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The Six-Minute Environmental Lawyer 2014

The Latest Aboriginal Law from the Supreme Court of Canada on Resource Development

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1 INTRODUCTION

The Supreme Court of Canada has recently released two important decisions on Aboriginal law, *Tsilhqot'in Nation v British Columbia* ("*Tsilhqot'in*")[1] and *Grassy Narrows First Nation v. Ontario* ("*Keewatin*").[2] This paper provides information on the background of each decision and the potential impacts on resource development in Ontario.

2 *TSILHQOT'IN NATION V. BRITISH COLUMBIA*, 2014 SCC 44

Tsilhqot'in Nation is made up of six bands in British Columbia that for centuries occupied a remote valley in central B.C. The Tsilhqot'in are not party to either a treaty or a land claim.

In 1983, with their lands still subject to an unresolved land claim, B.C. granted a commercial logging licence in Tsilhqot'in traditional territory. The Tsilhqot'in objected, talks to resolve the matter failed, and a court case was launched in 1998. In 2002, the Tsilhqot'in added a title claim, which the federal and provincial Crowns opposed. After a complex trial which lasted five years, the trial judge found enough evidence to award Aboriginal title over the land, but rejected the Tsilhqot'in claim due to a procedural matter.

The British Columbia Court of Appeal (BCCA), on appeal, rejected the claim for Aboriginal title based on the evidence that the Tsilhqot'in were "semi-nomadic". The BCCA found that a claim for Aboriginal title could only be granted for site-specific, intensively occupied areas.

The question before the SCC was whether the test for determining Aboriginal title should be narrow and site-specific or a more broad approach. The Tsilhqot'in were successful in their appeal. The test for Aboriginal title is based on "occupation" prior to the European assertion of sovereignty. More specifically, occupation must be proven to be sufficient, continuous and exclusive. The Court clarified how the test for Aboriginal title set out in Delgamuukw can apply to a semi-nomadic indigenous group such as the Tsilhqot'in. The SCC stated that these three indicia of title should be considered contextually and together to effectively translate pre-sovereignty Aboriginal interests into modern legal rights by way of title.

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1 *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.
2 *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48.

The SCC rejected the BCCA approach that Aboriginal title must be based on site-specific occupation and thus confined to specific village sites to find sufficiency. Rather, the SCC found that a culturally sensitive approach to sufficiency of occupation is required. Interestingly, the SCC also held that a claim for Aboriginal title is not an "all or nothing" proposition. Even if a title claim fails, it is open to the courts to find that other forms of Aboriginal rights exist, such as the right to hunt, trap or fish.

In the context of a title claim, sufficiency of occupation should take into consideration the Aboriginal claimants' type of land use and the frequency and intensity of use. Sufficient occupation will be found if the Aboriginal group in question acted in a way that would communicate to third parties that it held the land for specific personal purposes. Sufficiency of occupation was established for the Tsilhqot'in land in question because evidence showed that the land was regularly and exclusively used for hunting, fishing, trapping and foraging. Thus, even the Tsilhqot'in's semi-nomadic lifestyle was sufficient to ground a claim for Aboriginal title.

Continuous occupation requires evidence that occupation existed prior to European sovereignty. It does not require Aboriginal groups to provide evidence of a completely "unbroken chain of continuity". Nevertheless, the SCC found that the Tsilhqot'in people continuously occupied the area before and after the assertion of European sovereignty.

Exclusive occupation of the land at the time of sovereignty requires that the Aboriginal group had the intention and capacity to retain exclusive control over the lands. The Court found that the Tsilhqot'in repelled other people from the land and demanded permission from people passing through their territory, thereby meeting the requirement of exclusive occupation.

Significance of Aboriginal Title

The SCC said that Aboriginal title confers the right to the exclusive use and occupation of the land for a variety of purposes. This means that the Tsilhqot'in can decide how their titled land is used and have the right to benefit from those uses. The Crown has no beneficial interest in Aboriginal title lands. Aboriginal title is limited by two "carve-outs" — the uses of titled land must be consistent with the communal nature of the group's attachment to the land and its enjoyment by future generations, and title can only be alienated to the Crown.

Justification Test for Infringement Clarified

In *Tsilhqot'in*, issuing timber licences on Aboriginal title land amounted to a direct transfer of Aboriginal property rights to a third party. This constituted an infringement that needed to be justified where it was done without Aboriginal consent. In such circumstances, the Crown had to seek the consent of the title-holding Aboriginal group prior to authorizing development on the land where Aboriginal title had been proven. Absent such consent, the Crown could only encroach on Aboriginal title if it could be justified in the broader public interest under section 35 of the *Constitution Act, 1982*. In other words, title may be infringed where the Crown can establish a compelling and substantial objective that is consistent with the fiduciary duty owed

by the Crown to the Aboriginal group and has consulted the Aboriginal group. Of significance was the SCC's assertion that a "compelling and substantial objective" must be considered from both the Aboriginal and public perspectives. The SCC stated

> Where Aboriginal title has been established, the Crown must not only comply with its procedural duties, but must also justify any incursions on Aboriginal title lands by ensuring that the proposed government action is substantively consistent with the requirements of s. 35 of the Constitution Act, 1982. This requires demonstrating both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.

