SPECIAL LEGAL UPDATE

Tsilhqot'in Nation v. British Columbia: Considering the Implications
June 30, 2014

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 an Aboriginal group has proved Aboriginal title over a significant land base in Canada. However, it is also a landmark decision for another reason: the Supreme Court has clarified the law regarding the nature of Aboriginal title and, in doing so, will likely bring fundamental change to the way in which decisions are made regarding resource use on lands subject to Aboriginal title in Canada.

> *"Aboriginal title confers ownership rights similar to those associated with fee simple, including: 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." (Tsilhqot'in)*

Background

The Tsilhqot'in Nation is a group of six semi-nomadic *Indian Act* bands sharing common culture and history based in a remote part of central British Columbia. The Tsilhqot'in have never entered into a treaty with Canada, nor were they ever conquered.

In 1983, B.C. granted a commercial logging licence on land considered by the Tsilhqot'in people to be part of their traditional territory. The Nation objected, and eventually launched a claim for Aboriginal title to the land at issue – approximately 4,380 square kilometres, representing only a small portion of the Tsilhqot'in's asserted traditional territory.

The original trial began in 2002 and continued for 339 days over a span of five years. The British Columbia Supreme Court held that, despite being a nomadic people that used a large tract of land on a seasonal basis, the Tsilhqot'in had proved the necessary degree of occupation to establish an Aboriginal title claim to approximately 1,900 of the 4,380 claimed square kilometres.

On appeal, the British Columbia Court of Appeal overturned the finding that Aboriginal title had been established. The Court of Appeal adopted a more restrictive, "postage stamp" approach to Aboriginal title, suggesting that, while intense use and occupation of specific sites (such as village sites) could support a title claim over such small parcels, seasonal or nomadic use would often not be sufficient to ground a claim to Aboriginal title over a large tract of land.

Supreme Court of Canada's Decision

The Supreme Court of Canada upheld the trial decision that the Tsilhqot'in Nation provided sufficient evidence of exclusive use and occupation to support an Aboriginal title claim over just less than 2000 square kilometres. In doing so, the Supreme Court outlined a number of key principles regarding the allocation of resources on Aboriginal title land in Canada:

- Once proved, Aboriginal title confers on Aboriginal groups the *exclusive* right to decide how the land is used and 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 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 apply subject to the requirement that any infringements of proven Aboriginal title are either consented to by the Aboriginal group or are justified.
- The government can authorize infringements of proven Aboriginal title if the Aboriginal group provides its consent or if the infringement can be justified.
- Infringements of proven Aboriginal title can be justified if there is a "compelling and substantial" public purpose, and if the infringement is consistent with the Crown's fiduciary duty to the Aboriginal group (more on this below).

Nature of Aboriginal Title

Aboriginal title confers on an Aboriginal group the exclusive right to decide how the land is used and to benefit from those uses, subject to the right of the government to infringe Aboriginal title where justified.

Although it is a unique interest in land, Aboriginal title is often likened to fee simple ownership with the exception that it is a collective right. Therefore, land subject to Aboriginal title cannot be alienated (except to the government) and must be developed in a manner that preserves the use and enjoyment of the land for future generations.

> *"Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion of title under s. 35 of the Constitution Act, 1982." (Tsilhqot'in)*

Proof of Aboriginal Title

The onus of establishing Aboriginal title lies with the Aboriginal group claiming it. The Aboriginal group must demonstrate that the land was, prior to the assertion of European sovereignty, "occupied" in a manner that was "sufficient", "continuous" and "exclusive".

"*Sufficiency*" will be established where the Aboriginal group historically acted in a way that would communicate to third parties

> *"There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites." (Tsilhqot'in)*

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 the Court of Appeal, which limited the understanding of the sufficiency requirement of Aboriginal title to intensively used lands, like village sites.

"*Continuity*" will be established where the present occupation of the area is a result of pre-sovereignty occupation. This does not require an unbroken chain of continuity between current practices, customs and traditions and those that existed historically.

