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Chapter 17A
ABORIGINAL TITLE AND MINING IN CANADA—MORE QUESTIONS THAN ANSWERS

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Synopsis

§ 17A.01 Introduction*[1]

On June 26, 2014, the Supreme Court of Canada issued its decision in *Tsilhqot'in Nation v. British Columbia*.[2] The decision concludes a lengthy and complex journey that dates back to 1983 when the provincial government issued forest licenses to a logging company on land within the Tsilhqot'in Nation's asserted traditional territory. The Tsilhqot'in Nation's legal battle began when it sought a declaration from the court prohibiting commercial logging on the land, and that claim was eventually amended and expanded to include a claim for Aboriginal title.

The original trial spanned 339 days over five years, beginning in 2002, after which the trial judge—the late Justice D. H. Vickers—concluded in a 458-page judgment that the Tsilhqot'in Nation had established Aboriginal title to a portion of the lands within its claim area, as well as to a small portion of lands outside the claim area.[3] However, because the Tsilhqot'in Nation's pleading was made out on an "all or nothing" basis for the entirety of its claim area and not to any portions thereof, Justice Vickers determined, for procedural reasons, that he was prevented from making a declaration of Aboriginal title to anything less than the Tsilhqot'in Nation's entire claim area. He characterized his findings as a non-binding opinion. In 2012, the British Columbia Court of Appeal found that the Tsilhqot'in Nation had not established Aboriginal title over its entire claim area, finding that Aboriginal title must be proven on a site-specific basis (e.g., to distinct village sites) and not on a broad territorial basis.[4] Ultimately, the Tsilhqot'in Nation asked the Supreme Court of Canada to declare that it had established Aboriginal title over the area designated by Justice Vickers. In 2014, the Supreme Court of Canada did so, unanimously, and for the first time in Canadian history formally declared Aboriginal title to exist over 1,750 square kilometres of British Columbia.[5]

While the total title area subject to the declaration is modest relative to the size of British Columbia overall (approximately 0.18%), it must also be recognized that vast portions of British Columbia that have not been

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[2]2014 SCC 44, [2014] 2 S.C.R. 256.

[3]*Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700.

[4]*William v. British Columbia*, 2012 BCCA 285.

[5]*Tsilhqot'in*, 2014 SCC 44.

included in treaties remain subject to dozens of claims of Aboriginal title, which are often overlapping. As such, the decision contains important statements—and raises significant questions—regarding future declarations of Aboriginal title in other areas that could occur years or even decades from now.[6] Nowhere are these statements and questions going to be potentially more relevant than in the mining sector.

§ 17A.02 What Is Aboriginal Title?

The concept of Aboriginal title is based on the idea that Aboriginal land rights survived the assertion of British sovereignty unless otherwise addressed through treaties or conquest.[7] Simply put, Aboriginal people occupied the land prior to European settlement, and the Crown's title to lands is "burdened" by such rights.[8] As the Supreme Court of Canada stated in *Tsilhqot'in*: "The content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it."[9]

The Court in *Tsilhqot'in* addressed the question of what is required to prove title[10] and also confirmed earlier case law in respect of the nature, incidents, and restrictions of Aboriginal title.[11] These principles may be summarized as follows:

- Aboriginal title is a unique beneficial interest in the land and is akin to fee simple ownership.[12]
- Aboriginal title encompasses the right to the use and occupation of the land held for a variety of purposes. It confers the right

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[6] It is important to note the legal doctrine discussed by the Supreme Court of Canada in *Tsilhqot'in* was completely consistent with what it held in the 1997 decision in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, but in the *Delgamuukw* case, the Court did not (for procedural reasons) actually make any findings as to whether and where title had been proven in the case. The matter was remitted back for a new trial—after approximately $20 million in public funds had reportedly been spent in legal fees—and that further trial did not occur. *See* "Delgamuukw Ties B.C. in Knots—The Pall of Uncertainty," *The Northern Miner* (Apr. 27, 1998).

[7] *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 376–78.

[8] *Tsilhqot'in*, 2014 SCC 44, para. 69.

[9] *Id.* para. 70.

[10] The test for Aboriginal title is as follows: an Aboriginal group must show (1) that the land in question was occupied by that group prior to British sovereignty (1846 in British Columbia); (2) that there is continuity between present and pre-sovereignty occupation, but only if present occupation is relied on as proof of occupation pre-sovereignty; and (3) that the Aboriginal group's occupation at British sovereignty was exclusive. *Id.* paras. 25, 26.

