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Aboriginal Title Over the Buffalo Jump:
Decision of the British Columbia Court of Appeal in the *Tsilhqot'in* Case

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After reserving judgment for 19 months, on June 27, 2012, the British Columbia Court of Appeal released its decision in the *Tsilhqot'in* case. The Court made findings about Aboriginal rights, interference and justification, the proper title and rights holders - these provide some openings. But the Court's decision about Aboriginal title is a real heartbreak. That is the focus of the discussion here.

What the Court Decided

The Court said it sought a practical approach that would clarify the law and lead to progress in negotiations. It set up two theories: one, where Aboriginal title was recognized throughout Tsilhqot'in territory as a basis for reconciliation; and the other, advanced by the Province, was that Aboriginal title existed only where it can be proven in court, according to a newly minted test. Under this approach, while Aboriginal rights exist over a broad territory, Aboriginal title exists over small spots on the landscape where the Tsilhqot'in, who were identified as "semi-nomadic", could prove intensive exclusive use of definite tracts of land, extending back to 1846 when Crown sovereignty was asserted.

In a form of judicial legislation, the Court determined that for "semi-nomadic" peoples such as the Tsilhqot'in, reconciliation is achieved by the Court finding "a network of specific sites over which title can be proven, connected by broad areas in which various Aboriginal rights can be exercised." Where Aboriginal people do not need to exclusively occupy the land in order to continue their culture, Aboriginal title is not the appropriate right. Aboriginal rights provide cultural security. Aboriginal rights, not title, will "safeguard the culture and preserve Aboriginal peoples' ability to continue to carry out their traditional practices, activities, traditions and lifestyles."

> ... I agree with British Columbia's assertion that what was contemplated [by the Court in *Delgamuukw*] were specific sites on which hunting, fishing, or resource extraction activities took place on a regular and intensive basis. Examples might include salt licks, narrow defiles between mountains and cliffs, particular rocks or promontories used for netting salmon, or, in other areas of the country, buffalo jumps.

This result, according to the Court, is a "practical compromise that can protect Aboriginal traditions without unnecessarily interfering with Crown sovereignty and the well-being of all Canadians. ... [A]n overly-broad recognition of Aboriginal title is not conducive to these goals." The Court held that a broad territorial claim for Aboriginal title is not legally tenable and cannot succeed in court.

The result for the Tsilhqot'in is that while they can maintain a modest livelihood based on hunting and trapping rights, as soon as the land is used for other economic purposes, the land is suddenly *terra nullius* and available to Crown governments, without offering even an elementary explanation of the legitimacy of Crown authority and title over Tsilhqot'in territory in the absence of Treaty.

To be clear, the Aboriginal title which the Court in *Delgamuukw* held has not been extinguished in British Columbia - this Aboriginal title has been reduced by the Court of Appeal to be small spots on the landscape. Cultural security has replaced the jurisdictional and economic components of title; it is now cultural security which is the promise to achieve reconciliation.

Justice Denied; Peace Delayed

The Court's decision will not bring peace and it is not just. It ignores the common law as far back as the Royal Proclamation of 1763. It is part of the colonial story, when Aboriginal title was denied and the Reserve Commissioners were instructed to set aside village sites and enclosed fields; when, in 1927, *Indian Act* Indians were prohibited from going to court to address the land question, or for lawyers to help. It is a retrofit of the judgment of Justice McEachern in *Delgamuukw* at trial when he found Aboriginal rights existed over a broad territory, but held that Aboriginal title had been extinguished in British Columbia except to village sites and enclosed fields which had been set aside as Indian reserves – a judgment which was ultimately overturned by the Supreme Court of Canada ("SCC"). This recent judgment is wrong, too.

The Court turns reconciliation into a weapon to attack title. The Court said that recognizing a broad territorial title claim is the antithesis of reconciliation. Recognition of "other Canadians" is placed in opposition to recognition of Aboriginal title, thereby endorsing a vision which embodies adversarial and fear based colonial patterns of thinking which stand in the way of new patterns for living in peace and justice. As a society, we need to move away from fear based understandings to achieve equality in our diversity so that the adaptive genius of Indigenous cultures can flourish to the benefit of all. Without equality, there can be no justice. Without justice, there can be no peace.

