

Canada's Core Negotiation Mandates/Pre-Conditions = Termination

As I've written before, there are 93 Termination Tables involving 403 Indian Bands/Non-Status/Metis with a combined population of 331,945.

Termination—in this context means the ending of First Nations pre-existing sovereign status through federal coercion of First Nations into Land Claims and Self-Government Final Agreements that convert First Nations into municipalities, their reserves into fee simple lands and extinguishment (through modification) of their Inherent, Aboriginal and Treaty Rights.

Under Canada's core negotiating mandates/pre-conditions at these 93 Termination Tables, First Nations are expected to:

- ***Agree to extinguishment (modification) of Aboriginal Title;***
- ***Agree to the legal release of Crown liability for past violations of Aboriginal Title & Rights without compensation;***
- ***Agree to the elimination of Indian Reserves by accepting lands in fee simple within the provincial system;***
- ***Agree to removing on-reserve tax exemptions;***
- ***Agree to existing Private Lands/Third Party Interests (and therefore alienation of Aboriginal Title territory without compensation);***
- ***Agree (to be assimilated into) existing federal & provincial orders of government;***
- ***Agree to application of Canadian Charter of Rights & Freedoms over governance & institutions in all matters;***
- ***Agree to programs & services funding on a formula basis being linked to own source revenue;***
- ***Agree to a municipal form of self-government that accepts federal and provincial***

Sophie Pierre, Chair, B.C. Treaty Commission

'Termination Policies' continued from page 7

power.

From my reading of the SCC Tsilhqot'in decision Canada will likely try and continue with its Termination Policies (**Comprehensive Claims & Self-Government**) as a basis of negotiations at the 93 Termination Tables.

Let's not forget, while the **Supreme Court of Canada** issued the ***Tsilhqot'in*** decision it is up to the executive branch of the federal government to decide if and to what extent they will comply with the SCC ***Tsilhqot'in*** decision.

If First Nations who have borrowed money from the federal government try and pull out of negotiations Canada can call in the loans and demand a repayment schedule or place an indebted First Nation into third party management as they have already threatened to do with a couple of B.C. First Nations who have pulled out of negotiations already.

"Let's not forget, while the **Supreme Court of Canada** issued the ***Tsilhqot'in*** decision it is up to the executive branch of the federal government to decide if and to what extent they will comply with the SCC ***Tsilhqot'in*** decision"

Tsilhqot'in vs. Comprehensive Claims Policy (CCP)

Canada's initial reaction to the ***Tsilhqot'in*** decision has been predictably to cling to the CCP, in a statement issued on June 26, 2014, **Canada's Aboriginal Affairs Minister Bernard Valcourt** stated:

> ***"The decision by the Supreme Court of Canada on the appeal filed in the Roger William case involves complex and significant legal issues concerning the nature of Aboriginal title in the Province of British Columbia.***
>
> ***The Government of Canada is now taking time to review the Court's decision to determine next steps.***
>
> ***Our Government believes that the best way to resolve outstanding Aboriginal rights and title claims is through negotiated settlements that balance the interests of all Canadians.***
>
> ***Since 2006, we have concluded four treaties in British Columbia with a number of other agreements at advanced stages of negotiations.***
>
> ***We are committed to continuing this progress and ensuring an effective process for negotiating treaties."***

Similar to the **federal Minister Bernard Valcourt**, the **Ontario Minister for Aboriginal Affairs, David Zimmer** wrote in the National Post on July 9, 2014:

> ***"We look forward to continuing to work with the Algonquin's of Ontario and Canada to complete the initialing and approval of an agreement in principle. Resolving the Algonquin land claim will help to improve eastern Ontario's business climate by providing certainty for investors and opening up new opportunities for the Algonquin's and their neighbours to work together."***

BC First Nations Summit Logo

Along the lines of continuing with the status quo Comprehensive Claims/Self-Government negotiations I have heard the Quebec Ministry of Natural Resources officials are saying despite the Tsilhqot'in decision its "***business as usual***".

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Queen Elizabeth II singing the Constitution Act 1982 into law, April 17, 1982.

Meanwhile, a top proponent of the **B.C. Treaty Commission-Aboriginal Title extinguishment process**, **Grand Chief Ed John** is trying to put a positive spin on the mess the actively extinguishing First Nations in B.C. have gotten themselves into over the last 20 years of negotiating under Canada's First Nations Termination policies, while collectively borrowing about $500 million from the federal government to negotiate, **Grand Chief Ed John** told the **CBC** on July 8, 2014:

> "***As First Nations, we went to the table based on our title. The governments came to the table with their own mandate which was not to recognize title. So, it led to stalemates,***"
>
> "***Simply because you get involved in negotiations, it doesn't mean you capitulate to the other party's mandate. That's far from the truth,***"

Grand Chief Ed John is being disingenuous to the **CBC**, as a lawyer he knows the definition of a First Nation under the federal (and B.C.) **British Columbia Treaty Commission Act** of 1995, which provides:

> ***"first nation" means an aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, that has been mandated by its constituents to enter into treaty negotiations on their behalf with Her Majesty in right of Canada and Her Majesty in right of British Columbia; (emphasis added)***

The BCTC Act requires proof of a First Nations' mandate to negotiate with the Canada and BC governments and Canada's Comprehensive Claims Policy has required extinguishment of Aboriginal Title since the Comprehensive Claims Policy was first announced in 1973 by the federal government.

