Tsilhqot’in Nation – An East Coast Perspective

On June 26, 2014, the Supreme Court of Canada released one of the most significant aboriginal law decisions since*Marshall – Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44 (also known as the *William* decision). This decision could have considerable impact on aboriginal land title claims in areas of Atlantic Canada which are not covered by a modern treaty. This includes most of Atlantic Canada (except Labrador).

Background

Over twenty years ago, the province of British Columbia approved a private company’s plan to log a mountainous and sparsely populated area of central British Columbia which fell within the *Tsilhqot’in Nation’s* traditionally occupied territories. As a consequence, the group brought a civil action against the governments of Canada and the province of British Columbia, and claimed aboriginal title to a large part of that region. The claim was opposed by the governments, but there were no competing indigenous or non-indigenous claims. After a trial that lasted over 300 days, the judge at first instance expressed the opinion that the claimant group had established a claim to aboriginal title in excess of 200,000 hectares of that land. His decision was appealed, and the British Columbia Court of Appeal overturned the trial decision. The Supreme Court of Canada, in a unanimous decision, agreed with the trial judge, and issued a declaration of title.

Issues

There were three main issues in the case:

- What did the *Tsilhqot’in*, a very small semi-nomadic aboriginal group, have to prove in order to establish aboriginal title to the lands in issue?
- Did the province breach its duty to consult the aboriginal group before

granting approval?
- Can a province regulate the use of aboriginal title land under forestry legislation?

Proving Aboriginal Title

The court relied on its 1997 decision in *Delgamuukw* and confirmed that, in order to establish aboriginal title to an area of land, an aboriginal group must satisfy a three-part historic occupation test; that is, it must establish that its ancestors occupied the lands: (i) “sufficiently”; (ii) “continuously” (where present occupation is relied on as part of the proof offered in relation to its historic occupation); and (iii) “exclusively”, at the time the Europeans originally asserted sovereignty to the lands in issue. It emphasized that these factors need to be applied in an interrelated, culturally sensitive and flexible fashion.

The court also provided much needed clarity on the important question of whether a First Nations group can make a “territorial”, as opposed to a “site specific” claim (the latter is sometimes called the “postage stamp” approach). It specifically rejected the Court of Appeal’s suggestion that aboriginal title was confined to cases in which regular presence or intensive occupation of a particular tract of land at the relevant time had been proven. The judges held that a title claim could extend to territories that were “sufficiently” used for hunting, fishing, trapping and foraging prior to that date and that this test could, moreover, be satisfied by nomadic or semi-nomadic patterns of the occupation. In such cases, the facts do, however, have to demonstrate that the lands were regularly used by, and had been under the exclusive control of, the claimant group’s ancestors.

The court pointed out that the trial judge had heard a great deal of historic evidence pertaining to the claimant group and the use of the lands in issue in 1846, which was the pertinent date for the purposes of the case. That evidence included the small population that the land could sustain, archeological evidence of specific sites, the geographic pattern and proximity of sites in the area, the restrictions the claimant group historically imposed on the use of the land on outsiders. Oral evidence was also given by aboriginal elders. Notably, the Supreme Court of Canada specifically rejected the province’s argument that the claimant group’s population was only 400 in 1846 – and that such a small group could not practically control over 1900 square kilometres of rugged terrain. It reasoned that the intensity and frequency of use required can vary from case to case depending on the size of the group and the kind of land involved. The court also acknowledged that the evidence was, by its nature, sometimes imprecise and was at times conflicting, but the trial judge made no error in assessing it.

The Nature and Scope of Aboriginal Title

The court reiterated that aboriginal title confers a special form of property interest in lands. It confirmed that title carries with it several collective rights, including:

- The right to exclusive enjoyment and occupation of the land.
- The right to determine how it is used and to enjoy its economic benefits.
- The right to pro-actively manage it.

It did, however, also make it clear that aboriginal title imposes some significant restrictions on what aboriginal groups can do with the land. Specifically, it cannot be alienated except to the Crown, or encumbered or developed in ways that would prevent enjoyment and use by future generations.

Thus, this case makes it very clear that aboriginal title is very different from the ordinary common law notion of land title. It must also be noted that aboriginal title and other rights are constitutionally protected under s. 35 of the *Constitution Act*, 1982.

The Supreme Court of Canada also warned that governments, and others, who seek to develop or use lands which are subject to aboriginal title must obtain the consent of the aboriginal title holders. It also stressed the potentially serious consequences that failing to obtain such consent can have on both completed or pending projects:

…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. 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.