There is no possibility of breaking a system of thought unless you are conscious of it. I turn now to the logic and trajectory of this judgment to search out a path of justice.

The Tsilhqot'in Perspective Masked by Crown Dominance

The SCC has directed that, in making decisions about Aboriginal title and rights, the court and Crown governments should enquire into and give effect to the Aboriginal perspective. This allows for fundamentally different world views, legal orders and laws co-existing. Crown governments' recognition of the Aboriginal perspective is how reconciliation is achievable and achieved. The SCC has said: " ... only by fully recognizing the aboriginal legal entitlement can the aboriginal legal perspective be satisfied."

The Court's brief reference to the Aboriginal perspective in this decision is found at para. 233 of the judgment. The Court says: "The connection of the Tsilhqot'in Nation to its traditional territory has both spiritual and temporal aspects that are difficult to convey in the dry words of a judgment." Then the Court became speechless in terms of the Tsilhqot'in concepts of land.

The Court instead took the opportunity to express its own views about why reconciliation has not been achievable through negotiations. It referred to the "extreme positions" that have been taken by both sides, both in and out of court; for example; the Court noted the Province's position, until rejected by the courts, that Aboriginal rights and title had been completely extinguished in British Columbia, and the Gitxsan and Wet'suwet'en position in *Delgamuukw* that they had absolute ownership of their territory and a paramount right to govern it. The Court said that these positions "failed to provide a basis for genuine reconciliation of Aboriginal rights with Crown sovereignty."

The "extreme" position attributed to the Gitxsan and Wet'suwet'en by the Court, actually was the characterization of their position by the Attorney General's office during *Delgamuukw*, when Justice Groberman worked there before his appointment to the Bench. Justice Groberman wrote the *Tsilhqot'in* judgment for the Court.

The Gitxsan and Wet'suwet'en were pursuing a century old dream of justice they shared with the Allied Tribes and other Indigenous Nations. They wanted to go to court to stop the Province's denial of Aboriginal title in British Columbia since Confederation and to enforce clear law binding on Crown governments since sovereignty was asserted in British Columbia in 1846 and before. The law, first articulated in the Royal Proclamation of 1763, reflected international law which became part of the common law. This law required that Crown governments recognize the pre-existing legal rights of the Indigenous peoples to their territories, and the incremental perfection of Crown sovereignty through treaty making. In 1888, the Privy Council in the *St. Catherine's Milling and Lumber Co.* case, relying on section 109 of the *Constitution Act, 1867*, held that the "lands, mines, minerals and royalties" become available to provinces as a source of revenue only when Aboriginal title has been addressed. The converse of this proposition is that, if the estate of the Crown has not been 'disencumbered' – that is, if the Aboriginal title has not been extinguished – such lands are not available to the Province 'as a source of revenue'. Yet, for the most part, in British Columbia, the Province took control over the land and resources without treaty making, while Canada pursued assimilation policies. Residential schools carried out this policy of suppression. There was a prohibition against the potlatch, against spirit dancing, and ceremonial regalia were confiscated. It was illegal for Indigenous peoples to leave the reserves without a permit. This cultural suppression, domination and dispossession went on for over a hundred years before Indigenous peoples were even given the right to vote, which did not happen in federal elections until 1960. These are only a fraction of the infractions. The Gitxsan and Wet'suwet'en went to court to enforce the law that Crown governments systemically ignored. They wanted to negotiate a Treaty based on recognition and respect for their Aboriginal title, and not constrained by the continued denial of it.

From an Aboriginal perspective, their homelands are not small spots of land. Where does the idea come from that Indigenous people only relied on and used salt licks, rocks for fishing, narrow canyons and buffalo jumps for their existence and survival? It defies common sense. It is hard to believe that the 30 year debate in the courts, from *Calder* to *Delgamuukw,* about whether Aboriginal title was extinguished in British Columbia was about title not having been extinguished over a salt lick. What possible jurisdictional or economic component is there to

narrow defiles between mountains and cliffs? How did cultural security replace the jurisdictional and economic components of title?