[11] *See id.* para. 14 (citing *Delgamuukw*, [1997] 3 S.C.R. 1010; *R. v. Sparrow*, [1990] 1 S.C.R. 1075).

[12] *Id.* paras. 70, 73.

- to decide how the land will be used;
- of enjoyment and occupancy of the land;
- to possess the land;
- to the economic benefits of the land; and
- to proactively use and manage the land.[13]

- Aboriginal title is held collectively for both present and future generations.[14]
- Title lands cannot be disposed of by an Aboriginal group except to the Crown, nor can they be used in ways that would substantially deprive future generations of the land.[15]

§ 17A.03 How Do Treaties Fit In with Claims of Aboriginal Title?

As noted above, assertions of Aboriginal title can be addressed in whole or in part through treaty agreements. Indeed, much of Canada is subject to historical or modern day Aboriginal treaties.[16]

Some of the historical treaties purport to extinguish the Aboriginal interest in particular lands and grant certain hunting, fishing, trapping, and other traditional rights to the Aboriginal signatories. Also common in the historical treaties is the right of the Crown to "take up" treaty lands for settlement, mining, or other purposes identified in the treaty. One such treaty—Treaty 8—covers parts of Saskatchewan, the Northwest Territories, Alberta, and the northeast corner of British Columbia. However, disagreements exist about the nature and effect of these provisions.[17]

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[13] *Id.* para. 73.

[14] *Id.* para. 74.

[15] *Id.*

[16] *See* Keith B. Bergner & Michelle S. Jones, "Mapping the Territory: Aboriginal Title and the Decision in *Tsilhqot'in Nation v. British Columbia*," 61 *Rocky Mt. Min. L. Inst.* 14B-1, § 14B.02 (2015) (discussion of Aboriginal land legal regimes, including historical and modern treaties).

[17] Such disagreements have often resulted in litigation. For example, an Ontario First Nation challenged the province's jurisdiction to avail itself of the taking up provision of Treaty 3. The provision in question allowed the "Government in the Dominion of Canada" to take up lands for settlement, mining, lumbering and other purposes. The First Nation argued that only the federal government and not the province could take up treaty lands in accordance with Treaty 3. The decision of the Supreme Court of Canada in *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48—released shortly after the *Tsilhqot'in* decision—confirmed that Ontario does have the power to take up provincial lands under Treaty 3 and that federal approval is not required to do so. The Supreme Court of Canada's decision in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*,

Other historical treaties are often referred to as the "Peace and Friendship Treaties" and do not contain express provisions about surrendering land claims. Disagreements also exist about the nature and effect of these treaties.[18]

Finally, a number of modern, comprehensive treaties—also referred to as land claim agreements or final agreements—have been settled with select Aboriginal groups over the last 20 years. These all contain "certainty" provisions, address Aboriginal title claims, and provide that the treaty is a final settlement to all such claims.[19]

While not limited to British Columbia, the issue of Aboriginal title likely creates the most uncertainty in that province because most of British Columbia was not the subject of historical or modern treaties. Instead, it remains subject to asserted claims of Aboriginal rights and title that have not been resolved through negotiation or litigation. The exceptions are:

- part of the northeastern section of the province that is subject to Treaty 8;
- a few historical treaties on Vancouver Island known as the "Douglas Treaties";
- a modern treaty with the Nisga'a known as the Nisga'a Final Agreement; and
- modern treaties with a small number of First Nations who have undergone the British Columbia government's treaty-making process, including the Maa-nulth First Nations Final Agreement and the Tsawwassen Final Agreement.[20]

2005 SCC 69, which concerned the taking up provision of Treaty 8, came after a Treaty 8 First Nation objected to the issuance of a road authorization on treaty lands. The Court held that the provincial Crown was required to consult with the First Nation in relying upon the Treaty 8 taking up provision.

[18] *R. v. Marshall*, [1999] 3 S.C.R. 456.

[19] Some—like agreements entered into in the Yukon—refer to the "cede, release and surrender" of Aboriginal rights in exchange for the treaty benefits provided. *See, e.g.*, Carcross/Tagish First Nation Final Agreement § 2.5.0 (Oct. 22, 2005). Others like the more recent Tsawwassen treaty contain "modification" provisions. *See* Tsawwassen First Nation Final Agreement ch. 2, § 13 (Dec. 6, 2007) ("Despite the common law, as a result of this Agreement and the Settlement Legislation, the aboriginal rights, including the aboriginal title, of Tsawwassen First Nation, as they existed anywhere in Canada before the Effective Date, including their attributes and geographic extent, are modified, and continue as modified, as set out in this Agreement.").

