

Mining and Natural Resources Law

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Tsilhqot'in Nation

Two recent Supreme Court of Canada decisions provide guidance on how provincial governments must proceed when engaging in resource development on lands subject to Aboriginal title or to treaty agreements.

Tsilhqot'in Nation – Aboriginal Title

*Tsilhqot'in Nation v British Columbia*¹ represents the first time that a claim for Aboriginal title has been successful. However, this case is just the latest in a series of decisions on Aboriginal title dating back to *Calder*² from the early 1970's. At issue was whether the province of British Columbia had acted in accordance with the law when it granted a commercial logging license to lands claimed by the Tsilhqot'in Nation. The Court held that the lands in question were covered under Aboriginal title, and that the Province had failed to properly consult and accommodate the Aboriginal group. The Court also clarified a number of issues surrounding Aboriginal title, including its content, the test for establishing it, how development on Aboriginal title lands can proceed, and whether provincial laws can apply to those lands.

What is "Aboriginal Title?"

The Supreme Court first described the content of Aboriginal title in the landmark decision *Delgamuukw*.³ Aboriginal title derives from the use and occupation of land prior to the European assertion of sovereignty. This title amounts to a burden on the Crown's underlying title to land, giving rise to a fiduciary duty owed by the Crown. This unique relationship grants

rights similar to the common law concept of *fee simple*, including the right to "possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land."⁴ The key difference between Aboriginal title and a *fee simple* interest is that the use of the land must conform to the communal nature in which the land is held; namely that it is held not only for present generations, but for future generations as well. Therefore, land to which Aboriginal title attracts cannot be alienated, or sold, except to the Crown, and it cannot be used in a way that would prevent future generations from enjoying its use. There are no definitive answers regarding the specific uses to which the land may put; this will depend on the facts of each case. It is clear, however, that although Aboriginal title derives from a pre-sovereignty relationship to the land, Aboriginal groups are still free to use the land in modern ways.

The Test for Aboriginal Title

Due to the historical nature of Aboriginal title, the test for establishing a claim focuses on the nature of the occupation of the land prior to the European assertion of sovereignty. The Aboriginal group must demonstrate that it enjoyed sufficient occupation of the land prior to sovereignty. Where present occupation is relied on to demonstrate pre-sovereign occupation, it must be demonstrated that the group's occupation was continuous. However, it is not necessary to demonstrate a perfectly unbroken chain of occupation. Furthermore, it must be established that the occupation was exclusive. To meet the criteria of exclusivity, it must be demonstrated that prior to the assertion of sovereignty the Aboriginal group had the intention and capacity to control the land.⁵

¹ 2014 SCC 44 [*Tsilhqot'in Nation*].

² *Calder v British Columbia*, [1973] S.C.R. 313.

³ *Delgamuukw v British Columbia*, [1997] 3 S.C.R. 1010.

⁴ *Tsilhqot'in Nation* at para 73.

⁵ *Tsilhqot'in Nation* at para 48.

Sufficient occupation is to be assessed using both the common law and Aboriginal perspectives. Ultimately, it must be established that the land was used in such a way that third parties would know the land was held for the Aboriginal group's own purposes.⁶ This inquiry must reflect the nature of the Aboriginal group, as well as the characteristics of the land itself. The Supreme Court rejected the site specific approach previously used by the Court of Appeal,⁷ and found that even semi-nomadic groups could demonstrate sufficient occupation of large tracts of land. Further, it found that even a group unable to demonstrate the occupation sufficient to make out a claim of Aboriginal title may still be able to claim specific Aboriginal rights over the land, such as the right to hunt.

Development on Aboriginal Title Lands

Aboriginal title requires that any incursion on the land must be made with the consent of the title holders, or it must be justified under section 35 of the *Constitution Act, 1982*. The government must demonstrate that, in making the incursion, it has first discharged its procedural duty to consult, and, if necessary, that it has accommodated the Aboriginal group. The extent of this duty depends on the strength of the Aboriginal title claim. A dubious claim to land may only trigger a procedural requirement to notify the group in question of any planned incursions. On the other hand, if title is established, the government will have the more onerous obligation to either obtain the group's consent or demonstrate that the incursion represents a compelling and substantial objective, and that the government's actions are consistent with the Crown's fiduciary duty. The extent of the requirements of consultation and accommodation may vary in each case as the Aboriginal group moves from first making a claim of title, to eventually having title established by the court. It may be necessary to engage in increasing levels of accommodation as the claim progresses.