"*Exclusivity*" will 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.

Infringements of Aboriginal Title

The Court was clear that the purpose of the jurisprudence on Aboriginal rights and title is to establish "the process of reconciling Aboriginal interests with broader interests of society as a whole." With this in mind, even once Aboriginal title is established, the government can still authorize activities or pass regulations that infringe proven Aboriginal title in two ways: either the Aboriginal group consents to the proposed activities, or the Province satisfies a "justification of infringement" test.

> *"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 […] can justify the infringement of Aboriginal title." (Delgamuukw)*

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 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 a fairly broad range of objectives that recognize 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 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.*

In other words, while the *regulation* of forest resources in the *Forest Act* may be a justifiable infringement on Aboriginal title, the *allocation* of timber resources to third parties on Aboriginal title lands may be difficult for the government to justify.

> *"Broadly put, provincial laws of general application apply to lands held under Aboriginal title." (Tsilhqot'in)*

What to Expect

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 regarding the requirement for pre-proof consultation has not changed.

That said, we expect the decision will have a number of implications for Aboriginal rights and resource use in British Columbia, including the following:

Government Will Be Required to Conduct Deeper Pre-Proof Consultation

Currently, the vast majority of claims to Aboriginal title have not been proved in court. This means that the principles set out in *Tsilhqot'in* regarding infringement of government decisions on proven Aboriginal title do not directly apply; instead, the duty to consult and, where appropriate, accommodate Aboriginal groups continues to set the framework for government activities.

What is required of the government to satisfy this pre-proof duty depends on two key factors: strength of the Aboriginal claim to rights or title, and the degree of the proposed impact on the claimed rights or title. In a pre-proof setting, given the more generous interpretation of the test for proving Aboriginal title endorsed by the Supreme Court of Canada, the strength of many Aboriginal groups' title claims must now be viewed as stronger than the Province may have previously acknowledged – meaning more

meaningful consultation and accommodation will be required on lands where Aboriginal title is asserted, even if it is not yet proved. As the Court noted:

> *At the claims stage, prior to establishment of Aboriginal title, the Crown 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. Where a claim is particularly strong — for example, shortly before a court declaration of title — appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim.*

Practically, this means we should expect earlier and more extensive consultation regarding government decisions that affect lands subject to claims of Aboriginal title, even where title is not proved. Depending on the nature of the title claim, this may lead to more meaningful mitigation plans designed to address First Nations' concerns, as well as significant economic participation in projects.

Aboriginal Title May Be Used As a Tool to Oppose Controversial Projects

There are two major implications of the *Tsilhqot'in* decision for controversial projects in British Columbia.

First, as discussed above, it will be easier for an Aboriginal group to establish a strong claim to Aboriginal title, and where such a claim is established, the government must "take appropriate care" to "preserve the Aboriginal interest pending final resolution of the claim". This means that, more and more frequently, the content of the duty to consult prior to proof of Aboriginal title will require a higher standard of consideration of the impact on Aboriginal interests – meaning First Nations may become significantly more involved in the decision making process for many controversial projects.

Second, if Aboriginal title is proved, consultation and accommodation is no longer sufficient to justify government decisions regarding resource and land use. The Supreme Court was clear that the government can only authorize infringements on proven Aboriginal title in two circumstances: first, if First Nations consent; or second, if the incursion is "undertaken in accordance with the Crown's procedural duty to consult, [is] justified on the basis of a compelling and substantial public interest, and [is] consistent with the Crown's fiduciary duty to the Aboriginal group." In considering what this fiduciary duty entails, the Court was clear that "incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land".

While it will take some time (and likely some test cases) to flesh out the exact scope of these principles, one thing is clear: where Aboriginal title is proved, or even where a strong claim to Aboriginal title exists, Aboriginal groups should now have significantly more influence over land use decisions. We expect that for controversial projects such as Northern Gateway, Aboriginal opponents will see strategic value in doing the leg-work to establish strong title claims, or even launching title litigation, to gain leverage in regulatory processes regarding key project decisions.

