

# Live encounters

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Free online magazine from village earth



**Tsilhqot'in Nation  
win landmark Canadian aboriginal title judgement**



**Professor Bradford W. Morse**



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SEPTEMBER 2014

“Love and compassion are necessities, not luxuries.  
Without them humanity cannot survive.  
- Dalai Lama

## We have lost our insaanyat...our humanity

The continued bloodbath in the Middle East and other parts of the world does not appear to be abating. There is a savagery the likes of which has never been seen since *Attila the Hun*. So where does this hatred originate from? What fuels the slaughter? And what makes normal people join armies of gun slinging malignant beings hell bent on mutilating people?

*From childhood we are taught to loathe people that wear a different religious emblem or flag.*

*From childhood we are brainwashed that we are better than others, those of a different skin colour.*

*From childhood we learn how to revel in the suffering of others.*

*From childhood we begin to throw off the mantle of humanity and replace it with the sign of hostility and suspicion towards all that is alien to us.*

When we become parents we teach our children the same things we had learnt. And so the cycle of septicaemia of *us and them* continues.

We are now part of the river of inhumanity that flows through areas of conflict, disease and mind numbing poverty without any acknowledgement of the same. An embedded sense of disconnection from the images is reflective in our obese children and pets and a mean attitude to sharing our wealth and/or knowledge. These are guarded with a viciousness that amounts to committing culpable homicide of humanity.

Inhumanity has fine-tuned the ‘moral’ compass within us that points immediately to other factors like religion or ideology when confronted by the smell of blood in our nostrils, but never to us. It is always someone else’s fault, someone else’s problem quite forgetting that it is the inherent cultural concoction that awakes the beast in us and prompts us to commit unspeakable acts and that our indifference makes us complicit in the carnage. Our morals and ethics have become elastic.

In the last century we witnessed two world wars, millions massacred in smaller wars, genocide and more. And we have learnt nothing from this.

We are into the first quarter of the 21st century with renewed vigour to exterminate each other with all possible means at our disposal. More money is being spent on weapons that can deliver death more accurately, whilst millions continue to rot away in horrid conditions.

What a waste of all the wisdom we have garnered over eons.

We have truly lost our insaanyat...our humanity, for we have no use of knowledge that teaches us love and compassion.

Bertolt Brecht sums it up in the following words, “The first time it was reported that our friends were being butchered there was a cry of horror. Then a hundred were butchered. But when a thousand were butchered and there was no end to the butchery, a blanket of silence spread. When evil doing comes like falling rain, nobody calls out ‘stop!’ When crimes begin to pile up they become invisible. When sufferings become unendurable, the cries are no longer heard. The cries, too, fall like rain in summer.”

And George Bernard Shaw has the last word - “The worst sin toward our fellow creatures is not to hate them, but to be indifferent to them; that’s the essence of inhumanity”.

But is all lost?

In the midst of the mayhem there exists people across the world who still cherish and preserve, in their own way, the sanctity of life. Perhaps it is these folk that prevent us from completely destroying ourselves and the only home we have, earth.

I shall leave you now with these words of Mother Theresa (in the 1970s) when asked why the Little Sisters of the Poor picked up dying destitute people from the streets of Calcutta – “In life they are rejected by humanity. So we cleanse their bodies, clothe them and feed them until their last breath. We give them dignity in their dying moments. This is the least we can do”.

Om Shanti Shanti Shanti Om

Click on title of article to go to page



## Tsilhqot'in Canadian Aboriginal Title Landmark Decision : A Game Changer? Professor Bradford W. Morse

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## That Old Vision Terry McDonagh

Irish poet and dramatist, Terry McDonagh, taught creative writing at the University of Hamburg and was Drama Director at the Int. School Hamburg for 15 years. He now works freelance; has been writer in residence in Europe, Asia, Australia; published seven poetry collections, book of letters, prose and poetry for young people translated into Indonesian and German, distributed internationally by Syracuse Uni. Press; latest poetry collection Ripple Effect due for publication in May/June 2013, Arlen House; next children's story, Michel the Merman, illustrated by Marc Barnes (NZ) to be published in September 2013. He lives in Hamburg and Ireland. [www.terry-mcdonagh.com](http://www.terry-mcdonagh.com)



## Toraja People of Sulawesi, Indonesia Joo Peter

Aka Joachim Peter is a Visual artist and writer based in Southwest Germany, presently working on documentary & travel photography in Asia right. He loves to explore and combine all arts in his work. Joo has studied Arts; painting and graphics, worked for theatre ( designing stage, costume and light) , did some work for television and film, went into teaching. He writes essays and a blog in his native tongue, German, for he feels his language combines philosophy and humour. [www.joo-peter.photoshelter.com](http://www.joo-peter.photoshelter.com)



## To Trust and Trust Not! Natalie Wood

Born in Birmingham, England, U.K., Natalie Wood began working in journalism a month prior to outbreak of the 1973 Yom Kippur War. She remained in regional Jewish journalism for over 20 years, leaving full-time writing to help run a family business and then completed a range of general office work. Wood and her husband, Brian Fink emigrated from Manchester to Israel in March 2010 and live in Karmiel, Galilee where she continues to work, concentrating on creative writing. She features in *Smith Magazine's new Six Word Memoirs On Jewish Life* and contributes to *Technorati*, *Blogcritics* and *Live Encounters magazine*. Her stories - [Website](#) and journalism - [Website](#)



## UK antisemitism reflections Mark Gardner

Mark Gardner is Director of Communications at Community Security Trust, a charity that provides security for Britain's Jewish communities. He writes regularly at [CST Blog](#)



## Triangle of change: the situation of women in Saudi Arabia Eman Alhussein

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## Equal freedom for all requires limiting freedom of expression Dr. Emma Larking

Emma is a Postdoctoral Fellow in the Centre for International Governance and Justice at the Australian National University, working with Ben Authers and Hilary Charlesworth on Professor Charlesworth's ARC Laureate Fellowship project, 'Strengthening the international human rights system: rights, regulation and ritualism'. Her research background is in legal, political, and applied philosophy. She has extensive teaching experience in the University of Melbourne's School of Historical and Philosophical Studies, and of Social and Political Sciences. First published in [Regarding Rights](#)



## When the earth is cut Elizabeth Willmott-Harrop

Elizabeth is a freelance writer, poet and artist specialising in human rights advocacy, with a particular interest in the rights of women and children who has worked for many international organisations including Amnesty International and UNICEF, and has worked in a number of countries, where she has spoken with the victims of human trafficking. The subjects Elizabeth has worked and written on include inter-country adoption; legal reform; maternal and infant health; the sexualisation of children; and war propaganda. [www.libertyandhumanity.com](http://www.libertyandhumanity.com)



## Romancing the Lavani Aryaa Naik

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## Come here - Go Away! Dr. Candess M Campbell

Candess M. Campbell, PhD is the #1 Best-selling author of *12 Weeks to Self-Healing: Transforming Pain through Energy Medicine*. She is a Blogger, Intuitive Success Coach and International Psychic Medium. She has practiced as a mental health and chemical dependency counselor for over 30 years. [www.12weekstoselfhealing.com](http://www.12weekstoselfhealing.com)



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## TSILHQOT'IN Canadian Aboriginal Title Landmark Decision – A Game Changer?

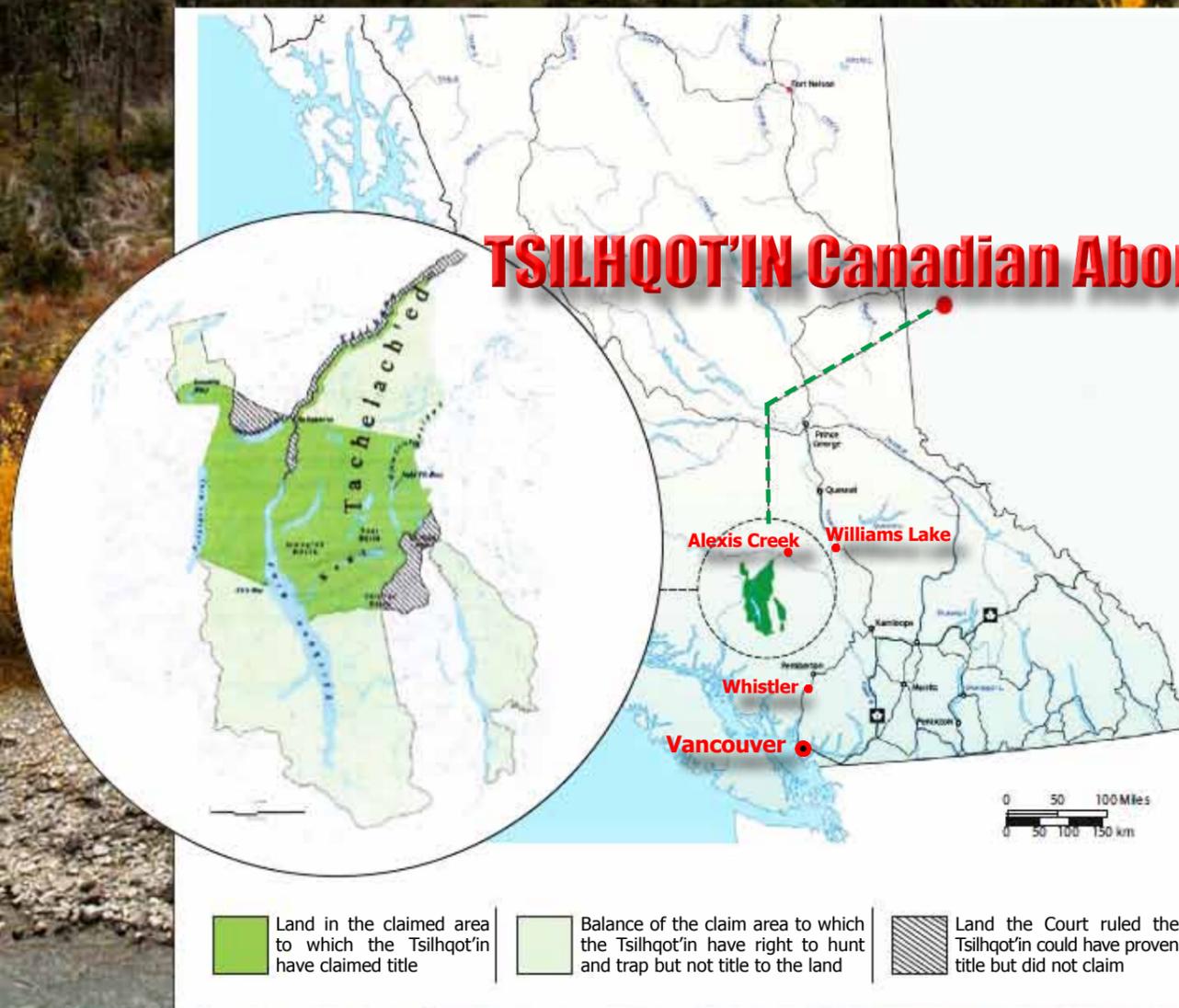
The meaning of 'Tsilhqot'in' is the People of the Blue Water. 'Tsilh' means blue, 'qo' means water and 't'in' means people.

### Bradford W. Morse

Professor and Dean of Law, University of Waikato (NZ), Professor Emeritus at University of Ottawa (Canada) and forthcoming Dean of Law at Thompson Rivers University (Canada)

The Supreme Court of Canada rendered an absolute ground-breaking decision on June 26, 2014 in the case, *Tsilhqot'in Nation v. British Columbia*<sup>1</sup>. The judgement quickly attracted massive publicity<sup>2</sup> as it is the first time in Canadian history in which the highest court has issued a specific declaration that Aboriginal title continues to exist today. The ruling has significant practical effect, which includes removing the power of the province to authorise logging without the consent of the Aboriginal title holders.

The Court, sitting with 8 members, unanimously pronounced that the Tsilhqot'in Nation held Aboriginal title over 1700 square kilometres (sq. kms.) of land in a relatively remote area of south central British Columbia 200 kms west of the town of Williams Lake. This land forms a significant part of the traditional territory of the Tsilhqot'in Nation, which consists of 6 distinct First Nations recognized as 'bands' under the federal Indian Act with approximately 3000 members.



Left: Photograph of Tsilhqot'in River at Farewell Canyon by <http://pixabay.com/en/users/werner22brigitte/>. Map [www.biv.com](http://www.biv.com), Logo of Tsilhqot'in National Government <http://www.tsilhqotin.ca/>



## Important web links for reference :

- [Assembly of First Nations \(AFN\)](#)
- [First Nations Summit](#)
- [Friends of Nemiah Valley \(FONV\)](#)
- [First Nations Women Advocating Responsible Mining FNWARM](#)
- [Union of British Columbia Indian Chiefs](#)
- [Respective Aboriginal Values and Environmental Needs \(RAVEN\)](#)
- [Tsilhqot'in National Government](#)
- [Xeni Gwet'in](#)
- [Northern Development](#)



Head of Union of BC Indian Chiefs Grand Chief Stewart Phillip. [Assembly of First Nations](#)

## Background to the Decision

The Tsilhqot'in Nation [previously called "Chilcotin" by outsiders] constitutes a distinct people who have occupied a valley bounded by mountains and blessed with rivers in the Chilcotin Plateau region of British Columbia (BC) since time immemorial.

It is an area that has been somewhat isolated and difficult to access since long before Europeans arrived. While possessing fish, animals, forests and other resources, it is a sufficiently arduous terrain that it has never been able to support a large population, nor is it along major trade routes so as to have attracted large numbers of either Indigenous or other peoples.

Even today there is relatively little incursion of non-Tsilhqot'in people into their valley. Like most First Nations in British Columbia, they never entered into a treaty with either the Imperial Crown of Great Britain during the colonial era or the federal government of Canada.

