Tsilhqot'in Nation v British Columbia (2014): An Expansion of Title and Justification

Introduction

On June 26, 2014, the *Tsilhqot'in Nation v British Columbia*[1] decision was released by the Supreme Court of Canada. It was popularly seen as a victory not only for the Tsilhqot'in Nation, but for Aboriginal groups across Canada.[2] It is a case about establishing Aboriginal title, and the conditions that are placed on Aboriginal title once it is granted or in the process of being granted. The case provides guidance on two questions: 1) How is Aboriginal title proven in Canada?; and 2) What are the limits of Aboriginal title?

The *Tsilhqot'in* case provides important answers for Aboriginal groups looking to prove their claims to land. It also has important implications for governments and corporations who wish to develop resources in areas that may be claimed by Aboriginal groups.

Facts

The Tsilhqot'in Nation is composed of six bands with a common culture. They have lived in a remote valley in central British Columbia for centuries. They lived, foraged, hunted and trapped on the land. They also repelled invaders. There are no treaty or other claims to the land. The Tsilhqot'in Nation has claimed title for about five percent of its traditional territory.

The dispute that launched this case began in 1983. That year, the government of British Columbia issued a forestry licence for an area on the traditional territory of the Tsilhqot'in Nation. The Nation challenged the grant of this licence on the grounds that that area was Aboriginal land where it properly held title.

Procedural History

The trial began in 2002. The trial Judge, Justice Vickers, heard evidence from elders, historians, and other experts. He also visited some of the sites for which the Tsilhqot'in Nation claimed title. After considering the evidence, he ruled that the Tsilhqot'in Nation was entitled in principle to a part of the area claimed.[3] He also ruled that it was entitled in principle to adjacent land that was not part of the original claim.[4] He decided that while the Tsilhqot'in Nation was entitled in principle to both areas, for procedural reasons he could not make a declaration of title.[5]

The decision was appealed by the Tsilhqot'in Nation to the British Columbia Court of

Appeal. The Court of Appeal determined that title had not been established, but that the Nation might be able to prove title in the future. The Tsilhqot'in Nation appealed this decision to the Supreme Court of Canada.

Issues

The following issues were addressed by the Supreme Court:

- What is Aboriginal title, and how is it proven?
- Are Aboriginal title claims limited to the area initially claimed?
- Was Aboriginal title proven in this case?
- Can the Crown infringe on Aboriginal lands?
- Did the Crown breach their duty to consult in this case?
- When do Provincial laws apply to lands with Aboriginal title?
- Does the *Forest Act*[6] apply to Aboriginal lands?

Decision

The Supreme Court supported the definition of Aboriginal title in *Delgamuukw v British Columbia*,[7] and clarified the test for Aboriginal title in that decision. Aboriginal title is the right by an Aboriginal group to exclusive use and occupation of the land for a variety of purposes. These uses must be consistent with the reason for their claim of title.[8]

To prove title, an Aboriginal group must prove that it exclusively occupied the land prior to the assertion of European sovereignty. To prove occupation, that occupation must be: sufficient, continuous (if present occupation is relied upon to prove occupation), and exclusive. The Court clarified that acts which would have shown possession of the land to other Aboriginal groups are sufficient.[9]

The Court also clarified that when courts consider claims for Aboriginal title, they are not limited to the area initially claimed. In this case, it declared that the Nation held title to the area proven at trial, based on its exclusive use and occupation of several areas.[10]

The limits of Aboriginal title were also explored and clarified. The Supreme Court clarified that once Aboriginal title has been proven, Aboriginal people must consent to the use of the land by government and other organizations. If they do not consent to the use of the land, provincial and federal governments (the Crown) may use section 35 of the Constitution to infringe on title if they:[11]

1) Fulfil their procedural duty to consult;
2) Act in a way that is supported by a compelling and important objective; and
3) Act in a way that is consistent with their duties to Aboriginal groups.[12]

In this case, the Supreme Court found that the government of British Columbia did not fulfill its procedural duty to consult Aboriginal people when it issued a forestry license.

The Court also clarified that provincial laws of general application apply to Aboriginal lands. The law at the centre of this case, the *Forest Act*, is a law of general application. However, the Court ruled in this case that the Act did not apply to Aboriginal lands, once title has been proven, because of the wording in the Act.[13]

Analysis

What is Aboriginal title, and how is it proven?

What is Aboriginal title?