On top of this, the First Nations participating in the **BCTC negotiations** have signed funding agreements, including promissory notes, all of which contain terms and conditions consistent with Canada's Termination Policies.

The fact that the SCC has kept the burden of proof on the Aboriginal Title holding groups to prove their Aboriginal Title to meet the "***strength of claim***" test means that many First Nations will not meet the legal test because it costs millions of dollars just to collect and analyze the historical, cultural and land use & occupancy data to prove Aboriginal Title and Rights let alone sustain the legal fees and court costs.

The federal and provincial governments will likely resist funding Aboriginal Title research now because they know what First Nations will do with the collected evidence of Aboriginal Title and Rights.

All that was required for First Nations to enter the **B.C. Treaty Commission process** was a map and a band council resolution, many First Nations at the Termination Tables did not do research before entering into negotiations with Canada and B.C. now they are at a disadvantage at the negotiation tables.

Under the **Tsilhqot'in Aboriginal Title Framework** moving from asserting to establishing Aboriginal Title can only be done by a court declaration or agreement, which means only a court declaration, since the federal government will likely try and keep its **Comprehensive Claims Policy** intact as much as possible.

As for the "***infringement justification***" analysis the burden will be on Crown governments

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British Columbia TREATY COMMISSION

'Termination Policies' continued from page 9

to prove the need for a development project is "***substantial and compelling***", and there will also be a corresponding burden of proof on a First Nation as well to show how the "***infringement***" of their "***asserted***" or "***established***" Aboriginal Title or Right will be negatively impacted.

This means First Nations—if they haven't done so already—need to develop databases not only of Indigenous land use and occupancy but natural resource inventories and analysis of the cumulative impacts of ongoing developments not to mention the alienation of their traditional lands.

Whether a First Nation is at a Termination Table or not they will all face the burden of proof and the need to counter federal and provincial laws "***infringing***" on Aboriginal Title and Rights.

All of this costs money. Where will First Nations get the money to meet the legal test for Aboriginal Title? Or to counter the Crown's "infringement" analysis?

"The ***Tsilhqot'in*** decision reinforces the de facto sovereignty of the Crown and the section 35 infringement justification test for federal and provincial laws to override First Nations Aboriginal Title and Rights"

Tsilhqot'in vs. Federal Aboriginal Self-Government Policy

Since the ***Tsilhqot'in*** case didn't address the matter of jurisdiction or self-government over Aboriginal Title lands in my view the **federal self-government policy** remains untouched by the SCC.

So for those First Nations negotiating under the federal self-government policy at the 93 Termination Tables the federal objectives of converting bands into municipalities with fee simple lands remains unchanged.

The ***Tsilhqot'in*** decision reinforces the de facto sovereignty of the Crown and the section 35 infringement justification test for federal and provincial laws to override First Nations Aboriginal Title and Rights.

As my friend **Peter Di Gangi** wrote about **Canada's Aboriginal Self-Government policy** in 1995 when it was brand new, and it remains true today, as Mr. Di Gangi wrote: ***"there are preconditions which the federal government has laid out. These are that:***

- ***First Nations must operate "within the framework of the Constitution.... in harmony with jurisdictions that are exercised by other governments". This will require "a harmonious relationship of laws".***
- ***The inherent right does not, in Canada's view, include "the right of sovereignty in the international law sense".***
- ***Self-government agreements and treaties must contain a provision allowing for the application of the Charter of Rights & Freedoms to aboriginal governments. The reference to treaties would seem to apply to future treaties.***
- ***"As a general rule.... agreements will not deviate from the basic principle that federal and provincial laws of an overriding national or regional importance will take priority over Aboriginal laws." This sounds like the POGG - peace, order & good government - requirement that was included in the Charlottetown Accord.***
- ***Federal and provincial laws cannot be automatically displaced by the introduction of a First Nation law - federal and/or provincial laws may continue or coexist, depending on the outcome of negotiations.***

The 9 Justices of the Supreme Court of Canada.

We now know in 2014 federal and provincial powers will override any First Nations powers

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in any self-government agreement.

Conclusion

I have seen the executive branch of the federal government ignore the 1997 SCC ***Delgamuukw*** decision on Aboriginal Title and manipulate the 2004 SCC ***Haida*** decision on the Crown's duty to consult & accommodate.

