Recent Developments in the Law of Aboriginal Title

Tsilhqot’in Nation v. BC and Beyond

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Agenda

A. Legal foundations – Tsilhqot’in Nation v. BC
B. Post-Tsilhqot’in – key issues and trends
C. Aboriginal title claims/cases to watch
D. Considerations for legal practitioners
E. Questions and discussion
Snapshot of *Tsilhqot’in Nation v. B.C.*

- A significant legal decision wherein Aboriginal title over a specific tract of land in BC was confirmed by the SCC
- Potential implications for land and resource users, proponents, developers, investors and others across Canada
- There is a generally consistent legal interpretation of the decision, but a wide diversity of views on how the decision will eventually impact activity on the land base (the sky is falling vs. a less pessimistic view)
- Leaves many outstanding practical and legal questions to be considered

A. Legal Foundations – *Tsilhqot’in Nation v. B.C.*

- SCC’s decision released on June 26, 2014
- SCC declared Aboriginal title over approximately 1700 square kms land (no other lands are directly affected)
- First time unextinguished Aboriginal title has been held to exist in Canada (procedural issues precluded title in earlier decisions)
- Raises concerns over potential effects on Canadian resource development and private land interests
A. Legal Foundations – *Tsilhqot’in Nation v. B.C.*

- Largely a restatement of principles from past case law (*Calder, Delgamuukw*)
- High evidentiary threshold to establish title: Aboriginal group must demonstrate occupation of land at the time of the assertion of European sovereignty was: (i) sufficient; (ii) continuous; and (iii) exclusive

- Aboriginal title:
  - arises from pre-existing legal right of Aboriginal peoples based on their use and occupation of the land prior to European arrival
  - is not confined to site-specific areas, but may apply to larger tracts of land regularly used and controlled. Intensive land use is not required
  - is the strongest form of constitutionally protected Aboriginal right
  - It confers certain rights similar to fee simple ownership: exclusive rights to use and occupy land, pro-actively use and manage land, and to economic benefits of the land
  - But, Aboriginal title is unique because it is held collectively by the group, and can only be sold or surrendered to the Crown

A. Legal Foundations – *Tsilhqot’in Nation v. B.C.*

- Pre-proof of title = consultation/accommodation framework applies
  - However, Crown many need to preserve Aboriginal interests if strong claim (new aspect of consultation spectrum?)

- Post-proof of title = new consent/justification framework applies
  - Crown must obtain the consent of the Aboriginal group to assign Aboriginal property rights to third parties or to use lands in a manner that would infringe Aboriginal title
  - However, Aboriginal title rights are not absolute. Absent consent, the Crown may still proceed if the proposed activity is justified
  - To justify an infringement of Aboriginal title, Crown must demonstrate:
    1. it has met its duty to consult and accommodate;
    2. the activity has a “compelling and substantial governmental objective”; and
    3. the activity is consistent with the Crown’s fiduciary duties
A. Legal Foundations – Tsilhqot’in Nation v. B.C.

Case law suggests a broad range of potential compelling and substantial governmental objectives that might justify an infringement:

- Delgamuukw: the types of “compelling and substantial governmental objectives” that might justify an infringement include: “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…”
- Sparrow: conserving and managing a natural resource
- Gladstone: the pursuit of economic and regional fairness (recognizing historical reliance of Aboriginal groups on the land/resources)
- Badger: important general public objectives
- Marshall; Bernard: for the good of larger society (to achieve reconciliation)
- Marshall (reconsideration): other public purposes

- Suggests many activities could potentially be justified if the greater public benefit outweighs the impact on title, including conservation activities

To justify an infringement, the activity must also be consistent with the Crown’s fiduciary duties:

- Delgamuukw:
  - the fiduciary relationship between the Crown and Aboriginal peoples may be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands
  - Fair compensation will ordinarily be required when Aboriginal title is infringed

- Tsilhqot’in:
  - A proportionality analysis applies – (benefits vs. adverse effects on Aboriginal interests)
  - Crown cannot act in a way that “would substantially deprive future generations of the benefit of the land” (inherent limit on land use)
B. Post-Tsilhqot’in – Key Issues and Trends

1. Inherent limit on land use
2. Implications for private property
3. Implications for treaty lands
4. Consent
5. Implementation of Aboriginal title rights

1. Inherent limit on land use

“Delgamuukw establishes that Aboriginal title “encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes”, including non-traditional purposes, provided these uses can be reconciled with the communal and ongoing nature of the group’s attachment to the land. Subject to this inherent limit, the title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits.”