In addition, such an objective must further the goal of reconciliation.

While the broad list of public interests capable of justifying an incursion on Aboriginal title set out by the Court in *Delgamuukw* has been retained, *Tsilhqot'in* refines the nature of the fiduciary duty owed by the Crown where infringement of title is proposed. First, Aboriginal title must be respected and incursions on title which will substantially deprive future generations of the benefit of the land must be justified. Second, the obligation of proportionality is imported into the analysis — there must be a rational connection between the infringement and the government's objectives. Minimal impairment and proportionality of impact must also be proven — the effect of the incursion on title must be minimized.

Finally, when it comes to projects where Aboriginal title is asserted or declared, proponents will want to obtain the consent of Aboriginal groups rather than relying on the Crown establishing a "compelling and substantial objective" to justify encroachment on Aboriginal title.

2.1 ABORIGINAL TITLE IN ONTARIO

Unsettled land claims and resource development: The *Tsilhqot'in* case has direct implications for the lands where land claims are not yet settled.

In Ontario there are a few unsettled claims. The largest is the Algonquin land claim over 36,000 square kilometres of eastern Ontario. The Algonquins of Ontario assert that they have Aboriginal rights and title to the Ontario portions of the Ottawa and Mattawa River watersheds. The claim is being negotiated and, if successful, will be Ontario's first modern-day constitutionally protected treaty. Notably, most Métis communities in Ontario are also untreatied.

Resource development within areas of unsettled Aboriginal title claims could face risks similar to those faced by the holders of forestry licences in Tsilhqot'in area. Projects risk significant delays due to potential litigation if the Crown does not adequately fulfil the consultation and accommodation process and Aboriginal title is proven. Projects may ultimately be cancelled.

Numbered treaties: Numbered treaties cover the majority of Ontario and the Prairies. The Crown and Indigenous people disagree over the meaning and intent of these treaties. The *Tsilhqot'in* decision may prompt some First Nations to assert Aboriginal title over traditional territories based on their traditional use of the land as a way of changing the interpretation and application of the treaties.

3 GRASSY NARROWS FIRST NATION V. ONTARIO (NATURAL RESOURCES), 2014 SCC 48

This case concerns the members of Grassy Narrows First Nation, and the ability of Ontario to take up lands under Treaty 3 for the purposes of resource development. The Grassy Narrows First Nation (Grassy Narrows) is located within the Keewatin lands. Wabauskang First Nation (Wabauskang) also has traditional territory within the Keewatin lands.

In 1873, Treaty 3 was negotiated between the Chiefs of the Ojibway and the Dominion of Canada. Treaty 3 territory covers a large portion of Northwestern Ontario and Eastern Manitoba, known as the Keewatin lands. At the time the Treaty was signed, the Keewatin lands were under the jurisdiction of the Government of Canada. Since 1912, these lands, except for a small area in Manitoba, have been part of Ontario.

The Ojibway yielded ownership (according to Canada) or negotiated land sharing (according to the Ojibway) of the Treaty 3 territory to Canada in return for reserve lands, annuities and goods. The Ojibway retained harvesting rights on non-reserve land within the Treaty area until the land was "taken up" for settlement, mining, lumbering, or other purposes by the Government of the Dominion of Canada or any of its duly authorized subjects.

Litigation Respecting the Abitibi/Resolute Forestry Operations Licence

In 1997, the Ontario Minister of Natural Resources (MNR) issued a licence to Abitibi-Consolidated Inc., now Resolute FP Canada Inc. (Resolute), to carry out forestry operations on Crown lands within the Keewatin lands. In 2005, Grassy Narrows commenced litigation against the provincial and federal governments and Resolute alleging that the licence violated their Treaty 3 harvesting rights.

Grassy Narrows argued that, absent federal authorisation, Ontario could not "take up" lands (i.e. issue permits) within the Keewatin lands under Treaty 3 so as to limit the harvesting rights protected under the Treaty. Grassy Narrows also argued that Ontario did not have the authority to infringe the Grassy Narrows' treaty rights under the *Constitution Act, 1867*.

Lower Court Decisions and the Two-Step Process

The trial judge agreed with Grassy Narrows that Ontario could not take up lands within the Keewatin lands without first obtaining federal government approval. Further, the trial judge found that the doctrine of interjurisdictional immunity allowed only the federal government, not the provinces, to infringe treaty rights. This became known as the two-step process.