Unlike many BC First Nations, however, they also faced little interference through significant migration of non-Aboriginal settlers into their territory wanting quality farm land or by major resource developers seeking mineral or timber wealth. As a result, there was little pressure on the Crown to extinguish their Aboriginal title to their traditional territory by purchase or treaty so as to smooth the path for outside interests to transform their valley.



Former National Chief of AFN, Shawn Atleo, prominent in the campaign in the last 4 years leading up to SCC decision.

All of this began to change, however, when the provincial government of BC decided to grant a forest licence to Carrier Lumber Ltd on December 9, 1983 to cut 5 million cubic metres of timber over a 10 year period without any prior discussion with the people who have always regarded these lands as exclusively theirs. Complaints from Tsilhqot'in people to the BC government were ignored and proposals for a more 'holistic approach' to logging were rejected by Carrier while it proceeded with the creation of modular lumber mills, road improvement and logging plans.

The first road blockade was established by the Ulkatcho Indian Band on July 17, 1989. While that blockade continued a second was launched 3 years later by the Nemiah Valley Indian Band (Xeni Gwet'in First Nation) to block a bridge that the company needed to access a major logging site. One of the 6 First Nations, Xeni Gwet'in, took a lead role in protesting what they saw as an unauthorized invasion of their homeland.

The Premier stepped in on May 13, 1992 to defuse the situation and promised that no further logging would occur without the consent of the Xeni Gwet'in.<sup>3</sup> The province subsequently terminated Carrier's licence. Negotiations ensued between parts of the Tsilhqot'in Nation and the Ministry of Forests over several years but ultimately broke down when the government refused to grant a right of first refusal to any logging.

The Xeni Gwet'in initially launched litigation in the BC Supreme Court on April 17, 1990 to block any timber harvesting that would negatively impact upon their traplines. This claim was later amended in 1998 to include an assertion of Aboriginal title on behalf of the entire Tsilhqot'in Nation regarding 4381 sq. kms., which reflects roughly 5% of their traditional territory. The pre-trial process was extremely prolonged and expensive. Fundraising efforts by the Tsilhqot'in Nation were quickly proven to be inadequate as the bills mounted.

As an example, Chief Roger William was asked 11,042 questions over 28 days of cross-examination in pre-trial discoveries (none of the answers were used during his 46 days on the witness stand).<sup>4</sup> Justice Vickers granted an order on November 27, 2001 directing the provincial government to pay "all reasonable disbursements" and to share equally all the future costs of the plaintiffs.<sup>5</sup> This decision was appealed all the way to the Supreme Court of Canada but the order was sustained.<sup>6</sup>

This still left the Tsilhqot'in with significant financial pressures and meant that their lawyers generally worked for 50% of their normal fees.



Tsilhqot'in protest at Taseko Mine's annual general meeting in Vancouver, June 2010 [LINK](#)



Rally on front steps of the Supreme Court of Canada before the case was argued on November 7, 2013 [LINK](#)

## Decisions of the Lower Courts

The trial of the lawsuit itself finally began before Mr Justice David Vickers of the BC Supreme Court in Victoria in 2002 and continued over a 5 year period involving 339 days of court time and an estimated cost of approximately \$30 million.<sup>7</sup> Those court days don't include the 10 pre-trial motions brought by the federal and provincial Crowns to have the case dismissed.

Justice Vickers devoted a major part of his judicial life to this case including visits to many places within the lands claimed. He listened to considerable oral testimony over many days from Tsilhqot'in elders, as well as other experts, and saw first-hand both the rugged nature of the terrain as well as the visible evidence of usage of specific sites.

In November 2007 Vickers J. concluded that the evidence in support of Aboriginal title was compelling for roughly 30% of the territory sought along with a small area within their traditional territory but not claimed in the lawsuit.<sup>8</sup> He ultimately decided that he could not issue a declaration confirming that title for procedural reasons (based on arguments later dropped by the Crown on appeal), however, he provided extensive comments about the nature of Aboriginal title, the legal test required to be met, the evidence submitted, and his assessment of the strength of the claim.

He further did declare that the Tsilhqot'in people "have an Aboriginal right to hunt and trap birds and animals throughout the entire Claim Area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses.

This right is inclusive of a right to capture and use horses for transportation and work." In his view, their Aboriginal rights, protected by s. 35 of the Constitution Act, 1982, included a commercial right to earn a moderate livelihood through hunting and trapping.<sup>9</sup>

The Tsilhqot'in Nation were pleased overall with the comments made by Justice Vickers about their proof of aboriginal title over part of their territory, yet they appealed as they did not want to start again with another likely very, very long trial and the court had still only confirmed evidence for 30% of their land. Both the federal and BC governments also appealed as they were unhappy with the Aboriginal rights finding along with the permission granted to the plaintiffs to relaunch their lawsuit for damages and title among various other rulings.

The formal decision on Aboriginal rights and title was upheld by the BC Court of Appeal in 2012, however, that Court took a markedly narrower view on the legal test for title. It concluded that previous Canadian law indicated Aboriginal title only existed at specific locales where the occupation of the land that existed pre-Crown sovereignty assertions was used so intensely as to be similar in nature to permanent usage like village sites, "salt licks" and "particular rocks or promontories used for netting salmon".<sup>10</sup>

The national political voice of federally recognized First Nations in Canada, the Assembly of First Nations, commented on the decision in these words:

*The BC Court of Appeal justified its "postage stamp" approach expressly because of its stated desire to avoid "unnecessarily interfering with Crown sovereignty and the well-being of all Canadians." This justification is not consistent with the principles of reconciliation but is instead a denial of First Nations' rights, including Aboriginal title.*

The Court of Appeal did agree though with all aspects of the trial judge's rulings on Aboriginal rights, including that they had been breached by the provincial government but provided no explicit remedy for that breach. The Tsilhqot'in Nation appealed again as their goal of obtaining recognition that this was their land and they should have major power in determining its usage remained unachieved.



Chief Roger William of the Xenigwet'in who led the court action and prior blockade for many years. [www.xenigwetin.ca](http://www.xenigwetin.ca)



Drying fish - [www.xenigwetin.ca](http://www.xenigwetin.ca)

## The Evolution of the Aboriginal Title Doctrine in Canada

Canadian law has flip-flopped over the generations when it has come to addressing the question of what rights the original peoples of Turtle Island possess over their historic lands and waters; under whose legal system is that decided; and what authority to govern that land and its peoples attach to any recognition of these historic rights by the dominant society. Canada has never been as regressive as Australia was from settlement in 1788 to 1992 by asserting that the continent was effectively vacant when the British arrived. Despite the fact that Aboriginal peoples had resided there for over 40,000 years, they were viewed as possessing no sense of land ownership, no government and no legal system.<sup>11</sup> On the other hand, our governments and courts had chosen not to follow the lead of the US Supreme Court in its trilogy of major decisions from 1823-32.<sup>12</sup> American law it recognized Indian title as being different from but “as sacred as the fee simple of the whites”. Indian Nations were described as previously independent nations who had been transformed into “domestic dependent nations” by the tides of history washing over the land through the superior size and might of the immigrants.

Instead, our courts have shied away from addressing the tough issues – such that the sovereign status of First Nations and the legal status of the right to Aboriginal self-government remain effectively untouched by judicial scrutiny. Our previously final court of appeal, the Judicial Committee of the Privy Council in London, ruled that Aboriginal title was merely “a personal and usufructuary right, dependent upon the good will of the sovereign”;<sup>13</sup> whose good will has frequently been absent. As our Supreme Court declared in 1990, there “can be no doubt that over the years the rights of the Indians were often honoured in the breach”.<sup>14</sup> The Supreme Court dramatically changed the legal landscape first with its decision in the Calder case in 1973 in which 6 of 7 judges declared that aboriginal title was recognized by the common law as it existed in Canada, although they split on whether general colonial legislation had indirectly extinguished the title of the Nisga’a Nation that had brought the appeal.<sup>15</sup> Aboriginal title was reaffirmed in importance by the same court in *Guerin*, in which the Federal Government was held to be in a fiduciary relationship with Aboriginal peoples that it had breached in that case causing it to be liable for \$10,000,000 in damages to the Musqueam First Nation.<sup>16</sup> The *Delgamuukw* decision<sup>17</sup> in 1997 was even more important as it articulated a clear and reasonably straightforward legal test for what needed to be proved to qualify for Aboriginal title:

*...the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.*<sup>18</sup>

That judgement reversed a decision of the BC Supreme Court that had restricted Aboriginal title solely to village sites and other locations of very intensive and on-going use. In 2005, the same Supreme Court of Canada, in its judgement in *Marshall; Bernard*,<sup>19</sup> seemed to embrace the view espoused by the trial judge rejected by the Court in *Delgamuukw*. Chief Justice McLachlin, for the majority, reinstated the convictions previously reversed by the Nova Scotia and New Brunswick Courts of Appeal. She declared that proving Aboriginal title required the claimant to demonstrate “possession similar to that associated with title at common law”.<sup>20</sup> She concluded that there was inadequate proof of sufficient occupation to meet the test for title on the facts of the 2 cases even though the evidence in *Bernard* clearly showed Mi’kmaq had been present in the area for 2500 years and the logging site in question in New Brunswick was near an existing reserve that itself reflected a longstanding semi-permanent village with a burial site nearby. At the very least, the strong impression left by the decision was that possession required a level of intensity analogous to villages and enclosed farms as required at common law. Both governments heavily emphasized such a reading before the BC Court of Appeal and Justice Groberman, for the unanimous Court, relied on her statements when he said that there

*... is no reason that semi-nomadic or nomadic groups would be disqualified from proving title, their traditional use of land will often have included large regions in which they did not have an adequate regular presence to support a title claim. That is not to say, of course, that such groups will be unable to prove title to specific sites within their traditional territories.*<sup>21</sup>

## The Stage is Set at the Supreme Court of Canada

Oral argument was presented before the Court on November 7, 2013. The appeal attracted a large number of interveners including 5 provincial governments (Alberta, Saskatchewan, Manitoba, Ontario and Quebec); many regional and national First Nations organizations and individual First Nations; 5 associations of natural resource companies; and 2 other non-governmental organizations. The journey by Tsilhqot’in elders from their traditional lands to the Supreme Court building in Ottawa was captured on film and is available on the web.<sup>22</sup> The judgement authored by Chief Justice Beverley McLachlin can definitely be seen as an answer to their prayers. The unanimous judgement really concentrates on 3 main issues: (1) identifying the proper test for Aboriginal title in Canada in 2014 and whether it was met by the evidence adduced at trial; (2) what rights do titleholders possess; and (3) what is the impact of existing Aboriginal title rights on provincial government jurisdiction and legal interests in those lands. The Court reversed the Court of Appeal’s view of the Aboriginal title doctrine and largely agreed with Vickers J except that the SCC was freed of the procedural shackles that had restrained the trial judge from granting the declaration sought.



L to R : Shuswap native families at the Tête Jaune Cache, BC, 1956 (courtesy Canada Science and Technology Museum/CN002990). and [www.xenigwetin.ca](http://www.xenigwetin.ca)

## Changing the Legal Landscape

### 1. Test for Aboriginal Title

After briefly reviewing the historical record, key prior decisions, and providing pleading guidance for future Aboriginal title cases all in 23 paragraphs, she turned her attention to the question of how to apply the 3 part Aboriginal title test from *Delgamuukw* (quoted above) into assessing the claim of a “semi-nomadic indigenous group”.<sup>23</sup> The specific stress on the Tsilhqot’in Nation as semi-nomadic could have led to a simple reaffirmation of the *Marshall* and *Bernard* cases, or their reconsideration, as the Mi’kmaq peoples involved in those 2 cases were described as “moderately nomadic” and “semi-nomadic”. Instead, she stated this question had never previously been directly answered by this Court, thereby opening the field for a 1st consideration. She concluded that the BCCA’s approach would result “in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping”<sup>24</sup> in contrast to the trial judge’s recognition of beneficial rights to the much larger territory that had been traditionally and exclusively used.

The distinction between the 2 extremes turned on the aspect of “sufficiency of occupation”. In other words, how **intensively** must the land have been used before the Crown claimed sovereignty? Relying upon a decision of the Australian High Court,<sup>25</sup> she concluded that the 3 characteristics of necessary occupation (being (1) sufficient; (2) continuous; and (3) exclusive) should be viewed together but in a way that does not lose the Aboriginal perspective through focusing solely on “common law concepts”. The indigenous partner looks to its own system of “laws, practices, customs and traditions of the group”<sup>26</sup> while European views stress possession and control of territory.

The *Delgamuukw* Court stated that the search for the appropriate answer in any particular case must consider the particular group’s circumstances in relation to its size, technology, lifestyle, resources available in their traditional territory and its natural geography - as these factors will affect the degree to which they could intensively use any portions of their land. The evidence indicated that the Chilcotin Plateau’s weather and resources were such that only 100 to 1000 people could be supported there, such that less intense use was to be expected. Less intensity does not mean invisibility, however, as McLachlin CJC stressed that the presence on the land must be obvious to any outsiders who would conclude the territory was occupied by some group of people.<sup>27</sup>

Ironically, she adopts the reasoning of Justice Cromwell, when he was on the Nova Scotia Court of Appeal that she had previously reversed in *Marshall*, on the wide range of acceptable forms of possession

recognizable at common law that should be accepted for proof of Aboriginal title. In *Tsilhqot’in Nation* she advocated for a “culturally sensitive approach” that reflected both common law views of sufficient possession for its purposes but also Aboriginal perceptions of what constituted possession of land that would include recognition of subsistence harvesting over a broad swath of land so long as it was regularly possessed in a way that displayed the intention to control any outside users.<sup>28</sup>

The second element that must be proven is to show the occupation of current Aboriginal residents is connected to those people who were residents when the Crown asserted its sovereignty over the lands. This does not necessitate having to demonstrate “an unbroken chain of continuity” but the extent and nature of any break in time is left undiscussed.<sup>29</sup> The final requisite is that exclusive occupation must be proven.

