IMPACTS OF TSILHQOT'IN PART I:

A LAYPERSON'S GUIDE TO *TSILHQOT'IN NATION V. BRITISH COLUMBIA*

This is the first in a series of seven articles on the Supreme Court of Canada's recent decision on Aboriginal title and its expected impacts. This article provides an overview of the key elements of the decision and poses the six key questions that we will answer in the coming weeks as part of this series.

On June 26, 2014, the Supreme Court of Canada released its reasons in *Tsilhqot'in Nation v. British Columbia*. The decision is the first time that an Aboriginal group has proved Aboriginal title over a significant land base in Canada. However, it is also a landmark decision for another reason: it will fundamentally change the way in which resource-based projects in Canada are regulated and approved.

What are Aboriginal Rights and Title?

To understand the implications of the *Tsilhqot'in* case, it is necessary to understand why Aboriginal rights and title have special significance in Canada. This understanding begins with a very simple history: Aboriginal people were here when European settlers arrived, living on and using the land that would become known as Canada. These first inhabitants were never conquered and, in many cases, never signed treaties surrendering their interest in the land. This is especially true in British Columbia.

This history leads us to the current situation in Canada: there are Aboriginal interests in Canadian land and resources that pre-date European contact and have never been surrendered. Canadian courts have acknowledged these interests as Aboriginal rights and title. Aboriginal rights recognize the rights of Aboriginal people, which pre-dated European contact, to carry out certain activities on traditional lands, such as hunting, fishing, gathering and a host of other activities. Aboriginal title, on the other hand, recognizes the pre-existing ownership of the land by Aboriginal people.

Until recently, it was not clear how Aboriginal title could be proved by Aboriginal groups. It was also not clear what a successful claim to Aboriginal title meant for Aboriginal people, the federal and provincial governments, or non-Aboriginal people using the land. These are the issues that the Supreme Court of Canada's decision in *Tsilhqot'in* addresses.

The Supreme Court of Canada's Decision

In 1983, B.C. granted a logging licence on land considered by the Tsilhqot'in to be part of their traditional territory. The Nation objected, and eventually launched a claim for Aboriginal title to the land at issue.

After conflicting rulings by two lower courts, the Supreme Court of Canada decided that the Tsilhqot'in Nation had proved Aboriginal title over just less than 2000 square kilometres, and set out a number of key principles regarding Aboriginal title in Canada:

- Aboriginal title confers on Aboriginal groups the *exclusive* right to decide how the land is used and the *exclusive* right to benefit from those uses.
- Aboriginal title can be proved over large areas of land that were used nomadically or seasonally by Aboriginal groups, not just over discrete parcels of intense use and occupation such as traditional village sites.
- Where Aboriginal title is proved, provincial and federal laws do not automatically cease to apply; rather, these laws continue to be valid provided that any infringements of Aboriginal title are either consented to by Aboriginal groups or are justified (more on this below).

Nature of Aboriginal Title

According to Supreme Court of Canada, Aboriginal title is similar to private property ownership. This means that an Aboriginal group that has proven Aboriginal title has the right to decide how the land will be used; the right to use, occupy and possess the land; the right to the economic benefits from the land; and the right to pro-actively use and manage the land.

However, one important restriction distinguishes Aboriginal title land from private property ownership: because Aboriginal title is held by an Aboriginal group as opposed to an individual, it must be held and managed for the benefit of current and future generations. This means that it can only be transferred to the government, and it cannot be used or developed in a manner that would deprive future generations of the ability to benefit from the land in a meaningful way.

Proven Aboriginal title dramatically changes the *status quo* of Canada's current land management process. Time will be needed to fully assess how governments will work with First Nations where Aboriginal title exists. What is clear is that governments and other non-Aboriginal users of Aboriginal title land will need to secure the consent of Aboriginal groups, and if that consent cannot be obtained, governments will be held to the high standard of having to justify any infringement on Aboriginal title (more on this below).

Proof of Aboriginal Title

In general, in order to support a claim to Aboriginal title, Aboriginal groups will need to prove their claim in court. To do this, the Aboriginal group must demonstrate that, prior to the assertion of European sovereignty, the land was: "occupied" in a manner that was "sufficient", "continuous" and "exclusive".

"*Sufficiency*" can be established where the Aboriginal group historically acted in a way that would communicate to third parties that it held the land for its own purposes. Regular use of territories for hunting, fishing, trapping and foraging will in many cases demonstrate sufficient occupation. This is in stark contrast to some previous lower court decisions, which limited Aboriginal title to intensively used lands, like villages.

"*Continuity*" is only relevant if an Aboriginal group asserts that its current occupation of the land is evidence of Aboriginal title. Where this is the case, they must demonstrate that the present occupation of the area is a result of pre-sovereignty occupation. For example, if an Aboriginal group has only occupied an area for the past fifty years, the continuity element cannot be shown and Aboriginal title cannot be proved.

