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What Does Aboriginal Title Mean For Mining In British Columbia?

The recent decision of the Supreme Court of Canada in *Tsilhqot'in v. BC* 2014 SCC 44 has received a great deal of attention and has caused people to ask some important questions. Nowhere has this been more so than in the mining sector. This bulletin attempts to address some of those questions.

Does aboriginal title include mineral rights?

The law is not completely settled on this point.

In *Delgamuukw v BC*, [1997] 3 SCR 1010, then Chief Justice Lamer, when explaining that the content of aboriginal title is not restricted to practices, customs and traditions which are integral to distinctive aboriginal cultures, stated:

> 122 The [*Indian Oil and Gas Act*] presumes that the aboriginal interest in reserve land includes mineral rights, a point which this Court unanimously accepted with respect to the *Indian Act in Apsassin v. Canada (Department of Indian Affairs & Northern Development*), [1995] 4 S.C.R. 344 (S.C.C.). On the basis of Guerin, aboriginal title also encompass mineral rights, and lands held pursuant to aboriginal title should be capable of exploitation in the same way, which is certainly not a traditional use for those lands.

This was cited in a decision by the Yukon Court of Appeal in *Ross River Dena Council v Yukon*, 2012 YKCA 14 (a duty to consult case, not a title case) where the Court stated:

> 32 ... Aboriginal title includes mineral rights (see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), at para. 122). In transferring mineral rights to quartz mining claim holders, the Crown engages in conduct that is inconsistent with the recognition of Aboriginal title.

While these statements may appear conclusive on their face, it is important to note that they are not necessarily settled law. In the case of paragraph 122 of *Delgamuukw*, this is the only mention of mineral rights and title, and it comes from a decision written by only three judges of the Court, concurred in by one other. Further, it is not the basis upon which the Court made its decision, and therefore is considered non-binding *obiter dicta*.

While one might argue that *obiter dicta* of the Supreme Court of Canada can and should be given considerable weight, it is equally important to note that in this developing area of law, brief comments made in passing by a court should not be determinative of the resulting legal order. A perfect example of this is the fact that in the *Tsilhqot'in* decision the Supreme Court of Canada completely divorced itself from its prior statements concerning the division of powers as between provincial and federal governments when it comes to aboriginal rights (including title). In *Delgamuukw* then Chief Justice Lamer had said this at paragraph 180:

> It follows that aboriginal rights are part of the core of Indianness at the heart of s. 91(24).

But in *Tsilhqot'in*, the Court easily dismissed the above, saying at paragraph 135:

> While no case has held that Aboriginal rights, such as Aboriginal title to land, fall at the core of the federal power under s. 91(24), this has been stated in obiter dicta.

Further, the Court in *Tsilhqot'in* did not address the issue of whether title includes ownership of mineral rights. But it did say at paragraph 73 that aboriginal title "confers ownership rights similar to those associated with fee simple" and in BC, fee simple land owners do not typically own any undersurface rights.

For all these reasons, it is far from inevitable that the courts will conclude that aboriginal title includes mineral rights in a case where that is a live matter for decision and where full arguments are presented. If and when such litigation does go forward, there are number of important questions and competing considerations that might need to be considered. For example:

- If aboriginal title were to include mineral rights:
  - What would happen to existing mineral tenures held under the *Mineral Tenure Act* for areas where title is proven? Would the answer differ if those claims were filed before or after section 35 came into force in 1982? i.e. would the filing of those claims prior to 1982 have the effect of extinguishing aboriginal title or this aspect of it?
  - What would happen in respect of privately held mineral rights that were included as part of original Crown grants and are not claims under legislation? Given that those occurred prior to 1982, would they have the effect of extinguishing title or this aspect of it?
  - What about undersurface mineral rights charges in favour of the Department of Soldier Services. This is a federal government entity created in 1919 to provide land to soldiers returning from war. Would those have had the effect of extinguishing aboriginal title or parts of it?
  - How would any such aboriginal mineral ownership fit within the existing *Mineral Tenure Act*?
  - What authority might aboriginal groups have to create systems for allocation and exploitation of mineral rights in respect of minerals under title land, given that band powers under the Indian Act do not extend to such matters?