As *Delgamuukw* itself stated, ‘exclusive’ is not equated with ‘sole’ as that Court indicated shared exclusivity could occur. In other words, the jurisprudence is demanding 2 things: (1) that the indigenous occupation prior to the arrival of colonization must not have co-existed with non-Aboriginal peoples; and (2) the Aboriginal group must have viewed itself as being both in control of the land and capable of excluding others whenever they wished. This latter aspect meant that they could also choose to share some of their territory with others and allow passage through their territory on whatever terms they set.

The Court concluded, as did the Court of Appeal, that the trial judge was correct in his assessment of the evidence as proving sufficiency of occupation, continuity and exclusivity to warrant aboriginal title over some parts of the territory. The Supreme Court upheld the appeal though on the basis that Vickers J was correct in his interpretation of the sufficiency of occupation element in relation to the evidence, which thereby meant title was awarded over large areas of traditional territory rather than small islands of villages and other sites. McLachlin, CJC declared that proof of intensive presence on and usage of the land was in error as a “territorial use-based approach to Aboriginal title”<sup>30</sup> was the correct standard.

### 2. Rights Conferred Before Title Proven

The Supreme Court in *Tsilhqot’in Nation* reiterated principles from *Haida Nation*<sup>31</sup> and other key cases that stressed the spectrum analysis when considering what obligations are on the Crown when faced with an assertion that Aboriginal or treaty rights. The onus is initially on the Aboriginal party to declare that they have rights protected by s. 35 **and** to offer enough evidence to raise a prima facie case such that the onus shifts to the Crown to respond.



L to R: [www.xenigwetin.ca/](http://www.xenigwetin.ca/) and [www.tsilhqot'in.ca/](http://www.tsilhqot'in.ca/)

## 2. Rights Conferred Before Title Proven contd...

The government  
*... owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases.*<sup>32</sup>

The Crown faces a clear risk in these circumstances if it does not obtain formal consent in writing from the indigenous communities concerned.

If it proceeds in a way that may damage the ability to exercise the Aboriginal or treaty rights in the future, or to enjoy fully any Aboriginal title that may be later proven to exist, then it is vulnerable to being sued for breaching its fiduciary duties, violating the honour of the Crown and acting contrary to section 35 if it cannot prove:

- (1) the rights have been extinguished prior to April 17, 1982;
- (2) the indigenous party surrendered or amended the rights willingly by agreement; or
- (3) the Sparrow justification test can be met.

As the Court suggested, "appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim."<sup>33</sup> The balance of power shifts significantly once title is proven to remain in existence.

## 3. Rights Conferred When Title Proven

The SCC has reaffirmed in *Tsilhqot'in Nation* that the nature of the subsisting Aboriginal interest that burdens the Crown's underlying, or radical, title is an independent legal interest. Aboriginal title not only generates a fiduciary duty on the part of the Crown [as the Crown unilaterally claimed sovereignty and imposed itself as the only legal buyer of that interest] that had been 1st articulated in *Guerin*, but it also means that the Crown's authority is limited to circumstances where it can justify its encroachment. As she wrote,

*"In simple terms, the title holders have the right to the benefits associated with the land – to use it, enjoy it and profit from its economic development. As such, the Crown does not retain a beneficial interest in Aboriginal title land."*<sup>34</sup>

This reflects a far, far more significant change in the law than a mere refinement to the test for Aboriginal title - it renders the legal import of a declaration that title exists potentially massive. The holders of continuing Aboriginal title have "ownership rights" that the judgment states are "similar to those associated with fee simple" except that it is a communal or collective title. These incidents of Aboriginal title include:

- "the right to decide how the land will be used;
- the right of enjoyment and occupancy of the land;
- the right to possess the land;
- the right to the economic benefits of the land;
- and the right to pro-actively use and manage the land."<sup>35</sup>

The latter incident is also framed as "the right to control how the land is used."<sup>36</sup> While this right, and the title itself, flows from the reality that First Nations were in full possession of the land as sovereign peoples before the Crown came along, their uses of their traditional territory is **not** limited to how they lived at the time of European contact. Instead, the Court declares that their position is effectively the same as any other Canadians. All landowners have the ability to alter land use patterns over time as technology, personal preferences and economic factors change.

One key distinction though, as hinted in *Delgamuukw* but made more explicit here, is that Aboriginal title is not just for the living members of the peoples or First Nations concerned; rather it is for the present **and all future generations**. This imposes a restriction on the way in which the territory can be developed as it may not be "misused in a way that would substantially deprive future generations of the benefit of the land."<sup>37</sup>



AFN Regional Chief of British Columbia Jody Wilson-Raybould has been the leading speaker for AFN in regard to the court case. [www.straight.com](http://www.straight.com)



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### 3. Rights Conferred When Title Proven contd...

Who will decide whether a potential use of the land would violate the rights of future generations is left unaddressed. It is also unclear if this is a matter that is solely to be raised among the beneficiaries, or if the Crown in its capacity as fiduciary has a right – and perhaps even an enforceable obligation – to ensure that any proposal being promoted by the Aboriginal leadership of today to alter the land significantly has been assessed with proper consideration of the beneficial interests of the future generations.

What is clear, though, is that anyone, including governments, seeking to make use of land subject to Aboriginal title must first “obtain the consent of the Aboriginal title holders.”<sup>38</sup> No private person, corporation or local government can proceed in a way that would affect that land where that consent is denied or has not been validly obtained.

Federal and provincial governments, however, are treated differently. Superior governments can act in the name of the Crown and have the ability to proceed even where consent is withheld IF it can meet the s. 35 Constitutional justification test. The Court stated

To justify overriding the Aboriginal title-holding group’s wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown’s fiduciary obligation to the group: *Sparrow*.

The duty to consult is regarded as a procedural duty triggered by the expectation that the Crown will always act honourably, and has caused all federal, provincial and territorial governments to change their behaviour in interacting with First Nations, Inuit and Metis wherever there is the prospect that a s. 35 right might be affected. Consultation policies, departmental processes and civil servant training has all become commonplace since the *Haida Nation* decision of 10 years ago. The Supreme Court here though is reframing this somewhat when Aboriginal title has been confirmed. Not only must the Crown in fact have fulfilled its procedural obligation, but it “must also ensure that the proposed government action is substantively consistent with the requirements of s. 35...”<sup>39</sup>

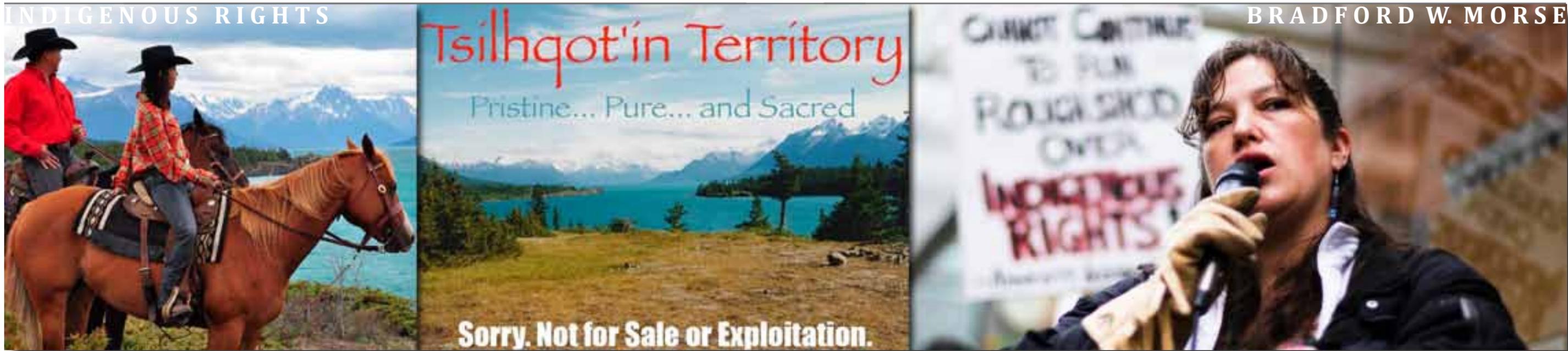
The 2nd element is the linchpin as the Crown must show that there is a “compelling and substantial objective” rather than a theoretical one. In *Sparrow* itself the Department of Fisheries and Oceans (DFO) had argued that its regulations controlling the length of fish nets and the times for the open

season were essential for conservation purposes. The Supreme Court in response made clear that conservation of a species would meet this test but only if the government did prove that the method of regulation was essential to achieve that compelling and substantial objective and it involved the least interference possible with the s. 35 right. DFO’s own evidence was that the total Aboriginal fishery reflected less than 5 % of the Fraser River salmon catch and that it could easily meet its conservation goal if it chose to regulate sport or commercial fishing more actively.

In *Tsilhqot’in Nation* the Court emphasised that the government’s objective must be canvassed from both the Aboriginal and the broader public’s perspective.<sup>40</sup> It drew upon the train of SCC cases in the 1990s that declared the goal of s. 35 being to aid in bringing about a “reconciliation between Aboriginal “prior occupation with the assertion of the sovereignty of the Crown.”<sup>41</sup> The government purporting to serve the “broader public good ... must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective” with its proposal if it seeks to justify violating the constitutionally protected Aboriginal title. The Court drew upon *Delgamuukw* to answer its own question as to what interests might justify such an incursion on a constitutional right by quoting with emphasis:

**In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title.** Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. (emphasis added)<sup>42</sup>

The final element is the Crown demonstrating that even though it seeks to infringe upon a proven s. 35 right it has still acted in a way that respects its role as fiduciary. At the very least this entails avoiding any hint of favouring its own interests at the expense of the Aboriginal party. The Crown must, however, do far more than avoiding self-interest. Its obligation to the Aboriginal title-holders is to both the current generation as well as **all** the future ones.<sup>43</sup> The justification argument must also meet a test of “proportionality” by including proof that the infringement is necessary to achieve the goal (“rational connection”), it constitutes the least possible incursion (“minimal impairment”) and the benefits anticipated from achieving “that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact).”<sup>44</sup>



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## Remedies

Prior to proof of s. 35 rights, any breach by the Crown of its duty to consult can give rise to courts granting injunctive relief, damages or orders to carry out the duty properly.<sup>45</sup> The situation is starkly changed when title has been proven as the Crown simply cannot proceed to infringe unless it obtains consent or can meet the justification test. Failing either, the Crown is subject to the “usual remedies that lie for breach of interests in land..., adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.”<sup>46</sup>

Here the province was found to have breached its duty to consult with the Tsilqot'in Nation and accommodate its collective interest in their traditional territory when it issued a licence to CLL in 1983. Although no such duty had been fully articulated by the courts at that time and the Tsilhqot'in's title had obviously not been proven, the province was aware of their existence on the land and their assertions of Aboriginal title. Thus, it could have and should have consulted before authorizing the building of infrastructure and allocation of cutting permits. The province did consult at a later point, however, it decided ultimately to proceed without consent, thereby rendering itself vulnerable if in future Aboriginal title was proved, as was done here.

## Impact upon Provincial Legislation

Although unnecessary to dispose of the case after deciding to grant a declaration of Aboriginal title (and therefore arguably *obiter dicta* and not binding), the Court concluded that it was important to give added guidance to all parties “and other Aboriginal groups” in Canada on the status of provincial legislation once title had been declared. The extensive argument before the lower courts, and no doubt in acknowledgement of 5 provinces intervening, led the Court to advise that “provincial laws of general application apply to lands held under Aboriginal title.”<sup>47</sup> This general proposition reflects the authority of provincial legislatures to pass laws regulating “property and civil rights” under s. 92(13) of the *Constitution Act, 1867*. On the other hand, provincial authority over land subject to continuing Aboriginal title is constitutionally limited by: (1) s. 35, thereby bringing us back to the fiduciary relationship and the Crown required to prove a compelling and substantial objective if it wishes to infringe; and (2) Parliamentary power over “Indians, and Lands reserved for the Indians” in s. 91(24). The 1st limit was described in *Sparrow* regarding Aboriginal rights as meaning that the statute or regulation must not be unreasonable, impose undue hardship or deny the title holder its preferred method of exercising the right. Violating any of the 3 factors would infringe the s. 35 rights.

In this case the province relied upon its Forest Act as empowering it to control all aspects of “Crown timber” on ‘Crown land’, which it had presumed the land in question to be. *The Forest Act* limited its scope to land vested in the Crown. Aboriginal title “confers a right to the land itself”<sup>48</sup> such that this land was vested in the Tsilhqot'in Nation and could not be “vested in the Crown” simultaneously so as to be eligible to be managed by the Ministry of Forests under the Act. On the other hand, to say that the Forest Act had no application whatsoever to the vast majority of the province that is subject to Aboriginal title claims not yet proven would mean that no one could protect the forests from abuse, respond to forest fires or deal with invasive species like the mountain pine beetle. The Court was clearly very concerned about creating any vacuum in effective forest management as this would be to the detriment of First Nations as well as all others. McLachlin CJC concluded that the BC Legislature must have meant that the Act would apply to forested lands under claim but only up to the point where “title is confirmed by agreement of court order.”<sup>49</sup> These lands ceased to be “Crown lands” once the court order confirmed Aboriginal title and the trees ceased to be “Crown timber” so as to be available to be regulated under the Act.