[20] At this time, modern treaty agreements have been signed but are not yet in force with the Yale First Nation and the Tla'amin Nation. More information about these modern treaties is available at http://www.bctreaty.net/files/treaties-and-agreements-in-principle.php.

§ 17A.04 Outstanding Questions

[1] Does Aboriginal Title Include Subsurface Rights?

Of particular concern to the mining industry is the question of whether Aboriginal title, where proven, includes subsurface rights.[21] Unfortunately, the law is not entirely settled on this point. The jurisprudence on the issue is underdeveloped, and the courts have never addressed the issue in the context of a proven claim to title. The *Tsilhqot'in* decision did not address this question specifically. As discussed above, it did note that Aboriginal title includes the right to decide how land will be used, the right to the economic benefits of the land, and the right to proactively use and manage the land. However, it also said that "Aboriginal title confers ownership rights similar to those associated with fee simple," and in British Columbia, fee simple ownership rights do not typically include subsurface rights, because subsurface rights were usually reserved to the Crown at the time of the original land grant.[22]

The limited guidance from the courts to date in this area comes mainly from the 1997 decision in *Delgamuukw v. British Columbia*.[23] There the Supreme Court of Canada, when explaining that the content of Aboriginal title is not restricted to practices, customs, and traditions which are integral to distinctive Aboriginal cultures, stated:

> 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 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*. 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.*[24]

This passage was cited in a decision by the Yukon Court of Appeal in *Ross River Dena Council v. Yukon*,[25] a case in which the Court found that

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[21] The term "subsurface rights" is used throughout this chapter and refers to both mineral (e.g., gold, silver, copper) and coal tenures.

[22] *Tsilhqot'in*, 2014 SCC 44, para. 73. *But see id.* para. 72 ("Aboriginal title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership — for example, fee simple — may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title 'is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts.' ").

[23] [1997] 3 S.C.R. 1010.

[24] *Id.* para. 122 (emphasis added) (citation omitted).

[25] 2012 YKCA 14.

the territorial government has a duty to consult Aboriginal groups when recording mineral claims. In *Ross River*, the Court stated: "*Aboriginal title includes mineral rights*. In transferring mineral rights to quartz mining claim holders, the Crown engages in conduct that is inconsistent with the recognition of Aboriginal title."[26]

While these statements may appear conclusive, they are not necessarily settled law. The *Delgamuukw* paragraph was a statement in the decision of only three of seven judges that heard the case. Of the other judges, two issued a dissenting opinion, one took no part in the decision, and one issued a one-line statement saying she concurred with the three-judge opinion, but was also in substantial agreement with the dissent.[27] Further, that paragraph was the only mention of subsurface rights and title in the decision, and it was not the basis on which the Court made its decision.[28]

Similarly, in the *Ross River* case, the Court's decision was also premised on the fact that obtaining mineral tenures in the Yukon allowed for some physical disturbance without any further approvals, which would normally require Aboriginal consultation.[29] That is not the case in British Columbia.[30]

It is possible to argue that even non-binding comments of the Supreme Court of Canada should be treated with deference, but it must be noted that in this developing area of the law, passing comments by a court are not necessarily determinative of the resulting legal order. For example, in the *Tsilhqot'in* decision itself, the Court divorced itself from its prior findings regarding the fundamental question of Canadian federal and provincial division of powers with respect to Aboriginal rights and title. In *Delgamuukw*, then Chief Justice C.J. Lamer had said: "It follows that aboriginal rights are part of the core of Indianness at the heart of [federal legislative authority]."[31] But in *Tsilhqot'in*, the Court easily dismissed

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[26] *Id.* para. 32 (emphasis added) (citation omitted). The *Ross River* decision and its statements regarding title and mineral claims were recently noted by the Saskatchewan Court of Appeal in *Buffalo River Dene Nation v. Saskatchewan (Energy and Resources)*, 2015 SKCA 31, but it was not necessary for the court to base its findings on that principle because the *Buffalo River* case involved treaty rights and not asserted Aboriginal title. *See id.* paras. 96, 97.

