Willms & Shier | Environment Aboriginal Energy Law

Report

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Supreme Court of Canada Grants Tsilhqot'in Aboriginal Title—Implications for Resource Development in Canada

By Julie Abouchar, Charles Birchall and John Donihee. With the assistance of Julia Paillé, Summer Law Student.

The Supreme Court of Canada (SCC) issued a ground-breaking declaration of Aboriginal title on June 26, 2014. The Court's decision in *Roger William (on behalf of the Tsilhqot'in Nation) v BC* marks the first time that a court has granted Aboriginal title to a specific land area in Canada – in this case, over a remote valley in central British Columbia. The Court also found that British Columbia breached its duty to consult when it made land use planning decisions and issued forestry licences over the lands where title was claimed by the Tsilhqot'in First Nation. This decision provides both a road map for Aboriginal title claims and key signposts for other cases respecting treaties and land claims. It also sends a clear signal that government cannot ignore questions about Aboriginal title when taking actions such as issuing permits. On July 11, the SCC applied the test used in the Tsilhqot'in case to its decision in *Grassy Narrows First Nation v Ontario (Natural Resources)* (see sidebar on page 2).

Reaction to the SCC's decision has been swift. Commentators have labelled it a "legal earthquake", a "game-changer" and, in one instance, predicted that "chaos" would result. For people who have been following SCC rulings since the *Calder* decision in 1973, this decision is simply the next chapter in a series of judicial decisions that increasingly require government to fulfill its obligations towards Aboriginal peoples in a timely way to lead to meaningful reconciliation.

Some commentators suggest that this decision could lead to a chill in resource development projects. However, business has recognized for some time that

In this issue ...

Congratulations!

- **John Willms**, **Donna Shier**, **Marc McAree** and **Julie Abouchar** are included once again in the 2014 edition of the *Canadian Legal Lexpert Directory.*
- In its 2015 edition, *The Best Lawyers in Canada*© recognizes Willms & Shier partners **John Willms**, **Donna Shier**, **Marc McAree**, **Julie Abouchar** and **Charles Birchall** in the field of Environmental Law. *The Best Lawyers in Canada*© also recognizes **Julie Abouchar** in two further fields—Aboriginal Law and Energy Regulatory Law.
- *Who's Who Legal* lists Willms & Shier Environmental Lawyers LLP as one of Canada's leading environmental law practices. **John Willms**, **Donna Shier**, **Marc McAree** and **Charles Birchall** are named as leading environmental lawyers.
- **John Georgakopoulos** was selected as a finalist for Lexpert's *Rising Stars—Leading Lawyers Under 40* competition.

forming partnerships with affected Aboriginal groups is a pre-requisite for project success. The *William* decision simply underscores the need for Aboriginal consent, particularly where Aboriginal title has been established.

Background

The Tsilhqot'in is made up of six bands in British Columbia. For centuries they occupied a remote valley in central B.C. The Crown has entered into modern land claims with some of the indigenous people of B.C. but the Tsilhqot'in are not party to either a treaty or a land claim. In 1983, with their lands still subject to an unresolved land claim, B.C. granted a commercial logging licence for activities on the area considered by the Tsilhqot'in to be their traditional territory. The Tsilhqot'in objected.

Talks with the province broke down when the Xeni Gwet'in (one of the six bands comprising the Tsilhquot'in) claimed a right of first refusal to logging. In 2002, the Tsilhqot'in added a claim for Aboriginal title to the land claim and the parties went to court. The federal and provincial governments opposed the title claim. After a complex trial which lasted five years, the trial judge found enough evidence to award Aboriginal title over the land, but rejected the Tsilhqot'in claim due to a procedural matter.

The British Columbia Court of Appeal (BCCA), on appeal, rejected the claim for Aboriginal title based on the evidence that the Tsilhqot'in were "semi-nomadic" (see "BC Appeal Court Tightens Grounds for Aboriginal Title Claims", Willms & Shier Report, September 2012). The BCCA found that a claim for Aboriginal title could only be granted for specific, intensively occupied areas, and that the area claimed by the Tsilhqot'in was too broad. The BCCA recognized, however, the Tsilhqot'in's rights to hunt and fish for all of the land claimed.

