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## 48(3) Front Matter

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# UBC LAW REVIEW

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# UBC LAW REVIEW

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# CONTENTS

VOLUME 48, NUMBER 3, 2015

Introduction <i>Joshua Nichols</i>	693
Foreword <i>Chief Roger William</i>	697
ARTICLES	
The Durability of <i>Terra Nullius</i> : <i>Tsilhqot'in Nation v British Columbia</i> <i>John Borrows</i>	701
Who Makes Decisions over Aboriginal Title Lands? <i>Gordon Christie</i>	743
Aboriginal Title: Travelling from (or to?) an Antique Land? <i>P.G. McHugh</i>	793
Exclusive Occupation and Joint Aboriginal Title <i>Kent McNeil</i>	821
Tsilhqot'in Law of Consent <i>Val Napoleon</i>	873
Lenses of Comparison across Continents: Understanding Modern Aboriginal Title in <i>Tsilhqot'in Nation</i> and <i>Ngati Apa</i> <i>Jacinta Ruru</i>	903
CASE COMMENT	
The <i>Tsilhqot'in</i> Case: The Recognition and Affirmation of Aboriginal Title in Canada <i>David M. Rosenberg, Q.C. &amp; Jack Woodward, Q.C.</i>	943

## INTRODUCTION

JOSHUA NICHOLS<sup>†</sup>

There is little doubt that *Tsilhqot'in Nation* is a landmark case in the common law doctrine of Aboriginal title.<sup>1</sup> Prior to this decision, the Court's response to the question of Aboriginal title had resulted in split decisions (*Calder*),<sup>2</sup> *obiter dicta* (*Delgamuukw*),<sup>3</sup> and uncertainty (*Marshall; Bernard*).<sup>4</sup> With this decision, the Court concluded that

- Aboriginal title flows from occupation in the sense of regular and exclusive use of land. . . .
- Aboriginal title confers the right to use and control the land and to reap the benefits flowing from it.
- Where title is asserted, but has not yet been established, s. 35 of the *Constitution Act, 1982*<sup>5</sup> requires the Crown to consult with the group asserting title and, if appropriate, accommodate its interests.

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<sup>†</sup> Joshua Ben David Nichols recently completed his law degree at the University of British Columbia and is currently a doctoral student at the Faculty of Law at the University of Victoria. He has a doctorate in philosophy from the University of Toronto. His primary area of research is political and legal philosophy with an emphasis on questions of colonization, violence, and sovereignty.

<sup>1</sup> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 [*Tsilhqot'in Nation*].

<sup>2</sup> *Calder v Attorney-General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145.

<sup>3</sup> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193.

<sup>4</sup> *R v Marshall; R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220.

<sup>5</sup> being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

- Once Aboriginal title is established, s. 35 of the *Constitution Act, 1982* permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group; for the purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, this framework displaces the doctrine of interjurisdictional immunity.<sup>6</sup>

This definitively moves the doctrine of Aboriginal title from being a kind of persuasive legal theory to a full-fledged common law doctrine. The question now is—as with all major decisions—which possibilities does it open and which does it close? Is it a decisive mark on the path towards “reconciliation”? The McLachlin court certainly seems intent on it being so.<sup>7</sup> But, reconciliation is by no means a clear destination and so the metaphors of “paths”, “landmarks”, and “progress” tend to be of little more than rhetorical value. The meaningful content of the term “reconciliation” is, I would argue, derived from the actual legal implications of the doctrines that claim to be guided by this aim. So what are these legal implications? It is this question that forms the basis for this special issue. The guiding aim was to offer a diverse group of legal scholars and legal practitioners the opportunity to reflect on the various possibilities that *Tsilhqot'in Nation* may hold.

John Borrows's essay examines the parts of the *Tsilhqot'in* decision that both reject and reproduce the legal fictions of *terra nullius* and the doctrine of discovery in Canadian law. This examination demonstrates the doctrine of discovery's durability, and from this basis Borrows argues that further attention is needed to erase this concept from Canadian law.

Gordon Christie's essay considers the nature of control an Aboriginal titleholder enjoys over what happens on Aboriginal title lands. He maintains that the case does not open a very promising future for a

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<sup>6</sup> *Tsilhqot'in Nation*, *supra* note 1 at para 2.

<sup>7</sup> The term “reconciliation” occurs a total of 13 times in the decision. See *Tsilhqot'in Nation*, *supra* note 1 at paras 16–17, 23, 81–83, 87, 118–119, 125, 139.



meaningful measure of Indigenous control over Indigenous territory. In light of this, Christie explores the practical opportunities that multiple sources of power and authority in relation to single tracts of land could open for Aboriginal titleholders.

