

The Myth of the Level Playing Field

In 2014, the Supreme Court rendered its decision in Tsilhqot'in, after which a staggering amount of opinion pieces were spewed forth discussing this landmark case.¹ The interest was unsurprising given it had been 17 years since Delgamuukw, the case that first acknowledged the possibility of Canada recognizing Aboriginal title.² After all that time, we finally had the Court point to a specific tract of land and say, "and this is what Aboriginal title looks like."³ See map of claim area in Woodward & Company link on Unit page "Tsilhqot'in Case Resource"

Without going into exhaustive detail, here are some of the main points of the case:

- The decision removes the fear that Aboriginal title could only be found on postage stamp areas where people lived either permanently or semi-permanently, and instead extends the possibility of Aboriginal title to wider territories that were heavily used by a people.
- The Court reminds everyone that translating precontact Aboriginal practices into modern-day rights cannot be done by shoving everything into a common-law box. Aboriginal perspectives must inform the translation process.
- The Court admonishes everyone to remember that it is inappropriate to approach Aboriginal land/rights claims on an overly technical basis. The issue is justice and reconciliation, so don't try to undermine this with nitpicking over dotted i's.
- Terra nullius, on which the Doctrine of Discovery heavily relies, was found to have never applied in Canada. So the Court has once again told us how Canada did not gain sovereignty over the lands, but remained consistently vague on how Canada did gain this sovereignty – other than saying, as always, that when sovereignty was asserted by the Crown, it crystallized. Colonial magic!

- The Court says the content of Aboriginal title is basically the right to “enjoy the economic fruits” of the land and resources. Aboriginal title is collective, not individual, and underneath it all still remains Crown title. Crown title consists of whatever is left over after Aboriginal title has been subtracted from the equation. Essentially remaining are: a fiduciary duty to deal fairly with Aboriginal peoples, and the right to infringe on Aboriginal title as long as the infringement meets section 35 test criteria (i.e., if it’s important enough to Canada).

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CHALLENGE CLAIM →

To keep this all in context, the *Tsilhqot’in* had Aboriginal title recognized in only 5 percent of their total claim area. Private properties within that area were left out of the claim and continue to exist as private properties. The territory in question did not overlap with other First Nations territory. And, Aboriginal title lands are still part of Canada and subject to justifiable infringement. Also important to remember is that this entire discussion is being framed within a context wherein we must accept that Canada has the right to recognize anything at all when it comes to Indigenous rights – a right hotly contested by Indigenous peoples themselves.

However, to hear some people talk, the *Tsilhqot’in* decision spells the end for modern democracy. It’s really this fear-mongering and the Western liberal myth of a level playing field I want to address.

To give you a sense of the arguments I’m referring to, Gordon Clark wrote a perfect example in *The Province* after the ruling was released.³ This quote sums up his argument well:

They [Canadians] reject special arrangements for aboriginals, including court decisions like *Tsilhqot’in*, because they breach the fundamental tenets of modern liberal democracies – equal citizenship and equality before the law – and perpetuate the divisions between First Nations and other Canadians.”⁴

Other pieces by other authors did a bang-up job of exposing a deeply racist reaction to the *Tsilhqot’in* decision and to Indigenous peoples in general, and are easily deconstructed for the distasteful, bigoted mess they are. Clark’s piece, however, is arguably more insidious because it appeals to the progressive desire for equality within a liberal democracy, wherein all people are created equal and deviations from that philosophy constitute the real injustice.

However, the argument ends up betraying itself in the end, ignoring the way in which Canadian law has been (and continues to be) used to strip Indigenous peoples of their land and resources to the benefit of Canadians. It sidesteps the way Indigenous peoples were denied equal citizenship rights until very recently, and

completely glosses over how deeply unequal the living conditions are for Indigenous peoples in this country. And, no, I do not mean unequal "in our favour." Decisions like *Tsilhqot'in* haven't created these divisions; hundreds of years of racist, colonial policies have.

For this reason, I would encourage progressive Canadians to critically reexamine this all too commonplace opinion and evaluate whether they truly wish to support such an approach.

Clark treads a well-worn path with his piece – and variations on this theme can fill volumes – so this is really not a response to the man himself. I want to challenge the ideas he expressed that are shared by so many well-meaning Canadians. Please permit me to break down for you what I find so problematic with the myth of the level playing field.

Acknowledging the past is good enough.

The Indigenous danger is economic.

The harm of discriminating *against* Indigenous peoples is clearly recognized by liberal progressives, so we don't really differ on that account. The disagreement is rooted in the notion that *accommodating* Indigenous difference is actively harmful to a modern democracy.

Accommodating Indigenous differences is not seen as harmful *merely* because it creates resentment. No doubt people resent all manner of accommodations provided to various categories of differences within the Canadian liberal democracy. This resentment is not called upon as justification for abolishing those other categories altogether or for moving backwards on advances that have been made. Imagine, for example, resentment being used as an actual, legal reason to abolish gay marriage in Canada.

Rather, the danger lies in the fact that (1) of all groups in Canada, only Indigenous peoples (and possibly the Québécois, also mentioned by Clark) have prior legal claim to land and resources that are otherwise believed to belong to Canada, and (2) this prior legal claim is recognized by Indigenous law, and Canadian Aboriginal law is viewed as deeply problematic because it directly impacts Canada's economic power. There is great fear the *Tsilhqot'in* decision – and the entire body of Aboriginal law that recognizes Aboriginal rights as burdens, or limits on Crown title – will damage Canada economically.

That is *exactly* what Jeffrey Simpson argued a year after the *Tsilhqot'in* decision. To repeat:

In this territory [of the *Tsilhqot'in*], with a few restrictions, the group [the *Tsilhqot'in*] now has de jure sovereignty, a precedent that, if extended over time,

would leave B.C. pockmarked with little self-governing, largely sovereign aboriginal territories over which the Crown's writ would barely run.⁸

This quote evokes an image of a disintegrating Canada, a modern democracy rent asunder and scattered to the winds by egregious and unjust accommodation of Aboriginal title.⁹ Okay, but what is so terrifying about that exactly?

Simpson then quotes Professor Dwight Newman who laments that due to recent Aboriginal law decisions, "it has become extremely difficult to get major infrastructure projects done in Canada."¹⁰ Ah. So, that's what this is *really* about.

NOTES

1. *Tsilhqot'in Nation v. British Columbia*, 2014, SCC 44.
2. *Delgamuukw v. British Columbia*, 1997, 3 SCR 1010.
3. Gordon Clark, "Gordzilla in the City: Native Court Rulings Perpetuate Unhealthy Divisions in Canada," *The Province* (blog), July 7, 2014, <http://blogs.theprovince.com/2014/07/07/gordzilla-in-the-city-native-court-rulings-perpetuate-unhealthy-divisions-in-canada/>.
4. *Ibid.*
5. Jeffrey Simpson, "Confusion Reigns on Aboriginal Rights When Court Rulings Meet Reality," *The Globe and Mail*, last modified July 11, 2015, <http://www.theglobeandmail.com/globe-debate/confusion-reigns-on-aboriginal-rights-when-court-rulings-meet-reality/article25413801/>.
6. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B *Canada Act, 1982* (UK), 1982, c 11, s 15.
7. Clark, "Gordzilla in the City."
8. Simpson, "Confusion Reigns on Aboriginal Rights."
9. Apparently, 149 years of a sometimes-functioning "Confederation" (really a decentralized federal state, but never mind) is much more important than tens of thousands of years of prior occupancy and the sociopolitical systems that arose prior to contact.
10. Simpson, "Confusion Reigns on Aboriginal Rights."