The Tsilhqot'in were granted leave to appeal to the SCC. The two lower courts set up the issue to be decided — whether the test for determining Aboriginal title should be narrow and site-specific or a more broad approach (see "Tsilhqot'in Nation Takes Lands Claim to the Supreme Court", Willms & Shier Report, April 2013).

Aboriginal Title

In the appeal to the SCC, the Tsilhqot'in sought a declaration of Aboriginal title over the area that was originally designated by the trial judge, except for a small portion that was privately held or underwater. The SCC granted their request.

The Court clarified how the test for Aboriginal title set out in *Delgamuukw* can apply to a semi-nomadic indigenous group such as the Tsilhqot'in. First, the test for Aboriginal title is based on "occupation" prior to the European assertion of sovereignty. More specifically, occupation must be proven to be sufficient, continuous and exclusive. The SCC stated that these three indicia of title should be considered contextually and together to effectively translate pre-sovereignty Aboriginal interests into modern legal rights by way of title. The SCC rejected the BCCA approach that Aboriginal title must be based on site-specific occupation and thus confined to specific village sites to find sufficiency. Rather, the SCC found that a culturally sensitive approach to sufficiency of occupation is required. Interestingly, the

SCC's Decision in *Keewatin* Clarifies Provincial Aboriginal Consultation Responsibilities for Resource Permits and Applies *Tsilqot'in*

The Supreme Court of Canada's July 11, 2014 decision in *Grassy Narrows First Nation v Ontario (Natural Resources)* (also known as "*Keewatin*") underscores once again the Crown's duty to consult. The decision also dealt with infringement of treaty rights—specifically, the Grassy Narrows First Nation and Wabauskang First Nation's harvesting rights under Treaty 3.

The SCC applied the test used by the Court in the June 26 decision in *Roger William (on behalf of the Tsilhqot'in Nation) v BC*.

The decision underscores the need for provinces and territories to consult early with Aboriginal communities and not wait for a resource project proponent to reach a deal with the community. Prior to issuing permits and authorizations (which have the potential to infringe rights), they must meaningfully consult with Aboriginal people on potential impacts to their rights.

Where does the decision leave resource proponents? It is more important than ever that proponents engage early with Aboriginal people in partnerships and when seeking consent for activities that could impact Aboriginal or Treaty rights. These activities provide the greatest certainty to move important resource projects forward.

SCC also held that a claim for Aboriginal title is not an "all or nothing" proposition. Even if a title claim fails, it is open to the courts to find that other forms of Aboriginal rights exist, such as the right to hunt, trap or fish.

In the context of a title claim, sufficiency of occupation should take into consideration the Aboriginal claimants' type of land use and the frequency and intensity of use. Sufficient occupation will be found if the Aboriginal group in question acted in a way that would communicate to third parties that it held the land for specific personal purposes. Sufficiency of occupation was established for the Tsilhqot'in land in question because evidence showed that the land was regularly and exclusively used for hunting, fishing, trapping and foraging. Thus, even the Tsilhqot'in's semi-nomadic lifestyle was sufficient to ground a claim for Aboriginal title.

Continuous occupation requires evidence that occupation existed prior to European sovereignty. It does not require Aboriginal groups to provide evidence of a completely "unbroken chain of continuity". Nevertheless, the SCC found that the Tsilhqot'in people continuously occupied the area before and after the assertion of European sovereignty.

Exclusive occupation of the land at the time of sovereignty requires that the Aboriginal group had the intention and capacity to retain exclusive control over the lands. The Court found that the Tsilhqot'in repelled other people from the land and demanded permission from people passing through their territory, thereby meeting the requirement of exclusive occupation.

