

# BACKGROUND

## THE WILSON ACTION A CHRONOLOGY AND UPDATE

*Prepared by Louise Mandell, Partner*

*Mandell Pinder Barristers and Solicitors*

### **September/October 1999 to 2004:**

The *Jules and Wilson* case arose in the period between the *Delgamuukw* and the *Haida and Taku* decisions. When the Province refused to put the *Delgamuukw* decision into effect, the logging which started these proceedings commenced in an effort to assert and protect Aboriginal Title and Rights.

Communities from the Okanagan and Secwepemc Nations were granted permits from their respective Tribal Councils to harvest trees in accordance with their laws. The Okanagan Indian Band (“OKIB”), under a permit issued by the Okanagan Nation Alliance (“ONA”), commenced logging in an area in close proximity to their village at 6 Mile near the head of Okanagan Lake (the “Browns Creek Watersheds”), on a cut block which the Province had designated as a Timber Sale Licence area. The ONA had earlier issued a permit to the Westbank First Nation (“Westbank”). The Shuswap Nation Tribal Council (“SNTC”) issued a permit to the Adams Lake, Neskonlith and Spallumcheen Indian Bands for the Harper Lake area.

The logging was organized under the historic principles stipulated by the ancestors in the 1910 Laurier Memorial.

Arthur Manuel, then Chief of Neskonlith and Chair of the SNTC and Interior Alliance, swore an affidavit identifying the underlying conflict:

Ever since the 1997 *Delgamuukw* decision, the member nations of the Interior Alliance, including the Secwepemc, tried to get the federal and provincial governments to engage in a good faith effort to implement the *Delgamuukw* decision and to address the pressing social and economic needs of our people by recognizing our right to be involved in the management, use and benefit of our lands and resources. However, while refusing to acknowledge our Aboriginal Title, the provincial government has continued to alienate and authorize logging and timber harvesting within our traditional territories, in areas and with methods, that are unauthorized by our people, and which violate our Aboriginal Title.

Dan Wilson, who was Chief of the OKIB when the logging took place, articulated the challenge engaged by the actions the OKIB took:

... The Okanagan Band has pressing and urgent economic needs. I, as a Chief, have an obligation to use our Aboriginal Title resources, such as timber, to improve the living conditions of my people. ...

The land question, and our efforts as Okanagan to have our Aboriginal Title and obligation to make decisions to protect our territories and resources, is what this case is about from an Okanagan perspective. It is a conflict between the Okanagan Nation’s ability to exercise our laws to make decisions about our Aboriginal Title lands (here, issuing a permit to allow the OKIB to harvest trees in the watersheds) and the Province’s authority to deny our right to exercise our Aboriginal Title.

A provincial forest official issued a stop work order (“SWO”) under the *Forest Practices Code* and the Province commenced a petition to enforce it. In response, the Band filed a Notice of Constitutional Question challenging the constitutional applicability of the enforcement provisions of ss. 96 and 123 of the *Code*. The Province was granted an injunction to stop the logging. It then applied to convert the petition to an action, an application which the *Jules and Wilson* litigants opposed, but which was granted by the Case Management Judge (the “CM Judge”).

The litigation to this point caused significant economic hardship for all of the First Nations parties. The *Jules and Wilson* litigants sought an order for advance costs because they could not fund an Aboriginal Title trial, an order refused by the CM Judge, but granted by the Court of Appeal and affirmed by the Supreme Court of Canada.

The Supreme Court of Canada upheld the costs order

**... The Bands claimed that they had Aboriginal Title to the lands in question and were entitled to log them.**

**... The issues sought to be raised at trial are of profound importance to the people of British Columbia, both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province.** In short, the circumstances of this case are indeed special, even extreme.

Following the Court of Appeal’s decision on costs in the *Jules and Wilson* proceedings, Mr. Justice Vickers made a similar costs order in *Tsilhqot’in*. On appeal, the Court recognized the benefit in these two important cases (i.e. *Okanagan* and *Tsilhqot’in*) proceeding, and upheld the costs order in *Tsilhqot’in*. Mr. Justice Hall noted that “an assertion of rights arising out of Aboriginal Title to land is at the heart of both cases.”

A Litigation Committee was formed of the four Bands, who decided to give instructions together to the lawyers, Mandell Pinder.

Westbank took the onus of proof question to the Court of Appeal, establishing that the Province must plead first and assume the onus to prove their title. The *Westbank* case settled.