I have yet to see any evidence of the legal fiction the colonial courts call the "***honour of the Crown***" outside the colonial courtrooms. So I can only surmise that **Canada's War on First Nations Aboriginal Title and Rights** will only continue and intensify as the stakes have now gotten higher for all parties as a result of the ***Tsilhqot'in*** decision.

Now that the federal, provincial and territorial governments know what evidence First Nations need to "**assert**" or "***establish***" Aboriginal Title or Rights, or what evidence First Nations need to respond to Crown "***infringement justification***" actions, the Crown governments will likely be trying to limit research funding while identifying Crown "***experts***" to shoot down First Nations evidence at the negotiation tables or in court.

It is a war for ownership, control, management of Aboriginal Title lands and Indigenous self-determination vs. continued Crown racism, colonialism and Termination of the collective rights of Indigenous Peoples in Canada.

For those of you who are sceptical of my comments on Crown government's bad faith should learn more than what is in the mainstream media.

A good example of what the federal and provincial governments—in this case Quebec—are capable of in the denial and extinguishment of First Nations' rights need to read **Dr. Shiri Pasternak's** Dissertation entitled "***On Jurisdiction and Settler Colonialism: The Algonquins of Barriere Lake Against the Federal Land Claims Policy***". It can be found here online: http://shiripasternak.com/Pasternak_Shiri_S_201309_PhD_thesis.pdf

Algonquins of Barriere Lake Encampment on Parliament Hill, Nat'l Day of Action 2007

"I have seen the executive branch of the federal government ignore the 1997 SCC ***Delgamuukw*** decision on Aboriginal Title and manipulate the 2004 SCC ***Haida*** decision on the Crown's duty to consult & accommodate"


CONSOLIDATION CODIFICATION

Indian Act Loi sur les Indiens

CHAPTER I-5 CHAPITRE I-5

Treaties and Tsilhqot'in-Treaties at Risk?

Federal Court Logo

Pictured Here are the Chiefs of the Nuu-chah-nulth Nation in 1922. They had been negotiating treaties before the Indian Act banned negotiations and hiring lawyers for land claims. My grandfather Dan Watts is in this picture, and I negotiated for a treaty from 1994-2009, and in 2014 we are still no closer to a treaty. Tsilhqot'in may mean we have aboriginal title lands and no treaty. (Photo Courtesy of Judith Sayers)

By Judith Sayers, July 4, 2014

For many years I had a bumper sticker that I displayed in my office that said BC is Indian Land. All those years ago that bumper sticker spoke our truth and it still does today except now we have the highest court of the land agreeing with us. The ***Tsilhqot'in*** decision is worth celebrating! This decision has major implications for the **treaty process in BC** and I will briefly outline the differences between the final agreements and going to court to get title declared.

In 1994, the **BC Treaty Commission** began accepting **Statements of Intent** and negotiations began going through the **6 stages of the treaty process**. Negotiations were political and proof of title was not required. Placing the map of your territory with your statement of intent set out the area the negotiations would cover. Overlaps were to be resolved by the First Nations themselves. The **first Final Agreement** under the **BC Treaty process** took effect on April 3, 2009 for the **Tsawwassen First Nation (TWN)**. On April 2, 2011, the **Maa-nulth First Nations (MNA)** final agreement came into effect. It took a total of 15 years to conclude negotiations for the TWN and 17 years for the Maa-nulth. The **Nisga'a treaty** negotiated outside the **BC Treaty process** took 24 years.

"When you consider the 12 years in courts to 15-24 years in negotiations, the court system amazingly took less time"

In 2002, the court proceedings that eventually ruled in favour of aboriginal title of the Tsilhqot'in began. The court proceedings lasted for 5 years with the decision being delivered on November 20, 2007. The Tsilhqot'in people were preparing their title case for many years before the trial began. The Tsilhqot'in talk of a journey of 25 years to get their final decision at the Supreme Court of Canada on June 26, 2014. Their actual time for the court battle was 12 years.

When you consider the 12 years in courts to 15-24 years in negotiations, the court system amazingly took less time.

WHO PAID?

Through the **BC Treaty Process**, First Nations took out loans to finance their participation in the negotiations. **Tsawwassen First Nation** has to pay back $5.6 million dollars over 10 years. **Maa-nulth** must pay back $12.75 million over 10 years. (**Maa-nulth** is comprised of 5 First Nations).

Ed John, Member Task Group First Nations Summit

In Tsilhqot'in, the court ordered the governments to pay the costs at the **BC Supreme Court level** and costs were not mentioned at the **BC Court of Appeal** or the **Supreme Court of Canada** decision.

HOW MUCH LAND DID FIRST NATIONS GET

Tsawwassen First Nation got 724 hectares of land held in fee simple in their final agreement. **Maa-nulth** obtained approximately 20,900 hectares.