[27] *Delgamuukw*, [1997] 3 S.C.R. 1010, para. 209.

[28] In *Delgamuukw*, the Court ordered a new trial due to a defect in the pleadings.

[29] *Ross River*, 2012 YKCA 14, para. 33.

[30] Under section 10 of the British Columbia *Mines Act*, R.S.B.C. 1996, c. 293, a permit is required before starting any work in, on, or about a mine.

[31] *Delgamuukw*, [1997] 3 S.C.R. 1010, para. 181 (citing *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 91(24) (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.)).

the above, stating: "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*."[32] The Court then went on to hold that provinces do have competence (from a division of powers perspective) to infringe Aboriginal title. This was a major issue and source of uncertainty for many years in Canada. But the Court disposed of the issue easily, dismissing its prior inconsistent comments as mere *obiter* and moving forward as though it was a minor issue.

In summary, while current statements of the Court suggest that Aboriginal title does include subsurface rights, the issue has never been thoroughly examined in case law and it is in no way clear what a court will hold when it is directly faced with the question and has the opportunity to hear full arguments on the issue.

[2] How Does Aboriginal Title Impact the Free Entry System?[33]

The comments by the Yukon Court of Appeal in the *Ross River* decision discussed above—that the mere transfer of subsurface rights to mining claim holders is inconsistent with the recognition of Aboriginal title—are potentially relevant to both the Yukon and to other jurisdictions in Canada.

The Court in *Ross River* did not, however, discuss in any detail what impact the conveyance of subsurface rights to third parties would have on Aboriginal title, when such subsurface rights are also very much dependent on numerous and onerous subsequent approvals that would be the subject of Aboriginal consultation. It is important to consider in this regard that for all of the mining claims acquired each year in British Columbia, for example, very few result in the development of a mine or any level of mineral or coal extraction.

In any case, if the comments of the Yukon Court of Appeal were to be accepted and adopted in British Columbia, then there would be a duty to consult *prior* to claims being established pursuant to the free entry system. That is not what has been occurring in British Columbia for decades and it is not what is occurring now.

[3] What Will Happen to Subsurface Rights If and When Title Is Proven?

Following the *Tsilhqot'in* decision, as an interim measure, the British Columbia government is not allowing the acquisition of rights to minerals

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[32] *Tsilhqot'in*, 2014 SCC 44, para. 135.

[33] A "free entry" system is one in which a mineral prospector is "free" to enter lands to explore for and stake claims to minerals.

(i.e., the free entry system) in the *Tsilhqot'in* title area, though no formal mineral or coal reserve has been created at this time.[34] It is however not clear what position the government is taking in respect of subsurface tenures that were obtained by companies before the title declaration was issued.

While this may not be a pressing issue for the *Tsilhqot'in* title area given the limited number of subsurface claims and the limited work done on them to date, it is potentially a huge issue for subsurface claim holders in parts of British Columbia that are subject to asserted (but as yet unproven) Aboriginal title. This is especially true where those projects are in advanced stages of development or even operation.

At this point it is impossible to predict how the courts will deal with this if and when called upon to do so.

One possibility would be that existing subsurface rights would continue to exist and that Aboriginal groups who have successfully proven title would need to respect them, even if such groups might have a related claim for compensation against the provincial government.

A second possibility is that existing subsurface rights holders would, on a declaration of Aboriginal title, lose such rights. In other words, existing subsurface tenures would become null and void and would instead be owned by the Aboriginal group. In this situation, a related question that would arise is whether such subsurface interest holders would have an ability to claim compensation against the government.

A third possibility is that—even if subsurface rights were not part of Aboriginal title—a First Nation that establishes Aboriginal title would have a right to declare that title lands be put to a use other than mineral exploration or mining, effectively frustrating the resource exploitation. Again, in this situation, a related question that would arise is whether such subsurface interest holders would have an ability to claim compensation against government or the Aboriginal group.

While these are questions that will likely become live only if and when title is found in other locations, they are nonetheless important ones for investors to consider now, because they could materially affect the value of subsurface rights and mining projects in any area where title is claimed but as yet unproven, which is most of British Columbia and other parts of Canada.

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[34] A Mineral Titles Office official confirmed this in a phone conversation on May 12, 2015.

[4] What About Subsurface Rights Issued Prior to 1982?