The Court Lost Its Way

The Court returned to ground where we have been before - and to positions which were rejected during the constitutional debate when section 35 was included. It revived from the judicial grave, two repudiated Crown government litigation positions. The first is that Aboriginal title, protected under section 35, exists and is defined where it can be proven in court. The other is that Aboriginal title lands are village sites and enclosed fields and perhaps other significant small spots of cultural importance within the traditional territories.

In 1980, the late Grand Chief George Manuel sounded the alarm. Trudeau's proposal for constitutional reform is "beyond consultation, beyond administrative battles with government, beyond petty politics. It is hitting at the roots - the very existence of the Indian Nations." UBCIC organized the Constitution Express, which left the station before Christmas, 1980, heading first to Ottawa and then to Europe, and, finally to Westminster, England, where they held a potlatch, reminding the British public about the Queen's law, the Royal Proclamation of 1763 and the Treaties, and about reciprocating the loyalty shown by the Indigenous Nations who honoured their relationship with the British Sovereign from generation to generation..

During this journey, section 35 was included in the Canada Bill, was taken out, and ultimately went back in again. Initially, the Premiers drafted language to limit constitutional protection to rights which can be proven in court. An earlier section 35 draft read:

> "The Aboriginal treaty rights of the Aboriginal peoples of Canada as they have been or may be defined by the Courts are hereby recognized and affirmed and can only be modified by amendment." (emphasis added)

The draft said that Aboriginal title exists only where it can be proven. This is the meaning the Court in *Tsilhqot'in* gave to section 35.

But this draft was replaced by section 35, which reads: "Existing Aboriginal and Treaty rights are hereby recognized and affirmed." When the wording of section 35 was agreed to, the Premiers thought that the word "existing" meant "extinguished". The first case to interpret section 35 was *R. v. Sparrow,* where the Crown governments argued that section 35 was an empty box. The SCC disagreed, and held that "existing" means the opposite - it means "unextinguished" and that section 35 holds the promise of rights recognition and reconciliation.

The legal effort by Indigenous Nations then turned to establishing that Aboriginal title has not been extinguished in British Columbia. *Delgamuukw* was a landmark case because extinguishment had been the underpinning of British Columbia's denial of Aboriginal title in British Columbia since Confederation. The governments argued that Aboriginal title had been extinguished and the doctrines of discovery and *terra nullius* were the centerpiece of Crown government defences. These doctrines are fear based ideas which are found at play deep within the cultural imagination of North America colonizers, and which form governments' modern litigation positions. The idea, in fashion through the cultural lens of the early colonizers, was one of hierarchies of races - a progression up a ladder of human societies staged in the imagined ascent to civilization. Seen through this lens, Western societies were at the very top - superior

civilizations who had a right, indeed a duty, to travel the world planting baby replicas of themselves everywhere; and the Indigenous people were at the very bottom - inferior cultures - hunters and gatherers who roamed the land opportunistically, without laws. This deeply flawed idea of categorizing races translated into legal doctrines: the doctrine of discovery, which allowed the colonizers to claim land on behalf of the sovereign simply by settling there; and the doctrine of *terra nullius,* which justified the dispossession of Indigenous Nations since the lands were not really occupied - Indigenous peoples did not have real laws. Crown governments maintained that Indigenous societies were so low on a scale of civilization that their concepts of land ownership were too primitive to be recognized as legal rights under the common law. Crown governments' laws benefited all, they imagined, bringing Christianity, democracy and economy. This was a clever device to steal the land. No treaties were needed because the land was a juridical vacuum waiting for the superior laws of the West to rule.

During *Delgamuukw*, these doctrines were argued in all of their declining alternatives. At the time of the assertion of sovereignty, the land was unoccupied; or, if occupied, it was by people who were not really civilized; or, if civilized, they did not have concepts of land ownership; or, if they ever did have title, it was extinguished by operation of the Crown's laws which granted tenures inconsistent with the continuation of Aboriginal title.

