June 27, 2014

Tsilhqot'in Decision: The Sky Is Not Falling

Despite the significant media attention that the recent Supreme Court of Canada (SCC) decision in *Tsilhqot'in Nation v. British Columbia* [2014 SCC 44](https://scc-ca-nu.gc.ca/case.nsf/FIC/13969) (Decision) has received, it represents a reiteration of established law regarding Aboriginal title that has been developed over decades. The Decision is historic because it is the first time that any court has formally declared that Aboriginal title exists, albeit under an existing legal framework. Lost in the headlines is that the Decision provides greater certainty and clarity for the application of provincial laws and regulatory regimes on Aboriginal title lands. In addition, on its face, the Decision does not affect lands over which there are “assertions” of Aboriginal title, to which the Crown’s duty to consult still applies.

The case, brought by Roger William on behalf of the Xeni Gwet’in First Nations Government and all Tsilhqot’in people, involved a claim seeking recognition of Aboriginal title to two tracts of land in the Tsilhqot’in traditional territory. The tracts of land are located in a remote valley in central British Columbia and consist mainly of undeveloped land.

The SCC released its Decision on June 26, 2014, allowed the appeal and granted the first declaration of Aboriginal title over the reasonably large area at issue.

**BRIEF FACTS**

The Tsilhqot’in Nation, a semi-nomadic grouping of six bands, has lived in part of central British Columbia for centuries. In 1983, British Columbia granted a commercial logging licence on land considered by the Tsilhqot’in people to be part of their traditional territory. The band objected and sought a declaration prohibiting commercial logging on the land. Talks with the province were unsuccessful, and the original land claim was amended to include a claim for Aboriginal title over 4,380 square kilometres – an area slightly smaller than Prince Edward Island and which comprises a small fraction of the Tsilhqot’in traditional territory. The federal and provincial governments opposed the title claim. In 1998, Chief Roger William of the Xeni Gwet’in Indian Band brought an action on behalf of the Tsilhqot’in against British Columbia and Canada.

The trial commenced in 2002 before the British Columbia Supreme Court and continued for 339 days over a span of five years. The trial judge heard extensive evidence from elders, historians and experts and spent time in the claim area. The Court held that “occupation” was established for the purpose of proving Aboriginal title by evidence showing regular and exclusive use of sites or territory. On this basis, the trial judge found that the Tsilhqot’in people were entitled to a declaration of Aboriginal title to a portion of the claim area as well as a small area outside the claim area.
On appeal, the British Columbia Court of Appeal held that the Tsilhqot’in claim to Aboriginal title had not been established. The Court of Appeal said that in the future, the Tsilhqot’in might be able to prove sufficient occupation for Aboriginal title for specific sites within the claim area where the Tsilhqot’in’s ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty. For the rest of the claimed territory, the Court of Appeal held that the Tsilhqot’in rights were limited to Aboriginal rights to hunt, trap and harvest.

SCC DECISION

The SCC overturned the appeal of the Court of Appeal’s narrow construction of Aboriginal title and occupation in favour of the trial judge’s finding that the Tsilhqot’in had established Aboriginal title to the claim area at issue. It held that a declaration of Aboriginal title should be granted for the claim area determined by the trial judge. The Decision is historic because it is the first time that any court has formally declared that Aboriginal title exists to a particular tract of land. However, the legal concept of Aboriginal title has been developing for over four decades since the SCC affirmed Aboriginal rights to land in *Calder v. Attorney General of British Columbia*; this case sparked the modern era of treaty negotiations between the federal and provincial governments and the First Nations without treaties. This Decision confirms and clarifies existing law in the area.

In its analysis, the SCC applied the test in *Delgamuukw* for Aboriginal title to land. The test requires that an Aboriginal group asserting title 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, occupation must have been continuous since pre-sovereignty; and (iii) at sovereignty, that occupation must have been exclusive. The trial judge found that the Tsilhqot’in occupation was both sufficient and exclusive at the time of sovereignty (as supported by evidence of more recent continuous occupation) and the SCC agreed with this conclusion.

In cases in which Aboriginal title is unproven, the SCC affirmed the well-established requirement that the Crown owes a procedural duty to consult imposed by the honour of the Crown and, if appropriate, to accommodate the unproven Aboriginal title claim. By contrast, where Aboriginal title has been established, the Crown must not only comply with its procedural duties but also ensure that the proposed government action is substantively consistent with the requirements of section 35 of the *Constitution Act, 1982*. At the time the commercial logging licences were granted, the Tsilhqot’in title claim had not yet been proven, and the SCC found that the honour of the Crown required the Province to consult with the Tsilhqot’in people on the uses of the lands and accommodate their interests. By failing to do both, the Province breached the duty owed to the band.