The Supreme Court affirmed its definition of Aboriginal title from *Delgamuukw*. Aboriginal title is a form of ownership that is similar to regular ownership of land. Aboriginal title allows for: 1) the right to decide how the land is used; 2) exclusive use and occupation; 3) the economic benefits of the land; and 4) the right to manage the land.

However, Aboriginal title differs from regular ownership in some important ways. The source of the title comes from the prior occupation of the land by Aboriginal peoples, it is held communally, and it can only be transferred to the Crown. It also has another important limit. Aboriginal title is held not only for the current generation, but also for all future generations of the Aboriginal group. Because of this, land with Aboriginal title cannot be used in a way that prevents future generations of Aboriginal people from using the land for traditional purposes.[14]

How is it proven?

The Court clarified the test for Aboriginal title from *Delgamuukw*. That test has three parts. To establish title, an Aboriginal group must show that:

1) the group *sufficiently* occupied the land before Europeans asserted sovereignty;
2) if present occupation is being used as proof, then the occupation must have been *continuous*; and
3) at the time sovereignty was asserted, that occupation must have been *exclusive*.[15]

The Court clarified that this test must consider the Aboriginal view of occupation and possession of the land. Because of this, the test should be treated as a way to explore the facts, not as a way to force ancestral Aboriginal practices into square boxes.[16]

Sufficient Occupation

The first part of the test, the issue of *sufficiency*, is at the centre of this decision. Occupation is *sufficient* when an Aboriginal group proves that it historically acted in a way that showed other groups that it controlled the land. The Court noted that the kind of acts needed to show this depended on the way of life of the people at that time, and on the type of land being considered.[17] Some examples given included: cultivated fields, houses, intense labour on the land, and the regular use of territory for hunting, trapping or foraging. The Court also affirmed that through these acts, nomadic and semi-nomadic peoples may be able

to prove title.

Continuous Occupation

The Court affirmed that *continuity* does not require proof of an unbroken chain of occupation, but rather proof that current occupation is based on occupation before sovereignty.[18] This means that the Aboriginal group was not required to have been present on that land at all times since sovereignty. This is important because it recognizes that Aboriginal peoples were often displaced by laws and government actions before the Crown began recognizing Aboriginal title.

Exclusive Occupation

In the decision, *exclusivity* is defined as the historical goal and capacity of an Aboriginal group to control the land. That other groups or individuals were on the land does not necessarily mean that the Aboriginal group cannot prove title. The Court clarified that exclusivity can be shown where others were excluded from the land, or were allowed access only after getting permission.[19] Another example given includes a lack of challenges to the group's occupation.

If the test for sufficient occupation, continuous occupation, and exclusive occupation is met, then Aboriginal title is proven.

Are Aboriginal title claims limited to the area initially claimed?

At the British Columbia Court of Appeal, the provincial government argued that courts should be limited to finding Aboriginal title only in those areas that an Aboriginal group claimed before trial.[20] The British Columbia Court of Appeal found that courts should take a functional approach to Aboriginal land claims, and allow evidence heard at trial to correct minor defects in the initial claim.[21]

The Supreme Court agreed with the approach taken by the Court of Appeal. It noted that there may be evidence that is seen at trial that was not available when lawyers drafted the initial claim.[22] The Supreme Court emphasized that land claims cases should be based on the best evidence available.

Was Aboriginal title proven in this case?

The Supreme Court found that the evidence in this case supported Justice Vickers' conclusion at trial that the Tsilhqot'in Nation had proven title.[23]

Justice Vickers had found that the Tsilhqot'in Nation had *sufficient* occupation of the land. Its regular presence on the land indicated occupation. He also found that that there was evidence to show *continuity* between pre-sovereignty and current occupation.[24] Finally, he found that the Tsilhqot'in Nation had proved *exclusivity*.[25] In pre-sovereignty times, the Tsilhqot'in Nation had repelled invaders and demanded permission from outsiders who wanted to pass through the land.