Significance of Aboriginal Title

The SCC said that Aboriginal title confers the right to the exclusive use and occupation of the land for a variety of purposes. This means that the Tsilhqot'in can decide how their titled land is used and have the right to benefit from those uses. The Crown has no beneficial interest in Aboriginal title lands. Aboriginal title is limited by one "carve-out" — the uses of titled land must be consistent with the communal nature of the group's attachment to the land and its enjoyment by future generations. In this case, issuing timber licences on Aboriginal title land amounted to a direct transfer of Aboriginal property rights to a third party. This constituted an infringement that needed to be justified where it was done without Aboriginal consent. In such circumstances, the Crown had to seek the consent of the title-holding Aboriginal group prior to authorizing development on the land where Aboriginal title had been proven. Absent such consent, the Crown could only encroach on Aboriginal title if it could be justified in the broader public interest under section 35 of the *Constitution Act, 1982*. In other words, title may be infringed where the Crown can establish a compelling and substantial objective that is consistent with the fiduciary duty owed by the Crown to the Aboriginal group and has consulted the Aboriginal group. Of significance was the SCC's assertion that a "compelling and substantial objective" must be considered from both the Aboriginal and public perspectives. The SCC stated

> Where Aboriginal title has been established, the Crown must not only comply with its procedural 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*. This requires demonstrating both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.

In addition, such an objective must further the goal of reconciliation.

While the broad list of public interests capable of justifying an incursion on Aboriginal title set out by the Court in *Delgamuukw* has been retained, *William* refines the nature of the fiduciary duty owed by the Crown where infringement of title is proposed. First, Aboriginal title must be respected and incursions on title which will substantially deprive future generations of the benefit of the land must be justified. Second, the obligation of proportionality is imported into the analysis — there must be a rational connection between the infringement and the government's objectives. Minimal impairment and proportionality of impact must also be proven — the effect of the incursion on title must be minimized.

Finally, when it comes to projects such as the Enbridge's proposed Northern Gateway Project, where Aboriginal title can be established, proponents will want to obtain the consent of Aboriginal groups rather than relying on the Crown establishing a "compelling and substantial objective" to justify encroachment on Aboriginal title.

Duty To Consult

The Crown is required to act in good faith towards any Aboriginal group asserting title to land. The Crown must also consult with and, if appropriate, accommodate the interests of the group. The consultation framework developed in *Haida* and similar cases applies and the depth of consultation required will depend on the framework developed in these earlier SCC cases. It should be noted that the SCC envisions a dynamic consultation process. Where early claims by Aboriginal peoples may not be well developed, limited consultation may be required. Over time, however, as the strength of a claim evolves, more consultation may be required. According to the SCC, "[t]he practical result may be a spectrum of duties applicable over time in a particular case". The SCC has clearly set out the basis for a dynamic and continuing relationship between the Crown and Aboriginal title claimants which is intended to result in reconciliation.

If the Crown fails to consult or consult adequately, the courts have applied various remedies which include injunctive relief, damages, or orders for consultation or accommodation.

In this case, the SCC found that the Crown owed the Tsilhqot'in significant consultation and accommodation in order to preserve the Tsilhqot'in's interests and that the Crown had not discharged this duty. Referring to the standstill that drove the parties to the courts, the SCC observed that the right is "not merely a right of first refusal" to logging but a "right to proactively use and manage the land".

Impact of the Decision on Provincial Laws

The SCC went on to find that provincial laws, including B.C.'s *Forest Act*, can apply to Aboriginal title lands, subject to justifying any infringement on Aboriginal title, consistent with the Crown's fiduciary relationship with Aboriginals.

The SCC will provide further guidance on the application of provincial laws to treaty rights when it releases its decision in the Keewatin case, argued in May 2014 (see "Landmark Keewatin Ruling Overturned", Willms & Shier Report, April 2013)

Application of the Decision to the Rest of Canada

- **Peace and friendship treaties –** The Crown and the Mikmaq and Maliseet of the Maritimes signed peace and friendship treaties with the Crown. These parties have different views about the impact of these treaties on title. The Tsilhqot'in decision may encourage assertions of Aboriginal title in areas covered by these treaties.

- **Unsettled land claims and resource development –** The Tsilhqot'in case has direct implications for the lands where land claims are not yet settled.