- If any persons who hold claims or fee simple mineral interests were adversely affected by an aboriginal title finding that includes mineral rights, what remedies might they have against the Crown or other parties from whom they acquired the rights and invested in them?

And what would all the above mean in the context of pre-proof consultation that will continue to occur in the majority of the province that is subject to asserted but unproven aboriginal title?

These are important questions. They provide strong reasons why the issue of whether aboriginal title includes mineral ownership should not be considered to be resolved at this time simply on the basis of a single non-binding paragraph in the 1997 *Delgamuukw* decision, written by three judges and concurred in by one other.

Can BC continue to authorize mineral claims and regulate mining on title lands?

The short answer is yes. As the Court said:

> [102] As a general proposition, provincial governments have the power to regulate land use within the province. This applies to all lands, whether held by the Crown, by private owners, or by the holders of Aboriginal title. The foundation for this power lies in s. 92(13) of the *Constitution Act, 1867*, which gives the provinces the power to legislate with respect to property and civil rights in the province.

Thus, even if aboriginal title does include mineral rights, this does not mean that the province cannot continue to issue tenures and regulate mining on lands for which title has been proven. Instead, government would need aboriginal consent or show that such actions were "justified". The test for justification of infringement of title has been around for 17 years (since the Supreme Court of Canada's decision in *Delgamuukw*) and reflects common sense. It requires government to have a compelling societal objective and to consult with the relevant aboriginal group before infringing the title. It also

requires the government to ensure that in authorizing infringements it does so to the minimum extent possible to achieve the societal goal, and that the public benefits are not outweighed by the adverse impacts on the aboriginal group. These are not unmanageable requirements.

Further, in both *Delgamuukw* and *Tsilhqot'in*, the Supreme Court stated expressly that mining is one of the compelling governmental objectives that could be used to justify infringement of aboriginal title. The Court also clearly stated in Tsilhqot'in that government can allocate to third parties the interests that First Nations own based on aboriginal title, provided consent is obtained or the justification test is met. Specifically, the Court said this at paragraph 127:

> Granting rights to third parties to harvest timber on Tsilhqot'in land is a serious infringement that will not lightly be justified. Should the government wish to grant such harvesting rights in the future, it will be required to establish that a compelling and substantial objective is furthered by such harvesting, something that was not present in this case.

With respect to asserted, but unproven title (which is the case for the vast majority of BC), nothing has changed. Government's ability to authorize projects is still subject to the duty to consult and accommodate under the principles of the Supreme Court's 2004 decision in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73. And doing so helps government later be able to justify those authorizations if the asserted title should become proven title in some specific areas.

Similarly, the comment at paragraph 92 of the *Tsilhqot'in* decision about the potential need to cancel projects after title is proven must be read very carefully. The court does not say projects may need to be canceled if title is later proven. It says that the projects would need to be canceled if they are "unjustifiably infringing" title. All this is to say that *unjustified* infringement would not be allowed to proceed in the face of title just because project permitting got

started before title was ultimately proven there. But justified infringements can indeed proceed in such circumstances.

Finally, in any case where infringement is found, in order to justify it, compensation by government may be required. While the court in *Tsilhqot'in* was silent on this point, these principles are clearly discussed in the *Delgamuukw* decision. But it is important to note that the compensation portion of infringement of aboriginal title is not necessarily the value of the land that is being affected or the profits derived from the resource. Here is what the Court said in *Delgamuukw*:

> 169 ...The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated. Since the issue of damages was severed from the principal action, we received no submissions on the appropriate legal principles that would be relevant to determining the appropriate level of compensation of infringements of aboriginal title. In the circumstances, it is best that we leave those difficult questions to another day…
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> 203 … It must be emphasized, nonetheless, that fair compensation in the present context is not equated with the price of a fee simple. Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown. Thus, generally speaking, compensation may be greater where the expropriation relates to a village area as opposed to a remotely visited area. I add that account must be taken of the interdependence of traditional uses to which the land was put.

