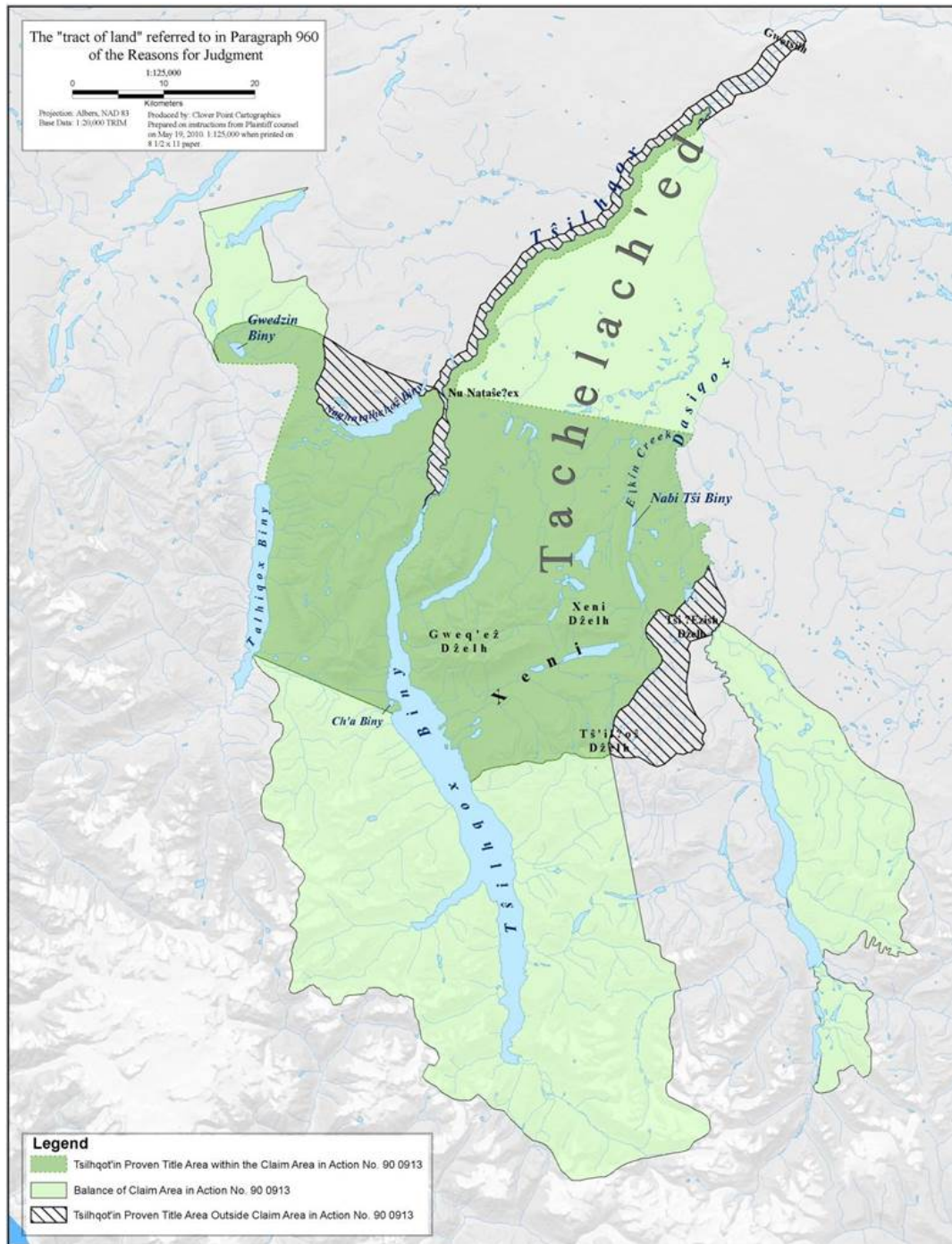


Tsilhqot'in Nation v. British Columbia 2014 SCC 44

The "tract of land" referred to in Paragraph 960
of the Reasons for Judgment

1:125,000
0 10 20
Kilometers

Projection: Albers, NAD 83
Date Date: 1/20/00 TRIM
Produced by: Clover Point Cartographics
Prepared on instructions from Plaintiff counsel
on May 19, 2010, 1:125,000 when printed on
1/2 x 1/1 paper



Legend

- Tsihqot'in Proven Title Area within the Claim Area in Action No. 90 0913
- Balance of Claim Area in Action No. 90 0913
- Tsihqot'in Proven Title Area Outside Claim Area in Action No. 90 0913

How Much Land?

Tsilhqot'in title area:

- a) 2-3% of claimed Tsilhqot'in traditional territory;
 - b) 18% of Xeni claimed caretaker area; and
 - c) 39% of Claim Area.
- Percentages are misleading.
 - Questions of fact in each case.

Abbreviated History of Land Claims

- 1973 *Calder v. British Columbia* – Nishga claim that Aboriginal title had not been extinguished; SCC dismissed claim for technical reasons but Aboriginal title recognized.
- 1980 *Baker Lake v. Minister of Indian Affairs* – Inuit claim to “title” to hunt and fish recognized; ownership claims dismissed.
- 1982 *Constitution Act*, s. 35, affirmed existing Aboriginal rights.
- 1985 *Delgamuukw v. British Columbia* started (claims of ownership and jurisdiction).

