

The Top Ten Uncertainties of Aboriginal Title after *Tsilhqot'in*

by Dwight Newman

In 2014, the Supreme Court of Canada rendered a historic decision on Aboriginal title in the *Tsilhqot'in Nation* case. For the first time, a Canadian court made a declaration that an Indigenous community owned specifically defined lands in Aboriginal title. Amid all the commentary about the case, there has not been enough attention to date, though, to the legal uncertainties that remain after the decision—and that have even been perpetuated and expanded by the Court's decision.

Legal uncertainties are often most harmful to the most vulnerable and marginalized within society. The legal uncertainties after the *Tsilhqot'in Nation* decision include uncertainties for Indigenous communities themselves on how they are permitted to use their own land. By not reaching more certainty, the decision may well have caused harm to fledgling Indigenous economies.

Legal uncertainty is of course also highly damaging to investment that would build economic prosperity for all, Indigenous and non-Indigenous British Columbians alike. The present paper tries to assess some of the key legal uncertainties left after the *Tsilhqot'in Nation* decision. Using a risk analysis, it considers the degree of uncertainty left on a number of points in the law and the impact of uncertainty on that point for investment in British Columbia.

The key uncertainties are these: ■ restraints imposed on Indigenous communities' use of their own lands through cultural assumptions by the courts; ■ the potential effects of the United Nations Declaration on the Rights of Indigenous

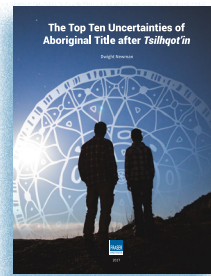
Peoples on Canada's approach to Aboriginal title; ■ remedies applying if a project is commenced on land later subject to Aboriginal title; ■ ownership of subsurface rights on Aboriginal title lands; ■ requirements of the Aboriginal title test; ■ land claims to land previously occupied; ■ scope of justified limits on Aboriginal title; ■ restrictions of Indigenous communities' use of their own lands through court-imposed rules about future generations' potential use of the land; ■ impact of Aboriginal title on fee simple (privately owned) land; ■ impact on sovereignty.

By using a risk-analysis approach to these uncertainties, the paper is able to rank them so as to highlight those that have the most significance and thus to establish a top ten list of uncertainties on Aboriginal title. Many of these uncertainties have very significant implications for British Columbia. Many have major implications for Indigenous communities themselves. Yet, the *Tsilhqot'in Nation* decision has left many issues unresolved. In some ways, it illustrates the limitations on any hopes of having the courts settle these matters and demonstrates once again the need for political leadership.

The concluding part of the paper highlights several options for policy steps that would be legally permissible if political leaders were ready to use them to resolve these uncertainties. There are advantages and disadvantages of simply continuing to press ahead on the treaty negotiation process, of referring some questions back to the courts, or of using an often under-discussed part of the constitutional amending formulae to legislate on some of the issues in ways that would work for governments and Indigenous communities.

There are many reasons people do not talk about these issues. Some wish to offer reassuring words to the business community. Some want to assess each step as either a progressive step forward or further colonialism. This is an area of policy beset by ideologies to a greater degree than any other. What is needed is sophisticated discussion of tough

issues. This paper tries to contribute to the conversation by highlighting a number of ways in which legal uncertainties after the *Tsilhqot'in Nation* decision imply ongoing problems, imply ongoing threats to fledgling Indigenous economies, and imply challenges with which all British Columbians and Canadians should be concerned.



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Understanding the top 10 risks from the *Tsilhqot'in* Legal Decision

	Uncertainty			Implications		
	Extreme	High	Moderate	Moderate	Major	Extreme
1 Governance aspects of Aboriginal title		██████████		██████████		
2 Possibility of Aboriginal title claims to private property		██████████		██████████		
3 Effects of future generations' rights on uses of Aboriginal title lands	██████████			██████████		
4 Scope of permitted or justified limitations on Aboriginal title		██████████		██████████		
5 Aboriginal title claims to previously occupied lands no longer occupied		██████████		██████████		
6 Requirements of the Aboriginal title test			██████████	██████████		
7 Ownership of subsurface mineral rights on Aboriginal title lands			██████████	██████████		
8 Remedies if a project is commenced on land later subject to a successful Aboriginal title claim			██████████	██████████		
9 Effects of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) on Aboriginal title			██████████	██████████		
10 Application of cultural limits on use of Aboriginal title lands			██████████	██████████		