Duty to Consult

The Supreme Court of Canada pointed out that the crown has a duty to consult in good faith with an aboriginal group about proposed land uses where the group has asserted, but has not yet established, aboriginal title to lands. It must also, where appropriate, accommodate its interests. The level of consultation and accommodation will vary with the strength of the claim.

It held that the province had not honoured its duty to consult or accommodate in this case.

Justification of Infringements

The court also confirms that, absent consent, any infringement of an established aboriginal title by the federal or provincial government, must be preceded by appropriate consultation with the aboriginal group and must be justified under s. 35 of the *Constitution Act*, 1982.

Application of Provincial Regulation

The court held that a province can still regulate the use of aboriginal titled land. For instance, generally applicable regulatory requirements pertaining to land use and the environment can still apply.

Implications for Atlantic Canada

This decision could have a significant impact on aboriginal claims in Atlantic Canada, and in particular, on businesses within the region:

- Much of Atlantic Canada (except Newfoundland and Labrador) is or may be

covered by historic aboriginal treaties which have been in existence since the 18th century. Those treaties likely do not establish aboriginal title to lands, but they may provide evidence of such title. This is suggested by a comment by the court in this case about the*Royal Proclamation of 1763* which indicates that, in its view, aboriginal title was already in existence at the time that proclamation was issued.

- Those historic treaties do not, in any event, specifically identify the areas over which aboriginal title exists so the historic occupation test still needs to be used to identify those areas. The relevant date for the application of that test in Atlantic Canada is also earlier (i.e. in the mid-1700s). This decision does not, therefore, remove all uncertainty with respect to such claims.
- Historically aboriginal groups in Atlantic Canada have had some of the same characteristics as the *Tsilhqot'in*; they tend to be small and semi-nomadic.
- This decision will likely provide impetus to aboriginal groups to pursue aboriginal title claims through negotiations, or litigation and will give them added confidence in making those claims. Given the extraordinary cost of this type of litigation, it will also likely put more pressure on the federal and provincial government to resolve aboriginal claims out of court through negotiations. It must also be noted that, even if a group cannot establish aboriginal title, it may be able to establish that it has other land-related rights by treaty or under the broader doctrine of aboriginal rights (e.g. hunting and fishing).
- In Newfoundland and Labrador, both the Labrador Inuit and Labrador Innu have either negotiated or are in the process of negotiating comprehensive land claims agreements which provide for different levels of influence and rights in different designated areas. The *Tsilhqot'in Nation* decision should not affect the enforceability of finalized agreements of this nature or the legislation enacted to ratify them. However, the decision may prove to strengthen the basis for any outstanding Aboriginal land claims in the province, such as the NunatuKavut Community Council Inc. claim, which to date has not been finally accepted for negotiation by the federal or provincial governments.
- In April 2013, the Government of Newfoundland and Labrador released its "Aboriginal Consultation Policy on Land and Resource Development Decisions" (the "Policy"). The Policy applies broadly to all "land and resource development decisions that have the potential to adversely impact asserted Aboriginal rights or asserted treaty rights". The Policy enforces structured discussions between government proponents and Aboriginal groups in a manner that promotes achieving a "a positive, sustainable, mutually beneficial outcome" and aligns with the duty to consult standard reiterated in the *Tsilhqot'in Nation* decision.
- It reminds government, and others seeking to develop lands which is or even might be, subject to an aboriginal title claim of the onerous nature of the duty to obtain consent, or to consult and justify any infringement of aboriginal title.
- This case may strengthen aboriginal title claims and, correspondingly, increase the level of consultation and accommodation required.
- It makes it clear that assessing the potential for aboriginal claims should be an integral part of any commercial land transaction including, in particular, land development projects. Where there is possibility that such a claim may be made, early engagement with aboriginal groups is key. While private proponents do not have the legal duty to consult, they have to be

part of the process. The negotiation of an impact benefit agreement with aboriginal groups may be required as part of the transaction.
- Where aboriginal title is found to exist, but was not respected when a development was approved in the past, there is a real risk that the project could be cancelled or damages could be awarded if it unjustifiably infringed on title or a claim for damages may also be made during modern treaty negotiations.
- While some may be alarmed at the Supreme Court of Canada's decisions, others may see it as a business opportunity (e.g. to engage in partnership or joint ventures with aboriginal groups).

More background on aboriginal law in Canada can be found in Stewart McKelvey's Doing Business in Atlantic Canada. Additional comment on the Tsilhqot'in case is also provided in the Stewart McKelvey's civil litigation blog, Bench Press.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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