Abbreviated History of Land Claims

- 1989 *Tsilhqot'in* Trapline Action started to resist logging based on claimed interference with Aboriginal trapping rights.
- 1990 *Sparrow* – SCC judgment – “s. 35 calls for a just settlement for Aboriginal peoples.”
- 1991 *Delgamuukw* trial judgment: Aboriginal title extinguished by colonial legislation.
- 1993 *Delgamuukw* Court of Appeal judgment (change in government; trial position abandoned).

Abbreviated History of Land Claims

- 1996-1997 *Adams, Côté, Van der Peet, and Delgamuukw* SCC judgments. Aboriginal title subset of Aboriginal rights – suggest nomadic people’s form of occupation “not sufficient” to support a claim of title.
- 1998 *Tsilhqot’in* Brittany Triangle and Trapline Aboriginal title claim started. “Claim Area” defined as “part of traditional territory.”
- 1998 Nishga treaty – Aboriginal title “modified” to full fee simple.

Abbreviated History of Land Claims

- 2000 Trial judgments in *R v. Bernard*; *R v. Marshall*. Debate on claims of semi-nomadic peoples.
- 2003 NBCA and NSCA judgments in *R v. Bernard*; *R v. Marshall*.
- 2003 *Tsilhqot'in* opening at trial – Plaintiff relied on *R v. Bernard* NBCA claiming Aboriginal title exists throughout seasonal round of semi-nomadic people.
- 2004 *Haida* duty to consult created by SCC.

Abbreviated History of Land Claims

- 2005 *R v. Marshall; R v. Bernard* SCC overturned NBCA and NSCA: physical occupation equivalent to common law title required to prove title.
- 2005 *Tsilhqot'in* closing arguments: B.C. relies on physical occupation test.
- 2007 *Tsilhqot'in* trial judgment.
- 2012 *Tsilhqot'in* British Columbia Court of Appeal judgment.
- 2014 *Tsilhqot'in* SCC judgment.

History of Case

Initial Trapline Action

- Based on Aboriginal trapping rights.
- No claim to Aboriginal title.

History of Case

Aboriginal Title Claims added in 1998

- Trapline and Triangle defined as Claim Area.
- Claim Area said to be “part of Tsilhqot’in traditional territory.”
- Advance costs order granted in 2001.

History of Case

Opening at Trial

- Relied on NBCA in *R v. Bernard*.
- Aboriginal title throughout seasonal round of semi-nomadic peoples.

History of Case

- *R v. Bernard* overruled by SCC, together with *R v. Marshall*.
- Aboriginal title required proof of physical occupation equivalent to common law title.
- Commentators said SCC rejected territorial approach.

History of Case

Closing arguments

- Province relied on SCC's physical occupation test to resist territorial claim.

History of Case

Trial judgment

- Rejected territorial approach and B.C.'s reading of *Marshall; Bernard*.
- Non-binding opinion – title proven to 1900 km² in and outside Claim Area.
- Title lands become Federal enclaves.

History of Case

Court of Appeal

- Dismissed appeals.
- Adopted B.C.'s reading of *Marshall; Bernard*.
- Nothing about consequences of proof of title.

History of Case

SCC

- Granted declaration of title to opinion area.
- Provincial laws apply subject to *Constitution Act* s. 35.

Issues Considered?

- What is the geographical scope of Aboriginal title: how is title proved?
- What is the content of Aboriginal title: what rights does Aboriginal title confer?
- What are the consequences of proof of Aboriginal title with respect to the application of Provincial laws?

Geographic Scope of Aboriginal title: Test for Proof of Aboriginal Title

- Trial Judge applied correct test.
- Sufficient, continuous, exclusive occupation extending beyond villages.
- Commentators wrong to say SCC rejected territorial test for title.

Content of Aboriginal Title

- Beneficial use.
- Right to decide use and manage.
- Possession and the right to enjoyment and occupancy.

Consequences of Declaration of Aboriginal Title

- Not Federal enclaves.
- Provincial laws apply.
- Any infringement must be justified.
- Compelling and substantial public purpose not inconsistent with fiduciary duty.

Consequences of Declaration of Aboriginal Title

- Aboriginal title lands cease to be “Crown” lands.
- Encroachments require consent or justification.

Importance of Findings of Fact

- Requirements for proof of Aboriginal title (sufficiency, continuity, and exclusivity of occupation) questions of fact in each case.
- Ability of the Crown to satisfy the justification test is a question of fact in each case.

Potential Impacts

- Title claims to block projects (Tahltan).
- Blockades and eviction notices (Gitksan).
- Demands for recognition (Tsilhqot'in Letter of Understanding).
- Re-Interpretation of Treaty 8 (*Re Paulette*).
- Demands for re-negotiation of IBA's.
- UN Declaration Solution: free, prior and informed consent throughout entire traditional territory.

Potential Impacts

- Challenges to Interim Treaty Measures (ONA).
- Modifications to consultation process (a) change in focus from hunting rights to title and right to decide use of land and economic component (b) revisit strength of claim assessments.
- Shared title agreements (Squamish, Lil'wat).
- Legislative amendments.