**May - July 2004:** The Province filed a Statement of Claim asserting exclusive ownership of and jurisdiction over the Watersheds, and pleading denial in the form of *terra nullius*: that the Watersheds were vacant Crown land and the Okanagan were not sufficiently organized to hold title at common law. The Okanagan filed a statement of Defence and Counterclaim, putting the Province to strict proof of its “bill of sale”, challenging the constitutional applicability of the *Forest Act*, including the Stop Work Order, in the Browns Creek Watersheds, and asserting Okanagan title and rights to the Browns Creek Watersheds. The pleadings make it clear that the proper title and rights holder is the Okanagan Nation.

**2004 - 2007:** The Province continued denial in the form of bringing two motions, to avoid a trial under the costs order based on Aboriginal title. The Court denied both motions.

The Province succeeded on a motion for costs savings by trying one case not two under the costs order. The Litigation Committee, as well as representatives from the ONA and SNTC, worked collaboratively, and participated in a decision making process through which it was decided that the *Wilson* case would proceed first, and the *Jules* Action would be stayed awaiting the outcome of the *Wilson* Action. Justice Sigurdson complimented the two Nations for how they found a solution to this difficult problem.

Following this, the Litigation Committee was expanded to include representatives from the ONA and the SNTC.

In the *Wilson* case, first time amendments were sought, including adding to the pleadings a declaration of Aboriginal title to the Browns Creek Watersheds.

The Province continued denial in the form of Crown conduct by granting Tolko cutting permits in the litigation area, over the objections of the Okanagan Nation, notwithstanding the outstanding issues in *Wilson* about who owns and has jurisdiction over the Browns Creek Watersheds.

The *Tsilhqot’in* trial concluded. The Court found that there was a defect in the *Tsilhqot’in* pleadings because of the language seeking a declaration of title, and no declaration of Aboriginal title was made. However, Mr. Justice Vickers went on to find that the *Tsilhqot’in* had met the test to prove Aboriginal title to a vast tract of land, approximately 200,000 hectares - and further, had he made a declaration of title, he would have found a provincial jurisdictional ouster of the *Forest Act* over Aboriginal title lands. If he was wrong about the unconstitutionality of the *Forest Act*, he found that the *Forest Act* unjustifiably interfered with Aboriginal title in all of its essential elements - the right to use, the right to choose, and its inescapably economic component. All parties appealed the decision. The appeal was put in abeyance, to allow negotiations to occur.

**July – October 2007:** The Province used the completion of the lengthy *Tsilhqot’in* trial under a costs order, and the Supreme Court of Canada’s decision in *Gray and Sappier* to make a third move in the *Wilson* case to avoid addressing title issues.

The Province made an admission that the OKIB have an Aboriginal right to harvest trees for domestic purposes within the tradition territory of the OKIB (including the Browns Creek Watersheds), and,

further, that the Province interfered with the admitted right with the issuance of the stop work order. In making the admission, the Province disregarded the pleadings that title and rights are in the Okanagan Nation. The Province then brought a motion to sever off the title issues in *Wilson*, and instead proceed to a trial based on the Province’s admitted interference with the admitted right.

The Court was persuaded that issues of title and jurisdiction could be litigated only if necessary; that it would be cheaper to first have a trial under the costs order, about whether the Province could justify in 1999, an admitted interference with the admitted right by issuing a Stop Work Order. A Title trial would take place only depending on the outcome of the rights trial and the *Tsilhqot’in* decision. A trial date has been fixed for the rights trial for March 2010.

Justice Donald dissented at the Court of Appeal about the severance decision, because the right admitted by the Province was never pleaded by the Okanagan, and the issues identified for the rights trial were never raised by the Okanagan Nation in their own defence.

The Okanagan submitted an Amicus Brief to the Inter-American Commission on Human Rights of the Organization of American States on behalf of the Hul’qumi’num Treaty Group, challenging Canada’s claim that the historic costs order provided a domestic remedy sufficient to prevent the use of international forums to challenge the theft by the Province of lands and resources from Indigenous Nations’ territories in the absence of Treaty.

The Court ordered that the Okanagan could continue to gather evidence of Aboriginal title in the Watersheds, including preparing affidavits for those over 70 years of age, or whose health is failing, continuing trail mapping, and preparing an affidavit from Jeannette Armstrong about Okanagan laws, all under the advance costs order (the “Preservation Order”). This work has been ongoing ever since.

The Court declined to grant the amendments to pleadings sought by the Okanagan until arguments were heard about whether the amendments could be litigated under the costs order.

In the *Tsilhqot’in* case, negotiations were unsuccessful and, over the objections of the Tsilhqot’in, the Province and Canada persuaded the Court that the appeal should proceed. The appeal has not proceeded because the Tsilhqot’in have no funds.

**November 2008 – March 2009:** Tolko advised that it is not willing to defer logging in the Watersheds and would commence logging unless OKIB obtained an injunction.