It is also not clear if the answer to these questions would be affected by whether or not subsurface rights were first issued by the Crown prior to the effective date of the *Constitution Act, 1982*.[35] More specifically, would a declaration of Aboriginal title have different impacts on subsurface rights that pre-date subsection 35(1) of the *Constitution Act, 1982*, which recognizes and affirms Aboriginal rights? In other words, where subsurface rights were established prior to 1982, would that have the effect of extinguishing Aboriginal title in those areas, or at least any subsurface rights that may be part of it? A very similar question arises with respect to privately held subsurface rights that were conveyed to fee simple title owners as part of a provincial Crown grant prior to 1982 (i.e., subsurface rights that passed to a landowner as part of a land grant rather than those that are obtained under mineral tenure legislation). Would such grants have the effect of extinguishing Aboriginal title?

The Supreme Court of Canada in *Delgamuukw* was clear that Aboriginal title could be extinguished prior to 1982, but it also stated that the province could not do so.[36] Rather—as discussed above—the Court in *Delgamuukw* found that only the federal government had such jurisdiction.[37] However, in the *Tsilhqot'in* decision, the Court dismissed these statements as *obiter dicta*, also as discussed above.[38] If the statements in *Tsilhqot'in* are taken at face value, then there is no binding case law authority that states that the provincial government could not (as a matter of the constitutional division of powers) extinguish Aboriginal title through legislation and acts prior to 1982.

An alternative argument can also be made: if the non-binding comments of the Court in *Delgamuukw* are correct, and Aboriginal title was *not* extinguished by the provincial grant of subsurface rights prior to 1982, then the granting of these rights and related infringement on Aboriginal title does not now need to be justified under subsection 35(1). Aboriginal rights and title were only "constitutionalized" in 1982, and prior to that, the province could lawfully infringe these rights (even if they were not extinguished) without having to meet a justification test.

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[35] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, c. 11 (U.K.).

[36] *Delgamuukw*, [1997] 3 S.C.R. 1010, paras. 173–74, 178.

[37] *Id.* para. 181.

[38] *Tsilhqot'in*, 2014 SCC 44, para. 135.

To date, the courts have discussed the implications of the provincial issuance of fee simple title with respect to Aboriginal title only to a limited extent.[39]

[5] Who Will Regulate the Physical Activity of Mining on Aboriginal Title Lands?

The Court in *Tsilhqot'in* held that provincial laws of general application (as well as federal laws) can validly apply to title lands.[40] But there are a couple of caveats.

First, the Court in *Tsilhqot'in* made clear that it will not be assumed that the legislature intended every general law to apply on title lands. Instead, the Court found that the *Forest Act*[41]—the legislation under which certain forest licenses had been issued despite the objections of the Tsilhqot'in Nation—did *not* apply on title lands because the definition of "Crown timber" was based on the concept of Crown land, meaning land vested in the Crown.[42] Aboriginal title lands are no longer vested in the Crown; rather, the beneficial interest in the land vests in the Aboriginal group.[43] This raises the question of whether a similar analysis could be applied to British Columbia's *Mineral Tenure Act*, for example, which uses the term "mineral lands" and defines the same as follows: "lands in which minerals or placer minerals or the right to explore for, develop and produce minerals or placer minerals *is vested in or reserved to the government* . . . ."[44] Similar questions would need to be considered in relation to the mining permitting and environmental protection legislation.

A second caveat is that—even if a provincial law of general application applies on its face—if the provincial law infringes on Aboriginal title, it must be able to meet the "justification" test (discussed below). It is not

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[39] In one such case, the British Columbia Court of Appeal found that an Aboriginal title claim cannot be registered as encumbrances on title in a provincial land title office: *Skeetchestn Indian Band & Secwepemc Aboriginal Nation v. Registrar of Land Titles, Kamloops*, 2000 BCCA 525. As a practical matter, the risk of Aboriginal title being pursued in respect of private fee simple lands is likely lower than in respect of Crown lands. This issue was also briefly touched on by the Court in *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 1712, paras. 82–85, 171, 195. There the Court noted that the parties had deemed it unnecessary for the Court to decide the issue in that particular proceeding.

[40] *Tsilhqot'in*, 2014 SCC 44, para. 101.

[41] R.S.B.C. 1996, c. 157.

[42] *Tsilhqot'in*, 2014 SCC 44, para. 109.

[43] *Id.* para. 116.