Inherent limit on Aboriginal title: land cannot be used in a way that is irreconcilable with the nature of the Aboriginal group’s attachment to it (Delgamuukw). Cannot deprive future generations of the benefit of the land

E.g. if occupation is established with reference to the use of the land as a hunting ground or ceremonial site, the Aboriginal group may not use it so as to destroy its value for such a use (e.g., strip mining, parking lot)

Title holder must surrender and convert lands into non-title lands to do so

Also raises question of what activities by third parties or the Crown title-holding Aboriginal groups can consent to (limit on consent?)
2. Implications for private property

- *Tsilhqot’in* confirms that the duty to consult/accommodate continues to apply where Aboriginal title is not established (and these same principles still apply in respect of Crown decisions/actions involving private lands).

- SCC did not discuss private property or other third party interests in *Tsilhqot’in*:
  - Claim did not overlap with any private property interests or overlapping First Nation claims, and was confined to a sparsely populated area
  - Action was precipitated by grant of a forest licence in 1983 and a cutting permit in 1989 to Carrier Lumber Ltd. – no longer at issue

- However, in *Delgamuukw*, SCC commented that there are private lands in the province that are subject to Aboriginal title, as the province has no authority to unilaterally extinguish Aboriginal title by selling the land

- Trial judge in *Tsilhqot’in* agreed, noting the effects of underlying Aboriginal title on private interests have not been addressed in the jurisprudence. A claim of Aboriginal title over private property may well be litigated in future cases
2. Implications for private property

Resolution of conflicting Aboriginal title vs. private interests?

- Taking up of Aboriginal title lands might be considered justification for infringement in certain circumstances (activities on Crown lands may be harder to justify than on private lands)
- Absent justification, in my view, courts will be reluctant to grant a remedy that would deprive third party landowners of their interests; SCC has repeatedly emphasized the importance of balancing competing interests
- Infringement remedies limited to claims against the Crown?
  - *Tsilhqot’in*: "the usual remedies that lie for breach of interest in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title."
  - *Delgamuukw*: fair compensation will ordinarily be required when title is infringed
  - *Rio Tinto*: suggests damages/compensation may be appropriate for breach of Crown’s duties

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2. Implications for private property


- Court found that certain lands were never formally surrendered, but held:
  - Following land transfer to a non-Aboriginal, Band had accepted the transaction and regarded the lands as no longer part of their reserve
  - Innocent third parties relied on the Crown patent granting fee simple and acts of public officials, and Aboriginal rights are not absolute
  - Equitable solution: interests of innocent third parties must prevail over any remedies that would set aside the Crown patent
  - Rather, other remedies for infringement of title could include a claim for damages against the Crown
- Decision suggests that remedies for breaches of Aboriginal title may be more likely to be restricted to claims against the Crown
- Criticism: extinguishment of title through judicial discretion is an unacceptable departure from common law and property law principles
3. Implications for treaty lands

- **Tsilhqot’in**: Aboriginal title continues to exist unless extinguished.

- Aboriginal title is often seen as largely a BC-specific issue due to a relative absence of historic (and modern) treaties.