The Court chose to “add the obvious” as a comment that the BC Legislature could amend the Act to cover Aboriginal title lands, so long as it met all “applicable constitutional restraints.”<sup>50</sup> What the Court failed to do was consider that Tsilquot'in Nation law should apply. Although earlier declaring that the “doctrine of terra nullius (that no one owned the land prior to assertion of sovereignty) never applied in Canada,”<sup>51</sup> the Court clearly could only conceive of a legal vacuum if neither federal nor provincial legislation applied. It is troubling that our highest Court did not even ask the obvious question: since Tsilquot'in Nation's Aboriginal title is derived from their pre-existing occupation as the sovereign of this territory with their own legal system, is that pre-existing law not immediately revived to apply on land to which their beneficial title is now recognized once more?

Instead, Chief Justice McLachlin could only see section 35 as providing a limited brake on either federal or provincial efforts to infringe the “aboriginal and treaty rights” protected therein, while simultaneously enabling such infringement to occur that is justified. Justified in the eyes of whom one might ask? The answer of course is the overwhelmingly non-Aboriginal judiciary. McLachlin drew the parallel with the *Canadian Charter of Rights and Freedoms* as similarly imposing a limit on both federal and provincial governments (except it does so to benefit individual rights) but subject to an argument that the breach of the Charter is justified. Here the Court suggests that provincial laws dealing with forest fires and pest invasions “will often pass the *Sparrow* test as it will be reasonable, not impose undue hardships, and not deny the holder of the right their preferred means of exercising it.”<sup>52</sup> This is strikingly worded as no such cases have ever been heard in order to justify the conclusion that they “will often pass the *Sparrow* test”.



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### Impact upon Provincial Legislation *contd...*

Legislation with such goals might well be embraced by First Nations, particularly if they were fully involved in the development of the statute as genuine partners and its implementation. One might also hazard a guess that such purposes of fire and pest management would pass the justification sniff test; but that is different than suggesting that they have already often passed such scrutiny. The decision does expressly note, however, that the transfer of timber rights reflects “a direct transfer of Aboriginal property rights to a third party” that would be a “meaningful diminution in the Aboriginal group’s ownership right”.<sup>53</sup> The Court also chose to state that it agreed with both lower courts when they said “that no compelling and substantial objective existed in this case.”

The 2nd constitutional limitation would be the presence of any federal legislation enacted pursuant to s. 91(24) intended to apply to Aboriginal title lands. No such federal statute exists outside *Indian Act* recognized reserves at present regarding forestry, so no paramountcy principle could presently be invoked in favour of the competing federal enactment.

### How Significant is this Decision Anyway?

It is truly hard to underestimate the importance of this judgement from our highest court. In Canadian geographic terms, it immediately applies in all parts of Canada where Aboriginal title has not clearly been extinguished.<sup>55</sup> Not only does this cover the vast majority of British Columbia, but it also includes areas in the southern Yukon and Northwest Territories, the Ottawa Valley, southern Quebec (from the Labrador and New Brunswick borders to Ontario), southern Labrador, and arguably all 3 Maritime provinces as well as the island of Newfoundland – as none of these have ever been affected by treaties with First Nations that expressly include the surrender of title to their traditional lands, even in their English language versions.<sup>56</sup>

Millions of Canadians live in areas in which Aboriginal title has never been willingly ceded by its traditional owners or explicitly extinguished by the Crown.<sup>57</sup> With all likelihood private landowners should be untouched by *Tsilhqot’in*,<sup>58</sup> but the same cannot be said for most natural resource companies who rely upon leases and licences from the Crown to exploit mineral and petroleum wealth and timber on Crown lands.<sup>59</sup>

Many cottagers as well as operators of fish and hunting lodges also rely on Crown leases. Concerns were immediately voiced that the impact could be negative for the resource sector.

As a leading columnist for the National Post put it: “...the implications are staggering: In B.C., for example, First Nations opposing projects such as the Northern Gateway pipelines may no longer need to raise blockades or anticipate lengthy court battles in order to stop shovels from hitting the ground.”<sup>60</sup> *West Coast Environmental Law* celebrated the decision and queried if this meant that the Enbridge pipeline would be cancelled.<sup>61</sup>

While a certain level of panic descended on the resource sector in BC, the Supreme Court rendered a decision a mere 15 days later that upheld Ontario governmental power to “take up” Crown lands so as to end treaty harvesting rights in order to issue licences for clear-cut forestry operations in the Keewatin area of Treaty 3 territory.<sup>62</sup>

The net result for now is that non-treaty First Nations in some major parts of Canada have gained considerable momentum in protecting their way of life and achieving greater prosperity for the future, while many Treaty First Nations remain impoverished watching the logging trucks roar past.

Grand Chief Stewart Phillip of the Union of BC Indian Chiefs described the implications of the judgments in somewhat provocative terms that reflects the view of many First Nations people in Canada when he said, “Canada’s top court adopted the international law principle of consent. Indigenous peoples in British Columbia have long been fighting for recognition of our rightful place in the Canadian federation. The Supreme Court of Canada has said that it is time to join the modern era of International Human Rights recognition. This decision puts an end to the legal oppression of Indigenous Peoples and enforces our fundamental human rights and freedoms.”<sup>63</sup>

Canada initially voted no (1 of only 4 nations to do so) when the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was overwhelmingly passed by the UN General Assembly on September 13, 2007 only to reverse its position 3 years later. One of the key reasons it had opposed UNDRIP under the Harper Government was disapproval of the frequent imposition of the “free, prior and informed consent” standard upon states in their dealings with indigenous peoples. Many will now suggest that this standard has been embraced by the Supreme Court, at least concerning proven Aboriginal title, albeit not explicitly.

The Court has truly provided considerable negotiating leverage to those Aboriginal peoples in Canada who retain Aboriginal title. As the unanimous judgement stated: *For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing.*<sup>64</sup>

At the same time, it has further entrenched the status quo that underpins elements of colonialism based on a much criticized Discovery Doctrine. This doctrine continues to be legitimate in 2014 the right of European monarchs to have claimed overarching sovereignty and underlying title to lands they never saw, simply because their representatives asserted the claim in their royal names. While the Court accepted that the *terra nullius* doctrine was inapplicable – as millions of indigenous peoples occupied and governed their own parts of North America – it sustains the legal architecture that has supported the theft of most of the continent and marginalized indigenous self-determination. Our highest court has championed a goal of reconciliation, however, for that to be achieved there must be an honest effort to explain how indigenous sovereignty was displaced and rightful possession ignored for generations.

## How Significant is this Decision Anyway? *contd...*

One can readily imagine that such a situation might include public works, such as highways, local streets, mass transit, airports, wharves, etc. In such circumstances the government will have to persuade future courts that these comply with the ‘compelling and substantial objective’ standard. While these types of projects may readily meet overall perceptions of the public good, that does not necessarily mean the Crown is home free. As we have witnessed with the prevalence of NIMBY reactions, First Nations will similarly likely argue that the government should build its highway elsewhere. Alternatively, demands may legitimately be presented to receive significant financial and other direct benefits, as many Impact Benefit Agreements between Aboriginal parties and resource companies have demonstrated for 2 decades through guaranteeing training, employment, service contracts, royalties, profit shares, etc. may be acceptable. The Court’s requirement that titleholders must ensure that benefits pass to future generations will also trigger the need for longer term arrangements, especially where the land is being altered permanently or a resource (such as petroleum or minerals) is being dissipated.

The potential necessity to cancel a project, when in midstream or after its completion, will also be of vital concern to the private sector. Having spent potentially millions if not 100s of millions of dollars with encouragement from federal and/or provincial governments, any rejection of a major development will logically trigger a lawsuit by the company to recover all monetary losses versus the government that failed to obtain indigenous consent. What if the highway or other development has long since been built even though the Aboriginal title is still alive? Restoration of the prior state of the land may be possible in some circumstances, although the cost could be great. In many other situations it will simply be impossible to mitigate the damage done to the natural habitat. UNDRIP addressed this very issue by requiring states to provide compensation in “the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.”<sup>65</sup>

It is clearly arguable that municipal and regional governments will lose all regulatory authority over lands as soon as they are confirmed to be Aboriginal title lands, just as they do at present with Indian Act reserves. These governments will need even more in the future to reach agreements with neighbouring First Nations on how they can work together. The Federation of Canadian Municipalities and the Union of BC Municipalities have both been encouraging the development of such practical relationships for over 20 years. Formal compacts between Indian tribes with state and local governments are widespread in the USA regarding cross-deputization of police, shared correctional facilities, integrated water and sewage systems, road clearing, etc.



Photograph : Shawn/Wikimedia Commons [LINK](#)

The Tsilhqot’in Nation decision will dramatically increase the necessity for more cooperation at the local level in large parts of the country. Perhaps one of the bigger surprises in the judgement is the Court’s comments about the fragility of existing legislation after a declaration of Aboriginal title has been issued. McLachlin CJC stated:

*Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.*<sup>66</sup>

One of the major practical implications of the judgement is how difficult it will be for other First Nations, even those with very strong evidence in support of their title assertions, to follow in the footsteps of Tsilhqot’in Nation. It benefited from very limited presence from outsiders couples with being 1st to push through with their Aboriginal title claim. As they were breaking new legal ground, they were able to access test case funding to help cover the likely \$40,000,000 cost of litigation. Such financial support will not be readily available for others, while provincial governments have deep pockets to draw upon in asserting jurisdiction to control Crown land.

At the end of the day, the Supreme Court has delivered a watershed that will be the subject of comment, debate, anger and celebration for many years to come. It has elevated the status of Aboriginal title significantly in Canada in a manner that is already attracting attention among indigenous peoples and states in many parts of the world. The decision enhances the bargaining power for those First Nations who retain strong arguments that they still possess Aboriginal title to much of their traditional territory.

At the same time, it has further entrenched the status quo that underpins elements of colonialism based on a much criticized Discovery Doctrine. This doctrine continues to be legitimate in 2014 the right of European monarchs to have claimed overarching sovereignty and underlying title to lands they never saw, simply because their representatives asserted the claim in their royal names. While the Court accepted that the *terra nullius* doctrine was inapplicable – as millions of indigenous peoples occupied and governed their own parts of North America – it sustains the legal architecture that has supported the theft of most of the continent and marginalized indigenous self-determination. Our highest court has championed a goal of reconciliation, however, for that to be achieved there must be an honest effort to explain how indigenous sovereignty was displaced and rightful possession ignored for generations.

## Foot Notes

- 01 Tsilhqot'in Nation v. British Columbia, [2014] SCC 44; available at: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/14246/1/document.do> [Hereinafter Tsilqot'in SCC].
- 02 Evidence of the perceived significance of this decision is indicated through the presence of a Wikipedia page. See: [http://en.wikipedia.org/wiki/Tsilhqot'in\\_Nation\\_v.\\_British\\_Columbia](http://en.wikipedia.org/wiki/Tsilhqot'in_Nation_v._British_Columbia) and that Google search of the case name generates 35,800 hits in 0.42 seconds.
- 03 For details of the blockades, government promises, terms of the licence that was issued and later cancelled by the Crown and the lumber companies successful lawsuit against the provincial government for damages, see, Carrier Lumber Ltd. v. British Columbia, 1999 CanLII 6979 (BC SC).
- 04 "Decision Reached in Historical Land Claim Case: Tsilhqot'in Nation v. British Columbia, 2007 BCSC 1700" at: <http://nativemaps.org/node/2809> . Chief William spent a further 46 days giving evidence during the trial. Night sittings were held in Victoria so elders could share sacred knowledge through stories that could only be told after dark.
- 05 Nemiah Valley Indian Band v. Riverside Forest Products Ltd., 2001 BCSC 1641 (CanLII), 2001 BCSC 1641.
- 06 Tsilhqot'in Nation v. Canada Attorney General, [2002] S.C.C.A. No. 295 (QL) relying on the earlier decision in British Columbia (Minister of Forests) v. Okanagan Indian Band, 2003 SCC 71 (CanLII), 2003 SCC 71.
- 07 Aboriginal Law Group of Lawson Lundell LLP, "The Tsilhqot'in Nation v. British Columbia Case: What It Means and What It Doesn't Mean" at: <http://www.worldservicesgroup.com/publications.asp?action=article&artid=2189> .
- 08 Tsilhqot'in Nation v. British Columbia, 2007 BCSC 1700.
- 09 Ibid.
- 10 William v. British Columbia, 2012 BCCA 285
- 11 This situation only changed when the Australian High Court decisively rejected the application of the doctrine of terra nullius through *Mabo v The Queen* (No. 2) (1992) 175 (AusHC).
- 12 *Johnson v. M'Intosh*, 21 US 543 (1823); *The Cherokee Nation v. Georgia*, 30 US 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).
- 13 *St. Catherines Milling and Lumber Company v. The Queen*, [1888] 14 AC 46, at 53.
- 14 *R. v. Sparrow*, [1990] 1 SCR 1075, at 1103.
- 15 *Calder v. Attorney General of British Columbia*, [1973] SCR313.
- 16 *Guerin v. The Queen*, [1984] 2 SCR 335.
- 17 *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.
- 18 Ibid, per Lamer CJ at para 143.
- 19 *R. v. Marshall*; *R. v. Bernard*, [2005] SCC 43.
- 20 Ibid., at para 54.
- 21 *William v. British Columbia*, 2012 BCCA 285, at para 222.
- 22 Tsilhqot'in journey video: <http://www.youtube.com/watch?v=QbjIPGqOaMs&feature=youtu.be>. Subsequent parts to this video have also been posted on You Tube.
- 23 Note 1, supra, at para 24.
- 24 Tsilqot'in SCC at para 29.
- 25 *Western Australia v. Ward*, (2002) 213 CLR 1 (AusHC).
- 26 Tsilqot'in SCC at para 35.
- 27 Tsilqot'in SCC at para 38.
- 28 Ibid.
- 29 Tsilqot'in SCC at para 46.
- 30 Ibid. at para 56.
- 31 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511.
- 32 Tsilqot'in SCC at para 91.
- 33 Ibid.
- 34 Ibid. at para 70.
- 35 Ibid. at para 73.