Tsilhqot'in have aboriginal title over 220,000 hectares or around half of their territory. Differences between TWN, MNA and Tsilhqot'in lands are stark.

'Treaties at Risk?' continued from page 12

STATUS OF LANDS

The TWN, MNA and other completed Final Agreements have accepted fee simple lands with some modifications. The land for TFN and MNA are held in fee simple meaning the underlying title is with the provincial Crown. Does it still have the burden of aboriginal title? There is no mention of what happens specifically to aboriginal title but they exchanged aboriginal title lands for fee simple lands that likely means extinguishment. The final agreement says that the aboriginal title of TWN and MNA including its attributes and geographic extent, are modified, as set out in the Agreement. As I understand this, Aboriginal title has been modified to the provisions for lands set out in the treaty- that is fee simple lands.

TWN and MNA have specific law making powers regarding their lands including the power to dispose, mortgage, or lease TWN lands, or to issue licenses or permits. They also have law making power over lands, management and a land registry system. The Final Agreement is definitive as to what powers TWN and MNA has over their lands.

Contrast the lands provisions in the Final agreements to the Tsilhqot'in who now have aboriginal title lands. Aboriginal title lands means the Tsilhqot'in hold an exclusive right to decide how to use and control the land, and to benefit from those uses. It includes the use, enjoyment and occupation of the lands. They can use their lands in modern ways.

The only restrictions on aboriginal title is that it is a collective right of all the peoples and must be treated as such (Chief and Council could not sell the land or consent to a development that affects their rights without going to the people for their consent) and that it must be used in such a way that does not deprive future generations of the benefit of the land. The Tsilhqot'in are not confined to specific provisions of power under a final agreement, but can control the land and resources keeping in mind its collective nature and what they have always done-preserve and protect the land for future generations.

RIGHT OF CONSENT

The court was clear that when aboriginal title has been proved as the Tsilhqot'in have, they must consent to any development on their lands. If they do not consent to development, the government must ensure that it has fully consulted and accommodated their interest and can only do things that have compelling and substantial objectives and now have to take into account the aboriginal perspective on their actions. They must also ensure their action are consistent with their fiduciary obligation and are within the framework of s. 35 requirement. That means there will be minimal impairment to aboriginal interests and there is enough for future generations. Finally, there has to be a principled reconciliation of First Nations interests with the interests of all Canadians. Principled, a new word added by the courts for a good reason.

The Crown must reassess its prior conduct and may have to cancel projects if the continuation of the project unjustifiably infringes title. Additionally, the Crown may have to amend their laws so they do not infringe aboriginal title.

If a court finds that consultation and accommodation has been inadequate, the government decision can be suspended, quashed or damages awarded. These are very serious implications for governments.

"If a court finds that consultation and accommodatio n has been inadequate, the government decision can be suspended, quashed or damages awarded. These are very serious implications for governments"

The Chief Justice had this to say about consent:

> ***"I add this. Governments and individuals proposing to use or exploit land, whether before of after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group."*** (paragraph 97 Tsilhqot'in decision.)

Contrast the right of consent Tsilqot'in now has with the definition of consult that is found in

'Treaties at Risk?' continued from page 13

"Chief" Stephen Harper in a headdress given to him by the Blood Tribe in Alberta.

TWN and MNA Final Agreements. The definition of consult means being provided with notice and sufficient information of the matter to permit the party to prepare its views on the matter, opportunity to present and have full and fair consideration of any views on the matter. TWN and MNA consent is limited to their lands with a few restrictions and no consent on lands outside their treaty lands.

FORESTRY

TWN and MNA own the Forest resources on their lands as specified in their agreements. They also can manage them. Their lands are treated as private lands and can export any timber they cut from it.

On aboriginal title lands, crown timber does not exist any more as it is not Crown lands. Provincial forestry laws apply to general things like forest health and forest fires but would not apply to allocations of timber through licenses and other tenures. The Court states:

> ***"the issuance of timber license on aboriginal title land is a direct transfer of aboriginal property rights to a third party and will plainly be a meaningful diminuation in the Aboriginal groups ownership right amounting to an infringement that must be justified in cases where it is done without aboriginal consent."*** (See also paragraph 116)

"Treaty mandates from the federal government are that fee simple lands are only on the table on a willing seller, willing buyer basis. This most likely will be a point of contention at treaty tables"

This raises a fascinating point. The province for several years now has wanted to turn the remaining crown forests into TFL's which we know would end up in the big forestry companies hands. Now that crown timber is First Nation timber in Tsilhqot'in lands, and the potential to be in other First Nations territories, the Province must rethink this kind of legislation or obtain the consent of First Nations.