During submissions before the Supreme Court, the government of British Columbia challenged these findings on the grounds that they were not specific enough to support title. The Supreme Court rejected that challenge. The province's argument relied on the idea that only intensively occupied areas were eligible for title. By contrast, the Supreme Court ruled that occupation is *sufficient* where Aboriginal groups acted in a way that demonstrated control to others.[26]

Can the Crown infringe on Aboriginal lands? The Justification Test

The Court re-affirmed its previous finding in *Delgamuukw* that the government may infringe on Aboriginal title for an important public goal.[27] The test for justifying infringement is based on the Court's interpretation of section 35 of the *Constitution Act, 1982*.[28] To justify infringing on Aboriginal title, a government must show that:

1) it consulted, and if appropriate, accommodated Aboriginal concerns (the duty to consult);
2) its actions are backed by a compelling and substantial goal; and
3) its actions are consistent with the Crown's obligations to Aboriginal groups.[29]

The duty to consult is broadly defined as a duty that the Crown has to consult with Aboriginal peoples on anything that may impact claimed Aboriginal rights or title. The amount of consultation or accommodation needed depends on how strong the Aboriginal claim is, and how much the infringement would affect the claim. Proven claims are more likely to require accommodation.

What counts as a compelling or substantial goal is determined on a case-by-case basis. However, there are many things that may count as a compelling and substantial goal. The Court gave some examples, including: development of agriculture, forestry, mining, general economic development, building infrastructure, and the settlement of foreign populations.[30]

The Court broke the test into four parts to determine if the Crown's infringement is consistent with its obligations:

1) An infringement cannot be justified if it would prevent future generations of Aboriginal people from benefiting from the land;
2) The infringement must be necessary for the Crown to achieve its goals;
3) The infringement must impact the Aboriginal rights as little as possible to achieve its goals;
4) The benefits arising from the goal must be proportionate to the negative impacts on Aboriginal rights.[31]

If all of these conditions are met, then the infringement is consistent with the Crown's obligations to Aboriginal groups. If the Crown does not fulfill its obligations, the Aboriginal group may be entitled to an injunction, damages, or a court order.[32] A court may even cancel a project where that project is built without consultation and it does not pass the

Supreme Court's test.

Did the Crown breach its duty to consult in this case?

The Court ruled that the Crown breached its duty to consult in this case.[33] The Province of British Columbia was obliged to consult with the Tsilhqot'in Nation and to accommodate its interests. In this case it did not consult at all with the Tsilhqot'in Nation and did not accommodate the Nation's interests. Therefore, the provincial government breached the duty it owed to the Tsilhqot'in Nation.

When do provincial laws apply to lands with Aboriginal title?

Section 91(24) of the *Constitution Act, 1867*[34] gives the federal government the exclusive power over "Indians, and Lands reserved for the Indians".[35] Hence, the provinces cannot create laws that specifically regulate Aboriginal lands. However, laws may have a **"double aspect"** . This means that those laws that are within the power of one level of government may have an aspect that touches the power of another level of government. For this reason, provincial laws of general application can apply to lands held under Aboriginal title.

The Supreme Court clarified that any provincial laws of general application that infringe on Aboriginal rights are limited in two basic ways: 1) The federal power over "Indians, and Lands reserved for the Indians"[36] may limit provincial laws of general application in some situations; 2) The justification test for infringement on Aboriginal claims discussed above also limits those infringements as to what can pass that test.[37]

The Court noted that provincial laws and regulations of general application that are meant to protect the environment or forests will usually apply to Aboriginal lands.[38]

Does the *Forest Act* apply to Aboriginal lands?

The law that the government of British Columbia used to grant the forestry licences at issue was the *Forest Act*. The Supreme Court ruled that this Act does not apply to Aboriginal lands.[39]

The Court ruled that the Act does not apply because it was not written to apply to Aboriginal lands. It was only written to apply to "Crown timber" that is on "Crown Lands". Since lands with Aboriginal title are not Crown lands, the Act does not apply to land where Aboriginal title has been established.

However, the Court noted that the *Forest Act* could be amended by the provincial legislature to apply to Aboriginal lands.[40] Because of this, the Court considered whether the Province of British Columbia was constitutionally barred from applying the Act to Aboriginal lands.

The Court noted that laws meant to manage forests in a way that deals with pests or prevents forest fires would likely apply.[41] This is because those laws would not impose any hardship or deny an Aboriginal group their preferred means of exercising their rights.

However, issuing licences to cut timber on Aboriginal land would be a serious infringement of Aboriginal ownership rights under the justification test. The Supreme Court noted that the province had not presented a compelling and substantial goal that would justify its issuing of licences.[42] Because of this, if the province wished to issue forestry licences on Aboriginal land in the future, it would have to show a compelling and substantial goal.

The Court also considered whether the province would be barred from applying the *Forest Act* to Aboriginal lands because of the doctrine of interjurisdictional immunity. The doctrine of interjurisdictional immunity is a legal concept that can be applied by the courts when valid provincial and federal laws and powers conflict. If interjurisdictional immunity is applied, then the parts of a law from one level of government that impair the power of another level of government to function within its jurisdiction will be found to be inapplicable.