- 36 Ibid. at para 75.
- 37 Ibid. at para 74.
- 38 Ibid. at para 76.
- 39 Ibid. at para 80.
- 40 Ibid. at para 81.
- 41 *R. v. Gladstone*, [1996] 2 SCR 723, at para 72, quoted with emphasis in Tsilqot'in SCC at para 81.
- 42 Tsilqot'in SCC at para 83.
- 43 Ibid at para 87.
- 44 Ibid.
- 45 Ibid at para 89.
- 46 Ibid at para 90.
- 47 Ibid. at para 101.
- 48 Ibid. at para 112.
- 49 Ibid. at para 115.
- 50 Ibid. at para 116.
- 51 Ibid. at para 69.
- 52 Ibid. at para 123.
- 53 Ibid. at para 124.
- 54 Ibid. at para 126.
- 55 The Supreme Court of Canada made clear in its first major decision on s. 35 of the Constitution Act, 1982 in *Regina v. Sparrow*, [1990] 1 S.C.R. 1075 that regulating aboriginal rights, even to a great extent, before 1982 is not enough to extinguish those same rights; rather they merely become narrower in scope through the regulation but return to greater meaning as if they had been sleeping and were awakened by s. 35 coming into force freed from those prior restrictions.
- 56 These areas of Atlantic Canada are affected by Treaties of Peace and Friendship negotiated by the Crown in from 1660 – 1761 with Mi'kmaq and Maliseet Nations in what is now Canada as well as a number of Indian nations in New England. These treaties did not include any extinguishment of Aboriginal title.
- 57 It should also be noted that many First Nations dispute explicit land surrender provisions in their treaties by asserting that such provisions were never part of the oral treaty negotiations such that their leaders never consented to any complete ceding of their territory, which was a concept that did not exist in their culture or their vocabulary.
- 58 The Australian High Court dealt with this issue very directly in its landmark judgement in *Mabo* (No. 2), note 11, supra. In Tsilqot'in the appellants expressly dropped seeking a declaration that included a small area of privately owned land as well as some lands submerged under water, even though the trial judge had included those lands as covered by Aboriginal title.
- 59 New Brunswick provides a stark exception to this pattern as many of the logging companies own their forests outright, although they still require provincial permits to log commercially.
- 60 Brian Hutchinson, "Supreme Court B.C. land-claim ruling has staggering implications for Canadian resource projects," *National Post*, June 26, 2014, <http://news.nationalpost.com/2014/06/26/supreme-court-b-c-land-claim-ruling-has-staggering-implications-for-canadian-energy-projects/> .
- 61 Jessica Clogg, "Tsilqot'in Nation v. British Columbia: Implications for the Enbridge Tankers and Pipelines Project," <http://wcel.org/resources/environmental-law-alert/tsilhqotin-nation-v-british-columbia-implications-enbridge-tankers> .
- 62 *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48.
- 63 Grand Chief Stewart Phillip, "UBCIC, Okanagan Nation Alliance & Shuswap Nation Tribal Council Welcome first declaration of Aboriginal Title," News Release, June 27, 2014, [http://www.ubcic.bc.ca/News\\_Releases/UBCICNews06271402.html#axzz39fccNNT1](http://www.ubcic.bc.ca/News_Releases/UBCICNews06271402.html#axzz39fccNNT1).
- 64 Tsilqot'in SCC at para 92.
- 65 UN Declaration on the Rights of Indigenous Peoples, Article 28(2).
- 66 Tsilqot'in SCC at para 92.

**This is a short poem I wrote some years ago  
but, sadly, its relevance lives on.**



## That Old Vision

As a child, it always seemed to me that older men  
loved war, except for some  
who knew Mars from silent hill walks.

These men were decorated in jaded colours  
and politics that hated sparkling eyes,  
and innocent sun among high clouds.

We are deep in enemy territory and  
enemy losses are heavy, cried the general  
with blood squelching through his eye teeth.

A poet glanced over his shoulder at the past  
pointing to a boy who shot his friend at dice.  
The boy's father runs free.

Some elders gouged out enemy hearts, found  
them guilty and flung them to children, but  
when a child fell upon a heart in peacetime,

the elders prayed before taking the child  
into the deep woods  
where they could hang him in peace.

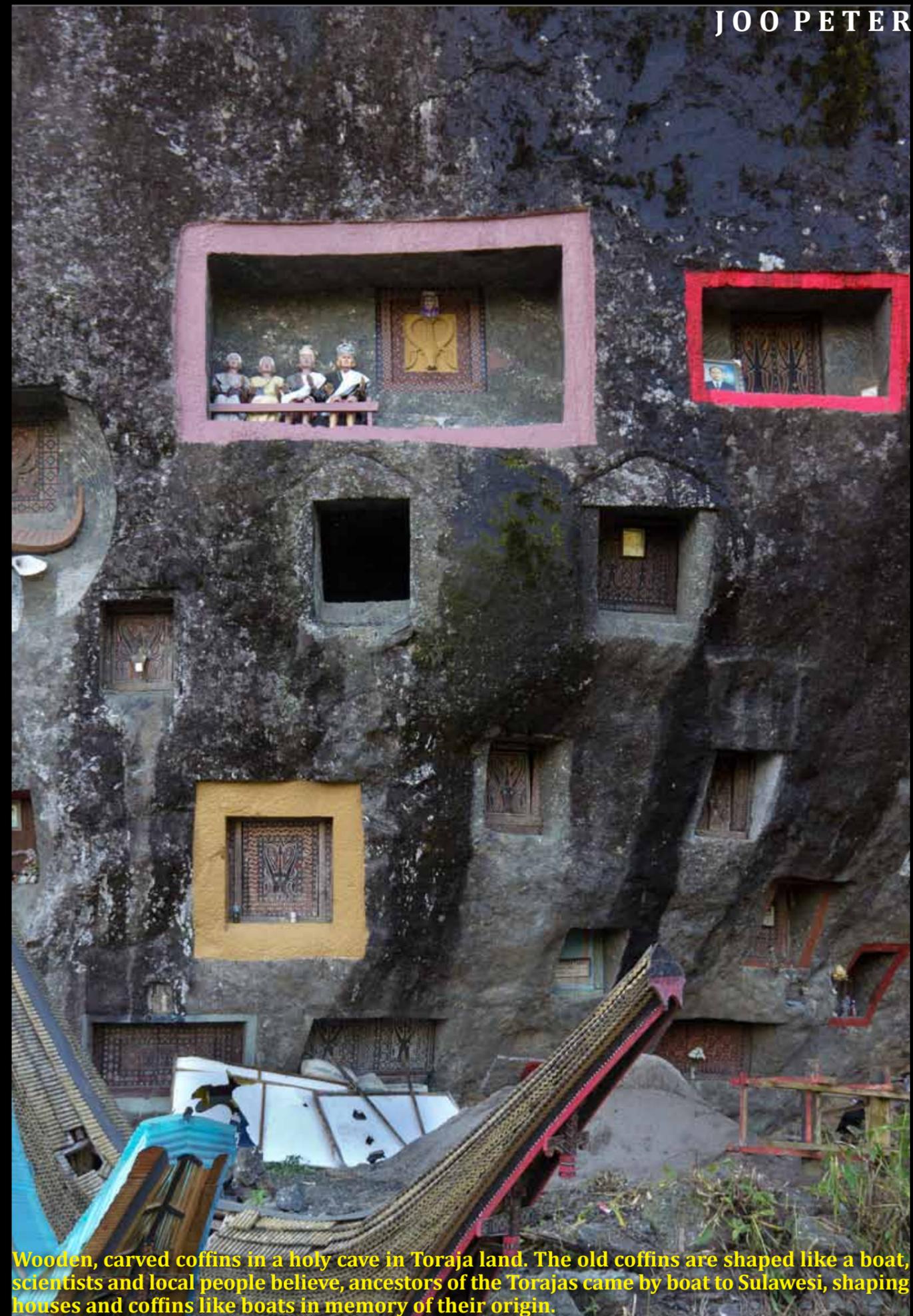
## Toraja People of Sulawesi, Indonesia

Living in the mountains of Sulawesi are the Toraja people who are proud, independent and smart. They keep a unique heritage alive and are famous for their Tau Tau figures, effigies of the deceased family members buried in caves in rocks. Major events are funerals in the village with sacrifices of buffalos. White buffalos are the most vulnerable.

When I was searching one of the caves hidden in the jungle for the ancient graveyards with boat-like shaped coffins and beautiful ornamental carvings, I met a rice farmer coming home from work. He told me that he was learning Spanish by himself and had visited Europe some time ago, travelling from Amsterdam to Vienna in winter time. Then he returned to work in the rice fields and built a new traditional house. That's the way Sulawesi people are. There might be a SUV in front of the home and the mummy of grandma in the back of the house: they know how to balance tradition and modern life.



Joo Peter - [www.joo-peter.photoshelter.com](http://www.joo-peter.photoshelter.com)



Wooden, carved coffins in a holy cave in Toraja land. The old coffins are shaped like a boat, scientists and local people believe, ancestors of the Torajas came by boat to Sulawesi, shaping houses and coffins like boats in memory of their origin.



Babies are buried in holes in holy trees, Toraja land, Sulawesi, Indonesia. The little doors covering the hole in the trees, where the babies are buried, are made of hairy palm strings, symbolizing the hair of the mother. Babies are spirits coming from nature, from the trees, so returning back to the trees. When the hole in the tree is closing in the following years, the spirit of the baby has successfully returned to spiritual world and is strong enough to help the family after its death, as a spirit.



Family member in traditional costume at a traditional funeral in a village in Toraja land, Sulawesi, Indonesia



Wooden, carved coffins in a holy cave in Toraja land. The old coffins are shaped like a boat, scientists and local people believe, ancestors of the Torajas came by boat to Sulawesi, shaping houses and coffins like boats in memory of their origin.



Man at a traditional funeral in a village in Toraja land.



Buffalo sacrifice at a funeral in a traditional village in Toraja land.



Traditional village in Toraja land. The traditional houses are called Tongkonan.



## To Trust and Trust Not!

All the [must-read, trendy liberal lefty news outlets](#) that have done their utmost to harm Israel are now hand-wringing about the massive spike in world antisemitism. Strange isn't it? Funny, that it's all [happened](#) since Israel began to pull its ground troops out of Gaza following Operation Protective Edge. Weird that the world's bravest, best war and defence correspondents with their accompanying cameramen were too timid to tell the truth while the war was at its height. Peculiar that we were treated to clip after clip of killed and maimed Palestinian women and children but of no dead or injured IDF troops – let alone any of terrified Israeli civilians running for their lives from the constant barrage of rockets on their homes in towns like Sederot and Be'er Sheva.

Odd, how the misjudged disappearance of late Israeli 2nd-Lt. [Hadar Goldin](#) was treated as devious Israeli Government P.R., while everyone decided to believe the outrageously deceitful 'Pollywood' productions staged at Hamas-held hospitals, churches and schools with their use of recycled, air-brushed photographs from other conflicts, people pretending to be dead or injured and doe-eyed children covered in latex fake blood patches. But don't worry! This sort of fauxtography has a fine history, starting as far back as [World War 1](#) with the con artistry of US-born RAF pilot, Wesley D Archer.

There's also huge competition for the best definition of chutzpa – the Yiddish word for brazen cheek. This time the gong goes jointly to all the major international news outlets, which together and apart allow themselves to be continually coerced, corrupted and otherwise manipulated by Hamas and the [sheiks](#) who fund them. Despite the phraseology generally employed, members of Hamas (Arabic for 'resistance') are not heroic freedom-fighting 'militants' but a bunch of snivelling toe rag terrorists who scavenge like rats in underground tunnels, exploit innocent children to help build them and hide behind tea-towel masks so as to appear as frightening as possible.

For more years than I care to recall, newspapers like The Guardian and The Independent with broadcast media led by BBC News and latterly Sky News have done their utmost to portray Israel as the prime pantomime villain of the M.E. Now Jews worldwide – even and especially those who profess to distance themselves from Israel – are reaping the poison that they sowed. [How dare The Guardian, the great anti-Israel manipulator pen this?](#) "Attacks on (U.K.) synagogues, Jewish shops and individuals – even children – are rising. They are inexcusable".

How could Rod Liddle, as a columnist for The Sunday Times, write solemnly about the [UK Jewish Film Festival-Tricycle Theatre](#) row : "As I see it, it is an act of antisemitism and may well be breaking the law, under section 29 of the Equality Act. Most of those involved in this grotesque act of discrimination are not really antisemitic. They are instead infantile, metro-liberal, radical chic narcissists ..."

Only the previous week, Times Newspapers had rejected anti-Hamas advertising featuring Nobel laureate Elie Wiesel, because those making the decision feared the strong wording would [offend readers!](#) However, with customary bare-faced audacity, The Guardian picked up the gauntlet and was due to run the advertisement on Tuesday 11 August. I could go on, mention an erudite feature by [The Telegraph's](#) Charles Moore or the personal article by [Hilary Freeman](#), one of the Mail Online's Jewish reporters. I am sure both individuals are sincere. But as I wrote in October last year, I worry about the Mail's ambivalent attitude to Jewish matters. When it surfaces like it did during a campaign to destroy Ed Miliband's credibility as Labour leader by impugning his late father, Ralph's loyalty to Britain it leaves the stench of stale Nazism hanging in the air. Alas, I have too many similar examples to include here.

