

The *Tsilhqot'in* Nation Decision on Aboriginal Title and Rights

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The British Columbia Supreme Court recently released its decision in the *Tsilhqot'in Nation* case. This decision is the most significant trial judgment on aboriginal title and rights since the Supreme Court of Canada decided the *Delgamuukw* case in 1997, and is the first case in which a court has concluded that the evidence before it proves aboriginal title over certain lands. Given its significance, this trial decision is likely to be appealed. In the interim, the decision has at least two significant implications. First, it demonstrates the type and degree of evidence required to prove aboriginal title; prior cases provided the theoretical framework on which this decision is based. Second, while it reinforces the importance of the Crown's obligation to consult and potentially accommodate First Nations in respect of their claims of aboriginal title and rights, it does not change the nature and scope of the Crown's duty in this respect.

Overview

The case was brought by Chief Roger William of the Xeni Gwet'in First Nation, on its behalf and on behalf of the approximately 3,000 members of the Tsilhqot'in Nation, of which the Xeni Gwet'in is a part. Tsilhqot'in territory lies in the Cariboo-Chilcotin region of British Columbia, near Williams Lake. The Court's decision relates to a portion of Tsilhqot'in territory, referred to as the "Claim Area". The Tsilhqot'in claimed aboriginal title and rights throughout the Claim Area.

The Court held that it could not make a final declaration of aboriginal title or grant a legal remedy because of the way the case had been pleaded in the plaintiff's Statement of Claim. However, the judge stated his opinion on the basis of the evidence that had been put before him that the Tsilhqot'in have aboriginal title to a significant portion of the Claim Area – an area estimated by Tsilhqot'in legal counsel to comprise approximately 200,000 hectares. The judge encouraged the parties to negotiate a swift resolution of the outstanding issues, and bring to reality a reconciliation of the longstanding Tsilhqot'in claims to their territory.

The Court also declared that the Tsilhqot'in have aboriginal rights to hunt, trap, and trade in furs to sustain a moderate livelihood, throughout the Claim Area.

Background

The Tsilhqot'in launched the legal proceedings against B.C. in 1989 to prevent harvesting of timber in the Claim Area. Initially, parties to the proceedings included forestry companies which had been granted permits by B.C. to log in the Claim Area. The companies later declined to exercise those permits, and were released from the legal proceedings. The federal government, having constitutional jurisdiction over "Indians and Lands reserved for the Indians" under the *Constitution Act, 1867*, was added as a defendant.

The trial began in 2002, and took 339 trial days – one of the longest trials in Canadian history. In the course of the proceedings, the trial judge made a number of interlocutory decisions, relating to evidence, pleadings, legal procedure, and costs. In particular, he ordered that the defendant provincial and federal governments pay a significant portion of the plaintiff's legal fees, and all of their disbursements (out-of-pocket expenses). The trial judge also established a procedure that was to be followed by counsel whenever a witness was expected to give oral history or oral tradition evidence, in order to allow counsel for the defendants an opportunity to test the reliability of that evidence. These rulings set precedents which will impact future aboriginal title cases.

On the issue of oral history and oral tradition evidence, the trial judge recognized that oral traditions, unlike documents, may change during their transmission over the course of time. This fluidity poses a challenge for the use of oral tradition as evidence to establish past historical events with precision. Nevertheless, the trial judge held that if oral history or oral tradition evidence was sufficient on its own to establish a conclusion of fact, he would make such a finding. Otherwise, he sought corroboration from other records such as contemporaneous documents created by explorers, fur traders and missionaries.

Aboriginal Title

The trial judge reviewed the extensive jurisprudence on aboriginal rights and title, concluding that aboriginal title is a species of aboriginal right which confers a "right to the land itself". The precise content of this right has yet to be established, but at very least it includes the right to exercise a degree of control over the resource activities which take place on the land.

