

SANGRA MOLLER LLP*Barristers & Solicitors***LEGAL CURRENCY***A Client Communication***Case Comment: *Tsilhqot'in Nation v. British Columbia***

On June 26, 2014, the Supreme Court of Canada (the "SCC" or the "Court") released its unanimous decision in *Tsilhqot'in Nation v. British Columbia*, upholding the Tsilhqot'in Nation's (the "Tsilhqot'in") claim to Aboriginal title and rights over 4,380 square kilometers of land including the Tachelach'ed area and the Trapline Territory (together, the "Claim Area") historically occupied by the Tsilhqot'in people (approximately in the central part of British Columbia, west of the Fraser River, between Big Lake and Tatlayoko Lake). This is a significant decision, as it is the first case in which the SCC has granted aboriginal title over specific areas of land. In its decision, the Court found:

- Aboriginal title can exist over relatively broad areas of land that were subject to occupation at the time European sovereignty was asserted;
- to ground Aboriginal title, "occupation" must be sufficient, continuous and exclusive;
- Aboriginal title confers the exclusive right to decide how land is used and the right to benefit from such uses, provided such uses are consistent with the group nature of the interest and the enjoyment of the land by future generations;
- where Aboriginal title has been established, the Crown must not only comply with its procedural fiduciary duties, but must also justify any incursions on Aboriginal title lands by ensuring that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*, which recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal people;
- Provincial laws of general application apply to land held under Aboriginal title, provided such laws are not unreasonable, impose no undue hardship and do not deny the Aboriginal title-holders of their preferred means of exercising their rights; and
- federal and provincial governments continue to have a duty to consult and potentially accommodate in cases where Aboriginal title has been asserted but not yet proven.

Background

The Tsilhqot'in is comprised of six bands including the Xení Gwet'in Indian Band. In 1983, the Province of British Columbia granted Carrier Lumber Ltd. a forest license to cut trees on land that the Tsilhqot'in claimed lay within the boundaries of their traditional

territories. In 1998, the Xení Gwet'in commenced an action on behalf of the Tsilhqot'in against the Province and the Government of Canada, declaring that the Tsilhqot'in held Aboriginal title over 4,380 square kilometers of the region to hunt and trap and to trade in skins and pelts taken from the Claim Area. They further claimed that forestry permits authorizing the proposed logging infringed their rights and titles.

Judicial History

Following a five-year trial, the British Columbia Supreme Court found that the Tsilhqot'in were entitled to a declaration of Aboriginal title over 40% of the Claim Area as well as to a small area outside the Claim Area. However, the court refused to make a declaration of title because the Tsilhqot'in's pleadings sought an "all or nothing" declaration of title and there was insufficient evidence to establish title over the entire Claim Area.

On appeal, the court held that the Tsilhqot'in claim to title had not been established and went on to state that Aboriginal title must be demonstrated on a "site-specific basis", requiring the Tsilhqot'in to demonstrate not just "presence", but "intensive presence" at a particular site.

The SCC's Decision

The SCC rejected the narrow approach to Aboriginal title taken by the Court of Appeal and held that a declaration for Aboriginal title should be granted for the area that the British Columbia Supreme Court had found (an area west of the Fraser River, between Big Lake and Tatlayoko Lake).

With respect to the test for Aboriginal title, the SCC applied the test from *Delgamuukw v. British Columbia* based on "occupation" prior to assertion of European sovereignty. To ground Aboriginal title, this occupation must be sufficient, it must be continuous (where present occupation is relied on) and it must be exclusive.

- Sufficient Occupation. The SCC held that in determining whether occupation was sufficient, parties must look to the Aboriginal group's culture and practices and compare them in a culturally sensitive manner with what is required at common law to establish title. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise

exploiting resources. To sufficiently occupy the land, the Tsilhqot'in had to show that it had historically acted in a way that would communicate to third parties that it held the land for its own purposes, and there must be evidence of a strong presence on or over the land claimed. The SCC agreed with the trial judge's findings that the parts of the land over which he found title were regularly used by the Tsilhqot'in, supporting the conclusion of sufficient occupation.

- (ii) Continuous Occupation. The SCC held that the concept of continuity did not require the Tsilhqot'in to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions and those which existed prior to European sovereignty. As such, the geographic proximity of the sites for which evidence of recent occupation was tendered and those for which direct evidence of historic occupation existed supported the inference of continuous occupation.
- (iii) Exclusive Occupation. In order to demonstrate exclusive occupation, the Tsilhqot'in was required to show that they had the intention and the capacity to retain exclusive control over the lands. The Court stated that this exclusivity may be established by proof that others were excluded from the land or that others were only allowed access to the land with the permission of the Tsilhqot'in. The SCC found that because, prior to the assertion of European sovereignty, the Tsilhqot'in repelled other people from their land and demanded permission from outsiders who wished to pass through their land, that the Tsilhqot'in treated the land as exclusively theirs.

The SCC found that there was ample direct evidence of the Tsilhqot'in's occupation at the time European sovereignty was asserted and that such occupation was sufficient, continuous and exclusive. The SCC therefore granted Aboriginal title over the Claim Area to the Tsilhqot'in.