- Many other parts of Canada are covered by historic “surrender” or “land cession” treaties, which provide strong historical evidence of extinguishment.

```plaintext
Certain areas of Canada are covered by modern treaties.

Must look at the terms of the specific treaty to determine the nature and scope of the particular Aboriginal rights, which may include fee simple land interests.
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3. Implications for treaty lands

- However, treaty areas are not immune from claims of Aboriginal title
  - Not all historic treaties are considered “land cession” treaties (e.g. Peace and Friendship treaties)
  - Aboriginal groups may dispute the interpretation of clauses and validity of extinguishment (e.g. text does not reflect the oral agreement of the parties)
  - Issues with poorly defined boundaries, whether particular Aboriginal groups are signatories, etc.

- Lack of determinative case law to date, but there are upcoming claims and cases challenging extinguishment under historic treaties, and other title claims overlapping with treaty lands, e.g.:
  - Wesley First Nation (Stoney Nakoda Nation) challenge to Treaty 7 in southern Alberta. Claim filed in 2003 and presently ongoing
  - Esquimalt First Nation – claim of Aboriginal title and unlawful infringement of certain Douglas Treaty lands on southern Vancouver Island. Title aspect of claim initially raised in 2014, new claim filed in February 2016
  - James Bay Cree Nation filed a claim on March 3, 2016 claiming Aboriginal title and rights in Treaty 9 territory in northern Ontario (not Treaty 9 signatories)

4. Consent

- “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 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.”

- “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.”

- “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.”
4. Consent

- Elevated expectations for consent post Tsilhqot’in, beyond proof of title. Consent perceived of as new standard for activities in traditional territories, treaty and non-treaty lands
- UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and principle of “free, prior and informed consent” (FPIC)
  - Potentially significant impacts for resource development; key issue is if FPIC is interpreted as a veto (varying interpretations, no consensus)
- Recent drivers for implementation of UNDRIP
  - Truth and Reconciliation Report and Calls to Action (June 2015) – Call upon federal, provincial, territorial, and municipal governments to fully adopt and implement UNDRIP as the framework for reconciliation.
  - Federal Government’s commitment to implement TRC recommendations, starting with UNDRIP
  - Premiers’ and Territorial leaders’ commitments to implement TRC recommendations in their own provinces/territories (July 2015)

5. Implementation of Aboriginal title rights

- Rights conferred by Aboriginal title include the ability to make decisions regarding how the land is used and managed (while federal/provincial laws of general application continue to apply per Tsilhqot’in)
- Steps taken by the Tsilhqot’in National Government (TNG) to implement its Aboriginal title rights to date:
  - Affirmation of the Nemiah Declaration – enacted March 19, 2015 as the law governing the Tsilhqot’in title area. Further laws, regulations and policies must be consistent with the Nemiah Declaration, made on August 23, 1989. No commercial logging, mining or exploration, commercial road building etc.
  - Draft Mining Policy released July 2014 – referred to as Tsilhqot’in “law” and appears to apply broadly to all of Tsilhqot’in traditional territory
  - TNG is in discussions with Cariboo Regional District to identify ways to share or grow services, and to collaborate on communications, land use planning, economic development and emergency planning
5. Implementation of Aboriginal title rights

- TNG’s agreements with the Province:
  - 2014 Letter of Understanding to set groundwork for negotiations and reconciliation
    - Includes various Pillars of Reconciliation (eg. Governance, Culture/Language, Justice, Management for Lands and Resources)
    - Contemplates establishing Tsilhqot’in ownership, management and control over additional areas of Tsilhqot’in territory outside of the declared title area
  - Interim understandings/practices in place for: emergency/wildfire response and road maintenance; private property owners and current tenure holders to access title lands; and existing guide outfitters to operate on title lands

C. Aboriginal title claims/cases to watch

- Post-Tsilhqot’in Aboriginal title claims filed:
  - Kwikwetlem First Nation – filed February 9, 2016 to lands around the Coquitlam River Watershed, including private lands
  - Stk’emlupsemc of the Secwepemc Nation (Tk’emlups and Skeetchestn Indian bands) – filed in Fall 2015. Claim covers area near Jacko Lake/Kamloops area. Includes private lands and area of KGHM Ajax copper-gold mine
  - Cowichan Tribes – seeks Aboriginal title declaration to land on Lulu Island held by Canada, City of Richmond, and other third parties, and to privately held Grace Islet
  - Lax Kw’alaams – filed September 2015, covers proposed PNW LNG facility, Lelu Island
  - Gitga’at – filed July 2014, seeks Aboriginal title declaration to three land and marine areas in the Douglas Channel impacted by Northern Gateway
  - Hwiltsum – Unrecognized First Nation seeks Aboriginal title declaration to lands on southern Vancouver Island and Lower Mainland, including Stanley Park
  - Esquimalt First Nation – New claim filed February 2016. Seeks order of possession for lands and waters, and compensation in Douglas Treaty area, southern Vancouver Island
  - James Bay Cree Nation (Ontario) – filed claim on March 3, 2016. Claim rights/title in Treaty 9 territory, northern Ontario and damages of $495 million. Although they are signatories to the James Bay and Northern Quebec Agreement and the Eeyou Marine agreement, they state that these do not apply to the lands in Ontario