[44] R.S.B.C. 1996, c. 292, § 1 (emphasis added).

at all clear at this point whether governments will take the position that mine permitting and environmental protection legislation either does not infringe upon title or that the infringement is justified. It is also not clear when and how any difference of views on those questions would be settled by the courts.

If such permitting legislation did not apply on title lands (either because it did not on its face or because it was an unjustified infringement) other questions still remain about Aboriginal regulation of such matters on title lands. Under the federal *Indian Act*,[45] the powers and authority given to Indian bands—the entities that typically govern Aboriginal groups and receive federal funds—extend to administrative, electoral, and reserve land management, among related other things.[46] Such powers do not extend to the allocation and exploitation of subsurface rights on title land or the regulation of mining and environmental protection generally. Furthermore, as the British Columbia Court of Appeal made clear in its 2012 decision in the *Tsilhqot'in* litigation, the nature of the Aboriginal title-holding entity is a matter unique to the history of each Aboriginal group and will not necessarily be the same collectivity that has membership in an "Indian band."[47] It is possible that the Court would find the power to regulate as implicit in the right to choose the use to which the land is put (a right that comes with Aboriginal title), but that would be a very vague basis upon which to try to establish detailed regulatory regimes and to consider how such regulations may integrate with other federal and provincial legislation respecting mineral development and the environment generally.

§ 17A.05 What Is the Path Forward?

The Supreme Court of Canada in *Tsilhqot'in* suggests two ways to enhance certainty in respect of natural resource tenures and development. Each has its own challenges, which unfortunately the Court did not discuss.[48]

[1] Option A—Consent

In *Tsilhqot'in*, the Court expressly encourages government to seek the consent of Aboriginal groups in order to make use of Aboriginal title lands:

> The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the

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[45] R.S.C. 1985, c. I-5.

[46] *See, e.g., id.* §§ 20–29 (administration of reserve lands); *see also id.* §§ 74–79 (election of band councils).

[47] *See William v. British Columbia*, 2012 BCCA 285, para. 149.

[48] *See* Bergner & Jones, *supra* note 16, § 14B.04 (discussing unanswered questions post-*Tsilhqot'in*).

> Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.[49]

Later in the decision, the Court identifies the possibly dire consequences of proceeding with a project on title lands without consent (and in the absence of a justified infringement, discussed below). The Court stated:

> Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.[50]

However, the concept of consent itself raises a number of questions, such as:

- When is the existence of consent determined? Would an Aboriginal group consent to the use of title lands for a mining development at the proposal, exploration, environmental assessment or permitting stage? How would consent, once provided, work with respect to mine life extensions or expansions to mine size, production rates, or mining techniques? Would consent be required at each stage anew?
- How will consent be documented? Would it take the form of a legal agreement between an Aboriginal group and government, and would the terms of such an agreement or any related payments be made public? Would a consent agreement be made into law or regulation?
- Who among the Aboriginal group can determine consent, and how will such decisions be made and manifest? The question of who may represent an Aboriginal group is as much of an issue in the pre-proof context as it would be in the title context. As mentioned above, the collective that holds Aboriginal title may not necessarily be the Indian Act band and is a matter for an Aboriginal group to determine itself. In the *Tsilhqot'in* decision, the Tsilhqot'in Nation rather than individual Indian bands or territorial sub-groups within the nation was determined to be the holder of Aboriginal title. In general, Aboriginal "nations" are groupings of indigenous people united by common language, culture, and tradition. There are roughly two dozen such nation groupings in British Columbia, but most Aboriginal institutions and

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[49] *Tsilhqot'in*, 2014 SCC 44, para. 76.

[50] *Id.* para. 92.

entities in the province are not neatly organized wholly according to nation lines. It will not always be straightforward or determinable by consensus whether the authority to consent to the use of title lands for mining purposes is held at the nation or other Aboriginal entity level.

- On a related note, who will be able to challenge consent decisions? Would this right lie with individuals within an Aboriginal group? Will other Aboriginal groups or First Nations with overlapping unproven Aboriginal title claims be able to challenge consent decisions? What will be the legal mechanism for such challenges (e.g., judicial review)?
- Could consent be revoked if an Aboriginal group subsequently changes its mind about a proposed use of title lands? Similarly, since Aboriginal title is recognized by the courts as including an obligation to consider the interests of future generations, do future generations also need to consent?