Rights Conferred By Aboriginal Title

The SCC confirmed that Aboriginal title encompasses the right to exclusive use and occupation of the land pursuant to the title for a variety of purposes, including non-traditional purposes, provided that these uses can be reconciled with the communal and ongoing nature of the group's attachment to the land. In short, the titleholders have the right to the benefits associated with the land. Importantly, this means that: (i) the Crown does not retain a beneficial interest in Aboriginal title land and (ii) governments and others seeking to use the land must obtain the consent of the Aboriginal title-holders. If the title-holder does not consent to the use, the government's recourse is to establish that the proposed incursion on the land is justified under s. 35 of the Constitution Act, 1982.

To justify incursion in the absence of consent, the government must show that: (1) it discharged its procedural duty to consult and accommodate; (2) its actions were backed by a compelling and substantial objective; and (3) the governmental action is consistent with the Crown's fiduciary obligation to the group. The Court went on to state that the required level of consultation and accommodation are proportionate to the strength of the claim. Where Aboriginal title is unproven but asserted, the Crown owes a procedural duty to consult and, if appropriate, to accommodate the unproven Aboriginal interest. However, where title has been established, the Crown must not only comply with its procedural duties, but must ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*.

In addition, the government's fiduciary duty infuses an obligation of proportionality into the justification process. This implies that any incursion must be necessary to achieve the government's goals (rational connection), that the government goes no further than necessary to achieve its goals (minimal impairment), and that the benefits that may be expected to flow from the government's goals may not be outweighed by the adverse effects on Aboriginal title-holder's interests (proportionality of impact).

Provincial Laws and Aboriginal Title

The Court also held that provincial laws of general application apply to lands held under Aboriginal title. However, there are important constitutional limits on this proposition. First, provincial powers are limited by s. 35 of the *Constitution Act, 1982*, which requires that every abridgment of the rights flowing from Aboriginal title be backed by compelling and substantive governmental objective and be consistent with the Crown's fiduciary relationship with the title-holders. Second, a province's power to regulate lands under Aboriginal title may also be limited by the federal power over "Indians, and Lands Reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*.

The Court suggested that the following factors will be relevant in determining whether a law of general application results in a minimal diminution of an Aboriginal right, giving rise to breach: (i) whether the limitation imposed by the legislation is unreasonable; (ii) whether the legislation imposes undue hardship; and (iii) whether the legislation denies the holder of the right their preferred means of exercising the right. It is expected that laws and regulations of general application aimed at protecting the environment or assuring the continued health of forests of British Columbia will usually be reasonable, not impose undue hardship and not interfere with the Aboriginal group's preferred method of exercising their rights.

With respect to the Forest Act (the "Forest Act"), the SCC held that under the Forest Act, the Crown can only issue timber licenses with respect to "Crown timber", which is defined as timber that is on "Crown land". "Crown land" is defined as "land...or an interest in land, vested in the Crown." The Crown is

not empowered to issue timber licenses on "private land", which is defined as anything that is not Crown land. Aboriginal title vests the lands under question in the Aboriginal group. Accordingly, the Forest Act will only apply to lands under claims for Aboriginal title up to the time title is confirmed by agreement or court order. Once Aboriginal title is confirmed, the lands will be considered as "vested" in the Aboriginal group and are no longer considered Crown lands. Notwithstanding, it is possible that the provincial legislature could consider amending the Forest Act to explicitly apply to lands over which Aboriginal title has been confirmed.

Potential Implications

The SCC's decision is expected to create challenges for proponents seeking to authorize development projects on Aboriginal lands and reduces certainty about resource projects in areas of the country where Aboriginal title is or could become an issue, which includes almost all of British Columbia. It is expected that this decision will also lead to a significant amount of additional litigation regarding Aboriginal title as other Aboriginal groups try to assert title claims as well.

What is clear is that after Aboriginal title to land has been established, the Crown (and presumably private individuals) must seek the consent of the title-holding Aboriginal group to commence development projects on their land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*. Considering the fact that the issuance of timber licenses on Aboriginal title lands will plainly be a meaningful diminution in the Aboriginal group's ownership rights, such intrusion will have to be justified in cases where it occurs without Aboriginal consent. The SCC has suggested that the Province should be aware that granting rights to third parties to harvest lands over which Aboriginal title has been confirmed (i.e. granting timber licenses), 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. If the government cannot establish a compelling and substantial objective, it appears that third parties wishing to harvest land under Aboriginal claim will be required to obtain licensing from the Aboriginal group directly.

Moreover, once title is established, it may be necessary for the Crown to reassess prior conduct in light of this new reality in order to properly discharge its fiduciary duty to the title-holding group. The SCC has suggested that 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. In addition, legislation enacted before title was established may be rendered inapplicable going forward to the extent that it unjustifiably infringes such Aboriginal title.

A significant question remains about whether and what compensation will be owed by governments to Aboriginal groups with respect to any unjustified resource extraction that occurred between the date of European sovereignty and the date Aboriginal title is granted to a First Nations group. This issue was not addressed by the Court in this decision and is expected to be the subject of possible future litigation.

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