

Aboriginal

The Supreme Court of Canada's Historic Aboriginal Title Case

The decision in *Tsilhqot'in Nation v. British Columbia* recognizes Aboriginal land title and upholds the Crown's duty to justify any incursions on that title right

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On June 26, 2014, the Supreme Court of Canada (SCC) released its unanimous decision in *Tsilhqot'in Nation v. British Columbia*.¹ Though this decision marks the first time the SCC has upheld a specific Aboriginal title claim, the SCC largely applied its existing legal framework developed over the last 40 years. The SCC also provided greater clarity to the question of when and to what degree provincial laws apply to Aboriginal title lands.

This decision is expected to have significant, but variable, implications for infrastructure and energy projects across Canada, depending on the geographic area at issue in a specific project. If a project involves lands where Aboriginal treaties clearly extinguish Aboriginal title rights, this decision will likely not change the applicable law. If a project involves lands where existing Aboriginal treaties do not clearly extinguish Aboriginal title rights, this decision will apply to future Aboriginal title claims. Similarly, if a project involves lands whose Aboriginal peoples never entered into treaties with the Crown, as was the situation in this case, this precedent applies. The law governing potential Aboriginal title claims depends on the existence and wording of Aboriginal treaties as well as the specific historical and other facts giving rise to the title claim in each particular case.

Before Aboriginal title is established by treaty or court order, the Crown is subject to a duty to consult and potentially accommodate Aboriginal interests. This decision does not change the legal framework applicable to lands subject to unproven Aboriginal title claims. The degree of consultation or accommodation required depends on the strength of the Aboriginal title claim and the severity of potential adverse impacts of the project. However, once Aboriginal title has been established, the Crown must either obtain consent from the Aboriginal title-holder, or satisfy a stringent public interest analysis to justify the incursion on Aboriginal title. The SCC confirmed that proposals to use or exploit land, before or after Aboriginal title is recognized, can avoid allegations of infringement or failure to adequately consult by obtaining the consent of any interested Aboriginal groups.

Though the SCC noted that objectives such as forestry may be sufficiently compelling and substantial objectives to justify an incursion on Aboriginal title as in the public interest, in the context of this case the SCC found that the

¹ 2014 SCC 44.

proposed logging sites were not economically viable, and as a result, the economic benefits of logging could not be considered a compelling and substantial objective. It will be important for companies developing projects in areas subject to Aboriginal title claims to bear in mind that courts in subsequent cases may similarly analyze the economic viability of a project in assessing whether the objective served by developing the project is sufficiently compelling and substantial to satisfy the test for an incursion.

As this is the first time the SCC has upheld a specific claim for Aboriginal land title, this decision may encourage future claims of a similar nature. Aboriginal groups are likely to rely on the SCC's holding that a semi-nomadic group can demonstrate sufficiently intensive exclusive occupation to ground an Aboriginal title claim.

Background

Throughout most of Canada, the Crown has entered into treaties with indigenous peoples whereby those peoples gave up their claim to land in exchange for reservations and other promises, but this largely did not occur in British Columbia. This issue with respect to the Tsilhqot'in Nation lay dormant until 1983 when the B.C. government granted a logging licence for part of the territory at issue. Roger William, former Chief of the Xeni Gwet'in First Nations government, one of the six bands that make up the Tsilhqot'in Nation, commenced a claim seeking a declaration prohibiting commercial logging. When the ensuing negotiations reached an impasse in 1998, the original claim was amended to include a claim for Aboriginal title on behalf of all Tsilhqot'in people. The Aboriginal title claim was confined to approximately five percent of what the Tsilhqot'in regard as their traditional territory.

In 2007, after 339 days of trial spanning five years, the British Columbia Supreme Court held that the Tsilhqot'in's semi-nomadic uses of a portion of the territory at issue were sufficient to demonstrate exclusive occupation for the purpose of proving Aboriginal title. The trial judge thus found that the Tsilhqot'in people were entitled to a declaration of Aboriginal title to a portion of the claim area as well as to a small area outside the claim area.

The British Columbia Court of Appeal (BCCA) adopted a narrower construction of the test for Aboriginal title. The BCCA held that that the Tsilhqot'in claim to title had not been established, but that title may be proven in the future with respect to smaller specific sites that the Tsilhqot'in had intensively used at the time of the assertion of European sovereignty. For the rest of the claimed territory, the Tsilhqot'in were confined to other Aboriginal rights, including rights to hunt, trap and harvest.

The Supreme Court of Canada's Decision

The SCC rejected the BCCA's narrow approach to Aboriginal title. In so doing, the SCC awarded the Tsilhqot'in Nation title over the claim area identified by the trial judge. Though this is the first case to recognize a specific

Aboriginal title right, it builds on and applies existing Aboriginal title jurisprudence that has developed over the last 40 years, since *Calder*².