  In Ontario there are a few unsettled claims. The largest is the Algonquin land claim over 36,000 square kilometres of eastern Ontario. The Algonquins of Ontario assert that they have Aboriginal rights and title to the Ontario portions of the Ottawa and Mattawa River watersheds. The claim is being negotiated and, if successful, will be Ontario's first modern-day constitutionally protected treaty.

  Unsettled claims are still being negotiated in the Akaitcho and Dehcho areas of the Northwest Territories and parts of Yukon as part of Canada's comprehensive land claim negotiation process.

  Resource development within areas of unsettled Aboriginal title claims could face risks similar to those faced by the holders of forestry licences in Tsilhqot'in area. Projects risk significant delays due to potential litigation if the Crown does not adequately fulfil the consultation and accommodation process and Aboriginal title is proven. Projects may ultimately be cancelled.

- **Numbered treaties –** Numbered treaties cover the majority of Ontario and the Prairies. The Crown and Indigenous people disagree over the meaning and intent of these treaties. The Tsilhqot'in decision may prompt some First Nations to assert Aboriginal title over traditional territories based on their traditional use of the land as a way of changing the interpretation and application of the treaties.

Conclusion

The SCC's recent decision in *William* has brought some clarity respecting Aboriginal title in B.C. At the same time, its effects will reverberate across Canada where consultation and appropriate accommodation is missing or lacking in resource development. In *William*, the SCC provides practical guidance for resource development, whether before or after a declaration of Aboriginal title. Governments (and proponents) can avoid a charge of infringement or failure to adequately consult by getting the consent of the interested Aboriginal group(s). Failing consent, the Crown will need to meet the SCC test for infringement consistent with its fiduciary obligations to Aboriginal people.

While some have commented that this decision could lead to a chill in resource development in Canada, we suggest that it provides greater certainty in how the Crown and proponents should proceed where Aboriginal title interests are concerned. It also makes clear that the overarching goal of section 35 is to build partnerships with Aboriginal communities and, in doing so, to achieve reconciliation with them. To quote (with a twist) the motivational poster produced by the British government in 1939, "Keep Calm and Carry On… with a Renewed and Better Defined Purpose".

Court Awards Ostrander Costs in Blanding's Turtle Appeal

By Charles Birchall

The Ontario Divisional Court determined on April 4, 2014 that Prince Edward County Field Naturalists and the Alliance to Protect Prince Edward County should pay "fair and reasonable" costs to Ostrander Point GP Inc. within 30 days of the decision. The costs award follows the Court's February 20, 2014 decision to allow an appeal by Ostrander and the Director of the Ministry of the Environment of the Environmental Review Tribunal's revocation of the Director's grant of a Renewable Energy Approval for a nine turbine wind farm in Prince Edward County. The costs award sends a message to citizen groups to budget for an award of potential litigation costs in the event a proponent or the government is successful.

Background

On February 20, 2014, the Ontario Divisional Court allowed an appeal by Ostrander Point GP Inc. (Ostrander) and the Director, Ministry of the Environment (Director) from the Environmental Review Tribunal's (ERT) decision to revoke the Director's decision to grant a Renewable Energy Approval for a nine turbine wind farm located on Crown land in Prince Edward County (see "Ontario Court Overturns ERT Decision Revoking Ostrander's Renewable Energy Wind Farm Approval"). The Court also set aside the ERT's decision and dismissed appeals by Prince Edward County Field Naturalists (PECFN) and the Alliance to Protect Prince Edward County (APPEC) from other parts of the ERT's decision.

Ostrander then sought costs against PECFN in the amount $120,000 inclusive of disbursements and HST. It also sought costs against APPEC in the amount of $30,000 inclusive of disbursements and HST. The Director only sought reimbursement from PECFN in the amount $2,926.70, representing the amount paid for transcripts.

Factors Considered in the Costs Decision

PECFN and APPEC argued that there should be no award of costs as the case involved matters of "public interest and also raised novel issues" (see "Ontario Court Overturns ERT Decision Revoking Ostrander's Renewable Energy Wind Farm Approval"). They relied on *St. James' Preservation Society v. Toronto (City)*, [2006] OJ No. 2726 (SCJ), which set out five factors to decide whether a particular proceeding constitutes public interest litigation. These factors, and the Court application of them to the Ostrander case, is as follows

1. **Nature of the unsuccessful litigant –** The PECFN and APPEC are not public advocacy groups pursuing a broad public policy mandate. As residents of Prince Edward County, they have a "direct and personal interest" in the outcome of the litigation.