For all the reasons above, while obtaining the consent of an Aboriginal group to use title lands for a purpose such as mining certainly brings some elements of certainty to project development, the concept of consent is not necessarily a tidy resolution when one considers the practical realities.

[2] Option B—Justified Infringement

It is essential to note that consent is not the *only* possible way to move forward with projects such as mining developments on Aboriginal title lands.

While the Court in *Tsilhqot'in* advocates consent as a way forward in terms of the potential use of title lands by those other than the title holders, it is well-established law—reiterated in clear statements by the Court in this instance—that government can infringe Aboriginal title without consent on the basis of the broader public good, in compliance with a specific judicial test based on the Supreme Court of Canada's decision in *R. v. Sparrow*[51] and refined in subsequent jurisprudence. The legal test for an infringement of Aboriginal title requires that government demonstrate the following:

(1) That it discharged its duty to consult and accommodate[52] the Aboriginal group;

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[51] [1990] 1 S.C.R. 1075.

[52] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, the Supreme Court of Canada held that government has duty to consult and accommodate Aboriginal groups in respect of proposed decisions or actions that could potentially affect asserted Aboriginal rights or title. The depth of consultation required in a particular context depends on the strength of an Aboriginal group's claim to asserted rights or title and the potential impact of the government decision or action on such rights or title. *Id.* para. 39.

(2) That there is a compelling and substantial objective for the infringement; and

(3) That the government action is consistent with the Crown's fiduciary obligation to the Aboriginal group.[53]

With respect to the second part of the test above, the Court in *Tsilhqot'in* held that the compelling and substantial objective must be considered from both the Aboriginal perspective and the perspective of the broader public and must further the goal of the reconciliation of Aboriginal interests with those of the broader interests of society.[54] The Court highlighted that the development of mining can be consistent with the goal of reconciliation and can, in principle, be a "compelling and substantial objective" capable of justifying an infringement of Aboriginal title. The Court's specific statements are as follows:

> As *Delgamuukw* explains, the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d'ëtre* of the principle of justification. Aboriginals and non-Aboriginals are "all here to stay" and must of necessity move forward in a process of reconciliation. To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective.
>
> 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." *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.[55]

These statements are encouraging for the mining industry. However, they must be considered alongside the third element of the justification

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[53] *Tsilhqot'in*, 2014 SCC 44, para. 77.

[54] *Id.* paras. 81–82.

[55] *Id.* paras. 82–83 (alterations in original) (citations omitted) (quoting *Delgamuukw*, [1997] 3 S.C.R. 1010, para. 165).

test—that is, the Crown's fiduciary obligation to the Aboriginal group. In *Tsilhqot'in*, the Court outlined two components of the Crown's fiduciary duty. First, because the Crown must respect that Aboriginal title is a communal interest to both present and future generations, incursions on title (without the consent of the Aboriginal group) cannot be justified if they would substantially deprive future generations of the Aboriginal group of the benefit of the land.[56] Second, the fiduciary duty requires that an incursion on title be proportional.[57] The Court noted that proportionality in this context requires

> that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact).[58]

While the elements of the justification test for government to infringe Aboriginal title are quite clear, significant questions exist as to whether, when, and how government may actually be prepared and able to meet them. In Canada, federal and provincial governments already struggle to make decisions affecting asserted or established Aboriginal rights and title claims. No Canadian government to date has issued any significant substantive response to the *Tsilhqot'in* decision. In September 2014, the British Columbia government and the Tsilhqot'in Nation signed a letter of understanding "to explore how to implement the Supreme Court of Canada decision," but there is no mention of the concept of justified infringements that the Court speaks plainly about.[59]

While one does not envy federal and provincial government having to enter into this sensitive fray, eventually they will be compelled to do so. When they do, there are various options that they can consider. These options include:

- Issuing public statements setting out positions in specific cases;
- Issuing written statements of government's position on subsurface interests and Aboriginal title (either general policy documents or terms and conditions of tenures and permits);

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[56] *Id.* para. 86.

[57] *Id.* para. 87.

[58] *Id.*

[59] News Release, British Columbia, "Interim Decisions Made Within Tsilhqot'in Title Land" (Mar. 13, 2015); *see* Letter of Understanding *between* Xeni Gwet'in First Nations Government, Tsilhqot'in National Government, on behalf of the Tsilhqot'in Nation, *and* Her Majesty The Queen in right of the Province of British Columbia (Sept. 10, 2014).