These arguments were all rejected in *Delgamuukw*, when the SCC held that Aboriginal title has not been extinguished in British Columbia; that Aboriginal title has jurisdictional and economic components. There are two authorities over the land co-existing, neither one absolute, and each constrained by the authority of the other. The SCC created a robust framework for engagement so that the interests of all Canadians would be properly considered in providing that Crown governments can justify interfering with Aboriginal and Treaty rights. The SCC placed reconciliation at the heart of the relationship and the core of the paradigm was stated: "We are all here to stay." Through this framework, the SCC created constitutional space for Indigenous and Western laws and cultures co-existing, for this country to be strong in diversity and unity.

Crown governments never liked what the SCC had to say. They didn't agree with the decision and they never implemented it. They denied the impact of *Delgamuukw*, and they also turned their litigation efforts to overturning it.

After *Delgamuukw*, the Province continued its incantation of denial and granted a multi-year, long-term logging tenure to a company without consulting the Haida Nation who brought a judicial review of that decision. The Province argued that "until the Haida people formally prove their claim, they have no legal right to be consulted or have their needs and interests accommodated." The Province raised concerns over "the breadth of the Haida's claims" which was "title to all of Haida Gwaii." The SCC rejected this argument and imposed obligations on the Crown arising from the assertion of Crown sovereignty, including to negotiate and implement treaties, and including the duty of consultation and accommodation when contemplating decisions which could interfere with section 35 rights, including Aboriginal title. The SCC said:

> Reconciliation requires Crown obligations to arise prior to 'proof', as otherwise when 'the distance goal of proof is finally reached, the Aboriginal people may find their land and resources changed and denuded. This is not reconciliation.

The Court in *Tsilhqot'in* revised the very idea that was rejected during the section 35 constitutional and extinguishment debate, namely, that Aboriginal title exists only where it can be proven. It ignored the *Haida* case, where constitutional obligations arose upon the assertion of Crown sovereignty over a broad territory. The honour of the Crown requires that Crown governments recognize unextinguished Aboriginal title throughout B.C. This Aboriginal title had been defined by the SCC in *Calder*, by the simple fact that when the settlers came, Indians were there, occupying their territories as their forefathers had done for centuries.

The Court in *Tsilhqot'in* also raised from the dead, arguments about Aboriginal title lands being just village sites and cultivated fields and other small spots on the landscape. This description of the scope of Aboriginal title lands was fully argued and rejected in *Delgamuukw*. At trial, the governments argued that Aboriginal title is confined to lands which are village sites and enclosed fields, which are today Indian reserves. This was accomplished, they argued, when Aboriginal title to the broad territory was extinguished by reserve creation. This argument was rejected by the trial judge and did not proceed to appeal. On appeal, the governments continued the position that Aboriginal title exists only over village sites and cultivated fields and other significant small spots, but the argument was cast in terms of the nature of Aboriginal title. They argued that Aboriginal title was no more than a bundle of rights to engage in activities (which are themselves Aboriginal rights) and that Aboriginal title encompasses the right to exclusive use and occupation of those small areas of land where those activities are intensively protected. The only lands where Aboriginal title could exist under this theory were village sites and fields cultivated in the European sense, and possibly the odd location where Aboriginal peoples could prove intensive continuous occupation, like a fishing site. This argument was rejected, and the SCC held that Aboriginal title is a right in land with jurisdictional and economic components.

The Court is going around in circles and creating a cyclone of frustration among Indigenous peoples.

A Newly Minted Test: Extinguishment by Litigation

Following *Delgamuukw*, Crown governments turned their efforts to turning the tables on *Delgamuukw,* and revised the argument about the Aboriginal title lands being village sites and enclosed fields, only this time, the argument migrated to the onus of proof. They fabricated a recycled *terra nullius* argument still centered around "occupation". This new argument is extinguishment by litigation, which succeeded in the *Tsilhqot'in* case. The opening for this litigation position came with the case of *Bernard and Marshall.* That case came to court when the citizens of the Mi'kmaq and Malaseet harvested trees without permit from the Province, and were charged under provincial law. Aboriginal title was a defence to a charge - no declaration of title was sought. The evidence of Aboriginal title was directed to physical occupation. Labelling these cultures "semi-nomadic", the trial judge found that there was insufficient evidence to establish title over the area where the logging took place. The SCC endorsed the factual findings of the trial judge and concluded that the accused had failed to meet the test of occupation. The Province of B.C. then elevated the SCC's application of the facts of that case to a theory about occupation, which they say is applicable to Aboriginal title lands in British Columbia. Nomadic" or "semi-nomadic" peoples, they argue, may never hold Aboriginal title, since, according to the new test for proof of title they erected coming out of *Bernard and Marshall*, Aboriginal title is only provable on small spots where intensive physical occupation of defined tracts of land can be established.