2. **Nature of the successful litigant –** Ostrander is a private party and not a public one such as the Director.

3. **Nature of the case – was it in the public interest?** While there is a measure of public interest in the appeals, which did raise matters not previously been considered by the Court, that alone is not enough to dictate a costs award.

4. **Whether the litigation had any adverse impact on the public interest –** While there is no serious adverse impact on the public interest, the appeal caused a delay to the wind turbine project going forward, despite its approval by two provincial ministries.

5. **Final consequences to the parties –** While Ostrander is better suited to absorb costs associated with the litigation, that alone is not a reason to deny costs. One function of awarding costs is to ensure that all parties "consider the wisdom of pursuing litigation and understand that there are consequences for doing so".

Costs Decision

Based on these factors, the Court determined that PECFN and APPEC should pay costs to Ostrander in an amount that is "fair and reasonable". The Court noted that Ostrander's appeal took up two of the three days of the appeals. With this in mind, the Court awarded Ostrander one third of what it had sought. PECFN was ordered to pay $40,000 inclusive of disbursements and HST and APPEC was ordered to pay $10,000 inclusive of disbursements and HST. ECFN was found liable (in the amount of $2,926.70) for reimbursing the Director the cost of providing additional transcripts for the appeal.

All of the costs were payable within 30 days.

Implications

If the proponent has received a government approval or permit to proceed with a project, citizen groups should recognize that there is a very real prospect that "fair and reasonable" litigation costs could be awarded against them if the proponent is successful in the appeal. This litigation risk is real, despite the degree of public interest involved and the extent to which the issues raised are novel. Moreover, citizen groups should budget for such costs and ensure that access to sufficient funds is readily available as the time for payment can be very short.

First Nations Launch Drinking Water Lawsuit Against Federal Government

By Julie Abouchar

Four Alberta First Nations launched a lawsuit against the federal government on June 16, 2014, alleging that Canada failed to provide resources and investments to ensure safe drinking water on reserves. The lawsuit, commenced by the Tsuu T'ina Nation, the Sucker Creek First Nation, the Ermineskin Cree Nation, and the Blood Tribe, is significant for First Nations communities across the country dealing with water quality issues. Water is important for cultural and ceremonial reasons in addition to sustaining life. However, there is a history of delayed action to ensure safe drinking water on reserves across the country. Currently, 58 First Nation water systems across Canada have boil water advisories resulting from unsafe drinking water quality.

Background

The following key events precede this litigation

- **2006 Expert Panel on Safe Drinking Water for First Nations –** The Minister of Indian Affairs and Northern Development and the Assembly of First Nations appointed an Expert Panel on Safe Drinking Water for First Nations in June 2006. The Panel's mandate was to hold hearings across the country and provide regulatory options for water on First Nations reserves. The Panel's November 2006 report provided options for water regulation on First Nations reserves. The report concluded that regulation alone would be insufficient to address water quality issues and that adequate resources and investment are pre-conditions to regulation.

- **2011 Report on First Nations Water Infrastructure –** The Federal government commissioned a report on the state of First Nations water infrastructure from engineering firm Neegan Burnside. This report, released in April 2011, estimated a cost of $1.08 billion in construction costs and $79.8 million in non-construction costs to bring First Nations water systems up to standards of water systems off reserve.

- **2013 *Safe Drinking Water for First Nations Act* –** The Federal government enacted the *Safe Drinking Water for First Nations Act* in May 2013. The Act provides a framework for regulations for (1) protecting sources of drinking water ; (2) standards for the design of water and wastewater systems; and (3) procedures for monitoring, testing and reporting adverse results.

  Regulations have not yet been drafted. The Act attracted opposition from First Nations based on the lack of infrastructure, training and support required for First Nations to comply with the Act. The Assembly of First Nations recognized the capacity gap, just as the Expert Panel had.

