

Supreme Court declares Aboriginal title in *Tsilhqot'in Nation v. British Columbia*¹

More than 41 years ago, a six-member panel of the Supreme Court of Canada held in *Calder v. BC*² that the concept of Aboriginal title exists under Canadian law. Now, for the first time in history, the Court has formally declared Aboriginal title to exist in a specified area of British Columbia historically occupied by the Tsilhqot'in people.

The ruling ends a complex and protracted legal journey which began in 1998 when the Tsilhqot'in Nation objected to British Columbia issuing third party logging authorizations in their traditional territory in the Chilcotin region of British Columbia.

Key findings

- The Court has confirmed that Aboriginal title can exist over relatively broad areas of land that were subject to occupation at the time sovereignty was asserted. The term "occupation" means regular and exclusive use of land and is not necessarily limited to village sites.
- With the exception of clarifying what is required to establish occupation, the decision does not make significant changes to the law of Aboriginal title as it has come to exist over the last several decades.
- The decision makes clear that provincial laws apply on lands for which Aboriginal title is claimed or proven.

¹ 2014 SCC 44.

² 1973] SCR 313, 34 DLR (3d) 145.

- In keeping with well-established law, federal and provincial governments continue to have a duty to consult and potentially accommodate in cases where Aboriginal title is asserted but not yet proven.
- Governments can infringe proven Aboriginal title, provided they meet the established tests for "justification".

Background of case and Court decisions

The Tsilhqot'in Nation (Tsilhqot'in) is comprised of six *Indian Act* bands, one of which is the Xení Gwet'in Indian Band.

In 1998, in response to proposed logging that had been authorized in the 1980s, Chief Roger William of the Xení Gwet'in Indian Band brought an action, on behalf of the Tsilhqot'in, against the Province of British Columbia and the Government of Canada. The logging was to occur in the Trapline Territory – a region that the Tsilhqot'in claimed lay within the boundaries of their traditional territory.

William sought several declarations, including that:

- the Tsilhqot'in hold Aboriginal title over 4,380 square kilometers of the region including the Tachelach'ed area and the Trapline Territory (Claim Area);
- the First Nations in the area hold Aboriginal rights to hunt and trap, to trade in skins and pelts taken from the Claim Area (as a means of securing a moderate livelihood), and to capture and use wild horses; and
- any forestry activity in the area unjustifiably infringed the existing Aboriginal rights.

After a 339 day trial spanning five years in the BC Supreme Court, the trial judge accepted a "territorial theory" of establishing title and found title over 40% of the Claim Area.

On appeal, the BC Court of Appeal rejected the lower trial Court's approach and held that Aboriginal title must be demonstrated on a "site-specific basis" – requiring intensive presence at a particular site.

Summary of the Supreme Court of Canada's decision

The Supreme Court of Canada held that the appeal should be allowed and that a declaration of Aboriginal title should be granted for the area that the BC Supreme Court had so found. When considering what evidence meets the legal test for occupation, the Court must look to the Aboriginal culture and practices in a culturally-sensitive manner. In this case, key factual findings included that, historically, the Tsilhqot'in people actively repelled others from their lands, demanded permission from others to access the land and had treated the lands as exclusively under their control.

The Court also declared that British Columbia had breached its duty to consult with the Tsilhqot'in in connection with the various authorizations it issued to third parties under the *Forestry Act*.

Finally, the Court stated that provincial laws of general application will continue to apply to Aboriginal title lands, subject to government meeting a "justification" test.

The justification test is consistent with prior cases and has three parts that must be met.

1. Did the government discharge its procedural duty to consult and accommodate;
2. Were the government's actions backed by a compelling and substantial objective; and
3. Is the governmental action consistent with the Crown's fiduciary obligation to the group.

The Court also referenced its previous ruling in *Delgamuukw*³ and said:

³ [1997] 3 SCR 1010

“What interests are potentially capable of justifying an incursion on Aboriginal title? In *Delgamuukw*, this Court, *per* Lamer C.J., offered this:

In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of [A]boriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that “distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community” (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.⁴”

Commentary

Much has been said, and will continue to be said, about the historic nature of this case. While there is no question that it is a significant decision, it is equally important to note that most of the Court's findings simply summarize or restate holdings in previous decisions, all of which have been part of the development of the law of Aboriginal title over the last decades.

First and foremost, the decision confirms the existing jurisprudence on the test for establishing Aboriginal title and the nature of it. It requires exclusive occupation by Aboriginal groups at the time

⁴ Para. 83.