Mr. Justice Vickers, the *Tsilhqot'in* trial judge, rejected the Province's "small spots" occupation theory, calling it "an impoverished view of aboriginal title" – an approach that "cannot be allowed to pervade and inhibit genuine negotiations." The trial judge found that Aboriginal title had been established to approximately 200,000 hectares, and that the test to establish Aboriginal title had been met by the Tsilhqot'in proving regular use of defined tracts of land through evidence of historical village sites, trails, and hunting and gathering activities. The Court of Appeal followed another trail to this Province's colonial past.

The test for proof of title adopted by the Court is not the test for proof of title that was decided in *Delgammukw*. The *Delgamuukw* test provides for proof of exclusive occupation in 1846 through evidence of physical possession or through laws. The new test adds the requirement of "intense use" and fails to mention laws. The test is also discriminatory. Crown granted common law property concepts do not enquire whether a rancher who holds large tracts of land in fee simple tenures uses all of the land when some of the land is left to lie fallow, or how annual the rancher's habits may be on the land, in order for the law to recognize the nature of a legal interest in land. The test is tantamount to Aboriginal title proven by adverse possession, rather than a *sui generis* interest in land and governance, defined by the societies of Indigenous peoples having complex social and legal orders.

The Court in *Tsilhqot'in* said that it does not want unnecessarily to interfere with Crown sovereignty. But during the 30 year extinguishment debate, from *Calder* to *Delgamuukw*, Crown governments had every opportunity to establish the legitimacy of the Crown's *de facto* sovereignty assertions, and they failed Yet, the Court accepted that the onus of proving title falls to Indigenous Nations seeking a court remedy. If Indigenous peoples fail to prove occupation (which, under the theory, can only ever be small spots within their territories), the on the ground effect is that the land, not proven, becomes the absolute legal property of the Crown. The new test is really *terra nullius* and the doctrine of discovery in action.

These litigation positions are pernicious. Practically, the governments' litigation positions of denial and injustice are the political *status quo*, reflected in legislation, policy and government negotiation positions. There was no change on the ground when Mr. Justice Vickers rejected this test. Wealth and power relations remain in place, while the land question is "before the court".

On this point, the ultimate destination of the *Tsilhqot'in* decision is bound up with the *Jules* and *Wilson* cases - both cases which are litigated under a Costs Order. The *Jules* and *Wilson* cases remain before the court in spite of successful efforts by the Province to sideline these cases to avoid a trial. In *Jules* and *Wilson,* the Tribal Councils exercised their inherent Aboriginal title jurisdiction, issuing permits to their member communities to log, and the Province enforced its forestry legislation which reflects its *de facto* sovereignty assertions, prohibiting any person from cutting a tree without permit from the Province. The difference between the *Jules* and *Wilson* and *Tsilhqot'in* cases is the reverse onus of proof. In *Tsilhqot'in*, the Tsilhqot'in commenced proceedings seeking a remedy of a declaration of title; whereas, in *Jules* and *Wilson*, the proceedings were commenced by the Province, and British Columbia shoulders the onus of proving that the timber is Crown timber and that it has the exclusive jurisdiction it asserts under the forestry legislation as the basis for the Stop Work Orders.