My concern has always been that the Crown wants to alienate all the timber without settling with First Nations under treaty or other agreements. For treaties, they would have to compensate timber companies for taking back the allocations and that cost comes off the top of the treaty settlement meaning less goes to the First Nation. If BC goes ahead with such legislation, this would definitely be an infringement on aboriginal title and rights for the Tsilhqot'in and the potential infringement on those who have not yet proven title.

Effect of Aboriginal title on Fee Simple Lands and Submerged lands.

Questions Tsilhqot'in left unanswered is private or fee simple lands and submerged lands. The court said they would not address these issues as they were not part of the claim. Underlying fee simple lands is crown title that has the burden of aboriginal title as per the Supreme Court of Canada. First Nations will tell you their title underlies all lands. This is still up for negotiations as to whether First Nations will be compensated for those lands or some other solution but aboriginal title has not been extinguished on fee simple lands or submerged lands and has to addressed. Treaty mandates from the federal government are that fee simple lands are only on the table on a willing seller, willing buyer basis. This most likely will be a point of contention at treaty tables.

FULL AND FINAL SETTLEMENT FOR TWN AND MNA

TWN and MNA have provided a full and final settlement of their rights and title. Meaning they cannot now claim aboriginal title or other rights beyond what is in their final agreements.

Tsilhqot'in may now go forward with proving title to the rest of their territory if they feel it is warranted and so can every other First Nation in BC.

CHALLENGES FOR THE TREATY TABLES

I am sure First Nations will want to have aboriginal title lands in any final agreement. Land allotments so far have been relatively small in relation to their aboriginal title lands. First Nations will be advancing their territorial lands. First Nations will not settle for 8% or less lands that are being offered at the current time. Those days are gone as the Tsilqot'in have

'Treaties at Risk?' conclusion from page 14

aboriginal title to 50% of their territory.

The federal and provincial governments will probably insist that title must be proved and there is no method for proof of title currently at the treaty tables. Nor would First Nations want to be proving their title to federal and provincial negotiators.

Going to court to prove title was a 12 year battle for the Tsilhqot'in. Litigation is expensive and lengthy and for First Nations who still have to pay back treaty loans, this could be costly. Can you imagine if 190 First Nations went to court to prove title? (I use 190 as there are 203 First Nations in BC, 5 are Tsilhqot'in, and 8 are treaty 8). It took 339 days over 5 years to do the trial for the Tsilhqot'in territory. Title cases will definitely grind the court system to a halt.

Other than courts, there is no method of proving title. Will First Nations and the governments be able to come up with an alternative system to prove title? Or would they want to?

One of the main issues of contention at treaty tables has been the status of lands. The governments would not allow lands to be **s. 91(24) lands** in the **Final agreements**. They would not agree to **s. 35 lands**. They only wanted fee simple lands and those First Nations who have final agreements finally agreed to it. This was an issue that was explored at length at the common table. The governments have no choice now but to agree to aboriginal title lands if they want treaties.

Negotiations are always possible, but will the parties be able to agree on the amount of land that the First Nations want as aboriginal title lands? Will the governments agree to consent? How seriously will they take the **Supreme Court of Canada** decision this time? We know after ***Delgamuukw*** there was no change of treaty mandates even though everyone thought there would be.

The risks for the province of BC and Canada are great. The economic implications for BC is immense if all First Nations went to court and got a minimum of 50% of their territories declared aboriginal title lands with ownership of the resources on those lands. 94% of British Columbia is Crown lands and those are subject to aboriginal title as are private lands.

Aboriginal title to water has never been negotiated or litigated, this a big ticket item yet to be negotiated. I bet the province wishes they took **Hupacasath** offer of joint ownership of water in our territory now.

It is clear that First Nations will be asserting their title in the courts, on the land, in a lobby with governments and at negotiating tables. Clearly the existing mandates at treaty tables are too limited and must be changed to reflect the new era of aboriginal title lands. The **treaty process** is probably pretty close to dead unless there can be radical changes to **treaty mandates** that enables recognition of aboriginal title lands, consent, and all the other elements affirmed in Tsilqot'in. It is a new era for First Nations in BC. Finally, a true level playing field.

[Reprinted courtesy of First Nations in British Columbia Portal: http://fnbc.info/blogs/judith-sayers/treaties-and-tsilhqot-treaties-risk]

"The **treaty process** is probably pretty close to dead unless there can be radical changes to **treaty mandates** that enables recognition of aboriginal title lands, consent, and all the other elements affirmed in Tsilqot'in"

Indigenous Bar Association Logo

OPINION—Supreme Court had 'no other choice' in landmark ruling: lawyer

David C. Nahwegahbow, IPC, LSM, LL.B
Nahwegahbow Corbiere Genoodmagejig Barristers & Solicitors

By David C. Nahwegahbow, for CBC News, Posted June 29, 2014, 5:00 AM

The Tsilhqot'in Nation case is a landmark decision because it is the first time in history that the Supreme Court ever issued a declaration of Aboriginal title – essentially a declaration that the Tsilhqot'in owned the land.