Canadian sovereignty was asserted. While the additional guidance that the Court provides in determining what is sufficient "occupation" at the time of sovereignty is important, the Court specifically notes its findings are consistent with its prior decisions: "In fact, this Court in *Marshall; Bernard* did not reject a territorial approach, but held only (at para. 72) that there must be "proof of sufficiently regular and exclusive use" of the land in question, a requirement established in *Delgamuukw*." (para 43)

And while the area of land over which title was found is not insignificant, it is also important to note that it represents only approximately 2% of the Tsilhqot'in traditional territory.

The Court also comments extensively on the nature of Aboriginal title, and other related principles such as the inherent limitation that Aboriginal groups not use title lands in a manner that is inconsistent with enjoyment by future generations. It also comments extensively on the test by which infringement of Aboriginal title can be "justified". But again, all of these findings are based on the Court's prior decisions and do not represent any major changes in the law.

There are a few passing comments from the Court that will surely be the subject of further discussion in future litigation. For example, the Court makes a brief statement at paragraph 92 to say that projects might need to be cancelled if they begin without Aboriginal consent, title is later proven and continuing the project would be "unjustifiably infringing". Similarly, the Court states at paragraph 86 that "incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land".

Provincial jurisdiction over title lands

The one area where this decision does represent a significant change in the law is that, for the first time, the Supreme Court of Canada clearly states that provincial legislation can apply to lands that are subject to Aboriginal title. While the application of such legislation will be dependent on meeting the justification analysis, there are no inherent limits from a federal/provincial division of powers perspective that prevent the provincial government from legislating over Aboriginal title lands. By holding that the well-

established constitutional doctrine of "interjurisdictional immunity" has no potential application in these circumstances, the Court has eliminated one of the key clouds of uncertainty that existed after the decisions below. Now governments will have to carefully consider how to tailor legislation to ensure that its application on Aboriginal title lands happens only in a manner that will be considered "justified". While there will no doubt be challenges in doing so, this is, from a constitutional perspective, a good problem for provincial governments to have.

Will there be a floodgate of Aboriginal title litigation?

An inevitable question is whether this decision will result in a significant number of other Aboriginal title claims coming forward through litigation. Only time will tell, but it is certainly not inevitable that this will be the case. Such litigation costs many millions of dollars, and at the end of the day, federal and provincial legislation can still infringe Aboriginal title for compelling purposes including economic development, mining and forestry.

While Aboriginal title can provide Aboriginal groups with very important abilities to determine the use of land (subject to any justified infringements) and derive economic benefits, one should not underestimate the degree to which involvement in land use, regulatory decision-making and benefit sharing can occur *in pre-proof context* through the exercise of rights concerning the duty to consult and accommodate. And while there is *no requirement* to provide economic benefits during the consultation and accommodation that takes place before Aboriginal rights or title are proven in Court, as a matter of practice it is quite common, and the government of British Columbia has brought forward many types of revenue sharing and other non-treaty arrangements that provide meaningful benefits to Aboriginal groups. Ultimately, Aboriginal groups will have to determine whether they believe the additional rights and benefits that they derive from pursuing title litigation, with all of its costs and uncertainties, are sufficiently worth it. It is certainly possible that many will decide it simply is not, provided that meaningful reconciliation initiatives continue in the pre-proof context.

Is compensation required for past activities once title is proven?

Aboriginal title includes the right to economic benefits from the land, and since Aboriginal title is established at the time of sovereignty, a significant question remains about whether and what compensation will be owed by governments to Aboriginal groups in respect of any unjustified resource extraction that occurred between the date of Canadian sovereignty and the date a Court may ultimately find Aboriginal title. This issue is not addressed by the Court in this decision, but it is one of the most significant questions that remain unanswered at this time. In earlier decisions such as *Delgamuukw*,⁵ the Court spoke openly about claims for damages resulting from unjustified infringements of Aboriginal title, without appearing to limit that discussion to activities that occurred before title was proven. But in no case to date has the Court ruled conclusively on these issues.

Conclusion

The *Tsilhqot'in* decision is historic and groundbreaking in the sense that it is the first time Aboriginal title has been declared under a framework that has been in existence for decades. But in many respects the decision simply adopts and applies existing jurisprudence and does not represent a substantial change in the law of Aboriginal title. It does however provide clarification on what constitutes "occupation" for title purposes, as well as confirmation that provincial laws continue to apply to Aboriginal title lands, subject to justification requirements. Such clarity is essential to promote reconciliation efforts and the continued governance of Canada and British Columbia.

⁵ [1997] 3 SCR 1010.

How Can We Help?

For further information about the legal implications of the *Tsilhqot'in* decision, please contact McMillan's **Aboriginal Law** team.

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a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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