**Case Brief - Tsilhqot’in Nation v. British Columbia, 2014 SCC 44**

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*Tsilhqot’in* represents the first court declaration of Aboriginal title for a First Nation in Canada.  Its significance ranks on par with the Supreme Court’s previous decisions in*Calder* and *Delgamuukw*.

Fundamentally, the Supreme Court of Canada’s decision overturns the Court of Appeal’s narrow view of Aboriginal title being limited to instances of intensive, site-specific occupation and restores the trial judge’s view that Aboriginal title exists on a territorial basis.[1]  The Supreme Court does so by carefully elucidating the test to establish Aboriginal title and synthesising its jurisprudence into one, coherent framework.  It re-states the test for Aboriginal title, the nature of the rights Aboriginal title confers, and whether provincial laws apply to Aboriginal title land.

**1.      The Test for Aboriginal Title**

To ground Aboriginal title, occupation prior to the assertion of European sovereignty must possess three characteristics: it must be sufficient; it must be continuous (where present occupation is relied on as proof of past occupation) and it must be exclusive.[2] To establish sufficiency of occupation, the court must take a context specific inquiry that considers not only the characteristics of the Aboriginal group and their perspective (i.e. laws, practices, customs and traditions) but also the character of the land over which title is asserted.[3]  For continuity between present and pre-sovereignty occupation, an unbroken chain of occupation is not required; instead the present occupation must be rooted in pre-sovereignty times.[4]  For exclusivity, the court uses the notion of whether the Aboriginal group exercised “effective control” over the land.[5]  This is a much broader view of Aboriginal title than that articulated by the Court of Appeal and is more in accord with international norms – a nation does not have to occupy every square metre of its territory so long as it can exercise effective control over the lands within its territorial boundaries.

**2.      The Legal Characterization of Aboriginal Title**

Aboriginal title is a beneficial interest in land, being the right to use and manage it, enjoy it, occupy it, possess it, and profit from its economic development.[6]  Because it is held communally, it cannot be used in ways that would prevent future generations from using and enjoying it. Some changes – even permanent changes to the land may be possible.[7] The right to control Aboriginal title land means governments must obtain the consent of the title holders to use the land.[8]  Aboriginal title is not merely a right of first refusal with respect to Crown land management – rather it is a right to proactively use and manage the land.[9]

The court also defines what remains of the underlying Crown title: a fiduciary duty owed by the Crown when dealing with Aboriginal lands and a right to encroach on Aboriginal title if the Crown can justify this in the broader public interest under section 35 of the *Constitution Act, 1982*.[10] To justify encroaching on Aboriginal title, the government must show (i) that it discharged its procedural duty to consult and accommodate, (ii) that such encroachment is pursuant to a compelling and substantive objective and (iii) the encroachment is nonetheless consistent with the Crown’s fiduciary duty.[11]

Even where the Crown consults about, and has a compelling, substantive objective with respect to, the encroachment or incursion on Aboriginal title, it still has to show that such incursion is consistent with the Crown’s fiduciary duty[12] such that the future generations of the Aboriginal groups are not substantially deprived of the benefits of the land.[13]  The fiduciary duty imports an obligation of proportionality: is there a rational connection between the government’s goal and the adverse impacts? is there minimal impairment of the Aboriginal interest? is there a proportionality of impact (i.e. do the benefits of the government action outweigh the adverse impacts on the Aboriginal interest)?[14]  On this point the law since *Delgamuukw* has required that the justification test from *Sparrow* applied to Aboriginal rights including Aboriginal title – in *Tsilhqot’in* the court has made this explicit.

**3.      Provincial Laws on Aboriginal Title Lands**

The province’s current *Forest Act,* as a matter of statutory interpretation, was intended to apply to lands subject to Aboriginal title claims[15] up to the time title is confirmed by agreement or court order.  Once Aboriginal title is so confirmed, the lands are “vested” in the Aboriginal group and the lands are no longer Crown lands.[16]  Given the declaration ordered by the court, the timber on the Tsilhqot’in lands no longer falls within the definition of Crown timber and the *Forest Act* no longer applies.[17]  This conclusion, while pragmatic, is disturbing because it may have the effect of eliminating any claim for damages that a group holding Aboriginal title would otherwise have for Crown-authorized activities on the lands without the consent of that group prior to the court declaration.

Section 35 is also to be used to assess whether future provincial legislation applies to Aboriginal title lands.  Is the legislation unreasonable, does it impose undue hardship and does it deny the Aboriginal title holders their preferred means of exercising their right? [18] General legislation that assigns Aboriginal property rights to third parties likely will result in a meaningful diminution of the Aboriginal interest that will result in an infringement unless there is consent or justification.[19]

Section 35 imposes limits on how both the federal and provincial governments can deal with Aboriginal title lands. Neither level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right, unless such an infringement is justified in the broader public interest and is consistent with the Crown’s fiduciary duty owed to the Aboriginal group. Aboriginal rights are thus a limit on both federal and provincial jurisdiction. There is no role left for the constitutional doctrine of interjurisdictional immunity to play.[20]

As a result, the court expressly overturned its previous decision in *Morris*, to the extent that it stood for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights.[21]   Instead, provincial laws of general application, including the *Forest Act*, apply to Aboriginal title lands unless those provincial laws are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the *Sparrow*justification framework. [22]

Devlin Gailus represented the Tsawout, Tsartlip, Snuneymuxw and Kwakiutl First Nations who intervened to support the Tsilhqot’in on this appeal.

[1] *Tsilhqot’in Nation v. British Columbia,*2014 SCC 44,paras. 27-29, 56

[2] *Tsilhqot’in*, para. 25

[3] *Tsilhqot’in,*paras. 35-37

[4] *Tsilhqot’in,*para. 46

[5] *Tsilhqot’in,*para. 50

[6] *Tsilhqot’in,*paras. 70, 73, 75

[7] *Tsilhqot’in,*para. 74

[8] *Tsilhqot’in,*paras. 76, 90

[9] *Tsilhqot’in,*para. 94

[10] *Tsilhqot’in,*para. 71

[11] *Tsilhqot’in,*paras. 77, 90

[12] *Tsilhqot’in,*paras. 84- 85

[13] *Tsilhqot’in,*para. 86

[14] *Tsilhqot’in,*para. 87

[15] *Tsilhqot’in*, para. 109

[16] *Tsilhqot’in*, para. 115

[17] *Tsilhqot’in*, para. 116

[18] *Tsilhqot’in*, para. 122

[19] *Tsilhqot’in*, para. 124

[20] *Tsilhqot’in*, paras. 139-141. The court goes on to signal that it does not believe the doctrine of interjurisdictional immunity has much of a role to play in other areas of constitutional law as well, characterizing the doctrine as being “often at odds with modern reality” and potentially thwarting federal-provincial cooperation in the regulatory sphere: paras. 148-149

[21] *Tsilhqot’in*, para. 150

[22] *Tsilhqot’in*, para. 151