But reading the case, it is clear the Court had no other legitimate choice.

The BC government did not properly consult and accommodate the Tsilhqot'in people with regard to forestry operations within their lands. The BC Supreme Court issued a non-binding ruling wherein Justice Vickers said that the Tsilhqot'in probably had Aboriginal title and that the Crown ought to negotiate a fair and honourable settlement.

"The Supreme Court held that the Aboriginal perspective, including Tsilhqot'in laws are to be given equal weight in determining Aboriginal claims. This applies equally to treaty claims"

What did the federal and BC governments do? Ignoring previous directions from the Supreme Court to seek reconciliation, they decided to appeal the ruling to the BC Court of Appeal and the Supreme Court of Canada.

The Crowns lost; common sense, the rule of law and constitutionalism prevailed.

Tsilhqot'in case proves Aboriginal title

The Crown governments argued that Aboriginal claimants had to establish intensive physical use of specific tracts of land to prove Aboriginal title – what has come to be known as the "postage stamp" theory of Aboriginal title. As the ethno-centric argument goes, the Tsilhqot'in and Aboriginal peoples generally were nomadic or semi-nomadic and unlike sedentary agricultural people, could never establish Aboriginal title to their traditional territories.

The IBA argued that Aboriginal claimants can also lead evidence of legal occupancy, i.e., Indigenous laws such as laws on tenure and trespass, to establish proof of Aboriginal title. There was ample evidence produced at trial to show that Tsilhqot'in people had such laws. The Supreme Court held that the Aboriginal perspective, including Tsilhqot'in laws are to be given equal weight in determining Aboriginal claims. This applies equally to treaty claims.

Tsilhqot'in proven to be owners of land

AANDC Headquarters, Gatineau, Quebec

Further, one of the most interesting things about the Tsilhqot'in case is with regard to the doctrine of terra nullius, a Latin term which means empty land. That theory espouses that Indigenous peoples were so uncivilized that they could not be seen in law to be true legal occupants and owners of their lands.

It was the legal basis upon which Indigenous peoples were dispossessed of their lands throughout the colonial period in many parts of the world. The Crown postage stamp theory of Aboriginal title is reminiscent of the doctrine of terra nullius. The Supreme Court has now stated unequivocally in the Tsilhqot'in case that the doctrine of terra nullius is not part of the law in Canada.

There is another important point in the case and that is the issue of consent.

The Supreme Court wrote that whether before or after a declaration of Aboriginal title, governments and individuals can avoid an infringement of the duty to consult by obtaining the consent of the Aboriginal group affected.

This effectively raises the significance of the First Nation communities in decision-making processes regarding resource management decisions affecting their land and rights. This lends credence to the United Nations Declaration on the Rights of Indigenous Peoples,

‘Landmark Ruling’ conclusion from page 16

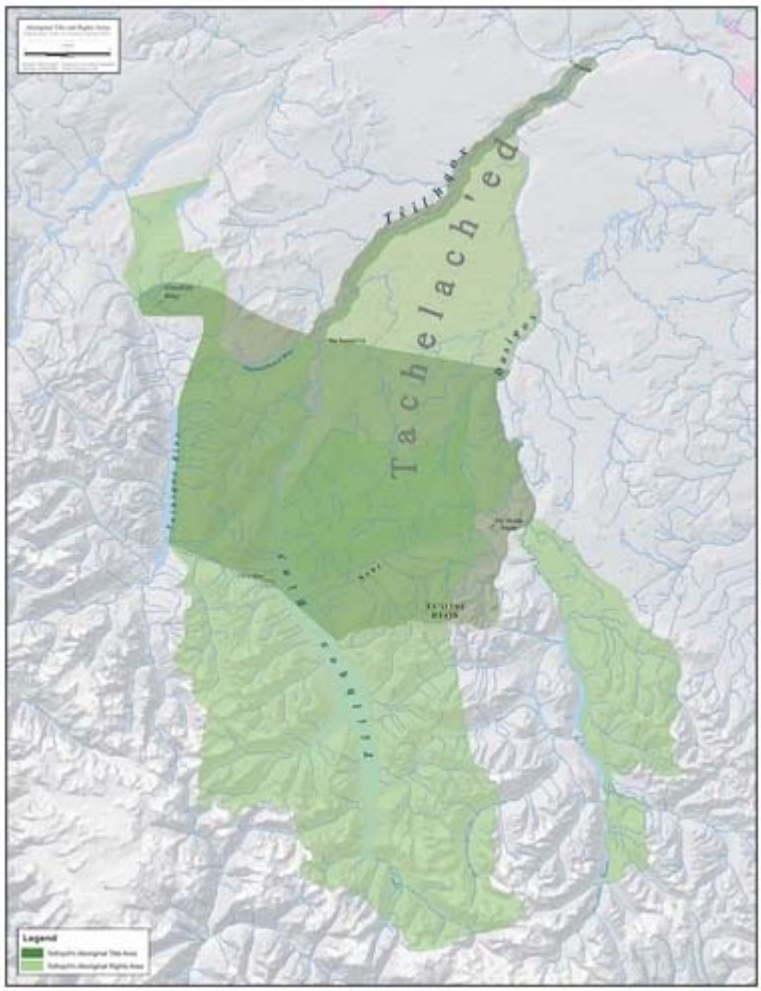
which calls for the free prior and informed consent before development on Indigenous lands.