All of which brings me to the sudden resignation of Sayeeda Baroness Warsi, who until early August was serving as Foreign Office Minister in Conservative Prime Minister David Cameron's cabinet. There may be many reasons why Baroness Warsi resigned, but like other people (please see pro-Israel commentator, Douglas Murray's views above) I suggest her policy about [Israel's war with Hamas](#) in Gaza comes some way down the list. Understandably, she is less pro-community cohesion than anti-Islamophobia; more concerned about her precarious position at Westminster than in [inventive Holocaust remembrance](#).

However her response to Chancellor George Osborne, who claimed her resignation was 'unnecessary', was noteworthy:

"My actions", she retorted with a thinly veiled reference to IDF Operation Protective Edge in Gaza, "would not have been necessary if he had done what he should have done, which is pick up the phone to people he is incredibly close to and say, 'It's unnecessary for you to meet your ends by taking out power stations, taking out homes, taking out schools and killing kids on beaches'".

Also revealing was an episode some years ago when the 'principled' Lady Warsi [spoke in Urdu](#) during a dinner in Rotherham, Yorkshire and praised fellow Muslim peer Nazir Lord Ahmed. She then remarked: "One of the lessons we have learnt ... is that not all Muslims who go into politics are principled. Not all Muslims that are involved with politics are Lord Ahmed. Not all of them put their community first, and career second".

This is the same Lord Ahmed who has been imprisoned for dangerous driving and later resigned from the Labour Party over allegations of antisemitism. Principles are, as principles do. I rest my case.



Synagogue in Hove, 2nd August (photo by F.Sharpe). Courtesy CST.

## UK antisemitism reflections

### Mark Gardner

Director of Communications at Community Security Trust, a charity that provides security for Britain's Jewish communities

[Link](#)

July 2014 now joins January 2009 as a month when war between Israel and Hamas caused antisemitism to spew forth across Britain. If this latest round of Middle East violence has now ended, then we may expect the antisemitism to gradually diminish: but this hatred has again been revealed, even if most of the time it lies beneath the surface. Are British Jews (and those elsewhere) to be forever held hostage to a seemingly intractable conflict in which totalitarian Jihadists are sworn to destroy Israel at whatever cost?

Members of the public expressing fears and concerns to CST have referenced this in different ways. One said she felt "stuck in a swamp". Another said that the hatred had come from "ordinary people, not what or who we expect it from...its the underlying anti-semitism, and now that they've put it out there, how are we supposed to put it back?". It may sound trite to speak of Jews defriending others on Facebook, but anecdotally, this seems to be happening again and again, with Jews deeply upset by what this conflict has revealed about those whom they believed to be their friends (in all meanings of the word).

Finally, two antisemitic incidents out of over two hundred, giving the merest hint of recent events. The first speaks volumes of how Jews risk being expected to behave: and the reactions they risk upon refusal.

1. Synagogue in Hove, 2nd August (photo by F.Sharpe) on title page.

Bare statistics do not, cannot, explain the emotion that many people are feeling right now: but they are stark. CST has now recorded over 200 antisemitic incidents for July 2014, making it very clearly the second worst month we have seen since our records began in 1984. (The worst was Jan' 2009, when 288 incidents were recorded. The second worst was Feb' 2009, with 114 incidents.) The July 2014 total is not yet finalised, because it takes time to properly analyse and categorise all of the reports reaching us from throughout Britain right now, so the figure of 200 is an absolute minimum.

Of course, antisemitic incidents occur every day, week and month of the year. CST recorded 304 between January and June 2014 (a rise of 36% from 2013). We now have over 200 in one month, so the maths are clear. Not every July incident relates to the Israel-Hamas conflict, but the majority do. Without listing every one of them, it is almost impossible to convey the scale and the impact of the invective, but each and every incident involves at least one victim and at least one perpetrator. They come randomly at Jews and Jewish locations throughout the country. Many of them appear to be perpetrated by Muslim youth and adults, but by no means all. That this racism is perpetrated in the name of human rights (for Palestinians) is bizarre, but nothing new: although it does help explain the deafening silence from the self-titled anti-racism movement. (Hope not Hate does not fit this category and is a [strong exception](#).)

The hatred is showing clear trends. Shouting "Free Gaza" on a pro-Palestinian demonstration is not antisemitic: but obviously is when yelled at a random Jew in the street, or when daubed on a synagogue wall. The same goes for screams of "child murderer", shouted at Jews or [pinned](#) on a synagogue. Then, there is the ever present antisemitic fixation with Nazism. This comes two ways, Jews being told that they are the new Nazis, or Jews being told that "Hitler was right" (a phrase that [trended](#) on Twitter).

Child murderer has a long history in antisemitism, almost 2,000 years longer than Nazism does. The accusation of Jews having killed Jesus, the embodiment of innocence, moved into medieval blood libels. Some Jews perceive sections of the UK media as having focussed to such an extent upon Gazan child victims in this latest conflict that it somehow indicates that these blood libels still lurk somewhere deep. Others would counter that this kind of 'unconscious antisemitism' argument is ridiculous and that the media could not focus upon dead and injured children if they did not actually exist, nor in such numbers. The fact remains: British Jews are being called child-murderers. The Nazi slanders and threats are not in mainstream media, but the question 'why didn't Jews / Israel learn the lessons of the Holocaust?' has been. This is surely repellent to the overwhelming majority of Jews. It comes posed as a question, but really it is a demand. Whatever its motivation, it smells of Jew-Israel-Nazi equivalence and 'we are holier than thou'.

2. Street in Bradford, evening of 26th July. A Jewish man and his wife were driving when they became caught in slow moving traffic due to an accident up the road. Every car in the queue was being stopped by a group of apparently Muslim men and women, carrying buckets and asking for money for Gaza. The Jewish man politely declined to donate, whereupon "you f\*\*king Jewish bastard!" was shouted at him. Then, another man used a loudhailer to also shout "you f\*\*king Jewish bastard!" at him. Next, "Jewish bastard coming down the road!" was shouted down the street to alert each of the other collectors.

The super-heated arguments of how the media covers Israel are not strictly CST's business; and neither are boycotts of Israel. Nevertheless, it is impossible to discuss how Jews feel right now without noting how both things impact upon antisemitism, upon how Jews are perceived and how Jews themselves feel.

One need not be a dyed in the wool defender of Israel, nor even a Zionist, to suspect that no other country on earth appears to evoke such passion and hatred. We need not cite Syria right now, nor Sri Lanka in 2009, because Britain itself has killed civilians in the Middle East in recent years, children included. Yet it is only one section of British society that is called "child-murderers", or "Nazis", or is told that Hitler should have wiped them all out.

Less rhetorically, we must note that antisemitic incidents will subside along with the images on people's television screens, but the long term damage to Jews of anti-Israel boycotts will persist. [Dry statistics](#) help us to measure the raw impact of this. If someone engages in "criticism of Israel" then 6% of British Jews consider that person "definitely antisemitic" and 27% answer "probably antisemitic". If that person supports a boycott of Israel, then 34% of British Jews consider them "definitely antisemitic" and 33% "probably antisemitic". So, boycott of Israel is a tipping point for most Jews in regarding criticism as being antisemitic or not. One consequence of this latest Israel-Hamas war will be a lot more boycotts, either through choice (such as trade unions and cultural venues) or through intimidation (such as commercial outlets). Just as Israel is being singled out for scrutiny and boycott, so many Jews are going to feel the same way.

When the Jewish Film Festival is given a 'ditch your Israeli Embassy link' [ultimatum](#) by the Tricycle Theatre in Kilburn, it betrays how British Jews' connections to Israel are the measure by which others judge them. The same applies to the National Union of Students decision to boycott Israel, which promises no end of trouble and intimidation for [Jewish students](#). Then, there are the mass intimidations of supermarkets that dare to sell Israeli goods, some of which have actually been forced to briefly stop trading as a result. (As cheerfully [relayed here](#) by a Labour MP.)

The Norwegian Peacebuilding Resource Centre (NOREF) is a resource centre integrating knowledge and experience to strengthen peacebuilding policy and practice. Established in 2008, it collaborates and promotes collaboration with a wide network of researchers, policymakers and practitioners in Norway and abroad.



Photo : Saudi\_women\_on\_Eid\_AFP

## Triangle of change: the situation of women in Saudi Arabia

Eman Alhussein

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### Executive summary

The current situation of Saudi women is influenced by three dominant and interlocking factors – the legal, the social and the economic. Because Saudi law is uncodified, powerful clergy are opposed to codification and make important legal judgments shaped and moulded by social norms, customs and conventions, with often-detrimental effects on women's legal and economic status. The "exclusiveness" pretext – the perception of the "unique" and "exclusive" nature of Saudi culture – has been used to integrate and maintain socially conservative norms and traditions in Saudi society that cannot be easily refuted or altered.

Royal decrees have been a primary vehicle for changing and challenging conservative norms and customs – allowing women greater access to job opportunities and public office and increased visibility in the public sphere. Economic pressures and factors have also contributed. The current analysis will explain the complex and dynamic interactions between the social, legal and economic factors influencing Saudi women's situation today in light of recent developments in the country.

The legal system in Saudi Arabia has not, however, been codified, because the powerful clerical class opposes any attempts at codification. These opponents argue against the development of law (*qanun*) because, firstly, law represents human-made regulations.

### The legal complexity of Saudi law pertaining to women

The legal system in Saudi Arabia is based on sharia or Islamic law, which has two primary sources, i.e. the Quran and the Sunnah (which are the practices and way of life advocated by the Prophet Muhammad). Sharia provides the principles in terms of which all legal matters are judged and resolved by clerics in the country's courts.

The legal system in Saudi Arabia has not, however, been codified, because the powerful clerical class opposes any attempts at codification. These opponents argue against the development of law (*qanun*) because, firstly, law represents human-made regulations. Secondly, the clerical class argues that such laws and regulations are contrary to an approach where legislation is interpreted (*ijtihad*) from the divine text. Because there are no written laws, judges and legal scholars tend to perform *ijtihad* by interpreting the texts in the way they find suitable.

Those who oppose codification insist on maintaining the *ijtihad* tradition. Furthermore, it is feared that codification will put an end to interpretation, which is seen as vital for the continuity of the Islamic heritage. Therefore, when referring to legislation, the term "regulation" (*nizam*) is used rather than "law" (*qanun*) to avoid creating lexical tensions. Those who call for the codification of the sharia (*taqin al-Sharia*) typically use the word *tadwin* (to record) rather than *taqin* (to codify).

What is more, judges rule differently on similar cases because their rulings rely on personal judgment and interpretation. This results in different readings and verdicts, demonstrating the need for codification in order to maintain a level of consistency. This need is especially relevant to cases that address women and their rights, because the current situation perpetuates laws that create constraints on women in both the private and public spheres. Not clarifying and standardising the terminologies used by judges and legal scholars sometimes leads to violations of women's rights.

This argument is especially relevant to the issue of *ahliyyat al mar'ah* (the competence of women), which has restricted women's role in the public sphere and bound them to a guardianship system that contradicts the principles of Islamic sharia. Because the laws are not codified, women must rely on their guardians' consent to manage their daily lives, including financial matters, education and work.

A 2004 study presented as part of the National Dialogue (*al-hiwar al-watani*), an annual event organised by the King 'Abd al-'Aziz Centre for Dialogue, established in 2003 to foster tolerance and understanding, examines Saudi women's increasing awareness of the differences between norms, customs and religion.

### The social constraints

During the 1980s and 1990s Saudi society was influenced by an unofficial religious discourse that evolved from being purely religious to becoming religiopolitical, especially following the Gulf War in 1991. This trend, especially in the absence of counter-discourses, contributed to shaping the current social and cultural structure of Saudi society with its underlying complexities and inconsistencies. Social factors are perhaps the most challenging for women because they maintain prevailing norms and perceptions, including the pretext of "exclusiveness" (*khususiyah*), which is the perception many Saudis have of their society and culture. It is argued that since the country is the birthplace of Islam and the land of the religion's two most holy cities, the country must preserve a unique Islamic identity and the distinct social characteristics of Saudi society.

One of the issues that is not fully addressed and analysed in scholarly work on Saudi Arabia is the country's social structure itself. There seems to be a tendency to categorise Saudis into two social groups, conservatives and liberals. However, some Saudi observers claim that only one group is capable of generating widespread support, i.e. the politically active Islamist movement (*al-tayyar al-Islami al-haraki*), which consists of people with an Islamist inclination. This movement shapes the legal system through organised social opposition to the introduction of any changes in the country, such as the United Nations Convention on the Elimination of All Forms of Discrimination against Women.

Furthermore, the issue of women and their situation is a highly politicised one among the various factions in Saudi society. For example, the politically active Islamist movement argues that norms and customs in Saudi Arabia protect women and, therefore, should be maintained. Conversely, the modernising movement (*al-tayyar al-tahdithi*) aims to highlight the distinction between norms and traditions, on the one hand, and religion, on the other, because it has become challenging for individuals and society as a whole to separate norms and customs from religion after decades of maintaining this religious discourse.

A 2004 study presented as part of the National Dialogue (*al-hiwar al-watani*), an annual event organised by the King 'Abd al-'Aziz Centre for Dialogue, established in 2003 to foster tolerance and understanding, examines Saudi women's increasing awareness of the differences between norms, customs and religion. The study confirmed that customs and norms are mixed in with and inform religious provisions, influencing how Saudi women perceive their rights and situation. Many judges and legal scholars tend to maintain social norms through their legal actions, decisions and judgments, demonstrating that the intermingling of these two constructs affects women.

There seems to be a general consensus in Saudi Arabia among both women and men that the problematic nature of granting women's rights stems not from sharia itself, but from customary laws and practices, which are responsible for restricting women's freedom to control their own lives.