The SCC's judgment confirms four key points, expanded on below: 1. Aboriginal title will be recognized where exclusive occupation prior to the assertion of European sovereignty can be demonstrated; 2. the duty to consult and accommodate in cases in which Aboriginal title or other rights have yet to be proved continues to apply; 3. Aboriginal title gives the right to exclusive use and occupation of the land; and 4. where Aboriginal title has been proven, incursions can only be justified in narrow circumstances on the basis of the broader public good.

1. What is required to demonstrate Aboriginal title?

The SCC applied the test for Aboriginal title to land, set out in *Delgamuukw*³. Aboriginal title is based on "occupation" prior to the assertion of European sovereignty. To make a finding of Aboriginal title, three characteristics are necessary: 1. occupation must be of sufficient intensity, in light of the context-specific carrying capacity of the land and the customs and characteristics of the specific Aboriginal group; 2. if present occupation is relied on as proof of occupation pre-sovereignty, the occupation between pre-sovereignty and the present must be continuous; and 3. occupation must have been exclusive at the time of sovereignty, in the sense of demonstrated intention and capacity to control the land.

2. The Crown is subject to a duty to consult and potentially accommodate before Aboriginal title is recognized

The duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of Aboriginal title, as set out in *Haida Nation*⁴. The degree of consultation or accommodation required lies on a spectrum, depending on the strength of the Aboriginal title claim and the severity of potential adverse impacts of the contemplated government action. At the high end of this spectrum, accommodation may be necessary.

3. Once recognized, Aboriginal title confers a substantial set of rights

Once recognized, Aboriginal title encompasses the collective right of the Aboriginal group to exclusively use and occupy land, including the right to benefit from its economic development. Land use is not limited to traditional purposes, provided that non-traditional uses can be reconciled with the communal and ongoing nature of the group's attachment to the land. This means that Aboriginal title land cannot be used in a manner that would prevent subsequent generations from enjoying it. The SCC noted that once Aboriginal title has been recognized, the Crown may have to reassess its prior conduct in light of the new title rights in order to faithfully discharge its fiduciary duty to the Aboriginal group.

² [1973] S.C.R. 313.

³ [1997] 3 S.C.R. 1010.

⁴ 2004 SCC 73.

In light of the fact that Aboriginal title is a comprehensive right to exclusively use and occupy land, once it is recognized, anyone seeking to make use of the land can only do so with the consent of the Aboriginal group that holds title. If the Aboriginal title-holder does not consent, the government's only recourse is to establish that the proposed incursion is justified under section 35 of the *Constitution Act, 1982*.

4. Incursions on Aboriginal title can only be justified in narrow circumstances

To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: 1. that it discharged its procedural duty to consult and accommodate, which is highest in cases where Aboriginal title has been established; 2. that its actions were backed by a compelling and substantial objective; and 3. that the government action is consistent with the Crown's fiduciary obligation to the Aboriginal group.⁵

The SCC affirmed its decision in *Delgamuukw*, which stated that government objectives that reconcile the prior occupation of North America by Aboriginal peoples with the assertion of Crown sovereignty may be considered compelling and substantial, and therefore capable of justifying an incursion on Aboriginal title. Government objectives that may satisfy this purpose include the development of agriculture, forestry, mining, and hydroelectric power, general regional economic development, protection of the environment, and the construction of infrastructure and settlement of people to support those aims.

Where a compelling and substantial public purpose is established, the government must show the proposed incursion on Aboriginal title is consistent with the Crown's fiduciary obligation toward Aboriginal people. This obligation includes two facets. First, the government must act in a manner that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. Incursions cannot be justified if they would substantially deprive future generations of the benefit of the land. Second, the Crown's fiduciary duty infuses an obligation of proportionality into the justification process: the incursion must be rationally connected to achieving the government's objective; the incursion must go no further than necessary to achieve the government objective; and the benefits expected to flow from the government objective must not be outweighed by the adverse effects on the Aboriginal interest.

While it was not necessary to decide this appeal, the SCC discussed the province's powers in respect of Aboriginal title lands, and the circumstances in which an infringement will arise. Provincial governments have the power to regulate the use of all lands within the province, whether they are held by the Crown, private owners, or holders of Aboriginal title; as a result, provincial laws of general application will usually apply. However, the SCC affirmed its decision in *Sparrow*, which held that laws of general application unconstitutionally diminish an Aboriginal right where: 1. the limitation imposed by legislation is unreasonable; 2. where the legislation imposes

⁵ [1990] 1 S.C.R. 1075.

undue hardship on the Aboriginal group; or 3. where the legislation denies the holder of Aboriginal title their preferred means of exercising the right.

In this case, the SCC held that granting rights to harvest timber from the Tsilhqot'in's lands is a serious incursion that will not be lightly justified. Should the government wish to grant such harvesting rights in the future, it will need to establish that this harvesting furthers a compelling and substantial objective, which was not present in this case.

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