More conflict in future likely

What are the implications of the Tsilhqot’in Nation case for Canada? Will Crown conduct change? It is hard to say. Unfortunately, judging from their past conduct, it is quite likely that federal and provincial governments will again ignore the advice of the Court on reconciliation. This will mean more conflict in the future.

However, I am hopeful that the Crown will learn from this case: that they will sit down with Indigenous peoples, modify federal and provincial laws and policies to positively embrace what section 35 of the Constitution Act, 1982 provides, and what the Supreme Court has been saying all along -- Aboriginal and treaty rights are hereby “recognized and affirmed”, and not denied, infringed and extinguished.

[David C. Nahwegahbow is from Whitefish River First Nation, which is part of the Anishinabek Nation. Mr. Nahwegahbow did his undergraduate studies at Carleton University and graduated from the Faculty of Law at the University of Ottawa. Mr. Nahwegahbow is a founding member and former President of the Indigenous Bar Association (IBA).]



Tsilhqot’in Aboriginal Title Territory.

Harper Does the Summer Shuffle of Top Bureaucrats [Promotes Wernick to PCO]

Michael Wernick headed for PCO in promotion by the PM.

By Kathryn May, Published on: July 11, 2014

The longtime deputy minister who stickhandled the federal government's attempts to reform First Nations education for the last eight years is among several senior bureaucrats who have moved to new posts in **Prime Minister Stephen Harper's** latest shakeup of the public service's upper ranks.

Michael Wernick is leaving **Aboriginal Affairs and Northern Development Canada** for the **Privy Council Office** later this month, where he will become a **special adviser**. Wernick joined Aboriginal Affairs in 2006 and is one of the longest-serving deputy ministers in the history of the department, which has been renamed under various reorganizations since Confederation.

In a bureaucracy where deputy ministers rotate through jobs every couple of years, **Wernick** stood out for his tenure at Aboriginal Affairs. Senior colleagues said he was determined to see the education act reforms through before moving on and was "***crushed***" when they were derailed.

"In a bureaucracy where deputy ministers rotate through jobs every couple of years, **Wernick** stood out for his tenure at Aboriginal Affairs. Senior colleagues said he was determined to see the education act reforms through before moving on and was "***crushed***" when they were derailed"

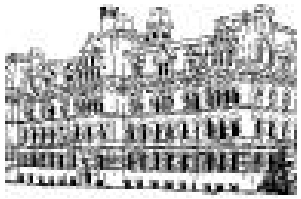
The Conservative government dropped its plan for an overhaul of First Nations education recently after the country's aboriginal chiefs disagreed on the necessary reforms. The government put the **education bill, C-33**, on hold following the sudden resignation of **Assembly of First Nations national chief Shawn Atleo**.

Wernick will be replaced by **Colleen Swords**, who after less than a year as the deputy minister at Canadian Heritage, is returning to Aboriginal Affairs where she spent four years working as **Wernick's second-in-command**.

Graham Flack, **PCO's deputy secretary to cabinet for plans and consultations and intergovernmental affairs**, moves to his first deputy minister posting and takes over as the head of Canadian Heritage.

The shuffle, announced Friday, is the second in less than a month. Other changes include:

- **Stephen Lucas**, PCO's assistant secretary to the cabinet for economic and regional development, fills Flack's position.
- **Lori Sterling**, the associate deputy minister at the Department of Justice, will become the deputy minister of Labour. She replaces **Hélène Gosselin**, who is retiring after a 33-year career in the public service.
- **Bill Jones**, deputy commissioner at the Canada Revenue Agency, is moving to National Defence as senior associate deputy minister.
- **Marta Morgan**, associate deputy minister of Industry, moves to Finance where she will become associate deputy minister.
- **Bill Matthews**, Treasury Board's assistant secretary of Expenditure Management, will take over as the new Comptroller General of Canada, replacing **James Ralston** who is retiring after 30 years.



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[Reprinted courtesy of the Ottawa Citizen.]

First Nations Mistaken in Their Celebration of Supreme Court Ruling

By Ian Mulgrew, Vancouver Sun Columnist, June 29, 2014

Welcome to Colonial Courtrooms," should have been the title of the Supreme Court of Canada's landmark aboriginal rights judgment.