- Amending subsurface tenure and environmental protection legislation; and
- Developing entirely new (and comprehensive) legislation regarding the manifestation of consent and a framework for justifying infringements.

These options are similar to recommendations made by the authors of a Macdonald-Laurier Institute analysis of the *Tsilhqot'in* decision.[60] The authors stated specifically:

> Those governments that embrace the details and direction of *Tsilhqot'in* will have the best chance of moving forward with carefully planned resource development. Those that resist will spend a great deal more time in court and will see resource activity stagnate in their jurisdictions. The challenge is to turn good law, carefully constructed, into effective public policy and practice.[61]

Of the options above, the introduction of new legislation is perhaps the most comprehensive and impactful path government could undertake in terms of providing certainty to investors. Such legislation could be all-encompassing and could address many of the questions discussed above. Key aspects of the legislation[62] could include the following topics:

- What the effect of title is on existing or future subsurface tenures on proven title lands;
- The nature of compensation available to third parties affected by Aboriginal title;
- The nature of compensation to Aboriginal groups when justified title infringements occur;
- Procedural requirements and decision-making principles to ensure infringements to title lands are justified; and
- Delegation of powers, where appropriate, to Aboriginal groups or individuals to administer provincial laws that apply on title lands.

In any discussion of potential legislation, it must however be borne in mind that government's ability to legislate in respect of Aboriginal title is limited.

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[60] Kenneth Coates & Dwight Newman, Macdonald-Laurier Inst., "The End Is Not Nigh: Reason Over Alarmism in Analysing the *Tsilhqot'in* Decision" (Sept. 2014).

[61] *Id.* at 2.

[62] Interesting questions would arise about the relative authority of federal and provincial governments in this respect. Such a discussion is beyond the scope of this chapter, but for present purposes, it is sufficient to note that the comments of the Court in *Tsilhqot'in* seem to make clear that this is not an area where authority would be limited to the federal government. *See Tsilhqot'in*, 2014 SCC 44, paras. 122–127.

Up until 1982, governments had the power to extinguish Aboriginal title in various ways, including clear legislation and implicit extinguishment through actions and treaties.[63] However, since 1982 government has been in a different position, as a result of the *Constitution Act, 1982*, which states in part: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[64]

With these 17 words, legislatures lost the ability to extinguish title in Canada. Instead, power was shifted to the hands of the judges who were, in turn, required to develop a legal framework to reconcile Aboriginal and non-Aboriginal interests and to determine what powers government does or does not have as it governs in relation to matters that have an effect on proven or even asserted Aboriginal rights and title. That is, of course, pretty much anything touching upon the use of land and resources.

§ 17A.06 Conclusion

In closing, it is important to note that in cases going back to the 2004 decision in *Haida Nation v. British Columbia (Minister of Forests)*,[65] the Supreme Court of Canada has invited government to step forward and regulate in this area (within limits).[66] It is as if the Court is aware that it has been thrust into the business of fundamentally re-engineering the social and economic order and that it appreciates high-level statements and principles on reconciliation and Aboriginal title are very much removed from what it takes to govern on the ground. Unfortunately, to date at least, governments in Canada have been very reluctant to take up the mantle that the Supreme Court of Canada has sought to hand them. If that remains the case, it will be unfortunate, because the framework and principles established by the Court in respect of Aboriginal title, consent, and infringement are very high level and raise many questions. They are—put simply—crude and rudimentary tools compared to what is typically addressed in balanced and well-functioning regulatory regimes. Achieving successful reconciliation of Aboriginal and non-Aboriginal interests requires more than rudimentary tools of basic legal principle; it requires

[63] It should however also be noted that at the time subsection 35(1) came into force, the law on Aboriginal rights and title was not fully developed. In fact, it was not until the Supreme Court of Canada's 1997 decision in *Delgamuukw* that we knew conclusively that Aboriginal title was part of the Canadian legal fabric and what it meant.

[64] *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, c. 11, § 35(1) (U.K.).

[65] 2004 SCC 73.

[66] *See, e.g., id.* para. 51; *see also Tsilhqot'in*, 2014 SCC 44, paras. 116, 117.

detailed and sophisticated government mandates that will be different than how government has governed in the past—but it will still be governing nonetheless. It is only through such steps—or decades upon decades of litigation—that the mining sector can achieve a reasonable degree of certainty in the face of widespread asserted (but as yet unproven) Aboriginal title claims.