IMPACTS OF TSILHQOT'IN PART VI:

THE EFFECT OF ABORIGINAL TITLE ON PRIVATE PROPERTY

In Parts I to V of this series on *Tsilhqot'in Nation v. British Columbia*, we examined the impact of proven Aboriginal title on Crown and treaty lands. In Part VI, we explore the answer to two important remaining questions: Is it possible for Aboriginal title to be proved over private land? If so, what effect will it have?

The Tsilhqot'in Nation notably omitted areas of private property from its claim to Aboriginal title, which means that the relationship between Aboriginal title and private property has not been resolved with any certainty. However, existing legal principles from *Tsilhqot'in* and other Aboriginal law cases provide a roadmap for resolving conflicts between Aboriginal title and private property.

In short, it is possible to prove Aboriginal title over private property in Canada. However, the government may be able to justify the infringement that private property interests represent on Aboriginal title. Where justification is not possible, Canadian and U.S. case law suggests that the remedy for infringement of Aboriginal title by a grant of private property interests will likely be financial compensation by the government.

Aboriginal Title versus Fee Simple Ownership

Private Property

When an individual purchases land in BC, he or she owns it in "fee simple." Fee simple is the most substantial interest in land that exists in law, giving the owner absolute rights of ownership and exclusive rights to use and occupy the land. Although essentially equivalent to absolute ownership, land held in fee simple is still held "in tenure on the Crown's underlying title." This means that fee simple ownership, because it is granted by the Crown, relies on the validity of the Crown's interest in the land in the first place, and any encumbrances on the Crown's underlying title also apply to the fee simple interest itself.

Aboriginal Title

Aboriginal title is similar to fee simple in that it confers exclusive use and occupation of the land. It also provides the group holding title with the rights to decide land usage and to benefit economically from its use. One primary difference between fee simple and Aboriginal title, as mentioned in previous parts of this series, is that Aboriginal title is a communal right held by the group *as a whole*. Consequently, uses of Aboriginal title land are restricted to those that will not deprive future generations of the benefit of the land. Another key element is that unlike land held in fee simple, which is generally transferrable, Aboriginal title lands may only be transferred to the Crown.

Can Aboriginal Title Be Proved Over Fee Simple?

Can Aboriginal title and fee simple ownership exist at the same time, over the same property? Since each type of ownership entails an *exclusive* right to the land in question, simultaneous ownership through Aboriginal title and fee simple seems problematic – if not impossible. However, Canadian courts have laid out a framework for resolving conflicts between the two types of ownership.

In order to prove Aboriginal title, the test set out in *Tsilhqot'in* requires an Aboriginal group to demonstrate that, prior to the assertion of European sovereignty, the land was occupied in a manner that was *sufficient*, *continuous* and *exclusive*. These can all be established where private property interests also exist.

Sufficiency – Sufficiency examines the degree of land use *prior to the assertion of European sovereignty*. Because this is a historical inquiry, it is possible for an Aboriginal group to establish this requirement over land that is currently held in private ownership.

Continuity – Where present occupation is relied on as proof of pre-sovereignty occupation, continuity between the present and pre-sovereignty occupation must be demonstrated. Importantly, this arm of the *Tsilhqot'in* test is optional – continuity must only be established if current occupation is a key element of proof of historical occupation. In a previous case called *Delgamuukw*, the Court also recognized that the continuity requirement should be given a very liberal interpretation. Considering its optional nature and liberal application, continuity should not present a meaningful barrier to proving Aboriginal title on fee simple lands.

Exclusivity – Exclusivity can be proved where an Aboriginal group can establish they historically had the intention and capacity to exclusively control the land. This is an inquiry into control at the time of European sovereignty only – present exclusivity is not required. As such, an Aboriginal group claiming title over privately owned property today would not be barred from proving this branch of the test.

Accordingly, based on the test laid out in *Tsilhqot'in*, Aboriginal groups can certainly prove Aboriginal title over land held in fee simple.

Is the Grant of Private Property Rights on Aboriginal Title Land Justifiable?

If it can be demonstrated that private property rights were granted by the government on Aboriginal title land, the first question to be answered is whether the infringement of the grant on Aboriginal title can be justified in the manner contemplated in *Tsilhqot'in.* In order justify an infringement of Aboriginal title, the Crown must prove three things:

1. The government meaningfully consulted with the Aboriginal group. This will be a question of fact in each case, but we anticipate that there will often be an open question as to whether sufficient (or any) consultation occurred – especially given the era in which most fee simple land grants were made by the Crown.

2. There is a compelling and substantial public objective. In *Delgamuukw,* the Supreme Court of Canada identified a number of matters that could be considered "compelling and substantial public objectives," including the general development of the interior of British Columbia, the building of infrastructure, and

the settlement of foreign populations. On its face, it seems that the granting of private property interests will fall squarely within these permitted objectives.

3. The government has acted in accordance with its fiduciary obligation to the Aboriginal group. In order to demonstrate that it has satisfied its fiduciary obligation, the Crown must prove that its actions: a) do not deprive future generations of the Aboriginal group of the benefit of the land; b) are necessary to achieve the government's goal; c) have gone no further than necessary to achieve the goal; and d) provide benefits to the public good that are not outweighed by the adverse effect on the Aboriginal interest. It is conceivable that the granting of certain private property interests by the government will not satisfy all these elements of the Crown's fiduciary duty.

In some cases, the Crown may be able to demonstrate the three matters described above, and therefore the granting of fee simple ownership on Aboriginal title lands will be justified in law. In other cases, such infringement will not be justified – meaning that Canadian courts may be asked to reconcile the two forms of ownership.

Reconciliation of Private Property and Aboriginal Title

Aboriginal Title vs. Private Property Rights

The interaction between private property and Aboriginal title is not something the Supreme Court of Canada has addressed directly. What we do know is that Aboriginal title does not exist in a vacuum – rather, it is part of a broader Canadian legal landscape and needs to be considered alongside interests of other stakeholders, including property owners.

In a 2001 Ontario case called *Chippewas of Sarnia Band v. Canada,* the court decided that although it "would plainly be wrong" to deny a claim to Aboriginal title on the grounds that it might be troublesome to others, innocent third parties are entitled to rely on seemingly valid acts of their government. The court suggested that where a private party relied on such government acts (including the granting of fee simple ownership), the interests of the innocent third party (the private property owner) should be protected. However, as suggested by the Supreme Court of Canada's decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* the appropriate remedy for historic breaches of the Crown's duties to First Nations can appropriately include compensation and damages.

Compensation

If the above requirements are established – proven Aboriginal title, an unjustified government infringement, and the affirmation of third party private ownership – it may be open to an Aboriginal group to claim damages against the Crown. Whether damages are available in such a case is a question that has not been considered in Canada in the context of proven Aboriginal title. However, it has been considered with approval in other contexts, such as the failure to consult on the large infrastructure development in *Rio Tinto.* Additionally, a series of cases in the U.S. Supreme Court involving the Oneida Indian Nation established that Indigenous groups have a common law cause of action (a right to sue) to

enforce their Aboriginal land rights and, if possession is not possible, those Indigenous claims to land can be compensated by money damages.

Based on this analysis, it is likely that Canadian courts will take the position that where these three elements exist – Aboriginal title is proved, there has been an unjustified infringement of that Aboriginal title by a grant of private property ownership, and the two forms of ownership cannot co-exist – the appropriate remedy for Aboriginal groups will generally be compensation from the Crown.

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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