A preliminary question was the date at which Britain acquired sovereignty over British Columbia, which the trial judge accepted as 1846. The trial judge concluded that the presence of Tsilhqot'in people in the Claim Area has been uninterrupted and continuous from prior to 1846 and up to the present time. The trial judge then reviewed the evidence, and expressed his opinion concerning the precise lands over which the Tsilhqot'in people have aboriginal title (for a description of these lands, see the Executive Summary of the case, available on the B.C. Courts' website: www.courts.gov.bc.ca).

In coming to his conclusions, the trial judge relied extensively on the oral history and oral tradition evidence provided by the plaintiff. The trial judge noted that in many cases there was a lack of written history, but commented that the Claim Area "...was and remains a remote part of this Province and it comes as no surprise that historical knowledge of the area is sparse."

The trial judge next considered the issue of exclusivity, or overlap with other First Nations. While overlapping claims by First Nations exist in some areas of British Columbia, the trial judge concluded that in 1846 the Tsilhqot'in people exercised effective control over the portions of land which he had identified, or could have excluded others from that land had they chosen to do so. Disputes with other First Nations occurred only at the limits of their territory, and European traders, missionaries, settlers and surveyors who entered Tsilhqot'in territory were aware that the Tsilhqot'in people considered it to be their land.

A significant issue in this case was the level of occupation by the Tsilhqot'in people of their territory. Past cases have established that occupation of aboriginal title land must have been exclusive, but need not have involved such a permanent level of development as is known in present times. In this case, the trial judge concluded that Tsilhqot'in people traditionally lived a semi-nomadic lifestyle. Movement for hunting, gathering, and other needs was frequent, given

the harsh geography and climate in which the Tsilhqot'in people live. Notwithstanding this movement, the trial judge held that the existence of village sites occupied for portions of each year, in addition to hunting grounds, cultivated fields, and fishing sites tied together by a network of foot trails, horse trails and water courses, defined the seasonal rounds of the Tsilhqot'in people. The trial judge reasoned that these sites and their interconnecting links set out definite tracts of land in regular use by Tsilhqot'in people in 1846, to an extent sufficient to warrant a finding of aboriginal title. This land, he concluded, provided security and continuity for the Tsilhqot'in people in 1846, and should continue to do so into the future.

Constitutional Issues

Having expressed his opinion as to the existence of Tsilhqot'in aboriginal title, the trial judge considered the consequences of this decision. First, he concluded that the provisions of the B.C. *Forest Act* do not apply to aboriginal title lands because the *Forest Act* is only applicable to the use of the forest resources of the Crown, not those resources belonging to other parties – including aboriginal title lands. Alternatively, the trial judge reasoned that the provincial government is unable to regulate forestry activities on aboriginal land by virtue of what is known as the constitutional doctrine of “inter-jurisdictional immunity”. Essentially, because the federal government has constitutional authority over “Indians and Lands reserved for the Indians”, the Court concluded that this jurisdiction includes aboriginal title lands. As a result, the Court held that only the federal government has the constitutional jurisdiction to authorize forestry activities, or any other use or control of resources (such as mining, oil & gas, and hydroelectricity) on aboriginal title lands.

This decision has significant implications for the provincial and federal governments, given B.C.'s longstanding management of provincial natural resources. If the trial judge's decision is upheld on appeal, it will mean that the federal and Tsilhqot'in governments must work together to determine the use to which Tsilhqot'in aboriginal title lands may be put.

However, the trial judge noted that an area which is merely subject to an *assertion* or *claim* of aboriginal title or rights is not excluded from the jurisdiction of the *Forest Act* (or, by extension, any other provincial legislation of general application). The judge also held that the existence of aboriginal rights on land, short of aboriginal title (such as hunting, trapping and gathering) does not oust provincial jurisdiction over that land.

Concerning private land, the judge noted that while the Claim Area includes private lands, the plaintiff did not claim any infringement of its aboriginal title as a result of legislative regulation of private lands in the Claim Area. As a result, the judge declined to make a declaration of Tsilhqot'in title and rights in relation to private lands. However, the judge did note that the creation of private interests in the Claim Area, such as by fee simple grant from the Province, has not and cannot extinguish Tsilhqot'in rights, including aboriginal title. The Court essentially left it up to the parties to reconcile the competing interests of the Tsilhqot'in, private parties and governments within the Claim Area.