While B.C. natives were busy last week celebrating the court's affirmation of their "aboriginal title," they should have paid closer attention to the fine print.

In spite of all the hand-wringing about threats to resource development and the land mass of B.C., this is a big victory for governments.

In the unanimous 8-0 decision, which dismissed with nary a nod the last half century of strident native assertions of sovereignty, the high court said B.C. natives are not unlike any other litigant squatter.

First they must establish they are the same people who have been living on and using the land forever, and then their rights will be decided by governments through talks or, in the end, by its appointed judges.

No longer will rhetoric about government-to-government discussions have currency — Chief Justice Beverley McLachlin decreed "aboriginal title flows from occupation in the sense of regular use of land."

McLachlin skirts issues of governance and sovereignty and notes only that "aboriginal land rights survived European settlement and remain valid" unless extinguished by treaty or otherwise.

Although aboriginal peoples have some extra rights constitutionally, government can still expropriate or place easements on their land — just as they can to anyone else's in the name of the greater good.

Like the rest of us, the natives have the right to take their case to court, said Justice McLachlin.

As long as the government negotiates in good faith and is willing to cut a reasonable cheque, any mine, industrial development or pipeline can proceed.

How radical. There is no native veto.

Natives may be able to establish aboriginal title but once they do, they don't appear to be much better off than non-native landowners in a fee-simple dispute with government. Like the rest of us, they can tell it to a judge — and we all know how that works.

Their control of the land, insofar as they can benefit from it, is constrained by the community nature of their rights and the need to look after the interest of future generations, which again presumably is subjected to judicial review given the fiduciary obligations involved.

Consider as well that if the Tsilquot'in decision is a benchmark, we could hand the same deal to B.C.'s roughly 200 other First Nations and still have two-thirds of the province left.

What they won here was an area of some 1,700 square kilometres — less than the size of Metro Vancouver — a wilderness with about 200 residents, a handful whom are non-aboriginal.

This 339-day trial was an embarrassment: Private lawyers got rich and the costs were in excess of at least $40 million.

This dispute in its broadest sense involved at most a grouping of six bands numbering 3,000 people and raw, isolated land that isn't worth a fraction of the cost of the litigation.

The Supreme Court should have pointed that out, and castigated both levels of government for ignoring their duty and obligation to the Tsilquot'in instead of dragging them through the courts.

There are fewer than 1 million First Nations people across the country and this decision is irrelevant to most of them because they have treaties.

Most of the country's non-status Indians are in this province and it is here that the Supreme Court

"Although aboriginal peoples have some extra rights constitutionally, government can still expropriate or place easements on their land — just as they can to anyone else's in the name of the greater good"

BULLETIN OF THE FIRST NATIONS STRATEGIC POLICY COUNSEL

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The First Nations Strategic Policy Counsel is a collection of individuals who are practitioners in either First Nations policy or law. We are not a formal organization, just a network of concerned individuals.

This publication is a volunteer non-profit effort and is part of a series. Please don't take it for granted that everyone has the information in this newsletter, see that it is as widely distributed as you can, and encourage those that receive it to also distribute it.

Feedback is welcome. Let us know what you think of the Bulletin—Russell Diabo, Publisher and Editor, First Nations Strategic Bulletin.

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'Mistaken Celebration' conclusion from page 19

decision has impact.

In B.C., the old colonial administration stopped signing treaties, leaving most of the province uncovered, and no successor government signed pacts.

There are about 155,000 First Nations people in B.C. — only 45 per cent of who live on a reserve — and they are hobbled by poverty and other disadvantages that are too numbing to recite.

This decision is a death knell for their dreams of sovereignty and the opening bell for a new native land-and-resource exploitation rush.

With this judgment, the focus shifts from the recognition of native self-government and the devolution of powers to appropriate First Nations structures to divvying up the pie.

We will see a burgeoning of the already crowded industry of land-claims lawyers, consultants and native ethno-cultural-historiographers and a blizzard of new litigation.

Think this marathon, decades-long court case is unique? Just wait.

This decision has brought clarity but it's a clarity that brings consequences that I think many natives may not welcome.

Chief Justice McLachlin calls it the new "governing ethos … of reconciliation."

All I hear is a new phrase for assimilation, and all I see is a roadmap for non-aboriginal interests and governments to achieve their ends.

We can infringe on native title as long as we justify it as a "necessary part of the reconciliation of Aboriginal societies with the broader political community of which they are part."

Resistance is futile, come on down aboriginal brothers and sisters and be part of European litigation culture.

Hmmm, heck of a victory.

That's a game-changer all right, but maybe not in the way natives think it is.

imulgrew@vancouversun.com **[Reprinted courtesy of Vancouver Sun]**