The Legal Challenge by the First Nations

The Plaintiffs' Application states that they have been dealing with unsafe and inadequate drinking water for too long. Their reserves do not have the infrastructure or expertise to treat and deliver drinking water. As a result, the Plaintiffs' reserves have frequently been under boil water advisories and residents have suffered adverse health effects from contaminated water. The lack of safe drinking water has caused some residents to move off reserve and has perpetuated long-standing disadvantages faced by First Nations people in Canada.

The Plaintiffs describe the injuries suffered by them, including adverse health effects, being deprived of the full benefit and use of their reserves, the diminishing economic value of their reserves, and diminishing residential conditions on reserves.

The Plaintiffs allege that the Federal government's failure to ensure safe drinking water for their reserves constitutes a violation of government duties and commitments. The Plaintiffs' claim is grounded in the Federal government's fiduciary duty and Honour of the Crown relating to the creation and management of reserves. It is also based on the section 7 right to life, liberty and security of the person, and section 15(1) equality rights provided in the *Canadian Charter of Rights and Freedoms*. The Plaintiffs further allege that the Federal government has violated the section 36 (1)(c) *Constitution Act* requirement that the federal and provincial governments be committed to providing equal public services to all Canadians.

The Plaintiffs ask Canada to remedy the unsafe drinking water conditions including: consulting and implementing strict standards and monitoring regimes, and increasing governance, resources and powers in the hands of the First Nations.

The Plaintiffs also seek an order for Canada to disgorge the savings it has made by failing to implement the necessary infrastructure to ensure safe drinking water.

U.S. Supreme Court GHG Decision Paves Way for New Coal-Fired Power Plant Emissions Regulations

By John Georgakopoulos

The United States Supreme Court held on June 23, 2014 that the U.S. Environmental Protection Agency (EPA) did not unilaterally have authority to reduce greenhouse gas (GHG) emission permitting thresholds. Based on the constitutional separation of powers, EPA should have obtained approval from Congress. The Court, however, affirmed that EPA can regulate GHG emissions from industries already subject to air pollutant regulations—a decision that enables President Obama to implement proposed regulations to reduce coal-fired power plant emissions. These regulations focus on emission reductions of 30% of 2005 values by 2030.

Willms & Shier Announcements

Willms & Shier Partners Called to the Nunavut Bar

Congratulations to **Julie Abouchar** and **Charles (Chuck) Birchall** for their calls to the Nunavut bar in June! The bar admissions strengthen the profile and capacity of Willms & Shier Environmental Lawyers LLP's new **Northern Team**, formed as of April 1, 2014 with the addition of **John Donihee** to the firm.

Willms & Shier's **Northern Team** provides expert legal advice on environmental, Aboriginal, energy and resource development matters in Canada's northern territories. The team represents clients ranging from Northern Boards and Tribunals, governments and industry proponents to Inuit, Inuvialuit and other Aboriginal organizations.

Welcome New Associates and Students!

Willms & Shier Environmental Lawyers LLP is pleased to welcome new associates **Robert Woon** and **Nicole Petersen**. Both Robert and Nicole were articling students and summer law students at Willms & Shier.

We are also pleased to welcome new articling students **Giselle Davidian** and **Mark Youden**.

John Willms Shares His Experience with the Beginnings of Environmental Law in Ontario

John Willms discusses his experiences as one of the first environmental lawyers in private practice in Ontario in an article and series of video clips appearing on the **Environmental Beginnings website**.

Environmental Beginnings is a project initiated by the Environmental Commissioner of Ontario to celebrate the 20th anniversary of the *Environmental Bill of Rights*.

The article and video clips provide a fascinating look into the origin of environmental law in Ontario!

The central issue was decided in favour of industrial groups, which argued that EPA's power was not unlimited and could only fall within the authority granted to it by Congress. The Court did, however, affirm EPA's argument that it can regulate GHG emissions from industries that already require permits for other air pollutants. These regulated industries are responsible for most of the air pollutant emissions in the U.S., and include power plants, refineries, and other industrial facilities.

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