Sufficiency of Revenue Sharing Initiatives Will Be Questioned

In many resource industries, provincial programs offer revenue sharing in exchange for Aboriginal consent to resource exploitation. An example is the Economic and Community Development Agreements regarding operating mines, pursuant to which provincial mineral tax revenue is shared with First Nations.

Given the altered landscape regarding the nature of Aboriginal title, we expect that many Aboriginal groups will re-think the sufficiency of these revenue sharing arrangements and question whether they are sufficient to justify the requested project consent.

The Province has framed many revenue sharing initiatives as "programs" that can be cancelled by either party. As part of its analysis of the *Tsilhqot'in* decision, the Province will likely be assessing whether it really wants short term consent that can be terminated by an Aboriginal group given the Court's position that consent can justify an infringement of Aboriginal title. We will not be surprised if the format of current revenue sharing arrangements changes to provide significant, long term revenue sharing benefits to First Nations in order to secure consent to projects.

Industry Will Seek Free, Prior and Informed Consent Through Impact Benefit Agreements

Free, prior and informed consent (FPIC) has become an international standard for the development of projects on indigenous land around the world. This concept has been embraced by a number of international law and voluntary standards, including the United Nations' Declaration on the Rights of Indigenous Peoples. However, Canadian governments have been reluctant to embrace this standard.

In *Tsilhqot'in*, while the Court stopped short of requiring FPIC for project development on Aboriginal title lands, it paved the way for FPIC to become a practical norm in Canada. The Court was clear that consent of an Aboriginal group was the primary way to allow infringements of Aboriginal title to occur. This means that project developers, who are often on the outside of Aboriginal title discussions between government and Aboriginal groups, can achieve certainty by working to secure Aboriginal support and consent for projects. To date, the primary mechanism for achieving this level of support and consent has been impact benefit agreements between developers and Aboriginal groups.

Implications of the Decision on Existing Projects Will Be Examined

It is not clear what the implications of the *Tsilhqot'in* decision will be on existing projects in British Columbia that do not have free, prior and informed consent of an Aboriginal group holding proven Aboriginal title over the project area. Once Aboriginal title is proved, any issuance of new permits or resource rights will be subject to the principles established in the decision. However, where new permits or resource rights are not required for the continued operations of a project, *Tsilhqot'in* does not clarify how an existing project will be impacted by a declaration of Aboriginal title on the project land.

Prior to *Tsilhqot'in,* project owners were comforted by the Supreme Court of Canada decision in *Rio Tinto*, where the Court suggested that historic breaches of Crown duties to First Nations result in a claim against the government, not operators of projects. However, for project owners operating without Aboriginal support in areas potentially subject to title, the Supreme Court of Canada in *Tsilhqot'in* had some chilling words:

> *Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title holding group going forward. 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 title if continuation of the project would be unjustifiably infringing.*

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The uncertainty created by this type of language from the Supreme Court of Canada suggests that prudent operators of resource-based projects operating on Crown land subject to Aboriginal title claims should consider developing strategies to seek and obtain consent.

The Nature of Existing Treaties Will Be Examined

It is important to note that this case arose in British Columbia, where there are few treaties between the government and Aboriginal groups. However, for the few treaties that exist in British Columbia, and for the numerous treaties in the rest of Canada, there will likely be a deep examination of whether the relevant treaty represented a surrender of Aboriginal title. Where the answer is yes, the implications of the *Tsilhqot'in* decision will be significantly less than where the answer is no. Where a treaty does not represent a surrender of Aboriginal title, the principles relating to Aboriginal title as set out in *Tsilhqot'in* will apply and augment existing treaty rights – meaning that the government may have significant obligations to the Aboriginal group outside the four corners of the treaty.

More Information

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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