In *Wilson*, in addition to the reverse onus of proof issue, the Okanagan also seek a remedy of a declaration of Aboriginal title to the Browns Creek Watershed, which is about 27,000 hectares of land, in order to enforce the constitutional consequences when title is declared. In this aspect of the case, the Province's defence is the same as in the *Tsilhqot'in* case, being the test now adopted

by the Court to prove title and amounting to extinguishment by litigation. This is what the test looks like through the lens of the *Wilson* case. The Okanagan have not, and cannot, be branded "semi-nomadic", and yet this was the Province's position at a case management conference:

> ... it's the position of the Crown that it is individual, small, defined tracts of land that inquiries about aboriginal title have to be concerned. And there would be literally thousands of those individual sites or potential defined tracts within this Browns Creek Watershed. And that would be a monumental undertaking to examine each of those. (emphasis added)

It is a theory of "death by a thousand paper cuts". Under the Province's theory, a tract of land could be an acre or a district lot, a burial plot or the Province's designation of a cutblock. The "thousand paper cuts" are the small isolated areas where Aboriginal title lands can exist under the theory. In the *Bernard and Marshall* case, the territory was 5,550,000 hectares; the *Tsilhqot'in* case engages 440,000 hectares; and the Browns Creek Watershed in the *Wilson* action, the backyard of the Okanagan Indian Band of the Okanagan Nation, concerns 27,500 hectares. The Province applies its theory equally to these territories so that large swaths of land remain available to be exploited by the Crown without regard to the original occupants. Reconciliation of asserted Crown sovereignty with pre-existing Indigenous Nations is one cut(block) at a time.

Racial Stereotyping and Other Illusions

Stereotypes are illusions. They have inflicted human suffering on a global scale, and they cannot bring peace.

This new test lies on a bed of racial stereotyping and prejudice that find expression in Crown government litigation positions, empowering Crown governments by a false sense of cultural superiority through the doctrine of discovery, and Indigenous governments a false sense of inferiority through the doctrine of *terra nullius*. The Tsilhqot'in are also specifically stereotyped by Crown governments in argument and through cross-examination. This complex and beautiful society, the Tsilhqot'in Nation, who has lived out their destiny in their homelands for thousands of years, these Peoples are portrayed as never having effective control of their territories (only of small spots); driven by subsistence survival needs; and living more by custom than by the rule of law. The Tsilhqot'in are portrayed as being without a legal order or sufficient population carrying capacity to exclusively occupy and control the land. The theory is a false theory of isolationism of peoples who share the same language and culture, isolated from each other and subsisting as roving semi-nomadic groups, and Aboriginal title to the land (if it exists at all) exists only in small parcels, segregated from other areas of that territory. The isolation of peoples (Xeni Gwet'in, not Tsilhqot'in) and isolation of territory (small spots, not contiguous territory; hunting blinds and salt licks, not watersheds) ignores the golden thread of continuity woven through the common law which recognizes the continuity of Indigenous peoples and their laws and land rights. The decision reflects these prejudices. The Tsilhqot'in harvesting practices are described by the Court as exercised "more or less on an opportunistic basis" and managed "to a limited extent". The Tsilhqot'in people are described as "roaming" over the lands.

A Tsilhqot'in elder, following the release of the decision, said: "Aboriginal title is who we are – we are from our homeland – that is where we come from. Our homeland is who we are."

Constitutional interpretation should be non-discriminatory; yet, the Court's approach has a deep and troubling interpretative inconsistency. Most constitutional rights are interpreted in accordance with a living tree approach - the tree is rooted in past and present institutions, but must be capable of growth to meet the future. Yet, this test and approach to Aboriginal title views Aboriginal title as a tree whose growth was stunted more than a hundred years ago and fashioned into a colonial artifact with new branches growing out of the decaying stump.

The Court's Dead End

The Court's approach cannot be sustained. It runs against the tide of domestic and international law. The doctrine of *terra nullius* has been repudiated by the SCC, which has said, "At the time of the assertion of British sovereignty, North America was not treated by the Crown as *res nullius*." "The maxim of *terra nullius* was not to govern."

It is settled law that British Columbia is not a juridical vacuum. The SCC has held that Indigenous laws pre-existed and survived the assertion of Crown sovereignty; these laws have not been extinguished, and find expression in section 35. This is the golden thread of continuity of the common law which was woven through the *Campbell* case, where the Court held that jurisdiction is not exhaustively divided between the Crown governments. Section 35 holds jurisdictional space for the operation of Indigenous laws.