### **The social constraints *contd...***

For example, women's freedom of mobility and the restrictions imposed by the guardianship system are both heavily rooted in cultural customs and backed by the legal system. This situation is further complicated by the fact that until recently women were not allowed to study law – an issue discussed in more detail in a later section.

There seems to be a general consensus in Saudi Arabia among both women and men that the problematic nature of granting women's rights stems not from sharia itself, but from customary laws and practices, which are responsible for restricting women's freedom to control their own lives. For example, they cannot apply for their own passports because the governing regulations for the issuing and renewal of Saudi passports require women to be accompanied by a male guardian. Furthermore, women need a *mu'arif* (a male relative who identifies the woman) and sometimes are required to provide *sak ithbat alhayat* (proof of life identification), regardless of their physical presence before the concerned authorities.

### **The economic challenges**

After King 'Abd al-'Aziz unified Saudi Arabia in 1932, Saudi society maintained a conservative tribal structure. With the oil boom in the 1960s and 1970s some changes began and more openness was witnessed in the country. Saudi girls and women were allowed into schools and colleges, and Saudi men were employed in government offices and other sectors of the country's thriving economy.

During the siege of Mecca in 1979 armed religious extremists took over the Grand Mosque to contest what they viewed as excessive Westernisation. There were immediate negative consequences for Saudi society and particularly for women (whose rights were seen as linked to Westernisation). The openness that was previously witnessed was reduced. At the same time, enabled by the country's wealth and in an attempt to appease the religious fundamentalists, the government opted to implement segregation between the sexes in workplaces and the public sphere. This is one of the historical reasons why women in Saudi Arabia make up a small proportion of the workforce, because gender segregation is partly responsible for the low number of women in various sectors of the economy.

Breaking this norm by allowing women to work in unsegregated areas was one of the main issues that infuriated the active Islamist movement, and opposition remains prevalent today. The opposition perspective on the issue of feminising shops is related to a number of royal decrees and orders that stress the importance of segregation between men and women. For example, the Council of

This discussion of norms and practices related to gender segregation has historically hindered Saudi women's access and entry to the labour market, as has extensive reliance on foreign workers. However, recent developments, including the economic need of some Saudi families for additional sources of income, resulted in a royal decree in 2011 that allowed women to work in domains that were previously restricted to men.

Ministers issued Order 759/8 in 2001 to stress the importance of segregation between men and women in the workplace. This order followed on the previous Royal Order 11651, issued in March 1983, forbidding women from being employed in jobs that allow mixing with men. According to the opposition, it is vital to follow these basic tenets that require segregation, and failure to do so risks harming the country's social fabric.

This discussion of norms and practices related to gender segregation has historically hindered Saudi women's access and entry to the labour market, as has extensive reliance on foreign workers. However, recent developments, including the economic need of some Saudi families for additional sources of income, resulted in a royal decree in 2011 that allowed women to work in domains that were previously restricted to men. This, crucially, helped legalise women's entry into the retail sector. The widespread opposition to this decree did not stop its enforcement and the creation of 500,000 jobs for women in less than three years. As a result, women have become more visible in the work force and public sphere.

### **The situation today**

When discussing women's rights, a number of issues are usually raised by various groups of Saudi women. To some, the guardianship system is one of the main issues that need to be dealt with to allow women more freedom and rights. Other issues that are also discussed include underemployment, education reform and the codification of sharia. However, both domestically and especially internationally, the issue of allowing women to drive often takes precedence.

The driving revolt in 1990, which was an attempt to break away from the pretext of "exclusiveness", was highly resented by the active Islamist movement. It was also widely opposed by other factions in Saudi society. This resentment re-emerged when a number of Saudi activists attempted to revive the driving debate in 2011. Both attempts in 1990 and 2011 were seen by many as contrary to a collective social and cultural identity. The driving campaign of October 26th 2013 and those that followed are examples of how change in Saudi is determined by the three factors outlined above. Activity on social media websites during the run-up to the 2013 driving campaign confirmed the continuous opposition from a large portion of the population, regardless of how vocal some Saudi women were in trying to defeat the ban. Also, a large number of Saudi women remained silent regarding the driving issue, not because they are against it, but because they know the social fabric of the country and that change can only be introduced gradually. This is especially so since many women can see that their situation has improved significantly since King 'Abd Allah's accession to the throne in 2005.

The driving ban has not been lifted partly due to the interplay among social, economic and legal factors; however, a number of developments are challenging the status quo. For example, economically, following the crackdown on illegal workers in late 2013, drivers' salaries have risen, putting economic pressure on women and families – which might lead to the eventual acceptance of attempts to lift the driving ban.

### **The situation today *contd...***

One of the most important changes that affected Saudi women in the past decade has been the increased visibility of women especially in the retail sector, as discussed above. In a highly patriarchal society women have rarely been considered as individuals; they are typically viewed as a part of the family unit in both private and public. This viewpoint has gradually changed as women have become more visible and, most importantly, have been increasingly considered as individuals. Therefore, when King 'Abd Allah issued a royal decree to include women in the advisory Shura Council in January 2013, women became both formal members of and visible in the highest political body in the country. In 2015 Saudi women will for the first time take part in the upcoming municipal elections as both voters and candidates.

The driving ban has not been lifted partly due to the interplay among social, economic and legal factors; however, a number of developments are challenging the status quo. For example, economically, following the crackdown on illegal workers in late 2013, drivers' salaries have risen, putting economic pressure on women and families – which might lead to the eventual acceptance of attempts to lift the driving ban. Socially, the issue of women driving has been widely discussed on social media and is no longer highly controversial. A book by two women who took part in the 1990 driving campaign was published in 2013 and details their struggle. This book is widely available in Saudi Arabia, along with other publications on women's rights. Legally, the inclusion of women in the court system as lawyers, and their overall growing presence in the workplace, may in turn help bring about further reform, possibly also affecting the driving ban.

The increased visibility of and greater public roles for women as individuals will likely lead to further normalisation in society. This transformation will help women realise their individuality and prompt additional changes to their situation. Furthermore, greater visibility in the Shura Council will help women voice their opinions in formal positions. In an unprecedented move, three female members of the council submitted a recommendation in October 2013 to lift the driving ban.

The "feminisation" of Saudi employment in shops was also enforced by royal decree, despite widespread opposition, as discussed above. In 2011 the first phase of the feminisation process started, but only targeted certain women's stores, resulting in the hiring of 43,383 Saudi women. In 2012 the second phase was launched, which allowed women to work in a wider variety of shops, increasing the number of female employees to 201,411 initially, and then to 454,274 in 2013. The last phase was launched in March 2014 and includes allowing women to work in smaller shops that do not have to be part of a complex or a shopping centre.

Women law graduates are also present in various organisations that promote women's awareness of their rights, such as the Mawaddah Foundation, which helps women obtain their rights after divorce, and the Tarahum Foundation, which supports female prisoners. All of these efforts by various organisations working to promote women's rights aided in the passing of the first domestic violence law in the history of the Kingdom in August 2013.

Lastly, one of the main obstacles women face in Saudi Arabia is the reform of the judicial system and the codification of personal status laws. Until recently Saudi women were not allowed to study law. Now, women law graduates are absorbed in various sectors of the country. Women law graduates are also present in various organisations that promote women's awareness of their rights, such as the Mawaddah Foundation, which helps women obtain their rights after divorce, and the Tarahum Foundation, which supports female prisoners. All of these efforts by various organisations working to promote women's rights aided in the passing of the first domestic violence law in the history of the Kingdom in August 2013. Also, in October 2013 women were allowed to obtain licences to practise law. In January 2014 the first female law firm was opened in Jeddah by a Saudi woman. All these changes in just two years appear to many to be promising indicators of wider possible reforms to the country's judicial system in the future.

### **Conclusion**

The reform agenda has taken some important steps, even though it has not fulfilled all of the aspirations of women in Saudi Arabia. Saudi women, especially those who advocate for more reforms, acknowledge the progress in recent years. This has included more women in the job market, the opening of some spaces of study (i.e. law), the acknowledgement of female political participation and the opening up of new opportunities for women. While some argue that the changes introduced are insufficient, the social, economic, legal and even historical factors that create this marginalisation have been accumulating over the last few decades and cannot be changed overnight or simply by rapidly introducing a series of royal decrees.

Recent developments related to all three factors discussed above signal the prospects for more changes to be made to the situation of women in Saudi Arabia.



## Equal freedom for all requires limiting freedom of expression

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The federal Government [claims that it has a 'freedom agenda'](#). Part of this agenda involves repealing section 18C of the *Racial Discrimination Act 1975*. This 'offensive behaviour' section makes it unlawful to publically offend, insult, humiliate or intimidate people on the basis of their race. The section has been in operation since 1995 and has been restrictively interpreted by the courts: in order to be unlawful the [behaviour must have a 'profound and serious' impact](#). The Government wants to replace section 18C with a new section making it unlawful only to 'vilify' or 'intimidate' people on the basis of their race. [Attorney-General George Brandis](#) says that the changes 'will strengthen the Act's protections against racism, while at the same time removing provisions which unreasonably limit freedom of speech.' A close look at the proposed amendments demonstrates, however, that they do not strengthen protections against racism.

### What is the substance of the proposed amendments?

The amendments repeal sections 18B, 18C, 18D and 18E of the Racial Discrimination Act. Currently, section 18B provides that if an act is done for two or more reasons, any one of which 'is the race, colour or national or ethnic origin of a person', then that act is taken to have been done because of the person's race, colour (etc.).

Section 18C(1) prohibits acts done in public that are:

- (a) *'...reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and' are*
- (b) *'...done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.'*

While unlawful, acts in breach of this section do not constitute a criminal offence – instead, they may be the subject of complaints to the Australian Human Rights Commission.

Section 18D lists exemptions for acts done 'reasonably and in good faith' in certain contexts. This means that otherwise offensive acts that are part of artistic performances or academic debates, for example, or are the subject of fair and accurate reporting, are not unlawful. Section 18E makes employers liable for the acts of their employees or agents that are unlawful under section 18C, unless the employer has taken all reasonable steps to prevent the unlawful behaviour. The proposed amendments *insert* a new section in the Act making acts done in public unlawful if they are reasonably likely to *vilify* or *intimidate* another person or group of persons and the acts are done because of the race, colour or national or ethnic origin of that person or group of persons. What counts as vilification or intimidation is narrowly defined, with the word 'vilify' specified to mean 'inciting hatred against

a person or a group of persons', and the word 'intimidate' to mean 'cause fear of physical harm'. The proposed section further specifies that assessing whether an act is *reasonably likely* to vilify or intimidate involves taking into account 'the standards of an ordinary reasonable member of the Australian community, not...the standards of any particular group within the Australian community'. The section also exempts any material 'communicated in the course of...public discussion' from being unlawful under the Act. Given the removal of protection against offensive, insulting, and humiliating behaviour, along with the fact that vilification and intimidation are so narrowly defined in the proposed amendments and the exemption for public discussion is so broad, the changes cannot plausibly be described as strengthening protections against racism.

### Reasonable limitations on freedom of expression

While the proposed amendments do not strengthen protections against racism, do they remove limitations on freedom of speech that are unreasonable in a liberal society?

In this year's [Alice Tay Lecture on Law and Human Rights](#), Federal Race Discrimination Commissioner Dr Tim Soutphommasane considers the meaning of 'freedom' in the liberal tradition. [He argues](#) that the enjoyment of equal spheres of freedom for all members of society – those who are potentially objects of racism as well as those who may hold racist views – requires placing some modest limits on freedom of expression, such as the limits currently contained in section 18C of the *Racial Discrimination Act*. This is the case, he says, because racism has a silencing effect on those who are subject to it, making it more difficult for them to freely express themselves and to air their perspectives in public. Testimony from people who encounter racism supports his claim. Given the impacts of racism, the limits on expression contained in section 18C are reasonable in a society committed to securing equal freedom for all.

Ironically, the Government has been unwilling to air the details of a public review of the proposed amendments. While the Attorney-General's department [refused a Freedom of Information request](#) by Fairfax media to view submissions to the inquiry, it was revealed today following a successful FOI request by Simon Rice from ANU's Faculty of Law that [76% of submissions to the review](#) agree with Dr Soutphommasane and oppose the changes. Despite this opposition, [Senator Brandis remains committed to amending the Racial Discrimination Act](#), although he is now working on 'a compromise wording for 18C'. It is difficult to see how his determination to amend the Act is consistent either with providing stronger protections against racism or with enhancing freedom for all.