Once established, Aboriginal title gives the right to exclusive use and occupation of the land for a variety of purposes, not confined to traditional or distinctive uses. Aboriginal title holders have the right to decide how land is used and the right to benefit from those uses, subject to the requirement that the uses must be consistent with the group nature of the interest; this condition means that the Aboriginal title land cannot be dealt with in a way that would prevent future generations of the group from using and enjoying it. The SCC also said that once title is established, it may be necessary for the Crown to reassess its prior conduct and potentially cancel decisions that result in an unjustifiable infringement of Aboriginal title. These retrospective and prospective comments from the SCC will likely be the subject of future litigation and interpretation.

Because Aboriginal title carries with it the right to control the land, governments and others seeking to
use the land must obtain the consent of the Aboriginal title holder. If the Aboriginal title holder does not consent to the proposed use of the land, the government must establish that the proposed incursion on the land is justified under section 35 of the Constitution Act, 1982.

The SCC stated that in order to justify infringements of Aboriginal title on the basis of the broader public good, government must satisfy the infringement and justification framework originally set out in Sparrow. To justify an infringement of Aboriginal title, the government must show (i) that it discharged its procedural duty to consult and accommodate; (ii) that its actions were backed by a compelling and substantial legislative objective; and (iii) that the governmental action is consistent with any Crown fiduciary obligation to the group. In discussing the interests potentially capable of justifying an incursion on Aboriginal title, the SCC referenced its previous 1997 decision in Delgamuukw:

In the wake of Gladstone, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that “distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community” (at para. 73) 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 aboriginal 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; emphasis in original deleted; para. 165]

Provincial laws of general application apply to lands held under Aboriginal title, subject to the constitutional limits and the infringement and justification framework from Sparrow. The SCC held that, in the present case, granting rights to third parties to harvest timber on Tsilhqot’in land is a serious infringement that will not lightly be justified. In order to grant such harvesting rights in the future, the government will be required to establish a compelling and substantial objective.

In concluding that provisions of the Forest Act were inapplicable to land held under Aboriginal title, the trial judge placed considerable reliance on R. v. Morris. In that decision, the SCC held that only Parliament has the power to derogate from rights conferred by a treaty because treaty rights are within the core of federal power over “Indians.” However, in the Decision, the SCC expressly overturned Morris and stated that to the extent that Morris stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, including Aboriginal title, it should no longer be followed.

**IMPLICATIONS FOR RESOURCE DEVELOPMENT**

The Decision is consistent with earlier SCC case law regarding Aboriginal rights and title generally. With the exception of the SCC’s finding on Morris, the Decision does not result in a change to existing law. Aboriginal title must be proven over a specific area, and significant evidence must be advanced in support of such claims. Although the evidentiary test has not changed, the SCC provides valuable guidance regarding how semi-nomadic peoples can assert and prove Aboriginal title. In this regard, the concepts of sufficiency, continuity and exclusivity are useful lenses through which to view the question of Aboriginal title. This guidance is relevant to jurisdictions across Canada, including Ontario and Atlantic Canada, where contrary to commonly held beliefs, title claims have been asserted. In Ontario, title
claims have been asserted across the province, including a 36,000-square kilometre section of eastern Ontario claimed by the Algonquins.

The Decision confirms that governments can infringe proven Aboriginal title, provided that they meet the established test for “justification” (i.e., a compelling and substantial governmental objective and the government action is consistent with any fiduciary duty to the group). The Decision indicates that governments may want to consider the test for “justification” when engaging in legislative activities. This particular guidance to governments should initiate an extensive review by all governments of their legislation affecting lands to ensure that the objectives of such legislation are clear and unambiguous because they will likely form a core component to any future justification.

The SCC confirmed that the Crown’s duty to consult continues to apply to activities or decisions by the Crown that may affect asserted, but unproven, Aboriginal title.

The Decision also provides regulatory certainty by making clear that provincial laws of general application apply to Aboriginal title lands, subject to constitutional limits. In considering whether provincial legislation applies to an area of federal jurisdiction, the SCC asked two questions:

1. Does the provincial legislation touch on a protected core of federal power? and
2. Would application of the provincial law significantly impair the federal power?

The SCC concluded that provincial laws of general application should apply unless they are unreasonable, impose a hardship upon the title holders or deny them their preferred means of exercising their rights, and such restrictions cannot be justified.

Finally, the SCC affirmed that governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.
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