Paul McHugh's essay focuses on how the doctrine of Aboriginal title raises questions of time. The fact that Aboriginal title is configured by reference to the state of the title at two particular moments (the present day and the date of Crown sovereignty) leads him to ask if the doctrine should be understood as a possessory action applicable to certain extant practices related to land, or if it is also a legal device for the pursuit of historical claims against the Crown. McHugh argues that the jurisprudence in Canada leaves both possibilities open, and that this is misleading as it treats the common law Aboriginal title as though it were both a historical reality and a late-20th century judicial contrivance when it is actually the latter and not the former.

Kent McNeil's essay questions how the test for title (specifically, the need for proof of exclusive occupation) will apply to Aboriginal claimants to areas where claims overlap. His response to this potential problem is to develop the concept of joint Aboriginal title and suggest how it might apply to overlapping claims.

Val Napoleon adopts a novel and provocative approach by providing a judgment on the judgment Supreme Court by the International Indigenous Trickster Court. By using the literary strategies of satire and irony, she is able to draw attention to the fictions that serve to ground the Supreme Court's jurisdiction over Indigenous territories and raise the question of the applicability of Indigenous legal orders.

David Rosenberg and Jack Woodward served as counsel on the case and offer a unique perspective on the procedural obstacles they faced during the 25-year period of litigation. In addition, their contribution presents a practitioners' perspective on a legal strategy that, they argue, the case opens up for non-treaty First Nations.

Jacinta Ruru's essay offers a comparative perspective on the test for Aboriginal title by comparing and contrasting tests in two common law countries, Canada and Aotearoa New Zealand. By relating the development of both tests, she is able to offer a broader understanding of

the legal rationality for the tests and the possibilities that their differences offer.

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September 9, 2015

**UBC Law Review**

Dear Readers,

I have been invited to write a few opening comments for this special issue of the *UBC Law Review*. I am the elected Chief of 20 Years for the Xenigwet'in and the representative plaintiff in the *Tsilhqot'in Nation* case.

It is interesting how time is relative and depending on how one approaches things, it can seem to move quickly or slowly.

I was a young man when government officials told my people that the lands where we lived would be logged. They said it was inevitable. They told us that the forests around us would be clear cut whether or not we agreed. I had witnessed the devastating effect such logging had on the neighbouring lands and how the wildlife had disappeared. It was my desire to protect our lands and way of life, and that led me into Band politics. That seems like a long time ago.

I spent 25 years of my life in the *Tsilhqot'in* case. That is the amount of time that it took from when the action was commenced until the decision came from the Supreme Court of Canada. Half of my lifetime, 25 years is a long time for a court case. But my people had been fighting to protect our land for hundreds of years, even with neighbouring First Nations before Europeans arrived.

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To my people it seems like only yesterday that six of our great warriors were wrongfully convicted and hanged for their part in the Tsilhqot'in War of 1864. The warriors turned themselves in under a flag of truth for peace talks. They were shackled and tried in a foreign court. They were labelled murderers even though they were only fighting to defend our territory. British Columbia has now officially apologized and exonerated those great warriors. The passage of time has started to erase that terrible episode in our history. We still await Canada's official apology. It is the path to reconciliation.

It took until June 26, 2014 for aboriginal title to be declared in Canada. We have now been declared the lawful owners of the land where we live. We also have the right to hunt and trap on the surrounding lands. It took this long for the law to declare what we have known to be true because it is part of who we are. My people, like other First Nations, have been living on our land and we know that the land is ours. We were here long before the explorers and missionaries came. We lived on the land long before Canada was born. We have never been conquered nor have we given our land away by treaty or any other means. Has anything really changed as a result of this great and historic decision by the Supreme Court of Canada?

While lawyers and academics debate the importance of the *Tsilhqot'in* case, I think that it is too soon to tell. Time and perspective will be needed to measure the true importance of this great case. It is true that many First Nations now have great

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opportunity of reaping benefits that are not being offered to them under the Treaty Process. It is also true that many, if not all, First Nations see the case as historic. Some say that this is a game changer and the tide has turned and our lands that were wrongfully taken from us will now be returned.

I would like to be able to report that I have witnessed meaningful change where I live which is in the area over which the Supreme Court of Canada declared that aboriginal title exists. I would also like to be able to report that the entire claim area which was held to be subject to aboriginal hunting and trapping rights has also been transformed. The truth is that we have now entered the second year of the post decision era and although negotiations continue with British Columbia, as of the date I write this, I have nothing concrete to report. But what I have learned is not to be too impatient. I do see some promise on the horizon.

Sedeni Gajedinsh (In the words of my people)

Yours truly,

Chief Dr. Roger William