C. Aboriginal title claims/cases to watch

- **Pre-Tsilhqot’in Aboriginal title claims filed:**
  - **Sinixt Nation Society** – filed Aboriginal title claim in 2013 to land near Revelstoke, south to the US border (alternative names for Sinixt Nation are ‘Lakes Tribe,’ ‘Arrow Lakes Indians,’ and ‘Arrow Lakes Band.’)
  - **Wesley First Nation (Stoney Nakoda First Nation) v. Alberta** – claim commenced in 2003, seeking declaration of Aboriginal rights and title over land covered by Treaty 7
  - **Chief Roy Michano v. Canada et. al.** - Ojibways of Pic River First Nation are one of eight Ojibway First Nations seeking a declaration of Aboriginal title to lands on north shore of Lake Superior, Ontario
  - **Saugeen Ojibway Nation** – Treaty 72 litigation in Ontario commenced in 2003 claiming Aboriginal title to portions of Lake Huron and Georgian Bay waterbeds
  - **Mohawks of Akwesasne** – Claim of Aboriginal title to waterbed of the St. Lawrence Seaway

- **Pre-Tsilhqot’in Aboriginal title claims on hold or pending:**
  - **Okanagan Indian Band** – claim launched in 2003, was put on hold pending the outcome of *Tsilhqot’in*
  - **Haida Nation** – commenced litigation in 2002, currently in abeyance. Claim title to all of Haida Gwaii, surrounding waters, sub-surface lands and water, and airspace
  - **Gitxsan Hereditary Chiefs** - Gitxsan Hereditary Chiefs and the Wet’suwet’en previously sought an Aboriginal title declaration to 58,000 square kilometres in BC in *Delgamuukw v. British Columbia*. Discussions with Canada and BC are ongoing and Gitxsan treaty negotiations remain inactive
  - **Musqueam First Nation** – filed claim in 2003, on hold
  - **Tahltan First Nation** – Tahltan announced when *Tsilhqot’in* decision was released that it would pursue an Aboriginal title claim to stop the proposed open-pit coal mine at Mount Klappen
C. Aboriginal title claims/cases to watch

Claims commenced against third parties, not the Crown:

- **Saik’uz and Stellat’en First Nations v. Rio Tinto, 2015 BCCA 154** – BCCA permitted First Nations to proceed with a claim in private and public nuisance and for breach of riparian rights against Rio Tinto for dam operation, on basis of asserted but unproven Aboriginal rights and title, as it was not plain and obvious that claims will fail (SCC denied leave to appeal on October 15, 2015)

- **Uashaunnuat (Innu de Uashat et de Mani-Utenam) v. Iron Ore Company of Canada, 2014 QCCS 4403 (leave to appeal dismissed, 2015 QCCA 2 (CanLII))** – Two Quebec Innu communities seek recognition of Aboriginal title and Aboriginal and treaty rights and a permanent injunction restraining mining and rail activity. Defendants sought to dismiss the action on basis that recognition of Aboriginal title and rights was a prerequisite to any other proceeding. Quebec Superior Court permitted the action to proceed. (SCC denied leave to appeal on October 15, 2015)

- **Ominayak v. Penn West Petroleum Ltd, 2015 ABQB 342** – Lubicon Lake Cree commenced a claim against Crown asserting Aboriginal title and rights to area east of Peace River, Alberta. Court allowed Lubicon to bring a separate action against Penn West Petroleum, which also alleges trespass and interference with rights

- **Halalt First Nation v. Catalyst Paper Corp.** – Claim commenced against Catalyst Paper in January 2016, alleging trespass for Crofton mill operations since 1957, interfering with riparian, water and land rights

D. Considerations for Legal Practitioners

- There is the potential for underlying Aboriginal title or claims of title in much of British Columbia and many other areas of Canada
- Claims may exist in respect of private lands, treaty lands, Crown lands, and bodies of water
- It is prudent in project or development-related due diligence to undertake a review of Aboriginal rights, interests and claims, including claims of title

Some suggested due diligence resources:

- ATRIS (INAC Aboriginal and Treaty Rights Information System)
- INAC Indian Land Registry System and First Nations Land Registry System
- INAC Specific Claims portal
- INAC First Nation Community Profiles
- BC Treaty Commission website
- BC Integrated Land and Resource Registry
- Court registry searches
- First Nations’ websites, news searches
D. Considerations for Legal Practitioners

- Remember that the Crown's duty to consult is triggered at a very low threshold—proven rights are not required; there only needs to be the potential for an adverse impact on Aboriginal rights or interests
- Aboriginal title is the deepest form of Aboriginal right, and claims should be taken seriously
- Proven Aboriginal title requires consent to undertake activities on the land, although consent is an increasingly common expectation, even absent proven Aboriginal title
- Consultation requirements may be triggered even in respect of activities taking place on private lands and in urban settings like Vancouver

- Building strong relationships, making agreements and providing opportunities for participation by Aboriginal groups in project development and operation are key aspects of reducing or mitigating Aboriginal-related risks and achieving a licence to operate

E. Questions and Discussion – Thank You!

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Stephanie Axmann is a Business Law Associate with McCarthy Tétrault in Vancouver, specializing in Aboriginal law. She advises clients in a range of industry sectors across Canada, including natural resources extraction (mining, forestry) and energy (renewables, oil and gas, LNG, nuclear).

Stephanie provides legal and strategic advice to project proponents, operators and lenders on Aboriginal law, policy and regulatory matters, drafts and negotiates commercial and relationship agreements with Aboriginal groups, and advises on complex Aboriginal litigation matters. Stephanie is ranked in Chambers Canada 2016 as an ‘associate to watch’ in the area of Aboriginal law.

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