Given the fact that the plaintiff did not claim infringement of aboriginal title over submerged lands (such as the land under lakes, rivers and streams), the trial judge declined to consider this issue.

The trial judge considered the impact of the B.C. *Forest Act* in the event he was wrong in concluding that it does not apply to aboriginal title land. He concluded that the passage of forestry legislation by the Legislature, in and of itself, does not infringe aboriginal title, but the

application of such legislation does so. This conclusion was based on the ruling of the Supreme Court of Canada in the *Delgamuukw* case that aboriginal title includes the right to plan for the use of land, which is also at the heart of legislation such as the *Forest Act*. Given that such legislation would remove the ability of aboriginal people to control the use to which land is put, it constitutes an unreasonable limitation on aboriginal title, thus constituting an infringement requiring justification.

In considering the justification analysis in the context of the Claim Area, the trial judge concluded that British Columbia had failed to establish that it has a compelling and substantial legislative objective for forestry activities in the Claim Area. First, the trial judge noted that there is no evidence that logging in the Claim Area is economically viable. Second, he concluded that there was no evidence that it was necessary to log the Claim Area to deter the spread of mountain pine beetle.

On the critical issue of consultation, the trial judge held as follows: “the Province has taken unto itself the right to decide the range of uses to which lands in the Claim Area will be put, and has imposed this decision on the Tsilhqot’in people without any attempt to acknowledge or address aboriginal title or rights in the Claim Area.” As a result, the trial judge concluded that B.C. did not meet its obligation to consult with the Tsilhqot’in people, and consequently did not justify its infringement of Tsilhqot’in aboriginal title.

Aboriginal Rights

The Tsilhqot’in claimed aboriginal rights (excluding aboriginal title) to hunt and trap birds and animals throughout the Claim Area for purposes of securing food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial and cultural uses, the right to capture and use animals, including horses, for transportation and work, and the right to trade skins and pelts obtained by hunting and trapping. These aboriginal rights were affirmed by the Court. (The plaintiff did not claim a right to fish.)

Concerning the plaintiff’s right to trade, the trial judge was satisfied that the Tsilhqot’in have continuously hunted, trapped and traded throughout the claim area and beyond from pre-contact times to the present. Accordingly, the trial judge concluded that the Tsilhqot’in have an aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood.

While the judge concluded that provincial legislation could apply to land over which the Tsilhqot’in had only aboriginal rights (short of title), he noted that “the Crown’s ability to alter or infringe upon any aboriginal right would be faced with severe restrictions.” As a result, even apart from the land over which the judge expressed his opinion as to Tsilhqot’in aboriginal title, the provincial government will be required to engage in extensive consultations concerning the Tsilhqot’in aboriginal rights over the rest of the Claim Area (a further 200,000 hectares or more).

Damages

The trial judge dismissed the plaintiff’s claims for damages by way of compensation for infringements of aboriginal title on procedural grounds, but expressly noted that this dismissal is “without prejudice to the right to renew these claims specific to Tsilhqot’in aboriginal title land. The resources on aboriginal title land belong to the Tsilhqot’in people and the unjustified removal of these resources would be a matter for appropriate compensation. It is not my intention to dismiss a valid claim for compensation where such a claim can be tied to Tsilhqot’in title land.”

Reconciliation

The trial judge spent the last 18 pages of his reasons for judgment on the topic of reconciliation, which has been the subject of considerable judicial commentary. The judge noted that the process of reconciliation should ideally take place outside the adversarial legal system, which produces a win/lose result. The judge expressed the hope that his decision will assist the parties in finding a contemporary solution that balances Tsilhqot'in interests and needs with the interests and needs of the broader society. The Court's decision, he indicated, constituted one step in the process of reconciliation.

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