The doctrine of discovery has also been repudiated, first by the Final Report of the Royal Commission on Aboriginal Peoples, next by the World of Council of Churches, and, recently, by the UN Permanent Forum in its May, 2012 session, issuing its report that "calls on States to repudiate such doctrines as the basis of denying Indigenous peoples basic rights." The illusions or stereotypes which animate these repudiated doctrines have been brought to light and addressed by the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), which Canada has endorsed. The UNDRIP is a commitment to end stereotyping in the law. The UNDRIP says:

> *Affirming further* that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,
>
> *Reaffirming* that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

The *Tsilhqot'in* decision runs afoul of these legal and human rights imperatives.

Cultural Security / Home Security

Recently, the federal government passed Bill C-38, in which it emasculated the environmental review processes which considered the public interest risks of big projects proceeding. Now decisions about big projects have been wrested from Boards and Tribunals and placed with the Federal Cabinet, who has made clear its policy, indeed its ideology, of glorifying exploitation of resources, in the name of economic growth, regardless of what that means for Indigenous peoples or for ecosystems. The Court has declared that the Tsilhqot'in have Aboriginal rights, and not title, over the Prosperity Mine project area. This raises the question of how cultural

security will constrain the Cabinet's review of Prosperity Mine and other major projects which put the environment and Indigenous cultures at risk. Will Cabinet delve into the Aboriginal perspective to ensure ancient stewardship laws are given expression, giving priority to traditional livelihood, and refuse these big projects? Will it fall to the courts to be the guardian of their cultural security?

The machinations of the legal system have made a mockery of access to justice for Indigenous peoples. The courts have not granted remedies, finding against Indigenous claimants on technicalities and pleadings irregularities in every aboriginal title case from B.C. - *Calder, Delgamuukw* and *Tsilhqot'in.* Now, the Court has blocked Indigenous peoples from using the courts at all for broad territorial claims. If Indigenous peoples cannot go to court under any circumstances to seek remedies for territorial title, they will exercise and protect their title on the ground. They and those who support Indigenous peoples, will be left to protect the land and to safeguard Indigenous culture.

Reconciliation

Back around the turn of the 20th century, there were many protests by Indigenous Peoples, and many elegant letters and petitions were written to the Queen and heads of government about the governments' denial of Aboriginal title, seeking a court reference challenging the legality of Crown government conduct. One was a Memorial written in 1910 by the Interior Tribes of British Columbia to Sir Wilfrid Laurier, Prime Minister of Canada. Here is just a portion of what the Chiefs had to say, when they recounted first meeting a whole new race of people they had never before known existed. Their perspective was inclusive, loving and generous:

> The "real whites" we found were good people. We could depend on their word, and we trusted and respected them. They did not interfere with us nor attempt to break up our tribal organizations, laws and customs. They did not try to force their conceptions of things on us to our harm. ... They never tried to steal or appropriate our country, nor take our food and life from us. They acknowledged our ownership of the country, and treated our chiefs as men. ... They had made themselves (as it were) our guests. We treated them as such, ... With us when a person enters our house he becomes out guest, and we must treat him hospitably as long as he shows no hostile intentions. At the same time we expect him to return to us equal treatment for what he receives. Some of our chiefs said, "These people wish to be partners with us in our country. We must, therefore, be the same as brothers to them, and live as one family. We will share equally in everything - half and half - in land, water and timber, etc. What is ours will be theirs, and what is theirs will be ours. We will help each other to be great and good.

Then, they recounted their dispossession and cruel treatment, and "demand[ed] that our land question be settled ... ". They said, "So long as what we consider justice is withheld, so long will dissatisfaction and unrest exist among us, we will continue to struggle to better ourselves."

Indigenous Nations have pursued this collective dream for justice ever since. "We will help each other be great and good." This struggle for justice has been the path of greatest resistance by Crown governments, and persistence by Indigenous Nations.