The Okanagan commenced an injunction application against Tolko in the *Wilson* Action, and sought directions about bringing Tolko into the *Wilson* Action as a third party, and claiming that Tolko’s TFL #49 in the Browns Creek Watersheds is invalid being a tenure issued by the Province who has no jurisdiction or title in the Watersheds. The amendment application was also brought back to Court.

The Court directed that any injunction against Tolko be brought outside of *Wilson*.

The Court agreed to hear arguments about whether the costs of the injunction proceedings against Tolko will be covered under the costs order, at the same time as the amendment application is argued about cost coverage. These arguments have not yet proceeded.

The Litigation Committee hosted a Denial Dinner and the Secwepemc and Okanagan Nations together raised money to defend the Browns Creek Watersheds against Tolko’s logging.

The Province agreed to negotiate the *Wilson* Action on the condition that a resolution of *Wilson* would also result in a resolution of the *Jules* Action. No negotiation proposal is currently tabled with government.

**October – November 2009:** Tolko advised that it did not log in the Watersheds in the summer of 2009 because of the economic climate, and would commence logging in on October 21, 2009. Members of the Okanagan Nation set up a camp in the Watersheds and on October 22, were served with a demand to vacate the area or Tolko would file an injunction.

On October 28, 2009, Tolko started a legal Action against the Okanagan Nation. The Company filed an Action against the Okanagan Indian Band, Chief Fabian Alexis, Chief Timothy Manuel, Grand Chief Stewart Phillip, Colleen Marchand, and “Persons Unknown”, claiming nuisance, obstruction, conspiracy and intentional interference with contractual relations. A remedy sought in the Action is an injunction to pave the way for Tolko to proceed with further industrial logging in the Browns Creek Watersheds (the “*Tolko* Action”).

The ONA offered Tolko a permit to harvest MPB trees in a manner which protects and preserves Okanagan cultural heritage, but Tolko declined, and now wants to get a Court order to forcibly remove Okanagan members from Okanagan territory, if necessary.

The ONA Chiefs Executive Council responded. On November 5, 2009, the Okanagan Nation Alliance filed an Action against Tolko, suing in trespass and interference to Aboriginal rights, claiming damages for the harm the company has done to the Browns Creek Watersheds by industrial logging, and seeking in injunction to prevent Tolko from further clear cut logging, road building and related activities in the Browns Creek Watersheds (the “New *ONA* Action”).

### **When will the cross injunction applications be heard?**

The dates for the injunction applications have been set for November 18 - 20, 2009 at the B.C. Supreme Court in Vancouver.

### **The New *ONA* Action: What is it about? How is it different from the *Wilson* Action?**

The *Wilson* Action challenges the claim of the Province to title and jurisdiction in the Browns Creek Watersheds, and raises issues requiring proof of Crown and Aboriginal title and rights. In the New *ONA* Action, the Province is not a party, and the case does not engage issues of proof of Aboriginal title.

While the Court has concluded that a company does not owe a duty of consultation and accommodation, the Court has also stated that a company may be liable to Aboriginal peoples if they commit a tort. In this Action, the ONA asserts that the company has committed two torts. Trespass is an old tort in law, although this will be the first time a First Nation has used the tort of trespass to hold a company accountable for damage to the land when the company operates under a Crown granted tenure and cutting permits. To establish trespass, the Okanagan Nation will need to show its possession of the Watersheds and its intention to control the land. The tort of interference to constitutional rights is a new tort which will be raised for the first time in this case.

Both Actions involve the Browns Creek Watersheds, where Aboriginal title has not been extinguished, and over which there are Aboriginal rights, including an admitted right in the *Wilson* Action to harvest trees for domestic purposes, as well as a Preservation Order granted in the *Wilson* Action to collect Aboriginal title evidence at risk, including trail mapping, which is not complete in the areas Tolko now wants to log.

**Why is this case important?**

The case is important to protect the Watersheds from further industrial logging, other than Mountain Pine Beetle (MPB) infected trees.

The case is also important because this is the first time a First Nation has sued a logging company in trespass and interference with constitutional rights and sought an injunction on the basis of those torts. It is also the first time a First Nation has held a company accountable for the damage they have caused to the land by the industrial logging methods they employ for the company’s economic benefit. If successful, this case could provide a remedy, without the necessity of proof of title, for First Nations to protect their lands and have their laws respected.

**Can the injunction costs against Tolko be covered under the costs order?**

Possibly. Justice Sigurdson, in the *Wilson* Action, directed that any injunction against Tolko be brought outside of *Wilson*. However, he also directed that the Court would hear an argument about costs coverage for an injunction against Tolko at the same time costs coverage for the amendment application in *Wilson* is argued.

**Will the trial in the *Wilson* case proceed in March, and what will the trial be about?**

The options will need to be examined, and instructions provided to the lawyers.