The requirement for a compelling and substantial objective must be considered from the Aboriginal group's perspective as well as the broader public's perspective.⁸ A wide range of interests may justify an intrusion on Aboriginal title, including the development of agriculture, mining, hydroelectric power, general economic development, and the building of infrastructure. As mentioned, any incursion must also be consistent with the Crown's fiduciary obligations to the Aboriginal group. Because Aboriginal title is a group interest, any incursion must not substantially deprive future generations of the benefit of the land. Furthermore, the Crown's incursion on Aboriginal title must be necessary to achieve the government's goal, it must go no further than necessary to achieve the goal, and the benefits of the goal must not be outweighed by the adverse effects on the Aboriginal interest.

There may be serious consequences if the government fails to comply with these requirements. Once Aboriginal title has been established, the government cannot grant projects, proceed with development, or pass legislation that has not either received consent of the impacted Aboriginal group or conformed to the above requirements. Even if Aboriginal title has been established after a project has already been granted, it may be necessary to cancel the project unless the government can obtain consent of the Aboriginal group.

Provincial Laws and Aboriginal Title

Although it was unnecessary to dispose of the appeal, the Supreme Court clarified that provincial laws of general applicability can apply to lands held under Aboriginal title. However, these laws must also be justified in accordance with the Crown's fiduciary duty to Aboriginal peoples.

⁶ *Tsilhqot'in Nation* at para 38.

⁷ *Tsilhqot'in Nation v British Columbia*, 2006 BCCA 2.

⁸ *Tsilhqot'in Nation* at para 81.

Unanswered Questions

Although the Supreme Court clarified many issues surrounding Aboriginal title, two central questions remain unanswered. First, it is unclear how Aboriginal title would apply to privately held lands. The Tsilhqot'in Nation only made claims to provincially-owned lands, and did not argue that it had title over the privately held lands in the area. Second, the Supreme Court specified that once Aboriginal title has been declared, previously granted projects may need to be cancelled - but there was no discussion as to whether damages may be claimed as well. Both these issues will likely result in future litigation.

Grassy Narrows First Nation – Treaty Agreements

Unlike the lands under dispute in *Tsilhqot'in Nation*, the land at issue in the *Grassy Narrows First Nation v Ontario (Natural Resources)*⁹ decision was covered under a historic treaty, *Treaty 3*. At issue was whether Ontario could grant a commercial logging license without the approval of the Federal Government.

Treaty 3 was signed by treaty commissioners acting on behalf of the Dominion of Canada, and Chiefs of the Ojibway, in 1873. Since that time, some of the lands covered under the treaty were transferred from Canada to the Province of Ontario. The treaty granted the Ojibway people rights to the land in question, including harvesting rights, subject to the government's ability to "take-up" the lands for development. The Grassy Narrows First Nation, descendants of the Ojibway, argued that a forestry license granted by the Province infringed their harvesting rights, and could therefore only be granted with Federal Government approval.

The Province May Exercise Rights as the Crown Under the Treaty

The Supreme Court held that although the treaty was negotiated by the Federal Government, it is an agreement between the Ojibway people and the Crown. The level of government that performs the rights and obligations is determined by the Constitution. Because section 92 of the *Constitution Act, 1982*, grants exclusive authority to the provinces to take-up provincial land for forestry, mining, and settlement, it was not necessary for the Province to consult with the Federal Government before taking-up the lands.

The Crown's Fiduciary Duties

Provinces are subject to the fiduciary duties owed by the Crown to Aboriginal peoples. In exercising its ability to take-up lands, a province must respect the rights granted to the Aboriginal people under the treaty. This includes informing itself of a project's impact on the Aboriginal group's ability to exercise their rights, and then communicating the province's findings to the Aboriginal group. The province must deal with the group in good faith and with the intention of addressing their concerns. The degree of accommodation is commensurate with the adverse impact of the project. Any action by a province which prevents the group from exercising their rights in a meaningful way could lead to an action for treaty infringement.

Please contact any member of our Mining and Natural Resources Group for further information on this case.

⁹ 2014 SCC 48 [*Grassy Narrows First Nation*].