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Supreme Court of Canada Ruling in Tsilhqot'in: Aboriginal Title and the Common Law

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On June 26, 2014, the Supreme Court of Canada rendered a decision confirming aboriginal title to approximately five percent of the Tsilhqot'in First Nation's traditional territory in British Columbia. This decision is very significant because it marks the first time a ruling defines aboriginal title "on the ground".

ABORIGINAL RIGHTS

The *Constitution Act, 1982* provides that existing aboriginal and treaty rights of the aboriginal peoples of Canada are recognized and affirmed. Among those rights are the right to engage in traditional activities such as hunting and fishing, the right to self-government, and aboriginal title. *Tsilhqot'in* deals with the existence of aboriginal title, its incidents, and the rights it confers.

RECOGNITION OF ABORIGINAL TITLE

The Supreme Court of Canada confirmed that aboriginal title enjoyed by a First Nation over a given territory through its sufficient, continuous and exclusive occupation thereof prior to the assertion of sovereignty by the British Crown is preserved and must be recognized.

In order to establish the existence of aboriginal title, the First Nation must show that it enjoyed sufficient, continuous and exclusive occupation of the claimed lands prior to the assertion of sovereignty. As the Court noted: "Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established."

SUFFICIENCY OF OCCUPATION. "[R]egular use of territories for hunting, fishing, trapping and foraging is "sufficient" use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law. In *Tsilhqot'in*, the Supreme Court of Canada confirmed that nomadic and semi-nomadic groups could establish title to land, provided they demonstrate sufficient physical possession, which is a question of fact.

CONTINUITY OF OCCUPATION. Proof of continuous occupation of the territory claimed may be based on proof of continuity between present and pre-sovereignty occupation, showing that the present occupation is rooted in pre-sovereignty times.

EXCLUSIVITY OF OCCUPATION. Exclusive occupation should be understood in the sense of intention and capacity to control the land. This is a question of fact which depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question.

With respect to the manner of applying these criteria, Chief Justice Beverly McLachlin, speaking for the majority, stated:

In my view, the concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title. This said, the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established.

CONTENT OF ABORIGINAL TITLE

Aboriginal title confers upon its holder the right to enjoy, use and control the land and to enjoy the benefits deriving therefrom. It is a collective title and consequently cannot be transferred except to the Crown. Furthermore, the land may not be used for a purpose that would deprive future generations of its enjoyment.

However, we note that the Court stated as follows in the *Delgamuukw* case: “If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so.”

EFFECT OF ABORIGINAL TITLE

The Supreme Court of Canada confirmed that, subject to what follows, provincial laws of general application apply to lands held under aboriginal title.

The effect of aboriginal title varies depending on whether the title is being claimed or has been recognized. Where title is claimed, the rules in *Haïda nation* continue to apply: when a First Nation claims title over a given territory, before authorizing a given project or activity, the Crown (federal or provincial government, as the case may be) must consult the First Nation and, depending on the circumstances, accommodate its concerns. The intensity of the duty to consult varies as a function of two criteria, namely the strength of the Nation’s claim on one hand and the extent of the proposed infringement on the other.

If the First Nation has a recognized aboriginal title over an area — as is now the case for the Tsilhqot’in First Nation — then consent of the First Nation is required before activities may proceed in the area. The exception to this rule is when the infringement is justified by a compelling and substantial public purpose, but even then, the infringement must be consistent with the Crown’s fiduciary duty towards the First Nation. This caveat is similar to the notion of expropriation in the public interest, except that here, the public interest must be weighed against the interest of the First Nation.

In the Supreme Court’s decision in *Delgamuukw*, Chief Justice Antonio Lamer, writing for the majority of the Court, described as follows what could constitute a compelling and substantial public purpose:

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 aboriginal 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.

The Court in *Tsilhqot'in* reproduced the above passage without comment. It then declared:

If a compelling and substantial public purpose is established, the government must go on to show that the proposed incursion on the Aboriginal right is consistent with the Crown's fiduciary duty towards Aboriginal people. [...] The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.

In the *Tsilhqot'in* case, the province had authorized a third party to engage in logging on lands claimed by the Tsilhqot'in First Nation without consulting the First Nation, that is to say, in violation of the rules that apply on lands subject to land claims. Now that title was recognized, the Supreme Court of Canada analyzed whether the infringement of aboriginal title without the consent of the First Nation was justified. It sided with the lower courts in finding that the reasons invoked by the province for authorizing the logging (economic benefits of the harvest and measures needed to stem mountain pine beetle infestation) were not supported by the evidence.

COMPENSATION FOR INFRINGEMENT OF ABORIGINAL TITLE

The question of compensation, not decided in *Delgamuukw*, is dealt with as follows in *Tsilhqot'in*: "The usual remedies that lie for breach of interests in land are available, adapted as necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title."

CONCLUSION

The *Tsilhqot'in* decision of the Supreme Court of Canada confirms that aboriginal title, recognized by the common law, does exist in Canada and it identifies a region of British Columbia where this holds true. The First Nation title holder has the right to decide how the land will be used, unless a compelling and substantial public purpose that is compatible with the Crown's fiduciary duty toward the First Nation justifies infringing on title without the consent of the holder. In these cases, the usual remedies are available, adapted as necessary. What *Tsilhqot'in* has not changed is the policy, so to speak, of the Supreme Court as regards the role of the judiciary in relation to the process of reconciliation between Aboriginal peoples and Canadian society. This process must be a good faith negotiation by both parties.