The Court in *Tsilhqot'in* followed a different path leading Indigenous peoples in B.C. to a Treaty table where government negotiation mandates have been found by international bodies to be a fundamental violation of human rights. Here they are left without recognized legal rights to negotiate a significant role in the management and decision making regarding the use of lands and resources and the sharing of economic benefits; empowering the political *status quo* where institutionalized poverty and the unsustainable use of lands and resources are the norm. The Court said that recognizing a broad territorial claim is the antithesis of reconciliation - pitting "other Canadians" in opposition to the recognition of Aboriginal title. Indigenous peoples are seen as the "other". This fragmented thought structure is in a permanent state of opposition. Indigenous Peoples are strangers - in contrast to the 1910 Memorial where Indigenous Peoples saw the white race as guests. On a collective level, conflict is extreme and endemic. This pattern of thinking is like a sinking ship. If you don't get off, you go down with it.

Contrast this to what the Court in *Delgamuukw* had to say about reconciliation. This passage was written by Justice Lambert of the Court of Appeal in *Delgamuukw*:

> The purpose of s. 35, when it was prepared in 1982, cannot have been to protect the rights of Indians to live as they lived in 1778, the date of the first certain contact between the Indians and people of European origin in what is now British Columbia. No constitution could accomplish that. Its purpose must have been to secure to Indian people, without any further erosion, a modern unfolding of the rights flowing from the fact that, before the settlers with their new Sovereignty arrived, the Indians occupied the land, possessed its resources, and used and enjoyed both the land and the resources through a social system which they controlled through their own institutions. That modern unfolding must come not only in legal rights, but, more importantly, in the reflection of those rights in a social organization and in an economic structure which will permit the Indian peoples to manage their affairs with both some independence from the remainder of Canadian society and also with honourable interdependence between all parts of the Canadian social fabric.

And this passage:

> In my view, the failure to recognize the true legal scope of aboriginal rights at common law, and under the Constitution, will only perpetuate the problems connected with finding the honourable place for the Indian peoples within the British Columbian and Canadian communities to which their legal rights and their ancient cultures entitle them.

A similar pattern of thinking appears in the concluding passage of Chief Justice Lamer's reasons in the Supreme Court of Canada:

> Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of s. 35(1) – "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.

Today, our challenge is at a turning point. The dream of justice through the courts is illusive. The old paradigm needs transformation, and that has not happened in spite of constitutional reform and court decisions like *Delgamuukw*. This is not just the struggle of Indigenous peoples. As a society, we need to end suffering; we need to make a break from what we think. Justice is a reflection of our collective consciousness, and injustice is a reflection of our collective unconsciousness.

It is not the courts who will achieve reconciliation. This must be done by each of us - by those in the society who are instruments of change - each in our own way - influencing thought, which in turn influences changed action. Action must make change to legislation, policy and government negotiation mandates. Governments don't make change; they respond to it.

Reconciliation requires an appreciation by both societies, Aboriginal and non-Aboriginal, of the diverse contributions of the other. Unity in diversity offers diverse cultural solutions to the survival challenges of humanity. To achieve reconciliation, recognition of Indigenous cultures, laws , Aboriginal title and rights to land; this is a prerequisite. We need a sense of justice between the actors; both need to be in the relationship. Justice is a prerequisite to unity, which is a prerequisite to peace.

We are already part of a global shift of consciousness. We are dreaming a new dream together - humans on this planet Earth. The consciousness is shifting from the idea that we are separate, to the consciousness that we are all connected on a global level. Indigenous world views and legal orders offer to this transformation, sacred laws and oral histories that teach an ancient consciousness that the world is alive; an awareness that we are all living members of a living body and that all living things are animated by the same life spirit - the force of love - the Creator that resides in each of us and in all living things. Indigenous thinking is spatial, spiritual, circular - where the wholeness of existence with humans is an integral part of the physical, taking human interests into account, but not in isolation of the rest. The genetic and cultural endowment of humanity is a single continuum; there is no social Darwinism ladder to success and no hierarchy of cultures but, rather, an essential connectedness of humanity.

Within this system of thought, transformation happens. Here, our collective talents can increasingly come together, constructing projects of building a vision of a reconciled future, assisting Indigenous peoples to address the past and to put their laws on the ground so that these laws can help steward Mother Earth back to health for the sake of seven generations of all cultures.

We are far more powerful and capable than we give ourselves credit for. The Creator put us in the world of the possible, not the impossible.