The Ontario Court of Appeal rejected the two-step process set up by the trial judge. Federal approval was not required prior to issuing provincial permits. The Court did not consider whether interjurisdictional immunity prevented provincial infringement on treaty rights.

Grassy Narrows and Wabauskang appealed to the Supreme Court of Canada.

The Supreme Court of Canada Decision

Two-Step Process Rejected

The SCC unanimously upheld the Court of Appeal decision, rejecting the two-step process and concluding that, "Ontario and Ontario alone has the power to take up lands under Treaty 3".

However, the SCC determined that the power to take up lands is not unconditional and that the Province is bound by the duties attendant on the Crown.

Ontario's authority to take up the lands is derived from both agreements and constitutional provisions. The division of powers set out in the Constitution determines the respective powers and obligations of the federal and provincial levels of government. When Ontario's borders were expanded to include the Keewatin lands, Ontario also became responsible for the promises made between the Crown and the Ojibway under Treaty 3 when acting within its constitutional powers.

Relying on *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, and subsequent decisions, the SCC reiterated that both provincial and federal governments are responsible for fulfilling the promises and satisfying the honour of the Crown.

The appellants argued that the federal government has jurisdiction over "Indians, and Lands reserved for the Indians" under section 91(24) of the Constitution and therefore has the authority to approve the taking up of provincial land. Rejecting this view, the SCC referred to *Mikisew Cree First Nation v Canada (Minister of Canada Heritage)*, 2005 SCC 69. The SCC stated that, although section 91(24) allows the federal government to enact legislation dealing with Indians and reserves that may have some incidental effects on provincial land, it does not allow the federal government to approve taking up land for provincial purposes.

The SCC also noted that Ontario has been exercising its power to take up lands through permits and authorisations on Crown lands for over 100 years without any objection. The SCC stated that this suggests that federal approval is not a necessary element of taking up lands under Treaty 3.

Limits on the Power To Take up Land

The SCC stated that, when taking up lands under Treaty 3, Ontario must "exercise its powers in conformity with the honour of the Crown and the exercise of those powers is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests".

Therefore, prior to issuing permits and authorizations, Ontario must respect Ojibway Treaty harvesting rights under Treaty 3.

Ontario must also fulfill its duty to consult and accommodate. Potential impacts on Treaty rights are considered an infringement. Any permit or legislation infringing Treaty rights must be justified, as set out by the SCC in *Tsilhqot'in*.

In *Tsilhqot'in*, the SCC determined that infringement may be justified if the Crown can establish a "compelling and substantial" objective consistent with its fiduciary duty owed to the Aboriginal group and has consulted the Aboriginal group. Of significance was the SCC's assertion that the "compelling and substantial objective" must be considered from both Aboriginal and public perspectives. In addition, such an objective must further the goal of reconciliation with Aboriginal groups.

As in *Tsilhqot'in*, the SCC determined in Keewatin that the interjurisdictional immunity argument did not apply. Moreover, it found that the doctrine of interjurisdictional immunity in no way precludes Ontario from applying the infringement test prior to issuing permits and authorisations.

4 SIGNIFICANCE OF DECISIONS TO RESOURCE DEVELOPMENT IN ONTARIO

The Supreme Court of Canada stated that "governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group."[3]

Some commentators suggest that these decisions could lead to a chill in resource development projects. Certainly these decisions leave open the possibility for further title claims in Ontario, which could put current and future business interests at risk. This is not necessarily true across the board as some commentators have described. Business has recognized for some time that forming partnerships with and obtaining consent from affected Aboriginal groups is a pre-requisite for project success. The *Tsilhqot'in* decision simply underscores the need for Aboriginal consent, particularly where Aboriginal title has been established. The *Keewatin* decision balances *Tsilhqot'in* by clarifying the power of the provinces to take up territory and legislate over lands claimed under Aboriginal title.

4.1 IMPACT OF THESE CASES ON THE DUTY TO CONSULT

As the SCC clarified the justification test for infringement, it also re-emphasized the importance of considering infringement of proven Aboriginal rights and treaty rights. Crown decision-makers will need to consider whether a contemplated action will infringe rights in the case where an action will significantly burden the ability of rights-holders to exercise their rights. If the action constitutes infringement, then the Crown will have to justify the action. The justification test represents a more onerous obligation than the requirements to discharge the duty to consult, and moves the spotlight back onto the Crown.

Provinces and territories may need to step up consultation activity rather than relying on proponents to make deals with Aboriginal people. Prior to issuing permits and authorizations which have the potential to infringe rights, they must meaningfully consult with Aboriginal people on potential impacts on their rights. Provinces and territories must also meet their fiduciary duty and uphold the honour of the Crown in their relationships with Aboriginal people.

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[3] *Supra* note 1 at 97.