"*Exclusivity*" can be established where the Aboriginal group historically had the intention and capacity to exclusively control the land. Evidence that other groups requested access to the land or chose not to challenge the exclusive occupancy of the land can demonstrate exclusivity.

Where an Aboriginal group is able to demonstrate these three components (sufficiency, continuity and exclusivity), they will be able to prove Aboriginal title.

The Ability of Government to Infringe Aboriginal Title

A fundamental principle of Canadian law is that, while private property ownership provides the land owner with extensive rights to use and occupy the property, it does not mean that federal and provincial laws cannot apply to the property. Even on private land, the *Criminal Code* forbids crimes, the *Fisheries Act* protects fish bearing streams, the *Environmental Management Act* regulates protection of the environment, and so on.

Similarly, even where Aboriginal title is proved, federal and provincial laws apply to the land provided that the Aboriginal group consents to the proposed activities or that the government can justify any infringement to Aboriginal title.

The government can justify an infringement by demonstrating:

(i) the government has meaningfully consulted with the Aboriginal group;
(ii) there is a compelling and substantial public objective; and
(iii) the government has acted in a manner consistent with its fiduciary obligation to the Aboriginal group.

"*Meaningful consultation*" requires, at a minimum, that the government must act with good faith to share information with and solicit responses from Aboriginal groups. The adequacy of consultation will always be fact dependent, and has been subject to much litigation in recent years. In the context of infringements of proven Aboriginal title, the government will be held to a high standard; simply sharing information without meaningful discussion will not be sufficient.

A "compelling and substantial public objective" is one of a fairly broad range of objectives that recognizes that "distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community." The Court embraced examples of sufficient public objectives from previous decisions, which include the development of forestry, mining and hydroelectric power; general economic development; protection of the environment; and the building of infrastructure.

The *"fiduciary obligation"* can be discharged where the infringement on Aboriginal title is necessary to achieve the objective; the infringement does not go beyond what is necessary to achieve the objective; the benefits of achieving the objective are not outweighed by the adverse effects on the proven Aboriginal title; and the infringements do not deprive future generations of the benefit of the land.

Based on these principles, the Court in *Tsilhqot'in* found that:

> *Granting rights to third parties to harvest timber on Tsilhqot'in land is a serious infringement that will not lightly be justified. Should the government wish to grant such harvesting rights in the future, it will be required to establish that a compelling and substantial objective is furthered by such harvesting, something that was not present in this case.*

While the *regulation* of resources under provincial laws *may* be a justifiable infringement on Aboriginal title, the *allocation* of resources to third parties on Aboriginal title lands will be difficult for the government to justify. In other words, the granting of rights to timber, minerals or water on Aboriginal title land to non-Aboriginal groups will be subject to intense scrutiny if the Aboriginal group has not provided its consent.

What to Expect Going Forward

Aboriginal groups, government and industry are all considering the implications of the decision for treaty negotiations, government-to-government agreements, public policy and resource allocation. While the general sense is that the decision will result in a significant departure from current practices, it will take time to determine exactly what the resulting changes will be.

In this vein, it is important to bear in mind that, while *Tsilhqot'in* addresses the process for, and implications of, proving Aboriginal title, no other First Nations have proved Aboriginal title as a result of the decision. In other words, the world has not changed overnight: the road to proving Aboriginal title will continue to be a lengthy one and the law that requires the government to consult with Aboriginal groups before Aboriginal title has been proved has not changed.

That said, it is reasonable to expect that the decision will have important implications for resource use in Canada, each of which raises significant questions about how the legal landscape in Canada has shifted. In the articles that will follow in this series, we will explore the following six important questions:

- What does the law regarding Aboriginal title mean for controversial projects such as pipelines, mines and the oil sands?
- How will project developers secure certainty for existing and future projects?
- What are the implications for provincial and federal laws aimed at the regulation and conservation of natural resources?
- What does *Tsilhqot'in* mean for existing treaties and the British Columbia treaty process?
- How will private property be affected by claims to Aboriginal title?
- Where do we go from here?

About Miller Titerle + Company LLP

Miller Titerle + Company LLP is a Vancouver based business law firm that works with First Nations and responsible resource developers regarding the allocation and use of resources in Canada.

Rob Miller, the leader of our First Nations legal group, has represented a number of high-profile First Nations in negotiations with government and industry regarding large resource projects. He has also provided advice to large resource companies on social licence, Aboriginal law and project development. Rob is recognized in the 2013 Best Lawyers in Canada guide in the area of energy law, and in the 2014 Lexpert Directory in the area of Aboriginal law.

If you would like more information regarding the implications of the *Tsilhqot'in* decision or on Aboriginal law issues generally, please contact:

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