Supreme Court of Canada Grants Tsilhqot'in Aboriginal Title in *William* – Implications for Resource Development in Canada

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The Supreme Court of Canada 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*[i] *– 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. The application of this case in the treaty context will be clearer after the SCC delivers its decision on* Keewatin,[ii]*, expected on July 11*.

Reaction to the Supreme Court of Canada's (SCC) 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,[iii] 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 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*[iv] 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 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*[v] 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.

Once title is established, the Crown may also need to consider if it is unjustifiably infringing title by continuing with its approvals or the legislation under which it is acts. If an infringement cannot be justified, cancellations of approvals or authorizations could result.

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".

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[i] Although the nature of Aboriginal title had been set out by the SCC in *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.
[ii] *Andrew Keewatin Jr. v. Minister of Natural Resources.*
[iii] *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313.
[iv] See *Delgamuukw v. British Columbia*.
[v] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.