\* With thanks to guest editor, [Rosemary Grey](#)



## When the earth is cut

Indigenous peoples were one with the land  
 But the earth on which their ancestors  
 Played and prayed and slaughtered and danced  
 Was ripped open by mining, left barren by deforestation

The soul of the community wept  
 Fought to protect the land and water, flora and fauna  
 The traditions and culture  
 Which relied upon nature and protected it  
 Tribal populations were thrust onto the frontline  
 Of human rights abuses from misplaced corporate power

“Civilised” societies use genocide and slavery  
 To steal land, resources and labour  
 So that progress knows no barrier  
 Wealth no bounds

Morality and legality were savaged  
 As we named *them* savages

They sit on another frontline  
 That of protecting culture and ecology  
 On behalf of us all  
 Mapping biodiversity through an intricate interplay

As languages have become lost  
 To ubiquitous tones  
 Oral traditions silent  
 Which once told of the parting of islands by great gods  
 Of the splendour of mountains and rivers  
 Landscapes now plundered and  
 For sale by the State

The demand for indigenous knowledge is at an all-time high  
 A marketable commodity  
 Resulting in abuse, rather than respect

**What of triumph among this injustice**

The EU fights the “biopiracy” of multinationals  
 Who exploit medicinal plants and traditional remedies  
 Without sharing the profits with aboriginal peoples

A landmark ruling from the Supreme Court of Canada  
 Recognises aboriginal land title  
 Setting a historic precedent affecting resource rights

### **Yet injustice among triumph**

In 2006, Botswana’s High Court ruled  
 the Bushmen’s eviction from their ancestral land  
 Was “unlawful and unconstitutional”  
 Yet the government continues its persecution

Can the rest of the world learn what aboriginals know  
**That when the earth is cut, so are we**

Imagine a neater way for justice to balance her scales  
 Tar sands miners destroy the earth’s water balance  
 An activity curtailed by Canada’s supreme court judgement

Imagine this:  
 The CEO who ordered the mining operation  
 The government official who sanctioned it  
 Has the water balance in their own body destroyed  
 So they are always thirsty

Their head throbbing unrelentingly  
 Unable to live without pain

Until they rectify their decision  
 Then and only then, is the balance in their own body  
 And the earth’s balance  
 Restored

**For when the earth is cut, so are we.**



## Romancing the Lavani



Sushama Deshpande

The year – 1814. An elaborately decorated hall with ornate pillars and crystal chandeliers is lined up with Maratha bejeweled chieftains dressed in expensive silk, swilling alcohol in and lustily ogling a woman. They are all watching a beautiful dancer, graceful as a gazelle, her voice sweet like a mynah bird swaying suggestively to lascivious lyrics. She and her musical accomplices are the only women in the hall. This is the house of ‘ill repute’ where ‘immoral women’ perform.

Forward to the year 2014. An air-conditioned auditorium is filled to the brim with “cultured” men and women all dressed in their finery. They watch and applaud an acclaimed and respected dancer perform a Maharashtrian “folk dance”. She sways suggestively to lascivious lyrics. This is a cultural event where respected artistes perform.

‘Tamasha’ a dance form derived from various other traditional forms of entertainment is the principal folk theatre of Maharashtra. It served as a racy, titillating form of entertainment for armies of Maratha and Moughul chieftains and was also present in some form during the rule of the Peshwas. What were popularly known as Lavani Tamashas found a substantial audience in the court of Bajirao Peshwa II from 1774 to 1818. However, when the Peshwa rule came to an end with Bajirao's surrender to the British, the Tamasha was forced to seek new sources of patronage. The lavani tamasha soon shifted to rural areas.

During this period, classical drama took the place of tamasha. While the traditional drama was perceived as moral and appropriate, the tamasha was seen as immoral and inappropriate. Respectable women did not perform in public, so the “respectable” drama had men performing women’s roles while the tamasha had women performing song and dance, resulting in the labeling of these women as licentious

The dance which was performed by a certain class and caste of women and was considered a part of their lineage was now being performed by women from respectable families thus putting an end to the history and lineage of a long line of performers. Though the art form has received an altered and celebrated "folk" status, the life histories of the traditional tamasha performers have remained largely invisible.

The tamasha characteristically began with a *gan* (a devotional offering to Lord Ganesha) and a *gavlan* (a comical act performed by the effeminate male artists through exaggerated feminine gestures). This was followed by the *shringarik lavani* (erotic song) and the *mujra* or collection of rewards. The *lavani* articulated female desire in explicit sexual terms and was almost entirely composed by males and performed by women before an almost entirely male audience, the elite among whom could bid for the sexual services of the female performers.

Change is inevitable they say and the tamasha is no exception to this rule. It has undergone several transformations since its inception in form and style, but the most significant mutation of the art form is reflected in the attempt to "purify" it.

Post-independence a sense of urgency to conserve Indian culture led to a new interest in regional cultural expression, leading to the rediscovery and reassessment of many art forms. The largely decadent tamasha went through a remarkable revival and refinement. The transformation that resulted was not only applicable to the art form itself but also to the practitioners of the art form. With attention and a certain amount of governmental support from the national and state Sangeet Natak Akademis the tamasha was altered to be more presentable to a family audience. The dance which was performed by a certain class and caste of women and was considered a part of their lineage was now being performed by women from respectable families thus putting an end to the history and lineage of a long line of performers. Though the art form has received an altered and celebrated "folk" status, the life histories of the traditional tamasha performers have remained largely invisible. A recent theatrical presentation of life histories of tamasha performers however, sheds light on implications of the transformation and the 'resistance' of these female artists. Did these women, essentially ignored by society find a respectable place in it after this cultural refinement? Did their lives change for the better?

Tichya Aaichi Goshta Arthat Mazya Athavanicha Pahad (Her mother's story, indeed a mountain of my memories), a one-person riveting play by renowned Marathi writer and theatre personality, Sushama Deshpande answers all these questions. It presents the life sketch of a tamasha dancer, Hira through a dialogue between Hira and her journalist daughter Ratna, and Hira's reflection on her life, society and her place in it. Hira has been presented a prestigious award by the government of India her excellence in the "art form". This has changed Ratna's perception of her mother but, very little has as far as Hira's place in the society is concerned.

Hira talks about her relationship with her mother who was also a tamasha dancer. Her grace, her voice, her allure. Hira looked up to her. Though her mother was a good artiste she was viewed with contempt.

When reflecting on the play, Sushama Deshpade shared, "I felt like writing a play on tamasha performers because when I met the women I realized how fascinating they were. They were truly empowered. They are acutely aware of the fact that they are being exploited but they make peace with the fact because they realize that they have to earn. Their relationships with their children are very complex because of the nature of their profession, there is a lack of respect from the children's end as they don't realize what good human beings their mothers are.

Hira, with quivering lips and a heavy heart recounts how she had to pay money to the court just to be able to cremate her mother as her mother's profession did not allow her to fit within the moral boundaries of society.

Hira is not even allowed to attend her lover's funeral; the father of her two children. He was a good man, he respected her art and loved her. Hira can't say the same for her son, who she feels is a product of the male dominated society with a strong chauvinist ego reflected in his thinking. Her daughter however she feels is smart, determined and dashing.

Through the play Hira she reflects on her father, some of her mother's clients and her childhood. She talks about her clients, her colleagues, how her relationship with the father of her children developed and about her love and respect for her art form.

When reflecting on the play, Sushama Deshpade shared, "I felt like writing a play on tamasha performers because when I met the women I realized how fascinating they were. They were truly empowered. They are acutely aware of the fact that they are being exploited but they make peace with the fact because they realize that they have to earn. Their relationships with their children are very complex because of the nature of their profession, there is a lack of respect from the children's end as they don't realize what good human beings their mothers are. The women are great on both levels; as artists and as human beings. These performers who bear the lineage of tamasha romanced with the *lavani* (the song), with their expressions, their graceful movements and their charisma. They subtly presented bold lyrics. Now, the tamasha is simply "performed". It's a pity but with the exception a few like Shakuntala Nagarkar, this institution is finished."

The play was recently staged at Gyaan Adab Centre in Pune, in the Indian State of Maharashtra, where Sushama Deshpande held the audience captivated for an hour and a half through her powerful performance and Hira's insightful story. A comment on the lives of traditional tamasha dancers, the play sheds light on how attempt at "purifying" the art form has led to the professional displacement of tamasha performers with a long lineage. Though their art form had found mainstream acceptance, they still stand on the periphery of social mores.



## Come here – Go Away!



Photograph, Mark Ulyseas

A friend recently shared she entered back into a relationship with a man she had been dating a couple months ago. The chemistry was great and they had a lot of fun. Soon he began setting boundaries around their time together and then didn't want to be with her any longer. As I listened to her share, I could hear how hurt and confused she had been. Then at a local music event, after a long talk they reconnected and reunited.

He had been married for several years and his wife cheated on him. Because of the unhealed pain, he was afraid to get too close to another woman. In the midst of their reconnection, and after a few drinks, he dropped the "L" word. So now, she has decided to be present, but cautious. She noticed throughout the whole relationship there was the simultaneous, come here, go away.

Listening to her triggered a memory of mine. I had reunited with a former boyfriend after several years. Due to my mounting career, I hadn't dated anyone since him. When he was in town one night, over a glass of wine, I shared that I loved him. I meant as a friend, but he lit up and confessed his feelings for me. Within a week, he visualized and shared his dream life for us and although I attempted to be emotionally cautious, I walked right into his dream. I fell into the intense high that comes from early love and our intimate connection was ablaze. During the next week he planned our lives together. He talked about how we would age and care for each other, our plans for retirement, and he even mentioned pre-nuptials although I was adamant that I didn't want to be married.

Occasionally I saw sparks in his eyes when he looked at me. I wondered what happened to this man I knew previously who was self-protective and controlling. For the first time, I met his adolescent daughter and he introduced me to his family via Skype.

Being right in step with him, I was elated. We connected well in intelligence, lifestyle, travel, music, abundance, and we were on our way. We texted every day and talked every night. While he was transitioning back to the city where I lived, some nights we would Skype. We spent fun filled weekends together, either here or there.

And then it happened. At the same time he was making plans for us to be together, he was pulling away. He would call and tell me he wanted to see me on the weekend, whispering loving, romantic, and suggestive words. I cleared my schedule for Saturday. Morning came and he called to tell me he was going to play the piano, organize his office, watch the soccer game and he'd contact me later. I was confused. When I attempted to get clear on his timetable, so I could be available and also plan my weekend, he got defensive. Eventually we got together to listen to music, see a movie, or go to an art gallery. We would be intimate and he would continue to espouse the dream of togetherness. The next day we would separate to do our own thing and in the next phone conversation he would be distant and disconnected. The relationship was continually filled with the tension of *come here, go away*. I began to get a sense that he was scaring himself. He jumped in too fast. This is somewhat similar to the example I shared of my friend earlier. Her boyfriend was scared because his former wife had cheated him on. In the case of my boyfriend, he had never been in love (admittedly) and was scared. He was too close to the flame. In both these cases, there was the crazy making behaviors of *come here, go away*.

This was a repeat of a previous experience. Jonathan and I had a lot of fun together. We traveled to music concerts, had great chemistry, the same interests, same friends, and similar work. We lived together for many years and we were great friends. Yet, there was always this sense of push and pull. Over time we moved to an isolated area in the country and my awareness of our distance increased. The more I asked for connection, cuddling (which we never did), the more distance he became. Eventually, knowing his mother, I understood that there was a small attachment disorder and the deep connection I desired was never going to happen.

Given my word for this year is Relationship – I have not only been studying and writing about love and relationship, but I have been preparing for dating myself. I am fortunate to be in a few singles groups where communication between men and women is open and we have a lot of fun dancing, listening to music, attending First Friday events downtown and actually, dating as a group.

Some are afraid to be alone and jump in unconsciously. In either case, for women and men both, past experiences create caution and fear going forward. Although the examples used to demonstrate come here, go away are those of men, these dysfunctional patterns happen with women as well. Would love to hear other women and men's views in the comment section.

Dating and creating relationship later in life is different. Early on it's easy to be distracted by raising children and demanding schedules, but later in life, we often have more disposable income and better choices regarding time. The women I know tend to be more aware and pickier.

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#### **Some reasons for *come here, go away* behaviors.**

- **Fear of being cheated on and hurt.**

One of my friends said she thought it was more difficult for men to experience infidelity. I think it may be that it's more difficult for those who are able to open up their hearts and invest deeply.

- **Fear of being controlled and having to give up the life they've become accustomed.**

This often shows up with people who have lived alone for a long time. Learning to share and compromise comes more easily for some than others. This issue is common with those who have acquired a lot of toys (race cars, 4-wheelers, etc.) or created habits such as spending all day watching sports on TV, hanging at local pubs or beach bumming. In some cases, I've seen men who want all the attention and act as if they 'own' the woman.

Another way this may happen is that one of the partners cannot have a voice in the decision-making.

- **Fear of loss of alone time or feeling suffocated.**

People definitely vary in how comfortable they are being close, although most people become more introverted as they age. Some have strong boundaries around personal space and others have very little. Being able to have a relationship where there is a healthy balance of merging and separating can be tricky.

Having separate space in a home and enjoying separate activities can help.

- **Fear of sharing their resources, especially through marriage and divorce.**

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Loss of half your income or more due to a breakup of a relationship or marriage can be devastating. It is critical to a healthy relationship to share your needs and expectations around resources early on.

A client shared with me that her husband's former wife receives half his retirement even though she has been married to him longer. This bothers her because "it eats at him!" Money is an issue, especially when dating later in life.

Relationships with children can be problematic. Whether one partner says "my children come first" or the new wife tries to create distance between her husband and his children, it can be problematic. This occurs even when the children are adults. I strongly suggest that couples think in terms of "this **and** this." With a little creative thinking couples can be inclusive at times and at other times have quality time with the children alone and their loved one alone. *As stated in Marko Petkovic's book [Feel Good Marriage – 7 Steps to a Rock Solid Marriage Without Counseling](#) "It's a scientifically proven fact that, during this time, [in love] our brains produce drugs that would be illegal on the street or need a medical prescription."*

Initially with hormones flying, it is difficult to see the signs of *come here, go away*. When you are high on love, it is like being on drugs.

#### **Steps you can take now to prepare for creating a healthy relationship.**

1. Inventory your past relationships. Notice your own patterns. Think about whether either sending the come here, go away message or being the recipient has been a pattern in your life.
2. Think about your boundaries and whether you are continually in other people's personal space or whether you set boundaries that make it difficult for others to reach you.
3. If you find yourself attracted to a man or woman that is emotionally unavailable, ask yourself if you too are holding back. Is this safe so you don't risk sharing your feelings and your life?
4. If you have a history of unresolved pain in relationships, give yourself the gift of either therapy or relationship coaching. These are luxuries (if not necessities) you deserve!

When writing this article I couldn't help thinking about Leonard Cohen's Joan of Arc. For those who do not hold back and jump right in, it says it all! [LINK](#)

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