It is possible that appropriate compensation could involve sharing a substantial portion of provincial revenues from such projects – something the province already does, through its resource revenue sharing policies.

Is consent required to move forward with projects on title lands?

No, it is not.

While much has been made of the language in the *Tsilhqot'in* decision, which encourages governments to obtain consent from aboriginal groups for projects, no one should fear these statements. Indeed proponents and governments already routinely take steps to try and obtain support from aboriginal groups for major projects where possible, and this is one of the potential outcomes of the process of consultation and accommodation that the law already requires. Consent is always preferable, but it is essential to note that nothing in this most recent decision *requires* it, and to the contrary the decision makes very clear that in the absence of consent, projects can proceed if they justifiably infringe title.

The subtle but important distinction is at the heart of a larger and challenging debate regarding the role of aboriginal consent in development of traditional lands. The UN Declaration on the Rights of Indigenous Peoples (a nonbinding declaration by the UN General Assembly) seeks to give full consent powers to aboriginal groups, and governments have discombobulated themselves simultaneously proclaiming support for this instrument while at the same time not wanting to accept it as giving aboriginal groups a veto. By contrast, the language used in ILO Convention 169 (an instrument which is legally binding at international law upon its signatories) has different language - language that is more consistent with that of the Supreme Court of Canada in *Tsilhqot'in*. It requires governments to consult "with the objective of achieving agreement or consent", but it does not preclude development where that cannot be achieved.

One should not be surprised that the Supreme Court of Canada has taken this more nuanced approach to "consent". Indeed, it is consistent with all of its prior statements encouraging negotiation but also noting that aboriginal groups do not have a veto, even if and where aboriginal title is proven. It is also consistent with the recent decision of the Federal Court in *Hupacasath First Nation v. Canada (Minister of Foreign Affairs* 2013 FC 900, where it stated that the UN Declaration is not part of the law of Canada. It is also consistent with the recent comments of the BC Supreme Court in *Snuneymuxw First Nation v. Board of Education-School District #68*, 2014 BCSC 1173.

Where does it go from here?

Allowing provincial laws to infringe aboriginal title but requiring them to be justified is the only true path to reconciliation. Any other approach would have resulted in a fragmented map of the province in which title lands become legal vacuums and, for all practical purposes, sterilized from economic development because no reasonable investor would ever invest in a legal vacuum. While these discussions involve sensitive political issues, the Supreme Court has been clear in setting out the legal path to reconciliation, and it would be a shame if the province does not take up the mantle that the Supreme Court of Canada has handed it.

To this end, and to address the many question that title raises, one option for the province would be to take up the court's repeated invitation to develop legislation dealing with such matters. For example, a new *Aboriginal Title and Reconciliation Act* could be created to do things such as:

- address the immediate questions investors have, such as the effect of existing or future mineral or forest tenures on title lands (i.e. Will the province seek to support them and rely on the justification analysis if necessary?);
- limit third party actions on title lands where and as appropriate;
- spell out when and what compensation will be available to third parties affected by aboriginal title;

- include procedural requirements and decision-making principles to ensure any infringements resulting from future statutory decisions are justified;
- provide for First Nation compensation when justified title infringements occur (e.g. similar to the existing revenue sharing program for mining in BC); and
- delegate powers where appropriate to aboriginal groups / persons to administer provincial laws applying on title lands.

While the province would most certainly want to consult aboriginal groups in developing such legislation, there would not be a requirement for consensus. And provided such legislation was reasonable, one would expect the courts to embrace it.

Whether the province adopts this course, or some other, remains to be seen.

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a cautionary note