Even though the *Forest Act* touched on Aboriginal lands, which are within federal powers, the Court ruled that interjurisdictional immunity does not apply to Aboriginal rights.[43] The Supreme Court decided this for two reasons. First, the courts prefer to allow for co-operation between the federal and provincial governments. Interjurisdictional immunity does not allow for co-operation. Second, section 35 of the *Constitution Act, 1982*[44] can be used to determine whether a province can justify infringing on Aboriginal title which is a federal matter. Therefore, the doctrine of interjurisdictional immunity is unnecessary in the context of determining whether a province is infringing on the power of the federal government. Aboriginal rights are already protected against the provincial government through the justification test in section 35 of the *Constitution Act, 1982*.[45]

Conclusion

The *Tsilhqot'in* case clarifies the test for establishing Aboriginal title. Aboriginal groups may claim title not only for lands that they lived on, but also lands that they exclusively used. This clarification makes it easier for many groups, including historically nomadic and semi-nomadic Aboriginal peoples, to claim title. Because of this clarification, other Aboriginal groups may be more likely to seek a declaration of title from the courts.

The decision also clarifies how governments may infringe on Aboriginal title, and regulate lands that have been declared to have Aboriginal title. This may help clarify disputes between Aboriginal groups and provincial governments and corporations about the use of resources on Aboriginal lands. Some Aboriginal groups have already served eviction notices to companies operating on their lands as a result of this decision.[46] For example, the Gitxaala Nation has announced plans to challenge the federal government's approval of the Northern Gateway Pipeline because of this decision.[47] What seems clear is that the *Tsilhqot'in* case will play a central role in decisions surrounding future developments on claimed Aboriginal lands.

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[1] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, 2014 SCC 44 (CanLII) .

[2] James Keller, “First Nation that won key court victory on land title unveils policy on rescource projects”, *The Province*, (31 July 2014) online: <http://www.theprovince.com>

[3] *Tsilhqot’in Nation*, supra note 1 at para 7.

[4] *Ibid*.

[5] *Ibid*.

[6] *Forest Act*, R.S.B.C. 1996, c. 157

[7] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1997 CanLII 302 (SCC) at paras 113-115 .

[8] *Tsilhqot'in Nation*, supra note 1 at paras 73-74.

[9] *Ibid* at para 38.

[10] *Ibid* at para 153.

[11] *Ibid* at para 76.

[12] *Ibid* at para 77.

[13] *Ibid* at paras 114-116.

[14] *Ibid* at paras 73-74.

[15] *Ibid* at para 25.

[16] *Ibid* at para 32.

[17] *Ibid* at para 35.

[18] *Ibid* at para 46.

[19] *Ibid* at para 38.

[20] *Ibid* at para 19.

[21] *Ibid* at para 20.

[22] *Ibid* at paras 21-23.

[23] *Ibid* at para 66.

[24] *Ibid* at para 55.

[25] *Ibid* at para 58.

[26] *Ibid* at para 38.

[27] *Ibid* at para 82.

[28] *Constitution Act, 1982*, s 35(1) being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[29] *Tsilhqot'in Nation*, supra note 1 at para 77.

[30] *Ibid* at para 83.

[31] *Ibid* at paras 85-88.

[32] *Ibid* at para 89.

[33] *Ibid* at para 98.

[34] *Constitution Act, 1867* (UK) 30 & 31 Vict c 3, s 91(24), reprinted in RSC, App III, No 5.

[35] *Ibid*.

[36] *Ibid*.

[37] *Tsilhqot'in Nation*, supra note 1 at para 106.

[38] *Ibid* at para 105.

[39] *Ibid* at para 116.

[40] *Ibid*.

[41] *Ibid* at para 123.

[42] *Ibid* at para 127.

[43] *Ibid* at para 140.

[44] *Constitution Act, 1982*, s 35(1) being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11.

[45] *Ibid*.

[46] The Canadian Press, "Gitxsan First Nation evicting rail, logging, sport fishing interests", *CBC News*, (10 July 2014) online: <http://www.cbc.ca>

[47] Jenny Uechi, "Gitxaala Nation to challenge Enbridge Northern Gateway approval in court", *Vancouver Observer*, (12 July, 2014) online: <http://www.vancouverobserver.com>